487 P.2d 910

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert Lee SILVER, Defendant-Appellant.

No. 646.

Court of Appeals of New Mexico.

July 23, 1971.

Harold H. Parker, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., C. Emery Cuddy, Jr., Joseph Patrick Whelan, Jr., Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Silver was convicted and sentenced for attempted armed robbery. He was found not guilty of attempted murder. He appeals.

We affirm.

Silver contends (1) that the trial court erred in failing to compel an election or severance of charges of attempted robbery and attempted murder because Silver was denied the opportunity to remain silent and not testify against himself in the attempted armed robbery charge; (2) that a statutory limit of $400.00 attorney fee for defense counsel for services rendered is a denial of equal protection and due process.

1. *Failure to Compel Election or Severance.*

In this court, Silver contends he should have had separate trials on each count. He argues that he had to testify on the charge of attempted murder to prove his innocence. He was acquitted. By testifying, Silver says he had convicted himself of attempted

armed robbery. If a severance had been granted, Silver says he would have remained silent on the charge of attempted armed robbery. He claims, therefore, that trial of two counts in one trial was prejudicial.

Prior to trial, defendant moved that he be separately tried on each count. The only reasons advanced in support of the motion went to asserted prejudice from being tried with co-defendants. Nothing in the motion asserts prejudice on the basis that the two counts against defendant would be tried at the same time.

Hearing was held on this pre-trial motion, but there is no record of what took place at the hearing. The trial court ordered that each of the defendants be granted a separate trial. There was no ruling on the claim that there should be a separate trial on each of the counts against defendant.

At the beginning of his trial, defendant moved:

> "The other thing, Your Honor, is to renew my motion again, that the counts be severed. That Mr. Wilson be required today to elect on which count he will proceed further on the attempted murder count or on the attempted armed robbert [sic]. And I have no new argument for the Court. I would simply again say to you that my client is severely prejudiced because of his inability to either exercise his right to speak in his own behalf, which he has, or to remain silent. The two counts prejudice that right, as I explained to the Court, plus the other reasons for prejudice that I gave the Court earlier."

The foregoing quotation is all the record shows in support of his claim that each count should have been separately tried. How the two counts made defendant unable either to "exercise his right to speak" or to "remain silent" is not explained.

The fact that two charges are joined in one trial does not, in itself, show legal prejudice to defendant. State v. Gunthorpe, 81 N.M. 515, 469 P.2d 160 (Ct.App. 1970). The fact that in taking the stand in his own behalf, defendant may thereby incriminate himself, does not, in itself, establish that defendant was deprived of due process. State v. Sero, 82 N.M. 17, 474 P.2d 503 (Ct.App.1970); State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct.App. 1969). The denial of the request for severance is not a basis for reversal unless abuse of discretion and prejudice is shown. State v. Gunthorpe, supra. The record does not establish per se prejudice.

Nor does the record show that the argument defendant makes in this court, concerning prejudice, was presented to the trial court. We do not go outside the record in considering a motion for severance. State v. Andrada, 82 N.M. 543, 484 P.2d 763 (Ct.App.1971). Since the record does not show that defendant's present contention was presented to the trial court, it will not be considered here. State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970).

2. *Limiting Defense Counsel Attorney Fees.*

Silver argues, without any facts, that the statutory attorney fee limitation of $400.00 in defense of indigent criminal cases is a denial of equal protection and due process under the United States Constitution; that to limit the amount is to invite poor representation for a criminal defendant. The payment provisions of the Indigent Defense Act are found in § 41–22–8, N.M.S.A.1953 (Repl.Vol. 6, Supp. 1969).

A denial of equal protection and due process to whom? There is no attempt to show that defendant in this case has been deprived of these constitutional rights because a statute limits the fee of his court-appointed attorney. There is no claim that defendant was poorly represented in this case.

Here, there are no facts indicating how the statutory fee limitation deprives the defendant of equal protection of the law or due process of law. The attack is against the statutory limitation, without

reference to facts. Absent a showing of how the asserted constitutional violation applies to the defendant, the claim presents no issue for decision. State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967).

The judgment and sentence is affirmed. It is so ordered.

HENDLEY, J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (specially concurring).

I specially concur to answer the claims of error and to emphasize the importance of the issues.

This court is burdened with Rule 93 [§ 21–1–1(93), N.M.S.A.1953 (Repl.Vol. 4)], and the Indigent Defense Act of 1968, § 41–22–1 through § 41–22–10, N.M.S.A. 1953 (Repl.Vol. 6, Supp.1969).

Indigent defendants are entitled to free representation in trial and appellate work. If the appointed attorney is not an expert criminal lawyer, claims of error may not be properly made during trial, nor properly preserved for review. If the claimed error is not decided, the indigent defendant can, at the expense of the state, continuously move the trial and appellate courts to vacate or set aside the conviction under Rule 93.

This court should sidestep its technical rules and decide all claims of error on appeal in indigent defense cases.

As one Supreme Court Justice has written:

> As the rule [Rule 93] now operates, the motions are mostly nonsense, falsehoods, or otherwise insufficient upon which to grant relief. They occupy the time of the trial courts, the appellate courts and the legal profession, and they impose a great financial burden on the public and the legal profession with very little fruitful results.

1. *Failure to Compel Election or Severance.*

The attempted armed robbery and attempted murder were two separate but continuing incidents in which Silver involved different persons. The attempted murder immediately followed the charge of attempted robbery. These circumstances grant the trial judge a broad and sound judicial discretion of the highest order to determine whether both charges should be tried together before one jury. State v. Paschall, 74 N.M. 750, 398 P.2d 439 (1965). The trial judge denied Silver's motion. His action will not be disturbed on review unless Silver affirmatively shows that he was in fact prejudiced in his defense on the merits, § 41–6–38(4), N.M.S.A.1953 (Repl.Vol. 6), and the trial court abused its discretion, State v. Gunthorpe, 81 N.M. 515, 521, 469 P.2d 160 (Ct.App.1970), cert. den. 81 N.M. 588, 470 P.2d 309 (1970), cert. den. 401 U.S. 941, 91 S.Ct. 943, 28 L.Ed.2d 221 (1971).

The record shows the state proved Silver guilty of attempted armed robbery beyond a reasonable doubt whether Silver testified or not. Silver does not contend otherwise. Even if there was error in denying severance, the error was harmless. Jones v. Commonwealth, 457 S.W.2d 627 (Ky.1970), cert. den. 401 U.S. 946, 91 S.Ct. 964, 28 L. Ed.2d 229 (1971).

Another factor speaks against Silver's claim. When the jury acquitted Silver of attempted murder, the jury proved it was able to follow and apply the evidence to each charge as instructed by the trial court. State v. Sero, 82 N.M. 17, 474 P.2d 503 (Ct.App.1970). This is ample to prove that denial of severance was not prejudicial.

Upon what basis can Silver claim he was prejudiced? Silver relies on 41 Temple Law Quarterly 458 (1968), entitled, "Joinder of Counts as a Violation of an Accused's Right to Remain Silent." The author believes that severance *as a matter of right* would seem to be needed to protect dual testimonial privileges.

The state did not answer Silver's contention in its answer brief. After due consideration, I do not agree that an accused is entitled to severance *as a matter of right* based upon dual testimony privilege, even

if requested before or during trial. It is a matter within the discretion of the trial court. For modern economic reasons, the status of judicial dockets, the delay in holding two trials with identical witnesses, the increased burden of criminal cases, the discretion of the trial court exercised for or against severance ordinarily speaks with a sense of justice.

American Bar Association Standards of Criminal Justice, when applicable, have been approved by the Supreme Court of Colorado. Jaramillo v. District Court, 484 P.2d 1219 (Colo.1971).

American Bar Association Standards of Criminal Justice relating to Joinder and Severance are deemed applicable, and may be approved by the Supreme Court of New Mexico. Sections 2.1(a) (b) read as follows:

> (a) A defendant's motion for severance of offenses or defendants must be made before trial, except that a motion for severance may be made before or at the close of all evidence if based upon a ground not previously known. Severance is waived if the motion is not made at the appropriate time.
>
> (b) If a defendant's pretrial motion for severance was overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Severance is waived by failure to renew the motion.

The commentary amply supports the above standards.

Silver's claim of error is denied because, (1) the trial court did not abuse its discretion in denying severance; (2) Silver did not affirmatively show prejudice on the merits; (3) the jury understood the difference in the two charges; (4) even if there was error, it was harmless.

2. *Limiting Defense Counsel Attorney Fees.*

Appointed lawyers in indigent criminal defense cases must remember that courts have the right to impose, without compensation, the duty to defend indigents accused of crime. Hale v. Brewster, 81 N.M. 342, 467 P.2d 8 (1970). If the statute mentioned were declared unconstitutional, lawyers would return to their traditional responsibilities found in the Attorney's Oath:

> I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.

Heretofore, the legal profession received commendations for its devotion to indigents in criminal cases without compensation. People v. Sims, 266 N.E.2d 536 (Ct.App. Ill.1970); People v. Wilson, 60 Misc.2d 144, 302 N.Y.S.2d 647 (1969).

Legislation affecting the reasonable regulations of the legal profession is a valid exercise of the police power of the state. In re Gibson, 35 N.M. 550, 4 P.2d 643 (1931). The Indigent Defense Act falls within this principle.

However, when lawyers are confronted with staggering burdens affecting their own family and business relationships, courts have the power to order payment of reasonable compensation. People ex rel. Conn v. Randolph, 35 Ill.2d 24, 219 N.E. 2d 337, 18 A.L.R.3rd 1065 (1966). As a result, some states have amended their indigent compensation statutes to grant courts, in extraordinary circumstances, the right to provide for compensation in excess of the statutory limits. People v. Sims, 266 N.E.2d 536 (Ct.App.Ill.1970); People v. Wilson, 60 Misc.2d 144, 302 N.Y.S.2d 647 (1969); State v. Apodaca, 252 Or. 345, 449 P.2d 445 (1969). New Mexico does not have such a provision.

In the United States, we have a principle of "Equal Justice to All." Any indigent person accused of crime, or any person of modest means accused of felonious crimes, should have court appointed lawyers with experience, competence, skill and knowledge in criminal law, practice and procedure. The reason is that it meets the challenge of district attorneys and staff who specialize in the prosecution of criminal cases. Constitutional questions might arise if young, inexperienced criminal law-

yers were appointed. Errors and mistakes would ordinarily follow, which deny defendants a fair and impartial trial. Claims of error may not be reviewed on appeal. But such questions cannot arise under limited compensation statutes when competent attorneys are appointed unless the court denies additional compensation where burdens are staggering and the family, business and life of the lawyers are seriously impaired. See Brown v. Board of County Com'rs of Washoe County, 85 Nev. 149, 451 P.2d 708 (1969).

The error claimed here is not a constitutional problem. No claim is made that the appointed attorneys were incompetent. It is a legislative problem, The New Mexico Bar Association should be "the most interested in protecting its members from the burdens and sacrifices of oppressive demands upon them to represent indigents." Jones v. Commonwealth, 457 S.W.2d 627 (Ky.1970), cert. den. 401 U.S. 946, 91 S.Ct. 964, 28 L.Ed.2d 229 (1971).

The Indigent Defense Act is constitutional. Silver was not denied equal protection of the law and due process. Whether monetary justice to court appointed attorneys is necessary depends upon the attitude of the New Mexico Bar Association and the legislature.

487 P.2d 915

STATE of New Mexico, Plaintiff-Appellee,

v.

Carl SHUEMAK, Defendant-Appellant.

No. 673.

Court of Appeals of New Mexico.
July 23, 1971.

Stephen G. Durkovich, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Shuemak was convicted of burglary and larceny in the event described in State v. Phillips (Ct.App.) 83 N.M. 5, 487 P.2d 915, decided July 23, 1971. In this case, the neighbor testified that only three men placed the television set back on top of the car after it fell off. The record does not contain any evidence to identify Shuemak as a participant in the burglary and larceny.

The judgment and sentence is reversed. Shuemak is discharged.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

487 P.2d 915

STATE of New Mexico, Plaintiff-Appellee,

v.

Amos B. PHILLIPS, Defendant-Appellant.

No. 674.

Court of Appeals of New Mexico.
July 23, 1971.

Joseph Warner III, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., C. Emery Cuddy, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of burglary and larceny of personal property of a value over $100 but less than $2500, defendant appeals. Section 40A-16-3, N.M.S.A.1953 (Repl.Vol. 6) and § 40A-16-1, N.M.S.A.1953 (Repl.Vol. 6, Supp.1969). There are two issues: (1) sufficiency of the circumstantial evidence to sustain the convictions and (2) sufficiency of the evidence as to the value of the stolen items. We hold the evidence is insufficient to sustain the burglary conviction. We affirm the larceny conviction.

Circumstantial evidence.

A residence was burglarized; two television sets, jewelry and clothing were stolen.

A neighbor observed three Negro males carrying a console-type television set from the rear of the residence and placing it on top of a car. The car drove off; the television set fell off. Four Negro males got out of the car and put the television set back on top of the car. No one got in or out of the car from the time it drove off until it was stopped by the police.

There were five occupants of the car when stopped—four Negro males and a female. Defendant was one of the males; he was sitting in the middle of the front seat; the female was sitting on his lap holding a box of jewelry. The back seat of the car was occupied by a portable television set, clothing and one Negro male. After defendant's arrest, but before leaving the place where the car was stopped by the police, defendant was observed taking jewelry from his pocket and dropping it on the ground. Jewelry was also found on the front floorboard of the car. There is an inference that all items of jewelry recovered were placed with the other items recovered and "tagged in evidence."

There is no direct evidence that defendant entered the residence or participated in removing the stolen property from the residence. Defendant was not identified as

one of the three men seen carrying the console-type television set to the car. Defendant's convictions, then, are based on evidence that he was an aider or abettor.

"* * * To be an aider or abettor, one must share the criminal intent of the principal. There must be a community of purpose, a partnership, in the unlawful undertaking. * * *" State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970). Concerning evidence which establishes aiding or abetting, State v. Ochoa, 41 N.M. 589, 72 P.2d 609 (1937) states:

> "* * * The evidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs, or by any means sufficient to incite, encourage or instigate commission of the offense or calculated to make known that commission of an offense already undertaken has the aider's support or approval. * * *"

Neither presence, nor presence with mental approbation is sufficient to sustain a conviction as an aider or abettor. Presence must be accompanied by some outward manifestation or expression of approval. State v. Salazar, 78 N.M. 329, 431 P.2d 62 (1967).

What is the evidence of aiding or abetting? Defendant was present in the car. When the journey began, defendant, the female and another male occupied the back seat. When the police stopped the car, defendant was seated in the middle of the front seat with the female on his lap and the female was holding a box of jewelry. When stopped by the police, the back seat was occupied by one male, a television set and clothing. Only four males were in the car and four males replaced the console television set on top of the car after it fell off. After being arrested, defendant was observed taking jewelry from his pocket and dropping it to the ground.

Burglary, under § 40A–16–3, supra, requires an unauthorized entry with the intent to commit a felony or theft therein. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct.App.1970). None of the above evidence indicates an outward manifestation or an expression of approval of the burglary. The evidence neither indicates that defendant encouraged commission of the burglary nor indicates that defendant supported or encouraged a burglary already undertaken. There being no evidence that defendant aided or abetted the burglary, his conviction of that offense is reversed.

It is different as to the larceny which, under § 40A–16–1, supra, "* * * consists of the stealing of anything of value which belongs to another." We agree with defendant that the evidence concerning the jewelry cannot be considered because there is no evidence that the jewelry that defendant dropped, that was found on the car's floorboard, and that was being held by the female, was the stolen jewelry. State v. Malouff, 81 N.M. 619, 471 P.2d 189 (Ct.App.1970). All we have is the suspicious circumstance that defendant took unidentified jewelry from his pocket and dropped it. Compare State v. Campos, 79 N.M. 611, 447 P.2d 20 (1968).

However, there is evidence that defendant changed position in the car, and the inference that he did so to make room in the back seat for some of the stolen property. In addition, the only inference from the evidence is that defendant assisted the reloading of the console television set on top of the car. This is evidence that defendant supported a larceny already undertaken.

Defendant asserts that the evidence of aiding and abetting the larceny fails to meet the requirement for conviction on the basis of circumstantial evidence. Specifically, he claims this evidence fails to exclude every reasonable hypothesis other than defendant's guilt. State v. Hardison, 81 N.M. 430, 467 P.2d 1002 (Ct.App.1970). The "reasonable hypothesis" which defendant claims has not been excluded in that defendant was asleep in the back seat of the car from shortly after he entered the car until the car was stopped by the police. This claim is based on defense evidence that

defendant, and the other occupants of the car, had been drinking steadily throughout the day preceding the evening of the crime; that he borrowed the car so that the female could be taken home and prevailed upon one of the other males to drive; that defendant and the female got into the back seat; that defendant went to sleep and was not awakened until the police stopped the car.

We disagree with this claim because the evidence that defendant had changed positions in the car, and helped reload the console television set, excludes the hypothesis that defendant was asleep and knew nothing about the larceny.

We hold the evidence of defendant's aiding or abetting the larceny is substantial and that the "circumstantial evidence rule" does not require that the larceny conviction be set aside.

Evidence as to value of the stolen property.

An element to be proved was that the value of the stolen property was over $100 but less than $2500.00. The parties are in agreement that the "value" involved is the market value at the time of the larceny. Compare State v. Parker, 80 N.M. 551, 458 P.2d 803 (Ct.App.1969).

The owner of the stolen property testified that the value exceeded $100 and less than $2500.00. This evidence was admitted over defendant's objection that "* * * a foundation has not been laid to show that she [the owner] would, through her own experience, know this fair market value. * * *" At the close of the State's case, defendant moved to dismiss on the basis that the evidence as to value was insufficient to go to the jury; that the owner's testimony showed she was only guessing in her testimony as to value.

We do not consider either of these two claims. However, as to them, see State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct. App.1970). The testimony of the owner of the property concerning the console television set is evidence of value within the amounts required under the charge. The set was purchased new in March or April prior to the Christmas it was stolen. The purchase price was $750.00 and it was "working all right" before it was stolen. This was substantial evidence of value. Compare Whitley v. State, 36 N.M. 248, 13 P.2d 423 (1932). Further, defendant elicited this testimony on cross-examination. Having brought this testimony into the case, he is not in a position to complain about it. State v. Harrison, supra.

The burglary conviction is reversed; the larceny conviction is affirmed. The cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUTIN, J., concurs.

HENDLEY, Judge (dissenting in part).

Although I agree with the result reached by the majority with regard to the affirmance of the conviction of larceny and their discussion relating to the value of the stolen property, I cannot agree with their reversal of the burglary conviction.

Viewing the evidence in the light most favorable to the State we have the following which relates to and gives rise to an inference of participation by defendant in the burglary. That evidence is: an admission by defendant of his presence at the scene of the burglary; his change of position from the backseat to the frontseat in the automobile; the possession of jewelry in his pocket when jewelry was taken in the crime although the jewelry is not identified as the jewelry taken; and the suspicious circumstances of attempting to divest himself of possession of the jewelry by dropping it on the ground at the time of the arrest.

The fact that defendant testified he was asleep because of too much liquor at the time of the burglary was a question of credibility for the jury. The fact of conviction meant they disbelieved the defendant. This disbelief could have been helped by the arresting officer's testimony that he smelled no alcohol at the time of the arrest.

From the foregoing facts, I believe we have something more than did the Supreme Court in State v. Salazar, 78 N.M. 329, 431 P.2d 62 (1967) wherein it was stated that mere presence without some outward manifestation of approval was insufficient.

Here, from the totality of the circumstances I fail to see how we can state as a matter of law that the defendant did not participate in the burglary. I believe we have circumstances that show an outward manifestation of approval of the burglary.

I respectfully dissent.

487 P.2d 919

STATE of New Mexico, Plaintiff-Appellee,

v.

Jake MARTINEZ, Defendant-Appellant.

No. 675.

Court of Appeals of New Mexico.

July 23, 1971.

Douglas T. Francis, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

Convicted of armed robbery, § 40A-16-2, N.M.S.A.1953 (Repl.Vol. 6), defendant ap-

peals. The four issues, and our answers, follow:

Failure to provide defendant with a copy of co-defendant's trial transcript.

A co-defendant to the armed robbery charge had been previously tried on a kidnapping charge. Defendant claims the trial court erred in failing to provide him a copy of the transcript of that trial. His argument, and the cases cited in support, is directed to defendant's right, as an indigent, to free access to instruments needed to vindicate defendant's legal rights. The argument is misdirected.

Co-defendant's trial was held on September 16 or 17, 1970. According to defendant, the co-defendant was sentenced on September 24, 1970, and a praecipe calling for a complete transcript of that trial was filed September 29, 1970. Defendant filed his motion asking for the transcript on January 6, 1971, filed a brief in support of the motion on January 11, 1971, and the motion was argued immediately prior to the trial on January 12, 1971.

The evidence is undisputed that the transcript had not been completed, and was not available, on January 12, 1971. According to defense counsel, the delay in preparation of the transcript occurred because the court reporter was "taking the cases in order."

Since the transcript was unavailable, the trial court treated the motion as a request for a continuance and denied it as not being timely. A motion for continuance is directed to the discretion of the court and the denial of the motion is not error unless there is a clear abuse of discretion. State v. Deats. (Ct.App.), 82 N.M. 711, 487 P.2d 139, decided June 18, 1971.

Here, there is no showing of an abuse of discretion. Instead, the record shows that the motion requesting the transcript was not filed until six days prior to trial; that the court had not been asked at an earlier date to require completion of the transcript; that the suggested continuance was based solely on the fact that the transcript had not been completed. The trial court could properly deny the request under these circumstances. Compare State v. Apodaca, 80 N.M. 244, 453 P.2d 764 (Ct. App.1969).

Denial of a mistrial on the basis of the prosecutor's opening statement.

In his opening statement, the prosecutor narrated the facts of the armed robbery which he intended to prove. In his narration, he referred to another man, not on trial, [the co-defendant], who "* * * went back in the room where the girls had been placed and took the girl named Cindy Cumfer and took her out of the room and escaped the police for the time being. * *"

Defendant objected to the remarks "* * referring to Cindy Cumfer and the taking away of Cindy Cumfer which is prejudicial as the jury has no reference to that in this case and it ties in with another crime. * * *" Defendant's motion for a mistrial was denied.

This is not a case where the prosecutor, in his opening statement, stated facts which he had reason to believe could not be proved. See State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct.App.1970). The facts of the case, as shown by the evidence, are that two men, armed with guns, committed the robbery; that in committing the crime they required the three girls involved to go to a back room; that one of the robbers returned to the room, pointed his gun at another of the girls but took Cindy with him. This evidence came in without objection.

Defendant seeks a requirement that if there is a reasonable possibility that the prosecutor's "inappropriate remark" contributed to the conviction, the State must prove beyond a reasonable doubt that the error complained of did not contribute to the conviction. Such a rule is stated in State v. Jones, 80 N.M. 753, 461 P.2d 235 (Ct.App.1969) but that case dealt with prosecutor comments concerning the failure of a defendant to testify. That is not the situation here.

In this case, the prosecutor did no more than refer to the events of the armed robbery. His remarks were appropriate to that charge and were not error when the entire

record is considered. We do not consider whether the rule of State v. Jones, supra, should be extended to "inappropriate remarks" which do not amount to constitutional error, since facts for such an extension are not in the record before us.

A motion for a mistrial is addressed to the discretion of the trial court and is reviewable only on the basis of an abuse of discretion. State v. Verdugo, 78 N.M. 762, 438 P.2d 172 (Ct.App.1968). At the time the motion was made there was nothing to show an abuse of discretion because the facts were not then before the court and counsel did not represent to the court what the facts would be. After the evidence came in concerning the robbery, and without objection, the record affirmatively shows no abuse of discretion.

Failure to instruct on a lesser included offense.

Defendant submitted a requested instruction on the lesser included offense of robbery. He claims the court erred in refusing to give this instruction. We disagree. Although robbery is a lesser offense included within the armed robbery charge, defendant was not entitled to have the jury instructed on the lesser offense unless there was evidence tending to establish it. State v. Andrada, 82 N.M. 543, 484 P.2d 763 (Ct.App.1971), and cases therein cited. The evidence is that defendant committed the robbery while armed. There is no evidence on which to base an instruction on the lesser offense of robbery.

Confusing instruction.

The indictment charged defendant with taking money from the immediate control of Cindy Cumfer, Suzana Ybarra *and* Juanita Ybarra while armed with a deadly weapon. Two instructions told the jury that the proof must be in the conjunctive; that the taking of the money, while armed, must have been from each of the three girls.

Defendant submitted three requested instructions which, in essence, repeated the instructions given, but after naming the three girls in the conjunctive added the words "and all of them." He complains of the refusal of the court to insert these words, asserting that without them the instructions were confusing. Defendant states the jury might have thought the word "and" should be read as "or."

We see no confusion in instructions that told the jury that proof must be in the conjunctive. The instructions given were adequate; therefore, it was not error to refuse to add the additional words. State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct.App.1970).

The judgment and sentence is affirmed. It is so ordered.

HENDLEY and SUTIN, JJ., concur.

487 P.2d 921

STATE of New Mexico, Plaintiff-Appellee,

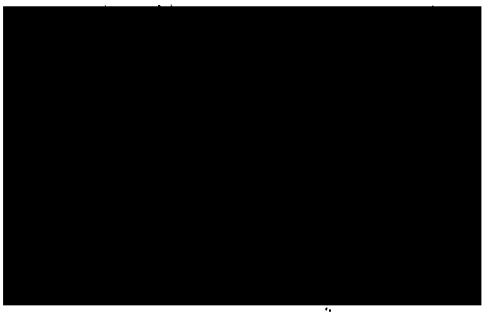
v.

Billy DODSON, Defendant-Appellant.

No. 669.

Court of Appeals of New Mexico.

July 16, 1971.



John C. Wheeler, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Ethan K. Stevens, C. Emery Cuddy, Jr., Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

On August 30, 1968, while serving a penitentiary sentence at the Prison Honor Farm in Los Lunas, defendant escaped. He was charged with and arraigned on the crime of escaping from the penitentiary, a second degree felony. On January 15, 1971, an amended information charging escape from a peace officer, a fourth degree felony, was filed against defendant. Defendant pleaded guilty to the fourth degree felony. The trial court after telling defendant he would be subject to further punishment and having satisfied itself that the plea was made voluntarily and intelligently accepted the guilty plea and immediately sentenced defendant to a term of one to five years to commence at the end of the sentence he was then serving.

Defendant appeals contending that "* * * the Trial Court Abused or Failed to Exercise its Discretion in that it Would Neither Hear Arguments Nor Make a Reasonable Investigation Bearing on Whether Sentence Should be Deferred, Suspended [or] Run Concurrent with Existing Sentence."

We affirm.

It is defendant's position that § 40A–29–9, N.M.S.A.1953 (Repl.Vol. 1964) provides that when an inmate is sentenced for a crime such sentence is to run consecutive to the sentence being served *unless the court specifies otherwise.* (Emphasis defendant's). Defendant maintains that the emphasized phrase clearly shows that the court may impose a concurrent sentence, the imposition of which defendant calls "a discretionary duty", and by refusing to hear argument on this matter the trial court failed to exercise its discretion.

Under § 40A–29–15, N.M.S.A.1953 (Repl. Vol. 1964) the sentencing court has discretion to defer or suspend a sentence. Defendant claims the trial court did not exercise its discretion under this section. Defendant also claims that the trial court did not exercise its discretionary duty under § 41–17–23, N.M.S.A.1953 (Repl.Vol. 1964) to determine whether a pre-sentence report should be obtained.

It is defendant's claim that the fact situation in this case differs from State v. Serrano, 76 N.M. 655, 417 P.2d 795 (1966). However, *Serrano* states:

> "The refusal of the trial court to hear the offered testimony, in our opinion, does not justify reversal for the reason that the statute, § 40A–29–15, supra, makes no requirement that the contemplated investigation shall include a trial, or hearing, nor does the statute by implication, or otherwise, grant the defendant the right to introduce testimony in support of his request. * * *"

Defendant also urges that this case differs from State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct.App.1970) in that we did not know the reason for the court's refusal to consider the defendant for probation in that case; but here we have an erroneous reason. Defendant urges that the reason was shown in the following comment made by the trial court:

> "THE COURT: I am sorry, the Court will make no change. The penitentiary officials will not permit and do not take a recommendation for the sentence to run concurrently. If they did, all these people could escape. That is the sentence of the Court. That is all."

Defendant would have us hold that the above post-sentencing statement is the court's reason for not hearing argument for making investigation on the nature of the sentence on defendant. Other than defendant's mere assertion, we have no indication that the post-sentence statement was the sole basis for the court's action. Accordingly, we need not determine the legal correctness of the post-sentencing statement or whether the court's consideration of the views of penitentiary officials was proper. The court is at liberty to make any inquiries that might assist it in making a decision about sentencing. We do not assume that the only investigation made is reflected by the record. State v. Serrano, supra. Defendant has failed to show that the trial court either failed to exercise its discretion or abused its discretion in rejecting defendant's request for "an opportunity to argue to the judge as to the nature of the sentence." Defendant having failed to affirmatively show either a failure to exercise discretion, or its abuse, regularity and correctness are presumed. State v. Follis, supra; State v. Serrano, supra.

Affirmed.

It is so ordered.

WOOD and SUTIN, JJ., concur.

487 P.2d 923

STATE of New Mexico, Plaintiff-Appellee,

v.

Raymond A. MARTINEZ, Defendant-Appellant.

No. 691.

Court of Appeals of New Mexico.

July 16, 1971.

Lowell E. McKim, Denny, Glascock & McKim, Gallup, for defendant-appellant.

David L. Norvell, Atty. Gen., C. Emery Cuddy, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Judge.

Defendant appeals his conviction of four counts of unlawfully selling marijuana. Section 54-5-14, N.M.S.A.1953 (Repl.Vol. 8, pt. 2). The defendant claims he was entrapped as a matter of law and the trial court erred in submitting the issue of entrapment to the jury.

State v. Sanchez, 79 N.M. 701, 448 P.2d 807 (Ct.App.1968) states:

> "* * * A defendant can be said to have been entrapped only when the officers or agents originate the criminal intent or design and use undue persuasion or enticement to induce defendant to commit the crime with which he is charged. He has not been entrapped if the officers or agents merely offer him an opportunity to commit an offense which he is ready and willing to commit. * * *"

Defendant testified that he never had anything to do with narcotics prior to the episodes involved in this case. He admitted the marijuana sales. In response to a question as to what conversations he had with Warren, the undercover agent, the defendant testified:

> "Yes, sir. He suggested that—he kept asking me all the time about marijuana, or whether I could obtain any, and being that I had financial difficulties and my wife was expecting a baby and the daughter having problems, I gave it my most consideration for almost a month or two, and I finally told Mr. Warren that I could get marijuana so that we could make a profit from it."

Defendant's testimony raises a factual issue as to whether the agent used "undue persuasion or enticement to induce Defendant to commit the crime." Entrapment did not occur merely because the undercover agent offered defendant an opportunity to involve himself in marijuana sales. In addition, there must be improper inducement. State v. Akin, 75 N.M. 308, 404 P.2d 134 (1965); State v. Roybal, 65 N.M. 342, 337 P.2d 406 (1959). According to defendant, he was having "financial difficulties." He gave the agent's suggestion his "most consideration for almost a month or two" before deciding to obtain the marijuana and "finally" agreed to involve himself in marijuana for a profit. This testimony raised a factual issue as to whether the criminal conduct was the product of the creative activity of the agent. State v. Sena, 82 N.M. 513, 484 P.2d 355 (Ct.App.1971). There being a factual issue, the trial court properly refused to find entrapment as a matter of law.

The judgment and sentence is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

487 P.2d 1085

John Gordon STRANCE, M.D., Petitioner-Appellant,

v.

The NEW MEXICO BOARD OF MEDICAL EXAMINERS, Respondent-Appellee.

No. 9192.

Supreme Court of New Mexico.

Aug. 9, 1971.

Toulouse, Moore & Walters, Albuquerque, for petitioner-appellant.

Howard F. Houk, Albuquerque, for respondent-appellee.

OPINION

OMAN, Justice.

This appeal is from a judgment of the district court affirming the suspension by the New Mexico Board of Medical Examiners of appellant's license to practice medicine in the State of New Mexico for a period of two years and one day. We affirm.

Appellant was licensed to practice medicine in Nevada and New Mexico. He resided and maintained his offices in Fallon, Nevada. He applied and by letter dated June 14, 1963 was designated as an Aviation Medical Examiner for the Administrator of the Federal Aviation Administration. This designation expired on December 31 of each calendar year and was valid only at his Fallon address. He was expressly so notified, and upon application was redesignated for each of the calendar years 1964, 1965 and 1966.

On February 21, 1966, the Board of Medical Examiners of the State of Nevada revoked appellant's license to practice medicine in that state, but stayed the revocation upon certain conditions. One of these conditions was that he refrain from the use of alcohol or alcoholic beverages. On March 16, 1966, he was committed to the Nevada State Hospital as an inebriate. On June 8, 1966, the Board of Medical Examiners of Nevada entered an order permanently revoking his license to practice medicine in that state.

By registered letter dated May 6, 1966, the Federal Air Surgeon notified him his

designation as Aviation Medical Examiner was thereby revoked. This letter was addressed to him at his Fallon address and was actually received and receipted for by his wife. He denied having ever received it. However, he made no application for redesignation for the years 1967, 1968 or 1969. During these years he practiced medicine and maintained his offices in Lovington, New Mexico.

On October 12, 1966, appellee, New Mexico Board of Medical Examiners, entered a decision and order permanently revoking appellant's license to practice medicine in the State of New Mexico. However, this revocation was stayed upon certain conditions, one of which was:

> "Respondent [Appellant] shall at all times comply with all of the laws of the United States, the State of New Mexico and its political subdivisions and the rules and regulations of the Board of Medical Examiners."

Appellant was notified of his right under § 67–26–17, N.M.S.A.1953 (Repl. Vol. 10, pt. 1, 1961) to have this decision and order reviewed, but no review was sought by him.

On March 20, 1970, appellee entered a decision and order suspending appellant's license for a term of two years and one day, with the privilege of reapplying for license after the expiration of said term. The conclusion of appellee upon which this action was predicated was:

> "That the respondent, John Gordon Strance, M.D., has failed to comply with the terms of his probation as ordered by the Board of Medical Examiners on 12 October 1966 and thus is guilty of unprofessional conduct in violation of Section 67–5–9, New Mexico Statutes Annotated, 1953 Compilation, as amended."

In addition to the above quoted condition for staying his suspension and a finding as to the foregoing recited events concerning his designation as an Aviation Medical Examiner and the revocation thereof, appellee predicated its conclusion that appellant was guilty of unprofessional conduct upon the following findings:

> "That notwithstanding the fact that respondent's designation as an Aviation Medical Examiner had been revoked by the Federal Aviation Agency, he continued to give medical examinations and issue the various medical certificates and student pilot certificates for a fee, as indicated on Exhibits 'B' through 'H' attached to the Order to Show Cause issued by the Board aforesaid.
>
> "That on 12 September 1969 the respondent was verbally informed over the telephone by Judith Hunter, an employee of the Federal Aviation Agency, that he was not an approved Aviation Medical Examiner and that he should not give any physical examinations or issue any certificates until approved. That notwithstanding this admonition, respondent unlawfully and illegally issued Medical Certificates III Class and Student Pilot Certificate to Leach Bob Roberts, Jr., Box 466, Lovington, New Mexico, on 14 November 1969, as indicated on Exhibit 'H' attached to the Order to Show Cause.
>
> "That all of the certificates issued by respondent subsequent to 6 May 1966 were unlawfully and illegally issued and invalid, and the respondent knew or should have known that all of the physical examinations performed and certificates issued by him prior to 14 November 1969 were unlawfully issued and invalid, and the respondent knew the certificate issued to Leach Bob Roberts, Jr., on 14 November 1969, as aforesaid, was unlawfully issued and invalid, as he had been personally informed on 12 September by Judith Hunter, as aforesaid, that he was no longer a designated Aviation Medical Examiner and was not to perform any examinations or issue any more certificates until approved.
>
> "That the respondent's illegal, unlawful, and unauthorized conduct in issuing the certificates to the various persons, as set forth under Exhibits 'B' through 'H'

attached to the Order to Show Cause, constitutes a violation of the terms of the probation of said respondent, as heretofore entered by the Board on 12 October 1966, in that such unlawful, illegal, and unauthorized conduct is unbecoming in a person licensed to practice medicine in the State of New Mexico, and was and is detrimental to the best interests of the public."

The only findings upon which a direct attack has been made are those contained in the last two paragraphs above quoted, and this attack will hereinafter be discussed. Since no claim has been made that the other findings are unsupported by substantial evidence, they are binding on this court. Springer Corporation v. Kirkeby-Natus, 80 N.M. 206, 453 P.2d 376 (1969); § 67–26–23, N.M.S.A.1953 (Repl. Vol. 10, pt. 1, 1961).

By his first point relied upon for reversal, appellant contends there was no substantial evidence that he violated the above quoted condition of the probationary order of October 12, 1966, or that his conduct was "unlawful, illegal and unauthorized" so as to constitute a basis for a finding of "unbecoming conduct," and appellee acted in excess of its authority.

In the findings which are not attacked, the issuance of certificates by him was described as unlawful and illegal. There is no question about appellant having made the examinations referred to in the findings after his designation as an Aviation Medical Examiner had been revoked, and after he must have known he lacked authority to make these examinations. He concedes that the Federal Aviation Administrator has properly promulgated and published regulations having the force of law, and quotes portions of §§ 183.13, 183.15 and 67.23 of 14 C.F.R. concerning the designation of Aviation Medical Examiners and renewals of these designations, and the fact that designated Aviation Medical Examiners are the only ones authorized by these regulations to make medical examinations for the different classes of airmen.

He urges that no provision is made in these regulations for punishment for the issuance of a certificate by a person not designated by the Federal Air Surgeon. Although, as hereinafter discussed, we are of the opinion that the establishment of criminal liability is not essential to a determination of the issues presented, Title 49 U.S.C.A. § 1472(b) provides in part:

> "Any person who knowingly and willfully forges, counterfeits, alters, or falsely makes any certificate authorized to be issued under this chapter, or knowingly uses or attempts to use any such fraudulent certificate, * * * shall be subject to a fine of not exceeding $1,000 or to imprisonment not exceeding three years, or to both such fine and imprisonment."

Each of the certificates of examination in question was executed by appellant on a form regularly furnished by the Federal Aviation Administration to and for use by designated Aviation Medical Examiners.

He seeks to avoid the effects of his acts by urging he negligently executed these certificates; that a determination of his guilt as to whether he knowingly and willfully executed the certificates may be made only by a proper court in a proper proceeding; and a determination by appellee of his guilt of unprofessional conduct in violation of § 67–5–9, N.M.S.A.1953 (Repl. Vol. 10, pt. 1, 1961) (Supp.1969), necessarily involved a determination of his criminal guilt.

In our opinion the evidence is clearly sufficient to support a criminal conviction of appellant for having knowingly and willfully executed the certificates. However, we do not understand that an administrative determination of "unlawful, illegal or unauthorized" conduct sufficient to support a conclusion of "unprofessional conduct," as provided in § 67–5–9, supra, and as concluded by appellee, as above shown and quoted, is dependent upon a prior judicial determination of criminal guilt. Nothing stated in Young v. Board of Pharmacy, 81 N.M. 5, 462 P.2d 139 (1969) or in McKay v. State Board of Medical Examiners, 103 Colo. 305, 86 P.2d 232 (1938), upon which

appellant relies, supports this position. As stated in the Colorado case, the purpose of an administrative hearing to determine a claim of immoral, dishonorable or unprofessional conduct is not that of imposing punishment but the protection of the public.

Here the revocation of appellant's license had been stayed, and he had been placed on probation upon condition that he comply with all the laws of the United States. He did not seek review of this revocation, the stay, the probation, or the stated conditions of the probation. He does not now challenge appellee's authority to so act in any of these particulars.

> "The board [Appellee] may, in its discretion, and for good cause shown, place the licensee on probation on such terms and conditions as it deems proper for protection of the public and for the purpose of the rehabilitation of the probationer, or both. * * *"

Section 67–5–9, supra.

Whether or not appellant was criminally guilty of violating the laws of the United States is not the issue, but rather whether or not his unlawful conduct in making examinations of airmen, when he knew he lacked the authority to so do, constitutes unprofessional conduct detrimental to the best interests of the public.

The scope of review by the district court was limited to a determination of whether the substantial rights of appellant had been prejudiced because appellee's:

> "* * * 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."

Section 67–26–20, N.M.S.A.1953 (Repl. Vol. 10, pt. 1, 1961).

It was not the function of the district court, nor is it the function of this court, to substitute its judgment for that of appellee. Seidenberg v. New Mexico Board of Medical Exam., 80 N.M. 135, 452 P.2d 469 (1969).

Appellant's second point is simply that the district court erred in affirming appellee's decision because of the claimed errors asserted in the first point.

We are of the opinion the trial court correctly decided that the challenged findings were supported by substantial evidence, and that appellee had the authority to effect the suspension upon the basis of these findings, the findings which are unattacked, and the power conferred upon it by statute.

The judgment should be affirmed.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

487 P.2d 1088

STATE of New Mexico, Plaintiff-Appellee,

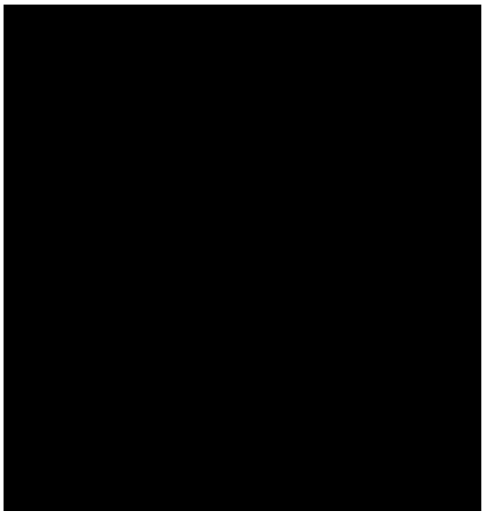
v.

Danny Ray LeMARR, Defendant-Appellant.

No. 9219.

Supreme Court of New Mexico.

Aug. 9, 1971.



Thomas J. Hynes, Farmington, for defendant-appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

McMANUS, Justice.

Defendant Danny Ray LeMarr was tried before a jury on five separate charges in the District Court of San Juan County, New Mexico. The charges, all by indictment, were burglary, kidnapping, aggravated battery, armed robbery and attempted rape. Defendant was found guilty on all five counts and sentenced to life imprisonment. The cause is on appeal from said conviction.

Testimony at the trial revealed that the defendant and one Wheeler escaped from the honor farm in Delta, Colorado (a state penal institution), wended their way to San Juan County, New Mexico, and during their stay there, the following incidents from which the charges were filed, occurred. A Mrs. Dolly Miller was purportedly assaulted with a knife and robbed; burglary of a laundromat; a kidnapping and an attempted rape of Mrs. Miller were also alleged.

An oral confession was given by defendant after his apprehension by officers. The defendant was properly advised of his rights in line with the case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The defendant claims that the confession was involuntary and that its admission into evidence was error on the part of the trial judge. Defendant objected to the use of the confession at the beginning of the trial. With the jury absent, a hearing concerning the confession was conducted and at the conclusion the court found that the confession was voluntary. During the hearing the following testimony of officer Mehl Tafoya of the Farmington, New Mexico, Police Department was recorded:

"Q Would you tell us what happened at that time?

"A Prior to interviewing Mr. LeMarr at this time, we had a waiver for rights and I read it to him, and as I was reading I would ask him various questions concerning whether or not he understood what I was saying, I also asked him how much education he had and he said sixth grade but had done a lot of reading and understood what I was saying. I then handed him the same waiver and asked him tc read it out loud,

which he did, and asked him if he wanted to waive his rights and discuss it with us, he said, 'Yes, if you fellows promise not to put me in the same cell with Mr. Wheeler, because he will kill me.' "

The same or similar statements were reflected in the testimony before the jury.

We feel that the confession was a voluntary one following the requirements of Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964). The answer of the officer to the effect that such would not be done was a natural one and certainly not phrased in a threatening or other unjustified manner. See State v. Lindemuth, 56 N.M. 257, 243 P.2d 325 (1952). In our opinion, State v. Dena, 28 N.M. 479, 214 P. 583 (1923), is not controlling here because of different facts and circumstances.

The defendant, because he was convicted of being an aider and abettor to the attempted rape committed by Wheeler, also objected to the court's use of instruction No. 14–C and its refusal to substitute defendant's requested instruction No. 1. The instruction given reads as follows:

"14–C. When a person has once committed acts which constitute an attempt to commit a crime, he cannot avoid responsibility by not proceeding further with his intent to commit the crime, either by reason of voluntarily abandoning his purpose or because of a fact which prevented or interfered with his completing the crime."

Defendant's requested instruction No. 1 states:

"Where a person intends to commit a crime but before his acts and conduct become an attempt and no act has been committed toward the ultimate commission of the crime, he makes no effort to accomplish it but abandons his original intent, the crime of attempt has not been committed."

The instruction given was intended to cover the situation wherein there was an alleged attempt to commit a rape upon the person of Mrs. Miller by a co-felon of appellant, Kenneth Wheeler. The evidence reflects nothing factual that would permit the giving of defendant's requested instruction No. 1. On the contrary, the evidence does reflect, and is uncontradicted, that Wheeler ripped off her shirt and attempted to take off her pants before he stopped his aggression. The defendant had been in the automobile prior to this action, and was in close proximity at the time, having left the automobile at the request of Wheeler, therefore implicating himself in and giving his tacit consent to Wheeler's actions. The testimony further reflects that Wheeler stopped his activity upon discovering blood on the shoulder of Mrs. Miller. Section 40A–28–1, N.M.S.A. (Repl.Vol. 6, 1964) states:

"Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission."

Section 41–6–34, N.M.S.A. (1953 Comp.) also states:

"Every person concerned in the commission of an offense, whether he directly commits the offense or procures, counsels, aids or abets in its commission, may be indicted or informed against as principal."

In light of the evidence adduced, the court's instruction, along with the other instructions, adequately and fairly covered the matter and the defendant's tendered instruction was properly refused.

Defendant offered two instructions, among others, that were denied by the court and defendant claims error as to such denial. The requested instructions are:

"No. 6. You are instructed that a person is not guilty of a crime when he commits an act or engages in conduct, otherwise criminal, when acting under threats and menaces which would create in the mind of a reasonable person the fear that his life would be in imminent and immediate danger if he did not commit the act or engage in the conduct

charged, such person then believes that his life would be so endangered."

"No. 7. If you find that defendant was acting under duress or compulsion at the time of committing the unlawful act which he is charged with and that said duress or compulsion was present, imminent, and impending, and that the said duress or compulsion produced a well-grounded apprehension in the defendant of death or serious bodily harm to the defendant if he did not perform the said unlawful act, then you will find the defendant not guilty as charged."

During the course of the trial defendant offered evidence to the effect that his participating in the crimes was as a result of duress and compulsion brought about by Wheeler. The defendant testified that Wheeler had threatened him with a knife if he did not break into a laundromat building. Interestingly enough, Wheeler promptly handed defendant the knife and defendant proceeded to the laundromat building. The defendant testified that he desired to turn himself in on several occasions, and on each occasion was threatened by Wheeler with bodily harm. However, the testimony of the defendant at the trial revealed that he had several opportunities to escape. At times, during the commission of the alleged acts, the defendant himself was in possession of the knife and on a number of occasions was outside of or away from the immediate control of Wheeler.

In connection with the defendant's assertion that he fled the Colorado prison camp because of coercion on the part of Wheeler, see People v. Noble, 18 Mich.App. 300, 170 N.W.2d 916 (1969), wherein the defendant attempted to justify his escape from a prison work camp to avoid homosexual attacks by other prisoners. The court rejected this defense and said, "However, the answer to the problem is not the judicial sanctioning of escapes."

In State v. Good, 110 Ohio App. 415, 165 N.E.2d 28, at 31, 32 (1960), the court said:

"The force which is claimed to have compelled criminal conduct against the will of the actor must be immediate and continuous and threaten grave danger to his person during all of the time the act is being committed. That is, it must be a dangerous force threatened 'in praesenti.' It must be a force threatening great bodily harm that remains constant in controlling the will of the unwilling participant while the act is being performed and from which he cannot then withdraw in safety. Fear of future harm cannot be the basis of such a defense."

In our own Circuit, in an opinion authored by Circuit Judge Sam G. Bratton in Shannon v. United States, 76 F.2d 490, at 493, (10th Cir. 1935), where two defendants among 14, in a conspiracy to kidnap case, asserted a defense of coercion from the other conspirators as a defense to their guilt, Judge Bratton said:

"Coercion which will excuse the commission of a criminal act must be immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion and is not entitled to an instruction submitting that question to the jury. * * *"

As to a statement of the rule in New Mexico, see State v. Lee, 78 N.M. 421, 432 P.2d 265 (1967).

With a comprehensive view of all of the evidence and instructions we are of the opinion that there was no error involved in the rejection of defendant's requested instructions Nos. 6 and 7 by the trial court.

Having determined that there was no error appropriate for a reversal of this cause the conviction of the defendant is affirmed.

It is so ordered.

OMAN and STEPHENSON, JJ., concur.

487 P.2d 1092

Thomas CHAFFINS, Petitioner,

v.

JELCO INCORPORATED, a corporation, and Industrial Indemnity Insurance Company, Defendants.

No. 9282.

Supreme Court of New Mexico.

July 21, 1971.

Further ordered that this cause be remanded to the Court of Appeals for such further proceedings therein as may be proper, and the record of Court of Appeals Cause No. 538, 82 N.M. 666, 486 P.2d 75 be and the same is hereby returned to the Clerk of the Court of Appeals.

487 P.2d 1092

WESTLAND CORPORATION, Respondent,

v.

COMMISSIONER OF REVENUE, Petitioner.

No. 9293.

Supreme Court of New Mexico.

July 21, 1971.

Further ordered that the record in Court of Appeals Cause No. 523, 83 N.M. 29, 487 P.2d 1099 be and the same is hereby returned to the Clerk of the Court of Appeals.

487 P.2d 1092

Melcor TAFOYA and Sabina Tafoya, his wife, Petitioners,

v.

Bobby WHITSON, Respondent.

No. 9306.

Supreme Court of New Mexico.

Aug. 12, 1971.

Further ordered that the record in Court of Appeals Cause No. 544, 83 N.M. 23, 487 P.2d 1093, be and the same is hereby returned to the Clerk of the Court of Appeals.

487 P.2d 1093

Meicor TAFOYA and Sabina Tafoya, his wife, Plaintiffs-Appellants,

v.

Bobby WHITSON, Defendant-Appellee.

No. 544.

Court of Appeals of New Mexico.

June 18, 1971.

Rehearing Denied July 14, 1971.

Certiorari Denied Aug. 12, 1971.

O. Louis Puccini, Jr., Charles G. Berry, McAtee, Marchiondo & Michael, Albuquerque, for plaintiffs-appellants.

Daniel C. Lill, LeRoi Farlow, Albuquerque, for defendant-appellee.

OPINION

HENDLEY, Judge.

Plaintiffs sued to recover damages for personal injuries and property damages arising out of an automobile accident in which defendant drove his car into the rear of Sabina's car. At the close of both plaintiffs' case and defendant's case, plaintiffs moved for a directed verdict on liability. Both motions were denied. The jury then returned a verdict for defendant.

Plaintiffs appeal asserting the trial court erred in (1) failing to direct a verdict on liability and (2) the giving of various instructions.

We affirm.

1. DIRECTED VERDICT.

In passing on plaintiffs' motion for a directed verdict on liability we view the evidence together with all inferences that could reasonably be drawn therefrom in a light most favorable to defendant, disregarding all evidence to the contrary. Francis v. Johnson, 81 N.M. 648, 471 P.2d 682 (Ct.App.1970).

There were conflicting accounts of the accident, but when we view only testimony most favorable to the defendant the record is as follows: Defendant was driving through Gallup on his way to Farmington from Tucson. There was a substantial amount of snow on the ground and it was snowing hard. He was proceeding east on old Highway 66. Plaintiff, Sabina, pulled in front of defendant and he proceeded to follow her at a speed of 10 miles per hour. Defendant followed Sabina's car because she had a Gallup license number and defendant was having difficulty seeing the road because of the snow. Defendant traveled about 25 to 35 feet behind Sabina's car. Sabina's car traveled over into the westbound lanes of the divided highway and when she saw this she brought her car to a stop. Defendant saw no brake lights but upon realizing Sabina was stopping he pulled his car into low gear and applied his brake. He was unable to stop and skidded into Sabina's car at an approximate speed of five miles per hour. Defendant's car was not equipped with chains or snow tires.

Following the accident, defendant discovered that plaintiff Sabina had traveled into the left hand lane of the westbound lanes of travel. The accident occurred in that lane.

In light of the foregoing, plaintiffs assert that defendant was negligent as a matter of law and there is no substantial evidence to support a finding of contributory negligence on the part of plaintiff. It is plaintiffs' position that defendant, as a matter of law, failed to keep his speed controlled as was necessary to avoid colliding with any person, vehicle on or entering the highway, contrary to § 64–18–1.1(C) (1), N.M.S.A.1953 (1969 Pocket Supp.). Also that pursuant to § 64–18–17(a), N.M.S.A.1953 (Repl.Vol.1960, pt. 2) defendant was negligent, as a matter of law, in following too closely in hazardous weather.

The mere fact that a statute is violated does not, in and of itself, make such violation the proximate cause of an accident. Terrel v. Lowdermilk, 74 N.M. 135, 391 P.2d 419 (1964). As stated in Martin v. Gomez, 69 N.M. 1, 363 P.2d 365 (1961), where the statute involved was driving on the left of the center line:

> "Granting that the defendant violated this statutory mandate, nevertheless, the evidence in this case relative to a causal connection between the statutory violation and the injury is not such as would have justified the trial court in ruling as a matter of law that the violation was the proximate cause of the injury. Consequently, the trial court was correct in leaving the issue of causation to the jury.

As Prosser on Torts points out at page 155, there are certain statutes a violation of which in and of itself is the proximate cause of an injury. But there are other statutes, such as the one involved in this case, a violation of which may or may not have any causal connection with an ensuing injury."

The issue of contributory negligence is usually an issue for the jury. Le Doux v. Peters, 82 N.M. 661, 486 P.2d 70 (Ct.App.), decided May 21, 1971. The question of negligence and contributory negligence can only be taken from the jury and decided as a matter of law when reasonable minds could not differ on the question. Based on the foregoing facts, we cannot say as a matter of law, that reasonable minds could not differ on the issue of defendant's negligence or plaintiff Sabina's contributory negligence. Lujan v. Reed, 78 N.M. 556, 434 P.2d 378 (1967).

Neither are we impressed with the argument on appeal that plaintiff Sabina was required to stop because of an emergency situation. The record does not show an emergency. There was no oncoming traffic. She could best extricate herself by driving back to the proper side of the road.

Plaintiffs cite Branstetter v. Gerdeman, 364 Mo. 1230, 274 S.W.2d 240 (1955) for the proposition that acts of the driver of the lead automobile are as a matter of law, too remote to be causative in the legal sense when the lead automobile stops without warning signals and is then rear-ended by another automobile. Our reply is that *Branstetter* involved different facts, there being a multi-automobile collision. In addition, even in such situation *Branstetter's* "too remote" theory is not the law in New Mexico. Compare Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct.App.1970).

The trial court properly denied plaintiffs' motion for a directed verdict on liability and submitted the issue to the jury.

2. INSTRUCTION ON SABINA'S STATUTORY VIOLATIONS.

Plaintiffs contend "* * * that the court erred in giving instructions Nos. 13, 14 and 15 all relating to the alleged violation by the plaintiff [Sabina] of the statutes regulating the proper actions to be taken by one using the roadway. * * *" It is plaintiff's position that if the statutes were violated then her actions did not constitute the proximate cause of this collision and that the court in giving these instructions implying that she was contributorily negligent as a matter of law if she had violated these statutes was error.

The instructions were related to certain statutes in force and stated:

13. "'Whenever any highway has been divided into two (2) roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the righthand roadway. * * *'

"If you find from the evidence that the plaintiff Sabina Tafoya conducted herself in violation of this statute you are instructed that such conduct constituted negligence as a matter of law."

14. "'No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.'

"If you find from the evidence that the plaintiff Sabina Tafoya conducted herself in violation of this statute you are instructed that such conduct constituted negligence as a matter of law."

15. "'(a) Any stop or turn signal when required herein shall be given either by means of the hand and

arm or by a signal lamp or lamps or mechanical signal device * * *'

"'All signals herein required given by hand and arm shall be given from the left side of the vehicle in the following manner and such signals shall indicate as follows: * * *'

"'3. Stop or decrease speed. Hand and arm extended downward.'

"If you find from the evidence that the plaintiff Sabina Tafoya conducted herself in violation of this statute you are instructed that such conduct constituted negligence as a matter of law."

Plaintiffs contend that instruction No. 13 was wrong in that the statute was enacted for the benefit of a particular class and that defendant is not within that class. The specific vice in the instruction should have been pointed out so as to leave no doubt that the court's mind was actually alerted. Castillo v. Juarez, 80 N.M. 196, 453 P.2d 217 (Ct.App.1969). Plaintiffs did not raise the question in the lower court. It cannot be first raised here on appeal.

Plaintiffs next contend that instructions Nos. 14 and 15 were improper in that there is no substantial evidence in the record to show that Sabina did not give an appropriate signal within the meaning of the statute. We disagree.

There was testimony that defendant was about 25 or 35 feet behind Sabina's car; that he could see she had a Gallup license; that he was intently watching her car; that he did not see her tail light come on; and that he "* * * had no difficulty in seeing her in front of him. * * *" It follows then that since defendant was intently watching and did not see the brake lights go on, a reasonable inference follows that they did not go on. Compare Turner v. McGee, 68 N.M. 191, 360 P.2d 383 (1961).

The cases cited by plaintiffs are distinguishable on their facts. Here, based upon the undisputed testimony that the tail light did not go on, we cannot say as a matter of law that the jury could not conclude that such was the proximate cause of the accident.

3. INSTRUCTIONS 13, 14 and 15 WERE BASED ON U.J.I. 11.1 INSTEAD OF U.J.I. 11.2.

A review of plaintiffs' objections to the foregoing instructions and whether they should have been under U.J.I. 11.2 (Violation of Statute or Ordinance—Excuse) instead of U.J.I. 11.1 (Violation of Statute or Ordinance) show they were never brought to the trial court's attention. Having not been brought to the trial court's attention they cannot be first raised here on appeal. Castillo v. Juarez, supra. Accordingly, we do not discuss the merit of plaintiffs' contention.

4. INSTRUCTIONS OF PROXIMATE CAUSE RESULTING FROM STATUTE OR ORDINANCE VIOLATION WERE MISLEADING.

Plaintiffs contend U.J.I. 12.10 was not a proper instruction defining proximate cause since it does not apply the term to the violations of the statutes as given in the other instruction (13, 14 and 15) and thereby misleads the jury resulting in prejudice to plaintiffs.

U.J.I. 12.10 states:

"*The proximate cause of an injury is that which in a natural and continuous sequence* [unbroken by any independent intervening cause] *produces the injury, and without which the injury would not have occurred.* [It need not be the only cause, nor the last nor nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it, causes the injury]."

The court gave only that portion which is italicized. No reason was stated for not giving the last bracketed portion.

Plaintiffs objected to the omission of the last bracketed portion of U.J.I. 12.10 when they stated to the trial court:

"I submit to the Court that in this connection, where—I think that this is an instruction that should be given where there is an issue of contributory negligence, as the Court has found that there is in this case. I think that in view of the statute, that the Court should instruct the jury on—that might have been violated by the plaintiff in this particular case, that the jury should be instructed in this regard, so that they may determine which negligence, even assuming that plaintiff was negligent, which negligence did cause the accident in question."

The "Direction for Use" of the last bracketed portion of U.J.I. 12.10 states that it "* * * should be used only when there is evidence of a concurring or contributing cause. Ortega v. Texas-New Mexico Ry. Co., 70 N.M. 58, 379 [370] P.2d 201 (1962). Rix v. Town of Alamogordo, 42 N.M. 325, 77 P.2d 765 (1938)."

Plaintiffs contend that the last bracketed portion "would have cleared, to some extent, the confusion caused by the jury being mislead into thinking that the plaintiff's [Sabina's] position, in being on the left hand side of the road, was the only cause of the accident." They assert that this omission "introduced a false statement of law to the jury." We do not agree. At worst it was a curable omission.

Plaintiffs' entire argument is based on the premise that contributory negligence was not an issue; but as we have shown above that premise is not well taken under the facts of this case. Furthermore, implicit in plaintiffs' contention are instructions Nos. 13, 14 and 15 which related to possible statutory violations by plaintiffs. However, taking all instructions as a whole, as we must (Garcia v. Barber's Super Markets, Inc., 81 N.M. 92, 463 P.2d 516 (Ct.App.1969)), we also have to consider instruction No. 12 which relates to defendant's possible violations in failing to control speed and following too closely.

We fail to see how the jury was misled into thinking Sabina's being on the wrong side of the road was the only cause of the accident. Instructions must be read as a whole and when so read, if they fairly represent all issues and applicable law, they are proper and a mere defect or omission in one instruction may be cured by another instruction. Chapin v. Rogers, 80 N.M. 684, 459 P.2d 846 (Ct.App.1969).

In light of the foregoing we fail to see how plaintiffs were prejudiced by the omission. Jewell v. Seidenberg, 82 N.M. 120, 477 P.2d 296 (1960). Section 21-2-1 (17) (10), N.M.S.A.1953 (Repl.Vol.1970).

5. THE LAST TWO PARAGRAPHS OF INSTRUCTION NO. 1 ARE MISLEADING AND PREJUDICIAL.

Instruction No. 1 reads:

"The plaintiffs claim that they sustained damages and that the proximate cause thereof was one or more of the following claimed acts of negligence:

"1. The defendant did not have his car under control.

"2. The defendant was not keeping a proper lookout.

"3. The defendant was following behind plaintiff too closely.

"The plaintiffs have the burden of proving that they sustained damage and that one or more of the claimed acts of negligence was the proximate cause thereof.

"The defendant denies the plaintiffs' claims and asserts the following affirmative defenses:

"The plaintiff Sabina Tafoya was contributorily negligent in that:

"1. She was driving to the left of the divider on the highway and actually driving the wrong way in the east bound lanes.

"2. That she stopped her car in the highway without signaling.

"3. That she stopped her car suddenly in the highway without sufficient reason.

"The defendant has the burden of proving the affirmative defenses.

"If you find that plaintiffs have proved those claims required of them and that none of the defendant's affirmative defenses have been proved, then your verdict should be for the plaintiffs.

"If on the other hand, you find that any one of the claims required to be proved by plaintiffs have not been proved or that any one of defendant's affirmative defenses have been proved, then your verdict should be for the defendant."

This instruction is U.J.I. 3.1. Plaintiffs contend it is prejudicial since it is poorly written and it confused the jury. Plaintiffs state that the jury could interpret the first part as plaintiffs must be able to prove all three of their claims. Such is not the language. The language reads "one or more."

6. INSTRUCTIONS 3, 5, 10, 17 AND 27 IMPROPER EVEN THOUGH NOT DEVIATING FROM U.J.I. INSTRUCTIONS.

(a) Instruction No. 3 is the definition of contributory negligence and as discussed under points 1 and 2 contributory negligence was an issue in the case.

(b) Instruction No. 5 is U.J.I. 13.12 on comparative negligence and states when contributory negligence of a plaintiff and negligence of a defendant is at issue the jury cannot compare negligence. Both issues were present, and, as the "Directions for Use" states, when both are present, the instruction is proper.

(c) Instruction No. 10 is U.J.I. 12.3 "Duty to Use Ordinary Care—Plaintiff." Plaintiffs failed to bring this to the court's attention. The objection was never made or preserved.

(d) Instructions Nos. 17 and 27 are U.J.I. 17.8 and 14.1 respectively on "No Damages Unless Liability" and "Liability Must be Determined Before Damages."

Defendant contends that under Clinard v. Southern Pacific Company, 82 N.M. 55, 475 P.2d 321 (1970) both instructions need not be given if the court "finds and states of record its reasons why the proposed instruction is erroneous or otherwise improper."

Contrary to plaintiffs' contention we fail to see how we can construe the colloquy between the court and counsel as the court stating its reasons for not using the instruction required by U.J.I. The record shows as follows:

"MR. BERRY: All right, sir.
Object to the Court's Instruction Number Twenty-Seven, which I realize is a UJI instruction, but I submit that it's repetitive, it's repetitious.

"THE COURT: What's that one about?

"MR. BERRY: That you are not to discuss damages until you first determine the issue of liability.

"THE COURT: That's one where I agreed with you, only under the directives of UJI, you're supposed to use it twice.

"MR. BERRY: I understand that, and I submit to the Court that UJI is wrong.

"THE COURT: I agree with you, but once you have this set of rules, you're stuck with it."

We see this interchange as indicating that the court agreed that the instruction was repetitious but not as giving the court's reasons for not using the U.J.I. In fact the court did knowingly give the U.J.I. instruction. *Clinard* does not hold that a court may not give the instruction if it thinks it is repetitious. Rather it says that if a court refuses to give the U.J.I. it must state its reason in the record. Section 21-1-1(51) (1) (c), N.M.S.A.1953 (Repl. Vol.1970).

Affirmed.

It is so ordered.

SPIESS, C. J., and SUTIN, J., concur.

487 P.2d 1099

WESTLAND CORPORATION, Appellant,

v.

COMMISSIONER OF REVENUE, Appellee.

No. 523.

Court of Appeals of New Mexico.
May 21, 1971.
Rehearing Denied June 16, 1971.
Certiorari Denied July 21, 1971.

Vance Mauney, Botts, Botts & Mauney, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Santa Fe, Richard J. Smith, Asst. Atty. Gen., for appellee.

OPINION

SUTIN, Judge.

This is a gross receipts tax case directly appealed by Westland Corporation from the decision and order of the Commissioner of Revenue under Administrative Procedures Act, §§ 4-32-1 to 4-32-25, N.M.S.A.1953 (Repl.Vol. 2, Supp.1969), adopted by the legislature in 1969. This was pursuant to Westland's "Notice of Appeal" in the transcript on appeal. In its brief, Westland states that this is an appeal pursuant to § 72-13-39, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1969) of the Tax Administration Act. The brief, however, cannot give the Court of Appeals jurisdiction.

Does the Court of Appeals have Jurisdiction under the Administrative Procedures Act?

The Administrative Procedures Act is not applicable here because the Commissioner of Revenue has not been specifically placed under the Act, nor subject to its provisions as provided by § 4-32-23 and § 4-32-2A, N.M.S.A.1953 (Repl.Vol. 2, Supp.1969). Mayer v. Public Employees Retirement Board, 81 N.M. 64, 463 P.2d 40 (Ct.App.1970). Therefore, this court lacks jurisdiction to review decisions of the Commissioner of Revenue under the Administrative Procedures Act.

Can Westland Appeal under the Tax Administration Act?

The Tax Administration Act [§§ 72-13-13 to 72-13-92, N.M.S.A., 1953 (Repl.Vol. 10, pt. 2, Supp.1969)] applies to and governs the Gross Receipts and Compensating Tax Act [§§ 72-16A-1 to 72-16A-19, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1969)], and the Emergency School Tax Act [§§ 72-16-1 through 72-16-19, N.M.S.A.1953 (Supp.1965) (Repealed 1967)], which are the subjects of this appeal. Section 72-13-39, N.M.S.A. 1953 (Repl.Vol. 10, pt. 2) provides for appeals from the commissioner's decision and order. The Court of Appeals has jurisdiction under this Act. Transamerica Leasing Corp. v. Bureau of Revenue, 80 N.M. 48, 450 P.2d 934 (Ct.App.1969); Union County Feedlot, Inc. v. Vigil, 79 N.M. 684, 448 P.2d 485 (Ct.App.1968).

Section 72-13-39, N.M.S.A.1953 (Repl. Vol. 10, pt. 2) reads as follows:

"Appeals from commissioner's decision and order.—A. If the protestant or claimant is dissatisfied with the action and order of the commissioner after a hearing, he may appeal to the court of appeals for further relief, but only to the same extent and upon the same theory as was asserted in the hearing before the commissioner or his delegate. All such appeals shall be upon the record made at the hearing and shall not be de novo. All such appeals to the court of appeals shall be taken within thirty [30] days of the date of mailing or delivery of the written decision and order of the commissioner to the protestant or claimant and if not so taken, the decision and order are conclusive.

"B. The procedure for perfecting an appeal hereunder to the court of appeals consists of the timely filing of a complaint on appeal with a copy attached of the decision and order from which appeal is taken. The appellant shall certify in his complaint on appeal that arrangements have been made with the commissioner or his delegate for preparation of a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the courts, at the expense of appellant, including three [3] copies which he shall furnish to the commissioner or his delegate.

"C. 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."

Pursuant to the above statute, all appeals shall be taken by timely filing of a "complaint" in the Court of Appeals within 30 days of the date of mailing or delivery

of the written decision and order of the commissioner. This is an administrative procedure in which the word "complaint" means an "expression of dissatisfaction." A "complaint" on appeal under this tax statute should be a short and plain statement showing that the taxpayer is dissatisfied and entitled to be heard.

Westland filed a "Notice of Appeal" which sets forth the facts upon which the "petitioner" relies, and it satisfied the requirement.

We, therefore, hold that this court has jurisdiction of this appeal.

Section 72–13–39(C), supra, provides the three grounds upon which the decision and order shall be set aside. No contention is made that the decision and order was arbitrary, capricious, or an abuse of discretion. The two remaining questions are: (1) Is the decision and order supported by substantial evidence? (2) Is it in accordance with law? We shall discuss them together.

Is the Decision and Order Supported by Substantial Evidence in the Record and in Accordance with Law?

The commissioner ruled that Westland was engaged in business; that monies received by it were gross receipts, and Westland was performing services for consideration for the three corporations so that all of its receipts were subject to tax.

We must, therefore, decide whether Westland was engaged in business within the meaning of the pertinent statutes, and whether all of the monies received by Westland were "gross receipts."

(1) *Was Westland Engaged in Business?*

The parties stipulated the following facts:

Westland is engaged in "activities" in connection with P.D.Q., Inc., Quick N' Handy, Inc., and Blue Ribbon Foods, Inc., all four are separate New Mexico corporations. Each is under common ownership with capital stock in each corporation owned by two McDonalds.

Westland has a banking account in which it placed funds received from each of the other corporations. These funds were estimated to be the amount required to pay advertising, legal fees, accounting fees, accounting expense, office supplies, bookkeeping costs (including salaries of administrative personnel and bookkeepers who are on the payroll of Westland), and overhead expenses, including rent on space to house the administrative function, bookkeeping and other office machines, repairs, utilities, insurance on vehicles, vehicle expense (including gas and oil), licenses, contributions to business and charitable organizations, bank charges, bank interest, and other banking expenses, and depreciation on all personal property of Westland, materials and supplies, used in this function are then paid out of these monies paid by the corporations and deposited in the banking account of Westland.

The purpose of the plan is to centralize the bookkeeping and management functions for the three other corporations, reduce the cost thereof, and make performance more efficient. The taxable period involved was January 1, 1966 through November 30, 1968.

Attached to the stipulation is the Notice of Assessment of Taxes with the commissioner's audits. The audits show the amount of revenue received by Westland from the three corporations, and the itemized disbursement of funds by Westland.

We are unable to determine from the stipulation, (1) whether the total amount of the disbursements are used for the operation of Westland, or (2) whether Westland, as agent or trustee for the three corporations, used a portion of the disbursements for the expense and operation of each of the three corporations. If Westland is subject to taxation, we are unable to determine whether all of the monies

received by Westland were "gross receipts."

Westland contends it was not engaged in business within the meaning of the applicable statutes.

Prior to July 1, 1967, the terms "business" and "engaging" were defined in § 72-16-2(F) and (G), N.M.S.A.1953 (Repl. Vol. 10, pt. 2) as follows:

> "F. 'Business' includes *all activities or acts engaged in,* personal, professional, and corporate, or caused to be engaged in with the object of *gain, benefit or advantage* either *direct or indirect.*
>
> "G. 'Engaging,' when used with reference to engaging or continuing in a business or profession, *includes the exercise of corporate* or franchise *power,* but it does not include occasional and isolated sales, or transactions by a person who does not hold himself out as engaged in business." [Emphasis added].

After July 1, 1967, § 72-16A-3(E), N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp. 1969), the definition was reduced in wordage:

> "E. 'engaging in business' means carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit;"

Westland contends that these statutes should be strictly construed against the state; that Westland does not hold itself out as engaging in business generally, but performs administrative functions only.

The issue under this point is whether the tax statutes apply to Westland. Strict construction does arise against the state where the applicability of the tax statute is ambiguous or doubtful in meaning or intent. Field Enterprises Educational Corp. v. Commissioner of Revenue, 82 N.M. 24, 474 P.2d 510 (Ct.App.1970); New Mexico Electric Service Co. v. Jones, 80 N.M. 791, 461 P.2d 924 (Ct.App.1969).

The above statutes are not ambiguous or doubtful in meaning or intent on the issue of whether Westland is "engaged in business". See, Bell Telephone Laboratories, Inc. v. Bureau of Revenue, 78 N.M. 78, 428 P.2d 617 (1966); Besser Co. v. Bureau of Revenue, 74 N.M. 377, 394 P.2d 141 (1964).

Westland admits it is engaged in "activities." Its object is "gain, benefit or advantage either direct or indirect." Its "activity" is "with the purpose of direct or indirect benefit."

For all monies received by Westland from the three corporations *in excess* of their necessary expenses, Westland received a direct benefit. This excess money was used for its own purposes. In its operations on behalf of itself and the three corporations, it held itself out as engaged in business. It was doing what it was organized to do.

Westland relies on Comer v. State Tax Commission, 41 N.M. 403, 69 P.2d 936 (1937). *Comer* was a commission agent for Phillips Petroleum Company only. He was not the owner or operator of a business, but merely an employee acting as manager or agent for the principal who was engaged in business. Comer was, therefore, not taxable. There was a concurring and a dissenting opinion. The majority gave the taxpayer the benefit of statutory interpretation. We do not believe that Westland falls into the classification of a commission agent. It is an independent corporation, organized for business purposes. It differs from *Comer* because it exercises a corporate power and services three corporations from which it receives money for its own benefit and advantage.

We agree that Westland acted as a "bookkeeper" in one respect for the three corporations if it is shown that Westland put monies received from the three corporations in one pocket and used a sufficient sum to pay their obligations out of the other pocket to save expenses for the three corporations. Although this is an "activity," it is not an engagement in business because it is not a gain, benefit, or advantage to Westland. But Westland

was engaged in business for itself, because its services to the three corporations constituted an "activity" for which it was organized.

The following cases support our position that Westland was engaged in business: Shelburne Sportswear, Inc. v. City of Philadelphia, 422 Pa. 199, 220 A.2d 798 (1966); Bonnar-Vawter, Inc. v. Johnson, 157 Me. 380, 173 A.2d 141 (1961), and Colway Realty Corp. v. Commonwealth, 198 Va. 1, 92 S.E.2d 271 (1956).

The definition of "engaging in business" under § 72-16A-3(E), supra, is definite and clear. Westland carries on an "activity with the purpose of direct or indirect benefit."

We, therefore, hold that Westland was engaged in business.

(2) *Were the Monies Received by Westland Gross Receipts?*

The commissioner ruled, (1) that the monies received by Westland were " 'gross receipts' as that term is defined in Section 72-16A-3(E), N.M.S.A.1953 (Supp.1967), and * * * Section 72-16-2(D), N.M. S.A.1953 (Supp.1965) * * *"; and (2) that Westland "was performing services for consideration" and the monies received were "subject to the gross receipts tax imposed by the * * *" tax statutes. Westland makes two arguments under this point: (1) The legislature did not intend that all monies received by a legal entity for administrative and accounting services were gross receipts, and (2) Westland is not a "person" as "person" is defined by statute.

The reporting period involved is January 1, 1966 to November 30, 1968. Because of a change in the statutes, we must determine "gross receipts" for the period of January 1, 1966 to July 1, 1967, and from July 1, 1967 to November 30, 1968.

First, let us determine taxability from January 1, 1966 to July 1, 1967. Prior to July 1, 1967, gross receipts were defined in § 72-16-2(D), in part, as follows:

> "D. 'Gross receipts' means the total sum, * * * received as *compensation for personal and professional services,* for the exercise of which a *privilege tax* is imposed by the Emergency School Tax Act, as amended, the total receipts of a taxpayer derived from trades, business, commerce." [Emphasis added.]

Section 72-16-4.10 imposed a 2% privilege tax on gross receipts "for any other business in which services (not professional) are performed *on a price or fee basis,*" [Emphasis added.]

Westland was a person defined by § 72-16-2(A). Westland performed personal services. Were these personal services taxable? We believe they are. The monies received by Westland and used in its own operation were "compensation for personal * * * services * * * performed on a price or fee basis." The monies received by Westland as agent or trustee of the three corporations and disbursed by it in the payment of debts or obligations owing by the three corporations are not compensation for personal services performed on fee basis.

Between July 1, 1967 and November 30, 1968, under the "Gross Receipts and Compensating Tax Act," effective July 1, 1967, "Gross Receipts" is redefined. " 'Gross receipts' means the total amount of money or the value of other consideration, received * * * from performing services in New Mexico,". Section 72-16A-3(F), N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp. 1969). This section also states:

> "In an exchange in which the money or other consideration received does not represent the value of the property or service exchanged, 'gross receipts' means the reasonable value of the property or service exchanged."

It also defined "service" which "means all activities engaged in for other persons

for a consideration, which activities involve primarily the performance of a service as distinguished from selling property." Section 72-16A-3(K), N.M.S.A. 1953 (Repl.Vol. 10, pt. 2, Supp.1969), amended 1969.

Section 72-16A-5 provides in part:

> "To prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax."

Westland was engaged in business and performed services for three other corporations from July 1, 1967 to November 30, 1968, the reporting period involved. The presumption that all receipts of Westland are subject to the gross receipts tax is met by the record of operation. The consideration paid Westland for services rendered, or the reasonable value of the service, was that sum of money received by it for services rendered to the three corporations. Westland acts as a "friendly agent" for the three corporations only for receiving and paying out sums for debts or obligations owing by the three corporations. On this point, Westland is supported by Colway Realty Corp. v. Commonwealth, 198 Va. 1, 92 S.E.2d 271 (1956); City of Los Angeles v. Clinton Merchandising Corp., 58 Cal.2d 675, 25 Cal.Rptr. 859, 375 P.2d 851 (1962). Compare Corbett Inv. Co. v. State Tax Commission, 181 Or. 244, 181 P.2d 130 (1947).

We, therefore, remand this case to the Commissioner of Revenue, (1) to make further findings on the use of the monies received by Westland from the other three corporations; (2) and determine whether all monies received by Westland are gross receipts and subject to tax.

It is so ordered.

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

487 P.2d 1104

Scott BROWN, Administrator of the Estate of Bobby Joe Winsor, deceased, Plaintiff-Appellant,

v.

LUFKIN FOUNDRY & MACHINE COMPANY, a corporation, and Gulf Oil Corporation, Defendants-Appellees.

No. 638.

Court of Appeals of New Mexico.

July 23, 1971.

James L. Brown, John R. Phillips, Jr., Farmington, for plaintiff-appellant.

George T. Harris, Jr., Frank H. Allen, Jr., Peter J. Broullire, III, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

A default judgment was granted plaintiff against defendant Lufkin in a wrongful death action for failure to answer within the time prescribed by law. The trial court set aside the default judgment, and plaintiff appeals. Defendant, Gulf Oil Corporation, having answered, is not a party to this appeal.

We affirm.

On March 17, 1969, the statutory agent of defendant Lufkin was duly served with process. Because of mistake or carelessness, the statutory agent did not notify Lufkin of service of the summons and complaint. On April 24, 1969, plaintiff filed a motion for default judgment. On May 9, 1969, a hearing was held on the motion, testimony and other evidence presented. On June 4, 1969, the trial court entered its findings of fact and conclusions of law, and filed a default judgment for plaintiff in the sum of $149,164.00, including an award of interest and costs.

On June 23, 1969, Lufkin entered its appearance, and on June 25, 1969, filed its answer. On June 26, 1969, Lufkin moved to set aside the default judgment with affidavits attached thereto. One basis was that the default judgment was not a final judgment. The affidavits were confined to improper service on Lufkin's agent and lack of knowledge of Lufkin of the complaint and summons. Counter-affidavits were filed by plaintiff of proper service, which included items of costs and expenses and time spent by plaintiff's attorneys in preparing for and obtaining the default judgment.

On September 10, 1969, the trial court found that Lufkin's failure to file an answer within the time prescribed by law was the result of excusable neglect under the provisions of Rule 60(b) [§ 21-1-1(60)(b), N.M.S.A.1953 (Repl.Vol. 4)]. The trial court entered its order setting aside the default judgment, holding it null and void and of no force and effect.

On October 10, 1969, plaintiff appealed to the Court of Appeals. On August 20, 1970, the appeal was dismissed with consent of the plaintiff, and a mandate issued that the case was remanded for such further proceedings as may be proper because the original order setting aside the default judgment was not a "final judgment" under Rule 54(b) [§ 21-1-1(54)(b), N.M.S.A.1953 (Repl.Vol. 4)].

On September 15, 1970, plaintiff moved for an amended order setting aside the default judgment on nine separate grounds.

On September 10, 1970, before the above motion was filed, Lufkin filed a response to the motion.

On September 21, 1970, the trial court entered its amended order setting aside the default judgment, held it to be null and void and of no effect, and it appeared to the court that there was no just reason for delay in entering a final and reviewable order to make it appealable under Rule 54(b). This became a final judgment and appealable.

On October 20, 1970, plaintiff again appealed.

Plaintiff relies on three points for reversal, (1) the trial court erred because there was no proof offered by Lufkin of a meritorious defense; (2) the trial court abused its discretion in setting aside the default judgment on the grounds of excusable neglect; (3) the trial court erred in not allowing plaintiff's requested attorney's fees and costs.

A. *Is Proof of Meritorious Defense Necessary?*

This point is not relevant. The issue of a meritorious defense is applicable where the defendant seeks to set aside a "final" default judgment under Rules 55(c) and 60(b). Wakely v. Tyler, 78 N.M. 168, 429 P.2d 366 (1967). These two sections deal only with "final judgments." When multiple parties are involved, the court may enter a "final judgment" as to one or more of the parties only upon an express determination that there is no just reason for delay. Section 21-1-1(54) (b). No such determination was made on the default judgment before it was set aside. It was not "final."

Section 21-9-1, N.M.S.A.1953 (Repl.Vol. 4) is not applicable. This section gives the trial court control of "final judgments and decrees" for a period of thirty days. The fact that the trial court did not rule on Lufkin's motion within thirty days is inconsequential.

Because of multiple defendants, the default judgment against Lufkin alone was interlocutory, not final. Rule 54(b); Bateman v. Gitts, 17 N.M. 619, 133 P. 969 (1913); Ex Parte Mason, 213 Ala. 279, 104 So. 523 (1925); 49 C.J.S. Judgments § 215. See Chronister v. State Farm Mutual Automobile Ins. Co., 67 N.M. 170, 353 P.2d 1059 (1960). "Interlocutory orders and judgments are, therefore, not brought within the restrictive provisions of 60(b), *but they are left within the plenary power of the court that rendered them to afford such relief from them as justice requires.*" 7 J. Moore, Federal Practice, § 60.20 at 227 (2d Ed. 1970).

Plaintiff, in his reply brief, makes a disclaimer as to defendant Gulf Oil Corporation if it will avoid Rule 54(b), and make the default judgment final. State ex rel. State Highway Commission v. Quesenberry, 72 N.M. 291, 383 P.2d 255 (1963), and National American Life Ins. Co. v. Baxter, 73 N.M. 94, 385 P.2d 956 (1963), relied on by plaintiff, are not applicable.

Gomes v. Williams, 420 F.2d 1364 (10th Cir. 1970), a New Mexico case, is emphasized by plaintiff. This decision is inapplicable because it applies to a final judgment.

The failure to prove a meritorious defense in this case does not constitute error upon which to reinstate the default judgment. Rules 55(c) and 60(b), and § 21-9-1, N.M.S.A.1953 (Repl.Vol. 4), are inapplicable. We hold that interlocutory default judgments under Rule 54(b) may be set aside or affirmed in the judicial discretion of the trial court.

B. *Did the Trial Court Abuse its Discretion?*

Plaintiff relies strongly on Bourgeious v. Santa Fe Trail Stages, 43 N.M. 453, 95 P.2d 204 (1939). The trial court refused to set aside a default judgment. The Supreme Court affirmed because it could not "set aside a judgment unless there was a clear abuse of discretion * * *" This was also true in Guthrie v. U. S. Lime and Mining Corp., 82 N.M. 183, 477 P.2d 817 (1970). "Discretion" and "abuse of discretion" have been wisely discussed in pre-

vious decisions. Salitan v. Carrillo, 69 N. M. 476, 368 P.2d 149 (1961); Independent Steel & Wire Co. v. New Mexico Cent. R. Co., 25 N.M. 160, 178 P. 842 (1918).

Carelessness and negligence in failing to appear, answer, or otherwise plead to the complaint do not deny a defendant his fair day in court. Laffoon v. Galles Motor Co., 80 N.M. 1, 450 P.2d 439 (Ct. App.1969).

Plaintiff sought to lead us to Arizona. However, the Supreme Court in Campbell v. Frazer Construction Co., 105 Ariz. 40, 459 P.2d 300 (1969), held the trial court did not abuse its discretion in setting aside a default judgment.

In the instant case, evidence was presented in the form of affidavits. Lufkin's agent stated the Deputy Sheriff of Santa Fe County made service upon the Gulf Oil Corporation and not on Lufkin. The Deputy Sheriff swore that he left two copies of the summons and complaint. Lufkin's motion admits both copies were sent to Gulf Oil Corporation. In this case, because of the conflict, we accept the affidavit of the Deputy Sheriff. See Singleton v. Sanabrea, 35 N.M. 491, 2 P.2d 119 (1931). Nineteen days after Lufkin learned of the default judgment, it made telephone calls to attorneys, entered an appearance, filed an answer and then moved to set aside the default judgment. Did the trial court properly exercise its discretion? We believe it did. We cannot say the trial judge acted beyond the bounds of reason or deliberately acted wrongfully or arbitrarily.

The trial court did not abuse its discretion.

C. *Is Plaintiff Entitled to Costs, Expenses and Attorney's Fees?*

Plaintiff's motion for an amended order stated that plaintiff had already been put to considerable time and expense in presenting evidence upon which the default judgment was based and that the rules provide for compensation.

It appears no ruling was made upon this question. However, since this case is still pending before the trial court the matter may be presented for a ruling.

It is ordered that the judgment of the trial court vacating the default judgment is affirmed.

HENDLEY, J., and OMAN, Supreme Court Justice, concur.

487 P.2d 1343

Manuel D. DURAN, Petitioner,

v.

The NEW JERSEY ZINC COMPANY, Respondent.

No. 9286.

Supreme Court of New Mexico.
Aug. 9, 1971.

Robertson & Reynolds, Silver City, for petitioner.

R. E. Riordan, Neil E. Weinbrenner, Las Cruces, for respondent.

OPINION

STEPHENSON, Justice.

This is a workmen's compensation case in which the trial court entered judgment for the claimant which was, on appeal to the Court of Appeals, reversed and remanded with instructions to dismiss the complaint on the grounds that the claim was not timely filed. Section 59–10–13.6 (A), N.M.S.A., 1953 (Supp.1969) (Laws 1959, ch. 67, § 10; amended, Laws 1963, ch. 269, § 6 and Laws 1967, ch. 151, § 1) Duran v. The New Jersey Zinc Company, 82 N.M. 742, 487 P.2d 170 (Ct.App.1971). We granted certiorari, reverse the Court of Appeals and affirm the trial court's judgment.

The period of limitations does not commence to run until it becomes reasonably apparent, or should become reasonably apparent, to the workman that he has an injury for which he is entitled to compensation. Noland v. Young Drilling Company, 79 N.M. 444, 444 P.2d 771 (Ct.App. 1968).

The trial court found as a fact that:

"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."

The Court of Appeals in its opinion says that it was reasonably apparent to the claimant that he was partially disabled on and after January 4, 1964, the date that he returned to work after his first injury. In making this statement, the court has attributed to an uneducated laborer a knowledge of the human body which apparently transcends that possessed by the attending physician. It has succumbed to the vice of weighing the evidence.

The doctor who treated the claimant and performed two operations on him, on each occasion was of the view that he could thereafter perform the duties required by his regular employment. It was not until September of 1968 that claimant's physician felt that his workload should be lightened.

The claimant testified, inter alia:

"A. I didn't feel too good but the doctor and the company keep telling me it takes about two years or three years before I can feel normal in my arm so I just kept working, * * *"

There is substantial evidence to support the trial court's quoted finding.

"* * * [W]e 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." Oberman v. Oberman, 82 N.M. 472, 483 P.2d 1312 (1971).

The rule is the same in workmen's compensation cases. Irvin v. Rainbo Baking Company, 76 N.M. 213, 413 P.2d 693 (1966); Gammon v. Ebasco Corporation, 74 N.M. 789, 399 P.2d 279 (1965); Montano v. Saavedra, 70 N.M. 332, 373 P.2d 824 (1962).

The Court of Appeals opinion places principal reliance upon Cordova v. Union Baking Company, 80 N.M. 241, 453 P.2d 761 (Ct.App.1969). A notable point of distinction between that case and this one is that in Cordova the Court of Appeals affirmed the trial court's determination that because it was reasonably apparent to the injured workman that he had a compensable injury, the period of limitations had therefore expired. Here, ignoring the substantial evidence rule, it has weighed the evidence and reversed.

Finally, the court, in speaking of the trial court's finding that we have quoted, says that there is a lack of evidence that claimant relied upon the doctor's statements. In accordance with our substantial evidence rule, such reliance, if it be consequential, is easily inferred in support of the trial court's finding and judgment. The inference arises from the fact that following, and in accordance with, the doctor's statements, the claimant did in fact twice return to his duties.

The decision of the Court of Appeals is reversed and the trial court is directed to reinstate and give full force and effect to its judgment.

It is so ordered.

COMPTON, C. J., and McMANUS, and MONTOYA, JJ., concur.

OMAN, Justice (dissenting).

As shown by the majority opinion and the opinion of the Court of Appeals, the decisive question is when it became reasonably apparent, or should have become reasonably apparent, to plaintiff that he was unable to some percentage-extent to perform the usual tasks in the work he was performing at the time of his injury and 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.

He had been employed by defendant for a total of 22 years. His duties in this employment, as well as in his other employments, consisted of manual labor, much of which was heavy.

The essential finding by the trial court, as quoted in both the majority opinion and in the opinion of the Court of Appeals, was that " '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.' "

The majority in their opinion state there is substantial evidence to support this finding, and that the Court of Appeals in reversing the trial court has ignored the substantial evidence rule. The Court of Appeals apparently predicated its reversal of this finding upon the fact that the evidence in support of the finding, if any, was medical evidence upon which plaintiff did not rely. The majority in their opinion state that if such reliance be of any consequence it can reasonably be inferred from the fact that plaintiff twice returned to the duties of his employment.

I must agree with the Court of Appeals, but I would do so upon the ground that plaintiff's sworn testimony amounted to a judicial admission of facts which required a determination that it had become reasonably apparent to him in 1964 that he was unable to some percentage-extent to perform the usual tasks in the work he was performing at the time of his injury and was unable to some percentage-extent to perform any work for which he is fitted.

The record clearly indicates, and no suggestion has otherwise been made, that plaintiff was in full possession of his mental faculties when he testified; he has sufficient intelligence and command of the English language to fully understand the purport of the questions asked of him and his answers thereto; he was testifying to facts peculiarly within his knowledge and about which he could not reasonably have been mistaken, and not about opinions, estimates, appearances or inferences; his testimony was clear and unequivocal; and he made no retraction, modification or explanation of his testimony which would indicate he had testified by mistake or inadvertence.

Under these circumstances, whether he was testifying truthfully or falsely, he should be bound by his testimony, and he should not be permitted to rely upon possible contradictions by other witnesses or possible inferences to the contrary from other evidence. He should not be allowed to recover on a finding which requires a conclusion that he perjured himself.

I appreciate that there are varying views as to the effect of a party's disserving testimony, and that difficulty arises at times in determining whether a statement by a party constitutes a judicial admission which the party will not be permitted to contradict. However, the view of most jurisdictions is that under certain conditions a party will be bound by his testimony, and he will not be allowed to recover on a finding which is predicated upon other evidence to the contrary. See the following, which are a few of the relatively recent cases in which this question has arisen: Bolam v. Louisville & Nashville Railroad Company, 295 F.2d 809 (6th Cir. 1961); Carter v. Winter, 32 Ill.2d 275, 204 N.E.2d 755 (1965); Motta v. Mello, 338 Mass. 170, 154 N.E.2d 364 (1958); Bradshaw v. Stieffel, 230 Miss. 361, 92 So.2d 565 (1957); Picarella v. Great Atlantic & Pacific Tea Company, 316 S.W.2d 642 (Mo.Ct.App. 1958); McNish v. General Credit Corporation, 164 Neb. 526, 83 N.W.2d 1 (1957); McLane v. Stillmaker, 103 Ohio App. 255, 143 N.E.2d 610 (1957); Bockman v. Mitchell Bros. Truck Lines, 213 Or. 88, 320 P.2d 266 (1958); Ford v. Robinson, 76 S. D. 457, 80 N.W.2d 471 (1957); Eidson v. Perry National Bank, 327 S.W.2d 683 (Tex. Civ.App.1959); Suniland Furniture Company v. Pruitt, 347 S.W.2d 835 (Tex.Civ. App.1961); De Vas v. Noble, 13 Utah 2d 133, 369 P.2d 290 (1962); J. A. Jones Construction Company v. Martin, 198 Va. 370, 94 S.E.2d 202 (1956); Smith v. Virginia Electric and Power Company, 204 Va. 128, 129 S.E.2d 655 (1963).

It is my judgment that plaintiff's testimony in the present case was such as to preclude his recovery, and that the above stated essential finding of the trial court could not be supported under the law applicable in most jurisdictions. It would unduly lengthen this dissent to quote all of plaintiff's testimony upon which I base my

opinion, but the following is a portion thereof:

"Q. Now what part of your body was bothering you after you went back to work in January of '64?

"A. Right up here to the top of my shoulder.

"Q. And how was it bothering you? What difficulty was it causing you?

"A. Every time I tried—every time I stretch out my arm to try to pick up something this whole muscle in here started jingling just like a bunch of ants crawling up and down and it don't seem to get away. I can't put no tension or pick up anything that way [weigh] four or five pounds. I can feel that, so I just can't do nothing. I can't pick up nothing.

"Q. Did it cause you any pain when you tried to pick up heavy objects?

"A. It does.

"Q. Did it cause you pain then?

"A. Yes.

"Q. Now how did you do your job? How did you do your work?

"A. Well I had to do it the best I could. Sometimes I used to work with my left hand, my left arm, more than the right and there was pain on that arm. I would let it rest a while and I kept going the same way. I was crippled in this arm ever since then.

"Q. Did your fellow employees, the other people that were working with you try to help you out any?

"A. They did."

"* * *

"Q. Now did you ever request light duty back in '64?

"A. I did. As a matter of fact, all the doctors that I went to they gave me a light duty slip and I turned it into the office and they have told the company about it. They don't accept it, though."

"* * *

"Q. Now were these symptoms always the same from '63 to right up to '68?

"A. Always the same."

"* * *

"Q. And you returned to work in the same capacity that you had before this accident on January 8th, 1964, is that about right?

"A. That's right.

"Q. You went back as a machine, I'm sorry, as a Mechanic #1?

"A. Yes, sir.

"Q. Doing the same duties that you had before?

"A. Same thing, yes.

"Q. But its your opinion and your feeling that the operation didn't do you any good? You are still having the same trouble with your arm?

"A. That's right.

"Q. And you felt that you could only do light work?

"A. That's right.

"Q. And the doctor had told you this, you say?

"A. He gave me a light duty slip.

"Q. But you went back to light duty?

"A. They wouldn't—the company wouldn't give me that.

"Q. You did go back to the same duty?

"A. The same work, yes.

"Q. And your arm never got better, did it?

"A. No."

"* * *

"Q. But that arm never got well, is that right?

"A. It never got well. My left arm is the one I did most of the work with.

"Q. All this time you had difficulty with that right arm?

"A. The right shoulder.

"Q. The right shoulder?

"A. Yes.

"Q. Not your right arm?

"A. The right shoulder.

"Q. All right, but it never gave you any peace from '63 on into until you went for the operation in January of 1968 is that right?

"A. Yes, that's right."

"* * *

"Q. And your problem today is the right arm and you say your right shoulder is the same now as it was right after the accident of November of 1963, is that right?

"A. That's right.

"Q. And all this time from 1963 until October 1968 you have requested light work and it was always refused to you?

"A. I have requested light work and it was recommended by all the doctors that I have gone to.

"Q. The doctors told you what your condition was and you discussed your condition with each one of these doctors, did you not?

"A. No.

"Q. Sir?

"A. How was that?

"Q. You talked to each one of these doctors? What was wrong with you?

"A. Certainly. I sure did.

"Q. And they told you what was wrong?

"A. Right.

"Q. So at all times you would go to these doctors they would tell you what they found?

"A. They tell me just what is wrong. They can't do nothing about it.

"Q. Then did you go get light duty?

"A. They gave me a slip. Its in black and white.

"Q. And this was the case all the way through 1964, '65, '66, '67 and '68?

"A. Certainly.

"Q. All the way through that period?

"A. Each time I went to a doctor, yes."

For the foregoing stated reasons, I respectfully dissent.

[redacted]

487 P.2d 1347

STATE of New Mexico, Plaintiff-Appellee,

v.

Jack MOSS, Defendant-Appellant.

No. 662.

Court of Appeals of New Mexico.

July 30, 1971.

[redacted]

Thomas B. Root, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of embezzlement, § 40A–16–7, N.M.S.A.1953 (Repl. Vol. 6), defendant appeals. Three of the five points raised concern the elements of embezzlement. The fourth point challenges the sufficiency of the evidence; the fifth point asserts the jury should have been instructed on the lesser offense of attempted embezzlement.

Elements of embezzlement.

Section 40A–16–7, supra, states in part:

"Embezzlement consists of the embezzling or converting to his own use of anything of value, with which he has been entrusted, with fraudulent intent to deprive the owner thereof."

(a) Defendant contends this statutory definition is incomplete; that an additional item is required. Defendant claims the "intent to deprive" requires an intent to "permanently" deprive. He asserts the Legislature intended the larceny and embezzlement statutes to supplement one another, that an intent to deprive the owner of his property "permanently" is a requisite of larceny, see State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968), and thus an intent to "permanently" deprive is a requisite element of embezzlement.

State v. Prince, 52 N.M. 15, 189 P.2d 993 (1948) states that a fraudulent intent to deprive the owner of his property is one of the essential elements of embezzlement. *Prince* does not state that the intent must be to "permanently" deprive. Further, the power to define crimes is a legislative function. State v. Allen, 77 N.M. 433, 423 P.2d 867 (1967); State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct.App. 1969). The Legislature did not include an intent to "permanently" deprive in its definition of the crime. A legislative intent to do so cannot be ascertained by comparing the embezzlement statute with the larceny statute, § 40A–16–1, N.M.S.A.1953 (Repl. Vol. 6, Supp.1969), because larceny is defined in terms of stealing, see State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945), and comparable language is not used in the embezzlement statute.

We found no New Mexico case which defines the requisite intent under § 40A–16–7, supra. State v. Piper, 206 Kan. 190, 477 P.2d 940 (1970) and State v. Pratt, 114 Kan. 660, 220 P. 505, 34 A.L.R. 189 (1923), indicate that intent to "permanently" deprive is not a requisite element of embezzlement because the gist of the offense "* * * is the intentional misappropriation to his own use by the wrongdoer while in lawful possession. * * *" State v. Piper, supra. Similarly, § 40A–16–7, supra, requires a conversion to the wrongdoer's use with fraudulent intent to deprive the

owner. This requirement does not include a requirement that the intent be to "permanently" deprive the owner. Compare § 64–9–4(a), N.M.S.A.1953 (Repl. Vol. 9, pt. 2), and State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct.App.1969).

(b) To have violated § 40A–16–7, supra, defendant must have embezzled or converted to his own use a thing of value "with which he has been entrusted." The jury was so instructed. Defendant claims that "entrusted" was not defined. Absent a clearly expressed legislative intent requiring otherwise, "entrusted" is to be given its usual, ordinary meaning. Tafoya v. New Mexico State Police Board, 81 N.M. 710, 472 P.2d 973 (1970). The common meaning of "entrust" is to "* * * commit or surrender to another with a certain confidence regarding his care, use, or disposal. * * *" Webster's Third New International Dictionary (1966). This common meaning did not require an instruction defining it. Compare State v. Nolan, 59 N.M. 437, 285 P.2d 798 (1955).

Defendant asserts the common meaning of "entrusted" is not applicable. His requested instruction, which was refused, read:

> "For an entrustment it must be shown that the accused occupied a designated fiduciary relationship and that the property came into his possession by reason of this fiduciary relationship, employment or office."

This requested instruction appears to be taken from State v. Prince, supra. Defendant asserts the language in *Prince*, similar to that of the requested instruction, is used in a technical sense; that there must be a "fiduciary" in a legal sense, or a designated relationship of *special* trust and confidence. Here, the relationship between the owner of the property (a car) and defendant was that of prospective buyer and seller. There is evidence that defendant was allowed to "try it out;" "* * * I told him that he could drive it around the block and see if he liked it. That is about as far as that went." Defendant claims the evidence in this case fails to show he was "entrusted" with the car in any special or technical sense, and that such a special meaning of "entrusted" is applicable.

We find nothing in the language used in State v. Prince, supra, in the discussion concerning entrustment, to indicate entrustment has a special or technical meaning. The accused must occupy a designated fiduciary relationship if a statute so requires, or a general fiduciary relationship if that is all the statute requires. Further, the property must come into the accused's possession by reason of that relationship. Fiduciary, in its common meaning, is no more than holding in trust or confidence. See Webster's Third New International Dictionary, supra. Thus, State v. Prince, supra, did not impose the technical view of "entrusted" for which defendant contends. Compare State v. Peke, 70 N.M. 108, 371 P.2d 226, cert. denied 371 U.S. 924, 83 S.Ct. 293, 9 L.Ed.2d 232 (1962).

State v. Prince, supra, not having imposed a special or technical meaning to "entrusted", the rule which disposes of this contention is—that the usual, ordinary meaning of "entrusted" is applicable unless there is a clear expression of legislative intent requiring otherwise. Here, there is nothing indicating the Legislature intended other than the usual, ordinary meaning, and, thus, that meaning is applicable here. This result, in our opinion, is consistent with State v. Prince, supra.

(c) Defendant asserts that where the time for return of the property is indefinite, or where conversion is not established by other proof, the prosecution must prove a "demand" for return of the property before the misappropriation can amount to embezzlement. He asserts such a rule is applicable under the facts of this case. He admits that § 40A–16–7, supra, by its wording, does not impose this requirement but asserts such a requirement should be added by this court.

Disregarding the question of this court's authority to impose requirements in addition to those set by the Legislature in de-

fining the crime, defendant's position confuses an evidentiary matter with the elements of the crime. Proof of a demand and a failure to return the property may be evidence of embezzlement because such proof is material to the questions of conversion of the property and a fraudulent intent to deprive the owner of his property. Such a demand and failure to return is not an element of the crime separate from and in addition to these elements. People v. Crane, 34 Cal.App. 599, 168 P. 377 (1917).

Defendant's attack on the elements of embezzlement is without merit.

Sufficiency of the evidence.

Defendant's attack on the sufficiency of the evidence is predicated on his contention that there must have been an intent to "permanently" deprive the owner of his property and that "entrusted" has a special or technical meaning. Having rejected defendant's viewpoint as to these two items, the basis for the attack fails, and the evidence need not be reviewed.

Attempted embezzlement.

[redacted] The trial court refused to instruct the jury on attempted embezzlement. Defendant claims this refusal was error because there was evidence justifying submission of the issue of "attempt"—that is, that the embezzlement was not consummated. See § 40A-28-1, N.M.S.A.1953 (Repl. Vol. 6). The evidence is undisputed that defendant was loaned the car and hadn't returned it more than three days later. While conflicting inferences may be drawn from the evidence as to whether he converted the car to his own use with the requisite intent, this evidence shows that defendant was either guilty of embezzlement or no crime at all. The evidence did not support an issue of "attempt." See State v. Andrada, 82 N.M. 543, 484 P.2d 763 (Ct.App.1971) and cases therein cited.

The judgment and sentence is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

487 P.2d 1350

George POULOS and Goldie Poulos, his wife, Plaintiffs-Appellants,

v.

COCK 'N BULL BEVERAGE, INC., and Ginger Beer Company, Defendants-Appellees,

v.

GLASS CONTAINERS CORPORATION et al., Third-Party Defendants.

No. 600.

Court of Appeals of New Mexico.

July 30, 1971.

[redacted]

[redacted]

[redacted]

Stuart Hines, Albuquerque, for appellants.

Charles B. Larrabee, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for Cock 'N Bull Beverage, Inc.

Ranne B. Miller, Keleher & McLeod, Albuquerque, for Ginger Beer Company.

OPINION

HENDLEY, Judge.

Relying solely on the doctrine of res ipsa loquitur plaintiffs instituted this action for damages, loss of wages and doctor and hospital bills based on injuries to the wife caused by an exploding bottle. The trademark of defendant, Cock 'N Bull Beverage, Inc., and the trade name of defendant Ginger Beer Company appeared on the label and on the cap of the bottle that exploded. No other names appeared on the bottle. Subsequently, defendant, Ginger Beer Company, filed a third party complaint against Glass Containers Corporation, who allegedly supplied the glass bottles used in the bottling of Cock 'N Bull Ginger Beer, against Nu Grape Bottling Company, who allegedly bottled and marketed the product, and against Southwest Distributing Company, who transported the Ginger Beer from California to New Mexico and resold to plaintiffs the case which contained the exploding bottle. At no time did plaintiffs attempt to join the third party defendants.

The trial court, sitting without a jury, found for defendants. Plaintiffs appeal raising three points for reversal. The first two points relate to the doctrine of res ipsa loquitur and will be discussed together. The third point relates to certain statements made by the third party defendants and the trial court's findings in regard to the third party defendants.

We affirm.

RES IPSA LOQUITUR

Our discussion concerns the lack of evidence establishing the requisite element of control necessary for the application of the doctrine of res ipsa loquitur. See Hisey v. Cashway Supermarkets, Inc., 77 N.M. 638, 426 P.2d 784 (1967).

There is an issue as to control because the evidence shows multiple parties were involved in the production and distribution of the bottle that exploded. Plaintiffs chose not to sue the supplier of the bottle, the actual bottler or the distributor. They sought to apply the doctrine of res ipsa loquitur to the company holding the right to use the name "Cock 'N Bull" on the basis that it authorized others to use the name and sold to the actual bottler the extract which flavored and colored the drink that was subsequently produced. Plaintiffs sought to apply the doctrine to the company authorized to bottle "Cock 'N Bull Ginger Beer" when that company had contracted with another company to do the actual bottling.

The trial court's undisputed and unattacked finding is there was no evidence that the parties who actually participated in the production and distribution of the bottle that exploded, the third party defendants, were agents of the defendants.

With no agency involved, plaintiffs sought to apply the doctrine on the theory that defendants had something to do generally with the article getting into the stream of commerce, see Blount v. T D Publishing Corporation, 77 N.M. 384, 423 P.2d 421 (1966), and that to invoke the doctrine he did not need "to go beyond the designated principal represented on the product labels. * * *" These general claims do not provide an answer; they do no more than pose the question: What did the defendants have to do with the bottle

that exploded; in what way were they a "principal" in regard to this item? There is no evidence that the two defendants had anything to do with the actual production of the drink, its bottling or distribution. Their involvement does include the name to be used, the type of bottle to be used and the formula to be followed in producing the drink. There is no evidence that these items had anything to do with the bottle that exploded.

In this case the basis for the trial court's decision appears in its second conclusion of law:

> "The doctrine of Res ipsa loquitur cannot be invoked in favor of the plaintiffs under the facts of this case inasmuch as plaintiffs failed to establish any exclusive control or management of the ginger beer products in question on the part of the above-named defendants."

This conclusion is supported by adequate findings which in turn are supported by the record and is dispositive of plaintiffs' appeal.

FINDINGS OF FACT

Plaintiffs' last contention concerns the trial court's findings of fact No. 9 and 10 which relate to the relationships between Ginger Beer Company, the Bottling Company and Southwest Distributing Company, the distributor. It is plaintiffs' contention that these findings are at variance with the evidence since they are only statements of "counsel from the counsel table." Direct evidence, and the inferences therefrom, support most of these findings. However, there is no testimony to support the finding that the bottler purchased the bottles from Glass Containers Corporation and that the bottle involved in this case was transported to Albuquerque by Southwest Distributing Company. These findings appear to be based on stipulations between defendants and third-party defendants in which plaintiffs did not join. However, we fail to see any prejudicial error against plaintiffs. Plaintiffs were not affected by the unsupported portion of the findings since even if they are eliminated, plaintiffs still have failed to establish the requisite control in the defendants for applying res ipsa loquitur. Plaintiffs are not entitled to a reversal based upon error which does not affect them and which is harmless to them. Wright v. Brem, 81 N.M. 410, 467 P.2d 736 (Ct.App.1970).

Affirmed.

It is so ordered.

WOOD, C. J., and OMAN, J., Supreme Court, concur.

487 P.2d 1352

Robert C. ANDERSON and Carol S. Anderson, his wife, Plaintiffs-Appellees,

v.

JENKINS CONSTRUCTION CO., Inc., Defendant-Appellant.

No. 687.

Court of Appeals of New Mexico.

July 30, 1971.

Stuart Hines, Albuquerque, for defendant-appellant.

David R. Gallagher, Mark H. Shaw, Gallagher & Ruud, Albuquerque, for plaintiffs-appellees.

OPINION

SUTIN, Judge.

This is a suit by Anderson against Jenkins Construction Co., Inc., to recover damages, or, in the alternative, for rescission plus damages, because of negligence or breach of warranty in the construction of a new house.

Upon stipulation of the parties, the cause was submitted to a disinterested expert who made findings as to cause of damage and cost of repairs. The expert filed his report and, later, a supplemental report. Upon consideration of the expert's reports, and after several further hearings before the trial court, judgment was entered for Anderson in the sum of $11,133.00. Jenkins appeals.

We affirm.

A. *Was Defendant Negligent and was there a Breach of Warranty?*

The trial court made findings of fact and conclusions of law which were

not challenged on appeal. These findings and conclusions are deemed true and controlling. Trinidad Industrial Bank v. Romero, 81 N.M. 291, 466 P.2d 568 (1970).

The trial court found and concluded that Jenkins was negligent in the construction of the residence, in its selection of a site and in the type of foundation used. The trial court also found that Jenkins warranted that the residence which it constructed for Anderson would be suitable for all normal residential purposes; that the residence, as constructed, was and is not so suitable, and concluded that Jenkins breached its warranty to Anderson. There was a breach of warranty.

B. *Did Jenkins have any Defenses to Breach of Warranty?*

Jenkins claims contributory negligence bars recovery by Anderson. The trial court rejected defendant's requested finding on contributory negligence. This refusal has not been preserved for review. Section 21–2–1(15) (16) (c), N.M.S.A. 1953 (Repl.Vol. 4).

Jenkins further claims it never had its day in court because the trial court used the expert's report as though the expert were appointed special master and not as an engineer to determine one facet of the case. However, Jenkins and Anderson stipulated they would be bound by the factual findings of the expert as to cause of the damage and costs of repairs. The legal determination as to liability would then be up to the court. The trial court understood the clear implication of the stipulation and so stated it in the record. Before judgment was entered, two hearings were held and proposed findings and conclusions were tendered by both parties. Jenkins had its day in court.

Jenkins also claims the trial court's decision was based on hearsay evidence and the judgment was made ex parte. The record is to the contrary. Jenkins had no defenses.

C. *Was Anderson Entitled to Damages for Delay?*

Anderson, in his answer brief, claimed a penalty under Supreme Court Rule 17 (3) [§ 21–2–1(17) (3), N.M.S.A.1953 (Repl. Vol. 4)] for delays in the trial court and during appeal. Jenkins did not respond in a reply brief.

Rules of Practice and Procedure in the Supreme Court were made applicable, insofar as pertinent, in the Court of Appeals. Section 21–2–2, N.M.S.A.1953 (Repl.Vol. 4). We hold this includes Rule 17(3).

Rule 17(3) reads as follows:

> 3. If a judgment be affirmed and it appear that the appeal was taken * * merely for delay, and has resulted in delay, the Supreme Court may award to the appellee * * * such damages as may be just, not exceeding ten per cent [10%] of the judgment complained of.

Jenkins did not controvert or dispute the statements in Anderson's answer brief, nor even mention the issue. This court will take the statements as true. Rosenthal v. Rosenthal, 197 Cal.App.2d 289, 17 Cal.Rptr. 186 (1961); Campbell v. Colgate-Palmolive Company, 134 Ind.App. 45, 184 N.E.2d 160 (1962).

Jenkins' delays in the trial court are irrelevant under Rule 17(3). We deplore the delays which occurred in the trial court, but we find no statutes or rules which create a penalty for these delays.

The issue is whether the appeal was taken for the purpose of delay and resulted in delay. Raby v. Westphall Homes, Inc., 76 N.M. 252, 414 P.2d 227 (1966). This depends upon whether the appeal was frivolous, vexatious and groundless, and not taken in good faith. Rogers v. Garde, 33 N.M. 245, 248, 264 P. 951 (1928); Cauthen v. Cauthen, 53 N.M. 458, 210 P.2d 942 (1949). Even though the appeal lacks merit, it does not follow that it was not taken in good faith. Durrett v. Petritsis, 82 N.M. 1, 474 P.2d 487, 490 (1970).

D. *Was the Appeal Frivolous?*

United States v. Martone, D.C., 283 F.Supp. 77, 80 (1968), says:

> An appeal is said to be "frivolous" where it presents no debatable question or no reasonable possibility of reversal, the word meaning of little weight or importance, not worth notice, slight.

In State v. Van Dorn, 8 Ariz.App. 228, 445 P.2d 176, 178 (1968), the word "frivolous" is defined by a partial quotation as follows:

> "Frivolous" has a colloquial meaning of trifling or silly. It also has an established meaning in law, when applied to appeals, of "manifestly insufficient or futile", "without merit and futile."

Anderson asserts that the record reflects dilatory tactics of Jenkins. It took more than 60 days for Jenkins to file its brief in chief after the transcript had been filed in this court. The brief does not attempt to comply with Supreme Court Rule 15 [§ 21-2-1(15), N.M.S.A.1953 (Repl. Vol. 4)]. Jenkins did not challenge the findings and conclusions of the trial court, and totally failed to mention the warranty theory of liability. It stipulated to be bound by an expert's findings in the trial court, and now makes unreasonable deviations therefrom. Anderson says, "Delay is as destructive to the legal system as the failure to place steel rebar in the concrete stem wall was to plaintiffs' residence." We agree. All of this displays this appeal is a further effort to delay a final determination of this cause. Jenkins made no contention to the contrary.

This was a frivolous appeal for the purpose of delay and not taken in good faith. Pursuant to Rule 17(3), this court believes it is just to assess damages equal to 5% of the judgment.

The judgment of the trial court is affirmed, plus 5% damages in addition to the judgment obtained in the trial court.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

487 P.2d 1355

STATE of New Mexico, Plaintiff-Appellee,

v.

Alton Leon BREWTON, Defendant-Appellant.

No. 694.

Court of Appeals of New Mexico.

July 30, 1971.

Roy G. Hill, Santa Fe, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Brewton seeks post conviction relief. He pleaded guilty to a misdemeanor committed

in the state penitentiary while serving a prior sentence. He seeks credit on his sentence for the 28 days which elapsed between the day he was served with a warrant for his arrest and the day when judgment and sentence was entered on his plea of guilty. Reliance is placed on § 40A-29-25, N.M.S.A.1953 (Repl.Vol. 6, Supp.1969). This section is not applicable because his confinement during this period was pursuant to his prior sentence.

The trial court order which dismissed Brewton's motion for amended judgment and sentence is affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

487 P.2d 1356

STATE of New Mexico, Plaintiff-Appellee,

v.

Pete GARCIA, Defendant-Appellant.

No. 648.

Court of Appeals of New Mexico.

July 30, 1971.

Charles Driscoll, Dan A. McKinnon, III, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Ray Sholenbarger, Sp. Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant, charged with murder in the death of Julian Narvaez, was convicted of voluntary manslaughter. Section 40A-2-3(A), N.M.S.A.1953 (Repl.Vol. 6). Only limited reference is made to the facts because we reverse the conviction for errors occurring at the trial. Since the cause is to be remanded for a new trial, we discuss three errors. We express no opinion as to the other issues raised in the appeal. We discuss: (1) admissibility of defendant's threat; (2) reference to collateral criminal offenses and (3) an instruction on self-defense.

Admissibility of defendant's threat.

The trial court permitted a State Police agent, "assigned to narcotics," to testify that defendant said to the agent: "'* * * If you or any narco ever stop me and I am loaded, you had better be prepared to shoot it out because I will kill you.'" This statement was made approximately fourteen months prior to the homicide. The agent testified that "narco" designated a police officer that works strictly in narcotics and that "loaded" means carrying narcotics. What connection did this threat to a narcotics agent have to the homicide charge against defendant? This question of relevancy must be examined from the viewpoint of deceased and of defendant.

The State asserts the threat went to the issue of why deceased acted as he did when he confronted defendant. We disagree. If defendant had threatened deceased, or a class of which deceased was a member, and deceased knew of the threat, then the threat would be relevant to deceased's actions when he encountered defendant. State v. Pruett, 22 N.M. 223, 160 P. 362, L.R.A.1918A, 656 (1916). If, however, deceased did not know of the threat, the unknown threat had no bearing on deceased's actions and was irrelevant. Territory of New Mexico v. Yarberry, 2 N.M. (Gild.) 391 at 454 (1883). There is no evidence that deceased knew of the threat; it was not admissible to show why deceased acted as he did.

The threat, even though uncommunicated to deceased, might have a bearing on defendant's actions toward deceased. Whether the threat has such a bearing depends on who was threatened. If the threat was against deceased, it would be relevant. State v. Ardoin, 28 N.M. 641, 216 P. 1048 (1923). If the threat was against a class of persons to which deceased belonged, it would be admissible on the question of defendant's actions. State v. Stewart, 34 N. M. 65, 277 P. 22 (1929). In addition, the threat might be admissible because of the relationship between defendant and deceased under the circumstances of the case. State v. Bailey, 27 N.M. 145, 198 P. 529 (1921).

Here, there is no evidence that defendant made a threat against deceased personally. The evidence is that deceased was not a narcotics agent; he was a sergeant in the patrol division of the Bernalillo County Sheriff's office. Deceased was not a member of the class that was threatened.

The State does claim a relationship in this case which, it asserts, made the statement admissible. It is that deceased was a police officer and the threat could be taken as not limited to police officers "who are solely involved in narcotics." If the threat were susceptible of such an interpretation, the threat would be admissible, and it would be for the jury to determine the meaning of the words used in the threat. State v. Todd, 28 N.M. 518, 214 P. 899 (1923). Here, the words used cannot be taken as applying to police officers generally because they are specific. The threat was against "you or any narco." The threat was against narcotics agents.

We hold that the defendant's threat against narcotics agents, fourteen months earlier, does not point with any reasonable certainty to deceased individually, or as a member of a class. State v. Todd, supra. The threat was not admissible as bearing on defendant's actions toward deceased.

Since a basic contention is that defendant acted in self-defense, admission of the testimony as to defendant's threat was prejudicial error.

Reference to collateral criminal offenses.

There were numerous references to defendant as a narcotics addict throughout the trial. Defendant presents a serious question as to the fairness of his trial because of these comments by the prosecutor. We do not decide this question since references to defendant as a narcotics pusher and as a heroin smuggler are in themselves reversible error.

Prior to the opening statement, defendant sought a ruling from the trial court prohibiting the prosecution from referring to him as a narcotics pusher. Defendant's motion was denied and in the opening statement the prosecutor told the jury that defendant was "an admitted narcotics pusher." The remark raises a question of improperly injecting defendant's character in the case, see State v. Alberts, 80 N.M. 472, 457 P.2d 991 (Ct.App.1969), and of prosecutor misconduct either on the ground of bad faith or an improper reference in an opening statement to facts which the prosecutor would be unable to prove. 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). However, the remark clearly is a reference to criminal conduct since it characterizes defendant as an admitted felon. See § 54-7-14, N.M.S.A.1953 (Repl.Vol. 8, pt. 2). We consider the remark on that basis.

A doctor called by the defense testified concerning defendant's intent to kill at the time the fatal shot was fired. The prosecutor, cross-examining the doctor concerning physical facts bearing on defendant's intent, suddenly asked:

> "Q You are aware, are you not, that Mr. Garcia was convicted of smuggling heroin in 1965, I believe, are you aware of that?"

In the arguments on defendant's motion for a mistrial, the prosecutor attempted to justify the question on the ground he was entitled to find out the basis of the doctor's opinion. The trial court denied the motion for a mistrial, but refused to permit the question to be answered and instructed the jury to disregard the question.

The State asserts the cross-examination question was proper, relying on State v. Turner, 81 N.M. 450, 468 P.2d 421 (Ct. App.1970). *Turner* held cross-examination of expert witnesses concerning collateral offenses was proper in that case; that the expert could be cross-examined as to the facts on which his opinion was based. The cross-examination in *Turner* was held not to be error because of the "novel procedure followed." There, the parties had stipulated that experts could express their opinion "* * * as to whether defendant's denial of the [collateral] charges was truthful. * * *" Here, we have no such stipulation; no such novel procedure. *Turner* is not applicable. The prosecutor's question interjected an alleged prior criminal conviction into the case; it did so by a question directed to a witness, not the defendant. We consider the question on the basis of the reference to the alleged prior conviction, and without regard to the prosecutor's good or bad faith in asking the question.

A person, put on trial for an offense, is to be convicted, if at all, on evidence showing he is guilty of that offense. The defendant is not to be convicted because, generally, he is a bad man, or has committed other crimes. Evidence of other offenses tends to prejudice the jury against the accused and predispose the jury to a belief in defendant's guilt. Thus, the established New Mexico procedure, with certain exceptions not here applicable, is that proof of separate criminal offenses is not admissible and it is prejudicial error to admit such proof. State v. Rowell, 77 N.M. 124, 419 P.2d 966 (1966); compare State v. Turner, supra.

Here, we are not concerned with *proof* of prior convictions but with the interjection of criminal offenses in the open-

ing statement and on cross-examination. Neither the opening statement remark nor the cross-examination question had a direct bearing on the homicide involved. There is neither evidence nor suggestion that the pushing or smuggling of heroin had anything to do with the fight which involved the fatal shooting of deceased and the serious wounding of defendant, and resulted in the homicide charge against defendant. The remark and the question were irrelevant to the case and under State v. Rowell, supra, were prejudicial to defendant. The trial court's admonition to the jury in connection with the question did not cure the prejudice under the circumstances of the case. State v. Rowell, supra.

Instruction on self-defense.

The question of whether the shooting of deceased was in self-defense was submitted to the jury. The jury was instructed on the rule of "apparent necessity," and that the reasonableness of defendant's belief was to be determined from the viewpoint of an ordinarily reasonable person under the existing circumstances. See State v. Beal, 55 N.M. 382, 234 P.2d 331 (1951) and cases therein cited.

After these instructions, which are not in issue here, the jury was instructed that even though the jury found that defendant was not the aggressor, and even though defendant was in fear of his life or great bodily harm:

> "* * * he [defendant] had no legal excuse to continue the combat or take any further action after Julian Narvaez was no longer able to continue the conflict or present a danger to Pete Garcia."

This instruction told the jury that if in fact decedent no longer presented a danger, the defendant had no legal excuse to take further action. It apparently contradicts, it clearly confuses, the rule that the apparent necessity for the killing is to be judged on the reasonableness of defendant's belief as an ordinarily reasonable person in the existing circumstances. State v. Beal, supra.

Thus, the issue is: What results when instructions are given which apparently conflict with, and certainly confuse, other admittedly correct instructions? Since we are unable to determine whether the confusing instruction was followed by the jurors, and since this is a homicide case where the theory of self-defense is a critical issue, the confusing instruction was error requiring reversal. See State v. Horton, 57 N.M. 257, 258 P.2d 371 (1953); State v. Buhr, 82 N.M. 371, 482 P.2d 74 (Ct.App.1971).

Although not raised as an issue, the record shows the following elapsed times in this appeal. Notice of Appeal was filed December 17, 1969. The transcript was not docketed in this court until February 16, 1971 or a time lapse of 426 days. Filing of briefs by attorneys was not completed until June 7, 1971; an elapsed time of 111 days. The case was submitted after oral argument on June 15, 1971. From date of submission to date of opinion is 45 days.

The judgment and sentence is reversed. The cause is remanded with instructions to give defendant a new trial.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

488 P.2d 105

Mrs. Manuel APODACA, formerly Trina Moya, et al., Plaintiffs-Appellants,

v.

The TOWN OF TOME LAND GRANT, a corporation, a/k/a Tome Land and Improvement Company, a corporation, a/k/a the Tome Land Grant, a community land grant, and all the Shareholders Thereof, and Horizon Corporation, a Delaware Corporation, Defendants-Appellees.

No. 9139.

Supreme Court of New Mexico.

Aug. 23, 1971.

Solomon & Roth, Santa Fe, Lorenzo E. Tapia, Albuquerque, for appellants.

Ahern, Montgomery & Albert, Albuquerque, for appellees.

OPINION

OMAN, Justice.

The trial court granted defendants' motion to dismiss plaintiffs' complaint, except as to plaintiff, Floyd Gurule. We reverse.

By the first cause of action of the second amended complaint, plaintiffs attacked the validity of a judgment entered in Cause No. 6492 on the docket of the District Court of Valencia County and sought a determination of their claimed rights in the common lands of the Town of Tome Land Grant, or in the proceeds from the sale of said lands. By the second and third counts of their complaint they sought equitable relief in the nature of restraining orders to prevent the distribution of the funds from the sale of the lands. This equitable relief was granted and the funds are presently in the hands of a trustee appointed for this purpose by the court.

The records in both this cause and Cause No. 6492 are before us on this appeal. In addition to the complaint in this cause, plaintiffs also filed a "Motion in Support of Special Appearance to Challenge Jurisdiction" in Cause No. 6492. The matters contained in and the relief sought by this motion are substantially the same as alleged in and sought by the first cause of action of the second amended complaint in the present suit. In fact, plaintiffs filed in both suits a common "Motion for Joinder for Purposes of Hearing" by which they sought to have the two suits joined for hearing the issues raised by the "Motion in Support of Special Appearance to Challenge Jurisdiction" filed in Cause No. 6492 and "Count I of the Second Amended Complaint filed in Cause No. 14849." One of the grounds asserted for

the joinder was: "That the issues and the evidence bearing thereon will be identical in most respects." This motion is still pending.

The trial court sustained the motion to dismiss the complaint, except as to plaintiff, Floyd Gurule, upon the ground that it "constitutes a collateral attack upon the judgment in Cause No. 6492 * * *." The complaint as to Mr. Gurule was not dismissed because he had not been named as a party in Cause No. 6492.

We need not decide whether the trial court was correct in determining this was a collateral attack on the judgment in Cause No. 6492. The case law on this point as announced by this court does not appear to be entirely consistent in all respects. See Bowers v. Brazell, 27 N.M. 685, 205 P. 715 (1922); Barela v. Lopez, 76 N.M. 632, 417 P.2d 441 (1966). However, the later cases clearly suggest that under the definitions of direct and collateral attacks adopted therein, the present suit would fall within the definition of a collateral attack as held by the trial court. See Barela v. Lopez, supra; Lucus v. Ruckman, 59 N.M. 504, 287 P.2d 68 (1955).

However, the record shows, and it is conceded, that at least one of the named plaintiffs in the present suit, other than Mr. Gurule, was not named as a party in Cause No. 6492, and, as shown above, the complaint sought not only to have the judgment in Cause No. 6492 declared void, but sought other relief, including the equitable relief which was granted. In defendants' "Response to Temporary Restraining Order," the first issue presented was "That Plaintiffs' Complaint does not state facts sufficient to constitute a cause of action." This issue was apparently resolved against defendants, since the restraining order was made permanent after a hearing on the issues. For these reasons the complaint should not have been dismissed for failure to state a claim upon which relief could be granted. Generally, as to the function to be performed by a motion under Rule 12(b) (6), Rules of Civil Procedure [§ 21-1-1(12) (b) (6), N.M.S.A.1953 (Repl.Vol. 4 1970)], and the circumstances under which the motion may properly be granted, see 2A, Moore's Federal Practice, § 12.08, at 2244 (2d ed. 1968); Rubenstein v. Weil, 75 N.M. 562, 408 P.2d 140 (1965); Jones v. International Union of Operating Engineers, 72 N.M. 322, 383 P.2d 571 (1963).

The order dismissing the second amended complaint should be reversed and the cause remanded with instructions to reinstate it upon the docket.

It is so ordered.

COMPTON, C. J., and MONTOYA, J., concur.

488 P.2d 107

STATE of New Mexico, Respondent,

v.

Loarn Anthony BISWELL, Relator.

No. 9307.

Supreme Court of New Mexico.

Aug. 17, 1971.

Further ordered that the record in Court of Appeals Cause No. 611, 83 N.M. 65, 488 P.2d 115, be and the same is hereby returned to the Clerk of the Court of Appeals.

488 P.2d 107

Samuel T. VALENCIA, Respondent,

v.

Donald Eugene DIXON and Paul Dixon, Petitioners.

No. 9310.

Supreme Court of New Mexico.

Aug. 23, 1971.

Further ordered that the record in Court of Appeals Cause No. 645, 83 N.M. 70, 488 P.2d 120, be and the same is hereby returned to the Clerk of the Court of Appeals.

488 P.2d 108

Carolyn Kay PROCTOR and Roger K. Proctor, Plaintiffs-Appellants,

v.

James WAXLER et al., Defendants-Appellees.

No. 606.

Court of Appeals of New Mexico.
July 2, 1971.
Certiorari Issued Aug. 19, 1971.

Willard F. Kitts, Albuquerque, for plaintiffs-appellants.

William K. Stratvert, Keleher & McLeod, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

This is a "slip and fall" on "ice and snow" summary judgment for defendants.

We reverse.

The City of Albuquerque is the owner, and Waxler and Johnson are operators of a public parking building at Fourth and Silver in Albuquerque, New Mexico. Carolyn Kay Proctor was a tenant who regularly occupied an automobile parking space for rent on the uncovered top floor. Johnson and Waxler maintained and operated the structure under a lease from the City of Albuquerque. The top floor, including the ramp leading to that floor, contains 28,647.-79 square feet.

On December 2, 1968, the car park opened for business at 6:45 a. m., with Waxler arriving at 6:40 a. m. Proctor arrived at the car park around 8:15 a. m. It had snowed early in the morning, but it is not clear whether it had stopped snowing before Proctor and another patron arrived. Upon arrival on the top floor of the car park, at the place where Proctor parked, there was one to three inches of serene, fresh snow. She parked in her regular place, alighted from the car and started

walking slowly to the elevator to the west and north of her car, and did not notice that ice lay beneath the snow. After she walked about 15 feet from her car, she suddenly slipped and fell on snow or covered ice and landed on her back. Another patron, coming to her rescue, also slipped and fell on the snow-covered surface. Both of them then noticed the slipperiness of the walking surface. Proctor was wearing "black patent flat heeled shoes," and the snow was not above the shoe level.

No inspection was made by defendants of the top floor until 9:00 a. m., after Proctor's fall. Defendants had on the premises for use on ice and snow, shovels, brooms and salt. It was understood these implements would be used "when necessary," and Waxler was the one who "would have used the implements and material."

The trial court found there was no genuine issue as to any material fact, and that defendants were entitled to judgment as a matter of law.

We shall not repeat again the many rules which guide a trial court to summary judgment. The questions in this case are: Was there a genuine issue of fact as to, (1) defendants' negligence; (2) Proctor's assumption of risk; and (3) Proctor's contributory negligence?

A. *Issue as to Defendants' Negligence.*

There are three New Mexico cases on "ice and snow" where a patron slipped and fell. Carter v. Davis, 74 N.M. 443, 394 P.2d 594 (1964); Crenshaw v. Firestone Tire & Rubber Co., 72 N.M. 84, 380 P.2d 828 (1963); Hallett v. Furr's, Inc., 71 N.M. 377, 378 P.2d 613 (1963). In each case, summary judgment was entered for defendant. Each case was decided before 1965.

In *Crenshaw* the court relied on 2 Restatement of the Law of Torts, § 343. This section was amended in Restatement of Law of Torts 2d, § 343 (1965), after each of the above cases had been decided. Mozert v. Noeding, 76 N.M. 396, 415 P.2d 364 (1966). This amended section is now applicable law in New Mexico. It need not be repeated here.

We are now concerned with the effect of the 1965 Restatement amendments on *Crenshaw*, *Hallett* and *Carter*. The trends establish that the 1965 amendments change the summary judgment rule therein contained. Consideration will be given only to those cases which discuss the amendments. We mention, however, in passing, Husband v. Milosevich, 79 N.M. 4, 438 P.2d 888 (1968). *Crenshaw* and *Hallett* are mentioned. *Carter* was applied. That case was tried to the court. It involved a slip and fall on the surface of a paved area which was icy or slippery. Plaintiff urged that the trial court should have found that defendants be charged with superior knowledge of the condition of the premises. The Restatement was not mentioned. Nevertheless, the court said:

> We do not find this to be the law under the circumstances here. In a case such as this, *the question of the knowledge of the condition is one of fact to be determined by the trier of fact.* If the proprietor does not have superior knowledge of the unsafe condition *while having acted as a reasonable man in attempting to keep informed,* then he can hardly be charged with failure to give timely notice thereof. [Emphasis added.]

A study of the Comments discloses that § 343 should be read together with § 343A in which "there are some situations in which there is a duty to protect an invitee against even known dangers, where the possessor should anticipate harm to the invitee notwithstanding such knowledge." Section 343A reads as follows:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, *the fact that the invitee is entitled to make use of public land,* or of the facilities of a public

utility, *is a factor of importance indicating that the harm should be anticipated.* Restatement (Second) Torts § 343A (1965), at page 218. [Emphasis added].

We believe that an issue of fact of negligence arises as to the possessor's anticipation of harm to an invitee notwithstanding the known and obvious danger of ice and snow.

Defendants rely on Luebeck v. Safeway Stores, Inc., 152 Mont. 88, 446 P.2d 921 (1968). The facts involved are similar to those in the present case. A verdict for plaintiff was reversed and the cause dismissed because the trial court should have directed a verdict for the defendant store. The court did not follow § 343 or § 343A. It rejected the decision in Dawson v. Payless For Drugs, 248 Or. 334, 433 P.2d 1019 (1967), because *Dawson* purported to rely on the 2nd Restatement of Torts, § 343A, reasoning that the duty imposed upon the possessor "arises only when the condition is *unreasonably dangerous.*" [Emphasis by the court]. *Dawson* also held "the jury could have reasonably found that (1) the probability of harm created by the icy condition of the parking lot was *unreasonably* great. * * *" [Emphasis by the court].

The *Luebeck* court said:

> We reject the Oregon rationale that natural conditions such as obvious snow and ice create such an *unreasonably dangerous* condition as to require the owner of the premises to take certain precautions. [Emphasis by the court].

The *Luebeck* court followed cases like *Crenshaw* which did not consider the 1965 Restatement amendment. We reject *Luebeck.* But we do not express agreement with *Dawson* that the condition must be "unreasonably dangerous." Section 343A does not state this, and § 343 mentions a condition which "involves an unreasonable risk of harm." This phrase was defined in Bromberg v. Gekoski, 410 Pa. 320, 189 A.2d 176 (1963), as follows:

> It may generally be defined as one [a condition] attended with an unreasonable risk of harm, one that is hazardous or unsafe or one that constitutes a danger to persons travelling thereon. It does not have to be such that is *very, very* hazardous, *very, very* unsafe or *very, very* dangerous. [Emphasis by the court].

Dawson did not discuss § 343. It cites Peterson v. W. T. Rawleigh Co., 274 Minn. 495, 144 N.W.2d 555 (1966), which also relied on § 343A. The Minnesota court said:

> Here a jury could find defendant should have foreseen that its elderly distributors would come to the loading dock for its products and attempt to negotiate the area between the dock and the entryway despite the slippery conditions. Under such circumstances we concur in the court's holding that the evidence supports a conclusion it was defendant's duty either to make the area safe for pedestrian travel or take appropriate measures to prevent the lot from being accessible. We therefore hold it was proper to submit defendant's negligence to the jury.

Kremer v. Carr's Food Center, Inc., 462 P.2d 747 (Alaska 1969), was decided December 22, 1969, and appears to be the latest decision in ice and snow cases under the Restatement. It holds that amended § 343 is determinative. It reversed a directed verdict in favor of Carr, where the parking lot was icy and Kremer slipped in a rut six inches deep. This was not a natural accumulation, but was unnatural or artificial accumulation of ice and snow. This distinction does not appear to have been significant to the Alaska court because the court did not discuss the importance of the difference in its decision. Comments from amended § 343 are recited to the effect that "the invitee enters upon the possessor's land accompanied by an implied representation that 'the land has been prepared and made ready and safe for his reception.' A business invitee may be entitled to the undertaking of affirmative steps by the possessor of land in order to promote the invitee's safety." The court also applied § 343A. It pointed out that, even though ice and snow prevail in Alaska for

many months, such climatic conditions do not negate "the possibility that the possessor should have anticipated harm to the business invitee despite the latter's personal knowledge of the dangerous snow and ice conditions or the general obviousness of such conditions."

The court further said:

> What acts will constitute reasonable care on the part of the possessor of land will depend on the particular variables of each case. Our decision today does not represent the adoption of a flat requirement that the possessor's duty requires that he attempt to keep his land free of ice and snow. Dependent on the circumstances, reasonable care on the possessor's part could be demonstrated by other reasonable acts such as the sanding of the area, or application of salt.

The court points out that *Dawson* and other cases hold the possessor has a duty to exercise reasonable care to keep the premises free of ice and snow.

For other cases which support *Kremer's* principles on the Restatement, see cases heretofore cited, and Rogers v. Tore, Ltd., 85 Nev. 548, 459 P.2d 214 (1969); Knudsen v. Merle Hay Plaza, Inc., 160 N.W.2d 279 (Iowa 1968); Gast, Inc. v. Kitchner, 247 Md. 677, 234 A.2d 127 (1967).

In summary, amended § 343 is applicable in New Mexico; this amended section imposes additional requirements upon a possessor of land in the possessor's relations with a business invitee; amended § 343 changed the standard applied in *Carter*, *Crenshaw* and *Hallett*, supra; § 343A is a limitation upon the liability imposed by § 343; the cases interpreting these restatement sections hold the question of liability in "slip and fall" on "ice and snow" cases is one of fact.

Applying the foregoing, a genuine issue of fact exists, (1) whether defendants knew or, by the exercise of reasonable care, they would have discovered the condition on the roof and whether they realized that it involved an unreasonable risk of harm to Proctor; (2) whether defendants should expect that Proctor would not realize the danger or fail to protect herself against it; and (3) whether defendants' failure to inspect, to remove ice and snow, or salt or warn Proctor, was a failure to exercise ordinary care. Since under *Carter* and *Crenshaw*, supra, it was a known and obvious danger, an issue of fact exists whether defendants should anticipate that physical harm would be caused by the condition.

We do not decide that defendants were negligent. We only decide that a genuine issue of facts exists for a jury to resolve.

B. *Assumption of Risk.*

Assumption of risk was raised as an affirmative defense. Did Proctor, as a matter of law, voluntarily assume the risk by walking slowly on fresh fallen snow without knowledge that it concealed ice beneath it? We do not believe so.

None of the previous New Mexico ice and snow, slip and fall cases discussed assumption of risk. It has been defined by U.J.I. 13.10, and discussed in slip and fall cases other than ice and snow.

Defendants rely solely on Dempsey v. Alamo Hotels, Inc., 76 N.M. 712, 418 P.2d 58 (1966), a bathtub slip and fall case in which Dempsey with knowledge stepped in to take a shower without a bath mat in the tub and fell injuring himself. The court held this was a voluntary exposure by Dempsey to a known and appreciated danger. It can be said that Dempsey elected to expose himself to the danger. The rule in New Mexico is that a *voluntary* exposure to danger exists only where the injured person might reasonably elect whether he should expose himself to the peril. Gray v. E. J. Longyear Co., 78 N.M. 161, 429 P.2d 359 (1967).

The foregoing New Mexico rule is consistent with Restatement, Second, Torts, § 496E which reads as follows:

> (1) A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk.
>
> (2) The plaintiff's acceptance of a risk is not voluntary if the defendant's

tortious conduct has left him no reasonable alternative course of conduct in order to

(a) avert harm to himself or another, or

(b) exercise or protect a right or privilege of which the defendant has no right to deprive him.

If we assume defendants were negligent, an issue in the assumption of risk defense is whether Proctor voluntarily assumed the risk. Since under *Crenshaw* and *Carter*, supra, the danger was known and obvious, the issue is whether Proctor had a reasonable election to expose herself to the danger. Gray v. E. J. Longyear Co., supra.

This reasonable election involves the "reasonable alternative course of conduct" in Restatement, Torts 2d, § 496E, supra. This alternative course of conduct is a factual question and under the record in this case, could not be decided as a matter of law.

C. *Contributory Negligence.*

Defendants also claimed contributory negligence as a defense. In the ice and snow, slip and fall cases, supra, in which assumption of risk was held to be a factual issue, contributory negligence was accorded equal dignity.

Proctor's conduct in walking from her car to the time of her fall creates a genuine issue of fact on the matter of contributory negligence. No New Mexico citations are necessary. Defendants again rely on Dempsey v. Alamo Hotels, Inc., 76 N.M. 712, 418 P.2d 58 (1966). We see no conduct standard similarity between attempting to take a shower in a motel without a bath mat, and walking slowly on snow or covered ice with black patent flat heeled shoes. The latter does not constitute negligence as a matter of law.

The summary judgment is reversed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

488 P.2d 112

STATE of New Mexico, Plaintiff-Appellee,

v.

E. R. DOWNING, Defendant-Appellant.

No. 677.

Court of Appeals of New Mexico.

July 30, 1971.

D. D. Archer, Artesia, for defendant-appellant.

David L. Norvell, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of issuing two worthless checks contrary to § 40–49–4, N.M.S.A.1953 (Repl. Vol. 6). He claims the evidence is insufficient to sustain the convictions.

As to the first check, he claims it was post-dated and the Worthless Check Act does not apply to any post-dated check. Paragraph B of § 40–49–6, N.M.S.A. 1953 (Repl. Vol. 6). We agree.

It was stipulated that the hay, which was sold to defendant, was weighed on the 25th of June. The payee of the first check testified twice that if the hay was weighed on the 25th of June, he accepted the check on that date. In other testimony the payee testified that he didn't remember when he accepted the check. He also testified, in answer to the court's question as to whether it was a post-dated check: "Not to my knowledge, it wasn't." The payee's lack of knowledge as to whether it was a post-dated check does not contradict his testimony that the check was accepted on the date the hay was weighed, which was June 25th. The check was dated June 30th; thus, it was post-dated and neither evidence nor inference contradicts this. The Worthless Check Act does not apply to post-dated checks. Section 40–49–6(B), supra. The defendant's motion to dismiss the charge as to the first check should have been sustained. The conviction, based on the first check, is reversed.

Defendant claims the Worthless Check Act and, therefore, § 40–49–4, supra, is not applicable to the second check. He relies on Paragraph A of § 40–49–6, supra, which makes the Act inapplicable to a check "* * * where the payee * * has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment on its presentation; * * *" The issue as to the applicability of this provision was submitted to the jury on conflicting evidence. Reviewing this evidence, and resolving the conflicts in favor of the State as the jury necessarily did by its verdict, State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct.App.1970), there is substantial evidence that the payee did not come within the above provision of § 40–49–6, supra.

The judgment and sentence based on the check dated June 30th is reversed. The judgment and sentence based on the check dated July 20th is affirmed. The cause is remanded with directions to proceed in a manner not inconsistent herewith.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

488 P.2d 113

STATE of New Mexico, Plaintiff-Appellee,

v.

Morris CHAPPELL, Defendant-Appellant.

No. 657.

Court of Appeals of New Mexico.

Aug. 6, 1971.

David W. Bonem, Quinn & Bonem, Clovis, for defendant-appellant.

David L. Norvell, Atty. Gen., Frank N. Chavez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Chappell was convicted and sentenced for aggravated battery. He seeks reversal on two points: (1) the trial court erred in refusing to declare a mistrial after inadmissible statements elicited from the defendant and mechanically reproduced were presented to the trial jury; (2) the trial court erred in failing to give one instruction tendered by Chappell.

We affirm.

A hearing on the admissibility of defendant's tape recorded statement was held out of the presence of the jury. The trial court made a preliminary determination that the statement was freely and voluntarily given and that the jury would be permitted to hear it. See State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct.App.1971).

Foundation testimony as to the voluntariness of the statement and the circumstances under which it was recorded was presented to the jury. No objection was made that a proper foundation for admissibility had not been presented. See State v. Baca, 82 N.M. 144, 477 P.2d 320 (Ct.App. 1970).

The tape was played for the jury. Questioning of the officer on the witness stand was directed to other aspects of the crime. Defense counsel interrupted and, for the first time, raised a question as to the contents of the statement. His motion:

> At this time we would move for a mistrial or in the alternative to request the Court to strike Exhibit 3 [the tape recording] from evidence and ask the jury to disregard the same for the reason that at the very outset [of] the said Exhibit 3 the defendant advised the police officers that he did not wish to answer "no more questions" and the police officers continued to question him.

After replaying the tape, out of the presence of the jury, the trial court ruled the objection was well taken. Shortly after the recording was underway, defendant stated: "I aint going to answer no more questions" but the questioning continued. The trial court ruled that all of the tape subsequent to the "no more questions" remark was inadmissible. Compare State v. Word, 80 N.M. 377, 456 P.2d 210 (Ct.App. 1969).

After this ruling by the trial court, defendant changed his position. He no longer wanted the jury instructed to disregard the inadmissible portion of the tape. Defendant sought a mistrial.

The motion for mistrial was denied; the jury was instructed to disregard the inadmissible portions of the tape.

We need not determine whether the trial court should have listened to the tape recording before it was played for the jury and whether defendant should have been given an opportunity, at the hearing out of the presence of the jury, to object to specific portions of the tape recording. See

Wright v. State, 38 Ala.App. 64, 79 So.2d 66 (1954), cert. den. 262 Ala. 420, 79 So.2d 74 (1955); State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962); Brewer v. State, 414 P.2d 559 (Okl.Cr.1966). The prosecutor had given defendant opportunity to listen to the tape recording in advance of trial, but defendant did not do so. Further, no issue was made as to the admissibility of the tape's contents until after it had been admitted. Compare State v. Soliz, 79 N.M. 263, 442 P.2d 575 (1968).

The issue is whether the trial court erred in failing to grant a mistrial when the grounds for excluding portions of the tape were not called to the trial court's attention until after the tape had been admitted and played to the jury. Compare State v. Lord, 42 N.M. 638, 84 P.2d 80 (1938); State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970). "A motion for mistrial is addressed to the discretion of the trial court and is reviewable only on the basis of an abuse of discretion." State v. Martinez, 83 N.M. 9, 487 P.2d 919 (Ct.App.), decided July 23, 1971. See State v. Hargrove, 81 N.M. 145, 464 P.2d 564 (Ct.App.1970), for a discussion of when the exercise of discretion is an abuse.

Defendant's contention is not based on information concerning the crime in the inadmissible portion of the tape. The content of what defendant said in that portion of the tape is consistent with his testimony from the witness stand. Defendant stated: "Our position would be that prejudice evolved from the laughter [of the defendant] and the language that was used [by the defendant] and could not be overcome by cautionary instruction. * * *" Thus, defendant asserts he should have been granted a mistrial because in discussing the crime in the inadmissible portion of the tape recording he laughed about the affair and used obscene language.

Having listened to the tape, we cannot say that the discretion exercised by the trial court in refusing to grant a mistrial was clearly against reason and, therefore, we decline to hold there was an abuse of discretion. State v. Hargrove, supra.

The trial court refused defendant's requested instruction concerning his "deluded belief." The request was properly refused because the insanity defense was sufficiently and accurately covered in instructions given. State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct.App.1970).

The conviction and sentence of Chappell is affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

488 P.2d 115

STATE of New Mexico, Plaintiff-Appellee,

v.

Loarn Anthony BISWELL, Defendant-Appellant.

No. 611.

Court of Appeals of New Mexico.

July 16, 1971.

Certiorari Denied Aug. 17, 1971.

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

David L. Norvell, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant was convicted of receiving stolen property valued in excess of $100.00 in violation of § 40A-16-11, N.M.S.A.1953 (Supp.1969). Defendant appeals contending that the trial court erred in permitting the district attorney to cross-examine him in regard to certain convictions of city ordinances and a federal firearms act violation.

We affirm.

Defendant's first contention regards the district attorney's cross-examination as to whether defendant had been convicted of a federal firearms act violation and his comments in connection therewith. Defendant asserts that the district attorney's statement in this regard was so prejudicial that he was denied his constitutional right to a fair and impartial trial.

The record regarding this matter is as follows:

"Q. Have you been convicted of a federal firearms act violation?

"A. Convicted? No.

"MR. EASLEY: Court please, the District Attorney is trying—I object to the question, for the reason that he has not phrased it and has not asked when, where and what court.

"Q. On the 25th of May, 1970, here in the Federal Court, on a charge of federal firearms violation? I believe the specific charge is failure to have a firearms license, federal firearms license, and you were represented by Mr. Easley.

"MR. EASLEY: Court please, the District Attorney knows there has been no conviction in that case. I am sure he is well aware of it, and I think it is highly prejudicial to the Defendant at this time, and I move that the Court so instruct the Jury to disregard any reference to it.

"MR. HANAGAN: My understanding is that there was a conviction. It is on appeal, but the conviction still remains in effect until such time as the appeal overturns it, and it is a proper question.

"MR. EASLEY: If the Court please, that is not right, and at this time I would like to make a motion, your honor.

"THE COURT: Well, just let me inquire. Mr. District Attorney, do you have any authority that supports your position that if the matter is on appeal, that you have a right to make inquiry about it?

"MR. HANAGAN: Your honor, it is my understanding that the conviction remains in effect until such time as the appeal does away with it.

"THE COURT: I don't know if that is true or not. Absent some authority, I am going to rule that the question is improper. The Jury will disregard the question having to do with the firearms violation, and will not use that in any manner in your consideration of this case and will wholly disregard any reference to such a conviction.

"MR. EASLEY: Court please, May I make an additional motion?

"THE COURT: You may.

"MR. EASLEY: Court please, I move that the Court declare a mis-trial in this case, for the reason that the inquiry that has been made by the District Attorney here, is so highly prejudicial to the Defendant, that it can not—the content of the examination can not be readily dismissed from the minds of these Jurors sitting in this case, and that it would be an impossible —be an impossibility for them to dismiss this from their minds.

"THE COURT: Motion will be denied."

We agree with defendant that when a witness denies a conviction that under §

20-2-3, N.M.S.A.1953 (Repl. Vol. 1970) the opposite party may prove such conviction. We further agree that such proof was never tendered. We, however, fail to see how the failure to prove the conviction and the colloquy quoted above was so prejudicial to the defendant that he was denied his constitutional right to a fair and impartial trial.

This case is controlled by State v. Garcia, 80 N.M. 247, 453 P.2d 767 (Ct.App.1969) wherein it stated:

> "* * * If a prosecutor inquires concerning a prior conviction and is unable to prove the conviction, a determination as to whether he acted improperly depends on the facts and circumstances. Here the record does not show whether the District Attorney was able to refute the denial. In fact, the record does not disclose the nature of the District Attorney's information concerning the prior forgery conviction. Accordingly, we do not have sufficient information before us to hold, as a matter of law, that the District Attorney acted improperly in asking about 'any other' convictions."

See also State v. Paul, 80 N.M. 521, 458 P.2d 596 (Ct.App.1969). Here, the record does not disclose the nature of the district attorney's information so we cannot say the district attorney proceeded either improperly or in bad faith in asking the question.

Although defendant's position in the colloquy is ambiguous, the trial judge understood defendant's position to be that the State cannot cross-examine a defendant about a conviction pending on appeal. We do not answer this question, however, see State ex rel. Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968). We do not reach this question because the record does not show there was a conviction pending on appeal. The colloquy assumes such a conviction but there is nothing in the record which shows this. See State v. Carlton, 82 N.M. 537, 484 P.2d 757 (Ct.App.1971). Apart from the district attorney's "understanding" on this question, the record is silent. The district attorney's "understanding" does not establish that such a conviction existed. See State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970). As to the district attorney's questioning concerning a conviction he "understood" to be pending on appeal, we cannot say he proceeded in bad faith in light of State ex rel. Chavez v. Evans, supra.

Defendant asserts that the trial court's admonition was insufficient to cure the "highly prejudicial" effect of the question asked by the district attorney. We cannot say from this record that the district attorney's question was either proper or improper, thus, we cannot say that defendant was prejudiced. Thus we do not reach the question of whether the admonition "cured" the asserted prejudice. Defendant also asserts the district attorney's "comments" during the colloquy were prejudicial. We do not consider this argument because it is raised for the first time on appeal.

Defendant also urges other New Mexico cases dealing with the limits of cross-examination going beyond the bounds of the name of the particular offense and fact of conviction. These cases are not applicable since the record here clearly shows that cross-examination of the district attorney concerned itself solely with the fact of conviction. All other statements made in this context were addressed to the court as legal argument on the question whether the conviction could be used while appeal is pending.

Defendant's other two points are that the trial court permitted questions, for impeachment purposes, which went to convictions of violating city ordinances and in so permitting the court did not weigh the illegitimate tendency of such questions to prejudice and this failure constituted a violation of defendant's right to a fair and impartial trial.

Once the possibility of prejudice is called to the attention of the trial court it has an affirmative duty to exercise its discretion to weigh the probative value of the evi-

dence versus the illegitimate tendency to prejudice. State v. Coca, 80 N.M. 95, 451 P.2d 999 (Ct.App.1969). While the record shows that as to one prior conviction, the city ordinance question was raised, it does not show that defendant invoked a ruling of the trial court on the possibility of prejudice from cross-examination concerning prior offenses. Assuming, however, that the question of prejudice was raised, our review of the record shows the trial court ruled on each objection made and, generally, supervised the cross-examination concerning prior offenses. The record does not support a claim that the trial court did not exercise its discretion.

Defendant places much reliance on State v. Waller, 80 N.M. 380, 456 P.2d 213 (Ct. App.1969). In *Waller* this court reversed a conviction in which the trial court ruled that under § 20–2–3, supra, cross-examination for impeachment purposes could extend to "any unlawful act." In this case, the court ruled that the violation of a city ordinance of that kind was admissible to show a specific act of wrongdoing by the defendant. This, defendant asserts "is much the same as saying that he could be cross-examined on 'any unlawful act.'" We do not agree. The court here specified that the kind of ordinance conviction about which it would permit defendant to be cross-examined. Compare State v. Knowles, 32 N.M. 189, 252 P. 987 (1927). We do not see that the court permitted questions that were not limited in extent, range, and form. State v. Hargrove, 81 N.M. 145, 464 P.2d 564 (Ct.App.1970). In addition there was neither denial by defendant nor was there suggestive repetition. Compare State v. Hargrove, supra; State v. Waller, supra.

The trial court is vested with broad discretion in allowing cross-examination to test the credibility of a witness. State v. Moultrie, 58 N.M. 486, 272 P.2d 686 (1954). In reviewing this record we find none of the extremes which were condemned by *Coca* and *Waller*.

Defendant claims that the trial court erred in permitting questions concerning convictions of city ordinances. In most of the questioning, the record does not show that the conviction was under a city ordinance. References are made to magistrate court. Magistrate courts are part of the judicial department of the State, § 36–1–1, N.M.S.A.1953 (1969 Supp.), and their criminal jurisdiction does not specifically refer to municipal ordinances. See § 36–3–4, N.M.S.A.1953 (1969 Supp.). Section 37–1–1, N.M.S.A.1953 (1969 Supp.) establishes municipal courts, and these courts have jurisdiction over alleged violations of municipal ordinances. Section 37–1–2, N.M.S.A.1953 (1969 Supp.). The record here does not show, except in one instance, that defendant was questioned concerning a conviction under a city ordinance. Defendant claims that it was the State's obligation to show the convictions, about which defendant was questioned, were for ordinance violations. We disagree. It was defendant's obligation to demonstrate his asserted error, and, thus, to show that ordinances were involved. State v. Knowles, supra. Defendant has not done so; his claim of general questioning concerning convictions for violating city ordinances is not reviewable under the record before us.

In one instance, the record shows defendant was questioned as to a conviction in the "City Court of Hobbs." The court ruled that "* * * conviction of violating a City Ordinance of that kind, is admissible for the purpose of showing a specific act of wrongdoing." Thus, the trial court did not permit the question under § 20–2–3, supra, which authorizes questions concerning convictions of felonies and misdemeanors. The question was permitted under § 20–2–4, N.M.S.A.1953 (Repl. Vol. 4, 1970) which permits impeachment by showing "bad moral character." Such character may be shown by specific acts of misconduct. State v. Sharpe, 81 N.M. 637, 471 P.2d 671 (Ct.App.1970).

Defendant contends the question should have been directed to the specific miscon-

duct rather than *conviction* of a city ordinance. The contention is directed to a semantic nicety that, in our opinion, is without merit. Defendant was asked if he was found guilty of "failure to maintain records." Thus, the specific misconduct was identified. The trial court's ruling permitting questioning concerning an ordinance "of that kind" is also directed to the specific conduct involved. The reference to the conviction showed the specific act of wrongdoing. There was no error in referring to an ordinance conviction in this context.

Defendant further contends the State failed to prove the ordinance conviction. This argument overlooks the procedure under § 20–2–4, supra. Denials under this section are binding on the cross-examiner. State v. Hargrove, supra. Compare § 20–2–3, supra. Here, the defendant gave a hesitant "yes" to the question. Being bound by the answer, the State would not have been permitted to "prove" the ordinance conviction under § 20–2–4, supra.

Affirmed.

It is so ordered.

WOOD and SUTIN, JJ., concur.

488 P.2d 120

Samuel T. VALENCIA, Plaintiff-Appellant,

v.

Donald Eugene DIXON and Paul Dixon, Defendants-Appellees.

No. 645.

Court of Appeals of New Mexico.

July 16, 1971.

Certiorari Denied Aug. 23, 1971.

Jack L. Love, John V. Coan, Albuquerque, for appellant.

James T. Roach, Eugene E. Klecan, Albuquerque, for appellees.

OPINION

SUTIN, Judge.

This is an appeal from a directed verdict in favor of the Dixons in an automobile guest case accident.

We reverse.

The defendant, Donald Eugene Dixon, called Gene, owned a 1964 Pontiac. Gene and Valencia were personal friends. On May 19, 1968, at 3:00 a. m., Gene was driving Valencia and another passenger from San Mateo to Grants, New Mexico, on State Road 53. About 18 miles south of San Mateo, Gene was driving 80 to 90 miles per hour in a 55 mile per hour zone. Valencia was asleep at the time of the accident. Gene was familiar with the highway and with the curve where the accident occurred. He knew that the curve was a "tricky" and "mean" curve. Shortly before the accident, Gene jerked the car to the right. It fishtailed. It went off the road, came back on and then went off again. It hit a bank and flipped upright on its wheels. It left over 400 feet of pressure marks on the highway, indicating a shifting of the weight of the car. It ended up in a bar ditch. Instead of making the curve, Gene was going straight, overshooting the curve, when he noticed his mistake. Valencia was injured. Shortly after the accident, Gene smelled of alcohol and he was charged with driving while intoxicated and reckless driving.

Gene knew there had been many accidents on this road and quite a number at the curve where this accident happened. Gene believed he was in a "trucker's trance," meaning he was awake, but he was hypnotized by the highway. He had been up since around 7:00 a. m. the previous morning, a period of about 20 hours.

There was no evidence the lights of Gene's car were on. Since no argument on this fact was made, it is presumed the lights were turned on prior to the accident.

A part of Gene's deposition was offered in evidence. He was asked: "If you pled guilty to reckless driving, you can answer yes or no." Gene answered: "To reckless driving, yes."

This admission creates the vital question. Does a plea of guilty to reckless driving create an issue of fact for the jury within the meaning of the guest statute, § 64–24–1, N.M.S.A.1953 (Repl.Vol. 9, pt. 2)?

Under the guest statute, if the accident caused by Gene was intentional "or caused by his heedlessness or reckless disregard of the rights of" Valencia, then Valencia has a cause of action for damages against Gene.

We have just held that a plea of guilty to reckless driving supports a finding of willful and wanton misconduct which is a prerequisite to an award of punitive damages. Svejcara v. Whitman (Ct.App.), 82 N.M. 739, 487 P.2d 167, decided June 18, 1971.

We do not determine whether Gene was heedless or reckless in operating his vehicle. Our function is to decide whether the evidence is such that an inference of heedlessness or recklessness may be fairly drawn from the evidence most favorable to Valencia, whether the evidence is contradicted, explained, or not.

Reckless driving is defined in § 64–22–3 (a), N.M.S.A.1953 (Repl.Vol. 9, pt. 2), as follows:

> Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard of the rights or safe-

ty 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.

Gene pleaded guilty to this offense. Gene's plea of guilty was admissible in evidence. Vargas v. Clauser, 62 N.M. 405, 311 P.2d 381 (1957). His admission describes the mental state with which his driving was done. In Simon v. Wilson, 78 N.M. 491, 432 P.2d 847 (Ct.App.1967), the defendant "was cited for either reckless or careless driving by the Albuquerque City Police, and he pleaded guilty and paid a fine." The importance of this plea of guilty was not discussed by the court in affirming summary judgment for the defendant. However, the above language is not an admission of a plea of guilty to reckless driving.

Gene relies on Berlin v. Berens, 76 S.D. 429, 80 N.W.2d 79 (1957). This was a guest case in which the defendant pleaded guilty to a criminal charge of reckless driving and speeding arising out of the accident involved in the civil lawsuit. However, the reckless driving statute stated the offense in the alternative, whereas our statute does not. Its guest statute also differs in language from our guest statute. The court also stated:

> Where a plea of guilty is admitted as substantive evidence in civil litigation involving the same occurrence it is not conclusive and may be explained. [Citing cases]. It is received as an admission against interest. The theory behind this being that it is an admission of the acts charged against him.

A plea of guilty to reckless driving, together with all of the other facts and circumstances, creates an issue of fact for the jury to determine whether the accident was caused by Gene's heedlessness or his reckless disregard of the rights of Valencia. The reason is that it provides substantial evidence of Gene's state of mind. His plea of guilty admits that he drove his vehicle "heedlessly in willful or wanton disregard of the rights or safety of others. * * *" This falls within the "unless" clause of the guest statute. Compare Svejcara v. Whitman, supra.

Martin v. Cafer, 258 Iowa 176, 138 N.W. 2d 71 (1965), overruled a previous case. It established that a plea of guilty to reckless driving "admits conduct that is admissible to show one or more of the elements or pieces of evidence relevant and material to proof of recklessness under the guest statute."

Gene's plea of guilty is not conclusive evidence of heedlessness or reckless disregard in this civil action. It is an admission, subject to explanation and contradictions, and is to be weighed and considered by the jury in connection with all other evidence in the case to determine whether Gene comes within the "unless" clause of the guest statute. Garvin v. Hudson, 76 N.M. 403, 415 P.2d 369 (1966); Michael v. Bauman, 76 N.M. 225, 413 P. 2d 888 (1966); Ward v. Ares, 29 N.M. 418, 223 P. 766 (1924); Lyons v. Kitchell, 18 N.M. 82, 91, 134 P. 213 (1913).

The factor which distinguishes negligence from heedlessness or reckless disregard is a particular state of mind. To be heedless or reckless, evidence must show that this particular state of mind is one of utter irresponsibility or conscious abandonment of any consideration for the safety of guest passengers. Forsyth v. Joseph, 80 N.M. 27, 450 P.2d 627 (Ct.App.1968). If the plaintiff cannot from the evidence, create at least an inference of this state of mind, negligence will remain negligence, and the guest statute will be an effective bar against a claim of damages. In the instant case, the plea of guilty to reckless driving permits an inference to be drawn that Gene's state of mind was sufficient for liability under the guest statute and motivated his conduct in operating the vehicle.

The judgment is reversed.

It is so ordered.

WOOD and HENDLEY, JJ., concur.

488 P.2d 123

Gene E. WILLCOX, Plaintiff-Appellant,

v.

UNITED NUCLEAR HOMESTAKE SAPIN COMPANY, Successors to Homestake Sapin Partners and Argonaut Insurance Company, Defendants-Appellees.

No. 624.

Court of Appeals of New Mexico.

Aug. 6, 1971.

Robert H. McBride, J. E. Casados, Casados & McBride, Albuquerque, for plaintiff-appellant.

Joseph J. Mullins, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

This is an appeal by Willcox from a judgment in a workman's compensation claim. The trial court awarded Willcox $1,462.50 for disability of 25% of the leg between the knee and ankle pursuant to § 59–10–18.4, subd. A(31), N.M.S.A.1953 (Repl. Vol. 9, pt. 1). Willcox claims additional compensation based upon a finding of partial bodily impairment. Defendants have cross-appealed on the allowance of attorney fees to Willcox after an alleged timely offer was made by defendants under § 59–10–23(D), N.M.S.A.1953 (Repl. Vol. 9, pt. 1). We affirm.

No claim is made that the trial court's findings are not supported by substantial evidence. The trial court found that plaintiff suffered an injury and was entitled to compensation for disability under the scheduled injury section of our workmen's compensation law. Section 59–10–18.4, subd. A(31), N.M.S.A.1953 (Repl. Vol. 9, pt. 1). In addition, the trial court found:

2. Although he returned to his work as a miner on July 5, 1968, the plaintiff continues to suffer pain in his ankle, limps, and this limp causes the plaintiff to suffer pain in the low back.

3. The Court finds, as a matter of medical probability, that, as a result of the injuries sustained by plaintiff, he has had an impairment of the body as a whole of 30 per cent, since the injury to the right lower leg and ankle interfere with the efficiency of the entire body of the plaintiff.

4. Notwithstanding the Court's Finding No. 3, the plaintiff is still able to perform fully the usual tasks of the work of a miner which he was performing at the time of his injury and is able to perform fully work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience.

Plaintiff asserts there is a conflict between findings 3 and 4. He claims: "* * * general body impairment caused by the scheduled injury should be compensable according to the percentage of impairment whether the disability be greater or less. * * *" Because he has a 30% impairment of the body as a whole, he claims he is entitled to compensation of 30% of total disability regardless of whether he has a partial disability as defined in § 59–10–12.19, N.M.S.A.1953 (Repl. Vol. 9, pt. 1, Supp.1969).

The New Mexico Supreme Court has held that a workman is not limited to compensation under the scheduled injury section, where, in addition to disability resulting from the scheduled injury, "there is evidence of separate and distinct impairment to other parts of the body." Montoya v. Sanchez, 79 N.M. 564, 446 P.2d 212 (1968), and cases therein cited. The fact that compensation is not limited to the scheduled injury section does not, however, mean that compensation outside the scheduled injury section is to be awarded on the basis of physical impairment. Compensation, apart from the scheduled injury section, is based on disability. See §§ 59–10–18.2 and 18.3, N.M.S.A.1953 (Repl. Vol. 9, pt. 1, Supp.1969). Disability is defined in §§ 59–10–12.18 and 12.19, N.M.S.A.1953 (Repl. Vol. 9, pt. 1, Supp. 1969). "Physical impairment" does not automatically equate with "disability" under the above statutes. Compare Rayburn v. Boys Super Market, Inc., 74 N.M. 712, 397 P.2d 953 (1964).

The trial court found a 30% physical impairment to the body as a whole. However, it also found that plaintiff did not suffer a "partial disability." Compare Finding No. 4 with § 59–10–12.19, supra. Not having established a "disability," plaintiff was not entitled to compensation outside the scheduled injury section. This result is consistent with New Mexico Supreme Court decisions involving a sched-

uled injury and compensation outside the scheduled injury sections. Where such compensation has been upheld, there was more than physical impairment; there was disability. See Quintana v. Trotz Construction Company, 79 N.M. 109, 440 P.2d 301 (1968); Yanez v. Skousen Construction Company, 78 N.M. 756, 438 P.2d 166 (1968); Webb v. Hamilton, 78 N.M. 647, 436 P.2d 507 (1968); Baker v. Shufflebarger & Associates, Inc., 78 N.M. 642, 436 P.2d 502 (1968); Casados v. Montgomery Ward & Co., 78 N.M. 392, 432 P.2d 103 (1967).

The trial court's findings are not in conflict. The trial court properly refused to award compensation outside the scheduled injury section.

The defendants on cross-appeal contend they made a timely offer of $1500.00 in settlement and, therefore, Willcox was not entitled to an attorney fee of $750.00 awarded by the trial court. The trial court found that a timely, written offer was made in compliance with § 59–10–23(D), N.M.S.A.1953 (Repl. Vol. 9, pt. 1), but, nevertheless, the court found that Willcox was required to employ attorneys to represent him in the prosecution of the claim, and $750.00 was a reasonable attorney fee.

The above statute provides for attorneys fees where compensation is collected in court proceedings in excess of the amount offered in writing thirty *days* or more *prior* to trial. The record shows that the offer was made March 3, 1970. The trial took place April 2, 1970. The day of March 3, is not to be included. The last of the 30 days shall be included. Section 21–1–1(6) (a), N.M.S.A.1953 (Repl. Vol. 4); § 1–2–2(G), N.M.S.A.1953 (Repl. Vol. 1). The day prior to trial would be April 1, 1970. The offer was made 29 days *prior* to trial, not 30 days. A timely offer of settlement was not made. The finding of the trial court is in error, but the conclusion of the trial court is sustained. Willcox was entitled to a reasonable attorney fee.

The judgment of the trial court is affirmed on the issue of attorney fees allowed Willcox in the district court trial.

Willcox claims attorney fees on this appeal if he won the appeal proper or the cross-appeal. Inasmuch as he received no additional compensation, he is not entitled to attorney fees on his appeal. Sisneros v. Breese Industries, Inc., 73 N.M. 101, 385 P.2d 960 (1963). He has successfully defended against the cross-appeal and is entitled to an attorney fee for such services. Kendrick v. Gackle Drilling Company, 71 N.M. 113, 376 P.2d 176 (1962); Brannon v. Well Units, Inc., 82 N.M. 253, 479 P.2d 533 (Ct.App.1970). Since the issue on cross-appeal was not complex and neither extensively briefed nor argued, plaintiff is entitled to $250.00 for the services of his attorney on the cross-appeal.

The judgment of the trial court is affirmed, and Willcox is awarded the sum of $250.00 attorney fees on defeating defendants' cross-appeal.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

488 P.2d 125

STATE of New Mexico, Plaintiff-Appellee,

v.

Joe Paul BELCHER, Defendant-Appellant.

No. 668.

Court of Appeals of New Mexico.

Aug. 6, 1971.

J. Lee Cathey, Carlsbad, for appellant.

David L. Norvell, Atty. Gen., Santa Fe, Ethan K. Stevens, Asst. Atty. Gen., for appellee.

OPINION

HENDLEY, Judge.

Convicted of forgery, Defendant appeals. His sole point on appeal is that the trial court abused its discretion in not granting a motion for continuance.

We affirm.

The motion was filed four days prior to trial and recited that it was necessary to obtain subpoenas for two out-of-state witnesses, who did not testify, and one in-state witness, who did testify at trial.

At the hearing on the motion the following facts emerged. Counsel was appointed on August 31, 1970, and talked to defendant about witnesses. No witnesses were named. On December 7, 1970, after notice of a trial setting for December 14, 1970, appointed counsel again consulted defendant. Again, defendant made no mention of witnesses. On December 9, 1970, appointed counsel received a letter from defendant relating to witnesses. This appears to be the first time defendant mentioned witnesses to his counsel. A motion for continuance was filed on December 10, 1970.

During trial the jury was informed of what the two absent witnesses would have testified to if they had been present and that the jury was to "take as true" what this testimony would have been. Sec. 21–8–11, N.M.S.A.1953 (Repl.Vol.1970). Defendant asserts this procedure, in accordance with Sec. 21–8–11, supra, does not dispose of the asserted error in denying a continuance, because he was prejudiced by the absence of "live" witnesses. Compare State v. Garcia, 82 N.M. 482 (Ct.App.), 483 P.2d 1322, decided April 2, 1971.

The granting or denying of a motion for continuance, based on the absence of a defense witness, rests in the sound discretion of the trial court and will not be interferred with except for abuse. 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 disclose an abuse of discretion by the trial court. The record does, however, show a lack of concern and diligence by the defendant in failing to notify his attorney of the witnesses, one of whom was his wife. Defendant will not be heard now to complain. See State v. Deats, 82 N.M. 711 (Ct.App.), 487 P.2d 139, decided June 18, 1971; State v. Gutierrez, 82 N.M. 578, 484 P.2d 1288 (Ct.App.1971).

Affirmed.

It is so ordered.

WOOD and SUTIN, JJ., concur.

488 P.2d 127

Billy CROSBY and Christine Crosby, Plaintiffs-Appellants,

v.

BASIN MOTOR COMPANY, a Corporation, and First National Bank of Farmington, a National Banking Association, Defendants-Appellees.

No. 672.

Court of Appeals of New Mexico.

Aug. 6, 1971.

Robert Hilgendorf, Chinle, Ariz., Paul Biderman, Crownpoint, for appellants.

Jack M. Morgan, Farmington, for First Nat. Bank of Farmington.

Joseph A. Palmer, Palmer & Frost, Farmington, for Basin Motor Co.

OPINION

SUTIN, Judge.

Crosby sued Basin Motor Company and First National Bank of Farmington to recover damages for statutory violations of the provisions on Default, Part 5, Article 9 of the Uniform Commercial Code, including conversion. This pertained to the repossession and resale of a pickup truck. Basin counterclaimed for $400.00 as a result of Crosby's default. The trial court denied recovery to Crosby and Basin. Crosby appeals.

Crosby abandoned his claims against First National Bank. Basin did not appear or respond in this court.

We reverse.

The trial court found: Basin sold Crosby a 1961 half-ton pickup under a Retail Installment Sales Contract which Basin sold with recourse to the First National Bank. Crosby defaulted in payment. The truck was repossessed and delivered to Basin. The balance due was $251.50. Crosby was given personal notice that the truck would be sold if not redeemed in full. The truck was of a type customarily sold on a recognized market and it was sold by Basin at private sale for $695.00. Basin paid $251.50 to First National Bank as payment of the remaining unpaid balance of the sales contract. The reasonable market value of the truck at the time of repossession was $150.00. In preparation for sale, Basin made commercially reasonable repairs on the truck of $435.73, but Basin did not sell the truck within 90 days after it was repossessed. At the time of repossession, Crosby had paid more than 60% of the purchase price of the truck. On the 91st day after repossession, the fair market value of the truck was $231.47.

The trial court concluded that Basin, upon taking possession of the truck, was a secured party in possession of collateral under § 50A-9-505(1), N.M.S.A. 1953 (Repl. Vol. 8, pt. 1), and was required to sell it under § 50A-9-504, N.M.S.A. 1953 (Repl. Vol. 8, pt. 1), within 90 days after possession was taken, but failed to do so which gave Crosby the right to recover damages in conversion under the provisions of § 50A-9-505, supra, or alternately under the provisions of § 50A-9-507(1), N.M.S.A. 1953 (Repl. Vol. 8, pt. 1), whichever recovery would be greater; that Crosby's damages in conversion were $231.47, the value of the truck at the time of conversion, or $236.32 under § 50A-9-507(1), supra, but each of these amounts were offset by the amount of $251.50 paid by Basin to the First National Bank. Therefore, Crosby was not entitled to recover any damages.

Crosby challenged two findings of the trial court: (1) that the truck was of a type customarily sold on a recognized market; (2) that the fair market value of the truck on the 91st day after repossession was $231.47.

Crosby also challenged one conclusion of law of the trial court: (1) that the minimum recovery was $236.32, and subject to offsets.

Crosby also made requested findings and conclusions which were denied.

(a) *Was Basin Entitled to Offsets?*

Basin was not entitled to the offset awarded by the trial court. Basin took $251.50 out of the sale proceeds of Crosby's vehicle, and applied it to Crosby's unpaid account on the sale, thereby extinguishing it as an obligation. Crosby was no longer obligated to Basin, and no claim for that amount survives for the trial court to award Basin any damages by way of counterclaim or offset. Cruzan v. Franklin Stores Corporation, 72 N.M. 42, 380 P. 2d 190 (1963); Charley v. Rico Motor Company, 82 N.M. 290, 480 P.2d 404 (Ct. App.1971). Crosby was entitled to recover from Basin the sum of $236.32 under § 50A-9-507(1), supra.

(b) *Was Crosby Entitled to a Second Minimum Recovery in Addition to that Granted Above?*

Crosby claims the trial court erred in finding that the truck was of a type customarily sold on a recognized market; that since Crosby did not receive written notice prior to the resale, another violation occurred under § 50A–9–504(3), N.M.S.A. 1953 (Repl. Vol. 8, pt. 1). Therefore, Crosby contends these remedies are cumulative, and he is entitled to damages for each violation. Crosby failed to show any actual additional damages resulting from the failure of Basin to give adequate notice. Furthermore, Crosby concedes there is no case law or statutory provision which expressly allows recovery of double, minimum damages under § 50A–9–507(1), supra, for two separate violations of the default provisions of the Uniform Commercial Code. Since the damages involved here are purely statutory, to be awarded "in any event" when the secured party fails to proceed in accordance with Article 9, Part 5 of the Uniform Commercial Code, and since § 50A–9–507(1), supra, does not specifically authorize separate statutory damages for each asserted violation of Part 5, we hold the statutory damage is not cumulative; that the statutory damage for violation of Part 5 may be recovered only once.

(c) *Was Crosby Entitled to More Damages for Conversion?*

Crosby contends the trial court's finding that the fair market value of the truck at the time of conversion was $231.47 is unsupported by substantial evidence; that the market value at the time of conversion was the sale price of $695.00.

The trial court found that the reasonable market value at the time of repossession was $150.00; that Basin made commercially reasonable repairs to the truck in preparation for sale of $435.73. These findings were not challenged. The trial court evidently arrived at the value of $231.47 by deducting the repairs plus $27.80, the cost of sale, which totaled $463.53. When deducted from the sale price of $695.00, it leaves a value of $231.47 at the time of conversion.

The measure of damages, in conversion, is the value of the property at the time of conversion with interest. A fair and reasonable basis for determination is all that is required. Valley Chevrolet Co. v. Whitaker, 76 N.M. 488, 416 P.2d 154 (1966).

The truck was repossessed August 31, 1967. The 91st day or the day of conversion would be November 29, 1967. Repairs of $408.97 were made before this date in preparation for sale. We have reviewed the record and note that Crosby failed to establish the value of the truck to be $695.00 at the time of conversion. Since its reasonable market value on August 31, 1967, was $150.00, we find no error in the trial court's finding that the fair market value was $231.47 at the time of conversion 91 days later. Crosby asserts that in addition to the fair market value, conversion damages include interest on that value and the trial court failed to include any interest. See Valley Chevrolet Co. v. Whitaker, supra. The trial court's conclusion, directed to the issue, has not been challenged. Accordingly, we decline to review the claim. See, § 21–2–1(15)(16)(e), N.M.S.A. 1953 (Repl. Vol. 4).

The trial court erred in applying $251.50 offset against Crosby's statutory damage under § 50A–9–507(1), supra.

The judgment in favor of Basin Motor Company is reversed. The cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

488 P.2d 337

Roy M. GILMAN and Ethel F. Gilman, husband and wife, et al., Plaintiffs-Appellants,

v.

Floyd POWERS and Mary Frances Powers, husband and wife, et al., Defendants-Appellees.

No. 9135.

Supreme Court of New Mexico.

Aug. 30, 1971.

Harry L. Patton, Clovis, for plaintiffs-appellants.

J. Fred Boone, Portales, for defendants-appellees.

OPINION

McMANUS, Justice.

Plaintiff instituted this action in the District Court of Roosevelt County. Several amended complaints followed. The essence of the action was a request for a declaratory judgment. The complaint was accompanied by an exhibit in the form of a survey of certain real estate in Roosevelt County and the plaintiffs asked the court to issue its declaratory judgment approving the survey plat and to affirm its correctness. Defendants' answer placed the problems at issue. After several hearings on the evidence the court issued a declaratory judgment which in effect denied the plaintiffs' requested relief. The court held that the boundaries of the respective tracts of land involved in the dispute were to be determined by existing fence lines or vestiges of fence lines. From this declaratory judgment the plaintiffs appeal.

The plaintiffs propose that there was a formal survey, following standards imposed by the United States Department of the Interior in the United States Bureau of Land Management's Manual, "Restoration of Lost or Obliterated Corners and Subdivisions of Sections * * * A Guide for Surveyors." United States Government Printing Office (1963). The claim is that the corners of the tracts involved herein were established by the survey and that the court is required to accept these surveyed boundaries as the true boundaries, even though the affected property owners have acquiesced in fence lines.

Plaintiffs-appellants lean heavily on their assertion that the court's findings of fact are inconsistent with the conclusions of law. The pertinent findings of the court are as follows:

"6. The original government survey of the township which includes the land involved in this action was performed in 1882, and only one of the original stones (at the southeast corner of said town-

ship) now can be located. Although the field notes of the original surveyor recite the placing of stone markers at each section corner and quarter-section corner in said township, there is no other evidence that such stones actually were set on the interior section and quarter-section lines thereof.

"7. Plaintiffs base their claim for declaratory relief on a private survey performed in April, 1968, by one Robert L. Lydick, which was tied to the stone marker at the southeast corner of the township and another stone found four miles north and one mile east of the Section 21 involved in this action, in the next township to the north of the one here involved, which stone appeared to have been placed by the original government surveyor. The Lydick survey also was tied into other private surveys made by Lydick in the township to the east of the one here involved and to a survey performed in said Section 21 in 1939, by one George W. Hawkins. The Lydick survey probably locates with reasonable accuracy the corners in question as they were or should have been located in the original survey, but due to inaccuracies in the original survey it is now impossible to locate with exactness the original corners of Section 21."

Conclusion of law No. 3 reads as follows:

"Since the true boundaries of the tracts involved herein have not been established, and since the parties and their predecessors in title have acquiesced in the existing fences, or vestiges thereof, as being their common boundaries for more than 30 years, a declaratory judgment should issue declaring said fences or fence lines to be the boundaries of said tracts, by acquiescence."

It appears that the original survey of this area was done in 1882 by government surveyors; another in 1939 by one Hawkins; still another by one Lydick in 1968. The last survey was made by surveyor Pendergraft in 1969. The court found from ample evidence that the 1882 survey was replete with errors and that the Pendergraft survey was not satisfactory due to a failure to conform with accepted rules. U. S. Bureau of Land Management's Manual, supra. However, the Pendergraft survey was at least valuable in pointing out errors and inaccuracies in the other surveys since the other two surveyors, Hawkins and Lydick, were not in complete agreement as to the true boundaries from the use of surveying methods.

All of the witnesses testified as to the existence of fences separating the tracts involved, or the vestiges of fences, along with other cultural aspects found in the area.

This Court has previously resolved boundary disputes; notably, in Woodburn v. Grimes, 58 N.M. 717, 275 P.2d 850 (1954). As in the case at bar, there was a dispute concerning what was the true boundary between the parties litigant. In Woodburn, supra, as here, surveyors appeared as witnesses for both sides and gave testimony pro and con as to the location of the boundary line. The court said, "Unquestionably, where uncertainty or dispute exists in this regard, a boundary line may be established by acquiescence," citing with approval the cases of Rodriguez v. La Cueva Ranch Co., 17 N.M. 246, 134 P. 228 (1912), and Murray Hotel Co. v. Golding, 54 N.M. 149, 216 P.2d 364 (1950), among others. In the Woodburn case, the Court also said:

"Interesting as this testimony is, we do not find it necessary to resolve the conflict. We rest our conclusion on the evidence as to the true location on the ground of the dividing line between the land of the contending parties."

In our case all parties agreed to the acquiescence theory. Based on the evidence there was more than ample support for the trial court's decision that the boundary line problem was resolved by acquiescence. Said evidence, in our opinion, was substantial. See Cave v. Cave, 81 N.M. 797, 474

P.2d 480 (1970). Reading the court's findings of fact and conclusions of law reveals no real inconsistency with his judgment.

Plaintiffs and defendants both object to the court's award of $876.50 to the witness Pendergraft. The court had ordered both sides to share this cost equally. All parties objected to the court's calling of this witness of its own motion, in the first instance. However, we feel it is within the sound discretion of the trial court to call such an expert witness to assist in shedding light on the issues in controversy where there are disputed facts. See Dinsel v. Pennsylvania Railroad Co., 144 F.Supp. 880 (D.C.Pa.1956). The expert witness, over the objections of all parties, was sworn and examined by the trial court and, at a later hearing, plaintiffs then cross-examined the witness with the trial court participating; whereas, the defendants declined cross-examination. Both plaintiffs and defendants protested the allowance of the sum to the expert witness. Their objection is well taken as to the amount of the fee. Section 20-1-4, subd. B, N.M.S.A. (Repl.Vol. 4, 1970) reads:

"The district judge in any case pending in the district court may order the payment of a reasonable fee, to be taxed as costs in addition to the witnesses fees provided for in subsection A, for any witness who qualifies as an expert and who testifies in the cause in person or by deposition. The additional compensation shall include a reasonable fee to compensate the witness for the time required in attendance and the necessary time required in preparation or investigation prior to the giving of the witness's testimony. The expert witness fee which may be allowed by the court shall be paid to only one [1] expert witness unless the court finds that the testimony of more than one expert was reasonably necessary to the prevailing party and the expert testimony was not cumulative. Provided that the total expert witness fees which may be allowed by the court to the prevailing party shall not exceed one hundred fifty dollars ($150)."

The decision of the trial court is hereby affirmed with the exception that the total expert witness fee is limited to $150.00 to be paid by the plaintiffs.

It is so ordered.

OMAN and MONTOYA, JJ., concur.

448 P.2d 339

DOANBUY LEASE AND CO., Inc., a corporation, Plaintiff-Appellant,

v.

Terrance MELCHER, individually and as Administrator of the Estate of Martin Melcher, Deceased et al., Defendants-Appellees.

No. 9215.

Supreme Court of New Mexico.

Aug. 30, 1971.

Losee & Carson, Artesia, for appellant.

Jennings, Christy & Copple, Roswell, for appellees.

OPINION

STEPHENSON, Justice.

The trial court dismissed these four consolidated actions purporting to act under and impose sanctions pursuant to Rule 37(d) of the Rules of Civil Procedure [§ 21-1-1(37) (d), N.M.S.A., 1953]. Plaintiff-appellant (Doanbuy) appeals. We affirm.

The actions were brought to foreclose operator's liens under an oil and gas operating agreement or alternatively to foreclose statutory operator's liens against the defendants-appellees (Melcher Interests) and, so far as we are here concerned, are identical. A number of similar suits between these parties pend in other states.

The issues center upon the conduct of Mr. Jerome B. Rosenthal at the taking of his deposition. There is no question but that he is president of Doanbuy, although the Melcher Interests failed to obtain any such admission from him upon oral depositions. Mr. Rosenthal is a Doctor of Laws, has practiced in Illinois and is in practice in California. His status as an attorney is a factor of considerable weight in our decision.

The Melcher Interests moved the court for an order permitting them to take the depositions of Mr. Rosenthal and another in California. After the usual procedures, Mr. Robert Winslow, attorney for the Melcher Interests, attempted to take the deposition of Mr. Rosenthal in Los Angeles. Various difficulties arose during the course of the California deposition of a nature that caused the trial judge to comment at the July 1, 1970 hearing as we shall see. The deposition was terminated when at the close of the first day Mr. Rosenthal indicated he would not return the next day.

The Melcher Interests moved that Doanbuy's complaint against them be dismissed pursuant to Rule 37(d) of the Rules of Civil Procedure and on other grounds not here material.

A hearing was had on the motion following which the court ordered, inter alia, "that Plaintiff should be given a further opportunity to remedy the matters upon which said Motions are based," that the deposition should be promptly taken in New Mexico and that the motion of the Melcher Interests would thereafter "come on further to be heard." The next day, the Melcher Interests gave notice of the taking of depositions of Doanbuy "by its president," Mr. Rosenthal, in Roswell, New Mexico. The fact that the deposition was of a party and not a mere witness is another significant factor.

Thereafter, Doanbuy moved, pursuant to Rule 30 of the Rules of Civil Procedure [§ 21-1-1(30), N.M.S.A.,1953] for a protective order quashing the notice of taking of depositions or in the alternative to enter its order limiting the scope of and time allowed for the deposition.

On July 1, 1970, a hearing was had on the motion. At the conclusion of the argument, the court made certain comments regarding the California deposition which we deem noteworthy and which are as follows:

"* * * [I]t is also very apparent to me in this deposition that Mr. Rosenthal

was not going to give any information of any kind to any of the purported facts of the lawsuit, and he would make answers, 'I don't know; if I ever knew, I have forgotten', repeatedly throughout this deposition. I have never seen a deposition of anybody given like this was given, particularly of a lawyer. Maybe they practice law like that in California, I don't know. But, we certainly don't here. And, I am still of the opinion that the defendants are entitled to depose this man who signed the pleadings as an officer, and from what I gather and from what little he did say in his deposition, he was president at the time he signed it. And, for him to sit there and say that he just doesn't know anything about anything; doesn't know who does know; but the defendant should know, I just can't feel that he truthfully and fully answered the proper questions. * * * But right from the start, Mr. Rosenthal apparently had a chip on his shoulder and was just not going to answer anything. * * *"

Judge Nash again ruled that Mr. Rosenthal must come to New Mexico, but that the depositions could last no more than two days. He appeared in Roswell before a reporter for two days. On the second day, Mr. Winslow on behalf of the Melcher Interests terminated the deposition.

Mr. Rosenthal's conduct at the deposition is somewhat difficult to describe. Certainly the trial judge's remarks which have been quoted apply in rich full measure, but somehow the Roswell deposition seems worse than the one taken in Los Angeles. The statements of Mr. Rosenthal consisted of evasions, expressions of hostility, insults, admonitions, objections, demands that counsel explain what bearing questions had upon the issues as prerequisites to answering, arguments and other similar responses. Pages are consumed by statements of inability to remember, which strain credulity to the breaking point, and with refusals to answer questions because of a claim that a question is pending that the witness cannot understand and will not permit to be withdrawn. These are merely examples.

In any case, the Melcher defendants renewed their motion to dismiss under Rule 37(d) on the grounds that Mr. Rosenthal had refused to appear and give his deposition, notwithstanding the court order. A hearing was had on the motion, at the conclusion of which the court said, in part:

"* * * I am convinced this man Rosenthal has refused to give a deposition and it appears he will continue to refuse to give one that will be of any assistance in helping clear up this matter. * * *"

The case was dismissed as to the Melcher Interests and it is from this order that Doanbuy appeals.

Doanbuy asserts that it was error for the court to have dismissed the case under Rule 37(d) since the witness appeared, was sworn and testified. It says the proper procedure would have been to file a motion under Rule 37(a), procure an order directing the witness to answer and, if upon another attempt to secure the testimony the order were disobeyed, make application for sanctions under Rule 37(b). Doanbuy relies on Independent Productions Corporation v. Loew's Incorporated, 283 F.2d 730 (2nd Cir. 1960) which does indeed support Doanbuy's position, as do a number of other cases in like vein.

Certainly, had the Melcher Interests so proceeded, their position would be clear, for such procedures are obviously contemplated by the Rules. We cannot say, however, that it was error for the trial court to proceed as it did under the peculiar facts of this case.

When a plaintiff in a civil action files a lawsuit, his adversaries are entitled to generally understand that he will proceed in a lawful manner and that compliance will be had with the Rules of Civil Procedure, including those relating to discovery.

In cases of this sort, depositions may go on for weeks or even months, involving substantial expense. The progress of cases

is hampered and delayed, the court dockets clogged and the beneficent purposes of discovery defeated by contumacious witnesses who refuse to be governed by the rules.

We are willing to assume that Mr. Rosenthal was well aware of his obligations and functions as a witness. If not, he was attended by competent counsel. A witness' function is a simple one—to answer questions. The telling of the truth, the whole truth and nothing but the truth is also highly regarded. It is not proper for a witness to evade, object, argue, engage in personalities and the like.

Doanbuy does not suggest what a further court hearing, direction to answer, or attempted deposition would have added to the overall picture. Certainly it had ample warning of the possible consequences of Mr. Rosenthal's behavior. The motion to dismiss because of conduct at the California depositions was hanging over its head. The trial court had repeatedly ordered the deposition taken, and had forcefully stated its views. How many times do Doanbuy and its president need be told to submit to depositions? We are much too concerned with the orderly and expeditious flow of cases through our trial courts to condone, even indirectly or by implication, Mr. Rosenthal's conduct. The courts of New Mexico have neither the time nor the inclination to indulge such querulous and petulant antics by civil litigants.

We are impressed with the reasoning of the court in Brady v. Hearst Corporation, 281 F.Supp. 637 (D.Mass., 1968) in which a strikingly similar fact situation was under consideration. That case involved a libel action. After notices of deposition were filed requiring plaintiff to appear and submit to an oral deposition, plaintiff refused to appear at the scheduled time. Defendants moved for a dismissal, but the court only directed that plaintiff appear again. What followed can best be described in the court's own words:

"An 83-page transcript of the abortive deposition of December 9 indicates that although plaintiff is a member of the bar she insisted on acting both as lawyer and witness at the deposition, despite the presence there of her associate counsel, and that in her dual capacity she refused to answer questions which were proper under Rule 26, Federal Rules of Civil Procedure, and reduced to a shambles all attempts by counsel for the defendants to take her deposition in an orderly and normal fashion. A reading of the transcript of this deposition indicates that what happened borders on the ludicrous. Having in mind that plaintiff as a member of the bar has at least as high an obligation as a lay witness to behave in an orderly and legal fashion, and to submit to orders of this Court relative to the taking of her pretrial deposition, I rule that her behavior on December 9 was tantamount to a refusal to submit to discovery, which forms an additional legally sufficient basis for the dismissal of this action."

We agree with the approach of the court in Brady and the views of the trial judge here that Mr. Rosenthal's conduct was tantamount to a refusal to appear. We fail to see how his physical presence added anything to the proceedings, nor why Doanbuy should be entitled to further directions or warnings. Since Mr. Rosenthal's conduct can only be equated with a refusal to appear, we hold that under the unusual facts of this case, Rule 37(d) is applicable and the court did not err in applying one of the sanctions permitted thereby.

Doanbuy makes the rather telling point that the Brady case stands alone. Indeed, this appears to be true, although other cases by implication support our ultimate decision. See Fong v. United States, 300 F.2d 400 (9th Cir., 1962); Bourne, Inc. v. Romero, 23 F.R.D. 292 (E.D.La., 1959); and Bourgeois v. El Paso Natural Gas Co., 20 F.R.D. 358 (S.D.N.Y., 1957), aff'd 257 F.2d 807 (2nd Cir., 1958). It stands alone no longer.

Finding no error, the trial court is affirmed.

It is so ordered.

McMANUS and OMAN, JJ., concur.

488 P.2d 343

The REGENTS OF the NEW MEXICO COLLEGE OF AGRICULTURE AND MECHANIC ARTS, a body corporate, Plaintiff-Appellee,

v.

ACADEMY OF AVIATION, INC., a New Mexico Corporation et al., Defendants-Appellees,

v.

BUREAU OF REVENUE of the State of New Mexico, Defendant-Appellant.

No. 9226.

Supreme Court of New Mexico.

Aug. 30, 1971.

Neil E. Weinbrenner, Las Cruces, for Theodore O. Ryan.

Darden & Sage, Las Cruces, for Regents.

Anthony F. Avallone, Las Cruces, for Academy of Aviation, Inc.

Johnnie M. Walters, Asst. Atty. Gen., Meyer Rothwacks, Crombie J. D. Garrett, Virginia M. Hopkinson, Attys., Tax Div., Dept. of Justice Washington, D. C.; Victor R. Ortega, U. S. Atty., Ruth C. Streeter, Asst. U. S. Atty., Albuquerque, for the United States.

David L. Norvell, Atty. Gen., Curtis W. Schwartz, Sp. Asst. Atty. Gen., Santa Fe, for defendant-appellant.

OPINION

COMPTON, Chief Justice.

The State of New Mexico appeals that portion of the judgment of the Dona Ana County District Court distributing monies originally owed by plaintiff to the defendant, Mesilla Valley Flying Service, Inc., and subsequently assigned by Mesilla to Academy of Aviation, Inc. The judgment awarded $500.00 to the Academy, $500.00 to Theodore O. Ryan, as assignee for benefit of creditors of defendant Mesilla, $353.64 to the State of New Mexico, and $3,813.65 to the United States of America.

The State claims priority by reason of its tax assessment against Mesilla. The United States claims priority by reason of a Federal tax lien filed against Academy. Ryan, the assignee for the benefit of creditors, claims priority due to an alleged failure by the State to properly perfect its lien against Mesilla, and priority over the United States because the assignment to Academy was void.

In this jurisdiction the transfer of substantially all assets of a corporation not in the normal course of business is governed by the Business Corporation Act—Sale of Assets, § 51–28–2, N.M.S.A.1953 (1969 Supp.). For a transfer to be valid certain requirements must be met. The board of directors must adopt a resolution recommending such transfer. Written notice must be given to each shareholder within a certain time period prior to the transfer. Shareholders must authorize the transfer by a two-thirds affirmative vote. It is evident that the board of directors of Mesilla did not meet these requirements. There was no notice to the shareholders, nor was there an affirmative two-thirds vote of the shareholders authorizing the transfer.

We find no cases in New Mexico on what effect failure to give notice to shareholders or have shareholders' approval for a transfer has on the validity of that transfer. However, the question has been considered by other courts.

Section 51–28–2, N.M.S.A.1953 (1969 Supp.) was derived, with slight modification, from the American Bar Association's Model Business Corporation Act, § 72 [now § 79]. The latter was adopted from § 157.-72, Chapter 32, Illinois Revised Statutes.

In 1938, the Seventh Circuit Court of Appeals, in In re Norcor Mfg. Co., 97 F.2d 208 (7th Cir. 1938), quoting from Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 45 N.E. 410 (1896), discussed the applicability of § 157.72 Ill.Rev.Stat. The court, at pages 212, 213, said:

> "'There are cases where it has been held essential to the validity of an instrument that the meeting at which it was authorized was called in accordance with the rules governing the relations between the corporation and its agents, but they have never been recognized as affecting strangers to the corporation in this state.
>
> "'* * * The courts of this state have always protected third parties dealing in good faith with corporations within the general scope of their powers.'"

A California court faced with interpreting Oregon Revised Statutes, § 57.711, noted that the Oregon statute was taken from the Model Business Corporation Act, § 72, which as stated above, was taken from Illinois statutes. That court, in McDermott v. Bear Film Co., 219 Cal.App.2d 607, 33 Cal.Rptr. 486, at page 490 (1963), said:

> "* * * In cases applying the Illinois provision before its enactment by Oregon, the courts have held that nonconsenting shareholders representing less than one-third of the stock may not set aside an executed transfer of corporate assets although the controlling interests in the corporation failed to send out notices of a shareholders' meeting to pass upon the transaction. * * *
>
> "* * * [that] in applying an Oregon statute drawn from a model act or statute of another state, the Oregon courts will accept it as judicially construed prior to Oregon's adoption of the law. * * *

"The cases applying the Illinois statute are consistent with the weight of American authority, which holds that failure to follow statutory formalities for obtaining shareholders' approval will not vitiate corporate transactions where in fact the requisite number of shareholders have consented; that such statutes are mandatory in requiring shareholders' consent, but only directory in specifying the procedure for obtaining consent; that a stranger dealing with the corporation in good faith is not put to the necessity of confirming the directors' compliance with internal notification procedures."

We think it implicit from the above cases that for a transfer to one other than a stranger to the corporation to be valid the statutory requirements must be strictly complied with. Here the directors and officers of Mesilla and Academy were the same persons with a recognized fiduciary duty owing to each corporation, thus not strangers to the corporation.

In Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 599, 41 S.Ct. 209, 65 L.Ed. 425 (1921), the United States Supreme Court said:

"The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation. * * *"

From the foregoing cases we adopt the following as the rule in transactions coming within the scope of § 51–28–2, N.M.S.A.1953 (1969 Supp.) A failure to adhere to statutory procedure will not invalidate a transaction with a stranger to a corporation where in fact the required two-thirds shares of the corporation entitled to vote have consented to the transaction. But, where as in this instance, the recipient of the corporate assets is not a stranger to the corporation, the statutory procedures must be strictly complied with.

The transaction in question from Mesilla to Academy was not to a stranger of the corporation, therefore, the procedures called for in the statute must have been strictly complied with. They were not. Pursuant to our interpretation of other jurisdictions' judicial construction of the pertinent statute and our promulgation of the above rule, we hold that the trial court erred in finding that the assignment from Mesilla to Academy valid. The transaction was void and the monies never passed to Academy.

Since the monies did not pass from Mesilla to Academy, the trial court erred in allowing Academy $500.00 exemption from those monies.

Internal Revenue Code of 1954, § 6321, provides that a tax lien attaches to all property and rights to property, whether real or personal, belonging to a person who refuses to pay a tax due after demand by the Internal Revenue Service. Since the transfer from Mesilla to Academy was void there was no property or rights to property subject to the lien of the United States. It follows that the United States should not participate in the distribution of the monies owed by the plaintiff.

In disposing of priorities between the assignee for the benefit of creditors and the State of New Mexico, we are governed by the Tax Administration Act, §§ 72–13–13 through 72–13–92, N.M.S.A.1953 (1969 Supp.).

An assessment of taxes is effective "when an effective jeopardy assessment is made as provided in the Tax Administration Act." Section 72–13–32(B) (3), N.M.S.A.1953 (1969 Supp.). Jeopardy assessments become liens on all property and rights to property of a person when that person neglects or refuses to pay the tax after it has been assessed. Section 72–13–51(A), N.M.S.A.1953 (1969 Supp.). We conclude that the jeopardy assessment issued by the State on October 16, 1968, pursuant to § 72–13–72, N.M.S.A.1953 (1969 Supp.), against Mesilla was an effective assessment. In addition, the assessment was a lien in favor of the State of New Mexico upon all property and rights to property

of Mesilla. According to § 72-13-32(C), N.M.S.A.1953 (1969 Supp.), an assessment made by the bureau is presumptively correct. This presumption may be overcome by showing that the Bureau of Revenue failed to follow the statutory provisions contained in the Tax Administration Act. We conclude that this presumption was not overcome, and that the State of New Mexico has a valid lien and is prior to the assignee for the benefit of creditors.

Defendant appellee, Ryan, contends that he as assignee for the benefit of creditors is entitled to $1,000.00 exemption of Mesilla's assets under § 72-13-50, N.M.S.A. 1953 (1969 Supp.). We agree.

The trial court erred in allowing the United States and Academy to participate in the distribution of the monies owed by the plaintiff. The judgment is reversed and remanded with direction to the trial court to enter a new judgment as follows: $1,000.00 to Theodore O. Ryan, as assignee for the benefit of creditors of Mesilla, and $4,167.29 to the State of New Mexico.

It is so ordered.

McMANUS and MONTOYA, JJ., concur.

488 P.2d 725

Master Sergeant John H. BAILEY and Marie A. Bailey, his wife, Plaintiffs-Appellees,

v.

Leandro BARRANCA and Leanor B. Barranca, his wife et al., Defendants-Appellants.

No. 9170.

Supreme Court of New Mexico.

June 30, 1971.

Rehearing Denied Aug. 2, 1971.

Roy F. Miller, Jr., Robert E. Melton, Albuquerque, for defendants-appellants.

William C. Bowers, Albuquerque, for plaintiffs-appellees.

OPINION

STEPHENSON, Justice.

Defendants-appellants Perea (Perea) appeal from an adverse judgment in an ejectment action brought by plaintiffs-appellees (Bailey).

This case has a rather complex and tangled factual, administrative and legal history which can best be stated in chronological order.

Mr. Bailey joined the army reserve in 1931 and in 1942 was called to active duty. He made the army his career, during the course of which he was for a time stationed in Albuquerque. He acquired a residence there in 1953 as to which there have been no problems in regard to taxes. He regularly claimed his veteran's exemption.

In December, 1955, twenty-four years after joining the reserve and thirteen years after going on active duty, he contracted to purchase the property involved in this action (the property) from Rollie L. Smith. The contract required monthly payments and provided in part:

> "Purchaser agrees to assess said real estate, for taxation to himself for the year 1956 and thereafter; pay all taxes * * * that may hereafter be levied or ordered by lawful authority and which would in the event of failure so to do create a charge against the real estate."

Various other provisions relate to taxes and procedures and consequences in event of non-payment. So far as appears, the deed remains in escrow and Mr. Smith still holds legal title.

Bailey paid taxes for 1957 and 1959, the former as a result of a notice from the county treasurer received January 8, 1959 that the property was to be sold. No explanation appears as to the circumstances of the other payment. No other tax payments were made on the property until after a mandamus action we will mention presently.

In January, 1962 and January, 1966 the property was deeded to the state for non-payment of 1958 and 1962 property taxes respectively.

Mr. Bailey was discharged from the army on August 31, 1966 and remained in the state of Washington.

The tax commission, after dispatching to Bailey the notices required by § 72-8-30, N.M.S.A., 1953 (which were not received by the addressee) sold the property at public auction to Perea on May 26, 1967, and executed and delivered a deed to him dated June 14, 1967. Perea went into possession and on September 15, 1967, Mr. and Mrs. Perea contracted to sell the property to Mr. and Mrs. Barranca (Barranca), who immediately went into possession and who, incidentally, have not filed briefs in this appeal. The record indicates Barranca had no notice of Bailey's claim until later.

According to Bailey, various letters were written to the county treasurer inquiring about taxes on the property, all of which were unanswered and none of which were on file in the treasurer's office. Bailey knew the property was subject to tax and sale for non-payment thereof at least as early as January, 1959, when the 1957 taxes were paid. Notwithstanding the entirely unsatisfactory procedure of writing the county treasurer and Mr. and Mrs. Bailey's presence in Albuquerque for several days in 1962 or 1963, no effective action looking toward the payment of taxes such as rendering assessments, making telephone calls, utilizing friends, business or banking connections or consulting counsel was taken by Bailey until after he learned, in early June, 1967, of the sale of the property by the state to Perea.

Knowledge of the sale stimulated Bailey to vigorous activity. He employed counsel and went to Santa Fe "to try to redeem" the property. The nature of these efforts is not clear and it may be doubted that compliance with § 72-8-32, N.M.S.A., 1953 was had. Bailey thereafter successfully prosecuted a mandamus proceeding in Santa Fe County against the State Tax Commission. For some odd reason, neither Perea nor Barranca were made parties, from which it logically follows that their rights could not have been effected. In any case, as a result of the mandamus proceeding, which was not appealed, the tax commission issued a tax deed to Bailey on September 3, 1968, with the anomalous and unlikely result that as matters now stand, there are two tax deeds from the commission outstanding, one to Perea and one to Bailey. To add to the overall confusion, it is to be recalled that the deed from Mr. Smith to Bailey is undelivered.

Thereafter this action was filed. It is in ejectment, although it seeks other relief. No question was raised as to this however. Perea counterclaimed to quiet their title. Such a counterclaim is proper in an ejectment action. Martinez v. Mundy, 61 N.M. 87, 295 P.2d 209 (1956).

Mr. Smith, on Pereas' motion, was ordered made a party, obviously to defend against Pereas' counterclaim. He was served but defaulted. Perea asserts judgment should have been entered against him by default.

The trial court simply refused all of Pereas' requested findings (although to a considerable extent based upon undisputed evidence on Bailey's testimony), adopted all of Bailey's and entered judgment for Bailey, decreeing their ownership of the property and granting them possession. This appeal followed.

A review of New Mexico statutes pertaining to assessment and collection of taxes demonstrates that the ultimate responsibility for payment rests upon the property owner. The property owner is required to make a declaration of all prop-

erty subject to taxation annually. Section 72-2-3, N.M.S.A., 1953 (1969 Supp.). A delinquent taxpayer is bound to know that taxes on his land have not been paid. N. H. Ranch Co. v. Gann, 42 N.M. 530, 82 P.2d 632 (1938). Bailey did not receive the notices required by § 72-8-30, supra, to be mailed to him by the tax commission at least thirty days prior to the actual sale. However, such notice was mailed and it is specifically provided in the statute cited that the fact that the notice was not delivered to the addressee shall not affect the validity of any subsequent sale.

The New Mexico legislature, and the courts as well, have gone far towards attempting to clothe tax titles with a measure of certainty and security. It is held that a tax title is in the nature of a new and independent grant from the sovereign authority, and is a new and paramount title in fee simple absolute, striking down all previous titles and interests in the property. Alamogordo Improvement Co. v. Hennessee, 40 N.M. 162, 56 P.2d 1127 (1936). Section 72-8-20, N.M.S.A., 1953 has been referred to in our cases as being a "curative" statute that stringently limits the grounds upon which a successful attack upon a tax deed issued by the state may be made. Section 72-8-21, N.M.S.A., 1953 limits the time for bringing such action. The facts of this case do not fall within any of the statutory grounds. In his brief, Bailey speaks much of the failure to receive notices from the county treasurer, but under provisions of the curative statute, this court has held that failure of a county treasurer to send notice that property has been sold for taxes was a mere irregularity. Brown v. Gurley, 58 N.M. 153, 267 P.2d 134 (1954); Hood v. Bond, 42 N.M. 295, 77 P.2d 180 (1938). A tax sale will not be invalidated under the curative act for failure to give or of the taxpayer to receive notice of taxes due or that redemption time is about to expire. Lawson v. McKinney, 54 N.M. 179, 217 P.2d 258 (1950). The very purpose of the curative statute is to stabilize and render tax sales efficient, to collect delinquent taxes and confer on the purchasers something of substance. Taylor v. Shaw, 48 N.M. 395, 151 P.2d 743 (1944); Aragon v. Empire Gold Mining & Milling Co., 47 N.M. 299, 142 P.2d 539 (1943).

Similarly, § 72-8-28, N.M.S.A., 1953, giving the State Tax Commission power and authority to administer such property as we are concerned with and providing that conveyances of such property shall be valid for the purpose therein expressed, and § 72-8-43, N.M.S.A., 1953, clothing deeds executed by the State Tax Commission with prima facie evidence of validity, have caused this court to observe that "their obvious purpose is to give a measure of certainty and security to tax titles." First National Bank in Albuquerque v. State, 77 N.M. 695, 427 P.2d 225 (1967).

The efforts of the legislature and the courts to clothe tax titles with stature, security and validity have been for valid social and economic purposes. First, and most obviously, were such not the case, the state would be deprived of a significant source of revenue. Who would purchase such titles and how much would they pay were they not safe? Perhaps more important, owners of land purchased from the State Tax Commission by themselves or their predecessors in title would fear to develop or improve such property, or devote it to its highest and best economic use if such titles were not secure.

In the case at bar, Bailey could scarcely gain entree to the courthouse were it not for the provisions of § 525 of the Soldiers' and Sailors' Civil Relief Act, as amended on October 6, 1942 (50 U.S.C.A.App. § 525), upon which he must place his sole reliance. That statute provides:

"§ 525. Statutes of limitations as affected by period of service. The period of military service shall not be included in computing any period now or hereafter to be limited by any law * * * nor shall any part of such period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 [Oct. 6, 1942] be included in computing any period now or

hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax or assessment.

"Oct. 17, 1940, c. 888, § 205, 54 Stat. 1181; Oct. 6, 1942, c. 581, § 5, 56 Stat. 770."

Mr. Bailey's contention, distilled to its essence, is that regardless of all other factual and legal considerations, by virtue of the quoted statute, he must automatically prevail. If his position be meritorious, it would mean that a career service person could buy real estate, ignore and disregard his tax responsibilities for perhaps thirty years and then at his leisure during the redemption period following discharge, reclaim the property.

The effect of any such holding on tax titles is readily apparent. Nothing would normally appear in the county clerk's records indicating the military status of the person whose title was extinguished by the deed to the state. If a tax title were offered or appeared in the chain of title, a prospective purchaser or encumbrancer would be required at his peril to make inquiry from matters dehors the county records whether or not the person whose title was extinguished was then in service and, if so, whether he still was; if not, the date of his discharge, etc.

A grave situation would be thereby created. We need look no further than northern New Mexico for an example. The failure of the area to develop economically is doubtless due to various factors, but certainly one of the principal causes is the prevailing imperfection of land titles with the attending dampening effect on values, sales prices and the availability of credit where land is offered as security.

We cannot close our eyes to such matters and are unwilling to attribute to the Congress any intention that the Soldiers' and Sailors' Civil Relief Act should have any such strange, unsettling and deleterious effect, or to create a separate and favored class of career service people for no particular reason.

The act upon which Bailey relies was passed at a time of declared war when millions of young men had been required, or were about to be required, to drop their civilian affairs and enter service. The Congress had a natural and proper concern for the civil affairs of such persons. This is demonstrated by the legislative history of the act. Volume 88, Part 4, Congressional Record, 77th Congress, shows that substantial debate was had in both the House and Senate before the bill received final passage. At 5363, Representative John Sparkman stated:

"* * * That original act became law on October 17, 1940. Conditions have greatly changed since that original act was passed. At that time we were considering calling in an army of 900,000 men for the purpose of giving them 1 year's training. The maximum time that we thought they would be away from home at that time was 1 year. Today we are counting the Army in millions. We are at war. We are not calling these men simply for the purpose of training, but we are calling them for the duration of the emergency and no one knows how long that may be."

This statement indicates that Congress was cognizant of the distinction between newcomers and career men and was concerned with hardship.

At 5368–5369, Representative Overton Brooks reiterated the hardship requirement:

"The people back home feel, and this Congress feels, that the Nation's defenders should not be compelled to fight a battle on two fronts at once—one back home and the other on the firing line facing the enemies of democracy. We feel that the normal obligations of the man contracted prior to service induction should be suspended as far as practicable during this tour of duty, and that the soldier should be protected from default in his obligations due to his inability to pay caused by reduction in income due to service."

The House Report on the Bill, No. 181, states in part:

"But in any case a rigid stay of all actions against the soldier is too broad. There are many men now in the Army who can and should pay their obligations in full. * * * This mere fact of being in military service is not enough; military service must be the reason for the defendant not meeting his obligations."

Such hardship and prejudice is the very basis of judicial decisions upon which Bailey relies. For example, in Boone v. Lightner, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed. 1587 (1943), the court construes the act in question and quotes from the House Judicial Committee Report as we have just done. In the body of the opinion, Mr. Justice Jackson states (at 319 U.S. 575, 63 S. Ct. 1231):

"The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. * * *"

Bailey places principal reliance upon Le Maistre v. Leffers, 333 U.S. 1, 68 S.Ct. 371, 92 L.Ed. 429 (1947) and it is true that the case contains language favorable to him, although the facts differed considerably. But even there, the aspect of hardship and prejudice played its part. The court said:

"* * * the Act must be read with an eye friendly to those who dropped their affairs to answer their country's call."

This description does not fit Bailey, of whom it might be said that he dropped his affairs upon his retirement from the service.

A study of the act shows that the moving force in its enactment was a condition of national emergency and attendant concern for the civil hardship and prejudice which might result to those called upon to deal with it. It was enacted

"In order to provide for * * * the national defense under the *emergent* conditions which are threatening the peace and security of the United States. * * *" § 510. (Emphasis supplied.)

Prejudice by reason of military service must be shown to reopen a default judgment (§ 520(4)). A stay of proceedings may be granted in the discretion of the court if it has been convinced that the serviceman's ability to participate in a lawsuit is "materially affected by reason of his military service." (§ 521). Hardship is a factor in those sections dealing with fines and penalties on contracts (§ 522), stays of executions of judgments and attachments (§ 523), maximum rates of interest (§ 526) and installment contracts for the purchase of property (§ 531). The act is bottomed on a concern for prejudice and hardship.

Nearly three decades have passed since the amendment to the act and nearly twenty-five years since Le Maistre. What was a reasonable construction then is not necessarily reasonable now.

The reasoning in King v. Zagorski, 207 So.2d 61 (Fla.App.1968) seems to us most sound, particularly in light of present conditions, based on facts substantially identical to those which confront us, and construing the same section of the act upon which Bailey relies.

We deem the following quotations from King, relating as they do to an identical fact situation, as being particularly apt:

"We do not believe the Civil Relief Act was designed to cover such situation. It could hardly have been intended to completely exempt a career service man owning property, who is knowledgeable about his tax obligations and is in no way handicapped because of military status, from paying the usual taxes assessed on his property. * * * He made no contention that he was under any economic stress or that he was physically handicapped or that he was personally removed from the area. He made no contention that he was in any manner whatsoever prejudiced in paying his taxes by being in the service.

"Basically and in laymen's language, the Civil Relief Act was designed to protect, from harassment and injury in connec-

tion with their civil affairs, those who, usually in a state of current or impending military emergency, find themselves torn from their normal business activities back home, and, in military raiment, en route to some far off place such as Bastogna or Dak To or plain Hill 618 to do battle for their country. It was not aimed primarily as protection for the career military man; certainly it was not reasonably intended to provide a cloak of immunity to a property owner who, even though in military service, was in no way disadvantaged from the ordinary civilian in payment of his normal ad valorem taxes for the upkeep of government. We find no reported case wherein the Civil Relief Act has been sought to be applied to a state of facts such as exists here.

"* * *

"Two conclusions irresistibly arise from a consideration of these provisions [of the Act]: (1) that the Act was aimed mainly to protect the newcomer inducted into the military service, and (2) that the Act is bottomed upon the premise of 'hardship.'

"* * *

"Zagorski purchased the land some sixteen years after he entered military service. He made no claim to ignorance of the Florida laws as to payment of taxes or the consequences of nonpayment. He was under no handicap because of military service.

"To permit a tax delinquent to finally redeem under such circumstances would be tantamount to giving a license to a career service man to acquire real property and then with impunity refuse to pay taxes thereon for so long as he should elect to remain in service, plus six months thereafter; while casually weighing whether his investment was worthwhile. At most, he would risk only a nominal per cent on the unpaid taxes if he finally chose to redeem after separating from the service. Such interpretation would give the career man an unwarranted weapon not intended by the Act. * * *"

It follows that the judgment must be reversed. The trial court is directed to set its judgment aside and enter judgment for Mr. and Mrs. Perea as prayed in their counterclaim quieting their title against Mr. and Mrs. Bailey and Mr. Smith.

It is so ordered.

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

488 P.2d 730

HOLIDAY MANAGEMENT COMPANY, a partnership, Plaintiff-Appellee,

v.

The CITY OF SANTA FE, a Municipal Corporation et al., Defendants-Appellants.

No. 9095.

Supreme Court of New Mexico.

Aug. 30, 1971.

John F. McCarthy, Jr., Sumner S. Koch, Santa Fe, for defendants-appellants.

George A. Graham, Jr., Truth or Consequences, for plaintiff-appellee.

OPINION

STEPHENSON, Justice.

Defendant-appellant ("City") has appealed from the issuance of an injunction which prohibited it from enforcing its zoning ordinances as they applied to a nonconforming Holiday Inn sign.

Neither plaintiff-appellee ("the partnership") nor its predecessor in interest owned the sign. Rather, both were lessees of the sign which was owned by Holiday Inns of America, Inc. ("the corporation") which was not a party.

The parties stipulated that the real estate where the partnership's motel is located was formerly owned by D & L Motels, a partnership, which constructed the motel building in 1961; that the sign in question was erected about December, 1961, complying with all then-existing ordinances; that D & L entered into a License (hereinafter called "franchise") Agreement with Holiday Inns Corporation on May 24, 1961, and a "Lease for Holiday Inn Sign" ("the first sign lease") with the corporation on June 20, 1961; that the first ordinance affecting the sign was No. 1963–19, adopted November 4, 1963, followed by the less restrictive ordinance, No. 1964–20, passed on August 26, 1964; that early in 1968 D & L Motels conveyed the motel real estate to the partnership and that the corporation about the same time issued a franchise and a sign lease ("the second sign lease") to the partnership; that under its respective sign agreements with D & L Motels and with the partnership, the corporation retained title to the sign; that on July 30, 1969, the City enacted ordinance No. 1969–18 amending the 1964 sign ordinance; that the partnership's motel is located in a C–2 (General Commercial) zoning district; and that the only claimed violation is that the face area of the sign in question exceeds that permitted by ordinances Nos. 1964–20 and 1969–18.

Under both sign leases, the sign was and remained the personal property of the corporation and was precluded from becoming a fixture or appurtenance to the real estate.

There is no question but that the sign violates all of the applicable ordinances, and we are thus not concerned that one of them, less restrictive in its effect, was adopted after the partnership's entry upon the scene. The sole issue is whether the City is free to enforce the material ordinances.

The primary position of the partnership is summarized in its answer brief as follows:

> "The rights of the Plaintiff, we contend, were determined prior to the enactment of any zoning ordinances by the City of Santa Fe which would require the removal of the sign. To now cause the Plaintiff to move the sign would be to deprive it of a pre-existing right and

deprive it of its property without paying just compensation therefor, it would impair the obligation of the pre-existing contract providing the maintenance of the sign and it will deprive Plaintiff of its property without due process of law, all because the ordinance passed by the City of Santa Fe would operate retrospectively and change the legal consequences of the prior acts of the Plaintiff herein."

It is obvious that if the partnership cannot project its rights in the sign or sign lease back in time so that the rights antedate the enactment of the material ordinance, its position must fail. This is an endeavor attended with some difficulty.

The partnership asserts that it has title to the land upon which the sign is emplaced; that it acquired its rights in the sign as "part and parcel" of the same transaction by which it acquired the motel, and that the sign and the motel building are "one entity." These factual assertions, in most instances, find support in the trial court's findings. But they lack legal significance in that they do not bring into play any legal principle which causes the partnership's rights in the sign or sign lease to antedate the sign ordinance. At least no such operative legal principle is suggested to us.

The partnership places its principal reliance upon an assertion that the second sign lease was a "re-issue" of the first. The record shows that the partnership's predecessor and the corporation entered into a "Lease For Holiday Inn Sign" in 1961. The first sign lease provides that in event the business or a material part thereof should be voluntarily or involuntarily transferred, all rights and interests of the predecessor (D & L Motels) in the sign should terminate. The corporation and the partnership entered into a "Maintenance Lease For Holiday Inn Great Sign" on April 4, 1968. Typed upon this second sign lease are the words "Reissued to new owners 1/29/68." Nothing in the transcript explains this notation. The parties stipulated that the first sign lease was reissued to the partnership and the trial court so found. No document or writing purports to transfer the first sign lease or any interest therein or in the sign to the partnership. To the contrary, the second sign lease is a completely separate document. It does not purport to cause the partnership to succeed to the rights of its predecessor in the sign or in the first sign lease, and in fact is executed on a different form. The City points out numerous differences in the documents, some of which are minor, but others of which are of some significance.

Thus, in view of what we have said of other contentions of the partnership, its theory that its rights in the sign or sign lease antedate the ordinance depends upon the meaning to be attributed to the word "reissue."

"Reissue" is not a word of precise legal meaning. Words and Phrases, Permanent Edition, indicates that it has not been judicially defined except as a word of technical meaning in the field of patents. It is not listed in Black's Law Dictionary, Revised Fourth Edition. Webster's Third New International Dictionary defines the noun and verb forms, so far as here pertinent, as follows:

> "reissue—n. A second or repeated issue (as of a publication) with change only in price or form. * * *"
>
> "re-issue—vb: To come forth again; * * * vt: to issue again; esp: to cause to appear or become available after a period of absence or unavailability."

In our view, the word "reissue" itself refutes the concept of uninterrupted continuity essential to the partnership's theory. This is borne out by the dictionary definition. If the first sign lease had continued, uninterrupted, there would have been no occasion for a second or repeated issue. It would not have come forth again or appeared or become available after an absence. These considerations, coupled with the lack of any transfer of rights in the sign or first sign lease to the partnership, the termination provisions of the first sign

lease in event of transfer, and the differences between the two sign leases, impel us to hold that the partnership's rights did not vest prior to the passage of the ordinance, and make consideration of the various authorities cited by it unnecessary.

The basis for the trial court's making the injunction permanent was a determination that the sign ordinance was unconstitutional. In the second point of the parties' briefs, the City claims that the court erred in this regard and the partnership with equal vigor asserts that it did not. The background to this issue is that the ordinance in question—so far as it affected non-conforming signs which existed at the time of its adoption—provided for compliance within five years by either removal or alteration. The trial court in its decision found, inter alia, that the economic life of the sign was thirty to forty years; that it was not a health, safety or moral hazard and did not adversely affect the general welfare; that the five-year toleration period was arbitrary, and that enforcement of the ordinance requiring the sign's removal would result in the taking of private property for public use without compensation.

No doubt in order to relate its views to the partnership, the court also concluded that the partnership, as successor in interest to its predecessor, was entitled to any rights its predecessor had, and, as we have said, that the sign lease had been reissued. We have previously pointed out the fallacy of this. It further concluded that the right to display the sign in its existing form became vested in the partnership's predecessor prior to the enactment of the sign ordinance and that the ordinance was invalid as to the partnership, another concept with which we have not agreed.

Had the partnership's predecessor continued as lessee of the sign from the time of the first sign lease until the time of trial, different questions would have been presented. Similarly, had the corporation been a party, since it was the owner of the sign prior to the enactment of the ordinance and continued as such to the time of judgment, it could doubtless raise the contentions advanced by the partnership. The validity of the partnership's legal contentions is doubtful, however, no matter who may advance them, not only as to the police powers of a municipality in general, (Barber's Super Markets, Inc. v. City of Grants, 80 N.M. 533, 458 P.2d 785 (1969); Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1941)) but also as to its specific power to impose reasonable controls for aesthetic purposes (Cromwell v. Ferrier, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1967); State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967); cf. City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964)).

However, in view of our decision that no rights regarding the sign vested in the partnership until long after the ordinance was enacted and any material amendments adopted, the standing of the partnership to raise these questions below is drawn sharply into question.

The entire thrust of the partnership's argument that the statute, as applied to it, is unconstitutional by reason of the toleration period being arbitrarily short, is predicated upon its rights in the sign having been in existence at the time of passage of the ordinance. It acknowledges the validity of those reasonable zoning ordinances which are prospective rather than retrospective in nature. The authorities cited by it deal with retrospective ordinances. Here, the reverse is true, since the ordinance antedates the acquisition of rights in the sign by the partnership. The partnership was charged with knowledge of the ordinance and, in point of fact, the managing partner of the partnership was informed of and aware of the sign ordinance before the partnership acquired the motel. It knowingly acquired rights in a then non-conforming use. It should not now be heard to complain that such action has not worked to its advantage. The passage of the ordinance and the commencement of the running of the toleration period, which incidentally was extended by

one of the amendments, thus did not affect any existing rights of the partnership.

We hold that under the facts of this case and the construction we have placed upon them, the partnership lacked standing to procure the injunction, and that it was improvidently issued.

The case is reversed, with instructions to dissolve the injunction and enter judgment for the City.

It is so ordered.

McMANUS and OMAN, JJ., concur.

488 P.2d 734

Marie Anne BROWN, Plaintiff-Appellant,

v.

NEW MEXICO STATE BOARD OF EDUCATION and Board of Education of the Jemez Mountain Independent School District No. 53, Defendants-Appellees.

No. 9197.

Supreme Court of New Mexico.

Sept. 13, 1971.

Dale B. Dilts, Albuquerque, for plaintiff-appellant.

David L. Norvell, Atty. Gen., E. P. Ripley, Sp. Asst. Atty. Gen., Solomon & Roth, Santa Fe, for defendants-appellees.

OPINION

OMAN, Justice.

This case has already been before this court twice on appeal and once before the Court of Appeals. Brown v. Romero, 77 N.M. 547, 425 P.2d 310 (1967); State ex rel. Brown v. Hatley, 80 N.M. 24, 450 P.2d 624 (1969); Brown v. Board of Ed., 81 N.M. 460, 468 P.2d 431 (Ct.App.1970). It is now before us for the third time on an appeal from an order of the district court dismissing an attempted appeal by plaintiff to that court, and to which attempted appeal reference is made in Brown v. Board of Ed., supra. We affirm.

As stated in Brown v. Board of Ed., supra, plaintiff undertook to appeal from a decision of the Board of Education of the State of New Mexico, hereinafter called State Board, affirming a decision adverse to her entered by the Board of Education of the Jemez Mountain Independent School Dist. No. 53, hereinafter called Local Board. In order to avoid the possibility of later finding she had appealed to the wrong court, she undertook to perfect her appeal in the Court of Appeals pursuant to § 77-8-17(F), N.M.S.A.1953 (Repl.Vol. 11, pt. 1, 1968), which became effective July 1, 1967, and also in the district court pursuant to the provisions of § 73-12-13, N.M.S.A.1953, as amended by Ch. 71 of the Laws of 1955, which was repealed in 1967. The portion of this repealed statute material to the present appeal provided:

> "* * * Any teacher or governing board aggrieved by decision of the State board may appeal to the district court, at which time a trial de novo of all matters of law and fact shall be had."

The decision of the State Board from which plaintiff sought an appeal to the district court was entered on August 5, 1969. In her effort to perfect her appeal to the district court, she filed a complaint, as plaintiff, against the State Board, as defendant, in the district court on August 29, 1969. The Local Board was not named as a party to this action and no summons was served upon it. On January 19, 1970, plaintiff's attorney filed a "Certificate of Service" showing he "* * * delivered a copy of the Complaint and Summons filed herein to the office of opposing counsel of record on September 4, 1969." There is no showing as to who these counsel were or that any of them represented the Local Board. However, the attorney for the Local Board admits a copy of the complaint was delivered to his office, but asserts, without contradiction, that he told plaintiff's attorney at the time that he "* * * did not necessarily represent the [Local Board] and in fact since the [Local Board] was not named as a party it was not possible to accept service for them in any event."

The defendant, the State Board, filed a motion to dismiss the complaint on September 3, 1969 on the ground that exclusive jurisdiction to review decisions of the State Board now rests in the New Mexico Court of Appeals.

On September 25, 1969, plaintiff filed her First Amended Complaint in which she named the Local Board as a defendant. There is no showing of service of this First Amended Complaint on the Local Board. On October 24, 1969, the Local Board entered a "Special Appearance to

Challenge Jurisdiction," whereby it sought a dismissal of the First Amended Complaint as against it on the ground that the same had not been timely filed. After a hearing on this jurisdictional challenge the district court entered the order of dismissal from which plaintiff has taken this appeal.

In Board of Ed., Penasco Ind. Sch. Dist. No. 4 v. Rodriguez, 77 N.M. 309, 422 P.2d 351 (1966) we held that a reasonable time within which to perfect an appeal to the district court under § 73–12–13, supra, was thirty days, which is the time for perfecting appeals under Supreme Court Rule 5(1) [§ 21–2–1(5) (1), N.M.S.A.1953 (Repl.Vol. 4, 1970)]. We also held a failure to perfect a timely appeal to the district court is jurisdictional.

Thus, unless the Local Board can be said to have been a party to the appellate proceeding in the district court initiated by the filing of the original complaint on August 29, 1969, in which the Local Board was not named as a party, the appeal as to the Local Board was untimely and the district court correctly held it lacked jurisdiction.

Plaintiff first contends the decision of the Court of Appeals in Brown v. Board of Ed., supra, is contrary to that of the district court and is controlling. A reading of the decision in that case clearly shows the question of timeliness of the filing of the appeal [complaint] in the district court was in no way involved. In fact, it could not have been involved in that case, which was an attempt to appeal directly to the Court of Appeals from the decision of the State Board.

In the original "Notice of Appeal" filed by plaintiff in the Court of Appeals, the State Board was named as appellee. Subsequently, an "Amended Notice of Appeal" was filed in that court in which the Local Board was named as an appellee. The Local Board sought by motion to have that appeal dismissed as to it on the ground that the appeal as to it had not been timely filed. This motion was denied without opinion, and the appeal was heard, considered and dismissed because of lack of jurisdiction over the subject matter of the case for the reasons stated in the opinion. Nothing said in the opinion can reasonably be construed as holding the Local Board had properly been made a party to that appeal by the filing of the Amended Notice of Appeal. In any event, the question now before us was not presented and could not have been presented or considered by the Court of Appeals.

Plaintiff next contends: "The companion case in the Court of Appeals extended the time in which this case could be filed in the District Court." The argument is that the case was before the Court of Appeals until the filing of its decision on April 3, 1970 in Brown v. Board of Ed., supra, and, upon the authority of Roberson v. Board of Education of City of Santa Fe, 78 N.M. 297, 430 P.2d 868 (1967), the filing of an appeal in the district court was not required until after the Court of Appeals had disposed of the case. Thus, she urges the filing of the Amended Complaint on September 25, 1969 was timely.

The opinion in the *Roberson* case does not support plaintiff's position. That case did not involve an appeal nor a jurisdictional time limit within which to take an appeal, but rather a writ of certiorari and the question of laches.

Plaintiff next contends: "Jurisdiction is derived from filing an appeal in the District Court within a reasonable time and serving notice upon opposing counsel of such appeal." Her argument is that the filing of the complaint on August 29, 1969, and the delivery of a copy thereof to the attorney for the Local Board on September 4, 1969, perfected the appeal, and the subsequent filing of the amended complaint, by which the Local Board was first named as a party "only clarified the record."

Her argument consists of brief statements to the following effect: (1) she followed the method for filing a civil action as prescribed by § 21–1–1(3), N.M.S.A. 1953 (Repl.Vol. 4, 1970); (2) a civil action

is commenced by the filing of a complaint; (3) she was only required to take her appeal within a reasonable time (Board of Ed., Penasco Ind. Sch. Dist. No. 4 v. Rodriguez, supra); (4) the filing of the complaint and service of a copy thereof on counsel for the Local Board conferred jurisdiction in the court over the Local Board; (5) misjoinder of parties is not ground for a dismissal of an action [§ 21-1-1(21), N.M.S.A.1953 (Repl.Vol. 4, 1970)]; and (6) parties may be dropped or added at any stage of the action on such terms as are just [§ 21-1-1(21), supra; § 21-2-1(8), N.M.S.A.1953 (Repl.Vol. 4, 1970)].

Her argument is faulty both in the analogies implied therein, and, in some particulars, in the conclusions she suggests must follow therefrom. She was required to take her appeal within a reasonable time, and thirty days has been held to be a reasonable time. Board of Ed., Penasco Ind. Sch. Dist. No. 4 v. Rodriguez, supra; Roberson v. Board of Education of City of Santa Fe, supra. A misjoinder of parties is not involved. An essential or necessary party to an appeal may not be added after the time allowed for appeal has expired. Clark v. Rosenwald, et al., 30 N.M. 175, 230 P. 378 (1924); compare Martz v. Miller Brothers Company, 244 F.Supp. 246 (D.Del.1965); Annot., 8 A.L.R.2d 6 at 112 (1949).

Plaintiff's final contention is that the "Failure to name the [Local Board] as a Defendant was not fatal to the appeal to the District Court." She relies upon the principle that notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant intends and appellee has not been misled or prejudiced. Spurlin v. Paul Brown Agency, Inc., 80 N.M. 306, 454 P.2d 963 (1969).

To extend this principle to this case and thereby hold the Local Board to be a party to this appeal, when it was not even named as a party thereto until the amended complaint was filed some 26 days after the time for appeal had expired, would be to disregard the principle underlying our many decisions that appellate jurisdiction depends upon the timely filing of the appeal, and would constitute an overruling of our decision in Clark v. Rosenwald, et al., supra.

In our opinion the trial court properly entered the order of dismissal, and this order should be affirmed.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

488 P.2d 1207

STATE of New Mexico, ex rel. Alean ELLIS and Jeanine Caruso, on behalf of themselves and all others similarly situated, Petitioners-Appellees,

v.

Richard W. HEIM, Director of the New Mexico Department of Health and Social Services et al., Respondents-Appellants.

No. 9272.

Supreme Court of New Mexico.

Sept. 20, 1971.

David L. Norvell, Atty. Gen., Julia C. Southerland, Robert J. Laughlin, Sp. Asst. Attys. Gen., Santa Fe, for respondents-appellants.

Earl Wylie Potter, Santa Fe, Michael B. Browde, Albuquerque, for petitioners-appellees.

OPINION

COMPTON, Chief Justice.

This is an appeal from a judgment enjoining the New Mexico Department of Health and Social Services from reducing the percentage of unmet need paid by that department to recipients of Aid for Families with Dependent Children, from 90% to 88%. We reverse.

The New Mexico legislature delegated to the Department of Health and Social Services the authority to make rules and regulations governing the dispersing of funds, § 13-1-10, N.M.S.A.1953. Pursuant to this authority, the Department amended its regulations to authorize Aid for Families with Dependent Children payments of 88% of unmet need beginning April 1, 1971. This notice of reduction was mailed to all recipients of Aid for Families with Dependent Children on March 1, 1971. Appellees contend that this reduction was done in such a manner that they were denied due process of law as required by the United States Constitution, relying mainly on Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

The question presented is whether the appellees have been denied due process of law as required by the Federal Constitution. We think the notices were adequate. The United States District Court for the

District of Vermont, when faced with a similar situation in Provost v. Betit, 326 F. Supp. 920 (1971), distinguished Goldberg v. Kelly, supra, thusly:

> "The plaintiffs rely on Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L. Ed.2d 287 (1970), and subsequent lower court decisions which reason, by analogy to Goldberg, that a reduction in welfare benefits must be preceded by notice and an opportunity to be heard. See generally, Woodson v. Houston, 27 Mich.App. 239, 183 N.W.2d 465 (1970); Morgan v. Martin, 2 CCH Pov.L.Rep. ¶ 12,113 (N.D.Colo.1970); Merriweather v. Burson, 325 F.Supp. 709 (W.D.Ga.1970); and Figueroa v. Wyman, 63 Misc.2d 610, 313 N.Y.S.2d 274 (1970). This reliance, it would appear, is misplaced. We are not here dealing with a factual determination that the level of an individual's grant should be reduced because of a change in individual circumstances, but rather with a state-wide social welfare policy impartially affecting all welfare recipients."

In this case the reduction is not based on a factual determination to reduce an individual's payment, but is a statewide reduction affecting a whole class of recipients, a legislative action, in order to meet budgetary limitations. The Department notified all Aid to Families with Dependent Children recipients that the reduction was to be taken from their checks beginning April 1, 1971. This notice, thirty days prior to the effective date of reduction, in light of our conclusion that the Department's action was a legislative action, was sufficient to meet applicable procedural due process requirements. On the other hand had the Departmental action been an individual determination the standards of procedural due process announced as required in Goldberg v. Kelly, supra, would be applicable.

Appellees raise the point that the Department's action contravenes its own regulations. Appellees cite New Mexico Department of Health and Social Services Regulations 271.122 as requiring and setting forth notice procedures to be followed by the Department when reducing benefits. Reliance on this regulation is misplaced. The regulation speaks only to proposed reduction by a county welfare office, not a state-wide policy change such as the change in issue here.

The judgment should be reversed.

It is so ordered.

OMAN and MONTOYA, JJ., concur.

488 P.2d 1209

Charles M. MORGAN, Respondent,

v.

NEW MEXICO STATE BOARD OF EDUCATION, Petitioner.

No. 9311.

Supreme Court of New Mexico.

Sept. 13, 1971.

Further ordered that the record in Court of Appeals Cause No. 643, 83 N.M. 106, 488 P.2d 1210, be and the same is hereby returned to the Clerk of the Court of Appeals.

488 P.2d 1209

EVCO, a New Mexico corporation, d/b/a Evco Instructional Designs, Petitioner,

v.

Franklin JONES, Commissioner of the Bureau of Revenue of the State of New Mexico, et al., Respondents.

No. 9322.

Supreme Court of New Mexico.

Sept. 29, 1971.

Further ordered that the record in Court of Appeals Cause No. 430, 83 N.M. 110, 488 P.2d 1214, be and the same is hereby returned to the Clerk of the Court of Appeals.

488 P.2d 1210

Charles M. MORGAN, Appellant,

v.

NEW MEXICO STATE BOARD OF EDUCATION, Appellee.

No. 643.

Court of Appeals of New Mexico.
June 25, 1971.
Rehearing Denied July 21, 1971.
Certiorari Denied Sept. 13, 1971.

M. J. Rodriguez, Jones, Gallegos, Snead & Wertheim, Santa Fe, for appellant.

David L. Norvell, Atty. Gen., E. P. Ripley, Sp. Asst. Atty. Gen., Santa Fe, Byron Caton, White & Caton, Farmington, for appellee.

OPINION

WOOD, Judge.

The teacher was discharged during the term of his written employment contract. Section 77-8-14, N.M.S.A.1953 (Repl.Vol. 11, pt. 1). He appealed the decision of the Local Board (Bloomfield Municipal School District) to the State Board (State Board of Education). The State Board affirmed the Local Board's decision. The teacher has appealed directly to this court. Section 77-8-17, N.M.S.A.1953 (Repl.Vol. 11, pt. 1). The dispositive issue is the applicability of a State Board regulation concerning procedures to be followed in supervising and correcting unsatisfactory work performance.

The Local Board found as a fact, after a hearing, that: (1) the teacher punished various children; (2) the punishment was inflicted in violation of school policy as set forth in the Local Board handbook; and (3) the teacher was informed of this policy prior to inflicting the punishment. The Local Board concluded that the teacher had breached his contract "* * * by failing to administer punishment in a judicious manner." The State Board found evidence in the record to substantiate the findings of the Local Board that good cause existed to discharge the teacher. With this we agree; there is substantial evidence to support the Local Board's findings. The violation of a known policy of the Local Board in regard to punishment, to the extent shown by the evidence in this case, is good cause for discharging the teacher for failing to administer punishment in a judicious manner.

We are concerned here with the procedure in effecting the discharge. Section 77-8-18, N.M.S.A.1953 (Repl.Vol. 11, pt. 1) authorizes the State Board, by regulation, to "* * * prescribe procedures to be followed by a local school board in supervising and correcting unsatisfactory work performance * * * of certified school personnel before notice of discharge is served upon them. * * *" Pursuant to

this authority the State Board adopted a regulation stating a procedure 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:" No claim is made that the teacher was not a certified non-tenure employee of the Local Board.

The procedure adopted in the regulation required three conferences, and a written record of the conferences, specifying the areas of unsatisfactory work performance, action taken to improve such performance and all improvements made. This procedure was not followed. The issue is the applicability of this regulation to the facts of this case.

The Local Board decision does not expressly refer to unsatisfactory work performance. The teacher was discharged for breach of contract. Because the discharge was for breach of contract, it is contended that unsatisfactory work performance is not involved and the requirement for conferences is not applicable. This contention emphasizes the label, "breach of contract," but disregards the nature of the breach. The breach was in failing to administer punishment in a judicious manner. Whether unsatisfactory work performance is involved depends upon whether the punishment involved is an aspect of the teacher's work performance.

It is asserted that the punishment involved cannot be an aspect of work performance in this case because the Local Board's decision did not determine that work performance was involved. Under this viewpoint work performance is not involved unless the Local Board attaches the label of work performance to the teacher's conduct in its decision. Implicit in this argument is the view that a Local Board may determine the applicability of § 77-8-18, supra, and the State Board regulation, by the choice of words it uses in its decision, and regardless of the facts of the case. Thus, under this view, a Local Board could avoid the applicability of the statute and regulation simply by not referring to work performance. Since work performance was not expressly mentioned in the Local Board's decision in this case, the argument is that work performance is not involved.

We disagree. The Local Board is subject to the State Board regulations. Section 77-4-2, N.M.S.A.1953 (Repl.Vol. 11, pt. 2). It is the State Board which determines whether there is a substantial departure from State Board regulations which is prejudicial to the appealing party. Section 77-8-17(D), supra. The Local Board's label, or lack of label, in its decision does not determine whether work performance was involved in the teacher's conduct.

Since the Local Board's label to its decision is not determinative of whether work performance was involved, what is determinative? The facts of the case. The Local Board's decision must rest on its conclusion of law and the conclusion must in turn be supported by one or more findings of fact. Section 77-8-16(E), N.M.S.A.1953 (Repl.Vol. 11, pt. 1); compare Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968).

The State and Local Boards claim that, under the facts, the punishment which the teacher imposed does not come within the term "unsatisfactory work performance" and, therefore, the regulation is not applicable. We disagree. Section 77-8-3(D), N.M.S.A.1953 (Repl.Vol. 11, pt. 1) required the teacher to "exercise supervision over students on property belonging to the public school and while the students are under the control of the public school; * * *" The Local Board found as a fact that the punishment was imposed upon children under the teacher's supervision and control and while the teacher was acting as a classroom teacher. Uncontradicted evidence at the Local Board hearing shows that several of the incidents for which the improper punishment was imposed occurred during school classes. Under the facts in

this case the punishment imposed by the teacher comes within the term "unsatisfactory work performance." See Fresno City High School Dist. v. De Caristo, 33 Cal.App.2d 666, 92 P.2d 668 (1939).

It is asserted that in holding the punishment imposed by the teacher comes within "unsatisfactory work performance," we are giving that term a "broad construction" never intended by the Legislature. It is claimed that this asserted "broad construction" could not have been intended, otherwise, the Legislature would not have enacted § 77-8-14, supra. It is argued that there may be various grounds for discharge, and with a "broad construction" to "unsatisfactory work performance" we are bringing a variety of grounds for discharge within the State Board regulation and the requirement of conferences. This view paints with too broad a brush.

Section 77-8-14, supra, pertains to discharge for cause and the procedures in effecting the discharge. Section 77-8-18, supra, is consistent with § 77-8-14, supra. Under § 77-8-18, supra, the notice of discharge provided for in § 77-8-14, supra, is not to be served until the procedures of the State Board regulations have been followed. These two statutes disclose no legislative intent that the punishment inflicted by the teacher is not an aspect of unsatisfactory work performance.

The fact that there are a variety of grounds which may constitute good cause for discharge does not mean that all of such grounds have been included within "unsatisfactory work performance" by this decision. See Fresno City High School Dist. v. De Caristo, supra. There are obviously grounds for discharge which do not involve unsatisfactory work performance. See Lopez v. State Board of Education, 70 N.M. 166, 372 P.2d 121 (1962); compare Fort Sumner Municipal School Board v. Parsons (Ct.App.), 82 N.M. 610, 485 P.2d 366, decided April 23, 1971. Here, we are not attempting to outline the boundaries of the term "unsatisfactory work performance." Compare McAlister v. New Mexico State Board of Education (Ct.App.), 82 N.M. 731, 487 P.2d 159, decided June 11, 1971, Lenning v. New Mexico State Board of Education (Ct.App.), 82 N.M. 608, 485 P.2d 364, decided May 7, 1971. Our holding is simply that under the facts of this case, the punishment inflicted by the teacher comes within unsatisfactory work performance.

It is contended that the regulation should not be applicable because the purpose of § 77-8-18, supra, is to establish a procedure "* * * for correcting teaching performance that is correctible [sic]. * * *" Section 77-8-18, supra, and the State Board regulation is not limited to "teaching performance." The statute and the regulation refer to "work performance." Section 77-8-18, supra, does refer to "correcting" unsatisfactory work performance.

We assume, but do not decide, that if the work performance was not correctable, the statute and the regulation issued under its authority, would not be applicable. Here, however, there is nothing to show the teacher's action in imposing punishment in violation of known policy was not correctable. No finding was made as to this. The record shows that after the principal investigated reports concerning the punishments inflicted, the teacher was asked to confer with the principal and the superintendent and that this conference was held. As to what happened at the conference, the record shows the teacher denied the charges of impermissible punishment; that threats were made; that the teacher was given the option of resigning or having a recommendation to the School Board for his dismissal; that the teacher refused to resign. This evidence does not show that the teacher's conduct was not correctable.

There is evidence that the decision to recommend discharge to the Local Board was made because of "the seriousness of the nature of this situation." We agree that the evidence shows a serious situation.

The evidence of the nature of the punishments inflicted supports the argument that serious injury could have been inflicted on the punished students. Two examples suffice—that of hitting a student with a drumstick and that of kicking a student. Although the situation was serious, the question remains: was it correctable? There is neither evidence nor finding that it was not, and no evidence that any effort was made at any conference to correct the teacher's unsatisfactory work performance.

It is asserted that if the State Board regulation is applied in this case, "* * * local school boards will be seriously handicapped in dealing with situations, where as here proper administration of the educational program calls for the immediate removal of a teacher from the classroom." In support of this view, several cases from Illinois are cited for the proposition that the courts should not interfere with the judgment of the Local Board as to what is in the best interest of the schools. The answer to this contention is that the State Board is a constitutional body which controls, manages and directs the public schools as provided by law. Fort Sumner Municipal School Board v. Parsons, supra. Section 77–8–18, supra, authorizes the State Board to issue the regulation involved here concerning unsatisfactory work performance. Section 77–4–2, supra, makes a Local Board's supervision and control of the public school in its district "subject to the regulations of the state board." The "handicap" to the Local Board in dealing with the fact situation in this case is imposed by our constitution and statutes; efforts to change this "handicap" should be directed to the Legislature and the people.

The regulation requiring conferences for unsatisfactory work performance was applicable under the facts of this case, but was not followed. Yet, the State Board found "* * * the record does not disclose a substantial departure from the procedures and regulations prescribed by the New Mexico State Board of Education which is prejudicial to the appellant. * * *" This finding is not supported by the record.

The absence of the required conferences and the failure of the Local Board to attempt to correct the unsatisfactory work performance was a substantial departure from the State Board regulation. This failure to follow the regulation deprived the teacher of an opportunity to correct his unsatisfactory work performance and, thus, was prejudicial to him. See Tate v. New Mexico State Board of Education, 81 N.M. 323, 466 P.2d 889 (Ct.App.1970); Brininstool v. New Mexico State Board of Education, 81 N.M. 319, 466 P.2d 885 (Ct.App. 1970). The State Board's finding of "no substantial departure from regulations" and "no prejudice to the teacher" is not sustained by the record and, therefore, is unreasonable. Wickersham v. New Mexico State Board of Education, 81 N.M. 188, 464 P.2d 918 (Ct.App.1970).

The decision of the State Board is reversed. The cause is remanded with instructions to the State Board to reverse the decision of the Local Board.

It is so ordered.

HENDLEY, J., concurs.

SUTIN, Judge (dissenting).

I respectfully dissent.

This dissent is based upon my special concurring opinions in McAlister v. New Mexico State Board of Education, 82 N.M. 731, 487 P.2d 159, filed June 11, 1971, and Fort Sumner Municipal School Board v. Parsons, 82 N.M. 610, 485 P.2d 366, filed May 21, 1971.

Here, the State Board of Education examined the transcript of the record before the Local Board and found:

* * * * * *

2. That the record does not disclose a substantial departure from the pro-

cedures and regulations prescribed by the New Mexico State Board of Education which is prejudicial to the appellant and that there is evidence in the record to substantiate the findings of the Bloomfield Board of Education that good cause exists for discharging Charles M. Morgan.

The State Board of Education concluded that the decision of the Local Board should be affirmed. This is compliance with the powers vested in the State Board of Education in § 77-8-17(D) and (E), N.M.S.A. 1953 (Repl.Vol. 11, pt. 1).

It is now obvious that when we look behind the powers vested in the State Board of Education, we impair the efficiency of school administration. Whether local boards should or should not be seriously handicapped in its decisions is the responsibility of the State Board, not the court's. When we grasp the power of review beyond that granted by statute, we become advocates, not judges.

Section 77-2-2(T), N.M.S.A.1953 (Repl. Vol. 11, pt. 1; Supp.) provides that one of the duties to be performed by the State Board is:

> T. review decisions made by the governing board or officials of any organization or association regulating any public school activity, and *any decision of the state board shall be final in respect thereto;* * * *. [Emphasis added.]

The legislature has spoken. It means what it says. In order to avoid judicial "Legisputation," we should recognize this duty granted the State Board. Cohen, Judicial "Legisputation" and the Dimensions of Legislative Meaning, 36 Ind.L.J. 414 (1961). "Legisputation" is a substitute for "judicial law-making" or "judicial legislation." If we follow accepted standards, we curb the excesses of judicial power.

The majority feeling otherwise, I respectfully dissent.

488 P.2d 1214

EVCO, a New Mexico Corporation, d/b/a Evco Instructional Designs, Appellant,

v.

Franklin JONES, Commissioner of the Bureau of Revenue of the State of New Mexico and the Bureau of Revenue of the State of New Mexico, Appellees.

No. 430.

Court of Appeals of New Mexico.
July 30, 1971.
Rehearing Denied Aug. 24, 1971.
Certiorari Denied Sept. 29, 1971.

Kendall O. Schlenker, Schlenker & Parker, P. A., Gallagher & Walker, Albuquerque, for appellant.

James A. Maloney, Atty. Gen., Richard J. Smith, Anne Bingaman, Asst. Attys. Gen., John C. Cook, Special Asst. Atty. Gen., Santa Fe, for appellees.

OPINION

OMAN, Justice.

The original opinion by this court in this cause appears in Evco v. Jones, 81 N.M. 724, 472 P.2d 987 (Ct.App.1970). As shown by that opinion, two points were presented to this court for consideration and decision. The second of these points is the one with which we are primarily concerned, and our reconsideration thereof has been occasioned by the following order entered on May 17, 1971, 402 U.S. 969, 91 S.Ct. 1655, 29 L.Ed. 2d 134 by the Supreme Court of the United States:

> "In view of the concessions made in the brief in opposition filed by the Attorney General of New Mexico, and on examination of the record, petition for writ of certiorari is granted, judgment vacated and case remanded to the Court of Appeals of New Mexico for reconsideration in light of the position asserted by the Attorney General in the brief in opposition. The Chief Justice, Mr. Justice Black, Mr. Justice Harlan, and Mr. Justice Stewart are of the opinion that certiorari should be denied."

The following positions were taken by the Attorney General in its said brief in opposition and in oral argument before this court upon rehearing after the remand: (1) because we concluded in our original opinion that the contracts, under which the taxpayer created and furnished reproducible originals of books, manuals, films and magnetic audio tapes to out-of-state purchasers, constituted sales of tangible personal property, rather than contracts for services as contended by the Commissioner, the in-state incidents, or the New Mexico activities of the taxpayer in the performance of these contracts, could not be taxed under the New Mexico Gross Receipts Tax without doing violence to the interstate commerce clause of the Federal Constitution; and (2) because of our determination that these contracts constituted sales, rather than contracts for services, the administrative burdens in apportioning receipts from these contracts are made "immensely more difficult."

A resolution of the question, as to whether the State has exerted its power

in proper proportion to the taxpayer's activities within the State and to its consequent enjoyment of the opportunities and protection which the State has afforded, should not be dependent upon whether the contract under which the activities are performed is a contract of sale or a contract for services. The State may properly exact a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964); Bell Telephone Laboratories v. Bureau of Revenue, 78 N.M. 78, 428 P.2d 617 (1966). We fail to understand how a tax on this aspect of interstate commerce can be constitutionally fair and valid if the incidents arise out of a contract for services, but constitutionally unfair and invalid when these same incidents arise out of a contract of sale.

In our opinion taxable incidents are equally apparent and are ascertainable with equal ease whether they arise out of a contract of sale or out of a contract for services. In any event, the relative ease of ascertainment of taxable incidents should not be the primary consideration in determining the validity or invalidity of a tax law.

As pointed out in our prior opinion, there is no question of apportionment in this case, because no question of multiple taxation is involved. The burden of showing the unconstitutionality of a tax upon interstate commerce rests upon the taxpayer. General Motors Corporation v. Washington, supra. In this the taxpayer failed.

We reinstate and reaffirm our opinion in Evco v. Jones, supra.

It is so ordered.

WOOD C. J., and HENDLEY J., concur.

489 P.2d 178

STATE of New Mexico, Plaintiff-Appellee,

v.

Curtis Franklin FLOWERS, Defendant-Appellant.

No. 9234.

Supreme Court of New Mexico.

Sept. 27, 1971.

Ray Hughes, Rose-Marie Gruenwald, Deming, for appellant.

David L. Norvell, Atty. Gen., Ray H. Shollenbarger, Jr., Sp. Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

OMAN, Justice.

Defendant was charged and convicted of murder in the first degree, contrary to the provisions of § 40A-2-1, N.M.S.A.1953 (Repl.Vol. 6, 1964), and of unlawfully taking a motor vehicle, contrary to the provi-

sions of § 64–9–4(a), N.M.S.A.1953 (Repl. Vol. 9, pt. 2, 1960). We affirm.

Briefly the facts pertinent to the questions raised on this appeal are: (1) defendant, a woman friend and a young man friend decided to spend some time in the mountains north of Deming, New Mexico; (2) there are some differences in the testimony as to defendant's reasons for this decision, but there is evidence he was attempting to evade the command of a subpoena to appear as a witness in a pending criminal case; (3) they took with them some food, bedding and a .22 caliber rifle which defendant had borrowed; (4) they had no means of transportation, so defendant, accompanied by the young man, who was called Butch, secured the use for approximately an hour of a second-hand automobile from a sales lot; (5) they drove to a point near the base of Cook's Peak and reasonably close to an unoccupied mine shack, where they unloaded their belongings; (6) defendant and Butch returned to Deming with the automobile and made arrangements to be taken back to Cook's Peak; (7) the three of them stayed in the shack, hunted and did some target practicing with the .22 rifle; (8) they secured water from a stock tank near the base of Cook's Peak and approximately three-quarters of a mile from the shack; (9) they were there only a couple of days when the woman wished to return to Deming; (10) defendant and Butch walked to Deming to get an automobile by which to return her; (11) they were both acquainted with decedent, who lived in Deming and who had a small sports car; (12) defendant invited decedent to go hunting with them in the mountains, and decedent accepted; (13) the following morning they drove back to the shack in decedent's car, and in the afternoon decedent, defendant and Butch started for water; (14) decedent and Butch were walking a few feet ahead of defendant who was carrying the .22 rifle; (15) Butch heard a shot from the rifle and saw decedent fall; (16) Butch claimed defendant had the rifle to his shoulder and pointed at decedent as he, Butch, turned after hearing the shot; (17) defendant claims he did not intend to shoot decedent, that the gun discharged for some unknown reason, and that the homicide was an accident; (18) immediately after the shooting defendant dropped or laid the gun on the ground, looked at decedent, and decided he was dead from a shot wound in the head; (19) defendant then asked Butch to help him remove decedent's car keys, wallet and watch from decedent's body and to move the body a few feet to a fenced mine shaft into which they dropped it; (20) they immediately returned to the cabin, and defendant instructed the woman and Butch to pack things so that they could leave; (21) they left very shortly thereafter by means of decedent's automobile, and, according to Butch, defendant said they were going to Canada; (22) on more than one occasion defendant told the woman and Butch that they were as guilty as he and had better keep their mouths shut, although he did not state of what crime or crimes he considered them guilty; (23) defendant was taken into custody near Fargo, North Dakota for failing to pay a motel bill, Butch was later taken into custody in Michigan and the woman was taken into custody in Oregon.

Defendant first contends the trial court erred in instructing the jury "* * * on theory of felony-murder doctrine."

The instructions to which objection was made were substantially in the language of our statute (§ 40A–2–1, supra) and defined murder in the first degree as all murder perpetrated (1) by any kind of wilful, deliberate and premeditated killing; or (2) in the commission of or attempt to commit any felony; or (3) by any act greatly dangerous to the life of another, indicating a depraved mind regardless of human life; or (4) from a deliberate and premeditated design unlawfully and maliciously to effect the death of a human being.

The objection made to the instructions was as follows:

"* * * they do include as an element of first degree murder a homicide

resulting during the commission or attempt to commit another felony, and defendant objects to this as introducing a false issue of this case because there is no evidence that at the time of the killing there was any other felony being committed or attempted to be committed at that time and there is no substantial evidence to sustain such a finding that at the time of the killing from all the evidence introduced there was any perpetrating or attempting to perpetrate at that time any other felony and that this definitely allows an implied, not just implied but gives the necessary intent for first degree murder when there is nothing in the record to sustain it. * * *"

Obviously the objection was that there was no substantial evidence to support a finding that defendant was in the act of committing or attempting to commit any felony, other than homicide, at the time of the killing. This is the only claimed error in the instructions which was urged by defendant, and is his only claim of error in the instructions upon which he may now rely. State v. Justus, 65 N.M. 195, 334 P.2d 1104 (1959), cert. denied, 365 U.S. 828, 81 S.Ct. 714, 5 L.Ed.2d 706 (1961). See also State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968); State v. Compton, 57 N. M. 227, 257 P.2d 915 (1953); State v. Roybal, 33 N.M. 187, 262 P. 929 (1927).

Defendant denied he had any intention of shooting decedent or of unlawfully taking his automobile at that time. But, in our opinion, the evidence clearly supports a reasonable inference that defendant had already formed the intent to take the automobile and was in the process of executing that intent and committing the felony defined in § 64–9–4(a), supra, when the shooting occurred and before the death of decedent. Defendant was in need of an automobile to aid in the accomplishment of his purposes, and, immediately after decedent had fallen from the shot and appeared to be dead, defendant proceeded to search the body for the automobile keys and other valuables and to conceal the body by dumping it in the mine shaft. Thereafter, he promptly proceeded to pack and escape in decedent's automobile.

The felony-murder provision of our statute is clearly applicable once conduct in furtherance of the commission of a felony has progressed sufficiently to constitute an attempt to commit the felony, and an attempt has been accomplished when an overt act, in furtherance of and tending to effect the commission of the felony, has been performed or undertaken with intent to commit the felony. Section 40A–28–1, N.M.S.A.1953 (Repl.Vol. 6, 1964). There is ample evidence to support a finding that defendant had accomplished an attempt to unlawfully take decedent's automobile without decedent's consent before the bullet struck decedent in the head, and that defendant, at the time he killed decedent, either by shooting him, by dumping his body in the mine shaft, or by both, was in the act of committing at least this felony.

Defendant now urges that if he did not shoot decedent accidentally, as he contends, then the only other conclusion to be drawn from the evidence is that he wilfully, deliberately and with premeditation shot and killed decedent. This being the case, it was improper to instruct on the felony-murder provision of our statute, because the intent to commit murder supplied thereby was obviously unnecessary and inconsistent with the clear intent to commit the murder, and the inclusion of the felony-murder provision in the instructions destroyed and nullified his defense of accidental killing, in that the jury could very well have believed the killing was accidental and still have convicted him because a felony, other than wilful, deliberate and premeditated murder, was committed by him. Even if we were to concede his position to be correct, still he cannot now be permitted to rely thereon. This position is clearly beyond the scope of his objection to the instructions, and it cannot be reasonably urged that the mind of the trial court was alerted to this position, or defect in the instructions, if in fact it be a defect.

Although this court has never decided the precise question now presented by de-

fendant, and, for the reasons stated, we do not now decide it, we have held that if a homicide occurs within the res gestae of a felony, the felony-murder provision of our statute is applicable, and whether the homicide occurred before or after the actual commission of the felony is not determinative of the applicability of the felony-murder provision. Nelson v. Cox, 66 N.M. 397, 349 P.2d 118 (1960); State v. Nelson, 65 N.M. 403, 338 P.2d 301 (1959), cert. denied, 361 U.S. 877, 80 S.Ct. 142, 4 L.Ed.2d 115 (1959). As to definitions and explanations of res gestae and the matters and events encompassed therein under the felony-murder principle, see State v. Nelson, supra; 1 Anderson, Wharton's Criminal Law and Procedure, § 252 (1957) and cases therein cited.

Defendant next contends that if the felony-murder provision of our statute is here applicable, the trial court erred because the felony was not identified and felony was not defined. Defendant must fail in this contention for at least the following reasons: (1) the felony of unlawfully taking a motor vehicle, contrary to the provisions of § 64-9-4(a), supra, was defined, and, as already stated, defendant was convicted thereof, and no attack is here made upon that conviction, except to the extent of the indirect attack thereon referred to in defendant's final point; (2) defendant made no requests for further identification or definition of the felony relied upon by the State, and, therefore, cannot now be heard on this question. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

Defendant's final point relied upon for reversal is that the trial court erred in instructing on the charge of unlawfully taking a motor vehicle after instructing on the felony-murder provision of our statute under the murder charge. His position is "* * * that if the unlawful taking of the motor vehicle constitutes the felony, then it is merged into the murder charge of Count 1 under the felony-murder doctrine. * * *"

If in fact there was any such merger, defendant failed to raise the issue in the trial court. The substance of the only objection made to the court's instructions is quoted above, and this cannot reasonably be construed as an objection to the instructions on unlawfully taking a motor vehicle, and particularly so on the ground this charged offense was merged in the murder charge. In fact the objection was clearly confined to the giving of instructions on the felony-murder provision of our murder statute, and the extent of the objection was that there was a lack of substantial evidence to support a finding that any felony, other than premeditated murder, was being committed or attempted at the time of the killing. The substance of the evidence in this regard has been discussed above.

The judgment of the trial court should be affirmed.

It is so ordered.

COMPTON, C. J., and MONTOYA, J., concur.

489 P.2d 181

Isidore TAPIA, personal representative of Willie Gauna, Jr., Deceased, Plaintiff-Appellant,

v.

Blevins McKENZIE, Defendant-Appellee.

No. 588.

Court of Appeals of New Mexico.
Aug. 6, 1971.
Rehearing Denied Sept. 7, 1971.

Eugene E. Klecan, James T. Roach, Albuquerque, for plaintiff-appellant.

Charles A. Pharris, Keleher & McLeod, Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

This car-cow collision case is concerned with summary judgment and res ipsa loquitur.

On the day of the accident cattle had been worked on the south side of the highway and 25 to 30 cows had been brought to the north side of the highway through an underpass. These cows had been put into a pasture north of and adjacent to the highway. The pasture was approximately 800 acres and 35 to 40 cows were in the pasture. One of the cows got onto the highway, but the record does not show when. After it was dark, Gauna, a motorist, collided with it. Gauna died from injuries received in the collision. His personal representative sued defendant for wrongful death. In this appeal, no claim is made that defendant was not the owner of the cow which got onto the highway.

The pasture from which the cow escaped was separated from the highway by a fence and a cattle guard. The briefs concede this to be an interstate highway. The fence and the cattle guard had been installed by a contractor for the State Highway Department and that department own-

ed and maintained the fence and cattle guard. Following the accident, it was determined that the portion of the fence inspected was in good repair and that the cattle guard was "top pole," "real good," "in repair and not in disrepair." The cow's "tracks crossed the cattle guard;" and she was trailed "up to where she got hit." "* * * A cattle guard would ordinarily hold anything, but it didn't this one."

On the basis of the foregoing, the trial court granted summary judgment; plaintiff appeals.

Summary judgment.

The basis of any liability on the part of defendant in this case is negligence. See Mitchell v. Ridgway, 77 N.M. 249, 421 P.2d 778 (1966); Grubb v. Wolfe, 75 N.M. 601, 408 P.2d 756 (1965); § 40A-8-10, N.M.S.A.1953 (Repl.Vol. 6, Supp.1969); § 64-18-62, N.M.S.A.1953 (Repl.Vol. 9, pt. 2, Supp.1969); compare § 22-20-1, N.M.S.A.1953.

Defendant, the movant for summary judgment, had the burden of establishing the absence of a material issue of fact and that he was entitled to summary judgment as a matter of law. Sanchez v. Shop Rite Foods, 82 N.M. 369, 482 P.2d 72 (Ct.App.1971). In this case, defendant had the burden of establishing an absence of a material issue of fact on the question of negligence.

Defendant did not meet this burden. The facts before the trial court make a prima facie showing as to the means by which the cow got out of the pasture. These facts, however, do not make a prima facie showing of no negligence (see N.M. U.J.I. 12.1) on the part of defendant because they show nothing as to action, inaction or foreseeability on the part of defendant in connection with the means of escape. Compare Martin v. Board of Education of City of Albuquerque, 79 N.M. 636, 447 P.2d 516 (1968).

The summary judgment was improperly granted because defendant did not make a prima facie showing that he was entitled to summary judgment. Sanchez v. Shop Rite Foods, supra; compare Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct.App.1970).

Res Ipsa Loquitur.

Because of the emphasis placed on res ipsa loquitur, both in the trial court and in this appeal, and because the summary judgment was erroneous, we briefly discuss this doctrine.

It is plaintiff's contention that under this doctrine he may go to the jury in this case upon a showing that defendant's cow was on the highway; that the highway was fenced and that decedent's car collided with the cow. This is a misreading of Mitchell v. Ridgway, supra. In that case, the horse escaped from the defendant's corral; the highway was not fenced at this point. Our Supreme Court held the facts in *Mitchell* were sufficient to avoid a non-suit; that the trial court erred in dismissing the suit "* * * for failure to state a claim upon which relief could be granted. * * *" When the dismissal is for failure to state a claim upon which relief can be granted, the issue is whether the plaintiff would be entitled to recover under any state of facts provable under the claim that is made. Pattison v. Ford, 82 N.M. 605, 485 P.2d 361 (Ct.App.1971). No such question is involved in this case.

In holding a cause of action was stated, Mitchell v. Ridgway, supra, referred to res ipsa loquitur and indicated the doctrine *could* be applicable in car-cow collision cases. For it to be applicable:

> "* * * The plaintiff must still fulfill the burden of satisfying the court, or the jury, that the accident was of a kind which ordinarily does not occur in the absence of someone's negligence, and that the agency or instrumentality, in this case a domestic animal, was within the exclusive control of the defendant. * * *"

If plaintiff fails to establish the essential elements of the doctrine, it would

not be available to make a prima facie case of liability. Hisey v. Cashway Supermarkets, Inc., 77 N.M. 638, 426 P.2d 784 (1967).

Thus, under the New Mexico Supreme Court decisions, plaintiff would not be entitled to go to the jury in this case upon a showing that defendant's cow escaped through a Highway Department cattle guard and was upon the highway, causing the collision. To get to the jury, there must be evidence tending to establish the elements of res ipsa loquitur. Mitchell v. Ridgway, supra.

It would not be different in a summary judgment situation. If defendant makes a prima facie showing entitling him to summary judgment, plaintiff, to defeat summary judgment, must then show there is a factual issue. Rekart v. Safeway Stores, Inc., supra. Plaintiff could do this by showing there are facts tending to establish the elements of res ipsa loquitur. If there is no showing that a factual issue exists as to the elements of the doctrine, the doctrine would not be available to defeat the summary judgment. Thus, the facts on which plaintiff relies here would not defeat a summary judgment, once a prima facie showing supporting summary judgment is made by defendant, because these facts do not tend to establish the elements of res ipsa loquitur.

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

It is so ordered.

HENDLEY, J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (specially concurring).

We disagree as to the meaning of summary judgment, the failure to explain applicable statutes, and the applicability of the doctrine of res ipsa loquitur. Therefore, I specially concur.

(a) *The Meaning of Summary Judgment*

McKenzie, the owner of a cow, was awarded summary judgment in an action for the wrongful death of Gauna, Jr., brought by Tapia under the doctrine of res ipsa loquitur. The deceased was driving an automobile in the nighttime in an easterly direction on Interstate Highway 40 (formerly Highway 66), when he collided with McKenzie's cow, between Clines Corners and Santa Rosa, New Mexico. Gauna is dead and silent. The only evidence is the deposition of McKenzie.

In order to sustain summary judgment under the doctrine, McKenzie had the burden of showing there was no genuine issue of material fact because, as a matter of law, (1) Gauna's death was not proximately caused by the cow while it was under the exclusive control and management of McKenzie; or (2) that the presence of the cow on the highway was not of a kind which ordinarily occurs in the absence of negligence on the part of McKenzie; or (3) McKenzie used ordinary care in his control and management of the cow. See, U.J.I. 12.14; Renfro v. J. D. Coggins Co., 71 N.M. 310, 378 P.2d 130 (1963). The burden rested on McKenzie, Ballard v. Markey, 66 N.M. 265, 346 P.2d 1045 (1959), and not on Tapia. Coca v. Arceo, 71 N.M. 186, 193, 376 P.2d 970 (1962).

McKenzie failed in his burden. This means there is a genuine issue of material fact as to each element of res ipsa loquitur.

Since there are genuine material issues of fact, they must be submitted to the jury. Zengerle v. Commonwealth Insurance Co. of New York, 60 N.M. 379, 291 P.2d 1099 (1955); Johnson v. Primm, 74 N.M. 597, 396 P.2d 426 (1964); Great Western Construction Co. v. N. C. Ribble Co., 77 N.M. 725, 427 P.2d 246 (1967). Tapia is entitled to present this case to the jury on the merits. Buffington v. Continental Casualty Company, 69 N.M. 365, 367 P.2d 539 (1961); Cortez v. Martinez, 79 N.M. 506, 445 P.2d 383 (1968). In other words, at the close of all the evidence in this case at the time of trial, McKenzie is not entitled to a directed ver-

dict because there are disputed issues of material fact.

The majority opinion holds only that McKenzie failed to establish the absence of negligence. But under the doctrine of res ipsa loquitur, Tapia would not be entitled to go to the jury unless he presents evidence tending to establish the elements of res ipsa loquitur. The reason I disagree is that if any elements of res ipsa loquitur are now absent, the majority has a duty to sustain the summary judgment. If McKenzie failed to establish the absence of negligence, can Tapia now add a claim based upon McKenzie's negligence?

The majority opinion fails to set forth all of the material facts. To do so, might aid the trial court. It should not direct a verdict for McKenzie. On remand, the trial court must necessarily look to the opinion, and not to the judgment of mandate, for the law of the case. All matters determined by the decision become the law of the case and are binding upon the courts and litigants. First National Bank of El Paso, Texas v. Cavin, 28 N.M. 468, 214 P. 325 (1923).

I have reviewed all of the New Mexico cases on summary judgment. It would be overly burdensome to review all of the principles. Decisions can be found on each side.

Summary judgment is a dangerous instrument in the administration of justice when it denies a party the right to trial based upon factual issues. The obvious purpose of the rule from its origin in New Mexico in 1949, was to hasten the administration of justice and to expedite litigation by avoiding needless trials. Agnew v. Libby, 53 N.M. 56, 201 P.2d 775 (1949). This has not proven true in actual experience.

The history of Rule 56(c) in New Mexico indicates that summary judgment does not hasten the administration of justice; that trial courts decide issues and grant summary judgments which, they believe, avoids a large trial docket. In the vast majority of summary judgments appealed, reversals occurred, and trial denied was trial delayed. It is the policy of courts of review to grant the right of trial whenever justice demands it. Trial courts must find a legal rather than a factual issue upon which to grant summary judgment. For example, in Electric Supply Co. v. United States Fidelity & Guaranty Co., 79 N.M. 722, 449 P.2d 324 (1969), the court said: "Here, there is only a question of law as to whether there was an accord and satisfaction." In Southern Union Gas Co. v. Briner Rust Proofing Co., 65 N.M. 32, 331 P.2d 531 (1958), the court said:

> Whether, indeed, under the circumstances of a given case, a duty exists is a pure question of law for determination by the court.

It has been stated in some negligence cases that, ordinarily, negligence is a question for the jury, but when *reasonable minds* cannot differ as to the facts and inferences to be drawn therefrom, the question is one of law. Stake v. Woman's Division of Christian Service, 73 N.M. 303, 306, 387 P.2d 871 (1963). This is a questionable doctrine to follow. "Reasonable minds" is an indefinite phrase. In this accident age, how can we determine what a reasonable mind is? In jury trials, reasonable minds are a cross-section of a community called for jury service. Each trial judge believes he has a reasonable mind, and knows what reasonable minds are, but he cannot know whether reasonable minds will differ. Where an issue of negligence is involved, ordinarily the trial court should allow a jury to determine whether "reasonable minds" can differ.

(b) *Applicable Statutes*

The statutes covering animals and livestock on highways need discussion.

Section 40A-8-10, N.M.S.A.1953 (Repl. Vol. 6, Supp. 1969), was originally adopted in the Criminal Code of 1936, N.M. Laws 1963, ch. 303, §§ 8-10. It was rewritten in N.M. Laws 1966, ch. 44, § 1, and amended by Laws of 1967, ch. 180, § 1, and called "An Act Relating to Animals." We quote only § A, because § B relates to

"*State* Public Fenced Highways," § C to highways within the jurisdiction of county commissioners, and § D to "unfenced roads or highways." Section E provides that "Whoever commits unlawfully permitting livestock upon public highways is guilty of a petty misdemeanor." Section A reads as follows:

> A. Unlawfully permitting livestock upon public highways consists of any owner or custodian of livestock *negligently* permitting his livestock to run at large upon any part of a public highway which is fenced on both sides. [Emphasis added.]

The other statute, entitled "Animals on Highway," which was adopted under motor vehicle traffic laws is § 64–18–62, N.M. S.A.1953 (Repl.Vol. 9, pt. 2, Supp.1969), adopted in 1966. The pertinent parts are the following:

> B. It is unlawful for any person *negligently* to permit livestock to wander or graze upon any *fenced* highway at any time or, during the hours of darkness, to drive livestock along or upon any highway which is normally used by motor vehicles.
>
> C. Owners of livestock ranging in pastures through which *unfenced* roads or highways pass shall not be liable for damages * * * unless such owner of livestock is guilty of *specific negligence* other than allowing his animals to range in said pasture. [Emphasis added.]

As originally adopted in 1953, the word "negligently" in § B was omitted. It was inserted by a 1965 amendment. This means that the legislature did not intend strict liability or liability without fault, but it intended a cow owner to be liable if he failed to exercise ordinary care in permitting the cow to wander or graze upon any fenced highway. See Johnson v. Hickel, 28 N.M. 349, 212 P. 338 (1923), where the word "negligent" does not appear in the statute; Prickett v. Farrell, 248 Ark. 996, 455 S.W.2d 74 (1970), where res ipsa loquitur is not followed, and Scanlan v. Smith, 66 Wash.2d 601, 404 P.2d 776 (1965), where an inference of negligence is allowed. It is also clear in the above statute that "specific negligence" applies to unfenced roads and not fenced highways. Tapia did not have the duty of proving specific acts of negligence.

Inasmuch as both statutes now provide for negligence in permitting livestock to run at large or wander or graze upon a fenced highway, they can both be read together. See Steed v. Roundy, 342 F.2d 159 (10th Cir. 1965), which interpreted the statutes before amendment.

I am unable to discover the legislative intent for adopting both statutes. However, the two statutes set forth above readily disclose that the purpose of each is to protect the public. Mitchell v. Ridgway, 77 N.M. 249, 421 P.2d 778 (1966). For this reason, we must construe the facts and the statutes to carry out the legislative intent. The term "livestock" is of plural origin, but it has been held that one horse upon a fenced highway falls within the statute. Mitchell v. Ridgway, supra, or one bull, Carrasco v. Calley, 79 N.M. 432, 444 P.2d 617 (1968), or one calf, Grubb v. Wolfe, 75 N.M. 601, 408 P.2d 756 (1965).

Inasmuch as the majority opinion does not advise the trial court of the applicability of these statutes, error may occur in a trial on the merits. Can Tapia now add a claim based upon McKenzie's negligence arising out of these statutes?

(c) *Res Ipsa Loquitur*

Res ipsa loquitur is a quagmire of judicial discussion. For a simple analysis, see Restatement of the Law, Torts, Second, § 328D and comment. Here, the authors comment that defendant's superior knowledge, or access to it, has been a very persuasive factor in the development of the principle and "normally, therefore, a verdict cannot be directed for defendant in a res ipsa loquitur case, solely upon the basis of defendant's evidence of his own due care."

In New Mexico, its first discussion arose in Hepp v. Quickel Auto & Supply Co., 37 N.M. 525, 528, 25 P.2d 197 (1933). The court recognized the doctrine as a rule of necessity based on the principle that under the common experience of mankind an accident of the particular kind does not happen except through negligence. Its chief justification is the superior knowledge of the defendant.

Res ipsa loquitur does not apply on summary judgment in medical malpractice cases. Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964), and Buchanan v. Downing, 74 N.M. 423, 394 P.2d 269 (1964), because of the need for expert medical testimony.

Every negligence case in New Mexico discloses that the doctrine of res ipsa loquitur is accepted or denied by the fact finder after all the testimony has been heard by the court or the jury. Chapin v. Rogers, 80 N.M. 684, 459 P.2d 846 (1969); Williamson v. Piggly-Wiggly Shop Rite Foods, Inc., 80 N.M. 591, 458 P.2d 843 (1969); Hisey v. Cashway Supermarkets, Inc., 77 N.M. 638, 426 P.2d 784 (1967); Gray v. E. J. Longyear Co., 78 N.M. 161, 429 P.2d 359 (1967); Pack v. Read, 77 N.M. 76, 419 P.2d 453 (1966); Renfro v. J. D. Coggins Co., 71 N.M. 310, 378 P.2d 130 (1963); D A & S Oil Well Servicing v. McDonald Oil Corp., 70 N.M. 396, 374 P.2d 146 (1962); McFall v. Shelley, 70 N.M. 390, 374 P.2d 141 (1962); Tuso v. Markey, 61 N.M. 77, 294 P.2d 1102 (1956); Tafoya v. Las Cruces Coca-Cola Bottling Co., 59 N.M. 43, 278 P.2d 575 (1955); Zanolini v. Ferguson-Steere Motor Co., 58 N.M. 96, 265 P.2d 983 (1954).

We have adopted Dean Prosser's Statement that in ordinary cases, res ipsa loquitur "avoids a non-suit and gets the plaintiff to the jury." Pack v. Read, 77 N.M. 76, 419 P.2d 453 (1966), and Tuso v. Markey, 61 N.M. 77, 294 P.2d 1102 (1956).

Under the doctrine of res ipsa loquitur, by denying summary judgment, I hold that McKenzie's evidence "does not ordinarily destroy the inference or presumption of negligence raised by plaintiff's proof or authorize the jury to disregard it or authorize a finding of the absence of negligence as a matter of law or warrant an affirmative direction for defendant. The rule is that, when all the evidence is in, the question whether defendant has rebutted the inference * * * is for the jury, and the case must be submitted to the jury to determine where the preponderance of evidence lies, for the weight of the explanation, like the weight of the inference, is for the determination of the jury." 65A C.J.S. Negligence § 220.20.

The majority opinion relies on Mitchell v. Ridgway, 77 N.M. 249, 421 P.2d 778 (1966).

First, I must explain an error which exists at times in cases involving res ipsa loquitur. In *Mitchell*, the court said:

> We are aware of the division of opinion that exists in other jurisdictions on the question of the applicability of res ipsa loquitur. The two views are well expressed in Wilson v. Rule, 169 Kan. 296, 219 P.2d 690 and Rice v. Turner, 191 Va. 601, 62 S.E.2d 24, where there was a refusal to apply the rule and in Scanlan v. Smith, 66 Wash.2d 601, 404 P.2d 776 the opposite result was reached. Although Scanlan v. Smith, supra, claims to represent the majority view the numerical difference is very close and the presence of statutes in some states weakens the claim. [77 N.M. at 252, 421 P. 2d at 781.]

Res ipsa loquitur was not an issue in *Scanlan*. That court held "the presence of the defendant's livestock on the highway was sufficient to raise a permissible inference of negligence which would take the plaintiff's case to the jury. * * *" The difference between a permissible inference of negligence and the doctrine of res ipsa loquitur is adequately explained in Hepp v. Quickel Auto & Supply Co., 37 N.M. 525, 25 P.2d 197 (1933).

The doctrine of permissible inference is not an issue, and I express no opinion upon its applicability in this case.

Frumer-Friedman, Personal Injury, Vol. 1, Animals, § 1.02, p. 274.2, Note 28, and supplement, points out that five jurisdictions, including New Mexico, favor res ipsa loquitur, and three jurisdictions are contrary. I do not know whether this analysis is accurate. In any event, Mitchell v. Ridgway, supra, declares the doctrine to exist in New Mexico. We are bound by this doctrine.

Second, the majority opinion misapplies Mitchell v. Ridgway, supra. Summary judgment was not an issue. The trial court granted a motion to dismiss plaintiff's complaint because it failed to state a cause of action. Since the complaint stated a cause of action, the court announced that plaintiff must establish the elements of the doctrine of res ipsa loquitur. A summary judgment amounts to more than the motion to dismiss. Pederson v. Lothman, 63 N.M. 364, 320 P.2d 378 (1958). In the instant case, this burden has been met by reversing summary judgment in favor of McKenzie.

McKenzie relies on Leet v. Union Pacific R. Co., 25 Cal.2d 605, 155 P.2d 42 (1944). But the court said that instances in which inferences are dispelled in res ipsa are rare. McKenzie quotes the following from Atchison, T. & S. F. Ry. Co. v. Simmons, 153 F.2d 206 (10th Cir. 1946), a New Mexico case, and relies on the emphasis added.

> "'It creates an inference of fact. It casts on the opposite party the duty of going forward with evidence or risking that the jury will infer negligence from the occurrence. It will take the case to the jury *unless the entire evidence is such that the presumption cannot stand against it.* It is not enough that the evidence of the defendant would, if true, be sufficient to rebut the presumption because it is for the jury to pass upon the credibility of the witnesses and the truth of the testimony. To justify a directed verdict the evidence must be so conclusive that minds of reasonable men could not differ as to the conclusions to be drawn therefrom.' (emphasis added)."

This language strongly supports Tapia's position that res ipsa is a factual question which makes a directed verdict a very difficult peak to climb.

Defendant contends that the evidence presented makes the doctrine inapplicable because it established how the cow got on the highway. Even if true, this does not destroy the inference because there is no explanation by McKenzie of any care used to restrain the freedom of this cow before it reached the cattle guard.

Let us proceed with the application of the doctrine of res ipsa loquitur to determine if an issue of fact is present.

Was the cow under the Exclusive Management and Control of McKenzie?

McKenzie contends he did not have exclusive control and management of the cow because the State of New Mexico, as well as himself, had control; that there is nothing more than surmise and speculation to connect McKenzie's exercise of control with the subsequent harm. He relies on Renfro v. J. D. Coggins Co., 71 N.M. 310, 378 P.2d 130 (1963). This case was tried to a court and all evidence was presented and findings made. It did not determine the meaning of "exclusive control." The Supreme Court held that control is not necessarily control exercised at the time of injury, but may be control exercised at the time of a negligent act which subsequently results in injury.

The State of New Mexico had no control over the cow before or at the time of the death on the highway. It had no control over the original escape of the cow. It had no duty to keep employees in this area to restrain the freedom of the cow or to exercise due care to avoid permitting the cow to cross a cattle guard or to wander or run at large upon the highway. This was a statutory duty of McKenzie alone. See Whitt v. Jarnagin, 91 Idaho

181, 418 P.2d 278 (1966); where a railroad had control of a cattle guard.

The cow was the causative factor in the death of Gauna, and an issue of fact exists whether it was under the exclusive control and management of McKenzie. "Exclusive control" does not mean actual, physical control at the time of the accident. Pollard v. Todd, 148 Mont. 171, 418 P.2d 869, 872 (1966). It does not have a narrow meaning. The test is one of the right of control rather than actual control. Ragusano v. Civic Center Hospital Foundation, 199 Cal.App.2d 586, 19 Cal.Rptr. 118 (1962); Parlow v. Carson-Union-May-Stern Co., 310 S.W.2d 877, 881 (Mo.1958).

McKenzie desires to file a third party complaint against the New Mexico State Highway Department. If this occurs, and, at the time of trial, there is evidence produced that the State Highway Department shared in the control, the doctrine of "exclusive control" can apply to both. Marzotto v. Gay Garment Co., 11 N.J.Super. 368, 78 A.2d 394 (1951); 65A C.J.S. Negligence § 220.15d. Prosser on Torts, ch. 7, § 43 (1941), states:

> The inference of negligence may arise against each of two or more parties who share control—as where each is under an obligation to inspect, and the defect is one which could have been discovered by such inspection.

For purposes of summary judgment, there is sufficient evidence to establish that an issue exists whether McKenzie had exclusive control of the cow when it found a way to escape the fenced area and meandered on the highway. Gauna's death was proximately caused by the cow being on the highway.

Was this the kind of Accident that Ordinarily does not occur in the Absence of Negligence?

The second important segment of res ipsa loquitur is whether the cow accident ordinarily does not occur in the absence of McKenzie's negligence. How can we tell? We do have certain guides to follow: (1) to rely on the common experience of mankind; (2) the cause of the cow being on the highway which is accessible to McKenzie and inaccessible to Tapia; (3) the duty of McKenzie to exercise reasonable care to prevent livestock from wandering on a fenced public highway; (4) the duty of McKenzie to protect the motoring public; (5) the absence of an explanation by McKenzie that the accident arose from want of care; (6) the animal Acts which are designed primarily to reduce collisions between motor vehicles and animals on fenced public highways.

Grubb v. Wolfe, 75 N.M. 601, 408 P.2d 756 (1965), lighted the way on the duties of a cow owner by pointing out that "Time and progress have forged the change." The reasons are clearly set forth. The facts and statutes are pre-1966, but the court said:

> The foregoing authorities establish that the owner of livestock has a duty to care for his property as a reasonable man, and that he may be liable for injuries to motorists resulting from collisions with his animals due to his negligence in permitting them to be on the highway.

This decision was followed in Mitchell v. Ridgway, supra, where the doctrine of res ipsa was adopted, and distinguished in Carrasco v. Calley, supra, where a district court found no evidence of negligence of a bull owner under an unfenced highway act.

In Mitchell v. Ridgway, supra, the court said:

> Modern highways and vehicular traffic in New Mexico with livestock permitted to roam presents an intolerable situation.

I believe the facts in this case, the statutes in effect, and the decisions mentioned above show that an inference of negligence arises and the cow accident would not have occurred if McKenzie had exercised due care. See also Whitt v. Jarnagin, supra.

Defendant relies on Steed v. Roundy, supra. This is a New Mexico case involv-

ing an automobile-horse accident in Valencia County. The case was tried by the court, and findings made that the defendant was not negligent. This was affirmed. In interpreting an earlier animal act with "negligent" permission to allow livestock to run at large, the court said:

> The later statute specifically requires proof of negligence on the part of the owner of livestock running at large on the public highways before liability would attach.

This case was decided March 1, 1965, before Mitchell v. Ridgway, supra, decided December 10, 1966. Mitchell v. Ridgway, supra, adopted res ipsa loquitur under the same statute without mentioning the federal case. I find no further citations of the *Steed* case. We confirm Mitchell v. Ridgway, supra.

Defendant also relies on Wilson v. Rule, 169 Kan. 296, 219 P.2d 690, and Rice v. Turner, 191 Va. 601, 62 S.E.2d 24, cited in Mitchell v. Ridgway, supra. These views were not followed.

The defendant relies on Hughes v. W & S Construction Co., 196 So.2d 339 (Miss. 1967). This was a jury trial in which res ipsa was not involved, but, by way of dicta, the court held that if it were involved, the defendant fully sustained his burden of proving lack of negligence. It relied on its earlier decision of Pongetti v. Spraggins, 215 Miss. 397, 61 So.2d 158, 34 A.L.R.2d 1277 (1952). These cases do not support summary judgment, but support a peremptory instruction after all the evidence is in and defendant's testimony is clear and undisputed that he exercised reasonable care to restrain the freedom of his calf.

McKenzie has not yet disclosed what care, if any he exercised to restrain the cow from leaving the fenced area.

McKenzie closes his argument with a strong appeal that res ipsa loquitur creates an intolerable and unjust burden on livestock owners and makes them insurers of the public safety. This is not true. All of his alleged defenses are preserved. The legislature made negligence of the livestock owner a misdemeanor in order to protect the motorist. This is the public speaking. At nighttime, on vast, divided, fenced, interstate highways, livestock owners must recognize the danger to motorists created by the presence of a cow on the highway. They have a duty to protect human life more than the duty they have to protect the life of one cow. They must restrain the freedom of the cow, not to preserve its life, but to preserve human life. They must not play with human life by saying, "not only could the cow not have gotten through that fence, it did not. Nothing came through that fence. A cattle guard would ordinarily hold anything, but it didn't this one." It sounds like the cow flew over the moon and took Gauna's life.

The doctrine of res ipsa loquitur is a rule of common sense, and common sense permits an inference from proof of the injury and the physical agency inflicting it, without requiring proof of facts pointing to the responsible human cause. Witort v. United States Rubber Co., 3 Conn.Cir. 690, 223 A.2d 323 (1966).

By this special concurring opinion, I do not hold that Tapia is entitled to a victory. I only hold that Tapia is entitled to a trial before a jury requested by McKenzie.

489 P.2d 406

Roger D. DULL et al., Plaintiffs-Appellants,

v.

Isabelle TELLEZ, Administratrix of the Estate of George Cromie, Deceased, Defendant-Appellee.

No. 647.

Court of Appeals of New Mexico.
Sept. 17, 1971.

Dennis J. Falk and Allen C. Dewey, Jr., Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for plaintiffs-appellants.

Eric D. Lanphere, Iden & Johnson, Albuquerque, for defendant-appellee.

OPINION

HENDLEY, Judge.

Plaintiffs sued for damages arising out of a rear-end automobile collision. The trial court submitted the issue of unavoidable accident because of an unforeseeable sudden illness to the jury. The plaintiffs objected on the ground that there was no evidence of a sudden illness and that by submitting this as the basis for an unavoidable accident instruction the trial court submitted a false issue to the jury. The jury returned a verdict for defendant and plaintiffs appeal asserting there was a lack of evidence to support giving instructions relating to unforeseeable sudden illness which constituted an unavoidable accident. It is not claimed that unforeseeable sudden illness is not a defense. See Dull v. Employers Liability Assurance Corp., 233 So.2d 43 (La.App.1970); Corin v. Gately, 338 Mass. 110, 153 N.E.2d 752 (1958); Boyleston v. Baxley, 243 S.C. 281, 133 S.E.2d 796 (1963).

We reverse.

Was there a basis for giving an unavoidable accident instruction based on an unforeseeable sudden illness?

A party is entitled to an instruction on his theory of the case upon which there is evidence. Boyd v. Cleveland, 81 N.M. 732, 472 P.2d 995 (Ct.App.1970). Provided there is such evidence an unavoidable accident instruction is appropriate. Flanary v. Transport Trucking Stop, 78 N.M. 797, 438 P.2d 637 (Ct.App.1968). The proper test for giving an unavoidable accident instruction is whether there is any evidence from which the jury could conclude that the accident occurred without the negligence of any party being the proximate cause. Boyd v. Cleveland, supra.

The record discloses the following. Shortly before 10:45 p. m. plaintiffs were stopped at a light on East Central in Albuquerque behind a Cadillac automobile. Plaintiffs' automobile was rear-ended by a car driven by George Cromie. Plaintiff, Roger, stated he felt there was more than one impact. Immediately after the collision Cromie backed his car off the road to a parking area. Roger's car was damaged in front and back, having been bumped into the Cadillac. Shortly after the accident the police investigated and found no skid marks left by the Cromie car. The police officer testified that Cromie was unstable on his feet and there was an odor of alcohol on his breath. The officer noted in his report that Cromie was a "* * * border-line drunk driver."

Cromie's wife was a passenger in the Cromie car and testified that on the afternoon before the accident Cromie and his son-in-law had cut some trees at their home, had their evening meal, watched television, and then went to the American Legion Hall about 9:15 p. m. where they consumed two beers while they watched television.

No testimony was offered which would tend to show in any way that Cromie had an indication of an illness prior to the accident. Over plaintiffs' objection, testimony was given relating to Cromie's condition after the accident. The day following the accident Mr. Cromie was brought home by a filling station attendant who discovered Mr. Cromie in a stalled vehicle in the middle of Central Avenue. The attendant testified that upon discovering Mr. Cromie that he could not talk or move—"It was like he was paralyzed." Mrs. Cromie testified that after he was brought home her husband could not lift his left leg or use his left arm and that she had to help him put on his clothes to go see the doctor. Mrs. Cromie also testified that less than a month after the accident her husband had a "nervous seizure", and could not control his walk.

After the "nervous seizure" Cromie was taken to the Veterans' Hospital and examined by Dr. Kaplan, a neurosurgeon. Dr. Kaplan took a history which included the accident some four weeks previously, the weakness in the left leg and arm after the accident, and the absence of any trouble before the impact with plaintiffs' car.

Dr. Kaplan performed numerous tests all of which were interpreted to mean that Cromie had a brain tumor on the right side. An operation was performed but a tumor could not be found. Dr. Kaplan stated it was highly improbable that the conclusions of the tests were in error and did not alter his diagnosis. Dr. Kaplan stated that Cromie "undoubtedly had the tumor" prior to the accident. Dr. Kaplan also stated that "[o]ften people who have tumors in the frontal lobes of the brain have impaired understanding of the meaning and significance of events" and so Mr. Cromie was "not quite aware of the severity of the disease he had." Dr. Kaplan also testified that it was a possibility that the impact of the accident caused the cancer [tumor] which was then unknown, to become active or known.

The record fails to disclose any evidence about an inability of Mr. Cromie to operate an automobile before or on the date of the accident. The testimony establishes

the first time Mr. Cromie was observed to experience difficulty was on the day following the accident.

It is plaintiffs' contention that since there was no direct testimony relating to a sudden illness by Mr. Cromie at the time of the accident that a determination that there was a sudden illness could be made only by basing an inference on an inference. Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct.App.1970).

Defendant claims that the proper inquiry is whether any inference necessary to the proof, of the numerous elements of the unforeseeable illness defense, is such that it can be said the evidence is sufficient that a "reasonable mind might accept [it] as adequate support for a conclusion." Samora v. Bradford, 81 N.M. 205, 465 P.2d 88 (Ct.App.1970).

We must first determine whether a reasonable inference exists as to whether or not Cromie suffered from a sudden illness. As stated in Samora v. Bradford, supra, "A reasonable inference is a conclusion arrived at by a process of reasoning. * * *" This conclusion, however, must be a rational and logical deduction from facts admitted or established by the evidence, when such facts are viewed in light of common knowledge or common experience.

In order to reach a conclusion of sudden illness we would have to infer facts which are not present in the record. The testimony, taken singularly or collectively, does not give rise to an inference of a sudden illness. Dr. Kaplan's testimony of a brain tumor does not, in itself, give rise to an inference of a sudden illness. This is particularly so because, according to Dr. Kaplan, it was not possible to state that any action of Mr. Cromie prior to the accident was caused by the tumor. Some additional evidence would be needed. Evidence that Mr. Cromie always braked his automobile with his left foot and the absence of evidence as to braking in this case does not give rise to an inference that the absence of braking was due to a sudden illness. Again, additional evidence is needed. The additional evidence on which defendant relies is the evidence of defendant's physical problems—his illness—subsequent to the accident.

We need not, and do not, determine that the evidence of the post-accident illness permits an inference that the illness preexisted the accident. See Ferran v. Jacquez, 68 N.M. 367, 362 P.2d 519 (1961). Assuming a pre-accident illness may be inferred, the issue here is whether an inference of a "sudden" illness, immediately prior to or at the time of the accident, may be inferred. This issue involves the timing of the illness—when it began. In our opinion, the fact that an illness existed on the day following the accident does not permit an inference Mr. Cromie was suddenly incapacitated by illness immediately prior to or at the time of the accident.

While the defendant is entitled to have inferences drawn in his favor such inferences must be reasonably based on facts established in evidence and not based merely on conjecture or other inferences. Rekart v. Safeway Stores, Inc., supra. The record fails to disclose such facts.

Reversed and a new trial granted.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

489 P.2d 408

STATE of New Mexico, Plaintiff-Appellee,

v.

Barry Lee FOSTER, Defendant-Appellant.

No. 680.

Court of Appeals of New Mexico.

Sept. 17, 1971.

Ray Tabet, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Foster appeals from a conviction of robbery while armed with a deadly weapon contrary to § 40A-16-2, N.M.S.A. 1953 (Repl.Vol. 6).

We affirm.

Foster relies on two points for reversal: (1) Foster was prejudiced by opening remarks of the trial court concerning other charges against him; (2) Foster was denied a fair trial and due process of law because he was brought into the courtroom attired in jail garment and handcuffed.

1. *Was Foster Prejudiced by Opening Remarks by the Trial Court?*

At the opening of court before the jury, the judge identified Foster as the defendant, and stated Foster was charged with the crime of robbery and aggravated battery in Cause No. 20385. The assistant district attorney called attention to the fact this was not the case. The judge left the bench, went back to his desk, to get file No. 20286, returned to the courtroom and admonished the jury to ignore his remarks about the first case. He proceeded to explain the charge in 20286, robbery while armed with a deadly weapon.

Was Foster prejudiced? We believe not. The inadvertent conduct of the trial court "was of such minor significance that we are unable to ascribe to it any improper suggestion by the court or improper effect upon the jury." State v. Favela, 79 N.M. 490, 444 P.2d 1001 (Ct.App.1968). If there was error in the remarks of the trial court, it was cured by the admonition. State v. Curry, 27 N.M. 205, 199 P. 367 (1921). See State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct.App.1969). The judge's inadvertent actions do not approach the situation in State v. Rowell, 77 N.M. 124, 419 P.2d 966 (1966), and State v. Jones, 80 N.M. 753, 461 P.2d 235 (Ct.App.1969).

2. *Was his Appearance a Denial of Fair Trial?*

At the close of the state's case on rebuttal, the following proceedings occurred:

MR. SINGER: Your Honor, I would like the record to show that the Defendant was brought into the courtroom in handcuffs and this is a practice that has been condemned by this Court and by the Supreme Court. The jury saw this, and I think it is extremely distasteful and I wish the Court would admonish that this not happen again.

THE COURT: Well, I am not sure what the policy is. It has never come up in my court before. After they once get

inside the courtroom it is not a good policy, but I am not going to reprimand the Sheriff. I am sure it is an innocent mistake.

MR. TABET: We would like to add that as an additional ground to the motion.

THE COURT: Well, denied. * * *

First, there is no comment or evidence Foster was attired in prison clothing. This does not constitute error. State v. Sluder, 82 N.M. 755, 487 P.2d 183 (Ct.App. 1971).

Second, other than counsel's statement, there is no showing that any juror saw Foster handcuffed. This does not constitute error. State v. Sluder, supra. Furthermore, counsel's remarks were not evidence. Bollinger v. Rheem Mfg. Co., 381 F.2d 182 (10th Cir. 1967). He had a duty to prove the jury saw Foster in the courtroom with handcuffs on. Wallace v. Wanek, 81 N.M. 478, 468 P.2d 879 (Ct. App.1970). Foster was not prejudiced, or denied a fair trial, or denied due process. See State v. Gomez, 82 N.M. 333, 481 P.2d 412 (Ct.App.1971).

Affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

489 P.2d 410

STATE of New Mexico, Plaintiff-Appellee

v.

Joe Paul BELCHER, Defendant-Appellant.

No. 737.

Court of Appeals of New Mexico.

Sept. 17, 1971.

Charles A. Feezer, Carlsbad, for appellant.

David L. Norvell, Atty. Gen., Santa Fe, Ronald Van Amberg, Asst. Atty. Gen., for appellee.

OPINION

WOOD, Chief Judge.

Convicted of forgery, § 40A-16-9, N.M. S.A.1953 (Repl.Vol. 6), defendant appeals. A related case is State v. Belcher, 83 N.M. 75, 488 P.2d 125 (Ct.App.), No. 668, decided August 6, 1971. The issues in this appeal concern: (1) venue and (2) admission of certain exhibits as evidence.

Venue.

Defendant moved for a change of venue, relying entirely on copies of four newspaper articles. The trial court ruled the articles, in themselves, were insufficient to require a change of venue. We agree. State v. Foster, 82 N.M. 573, 484 P.2d 1283 (Ct.App.1971) and cases therein cited.

Exhibits.

(a) Money.

Prior to trial, defendant moved to suppress a sum of money as evidence. The motion was denied. At trial, the money was admitted as evidence over defendant's objection. Defendant claims these rulings were error.

An envelope was identified as containing a certain sum of money. Defendant claims error because the envelope was "never opened or examined by the jury." As to this, the trial court stated that if defendant "* * * is requesting that we verify the contents of the envelope, this will be done. * * *" This offer by the trial court was declined.

Defendant claims that this money was not connected up "as fruit of the crime" and was not "circumstantially connected with the offense with which the defendant is charged." We agree there is no direct evidence that the money was a "fruit of the crime," but that did not make the money inadmissible. See State v. Gray, 79 N. M. 424, 444 P.2d 609 (Ct.App.1968) as to reasons for admitting exhibits.

One reason for admitting an exhibit is to illustrate, explain or throw light on a criminal transaction. State v. Gray, supra. Here, the money filled that rule. There is evidence that defendant cashed forged checks at two businesses, within a short period of time. At one place he purchased a pint of whiskey, paid with a forged check for $60.00 and received the change. At the second place, he purchased a carton of cigarettes, paid with a forged check for $63.00 (the basis of this prosecution) and received the change. The amount of money in defendant's possession, when arrested a short distance and in a short period of time after cashing the second check, certainly tends to throw light on the transaction. The possession of the money, considered with the time and distance factors involved, circumstantially connected defendant with the criminal offense. See State v. Santillanes, 81 N.M. 185, 464 P.2d 915 (Ct.App.1970); compare State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct.App.1969).

(b) Red plastic wallet.

A red plastic wallet, identified by witnesses as belonging to defendant, was admitted into evidence. Among its contents was an identification card bearing the name of the payee named in the forged checks. The wallet was found "around the corner" from the business where the $63.00 forged check was cashed.

Defendant asserts that the wallet should not have been admitted because of the

weakness in the proof of the chain of custody of the wallet after it was found.

We agree that the evidence is weak, both as to who had physical possession and as to whether the contents were in the same condition at trial as when found. However, the witness who found the wallet testified that he was satisfied "[t]hat it is the same now as it was then."

Defendant's argument is based on the possibility of changes in the wallet and its contents. Doubt concerning the exhibit would go to the weight to be accorded the exhibit, but such doubt did not render the exhibit inadmissible. State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct.App.1970); see State v. Johnson, 37 N.M. 280, 21 P.2d 813, 89 A.L.R. 1368 (1933).

The judgment and sentence is affirmed. It is so ordered.

HENDLEY and COWAN, JJ., concur.

489 P.2d 641

Walt WIGGINS, Plaintiff-Appellee,

v.

Wilfred E. RUSH, Defendant-Appellant.

No. 9235.

Supreme Court of New Mexico.

Oct. 4, 1971.

Garland, Martin & Martin, William L. Lutz, Las Cruces, for appellant.

Sanders, Bruin & Baldock, Roswell, for appellee.

OPINION

MONTOYA, Justice.

This is a suit wherein the plaintiff-appellee Walt Wiggins, hereinafter called

"Mr. Wiggins," in an action for a declaratory judgment, filed a complaint against his wife Roynel F. Wiggins, hereinafter called "Mrs. Wiggins," Wilfred E. Rush, hereinafter called "Mr. Rush," and others, the latter being the grantors of three deeds to certain property wherein Mr. and Mrs. Wiggins were the grantees. Mr. Wiggins alleged the property was his sole and separate property. Appellant Mr. Rush was the only answering defendant in the case and he contends that the property in question was held either in joint tenancy or as community property, and that the transcript of the judgment filed by him, which had been obtained in a case for an antenuptial debt of Mrs. Wiggins, was a valid lien against the property described in the complaint.

In summary, the following are the pertinent findings made by the trial court. Prior to her marriage to Mr. Wiggins in April 1963, Mrs. Wiggins had signed and delivered to Mr. Rush her promissory note for $35,000 dated September 1, 1962. At the time of her marriage, Mrs. Wiggins owned separate property in Texas and Arizona.

After their marriage, Mr. and Mrs. Wiggins acquired a farm in Kansas, both being named as grantees in the deed. On January 5, 1965, Mrs. Wiggins quitclaimed her interest in the Kansas property to Mr. Wiggins, and also conveyed her separate property in Texas to her brothers. In 1966, the Kansas property was traded by Mr. Wiggins for certain property in Arkansas, and the Arkansas property was deeded to both Mr. and Mrs. Wiggins. That same year, the Arkansas property was traded for some Texas property and title thereto was taken in both their names. In 1966, the Texas property was traded to one of the defendants Geneva Spurrier for certain Chaves County property, which is involved in this action. That deed conveyed the property to Mr. and Mrs. Wiggins as joint tenants. In 1967, Mr. and Mrs. Wiggins acquired two other tracts of land in Chaves County, New Mexico, from two different grantors, M. C. Scott and G. E. Stephens. The deed from Scott conveyed title to Mr. and Mrs. Wiggins, with no recital as to their marital status. The deed from Stephens conveyed that land to Mr. and Mrs. Wiggins as joint tenants. During their marriage, Mr. and Mrs. Wiggins acquired title to two other tracts of land in Lincoln County, New Mexico, and title was conveyed to them as joint tenants. When the properties in Kansas and Texas were purchased, both Mr. and Mrs. Wiggins executed notes and mortgages to secure the purchase price. In acquiring the Arkansas property, both Mr. and Mrs. Wiggins assumed the encumbrances on the property.

During their marriage, Mr. and Mrs. Wiggins had joint bank accounts, or other accounts on which Mrs. Wiggins was authorized to sign checks. No effort was made by them to separate their properties or moneys during their marriage. They commingled their property and income and no effort was made to segregate income acquired from separate property. Substantial mortgage payments from joint accounts were made by Mr. Wiggins from his earnings upon the property acquired during the marriage. The court also found that they never intended to take title to their properties in joint tenancy, and that Mr. Wiggins never intended to give his wife an undivided one-half interest in the properties. The court further found that the properties involved in this action were acquired through the joint efforts of both Mr. and Mrs. Wiggins and were community property.

Mr. Rush obtained a judgment against Mrs. Wiggins in the Sierra County District Court, based upon the $35,000 promissory note, and filed a transcript of said judgment in Chaves County. In another case filed in Chaves County, a decree was obtained foreclosing the Sierra County judgment lien against the undivided interest of property conveyed to Mr. and Mrs. Wiggins by Stephens et ux., but no adjudication was made as to the character and

extent of such interest because Mr. Wiggins was not a party to such action.

The trial court concluded that Mr. and Mrs. Wiggins did not intend to take the properties as joint tenants; that the evidence was clear and convincing the properties in question were acquired through their joint efforts; and that the properties in question were community property.

The trial court also concluded that the community property of Mr. and Mrs. Wiggins was not liable for the antenuptial debts of Mrs. Wiggins. Therefore, the judgments in cause No. 35085 of the District Court of Chaves County, and cause No. 7076 in Sierra County and recorded also in Chaves County, did not constitute effective liens to the properties described in Mr. Wiggins' complaint.

Appellant Mr. Rush relies upon two points in seeking reversal of the trial court's decision. One contention is that there was no evidence to overcome the statutory presumption of joint tenancy, and the trial court's finding, that the property of Mr. and Mrs. Wiggins was community property, was not supported by substantial evidence. The other contention advanced by appellant is that, even if the property is community property, it would be liable for the antenuptial debts of Mrs. Wiggins.

Appellant's first contention relies heavily upon § 70-1-14.1, N.M.S.A., 1953 Comp., which reads as follows:

> "An instrument conveying or transferring title to real or personal property to two [2] or more persons as joint tenants, to two [2] or more persons and to the survivors of them and the heirs and assigns of the survivor, or to two [2] or more persons with right of survivorship, shall be prima-facie evidence that such property is held in a joint tenancy and shall be conclusive as to purchasers or encumbrancers for value. In any litigation involving the issue of such tenancy a preponderance of the evidence shall be sufficient to establish the same."

The major question is whether there is a preponderance of the evidence to support appellant's contention that the property was a joint tenancy. Both the intention of the parties and the source of funds used to purchase the property have bearing on this issue.

The trial court found that Mr. and Mrs. Wiggins did not understand the meaning or effect of a joint tenancy, nor did they wish to hold the property as joint tenants. Hence, the court's conclusion, that Mr. and Mrs. Wiggins did not intend to take the property as joint tenants, has substantial support in the record.

In examining the source of funds used to purchase the property, the trial court found that, during their marriage, Mr. and Mrs. Wiggins made no effort to segregate their separate funds from their community funds, nor was any accounting made as to sources of income. It appears that all moneys were deposited in a joint account. The rule is that if separate property has been so commingled or mixed with property acquired after marriage, so that the separate property cannot be clearly traced or identified, then there is a presumption that the property acquired after marriage is community property, unless this presumption can be overcome by proof. Stroope v. Potter, 48 N.M. 404, 151 P.2d 748 (1944); Burlingham v. Burlingham, 72 N.M. 433, 384 P.2d 699 (1963); Wood, the Community Property Laws of New Mexico, Ch. V, § 24 at 38 (1954).

Nothing appears in the record to indicate that the separate funds of either Mr. or Mrs. Wiggins were traceable in their joint account. The effect of this commingling was that any separate funds deposited in the joint account were transmuted into community funds. See, Burlingham v. Burlingham, supra. The trial court also found these community funds were used to purchase the property, and that mortgage payments on the property were made with community funds.

Because it was not the intention of Mr. and Mrs. Wiggins to hold the property as joint tenants, and because community funds were used to purchase the property,

the trial court concluded that a joint tenancy was not created. This conclusion, being supported by evidence of a clear and convincing nature, should be upheld.

Appellant further argues that § 57-4-1, N.M.S.A., 1953 Comp., is applicable. That section states:

"All other real and personal property acquired after marriage by either husband or wife, or both, is community property; * * * except, that when any such real or personal property is acquired by husband and wife by an instrument in writing in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is community property of said husband and wife. * * *"

However, in view of the trial court's findings, that community funds were used to purchase the property, the fact that the deeds named Mr. and Mrs. Wiggins as joint tenants is not controlling. In re Trimble's Estate, 57 N.M. 51, 253 P.2d 805 (1953).

Having held that the property in question was community property, the next question is whether the interest of Mrs. Wiggins in the community property is liable for her antenuptial debts.

There are several statutory provisions governing the community estate. See, §§ 57-3-8, 57-3-9, 57-4-2, 57-4-3, 29-1-8, N.M.S.A., 1953 Comp., and § 29-1-9, N.M.S.A., 1953 Comp. (1969 Pocket Supp.), but none of these sections deal with the precise question of whether the community is liable for antenuptial debts of either spouse. This court has held the wife's separate property was not liable for community debts, E. Rosenwald & Son v. Baca et al., 28 N.M. 276, 210 P. 1068 (1922), but we have not decided whether the community would be liable for a spouse's antenuptial debt.

There is no unanimity among the courts as to how this question should be resolved. The California court has held that the separate property of the wife and the community estate were equally liable for the debts of the wife contracted before marriage. Van Maren v. Johnson, 15 Cal. 308 (1860). Texas also reached the same result, however the holding in the Texas case may be modified by reason of subsequently enacted statutes. Dunlap v. Squires, 186 S.W. 843 (Tex.Civ.App.1916).

In Washington, the court held that community property would not be liable for the antenuptial debt of one of the spouses. Escrow Service Co. v. Cressler, 59 Wash. 2d 38, 365 P.2d 760 (1961). That decision apparently was based upon a statute lending itself to that interpretation. See, R.C.W. 26.16.200. The Arizona court also has determined that the community estate would not be liable for the antenuptial debts of one spouse. Forsythe v. Paschal, 34 Ariz. 380, 271 P. 865 (1928), see discussion of case infra.

This being a question of first impression in this jurisdiction, counsel for appellant urges this court to apply common law principles to the instant case, because of the 1876 statute declaring the common law shall be the rule of practice and decision in New Mexico. Counsel argues that the application of common law principles would result in a finding that the husband is liable for the debts of his wife contracted *dum sola*. See, Van Maren v. Johnson, supra.

Appellant further contends that New Mexico's community property statutes were, in large part, adopted from the California statutes then in effect. He cites the general rule to-wit: The adoption of the statutes from another state includes prior construction of those statutes by the courts of that state. Appellant, therefore, urges us to follow the California decision holding that the community property of the wife is liable for her antenuptial debts. That argument was disposed of by this court in McDonald v. Senn, 53 N.M. 198 at 205, 204 P.2d 990 at 993-994, 10 A.L.R.2d 966 at 971 (1949), as follows:

"It is true, the New Mexico community property laws were largely an adop-

tion of the California statutes. But this court has never followed the decisions of the California courts with respect to the interests of the spouses in community property; nor have the courts of any other state done so. This conflict of decisions goes back to an early date."

This court has held that common law principles, which are applicable to our conditions and circumstances, are the rule of practice and decision in New Mexico. Browning v. Estate of Browning, 3 N.M. (Gild), 659, 9 P. 677 (1886). We have also held that, when dealing with community property concepts, it is necessary to look to the Spanish-Mexican law for definitions and interpretations concerning the community estate. Beals v. Ares, 25 N.M. 459, 185 P. 780 (1919). In addition, this court stated in McDonald v. Senn, 53 N.M. at 213, 204 P.2d at 999, 10 A.L.R.2d at 977:

"The state's public policy on the subject of community property is expressed in the statutes, interpreted in the light of the Spanish-Mexican law. * * *"

It appears the community property concept is unique and not part of the common law of New Mexico. We must, therefore, reject appellant's contention that common law principles apply and look instead to the Spanish-Mexican law.

The Supreme Court of Louisiana, in Fazzio v. Krieger, 226 La. 511 at 516–517, 76 So.2d 713 at 715 (1954), pointed out:

"* * * Research into the Spanish law of community property reveals that since the year 1255 A.D. the Spanish law has contained the provision that an antenuptial debt of one spouse is the liability of his separate property alone. * * *"

We are in complete accord with the Louisiana court in the interpretation of the Spanish law on this subject.

Mr. William Q. deFuniak, in his authoritative treatise, Principles of Community Property, Vol. I, § 158 at 442, is critical of court decisions holding the community estate liable for the antenuptial debts of one of the spouses, and states:

"The conclusion regrettably reached from the foregoing is that in none of the states discussed is there any clear understanding of the true principles applicable so far as community property is concerned. But another view exists in some of the community property states which seems to represent a more correct understanding and proper application of the law. This view denies any liability of the community property for antenuptial debts and obligations of the spouses. In justification of this view it is pointed out that the proper maintenance and protection of the family would be endangered if the community estate and earnings could be diverted from its purpose of insuring such maintenance and protection, in order to satisfy debts in no way connected with the family. * * *"

We believe the view expressed by Mr. deFuniak is the better rule.

A close examination of Forsythe v. Paschal, supra, is warranted because the facts of that case closely parallel the instant case and call for an application of the above cited rule. In Forsythe, the Arizona court faced the question of whether the community property was liable for the separate debts of either spouse contracted before marriage. As in New Mexico, Arizona had statutes governing community property, but those statutes were silent on the question of liability of the community for the antenuptial debts of either spouse. See, R.S.A.1913, Civil Code, ¶¶ 3853 and 3854. Like New Mexico, Arizona also had a statute adopting the common law as the rule of decision in all courts of that state. Laws of Arizona 1907, Ch. 10, § 8; see also, Hageman v. Vanderdoes, 15 Ariz. 312, 138 P. 1053 (1914).

Two contentions raised in Forsythe v. Paschal, supra, were argued in the instant case. First, that it was the rule in certain other community property states, notably California and Texas, that the community property was liable for the antenuptial

debts of either spouse. Secondly, that the maxim of "*expressio unius est exclusio alterius*" should be applied to the statutes governing community property. It was argued that, since the legislature expressly stated the separate property of either spouse should not be liable for the antenuptial debts of the other and did not expressly exempt the community estate from liability for such debts, the maxim of "*expressio unius*" implied that the community would be liable for antenuptial debts.

The Arizona court disposed of the first contention by citing its former decisions holding that the nature of the community property estate was based upon a different theory than Texas and California. Consequently, decisions of those states were not controlling in Arizona. In dealing with the contention that the maxim of "*expressio unius*" applied, the court reasoned that, though the maxim was true as a general principle, when the public policy of the state was vitally affected the maxim would not be applied to contradict it.

The State of New Mexico has a vital interest in the marital status. This interest is clearly expressed in our statutory framework concerning the marital status, including its creation, dissolution, and the methods by which the parties to the marriage can hold property. It is this vital state interest in the marital status that distinguishes the marriage relationship from other contractual relationships. For a creditor of one of the spouses to be allowed to collect his debt from the community estate would materially affect the property of the family unit, and could ultimately undermine the marital relationship. As the Arizona court stated in Forsythe v. Paschal, 34 Ariz. at 386, 271 P. at 867:

> "* * * There are few things which would do more to destroy the solidarity of family life and the proper maintenance of the children of the marriage than the possibility that the community estate and earnings primarily intended by the state for this protection could be diverted from that purpose to satisfy debts in no way connected with the family. * * *"

This court is in full accord with the Arizona court on this point. New Mexico's interest in the protection of the family relationship, as expressed in our statutes, indicates that the state deems itself an interested party when the community estate and the marriage itself are affected. If the legislature had intended that the community property of the marriage should be subjected to the antenuptial debts of either spouse, it would so state. This it has not done.

For this court to hold that the community estate of Mr. and Mrs. Wiggins is liable for the antenuptial debt of Mrs. Wiggins would be against the public policy of New Mexico.

The decision of the trial court is affirmed.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

489 P.2d 646

LOUIS LYSTER GENERAL CONTRACTOR, INC., a New Mexico Corporation, Plaintiff-Appellant,

v.

CITY OF LAS VEGAS, New Mexico, a municipal corporation, Defendant-Appellee and Cross-Appellee,

v.

T. E. SCANLON AND ASSOCIATES, a partnership, Third-Party Defendant-Appellee and Cross-Appellant.

No. 9204.

Supreme Court of New Mexico.

Oct. 8, 1971.

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[redacted]

H. E. Blattman, Las Vegas, Charles E. Barnhart, Albuquerque, for appellant.

Zinn & Donnell, Santa Fe, for appellee and cross-appellant Scanlon.

Roberto L. Armijo, Las Vegas, for appellee and cross-appellee City of Las Vegas.

OPINION

STEPHENSON, Justice.

Louis Lyster General Contractor, Inc. ("Lyster") and T. E. Scanlon and Associates, sometimes called Scanlon-Erwin & Associates, both names referring to the same entity and hereafter collectively called "Scanlon," have appealed from a money judgment entered against them in favor of the Town of Las Vegas on account of a structural failure in a sewage treatment facility in this case of many stercoraceous facets. The City of Las Vegas ("the City") has since been substituted for the Town of Las Vegas as a party.

This is the second appeal in this case. See Louis Lyster Gen. Con., Inc. v. Town of Las Vegas, 75 N.M. 427, 405 P.2d 665 (1965) (the "first appeal"). The opinion, which reversed and remanded for a new trial, accorded the parties the right "to amend their pleadings to simplify the same and to eliminate the present errors and confusion as to issues, parties, and the type of relief sought." This has proven a vain hope.

Scanlon asserts that he was not a party at the time of the second trial. This issue is to be resolved by the law relating to pleading. The pleadings here are complex. We will first deal with Lyster's appeal and will defer an exposition of the pleadings, except as they relate to Lyster, until we reach Scanlon's appeal.

Following the first appeal, Lyster filed an amended complaint against the City only, Scanlon being omitted as a defendant, seeking recovery of the unpaid balance on a construction contract. The complaint as amended alleged the structural failure in question to have resulted from an inadequate and improper design by Scanlon as the agent of the City. The City by its answer denied the agency and alleged that the failure was in part caused by Lyster's improper workmanship and failure to follow the plans and specifications.

Lyster, from a time antedating the first trial and the first amended complaint, while Mr. Lyster individually was plaintiff, was

a defendant in a third-party complaint filed against it by the City seeking a money judgment, asserting that it had failed to complete a tray as specified in the contract documents and that it was negligent in the construction of the tray slab, which resulted in its collapse. Lyster does not assert that it was not properly defending this claim of the City.

The issues embodied in all of the pleadings were tried to the court without objection by anyone other than Scanlon. Following trial, findings were requested by Lyster and United States Fidelity & Guaranty Company (U. S. F. & G.), Lyster's surety. The court in its decision found various items of negligence on the part of both Scanlon and Lyster, and that such acts or omissions equally contributed to the structural failure. Judgment was entered against Lyster and Scanlon for various items of damages, including liquidated damages. No judgment was entered against U. S. F. & G. The means of its escape do not appear.

The evidence showed that the contract called for a circular structure forty feet in diameter and thirty feet high of reinforced concrete. Eight feet from the top there was a tray with a four-foot opening in the center. The portion of the structure from the tray upward comprised the upper chamber. A revolving arm driven by an electric motor was designed to revolve slowly over the surface of the tray. In operation, waste material was supposed to enter the structure, find its way onto the tray and then pass through the opening into the lower chamber. The revolving arm was designed to keep the solids broken up and move them slowly to the center.

There was a structural failure of the tray during the time the plant was being tested, as evidenced by a crack around the tray where it joined the outer walls and a dropping of the tray from a point at the end of the structural steel supports which extended seven feet inward from the outer walls. The tray hit the revolving arm, jamming and binding it and the machinery which moved it, rendering the structure inoperative.

Lyster, in its first four points, attacks certain findings of fact made by the trial court and also, in some instances its failure to adopt findings requested by Lyster. We are bound to view the evidence, together with all favorable 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. Oberman v. Oberman, 82 N.M. 472, 483 P.2d 1312 (1971). We have examined those portions of the record cited by the parties in support of their respective positions.

Lyster's Point One is:

"THE COURT ERRED IN REFUSING TO FIND THAT SCANLON'S CONTRACT WITH THE TOWN REQUIRED SCANLON TO PROVIDE A RESIDENT SUPERVISOR FOR THE PROJECT."

This point is abstract and without relevance. Since no causal relationship between the want of a resident inspector and the failure of the structure is suggested, the court's action related merely to evidentiary matters, and the error, if any, was harmless.

Lyster's Point Two is:

"THE COURT ERRED IN ITS FINDING OF FACT NO. 15, TO-WIT, 'SAID CLARIFIER-DIGESTER WAS EQUIPPED WITH AN ALARM SIGNAL WHICH WAS SET TO GO OFF AT ANY TIME EXCESSIVE FRICTION DEVELOPED BETWEEN THE DORR-OLIVER MECHANISM AND THE STRUCTURE, THUS PROVIDING AN OPPORTUNITY TO STOP OPERATION OF THE UNIT FOR INSPECTION AND REMEDIAL ACTION.'"

And its Point Four is:

"THE COURT ERRED IN MAKING ITS FINDING OF FACT NO. 20, TO-WIT: 'THAT AFTER COMPLETING

THE CONSTRUCTION OF SAID CLARIFIER-DIGESTER, LOUIS LYSTER, GENERAL CONTRACTOR, INC., NEGLIGENTLY AND IN VIOLATION OF HIS CONTRACT, ATTEMPTED TO SEED THE SAME WITH RAW SEWAGE AND SLUDGE DURING COLD, INCLEMENT AND FREEZING WEATHER, THEREBY RENDERING IT IMPOSSIBLE FOR THE SEEPING AREA WHICH PERMITTED MATERIAL ON THE UPPER PORTION OF THE UNIT TO SEEP DOWN INTO THE LOWER PORTION OF THE UNIT TO BECOME CLOGGED, FROZEN AND STOPPED; AND THAT SAID CONTRACTOR NEGLIGENTLY FAILED TO CHECK OR DETERMINE WHETHER OR NOT SAID SEEDING MATERIAL WAS IN FACT FLOWING INTO THE LOWER CHAMBER OF SAID UNIT, AND WHETHER OR NOT SAID LOWER CHAMBER HAD BECOME FILLED BEFORE ALLOWING THE UPPER CHAMBER TO FILL UP.' "

We agree with Lyster as to both Points Two and Four. However, since our decision as to them is neither dispositive of the appeal nor significant in the result we reach, it does not seem worthwhile to discuss them further.

Lyster's Point Three is:

"THE COURT ERRED IN MAKING ITS FINDING OF FACT NO. 16, TO-WIT, 'THAT, AS DESIGNED BY T. E. SCANLON, SAID TRAY SLAB WAS TO BE CONSTRUCTED WITH CONCRETE WITH REINFORCING STEEL BARS WHICH WERE TO BE PLACED, SET AND TIED-IN IN A PRECISE AND SPECIFIC MANNER.' AND ERRED FURTHER IN MAKING ITS FINDING OF FACT NO. 18, TO-WIT, 'THAT IN CONSTRUCTING SAID CIRCULAR STRUCTURE AND TRAY SLAB LOUIS LYSTER, GENERAL CONTRACTOR, INC., NEGLIGENTLY, AND IN VIOLATION OF HIS CONTRACT WITH THE TOWN OF LAS VEGAS, FAILED TO PLACE SOME OF THE SPECIFIED REINFORCING STEEL BARS IN ACCORDANCE WITH THE PLANS AND SPECIFICATIONS REFERRED TO IN, AND MADE A PART OF, PLAINTIFF'S EXHIBIT NO. 1, THE CONTRACT, WHICH PLANS AND SPECIFICATIONS ARE PLAINTIFF'S EXHIBITS NO. 2 HEREIN.' AND FURTHER ERRED IN REFUSING TO ADOPT THE PLAINTIFF'S REQUESTED FINDING OF FACT VI, TO-WIT, 'THAT LOUIS LYSTER, GENERAL CONTRACTOR, INC., DID CONSTRUCT SAID SEWAGE TREATMENT PLANT IN ACCORDANCE WITH PLANS AND SPECIFICATIONS BY T. E. SCANLON AND ASSOCIATES.' "

From an examination of the plans and specifications, it seems to us that the placement of steel was detailed with some specificity and that accordingly the court's Finding No. 16 is sustained by the evidence.

The crucial question is whether substantial evidence supports Finding No. 18. Lyster launches its argument and analysis of the evidence by saying that the testimony of both Mr. Lyster and Mr. Scanlon, who have personal interests, would be ignored and the testimony of "the highest qualified expert" is then discussed. This constitutes a bald plea for us to weigh the evidence which we decline to do. Lyster's argument and analysis is forceful and persuasive. From the cold record, we might have made findings different from those made by the trial court, but we are unwilling to depart from our oft announced substantial evidence rule.

Actually, there was an implication from the testimony of Lyster's expert that the steel intended to reinforce and support the tray had been placed by Lyster in a manner at variance with the plans and normal practice. There was considerable testi-

mony from Mr. Scanlon to the effect that this steel had not only been improperly placed, but that such placement was also the cause of the structural failure.

We thus must resolve this point adversely to Lyster. Since the findings attacked are supported by substantial evidence, it follows that it was not error for the court to refuse the contra finding requested by Lyster.

In its fifth point Lyster claims that the trial court erred in finding that Scanlon was not the agent of the City and in refusing a requested finding that he was, and in its sixth point that the court erred in declining to impute the negligence of Scanlon to the City.

We do not agree. In the present posture of the case, the doctrines of agency and respondeat superior are without significance and the error, if any, was harmless. Lyster, in its amended complaint, sued the City for the unpaid balance of the contract price on the theory that the proximate cause of the failure was the inadequate and improper design of the structure by Scanlon, who was the agent of the City. City, in its amended answer, denied the agency and affirmatively alleged that:

> "* * * the failure was caused, in part, by improper workmanship on the part of [Lyster], and in part, by [Lyster's] failure to do the work in accordance with the plans, specifications and designs * * *."

We have held that the court's findings numbers 16 and 18, together determining that Lyster was negligent and failed in certain respects to follow the plans and specifications, were supported by substantial evidence. Moreover, the court found that Lyster negligently and in violation of his contract placed an excessive amount of grout on the tray, thereby adding to the deadweight that the tray had to support. That finding is not attacked, and is therefore binding upon us.

Lyster has thus been determined to have been at fault by findings either sustained by us or not attacked by it in respects entirely independent of and unconnected with the negligence of Scanlon in the fields of engineering and design (which was found by the trial court to exist and is not now attacked by any party). Lyster cannot impute its own negligence to the City under any application of the doctrine of respondeat superior based upon Scanlon's asserted negligence and agency.

We have no difficulty with proximate cause in regard to Lyster's negligence. No argument is directed to it nor is attack made on the court's finding in regard to it, which states:

> "24. That the failure of the clarifier-digester unit resulted proximately from the aforesaid act of negligence of Louis Lyster, General Contractor, Inc., and T. E. Scanlon, and that said acts of negligence were equally contributing factors to said failure."

Thus the concepts of agency and imputed negligence have no role at this juncture in resolution of the issues tendered by the first amended complaint or the answer to it, either as instruments of Lyster's offense or of the City's affirmative defense.

Neither can Lyster complain of error as to Scanlon's negligence or the imputation thereof to the City in relation to the latter's third-party complaint against Lyster, upon which the City's recovery against Lyster is predicated, or Lyster's answer thereto.

The third-party complaint (Mr. Lyster, individually, was then the plaintiff and the mentioned pleading added the Lyster Corporation which is now the plaintiff) alleged negligence and failure to follow the plans and specifications on the part of Lyster. Lyster in its answer admitted certain of the City's allegations and denied others, but pleaded no affirmative defenses in general nor, specifically, any defensive matter based upon Scanlon's agency or the imputation of his negligence to the City.

It is true that in the same pleading, Lyster cross-claimed against its co-third-party defendant, Scanlon, alleging the inadequacy of his design. However, the cross-claim is

without significance now because Lyster asserts no claim against and seeks no recovery from Scanlon.

Finally Lyster complains of the award of liquidated damages, or at least of the award in conjunction with the other damages we will mention.

As to damages, including liquidated damages, the contract provided:

"7–23: *Time.*

"* * *

"b. *Damages Occasioned by Contractor's Delay*: If the work is not completed in accordance with the foregoing, it is understood that the Owner will suffer damage; and it being impracticable and infeasible to determine the amount of actual damage, it is agreed that the Contractor shall pay to the Owner as fixed and liquidated damages, and not as a penalty, the sum set out in the 'Instructions to Bidders' of these contract documents for each calendar day until the work is completed and accepted, and the Contractor and his Surety shall be liable for the amount thereof; * * *"

"2–11: *Date of Completion*: This contract must be completed in one hundred twenty (120) weather working days. For each day that any work shall remain uncompleted after the 120 weather working days has expired, the sum of Fifty Dollars ($50.00) per weather working day shall be deducted from any money due the Contractor, not as a penalty but as liquidated damages and added expense for engineering services. * * *"

"Section 4—*Contract*

"* * *

"5. That in the event any of the provisions of this contract are violated by the Contractor or by any of his subcontractors, the Owner may serve written notice upon the Contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within ten (10) days after the serving of such notice upon the Contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said ten (10) days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety, shall have the right to take over and perform the contract provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account of and at the expense of the Contractor, and the Contractor and his Surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor."

Some explanation of the court's overall award is essential to an understanding of our disposition of this issue. The court awarded damages for remedial work by another contractor, additional engineering fees and expenses of reactivating the old plant, as well as liquidated damages. Findings were also made, and are not now attacked, the thrust of which is that Lyster abandoned the job.

Specifically as to liquidated damages, the court found:

"38. That under the terms of its contract with the Town of Las Vegas, Louis Lyster, General Contractor, Inc., was to have completed the work called for thereunder within 120 weather working days, and the sum of $50.00 per weather working day beyond said period was agreed and stipulated to as liquidated damages. Said period of 120 days had elapsed prior to December 20, 1961."

"39. That there is due to the Town by Louis Lyster, General Contractor, Inc., the sum of $10,000.00 representing liquidated damages for 200 days at $50.00 a day."

Gruschus v. C. R. Davis Contracting Company, 75 N.M. 649, 409 P.2d 500 (1965) held, regarding liquidated damage provisions, that:

> "* * * [S]uch a clause will only be denied when the stipulated amount is so extravagant or disproportionate as to show fraud, mistake or oppression."

We find no such factors present. Apart from the fact that the contract price alone was over $109,000.00, the depriving of a municipality with a population of several thousand people of its sewage treatment facility is a serious matter. The amount of the agreed liquidated damages per day does not seem excessive, and does not approach being "extravagant or disproportionate."

Lyster says that "an award of actual damages is a bar to the awarding of liquidated damages." This is the converse of the holding in Gruschus that liquidated damages precluded the award of "actual" damages under the circumstances of that case. The prime significance of Gruschus is in its holding that:

> "There would seem to be no sound reason why persons competent and free to contract may not agree on the amount of liquidated damages for failure to complete a contract within a specified time to the same extent as they may contract on any other subject, or why their agreement in this respect, when fairly and understandingly entered into, with a view to just compensation for an anticipated loss, should not be enforced. * * *"

The court in Gruschus considered and applied the contract before it. We must do the same here. There is no occasion to construe a contract the meaning of which is clear, or to resort to rules of construction. It is only necessary to read and apply it. It is not claimed this contract is ambiguous.

When this is done several things are clear. First, the facts are easily distinguishable from those considered in Gruschus. There, only damages for delay were sought. Here, various other items of damages were suffered. Secondly, in Gruschus the contract was completed, whereas here, according to findings which were not attacked, it was abandoned. Finally, under the contract in this case, the operation of the liquidated damage clause is restricted solely to delay. It is only for delay that liquidated damages may here be recovered, and under the holding in Gruschus only liquidated damages may be recovered for delay.

Yet the contract itself provides for other damages, and others have been suffered. The vice to be guarded against is a duplication of damages. The damages here, other than the liquidated damages, are unrelated to delay and duplication has not occurred. We therefore fail to understand why the court's award of the other damages which are unrelated to delay should preclude the award of liquidated damages which is predicated solely upon delay. City was not required to elect to pursue one type of damages or the other because the provisions are not mutually exclusive.

We are not, however, satisfied with the amount of liquidated damages awarded.

Text writers and courts have arrived at various conclusions as to whether, and how much, liquidated damages should be awarded when the contractor has abandoned the project. 5 Williston, on Contracts, § 785 (3rd ed. 1961); 5 Corbin, on Contracts, § 1072 (1964). We are spared the necessity of determining this issue. It is not argued, and neither party tendered evidence or requested findings on the length of time reasonably required for completion, or any other factual feature which would bring the award within any of the various rules of law applicable to such fact situations. But we are nevertheless at a loss to determine how the court arrived at the 200 days specified in its Finding 39.

One feature glares forth which makes us unwilling to approve the award of liquidated damages in its present form. On May 22, 1962, City gave notice to Lyster that unless the latter took certain action (which did not occur), the contract would be terminated ten days after receipt of the letter.

This was doubtless done pursuant to Section 4(5) of the contract. Obviously the City cannot in one breath terminate the contract and in the next claim damages which thereafter accrue to it under its terms on a day-by-day basis.

The trial court is directed to set aside its judgment insofar as liquidated damages against Lyster are concerned, determine the number of days for which City is entitled to liquidated damages up to the effective date of the City's termination of the contract, and fix the amount of liquidated damages accordingly.

We come now to the appeal of Scanlon, whose basic assertion is that he was not a party from the time of filing the first amended complaint. In order to resolve this question, an analysis of the pleadings, notable for their complexity, is required.

It is clear that Scanlon lost the lawsuit. Judgment was entered against him, but even here the difficulties commence. He is referred to in the judgment as a "third party defendant." Presumably because of this expression of descriptio personae, he takes the position that the judgment was rendered on the third-party complaint, upon which his primary attack is waged. It is true that he had been a third-party defendant, more or less, but he was several other things as well including, at one stage, defendant, cross-defendant in an action by his co-third-party defendant Lyster, and cross-defendant in a cross-claim (mislabeled counterclaim and hereinafter so called) filed by his co-defendant, the City.

Originally, as "T. E. Scanlon & Associates, a partnership," Scanlon was a co-defendant with the City. He answered as "T. E. Scanlon, a sole proprietorship doing business as T. E. Scanlon & Associates." Mr. Lyster, individually, was then plaintiff, but in the amended complaint, the Lyster Corporation was plaintiff and Scanlon was omitted as a defendant. The amended complaint and answer seem to be regarded by all as having replaced the original complaint and answer, notwithstanding the change of parties plaintiff and defendant. No one contends otherwise and we hasten to accept this premise.

The amended answer is noteworthy in paragraph 7 and the prayer. The former states:

> "7. This defendant affirms all of the allegations and averments of all of its prior pleadings herein insofar as the same may be applicable to the first amended complaint herein, meaning and intending hereby to stand by the issues as the same have heretofore existed herein as shown by the prior pleadings herein."

The City prayed, inter alia, that upon trial of the issues, "the Court render judgment in favor of this defendant on its third party complaint and its counter claim against the defendant" Scanlon.

We now come to the so-called third-party complaint. At an early stage, City moved for leave to file a third-party complaint against Lyster and U.S.F.&G., neither of whom were theretofore parties. The motion was granted, and leave was given to file such a complaint against those parties, naming them.

When the third-party complaint was filed, it purportedly included Scanlon as a third-party defendant in the guise of "Scanlon-Erwin & Associates, a partnership." Scanlon asserts or assumes that this is the pleading upon which judgment was rendered against Scanlon, and vigorously claims that the procedures utilized were jurisdictionally defective because Scanlon was already a party under another nome de guerre; that he was wrongfully deprived of his right to be heard on whether the motion should be granted; that the order did not authorize the filing of the pleading against him, etc. To which we would add that the third-party complaint alleges no wrongful act or omission on the part of Scanlon. It does not even cast aspersions upon him. It is only possible to see that he was apparently intended to be a third-party defendant by reference to the caption. The attack upon the third-party

complaint by Scanlon constitutes the first principal limb of his argument.

The only response which the third-party complaint elicited from Scanlon was a motion to dismiss for failure to state a claim upon which relief could be granted. The motion appears to have considerable merit and no disposition has been made of it. The motion, however, does not seem to have seized the attention of the parties and we will pass on to other matters.

The next pleading filed against Scanlon was Lyster's cross-claim. We have already spoken of this in regard to Lyster's appeal and determined it to be without present significance.

Finally, there is the counterclaim by the City against its then co-defendant Scanlon. Obviously it is a cross-claim, and while it says it is a claim against "Defendant, T. E. Scanlon & Associates," the cause of action is alleged against "Scanlon, Erwin & Associates," but both entities are apparently just Scanlon. We are not disposed to boggle at such discrepancies. Scanlon replied to the peading.

The parties do not give much attention to the counterclaim. Scanlon finds it convenient to ignore it, other than to mention that it is mislabeled. The City does not seem to rely on it as a means of sustaining the judgment, merely mentioning it in passing as an indication of jurisdiction. We take a more serious view of it.

At the commencement of the trial, the pleadings were reviewed and discussed prior to commencement of the testimony, during the course of which the counterclaim and Scanlon's reply to it were discussed.

Since the filing of the amended complaint, Scanlon has consistently taken the position that he was not a party. Although he was present at the trial, his presence was in response to a subpoena and he was unattended by counsel. He was called as an adverse witness by Lyster and as an expert witness by the City. Also, his pretrial deposition was introduced. During the trial Scanlon, with protestations of amazement that he should be thought a party, questioned a witness. In a colloquy between the court and Scanlon, the latter was told that the cross-claim was being tried.

In its decision, the court found that the case had been tried on the issues presented by all of the pleadings we have mentioned, and possibly others, specifically including the counterclaim and Scanlon's answer to it.

As we have said, Scanlon's primary attack is upon the third-party complaint. We agree with Scanlon that, for the reasons to which we have referred, not the least of which is that it was not at issue, the third-party complaint can not constitute the basis of the award against Scanlon.

Scanlon asserts paragraph 7 of the amended answer, quoted supra, could not breathe new life into prior pleadings which had expired, as he says the third-party complaint had done. We agree. Paragraph 7, in the framework of these pleadings, which we trust are unlikely to be duplicated, was so general and its effect so vague, indefinite and uncertain, that it was ineffectual to revive or otherwise affect prior pleadings. 2A Moore's Federal Practice, Par. 10.05. Which, of course, is another way of saying that we do not understand it.

Scanlon's other principal contention is that the filing of the amended complaint by Lyster "erased the board clean," apparently obliterating all prior pleadings. This is based on the opinion and mandate in the first appeal, insofar as it stated that a new trial should be granted:

> "* * * on the issues raised by the pleadings, either as they now exist, or may be hereafter amended."

Scanlon asserts it had to be one way or the other. We do not agree. A reading of the mandate together with the opinion, insofar as it relates to pleadings, parties and issues, convinces us that it was intended to accord each party a right to amend, rather than to Lyster to so make the election for all. We are prepared only to hold that the amended complaint and answer superseded the original com-

plaint and answer, thereby eliminating Scanlon as a defendant as to the complaint, but not affecting his status otherwise.

This leaves us to deal with the counterclaim, which we consider to be the crucial issue. Prior to the first appeal, the issues of the counterclaim were joined by the parties to it and fully formulated. We are furnished with neither authority nor any logical reason as to why the City was obligated to replead the same claim in the form of a third-party complaint or whatever following the amended complaint. Why should a change in the parties and relief sought in the complaint extinguish a pre-existing counterclaim and reply, over which the court had theretofore had undoubted and unquestioned jurisdiction? We have found no such authority and no such logical reasons occur to us. We fail to see why the situation is changed or affected by Scanlon having been dropped as a defendant in the amended complaint. The authorities we have found indicate the counterclaim survived the amendment. 3 Moore's Federal Practice, Par. 13.36 at page 98, states:

> "* * * [I]f the original bill or claim in connection with which the cross-claim arises is dismissed for lack of jurisdiction, it would seem, on analogy to cases concerning counterclaims, that the dismissal carries with it the cross-claim, *unless the latter is supported by independent jurisdictional grounds.*" (Emphasis supplied.)

Thus, in Frommeyer v. L. & R. Construction Co., 139 F.Supp. 579 (D.N.J. 1956), there were properly filed cross-claims followed by a dismissal of the complaint as to the co-party defendant against whom the cross-claims were filed The court, in noting that "the aim of procedural rules is facilitation not frustration of decisions on the merits," answered the contention that the cross-claims were required to be repleaded as third-party complaints. It said that the cross-claims were proper when filed and continued to be so:

> "Once proper, they did not cease to be so because the party to whom they were addressed subsequently ceased to be a co-party."

See also Picou v. Rimrock Tidelands, Inc., 29 F.R.D. 188 (E.D.La. 1962). It is unlikely that any problem in this case could have been solved by more pleadings.

The amended answer, in its prayer, made clear recovery was sought on the counterclaim. The court considered it was trying the issues of the counterclaim. We are not convinced that judgment was rendered against Scanlon on the third-party complaint rather than the counterclaim. The judgment does not specify what pleadings formed the basis for the award against him. While he was designated as a third-party defendant in the judgment, he could have been designated by a number of other descriptions with equal facility. Such minutiae should not be the basis for striking down judgments. The trial court's findings mesh with the issues of the counterclaim and fully sustain the determination of Scanlon's liability.

A judgment carries with it a presumption of validity. State for Use and Benefit of Dar Tile Co. v. Glens Falls Insurance Company, 78 N.M. 435, 432 P.2d 400 (1967). In Ellis v. Parmer, (76 N.M. 626, 417 P.2d 436 (1966), Oman, J., stated:

> "On appeal all reasonable presumptions will be indulged to support the decision and judgment of the trial court and the proceedings in that court."

We are thus willing to presume that the judgment against Scanlon was predicated on the counterclaim and it is affirmed except as to the amount of damages.

An adjustment is also required in the amount of damages awarded against Scanlon. Firstly, an award of $10,000.00 of liquidated damages was predicated on the contract between Lyster and the City. Scanlon was not a party to that contract. He asserts and the City concedes that the award against him should be diminished by the amount of any liquidated damages.

Similarly, Scanlon claims that he should have been credited with an additional $1,182.00 representing the value of con-

tracted work not completed by Lyster, and which was taken into account in fixing the award against Lyster. The correctness of this position was conceded by the City at oral argument and the award against Scanlon should accordingly be further diminished by this amount.

Finally, Scanlon says that he should be allowed a credit of $12,442.53, which was allowed to Lyster but not Scanlon. This figure represented the unpaid balance on the contract between Lyster and the City. The City does not attack the credit to Lyster but resists granting it to Scanlon.

We cannot agree with Scanlon's position. The damages flowed equally from Scanlon's negligence and we see no impropriety in the award. Moreover, the credit contended for by Scanlon is akin to the liquidated damages in that it was granted to Lyster as a result of the contractual relationship between it and the City—a contract to which Scanlon was not a party.

Scanlon points out that the City has not been damaged in the amount of the credit and, in effect, is holding those funds. True, but in like effect, they are funds of Lyster. Such was doubtless the theory of the credit to it. The credit relates to issues between Lyster and the City, in which Scanlon plays no part and as to which he is entitled to no benefit.

The district court is directed to set its judgment aside and to enter judgment in favor of the City against Lyster and Scanlon, making the adjustments in the amount of damages awarded that we have specified and taking care to avoid granting to the City any duplicate recovery.

It is so ordered.

COMPTON, C. J., and OMAN, J., concur.

489 P.2d 659

Lee R. DAVIS, d/b/a Sutherland Furniture and Appliance, Respondent,

v.

COMMISSIONER OF REVENUE of the State of New Mexico, Petitioner.

No. 9329.

Supreme Court of New Mexico.

Oct. 6, 1971.

Further ordered that the record in Court of Appeals Cause No. 653, 83 N.M. 152, 489 P.2d 660, be and the same is hereby returned to the Clerk of the Court of Appeals.

489 P.2d 659

In the matter of John W. GURLEY, Attorney at Law.

No. 9145.

Supreme Court of New Mexico.

Oct. 6, 1971.

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, John W. Gurley, with unethical and unprofessional conduct in the handling of his office trust account, and including findings of fact and conclusions and recommendations, and Amended Report and Recommendation of the Board of Commissioners, and the Court being sufficiently advised in the premises, and Respondent appearing in person; COMPTON, Chief Justice, and McMANUS and STEPHENSON, Justices, concurring.

Ordered that the Report of Board of Bar Commissioners to the Court of their findings of fact and conclusions and recommendations and the Amended report and recommendation filed herein be and the same are hereby adopted in their entirety.

Further ordered that the Respondent, John W. Gurley, be and he is hereby privately reprimanded for his conduct in the handling of his office trust account, as fully set forth in the Report of Board of Bar Commissioners.

489 P.2d 659

The MESCALERO APACHE TRIBE, Petitioner,

v.

Franklin JONES, Commissioner of the Bureau of Revenue of the State of New Mexico, and the Bureau of Revenue of the State of New Mexico, Respondents.

No. 9331.

Supreme Court of New Mexico.

Oct. 6, 1971.

Further ordered that the record in Court of Appeals Cause No. 653, 83 N.M. 158, 489 P.2d 666, be and the same is hereby returned to the Clerk of the Court of Appeals.

489 P.2d 660

Lee R. DAVIS, d/b/a Sutherland Furniture & Appliance, Appellant,

v.

COMMISSIONER OF REVENUE of the State of New Mexico, Appellee.

No. 653.

Court of Appeals of New Mexico.
Aug. 6, 1971.
Rehearing Denied Sept. 7, 1971.
Certiorari Denied Oct. 6, 1971.

O. R. Adams, Jr., Adams & Zeikus, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., John C. Cook, Special Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

The Bureau made a deficiency assessment of gross receipts tax on Davis for State and Municipal tax. The assessment was based on Davis' failure to include "time price differentials" on credit sales which were made on installment contracts and sold to finance companies.

Although the retail installment contracts were made in Davis' name, the finance companies furnished the contract forms, approved credit of the purchasers before the contracts were executed, and then purchased the contracts by paying Davis the "Total Cash Sales Price" less the amount received by Davis as a down payment. Davis did not receive the "time price differential." That sum, if paid, was received by the finance company purchasing the contracts.

Davis protested the deficiency assessment on the grounds that he never received the money on which the deficiency assessment was based and that such a tax would be discriminatory and unconstitutional "* * * because his gross receipts would be taxed at more than the applicable tax rates and more than the receipts of other taxpayers."

We reverse.

Two assessments were made. One assessment was made under § 72-16-7, N.M.S.A.1953 (Repl.Vol.1961) [repealed Laws 1966, Ch. 47, § 22, July 1, 1967] and the other for the period after July 1, 1967, being under § 72-16A-3, subd. F, N.M.S.A.1953 (Repl.Vol., Supp.1969).

Those statutes read:

72–16–7 "* * * Provided, that in the event the seller or leaser [sic], who has so elected, transfers his interest in any such contract to some third person he shall pay the tax upon the full sale price of the commodity involved, unless a record is kept of payments thereafter made on such contracts in such manner that the bureau of revenue can at all times ascertain from the records of the seller the amount paid thereon by the purchaser. * * *"

72–16A–3 "* * * F. 'gross receipts' means 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, and includes any type of time-price differential and receipts from sales of tangible personal property handled on consignment but excludes cash discounts allowed and taken.

"In an exchange in which the money or other consideration received does not represent the value of the property or service exchanged, 'gross receipts' means the reasonable value of the property or service exchanged.

"When the sale of property or service is made under any type of charge, conditional or time sales contract or the leasing of property is made under a leasing contract, the seller or lessor may elect to treat all receipts under such contracts as gross receipts as and when the payments are actually received. If the seller or lessor transfers his interest in any such contract to a third person, he shall pay the gross receipts tax upon the full sale or leasing contract amount.

" '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;"

Assessment Prior to July 1, 1967.

The Bureau contends that although "full sale price" is not defined under the repealed law, "gross proceeds of sales" was defined by § 72–16–2, subd. E, N.M.S.A. 1953 (Repl.Vol.1961) [repealed Laws 1966, Ch. 47, § 22, July 1, 1967] which stated, in part:

" 'Gross proceeds of sales' means the sum or value proceeding or accruing from the sale of tangible personal property, * * * including any services that are a part of such sales * * *, whether received in money or otherwise, including all receipts, cash, credits and property of any kind or nature, and also the amount for which credit is allowed by the seller to the purchaser, * * *"

It is the Bureau's contention that under this section, which must be read with § 72–16–7, supra, that the clear legislative intent is to include "time price differential" as either "* * * services that are a part of * * * sales * * *" or "* * * the amount for which credit is allowed by the seller to the purchaser."

We cannot agree with either of the Bureau's contentions. We must view the legislative intent from the language of the Act and the words will 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). A reading of the full Act shows the legislative intent to be that taxes were to be assessed only on what was received or would be received. It is an undisputed fact that the assessment made was on a "time price differential" which never was, nor would be, received by Davis. Davis would only receive the down payment and the balance of the purchase price would be paid to him by the finance company. The finance company would then receive the "time price differential."

The Bureau's reliance on Field Enterprises Educational Corporation v. Commissioner of Revenue, 82 N.M. 24, 474 P.2d 510 (Ct.App.1970), is misplaced. Although *Field Enterprises Educational Corporation*

dealt with an undetermined and not precomputed service charge, one thrust of the case is that the monies from the "service charge" which were not received were not taxable. As stated in *Field Enterprises Educational Corporation*:

> "* * * 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."

We cannot extend the applicability of the statute beyond a clear import of the language used. Field Enterprises Educational Corporation v. Commissioner of Revenue, supra.

Assessment After July 1, 1967.

We find the same foregoing reasoning applicable under the Gross Receipts and Compensating Tax Act, § 72-16A-1, N.M.S.A.1953 (Supp.1969) et seq. We fail to see the Bureau's construction as being reasonable in light of the stipulation that the taxpayer only received the down payment and the balance of the "Cash Sale Price" or "Total Cash Price" while the finance company received the difference between the "Cash Sale Price" or "Total Cash Price" and the "Total Time Balance." Compare *Field Enterprises Educational Corporation.*

We are not dissuaded from our decision by the language under § 72-16A-3, subd. F, supra, being changed from "full sale price" to "Full sale contract amount." We do not think the Legislature intended to tax that which was not received or never would be received. We believe this is evidenced by the fact that as a part of the "gross receipts" definition is the exclusion from taxation of "cash discount allowed and taken."

The Bureau contends its theory of taxing the "Time Balance" is consistent with its Regulation 3(E)-3. We disagree. The example set out in the Regulation contemplates a seller who carries his own contracts and after collecting for a period of time, sells the contracts. Such are not the facts of the instant case.

A fact of this case is that Davis would never receive any part of the "time price differential." This being so, no part of that differential was a gross receipt chargeable to Davis.

Having reached our decision, we do not discuss the taxpayer's equal and uniform taxation contention or the argument that taxpayer was the agent of the finance company in writing the contracts and that it was never contemplated that taxpayer would finance the purchasers.

Reversed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

489 P.2d 662

STATE of New Mexico, Plaintiff-Appellee,
v.
Donald DEATS, Defendant-Appellant.
No. 713.

Court of Appeals of New Mexico.
Sept. 17, 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

WOOD, Chief Judge.

Post-conviction relief was denied without an evidentiary hearing. Section 21-1-1(93), N.M.S.A.1953 (Repl.Vol. 4). Defendant appeals. Prior appellate decisions concerning the conviction and sentence involved in this appeal are: State v. Montoya, Deats and Perez, 80 N.M. 64, 451 P. 2d 557 (Ct.App.1968), aff'd in Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969). The four issues, and our answers, follow.

Improperly constituted jury.

Defendant asserts that one of the members of his trial jury was ineligible to serve as a juror and that the trial court should have held an evidentiary hearing to determine whether in fact this allegation was true.

This point might well be disregarded by this court because defendant cites neither the applicable statute nor decisions of the New Mexico Supreme Court applying that statute. See § 21-2-1(15) (12), N.M.S.A. 1953 (Repl.Vol. 4). However, we decide the question on the merits.

The applicable statute at the time of defendant's trial was § 19-1-2, N.M.S.A.1953. For the current statute, see § 19-1-2(B), N.M.S.A.1953 (Repl.Vol. 4), enacted as Laws 1969, ch. 222, § 2. Sec-

tion 19-1-2, supra, provides that service as a juror by a disqualified person:

> "* * * shall, of itself, not vitiate * * * any verdict rendered by that jury, unless actual injury to the person complaining of the same shall be shown, * * *"

A showing that there was an ineligible juror would be insufficient. Defendant had the burden of affirmatively showing "actual injury." State v. Ortega, 77 N.M. 312, 422 P.2d 353 (1966); see State v. Eskildson, 36 N.M. 238, 13 P.2d 417 (1932), Territory v. Armijo, 7 N.M. 571, 37 P. 1117 (1894); United States v. Gomez, 7 N.M. 554, 37 P. 1101 (1894); United States v. Folsom, 7 N.M. 532, 38 P. 70 (1894).

Defendant's motion made no claim of "actual injury." No evidentiary hearing was required because the claim was legally insufficient.

Indeterminate sentence as a violation of due process and equal protection.

Defendant's sentence for the offense involved in this case is for not less than ten years nor more than fifty years. See § 40A-29-3(B), N.M.S.A.1953 (Repl.Vol. 6). The State Board of Probation and Parole has discretion, within specified limits, to determine how much of the sentence will be served within the confines of the penitentiary. Section 41-17-24, N.M.S.A. 1953 (Repl.Vol. 6). Because of this discretion, defendant contends the length of his punishment is vague and uncertain, and this violates due process because he had the constitutional right to know the length of his punishment within the penitentiary. Further, under this sentence "* * * there is no equal protection afforded one Defendant as against any other. * * *" Since these claims do not attack the sentence imposed, but attack the way that sentence will be executed, prior appellate decisions of New Mexico indicate a post-conviction motion is not the proper procedure to raise these issues. State v. Bambrough, 81 N.M. 548, 469 P.2d 527 (Ct.App.1970) and cases therein cited. However, we treat these claims as properly before us and decide them on the merits.

The claim that an indeterminate sentence is too vague to satisfy due process of law proceeds on the assumption that a defendant must have a definite and fixed punishment. The emphasis is on certainty in the length of punishment. This emphasis is contrary to the indeterminate sentence theory that punishment should be "* * * proportioned to the progress of the prisoner toward rehabilitation * * *;" that punishment "* * * is made to fit the offender rather than the crime." McCutcheon v. Cox, 71 N.M. 274, 377 P.2d 683 (1962).

Under the indeterminate sentence theory, the sentence "* * * is in effect for the maximum, subject to reduction * * *" in the manner provided in the probation and parole statute. Woods v. State, 130 Tenn. 100, 169 S.W. 558 (1914); compare § 41-17-30, N.M.S.A.1953 (Repl. Vol. 6). The discretion vested in the probation and parole officials in determining reductions from the maximum sentence do not make an indeterminate sentence void for vagueness as a general proposition. Ughbanks v. Armstrong, 208 U.S. 481, 28 S.Ct. 372, 52 L.Ed. 582 (1908); Woods v. State, supra. This due process issue could arise, of course, in connection with the manner that reductions are applied against defendant's sentence. Conston v. New Mexico St. Bd. of Probation & Parole, 79 N.M. 385, 444 P.2d 296 (1968), but that is not the claim made. Defendant's claim is that the indeterminate sentence law, as a general proposition, is void for vagueness. We hold it is not.

Nor does the indeterminate sentence violate the requirement of equal protection. The fact that another prisoner may serve less, or more, time under the same indeterminate sentence does not violate "equal protection" because this constitutional provision does not require identical punishments and does not protect defendant from the consequences of his crime. State v. Follis, 81 N.M. 690, 472

P.2d 655 (Ct.App.1970); State v. Holly, 79 N.M. 516, 445 P.2d 393 (Ct.App.1968); State v. Sharp, 79 N.M. 498, 445 P.2d 101 (Ct.App.1968); see State v. Sandoval, 80 N.M. 333, 455 P.2d 837 (1969).

Indeterminate sentence as cruel and unusual punishment.

Defendant contends his sentence of not less than ten nor more than fifty years is cruel and unusual punishment. State v. Peters, 78 N.M. 224, 430 P.2d 382 (1967) held to the contrary. See also State v. Sisneros, 81 N.M. 194, 464 P.2d 924 (Ct. App.1970). Under State v. Peters, supra, the claim is without merit.

Interference with appeal.

In his motion, defendant states: "My efforts to secure a reversal of the conviction were thwarted by the District Attorney. While I was free from custody under a $15,000.00 bond and engaged in prosecuting an appeal to the United States Supreme Court the District Attorney invoked a minor and discredited pending charge against me to put me back in jail. The charge was subsequently dismissed, the appeal failed. * * *"

We take judicial notice of the appellate records pertaining to defendant's conviction. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct.App.1970); see Ex Parte Lott v. State, 77 N.M. 612, 426 P.2d 588 (1967); Cartwright v. Public Service Company of New Mexico, 68 N.M. 418, 362 P.2d 796 (1961). Those records show that the New Mexico Supreme Court stayed execution of the sentence upon the filing of an appeal bond and ordered that defendant should be released from the penitentiary for a period of ninety days from July 2, 1969. This stay, and release under bond, was to enable defendant to petition the United States Supreme Court for a review of the conviction which New Mexico appellate courts had affirmed. Defendant sought an extension of this ninety day period; his motion was denied.

The appellate records conclusively show that execution of the sentence in the particular case was ordered delayed for no more than a ninety day period. They also conclusively show that defendant was not back in the penitentiary at the end of the ninety day period. Since the authorized stay did not exceed ninety days, any District Attorney's "interference" subsequent to the ninety day period would not be a basis for relief because defendant was not legally authorized to be out of the penitentiary after the ninety days expired. Defendant's claim, to require a hearing, must of necessity be within the ninety day period when bond was authorized. His claim, however, is not so limited; it is a general claim based on being "free from custody" without regard to the dates when he was authorized to be out of the penitentiary. Thus, without specific factual allegations as to the dates of the District Attorney's asserted interference, the claim is too general to require an evidentiary hearing. See State v. Flores, 79 N.M. 412, 444 P.2d 597 (Ct.App.1968).

Further, the claim made asserts that defendant was "back in jail" on a pending charge. Nothing in the Supreme Court's orders gave defendant immunity from arrest on other charges during the ninety day bond period. In addition, there is no allegation as to how long defendant remained in jail under the alleged "minor" charge or how this jailing interfered with his efforts to file a petition with the United States Supreme Court. Specific factual allegations, necessary to state a claim, are missing.

The order denying relief is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

489 P.2d 666

The MESCALERO APACHE TRIBE,
Appellant,

v.

Franklin JONES, Commissioner of the Bureau of Revenue of the State of New Mexico and the Bureau of Revenue of the State of New Mexico, Appellees.

No. 635.

Court of Appeals of New Mexico.

Aug. 6, 1971.

Rehearing Denied Sept. 7, 1971.

Certiorari Denied Oct. 6, 1971.

S. Thomas Overstreet, Fettinger, Bloom & Overstreet, Alamogordo, for appellant.

David L. Norvell, Atty. Gen., John C. Cook, Special Asst. Atty. Gen., Santa Fe, for appellees.

OPINION

HENDLEY, Judge.

The Bureau of Revenue (Bureau) imposed a compensating tax on the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises (Tribe) based upon the purchase price of materials used to construct two ski lifts. The Bureau also imposed an emergency school tax on the gross receipts of the operation of the ski resort. The Tribe protested the compensating tax assessment and also filed a claim of refund for the sums paid under the emergency school tax assessment. The Bureau ruled adversely on the Tribe's protest of the compensating tax assessment and the claim of refund of the school taxes. The Tribe appeals directly to this court pursuant to § 72-13-39, N.M.S.A.1953 (Supp.1969).

We affirm.

This appeal is based upon a stipulation of facts entered into by the Tribe and the Bureau, a summary of which is as follows. The Tribe is a treaty tribe residing on reservation lands situated within the counties of Lincoln and Otero in the State of New Mexico and has adopted a constitution in accordance with governmental regulations. The ski resort is also located in Lincoln and Otero Counties and is on lands belonging to the United States Forest Service under a thirty year lease to the Tribe, except for some of the cross-country ski trails which are on reservation lands. No part of the ski resort buildings or equipment are located within the boundaries of the Tribe's reservation. The basic purpose of the ski

resort is to provide revenue which is used for educational, social and economic welfare of the Tribe. The ski resort also provides a job training center for approximately twenty to thirty tribal members. The purchase and construction of the ski resort was totally financed by a loan from the Federal Government pursuant to 25 U.S.C.A. § 470. The approval of the Bureau of Indian Affairs of the Department of Interior is required for the ski resort budget for each fiscal year, leasing of equipment or other property, leasing facilities to concessionaires, plans and designs for construction of additional facilities or improvements, disposal of property other than expendable items, form and contents of monthly interim reports and accounting records and other related areas dealing with the ski resort.

On appeal the Tribe asserts: (1) the State has no authority to tax the Tribe; (2) assuming it has authority to tax the Tribe, the State, in its statutes, has not attempted to tax the Tribe; and (3) the Tribe is exempt from taxation because it is a federal instrumentality.

1. AUTHORITY TO TAX.

The Tribe contends that the State has no authority to tax because: (a) exclusive jurisdiction over the Tribe is vested in the Federal Government; (b) it is inconsistent with the Treaty between the Tribe and the Federal Government; and (c) it interferes with the Tribe's right to self-government.

(a) *Exclusive Jurisdiction.*

It is the Tribe's contention that the Treaty between the Tribe and the United States Government, which became effective March 25, 1883, vests exclusive jurisdiction over the Tribe in the Federal Government. Article I of the Treaty states:

> "Article 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit."

The Tribe further contends that this argument is buttressed by Article I, Section 8 of the United States Constitution which states that the United States Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *"

We agree with the Tribe on this general proposition, but we must call attention to the fact that the Tribe submitted to the United States "power and authority." Subsequently, the United States Congress, on June 20, 1910, 36 Statutes at Large, 557, ch. 310, enacted the Enabling Act for New Mexico. Section 2, second, after stating that Indian land shall be under the absolute jurisdiction and control of the Congress of the United States, stated in part:

> "* * * [B]ut nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe."

This Enabling Act is a specific grant of power which was later incorporated into Article XXI, Section 2, of the New Mexico Constitution wherein the almost identical language was adopted.

Consequently, by virtue of the Enabling Act the Federal Government permitted the State of New Mexico to tax, "* * * as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian."

The Tribe contends that under Article VI, (Clause 2), of the United States

Constitution, when there is a conflict between a Treaty and the provision of a State Constitution or statute, regardless of whether the State constitutional or statutory provision is prior to or subsequent to the making of the Treaty, the Treaty will control. United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134 (1937). We agree with this general proposition, however, we do not find the Treaty to be in conflict with the provisions of the New Mexico Constitution or any of its statutes when the tax is on lands or properties located off Indian land. The Treaty submits the Tribe to the laws of the United States, and the Enabling Act permits New Mexico to tax in this situation.

The Tribe contends the lease of the Federal Forest Service lands was an acquisition of land under 25 U.S.C.A. § 465, which permits the Secretary of Interior to acquire lands within or without existing reservations for the purpose of providing lands for Indians. 25 U.S.C.A. § 465 provides that title to "any lands or rights acquired" pursuant to 25 U.S.C.A. § 470 shall be exempt from State taxation. The purchase and construction of the ski resort was financed by a loan under 25 U.S.C.A. § 470. Assuming the Tribe's leasehold rights and its interest in the ski resort facilities are land, or rights acquired in land, a proposition we do not decide, the exemption from State taxation is also to land, or rights acquired in land. The tax involved here applies neither to land nor to rights acquired in land. The tax under the old "compensating or use tax" is on tangible personal property, see § 72–17–3, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2) and under the Emergency School Tax Act on the privilege of engaging in business activities within New Mexico. See § 72–16–4.1, N.M.S.A.1953 (Repl. Vol. 10, pt. 2); see Edmunds v. Bureau of Revenue, 64 N.M. 454, 330 P.2d 131 (1958). The exemption under 25 U.S.C.A. § 465 does not apply in this case.

We have considered the Tribe's other contentions and cited cases, but find them distinguishable on the facts and under the law above cited.

(b) *The Taxation Being Inconsistent with the Treaty.*

The Tribe relies upon Articles 9, 10 and 11 of the Treaty when read with Article 1, cited above, for the proposition that the Treaty imposed a duty on the United States Government to pass legislation and do other acts to insure the permanent prosperity and happiness of the Tribe and that the United States Government is duly bound by this Treaty to make donations, gifts and implements to the Tribe. The Tribe contends that it would be inconsistent with those purposes for the State of New Mexico to be allowed to disrupt the scheme of the Federal Government by permitting an imposition of New Mexico taxes on the Tribe.

We fail to see the merit of the argument. In reviewing the other Articles of the Treaty, the apparent purpose of the Treaty was to insure the Tribe of certain lands and of certain freedoms on tribal lands but it did not include freedom from a situation as disclosed by the facts of this case.

We do not pass judgment on the contention of the Tribe that the Federal Government is interested in the financial success of the Tribe's operation of a ski resort; however, we fail to see, in light of the foregoing Treaty and Enabling Act provisions, how the Federal Government intended to exempt the Tribe from taxation for activities and operations occurring off Indian lands. The Enabling Act itself denies this contention.

(c) *Interference with Tribe's Right to Self-Government.*

We agree with the Tribe's contention that if the imposition of a State tax on the Tribe interferes with the Tribe's right to reservation self-government the tax must fail. Ghahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (Ct.App.1969). The Tribe claims such interference in this case even though the taxes involved arose from

and because of operations conducted by the Tribe on non-Indian land. The claim is based on the fact that revenue derived from the ski resort operation is used for the welfare of the Tribe and the resort provides job training for members of the Tribe. These facts show no interference with reservation self-government. The Tribe contends, however, that it *might* interfere because the power to tax is the power to destroy and: "The purpose for which the appellant entered into the ski resort operation is being frustrated and possibly could even be totally defeated if New Mexico is allowed to tax the operation." There are no facts showing a present frustrated purpose; the remainder of the argument is no more than speculation. There being no factual basis for the claim, it is rejected. Compare Organized Village of Kake v. Egan, 369 U.S. 60, 80 S.Ct. 562, 7 L.Ed.2d 573 (1962); McClanahan v. State Tax Commission, 14 Ariz.App. 452, 484 P.2d 221 (1971).

2. AUTHORITY TO TAX THE TRIBE WHICH THE STATE HAS NOT ATTEMPTED TO TAX.

It is the Tribe's contention here that since it is not specifically named in § 72–17–2(e), N.M.S.A.1953 (Repl. Vol. 1961) of the Compensating Tax Act, and § 72–16–2(A), N.M.S.A.1953 (Repl. Vol. 1961) of the Emergency School Tax Act (both repealed July 1, 1967, and both taxes were for periods of time prior to the repeal), that they are excluded on the basis that general acts do not apply to State statutory authority to tax the Tribe. See Chouteau v. Commissioner of Internal Revenue, 10 Cir., 38 F.2d 976 (1930); compare Southern Union Gas Company v. New Mexico Public Service Commission, 82 N.M. 405, 482 P.2d 913 (1971).

No claim is made that the Tribe does not come within the definition of "person" in §§ 72–17–2(e) and 72–16–2(A), supra. The claim is simply that to be taxable, the Tribe must have been specifically named. We disagree. Whatever may be the current validity of the concept that Indians could not be taxed unless specifically named, the Enabling Act specifically permitted the taxation "as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian. * * *" With this specific federal legislative permission, we see no basis in reason, in New Mexico, for the concept that Indians must be specifically named to be included within a statute of general application. The Enabling Act states that Indian property, in the situation in this case, is to be taxed as other property is taxed.

3. TRIBE EXEMPT FROM TAXATION BECAUSE IT IS A FEDERAL INSTRUMENTALITY.

It is the Tribe's contention here that even assuming New Mexico does have authority to tax the Tribe, and assuming further that the Tribe comes within the definition of "person" in the taxing statutes, the Tribe is exempt because it is a federal instrumentality.

The Tribe cites the Handbook on Federal Indian Law, U. S. Printing Office (1958) at page 853, for the proposition that insofar as the instrumentality doctrine is concerned, it relates to Indians, their property and their affairs. We do not agree with the Tribe on this general proposition. The Tribe's argument is based on the fact that it is a Tribe and its ski resort operation is financed and supervised by the Federal Government. These facts, in our opinion, are insufficient to support a conclusion that the ski resort is virtually an arm of the United States Government, see dissenting opinion of Justice Marshall in First Agricultural Nat. Bank v. State Tax Commission, 392 U.S. 339, 88 S.Ct. 2173, 20 L.Ed.2d 1138 (1963), and cases cited therein; certainly the ski resort is not essential for the performance of governmental functions, but, even if the ski resort could be considered a federal instrumentality, the immunity of the resort from taxation is removed by the provisions of our En-

abling Act previously discussed in this opinion.

Affirmed.

It is so ordered.

Wood, C. J., concurs.

SUTIN, Judge (specially concurring).

I specially concur only because the Mescalero Apache Tribe or Sierra Blanca Ski Enterprises, I.D. No. 14–703019–00, which owns the ski resort, is a federal Indian chartered corporation, pursuant to 25 U.S.C.A., §§ 477 and 470.

The fact of being a chartered corporation does not appear in the stipulation. Nevertheless, it states:

* * * * * *

> 7. The purchase and construction of the ski resort was financed completely by a loan to the Tribe by the federal government under 25 U.S.C.A. Section 470.

25 U.S.C.A., § 470 provides that the Secretary of the Interior "* * * may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, * * *"

25 U.S.C.A., § 477 provides that the Secretary of the Interior may issue a charter of incorporation to a tribe. It further provides:

> Such charter may convey to the *incorporated tribe* the power to purchase * *, or otherwise own, hold, manage, operate and dispose of property of *every* description, real and personal, * * * *and such further powers as may be incidental to the conduct of corporate business,* not inconsistent with law, * * *. Any charter so issued shall not be revoked or surrendered except by Act of Congress. [Emphasis added.]

Article XI, Section 1(a) of the Tribe's Revised Constitution is a part of the stipulation. It provides that the Mescalero Apache Tribal Council has the duty and power to transfer tribal property and other assets to tribal corporations.

The Mescalero Apache Tribe states in its reply brief:

> The issue of a federally chartered corporation under Section 477 is not present in this case.

To me, this constitutes an admission that the Tribe, or Sierra Blanca Ski Enterprises is an Indian chartered corporation. This corporation should be taxed.

The Notice of Assessment of Taxes by the Commissioner was made to Sierra Blanca Ski Enterprises, not to the Tribe. The title of the Protest of Assessment filed by the Tribe refers to Sierra Blanca Ski Enterprises. The Tribe stated it was the "owner and operator of Sierra Blanca Ski Enterprises." In the title to the stipulation of the facts and the decision and order of the Commissioner, it is described as "Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, I.D. No. 14–703019–00." The Tribe was taxed in this name because probably it led the Commissioner to believe it was not a chartered corporation.

If the assumptions of corporate life in this specially concurring opinion are wrong, and called to the attention of this court on motion for rehearing, I will dissent. I do not agree that an Indian Tribe is subject to payment of the state compensating tax or school tax assessments.

This appears to be the first state tax case against an Indian chartered corporation or tribe. Let us take a look at the history of corporate Indian tribes.

Cohen's Handbook of Federal Indian Law, p. 277, states:

> In the narrow sense in which the term is frequently used, a corporation is something chartered by a government, and in this sense only those Indian tribes which have been chartered by some government, e. g., the Pueblos of New Mexico incorporated by territorial legislation, and the tribes incorporated under section 17 of the Act of June 18, 1934, [25 U.S.C.A., § 477] are to be considered corporations.

See United States v. Lucero, 1 S.M. 422, 438 (1869).

In Cohen's supra, pp. 278, 279, the author says:

> Thus it has been administratively determined that the Pueblos of New Mexico are entitled to receive grazing privileges under the Taylor Grazing Act, under the clause in section 3 of that act conferring such rights upon "corporations authorized to conduct business under the laws of the State." The principle involved would appear to be equally applicable to any Indian tribe which has a recognized corporate status, either under the Act of June 18, 1934, or otherwise.

See also Cohen's, supra, p. 399, wherein it is said:

> The corporate status of the Pueblos has been recognized in many cases.

The corporate status of Pueblo Indian communities, created in 1847, is still alive in New Mexico. Section 51-17-1, N.M.S.A. 1953 (Repl.Vol. 8, pt. 1). This section gave the Indian Pueblos the status of bodies politic and corporate, and, as such, empowered them to sue in respect of their lands. Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 39 S.Ct. 185, 63 L.Ed. 504 (1918); Garcia v. United States, 43 F.2d 873 (10th Cir. 1930).

In 1904, the Supreme Court of New Mexico held taxable the lands of the Pueblo Indians in New Mexico. Territory v. Delinquent Tax List, 12 N.M. 139, 76 P. 307 (1904).

The Tribe claims 25 U.S.C.A. § 465 is a restraint on state's activities. This section applies to title to lands taken in the name of the United States in trust for the Indian tribe or individual Indian. Such lands are exempt from state and local taxation. Chartered Indian corporations are not covered by this section. But see, Martinez v. Southern Ute Tribe, 150 Colo. 504, 374 P.2d 691 (1962).

Under the state taxing acts, a "person" includes a corporation. They do not exclude Indian chartered corporations. Neither is the Indian chartered corporation exempt from payment of taxes. If it were intended to be an instrumentality of the United States, it would have been so stated in 25 U.S.C.A. § 477.

It might be noted that § 72-13-79, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1969), of the Tax Administration Act, adopted in 1965, provides:

> Liens will attach or levy may be made by terms of any provision of the Tax Administration Act * * * to or on property belonging to the United States of America or to an Indian tribe, an Indian pueblo or any Indian only to the extent allowed by law.

Here again, the Indian chartered corporation is omitted.

Some states "have been given jurisdiction by federal statute over the reservations within their borders. The tribes within these states no longer exercise governmental functions independent of the state. Moreover, Congress has authorized all states to extend jurisdiction over tribes within their borders by official act" with tribal consent. 25 U.S.C.A., §§ 1321-22 (Supp.1970); 82 Harvard Law Review 1343. New Mexico has not moved toward assumption of jurisdiction.

The Mescalero Apache Tribe has left the confines of its reservation. It has donned the robes of a corporation to join its competitors in business. It stood high in its tradition as a separate "nation." It now stands strong in its business and cultural development. As it earns money from citizens of this country, it should carry the same burdens of taxation as its competitors. It may even continue in additional ventures in business in every phase of corporate life. New Mexico should welcome this adventure as much as it has welcomed others to come in the last 123 years.

In my opinion, an Indian chartered corporation operating on non-Indian land is subject to the compensating tax and school tax of this state.

For these reasons, I specially concur.

489 P.2d 673

STATE of New Mexico, Plaintiff-Appellee,

v.

James Andrew NEWMAN, Defendant-Appellant.

No. 686.

Court of Appeals of New Mexico.

Sept. 17, 1971.

Robert N. Singer, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Ray Shollenbarger, Sp. Asst. Atty. Gen., Santa Fe; for plaintiff-appellee.

OPINION

COWAN, Judge.

Defendant appeals a conviction of burglary from an automobile. Section 40A-16-3, N.M.S.A.1953 (Repl.Vol.1964).

We affirm.

Defendant first complains that the trial court committed error in permitting the jury to try the defendant after seeing him brought handcuffed into the courtroom.

The record discloses only that, just prior to trial and in chambers, the following conversation took place between the court and counsel:

"MR. SINGER: * * * secondly, Your Honor, the jury, so far as I know, is seated in the courtroom and have been for the last ten or fifteen minutes. The defendant was just brought in in handcuffs with his hands tied behind his back and the handcuffs were removed from him in the presence of the jury. This practice has been repeatedly and repeat-

edly condemned by the courts and it has happened to me two or three times at trial. The sheriff's office is insisting on doing this type thing. This is not a capital crime. It is simply a burglary and it is extremely prejudicial to have this happen to the defendant in front of the jury and we strenuously object.

"THE COURT: Why?

"MR. SINGER: It leaves the impression that he is in custody, that he is a dangerous man and that he is guilty.

"THE COURT: They know he is in custody.

"MR. SINGER: They don't know that he is in custody. The jury has no idea whether he is in custody.

"THE COURT: If he is sitting there—

"MR. SINGER: For the record, at least, I object. * * *"

No ruling was requested by the defendant and no action was taken by the court. Had there been proof or contention that defendant had been in handcuffs in the courtroom during jury selection or trial, without reasonable justification, defendant's objection might have borne fruit. Absent such proof or contention, we find no reversible error. See State v. Gomez, 82 N.M. 333, 481 P.2d 412 (Ct.App.1971); Territory v. Kelly, 2 N.M. 292 (1882).

Secondly, defendant complains that the State failed to rebut or disprove defendant's inference that the jury was invalidly constituted. This point is also without merit.

Defendant is Negro. Upon being told that about two percent of the population of Albuquerque is Negro, defense counsel explained his objection:

"Whatever it is, it is some per cent, whatever per cent it is, there is no percentage [of Negroes] represented on this jury panel and I object to that. This seems like prima facie evidence that there has been systematic exclusion of Negroes and other minority groups from this panel, almost every name in there is Anglo-Saxon."

Again, that is the extent of the record and it is not enough.

The mere absence of persons of a race or class does not give rise to the inference of systematic exclusion. Padgett v. Buxton-Smith Mercantile Company, 283 F.2d 597 (10th Cir. 1960), cert. denied 365 U.S. 828, 81 S.Ct. 713, 5 L.Ed.2d 705 (1961). One is not entitled to relief simply because there is no member of his race on the jury unless he shows that the absence results from purposeful discrimination. State v. Tapia, 81 N.M. 365, 467 P.2d 31 (Ct.App. 1970). The defendant has the burden of showing, prima facie, discriminatory selection practices. United States v. Butera, 420 F.2d 564 (1st Cir. 1970).

Thirdly, defendant complains of a fatal variance between the indictment and the proof. The indictment was:

"The July 1970, Grand Jury, in and for Bernalillo County, accuses JAMES ANDREW NEWMAN of BURGLARY contrary to Sections: 40A-16-3 and 40A-29-3D, NMSA 1953 (1963 Supp.), and charges that:

"On or about the 30th day of September, 1970, in the County of Bernalillo, State of New Mexico the said JAMES ANDREW NEWMAN, did without authority or permission enter a vehicle to wit: a 1965 Opel, New Mexico License No. 2-U8072 belonging to Douglas L. Farnham, 204 Central South East, Albuquerque, New Mexico, with intent to commit a theft therein."

The variances were that the owner, Farnham, testified that the vehicle was a 1969 Opel GT and there was no testimony as to the license number. We hold this immaterial. The owner and officers testified to the car's ownership, to its location, to its color and physical description and to the toolbox taken from it. One of the officers testified to the actual taking of the toolbox from the car by the defendant.

The essential elements of the crime were established. The model and license of the vehicle were surplusage in the indictment and need not be proved. State v. Kimbell,

35 N.M. 101, 290 P. 792 (1930); State v. Herrera, 28 N.M. 155, 207 P. 1085 (1922). The Supreme Court of Indiana stated the rule succinctly in Powell v. State, 250 Ind. 663, 237 N.E.2d 95 (1968), with the words "what is unnecessary to allege is automatically unnecessary to prove."

Defendant makes no claim of prejudice as required by subsection (4) of § 41-6-37, N.M.S.A.1953, nor does he attempt to avoid the provisions of sub-section (2). He attacks the two sub-sections on the constitutional grounds of double jeopardy, asserting only the possibility of prejudice. See State v. Parker, 80 N.M. 551, 458 P.2d 803 (Ct.App.1969); compare State v. Vallo, 81 N.M. 148, 464 P.2d 567 (Ct.App.1970).

Sub-section (2) states: "No variance between those allegations of an indictment, * * * which state the particulars of the offense, whether amended or not, and the evidence offered in support thereof shall be ground for the acquittal of the defendant. * * *"

Sub-section (4) 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."

Defendant's assertion of the mere possibility of double jeopardy is insufficient to give rise to a constitutional issue in this court. See State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967); State v. Silver, 83 N.M. 1, 487 P.2d 910 (Ct.App.1971).

The conviction and sentence are affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

489 P.2d 881

Lloyd G. SWIFT, Plaintiff-Appellant,

v.

SHOP RITE FOOD STORES, INC., et al., Defendants-Appellees.

No. 9231.

Supreme Court of New Mexico.

Oct. 18, 1971.

Hannett, Hannett, Cornish & Barnhart, Albuquerque, for appellant.

Branch & Dickson, Bill Chappell, Jr., Albuquerque, for appellees.

OPINION

MONTOYA, Justice.

Plaintiff-appellant Lloyd G. Swift, hereinafter referred to as "Swift," a former employee of defendant-appellee Shop Rite Food Stores, Inc., hereinafter referred to as "Shop Rite," filed suit in Bernalillo County seeking a declaration that certain restrictions against competition contained in Shop Rite's profit sharing plan were unenforceable against Swift. Both parties moved for summary judgment and the trial court entered an order and judgment granting Shop Rite's motion.

While Swift was employed by Shop Rite at Wichita Falls, Texas, he became eligible and voluntarily joined Shop Rite's profit sharing plan. The plan provided that a participating employee would forfeit certain credits to his account, representing contributions made by Shop Rite, in the event the employee terminated his employment and, within one year, accepted employment which was directly or indirectly in competition with Shop Rite. The plan also provided for an administrative committee to interpret and construe provisions of the plan, decide disputes arising under the terms of the plan, and direct the administration of the plan. The plan provided further that determinations of the administrative committee were binding upon all interested parties.

Some time after having joined the plan, Swift voluntarily terminated his employment with Shop Rite and, within one year, entered the employ of American Community Stores in Nebraska. Swift requested the trial court to find that American Community Stores operates stores in Iowa and Nebraska, and that Shop Rite does not have stores in either of those states. Swift also requested the trial court to find that Shop Rite operates stores in New Mexico and Texas, where wholly owned subsidiaries of American Community Stores operate grocery concessions in discount houses.

Swift was paid all amounts contributed by him under the provisions of the plan. However, the administrative committee determined that he had entered competition with Shop Rite within one year and, in consequence thereof, Swift was to forfeit that portion contributed by Shop Rite. It is that portion which Swift sought when he asked the trial court to declare invalid the restriction against competition within one year.

On appeal, Swift argues that the actions of the administrative committee were arbitrary and capricious, and that his rights were violated. Swift asks this court to review the decision of the administrative committee.

Swift cites Russell v. Princeton Laboratories, Inc., 50 N.J. 30, 231 A.2d 800 (1967), in support of his contention. In Russell, an employee was unable to continue in his job because it had become deleterious to his health. He requested a change in job assignment, but none was available and he was forced to terminate his employment with the company. Pension fund benefits were declared forfeited by a committee of employees, under a provision of the plan which provided for forfeiture if an employee left the company voluntarily. The trial court granted the company's motion for summary judgment, but the appellate court reversed, holding that the termination of employment was not voluntary. The court examined the composition of the committee which had declared the forfeiture and found that the members of the committee had a pecuniary interest in the decision. Any sum not given to the employee would be shared among the remaining employees, who numbered about twenty-five. In addition, the appellate court concluded that the pension fund was not a mere gratuity, but something the employee had earned. The court reasoned that the fact that he could no longer work at the company should not affect his rights to something he had already earned.

We believe the Russell case and the instant case are clearly distinguishable. Swift voluntarily joined Shop Rite's profit sharing plan. He did so with full knowledge that the decisions of the committee would be binding upon him. When Swift terminated his employment, he did so voluntarily with full knowledge of the plan's provision against direct or indirect competition within one year thereafter. Upon Swift's voluntary employment with American Community Stores, he accepted the possibility that the administrative committee could find him in competition with Shop Rite. These facts distinguish the instant case from the Russell case upon which Swift relies. In light of voluntary acceptance by the employee of the provisions of the plan, and in the absence of any showing of fraud or bad faith, this court will not examine the decision of the administrative committee. Lano v. Rochester Germicide Co., 261 Minn. 556, 113 N.W.2d 460 (1962); Gitelson v. Du Pont, 17 N.Y.2d 46, 268 N.Y.S.2d 11, 215 N.E.2d 336 (1966); see also, Annot. 42 A.L.R.2d 461 at 472. The trial court correctly found that the administrative committee acted within the scope of the authority granted to it under the terms of the plan, and its decision was not arbitrary or capricious.

Swift also argues that the restriction contained in the plan is against the public policy of New Mexico, because such restriction is without territorial limits, citing Nichols v. Anderson, 43 N.M. 296, 92 P.2d 781 (1939), and Lovelace Clinic v. Murphy, 76 N.M 645, 417 P.2d 450 (1966).

Nothing in the plan gives Shop Rite the right to enjoin Swift from being employed by a competing business, nor could Swift be civilly liable to Shop Rite for any breach of covenant. Therefore, the cases cited by Swift are clearly distinguishable.

In this case, there is no unreasonable restriction of the freedom of Swift to earn a living, nor is the public necessarily deprived of Swift's skill and services. The provision of Shop Rite's profit sharing plan against competition did not bar Swift from accepting employment in a competing business. Swift had the choice of preserving his interest in the profit sharing plan by not accepting competing employment within one year, or risking forfeiture of his interest by exercising his right to work for whomever he chose. See, Kristt v. Whelan, 4 A.D.2d 195, 164 N.Y.S.2d 239 (1957), aff'd 5 N.Y.2d 807, 181 N.Y.S.2d 205, 155 N.E.2d 116 (1958). We do not believe the restriction in the plan offends the public policy of New Mexico.

The decision of the trial court is affirmed.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

489 P.2d 883

Elizabeth STRIPLING, Plaintiff-Appellant,

v.

PMC REALTORS, INC., Defendant-Appellee.

No. 9283.

Supreme Court of New Mexico.

Oct. 18, 1971.

David L. Norvell, Atty. Gen., Frank N. Chavez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Martin & Martin, Las Cruces, for defendant-appellee.

OPINION

McMANUS, Justice.

This action was brought in Magistrate Court, Dona Ana County Division II, State of New Mexico. Plaintiff sued for $500 and judgment was awarded in the amount of $90, plus costs of $14. Plaintiff appealed the judgment to the District Court of Dona Ana County, New Mexico. The notice of appeal was timely filed on July 21, 1970, pursuant to § 36-15-2, N.M.S.A. (1969 Pocket Supp.).

In October of 1970, defendant filed a motion to dismiss the appeal on the basis that a transcript of the proceedings in the magistrate court had not been filed by the magistrate pursuant to § 36-15-2(C), N.M.S.A. (1969 Pocket Supp.). The motion was granted and the order so issued. It is

from this motion and order that the plaintiff has appealed.

Our State has several cases dealing with the failure to file the transcript in a lower court proceeding when so dictated by statute. The earliest of these is Oskins v. Miller, 33 N.M. 658, 275 P. 97 (1929). In that case the justice of the peace failed to file a transcript of the entries in the docket on or before the first day of the term of the district court as required by statute. We affirmed the dismissal of the appeal but indicated that had the appellant made application to the district court to correct the defect, then the appeal would have been granted.

In a later case, Rixey et al. v. Burgin, 39 N.M. 176, 42 P.2d 1118 (1935), proper notice of appeal was given to the district court pursuant to the applicable statute. The justice of the peace failed to file the proper transcript before the first day of the regular term. The appellee filed a motion to dismiss but, before the motion was disposed of, the appellant filed a motion praying for an order of the district court to the justice of the peace ordering the justice to file the transcript. The Court, in extending the language in Oskins v. Miller, supra, stated:

> "[In Oskins] is an intimation that an application to the district court to correct the omission of the justice of the peace by supplying the transcript would have defeated the dismissal of the appeal for failure to have such transcript filed. This would seem to be sound, even assuming that it is the duty of the party interested to see to it that the justice timely performed his statutory duty. Certainly, it would be too harsh to say that a party claiming a meritorious appeal may be deprived of the fruits thereof through the failure of an officer to perform his duty imposed upon him by statute, such party not being clearly at fault."

The third case of importance in this area is Lea County State Bank v. McCaskey Register Co., 39 N.M. 454, 49 P.2d 577 (1935). In a lengthy opinion, Justice Bickley, who also authored the shorter Rixey opinion, indicated that the appeal is properly taken at the time that the appellant files notice of appeal and posts the appeal bond. At that point the district court takes jurisdiction. The Court stated in 39 N.M. at 464, 49 P.2d at 582, 583:

> "* * * [W]here the party desiring to appeal has been allowed an appeal and is thus in a position to rely upon the justice of the peace performing a statutory duty or his obedience to the orders of the district court to send up the transcript and the papers the appeal is deemed perfected. It will be observed that when appellant has done all that the law requires of him he has put the cause beyond the justice's control. * * * [A]nd perforce under the control of the district court."

The Court continued, in 39 N.M. at 465, 49 P.2d at 583:

> "Under some circumstances the party appealing might be adjudged guilty of negligence in failing to take proper steps to require the justice of the peace or the district clerk to perform their duties imposed upon them, when they had failed therein and this might furnish a sufficient reason to dismiss the case. But a dismissal under such circumstances would be for want of prosecution of the appeal with proper diligence and could not be justified on the ground that the district court was without jurisdiction to try the case."

The above cases were based on statutes dealing with the proper procedure for appeal from a justice of the peace decision to the district court. The record in the present case stipulates that the current statute is similar in general meaning to the prior statutes referred to in the foregoing cases.

The current statute, § 36-15-2(A), (B), N.M.S.A. (1971 Pocket Supp.) requires:

> "A. An appeal from the magistrate court is taken by filing with the clerk of the district court a notice of appeal.

"B. The clerk of the district court shall docket the appeal upon payment of the docket fee, and shall transmit a copy of the notice of appeal to the magistrate court from which the action is appealed and to the opposite party in the action, or to his attorney. * * *"

Once the appealing party has done what is required in these two sections, the magistrate shall file the transcript from the lower court. Section 36-15-2(C), N.M.S.A. (1971 Pocket Supp.) states:

"Within ten [10] days after receipt of the notice of appeal from the clerk of the district court under subsection B, the magistrate shall file with the clerk of the district court a transcript of all proceedings taken in the action in the magistrate court. At any time after the transcript has been filed, the action may be called for trial in the district court by either party by giving notice to the other party as provided by the Rules of Civil Procedure for the district courts."

In the present case, plaintiff Stripling filed a timely notice of appeal which was duly transmitted to the district court. It then took several months for the magistrate to send a semblance of the transcript to the district court. Further, the papers were not sent until the day the defendant, PMC Realtors, filed its motion to dismiss.

While there are similarities in this case and the Rixey and Lea County State Bank cases, supra, the plaintiff's failure to look into or take any overt action to see that the transcript was properly filed during the passage of several months certainly can be construed as a failure to diligently prosecute the appeal.

In Callahan v. Stover, 263 S.W.2d 630, 638 (Tex.Civ.App.1953) the court said:

"While it may be primarily the duty of the county clerk to prepare and transmit the proper papers to the district clerk, and of the latter to file them and to docket the cause in the district court, the appellant is not without responsibility in the matter."

In Callahan v. Stover, supra, at 638, the court referred to the case of Wells v. Driskell, 105 Tex. 77, 145 S.W. 333 (1919), and, speaking of the appellant's duty regarding the transcript in an appeal from a justice court to the county court, quoted from the Driskell case as follows:

"He should use diligence to procure such transcript and have it filed at such time, as required by law."

In this cause the record does not reflect a sufficient excuse for the failure of appellant to pursue the matter in the period of time involved.

The decision of the trial court is hereby affirmed.

It is so ordered.

COMPTON, C. J., and MONTOYA, J., concur.

489 P.2d 885

TABET LUMBER COMPANY, Inc., Plaintiff-Appellee,

v.

Peter CHALAMIDAS, Defendant-Appellant.

No. 698.

Court of Appeals of New Mexico.

Oct. 1, 1971.

Ben F. Roybal, Louis Stewart, Albuquerque, for appellant.

Frederick B. Howden, Albuquerque, for appellee.

OPINION

WOOD, Chief Judge.

This appeal concerns repairs to the roof of defendant's building. Plaintiff's complaint alleged a balance due it for doing the repair work; defendant's request for affirmative relief, treated as a counterclaim, alleged the repairs were made negligently with unsuitable materials which resulted in the collapse of the roof. The trial court entered judgment in plaintiff's favor; defendant appeals. The issues concern: (1) open account and account stated; (2) attorney fees and interest; and (3) disposition of the counterclaim.

Open account and account stated.

The trial court found that defendant was indebted to plaintiff on "open account." Defendant challenges this finding and the conclusion based thereon that he is liable, asserting the evidence does not support a finding of an open account. We agree.

"Open account" is defined in Gentry v. Gentry, 59 N.M. 395, 285 P.2d 503 (1955) and Heron v. Gaylor, 46 N.M. 230, 126 P. 2d 295 (1942); see Panhandle Irrigation, Inc. v. Bates, 78 N.M. 706, 437 P.2d 705 (1968). There is no evidence of a "connected series of debit and credit entries" or a "continuation of a related series." Heron v. Gaylor, supra. Compare Cutter Flying Serv., Inc. v. Straughan Chevrolet, Inc., 80 N.M. 646, 459 P.2d 350 (1969). Nor is there evidence that the amount claimed to be due by plaintiff, and defendant's pay-

ments thereon, were intended by the parties as the beginning of a connected or related series. The evidence shows a single independent transaction; an agreement for plaintiff to make roofing repairs to defendant's building, and two payments from defendant on the resulting bill. See Goodsole v. Jeffery, 202 Mich. 201, 168 N.W. 461 (1918).

Although the finding of "open account" is erroneous because not supported by substantial evidence, this does not dispose of the question of defendant's liability. We must still determine whether the trial court reached the correct result. Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969); Scott v. Murphy Corporation, 79 N.M. 697, 448 P. 2d 803 (1968).

The trial court also found that upon completion of the work, plaintiff presented his bill to defendant; that defendant made a partial payment and acknowledged in writing the remaining amount then owed. Substantial evidence supports this finding. This is a finding of an "account stated" as defined in Leonard v. Greenleaf, 21 N.M. 180, 153 P. 807 (1915). See Brown v. Cory, 77 N.M. 295, 422 P.2d 33 (1967); Capps v. Ratcliff, 66 N.M. 22, 340 P.2d 1073 (1959); Gordon Stores Co. v. Rubin, 39 N.M. 100, 41 P.2d 276 (1935).

Defendant questions the reasonableness of the amount involved. Assuming "reasonableness" of the amount involved is a defense to an account stated, see Brown v. Cory, supra, the evidence that defendant agreed to the amount is evidence of its reasonableness.

The finding of an account stated supports the conclusion that $1,274.48 was unpaid and owing and the judgment in that amount is affirmed.

Attorney fees and interest.

The trial court made an award of attorney fees as part of the damages. Absent statutory authority or rule of court, attorney fees are not recoverable as an item of damages. Riggs v. Gardikas, 78 N.M. 5, 427 P.2d 890 (1967). The authority relied on for the award is § 18-1-37, N.M.S.A.1953 (Repl. Vol. 4). This section, however, pertains to an allowance of attorney fees, as costs, in actions to recover on an open account. Since there was no open account in this case, § 18-1-37, supra, does not support the award. There being no showing of authority, the award of attorney fees is reversed.

The trial court awarded interest for a period beginning six months after the last payment on the account up to the date of judgment. It did so on the basis of § 50-6-3 (Fifth), N.M.S.A.1953 (Repl. Vol. 8, pt. 1). This section pertains to interest on money due on open account. Since there was no open account in this case, the interest award on the basis of an open account is erroneous and is reversed.

Disposition of the counterclaim.

The theory of the counterclaim was negligent repair. Defendant submitted numerous requested findings on this issue, all of which were refused by the trial court. Most of the requested findings were requests for evidentiary rather than ultimate facts and may be disregarded. However, one requested finding was that the roof collapsed because of the inadequate repair job by plaintiff.

Although the requested finding directed to the asserted inadequate repair job was refused, the trial court made no affirmative findings concerning the counterclaim.

Defendant asserts the trial court erred in failing to make findings of fact and conclusions of law in connection with the counterclaim. He relies on § 21-1-1(52) (B) (a), N.M.S.A.1953 (Repl. Vol. 4). Under this provision, a trial court, when properly requested, is required to find the ultimate facts. It has been held that a failure to so find constitutes reversible error. Aguayo v. Village of Chama, 79 N.M. 729, 449 P.2d 331 (1969) and cases therein cited. In Aguayo, supra, although the trial court had refused requested findings, it nevertheless had "failed to find ei-

ther way" on material disputed issues. There was a reversal because of absence of findings. Aguayo, supra, if applied, would appear to require a remand in this case because, although plaintiff argues to the contrary, there are no findings by the trial court as to the counterclaim.

Aguayo, supra, and the cases cited therein, do not refer to another rule developed by the New Mexico Supreme Court. This rule is that where a party has the burden of proof on an issue and requests findings on that issue, which are refused, the legal effect of the refusal of the requested findings is a finding against that party. Lopez v. Barboa, 80 N.M. 338, 455 P.2d 842 (1969) and cases therein cited; State for Use of Thornton v. Hesselden Const. Co., 80 N.M. 121, 452 P.2d 190 (1969) and cases therein cited. Under these cases, if applied, the refusal of the requested findings concerning the counterclaim would have the effect of a finding against defendant on the counterclaim and no remand would be required because of missing findings.

We are unable to reconcile the two rules. We note that decisions not involving our present rules of civil procedure indicate that the refusal of a requested finding is not the equivalent of a direct finding to the contrary. State Nat. Bank of El Paso, Tex. v. Cantrell, 46 N.M. 268, 127 P.2d 246 (1942); Apodaca v. Lueras, 34 N.M. 121, 278 P. 197 (1929). If these two decisions are still valid, it would seem that the trial court should have made findings of fact in connection with the counterclaim.

Since this case must be remanded because of the erroneous award of interest and attorney fees, we apply the rule of Aguayo v. Village of Chama, supra.

Also under this point, defendant asserts the trial court erred in dismissing the counterclaim. This may have been the intended result, but the record does not show a disposition of the counterclaim. The trial court's findings and conclusions made no specific mention of the counterclaim; neither does the "Final Judgment." Once the requested findings on the counterclaim were refused, the counterclaim was ignored. The judgment entered on remand should dispose of the counterclaim.

The judgment for the account stated in the amount of $1,274.48 is affirmed. The awards of interest and attorney fees are reversed. Required findings of fact and conclusions of law concerning the counterclaim are absent and there is no judgment disposing of the counterclaim. The cause is remanded with instructions for the entry of findings and conclusions on the counterclaim and a new judgment consistent with this opinion.

It is so ordered.

SUTIN and COWAN, JJ., concur.

489 P.2d 888

STATE of New Mexico, Plaintiff-Appellee,

v.

Lloyd COVENS, Defendant-Appellant.

No. 702.

Court of Appeals of New Mexico.

Oct. 1, 1971.

F. Randolph Burroughs, Fettinger & Burroughs, Alamogordo, for appellant.

David L. Norvell, Atty. Gen., James H. Russell, Jr., Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

Convicted of "unlawful use of marijuana," defendant appeals. He contends: (1) no crime was charged; (2) the term "unlawful use" is void for vagueness; and (3) the admission of two marijuana cigarettes into evidence was not relevant to an "unlawful use."

Whether a crime was charged.

The information charged defendant with ". . . Unlawful Use of Marijuana, a violation of Section 54-7-51, ..." N.M.S.A.1953 [Repl.Vol. 8, pt. 2, Supp. 1969 (repealed Laws 1971, ch. 245, § 13)]. Section 54-7-51, supra, stated penalties for unlawful use of marijuana but did not define the offense of "unlawful use." Unlawful use is declared an offense in § 54-7-50, N.M.S.A.1953 (Repl.Vol. 8, pt. 2). The 1971 amendment to § 54-7-50, supra, is not involved. See Laws 1971, ch. 245, § 8. Because the statutory reference was to the penalty section and not to the section establishing the crime, defendant asserts he was not charged with a crime and the charge against him should be dismissed. We disagree.

Section 41-6-7(1) (b), N.M.S.A. 1953 (Repl.Vol. 6) states an information is valid and sufficient if it states "* * * so much * * * of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged." When the information charged defendant with unlawful use of marijauna it charged defendant with enough of § 54-7-50, supra, to give defendant notice of the offense intended to be charged.

Defendant asserts, however, that the reference to § 54-7-51, supra, is fatal to the information; that a statutory reference in an information is required to be accurate, regardless of the provisions of § 41-6-7, supra. He relies on State v. Anderson, 40 N.M. 173, 56 P.2d 1134 (1936). State v. Anderson, supra, was sufficiently distinguished in Smith v. Abram, 58 N.M. 404, 271 P.2d 1010 (1954) so as not to be applicable. State v. Holly, 79 N.M. 516, 445 P. 2d 393 (Ct.App.1968) specifically held that where the allegations in an information were sufficient (as here) to charge the offense under § 41-6-7, supra, a statutory misreference did not make the information fatally defective.

"Unlawful use" as being void for vagueness.

Section 54-7-50, supra, does not define "unlawful use." Defendant asserts

that this term, being undefined, is vague and uncertain and, therefore, violates the requirements of due process. Compare State v. Minns, 80 N.M. 269, 454 P.2d 355 (Ct.App.1969). The answer to this claim is that § 54–7–50, supra, makes all use of marijuana unlawful unless the use comes within one of the exceptions stated in that section. Since no claim is made that any of the exceptions are in any way involved, the applicable portion of § 54–7–50, supra, reads: "* * * the use of marijuana is unlawful * * *." We see no constitutional vagueness in this unqualified prohibition on the use of marijuana.

Relevancy of two marijuana cigarettes to unlawful use.

Two undercover agents (a State Policeman and a City of Roswell detective) testified that a number of people were at a residence in Alamogordo. One of the persons present had a plastic bag containing three or four hand rolled cigarettes and some loose material. The cigarettes were taken from the bag and smoked by those present, including the defendant. Other cigarettes were rolled from the loose material in the bag, and placed on a table. Some of these were also smoked. The two cigarettes admitted into evidence were taken from the table. They contained marijuana.

Defendant asserts these two cigarettes should not have been admitted. He points out that he was not charged with "possession" of marijuana but with "unlawful use." He argues that the cigarettes were not relevant to the charge of "unlawful use" because these two cigarettes had never been used. He uses "irrelevant" in the sense of "no logical relationship to the facts in issue."

The relevancy, the logical relationship between the facts in issue and the two cigarettes, is as follows: defendant smoked a cigarette made up from the loose material in the plastic bag. The cigarettes in question were also made from the loose material in the plastic bag. Defendant "used" a cigarette made from the same material as the cigarettes in question. The cigarettes in question contained marijuana. They were, therefore, relevant to the question of defendant's use of marijuana, and were properly admitted.

The amended judgment and sentence is affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

489 P.2d 1176

STATE of New Mexico ex rel. STATE HIGHWAY DEPARTMENT of New Mexico, Petitioner-Appellant,

v.

FOX TRAILER COURT et al., Defendants-Appellees.

No. 9239.

Supreme Court of New Mexico.

Oct. 22, 1971.

David L. Norvell, Atty. Gen., E. E. Chavez, James V. Noble, George D. Sheldon, Sp. Asst. Attys. Gen., Santa Fe, for appellant.

Martin & Martin, William L. Lutz, Las Cruces, for appellees.

OPINION

McMANUS, Justice.

The petitioner-appellant, State Highway Department of New Mexico, brought this suit to condemn lands needed for the construction of Interstate Highway 10 in Las Cruces, New Mexico. The suit was filed under the Special Alternative Procedure for Eminent Domain. This appeal involves tracts 17–7, 17–8, 17–8–EL and 17–8–EL–1, all in Dona Ana County, New Mexico. A jury trial ensued resulting in a verdict of $158,000 for the defendants herein. Judgment was entered and petitioner appeals.

Appellant claims five points of error resulting from the trial of the cause. The first was a claim that the court erred in

authorizing the defendants to propound interrogatories, obtain production of documents and take a deposition based thereon. Appellant alleges there is no authority for such procedure and that they were not proper matters for discovery. Section 22-9-56, N.M.S.A. (1971 Pocket Supp.) provides:

> "The Rules of Civil Procedure shall apply to the special alternative procedure in eminent domain except where special provisions are found in the special alternative procedure which conflict with the rules of civil procedure and then the rules of civil procedure shall not apply."

We see no conflict in this cause. See, also, State ex rel. New Mexico State Highway Commission v. Taira, 78 N.M. 276, 430 P.2d 773 (1967); State ex rel. State Highway Commission v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966), and United States v. 23.76 Acres of Land, Etc., 32 F.R.D. 593 (D.Md.1963).

Appellant's second point claimed it error for the court to permit mortgagees to give value testimony when the foundation of that testimony was on financial statements made by the condemnee in which the value of the property condemned constituted only part of the defendant's net worth and when the values were not segregated in the testimony. In this regard the court determined that these witnesses were qualified to express their opinions. The determination whether an expert has the necessary qualifications to testify upon a given proposition is in the discretion of the trial judge and will not be overturned unless an abuse of such discretion is shown. Transwestern Pipe Line Company v. Yandell, 69 N.M. 448, 367 P.2d 938 (1961). The transcript reveals no such abuse of discretion.

Appellant's Point Three claims that the verdict and the judgment of the court is not supported by substantial evidence and should be set aside.

The landowner himself testified as to his opinion of the value of the land. The award by the jury was less than such proferred testimony. See City of Albuquerque v. Ackerman, 82 N.M. 360, 482 P.2d 63 (1971); State ex rel. State Highway Commission v. Chavez, 80 N.M. 394, 456 P.2d 868 (1969), wherein the court held that the testimony of the landowner presented substantial evidence.

In its Point Four appellant asserts that the court erred in refusing to permit the testimony of expert witnesses until all evidence forming a basis for formation of such expert opinion had been introduced by the petitioner. The order of proof in a case is addressed to the sound discretion of the trial court. El Paso Electric Company v. Landers, 82 N.M. 265, 479 P.2d 769 (1970). Nowhere in the trial of this cause is there reflected an abuse of the court's discretion in this regard.

Lastly, appellant claims the court erred in permitting the improper rebuttal testimony of the witness Weise. This, again, is a matter within the discretion of the trial court and we see no abuse thereof. See El Paso Electric Company v. Landers, supra.

The errors claimed by the appellant are without merit and the case should be affirmed.

It is so ordered.

COMPTON, C. J., and STEPHENSON, J., concur.

489 P.2d 1178

STATE of New Mexico, Plaintiff-Appellee,

v.

Braulio RODRIGUEZ, Defendant-Appellant.

No. 9302.

Supreme Court of New Mexico.

Oct. 22, 1971.

Leon Karelitz, Las Vegas, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas L. Dunigan, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

OMAN, Justice.

The trial court denied defendant's motion for post-conviction relief under Rule 93 [§ 21-1-1 (93), N.M.S.A. 1953 (Repl. Vol. 4, 1970)] without granting an evidentiary hearing thereon. In order to prevail under his first point relied upon for reversal, he concedes we must reconsider and overrule our opinion in State v. Fines, 78 N.M. 737, 437 P.2d 1006 (1968), in which we held the admissibility of illegally obtained evidence is not an issue reviewable under Rule 93, if the circumstances of the search and seizure were fully known to defendant at the time of trial.

Our opinion in State v. Fines, supra, has been followed in a number of decisions by this court and by the New Mexico Court of Appeals, and we are not now inclined to overrule it.

Under his second point defendant contends: (1) he could not properly be tried, convicted and sentenced under an information charging him with first degree murder; (2) he was denied a speedy trial; (3) a statement used against him was involuntarily obtained; (4) he was denied the effective assistance of counsel, and (5) the evidence was insufficient to support his conviction.

His first contention is not sustainable under New Mexico law. State v. Cochran, 79 N.M. 640, 447 P.2d 520 (1968); State v. Franklin, 78 N.M. 127, 428 P.2d 982 (1967).

He must fail in his second contention because he did not ask for a speedy trial and he raised no question concerning the same before trial. Patterson v. State, 81 N.M. 210, 465 P.2d 93 (Ct.App.1970).

The record conclusively supports the finding of the trial court that the statement was voluntarily, intelligently and knowingly made by defendant after he had

received all admonitions required under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Thus, his third contention is without merit.

His fourth contention is likewise without merit since the record affirmatively shows his trial was not a sham, a farce or a mockery. State v. Ramirez, 81 N.M. 150, 464 P.2d 569 (Ct.App.1970).

His final contention has already been ruled upon adversely to him. State v. Rodriguez, 81 N.M. 503, 469 P.2d 148 (1970).

The order denying the motion should be affirmed.

It is so ordered.

STEPHENSON and MONTOYA, JJ., concur.

489 P.2d 1179

Rodney L. RINDELS et al., Plaintiffs-Appellants,

v.

The PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, INC., and Dottie Rindels, Defendants-Appellees.

No. 9248.

Supreme Court of New Mexico.

Oct. 22, 1971.

Jack L. Love, John V. Coan, Albuquerque, for appellants.

Gallagher & Ruud, John Hogan Stewart, Albuquerque, for Dottie Rindels.

White, Gilbert, Koch, Kelly & McCarthy, Santa Fe, for Prudential Life Ins. Co.

OPINION

MONTOYA, Justice.

Plaintiffs, Rodney Rindels and Bonnie Rindels, as mother and next friend of Ricky L. Rindels, Louise R. Rindels and Linda R. Davis, hereinafter referred to as plaintiffs, brought this action in the District Court of Valencia County against defendants, Prudential Life Insurance Company of America, hereinafter referred to as "Prudential," and Dottie Rindels, hereinafter referred to as the defendant, seeking a declaration as to the rights of the parties in certain life insurance proceeds written upon the life of Ray Rindels. Upon stipulated facts, the trial court decided that the plaintiffs were not entitled to any of the proceeds of the insurance policy. From that adverse judgment, plaintiffs appeal.

The decedent Ray Rindels and Bonnie Rindels were divorced on August 25, 1965. The final decree approved a stipulated settlement executed by the parties on July 16, 1965, which contained the provision that:

> "Defendant [Ray Rindels] * * * shall maintain his present life insurance policy and/or policies setting out the minor children as beneficiaries thereunder."

The minor children referred to in the decree were plaintiffs Rodney L., Ricky L., Louise R. and Linda R. Rindels. At the time of the divorce, Ray Rindels was employed by Homestake-Sapin Partners. In connection with his employment with Homestake-Sapin, Ray Rindels received coverage in a group life insurance policy written by Equitable Life Assurance Society. Under this plan, the employer provided $3,000 in coverage and, pursuant to an option, Ray Rindels purchased an additional $2,000 in coverage. This $5,000 policy was the only life insurance in effect upon the life of Ray Rindels at the time of the divorce decree.

Ray Rindels married defendant Dottie Rindels on September 3, 1965. On August 9, 1966, Ray Rindels ended his employment with Homestake-Sapin and his group life insurance policy automatically terminated. Shortly thereafter, Ray Rindels was employed by Kerr-McGee Oil Industries, Inc., and on November 22, 1966, he became insured in the amount of $12,000 under an employee group life policy written by Prudential. Ray Rindels named his wife defendant Dottie Rindels as beneficiary under the Prudential policy.

Ray Rindels died on March 20, 1969, survived by defendant and two minor children by that marriage. On March 27, 1969, the attorney for plaintiffs notified Prudential that plaintiffs claimed $5,000 of the $12,000 insurance proceeds from the group policy held by Ray Rindels at the time of his death.

Plaintiffs claim that, by reason of the settlement agreement between Ray Rindels and Bonnie Rindels incorporated in the divorce decree of August 25, 1965, plaintiffs acquired an equitable interest in the original Equitable Life Assurance policy that could not be defeated by the subsequent change of employers, group life insurance policies and beneficiaries. Plaintiffs ask this court to follow the equitable maxim that "equity regards as done what ought to be done" and that the equitable interest of the children in $5,000 of the $12,000 policy should be decreed. In the alternative, plaintiffs ask that this court impress a constructive trust in the amount of $5,000 on the proceeds received by defendant for the benefit of plaintiffs.

Plaintiffs argue that, at the time Ray Rindels was issued the second policy as a result of his employment with Kerr-McGee, he was obligated by the terms of the divorce decree to name the plaintiffs as beneficiaries. This he did not do. Plaintiffs contend that they acquired an equitable interest in the first policy by reason of the provision in the divorce decree, and that this equitable interest attached to the second policy. Therefore, when Ray Rindels died, plaintiffs claim that $5,000 of the proceeds of the second policy should rightfully belong to them by virtue of their equitable interest.

In support of their position, plaintiffs rely heavily upon Dixon v. Dixon, 184 So. 2d 478 (Dist.Ct.App.Fla.1966), aff'd 194 So.2d 897 (1967). In that case, the decedent had entered into a settlement agreement requiring decedent to maintain and keep current with his employment any and all policies on his life made payable to the minor children of the parties to the divorce. Subsequently, when the employers changed underwriters, decedent attempted to name his brother as beneficiary of the substituted policies. The court held that the attempted change was ineffective because, under the terms of the settlement agreement, decedent had surrendered the essential incidents of ownership of the policies.

The Dixon case, supra, is clearly distinguishable from our own. In the instant case, there was no attempt to change bene-

ficiaries of the policy referred to in the divorce decree. Ray Rindels' original policy was terminated automatically when he ceased his employment with Homestake-Sapin. Almost one-hundred days later, Ray Rindels obtained the second policy as an incident to his new employment with Kerr-McGee. The second policy was obtained as a result of his employment with a different employer, and was written by another insurance company; whereas, in the Dixon case, supra, there was only a change in the underwriter issuing the employer's group life plan. In addition, the Dixon case, supra, is distinguishable by the terms of the Florida court's own opinion, which stated, 184 So.2d at 480:

> "* * * The policies here [of decedent] could not be allowed to lapse (except by the insured's leaving his employment), and were required to be made and kept payable to his son * * *."

In the instant case, Ray Rindels left his employment with Homestake-Sapin and the insurance coverage in effect at the date of the divorce decree was terminated.

More in point is Lock v. Lock, 8 Ariz. App. 138, 444 P.2d 163 (1968). In that case, decedent agreed with his first wife, by a property settlement agreement incorporated in the divorce decree, to maintain life insurance payable to a trust for the benefit of his minor children. The property settlement agreement did not refer to any specific policy. In compliance with the agreement, decedent took out a policy; however, the policy was allowed to lapse. Decedent subsequently remarried, naming his second wife as beneficiary of certain other policies. One question facing the court was whether, by the terms of the settlement and decree, the minor children obtained an absolute vested right in the proceeds of all insurance upon the decedent's life.

The Arizona court held that the decedent, by taking out the policy, had complied with the terms of the divorce decree. It also held that decedent breached the agreement incorporated in the decree by allowing the policy to lapse. When the policy lapsed, the interest of the minor children also lapsed, and their remedy was a cause of action against the estate of the decedent, rather than a cause of action based upon other insurance policies on decedent's life.

In Lock, supra, the Arizona court also considered the question whether a constructive trust should be impressed for the benefit of the minor children. The court decided that, in the absence of a finding of fraud by the trial court and such finding being supported by the weight of the evidence, the appellate court could not impress a constructive trust.

Nothing in the record in the instant case indicates plaintiffs alleged that Ray Rindels fraudulently terminated the first policy in an attempt to defeat the rights of plaintiffs. Therefore, this court will not impose a constructive trust on the proceeds of the Prudential policy for the benefit of plaintiffs.

This court is in accord with the foregoing decision of the Arizona court in Lock, supra. Any rights that plaintiffs had in Ray Rindels' first policy ceased to exist when he left the employ of Homestake-Sapin.

It, therefore, follows that plaintiff's contentions are without merit and the judgment of the trial court is affirmed.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

489 P.2d 1182

STATE of New Mexico, Plaintiff-Appellee,

v.

David BACA, Defendant-Appellant.

No. 678.

Court of Appeals of New Mexico.

Oct. 8, 1971.

Larry D. Beall, Toulouse, Moore & Walters, P. A., Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Jr., Ronald Van Amberg, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

COWAN, Judge.

Defendant appeals following his conviction of armed robbery, Section 40A–16–2, N.M.S.A.1953 (Repl.Vol. 6).

He urges two points for reversal but insufficiency of the evidence is the main thrust of both and is determinative.

We reverse.

The statute 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."

The use or threatened use of force or violence is not, in and by itself, sufficient. It must be the lever by which the thing of value is separated from the person or immediate control of another. The evidence on this point falls short of that necessary to convict. State v. Sanchez, 78 N. M. 284, 430 P.2d 781 (Ct.App.1967).

On February 15, 1970, at approximately 1:00 o'clock A.M., the defendant entered the Cross Roads Bar, a combination bar and package store, in Albuquerque, New Mexico. Three employees, Eddie Tapia,

Liz Rivera and Arthur Garcia, also known as Junior, were present. Defendant ordered a quart of beer and, as Mr. Tapia started to ring up the sale, jumped over the counter with a butcher knife in his hand.

Mr. Tapia was, as he testified, taken by surprise. The record is silent as to what next occurred but, sometime thereafter, the defendant ran toward the door. As he reached it, he collided with Arthur Garcia, who had been alerted by a call from Liz Rivera, "Junior, the register!" and by glass breaking. A scuffle ensued, with Mr. Garcia being joined by Eddie Tapia and a customer or two. Defendant was subdued and then released. He fled, leaving behind his coat, cap and the knife. A five dollar bill and a one dollar bill were found at the scene, and "about $275.00" was missing from the cash register when it was checked by Mr. Tapia and Mr. Garcia shortly thereafter. No testimony as to the taking of the money by the defendant was offered by the State. Liz Rivera did not testify and Mr. Tapia testified only to surprise.

Arthur Garcia testified that Mr. Tapia later said "I was going to do something but I was too scared." This testimony, while hearsay, was admitted without objection and therefore is competent. Fox v. Doak, 78 N.M. 743, 438 P.2d 153 (1968); State v. Trujillo, 60 N.M. 277, 291 P.2d 315 (1955). But, as our Supreme Court stated in State v. Romero, 67 N.M. 82, 352 P.2d 781 (1960)

> "* * * this rule does not operate to make objectionable testimony conclusive proof of the matter asserted therein. The fact that it was hearsay does not prevent its use as proof so far as it has probative value, but this is limited to the extent of whatever rational persuasive power it may have. * * *"

Therefore, even assuming the defendant took some money from the cash register, was there proof that force or fear was the moving cause inducing Eddie Tapia to part unwillingly with it? We think not. State v. Sanchez, supra. Eddie Tapia was the logical witness to testify to the necessary facts, if facts there were. He did not do so. He and he alone had the knowledge of whether he parted with anything of value, in this case money from the cash register, from his immediate control through the use or threatened use of force or violence on the part of the defendant.

The defendant's motion for a directed verdict, questioning the sufficiency of the evidence for a conviction of armed robbery, should have been sustained.

The judgment and sentence is reversed. The cause is remanded with instructions to vacate the conviction, judgment and sentence, and dismiss the charge under which the defendant was prosecuted.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

489 P.2d 1183

STATE of New Mexico, Plaintiff-Appellee,

v.

Calvin D. WILLIAMS, Defendant-Appellant.

No. 697.

Court of Appeals of New Mexico.

Oct. 8, 1971.

James F. Beckley, Nordhaus & Moses, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Frank N. Chavez, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

Convicted of three armed robberies, § 40A-16-2, N.M.S.A.1953 (Repl.Vol. 6), defendant appeals. Defendant claims error on the basis that the trial court forced defendant to be represented by counsel not of his own choice.

A letter dated two days prior to trial was received by the trial court on the morning of and immediately prior to beginning the trial. In this letter, defendant stated that court-appointed counsel was no longer representing him, listed three "reasons" why defendant did not want to be represented by court-appointed counsel and asked that a new attorney be appointed. At the trial court's suggestion counsel responded to the "reasons." Counsel pointed out that the first time he knew of defendant's desire for a change of attorney was after counsel had been unable to obtain a continuance of the trial date as defendant desired. Counsel indicated he had promptly reported defendant's desire for a change of attorney. The trial court denied the request for a change of attorney. It stated: "* * * The Court feels it is only for the purpose of delay. * * *"

Defendant then presented a document entitled "Affidavit of Disqualification" which, in essence, repeated the "reasons" in his letter, asked the trial court to disqualify court-appointed counsel from future representation of defendant, and again asked the trial court to "* * * appoint legal counsel to represent petitioner." The trial court again denied the request.

Defendant then stated: "* * * I would like to make a record I disqualified Mr. Pittman as my attorney. I do not have an attorney representing me as of this moment." The court's response was: "The Court will have Mr. Pittman represent you as I stated, and we will continue with this trial. * * *"

The Brief in Chief states: "* * * Defendant does not claim that the denial of his motion for another attorney is error. The error committed by the trial court upon which this Appeal is based is that the trial court forced him to be represented by Mr. Pittman."

We agree there was no error by the trial court in denying the request for a change of attorney. State v. Lujan, 82 N.M. 95, 476 P.2d 65 (Ct.App.1970); State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct.App. 1970). As to the timing of the request and the attempted delay, see State v. Gutierrez, 82 N.M. 578, 484 P.2d 1288 (Ct.App.1971); State v. Guy, 82 N.M. 483, 483 P.2d 1323 (Ct.App.1971.)

Nor was there error because Mr. Pittman did in fact represent defendant at the trial. Defendant would have us hold that he waived his right to be represented by counsel after the request for a change of attorney was denied. The record is to the contrary. Defendant was not seeking to defend himself; he was seeking a change of attorney. There is no issue as to waiver of the right to counsel. See Hudson v. North Carolina, 363 U.S. 697, 80 S.Ct. 1314, 4 L.Ed.2d 1500 (1960);

Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969).

Although defendant had no right to a change of attorney, and never asserted that he desired to defend himself, defendant claims it was error for the trial court to require Mr. Pittman to continue in the case. No contention is made that defendant was prejudiced by the representation of Mr. Pittman; defendant simply didn't want Mr. Pittman as his attorney. See Hodge v. United States, supra. The claim then is no more than a claim that defendant had a right to choose his court-appointed counsel. He had no such right. State v. Lujan, supra; State v. Salazar, supra.

The judgment and sentence is affirmed. It is so ordered.

HENDLEY and COWAN, JJ., concur.

490 P.2d 234

GAVIN MALOOF & CO. et al., Plaintiffs-Appellants,

v.

David R. SIERRA, Director of the Department of Alcoholic Beverage Control, et al., Defendants-Appellees.

No. 9233.

Supreme Court of New Mexico.

Nov. 1, 1971.

Adams & Zeikus, O. R. Adams, Jr., Albuquerque, for plaintiffs-appellants.

Lynell G. Skarda, Clovis, for Clinton Realty.

David L. Norvell, Atty. Gen., Thomas L. Dunigan, Asst. Atty. Gen., Santa Fe, for Director, Dept. of Alcoholic Beverage Control.

OPINION

OMAN, Justice.

Plaintiffs sought a writ of mandamus ordering the Chief, Division of Liquor Control, now the Director, Department of Alcoholic Beverage Control, to refrain from transferring a liquor license until plaintiffs, wholesale liquor dealers, had been paid their respective claims for liquors sold to the licensee, or until satisfactory arrangements had been made by the licensee and plaintiffs for the payment of these claims. Their claim of right to the relief sought was predicated upon the following provision in § 46-5-15(B), N.M.S.A.1953 (Repl.Vol. 7, 1966):

> "Licenses are assignable and transferable. * * * The transfer or assignment shall not be approved until the chief of division is satisfied that all creditors of the licensee in connection with the operation of the business have been paid or that satisfactory arrangements have been made between the licensee and the creditor for the payment of such debts."

The district court issued an alternative writ of mandamus, and subsequently en-

tered summary judgment in favor of plaintiffs. A permanent writ of prohibition then issued from this court by which the district court was restrained and prohibited from further proceeding until the defendant, Clinton Realty Company, was made a party to the district court proceedings. State ex rel. Clinton Realty Co. v. Scarborough, 78 N.M. 132, 429 P.2d 330 (1967).

Thereafter Clinton Realty Company was made a party to the mandamus proceedings in the district court, and that court then dismissed those proceedings with prejudice. Plaintiffs appealed and this court reversed and remanded for trial on the merits. Gavin Maloof & Co. v. Branch, 80 N.M. 334, 455 P.2d 838 (1969).

After a trial on the merits, the district court concluded that by reason of the sale of the liquor license to the Clinton Realty Company at a foreclosure sale conducted pursuant to order of the district court of Curry County the license became and now is the property of Clinton Realty Company, free and clear of all claims of plaintiffs; plaintiffs do not have and did not at any time have a lien of any nature on the license, but were only general creditors of the former licensee; and the Director, Department of Alcoholic Beverage Control, cannot properly and legally refuse to transfer a license to one who becomes the purchaser thereof at a judicial foreclosure sale on the ground that the former licensee had not paid the claims of unsecured creditors. Judgment was entered accordingly in favor of Clinton Realty Company and plaintiffs appealed. We affirm.

Plaintiffs attack the judgment under two separately stated points relied upon for reversal. However, their success in securing a reversal of the judgment is dependent upon the validity of their claims to a lien on or security interest in the license by reason of the above quoted language from § 46-5-15(B), supra. This court ruled contrary to plaintiff's position in State ex rel. Clinton Realty Co. v. Scarborough, supra, wherein it was stated:

"Thus, even though the legislature intended to provide protection for general creditors of a licensee by making payment of such claims a condition to approval by the liquor director of a voluntary transfer of a liquor license, the legislature authorized the creation of liens against such licenses by execution, attachment, security transactions, receivers and other means to which tangible personal property may be subject. It must be assumed these secured transactions are enforceable by foreclosure and carry a right to payment prior to that of general creditors. * * *"

The judgment should be affirmed.

It is so ordered.

COMPTON, C. J., and MONTOYA, J., concur.

490 P.2d 235

In the Matter of Anthony F. AVALLONE, Attorney at Law.

No. 8897.

Supreme Court of New Mexico.

April 19, 1971.

Rehearing Denied May 13, 1971.

Certiorari Denied Oct. 19, 1971.

See 92 S.Ct. 210.

Paul A. Phillips, Albuquerque, for appellant.

Robert S. Skinner, Raton, amicus curiae, on behalf of the Bd. of Bar Commissioners.

OPINION

COMPTON, Chief Justice.

This is a disciplinary proceeding instituted against Anthony F. Avallone, an attorney practicing in Las Cruces, New Mexico. He was charged with five counts of unethical conduct. The matter was heard by the Board of Bar Commissioners, *sitting as referees of this Court, pursuant* to our Rule 3(3) (1.10) (§ 21–2–1(3) (1.10), N.M.S.A. (1953 Comp.). Counts III and V were dismissed for lack of evidence. With regard to the remaining counts, the Board made the following findings of fact, conclusions of law and recommendation:

"COUNT I, FINDINGS OF FACT

"1. *That on or about October 15, 1968, in* Las Cruces, New Mexico, the Respondent attended a meeting of a group of persons concerned with problems of urban renewal and spoke to the group on condemnation procedures advising them of their rights and volunteered advice to bring lawsuits. His conduct at that meeting was such as to incite the group and stir up strife and litigation.

"2. At the aforesaid group meeting, Respondent advised the assembled group that he would represent them as their attorney on a contingency basis.

"3. That at the aforesaid group meeting, the Respondent solicited professional employment either directly or indirectly.

"CONCLUSION OF LAW

"That the Respondent's actions and conduct at the group meeting in Las Cruces on or about October 15, 1968, were in violation of Canons 27 (Advertising, Direct or Indirect) and 28 (Stirring Up Litigation).

"RECOMMENDATION

"As to Count I of the Committee's Complaint, the Board of Bar Commissioners recommend that the Respondent be reprimanded.

"COUNT II, FINDINGS OF FACT

"1. That the Respondent caused his name to be listed in the Las Cruces, New Mexico, telephone directory in three separate places, one of which was in connection with a Las Cruces realty company wholly owned by him. He also had the same telephone number for two other businesses which he set up, those being the MTG Mortgage Broker and the New Mexico Financial Planning Services Bonded Trust, both of which are, or would have been, relative to the Respondent's law practice. That common telephone number appears in the Las Cruces telephone directory nine times.

"2. That the Respondent continued a separate business known as the 'A-Realty Company' from the same office, or set of offices, in which he practiced law in Las Cruces, New Mexico, utilizing a common telephone number, reception room and secretary and telephone operator. His realty company advertised by three methods; newspaper advertisements, a listing in the Las Cruces telephone directory in which the Respondent's name is shown, and by a prominent sign in the front of the common offices of the

Respondent which was displayed with the Respondent's law office sign, with substantially the same printing.

"3. That the listings in the telephone directory of the businesses other than the Respondent's law office, have been discontinued as of the date of the hearing on this matter, and that the sign and office of 'A-Realty Company' have been removed from the Respondent's law office premises.

"4. Proof of feeding the Respondent's law practice by his other businesses was not established.

"CONCLUSIONS OF LAW

"1. That the actions and conduct of the Respondent in procuring telephone listings in the Las Cruces telephone directory and utilizing a common phone number for his law practice, his realty company and his other related businesses were in violation of Canon 27 of the Canons of Professional Ethics.

"2. That the Respondent's actions and conduct in utilizing the common signs in front of his law office to advertise both his law office and his realty company were in violation of Canon 27 of the Canons of Professional Ethics.

"RECOMMENDATION

"That as to Count II of the Committee's Complaint the Respondent should be reprimanded.

"COUNT IV, FINDINGS OF FACT

"That the Respondent as attorney for defendant Borst in Cause No. 21870, Third Judicial District, participated in an agreement for installment payment of a lesser amount than said judgment provided for in said Cause No. 21870.

"2. That said agreement was not performed by the defendant and that Respondent knew that it had not been performed.

"3. That Respondent knew and had notice that the agreement had been rescinded for non-performance by the plaintiff, but, notwithstanding that notice, went with defendant and obtained from the Escrow Agent satisfaction of judgment and release of transcript of judgment.

"4. That defendant thereafter, with Respondent as his attorney, caused to be filed an action against plaintiff Clair and his attorney Garland, Martin and Martin, Cause No. 22794, that such action was unjustifiable, and that it was filed with the intention of harassing and injuring the defendants.

"CONCLUSIONS OF LAW

"That Respondent's conduct as attorney for plaintiff in bringing suit against the defendants in Cause No. 22974 resulted in working only harassment and injury to defendants, and such conduct was in violation of Canon 30, Justifiable and Unjustifiable Litigation, Canons of Professional Ethics."

"RECOMMENDATION

"As to Count IV of the Committee's Complaint it is recommended that Respondent be suspended from the practice of law in the State of New Mexico with leave to apply for reinstatement after a period of one hundred twenty (120) days."

Appellant does not challenge the report of the referees with regard to Counts I and II. His challenge is limited to findings under Count IV only. The decisive question is whether the findings are supported by clear and convincing evidence. Canon 30 of the Canons of Professional Ethics reads:

"30. Justifiable and Unjustifiable Litigation.

"The lawyer must decline to conduct a civil cause or to make a defense when

convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination."

The record is voluminous, nevertheless, we have carefully considered the evidence and, when viewed in light of the Canon, we can reach no other logical conclusion than that the respondent caused to be filed the action against Clair and his attorneys with the intent to harass and injure the defendants.

Borst, a witness for the respondent, testified that he instituted the action against Clair and the attorneys because they had harassed him in a former suit which he had lost, and that respondent was made aware of the purpose of the suit against Clair and the attorneys. The evidence points up unerringly Borst's purpose in filing the action against Clair and his attorneys. While Borst attempted to take full responsibility for bringing the action, respondent was in no position to side-step his responsibility as an attorney in bringing the action.

Amicus curiae urges us to review the evidence under counts III and V and subject the respondent to further discipline. Possibly, the evidence would support his position; nevertheless, we are inclined to follow the recommendations of the referees.

The recommendations of the referees should be adopted, with costs assessed against the respondent.

It is so ordered.

TACKETT and McMANUS, JJ., concur.

STEPHENSON, J., dissenting.

STEPHENSON, Justice (dissenting).

I must dissent from the opinion of the majority insofar as it relates to Count IV of the complaint, to which my comments are limited. I do so with reluctance not only in deference to my learned brethren, but also to the distinguished attorneys who are members of the Board of Bar Commissioners of the State Bar of New Mexico (the Board). Without their unselfish and valued services this court would find it virtually impossible to cope with problems arising in the field of ethics, grievances and discipline.

The first sentence of Canon 30, with which we are here concerned, if it is parsed into its constituent elements, requires the following as a prerequisite to violation:

A. The client or litigant in the existing or prospective litigation must intend to harass or to injure or to work oppression or wrong on the opposite party. The intent here is of the client.

B. The lawyer must be convinced that the client's intention is as described in A above.

My dissent is primarily based on B above. Although Finding No. 4 is probably sufficient insofar as the client's purpose and intention are concerned, it is completely silent as to the state of the attorney's mind. It says that Mr. Avallone represented Mr. Borst, but fails entirely to find that Mr. Avallone was convinced of anything as to Mr. Borst's intentions. The finding therefore fails to support the conclusion and the recommendation.

Secondly, it is implicit in Finding No. 4 and in the majority opinion that Mr. Avallone is regarded as being guilty of wrongdoing in representing Mr. Borst in the suit against Mr. Clair. I feel that this is erroneous for two reasons. He was not charged with any wrongdoing in suing Mr. Clair, the charge relating solely to the suit against the attorneys. Moreover, I fail to see why Mr. Avallone is subject to criticism

for having acted as attorney in a suit against Mr. Clair. Regarding the settlement agreement to which reference is made in Finding No. 1, the evidence is clear that Mr. Clair and his attorney had indulged Mr. Borst; had granted him extensions and had not insisted on prompt payment as provided in the agreement, although there is a conflict in the evidence as to whether a final extension was granted. I realize Mr. Clair's attorney took the position that the settlement agreement was at an end, but Mr. Avallone took the position that it was not. I fail to see why the position of one is more final or binding than of the other. Neither was in a position to pass decrees. It seems to me there was an honestly debateable legal issue as to whether or not Mr. Clair could, under the circumstances, "* * * abruptly rescind for noncompliance without fair warning of an intention to insist upon a literal compliance with the contract in the future." Nelms v. Miller, 56 N.M. 132, 241 P.2d 333 (1952); see also Trujillo v. Collins, our number 9064, opinion filed November 16, 1970, 82 N.M. 186, 477 P.2d 820 (1970).

The first count of the cause in question, 22794, sought a declaratory judgment as to whether the contract was or was not rescinded, an appropriate device, and the second count was for damages. Plaintiffs lost cause No. 22794. Happily, loss of lawsuits by dismissal on motion or otherwise does not necessarily carry any adverse ethical imputation, or our ranks would be considerably depleted. The merits of cause No. 22794 was not the issue presented to the Board for its decision.

Let it be understood that I hold no brief for Mr. Avallone insofar as suing Mr. Clair's lawyers is concerned. In my view, Mr. Avallone never advanced any reasonable, or credible reason for having sued the attorneys. It is stated in G. Warvelle, Legal Ethics, § 323 (2d ed. 1920):

> "Suits against attorneys. A retainer may properly be accepted in a suit against an attorney, yet, as a rule, it should be received reluctantly and the matter settled, if possible, in an amicable manner. The principle of professional fraternity, as far as it will apply, should characterize all proceedings of this nature, particularly where no moral turpitude is involved. This has long been the settled rule of the ethical code and is still in force, notwithstanding its non-observance by the legal tradesman."

I have said that I believe an essential element of a violation of Canon 30 is lacking. Unfortunately, the rules by which we are bound preclude us from supplying the missing factual elements, however richly justified such a step might be from the state of the record. Supreme Court Rule 3(1.12) [§ 21–2–1(3) (1.12), N.M.S.A., 1953]. See also Rule of Civil Procedure 53(e) (2) [§ 21–1–1(53) (e) (2), N.M.S.A., 1953]; 45 Am.Jur. "References" § 37. In my opinion, the cause should be remanded to the Board with directions to make findings upon the issue of Mr. Avallone's convictions. It is stated in 45 Am.Jur. "References" § 46, that:

> "If the referee's report is incomplete in that he fails to make findings on all the issues, the court should send the report back to the referee with instructions to make findings on all material issues."

See also Rule of Civil Procedure 53(e) (2), supra.

For the foregoing reasons I dissent. Although the findings I have criticized regarding cause No. 22974 insofar as it pertained to Mr. Clair might be regarded as surplusage, I feel that the essential factual element missing from the findings as to Mr. Avallone's state of mind leaves me no alternative.

490 P.2d 240

Donald G. REINHART, Plaintiff-Appellant,

v.

RAUSCHER PIERCE SECURITIES CORPORATION and Mel Schramek, Defendants-Appellees.

APOLLO ENTERPRISES, INC., a New Mexico corporation, Plaintiff-Appellant,

v.

RAUSCHER PIERCE SECURITIES CORPORATION and Mel Schramek, Defendants-Appellees.

No. 671.

Court of Appeals of New Mexico.

Oct. 8, 1971.

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[redacted]

Stanley C. Sager, Menig, Sager & Curran, Albuquerque, for plaintiffs-appellants.

Robert M. St. John, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for Rauscher Pierce Securities Corp.

James I. Bartholomew, Albuquerque, for Mel Schramek.

OPINION

SUTIN, Judge.

Defendants were granted summary judgment. Plaintiffs appeal.

We reverse.

Plaintiffs sued defendants for damages for breach of an oral contract relating to a "stopped stock" loss on three unlisted stocks, or, in the alternative, damages for defendants' negligence in failing to sell the stock or advise plaintiffs when the shares dropped below the agreed amount.

Defendants filed a motion to dismiss, or, in the alternative, for summary judgment on various grounds. Based upon pleadings, depositions and affidavits, the trial court granted defendants summary judgment and dismissed plaintiffs' complaint.

Plaintiffs seek a reversal on two grounds: (1) there are factual issues indicating the existence of a contract, its breach and resulting damages; (2) the facts show the existence of a duty by defendants to plaintiffs, its breach, and resultant damages due to negligence.

In order to sustain a summary judgment, defendants had the burden of showing an absence of a genuine issue of material fact as a matter of law. Tapia v. McKenzie, 83 N.M. 116, 489 P.2d 181 (Ct. App.1971). Here defendants had the burden of establishing an absence of a material issue of fact on the question of contract.

1. *Was the Evidence Sufficient to Create an Issue of Fact of Existence of Oral Contract, its Breach, and Resultant Damage?*

We are required to view the record in the light most favorable to plaintiffs. The record discloses the following:

Plaintiff Reinhart was a C.P.A. and an officer of Apollo. Defendant Schramek was a stockbroker employed by Rauscher Pierce.

On March 12, 1970, Reinhart and Schramek went to lunch at Four Hills Country Club to discuss the possibility of limiting losses on plaintiffs' shares of unlisted stocks to 10% of cost. These stocks were over-the-counter "bid and ask." They were held in the street name of Rauscher Pierce.

Reinhart told Schramek, he, Reinhart, was busy and could not watch the stocks; he wanted to set a maximum limitation on a loss of 10%; "take your loss and get out." Schramek agreed that Reinhart's thinking was sound. Reinhart inquired:

> I want you to set a 10% limit and when it hits 10% sell it. Can you do this, sell it, will you do this?
>
> Can you sell for me when the total decrease is 10%?

You will watch my stocks and you will do this?

Schramek answered, "yes" to each question. Reinhart relied on Schramek as an expert. He instructed Schramek to sell the stock when it went down 10% or was approaching 10% rapidly. This meant 10% below cost which included taxes and commissions. It was further agreed that plaintiffs' stock would be left in the street name of Rauscher Pierce. This agreement included any stock that Schramek would sell for him. Before May 6, 1970, plaintiffs purchased through defendants two unlisted "units," and one unlisted stock.

Between March 12 and April 8, 1970, Schramek called Reinhart almost every day. The next time Schramek called was April 15, 1970, and told Reinhart the stocks had gone down below 10%. On April 17, Schramek again called and informed Reinhart that two of the stocks had gone down quite a bit and below 10%. Schramek had not observed the decline prior to April 15, 1970, and stated he was sorry. The general consensus of the discussion was both hoped the market would turn around. Schramek did not feel like it was time to sell the stocks. Both were attempting to minimize the losses. Reinhart did not request a sale on April 15 or 17. Schramek gave him some more quotes thereafter. However, around May 1, 1970, Reinhart ordered the stocks sold at a loss.

The regulations of the National Association of Security Dealers (NASD) handle over-the-counter transactions. They provide in part that "Good faith in such matters is essential. In fact, the integrity of the spoken word is the keystone of the over-the-counter activities." Rauscher Pierce is a registered representative which tries to do the best it can for its customers according to the customers' instructions.

Defendants contend, (a) no agreement had come into being because of vagueness, uncertainty, ambiguity; (b) if there was an agreement, it was unenforceable because of impossibility of performance, the statute of frauds, and a lack of mutuality; (c) if an agreement did exist, the subsequent conduct of Reinhart precludes recovery because of waiver, estoppel or an accord and satisfaction.

No reference was made to any citations or law affecting over-the-counter brokerage transactions. Over-the-counter market embraces all transactions not made on stock exchanges. A "stop order" or "stop loss order" applies only to listed stocks, and they are not applicable to this case.

(a) *Was the Agreement Vague, Uncertain or Ambiguous?*

The question is whether the terms of the oral contract are clear or whether an uncertainty or ambiguity exists. "The question whether an ambiguity or uncertainty exists is one of law." "* * * [I]f there is uncertainty or ambiguity, the intent of the parties may be ascertained from the language and conduct of the parties, the objects sought to be accomplished and the surrounding circumstances at the time." Jernigan v. New Amsterdam Casualty Company, 69 N.M. 336, 367 P.2d 519 (1961).

Limited to the evidence most favorable to plaintiffs, defendants have not pointed to any vagueness, uncertainty or ambiguity. They rely on Lamonica v. Bosenberg, 73 N.M. 452, 389 P.2d 216 (1964). A summary judgment was not involved. It adopted a principle that "When minds of the parties have not met on any part or provision of a proposed contract, all of its portions are a nullity." In the present case, the minds of the parties met. The law does not favor the destruction of contracts because of uncertainty. We are able to ascertain the parties' intentions with reasonable certainty. We have reviewed the cases cited from foreign jurisdictions. They are not in point on the issue of summary judgment. For purposes of summary judgment, we conclude that the agreement is reasonably definite and certain as to its terms so that the agreement could be performed.

Defendants agreed to sell plaintiffs' stock at a loss not to exceed 10% of cost.

The defendants failed to do so. We find no uncertainty or ambiguity as a matter of law.

(b) *Was the Agreement Unenforceable?*

Wood v. Bartolino, 48 N.M. 175, 146 P.2d 883 (1944), defines "impossibility" of performance as a defense. Without repeating the definition, we do not believe the doctrine applies to the present case, as a matter of law, where summary judgment is granted. Neither can we take judicial knowledge of the market to determine the issue of impossibility. Compare Sanders v. Freeland, 64 N.M. 149, 325 P.2d 923 (1958).

On the statute of frauds defense, defendants contend the oral contract was not to be performed within one year from the date of the agreement. This is based on Reinhart's statement that his agreement applied to any other stocks that he would purchase as long as Schramek was his broker. Reinhart never said he wanted defendants to hold his stock for a year or more. He could terminate the agency within a year. It was capable of performance within a year. Therefore, the rule does not apply. Compare Westerman v. City of Carlsbad, 55 N.M. 550, 237 P.2d 356 (1951). Restatement, Law of Agency, Second, § 414.

The statute of frauds does not apply to the relationship between a broker and customer which creates a relation of trust and confidence. Mitchell v. Allison, 51 N.M. 315, 183 P.2d 847 (1947); Harris v. Dunn, 55 N.M. 434, 234 P.2d 821 (1951). Neither is the one year provision applicable. 49 Am.Jur. Statute of Frauds, §§ 28, 29; 37 C.J.S. Frauds, Statute of §§ 49, 50.

It has been suggested that § 50A-8-319, N.M.S.A.1953 (Repl. Vol. 8, pt. 1), entitled Statute of Frauds, is applicable here. It is not because a "sale of securities" did not take place in this case. The facts here established an agency relationship, not a sale. Lindsey v. Stein Bros. and Boyce, Inc., 222 Tenn. 149, 433 S.W.2d 669 (1968). 21 A.L.R.3d 964, 977, § 4(d); 3 Anderson, Uniform Commercial Code, Second Edition, § 8-319:5, p. 789.

(c) Finally, there was no lack of mutuality on the basis of Reinhart's testimony. Reinhart and Schramek agreed on the terms of sale in the event of loss.

We conclude that there is sufficient evidence to create an issue of fact as to the existence of an enforceable agreement between the parties, its breach, and resultant damage.

2. *Were There Defenses of Waiver, Estoppel and Accord and Satisfaction as a Matter of Law?*

Defendants contend that the defenses of waiver, estoppel and accord and satisfaction all relate to Reinhart's conduct when the market declined, and the loss in his investments became apparent to him.

(a) *Waiver*

"Waiver" is the intentional abandonment or relinquishment of a known right. An intention to waive a right is ordinarily a question of fact. Chavez v. Gomez, 77 N.M. 341, 423 P.2d 31 (1967). Reinhart testified that he considered defendants obligated to sell even when the market went below 10% loss. This was not consent to a different course of conduct. He was trying to minimize the loss. Schramek did not feel that a sale should be made. This did not constitute a defense under summary judgment. See Ed Black's Chevrolet Center, Inc. v. Melichar, 81 N. M. 602, 471 P.2d 172 (1970).

(b) *Estoppel*

"Estoppel" is the preclusion, by acts or conduct, from asserting a right which might otherwise have existed, to the detriment and prejudice of another, who, in reliance on such acts and conduct, has acted thereon. Miller v. Phoenix Assur. Co., Limited, of London, 52 N.M. 68, 191 P.2d 993 (1948). Defendants have not pointed to any acts or conduct of Reinhart relied on by defendants which was detrimental or prejudicial to them and upon which they acted. Reinhart had a duty to

act reasonably under the circumstances. Mogollon Gold & Copper Co. v. Stout, 14 N.M. 245, 91 P. 724 (1907). This did not constitute a defense under summary judgment.

(c) *Accord and Satisfaction*

An accord and satisfaction is defined in White v. Ragle, 82 N.M. 644, 485 P.2d 978 (Ct.App.) decided May 21, 1971. Reinhart's evidence, viewed in its best light, shows that when Reinhart ordered the stocks sold it was not done in settlement and satisfaction of the losses sustained. It was done to attempt to mitigate damages.

None of the defendants' alleged defenses are sufficient as a matter of law to sustain a motion for summary judgment.

3. *Was the Evidence Sufficient to Create an Issue of Fact of Existence of a Negligence Action?*

The relationship between Schramek and Reinhart was that of agent and principal. The contract of sales is between Reinhart and a third party, Schramek acting as the customer's agent in making the contract. This is fiduciary in nature and Schramek must exercise his duties with the utmost good faith and integrity. Meyer, The Law of Stock Brokers and Stock Exchanges, §§ 39, 40. See Iriart v. Johnson, 75 N.M. 745, 411 P.2d 226 (1965); Twomey v. Mitchum, Jones & Templeton, Inc., 262 Cal.App.2d 690, 69 Cal.Rptr. 222, (1968).

Schramek had a duty to use reasonable care to obtain terms which best satisfy the manifested purposes of Reinhart. Restatement of the Law, Agency Second, § 424. Defendants had a duty to exercise reasonable skill and ordinary diligence and not to act negligently. Wilson v. Hisey, 147 Cal.App.2d 433, 305 P.2d 686 (1957); Mattieligh v. Poe, 57 Wash.2d 203, 356 P.2d 328, 94 A.L.R.2d 464 (1960); 12 C.J.S. Brokers § 26; 12 Am.Jur.2d Brokers, § 96.

There is some evidence that Schramek did not know about the drop in the stock at the time it occurred, and did not feel like it was time to sell. This conduct, together with other facts and circumstances relating to breach and damages, is sufficient to create a genuine issue of fact as to defendants' liability for negligence. Defendants raised no affirmative defenses to plaintiffs' claim of negligence.

The summary judgment is reversed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

490 P.2d 458

Felix RODRIGUEZ, Warden, New Mexico State Penitentiary, Petitioner,

v.

The DISTRICT COURT OF the FIRST JUDICIAL DISTRICT, IN AND FOR the COUNTY OF SANTA FE, State of New Mexico, and The Honorable Santiago Campos, as Judge of the First Judicial District, Respondents.

No. 9332.

Supreme Court of New Mexico.

Oct. 28, 1971.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

David L. Norvell, Atty. Gen., Winston Roberts-Hohl, Asst. Atty. Gen., Santa Fe, for petitioner.

Watson, Stillinger & Lunt, David L. Lunt, Santa Fe, for respondents.

OPINION

PER CURIAM.

This is an original prohibition proceeding in which Mr. Rodriguez, Warden of the New Mexico Penitentiary, seeks to prohibit the Respondents from executing or enforcing a certain order directing Petitioner to discharge one Dorsey Lee Robertson, a prisoner.

We issued an alternative writ, which we now determine to have been improvidently issued.

The subject matter of this action has a complex and unfortunate procedural history, some review of which is essential to an understanding of our ruling. This action, in which Warden Rodriguez is the petitioner, has been preceded by two habeas corpus proceedings in which he was re-

spondent, which were filed in the District Court of the First Judicial District in and for Santa Fe County, in the first of which District Judge James M. Scarborough of Division II presided and in the second District Judge Santiago E. Campos of Division III. Warden Rodriguez in both of the habeas corpus proceedings and in this action has been represented by the Attorney General and his position will hereafter be referred to as "the State." The prisoner has been ably represented by court-appointed counsel.

Mr. Robertson pleaded guilty to the crime of assault by a prisoner in the District Court of Lea County and was sentenced to the penitentiary on October 20, 1970 for a term of not less than two nor more than ten years. Following confinement, he filed in that court a document which the presiding judge regarded as being a motion for a new trial and change of venue, and which was denied. Thereafter, he filed the first petition for a writ of habeas corpus in Santa Fe County District Court which we have mentioned. In the petition the prisoner did not complain of having been deprived of his right to appeal, but rather advanced other grounds not now pertinent. The State in response filed a motion to dismiss for failure to state a claim upon which relief could be granted under our habeas corpus statutes and on the grounds that the prisoner's position was governed by Rule 93 of the Rules of Civil Procedure [§ 21-1-1(93), N.M.S.A., 1953] and ought to have been brought in the District Court of Lea County. No order was entered on this motion.

Final hearing was held before Judge Scarborough and from his Judgment and Order it appears that he considered the pleading filed by the prisoner in Lea County District Court to have been a motion for an appeal, and the denial of that motion to have unlawfully and unconstitutionally deprived Mr. Robertson of his right to appeal. How an appeal could have been successfully prosecuted from a guilty plea we are not prepared to say, but this is a question we have no opportunity to answer in this case. The point here is that the prisoner had an undoubted right to appeal his sentence and the State does not contend otherwise. N.M. Const., Art. VI, § 2.

Judge Scarborough's Judgment and Order, entered on June 15, 1971, provided:

> "IT IS THEREFORE ORDERED that the Petitioner be remanded to the New Mexico State Penitentiary, there to remain until June 30, 1971, at which time he is to be released unconditionally, provided, however, that if prior to June 30, 1971, the sentencing court, being the District Court of Lea County, New Mexico, has issued an Order allowing Petitioner an appeal from his conviction, based upon his Notice of Appeal timely filed on November 10, 1970, then he shall not be released pursuant to this proceeding."

Even at this juncture the opportunity to inquire into the merits of the prisoner's incarceration in a reasonably orderly way had not been lost, but no one furnished the presiding judge of the Lea County District Court a copy of the order or advised that court of its entry or content.

The prisoner however had a copy of it, which on June 30, 1971, he exhibited to penitentiary authorities and demanded his release. A flurry of activity on the part of the Attorney General was occasioned thereby, culminating in the entry of an order on that day by the District Court of Lea County allowing Mr. Robertson an appeal, appointing counsel to represent him and setting an appeal bond. This, of course, came too late. We cannot equate "prior to June 30" with "on or before June 30."

The State, in this proceeding, asserts that it was the duty of the prisoner to apprise the Lea County District Court of Judge Scarborough's Judgment and Order. This is a claim which does not merit serious consideration. At the hearing, the State admitted that this omission stemmed from "neglect." Such an admission is in any case implicit in the motion filed by the State under Rule 60(b) (1) of the Rules

of Civil Procedure [§ 21–1–1(60) (b) (1), N.M.S.A., 1953] seeking relief from Judge Scarborough's Judgment and Order on grounds of excusable neglect. However, since the State did not bestir itself to make this motion until September 27, 1971, Judge Scarborough denied the relief sought on the grounds that it was not made within a reasonable time.

Meanwhile, following the events of June 30, 1971, Mr. Robertson, who seems throughout to have been rather well advised, remained quiescent until the State allowed its time for appeal from Judge Scarborough's Judgment and Order to run out. This occurred on July 15, 1971. In this reposes the nub of the State's problem. Judge Scarborough had undoubted jurisdiction of the subject matter and of the parties before him, and his Judgment and Order was binding on the parties and clothed with all of the attributes of finality.

This case is governed by State ex rel. Hanagan v. District Court, 75 N.M. 390, 405 P.2d 232 (1965), the following quotation from which seems particularly apt:

> "Although the proceeding presents a number of questions which undoubtedly need to be answered, we are impressed that in the instant case we are foreclosed from doing so. Intervenor was ordered discharged from the custody of the Warden of the penitentiary. The order was not appealed and is accordingly final. Leach v. Cox, 74 N.M. 143, 391 P.2d 649. Since intervenor was being detained within the First Judicial District, there can be no question that respondent had jurisdiction to consider intervenor's petition for habeas corpus, Art. VI, § 13 New Mexico Constitution, § 22–11–3, N.M.S.A.1953. This being true, it matters not if he erred; release on the writ having been decreed, the time for appeal having passed, the writ is final and not subject to recall or amendment."

The prisoner was not, however, released under Judge Scarborough's Judgment and Order and on July 20, 1971, he filed the second petition for writ of habeas corpus. Following hearing, Judge Campos ordered the prisoner released and that order is the subject of this proceeding. In making this ruling, Judge Campos said in part:

> "This ruling is most distasteful to me. However, I can see no way in which it can be avoided.
>
> "I am ruling in this manner in view of the State's failure to act within the time set by Judge Scarborough's Order, filed June 15, 1971. My ruling today is not a ruling on the correctness of that Order. It is merely that this Order was effective when rendered and it not having been appealed or the conditions therein complied with, the terms thereof are binding on the State."

This is a result in which we concur and a sentiment which we share. The prisoner must be accorded his rights, and the orderly processes of the law given effect, regardless of how an individual case may have been handled. If governance by law is demanded of our citizens, can less be expected of the State or of us?

In any case, Judge Campos had jurisdiction of the persons and subject matter in the proceeding before him. It follows that he is not threatening to exceed his jurisdiction by enforcing his order, and the remedy of prohibition is thus not available to the State.

The alternative writ is discharged.

It is so ordered.

490 P.2d 461

WESTERN STATES COLLECTION COMPANY, Plaintiff-Appellant,

v.

Lee W. SHAIN and Loring W. Shain, Defendants-Appellees.

No. 9257.

Supreme Court of New Mexico.

Nov. 8, 1971.

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

Cotter, Hernandez, Atkinson, Campbell & Kelsey, Albuquerque, for defendants-appellees.

OPINION

STEPHENSON, Justice.

The trial court entered judgment on the pleadings in favor of appellees (defendants) and appellant (plaintiff) appeals. We reverse.

Plaintiff sued to foreclose the lien of a judgment. Suit was filed within seven years of the entry of the judgment, but more than four years after a transcript of it had been recorded as a lien. One of defendants' affirmative defenses was that the judgment lien had been barred by the statute of limitations. On defendants' motion for judgment on the pleadings, the trial court dismissed the complaint on that basis.

Judgment liens, which did not exist at common law, were created by § 21-9-6, N.M.S.A., 1953, which, insofar as material, provides:

> "Any money judgment rendered in the * * * district 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. * *"

Section 23-1-2, N.M.S.A., 1953 (1971 Pocket Supp.) provides in pertinent part:

> "Actions founded upon any judgment of any court of the state may be brought within seven [7] years from and after the rendition or revival of the judgment, and not afterward * * *."

No statute specifically provides for a period of limitation applicable to foreclosure of judgment liens. By § 23-1-4, N.M.S.A., 1953, a four-year limitation is provided for "all other actions not herein otherwise provided for and specified."

The question here is whether the limitation period for judgment liens created by § 21-9-6 is the seven years under § 23-1-2 or the four years under § 23-1-4.

Another statute worthy of mention primarily because of the efforts of both parties to draw aid and comfort from it is § 21-9-19, N.M.S.A., 1953 (1971 Pocket Supp.) which provides for a simplified procedure for revival of judgments. We are not persuaded that it bears upon the issues here, but rather deals with limitations on and revival of judgments, rather than

the limitation period applicable to judgment liens.

Defendants claim that the statute of limitations applicable to judgment liens is the four years provided in § 23-1-4. They concede that should the judgment with which the lien was associated be revived or renewed by a suit filed for that purpose, the lien might be thereafter resuscitated by another compliance with § 21-9-6. Presumably, according to defendants' theories, if the judgment were renewed by the procedures created by § 21-9-19, the lien would be thereby revived without further action, at least as to real estate situate in the county in which the judgment was entered.

Land titles, and rights and liabilities in relation to them, should be as definite and certain as is permitted by statute and the common law. The expiring of judgment liens and their springing to life following a hiatus of up to three years, which could follow adoption of defendants' theories, would result in confusion with attendant unsettling effects. We doubt that the legislature had any such semantical or logical gymnastics in mind in adopting the statutes to which we have referred.

Defendants place their principal reliance on Pugh v. Heating & Plumbing Finance Corporation, 49 N.M. 234, 161 P.2d 714 (1945) and Curtis Manufacturing Company v. Barela, 76 N.M. 392, 415 P.2d 361 (1966).

The learned and interesting opinion in Pugh considered whether the four year or the six year limitation statute (analogizing from the fact that judgment liens are by statute foreclosed like mortgages) applied to judgment liens. It did not really need to consider these questions since the judgment and the associated lien with which it was dealing were both approaching their eleventh anniversary and were barred under any conceivable statute of limitations which might apply. Much of what is said may thus be regarded as dicta, recognized in the opinion itself by the following language:

> "All we say in this immediate connection is that the lien is gone when the right to enforce the judgment is gone."

Certainly we have no quarrel with that statement, nor with the holding in Pugh that the lien and the judgment, though related, are separate rights. Such was the holding in Curtis Manufacturing Company, which held that the judgment and judgment lien being separate rights, gave rise to separate causes of action.

Although separate rights and separate causes of action arise from a judgment and a judgment lien, it does not necessarily follow that the latter is not "founded" upon the former within the meaning of § 23-1-2. The existence of a valid judgment is a prerequisite to the existence of the lien. The lien is for the amount of the judgment, secures it and provides a means for its enforcement. Moreover, under Pugh, the lien expires with the judgment. Considering statutory words used in their ordinary way, no unusual or strained construction is involved in regarding a judgment lien as being "founded" on the judgment from which it arises.

Otero v. Dietz, 39 N.M. 1, 37 P.2d 1110 (1934) is persuasive. That case involved a rather complex fact situation but it suffices to say that the court was considering the survival of the judgment lien during the two-year hiatus between the expiration of the five-year restriction on taking out execution on a judgment (which was provided by a statute similar in terms to § 21-9-20, N.M.S.A., 1953, prior to its 1971 amendment) and the seven-year limitation period. Although the applicability of the four-year limitation period was not directly dealt with in the opinion, the court did say:

> "* * * [W]hen the Legislature in 1891 said that upon the doing of certain acts by the judgment creditor, there should attach as an incident to his judgment a lien, *we see no reason upon principle for denying the existence of the lien, so long as the judgment itself possesses full vitality.*" (Emphasis ours.)

No one seems to have meanwhile thought of any very good reason for taking a different view.

We hold that the period of limitation applicable to judgment liens is the seven years provided by § 23–1–2, with the important qualification stated in Pugh that the enforceability of the judgment lien expires with the judgment upon which it is founded.

The judgment on the pleadings is reversed and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

McMANUS and MONTOYA, JJ., concur.

490 P.2d 463

Eugene F. CINELLI, Plaintiff-Appellant,

v.

WHITFIELD TRANSPORTATION, INC., a Delaware Corporation, et al., Defendants-Appellees.

No. 9241.

Supreme Court of New Mexico.

Nov. 8, 1971.

Stanley P. Zuris, Albuquerque, for plaintiff-appellant.

No appearance for defendants-appellees.

OPINION

OMAN, Justice.

Defendant Board of County Commissioners, hereinafter referred to as Board, issued a Special Use Permit under § 13 of the Comprehensive Zoning Ordinance of Bernalillo County. The other defendants were thereby authorized to use a ten-acre tract of land as a truck terminal. This action of the Board was taken over the protest of plaintiff, and he sought relief therefrom in the district court, apparently pursuant to the provisions of § 14–20–7, N.M.S.A.1953 (Repl. Vol. 3, 1968). The district court granted summary judgment in favor of defendants and plaintiff has appealed therefrom. We reverse.

Although the procedures prescribed by § 14–20–7, supra, were not strictly complied with, the district court had before it the entire record in the Office of the Zoning Administrator relative to the application for zone change and the issuance by the Board of the Special Use Permit. It also had before it and considered the pleadings,

the Comprehensive Zoning Ordinance, the Subdivision Ordinance of Bernalillo County, affidavits of the members of the Board, and a counter affidavit by plaintiff.

Since defendants failed to file answer briefs in this court, we have had presented to us only the views and arguments of plaintiff as to the claimed impropriety and illegality of the district court's action in granting the summary judgment. Plaintiff has presented his views under two points relied upon for reversal. The first point is his claim of error on the part of the trial court in holding "* * * that Section 13–B (13) of Bernalillo County Commission Ordinance No. 25 [Comprehensive Zoning Ordinance] authorized the County Commission to permit the use of land for a truck terminal." The substance of his argument under this point is that the issuance of a Special Use Permit for the construction and maintenance of a truck terminal on the ten acres which are located in a C–1 [Commercial] Zone was not authorized by and is contrary to the express provisions of § 13–B (13) of the Comprehensive Zoning Ordinance which provides for the issuance of Special Use Permits for a "Planned Development Area." Regardless of the merits of plaintiff's argument on this point, we predicate our reversal of the summary judgment on other grounds.

Under his second point he claims there were genuine issues of fact to be decided which precluded the trial court from properly granting summary judgment. We agree. We have not overlooked the manner and extent of the review authorized by § 14–20–7, supra. See in this regard Peace Foundation, Inc. v. City of Albuquerque, 79 N.M. 241, 442 P.2d 199 (1968); Coe v. City of Albuquerque, 79 N.M. 92, 440 P.2d 130 (1968).

By his affidavit in opposition to the motion for summary judgment, plaintiff detailed the grounds for his claim of irreparable injury by flooding and diminution of the value of his property unless the Special Use Permit issued by the Board should be declared null and void. The affidavits of the members of the Board controvert in a very general way the claims of the plaintiff. However, in the record of the proceedings before the Board, it expressly appears the Board may have failed and refused to consider the drainage problem and the danger from flooding to which plaintiff's property might be subjected by the development of the truck terminal. Both the Comprehensive Zoning Ordinance and § 14–20–3, N.M.S.A.1953 (Repl. Vol. 3, 1968) list as purposes to be effected by the ordinance the securing of safety "* * * from fire, panic and other dangers" and the facilitation of "* * * adequate provision for * * * water, sewerage * * * and other public requirements."

The district court may not substitute its judgment for that of the Board, but when it was made to appear by the affidavits and other matters in the record that the Board may have improperly failed to consider the matters which it was required to consider in making the zoning change, then a question of fact was presented on the issue of the arbitrariness of the Board in granting the Special Use Permit, and it was improper for the court to grant summary judgment and thereby resolve this issue as a matter of law.

The summary judgment is reversed and the cause remanded with instructions to take whatever action is proper and necessary consistent with this opinion.

It is so ordered.

McMANUS and MONTOYA, JJ., concur.

490 P.2d 465

Jose E. GOMEZ et al., Plaintiffs-Appellants,

v.

BOARD OF EDUCATION of DULCE INDEPENDENT SCHOOL DISTRICT NO. 21, Defendant-Appellee.

No. 9252.

Supreme Court of New Mexico.

Oct. 18, 1971.

Rehearing Denied Nov. 18, 1971.

Bigbee, Byrd, Carpenter & Crout, Michael H. Siegler, Paul D. Gerber, Santa Fe, for plaintiffs-appellants.

Solomon & Roth, Santa Fe, for defendant-appellee.

OPINION

McMANUS, Justice.

This cause was brought in the District Court of Rio Arriba County by resident qualified voters owning real property within the defendant School District seeking a declaratory judgment that the expenditure of certain funds of defendant to be derived from the issuance of bonds approved at an election, violated the provisions of Art. XII, § 3, and Art. IX, §§ 11 and 14, of the Constitution of New Mexico. The first count of the complaint seeking to set aside the election for failure to comply with certain statutory provisions was withdrawn and plays no part in this suit. After a hearing, the nature and contents of which are not reflected in the transcript, the court entered the following order of dismissal:

"This matter having come on regularly before the Court, and the Contestants being present by and through counsel, Bigbee & Byrd and G. Stanley Crout, and the Contestee being present by and through counsel, Charles S. Solomon, and the Court having heard the arguments of counsel and having examined the record herein; and,

"The Court being advised by counsel for the Contestants that they have withdrawn their First Cause of Action and wish to proceed solely on the Second Cause of Action; and

"The Court finds that the Second Cause of Action is framed as a declaratory judgment action and considered the arguments and authorities presented by counsel on such basis,

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Second Cause of Action be dismissed

without prejudice on the merits in any subsequent cause on the grounds that it is premature and there is no justiciable controversy between the parties at this time."

The moneys from the bond issue referred to above, as alleged in the complaint and not denied, are to be spent for roads, equipment, class rooms, and for other purposes, some of the improvements to be made on Jicarilla Apache Tribe lands under lease to the defendant herein. The fact that the bond issue money has not been raised, nor spent, does not make the suit a premature one. The suit is one to be determined at the present time. The New Mexico declaratory judgment act, § 22-6-1, N.M.S.A. (1953 Comp.), reads:

"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."

See Jones v. Merrimack Valley School District, 107 N.H. 144, 218 A.2d 55, 57 (1966).

Inasmuch as the plaintiff has alleged several violations of our Constitution, and the parties are interpreting the Jicarilla Apache Tribe—Board of Education lease differently as between them, it would appear obvious that an actual controversy exists.

The order dismissing this cause is hereby reversed and remanded for a trial on the merits.

It is so ordered.

COMPTON, C. J., and OMAN, J., concur.

490 P.2d 466

STATE of New Mexico, Plaintiff-Appellee,

v.

Wayne Arnold MORDECAI, Defendant-Appellant.

No. 650.

Court of Appeals of New Mexico.
Sept. 24, 1971.
Rehearing Denied Oct. 15, 1971.

Joseph (Sib) Abraham, Jr., Bart Cox, Alice L. Dwyer, El Paso, Tex., Robert W. Ward, Lovington, for defendant-appellant.

David L. Norvell, Atty. Gen., Anne K. Bingaman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of unlawfully selling or disposing of marijuana defendant appeals. He asserts five points for reversal which are: (1) change of venue; (2) admission of a three pose mug shot; (3) entrapment; (4) refusal of impeachment testimony and (5) six minute deliberation constitutes jury misconduct.

Point one regarding change of venue was disposed of by State v. Mosier and Mordecai (Ct.App.), 83 N.M. 213, 490 P.2d 471, decided September 17, 1971, which had been consolidated with the trial in this case for the purpose of the motion for the change of venue. Point five was resolved contrary to defendant's position by State v. Mosier and Mordecai, supra.

We affirm.

ADMISSION OF A THREE POSE MUG SHOT.

Defendant contends that the three pose mug shot should not have been admitted into evidence because the photograph was immaterial, there was no proper predicate, it was of such an inflammatory nature as to be prejudicial, and the photographing of the defendant was a violation of his rights under the Fifth and Fourteenth Amendments of the United States Constitution. We discuss each contention in turn.

Immateriality.

Relying on United States v. Silvers, 374 F.2d 828 (7th Cir. 1967) defendant contends that absent a showing of special circumstances or some special need based upon facts it was error to admit photographs which on their face disclose past incarcerations. Defendant further contends that absent any showing of a clear probative purpose mug shots taken from police files are not material to the issues being tried in a criminal case.

We disagree. Evidence of the appearance of both the undercover agent and the defendant was developed during question-

ing, and without objection. This evidence went to the ability of the undercover agent to "identify" with people suspected of dealing in narcotics. The questioned photograph, taken after defendant's arrest, shows defendant's appearance. The photograph illustrated the "appearance" testimony and was material to that issue. See State v. Webb, 81 N.M. 508, 469 P.2d 153 (Ct.App.1970). Further, the citations on which defendant relies are distinguishable because they go to the question of a photograph of a defendant showing a past criminal record. The evidence as to the photograph in this case is that it was taken after defendant's arrest on the charge for which he was being tried.

Absence of a proper predicate.

In asserting an absence of a proper "predicate", defendant argues there was a "total absence of any legitimate issue which might be resolved or illustrated by * * *" introduction of the photograph. We disagree.

The defendant made a "motion in limine" to suppress admission of the three pose photograph of defendant taken the day after his arrest because his appearance would inflame the minds of the jurors. During the argument on this motion the State explained that the only purpose for which the photographs would be introduced would be to rebut any testimony elicited by defense counsel regarding the undercover agent's hairstyle and general appearance. Thereafter, defendant sought to assert the defense of entrapment, using the undercover agent's dress and appearance to allude to the fact that he gave the appearance of a person who deals in drugs. The State then rebutted on redirect by showing that defendant had long hair and whiskers and was dressed very informally. The State then introduced the three pose mug shots for corroboration. Since the testimony went in without objection, the picture could only convey information already admitted before the jury. State v. Leach, 58 N.M. 746, 276 P.2d 514 (1954).

Inflammatory nature of photographs.

Defendant maintains that Lea County was conservative, that beards and long hair were not common and so when the defendant was depicted in that fashion he would come up against the prejudice in the community reserved for persons who "* * * by their dress, hair length and life styles, display publicly their lack of appreciation of the more traditional way of life so dear to the hearts of the Lea County citizenry."

Defendant states that because of the county's conservatism, he was dressed conservatively at trial, and, thus, the photograph showing his earlier style of hair and mode of dress inflamed the jury against him.

It is well settled that the trial courts are given broad discretion when deciding evidentiary questions. State v. Webb, supra. We fail to see how the trial court abused its discretion when defendant's appearance in relation to the undercover agent was a material issue and when the defendant did not object to the testimony regarding the appearance of the defendant. Once this testimony was introduced, without objection, the introduction of photographs merely corroborated testimony already received. This was not reversible error. State v. Leach, supra. The fact that the photograph might have had some inflammatory effect did not render it inadmissible because it was material to the issues in the case. Compare State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct.App.1969); State v. Gray, 79 N.M. 424, 444 P.2d 609 (Ct.App. 1968).

Fifth Amendment Violation.

Defendant contends that the Fifth Amendment of the United States Constitution prohibition against self-incrimination was violated by photographing him when he was in custody. Defendant concedes that evidence of fingerprints, blood type, hair samples have been held not to come within this prohibition; nevertheless, he maintains there is a distinction in this situation in that he could have done

something to improve his appearance in the photographs. We fail to see the significance of that distinction. The privilege against self-incrimination is limited to disclosures that are "communicative" or "testimonial" in nature and does not include identifying physical characteristics. 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); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); State v. Williamson, 78 N.M. 751, 438 P.2d 161 (1968); State v. Ramirez, 78 N.M. 584, 434 P.2d 703 (Ct.App.1967).

ENTRAPMENT.

Defendant contends that he was entrapped as a matter of law. Defendant does not disagree with the proposition that one is not entitled to the defense of entrapment when he was merely given an opportunity to commit an offense he was already willing to commit. State v. Martinez (Ct.App.), 83 N.M. 13, 487 P.2d 923, decided July 16, 1971; State v. Sanchez, 79 N.M. 701, 448 P.2d 807 (Ct.App.1968).

It is defendant's position that he might have been ready and willing to sell marijuana in El Paso, Texas but that he was "* * * entrapped into committing the offense of sale of narcotics in the State of New Mexico. * * *" Defendant relies on Carbajal-Portillo v. United States, 396 F.2d 944 (9th Cir. 1968). Even if we assume that New Mexico has the identical rule, *Carbajal* does not aid defendant. In *Carbajal* defendant was willing to transport narcotics for sale within the country of Mexico but was reluctant to do so in the United States. The opinion in *Carbajal* notes that the Assistant United States Attorney "* * * with commendable candor acknowledged that Carbajal would not have brought the narcotics into the United States but for the importuning of Ricos, the narcotics agent." In this case, the evidence raised a factual question whether defendant was willing to commit the offense in New Mexico. This factual question, as to entrapment, was submitted to and resolved by the jury.

IMPEACHMENT TESTIMONY.

Defendant contends that the trial court erred in refusing to permit testimony to impeach earlier testimony of the State's undercover agent. The testimony sought to be impeached was that given on cross-examination of the agent by the defendant, and concerned aspects of the agent's personal life and activities which were unrelated to any activity of the agent in this case.

Section 20-2-4, N.M.S.A.1953 (Repl. Vol. 1970) permits impeachment of the credibility of a witness by general evidence of his bad moral character. Under that section it is proper to use specific acts of misconduct to show bad moral character. State v. Sharpe, 81 N.M. 637, 471 P.2d 671 (Ct.App.1970). However, the answer of the witness is conclusive of the matter under inquiry. Martinez v. Avila, 76 N.M. 372, 415 P.2d 59 (1966); See State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.1969).

Defendant relying on Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed. 2d 848 (1958), maintains that once "* * * defendant raised the defense of entrapment he automatically placed his own past behavior at issue (in order for the State to show pre-existing disposition to commit the offense). * * *" Defendant maintains that once this happens the undercover agent's prior behavior would likewise become relevant. We do not so read *Sherman*. In *Sherman* the inquiry into prior activities of the agent was limited to those which led up to the entrapment.

Affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

490 P.2d 470

STATE of New Mexico, Plaintiff-Appellee,
v.
Robert Dan PEDRO, Defendant-Appellant.
No. 660.

Court of Appeals of New Mexico.
Oct. 15, 1971.

[redacted]

Scott McCarty, Albuquerque, David H. Getches, Richard B. Collins, Jr., Native American Rights Fund, Boulder, Colo., for defendant-appellant.

David L. Norvell, Atty. Gen., Leila Andrews, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of violating § 54-5-16, N.M.S.A.1953 (Repl.Vol. 8, pt. 2), defendant appeals. The portion of § 54-5-16, supra, involved in this appeal makes it unlawful "* * * to possess, * * * anhalonium, commonly known as peyote or pellote; * * *" We need consider only one of the issues raised by defendant; that issue, which is dispositive, is whether the statute requires that possession of anhalonium be intentional.

[redacted] Section 54-5-16, supra, does not state that the possession must have been intentional. In this situation, judicial construction of the statute is required. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280 (1941). "Intent" is required unless it clearly appears that the Legislature meant to eliminate "intent" as part of the offense. State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct.App.1969); State v. Davis, 80 N.M. 347, 455 P.2d 851 (Ct.App.1969). It does not clearly appear from the statute that the Legislature intended to make unintentional possession of anhalonium a crime. Accordingly, an intent to possess the anhalonium is required. The same result has been reached in other cases where the statute which prohibited possession did not refer to "intent." As to narcotic drugs, see State v. Giddings, 67 N.M. 87, 352 P.2d 1003 (1960), State v. Mosier and Mordecai, (Ct. App.), 83 N.M. 208, 213, 490 P.2d 466, 471, State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970); as to mercury, see State v. Davis, supra; as to burglary tools, compare State v. Lawson, 59 N.M. 482, 286 P. 2d 1076 (1955).

[redacted] In this case, the trial court ruled that "intent" was not an element of the offense of possession of anhalonium. Being of this view, which was erroneous, the trial court did not determine whether there was an intentional possession. We do not remand the case for such a determination because there is no evidence of intentional possession. Neither evidence nor inference in the State's case shows defendant inten-

tionally possessed anhalonium. The defense evidence is to the effect that defendant, an Arapahoe Indian, was treated for an illness by White Oak, an Arapahoe "Indian Doctor;" that after the treatment, defendant was given "medicine" to carry on his person as a "protection;" that defendant did not know the composition of this medicine. This medicine is the substance on which the prosecution is based.

There being no evidence of intentional possession, the conviction is reversed. The cause is remanded with instructions to set aside the judgment and sentence and to dismiss the charge against defendant.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

490 P.2d 471

STATE of New Mexico, Plaintiff-Appellee,

v.

William Byron MOSIER and James W. Mordecai, Defendants-Appellants.

No. 661.

Court of Appeals of New Mexico.

Sept. 17, 1971.

Rehearing Denied Oct. 12, 1971.

Joseph (Sib) Abraham, Jr., Alice L. Dwyer, El Paso, Tex., Robert W. Ward, Lovington, for defendants-appellants.

David L. Norvell, Atty. Gen., Frank N. Chavez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendants, Mosier and Mordecai, were convicted of possession of more than one ounce of marijuana. Defendant Mosier was also convicted of possession of LSD. They appeal asserting (1) the trial court lacked jurisdiction; (2) failure to grant a change of venue denied them the right to a fair and impartial trial; (3) the jury deliberated for ten minutes and the shortness of time constituted jury misconduct; (4) the chemical tests were not valid; (5) there was no chain of custody of the evidence introduced; (6) illegally seized evidence was used against them.

We affirm.

LACK OF JURISDICTION.

It is defendants' position that the offenses, if any were committed, occurred in the State of Texas and under the rule of "lex loci" the State of New Mexico had no jurisdiction to try the defendants for the offenses. We do not decide whether any offenses committed by the defendants occurred in the State of Texas. The issue is whether there is evidence of possession in New Mexico so as to support the conviction for violation of laws of the State of New Mexico.

We view the evidence in the light most favorable to support the verdict, resolving all conflicts and reasonable inferences in favor of the verdict. State v. Sedillo, 82 N.M. 287, 480 P.2d 401 (Ct.App.1971). For possession the State must prove physical or constructive possession of the object, with knowledge of the object's presence

and narcotic character. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970). Knowledge however was not an issue because defendants admitted knowing about the general scheme in which the undercover agent was to carry several kilos of marijuana from El Paso to Hobbs. It is defendants' claim that the possession in New Mexico was not proved and since possession was an element of the charge the trial court was without jurisdiction.

The undercover agent testified that the defendants came to Hobbs with him at the direction of a third individual who had to spend some time with "a chick" in El Paso. Defendants argue that the evidence conclusively shows that the possession of the marijuana changed hands in Texas when several kilos of marijuana were given over to the undercover agent and placed in the trunk of his car. Nevertheless, the undercover agent testified that a brother of defendant Mordecai directed the two defendants to accompany the undercover agent to Hobbs where they were to sell several kilos. The undercover agent stated explicitly that the defendants came to Hobbs to sell marijuana.

There is evidence that defendants helped unload the marijuana after arriving in Hobbs, and helped carry it to where it was stored. There is evidence that, in Hobbs, defendants "manicured" some of the marijuana; that one of them rolled and partially smoked a joint; and that both defendants checked on the undercover agent when the agent removed some of the marijuana. This evidence clearly establishes that the defendants were in possession. Possession means the care, control and management on the occasion in question. State v. Maes, supra; State v. Favela, 79 N.M. 490, 444 P.2d 1001 (Ct.App.1968).

The record also shows that defendant Mosier had possession of the LSD in the State of New Mexico. There was evidence that Mosier had the LSD tablets in his possession in El Paso, brought them to Hobbs and stored the tablets with the marijuana at the time the marijuana was stored. This testimony was sufficient to establish possession of LSD by defendant Mosier. State v. Maes, supra.

CHANGE OF VENUE.

It is defendants' contention here that the trial court's refusal of a change of venue on the grounds of pre-trial publicity jeopardized their right to a fair and impartial trial.

The trial court held a lengthy hearing on the motion for a change of venue. Both the defendants and the State called witnesses. Several witnesses testified that they had no reason to believe that the defendants would not receive a fair trial in Lea County. Some witnesses remembered reading about drug related items in the newspapers but did not recall the details or the names of the defendants. Other witnesses testified that it would be difficult to obtain a fair and impartial hearing in Lea County because of the strong feelings about narcotics.

After hearing the witnesses and viewing the exhibits introduced the trial court denied the motion for a change of venue without findings. Only an oral request for findings was made and none were submitted. Accordingly, this case appears to be controlled by State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952) wherein the court stated that unless specific findings were requested the absence of findings is waived. However, we have received the evidence before the court in connection with the motion, and there is evidence supporting the ruling denying the motion. The ruling was not an abuse of discretion. See Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969).

JURY DELIBERATION.

Defendants contend they should be granted a new trial because the jury deliberated for only ten minutes and that such a short time for deliberation constitutes jury misconduct. Defendants contend that although there are no cases directly in point

that a "rational mind can reach no other conclusion." We do not agree.

One of defendants' contentions is that a jury should at least take sufficient time to read the instructions prior to rendering the verdict and that ten minutes is not sufficient time to read the court's instructions. This argument is based on the false premise that the only way for the jury to appraise itself of the instructions is to read them. Such is not the case. The instructions are read to the jury by the court and the written instructions need not go to the deliberation room unless there is a request. Section 41–11–12, N.M.S.A. 1953 (Repl. Vol. 1964); State v. Beal, 48 N.M. 84, 146 P.2d 175 (1944). Compare the rule in criminal cases, § 21–1–1(51) (2) (g), N. M.S.A. 1953 (Repl.Vol.1970) with the rule in civil cases, § 21–1–1 (51) (1) (g), N.M. S.A. 1953 (Repl.Vol.1970). Here the record shows no request by either party.

Furthermore, there is no rule requiring the jury to deliberate for any particular length of time. Wall v. United States, 384 F.2d 758 (10th Cir. 1967). The amount of time to be spent in deliberation is a matter for the jury to determine. State v. Peck, 429 S.W.2d 247 (Mo.1968) and there is nothing in the nature of things to prevent a jury from being so overwhelmed by the evidence that they need not leave the jury box to reach a verdict. See State v. Lumbra, 122 Vt. 467, 177 A.2d 356, 91 A.L.R.2d 1235 (1962); Commonwealth ex rel. Sharpe v. Burke, 174 Pa.Super. 350, 101 A.2d 397 (1953).

Defendants' fourth point challenges the validity of the chemical tests; questions the chain of custody of the marijuana introduced into evidence; and urges that the marijuana be suppressed as being illegally seized evidence.

VALIDITY OF THE TESTS.

Dr. Schoenfeld, a biochemist and toxicologist, testified that two of the sacks, exhibits 1 and 7, contained marijuana. This testimony was based on a chemical analysis in his laboratory. Defendants point out that the marijuana actually used in the testing was about one gram and the undercover agent testified that he put one ounce (over 28 grams) of marijuana into one of the sacks, and that it could have been one gram of this marijuana that was tested.

Assuming this is true as to one of the sacks, this still does not affect the proof as to the second sack tested. The undercover agent co-mingled marijuana in only one sack and in fact the contents of both sacks tested proved to be marijuana.

Defendants likewise point out that exhibits 2 through 5 were not tested. The expert, in open court, identified those four exhibits as containing marijuana based on sight and smell. Assuming but not deciding that his open court identification was not adequate, the possession of the two tested sacks of marijuana was adequate to support the conviction.

As to the LSD, exhibit 6 presents no identity problem. The expert testified that he tested 6 of 65 pills, a representative sample, and found that they contained a "relatively low level of LSD."

CHAIN OF CUSTODY.

The record is clear that Dr. Schoenfeld went to Hobbs and picked up exhibits 1, 6 and 7 from Lt. Fowler for identity analysis. In court these exhibits were identified by Lt. Fowler by marks he had made on them after they were seized. Exhibit 1 and 7 were identified in court by Officer Vance Adams of the State Police as those he picked up from Dr. Schoenfeld and kept in his office in Roswell until the day of trial. Exhibit 6, the LSD, was received from Dr. Schoenfeld by Lt. Fowler who identified the tablets as the same ones he had given to Dr. Schoenfeld for analysis, and who kept them until trial.

Chain of custody of exhibits 2 through 5 is established by testimony that they were

kept locked up at Hobbs after seizure until trial, and as was discussed above these exhibits are not necessary for upholding the conviction.

The chain of custody was sufficiently established. Compare State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct.App.1970).

ILLEGAL SEIZURE.

Defendants' claim that their arrest without a warrant was unlawful, not supported by probable cause and that the search and seizure of narcotic drugs used to convict them was therefore unlawful. Since the issue of probable cause for arrest is raised, not as defense in itself, but as a basis for the claim that the marijuana was seized pursuant to an unlawful arrest, in light of our resolution of the search and seizure issue we need not address ourselves to probable cause. Our discussion is limited to a seizure pursuant to an arrest.

The record reveals that upon arrival in Hobbs the undercover agent instructed his girl friend to call Lt. Fowler and tell him about the drugs. The following morning Lt. Fowler and several other detectives went to the undercover agent's home. The undercover agent told Lt. Fowler where to find the narcotics. After Lt. Fowler had seen the sacks of marijuana and pills, he ordered the arrest of defendants. There was no search pursuant to an arrest. The finding of the marijuana and LSD in the undercover agent's home after the officers were informed by the undercover agent was hardly a search, but if it was a search it was by permission of the owner of the house. A search after permission is given by one who has authority is valid. State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970); State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App.1969).

Affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

490 P.2d 475

Sister Mary Assunta STANG, Personal Representative and Ancillary Administratrix with the Will Annexed In the Matter of the Last Will and Testament of Catherine Lavan, Deceased, et al., Plaintiffs-Appellants,

v.

HERTZ CORPORATION, a corporation, Defendant-Appellee.

Sister Mary Assunta STANG, Personal Representative for Catherine Lavan, Deceased, Plaintiff-Appellant,

v.

HERTZ CORPORATION, a corporation, Defendant-Appellee.

No. 626.

Court of Appeals of New Mexico.

Sept. 10, 1971.

Certiorari Granted Oct. 20, 1971.

Richard E. Ransom, Smith, Ransom & Deaton, Albuquerque, for plaintiffs-appellants.

Bruce D. Hall, James C. Ritchie, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

The automobile accident involved in this case occurred when a tire blew out. The tire, manufactured by Firestone Tire & Rubber Company, was mounted on a car belonging to Hertz Corporation. The car had been rented by a nun, and Catherine Lavan, also a nun, was a passenger in the car when the blowout occurred. Catherine Lavan suffered injuries in the accident resulting in her death. Prior appellate decisions were concerned with damages in wrongful death actions. 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). Subsequent to the appellate decisions, the case was tried and submitted to a jury as against Firestone. The verdict was in favor of Firestone. There is no appeal from this verdict. The trial court directed a verdict in favor of Hertz. The dispositive issues in this appeal concern the liability of Hertz. Plaintiffs contend there were issues for the jury concerning: (1) an express warranty and (2) strict liability in tort.

Express warranty.

Plaintiffs assert the rental agreement contains an express warranty. They rely on a statement that the "vehicle" was in good mechanical condition. Defendant contends that "vehicle" does not include tires because twice in the rental agreement "tires" were referred to in a sense separate from "vehicle."

Apart from the rental agreement, a Hertz representative, in a conversation with one of the nuns, stated: "you have got good tires." Plaintiffs contend this statement was also an express warranty as to the tires. Defendant asserts this statement was no more than "puffing." See § 50A-2-313(2), N.M.S.A.1953 (Repl.Vol. 8, pt. 1).

It is not necessary to answer these contentions. Section 50A-2-313(1), N.M.S.A.1953 (Repl.Vol. 8, pt. 1) reads:

> "Express warranties by the seller are created as follows:
>
> "(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> "(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> "(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model."

We assume there is no distinction between "seller," as used in the statute, and defendant's status as lessor. See Uniform Laws Annotated, Uniform Commercial Code § 2-313, official comment 2 (1962).

Under § 50A-2-313(1), supra, the affirmation of fact (the rental agreement) creates an express warranty if it "becomes part of the basis of the bargain." Similarly, the description of the goods (the reference to good tires) creates an express warranty if the description "is made part of the basis of the bargain." Compare the comments concerning representations made for the purpose of inducing a sale in Vitro Corp. of America v. Texas Vitrified Supply Co., 71 N.M. 95, 376 P.2d 41 (1962).

There is no evidence that any of the nuns relied on, or in any way considered, the terms of the rental agreement before agreeing to the rental. See Speed Fastners, Inc. v. Newsom, 382 F.2d 395 (10th Cir. 1967). The comment concerning "good tires" was made after the car had been rented. See Terry v. Moore, 448 P.2d 601 (Wyo.1968). There is no evidence that either the terms of the rental agreement or the reference to "good tires" were part of the basis of the bargain. There was insufficient evidence for the question of express warranty to be submitted to the jury.

Strict liability in tort.

Plaintiffs assert: "Strict liability for one who places a defective product in the stream of commerce is now a fact of law. * * *" They urge this court to adopt this concept in New Mexico, and apply it to a lessor. Evidence pertaining to this contention is that tire failure was the cause of the accident; this failure resulted from impact damage to the tire; the impact damage existed at the time the car was rented; and the impact damage was not discoverable by normal inspection procedures. The rule sought is that stated in 2 Restatement Torts 2d, § 402A (1965). See Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct.App.1969); Moomey v. Massey Ferguson, Incorporated, 429 F.2d 1184 (10th Cir. 1970). Section 402A, supra, reads:

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

"(a) the seller is engaged in the business of selling such a product, and

"(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

"(2) The rule stated in Subsection (1) applies although

"(a) the seller has exercised all possible care in the preparation and sale of his product, and

"(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

Section 402A, supra, applies to sellers; the defendant in this case is a lessor. If we apply strict liability against a seller we see no basis in logic for distinguishing a lessor because the practical effect is the same. The strict liability rule has been extended to lessors. Bachner v. Pearson, 479 P.2d 319 (Alas.1970); Price v. Shell Oil Company, 2 Cal.3d 245, 85 Cal.Rptr. 178, 466 P.2d 722 (1970); Stewart v. Budget Rent-A-Car Corporation, 470 P.2d 240 (Hawaii 1970); Cintrone v. Hertz Truck Leasing, etc., 45 N.J. 434, 212 A.2d 769 (1965); see German, Seller Beware—Strict Liability But Not Absolute Liability, XXXVII Insurance Counsel Journal 44 (1970).

Although we see no logical basis for distinguishing a lessor from a seller in connection with the concept of strict liability, nevertheless the Restatement Torts 2d makes such a distinction. Sections 407 and 408 state rules of liability against lessors in terms of negligence. The comment to § 407 states liability under that section is the same as that stated in 2 Restatement Torts 2d, § 388 (1965). The New Mexico Supreme Court applied § 388 in Villanueva v. Nowlin, 77 N.M. 174, 420 P.2d 764 (1966). Compare Barham v. Baca, 80 N.M. 502, 458 P.2d 228 (1969). We have found no New Mexico decision which considered the relationship of § 402A to §§ 407 and 408.

In Speyer, Inc. v. Humble Oil & Refining Company, 275 F.Supp. 861 (W.D.Pa.1967), cert. denied 394 U.S. 1015, 89 S.Ct. 1634, 23 L.Ed.2d 41 (1969), the restatement distinction was applied.

A choice between these conflicting Restatement Torts sections is a choice of policy. As we see it, the same policy is involved in determining whether § 402A is to be adopted as New Mexico law. As stated in Bachner v. Pearson, supra:

> "* * * [Strict] [l]iability is attached, as a matter of policy, on the basis of the existence of a defect rather than on the basis of the defendant's negligent conduct. * * *"

If the policy decision is that § 402A, supra, applies, then that same policy decision would carry over and make liability for negligence under §§ 407 and 408 inapplicable. If § 402A is not applicable, then no conflict exists with §§ 407 and 408.

The issue presented, then, is whether § 402A, supra, is applicable in New Mexico. Plaintiffs candidly present the question as one of public policy. They point out that more than half the states have adopted some form of strict liability. See citation of cases in 1 Hursh, American Law of Products Liability, 1961, § 5A:2 (Supp. 1971). They urge us to play follow the leader.

In determining whether to do so, we are concerned with the policy reasons for adopting strict liability, and rejecting liability based on negligence, as against a supplier of a defective product. Comment c to § 402A, supra, states:

> "* * * the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products."

The decisions and the articles concerning strict liability of a supplier have little variation from Comment c, supra. Our summary of the "justifications" for imposing strict liability, taken from decisions cited in Hursh, supra, and articles hereinafter cited, is: as an incentive to guard against defects; to spread the risk of loss as a cost of doing business (insurance is included as an aspect of risk-spreading); to avoid circuity of action; public interest in human safety requires it; suppliers, by placing their goods on the market, represent that they are suitable and safe for use. See Prosser, The Assault Upon The Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 32 ATL L.J. 1 (1968); Schwartz, A Products Liability Primer, 33 ATL L.J. 64 (1970). Plaintiffs' reason for imposing strict liability is "* * * the fact that the supplier was involved in the business of placing the product in the stream of commerce. * * *"

Smyser, Products Liability and the American Law Institute: A Petition for Rehearing, 42 U. of Detroit L.J. 343 (1964–65) suggests that the foregoing "justifications" are conclusions for which supporting data are lacking. Sandler, Strict Liability and the Need for Legislation, 53 Va.L.R. 1509 (1967) suggests that some of the foregoing policy arguments are ineffectual and even conflicting. Cowan, Some Policy Bases of Products Liability, 17 Stanford L.R. 1077 (1964–65) suggests there are policy considerations in addition to those summarized above. See dissenting

opinion of Justice Hall in Cintrone v. Hertz Truck Leasing, Etc., supra.

Apparently, there is unanimity on one thing—that the issue before us is a policy issue. The question then is whether this court is the appropriate body to make such a decision. The choice of policy involves more than a choice between legal theories.

Obviously, economics is involved in "risk-spreading" and "cost of doing business." Prosser, Yale L.J., supra, n. 147 at 1121, suggests the validity of risk-spreading may depend on the size of the defendant organization. 2 Harper and James, The Law of Torts § 28, at 33 (1956), states that injuries in the products liability area are "increasingly attributable to large-scale enterprise." Our limited research suggests that "large-scale enterprise" is rare in New Mexico. U.S. Dept. of Commerce, Bureau of Census, New Mexico CBP-67-33, County Business Patterns, 1967, Table 1E, indicates only 15 employers in New Mexico had 500 or more employees in that year. Bank of New Mexico, Ninth Annual Summary Study, The Economy of the State of New Mexico and the City of Albuquerque, June, 1971, states that only 11 of 400 manufacturers in Albuquerque, our largest city, employ 250 persons or more. If size is a factor, and it appears to be, this court is not equipped to determine what would amount to "large-scale enterprise" in New Mexico. Yet, Justice Botter, dissenting in Magrine v. Spector, 100 N.J.Super 223, 241 A.2d 637 (1968) states: "* * * Obviously we cannot determine the rule of liability on the basis of the size or resources of one of the parties. * * *"

Section 402A, supra, places no limitation on "size," regardless of how that term may be defined. It applies to all suppliers. Risk-spreading, as a justification for strict liability, may not be sound when applied to a one-man operation, or even a large financially or competitively marginal defendant. See Magrine v. Krasnica, 94 N.J.Super. 228, 227 A.2d 539 (1967) aff'd Magrine v. Spector, supra; Prosser, Yale L.J., supra, n. 147.

Apart from economics, is the incidence of defective products causing injury sufficient to justify strict liability? We simply do not know. Schwartz, 33 ATL L.J., supra, gives figures on a nationwide scale. These statistics include, but, however, are not limited, to defective products.

Comment c to § 402A, supra, refers to "public policy demands." These words seem more appropriate to legislative consideration, "demands" more consistent to contract negotiation, than to judicial evaluation.

Some of the reasons advanced in support of strict liability are more relevant than others. For example, we consider "circuity of action" to be of little merit because of § 21-3-16, N.M.S.A.1953 (Repl.Vol. 4). We are attracted to the idea that, as between the injured user and the supplier of the defective product, the supplier should be liable. Yet our attraction is as individuals and consumers. As judges, a necessary consideration is whether we are equipped to make that choice.

We judge neither the validity of the reasons advanced in support of strict liability nor the validity of the concept of strict liability. The issue is whether § 402A, supra, which imposes strict liability on all sellers, should be adopted as New Mexico law. Since this issue involves economic considerations, the consequences of which are unknown, accident statistics which are also unknown and public demands which we are not structured to ascertain, we decline to adopt § 402A, supra, as New Mexico law. Smyser, U. of Detroit L. J., supra; Sandler, Va.L.R., supra. In reaching this result, we do not suggest what our position would be as to strict liability when presented on a basis more limited than the broad and rigid sweep, of § 402A, supra. We hold only that the extension of a seller's liability from negligence to strict liability under § 402A, supra, lies with the Legislature and not this court. See Phares

v. Sandia Lumber Company, 62 N.M. 90, 305 P.2d 367 (1956).

Since we decline to adopt § 402A, supra, defendant's liability would be based on negligence. No claim is made that defendant was negligent.

Since the evidence of express warranty was insufficient to go to the jury and since there is no claim that defendant was negligent, the directed verdict in favor of Hertz is affirmed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

490 P.2d 480

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert Joe SAMORA, Defendant-Appellant.

No. 667.

Court of Appeals of New Mexico.

Oct. 22, 1971.

Harold H. Parker, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Ethan K. Stevens, James H. Russell, Jr., Asst. Attys. Gen., for plaintiff-appellee.

OPINION

SUTIN, Judge.

Samora was convicted of kidnapping, under § 40A-4-1, N.M.S.A.1953 (Repl.Vol. 6).

We affirm.

This is a companion case to State v. Martinez, 82 N.M. 9, 487 P.2d 919 (Ct. App.1971), in which Martinez was convicted of armed robbery. We affirmed Martinez.

Samora first contends the trial court erred in allowing a police officer to testify at trial to an out-of-court identification of Samora at an elevator in a police station because, in the absence of defense counsel, this constituted an illegal "showup."

The term "showup" has sometimes been used interchangeably with "lineup," State v. Morales, 81 N.M. 333, 466 P.2d 899 (Ct. App.1970), and is also used to refer to a situation where one suspect is shown by himself to a witness. 39 A.L.R.3d 791, 793, Note 1. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). This is called a "one-man showup." Bates v. United States, 132 U.S.App. D.C. 36, 405 F.2d 1104 (1968).

We interpret Samora's use of the term "showup" to mean a one to one confrontation between the accused and a witness. In this case, there was evidence introduced at trial of an out-of-court confrontation of Samora with a witness, a police officer, in the absence of an attorney for Samora.

Samora was first seen by the police officer between 12:30 a. m. and 1:00 a. m. at Larry's Drive-In where two men had entered with the apparent intent to commit robbery. The lights were on in the kitchen area. The man, later identified as Samora, had a 45 automatic gun in his hand. He was 30 feet from the police officer when seen. Samora faced the officer ten or fifteen seconds. Prior to his arrest, the officer independently identified Samora from a photograph at the police station.

Some six hours later, Samora was arrested and taken to the police station. The arresting officer and Samora were standing at the elevator in the building, at this time, the police officer witness came out of the radio room, saw Samora and identified him as the man he had seen inside Larry's Drive-In during the armed robbery. This identification was made without an attorney for Samora being present. During trial, on direct examination, the officer identified Samora positively as the man he saw in the kitchen at Larry's Drive-In.

On cross-examination, defense counsel referred to "mug" photographs of Samora. On redirect examination, the trial court, over specific objection, allowed the police officer to testify to the out-of-court elevator identification of Samora when no defense attorney was present. However, the police officer further testified that he was not influenced by the fact that Samora was in custody at the elevator. He was positive at the time of trial that Samora was the same man he had seen earlier in the drive-in.

Was the out-of-court elevator identification illegal and inadmissible because Samora, at that time, was without an attorney, was not advised of his right to an attorney, and did not waive this right? The answer is "no."

The out-of-court identification was inadvertent or accidental. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App.1970). It was not an arranged lineup or confrontation planned by the police department. We have assumed that a lineup identification of a defendant is illegal where a defendant was not represented by counsel at that lineup. State v. Clark, 80 N.M. 91, 451 P.2d 995, (Ct.App.1969), reversed on other grounds, 80 N.M. 340, 455 P.2d 844 (1969). That issue is absent here. The admission in evidence of the accidental elevator identification was not error.

Secondly, Samora contends it was error to allow in evidence a gun and other

evidence found on the person of Jake Martinez, a participant with Samora in the armed robbery of Larry's Drive-In, because this was an abuse of discretion. No authority is cited. Samora claims that the Martinez items of evidence did not materially aid the jury while its prejudice to Samora far outweighed its probative value. This point has no merit. The crime of kidnapping, with which Samora was charged, grew out of the attempted robbery of the drive-in by Samora and Martinez. Both were identified as being at the place of the crime in the building at the same time, each in possession of guns. Both had a common design of robbery. Under these circumstances, the Martinez items of evidence were admissible.

The rule is well established that a weapon or other instrument found in the possession of the accused's associates is admissible as part of the history of the arrest and as bearing on the crime. 22A C.J.S. Criminal Law § 712(C); Harris v. State, 450 P.2d 857 (Okl.Cr.1969); People v. Johnson, 35 Ill.2d 516, 221 N.E.2d 497 (1966); State v. Lindner, 282 S.W.2d 547 (S.Ct.Mo.1955). See State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct.App.1969).

The trial court did not abuse its discretion in admitting the Martinez items in evidence.

Samora further contends the trial court abused its discretion in allowing in evidence a "mug shot" of Samora because it was suggestive of guilt and was prejudicial. The record shows the state did not offer the "mug shot" in evidence on direct examination of a police officer. Samora's attorney on cross-examination first questioned the police officer on the photographs and opened up the subject. On redirect examination, the state properly questioned the police officer with reference to the "mug shot." It was identified without objection before it was offered in evidence. At this late stage, Samora's attorney objected. The trial court did not abuse its discretion in admitting the photograph in evidence.

Finally, Samora claims he was entitled to a directed verdict. There is no merit to this contention.

Affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

490 P.2d 667

Steven MARES, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 9287.

Supreme Court of New Mexico.

Nov. 11, 1971.

Stanley F. Frost, Tucumcari, for petitioner.

David L. Norvell, Atty. Gen., C. Emery Cuddy, Jr., Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

STEPHENSON, Justice.

Petitioner was tried and convicted of entering a dwelling with intent to commit a felony while armed with a deadly weapon. He appealed and the Court of Appeals affirmed. State v. Mares, 82 N.M. 682, 486 P.2d 618 (Ct.App.No. 561, decided May 28, 1971). We granted certiorari and reverse.

Following commission of the crime and on the same day, a juror was present in the dwelling in question with Mrs. C., the complaining witness, while two police officers (who testified at trial) were also present seeking latent fingerprints. Petitioner was convicted on fingerprint evidence. None of these facts came to light until after the verdict, at which time they were the subject of a motion for a new trial.

At the proceedings on petitioner's motion for new trial, Mrs. C. did not recall discussing the crime with the juror. Taking her statement at face value, neither did she deny such a conversation. We find it impossible to visualize a gathering such as the evidence discloses, taking into account the traumatic emotional experience suffered by Mrs. C.; the juror's long standing friendship with her with natural feelings of concern and solicitude; the presence of the police officers (apparently acquainted with the juror) busily engaged in their search for evidence, with no conversation concerning the crime or its facts having occurred. A phlegmatic detachment of such magnitude on the part of each person there present boggles the mind.

. It is true that on voir dire the juror admitted his friendship with Mrs. C. However, a want of diligence in failing to challenge is not thereby indicated on the part of petitioner's counsel. In many of our counties, it would be practically impossible to obtain a jury the members of which were all unacquainted with principals in a lawsuit. It is also true the juror said that the acquaintance would not affect his decision, a statement to which the Court of Appeals seems to have attached great weight. We do not regard this statement as conclusive. People v. DeHaven, 321 Mich. 327, 32 N.W.2d 468 (1948); Whitson v. State, 65 Ariz. 395, 181 P.2d 822 (1947); 47 Am.Jur.2d, Jury, § 276.

On voir dire, the prospective jurors were asked questions concerning purported knowledge of the facts of the case and the list of witnesses was read out. The only fact disclosed by the juror was that he had been a good friend of Mrs. C. and her late husband for twenty-two years. It seems to us the juror ought to have indicated the involvement we have described, at least to such an extent as would have put counsel on further inquiry. A prospective juror's silence can be the same as a negative answer upon which a party has a right to rely. 47 Am.Jur.2d, Jury, § 208.

Petitioner has a right to trial "by an *impartial* jury." U.S.Const. amend. VI, N.M.Const. art. 2, § 14.

An impartial jury is one "where *each and every one* of the twelve members constituting the jury is totally free from any partiality whatsoever." State v. McFall, 67 N.M. 260, 354 P.2d 547 (1960) (emphasis added).

The controlling question here is whether these constitutional rights were accorded to petitioner.

There have been a few cases which have allowed a new trial because of later discovered relationships between the jurors and the parties involved or because of relationships between jurors and persons involved in similar litigation. Thus, in People v. DeHaven, supra, the defendant was convicted of statutory rape of his stepdaughter. After trial it was discovered that two of the jurors had failed to reveal that a common relative had been convicted of a similar crime several years before. The court held that such a relationship was such as to deprive the defendant of an impartial jury.

We are impressed with the court's reasoning in Marvins Credit Inc. v. Steward, 133 A.2d 473 (Mun.Ct.App., D.C., 1957). It involved a contract action. None of the jurors responded when asked as a whole if they had a charge account with the plaintiff corporation or if they had ever been sued on a charge account with it. It was discovered after trial that one juror and her husband not only had an account with the corporation, but that they had been sued on the account and subjected to garnishment proceedings. The court, in reversing and granting a new trial, noted that if the juror had answered truthfully counsel could have "probed her mind as to bias or prejudice" so as to obtain a challenge either for cause or peremptorily. The court then continued:

> "While the decisions agree that in all jury trials the parties are entitled to have their matters adjudged by jurors as impartially as is humanly possible, some

cases hold to the view that the burden is on the complaining party to establish prejudice; others that the trial judge has wide discretion in determining whether to set aside a verdict; and that except where clear abuse of discretion is demonstrated, the appellate court should not interfere. Others have decided against the granting of a new trial because the questions asked were not sufficiently important or relevant, or that the juror's involvement in other controversies was too remote in time, or that the questions asked were vague or unclear. In some cases the courts have found that counsel already had knowledge of the facts that would otherwise justify the juror's disqualification and have held that counsel waived his rights.

"We think that the rule to govern such situations may be summarized as follows: Full knowledge of all relevant and material matters that might bear on possible disqualification of a juror is essential to a fair and intelligent exercise of the right of counsel *to challenge either for cause or peremptorily.* It is the duty of a juror to make full and truthful answers to such questions as are asked, *neither falsely stating any fact nor concealing any material matter.* If a juror falsely represents his interest or situation or conceals a material fact relevant to the controversy and such matters, if truthfully answered, might establish prejudice or work a disqualification of the juror, the party misled or deceived thereby, *upon discovering the fact of the juror's incompetency or disqualification after trial,* may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though the bias or prejudice is not shown to have caused an unjust verdict, it being sufficient that a party, *through no fault of his own,* has been deprived of his constitutional guarantee of a trial of his case before a fair and impartial jury.

See also Shulinsky v. Boston & M. R. R., 83 N.H. 86, 139 A. 189 (1927).

Our system of justice goes to great lengths in seeking compliance with the constitutional mandates regarding impartial juries. Opportunity for extensive voir dire is granted. Elaborate admonitions are given designed to insulate jurors from outside influence. Juries are often segregated, and any unauthorized contact with a juror is presumptively prejudicial to a criminal defendant. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct.App.1967). It seems incongruous to permit this verdict to stand, in light of these principles and policies.

We do not attribute conscious fault to any principal in this proceeding. We rather regard it as an unfortunate situation created by an unforeseen or unforeseeable web of coincidences. However, petitioner should not as a result be prejudiced.

Our trial courts have broad discretion in granting or denying new trials. State v. Pope, 78 N.M. 282, 430 P.2d 779 (Ct.App.1967). Expansion on this generality would be pointless, since each case must turn upon its own facts, but by nothing we have said do we intend to restrict or modify those powers.

The case is reversed, and the trial court ordered to grant petitioner a new trial.

It is so ordered.

McMANUS and MONTOYA, JJ., concur.

OMAN, Justice (dissenting).

I am unable to agree with the majority opinion. In my judgment, the Court of Appeals properly decided the issues presented on appeal.

Even though I were to agree with the result reached by the majority, in my opinion the nature of the issues presented on appeal are not such as to warrant our review of the decision of the Court of Appeals. Section 16-7-14, N.M.S.A.1953 (Repl.Vol. 4, 1970) grants to this court ap-

pellate jurisdiction to review by certiorari a decision of the Court of Appeals which:

"(1) is in conflict with a decision of the Supreme Court;

"(2) is in conflict with a decision of the court of appeals;

"(3) involves a *significant* question of law under the Constitution of New Mexico or the United States; or

"(4) involves an issue of *substantial* public interest that should be determined by the Supreme Court. [Emphasis added]

It is apparent from a reading of the opinion of the Court of Appeals and the opinion of the majority of this Court that the decision of the Court of Appeals does not fall within the first (1), second (2), or fourth (4) areas of appellate review as provided and granted to this court by § 16-7-14, supra. In fact the contentions made by appellant in his petition for certiorari were (1) that he was "* * * denied * * * a fair trial by impartial jury as required by Article II, Section XIV of the Constitution of the State of New Mexico and Amendment VI of the United States Constitution," and (2) that he "* * * was denied his constitutional right to due process of law" in that "* * * there was not substantial evidence introduced which would support a jury verdict of guilty."

The majority in their opinion have not predicated their reversal of the Court of Appeals and of the trial court upon a lack of "due process of law" or the lack of "substantial evidence" to sustain the conviction, but have expressly stated: "The controlling question here is whether these constitutional rights [to an impartial jury, as provided in the United States Constitution, Amendment VI, and New Mexico Constitution, Art. II, § 14] were accorded to petitioner [defendant]."

Thus, the right of this court to review the decision of the Court of Appeals is dependent upon a resolution of the question as to whether the facts of this case present a *significant* question of law under the constitutional guarantee of "trial by an impartial jury." The majority have resolved this question in the affirmative, while I would resolve it in the negative.

My views are predicated upon the common and clearly defined nature of the constitutional question involved, the unusual and peculiar facts of this case, the unlikeness of any substantial effect of the majority decision upon or the applicability thereof to other cases which may arise under this constitutional guarantee, and my objection to the substitution by the majority of their judgment for the judgment of the trial court. The majority concede a trial court is vested with broad discretion in the matter of granting or denying a defendant's motion for a new trial based upon his claim of denial of trial by an impartial jury.

Without unduly lengthening this dissent by recitation of all the facts bearing upon the question presented, the following pertinent facts clearly appear in the record, and, to a certain extent, are referred to in the opinions of the majority and the Court of Appeals:

(1) We are concerned here with the question of the impartiality of but one juror.

(2) This one juror, a Mr. Sefcik, in response to a question asked of him on voir dire as to whether he knew Mrs. C., answered that he was a good friend of hers and had known her and her husband for twenty-two years.

(3) When asked if he thought this "relationship would affect his opinion," he answered, "No."

(4) When the prospective jurors were asked as a whole if any of them had heard what were purported to be the facts of the case, Mr. Sefcik and most of the others made no response. A lack of response by them clearly indicated that they had not heard what purported to be the facts of the case.

(5) When the prospective jurors were asked as a whole by the trial court to indicate if they were unable to try the case according to their oath or would be unable to base their verdict on the law and the evidence, there was no response. This lack of response clearly indicated that they could and would abide by their oaths as jurors and decide the case according to the evidence adduced before them and the law as given them by the trial court.

(6) As pointed out by the Court of Appeals in its opinion, defendant was in no way limited in his voir dire examination of Mr. Sefcik. Defendant did not challenge him for cause, nor did defendant elect to excuse him by the exercise of one of defendant's remaining peremptory challenges.

(7) The chief of police and the chief of detectives were the two officers who went to the home of Mrs. C. for the purpose of making a subsequent and further investigation of the breaking and entering of her home. When they arrived Mrs. C. and Mr. Sefcik were present in the house. This subsequent investigation consisted of dusting and unsuccessfully attempting to lift fingerprints from an area inside a ultity room which adjoined but was separated from the kitchen by a door. This door was closed when the officers were working in the utility room, and Mrs. C. and Mr. Sefcik were drinking coffee in the kitchen.

(8) The officers, upon their arrival at the home, greeted Mrs. C. and Mr. Sefcik, but in no way discussed the case with them.

(9) Mrs. C. testified she has no recollection of ever discussing the case with Mr. Sefcik. She admits she may at some time have remarked to him that her home had been broken into, but this fact was generally known in the community. Mrs. C. had no idea as to the identity of the person who had broken into her home.

(10) As pointed out by the Court of Appeals, there is nothing to show Juror Sefcik had any knowledge of the case, other than what he learned at the trial, or that his relationship with Mrs. C. was other than what he stated on the voir dire examination of him as a prospective juror.

The trial court in its discretion, after hearing all the voir dire examinations, after hearing all the evidence adduced at the trial and observing the witnesses and the jurors, including Juror Sefcik, and after hearing the evidence adduced by defendant and the State at the hearing on the motion for a new trial, denied the motion. In my opinion, the reversal of the trial court, in view of the evidence and the opportunity of the trial court to observe the witnesses, the jurors and all the proceedings, is to disregard the judgment of the trial court, to strip it of all discretion, and to discredit the voir dire examination of Juror Sefcik and the sworn testimony of the two officers and Mrs. C. produced at the hearing on the motion for a new trial. I am unable to accept the substitution of the doubts and disbeliefs of the majority of this Court for the sworn statements of all the witnesses and the judgment and discretion of the trial court.

The majority describe the factual situation as "* * * an unfortunate situation created by an unforeseen or unforeseeable web of coincidences." They also agree that each case in which is raised the question of the deprivation of a trial by an impartial jury "must turn upon its own facts." I believe these premises lead to the inescapable conclusion that the majority's opinion will be of little value and of no particular significance to anyone but this one particular defendant. A constitutional question, which is neither novel nor unusual and the resolution of which will be of primary concern only in a particular case arising out of an "unforeseen or unforeseeable web of coincidences," is not, in my opinion, a "significant question" of constitutional law.

A quick check of the opinions in Vol. 81 of the New Mexico Reports, which is the latest published volume of the opinions of this Court and the Court of Appeals, shows 65 of those opinions were written by the

Court of Appeals in criminal cases or in post-conviction proceedings arising out of criminal cases. In 37 of these 65 cases one or more claimed constitutional questions were presented on appeal. I feel certain a careful study of the records and briefs on appeal would disclose that a constitutional issue was either directly or indirectly involved in several more of the 65 cases, and, unquestionably, constitutional issues were also involved in some of the civil cases appealed to the Court of Appeals and reported in Vol. 81 of the New Mexico Reports. I do not mean to suggest that my hurried counts of the cases may not be in error, but they are very nearly correct. Nor do I mean to suggest that all the constitutional contentions raised were meritorious. However, constitutional issues are presented in a large number of cases decided by the Court of Appeals.

If we were to take the position that all constitutional questions are *significant*, even though not novel or unusual and not likely to be of concern, except in the case at hand, are we not obliged to review all decisions of the Court of Appeals involving a claimed constitutional question, if the aggrieved party petitions for a writ of certiorari? If not, then on what basis are we going to select those cases in which we grant a writ and conduct a review, if a constitutional question is involved?

If we are going to grant the writ whenever a constitutional question is raised, we can be certain that many more petitions for writs will shortly be reaching us, and we will be compelled to review far more Court of Appeals decisions than we have ever reviewed in the past. In only 8 of the 37 cases above mentioned did the defendant petition this Court for a writ of certiorari, and we granted a writ in none of them.

Since I am of the opinion the Court of Appeals properly denied defendant's claim on appeal that he was not tried to an "impartial jury," and I am further of the opinion that this claim did not present a "significant question of law under the Constitution of New Mexico or the United States," it follows that I feel the writ of certiorari was improvidently granted and the majority opinion is in error. However, the majority disagree with me in both respects. Therefore, I respectfully dissent.

COMPTON, C. J., *concurs.*

490 P.2d 672

Ira MILLER, Administrator with the Will Annexed of the Estate of F. A. Miller, Deceased, Plaintiff-Appellant,

v.

Elger E. MILLER, Defendant-Appellee.

No. 9194.

Supreme Court of New Mexico.

Nov. 8, 1971.

Grantham, Spann, Sanchez & Rager, Sutin, Thayer & Browne, Albuquerque, for plaintiff-appellant.

Garland, Martin & Martin, Las Cruces, Standley, Witt & Quinn, Santa Fe, for defendant-appellee.

OPINION

McMANUS, Justice.

This suit was brought in the District Court of Lincoln County, New Mexico, by the executor of the estate of Fountain Alexander Miller, a/k/a F. A. Miller, a/k/a Fount A. Miller, deceased, against Elger E. Miller, a/k/a E. E. Miller, son and heir at law of the decedent, and the son's daughter Joetyne Miller Wright. The complaint asserted four claims for relief. The first was against Elger E. Miller only and sought to establish a trust in an 80-acre tract of land allegedly purchased with decedent's funds or, in the alternative, for damages. The second claim sought judgment against Elger E. Miller for funds of the decedent allegedly used in the construction of a residence property and to establish a lien for the judgment against real estate in which the defendant, Joetyne Miller Wright, had an interest. The third claim was against Elger E. Miller only and sought a decree declaring a bill of sale to certain cattle to be invalid. The fourth claim sought a general accounting against Elger E. Miller for funds of the decedent which had been received and used by this defendant. The defendant answered in effect denying the allegations of the complaint and, in addition, counterclaimed for wages and income due defendant and, generally, that the lands, wages and income of defendant was as a result of his ownership of the land involved. Defendant further alleged that the statute of limitations had run on plain-

tiff's claims. We note that Joetyne Miller Wright was dismissed as a party during the trial.

The trial court in its findings of fact and conclusions of law held that E. E. Miller owned the 80-acre tract; that the funds used in the construction of residence property belonged to E. E. Miller; that the bill of sale to certain cattle was valid; that E. E. Miller had fully accounted for all funds of decedent, and that the statute of limitations had run on plaintiff's claim. A final judgment dismissing plaintiff's complaint with prejudice was then filed. Plaintiff appeals.

Fountain A. Miller was a rancher-businessman in Lincoln County and passed away April 11, 1965, leaving several heirs who will be referred to herein.

There were several other litigated actions affecting these parties and the property herein. The first major cause of action involved a will contest over the distribution of the estate of Fountain A. Miller. The Supreme Court of New Mexico, on an appeal from a judgment entered in consolidated causes Nos. 37 and 39, Probate, District Court of Lincoln County, decided that a will of Fountain A. Miller, drawn in 1952, was invalid because of undue influence. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968). The second cause arose in the United States District Court, District of New Mexico, No. 6298, later sustained on appeal in Miller v. Miller, 406 F.2d 590 (10th Cir. 1969), and involved a deed dated March 2, 1961, executed by F. A. Miller to Elger E. Miller, the defendant in this cause. This particular deed covered all of F. A. Miller's real estate in Lincoln County. The lower court set aside the deed on the basis that the deed was induced through undue influence and was a testamentary instrument. While both of the above cases were pending, this cause was instituted in the District Court of Lincoln County with Ulrich F. Miller, executor of the estate of Fountain A. Miller, as the moving party. Shortly thereafter, Ulrich F. Miller passed away and Ira D. Miller was substituted as administrator with the will annexed of that estate and as a party plaintiff in this particular cause. In the instant cause, one of the bones of contention is another deed alleged to have been executed on July 1, 1955, from F. A. Miller to the defendant, Elger E. Miller, and his daughter. Elger E. Miller is claiming under this particular deed in this lawsuit and, of course, answers by way of defense to the plaintiff's complaint herein that inasmuch as he was deeded this property, he owned it, and would not have to make an accounting of the funds. Also at issue is a bill of sale dated October 10, 1955 from F. A. Miller to Elger E. Miller, covering F. A. Miller's cattle and cattle brand. Both the deed in 1955 and the bill of sale in 1955 were mailed to F. A. Miller's then attorney, J. Benson Newell, Las Cruces, New Mexico.

On February 11, 1957 E. E. Miller wrote a letter, in his own handwriting, to attorney Newell. This letter, referring to the 1955 deed and bill of sale, read as follows:

"Hollywood, N. M.
Feb—11—57

"Mr. Benson Newell
Las Cruces, N. Mex.

Dear Benson, Enclosed Deed & Bill [of] Sale. Dad wants you to keep this for him until he dies or wants it back.
Will see you Feb 25 for the trial of Tularosa property if they don't change it again.

Yours truly,
E. E. Miller
Bro."

The defendant testified that he sent a subsequent bill of sale and deed to Mr. Newell by a March 2, 1962 letter. This letter was admitted as an exhibit and read as follows:

"Hollywood, N. M.
Mar. 2, 1962

"Mr. J. Benson Newell
Las Cruces, N. Mex.

Dear Mr. Newell, Enclosed Bill of Sale and Deed of mine which I want you to

keep and give to Dad if something happened to me first.
Also is another Deed made to me personally leaving out all others which he wants. Keep this and return the other Deed you have of his.
Please send it Registered Mail, Deliver to Addressee Only to Fount A. Miller, Hollywood, N. Mex.
With Kindest personal regards.

Bro.
E. E. Miller

P.S.
The dollar is for Postage on return letter."

The bill of sale enclosed with this letter was executed by the defendant to F. A. Miller and covered the defendant's cattle. The deeds referred to in the letter were the March 2, 1961 deed executed by F. A. Miller to the defendant and a deed dated March 2, 1961 executed by E. E. Miller to his father and covered an 80-acre tract of land. The July 1, 1955 deed referred to above was then returned by its holder, Mr. Newell, and was offered into evidence in the instant cause.

In Galvan v. Miller, supra, the Supreme Court held that F. A. Miller was subjected to undue influence in 1952 and, consequently, upheld the judgment of the district court which set aside a judgment of the probate court admitting a 1952 will to probate. The Supreme Court further held that evidence that a major beneficiary under the will was the dominant party in confidential and fiduciary relationship with the testator was sufficient to raise a presumption of undue influence. In cause No. 6298 in the United States District Court, referred to above, the action was against Ira B. Miller, individually and as administrator with the will annexed of the estate of F. A. Miller, deceased.

During the pendency of this cause, E. E. Miller and daughter filed a suit in Lincoln County claiming title to the property in question under the July 1, 1955 deed. Defendant was Ira B. Miller, individually and as administrator. Said cause was removed to the United States District Court and became cause No. 8433, Civil, in that court. Also pending there at the same time was cause No. 8121, Civil, an action brought by Ira B. Miller, individually and as administrator with the will annexed of the estate of F. A. Miller, against E. E. Miller and his daughter, seeking to set aside the July 1, 1955 deed on the ground that it was a testamentary disposition and had not been unconditionally delivered, as well as other grounds. Causes 8121 and 8433, supra, in the United States District Court were consolidated and tried.

The plaintiff took the position at the trial of the instant cause, and on appeal, that the court erred in refusing to accept the prior decisions of the state district court and the United States District Court as decisive on any issue in this cause. Both of these causes have been affirmed on appeal in Miller v. Miller, supra, and in Galvan v. Miller, supra. In Miller v. Miller, the court affirmed the trial court's decision that the 1961 deed was not unconditionally delivered and that it was an attempted testamentary disposition. The appellate court decision in Galvan v. Miller, supra, has been referred to previously. The issues resolved in these cases are res judicata. The estate of F. A. Miller and the defendant herein were also parties in the two causes.

Meeker v. Walker, 80 N.M. 280, 286, 454 P.2d 762, 768 (1969), quoting from Henderson v. U. S. Radiator Corporation, 78 F.2d 674 (10th Cir. 1935), set forth what we feel is the correct statement of the law, as follows:

> "'Any right, fact or matter in issue and directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree has been rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated by the same parties and their privies, whether the claim, demand, purpose or subject-matter of the two suits is the same or not.'"

In the trial court's findings which were reviewed in Galvan v. Miller, supra, finding No. 7 reads as follows:

"By reason of the confidential and fiduciary relationship existing between Fount A. Miller, deceased, and his son Elger E. Miller, the said Fount A. Miller was, on April 1, 1952 and at all times subsequent thereto, subject to the will, direction and suggestion of Elger E. Miller as to all business matters and all of the actions of the said Fount A. Miller, deceased, in business matters were suggested by and directed by his said son, Elger E. Miller."

This finding of the trial court was not disturbed in the opinion of Galvan v. Miller, supra. Therefore it is applicable to the deed of July 1, 1955, in that Fount A. Miller was subject to the will, direction and suggestion of Elger E. Miller. Merely by way of comment, we observe that in consolidated causes 8121 and 8433, to which reference is above made, the United States District Court held that the 1955 deed was void for the same reasons given for the invalidity of the 1961 deed.

We hold that parties to a suit and their privies are bound by final decisions, not only as to all matters which were offered or received to sustain or defeat a claim but also as to any admissible matter which might have been offered for that purpose. See Ealy v. McGahen, 37 N.M. 246, 21 P.2d 84 (1933). This rule was stated in the Ealy case, at 251, 21 P.2d at 87, as follows:

"Final judgments are conclusive as to the claim or demand in controversy as to the parties in the suit and those in privity with them, not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Public policy requires that there be an end to litigation and that rights once established by a final judgment shall not again be litigated in any subsequent proceeding.

"We have held, and rightly: 'It (the judgment) is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * *'"

Inasmuch as we have declared the July 1, 1955 deed an invalid instrument, the plaintiff's second point concerning such deed is hereby resolved. The validity of the deed and, consequently, the holder of title, could not properly have been determined in this suit. In addition, it is interesting to note that the 1955 deed was admitted into evidence for a limited purpose, to show why the defendant "kept the income from the property," and not to establish title to the property.

Plaintiff's point three concerns the claim that the court erred in dismissing the first, second, and fourth claims of plaintiff's complaint in the trial court. The first claim of plaintiff there dealt with a request for a constructive trust to be established in regard to the purchase of an 80-acre tract of land in 1958. The moneys for this purpose came out of a joint account of F. A. Miller and E. E. Miller, and title placed in E. E. Miller. The trial court, in the instant case, did find that F. A. Miller consented to the expenditure of these funds and that E. E. Miller exerted no influence over his father. The findings are improper and ineffective in the light of the decision in Galvan v. Miller, supra. The second claim concerned funds used by E. E. Miller to construct a residence. Consequently, there must be an accounting of any funds of F. A. Miller used in the construction of the E. E. Miller residence.

Another contention by defendant concerned a bill of sale to E. E. Miller from F. A. Miller on October 10, 1955, covering F. A. Miller's cattle and cattle brand. This bill of sale falls into the same category as the July 1, 1955 deed and must be declared

void and invalid because of the lack of unconditional delivery and the further fact that it was a testamentary instrument. In addition, this bill of sale resulted from, or was executed by reason of, undue influence asserted by defendant over his father as found in Galvan v. Miller, supra, and by reason of the fact that the bill of sale was delivered under circumstances exactly like those under which the 1961 deed was delivered and which were held not to constitute an unconditional delivery in Miller v. Miller, supra.

The court found that the statute of limitations applied to all four counts of plaintiff's complaint. The first count dealt with a claim to establish a trust in an 80-acre tract allegedly purchased with decedent's funds. The second count sought judgment for funds of the decedent allegedly used in the construction of a residence property. The record does not disclose any knowledge attributable to F. A. Miller of either of these transactions. Limitations do not run between a trustee and his beneficiary until there has been a repudiation of the constructive trust. See Strausburg v. Connor, 96 Cal.App.2d 398, 215 P.2d 509 (1950); Abrams v. Bendat, 165 Cal. App.2d 89, 331 P.2d 657 (1958); Bogert, Trusts and Trustees, § 953 (2d Ed.1962). It is a matter of res judicata that the fiduciary relationship between the defendant and F. A. Miller continued until F. A. Miller's death. Plaintiff's complaint was filed within four years from this date. The applicable statutes are: § 23–1–4, N.M.S.A. (1953 Comp.) which reads:

> "[The following actions may be brought within the time hereinafter limited.] Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified within four [4] years."

and § 23–1–7, N.M.S.A. (1953 Comp.), reading:

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

Concerning count three the bill of sale was not placed of record until April 14, 1965 and the action was filed within four years from that date. All of the items claimed under count four represent funds received by the defendant during 1965, 1966, 1967 and 1968. These items, then, would not be barred under the above statute of limitations.

It is further disclosed that in F. A. Miller's lifetime, he and his son Elger operated a cattle ranching business jointly in Lincoln County. During the period, Elger E. Miller operated F. A. Miller's business and affairs under a general power of attorney and all agree that a close and confidential relationship existed between the parties. Between July 1, 1955 and F. A. Miller's death, the defendant executed various real estate leases under a power of attorney. The parties also maintained joint bank accounts in banks and deposited all receipts and incomes in these joint accounts, including lease rentals, cattle sales, receipts of sales of gravel, and payments for rights of way.

It has been shown by the evidence in this cause that E. E. Miller violated his fiduciary obligations and without the knowledge of F. A. Miller used funds for his own uses and purposes. Further, that the executor and now the administrator with the will annexed, was not aware of the purposes for which said moneys were used. All of these transactions must be accounted for, including funds of F. A. Miller used to purchase an 80-acre tract, now in the name of E. E. Miller, and funds of F. A. Miller used to construct E. E. Miller's residence.

The estate of F. A. Miller is entitled to a full accounting of all matters raised in this cause. Consequently, the judgment of the trial court is reversed and remanded for an accounting and compliance with this decision.

It is so ordered.

OMAN and MONTOYA, JJ., concur.

490 P.2d 678

COMMERCE BANK AND TRUST, a New Mexico Banking Corporation, Plaintiff-Appellee,

v.

Imogene Whitfield JONES, also known as Jeanie Whitfield, Defendant-Appellant.

No. 9299.

Supreme Court of New Mexico.
Nov. 11, 1971.

James L. Dow, Carlsbad, for defendant-appellant.

McCormick, Paine & Forbes, Carlsbad, for plaintiff-appellee.

OPINION

STEPHENSON, Justice.

Appellee ("the bank") obtained a joint and several judgment against appellant and Stanley L. Jones, who took no appeal. We affirm.

Among the trial court's findings were the following:

"1. At all times material hereto the two defendants were husband and wife and each was possessed of a separate estate.

"2. Prior to November 29, 1969, Defendant Stanley L. Jones requested from Plaintiff a loan of $5,000.00 which was refused by Plaintiff.

"3. On November 29, 1970, Plaintiff made a loan of $5,000.00 to the Defendants, the requirements for the loan including the signature of the wife to the note and furnishing by the wife of a separate financial statement as to her separate estate.

"4. The loan would not have been made to Defendants except for the joinder of Defendant Imogene Whitfield Jones on the note and the furnishing of the financial statement of Defendant Imogene Whitfield Jones.

"5. When the note of 29 November 1970 became due, Defendants paid the interest, and requested renewal of the note. On March 5, 1970, the Defendants executed and delivered to Plaintiff their renewal note, in the amount of $5,000.00 due on demand or not later than May 5, 1970, the note being Plaintiff's Exhibit 1 in this cause. At the time of renewal of the note, no requirements were made of Defendants, other than signature of the renewal note.

"6. The proceeds of the loan were immediately deposited in the account of Francisca Corporation, a Corporation in which Defendant Stanley L. Jones was the major stockholder, which stock he owned as his separate property."

The court concluded that appellant executed the note as an accommodation to her husband for the benefit of the bank and that she had pledged her separate credit. The question presented to us is whether appellant's separate property is liable for the judgment. We are thus not concerned with property rights of the conjugal partners inter se.

Appellant relies upon the proposition that a wife's separate property is not liable for community debts. This is a principle with which we have no quarrel and from which we have no desire to depart so long as it is correctly understood and properly applied. However, a simplistic application of it may do violence to the rights of creditors in circumstances in which the wife by her acts or omissions has emerged from the shelter which the law has erected for her and her separate property.

E. Rosenwald & Son v. Baca et al., 28 N.M. 276, 210 P. 1068 (1922) is a typical case on the principle under discussion, and the one relied upon by appellant here. There the question was whether the separate property of the wife was liable on an open account incurred by her deceased husband. The court said the issue was whether or not the lady "had by conduct and representations made her separate property liable for the debt." The court reversed a directed verdict for plaintiff and remanded for further proceedings because there was "no word of testimony * * * showing any absolute contract or promise * * *" on the part of the wife in obtaining the credit. It is clear that had there been such a contract or promise, the result would have been otherwise.

Here the appellant voluntarily and without any qualification or restriction signed a note which on its face is an "absolute contract or promise." We hold that a wife who joins with her husband on a note is jointly and severally liable and may be legally bound to pay the entire debt. A judgment on a joint and several note signed by both the husband and the wife is collectible from the community property or the separate property of either or both. Cabot v. First National Bank of Santa Fe, 81 N.M. 793, 474 P.2d 476 (1970).

Appellant had a complete right to enter into such undertaking and to subject her property to liabilities differing from those which under our law would otherwise apply. Disabilities resulting from her marital status have been removed by statute. Section 57-2-6, N.M.S.A., 1953.

Appellant claims that this case is distinguishable from Cabot in that the note there provided for joint and several liability whereas the one here does not. If this be a deficiency in the note we are considering, a feature of which we are by no means convinced, it is a lack filled by § 50A-3-118(e), § 21-6-2 and § 21-6-3, N.M.S.A., 1953, each of which provides for joint and several liability.

A good deal of the trial below and the argument here is devoted to the question of whether the note sued on was a community debt. The nature of the

debt as community or otherwise plays no part in our decision. Even though an indebtedness may be community in nature as between the conjugal partners, the wife, by her acts or omissions in dealings with third parties, may make her separate property liable for its payment. Such is the case here.

The judgment is affirmed; the appellee is further awarded the additional sum of $500.00 for services of its attorney in this court.

It is so ordered.

COMPTON, C. J., and MONTOYA, J., concur.

490 P.2d 680

STATE of New Mexico, Plaintiff-Appellee,

v.

Terry Lee BROWDER, Defendant-Appellant.

No. 696.

Court of Appeals of New Mexico.
Oct. 29, 1971.

Harvey C. Markley, Lovington, for defendant-appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of receiving stolen property in excess of $2500.00, defendant appeals. Section 40A-16-11, N.M.S.A. 1953 (Repl. Vol. 6, Supp.1971). The appeal challenges the sufficiency of the evidence. The State asserts defendant may not have the evidence reviewed as to its sufficiency because defendant's motion for a directed verdict at the close of the case-in-chief was denied and not renewed at the close of all the evidence. See State v. Phipps, 47 N.M. 316, 142 P.2d 550 (1943); State v. Vargas, 42 N.M. 1, 74 P.2d 62 (1937). We do not reach this procedural problem; our review is on the basis of fundamental error.

State v. Torres, 78 N.M. 597, 435 P.2d 216 (Ct.App.1967) states:

"The doctrine of fundamental error is resorted to in criminal cases only if the innocence of the defendant appears in-

disputable, 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). * * *"

Three "oil field" drilling bits disappeared from drilling locations in eastern Oklahoma. These locations were in the general vicinity of Fort Smith, Arkansas. The bits were recovered from a house in Hobbs, New Mexico. Defendant was in the Fort Smith area at the time the bits disappeared and was staying in the house in Hobbs, as a visitor, at the time the bits vere recovered.

Two other men are connected with the house where the bits were located: Meissner, who was also staying in the house and was present when the bits were found; and Sewell, who had rented the house. The detective who discovered the bits testified that Sewell had taken some of defendant's property and disappeared. According to defendant, this property was defendant's car and clothes.

Other evidence is: (1) Defendant had rented the house immediately prior to the time Sewell became the renter; (2) Meissner and defendant returned from Arkansas together in defendant's car; (3) the detective, acting on the basis of information received from an unidentified person, went to a bar looking for a person (unidentified) reported to be trying to sell bits and then went to the house where the bits were found; and (4) defendant, in response to the detective's question, stated he did not have a bill of sale for the bits.

Section 40A–16–11, supra, defines the crime of receiving stolen property as "* * * buying, procuring, receiving or concealing anything of value, knowing or having reason to believe the same to have been stolen or acquired by fraud or embezzlement." See State v. Carlton, 82 N.M. 537, 484 P.2d 757 (Ct.App.1971). There is neither direct nor circumstantial evidence that defendant bought, procured, received or concealed the bits. The jury was instructed on aiding and abetting but there is neither evidence nor inference that defendant participated in any way in any buying, procuring, receiving or concealing of the bits. See State v. Salazar, 78 N.M. 329, 431 P.2d 62 (1967). Defendant was present in the house where the bits were found, but presence alone is insufficient. State v. Grove, 82 N.M. 679, 486 P.2d 615 (Ct.App.1971); State v. Harrison, 81 N. M. 324, 466 P.2d 890 (Ct.App.1970).

Here, there is a total absence of evidence to support the conviction. In addition, there is evidence of an exculpatory nature. Defendant testified he had been in the Fort Smith area visiting relatives. He also testified that he stayed at the house in Hobbs where the bits were found because he was having marital difficulties. Other exculpatory evidence is that the house where the bits were found had been rented by Sewell, and that Sewell had disappeared.

[redacted] We recognize that the doctrine of fundamental error is to be applied sparingly and is not to be used to excuse failure to make proper objection in the trial court. 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. Sanders, 54 N.M. 369, 225 P.2d 150 (1950). We also recognize that fundamental error must go to the foundation of the case. State v. Garcia, 46 N.M. 302, 128 P. 2d 459 (1942). We apply the doctrine within these limitations. We do not hold that the innocence of defendant is indisputable. We do hold that the absence of evidence against defendant, together with the exculpatory evidence, makes his guilt so doubtful "* * * that it would shock the conscience to permit his conviction to stand. * * *" State v. Torres, supra.

The judgment and sentence is reversed. The cause is remanded with directions to discharge the defendant.

It is so ordered.

SUTIN, J., concurs.

COWAN, Judge (dissenting).

The majority failed to "view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences in favor of the verdict of conviction" as they are required to do. State v. Hinojos, 78 N.M. 32, 427 P.2d 683 (Ct.App.1967).

Defendant was an oil field worker. Separated from his wife, he had been renting a house at 118 West Byers in Hobbs, New Mexico, from March 1970 until "just before Christmas". The landlord had gone to the house a day or two before Christmas, found defendant gone and a man named Jim Sewell living there. Told by Sewell that the defendant had moved out, he rented the house to Sewell.

On December 15 or 16 defendant had left Hobbs for Ft. Smith, Arkansas, just across the eastern border of Oklahoma, to visit his family. Ft. Smith is near an oil producing area in eastern Oklahoma.

The three drilling bits involved in the case, worth approximately $1100 each, had been delivered from Ft. Smith to different drilling locations nearby, one on December 16, one on December 21, and one on December 28, 1970. The practice is for the supply houses to deliver bits to drilling rigs where they may or may not be used. If one is needed, it will be used and the drilling company charged for it. If not used, it will be picked up and returned to the warehouse. Each bit has its own individual IBM card so that its location can be determined at any time. The three bits were not used, but disappeared from the locations.

On the morning of December 31, 1970, the defendant, accompanied by a man named Meissner, left Ft. Smith to return to Hobbs. They arrived in Hobbs about 10:00 P.M. and celebrated New Year's Eve until 1:00 A.M., January 1, 1971. Somewhat intoxicated, they went to the house at 118 West Byers and went to sleep in the front room.

That same day, a Hobbs police officer received a telephone tip that "there were two men selling some stolen drill bits" at a bar and that they were then at 118 West Byers, in Hobbs. He drove there, was granted admission and permission by Meissner to look through the house. On the kitchen counter were the three drill bits from the Ft. Smith area, some 650 miles away, where they and the defendant had been only a short time before. This is evidence sufficient to support the conviction.

This jurisdiction is committed to the doctrine that fundamental error is to be resorted to in criminal cases only for the protection of those whose innocence appears indisputably, or open to such question that it would shock the conscience to permit the conviction to stand. State v. Rodriguez, 81 N.M. 503, 469 P.2d 148 (1970).

The record before us does not suggest the indisputable innocence of the appellant, nor that the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to stand. Feeling that the majority opinion extends the doctrine of fundamental error beyond its proper limits, I dissent.

490 P.2d 683

STATE of New Mexico, Plaintiff-Appellee,
v.
Roger RANNE, Defendant-Appellant.
No. 692.

Court of Appeals of New Mexico.
Oct. 29, 1971.

Harvey C. Markley, Lovington, for defendant-appellant.

David L. Norvell, Atty. Gen., C. Emery Cuddy, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant's conviction of robbery, aggravated battery and aggravated burglary was affirmed on appeal. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct.App.1969). He is now before this court on appeal from an order denying, without hearing, his motion for post-conviction relief filed pursuant to Rule 93 [§ 21–1–1(93), N.M.S.A.1953 (Repl. Vol.1970)].

Defendant's first point on appeal is that there was a misunderstanding between the court and defendant at the time of an alleged "plea bargaining session" which resulted in prejudice to the defendant. The motion raises no such contention and accordingly cannot be raised for the first time on appeal. Section 21–2–1(20), N.M.S.A.1953 (Repl.Vol.1970). Even if this contention was raised it is disposed of by State v. Leyba, 80 N.M. 190, 453 P.2d 211 (Ct.App.1969).

Defendant's second point of appeal is that the testimony of the State's witness at trial is contradicted by a State's witness who testified at the preliminary hearing but not at trial and that this resulted in prejudice to the defendant. This contention is disposed of by State v. Minns, 81 N.M. 428, 467 P.2d 1000 (Ct.App.1970).

Affirmed.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

490 P.2d 959

HOMESTEAD INVESTMENTS, INC.,
Plaintiff-Appellee,

v.

FOUNDATION RESERVE INSURANCE COMPANY, Inc., Defendant-Appellant,

First National Bank in Albuquerque, Intervenor-Appellee.

No. 9259.

Supreme Court of New Mexico.

Nov. 15, 1971.

Ussery, Burciaga & Parrish, Albuquerque, for defendant-appellant.

N. Tito Quintana, Albuquerque, for plaintiff-appellee.

OPINION

MONTOYA, Justice.

Plaintiff-appellee Homestead Investments, Inc., hereinafter referred to as "plaintiff," brought this action in the District Court of Bernalillo County, New Mexico, seeking recovery for a fire loss from defendant-appellant Foundation Reserve Insurance Company, Inc., hereinafter referred to as "defendant." By stipulation of all parties, the First National Bank in Albuquerque, hereinafter referred to as "Bank," was granted a right to a certain portion of any proceeds recovered by plaintiff by reason of the Bank's mortgage on the property in question. Following separate trials to the court on the issues of liability and damages, the court found defendant liable on the policy of insurance and awarded damages to plaintiff. Defendant appeals from both decisions.

Plaintiff, owner of land and improvements at 511 Broadway S.E., Albuquerque, New Mexico, entered into a contract of fire insurance with defendant covering the premises. The contract of insurance in this case was a standard form fire insurance policy which, under New Mexico law, must contain provisions (1) requiring the insured to render a formal proof of loss within sixty days after the loss; and (2) stating that "[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court * * * unless commenced within twelve [12] months

next after inception of the loss." See § 58-8-10, N.M.S.A., 1953 Comp. (Repl. 1962).

On October 23, 1967, while the aforesaid policy was in full force and effect, the building on the land was destroyed by fire. Defendant was given oral notice of the loss through its agent, who contacted an insurance adjuster to investigate the claim.

The evidence shows that, upon issuing the contract of insurance, the defendant sent the insurance policy to the Bank, the holder of the mortgage on the premises in question. The defendant also furnished to the plaintiff an eight page document designated as "Standard Fire Insurance Policy, Memorandum of Insurance." This document contained various endorsements and appears to set forth all the essential terms of the contract, but did not contain the printed page which refers to proof of loss, or the twelve-month limitation for the commencement of suit under the policy.

The trial court found that at no time did defendant deny liability under the policy, nor did defendant tender or offer to refund to plaintiff the amount of unearned premiums under the policy. During the time that negotiations between plaintiff and defendant were pending, the limitation period ran and the action by plaintiff on the policy was filed after the expiration of the twelve-month limitation period. The trial court further found that the policy furnished to plaintiff did not contain any provision requiring notice and proof of loss, or the limitation that any action on the policy be filed within twelve months following the loss, whereas the evidence shows that the copy of the policy delivered to the Bank did contain those provisions. The trial court then concluded, as a matter of law, that defendant was estopped from asserting the limitation requiring written notice of loss and proof of loss, or the twelve-month limitation period, and that, therefore, defendant was liable under the policy.

On the issue of damages, the court heard evidence and decided that there was substantial evidence to support a finding that the fire loss was $16,500.

On the issue of liability, defendant contends that it is not liable by reason of the failure by plaintiff to submit written proof of loss and by its failure to file an action within the twelve-month period following the date of loss.

Defendant argues that, because the mortgage contract between plaintiff and the Bank provided for delivery of the policy to the Bank, the Bank became plaintiff's agent and, therefore, plaintiff was chargeable with knowledge of the provisions in the copy received by the Bank.

While it does seem that the Bank, as mortgagee of the property, did have a right to possession of the policy, we do not believe that plaintiff should be bound by the copy delivered to the Bank. Nothing in the record indicates an express or implied intention that the Bank should act as agent for plaintiff. Therefore, delivery to the Bank could not constitute constructive delivery to plaintiff. 1 Couch on Insurance 2d, § 10:16 at 436 (1968); Wittliff v. Tucker, 208 S.W. 751 (Tex.Civ.App.1919).

The memorandum of insurance delivered to plaintiff did not include the page containing the provisions requiring written proof of loss and that any suit be commenced within twelve months following a loss. The fact that the Bank received a complete copy of the policy does not provide plaintiff with notice of provisions not included in their copy.

Defendant argues that even if the copy of the policy received by plaintiff did not include the provisions requiring suit to be filed within twelve months, nevertheless, plaintiff could not prevail. Defendant contends that § 58-8-10, supra, which prescribes terms for the standard fire insurance policy in New Mexico, requires that suits on claims be commenced within twelve months following the loss, and that failure to do so precludes recovery.

In Conte v. Yorkshire Insurance Company of New York, 5 Misc.2d 670, 163 N.Y.S.2d 28 (Sup.Ct.1957), the court faced a

situation very much like our own. In that case, the insured brought an action against the insurer on a fire insurance policy after the twelve-month limitation period as prescribed by statute. Through a printer's error, the limitation was omitted in the copy received by the insured. The court said, 5 Misc.2d at 672, 163 N.Y.S.2d at 30:

> "* * * [T]he statute makes it incumbent upon the company to deliver to the policyholder a printed form of fire insurance which embodies the standard provisions stipulated in the statute, including the proviso limiting the commencement of an action to a twelve-month period. * * * The insured has no duty or responsibility in this respect, and speaking realistically, has no reason to know of such a limitation. If the company, as in the case at bar, fails to provide him with a proper policy, one which complies with the statute, it should suffer the consequences of its neglect and not suddenly pull a trapdoor on the innocent insured who parted with the premiums."

The court held that the insurer would be equitably estopped from asserting the twelve-month limitation period to bar plaintiff's recovery.

Also, in Fredericks v. Farmers Reliance Insurance Company of New Jersey, 80 N. J.S. 599, 194 A.2d 497 (1963), the New Jersey court held that an insurer was equitably estopped from asserting the twelve-month limitation period prescribed by statute, because it had prevented the insured from knowing of the limitation by withholding a copy of the policy. In so holding, the court stated, 80 N.J.Super. at 604, 194 A.2d at 500:

> "* * * A member of the public is chargeable with knowledge of any general statute of limitations, including the six-year contract period. But we think that the insured party under an insurance contract is entitled to look to his policy for notice of any shorter limitation period set forth therein as a condition of his right to recover thereon. The Legislature has not simply and unqualifiedly created a 12-month statute of limitations for claims on fire policies, as it has of six years for contracts generally. It has directed the *inclusion* of a 12-month limitation condition *in the policy issued*. The intent obviously is that the insured may be apprised of all his rights, including that limitation upon them, by reading the policy. Any conduct properly invocable against the company's pleading the limitation condition, under general estoppel principles, should therefore still bar it without regard to the fact that the limitation condition in a fire policy is dictated by statute."

See also, Godwin v. Continental Insurance Company, 436 F.2d 712 (3d Cir. 1971), and Union Fire Ins. Co. of Paris, France v. Stone, 41 Ga.App. 49, 152 S.E. 146 (Ct. App.Ga.1930).

In a case decided in California, Elliano v. Assurance Co. of America, 3 Cal.App.3d 446, 83 Cal.Rptr. 509 (Cal.App.1970), that court considered the effect of the insured being furnished a "memorandum of insurance" instead of the policy which, as in the instant case, was virtually identical except for the omission from the memorandum of the page containing the twelve-month limitation period. In deciding the question, the California court stated, 3 Cal.App.3d at 452, 83 Cal.Rptr. at 513:

> "However, it is to be noted that the memorandum contains no statement designed to give notice that it does not contain all of the material provisions of the contract. In view of its content and arrangement, this memorandum presented the appearance of a duplicate of the policy. Its evident purpose was to inform the insured of the material terms of the contract and the extent of its coverage. In these circumstances we hold that the parties to this action stand in essentially the same position as if respondent had delivered to appellant ei-

ther an original or an exact copy of a policy which omitted the limitation provision here in question."

This court is in accord with the foregoing decisions in holding that the insured should be able to rely upon the provisions of his policy or memorandum of insurance to inform him of all his rights and duties under his insurance contract. The trial court found that the policy delivered by defendant to plaintiff did not include the provisions requiring written proof of loss, and that any action on the policy be commenced within twelve months following the loss.

We hold that because of defendant's failure to include provisions required by § 58-8-10, supra, relating to written proof of loss and the twelve-month limitation period in which to bring suit, it cannot now rely upon the terms of the statute to preclude plaintiff's recovery. The trial court was correct when it held that the defendant was estopped from asserting the policy limitations.

Defendant also contends that the trial court erred in refusing to grant its motion for summary judgment. The record in the case shows no ruling by the court on this motion. There is also no indication in the record that the ruling of the trial court was invoked. It is clear that the trial court determined there were factual issues present and proceeded to hear testimony on those issues. The trial court was correct in so doing. See, Godwin v. Continental Insurance Company, supra.

On the issue of damages, there is ample support in the record to sustain the trial court's assessment of damages in the amount of $16,500. Therefore, defendant's contention, that the trial court erred in awarding damages not proximately caused by the fire, is without merit.

The decision of the trial court is affirmed.

It is so ordered.

OMAN and STEPHENSON, JJ., concur.

490 P.2d 962

Servando S. SANCHEZ and Pedro Jaquis, Petitioners,

v.

PUBLIC SERVICE COMPANY of New Mexico, Respondent.

No. 9294.

Supreme Court of New Mexico.
Nov. 8, 1971.
Rehearing Denied Nov. 24, 1971.

Standley, Witt & Quinn, John F. Quinn, Santa Fe, Willard F. Kitts, Albuquerque, for petitioners.

Keleher & McLeod, John B. Tittmann, Albuquerque, for respondent.

OPINION

STEPHENSON, Justice.

Respondent (defendant) was granted summary judgment. The Court of Appeals

affirmed. Sanchez v. Public Service Company of New Mexico, 82 N.M. 752, 487 P. 2d 180 (Ct.App. decided June 18, 1971). We reverse. A statement of facts, issues and procedures had appears in the opinion of the Court of Appeals.

Summary judgment may properly be granted only if the moving party is entitled to it as a matter of law upon clear and undisputed facts. Coe v. City of Albuquerque, 81 N.M. 361, 467 P.2d 27 (1970). The evidence must be viewed in its most favorable aspect in support of a trial on the issues. Johnson v. J. S. & H. Construction Co., 81 N.M. 42, 462 P.2d 627 (Ct.App. 1969). All reasonable inferences will be drawn in favor of the party against whom summary judgment is sought. Barber's Super Markets, Inc. v. Stryker, 81 N.M. 227, 465 P.2d 284 (1970). The burden rests upon the movant to show there is no genuine issue of material fact. Cessna Finance Corp. v. Mesilla Valley Flying Serv., 81 N.M. 10, 462 P.2d 144 (1969).

There is a factual conflict here. Petitioners (plaintiffs) assert that the height of the power line was 13 to 18 feet, based upon the estimate stated in the Lovato affidavit. Defendant's position is that the line was 28 feet 11 inches high, based upon a measurement two days after the injury, coupled with a statement in the Roundtree affidavit to the general effect that the line was in the same position at the time of the measurement as it was at the time of the injury.

We are not concerned with which version weighs most heavily, but with whether there is an issue of a material fact. The height of the line being a material fact, we have no hesitancy in holding that such an issue existed.

The Court of Appeals held plaintiffs' factual position "inherently improbable" based upon an application of the "physical facts" rule. See Ortega v. Koury, 55 N.M. 142, 227 P.2d 941 (1951) where we said:

> "Physical facts and conditions may point so unerringly to the truth as to leave no room for a contrary conclusion based on reason or common sense, and under such circumstances the physical facts are not affected by sworn testimony which in mere words conflicts with them. * * *"

See also Massey v. Beacon Supply Company, 70 N.M. 149, 371 P.2d 798 (1962) and Bolen v. Rio Rancho Estates, Inc., 81 N.M. 307, 466 P.2d 873 (Ct.App.1970) where it was held:

> "The rule will not be applied if the physical facts show only that the oral testimony is improbable. * * * For its application, the physical facts must be such that conflicting oral testimony is inherently improbable. * * *"

The measurement two days after the injury was a physical fact. Standing alone it was meaningless, unless related to the time of the injury. This was attempted not by any physical facts, but by mere testimony, the thrust of which was that there had been no change. The physical fact rule is hence inapplicable.

No reasonable distinction can be made between the facts and issues in this case and Wisehart v. Mountain States Telephone & Tel. Co., 80 N.M. 251, 453 P.2d 771 (Ct.App.1969), which dealt with a strikingly similar fact situation.

The trial court is directed to set aside the summary judgment and to proceed in a manner not inconsistent herewith.

It is so ordered.

COMPTON, C. J., and McMANUS, OMAN and MONTOYA, JJ., concur.

490 P.2d 964

Bob McNABB and Frances McNabb, his wife, Plaintiffs-Appellees,

v.

Carmel E. WARREN and Thelma D. Warren, his wife, Defendants-Appellants.

No. 9304.

Supreme Court of New Mexico.

Nov. 15, 1971.

Standley, Witt & Quinn, Donald W. Miller, Sante Fe, I. M. Smalley, Deming, for appellants.

John F. Schaber, Deming, for appellees.

OPINION

MONTOYA, Justice.

Plaintiffs-appellees McNabbs brought this action in the District Court of Luna County, New Mexico, against defendants-appellants Warrens on a promissory note. Defendants answered, admitting execution and delivery of the promissory note, but denied that they were in default in the payment of said note. They also alleged that the release by the plaintiffs of the deed of trust securing the promissory note cancelled their indebtedness on the said promissory note. After a trial to the court, judgment was rendered for plaintiffs in the amount of $42,158.16, plus interest until paid. Defendants appeal from that decision.

The decision of the trial court is contained in the judgment, wherein the trial court decreed that plaintiffs recover from the defendants, jointly and severally, the sum of $42,158.16. The judgment contains no findings nor did counsel for plaintiffs or defendants submit any requested findings of fact for the trial court's consideration.

Defendants raise several contentions in seeking reversal of the trial court's decision. First, defendants argue that the decision is not supported by substantial evidence. Next, defendants argue that under §§ 50A-3-601(2) and 50A-3-605, N.M.

S.A., 1953 Comp., plaintiffs' release of the deed of trust cancelled defendants' indebtedness on the promissory note.

Consideration of these points raised by defendants requires a review of the evidence adduced at trial. The record reveals that neither plaintiffs nor defendants submitted requested findings of fact and conclusions of law. Rule 52(B) (a) (6), Rules of Civil Procedure (§ 21-1-1 (52) (B) (a) (6), N.M.S.A., 1953 Comp.), provides that a party waives specific findings if he fails to make a request therefor in writing, or if he fails to tender specific findings. This court has repeatedly held that a party who does not request findings of fact and conclusions of law cannot on appeal obtain a review of the evidence. Owensby v. Nesbitt, 61 N.M. 3, 293 P.2d 652 (1956). See also, Speechly v. Speechly, 76 N.M. 390, 415 P.2d 360 (1966). Therefore, this court will not consider defendants' contentions.

Defendants also contend on appeal that it would be inequitable for plaintiffs to have reacquired the motel property valued between $85,000 and $100,000 for a nominal consideration of $1,000, and still hold defendants to their promissory note. The pleadings did not raise this issue.

Under § 21-2-1(20) (2), N.M.S.A., 1953 Comp. (Repl.Vol. 4, 1970), this court cannot review questions not presented to the trial court for a ruling. Nothing in the record indicates that defendants raised this equitable defense at trial. Defendants' contentions are not subject to review by this court for the first time on appeal. Section 21-2-1(20) (1), N.M.S.A., 1953 Comp. (Repl.Vol. 4, 1970). See Koran v. White, 69 N.M. 46, 363 P.2d 1038 (1961).

The decision of the trial court is affirmed.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

490 P.2d 965

BOISE CITY FARMERS COOPERATIVE,
Plaintiff-Appellee,

v.

A. W. LAYTON, Defendant-Appellant.

No. 9300.

Supreme Court of New Mexico.
Nov. 15, 1971.

Eugene E. Brockman, Tucumcari, for appellant.

Krehbiel & Alsup, Clayton, for appellee.

OPINION

MONTOYA, Justice.

Plaintiff-appellee Boise City Farmers Cooperative, an Oklahoma corporation, brought this action in the District Court of Union County, New Mexico, against defendant-appellant A. W. Layton, a New Mexico resident, to recover on certain accounts allegedly owed by defendant. After a trial to the court, judgment was rendered for plaintiff. Defendant brings this appeal from that decision.

Plaintiff's suit was based upon two separate accounts, one in the name of A. W. Layton and the other in the names of Layton and Tapp. Robert Tapp, who was on the second account, had left the jurisdiction and his whereabouts was unknown. The major question facing the trial court was whether defendant was liable for the full amount of the account in the names of Layton and Tapp.

The trial court found that, prior to March 1965, plaintiff opened an account in the names of Layton and Tapp at the direction of Robert Tapp. During the same period, defendant maintained another account in the name of A. W. Layton. At various times over the next two years, employees of defendant purchased livestock feeds and related items and designated to officers or employees of plaintiff whether to charge the items to the account of A. W. Layton or to the Layton and Tapp account. The court found that defendant knew of both accounts; that statements on both accounts were regularly mailed to plaintiff by defendant; and that defendant never raised any question or complaint as to the manner in which such accounts were charged. The court also found that, during this period, defendant and Tapp were running cattle "in association" near Boise City, Oklahoma. On the basis of these findings, the trial court awarded plaintiff the balance due on both accounts, plus interest, attorney's fees and certain court costs.

Defendant seeks reversal of the court's decision on grounds that the findings of fact do not support the conclusions of law made by the court.

Defendant also contends that, there being no co-ownership of any property as between Tapp and himself, he cannot be held liable for Tapp's indebtedness unless there is a partnership by estoppel.

It is unnecessary for this court to consider whether there was a so-called partnership by estoppel. The record indicates there is ample support for the trial court's conclusion that defendant was liable on both accounts. The record reveals that it was defendant's employees who designated to which account various purchases should be credited. No attempt was made by defendant to deny liability on the Layton and Tapp account for a period of approximately two years, during which time the account was active. In addition, there is ample evidence that the items purchased on the Layton and Tapp account were used to feed the cattle belonging to defendant and Tapp. By defendant's own admission, the cattle of Layton and Tapp were run together:

> "* * * we [Layton and Tapp] was in together on some trades, together. Partners, dealing in cattle. But, these cattle that we run was a partnership, that we kept and run."

While it appears that defendant and Tapp were not engaged in a formal partnership, the record shows that they were running cattle in association with each other, and that supplies purchased on the account of Layton and Tapp by defendant's employees were used for the benefit of these cattle. Therefore, the conclusion that defendant was liable has ample support in the record and defendant's contention is without merit.

Defendant further contends that there is no evidence to support the trial court's findings that the sale of feed was to de-

fendant and Tapp; that defendant and Tapp were in association; and that defendant knew of the Layton and Tapp account.

This court has repeatedly held that if the findings of fact are supported by the evidence, they will not be disturbed on appeal. Jones v. Anderson, 81 N.M. 423, 467 P.2d 995 (1970).

A review of the evidence adduced at trial shows that there is evidence upon which the trial court could have made the challenged findings. The testimony of defendant himself, supra, tends to show that he and Tapp were running cattle in association. Plaintiff's employee testified that monthly statements of both the A. W. Layton and the Layton and Tapp accounts were sent to defendant, and that he knew of the Layton and Tapp account. Finally, there was evidence that the feeds purchased on the Layton and Tapp account were used to feed the cattle belonging to the defendant and Tapp. There is ample evidence to support the trial court's findings.

The decision of the trial court is affirmed.

It is so ordered.

COMPTON, C. J., and OMAN, J., concur.

490 P.2d 967

STATE of New Mexico, Appellee,

v.

Andrew Michael BOGDAN, Appellant.

No. 741.

Court of Appeals of New Mexico.

Oct. 15, 1971.

Certiorari Denied Nov. 17, 1971.

Paul F. Sherman, Sherman & Sherman, Deming, for appellant.

David L. Norvell, Atty. Gen., Ronald Van Amberg, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

COWAN, Judge.

Defendant was convicted and sentenced on two counts of aggravated battery contrary to § 40A–3–5, N.M.S.A.1953 (Repl. Vol. 6). No appeal was taken from this judgment and sentence. Thereafter, under Rule 93 [21–1–1(93), N.M.S.A.1953 (Repl. Vol. 4)], defendant filed a Motion to Vacate Judgment and Sentence and an Addendum to Motion for Vacatement (sic) of Judgment and Sentence. These motions were heard by the trial court, evidence was introduced, and the court filed findings of fact and conclusions of law. See State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct.App. 1969). The court then entered its order overruling such motions and from this order the defendant appeals to this court.

The defendant was represented by court-appointed counsel both at his trial and at the hearing on his motions. He also participated in the various proceedings, representing himself.

Defendant claims error under 14 points. All claimed errors concern the alleged denial or violation of defendant's constitutional or statutory rights. None of the claimed errors have merit. Substantial evidence supports the trial court's findings. We find no reversible error.

The defendant has also filed with this court an instrument styled "Motion to Suppress and Exclude Document" by which he complains that his brief in chief "contains inconsistent facts and contentions therein are not properly defended." He asks leave to amend and attaches certain instruments. These instruments are already a part of the record and were duly considered by this court. The court has also considered the motion and concludes it is not well taken.

Defendant's motion to Suppress and Exclude Document is denied.

The order of the trial court denying the motions is affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

490 P.2d 968

KAISER STEEL CORPORATION,
Appellant,
v.
PROPERTY APPRAISAL DEPARTMENT,
Appellee.
No. 582.

Court of Appeals of New Mexico.
Sept. 3, 1971.
Rehearing Denied Sept. 27, 1971.
Certiorari Denied Nov. 9, 1971.

Paul A. Kastler, Wright & Kastler, Raton, James E. Sperling, John R. Cooney, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Anne K. Bingaman, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

The appeal is concerned with the evaluation for ad valorem tax purposes of mine run coal produced at the York Canyon mine of Kaiser (Kaiser Steel Corporation) in Colfax County. The three issues concern: (1) the assessed valuation; (2) the refusal to allow certain claimed deductions; and (3) the method of averaging used in determining the valuation.

The property appraisal department is the successor to the State Tax Commission. Section 72-25-3, N.M.S.A.1953 (1970 Int. Supp.). Under § 72-6-7(6), N.M.S.A.1953 (Repl. Vol. 10, pt. 2) it is to determine "* * * the market value of the average annual output of such productive mineral property, * * * " Under § 72-6-7(10), N.M.S.A.1953 (Repl. Vol. 10, pt. 2) it may determine this market value "to be the ad valorem value of the mineral." The property appraisal department assessed Kaiser on the basis of its determination of market value. Kaiser protested this assessed value. Section 72-25-10, N.M.S.A.1953 (1970 Int. Supp.). A hearing was held before the property appeal board. See §§ 72-25-11 through 72-25-18, N.M.S.A.1953 (1970 Int. Supp.). The property appeal board made findings of fact and conclusions of law. Its decision affirmed the assessment. Kaiser appealed directly to this court. Section 72-25-19, N.M.S.A.1953 (1970 Int.Supp.). The issues exist between Kaiser and the property appraisal department, hereinafter referred to as "State." The school district is identified as a party only because the mine is located within the district.

All three issues concern § 72-6-7(6), supra. It reads:

> "From such returns and statements, and such other information as may be available, the commission shall ascertain and determine the market value of the average annual output of such productive mineral property, including any bonus or subsidy payments, less the actual cost of producing and bringing the output to the surface and of milling, treating, reducing, transporting and selling the same, over the period of five (5) years (or so much of such period as the property has been in operation) next preceding the year in which such return is required to be made. Provided, however, that any person may elect to have his output valuation computed on an annual basis instead of on a five-year average basis. If such election is exercised, such person may not change from the one-year basis except with the approval of the commission.

"But there shall not be included as part of such cost any amounts paid for salaries of any persons not actually engaged in the operation of such property or the milling, treatment, reduction, transportation, or selling such output, or in the immediate management or superintendence of such operations; nor shall there be included as part of such cost any amounts paid for improvements or the purchase of machinery, equipment, appliances, or for construction of mills, reduction works, transportation facilities or other buildings or structures."

Assessed valuation.

The market value of the average annual output is to be determined over a five year period or so much thereof as the property has been in operation. Here, a four year period is involved. The property appeal board found the total market value for the four year period. The value is calculated to be approximately $8.50 per ton for the years in question, 1968 and 1969. We use this figure hereinafter realizing there is a slight variation in the actual mathematical calculation. Kaiser contends this $8.50 per ton figure is not supported by substantial evidence.

Section 72-25-19, supra, states the basis of this court's review. One basis is whether the decision is supported by substantial evidence. We are to determine that question "* * * upon consideration of the entire record or portions of the record cited by the parties. * * *"

In determining whether a finding is supported by substantial evidence, New Mexico's traditional approach, in reviewing both court decisions and administrative decisions, has been: "* * * 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 viewed in the aspect most favorable to the verdict. * * *" Tapia v. Panhandle Steel Erectors Company, 78 N.M. 86, 428 P.2d 625 (1967). See Wickersham v. New Mexico State Board of Education, 81 N.M. 188, 464 P.2d 918 (Ct.App.1970). Thus, traditionally, New Mexico has looked only to supporting evidence and inferences in determining whether there is substantial evidence supporting a questioned finding.

Here, it is suggested that § 72-25-19, supra, changes this traditional approach because we are to consider "the entire record." Compare the Administrative Procedures Act, § 4-32-22, N.M.S.A.1953, (Repl. Vol. 2, Supp.1969). There may be merit to this view. See Universal Camera Corp. v. National Labor Rel. Bd., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); 4 Davis, Administrative Law Treatise (1958), § 29.03; compare the unpublished paper of Justice Oman, Judicial Review of Administrative Decisions Including the Problems of Evidence and Appeal given at the State Bar Mid-Year Institute, April 1970. There have been New Mexico Supreme Court decisions where similar language was used in the statute being reviewed, but we found none which decided the effect of such language. See Strance v. New Mexico Board of Medical Exam., 83 N.M. 15, 487 P.2d 1085, decided August 9, 1971; Young v. Board of Pharmacy, 81 N.M. 5, 462 P.2d 139 (1969); Seidenberg v. New Mexico Board of Medical Exam., 80 N.M. 135, 452 P.2d 469 (1969).

We do not decide whether a consideration of "the entire record" changes the traditional view as to the evidence and inferences to be reviewed in determining whether the evidence is substantial. It is unnecessary to do so. Under the traditional approach the evidence is not substantial.

The evidence supporting an assessed valuation of $8.50 per ton of mine run coal is that Kaiser made two sales at that price at the mine to a competing steel mill (Colorado Fuel and Iron). In 1968, Kaiser sold approximately 31,000 tons of a total production of 724,000 tons, which is slightly over 4%. In 1969, Kaiser sold approximately 70,000 tons of a total production of 802,000 tons—slightly less than 9%. The State claims these two sales support the inference that all the coal produced in those years had

a market value of $8.50 per ton. Kaiser asserts the sales show no more than that the tonnage sold had a market value equivalent to the sales price.

"* * * Fair market value is theoretically what a willing seller would take and a willing buyer offer. * * *" Board of Com'rs of Dona Ana County v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953). See Hardin v. State Tax Commission, 78 N.M. 477, 432 P.2d 833 (1967). Here, we have no such seller or buyer. All the mine run coal produced, with the exception of the sales identified above, was produced by a Kaiser mine and transported to a Kaiser steel mill in Fontana, California. Kaiser is an integrated steel manufacturer; the York Canyon mine is a captive mine. In this situation, in considering the question of market value, we indulge in a fiction. We consider the mine as the seller; the steel mill as the buyer. United States v. Cannelton Sewer Pipe Co., 364 U.S. 76, 80 S.Ct. 1581, 4 L.Ed.2d 1581 (1960); United States v. Henderson Clay Products, 324 F.2d 7 (5th Cir. 1963).

As to the price between this fictional seller and buyer, Ford v. Norton et al., 32 N.M. 518, 260 P. 411, 55 A.L.R. 261 (1927), states: "* * * The market price of a commodity is the exchange value. It is determined by the demand for it in relation to the supply, and is proved, when possible, by actual sales. * * *" Here, there is no evidence of a demand for 96% and 91%, respectively, of the mine's supply except the demand provided by the Fontana steel mill. The State contends: "* * * The evidence showed that other steel mills were in operation in the years in question in Utah and Los Angeles. Such mills could, *presumably*, [our emphasis] have provided markets for a large portion of the mine's production at the same price per ton at York Canyon which Colorado Fuel and Iron agreed to pay. * * *" No portion of the record is cited in support of this "presumption." In our review of the record we found nothing on which to base this "presumption." Our review is limited to the record. Section 72-25-19, supra.

The steel mill's demand for the mine's supply shows an exchange value exists, but that demand does not determine what the value is. The fact that the steel mill took almost 96% of the mine run coal in 1968 and over 91% of the mine run coal in 1969, does not show that it took, or would have taken, the coal, as a "willing buyer," at a price of $8.50 per ton, plus freight, for the more than 1000 miles between York Canyon, New Mexico and Fontana, California. The closeness of the mine to its market, is a factor in determining the exchange value, in this case the market value, of the coal. Paxson v. Cresson Consol. Gold Min. & Mill Co., 56 Colo. 206, 139 P. 531 (1914).

Concerning both demand and accessibility of a market, Alfred A. Wheeler, 11 B.T.A. 579 (1928) states:

> "Among the essential factors in determining market value are the existence of a demand and the accessibility of a market. Without a demand a rich natural resource may lie dormant and be commercially valueless. Create an active demand and the same deposit may find a ready market. The truth of this fact was demonstrated by the abnormal demand for this very product during the late war. Similarly, proximity to market may be a determining factor. Two deposits of ore, one in close proximity and the other far removed from the consuming market, will vary greatly in fair market value. In the instant case as to 1913 there is proof neither of a demand nor of an available market. * * *"

The market value of the mine run coal is based on evidence of sales of 4% and 9% of production at $8.50 per ton. This evidence does not support an inference that 96% and 91% of production had a market value of $8.50 per ton absent evidence of a market at that price. The finding utilizing a market value of $8.50 per ton for all mine run coal is not supported by substantial evidence. See the discussion of probative evidence in Young v. Board of Pharmacy, supra.

The State also asserts that the finding of the property appeal board is correct as a

matter of law. It relies on cases concerned with gross income from mining in determining the allowance for depletion under 26 U.S.C.A. § 613. An issue in such cases is the "representative field or market price," where, as here, the taxpayer is an integrated producer and user of the mineral to be valued. See Bingaman, 10 Nat.Res.J. 415, at 428–429 (1970).

Chief reliance is placed on Part III "Depletion Issue—Howell Field" of the opinion in Panhandle Eastern Pipe Line Co. v. United States, 408 F.2d 690, 187 Ct.Cl. 129 (1969). Panhandle Eastern States: "* * * Absent any other comparable wellhead sales of comparable gas, the one such sale in question certainly constitutes evidence indicative of the market price of plaintiff's production in the Howell Field. * * *" In Panhandle Eastern the issue was the value of the production, other than the one sale referred to in the quotation. Here, the issue is the value of the production, other than the two sales established by the record. To this extent, Panhandle Eastern is comparable. But in Panhandle Eastern there were additional facts. There was evidence of the price at which the remainder of the production was sold. That price was a delivered price after transportation. In Panhandle Eastern the delivered price was used, after delivery costs were subtracted, and the result was held to be the market value of this gas, that is, the gas apart from the one sale. The decision in Panhandle Eastern is consistent with the view that market value requires a demand at a price.

In Kaiser's case, there is evidence of a demand, at a price, but we do not consider this evidence because it supports Kaiser's rather than the State's, per ton valuation. Following the traditional view as to the evidence to be reviewed in determining substantial evidence, we consider only evidence supporting the questioned valuation. We have already held that the evidence is not substantial. The question here is whether, under Panhandle Eastern, our decision is erroneous as a matter of law. It is not because Panhandle Eastern dealt with facts not before us. There is no evidence of a delivered price which supports the State's $8.50 per ton valuation. The quotation from Panhandle Eastern does not require the State's valuation be upheld as a matter of law because that quotation was neither the factual nor legal basis for the decision in that case.

Other cases relied on by the State are also distinguishable. In Hugoton Production Company v. United States, 349 F.2d 418, 172 Ct.Cl. 444 (1965) there were comparable sales in the area. In Riverton Lime & Stone Co., 28 T.C. 446 (1957) the taxpayer had sold his entire production and the question was the value of a portion of the production sold in a different form. In Greensboro Gas Co., 30 B.T.A. 1362 (1934), aff'd 79 F.2d 701 (1935), the taxpayer had purchased gas and the price paid for the purchases supported the valuation fixed by the taxing authority. Further, in Greensboro, supra, the valuation was not attacked. We have no evidence in the present case comparable to that utilized in the above cases. Other authority cited by the State is similarly distinguishable. We hold that the depletion cases, under the Internal Revenue Code, do not require a result, as a matter of law, other than the one we have reached.

Finally under this issue, the State contends the burden of proof was upon Kaiser; that is, "* * * Kaiser had the burden of showing that such sales [the 4% and 9% amounts] should, * * * not be accepted as the market value of the remaining production. * * *" It asserts that Kaiser failed to meet its burden and, therefore, the State's valuation should be upheld.

We agree that the burden of proof was on Kaiser, see generally International Min. & C. Corp. v. New Mexico P. S. Com'n, 81 N.M. 280, 466 P.2d 557 (1970); S. I. C. Finance-Loans of Menaul, Inc. v. Upton, 75 N.M. 780, 411 P.2d 755 (1966). Kaiser's burden of proof was both the burden of producing evidence and the burden of persuasion. 1 Cooper, State Administrative Law, at 355 (1965); compare Mayfield v. Keeth

Gas Company, 81 N.M. 313, 466 P.2d 879 (Ct.App.1970). This burden, in this case, where the validity of the State's valuation is in issue, is not the burden of showing the correct valuation. Kaiser's burden was to show the State's valuation was erroneous. Vale v. DuPont, 7 W.W.Harr. 254, 182 A. 668, 103 A.L.R. 946 (Del.1936).

Kaiser did produce evidence on this issue; it undertook to persuade the property appeal board that the valuation was incorrect. Did Kaiser fail in its burden of persuasion because the property appeal board erroneously upheld the State's valuation? Until a legally correct result is reached, we cannot say, as a matter of law, that there has been a failure in the burden of persuasion. Discussion of Kaiser's burden of proof at this point is misleading when the decision of the property appeal board is legally incorrect. Specifically, an asserted failure in Kaiser's burden of persuasion does not require that we uphold the State's valuation when that valuation is not supported by substantial evidence.

The valuation of $8.50 per ton for the mine run coal in 1968 and 1969 is not supported by substantial evidence; the finding utilizing that valuation is incorrect. The decision applying that valuation is reversed.

Claimed deductions.

The State disallowed certain claimed deductions and the property appeal board affirmed the disallowance. Kaiser asserts this was error. Its evidence before the property appeal board was that the deductions sought were pursuant to good accounting principles. Kaiser also argued that it found nothing in the statute which prohibited the deductions.

The deductions claimed are royalties, property taxes, income taxes, depreciation and depletion. Portions of § 72-6-7(6), supra, seem specifically pertinent to two of the claimed deductions. The market value is to include bonus or subsidy payments and there is evidence that the royalty payments fall into that category. Amounts paid for improvements are not to be included as part of the costs. This seems to indicate that depreciation on such improvements should also not be included. However, there is no specific language concerning property or income taxes and depletion. Since the propriety of a deduction for these three items must be answered on the basis of general statutory language, we give our answer to all five of the claimed deductions on the same basis.

Section 72-6-7(6), supra, states the market value is to be determined:

> "* * * less the actual cost of producing and bringing the output to the surface and of milling, treating, reducing, transporting and selling the same, * * *."

"Actual cost" is not defined. Kaiser asserts that in the absence of a statutory definition we should look to the evidence and that the undisputed evidence is that under good accounting principles the claimed deductions are an actual cost. This argument, and the contention that the deductions should be allowed unless there is a statutory prohibition, is met with a rule of statutory construction in tax matters.

That rule is that legislative intention to authorize a deduction must be clearly and unambiguously expressed in the statute. Reed v. Jones, 81 N.M. 481, 468 P.2d 882 (Ct.App.1970). See Field Enterprises Ed. Corp. v. Commissioner of Rev., 82 N.M. 24, 474 P.2d 510 (Ct.App.1970). Kaiser seeks deductions from the market value of its production. Since it is neither clear nor unambiguous that the claimed deductions are included in the term "actual cost," the claimed deductions were properly disallowed.

Method of Averaging.

The portion of § 72-6-7(6), supra, involved in this point reads:

> "* * * determine the market value of the average annual output of such pro-

ductive mineral property * * *, less the actual cost of producing and bringing the output to the surface and of milling, treating, reducing, transporting and selling the same, over the period of five (5) years (or so much of such period as the property has been in operation) next preceding the year in which such return is required to be made. Provided, however, that any person may elect to have his output valuation computed on an annual basis instead of on a five-year average basis. * * *"

Section 72-6-7(6), supra, clearly authorizes the averaging of market value of the output over the four year period involved in this case. It is not clear whether an averaging method is authorized for the cost deduction. It depends upon whether the phrase beginning "over the period of five (5) years" modifies the "less the actual cost" phrase as well as the "average annual output" phrase.

For the tax year involved, 1970, it would be to Kaiser's advantage not to average the costs. It produced more tons of coal in 1969 and, thus, has greater production costs to be deducted in connection with that production. The advantage is in deducting the greater production costs for one year against an averaged output which includes years in which there was less production. It asserts, however, that this procedure results in a distortion when costs are related to the averaged production and, therefore, when the output is averaged, costs should also be averaged. The State does not disagree with Kaiser's position. It asserts that § 72-6-7(6), supra, can be read in both ways; that costs could be averaged or that costs could not be averaged.

We cannot determine the view of the property appeal board with certainty. Its finding No. 10 refers to averaged value of production less averaged costs of production, yet the remainder, which is the taxable value, was a figure which is not correct if costs have been averaged. Its finding No. 9 refers to total costs of production for the four year period, and this is an indication of cost averaging, yet the figure used is the cost figure for one year only. Its conclusion of law, as to a net assessable production amount, uses a figure indicating costs have not been averaged. We cannot say whether the property appeal board refused to average costs, or intended to average costs and made an arithmetical error. Thus, the administrative decision does not provide a guide to whether costs are to be averaged.

It is our view that a determination of the market value of an *average* annual output, less the actual cost, over the period of years involved requires an averaging of the costs. We so hold. We reach this result on the basis that the commas setting off the "less the actual cost" phrase are used to enclose and not to separate. State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969).

The decision of the property appeal board is reversed. The cause is remanded to that board for further proceedings consistent with this opinion. Such further proceedings shall consist of new findings based on the present record and without taking additional evidence. Section 72-25-19(H), supra.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

[redacted]

490 P.2d 975

KAISER STEEL CORPORATION, Respondent,

v.

PROPERTY APPRAISAL DEPARTMENT, Petitioner.

No. 9344.

Supreme Court of New Mexico.

Nov. 9, 1971.

[redacted]

Further ordered that the record in Court of Appeals Cause No. 582, 83 N.M. 251, 490 P.2d 968, be and the same is hereby returned to the Clerk of the Court of Appeals.

490 P.2d 975

STATE of New Mexico, Respondent,

v.

Andrew Michael BOGDAN, Petitioner.

No. 9353.

Supreme Court of New Mexico.

Nov. 17, 1971.

[redacted]

Further ordered that the record in Court of Appeals Cause No. 741, 83 N.M. 250, 490 P.2d 967, be and the same is hereby returned to the Clerk of the Court of Appeals.

[redacted]

490 P.2d 975

STATE of New Mexico, Respondent,

v.

Calvin D. WILLIAMS, Petitioner.

No. 9355.

Supreme Court of New Mexico.

Nov. 17, 1971.

[redacted]

Further ordered that the record in Court of Appeals Cause No. 697, 83 N.M. 185, 489 P.2d 1183, be and the same is hereby returned to the Clerk of the Court of Appeals.

490 P.2d 1232

STATE of New Mexico, Respondent,

v.

Egerald A. NELSON, Petitioner.

No. 9363.

Supreme Court of New Mexico.

Nov. 23, 1971.

Further ordered that the record in Court of Appeals Cause No. 703, 83 N.M. 269, 490 P.2d 1242, be and the same is hereby returned to the Clerk of the Court of Appeals.

490 P.2d 1232

Guadalupe HINOJOSA, Respondent,

v.

Allen NIELSON, Petitioner.

No. 9352.

Supreme Court of New Mexico.

Nov. 24, 1971.

Further ordered that the record in Court of Appeals Cause No. 706, 83 N.M. 267, 490 P.2d 1240, be and the same is hereby returned to the Clerk of the Court of Appeals.

490 P.2d 1233

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert James HEIM and Frederick W. Just, Defendants-Appellants.

No. 695.

Court of Appeals of New Mexico.

Nov. 12, 1971.

Fred M. Calkins, Jr., Matteucci, Franchini, Calkins & Michael, Albuquerque, for defendants-appellants.

David L. Norvell, Atty. Gen., C. Emery Cuddy, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of burglary defendants appeal asserting three points for reversal. The first point, failure of the trial court to grant defendants' motion for a directed verdict, is dispositive of the appeal. We reverse.

Shortly before 4:35 p. m. on September 11, 1970 the Cordeiro residence was burglarized. Among the items taken were two small novelty knives, a gun and a television set. An eye-witness identified one of the three men involved. The one identified is not involved in this action. Subsequently, at some time before 11:25 p. m. on September 11, 1970 the two defendants, in possession of the burglarized items at a motel, were arrested. This was some distance from the Cordeiro residence. The record is silent and there are no facts upon which inferences can be based as to how the defendants came into possession of the items taken from the Cordeiro residence.

Burglary is the unauthorized entry of a dwelling or other structure with intent to commit a felony or theft therein. Section 40A–16–3, N.M.S.A.1953 (Repl.Vol. 1970). Recently stolen property found in the possession of a defendant will not alone support a conclusion of guilt unless there is evidence of other circumstances connecting the defendant with the crime charged. State v. Graves, 73 N.M. 79, 385 P.2d 635 (1963). It is not enough that the testimony raised the strong suspicion of guilt. State v. Easterwood, 68 N.M. 464, 362 P.2d 997 (1961). The evidence and reasonable inferences that flow therefrom must exclude every reasonable hypothesis other than the guilt of the defendant. State v. Malouff, 81 N.M. 619, 471 P.2d 189 (Ct.App.1970).

Under the foregoing circumstances we cannot say that there are not other reasonable hypotheses which permit of defendants' innocence in view of the evidence presented by the State. State v. Seal, 75 N.M. 608, 409 P.2d 128 (1965).

Since we reverse for a failure of proof, rather than an error in the trial proceedings, the cause is remanded with instructions to discharge the defendants. State v. Malouff, supra.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

490 P.2d 1234

Dan PLATERO, Plaintiff-Appellant,

v.

T. Max JONES, and a Certain Portion of Land located at 5½ of 5½ Section 34, Township 13 North, Range 12 West in Bluewater Community, and All Other Persons Unknown Claiming any Right, Title or Easement in the property affected by this action, Defendant-Appellee.

No. 712.

Court of Appeals of New Mexico.

Nov. 5, 1971.

[redacted]

James Wechsler, Paul L. Biderman, Crownpoint, for appellant.

W. P. Kearns, Jr., Grants, for appellee.

OPINION

WOOD, Chief Judge.

Plaintiff claimed that a garbage dump located on land allegedly owned by defendant constituted a nuisance. He asserted he had been damaged by this alleged nuisance and that it should be enjoined. From an adverse judgment, plaintiff appeals. The appeal attacks certain findings of the trial court. Two legal rules, applicable to the findings, dispose of the appeal. Accordingly, we do not reach any substantive question concerning the law of nuisance.

[redacted] The essence of the attack on the findings is that the testimony which supports the findings is not credible. Plaintiff would have us substitute our judgment for that of the trial court, both as to the credibility of the witnesses and the weight to be accorded the evidence. This contention is contrary to an established applicable rule. That rule is that the reviewing court does not pass upon the weight of the evidence or upon the credibility of the witnesses; rather, it views the evidence in its most favorable light in support of the trial court's findings. Rutledge v. Johnson, 81 N.M. 217, 465 P.2d 274 (1970); Samora v. Bradford, 81 N.M. 205, 465 P.2d 88 (Ct. App.1970). There being evidence to support the findings, the attack made on the findings fails.

[redacted] Two of the challenged findings expressly deal with plaintiff's right to the relief sought at trial. The trial court found plaintiff "* * * failed to show any causal relationship between the existence of the garbage dump and the death of his livestock." This finding disposes of the damage claim based on the dead livestock. The trial court also found: "That the plaintiff failed to show that he owns Indian Allotment No. 1113, or that he is now entitled to the use of any part of it." This finding disposes of the damage claim based on cleaning up the garbage refuse which had been washed or blown onto the allotment from the dump. This finding also disposes of the claim for an injunction

since that claim was based on plaintiff's alleged interest in the Indian Allotment. Plaintiff specifically requested both of these findings. Plaintiff will not be permitted to complain on appeal because the trial court made the findings that he requested. Cochran v. Gordon, 77 N.M. 358, 423 P.2d 43 (1967).

Affirmed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

SUTIN, J., not participating.

490 P.2d 1235

STATE of New Mexico, Plaintiff-Appellee,

v.

Maurilio GARCIA, Defendant-Appellant.

No. 705.

Court of Appeals of New Mexico.

Nov. 5, 1971.

Wycliffe V. Butler, Butler & Colberg, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas L. Dunigan, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

COWAN, Judge.

Following a conviction of burglary under Section 40A–16–3, N.M.S.A.1953 (Repl. Vol. 6), defendant appeals.

We affirm.

The defendant asserts three points for reversal. Under Points I and II he complains that testimony regarding his use of narcotic drugs (heroin and methadone) and testimony of his prior convictions for petty larceny and misdemeanors was prejudicial and its introduction in evidence constituted reversible error. This testimony was elicited from the defendant on cross-examination by the State.

Our statutes provide: "A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, * * *" § 20–2–3, N.M.S.A.1953 (Repl. Vol. 4), and "The credit of a witness may be impeached by general evidence of bad moral character not restricted to his reputation for truth and veracity; * * *" § 20–2–4, N.M.S.A.1953 (Repl. Vol. 4).

"The trial court is allowed a broad discretion in controlling the extent of cross-examination of an accused directed at testing his credibility. The primary responsibility is on the trial court to determine

when the cross-examination should be limited, because the legitimate probative value on the credibility of the accused is outweighed by its illegitimate tendency, effect or purpose to prejudice him as a defendant. The discretion of the trial court in making this determination will not be disturbed on appeal, unless the appellate court can say the trial judge's action was obviously erroneous, arbitrary and unwarranted." State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966).

It is a long established rule that 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 credibility through securing from the witness on cross-examination admissions of specific acts of misconduct. The extent of cross-examination in this regard is controlled through the exercise of the trial court's discretion and, absent claimed abuse thereof, this court will not review the matter. State v. Holden, 45 N.M. 147, 113 P.2d 171 (1941); State v. Hargrove, 81 N. M. 145, 464 P.2d 564 (Ct.App.1970). The cases on which defendant relies, State v. Lord, 42 N.M. 638, 84 P.2d 80 (1938) and State v. Alberts, 80 N.M. 472, 457 P.2d 991 (Ct.App.1969), are distinguishable on their facts.

Under his Point III defendant urges that the failure of the trial court to rule on his motion for continuance constituted reversible error.

Trial was set for January 6, 1971. On December 30, 1970, the defendant filed a motion for continuance but proceeded to trial, after having announced ready and without renewing his motion or invoking a ruling by the trial court on the motion previously filed.

To preserve a question for review it must appear that a ruling or decision by the trial court was fairly invoked. Supreme Court Rule 21-2-1(20) (2), N.M.S. A.1953 (Repl. Vol. 4); Mitchell v. Allison, 54 N.M. 56, 213 P.2d 231 (1949); State v. Faulkenberry, 82 N.M. 553, 484 P.2d 773 (Ct.App.1971). In addition to his failing to preserve this question for review, no prejudice has been shown or argued by the defendant. Error, to warrant reversal, must be prejudicial. State v. Williams, supra.

There being no error in the record, the judgment and sentence of the trial court is affirmed.

It is so ordered.

WOOD, C. J. and HENDLEY, J., concur.

490 P.2d 1236

STATE of New Mexico, Plaintiff-Appellee,

v.

Johnny JAMES, Defendant-Appellant.

No. 693.

Court of Appeals of New Mexico.

Nov. 5, 1971.

Walter F. Wolf, Jr., Schuelke & Wolf, Gallup, for defendant-appellant.

David L. Norvell, Atty. Gen., C. Emery Cuddy, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

COWAN, Judge.

The defendant has appealed to this court from a judgment and sentence following his conviction of burglary and of buying, procuring, receiving or concealing stolen property.

We reverse as to the defense of insanity instruction and affirm as to the finding of voluntariness of the confession.

Defendant urges under point 1 that the trial court erred in its refusal to sustain a motion to suppress his confession. Defendant argues that his statement or confession was not voluntary because he was detained for approximately 24 hours without charges being filed against him, without his appearing before a magistrate and without a warrant being issued for his arrest. He further argues that the statement resulted from promises and inducements of leniency for his wife, that the statement was taken from him while he was insane, and that it was taken after he had advised the police that he did not want to make any statement and had refused further interrogation from policemen without an attorney being present.

Following receipt of information connecting the defendant and his wife with burglary of a trading post in Gallup, New Mexico, officers of the Gallup Police Department called at the place of business where defendant worked. He voluntarily accompanied them to the police station where he was placed under arrest as a parole violator following a telephone call made by one of the officers to the parole officer who advised that he had a "hold order" on the defendant. This occurred at approximately 4:30 P.M. on August 10, 1970. Defendant was advised of his rights but told the officers that he did not want to talk to them; that he wanted to wait and see a lawyer. No attempt was made

to interrogate him further at that time nor was a lawyer provided him then.

Defendant's wife had been placed in jail also. The following day, August 11, the defendant notified the officers that he wanted to talk with them. He was brought down from his cell and confessed to the crimes for which he was convicted, stating that his wife was not involved.

The record is not clear as to when the defendant learned that his wife was in jail, but he testified that the officers told him his wife would be freed if he confessed. The officers denied that any promises or inducements whatsoever were made to him. Defendant did not request an attorney at that time. He admitted that his rights had again been made clear to him before he gave his statement on August 11.

At a hearing, out of the presence of the jury, to determine the admissibility of the statement, the two officers testified, as did the defendant. There was no evidence that the circumstances surrounding the arrest, the fact that the defendant had been in jail overnight without arraignment, or the fact that he had no lawyer, in any way rendered the statement involuntary. That he was insane at the time he gave it is also unsupported by the evidence. There remains only the question of whether his statement was induced by a promise of freedom for his wife. We think it was not.

The trial court ruled, as a matter of law, that the confession was voluntary before submitting it to the jury under proper instructions requiring the jury to consider any questions concerning whether it was voluntary, as well as its truth or the weight to accord it. The disputed facts were resolved in favor of the state and no constitutional right was denied the defendant. State v. Gutierrez, 79 N.M. 732, 449 P.2d 334 (Ct.App.1968); Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964).

Under point 2 defendant complains that the trial court erred in giving instruction number 5 and in refusing defendant's requested instructions 1, 2 and 4, relating to plaintiff's defense of insanity at the time of the alleged crimes.

The court's instruction number 5 is:

"The Defendant has also entered a plea of Not Guilty by reason of Insanity, and it is your function to determine the issue raised by this plea, whereby he alleges that he was insane at the time of the commission of the offense.

"The law presumes that the defendant was sane. That presumption may be rebutted, but is controlling until overcome by a preponderance of evidence. A preponderance of evidence is such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. The burden of proving insanity is on the defendant; that is to say, it is incumbent upon him to establish by a preponderance of evidence that he was insane at the time of committing the offense charged.

"The issue for you to determine is whether or not the defendant was sane or insane at the time of the commission of said offense. Although you may consider evidence of his mental state before and after that time, such evidence is to be considered only for the purpose of throwing light upon his mental condition as it was when the offense was committed.

"Insanity, as the word is used in these instructions, means such a diseased and deranged condition of the mental faculties of a person as to render him incapable of knowing the nature and quality of his act and of distinguishing between right and wrong in relation to the act with which he is charged and that disease of the mind prevented the defendant from committing the offense.

"The test of accountability is this: Did the party have sufficient mental capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another, and in itself wrong? Further, you must decide whether dis-

ease deprived the defendant of whatever will power he happened to have. Stated another way, before you can find the defendant not guilty by reason of insanity, you must be satisfied that at the time of committing the act, the accused, as a result of disease of the mind: (a) Did not know the nature and quality of the act; or (b) Did not know that it was wrong; or (c) Was incapable of preventing himself from committing it.

"You are instructed that if the defendant had the capacity to appreciate the nature and quality of the act, that he did know that it was wrong and was capable of preventing himself from committing it, he was sane under the law and is responsible to the law for the act thus committed."

The defendant urges that this instruction is erroneous because it requires that the defendant prove his insanity by a preponderance of the evidence; it failed to advise the jury as to the ultimate burden of proof on the issue of insanity; the words "deranged condition of the mental faculties" should not have been used; the disjunctive term "or" should have been used in the fourth paragraph thereof instead of the conjunctive term "and"; it defines the test of accountability improperly; and it should have advised the jury to first determine the defendant's guilt or innocence of the crime charged without consideration of the issue of insanity.

We agree that the court's instruction number 5 was erroneous for all of the reasons above set forth. Defendant's claim of error under point 2 is meritorious.

In State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936), the Supreme Court definitively sets forth the basis for, and procedure under, a plea of not guilty by reason of insanity at the time of the commission of the offense, in the following words:

"A plea of insanity by one accused of the commission of a crime may be likened to a plea of confession and avoidance in a civil action. The defendant admits that he committed the act or acts charged against him, but seeks to avoid a judgment or penalty on account of such act or acts, and to absolve himself from liability, on a sound legal theory.

"In a criminal case the prosecutor may rest upon the presumption of sanity in establishing a prima facie case. It is then incumbent upon the defendant to overcome that presumption by competent evidence and to reasonably substantiate his plea of insanity. Such evidence must reasonably tend to show that at the time of the commission of the crime the defendant was incapable of distinguishing right from wrong so as to excuse him from the legal consequences of his act.

"Stated another way: The state is obliged to establish the defendant's guilt beyond a reasonable doubt. Crimes involving a guilty intent cannot be successfully prosecuted against one charged who is insane, because an insane person does not have the capacity to form a criminal intent. Therefore, the burden of proof is upon the state to prove that the defendant is sane beyond a reasonable doubt. In the first instance, this burden is met or satisified by the presumption that the defendant is sane.

"It then becomes the duty of the defendant and upon him is the onus or burden of going forward with evidence to overcome this presumption.

"When the defendant has put in evidence reasonably tending to show him insane, the problem is then to determine whether it is sufficient to take the case to the jury. This is a question for the court to determine. Therefore, when all the evidence is in, if there has been adduced competent evidence reasonably tending to support the fact of insanity urged by the defendant as a defensive issue in the case, it is the duty of the court to instruct on the question of insanity. Otherwise, the court may properly refuse such instruction. 14 R.C.L. pp. 799–800, § 58; State v. Martinez, 30 N.M. 178, 230 P. 379."

This rule was followed in State v. Moore, 42 N.M. 135, 76 P.2d 19 (1938), where it was said:

"'If the only evidence tending to prove insanity is such that it is disbelieved and disregarded by the jury, then the presumption of sanity remains and should have the same effect as if no evidence had been introduced tending to prove insanity. The jury might well be instructed that in weighing the evidence they may not consider the presumption, yet, if uninfluenced by the presumption they reach the conclusion that the evidence tending to show defendant's insanity is not entitled to credit and is disregarded by them, the presumption of sanity may then be regarded as remaining in force. * * *'

"The sanity of the accused must be proven by the state just like any other material fact. The determination of that fact from the evidence is left to the jury. * * *"

This rule of law has been consistently followed in this state and we see no reason to depart from it. State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct.App.1969). Nothing said in State v. Torres, 82 N.M. 422, 483 P.2d 303 (1971), is inconsistent with what we have said here.

Prior to 1954 this jurisdiction had adopted the rule from the McNaughten Case, 10 Clark & F. 199, 8 Eng. Reprint, 718, the so-called "right and wrong test". In State v. White, 58 N.M. 324, 270 P.2d 727 (1954), the court extended the McNaughten rule to include a third test, stating:

"For the purpose of clarifying the rule of law applicable to the defense of insanity in criminal cases in this jurisdiction, we state it to be as follows: 'The jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind * * * (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it. * * *'"

Satisfactory proof of the existence of either one or more of the three tests is sufficient to bar a guilty verdict. The definition of insanity, as set forth in *White*, is the proper one upon which to base instructions and establishes the rule in this jurisdiction where the question goes to the defendant's plea of insanity at the time of the commission of the crime. State v. Upton, 60 N.M. 205, 290 P.2d 440 (1955).

We further hold that, when the issue of insanity has been properly raised, the jury should be instructed to consider first whether the defendant is guilty of the crime charged, without consideration of the question of insanity. Should the defendant be found not guilty, there would be no necessity for further consideration. Should the defendant be found guilty, then the jury would determine whether the defendant is not guilty by reason of insanity.

The trial court's instruction number 5 being erroneous, defendant's conviction and sentence is reversed and a new trial awarded him.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

490 P.2d 1240

Guadalupe HINOJOSA, Plaintiff-Appellant,

v.

Allen NIELSON, Defendant-Appellee.

No. 706.

Court of Appeals of New Mexico.

Oct. 15, 1971.

Certiorari Denied Nov. 24, 1971.

Lorenzo A. Chavez, Melvin L. Robins, Albuquerque, for appellant.

James A. Parker, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for appellee.

OPINION

WOOD, Chief Judge.

The trial court held that plaintiff assumed the risk of a slip and fall as a matter of law and granted summary judgment in favor of defendant. Plaintiff's appeal asserts there was a factual issue as to assumption of risk and summary judgment was improper. See Coe v. City of Albuquerque, 81 N.M. 361, 467 P.2d 27 (1970). We agree and reverse.

Plaintiff was employed by defendant as a farm and ranch laborer. Because of a prior injury to his leg or ankle, he was using crutches. It is undisputed that defendant told plaintiff to stop using the crutches and to use a cane. The "cane" was a broken shovel handle. Two or three days later, plaintiff went to a cattle pen to fill a water trough. He broke the ice in the trough with the shovel handle. He started to fill the trough, using a plastic hose. The hose was stiff. While shoving the hose into the trough with his left hand, and holding the shovel handle for support with his right hand, he slipped and fell backward. Plaintiff alleges he reinjured himself in this fall. The surface in the area was frozen ice and mud.

In his deposition, plaintiff testified that he didn't want to use the shovel handle because he knew it was unsafe; that he felt the handle was unsafe both before he used it and when he used it; that he thought the handle was unsafe because he might slip with it and that's what happened. He also testified the handle would be more dangerous if used on ice or snow. This testimony would appear to meet the first two elements of assumption of risk—that a dangerous situation existed and that plaintiff knew of the dangerous situation. We do not concern ourselves, in this opinion, with the third element—voluntary ex-

posure to the danger. See Francis v. Johnson, 81 N.M. 648, 471 P.2d 682 (Ct. App.1970); N.M.U.J.I. 13.10. Defendant relies on this deposition testimony to support the summary judgment.

However, plaintiff also testified in his deposition that he never felt the handle was unsafe to the extent he would fall; that he knew the handle was dangerous but he never thought "I would slide or nothing;" that he didn't think he "would fall or anything like that." He also testified that he "never thought" the handle would be more dangerous if used on ice or snow. This deposition testimony raises a question as to whether plaintiff actually knew or appreciated the specific danger of slipping and falling when using the handle as a cane. See Tapia v. Panhandle Steel Erectors Company, 78 N.M. 86, 428 P.2d 625 (1967).

The two preceding paragraphs show that plaintiff gave conflicting testimony in his deposition. Where there is such a conflict at trial, the conflict is to be resolved by the trier of fact. Hughes v. Walker, 78 N.M. 63, 428 P.2d 37 (1967); Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct.App.1970). There has been no trial in this case; summary judgment was granted. "In considering the merits of a motion for summary judgment, it is not the function of the trial court or the appellate court to weigh evidence. A summary judgment may be granted only where the facts are clear and undisputed. * * *" Johnson v. J. S. & H. Construction Co., 81 N.M. 42, 462 P.2d 627 (Ct.App.1969). There being a factual conflict, the summary judgment was improper.

Defendant asserts this case is controlled by Williamson v. Smith, 82 N.M. 517, 484 P.2d 359 (Ct.App.1971), cert. granted April 14, 1971, and not yet decided by the New Mexico Supreme Court. We disagree. In *Williamson,* it was undisputed that the plaintiff knew of the specific danger involved. Here, there is a conflict in plaintiff's testimony.

Defendant also seeks to raise an issue as to an asserted conflict between plaintiff's deposition testimony and an affidavit of plaintiff filed in opposition to the motion for summary judgment. See Apodaca v. Atchison, Topeka and Santa Fe Railroad, 67 N.M. 227, 354 P.2d 524 (1960). We do not reach this question because plaintiff's conflicting deposition testimony raised a factual issue to be resolved by the trier of the facts.

The summary judgment is reversed. The cause is remanded with instructions to set aside the summary judgment and reinstate the case on the trial calendar.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

COWAN, J., not participating.

490 P.2d 1242

STATE of New Mexico, Plaintiff-Appellee,

v.

Egerald A. NELSON, Defendant-Appellant.

No. 703.

Court of Appeals of New Mexico.

Oct. 29, 1971.

Certiorari Denied Nov. 23, 1971.

Walter R. Parr, Crouch & Lenko, Las Cruces, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, C. Emery Cuddy, Jr., Asst. Atty. Gen., for plaintiff-appellee.

OPINION

SUTIN, Judge.

Nelson was convicted of armed robbery, § 40A-16-2, N.M.S.A.1953 (Repl. Vol. 6). He argues: (1) the trial court should have instructed the jury on insanity as a defense; (2) the state failed to prove "the necessary felonious intent."

It is not disputed that Nelson used a gun to force a gas station attendant to open a cash box, hit the attendant on the head with the gun, took the money, and that the gun discharged prior to defendant's taking the money from the station cash box. The bullet came within three or four inches of the attendant's right ear.

The only arguments raised relate to mental capacity.

(a) Was Nelson Entitled to an Instruction on the Issue of Insanity as a Defense?

Nelson was in the army for three years and one month, two years of which was in Germany. He was away from his family for about two years, was depressed and started taking black pills called "speed" for about three or four days before the robbery was committed. The "speed" pills were amphetamines. This was an experiment to uplift himself. He denied habitual use. On the night of the robbery, Nelson took two amphetamines and some mescaline. He remembers what happened, but he claimed he had no control over what happened.

A psychiatrist examined Nelson in the county jail on two occasions at the request of the trial court to determine Nelson's mental state at the time of the robbery. The examinations were two and three months after the robbery.

From Nelson's description of his mental state, Nelson showed symptoms consistent with amphetamine intoxication and also symptoms of the use of mescaline. This was not diagnostic. There would have to be amphetamines in the urine to corroborate the diagnosis. No such evidence was obtained. The doctor's opinion was based solely on his conversations with Nelson. Nelson did not lose orientation and did not feel confused but he did experience auditory and visual hallucinations and a marked feeling of depersonalization. At the time of the robbery, Nelson had feelings of depersonalization as if he were mechanical-

ly operated. This means Nelson felt as if he were two persons, one that was watching while being in this mental state, one being unable to control the other. He had diminished control of his actions because he was in a state of amphetamine intoxication. He had lost contact with reality. It was not a mental illness, but it closely resembled paranoid schizophrenia. In the doctor's opinion, Nelson was in a state of depersonalization to such a degree that he was unable to know what he was doing exactly; the part of him that was doing the acting did not know right from wrong; the other part of him knew right from wrong and wanted to be stopped from committing the crime. He found no significant degree of insanity or mental illness.

Nelson's evidence shows nothing more than temporary effects of drug "intoxication." The trial court instructed the jury on this issue. Since Nelson did not have a diseased mind, the evidence does not fall within the rules set forth in State v. White, 58 N.M. 324, 270 P.2d 727 (1954); State v. Flores, 82 N.M. 480, 483 P.2d 1320 (Ct.App. 1971); State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct.App.1969). The evidence is not sufficient upon which to require an instruction on insanity.

(b) Did the State Fail to Prove the Necessary Felonious Intent?

Nelson contends that the case should have been dismissed because his voluntary drug intoxication had rendered him mentally incapable of forming an intent to steal. "Theft" is an element of the crime of robbery. Section 40A-16-2, supra. It includes the concept of criminal intent. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968); State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct.App.1969). The trial court instructed the jury on the general issue of intent to the effect that if the jury was not convinced beyond a reasonable doubt that Nelson was acting of his own free will, then Nelson did not intend to commit the offense. Voluntary drug intoxication falls in the same classification as voluntary alcohol intoxication. Couch v. State, 375 P.2d 978 (Okla.Cr.1962). When a defendant claims he was so intoxicated as to be unable to form the necessary intent, the question of intent is a matter for the jury. State v. Rayos, 77 N.M. 204, 420 P.2d 314 (1967). The evidence in this case, viewed most favorably on behalf of the state, created an issue of fact for the jury and not a matter of law for the trial court. The jury believed Nelson had the necessary felonious intent. This denies us the right, as a court of review, to grant relief, because we do not sit as a second jury.

The trial court did not err in denying Nelson's motion to dismiss.

We affirm.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

491 P.2d 160

CHRYSLER CREDIT CORPORATION,
Plaintiff-Appellee,

v.

BEAGLES CHRYSLER–PLYMOUTH et al.,
Defendants-Appellants.

No. 9291.

Supreme Court of New Mexico.
Nov. 29, 1971.

Morris Stagner, Clovis, for defendants-appellants.

Rowley, Hammond, Murphy & Rowley, Richard F. Rowley, II, Clovis, Anderson, Edwards & Warnick, Lubbock, Tex., for plaintiff-appellee.

OPINION

McMANUS, Justice.

Appellee, hereinafter referred to as Chrysler Credit, instituted a suit in replevin against appellants, hereinafter referred to as Beagles, for recovery of certain motor vehicles in possession of Beagles under a "floor plan" financing arrangement with Chrysler Credit. Included in the complaint was a prayer for recovery on notes executed by Beagles, in addition to the replevin action. Certain vehicles were seized under the writ of replevin; other vehicles were not seized for the reason they had been sold to third parties by Beagles; also, other vehicles were in transit. The parties stipulated that the vehicles seized pursuant to the writ of replevin were subsequently sold and the proceeds applied to the indebtedness of Beagles. The trial was held before the court and judgment was granted against Beagles for a deficiency of $11,621.42, plus $165.05 "shrinkage" on 1971 model vehicles which had not been replevied because they had not reached Beagles' possession but were stopped in transit. In addition, the court granted appellee judgment for $36,646.71, being the amount claimed for vehicles disposed of by Beagles to third parties. In addition, accumulated interest, plus storage, was awarded, as well as attorney fees. The sum of the above, less $48.46 allowed as a set-off resulted in a judgment of $57,075.41. Chrysler Credit presented a cost bill which included a bond premium for a replevin bond in the amount of $3,674.00. The court also awarded this amount over the objection of Beagles.

Beagles' claim that the trial court erred and was without jurisdiction to enter judgment assessing damages in favor of Chrysler Credit in excess of that permitted in §

22–17–1, N.M.S.A. (1953 Comp.). The section referred to reads as follows:

> "Any person having a right to the immediate possession of any goods or chattels, wrongfully taken or wrongfully detained, may bring an action of replevin for the recovery thereof and for damages sustained by reason of the unjust caption or detention thereof."

We have no quarrel with the above statute or its contents. A reading of Chrysler Credit's complaint shows that their claim, in addition to replevin of vehicles in Beagles' possession, also prays for payments due under promissory notes covering vehicles sold to third persons and not under the control or possession of Beagles. Chrysler Credit also claims moneys due from Beagles as regards vehicles in transit and not yet received by Beagles. Beagles' answer was in the nature of a general denial.

The matters referred to above were not called to the attention of the trial court and were brought up for the first time on this appeal. See Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968), wherein the matter not brought to the attention of the trial court cannot be raised for the first time on appeal. Concerning jurisdiction, all parties in their respective findings conceded that the court had jurisdiction of the matters before it.

The only statutory authority in New Mexico dealing with costs of bonds is § 28–1–3, N.M.S.A. (1953 Comp.). This section makes no specific reference to replevin bonds. The replevin section makes no reference to costs. Notwithstanding, the costs were properly allowed since § 28–1–3, supra, is general enough to include replevin bonds. The applicable language is:

> "* * * [I]n all actions and proceedings a party entitled to recover costs therein shall be allowed and may tax and recover such sum paid such a company for executing any bond, recognizance, undertaking, stipulation or other obligation therein * * *, during each year the same has been in force."

In a very early Washington case, Stilwell Bros., Inc. v. Union Machinery & Supply Co., 94 Wash. 61, 161 P. 1048 (1916), the court, in interpreting a similar statute, stated:

> "* * * There has been some difference of opinion among the courts whether [the charge for a replevin bond] was within the legal meaning of the words 'costs and disbursements,' but we think there can be no question under our present statute * * *. It [has been] held that a premium on an appeal bond [is] a proper item to be taxed as costs, and that a proper construction of the statute mentioned [requires] that we give meaning to the words:
>
> "'* * * In all actions and proceedings, the party entitled to recover costs may include therein such reasonable sum as may have been paid such company for executing or guaranteeing any such bond or undertaking therein as may be allowed by the court or judge before whom the action or proceeding is pending'
>
> "—thereby making a special provision for actions and proceedings and holding specifically that the statute was not limited, as there contended, to the recovery of premiums paid by receivers and others acting in a fiduciary relation."

See also Metropolitan Bldg. Co. v. Curtis Studio of Seattle, 138 Wash. 381, 244 P. 680 (1926).

The language in § 28–1–3 is substantially the same language as quoted by the court in Stilwell. Under the circumstances, the only conclusion that can be reached is that the New Mexico statute applies to replevin actions just as the Washington statute did in the cited case.

The section referred to above also specifies that the amount recoverable cannot exceed one per cent on the amount of the bond. Even though the judgment finally recovered was in the amount of $57,075.41, the amount of $3,674.00 awarded as the cost of the premium of the bond was not excessive. The original suit involved a sum

of approximately $400,000 and the initial bond was for that amount.

Finally, § 22-17-19, N.M.S.A. (1971 Pocket Supp.) states:

> "The district court clerk shall docket the action in replevin and the cause *shall then proceed as in other civil actions.*" (Emphasis ours.)

In the instant cause, then, § 28-1-3, supra, is logically applicable.

The judgment of the trial court is affirmed.

It is so ordered.

STEPHENSON and MONTOYA, JJ., concur.

491 P.2d 162

RIO GRANDE GAS COMPANY,
Plaintiff-Appellee,
v.
Ray E. GILBERT, Jr., Defendant-Appellant.
No. 9296.

Supreme Court of New Mexico.
Nov. 29, 1971.

Keleher & McLeod, John B. Tittmann, Albuquerque, for defendant-appellant.

Bivins & Weinbrenner, Las Cruces, for plaintiff-appellee.

OPINION

McMANUS, Justice.

This suit was brought in the District Court of Dona Ana County in 1967. The complaint alleged that defendant-appellant Gilbert was indebted to plaintiff-appellee Rio Grande Gas Company in the sum of $6,678.69. The indebtedness arose during the years the appellant served as president of Rio Grande Gas Company.

Appellant answered appellee's allegations by way of general denial and counterclaimed as against the appellee. The counterclaim alleged that the appellant had expended, during the years he served as president, the sum of $9,653.76 for the benefit of the appellee. The counterclaim further alleged that after allowance for all offsets and credits, appellee was indebted to the appellant in the sum of $1,353.76 and that appellee also owed appellant severance and relocation expense in the amount of $2,856.36. The total amount thus counterclaimed was $4,210.12. The appellee's reply to the counterclaim amounted to a general denial of all allegations.

Appellee submitted interrogatories to appellant pursuant to Rule 33, New Mexico Rules of Civil Procedure, and moved for production of documents pursuant to Rule 34, New Mexico Rules of Civil Procedure. After several delays and extensions, the court, upon motion of the appellee, granted a default judgment against appellant under Rule 37(b) (2), New Mexico Rules of Civil Procedure, for refusal to obey the order to produce. Motion to vacate the default was denied and final judgment was entered in the amount of $6,678.69.

Appellant filed a motion to vacate and set aside the final judgment. Since the motion was not acted on within 30 days, and since he felt there was a possibility the motion might be denied by operation of law, appellant appealed. The cause, No. 8903 on the Supreme Court docket, was subsequently dismissed as premature.

The case was returned to the district court and thereafter appellant's motion to set aside the court's prior entry of default and judgment was denied. It is from this order, entered December 16, 1970, that the appellant appeals.

Appellant's contention is that he did in good faith attempt to comply with the court's order to produce documents and was prevented from doing so by the appellee. Further, appellant contends if the court knew he had attempted in good faith to obey the order, but refused to investigate the facts, then the failure by the court to vacate the default was error and an abuse of discretion.

In order to determine if, indeed, there was error, we must look to the facts as established by the existing record.

On April 15, 1968, appellee submitted interrogatories to appellant pursuant to Rule 33, supra. On April 23, 1968, appellee filed a motion for production of documents by the appellant, pursuant to Rule 34, supra. On July 3, 1968, appellee filed a motion for an order to compel the appellant to answer the interrogatories. On August 14, 1968, the court ordered appellant to produce documents within 20 days of the date of the order and to answer interrogatories not later than 20 days of the date of the order. On September 6, 1968, appellee moved the court to dismiss appellant's counterclaim and render judgment by default on the basis that appellant had failed to comply with the court's orders of August 14, 1968.

Hearing on the above motion was set for September 13, 1968. One day prior to the hearing, answers to the interrogatories were filed. The appellant also agreed to comply with the order to produce documents providing he could be present at the time of examination by the accountants of the appellee. Following this agreement, for a period of some two months, the accountants and the appellant could never seem to come together; thus the appellee never examined the appellant's documents.

On November 12, 1968, the appellee filed an amended motion alleging the above facts and further alleging that the appellant, by his delaying tactics, was refusing to comply with the court's order to produce documents, and as a result of this ostensible refusal appellee was entitled to a default judgment.

Hearing on the motion was set for December 11, 1968, and the appellant was, through his attorney of record, duly notified. On the day of the hearing, neither the appellant nor his attorney put in an appearance. Following the hearing, the court ordered the default judgment be taken against appellant. The motion on the part of the appellant to vacate the order was subsequently denied.

Prior to the hearing on the motion to vacate the default judgment, the appellant changed attorneys. The court held that the change in attorneys and the entry of appearance were contrary to §§ 18–1–13 and 21–1–1(89) of the laws and procedures of New Mexico. The court noted that all those pleadings filed by Mr. Tittmann, the proposed new attorney, would be stricken from the file. The court also found that the requested extension of time requested by the attorney was scandalous and contained unverified, unethical accusations and would

not be allowed by the court. Subsequent proceedings, discussed later in the opinion, resulted in appellant's motion to vacate the default judgment being denied on December 16, 1970.

Appellant claims the court erred in failing and refusing to vacate and set aside the default order of December 20, 1968, and the final judgment entered March 19, 1969.

New Mexico has no cases that establish the criteria necessary to invoke Rule 37(b)(2), supra, for failure to produce documents. This court has stated, however, that failure to appear for deposition must be wilful; there must be a showing of a conscious or intentional failure to appear. Such a showing will result in a finding of wilful failure to appear and the sanctions of Rule 37, supra, will be imposed. See Kalosha v. Novick, 77 N.M. 627, 426 P.2d 598 (1967). Other jurisdictions have applied the same criteria as noted above to cases where the party has failed to produce documents pursuant to court order. In Oaks v. Rojcewicz, 409 P.2d 839, 840 (Alaska 1966), the court stated:

> "In our view the record must establish a willful refusal on the part of a party ordered to make discovery before the court is authorized to dismiss the party's claim under Civ.R. 37(b) (2) [c]."

In a California case, Filipoff v. Superior Court of Los Angeles County, 56 Cal.2d 443, 15 Cal.Rptr. 139, at 143, 364 P.2d 315 at 319 (1961), the court stated:

> "Since the subpoena called for the production of those documents, the mere bringing of them to the deposition was not, in any real sense, 'production.' The refusal [of the attorney] to let the documents out of his possession, was tantamount to a refusal to produce * * *."

In a Utah case, the defendant, who had counterclaimed, was ordered to produce documents which he failed to produce. Several months later, at the pretrial conference, he was again ordered to produce documents and again he failed to so comply. The plaintiff filed a motion for default judgment. At the hearing, defendant argued that he had not wilfully failed to produce since he did not have the documents, even though he had testified to the contrary at the initial hearing several months previous. The court granted the default judgment. The Utah Supreme Court, in Tucker Realty, Inc. v. Nunley, 16 Utah 2d 97, 396 P.2d 410, 412 (1964), stated:

> "We recognize that the granting of a judgment against a party solely for disobeying an order to cooperate in discovery procedure is a stringent measure which should be employed with caution and restraint and only where the failure has been wilful and the interests of justice so demand. Except in very aggravated cases, less serious sanctions undoubtedly could be applied to accomplish the desired result, particularly where there is any likelihood of injustice by depriving a party of a meritorious cause of action or defense. Whether the failure to comply with the court's order has been wilful and whether the circumstances are so aggravated as to justify the action taken is primarily for the trial court to determine. Unless it is shown that his action is without support in the record, or is a plain abuse of discretion, it should not be disturbed. * * *"

In a 1958 Illinois case, Sager Glove Corp. v. Continental Casualty Co., 19 Ill.App.2d 568, 154 N.E.2d 833 (1958), plaintiff repeatedly failed to comply with an order to produce documents and to submit its president to complete a deposition. Defendants first made motion for deposition by plaintiff's president in November, 1956. Plaintiff failed to comply and defendants gave notice that they would move for an order to dismiss. Plaintiff was ordered to produce its president in January, 1957. The deposition was commenced and continued through several months due to the failure of the deponent to appear. In September, 1957, the defendants obtained an order for production of documents. In October, defendants moved to dismiss for failure to comply with the September order. The matter was continued through November and finally in December, 1957, the motion

to dismiss was granted. On appeal, the Appellate Court of Illinois sustained the trial court. It stated:

"Plaintiff had several opportunities to comply with the deposition and discovery orders but complied fully with none and only partially with one. For this reason * * * we cannot say that the court abused its discretion in dismissing plaintiff's suit.

"* * * [I]f a party fails to produce documents as ordered by the court it is proper to strike his pleading and enter judgment against him as in default. * * * The trial court had the responsibility to uphold the dignity and authority of the court and we cannot say that the serious step taken was not a proper exercise of discretion."

In order to apply any of these holdings to the case before us, we must once again look at the record. The following facts are presented by the record and are uncontradicted:

1) A motion to produce documents was filed by appellee on April 23, 1968.

2) On August 14, 1968, the trial court ordered the appellant to produce the above called for documents within 20 days of the date of the order.

3) When appellant failed to comply with the above order, appellee moved the court to dismiss the counterclaim and render a default judgment on September 6, 1968.

4) A hearing on the motion was scheduled for September 13, 1968. Prior to the motion hearing, however, the appellant answered interrogatories and agreed to produce documents at the office of his attorney for inspection by appellee's accountants.

5) On September 14, 1968, appellant brought a number of boxes and brief cases to the office of appellee's attorney without advance notice. Appellee's attorney had a previous appointment and the documents were not left.

6) On September 27, 1968, appellee's accountant flew to Las Cruces from Phoenix, Arizona. He went to the office of appellant's attorney but the documents were not available for inspection, the reason being that the appellant was in the hospital in El Paso and he wanted to be present when the accountant went over them. The appellant's attorney did suggest that the accountant come to El Paso and he could go over the documents in the hospital room. The accountant returned to Phoenix.

7) In early October, 1968, appellant took all of his personal records to Phoenix in order that the appellee's accountants could examine them there. The accountant handling the case was on vacation; consequently, appellant returned to Las Cruces.

8) Following this trip, appellant contacted the accountants, by long distance telephone, some two weeks later. The substance of that conversation included a statement to the effect that the accountants had been ordered, by Willis Umholtz, representative of the appellee, not to discuss the case with the appellant nor look at any of his records without arranging an appointment with appellant's attorney.

9) In early November, appellant made another trip to Phoenix for the purpose of handing the documents to the accountants. At that time, the only communication was by telephone.

10) After this trip, on November 12, 1968, the appellee filed another motion to dismiss and enter a default judgment.

11) The appellant failed to appear at said hearing due to the fact that his attorney failed to notify him.

It is at this point in the litigation that the record becomes somewhat muddled. Around the middle of February, 1969, the appellant released his then attorney, R. E. Riordan, and then retained the law firm of Keleher & McLeod. John B. Tittmann of the Keleher firm wrote the district court and informed him that the firm had been employed by the appellant and that he, Tittmann, was filing an entry of appearance, motion for extension of time, motion for

oral argument or hearing, and request to plaintiff to admit facts. Following this letter and an order by the court denying all of the above pleadings, appellant filed the proper documents under Rule 89, New Mexico Rules of Civil Procedure, for change of attorney.

There is no doubt that the appellant failed to produce documents as ordered by the court. The question, then, is whether or not the appellant's failure was wilful and, if so, should he be denied relief.

All of appellant's stated attempts to comply with the court's order came well after the appointed time for their submission. These attempts to comply were all attendant with circumstances that would not lend an air of complete earnestness; for example, the appellant appeared at opposing counsel's office on a Saturday, close to noon, and failed to leave the documents for examination; the appellant's trips to Phoenix were without advance notice; the trip of appellee's accountant to Las Cruces, although prearranged, was useless since appellant was in an El Paso hospital and his attorney refused the accountant access to the documents unless he went to El Paso and examined them in the appellant's hospital room. In fact, none of the actions of the appellant were geared with a real attempt to comply with the court's order.

In Brookdale Mill v. Rowley, 218 F.2d 728, (6th Cir. 1954), the court said:

> "* * * [F]ailure to act, as well as action, may be willful, New Union Coal Co. v. Walker, 182 Ark. 460, 31 S.W.2d 753; Donk Bros. Coal & Coke Co. v. Peton, 95 Ill.App. 193; and that a willful violation of a provision of a statute or regulation is any conscious or intentional failure to comply therewith, as distinguished from accidental or involuntary non-compliance, and that no wrongful intent need be shown to make such a failure willful. Cf. Roberts, Johnson & Rand Shoe Co. v. Dower, 7 Cir., 208 F. 270; In re Pierce, 163 N.C. 247, 79 S.E. 507; * * *."

Further, in the cause before us there are indications that the trial court made a distinct effort to expedite the matter, as can be seen by the delay of orders and the correspondence between parties, and between the parties and the court. We see no abuse of discretion on the part of the trial court that should change the result.

The decision of the trial court will be affirmed.

It is so ordered.

OMAN and STEPHENSON, JJ., concur.

491 P.2d 166

H. H. TRICKEY et al., Defendants-Cross-Claimants-Appellants,

v.

Helena J. Harris ZUMWALT, Defendant-Cross-Defendant-Appellee,

v.

ALBUQUERQUE NATIONAL BANK, Executor of the Estate of Evelyn K. Giant McDowell, Deceased, Defendant-Appellee.

No. 9298.

Supreme Court of New Mexico.

Nov. 29, 1971.

Modrall, Sperling, Roehl, Harris & Sisk, Peter J. Adang, Albuquerque, for appellants.

John E. Hall, Albuquerque, for Zumwalt.

OPINION

COMPTON, Chief Justice.

On October 1, 1964, appellants entered into a real estate sales contract with appellee Zumwalt for the sale of land for $60,000.00, $5,000.00 cash, and the balance payable in annual installments.

On November 24, 1969, the State of New Mexico commenced condemnation proceedings against the property involved, eventually acquiring the entire tract. In accordance with § 22-9-43, N.M.S.A.1953 Comp. (1971 Supp.), the State deposited an amount equal to its initial offer, $27,000.00, into the registry of the court, and then took immediate possession. In answering the condemnation proceeding, appellee and appellants alleged the value of the land to be $160,000.00.

On February 18, 1970, pursuant to the terms of the contract, appellants notified appellee that she was in default of the contract in the amount of $9,486.66, principal and interest, and that unless this amount was paid within thirty days, the contract would be terminated and that all previous payments retained as rentals pursuant to language set forth in the contract. The cause was heard by the court and the court held that the application of the condemnation deposit to the balance of the contract, cured any past default. From the ruling of the court the appellants have appealed.

Subsequently the State deposited an additional $15,000.00 into the registry of the court, which sum was credited to the balance due on the contract. These credits left an alleged balance of principal and interest of approximately $9,500.00, which amount is disputed by appellee.

The decisive question is whether any part of the condemnation money deposited by the State could be applied to cure appellee's default without impairing the sellers' security in the deposit. We think not. By allowing the deposited funds to be used to cure the delinquent amounts, the court extinguished any right of recovery that the vendors had against the purchaser for the delinquent balance, thus impairing the security of the vendors by the amount of the delinquent balance. In Mesich v. Board of Com'rs of McKinley County, 46 N.M. 412, 129 P.2d 974, we adopted the position that a vendor in a real estate sales contract holds the legal title as trustee for security only. When this security is condemned by one vested with the power of eminent domain, the award, in this instance the preliminary deposit prior to final determination of the award, stands in place of the land and is security for performance of the contract and is subject to liens just as if it were the land. See 2 Nichols on Eminent Domain, § 5.74.

We do not decide the issue of appellee's alleged default, only that the condemnation

deposit cannot be used to cure any default under the real estate sales contract. The record discloses, however, that from the due date of the first installment payment there is a record of delinquent payments and in some years no payment at all was made as of the due date. Even though the appellee was continually delinquent in paying on the contract, appellants refrained from declaring a forfeiture of the contract until the condemnation suit was instituted.

The cause is reversed and remanded with instructions to the trial court to enter an order disbursing the funds in a manner not inconsistent with this opinion and to determine, from the record made, the issue of appellee's default as of March 18, 1970.

It is so ordered.

STEPHENSON and MONTOYA, JJ., concur.

491 P.2d 168

Elizabeth JACOBSON, Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant-Appellee.

No. 9280.

Supreme Court of New Mexico.

Nov. 29, 1971.

Thomas D. Schall, Jr., Albuquerque, for plaintiff-appellant.

Eugene E. Klecan, Albuquerque, for defendant-appellee.

OPINION

STEPHENSON, Justice.

Appellee ("State Farm") was granted summary judgment and appellant ("plain-

tiff") appeals. We affirm. This case has been here once before. 81 N.M. 600, 471 P.2d 170 (1970).

State Farm issued a policy of insurance to plaintiff which included disability coverage as follows:

"COVERAGE T—Total Disability.

"To pay the applicable amount of weekly indemnity stated as applicable to the insured designated for such coverage in the declarations for each week of continuous total disability of each insured which shall result directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while occupying or through being struck by an automobile, provided:

"(1) such disability shall commence within 20 days from the date of such accident, and

"(2) such disability has a duration of not less than seven consecutive days, and

"(3) any disability during the period of one year from its commencement shall be deemed total disability only if it shall continuously prevent the insured from performing any and every duty pertaining to his occupation, and

"(4) any disability after said one year shall be deemed total disability only if it shall continuously prevent the insured from engaging in any and every gainful occupation for which he is reasonably fitted by education, training or experience. * * *"

Plaintiff was injured in an automobile collision on August 8, 1967. She then suffered distress which sometimes required her to leave her work or even miss work for periods of up to three consecutive days, a situation which continued until October 28, 1967 and from time to time thereafter. No claim is made by plaintiff for disability payments on account of this sort of disability.

Ultimately plaintiff was confined in a hospital on more than one occasion for both conservative treatment and surgery, and was disabled for continuous periods of seven days or more on four occasions between October 28, 1967 and December 2, 1968. She says she was intermittently so disabled for a total of forty-one weeks during that time.

On these facts, both parties moved for summary judgment on the disability compensation count of the complaint. The trial court sustained State Farm's motion.

It is plaintiff's theory that her disability "commenced" within twenty days of the accident because during that time "on her first day at work following the collision of August 8, 1967 she was in such distress, and was so nauseated that she could not continue at her work for the full day and returned to her home; that on a number of occasions on the days immediately following the collision in the month of August, 1967 she reported for work but was unable to continue because of pain and nausea; that on several occasions during the month of August, 1967 she was so nauseated that she could not drive her automobile and her employer made arrangements for taking her from the office to her home; that on the 24th of August, 1967 she was seen by Dr. H. V. Hedman and saw him on three occasions; * * * that through the kindness of her employer no deductions were made for the considerable amount of time she took off in August, 1967; * * *."

Plaintiff concedes that no "continuous total disability" of at least "seven consecutive days" either occurred or commenced within twenty days of the injury. She asserts that it is sufficient that some disability occurred in the first twenty days and that the features of totality and duration could come later.

Plaintiff further contends that to be entitled to disability payments under the provisions of the policy we have quoted, the entire disability period for which claim is made need not be continuous, but rather may be intermittent so long as each period for which claim is made amounts to seven days or more.

We do not agree with her first premise and therefore need not consider the second.

The first paragraph of Coverage T provides compensation in a specified amount "for each week of continuous total disability" which, by paragraph numbered 2, must have "a duration of not less than seven consecutive days." Paragraph numbered 1, which sets forth the twenty-day requirement, in speaking of "such disability," refers to "continuous total disability" in the first paragraph.

The intermittent distress suffered by plaintiff during the first twenty days following the collision, as a matter of law, cannot be said to be commencement of "continuous total disability" and we therefore do not reach the question of whether the compensable period must be continuous in its entirety or whether it may be intermittent so long as each period consists of seven days or more. Our interpretation of the policy's provisions is made with full knowledge of the axiom that ambiguities in insurance policies are resolved in favor of the insured. The portion of the policy we have construed is not ambiguous.

The policy also contained a medical payment provision for a maximum of $1,000.00. It is undisputed that plaintiff's medical expenses exceeded that sum. However, the policy contained provisions that State Farm would "be subrogated to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery" which the plaintiff might have, and plaintiff was required to "do nothing after loss to prejudice such rights."

State Farm was prepared to pay $1,000.00 to the plaintiff and advised her attorney that it would do so upon execution by plaintiff and return to it of a "Loan Receipt Under Medical Payments Coverage" by the terms of which the payment was said to be a loan, though repayable only from recovery from the tortfeasor. The plaintiff signed the loan receipt, but only after her attorney had placed thereon, above her signature, a notation that "Foregoing signed under doctrine of Harleysville Mutual v. Lea, 410 P.2d 495." Some time while these matters were proceeding, plaintiff settled with and released the tortfeasor. State Farm took the position that the settlement and release, together with the notation placed on the loan receipt, destroyed its subrogation rights. It therefore declined to pay plaintiff under the medical payments coverage.

Plaintiff, in another count, sued upon the medical payment provisions of the policy. After filing of affidavits disclosing these facts, plus a great many more, the court granted summary judgment on State Farm's motion as to this claim as well.

State Farm asserts that the issues in respect to medical payments are resolved in its favor by Motto v. State Farm Mutual Automobile Insurance Co., 81 N.M. 35, 462 P.2d 620 (1969), the opinion in which was handed down during the pendency of this case and subsequent to the episodes in respect to the loan receipt which we have recounted. Plaintiff tacitly takes the same view of Motto in urging us to overrule that case, a step which we are not persuaded we ought to take.

Harleysville Mutual Insurance Company v. Lea, 2 Ariz.App. 538, 410 P.2d 495 (1966), the case previously mentioned in our explanation of occurrences related to the loan agreement, held on similar facts that actions for personal injuries were not assignable at common law, and even though by statute they survive, they are still not assignable in whole or in part prior to judgment. Such is not the law of New Mexico in respect to subrogation claims. Motto v. State Farm Mutual Automobile Insurance Co., supra.

Plaintiff seeks to distinguish the case at bar from Motto on the grounds that in the latter the settlement and release were concealed. This is not a distinguishing feature. The effect of what was done in Motto and here by the insureds had the same effect on the insurer's subrogation rights.

Finding no error, we affirm. It is so ordered.

COMPTON, C. J., and OMAN, J., concur.

491 P.2d 171

Apolonio MARTINEZ, Plaintiff-Appellant,

v.

UNIVERSAL CONSTRUCTORS, INC., Employer, and Mountain States Mutual Casualty Company, Insurer, Defendants-Appellees.

No. 717.

Court of Appeals of New Mexico.

Nov. 12, 1971.

Edwin L. Felter, Santa Fe, for plaintiff-appellant.

M. J. Rodriguez, J. E. Gallegos, Jones, Gallegos, Snead & Wertheim, Santa Fe, for defendant-appellee.

OPINION

WOOD, Chief Judge.

In this workmen's compensation case, the trial court found that plaintiff "* * has no disability which is a natural and direct result of the accident. * * *" Section 59–10–13.3, N.M.S.A.1953 (Repl. Vol. 9, pt. 1). Plaintiff's appeal: (1) challenges the sufficiency of the evidence to support this finding and (2) contends this court should weigh the evidence and make our own determination as to disability.

Sufficiency of the evidence.

Plaintiff claims the uncontroverted medical evidence establishes that plaintiff is disabled, to some extent, as the result of his on-the-job accidental injury. See Ross v. Sayers Well Servicing Company, 76 N.M. 321, 414 P.2d 679 (1966). While there is evidence sufficient to support a finding of disability, plaintiff's treating physician testified that plaintiff was not disabled. If the treating physician's testimony was sufficient to support a finding of *no disability,* then there was a conflict in the evidence and it was the trial court's function to resolve the conflict. Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642 (1968).

Plaintiff's argument infers that the treating physician's testimony did not raise

a conflict in the evidence because the treating physician is a general practitioner and his testimony allegedly contradicts the testimony of two medical specialists. The fact that the treating physician was a general practitioner did not prevent him from testifying as an expert. Hamilton v. Doty, 65 N.M. 270, 335 P.2d 1067 (1958); Los Alamos Medical Center v. Coe, 58 N.M. 686, 275 P.2d 175 (1954); compare Irvin v. Rainbo Baking Company, 76 N.M. 213, 413 P.2d 693 (1966).

Plaintiff contends the treating physician's testimony is insufficient because he did not appear and testify at the trial; rather, his testimony was by deposition. We find nothing in the rule concerning oral depositions, § 21-1-1(26), N.M.S.A.1953 (Repl.Vol. 4), which indicates that deposition testimony is to have a lesser effect than testimony presented "live" at trial or which indicates that deposition testimony is insufficient to raise a conflict in the evidence. N.M.U.J.I. 15.3 states that deposition testimony is entitled to the same consideration as any other testimony. See Newman v. Los Angeles Transit Lines, 120 Cal.App.2d 685, 262 P.2d 95 (1953); Belser v. American Trust Co., 125 Cal.App. 344, 13 P.2d 951 (1932).

No contention is made that the deposition testimony was not properly before the court. The parties stipulated that the deposition of two doctors "* * * may be used for the trial of this cause in lieu of said doctors appearing personally to testify. * * *" The trial court approved the stipulation.

We hold the trial court could properly consider the deposition testimony of the treating physician. This deposition testimony was substantial evidence which supported the trial court's finding of no disability.

Weight of the evidence and determination of disability.

Plaintiff asks us to weigh the evidence and independently determine the issue of disability. This request is based on the rule "* * * that when evidence on an issue is primarily or substantially all documentary, the * * * [appellate court] is as well positioned as the trial court to consider and weigh the evidence and determine the facts disclosed thereby. * * *" Baker v. Shufflebarger & Associates, Inc., 78 N.M. 642, 436 P.2d 502 (1968). Plaintiff claims that all of the evidence of *no disability* was the deposition testimony of the treating physician; that a medical specialist who testified by deposition and another medical specialist who appeared and testified at trial were of the opinion that plaintiff had some disability. It is under these circumstances that plaintiff asks us to weigh the evidence.

If we disregard plaintiff's own testimony and limit consideration of this issue to the testimony of the three doctors, there is considerable doubt that "substantially all" of the evidence of *no disability* is to be located in the deposition of the treating physician. The medical witness who appeared and testified at trial was of the opinion that plaintiff had a 10 to 15% disability, but didn't know whether the disability was due to the injury or plaintiff's age. Further, this doctor was of the opinion that plaintiff deliberately exaggerated his symptoms.

Assuming, however, that substantially all of the evidence of *no disability* is documentary, the appellate court may review and weigh the evidence, but in doing so it does not exclude the finding of the trial court. Rather, the trial court's finding is to be included in the weighing and review. Kosmicki v. Aspen Drilling Company, 76 N.M. 234, 414 P.2d 214 (1966).

The applicable rule, stated in Valdez v. Salazar, 45 N.M. 1, 107 P.2d 862 (1940) is:

> "* * * Where all or substantially all of the evidence on a material issue is documentary or by deposition, the Supreme Court will examine and weigh it, and will review the record, giving some weight to the findings of the trial judge on such issue, and will not disturb the same upon conflicting evidence unless

such findings are manifestly wrong or clearly opposed to the evidence."

Here, there is conflicting evidence and the finding by the trial court cannot be categorized as manifestly wrong or clearly opposed to the evidence. Accordingly, the finding of the trial court is not to be disturbed. Kosmicki v. Aspen Drilling Company, supra; Brannon v. Well Units, Inc., 82 N.M. 253, 479 P.2d 533 (Ct.App.1970).

The judgment is affirmed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

SUTIN, J., not participating.

491 P.2d 173

Joe ARAGON, Administrator of the Estate of Joseph T. Aragon, a minor, Deceased, Plaintiff-Appellee,

v.

Roelof SPEELMAN and Rose Speelman, Defendants-Appellants,

Mrs. Joe Aragon, Plaintiff in Intervention-Appellant.

No. 633.

Court of Appeals of New Mexico.

Nov. 12, 1971.

OPINION

HENDLEY, Judge.

Plaintiff brought suit to recover damages for a wrongful death. The jury returned a verdict for plaintiff. Defendants filed a motion for judgment NOV, or in the alternative for a new trial. The motion was denied and defendants appeal raising four points for reversal; contributory negligence, erroneous instructions, assumption of risk and proximate cause. Plaintiff cross-appeals on the dismissal of a complaint in intervention by decedent's mother for damages for bystander recovery. We reverse and grant defendants a new trial but affirm the trial court's dismissal of the complaint in intervention. Our reversal involves two issues—instructions on change of lane and sudden emergency. Because of this reversal we do not discuss other issues raised by defendants. However, we are of the opinion that on the present record any contributory negligence of decedent as the proximate cause of the accident was a jury question, the trial court did not err in refusing to instruct on assumption of risk and the issues of defendants' negligence and proximate cause were for the jury.

In viewing the evidence and all reasonable inferences that flow therefrom in the light most favorable to the plaintiff and to support the verdict the record discloses the following. See Tapia v. Panhandle Steel Erectors Company, 78 N.M. 86, 428 P.2d 625 (1967).

State Highway 47 runs generally north and south in front of the home in which plaintiff-decedent resided. Approximately twenty seconds before the accident occurred plaintiff-decedent was observed by his mother riding his bicycle in a northerly direction on Highway 47 towards the double yellow line which divided the east from the west half of the four-lane highway. Between that time when the decedent's mother saw and spoke to her son and the time of impact her son had ridden his bicycle from the east half to the west half of the highway and was proceeding in a general southerly direction in the outside southbound lane. The defendant-driver was proceeding in a southerly direction in the outside lane of the highway and approximately two-tenths of a mile before the point of impact observed the decedent in the same lane. Defendant-driver changed to the inside lane some two or three hundred yards prior to the point of impact. Decedent had his back to defendant-driver and was pedalling his bicycle in the western-most lane of the highway and had no knowledge that defendant's automobile was approaching from behind. The defendant-driver did not sound her horn to alert the bicyclist of her approach. The speed limit in the area was 50 miles an hour and the defendant-driver testified she may have stated to the State Policeman investigating the accident that she was travelling 60 miles per hour but was travelling 50 miles per hour at the impact. Immediately after the accident the defendant-driver told the investigating policeman she did not know which lane the boy was in. She just saw him and swerved and hit the brakes and eventually came to rest near the east side of the highway.

A passenger in the automobile stated she first observed the decedent moving in a generally west-to-east direction in the path of defendant-driver's automobile which was in the outside lane; that this observation was about two-tenths of a mile before the impact; that as the automobile continued in the southerly direction plaintiff-decedent had moved from a point on the west side of the western-most southbound lane to just short of the middle of the two southbound lanes; and that decedent was at the white

stripe which divides the two southbound lanes and was travelling in a south-easterly direction on the bicycle in the middle of the highway just before impact.

The investigating State Police officer testified that the left skid mark of defendant's automobile was 194 feet and that the right skid mark was 62 feet; that this was caused by an abrupt swerving and application of the brakes; that the place of impact was in the inside southbound lane as shown by a "gouge" mark 2 feet in from the yellow double dividing line; that the impact was probably just prior to the "gouge" marks; that after the impact the bicycle wound up in the inside southbound lane; that the impact to the bicycle appeared to begin as a glancing blow to the rear wheel with the primary impact in front of the seat, making a "V" out of the bicycle; that the impact appeared to have been on the left side of the bicycle; and that the point of impact on the defendant's automobile was on the right front corner and headlight with damage there and to the hood and windshield.

CHANGE OF LANE.

Plaintiff submitted, and the trial court gave, an instruction which stated:

"No. 16—There was in force in the state at the time of the occurrence in question a certain statute 64–18–16 [N.M.S.A. 1953 (Repl. Vol. 1960)] which provided in part that:

"'Whenever any roadway has been divided into two (2) or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

"(a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety; * * *'

"If you find from the evidence that the defendant conducted herself in violation of this statute you are instructed that such conduct constituted negligence as a matter of law."

Defendant objected on the grounds:

"* * * that there is no evidence that the defendants' vehicle moved from one lane to another at anywhere close to where the accident occurred and that the instruction therefore has no applicability to this case and prejudices the defendants' action."

We agree.

As stated in Garcia v. Barber's Super Markets, Inc., 81 N.M. 92, 463 P.2d 516 (Ct.App.1969):

"A party is entitled to an instruction on his theory of the case if such a theory is pleaded and supported by the evidence. * * * Moreover, if a theory is pleaded and supported by the evidence, a refusal to instruct the jury on that theory constitutes reversible error. * * * Conversely, if there is no evidence to support the theory, it would be reversible error to instruct on that theory. * * *" (Citations omitted).

We fail to find anywhere in the record any evidence or any inference which would lead to a conclusion that defendant was proceeding in violation of the statute at the time of the change of lane. At the time of the change of lane by defendant-driver the record shows that the defendant-driver was approximately two to three hundred yards from the decedent and that decedent was in the outside lane and that the inside lane was unobstructed. Further, the record reveals there was no other vehicular traffic in the general area at the time of the accident.

Before a motorist travelling on a multi-lane highway changes lanes he must first ascertain if he can do so safely without endangering following or approaching traffic. Section 64–18–16, supra. A person travelling upon a multi-lane roadway has the right to assume, in the absence of indication to the contrary, that a fellow motorist will continue in his lane of travel. See Dent v. Falvey, 371 S.W.2d 63 (Tex. Civ.App.1963); Ballas v. Superior Mutual Insurance Co., 13 Wis.2d 151, 108 N.W.2d 192 (1961).

There is no evidence that defendant-driver could not safely change lanes when she did. Failing such evidence, the instruction raised a false issue and only tended to confuse the jury.

SUDDEN EMERGENCY.

Defendants submitted an instruction on the doctrine of sudden emergency in the form of UJI 13.14. The trial court gave the instruction in the following form:

> "No. 19—A person who, without negligence on *his* [or] her part, is suddenly and unexpectedly confronted with peril arising from either the actual presence of or the appearance of imminent danger to herself or another, is not expected nor required to use the same judgment and prudence that is required of her in the exercise of ordinary care in calmer and more deliberate moments.
>
> "*His or* her duty is to exercise only the care that a reasonably prudent person would exercise in the same situation.
>
> "If at that moment *he or* she does what appears to *him or* her to be the best thing to do, and if *his or* her choice and manner of action are the same as might have been followed by any reasonably prudent person under the same conditions then she has done all the law requires of *him or* her, even though in the light of after events, it might appear that a different course would have been better and safer." (The italicized portion of the instruction was added by the trial court over the objection of the defendant).

Defendant objected to this on the grounds:

> "* * * that there is no evidence whatsoever that the deceased was faced with a sudden emergency nor had to act or that his actions were because of any sudden and unexpected emergency. Therefore, the instruction as it applies to the decedent is incorrect and the defendants are prejudiced thereby."

With regard to that part of the instruction which would relate to decedent the instruction was erroneous. The record fails to reveal any evidence that the decedent was aware of the presence of the defendant's automobile.

Defendant would have us infer from the testimony that the noise of the automobile startled decedent and caused him to swerve to the left by being alarmed and that the decedent acted in an erratic manner and thus created an emergency situation. With this we cannot agree. There is no testimony that plaintiff-decedent was startled. Nor are there facts from which an inference could be drawn that plaintiff-decedent was startled. Inferences must be founded on facts. See Dull v. Tellez (Ct.App.) 83 N.M. 130, 489 P.2d 406.

Plaintiff cites the case of Webb v. Felton, 266 N.C. 707, 147 S.E.2d 219 (1966) for the proposition that there are inferences which would flow from the foregoing facts which would lead to the conclusion that an emergency situation would exist when an automobile is overtaking a bicyclist. In *Webb* there was evidence of a sudden, loud noise just before the accident. Here, there is no evidence of such a noise which would frighten or give notice to the bicyclist.

We note that § 64–19–2, N.M.S.A. 1953 (Repl.Vol.1960) states in part that "[e]very person riding a bicycle upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this act. * *" This statute by its very nature, places bicyclists in the same duty category as other vehicular traffic.

BYSTANDER RECOVERY.

Decedent's mother filed a complaint in intervention which alleged among other things that she had spoken to decedent (her son) before he was struck by defendant's automobile; that the next thing she heard was "a horrible loud sound"; that upon turning she saw her son flying through the air above defendant's automobile; and, that as a result of the negligence of defendant she suffered fright, shock and emotional distress. The trial court dismissed the complaint in intervention and intervenor appeals.

The question of whether what is commonly referred to as bystander recovery, under the foregoing facts, states an actionable claim is one of first impression in New Mexico.

Intervenor asserts that we should follow the reasoning in Dillon v. Legg, 68 Cal. 2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968). There the California court in reversing the earlier decision of Amaya v. Home Ice, Fuel and Supply Co., 59 Cal.2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963) held that a mother who personally witnessed the defendant's car colliding with her infant daughter, lawfully crossing the road, had stated a good cause of action where the emotional distress and shock suffered resulted in physical injuries.

Intervenor also refers us to Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970) which permitted bystander recovery. However, that case was also predicated upon an allegation of physical injury caused by the shock of having witnessed the death of a plaintiff's child.

Intervenor would have us go beyond *Dillon* and *Daley* where there was a claim of physical injury. She would have us hold that the allegations of fright, shock and emotional distress are sufficient to defeat a motion to dismiss for failure to state a claim. This we will not do.

Further, we do not decide whether bystander recovery, under a factual situation as set forth in *Dillon* or *Daley*, would be allowed. Our decision goes no further than to say we will not permit a recovery under the allegations of the instant case.

For collected cases and comments see 29 A.L.R.3rd 1337 (1970) "Right to Recover Damages in Negligence for Fear of Injury to Another, or Shock or Mental Anguish at Witnessing Such Injury"; 33 American Trial Lawyers Journal (1970) page 1; and Melendes, 11 For the Defense, No. 2, April, 1970, page 41.

Reversed and remanded for proceedings not inconsistent herewith.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

491 P.2d 507

Stewart BAKER, Plaintiff-Appellee,

v.

Gene BAKER, Defendant-Appellant.

No. 9162.

Supreme Court of New Mexico.
Dec. 13, 1971.

McDermott, Connelly & Stevens, Santa Fe, for appellant.

Bachicha & Corlett, Santa Fe, for appellee.

OPINION

OMAN, Justice.

This cause is before us on appeals from an order fixing the custody of two minor children and from an order denying a motion to extend the time within which to

file the transcript with this court as required by Supreme Court Rule 14 [§ 21–2–1(14), N.M.S.A.1953 (Repl.Vol. 4, 1970)]. We reverse both orders.

Briefly and chronologically the pertinent facts are as follows:

(1) Appellee and appellant were formerly husband and wife and they had two daughters, Kelty and Eliza. These children were 7 and 5 years of age respectively at the time of the entry of the custody order now before us.

(2) Upon the divorce of the parties in Harris County, Texas, the custody of the two children was awarded to their mother, appellant, with certain rights of visitation in their father, appellee. The father's visitation rights were subsequently modified on December 26, 1968 by the Texas court.

(3) Problems arose between the parties relative to the exercise by the father of his visitation rights. These problems became more serious when the mother and the two children moved from Houston, Texas to Santa Fe, New Mexico on about August 15, 1970. The father continued to reside in Houston, Texas.

(4) On September 25, 1970, the father filed his petition in the district court of Santa Fe County seeking certain "visitation rights with the minor children of the parties."

(5) A reading of the entire transcript of the trial proceedings, which were conducted on November 11 and 12, 1970, clearly shows that the evidence adduced by both sides related to issues properly cognizable in a proceeding for the purpose of determining visitation rights. Some of this evidence would also have been germane to a determination of the custody of the children, had there been a custody issue raised by the parties.

(6) All the evidence was presented and the parties rested their cases on November 11. The proceedings were resumed at 9:30 the following morning. From then until 12:15 p. m., when a recess was taken until 5:15 p. m., most of the time was consumed by the trial court in announcing its decision and reasons therefor. In fact the report of this portion of the proceedings consumes 55 pages of the transcript.

(7) Near the end of the 44th page of the court's announcement of its decision and reasons therefor, the trial court stated:

> "My best judgment is that the pleadings are amended to conform to the proof, and the proof shows me that the custody of Eliza should be removed from Mrs. Baker and placed in Mr. Baker. The appellate court well may not agree with that, but that will be up to the appellate court. * * *"

This was the first and only time in the entire proceedings that reference was made to an attempt to convert the proceedings from one concerning visitation rights to one awarding custody, or to any suggested amendment of the pleadings to conform to the proof in this regard. We have above stated that the evidence adduced was germane to the issue of visitation rights as raised by the pleadings.

In three other instances and in different contexts the trial court did refer to custody. Early in the trial and during the giving of the testimony of the father, who was the first witness, reference was made to the limitation of a hearing on custodial and visitation rights to events which have transpired since the last preceding hearing. In a subsequent exchange between the trial court and the mother's attorney, the court stated: "Well, that has no bearing on the issues. This matter concerns his custodial rights."

After all the evidence had been adduced and the question was raised as to whether to proceed with arguments at that time or wait until the following morning, November 12, the trial court stated:

> "It has been as long for me as it has been for you. I have been in and through a lot of custody cases and I don't anticipate you can bring up something I haven't heard already, but you

might, and if you do and if it's material and persuasive I want time to think about it."

(8) As its reasons for deciding to leave the custody of Kelty with her mother, with no rights of visitation in the father, and awarding the custody of Eliza to the father, with no rights of visitation in the mother, the trial court stated in part:

(a) It believed the ideal situation would be for the mother to have custody of both children, with extensive visitation and partial custody rights in the father.

(b) It wanted the mother ". . . to have both children but not on her terms, because her terms are diabolically bad. * * *"

(c) "* * * Mrs. Baker is going to ruin Kelty's life. She is going to turn Kelty against men so that Kelty will be totally and completely incapable of having a wholesome relationship and marriage to a man—in my judgment. * * *"

(d) If Eliza continues indefinitely in the custody of her mother she will be "* * * subjected to the same grave danger that I [trial judge] think has already overtaken Kelty. * * *"

(e) The reason for "* * * awarding custody of Kelty to Mrs. Baker without visitation rights and custody of Eliza to you [Mr. Baker] without visitation rights is that I [trial judge] am undertaking to apply a type of shock therapy, I'm talking about Court shock therapy. * * *"

(9) Just before concluding his lengthy reasoning for converting this "visitation rights" hearing into a "custody" hearing and making an award opposed by both parents [although the father is now apparently reconciled to the award], the trial court stated: "* * * I think that the judgment in this Court should be entered not later than five o'clock this afternoon and that Mr. Baker should take the custody of Eliza not later than five, five-thirty or six today. * * *"

(10) The trial court recessed at 12:15 p. m. The mother sought prohibition in this court that afternoon, but her petition was denied. The trial court reconvened at 5:15 p. m. Shortly thereafter the order of custody, which had been prepared by the father's attorney, was signed and entered. The trial court observed:

"I would like for the record to show if it were an earlier hour and this matter was not such of an urgent nature, and not at least tentative plans on behalf of the defendant [the mother], through her counsel, to get into the Supreme Court as fast as possible [to seek supersedeas and stay], I would have the Order redrawn or amended to show several things. . . . I would have had, had I had time and drawn the Order to suit me precisely and categorically, that the continuation of Eliza in the custody of her mother would calculate irreparable, irreversible, and I believe harm of a psychological nature and of great seriousness. I will sign it like it is in view of the hour and what apparently is waiting in the wings to develop."

(11) This court, very shortly after the entry of the order, granted supersedeas, fixed the amount of the supersedeas bond and stayed the execution of the order.

(12) The mother proceeded immediately to perfect her appeal by filing notice of appeal on November 12. On February 10, 1971, an order was entered extending the time until March 29, 1971, within which to file the transcript in this court. A subsequent motion to extend the time until April 28 was denied and an order entered accordingly. We granted leave to file the transcript in this court.

As to the appeal from the order denying a further extension of time in which to docket the appeal from the custody order, we must agree with the trial court that counsel for appellant was dilatory in some respects. We condemn unnecessary delays and expect full compliance with the rules of this court. However, appeals should generally be decided on their merits, and particularly so this one which concerns the welfare of two young sisters, as well

as the rights of their parents to their custody and visitation, and in which the requested extension of time could not have prejudiced appellee to any appreciable degree, if at all. See the opinions in the following cases for discussions of this court's policy of deciding appeals on their merits: State v. Reyes, 79 N.M. 632, 447 P.2d 512 (1968); Alamogordo Federal Savings & Loan Ass'n v. Snow, 66 N.M. 216, 345 P.2d 746 (1959); Barelas Community Ditch Corp. v. City of Albuquerque, 61 N.M. 222, 297 P.2d 1051 (1956).

The trial court abused its discretion in refusing to grant the requested extension of time.

As to the appeal from the custody order, we reverse on two grounds. First, we fully recognize that the trial court has wide discretion in determining whether the custodial provisions of an order or decree should be modified. Fox v. Doak, 78 N.M. 743, 438 P.2d 153 (1968). We also appreciate that if an issue is litigated by either express or implied consent of the parties, then the trial court is obliged to treat this issue in all respects as if it were pleaded. Wynne v. Pino, 78 N.M. 520, 433 P.2d 499 (1967). However, as stated above, the father sought by his pleadings only certain "visitation rights with the minor children," and nothing was ever said by him or his counsel in the pleadings or in the entire proceedings about seeking custody of the children, or either of them. The record clearly evidences surprise and doubt on the father's part concerning the wisdom of the court's decision to separate the children, give him total custody of Eliza and no visitation rights with Kelty and the mother total custody of Kelty and no visitation rights with Eliza. He apparently decided to accept this decision after the proceedings were concluded in the trial court, except for the entry of the order and a discussion between the trial court and counsel concerning the entry and the matters of supersedeas and stay.

The mother was so surprised and upset that she had to be placed under medical care. Perhaps this is what the trial court meant by "Court shock therapy." If so, it fails to gain our sympathy or approval.

It is apparent that the issue of custody was not litigated, and, as the trial court anticipated, we do not agree the pleadings should have been amended to conform to the trial court's concept of the proof, nor do we agree the matter of visitation rights should have been completely ignored and the custody of Eliza placed in her father.

Secondly, there was no evidence to indicate the mother was fit to have the custody of Kelty, but unfit to have the custody of Eliza. In a proceeding to modify a custody provision, the burden is on the moving party to satisfy the court that circumstances have so changed as to justify the modification. Merrill v. Merrill, 82 N.M. 458, 483 P.2d 932 (1971). Here the trial court was satisfied that the custody of Eliza should be changed without any issue in regard thereto ever having been raised or litigated, and without any evidence to show her best interests and welfare would be served by the ordered change. Every presumption is in favor of the resonableness of the original decree of the Texas court awarding the custody of both children to the mother. Merrill v. Merrill, supra; Kerley v. Kerley, 69 N.M. 291, 366 P.2d 141 (1961).

The orders of the trial court are reversed and the cause remanded with directions to conduct such further proceedings herein as the trial judge who hereafter presides over this case may deem proper under the pleadings and consistent with this opinion.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

491 P.2d 511

STATE of New Mexico, Plaintiff-Appellee,

v.

Kenneth CRANFORD, Defendant-Appellant.

No. 9309.

Supreme Court of New Mexico.

Dec. 13, 1971.

Joseph D. Beaty, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Ronald Van Amberg, James B. Mulcock, Jr., Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

COMPTON, Chief Justice.

The defendant was convicted of first degree murder and now appeals alleging various grounds for reversal.

Appellant was arrested in Juarez, Mexico, by Mexican officials on January 18, 1971. Present but not participating in the arrest was Officer Willie Garcia of the New Mexico State Police, at whose request the arrest was made.

Appellant was held by Juarez officials for approximately three days, during which time he was questioned by Mexican authorities, an agent of the Federal Bureau

of Investigation, and by Officer Garcia. While in custody in Mexico appellant signed two Advice of Rights forms that were provided by the FBI agent, advising him of his constitutional rights as they applied in Mexico. The Advice of Rights forms signed by him deleted the section stating that an attorney would be provided appellant if he could not afford one. While in Mexico, appellant also gave a written statement to Officer Garcia in which he admitted killing Ellis Hall, which, over appellant's objection was admitted into evidence at his trial.

Appellant contends that the trial court committed prejudicial error in admitting into evidence his statement taken while appellant was in custody of the Mexican police. He further contends the court erred in admitting the Advice of Rights forms and certain statements made by him to the FBI agent while being interrogated in Mexico. He also contends that he was denied the right of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, and urges us to apply Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, extraterritorially. These contentions were answered in United States v. Dopf, 434 F.2d 205 (5th Cir.), wherein the defendants had made statements while in the custody of Mexican authorities which were admitted into evidence at their trial in the United States. The rationale of the Dopf holding, supra, is persuasive. Though Dopf, supra, was reversed on other grounds, the court explicitly affirmed the lower court's ruling that the claimed constitutional rights of the defendants did not apply while they were in Mexico. Appellant's claim of errors is without merit. Due to the non-application of Miranda, supra, appellant's argument that the Advice of Rights forms should not have been entered into evidence is without merit.

Appellant's second point for reversal is that the trial court committed prejudicial error in denying his motion to suppress the statement given to Officer Garcia, as being involuntary, and in finding that the appellant's constitutional rights had not been violated. It is basic that in a criminal case, a defendant is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for truth or falsity of the confession, and even though there is other ample evidence to support the conviction. Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760, and Malinski v. New York, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029. Once the trial court, as here, properly determined the confession to be voluntary and admitted it into evidence, it was for the jury, upon proper instruction ultimately to determine whether the confession was voluntarily made, whether it was trustworthy, and decide the weight to be given the confession. Our earlier discussion disposes of this point. For an analysis of a free and voluntary confession, see Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747, see also, Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908; Stein v. New York, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522.

Appellant further contends that the trial court erred in refusing to give an instruction requested by him. There was no error in the ruling of the court as the subject matter of the instruction requested was adequately covered by the instruction given by the court. This is so even though the tendered instruction was an accurate statement of the law. See State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388, cert. denied 81 N.M. 669, 472 P.2d 383.

Appellant claims that the use of the Allen Charge, referred to as the "shotgun" charge, given by the trial court was prejudicial error. We do not agree. As far back as Territory v. Donahue, 16 N.M. 17, 113 P. 601, we approved the instruction, and we see no reason to alter our position. In urging prejudicial error in the court's instruction, appellant places great importance on the addition of a sentence to the instruction that absolute certainty is not required of the jury in reaching its

decision. This was not error. Proof of guilt beyond a reasonable doubt is all that is required, not absolute certainty.

Finally, appellant contends that the court's refusal to grant a mistrial was prejudicial error. Ordinarily the granting of a mistrial is a matter within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. See, State v. Compos, 61 N.M. 392, 301 P.2d 329. We see no abuse of discretion.

The judgment should be affirmed and it is so ordered.

OMAN and MONTOYA, JJ., concur.

491 P.2d 513

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation, Plaintiff-Appellant,

v.

John Raymond GONZALES et al., Defendants-Appellees.

No. 9271.

Supreme Court of New Mexico.
Dec. 13, 1971.

Hal F. Simmons, Albuquerque, for appellant.

Edward G. Parham, Keleher & McLeod, Ranne B. Miller, Albuquerque, for appellees Bailey.

Walter K. Martinez, Grants, for Rominger & Schlenker.

OPINION

OMAN, Justice.

Plaintiff issued a policy of automobile insurance to a Mr. and Mrs. Torrez. On October 28, 1967, defendant Gonzales, a brother of Mrs. Torrez, without the permission or knowledge of the named insureds, took the automobile, and while operating the same collided with the rear of a vehicle in which Mr. and Mrs. Bailey were riding. The Bailey vehicle was then caused to collide with the vehicle in which Rominger and decedent Nolan were riding.

Plaintiff brought a declaratory judgment suit for the purpose of acquiring a judicial determination on the question of its coverage of Gonzales under the policy. The trial court granted plaintiff a summary judgment on this issue and no appeal has been taken therefrom. However, the court permitted the case to be tried to a jury on the defenses of waiver and estoppel. The jury returned a verdict for defendants and against plaintiff. The trial court denied plaintiff's motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial, and entered judgment requiring plaintiff to defend Gonzales against any claims asserted against him by the other defendants and to pay any judgment entered against him in favor of the claimants. Plaintiff appeals. We reverse.

It appears from the record and the briefs that the asserted waiver concerns itself with the claim that plaintiff "waived its right to deny coverage" to Gonzales, and the asserted estoppel concerns itself with plaintiff's failure to fully investigate the accident and to notify Gonzales prior to service of summons and a copy of the complaint upon him on July 23, 1968, that he was not covered by the policy.

In addition to the foregoing recited facts, the following are pertinent:

(1) Plaintiff at no time told Gonzales or any one else that he was covered by the policy of insurance.

(2) On November 1, 1967 plaintiff had Mrs. Torrez execute an "Authorization for Claim Service and Non-Waiver of Rights." A like authorization and non-waiver was taken from Gonzales on November 7. By these instruments it was agreed that such actions as plaintiff might take in investigating, negotiating, settling, denying or defending against any claim arising out of the accident would not waive any rights of plaintiff under any contract of insurance.

(3) Plaintiff's investigation consisted of interviewing Mrs. Torrez and Mr. Gonzales and taking statements from them, taking from them the said non-waiver agreements, taking pictures of the automobiles involved, and securing the state police report of its investigation of the accident.

(4) Plaintiff's agent testified he may have told Gonzales he would be notified as to whether he was covered under the policy. He also testified that generally it is a good practice to conduct an investigation as soon as possible after an accident, and it would be more difficult to conduct an investigation after a lapse of nine months.

(5) Gonzales testified plaintiff's agent said plaintiff "was investigating the accident," but did not tell him "* * * there was a question of whether or not [he]

would be covered under the policy," and plaintiff never told him he was not covered.

(6) Gonzales never made an investigation of the accident. He knew he had taken the automobile without permission and after having been told not to take it because of his driving record. As above stated, it has been judicially determined that he had no permission to take the automobile and was not covered under the policy. Thus, at no time were there any rights and duties existing between him and plaintiff under this contract.

Insofar as waiver is concerned, it is apparent the "right of plaintiff to deny coverage to Gonzales" is not a right arising under the contract of insurance, and the rights and duties with which we are here concerned are those of plaintiff under the policy. In any event, the evidence is not sufficient to support a verdict on the theory of waiver.

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate support for a conclusion. The substance of this relevant evidence must be such as will support the drawing of reasonable inferences therefrom. Durrett v. Petritsis, 82 N.M. 1, 474 P.2d 487 (1970); Cave v. Cave, 81 N.M. 797, 474 P.2d 480 (1970); Young v. Signal Oilfield Service, Inc., 81 N.M. 67, 463 P.2d 43 (Ct.App.1969).

Defendants claim that under the trial court's instruction on waiver the first element thereof is "* * * that waiver occurs when a party having a duty to act or speak has full knowledge of all facts. * * *" They claim plaintiff had this knowledge when it learned from Mrs. Torrez and Mr. Gonzales that he was using the vehicle without permission. Gonzales also knew this and knew it before plaintiff did. The following language taken from Smith v. Orion Insurance Company, 298 F.2d 528, 533 (10th Cir. 1961) is quoted and relied upon by defendants as support for their position:

"It is, of course, true that [an insurance] company may waive a defense it has by unreasonably delaying and notifying *an insured that it stands thereon.*" [Emphasis added]

The fallacies in this reliance by defendants lie in the facts that Gonzales was not an insured and plaintiff was not relying upon a defense it had under the contract of insurance. There was a total absence of right on the part of Gonzales under the policy. If the "right to deny coverage" can in some inexplicable manner be converted into a right of defense on the part of plaintiff under the policy, still Gonzales must fail, because plaintiff owed him no duty to investigate further or to tell him what he already knew.

Defendants next contend "The final element of waiver is whether [plaintiff's] inaction reasonably lead to the conclusion it was abandoning a legal right. * * *" Again the purported legal right is that of the "right to deny coverage" to one who at no time was covered under the policy, and the purported waiver of this right could only arise from the failure of plaintiff to conduct a complete investigation into the accident, which duty it did not owe Gonzales, and in failing to advise him before filing suit that it was denying coverage, which also was a duty it did not owe him.

Defendants also contend plaintiff may not rely upon the fact that waiver is the intentional abandonment or relinquishment of a known right as held in Ed Black's Chevrolet Center, Inc. v. Melichar, 81 N.M. 602, 471 P.2d 172 (1970); Clovis National Bank v. Thomas, 77 N.M. 554, 425 P.2d 726 (1967); Chavez v. Gomez, 77 N.M. 341, 423 P.2d 31 (1967); Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct.App.1970). Plaintiff not only requested an instruction so defining waiver, but objected to the trial court's failure to give this request. However, it does not now claim error on the part of the trial court in denying the request or in giving the court's instruction. It contends the matter of intentional abandonment or relinquishment is implicit within the court's instruction. It makes no difference whether the language of the

instruction can or cannot properly be equated with an intentional abandonment or relinquishment of a known right. As already stated, as between plaintiff and Gonzales, there existed no rights or duties between them under the policy of insurance, because Gonzales was at no time a party to this contract. In any event, the evidence here from which defendants claim there is an inference of abandonment and relinquishment of the right to deny coverage is not substantial and the claimed inference therefrom is not reasonable.

> "Estoppel is the preclusion, by acts or conduct, from asserting a right which might otherwise have existed, *to the detriment and prejudice* of another, who in reliance on such acts [or] conduct, has acted thereon." [Emphasis added]

Miller v. Phoenix Assur. Co., Limited, of London, 52 N.M. 68, 191 P.2d 993 (1948).

There is no estoppel unless the person acting in reliance on the acts or conduct of the other, has been induced to take a position to his prejudice or detriment. Doran v. First National Bank of Clovis, 22 N.M. 236, 160 P. 770 (1916). See also Porter v. Butte Farmers Mutual Insurance Company, 68 N.M. 175, 360 P.2d 372 (1961); First Nat'l Bank of Clayton v. Harlan, 30 N.M. 356, 234 P. 305 (1924).

The trial court's instruction was:

> "Estoppel occurs where a party does or omits to do something or says or fails to say something, which it intends or should reasonably expect to influence the action of the other party and *the other party relies and acts thereon to his prejudice.*" [Emphasis added]

We neither affirm the correctness of this instruction nor the applicability to the facts of this case of the estoppel doctrine, but quote the instruction only to point out that under the law of this case, as well as the holdings of this court, there can be no estoppel unless Gonzales relied and acted upon the acts or omissions of plaintiff to his prejudice.

The plaintiff stated to Gonzales it was investigating the accident. This it did. It made no representation that it would conduct a prompt and thorough investigation of all the facts surrounding the accident. The question to be resolved by this investigation, insofar as Gonzales was concerned, was that of his permission to use the vehicle. He knew he had no such permission.

Even if we were to assume plaintiff was obliged to conduct a full and complete investigation into the facts, there is absolutely no evidence of substance that Gonzales was prejudiced by this failure on the part of plaintiff. Gonzales was free at all times to conduct whatever investigation he felt necessary, and he definitely knew plaintiff was contending he was not covered by the policy of insurance when he was served on July 23, 1968 with a copy of the complaint and summons, if he did not know so before then. He contends, however, that this delay of nine months is presumed to have worked prejudice against him, and he relies upon the opinion of this court in Mountainair Mun. Sch. v. United States Fid. & Guar. Co., 80 N.M. 761, 461 P.2d 410 (1969).

The question in the Mountainair case related to the failure of an insured to give notice to the insurer, which clearly is not close to the factual question now before us upon which the claim of estoppel is predicated. However, this court in the Mountainair case quoted with approval the following from Purefoy v. Pacific Auto. Indem. Exch., 5 Cal.2d 81, 53 P.2d 155, 159 (1935):

> "'* * * But respondent argues with convincing force herein that the lapse of time which removes the opportunity for prompt investigation, also destroys the possibility of showing prejudice arising from delayed inquiry. Where witnesses are interviewed after lapse of time, during which they either may have forgotten the facts, or been approached solely by representatives of the injured party, it virtually becomes

impossible to learn what facts, favorable to defendant, could have been ascertained through prompt inquiry. We are impelled to the conclusion that prejudice must be presumed in such situations.' "

A reading of the following cases demonstrates that the California courts have long since departed from the announcement in the Purefoy case that prejudice can be presumed from the failure to conduct a prompt investigation, or from the lapse of time. Abrams v. American Fidelity and Casualty Company, 32 Cal.2d 233, 195 P.2d 797 (1948); Gibson v. Colonial Insurance Company, 92 Cal.App.2d 33, 206 P.2d 387 (1949); Campbell v. Allstate Insurance Co., 60 Cal.2d 303, 32 Cal.Rptr. 827, 384 P.2d 155 (1963); Hanover Insurance Company v. Carroll, 241 Cal.App.2d 558, 50 Cal.Rptr. 704 (1966); Northwestern Title Security Company v. Flack, 6 Cal.App.3d 134, 85 Cal.Rptr. 693 (1970).

Insofar as the opinion of this court in the Mountainair case held that a presumption of prejudice arises from the fact of delay alone, or that delay or lapse of time alone may work an estoppel, it is inconsistent with the holding of this court to the contrary in Modisette v. Foundation Reserve Insurance Co., 77 N.M. 661, 427 P.2d 21 (1967). The factual question in the Modisette case is far different from that in the present case and from that in the Mountainair case; but in the Modisette case we held: "However, delay or lapse of time alone does not * * * work an estoppel. * * *"

To the extent that the opinion in the Mountainair case is inconsistent with our holding in the Modisette case, we overrule our opinion in the Mountainair case.

The judgment of the trial court should be reversed with directions to enter judgment for the plaintiff notwithstanding the verdict.

It is so ordered.

COMPTON, C. J., and McMANUS, STEPHENSON and MONTOYA, JJ., concur.

491 P.2d 517

Joe T. PRICE, Plaintiff-Appellee,

v.

Reba Smith PRICE, Defendant-Appellant,

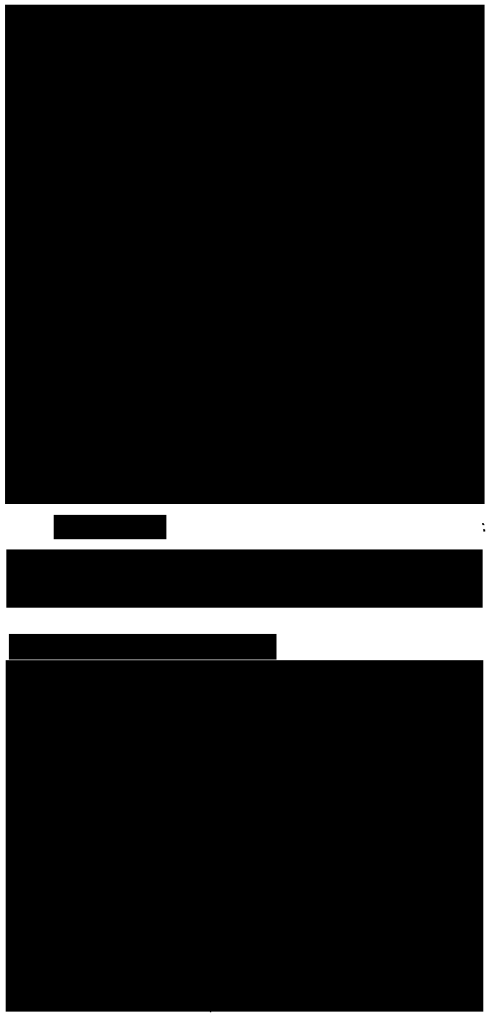
v.

Mrs. G. T. (Gladys) PRICE, Intervenor-Appellee.

No. 9247.

Supreme Court of New Mexico.

Dec. 13, 1971.



Jack T. Whorton, Alamogordo, for appellant.

Lon P. Watkins, Carlsbad, for appellees.

OPINION

COMPTON, Chief Justice.

On July 30, 1969, a divorce was granted on defendant's counterclaim. The custody of their minor son of 16 months was awarded to the defendant, with reasonable visitation rights granted to the plaintiff and Mrs. J. T. Price, plaintiff's mother and the named intervenor.

Subsequently, on October 1, 1970, the plaintiff and intervenor, moved for a definite visitation order, alleging that neither he nor his mother had been given reasonable opportunity to visit with the child or to have the child visit with them in the home of the intervenor where the plaintiff resided. The defendant resisted the motion and following a hearing thereon, the court entered the following order:

> "1. That the Decree heretofore entered in this cause with respect to the custody and visitation rights of plaintiff and intervenor be modified and that intervenor, Mrs. J. T. (Gladys) Price be, and she hereby is allowed to have the minor child of the parties, Joseph Thomas Price III, with her for one week of each month beginning at 8:00 a.m. on each Tuesday of the first week of each month, and she shall return said child to his mother at Artesia, New Mexico on each following Sunday of each month at the hour of 8:00 p.m."

The defendant is seeking a review of alleged errors. The decisive question here is whether the above order affects a change of custody of the child or is a mere clarification of rights of visitation. We are inclined to the latter view. We are not unmindful of the rule that to modify a custody decree, the burden is on the moving party to satisfy the court that circumstances have so changed as to justify the modification. Tuttle v. Tuttle, 66 N.M. 134, 343 P.2d 838; Fox v. Doak, 78 N.M. 743, 438 P.2d 153.

Modification of the decree as to custody of the child was not sought and from a reading of the record, it is obvious that reasonable visitation rights were not available to the plaintiff and intervenor in the home of the defendant.

We are slightly baffled just why the intervenor-grandmother was permitted to enter the case. Be that as it may, the divorce decree of July 30, 1969, specifically recites that the court had jurisdiction of the parties and the subject matter, and the intervenor was named as a party therein. Other points urged for a reversal of the order are found without merit.

The judgment should be affirmed.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

MONTOYA and OMAN, JJ., dissenting.

MONTOYA, Justice (dissenting).

I cannot agree with the majority opinion. The majority have decided that the order of the trial court does not change custody, but is merely a clarification of visitation rights. The order which modified the previous decree is, by its terms, a modification of "custody and visitation rights of plaintiff and intervenor." The previous decree of the trial court, entered on July 30, 1969, provided that "the plaintiff and intervenor are entitled to rights of reasonable visitation with said child."

The motion filed below by plaintiff and intervenor sought both a clarification of visitation rights and an order allowing the child to visit with plaintiff and intervenor over Saturday and Sunday twice monthly. The trial court, in the order now before us, authorized the intervenor to have the child from 8:00 a.m. each Tuesday of the first week of every month until the following Sunday at 8:00 p.m. The effect of the order is that the child is with the intervenor a total of six days, or one-fifth of each month. I do not believe that such an arrangement can properly be said to constitute visitation rights only. The court's order amounts to nothing less than a shared or split custody between the defendant-

mother of the child and the intervenor-grandmother. The order provides only for the intervenor to have the child for six days each month, without any mention being made about visitation rights awarded to the plaintiff-father. Although the evidence shows that the father lived in the same house with the intervenor, the record further discloses that the plaintiff-father had not, since the entry of the final decree on July 30, 1969, ever exercised visitation rights afforded him under the original decree.

This case should be remanded to the trial court for a clarification of the order from which this appeal resulted. The record does not contain the pleadings filed by the parties or considered by the court before the entry of the final decree. There is nothing in the record to indicate whether the intervenor had standing to litigate the question of visitation or custodial rights. The transcript of proceedings indicates that the trial judge wanted to confer visitation rights on the intervenor-grandmother; however, the trial judge, in his oral decision, stated:

> "* * *. I do not find that the allegations of the Complaint of the Intervenor that Reba Smith is an unfil [sic] person to have the custody, care, and control of the child has been sustained. The Complaint of the Intervenor will be dismissed. * * *."

No formal order was ever entered dismissing the complaint in intervention pursuant to the trial court's oral ruling, but it raises the question as to the legal standing of the intervenor in the proceeding.

Another reason requiring a remand of this case is the failure of the trial court to make findings of fact and conclusions of law as required by Rule 52(B) (a), Rules of Civil Procedure (§ 21–1–1(52) (B) (a), N.M.S.A., 1953 Comp. (Repl.Vol. 4, 1970)). Both the defendant and intervenor submitted requested findings of fact after the trial court had ruled on the motion for modification. No disposition of such requests by the trial court appears in the record. Pursuant to the motion, the trial court received evidence to clarify visitation rights and findings were required under Rule 52(B) (a), supra. The motion is not one under Rules 12, 50 or 56, Rules of Civil Procedure (§§ 21–1–1(12), 21–1–1(50) or 21–1–1(56), N.M.S.A., 1953 Comp. (Repl.Vol. 4, 1970)), where findings of fact are not required under the exceptions set forth in Rule 52(B) (a), supra. The proceedings below constituted "an action tried by the court without a jury" and its order constituted a "judgment on the merits." Thus, the court was required by Rule 52(B) (a), supra, and Rule 41(b), Rules of Civil Procedure (§ 21–1–1(41) (b), N.M.S.A., 1953 Comp. (Repl.Vol. 4, 1970)), to determine and find the facts. In Laumbach v. Laumbach, 58 N.M. 248, 270 P.2d 385 (1954), this court stated:

> "We have held in an unbroken line of decisions that it is the duty of the court to make findings of fact. In this case the court was requested by both parties to make a finding of fact on a material issue, and on conflicting testimony, and failure to do so constitutes error."

Intervenor-appellee conceded in her brief, and on oral argument, that findings of fact were required to be made by the trial court and urged that the matter be remanded to the District Court for the purpose of making findings of fact and conclusions of law. The requirements of Rule 52(B) (a), supra, makes the finding of facts in this case mandatory. When requested findings of fact were timely submitted, it then became the duty of the trial court to find all the ultimate facts. See, Laumbach v. Laumbach, supra. Furthermore, it is the duty of this court to apply and enforce rules of practice, as well as appellate rules, to promote the orderly disposition of all cases.

In matters involving child custody, though the trial court is vested with a wide discretion, the paramount consideration is the welfare of the child and it becomes important to clarify the rights and status of all parties involved in such a proceeding.

Since the trial judge who entered the order questioned herein is no longer on the Bench, the proper disposition of this appeal is to remand the matter to the District Court with instructions to reopen the case and hear additional evidence as may be submitted to clarify the standing of intervenor, not only as to custody but visitation rights as well. This I deem necessary in view of the trial court's original finding which has not been modified, that the defendant-mother of the child, appellant herein, was a fit and proper person to have custody of said child.

The majority having decided otherwise, I respectfully dissent on the grounds stated.

OMAN, J., concurs.

491 P.2d 520

PEOPLE'S CONSTITUTIONAL PARTY et al., Plaintiffs-Appellees,

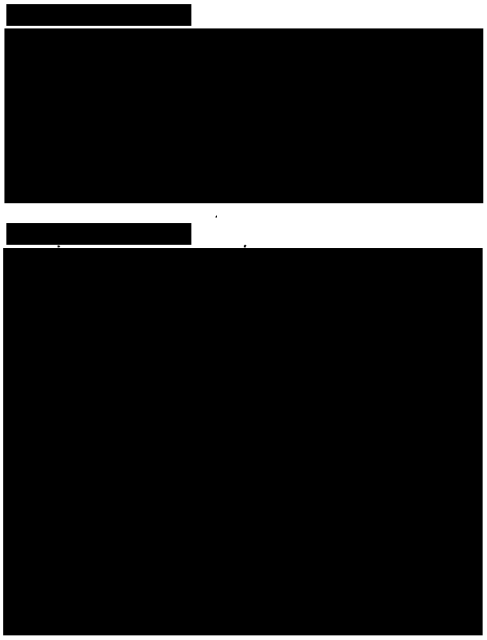
v.

Ernestine D. EVANS, Defendant-Appellant.

No. 9120.

Supreme Court of New Mexico.

Dec. 6, 1971.



James A. Maloney, Atty. Gen., Justin Reid, Frank N. Chavez, Ronald J. Van Amberg, Asst. Attys. Gen., Santa Fe, for appellant.

Michael B. Browde, Peter C. Mallery, Albuquerque, for appellees.

OPINION

OMAN, Justice.

People's Constitutional Party (P.C.P.) is a qualified political party of the State of New Mexico, and as of May 1970 there were 169 qualified voters registered as members of this party. Plaintiffs, William Higgs and Alfredo Martinez, were registered members of the P.C.P. and qualified voters of the State of New Mexico. Higgs was a declared candidate for the office of United States Senator and Martinez a declared candidate for the office of State Treasurer. The P.C.P., Higgs and Martinez did not participate in the 1970 primary nominating election, but sought placement on the 1970 general election ballot.

Plaintiff, Sophia Fajardo, was a registered Democrat and a qualified voter of the State of New Mexico who claimed a desire to have a broader choice of candidates in the 1970 general election than would be provided by the Democratic and Republican candidates.

Plaintiff sought and recovered a judgment from the trial court declaring §§ 3-8-2(B), (C) and 3-8-3(C), N.M.S.A.1953 (Repl. Vol. 1, 1970) unconstitutional and enjoining defendant as Secretary of State from enforcing the provisions of these sections of our statutes. Defendant appealed, but the case was not docketed in this court until long after the 1970 general election had become history. Consequently, our only concern now is with that portion of the judgment declaring these sections of our statutes unconstitutional. We reverse.

The questions presented are whether the requirements of §§ 3-8-2(B), (C) and 3-8-3(C), supra, contravene plaintiffs' rights as guaranteed by Art. II, § 8, and Art. VII, § 5 of the Constitution of New Mexico, and by the First Amendment and Fourteenth Amendment to the United States Constitution.

Section 3-8-2(B), supra, provides in pertinent part:

"The names certified to the secretary of state [as nominees of a minority party which selects its nominees by convention][1] * * * shall be accompanied by a list of signatures and legal addresses of not less than three per cent [3%][2] of the qualified electors of the state as computed from the total number of votes cast for the office of governor at the last preceding general election at which the governor was elected. Such petition shall be to the effect that the

1. This is the manner in which the P.C.P. selects its nominees.

2. Prior to April 8, 1971 and at the time of the entry of the judgment the figure was five per cent [5%], but plaintiffs take the position this change in no way affects the decision of the trial court or plaintiffs' position.

signers thereof endorse the principles of the political party named thereon or that the signers will designate or have designated such party affiliation on their affidavits of registration."

Section 3-8-2(C), supra, contains similar provisions as to nominees for county offices. Section 3-8-3(C), supra, provides that minority parties which make nominations by methods other than a political convention must comply with the above requirements as to accompanying lists of signatures of qualified electors.

Art. II, § 8, and Art. VII, § 5 of the Constitution of New Mexico provide:

Art. II, § 8

"All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

Art. VII, § 5

"All elections shall be by ballot, and the person who receives the highest number of votes for any office, except in the cases of the offices of governor and lieutenant governor, shall be declared elected thereto. The joint candidates receiving the highest number of votes for the offices of governor and lieutenant governor shall be declared elected to those offices."

The New Mexico Constitution also provides in Art. VII, § 1:

"The legislature shall have the power to require the registration of the qualified electors as a requisite for voting, and shall regulate the manner, time and places of voting. The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections, and guard against the abuse of elective franchise. * * *"

Plaintiffs concede the right of the Legislature to regulate the organization and conduct of elections and that the questioned statutory provisions do regulate elections. However, they argue that the signature requirements of these statutory provisions constitute onerous burdens which prevent minority parties from placing their nominees on the ballot. Their argument apparently is that minority parties have the right to form and participate in general elections by having their party names and emblems and the names of their nominees placed on the printed ballot or voting machines, without any show of support for a party, for a party's principles or for the nominees thereof. They predicate this claim of right primarily upon the "free and open" election provision of Art. II, § 8 quoted above, and upon their construction of the majority opinion in Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). In fact their entire argument, that the statutory provisions in question contravene both the state and federal constitutions, depends very largely upon their construction of the majority opinion in Williams v. Rhodes, supra, and this majority opinion apparently was the primary force resulting in the trial court's persuasion to hold the statutory provisions unconstitutional.

Elections of necessity must be organized and controlled to protect the right of suffrage, secrecy of the ballot, and against confusion, deception, dishonesty and other possible abuses of the elective franchise. The Legislature is charged with the duty of enacting laws to accomplish the purity of elections and protect against abuses. It takes little imagination to conceive of confusions and deceptions which might be worked upon electors if plaintiffs' position were to be accepted. Free and open elections do not require a total lack of restraint on the number of political parties and nominees entitled to placement on the ballot.

In any event, the Legislature has determined that the signature list requirements as provided by §§ 3-8-2(B), (C) and 3-8-3(C), supra, are consistent with its authority and duty to secure the purity of elections and guard against abuse of the elective franchise. It is our duty to uphold this legislative determination, unless satisfied beyond all reasonable doubt that the

Legislature went outside its constitutional authority in enacting these statutory requirements. McKinley v. Alamogordo Municipal School Dist. Auth., 81 N.M. 196, 465 P.2d 79 (1969); City of Raton v. Sproule, 78 N.M. 138, 429 P.2d 336 (1967); State v. Pacheco, 81 N.M. 97, 463 P.2d 521 (Ct.App.1969); Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control, 80 N.M. 633, 459 P.2d 159 (Ct.App.1969). We are not so satisfied.

Nothing said by the Supreme Court of the United States in Williams v. Rhodes, supra, is inconsistent with our interpretation of the New Mexico constitutional provisions in question and above quoted, and nothing said by that Court persuades us to the interpretation urged upon us by plaintiffs.

We next consider whether the signature list requirements under § 3-8-2(B), (C) and 3-8-3(C), supra, violate plaintiffs' United States constitutional rights of freedom of association, as guaranteed by the First Amendment,[3] and of equal protection, as guaranteed by the Fourteenth Amendment. The cases controlling a determination of these issues are Williams v. Rhodes, supra, and the later case of Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).

In the Williams case the election laws of Ohio were held unconstitutional because they constituted an entangling web of election laws, the totality of which imposed a burden on voting and associational rights amounting to an invidious discrimination against all but two particular parties—the Democrats and Republicans. See the opinion in the Jenness case, supra, and also 30 Ohio St.L.J. 202 (1969) for analyses of the substance and significance of the Williams decision. In the Jenness case the validity of the Georgia statutes was upheld. See the opinion in that case for a discussion of the differences between the Ohio and Georgia statutes.

The result reached and most of the reasoning of the Court in the Williams case are not applicable here, because we are only concerned with the quantitative and qualitative requirements of the two sections of our statutes shown above, and because the nominating requirements of our statutes do not impose a burden on voting and associational rights which effectively bar all minority parties from the ballot. The quantitative requirement as to names on the nominating petition under the Ohio statutes was qualified electors totaling 15% of the numbers of ballots cast in the last preceding gubernatorial election; under the Georgia statutes it was a number of electors of not less than 5% of the total number of electors eligible to vote in the last election for the filling of the office the candidate is seeking; under our statutes it is 3% of the qualified electors of the state as computed from the total number of votes cast for the office of governor at the last preceding general election at which the governor was elected. Thus, clearly our quantitative requirement is valid.

In neither the Williams nor the Jenness case was there involved a qualitative requirement such as ours. This requirement, as shown above, is that the signers of a nominating petition, in addition to being qualified electors, must in effect state that they "* * * endorse the principles of the political party named thereon * * *" or "* * * will designate or have designated such party affiliation on their affidavits of registration."

One of the principal purposes of a political association or party, as well as of any association, is to promote the advancement of common ideas and beliefs and the airing of grievances. Williams v. Rhodes, 393 U.S. at 38, 89 S.Ct. 5, supra; N.A.A.C.P.

3. This First Amendment right is made applicable to the states by the Fourteenth Amendment. Williams v. Rhodes, supra; New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

v. Alabama, 357 U.S. 449, 460, 78 S.Ct 1163, 2 L.Ed.2d 1488 (1958); Bates v. Little Rock, 361 U.S. 516, 523, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960). The nominees of all major parties are selected at the primary election only by the registered electors of each respective party and only from candidates whose registration records show affiliation with the particular party for one year next preceding the filing date for the primary election. Sections 3-8-1(A), 3-8-5, 3-8-17 and 3-8-24, N.M.S.A. 1953 (Repl.Vol. 1, 1970).

We are unable to understand how the foregoing stated requirements, that signers of a nominating petition must in effect state that they "* * * endorse the principles of a political party named thereon * * *" or "* * * will designate or have designated such party affiliation on their affidavits of registration," can possibly be viewed as violating plaintiffs' rights of association or equal protection. In fact the stated requirement is less restrictive than that imposed on electors and candidates who wish to participate in the nominating process of the major political parties.

The State has a legitimate interest in trying to determine some degree of good faith on the part of electors who sign nominating petitions, and in assuring at least a modicum of support for a political party and its nominees whose names are placed on the general election ballot. The requirements in these respects imposed by our Legislature are consistent with its duty to protect the purity of elections and safeguard against abuse of the elective franchise.

The judgment of the trial court should be reversed.

It is so ordered.

McMANUS, and STEPHENSON, JJ., concur.

491 P.2d 524

Debbie PETERS, a Minor and Helen Peters, Her Mother, Petitioners,

v.

Gregory Ronald LeDOUX, a Minor by Mary Gallegos, as Guardian and Next Friend, Respondents.

No. 9278.

Supreme Court of New Mexico.

Dec. 6, 1971.

Leon Karelitz, Las Vegas, for petitioners.

Duran, Pearlman & Short, Albuquerque, for respondents.

OPINION

OMAN, Justice.

The New Mexico Court of Appeals affirmed a judgment of the trial court in favor of plaintiffs against both defendants. LeDoux v. Peters, 82 N.M. 661, 486 P.2d 70 (1971). The case is now before us on certiorari. We affirm the results reached by both the trial court and the Court of Appeals, but disagree with some of the appraisals and conclusions of the Court of Appeals as to the New Mexico law on the family purpose doctrine.

We consider only the second issue raised by defendant, Helen Peters, hereinafter referred to as defendant, under her first point relied upon for reversal, and the disposition thereof by the Court of Appeals. Her contention is that: "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." The Court of Appeals held this contention was "* * * not in line with New Mexico decisions."

The facts bearing upon this issue are set forth in the opinion by the Court of Appeals.

We are unable to say these facts failed to substantially support the claim that defendant maintained the vehicle for the general use and convenience of her family. Thus, we agree with the trial court's conclusion that plaintiff should recover from defendant under the family purpose doctrine.

The opinion of the Court of Appeals, that defendant's contention is inconsistent with New Mexico decisions, is first predicated upon the assertion that the decisions in Pouliot v. Box, 56 N.M. 566, 246 P.2d 1050 (1952) and Stevens v. Van Deusen, 56 N.M. 128, 241 P.2d 331 (1951), "* * * 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. * * *"

The ownership of the vehicle in the case now before us is not in question, as shown by the facts recited in the Court of Appeals opinion. Consequently, even if the Pouliot and Stevens cases had held the heads of families liable under the family purpose doctrine, although they did not own the vehicles in question, this holding still would have no significance in the present case. In the present case defendant unquestionably owned the vehicle driven by her daughter. However, this court in neither the Pouliot nor the Stevens case said the automobile in question was not owned by the parent, nor did it say the automobile was owned by the minor child. In both cases it is clearly suggested that under New Mexico statutes the parent may in fact have been the owner. In neither case was the question of ownership decided, and the decision in neither turned upon this question. Both cases involved the reversal of summary judgments, and both, insofar as pertinent to the question now before us is concerned, stated that the status of the minor, whether emancipated, is a question of fact and cannot be decided as a matter of law.

Insofar as the question of ownership is concerned, this court in Boes v. Howell, 24 N.M. 142, 148, 173 P. 966 (1918), in announcing it agreed with the view expressed by the Washington court in the case of Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020 (1913), quoted the following from the opinion in the Washington case:

> "'* * * It seems too plain for cavil that a father, who furnishes a vehicle for the customary conveyance of the members of his family makes their conveyance by that vehicle his affair—that is, his business—and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another is his agent. * * *'"

Elsewhere in the opinion of this court in the Boes case reference is made to

"'* * * one who keeps an automobile for the pleasure and convenience of himself and his family * * *'" to "'[t]he owner of an automobile who maintains it for the general use of his family * * *'" and to "'* * * he [who] purchased and kept the automobile for the use of his family.'"

In the Pouliot and Stevens cases the court quoted the following with approval from Robinson v. Ebert, 180 Wash. 387, 39 P.2d 992, 995 (1935):

"'Whether a parent gives to an unemancipated minor child an automobile with permission to use the same, or whether he gives the child the money with which to buy an automobile, or whether he permits the child to purchase a car with money given the minor by some one else or earned by him, would, under circumstances similar to those here shown, appear to make little difference as to the question of whether or not the parents' responsibility constitutes a question of fact to be determined by the jury. * * *'."

These expressions would seem to indicate that ownership, in the sense of being the holder of title to the automobile, is not essential to liability under the family purpose doctrine. Accord, Lopez v. Barreras, 77 N.M. 52, 419 P.2d 251 (1966). However, as already stated, the question of ownership is not in dispute in this case.

The Court of Appeals next states the Pouliot and Stevens cases held liability could be imposed under the family purpose doctrine "* * * when the vehicle was not maintained for the general use and convenience of the family * * *." We fail to find anything in the opinion in either of these cases which could properly be so construed. In each case a minor child had purchased and apparently was paying the upkeep on the vehicle involved. However, in view of the nature of the cases and the stated issue upon which the summary judgments were reversed, we are unable to equate any language by this court in either opinion with the statement that under the family purpose doctrine, as developed in New Mexico, liability is not dependent upon the maintenance of the vehicle for the general use and convenience of the family.

This court in Boes v. Howell, supra, expressed this element of the family purpose doctrine in the following language:

"'* * * who furnishes a vehicle for the customary conveyance of the members of his family * * *.'"

"'* * * he [who] purchased and kept the automobile for the use of his family.'"

"'The owner of an automobile who maintains it for the general use of his family * * *.'"

"'One who keeps an automobile for the pleasure and convenience of himself and his family * * *.'"

This court, by Order No. 8000 Miscellaneous, dated May 5, 1966, approved the jury instructions prepared by the New Mexico Supreme Court Advisory Committee on Uniform Jury Instructions. The instruction on the family purpose doctrine appears as U.J.I. 4.9 and, together with the directions for use, is as follows:

"If a motor vehicle is maintained by the owner for the general use and convenience of his family, then the owner is liable for the negligence of a member of the family, (whether he be a minor or an adult), having authority to drive the motor vehicle and while it is being used for the pleasure or convenience of the family or a member of it.

"(This rule applies even though the motor vehicle was purchased by or registered in the name of a minor child or where the expense is paid by such minor child, so long as that child is a member of the household and under the general care and control of the head of the family).

Directions for Use

"This instruction is not to be used if a member of the family took the vehicle contrary to instructions.

"The last paragraph is to be used only when there is an issue relative thereto.

"Naturally, the instruction is not to be used if there is no issue."

The committee comment, which has not been quoted but which follows immediately after the quoted Directions for Use, clearly indicates that the committee considered and drafted the quoted instruction from its understanding of the decisions in Boes v. Howell, supra; Stevens v. Van Deusen, supra; Pouliot v. Box, supra; Burkhart v. Corn, 59 N.M. 343, 284 P.2d 226 (1955). By its approval of the instruction, this court approved this understanding, and we are still of the opinion that the committee and this court correctly understood and defined the family purpose doctrine in U.J.I. 4.9 as that doctrine has been explained and applied in the stated cases, excepting as to the requirement of ownership. The maintenance of the vehicle "* * * for the general use and convenience of [the] family, * * *" is essential to liability under the doctrine. Accord, Daniel v. Patrick, 333 S.W.2d 504 (Ky.1960); Coffman v. McFadden, 68 Wash.2d 954, 416 P.2d 99 (1966).

The Court of Appeals further relied upon what it calls a presumption of agency arising from a child's use of the parent's vehicle as announced in Burkhart v. Corn, supra. In that case, after detailing the evidence as to the purposes for which the vehicle was maintained and the purposes for and the extent of the use thereof by the child, the court stated:

"* * * we think this evidence alone establishes a prima facie case of liability under the family purpose doctrine. The burden was then upon the parents to overcome the presumption of agency arising from such ownership and use. * * *"

"* * *

"* * * In any event the truth of any rebutting evidence purporting to disprove the inference of agency thus created was for the trier of the facts."

It is apparent from a reading of the evidentiary facts recited in the opinion that the uses made of the vehicle amounted to a general use thereof for the convenience of the family. Thus, this court properly concluded this evidence sufficient to establish a prima facie case of liability under the family purpose doctrine.

Although the terms "presumption" and "inference" were used in the opinion in the Burkhart case, they were not used in the sense or given the effect which the Court of Appeals would now give them. The Court of Appeals, in effect, says after it had been made to appear that defendant owned the vehicle and had given her daughter permission to drive it, nothing more was required to establish a prima facie case under the family purpose doctrine. This is not supported by the decisions of this court, but is inconsistent therewith and with U.J.I. 4.9 quoted above.

The opinion and order of the Court of Appeals, insofar as they affirm the judgment of the trial court, are hereby affirmed, but insofar as the opinion is inconsistent herewith it is repudiated and disaffirmed.

It is so ordered.

COMPTON, C. J., and McMANUS, STEPHENSON and MONTOYA, JJ., concur.

491 P.2d 528

In the Matter of the ESTATE of David S. SHEHADY, Deceased.
Imogene SHEHADY, Appellant,
v.
Myrna Louise RICHARDS, now Myrna Louise Wolf, and David Richards, Appellees.
No. 9270.

Supreme Court of New Mexico.
Dec. 6, 1971.

McCormick, Paine, Feezer & Forbes, Carlsbad, for appellant.

Jerome D. Matkins, W. T. Martin, Jr., Carlsbad, for appellees.

OPINION

OMAN, Justice.

This cause is before us on a stipulation of facts, which are consistent with the findings made by the trial court, and a stipulation as to the issue to be determined by us on this appeal. This issue is:

"Whether or not the adoption of David Richards and Myrna Louise [Richards] Wolf by W. D. Richards prohibits them [David and Myrna] from inheriting from the decedent who was their natural father."

The trial court ruled the adoption did not prohibit them from inheriting from decedent, and they are entitled to share in decedent's estate according to the New Mexico laws of descent and distribution. We reverse.

Briefly the pertinent facts are:

(1) Decedent was first married to Elizabeth on November 29, 1928. This marriage was terminated by divorce on February 18, 1933.

(2) From this marriage Myrna was born on September 23, 1929, and David was born on April 8, 1931.

(3) Subsequent to the divorce of Elizabeth from decedent, she married Richards.

(4) On June 10, 1942, Myrna and David were adopted by Richards and given his name. Richards was joined in the adoption proceedings by his wife, Elizabeth, the natural mother of Myrna and David.

(5) Decedent and Imogene were married on January 11, 1966, and no children were born of this marriage.

(6) Decedent died intestate on July 16, 1970. He had no heirs by adoption.

(7) Imogene, his surviving widow, claims to be decedent's sole heir at law and entitled to his entire estate.

(8) Myrna and David claim to be heirs of decedent and entitled to an interest in decedent's estate under the New Mexico laws of descent and distribution.

The resolution of the issue presented depends very largely upon the meaning and effect of §§ 22-2-10, 22-2-19 [Repealed in 1971] and 29-1-17, N.M.S.A. 1953. These sections of our statutes provide:

"*22-2-10. Effect of final adoption decree.*—A final decree in adoption granted under this act [22-2-1 to 22-2-12] *shall divest the parents* and guardians of the person *of the child of all legal rights and obligations in respect to the child, and the child shall be free from all obligations in respect to them, and such child shall be, from and after the entry of such decree, to all intents and purposes, the child of the person or persons adopting it as if*

born to him or them in lawful wedlock, except that, in a stepparent adoption, *the rights and relationship between the child and the natural parent married to the petitioner remain unchanged by the adoption.*" [Emphasis added]

"*22-2-19. Name taken by adopted person—Rights of inheritance.*—Upon the granting of the adoption, the adult person shall take the family name of the person adopting and *shall be entitled to all the rights, including the right to inherit as now provided by law, of a natural child of such adopting person.*" [Emphasis added]

"*29-1-17. Inheritance by and from adopted child.*—Whenever a child has been legally adopted, such child shall inherit from the adopting parents, and each of them, and the adopting parents and each or either of them shall inherit from the adopted child, *to the same extent as if he were a natural child of the adopting parents. For all inheritance purposes without exception the adopted child shall be considered a natural child of the adopting parents* and in the event of the death of such adopted child, his estate shall ascend, descend and be distributed as is otherwise provided by law for natural born children of the same family, *all to the exclusion of the natural or blood parents of such child,* Provided, however, where one [1] of the natural parents be united in bonds of matrimony to the other adopting parent *then in such event the rules of inheritance as above set out shall attach as if said child were the natural child of both such parents.*" [Emphasis added]

It is the public policy in New Mexico, as demonstrated by the foregoing provisions of our statutes and as announced by this court in Delaney v. First National Bank in Albuquerque, 73 N.M. 192, 386 P.2d 711 (1963), "* * * to treat adopted children the same as natural children. * * *" This policy is consistent with the developing trend to treat an adopted child as the natural child of the adopting parents and the family of those parents, and to terminate in every respect, when considering legal rights and obligations, the relationship with the child's natural parents. In re Silberman's Will, 23 N.Y.2d 98, 295 N.Y.S. 2d 478, 242 N.E.2d 736 (1968); In re Estate of Wiltermood, 78 Wash.2d 238, 472 P.2d 536 (1970); In re Estate of Russell, 17 Cal.App.3d 758, 95 Cal.Rptr. 88 (1971); People v. Estate of Murphy, 481 P.2d 420 (Colo.App.1971); Weitzel v. Weitzel, 16 Ohio Misc. 105, 239 N.E.2d 263 (1968); In re Estate of Jalo, 474 P.2d 355 (Or.App. 1970); Epstein, Inheritance Rights of an Adopted Child in Texas, 6 Houston L.Rev. 350, 354 (1968); Halbach, The Rights of Adopted Children Under Class Gifts, 50 Iowa L.Rev. 971, 974 (1965).

The Supreme Court of Wisconsin in In re Estate of Topel, 32 Wis.2d 223, 145 N.W. 2d 162 (1966), was confronted with the identical issue here raised, except the decedent was the natural paternal grandfather of the adopted children rather than the natural father. The statute there involved provided:

"48.92. *Effect of adoption.* (1) After the order of adoption is entered the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist between the adopted person and the adoptive parents. The adopted person shall be entitled to inherit real and personal property from and through the adoptive parents in accordance with the statutes of descent and distribution, and the adoptive parents shall be entitled to inherit real and personal property from and through the adopted person in accordance with said statutes.

"(2) After the order of adoption is entered the relationship of parent and child between the adopted person and his natural parents, unless the natural parent is the spouse of the adoptive parent, shall be completely altered and

all the rights, duties and other legal consequences of the relationship shall cease to exist."

In neither the Wisconsin statutes nor in our statutes is there an express provision that an adopted child shall not succeed to or inherit from the estate of his natural parent or relative of the natural parent. There are differences in the language of the statutes, but in both there are express references to, or language to the effect that, an adoption effects changes in the legal status of the parties to the extent that the adopted child shall become the child of the adopting parent or parents the same as if born to him or them in lawful wedlock, and that for all inheritance purposes, without exception, the adopted child shall be considered as the child of the adopting parents.

In holding an adoption under the Wisconsin statute destroyed or terminated the grandchildren's status as "lawful issue of any deceased child," the Wisconsin Supreme Court stated in part:

"Modern adoption statutes generally establish a status, the incidents of which are in the nature of a natural relationship of parent and child. 2 Am.Jur.(2d), Adoption, p. 941, sec. 100. There is no exception in the present statute to this complete substitution of adoptive relationship for the natural relationship. We think the intent of sec. 48.92, Stats., from its language is to effect upon adoption a complete substitution of rights, duties, and other legal consequences of the natural relation of child and parent and kin with those same rights, duties, and legal consequences between the adopted person and the adoptive parents and kin."

"* * * * * *

"The legislative policy evidenced by sec. 48.92 is a change in thinking from the older view that adoption was only a type of contractual affiliation between the parties and that while the adoptive parents could make for themselves an heir by adoption, they could not by that means make one for their kindred. This view is expressed in the Estate of Boyle (1955), 271 Wis. 323, 329, 73 N.W.2d 425, 428; Estate of Bradley (1925), 185 Wis. 393, 396, 201 N.W. 973, 974, 38 A.L.R. 1; Estate of Uihlein (1955), 269 Wis. 170, 176, 68 N.W.2d 816, 820. The public attitude toward adoption and its acceptance has greatly changed in recent years. The philosophy of present adoption statutes of this state is best expressed by an anonymous poem entitled, The Adoptive Mother's Answer:

"Not flesh of my flesh
Not bone of my bone
But still miraculously
My own.
Never forget
For a single minute—
You didn't grow under my heart
But in it."

In Wailes v. Curators of Central College, 363 Mo. 932, 254 S.W.2d 645, 37 A.L.R.2d 326 (1953), the principal question presented was whether a person legally adopted "* * * may inherit from the natural parents, or, as in this case, from the natural grandparents." The resolution of this question was dependent upon the construction of a section of the Missouri statutes dealing with the consequences of adoption. This section of the statute is quoted in the court's opinion but is not here quoted because of its length. However, again there was no express provision therein that an adoptive child should not succeed to or inherit from the estate of his natural parent or relative of the natural parent. There were provisions expressly providing that the status of the adopted child was the same as though born to the adopting parent and that all legal relationships and all rights and duties between the adopted child and his natural parents ceased and determined. Again the language of our statutes, as quoted above, is different, but the intent and effect thereof are the same.

In holding that adopted children may not inherit from their natural parents, or their natural grandfather, the Supreme Court of Missouri stated in part as follows:

"It seems to us that the legislature by the above section [the quoted section from the Missouri statutes] has provided that when a person is legally adopted under the provisions of the adoption law, all ties of such adopted person with the natural parents and kin are completely severed. * * *"

"* * * * * *

"If an adopted child inherits from his natural parent as well as from his adoptive parent then there is a dual inheritance. This court in the Palms [Mississippi Valley Trust Co. v. Palms, 360 Mo. 610, 229 S.W.2d 675] case, supra, said, 229 S.W.2d loc. cit. 681 (12): 'It is no part of the public policy of the state that adoption should operate as an instrumentality for dual inheritance, with resulting animosity and litigation among those whom a testator provided in his will should share with equality and per stirpes. And the denial of dual inheritance under these circumstances is not opposed to the public policy of promoting the welfare of adopted children.' That statement was made as applying to the children in that case where the children claimed dual inheritance from their natural grandfather. However, the principle there expressed also applies where an adopted child claims the right to inherit from both the adoptive and natural parent. * * *"

We agree with the reasoning of the Wisconsin and Missouri courts, which is in accord with the express and clearly implied meanings of our statutes and with the public policy of our state as declared in our statutes and by this court in Delaney v. First National Bank in Albuquerque, supra.

The Decree of Determination of Heirship should be reversed and the cause remanded for the entry of a decree determining that Myrna and David are not heirs at law of decedent.

It is so ordered.

COMPTON, C. J. and McMANUS, J., concur.

491 P.2d 531

Emmett T. CHALMERS, Plaintiff-Appellee,

v.

Henry J. HUGHES and Phyllis Hughes, Defendants-Appellants.

No. 9221.

Supreme Court of New Mexico.

Nov. 22, 1971.

Rehearing Denied Dec. 21, 1971.

OPINION

COMPTON, Chief Justice.

This is a statutory quiet title action. The trial court found for the plaintiff. Judgment was entered accordingly and the defendants have appealed.

Title to the land in question has followed a somewhat circuitous path, one rather difficult to follow. In 1957, the title was quieted in one Fergus O. Mera. In 1960, in Cause No. 29286, Elvera Wieneke, successor in title to Mera, brought an action against Emmett T. Chalmers, the plaintiff in this action, and others, to quiet title. Issue was joined by Chalmers also claiming title, and discovery proceedings were begun by him. In attempting to make discovery, Chalmers sought to have Wieneke give her deposition but she failed to appear. Chalmers then obtained a court order directing her to give her deposition and Wieneke again refused to permit her deposition to be taken. Having twice refused to allow her deposition to be taken, the court granted Chalmers' motion for default judgment and dismissed Wieneke's action with prejudice. Subsequently, Wieneke conveyed the title to the defendants below. Chalmers has now instituted this quiet title action. The court below held that the dismissal with prejudice in Cause No. 29286 was an adjudication on the merits and res judicata as to Wieneke's claim of title.

The decisive question is whether the dismissal with prejudice in Cause No. 29286 constitutes an adjudication on the merits and is thus res judicata of the issues between the parties and their privies. We conclude that the dismissal with prejudice against Wieneke quieted title in Chalmers and extinguished any claim to title that Elvera Wieneke may have had. Rule 37(d), our Rules of Civil Procedure.

We observe that the trial court relied on Rule 41(b) of our Rules of Civil Procedure in reaching the decision that a

Bachicha & Corlett, Santa Fe, for defendants-appellants.

White, Gilbert, Koch, Kelly & McCarthy, Santa Fe, for plaintiff-appellee.

dismissal with prejudice constituted an adjudication on the merits. Though the court reached the proper result, we feel that the reliance on Rule 41(b) was improper. Rule 41(b) deals with sanctions available for use during the trial, whereas Rule 37(d) spells out sanctions for failure to give a deposition or answer interrogatories. Rule 37(d) of our Rules is adequate in itself to allow a dismissal with prejudice. See Societe Internationale, Etc. v. Rogers, 357 U. S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255. Compare also Halverson v. Campbell Soup Co., 374 F.2d 810 (7th Cir. 1967). See also 74 Harv.L.Rev. 940 (1961) for a discussion of discovery sanctions.

The conclusion reached disposes of appellants' claim that appellee relied on the weakness of appellants' title to prove his claim.

Appellants further contend the trial court erred in overruling their objection to the costs assessed against them. Assessment of costs is within the sound discretion of the trial court and will not be disturbed unless there is a showing of abuse of discretion. We see no abuse of discretion in this regard. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379; Davis v. Severson, 71 N.M. 480, 379 P.2d 774.

Appellants contend further that the court committed prejudicial error in not marking "refused" their requested findings and conclusions as required by Rule 52(B)(a) (5), our Rules of Civil Procedure. We observe that the trial court's decision states that, "The Court has considered such requests and they are all hereby denied except such as are included in this Decision." This statement is a sufficient compliance with the rule. Stull v. Board of Trustees, 61 N.M. 135, 296 P.2d 474.

The judgment should be affirmed, and it is so ordered.

McMANUS, and OMAN, JJ., concur.

491 P.2d 533

Fanny ATOL, Plaintiff-Appellee,

v.

Dante SCHIFANI, Defendant-Appellant.

No. 710.

Court of Appeals of New Mexico.
Oct. 29, 1971.
Rehearing Denied Nov. 12, 1971.
Second Rehearing Denied Nov. 22, 1971.
Certiorari Denied Dec. 2, 1971.

Arthur H. Coleman, Santa Fe, for appellant.

Leslie D. Ringer, Santa Fe, for appellee.

OPINION

SUTIN, Judge.

Schifani appeals from a judgment against him based on six promissory notes and one additional loan.

We reverse.

Schifani relies on three grounds for reversal: (1) the trial judge disregarded an affidavit of disqualification; (2) the trial court erred in proceeding to trial without the presence of Schifani and his attorney because the case was not ready for trial; and (3) the trial court erred in denying Schifani's motion for a new trial and to alter and amend judgment in the interest of justice.

1. *Did the Trial Court Legally Disregard the Affidavit of Disqualification?*

On January 17, 1968, the Atol complaint was filed and the case was assigned to Judge Samuel Z. Montoya. Schifani filed his answer in denial March 8, 1968. On February 3, 1969, Schifani, through a change of attorneys, filed a motion for leave to file an amended answer with a copy of the proposed amended answer attached which asserted affirmative defenses. On October 5, 1970, all attorneys

were notified that trial would take place November 10, 1970, before Judge James M. Scarborough. On November 5, 1970, Schifani filed an affidavit of disqualification of Judge Scarborough. On November 11, 1970, a judgment was entered for Atol against Schifani in which the affidavit of disqualification was rejected.

Prior to amendment, [see § 21–5–9, N.M.S.A.1953 (Repl. Vol. 4, Supp.1971)], §§ 21–5–8 and 21–5–9, N.M.S.A.1953 (Repl. Vol. 4) provided that the affidavit shall be filed against "the judge before whom the action or proceeding is to be tried and heard * * * not less than ten (10) days before the beginning of the term of court, if said case is at issue."

When is a case "at issue"? For purpose of disqualification, a "case is at issue" at that stage of procedure when an answer is filed which requires no further pleadings by the plaintiff. Notargiacomo v. Hickman, 55 N.M. 465, 235 P.2d 531 (1951). Compare State ex rel. Weltmer v. Taylor, 42 N.M. 405, 79 P.2d 937 (1938). "The pleadings are the formal allegations by the parties of their respective claims and defenses." Section 21–4–1, N.M.S.A.1953 (Repl. Vol. 4). The pleadings consist of a complaint, answer and, if necessary, a reply. A motion is not a pleading. Section 21–1–1(7) (a), (c), N.M.S.A.1953 (Repl. Vol. 4). Jacobson v. State Farm Mutual Automobile Ins. Co., 81 N.M. 600, 471 P.2d 170 (1970). This case was at issue under the disqualification statute on March 8, 1968, when the Schifani answer was filed. Notargiacomo v. Hickman, supra.

Pursuant to Rule 83 of the Rules of Civil Procedure, [§ 21–1–1(83), N.M.S.A.1953 (Repl. Vol. 4)], the First Judicial District adopted District Court Rule 8 which provides in part that "the assignment of cases to the several judges of the district will be varied in accordance with the work load." This rule does not conflict with any statute or rule of the Supreme Court. See § 16–3–15, N.M.S.A. 1953 (Repl. Vol. 4). Inasmuch as the assignment can vary from time to time, if Schifani desired to disqualify Judge Scarborough, he was required to file the affidavit not less than ten days before the beginning of that term of court which followed March 8, 1968. The two regular terms began the first Monday of March and the second Monday of September of each year as provided by Laws 1961, ch. 188, § 2 which was in effect during the year 1968, and thereafter repealed.

The affidavit, filed November 5, 1970, was late and was correctly rejected by the court. State v. Baca, 81 N.M. 686, 472 P.2d 651 (Ct.App.1970).

2. *Did the Trial Court err in Proceeding to Trial Without the Presence of Schifani or his Attorney Because the case was not Ready for Trial?*

The first point raised by Schifani under this issue is that the case was not ready for trial on November 10, 1970.

On February 3, 1969, Schifani filed a motion for leave to file an amended answer with a copy of the amended answer attached thereto, which contained seven affirmative defenses. The trial court never ruled upon this motion. In the judgment filed November 11, 1970, the trial court stated:

> WHEREUPON defendant moved in open Court that the trial should not proceed for the additional reason that the cause is not at issue, inasmuch as there is pending defendant's Motion for Leave to File his Amended Answer. *The Court having heard the arguments of counsel finds that despite the pendency of such motion the cause remains at issue and that the trial should proceed as assigned.* [Emphasis added.]

Under Rule 15(a) of the Rules of Civil Procedure, [§ 21–1–1(15) (a), N.M.S.A.1953 (Repl. Vol. 4)], Schifani had the right to amend his answer by leave of court or by written consent of the adverse party. But leave shall be freely given when justice so requires. The motion to amend is addressed to the sound discretion of the trial court. If denied, the order is

subject to review for a clear abuse of discretion. Vernon Company v. Reed, 78 N.M. 554, 434 P.2d 376 (1967). In Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965), the court said:

> The law has long recognized the principle that amendments to pleadings are favored, and that the right thereto should be liberally permitted in the furtherance of justice.

The motion was filed February 3, 1969, twenty-one months before the argument was heard in court. We do not condone the practice of attorneys permitting motions to rest in peace. The disposition of motions is an important aspect of civil procedure and some reasonable time and place for hearing and disposition should be established by district courts. Section 21–1–1(78), N.M.S.A.1953 (Repl. Vol. 4). See also § 21–4–23, N.M.S.A.1953 (Repl. Vol. 4) where a motion may be considered denied or overruled after 30 days written notice to that effect after 90 days have expired from submission of the motion. The record in this case fails to show that either rule is applicable here.

The record clearly shows that defendant called the pendency of the motion to amend to the attention of the trial court, and that the trial court proceeded to trial despite the pendency of the motion. The pending motion sought to amend the issues to be tried. Since amendments to pleadings are favored and should be liberally permitted in the furtherance of justice, Martinez v. Research Park, Inc., supra, the trial court abused its discretion in proceeding to trial "despite the pendency of such motion." Atol contends the record fails to show any effort was made to get the motion to amend decided. In the circumstances here, where the trial court recognized the pendency of a motion directed to the issues to be tried and where Schifani was objecting to trial because the motion was pending, the trial court was sufficiently alerted to the fact that the motion should be disposed of. State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179 (1941); compare In re Stern's Will, 62 N.M. 411, 311 P.2d 385 (1957).

The trial court erred in not ruling on the motion to amend the answer of Schifani. After a ruling on the motion, the case may be set down for trial. It is unnecessary to decide Schifani's third point.

This case is remanded with direction to the trial court to rule on the motion to amend, and, thereafter, proceed with a new trial.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

COWAN, J., not participating.

491 P.2d 536

Frank YEARY and Great American Insurance Company, Plaintiffs-Appellants,

v.

AZTEC DISCOUNTS, INC., and Eddie Chavez, Defendants-Appellees.

No. 665.

Court of Appeals of New Mexico.
Nov. 19, 1971.

William H. Carpenter, Mercer & Carpenter, Perry Key, Albuquerque, for appellant Frank Yearby.

J. E. Casados, Casados & McBride, Albuquerque, for appellant Great American Insurance Company.

Ranne Miller, Charles A. Pharris, Keleher & McLeod, Albuquerque, for appellees.

OPINION

COWAN, Judge.

Plaintiff Frank Yeary (called plaintiff here) filed a personal injury action against Aztec Discounts, Inc., Globe Shopping City, Inc., Eddie Chavez, and Great American Insurance Company. The latter, as compensation insurance carrier for the plaintiff's employer, was dismissed as a defendant and joined as a plaintiff. On plaintiffs' motion their complaint was dismissed as to Globe Shopping City, Inc. Answer was by general denial and raised affirmative defenses of contributory negligence and assumption of the risk, as well as others not pertinent to this appeal.

Thereafter, based upon the pleadings and depositions, the court entered a summary judgment in favor of the two remaining defendants and plaintiffs appeal.

We reverse.

Plaintiff was a routeman employed by Pepsi Cola Bottling Company. As part of his duties, he went to the store of defendant Aztec Discounts, Inc., from time to time, to deliver bottled Pepsi Cola and to take away empty bottles and cases. Defendant Eddie Chavez, an employee of Aztec, was in charge of the stockroom where the merchandise was stored. Empty bottles of various brands, unsorted, were in cases stacked between six and eight feet high and three to five stacks deep, along one wall in the Aztec storeroom. There was an aisle approximately thirty inches wide, through which the routemen could enter and pick up bottles. Employees of Aztec were responsible for placing the empty bottles in the storeroom, and ordinarily put different brands of soda bottles and different size bottles in the cases. Plaintiff was the first routeman to arrive at Aztec's store on Monday, August 4, 1969, the day he was injured. The cases

of empty bottles, accumulated over the weekend, were stacked just as Aztec's employees had left them the night before. On the morning of the accident, the plaintiff had sorted out about ten to fifteen cases of empty bottles, and was picking up the last case of a stack when one or more stacks of cases either to his side, to his rear, or both, fell and injured him.

The plaintiff and other routemen had complained to defendant Eddie Chavez and other employees of defendant Aztec prior to the accident of August 4, 1969, because bottles of different sizes and brands were mixed in the same case and it was potentially dangerous to stack them in this manner. Previously, stacks on which plaintiff was working had fallen when he reached up to take a case of bottles from the top of the stack. He was not aware of any other occasion when a stack had fallen without some contact having been made with it. The stacks were not always unstable, and one could not tell by looking at them that they were likely to fall. There was no evidence that the plaintiff knew or should have known of the specific danger involved, i. e., that the stacks might fall without contact. Compare Hinojosa v. Nielson, (Ct.App.), 490 P.2d 1240, decided October 15, 1971. On the morning of the accident, the plaintiff had not worked on the stack or stacks which fell nor had he touched or bumped any stack prior to its falling.

The rules set out in Barber's Super Markets, Inc. v. Stryker, 81 N.M. 227, 465 P.2d 284 (1970), are applicable to this case.

> "A party moving for summary judgment has the burden of establishing that there is no material issue of fact to be determined by the fact finder and that he is entitled to judgment as a matter of law. Spears v. Canon de Carnue Land Grant, 80 N.M. 766, 461 P.2d 415; Great Western Construction Co. v. N. C. Ribble Co., 77 N.M. 725, 427 P.2d 246. The burden is not on the opposing party to prove a prima facie case. Coca v. Arceo, 71 N.M. 186, 376 P.2d 970. A party opposing a motion for summary judgment is entitled to have all reasonable inferences construed in a light most favorable to him. Cillessen Bros. Construction Co. v. Frank Paxton Lumber Co., 79 N.M. 95, 440 P.2d 133. Even where the basic facts are undisputed, if equally logical but conflicting inferences can be drawn from the facts, summary judgment should be denied. Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co., 77 N.M. 730, 427 P.2d 249; Hewitt-Robins, Inc., Robins Conveyors Division v. Lea County Sand & Gravel, Inc., 70 N.M. 144, 371 P.2d 795."

The last rule, that of conflicting inferences, governs the disposition of this appeal.

Negligence, contributory negligence and assumption of the risk are factual matters to be determined by the trier of fact, Stewart v. Barnes, 80 N.M. 102, 451 P.2d 1006 (Ct.App.1969), and summary judgment is not a substitute for trial. Hewitt-Robins, Inc. v. Lea County Sand & Gravel, Inc., supra. All "matters presented and considered by the court must be viewed in the most favorable aspect they will bear in support of the right to a trial on the issues. [Citation omitted] All reasonable inferences must be construed in favor of the party against whom the summary judgment is sought." Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co., supra.

In light of the foregoing authority, it follows that, although the basic facts may be undisputed, equally logical but conflicting inferences can be drawn from these facts pertinent to the issues of negligence, contributory negligence and assumption of the risk. The granting of summary judgment was error. Barber's Super Markets, Inc. v. Stryker, supra.

The summary judgment is reversed and the cause remanded with directions to proceed in a manner not inconsistent herewith.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

WOOD, C. J., not participating.

491 P.2d 539

Jose E. BLEA, Plaintiff-Appellant,

v.

LOWDERMILK BROTHERS, INC., as Employer, Mountain States Mutual Casualty Company, Inc., as Insurer, Defendants-Appellees.

No. 726.

Court of Appeals of New Mexico.
Nov. 19, 1971.

Edward J. Apodaca and Jacob Carian, Albuquerque, for plaintiff-appellant.

Ray Hughes, Deming, for defendants-appellees.

OPINION

COWAN, Judge.

Plaintiff appeals from a judgment denying him recovery and dismissing his claim for workmen's compensation.

We affirm.

On May 26, 1968, while employed as a foreman for defendant Lowdermilk Brothers, Inc., plaintiff received a compensable injury when he slipped and splayed his legs. He was paid compensation for 54 weeks by the defendant insurance company and was treated or examined by an orthopedic surgeon, a neurosurgeon, and two psychiatrists.

After compensation was suspended plaintiff filed suit, alleging total disability. Evidence at the trial was that the plaintiff had fully recovered from physical or organic injury resulting from the accident. He had no disability either from an orthopedic or a neurological standpoint and, in the words of his treating orthopedist when he last saw the plaintiff on March 21, 1969, ". . . there was no medical impairment of function as regards his locomotive system, his back or his neck, which would render him impaired. . ." He had been cleaning his yard, chopping weeds, mowing the lawn, trimming bushes and trees, repairing and replacing the roof, driving a motor vehicle on trips, and doing other physical labor. He performed all the tasks which he had prior to the injury except gainful employment. There was little, if any, labor required of him in his job as a foreman although he was, at times, called upon to do some physical labor.

His claim at the trial was that he was totally disabled because of lack of motivation and that this "lack of motivation" was an element of traumatic neurosis resulting from the injury. He did not urge or attempt to prove, nor does he now argue, that he is partially disabled to any percentage-extent.

He urges by his first two points that the court erred in making the following findings:

"10. The psychiatric condition (hereafter called traumatic neurosis) which plaintiff suffered might possibly have been caused by the accidental injury of May 26, 1968, but it is not established as a medical probability.

"11. The traumatic neurosis which plaintiff suffered is not severe nor moderate, but is only of a mild degree, and the resultant disability therefrom is only slight, and plaintiff is able to perform the usual tasks in the work he was performing at the time of said accidental injury."

He further argues under a third point that other of the court's findings were generally unsupported by the evidence.

The court's finding number 11, with the conclusions of law based thereon that the defendant was not totally disabled and was not entitled to further compensation benefits, is dispositive of this appeal. It is therefore unnecessary to discuss the other claimed error.

The applicable law is set out in Lopez v. Schultz & Lindsay Construction Company, 79 N.M. 485, 444 P.2d 996 (Ct.App. 1968), where this court stated:

"In viewing the evidence to determine whether or not it substantially supports the findings, it must be viewed, together with all reasonable inferences deducible therefrom, in the light most favorable to support the findings. . . . The credibility of the witnesses and the weight to be given their testimony are to be determined by the trial court and not by the appellate court. . . . The appellate court may not properly substitute its judgment for that of the trial court as to the credibility of any witness or as to the weight to be given his testimony. . . . It is not for the appellate court to say what testimony should be given credence and what should be disbelieved. . . . Although we are firmly committed to the view that our Workmen's Compensation Act must be liberally construed to effect its purpose, this view of liberal construction applies only to the law and not to the facts. . . . On appeal only that evidence and the reasonable inferences to be drawn therefrom which support the findings will be considered. All evidence unfavorable to the findings will be disregarded. . . . ."

Although not uncontradicted, there was evidence that the plaintiff was suffering from a "mild, not a moderate and not a severe traumatic neurosis" and that this was not disabling. There was also evidence that if the plaintiff had been suffering from a severe, or even a moderate, degree of traumatic neurosis he would have been unable to engage in the various activities herein mentioned. As one of the psychiatrists testified when questioned concerning plaintiff's lack of motivation, "I am telling you he is happy with his present lot. I don't think that he is suffering from a severe degree of these symptoms. If he were, he would not be able to engage in all these other activities. It would be impossible."

Plaintiff relies on Ross v. Sayers Well Servicing Company, 76 N.M. 321, 414 P. 2d 679 (1966), but that case is distinguishable because there the medical evidence was uncontroverted, and here it is not.

Concluding that the court's finding number 11 is supported by substantial evidence, we affirm the judgment.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

SUTIN, J., not participating.

491 P.2d 1079

STATE of New Mexico, Respondent,

v.

Warren GRUENDER, Petitioner.

No. 9364.

Supreme Court of New Mexico.

Dec. 9, 1971.

This cause coming on before the Court for consideration on petition for writ of certiorari directed to the Court of Appeals of the State of New Mexico, and the Court having considered said petition and being sufficiently advised in the premises;

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

It is further ordered that the record in Court of Appeals, 83 N.M. 327, 491 P.2d 1082, be and the same is hereby returned to the Clerk of the Court of Appeals.

491 P.2d 1080

STATE of New Mexico, Plaintiff-Appellee,

v.

Mose Lee GILLIAM, Defendant-Appellant.

No. 711.

Court of Appeals of New Mexico.

Nov. 19, 1971.

Donald C. Cox, Easley & Reynolds, Hobbs, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas L. Dunigan, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Gilliam was found guilty of robbery while armed with a deadly weapon. Section 40A–16–2, N.M.S.A.1953 (Repl. Vol. 6). This is a companion case with State v. White, (Ct.App.) No. 707, decided November 12, 1971.

We affirm.

Gilliam contends: (1) the trial court erred in denying his motion to suppress testimony relating to an out-of-court photo identification by the victim of the robbery; (2) the trial court erred in permitting in-court identification of the defendant by the victim, because no proof was offered that the in-court identification was not tainted by illegal photo identification.

1. *Did the Trial Court err in Denying Gilliam's Motion to Suppress Evidence of an Out-of-Court Photo Identification Made by the Victim?*

Gilliam bases his contention on two separate grounds. (a) The police photographic

identification procedure was so impermissibly suggestive as to deny Gilliam due process; and (b) the procedure was conducted in absence of counsel.

At a preliminary hearing on motion to suppress, a partial stipulation of facts was entered into as follows: On the second day following robbery of the Quick Shop Grocery Store in Hobbs, a police officer, who suspected Gilliam, stopped the car in which Gilliam was riding, and brought him to the police station. The officer said Gilliam was not arrested and he was advised of his rights. Gilliam felt he was under arrest and was not advised of his rights. Mug shots were taken. Then the police officer showed the victim in the hospital three of these mug shots of Gilliam. She positively identified Gilliam as one of the two men who had robbed her. Later that afternoon, Gilliam was again picked up and taken to the police station where additional mug shots were taken. The police officer and Gilliam again disagreed over whether Gilliam was arrested and advised of his rights. These photographs were put in a mug book with 50 pictures and taken by two detectives to the victim who again identified Gilliam. That night, Gilliam was arrested, put in jail and advised of his rights.

In addition to the stipulation, the evidence showed the victim had seen Gilliam in her store five or six times before the robbery, and she saw him at the time of the robbery; she positively identified him at trial.

The trial court denied the motion to suppress on the grounds that due process does not require presence of counsel when photographs or a mug book is shown to a victim for identification, and that in view of the totality of the circumstances, the identification procedure was not so impermissibly suggestive as to violate Gilliam's due process rights.

First, Gilliam contends that if a photo identification procedure is "unnecessary" it is violative of due process to admit evidence of identification made, "unless there can be a showing on the part of the State that the in-court identification is independent of the constitutionally illegal out-of-court identification." He also argues that the photo identification procedure followed in this case was so impermissibly suggestive as to violate due process standards, and require exclusion of the in-court identification.

Gilliam's first contention is an erroneous statement of the law; whether the use of photographic identification procedures is "necessary or unnecessary" is a factor to be considered among the totality of the circumstances surrounding the identification. The standard is whether " 'photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' " State v. Baldonado, 82 N.M. 581, 484 P.2d 1291 (Ct.App.1971).

While the procedure of showing only one photograph to a victim or witness to a crime has been criticized, and is suspect in and of itself, we cannot conclude that the photograph identification procedure used in this case was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The victim had seen Gilliam in the store several times previously, and connected his manner of wearing a hat worn in his prior visits to the store with Gilliam. Her description of the robber, and of the times he was in the store, led the officer to suspect Gilliam. She had ample opportunity to observe Gilliam in the course of the robbery. Her identification of Gilliam was unwavering and positive.

There was no showing that the mug photographs led to misidentification of Gilliam in this case.

In the second place, during trial, the victim made an independent in-court identification. She testified she saw Gilliam face to face during the robbery. She did not rely on any photographs shown to her.

Second, Gilliam contends he was entitled to assistance of counsel at the time the mug shots were taken to the victim.

At the time the mug shots were taken to the victim, Gilliam was not under arrest or in custody, or subject to interrogation. He was free. The adversary system had not begun to operate against him. No authority has been cited that Gilliam was entitled to assistance of counsel during an investigatory procedure.

It has been held that where a defendant, not under arrest, or in any way detained, makes a voluntary statement in the nature of a confession, the statement is admissible during trial, even though the defendant had no warning, and had not been advised of his rights to remain silent, or of his right to consult an attorney. State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968). See State v. Anaya, 81 N.M. 52, 462 P.2d 637 (Ct.App.1969).

In State v. Carrothers, 79 N.M. 347, 443 P.2d 517 (Ct.App.1968), a mug shot was shown to witnesses after defendant had been charged and counsel appointed to defend him. For purposes of discussion, the court assumed "that all pre-trial identification of a suspect *in custody,* whether in person or by photograph, after counsel has been appointed or employed, is tainted unless counsel be present, ..." [Emphasis added.] This assumption does not fall within the facts concerning Gilliam, and is not applicable.

Under the facts of this case, we hold that Gilliam was not entitled to assistance of counsel while the mug photographs were shown to the victim for identification because Gilliam was not arrested or in custody, and the investigatory stage had not shifted to the accusatory stage. We do not decide what rule should be adopted when mug shots are taken while an accused is under arrest or in custody, and, thereafter, the photographs are shown to the witness for identification. See McGee v. United States, 402 F.2d 434, 436 (10th Cir. 1968) cert. denied, 394 U.S. 908, 89 S.Ct. 1020, 22 L.Ed.2d 220 (1969); United States v. Bennett, 409 F.2d 888, 898–900, (2d Cir. 1969); United States v. Ballard, 423 F.2d 127, 130–131 (5th Cir. 1970); United States v. Robinson, 406 F.2d 64, 67 (7th Cir. 1969) cert. denied, 395 U.S. 926, 89 S.Ct. 1783, 23 L.Ed.2d 243 (1969).

2. *Was the Identification Evidence Admissible During Trial?*

An in-court identification of Gilliam was admitted at trial. Gilliam contends that since the out-of-court identification was illegal, it was inadmissible because the state failed to prove that the in-court identification was independent of the out-of-court identification. The out-of-court identification was legal. Furthermore, the record is clear that the victim met Gilliam prior to the crime and saw him face to face during the crime and positively identified him. The in-court identification was independent. State v. Morales, 81 N.M. 333, 466 P.2d 899 (Ct.App. 1970), cert. den. 400 U.S. 842, 91 S.Ct. 84, 27 L.Ed.2d 77.

Affirmed.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

491 P.2d 1082

STATE of New Mexico, Plaintiff-Appellee,

v.

Warren GRUENDER, Defendant-Appellant.

No. 663.

Court of Appeals of New Mexico.

Nov. 5, 1971.

Certiorari Denied Dec. 9, 1971.

David F. Boyd, Jr., Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Ray Sholenbarger, Sp. Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of burglary defendant appeals, asserting five points for reversal: (1) the prosecuting attorney made an impermissible comment in his opening statement regarding defendant's right to remain silent; (2) there is substantial evidence that the statement given by defendant was not freely and voluntarily given; (3) the statement given did not admit an essential element of the crime charged; (4) it was error to refuse defendant's requested instruction that the jury must find defendant innocent if a conclusion of innocence could reasonably be drawn from the evidence; (5) the jury verdict disregarded the court's instruction No. 10 and the verdict was a result of bias and prejudice and unsupported by evidence. We affirm.

IMPERMISSIBLE COMMENT IN OPENING STATEMENT.

The prosecution, in referring to the state of disarray of the burglarized home, reminded the jury to "Remember that when the defendant testifies, if he does . . ." It is the language "if he does" that is asserted by defendant to be reversible error. Defendant relying on State v. Miller, 76 N.M. 62, 412 P.2d 240 (1966) contends for the first time on appeal that this was a comment by the prosecutor upon an accused's failure to testify.

No objection was made and no ruling of the trial court was invoked as to this claimed error. Thus it was not preserved for review. Section 21-2-1(20)(2), N.M.S.A.1953 (Repl.Vol.1970). Only jurisdictional questions or claims of fundamental error may be raised the first time on appeal. Section 21-2-1(20) (1), N.M.S.A.1953 (Repl.Vol.1970). Defendant does not claim that the assertedly improper comment is jurisdictional or amounts to fundamental error. State v. Reynolds, 79 N.M. 195, 441 P.2d 235 (Ct.App.1968). See State v. Montoya, 80 N.M. 64, 451 P.2d 557 (Ct.App.1968).

INVOLUNTARY CONFESSION.

Defendant in relying on his own testimony at trial contends that there was substantial evidence to the effect that the statement given by him was involuntary and that the trial court erred in allowing it to go to the jury. Defendant also contends the State's testimony in opposition is inaccurate on its face.

The procedure to be followed by the court in determining the voluntariness of a confession is set forth in State v. Word, 80 N.M. 377, 456 P.2d 210 (Ct.App.1969) and the cases cited therein: That the trial court is to hold a hearing out of the presence of the jury in order to have an impartial and reliable determination on the issue of voluntariness; the determination is to be uninfluenced by the truth or falsity of the confession. See Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964). Defendant is not attacking the adequacy of the trial court's ruling that the confession could go to the jury, see State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct.App.1971). The claim is no more than, on the evidence presented at the hearing, the trial court's ruling was wrong.

In the hearing held by the court the State introduced evidence that the confession was voluntary. The defendant introduced evidence that the confession was not voluntary. There being conflicting evidence, the trial court did not err in permitting the jury to pass on the question of the voluntariness of the confession. State v. Gutierrez, 79 N.M. 732, 449 P.2d 334 (Ct.App.1968).

STATEMENT GIVEN DID NOT ADMIT AN ESSENTIAL ELEMENT OF THE CRIME.

It is defendant's contention that under the facts in this case, burglary was committed only if his unauthorized entry was made with intent to commit a theft, and

here there is no probative evidence that defendant had an intent to commit a theft when he went into the home. Defendant states that there was no independent evidence of a corpus delicti without which he could not be convicted.

Defendant contends there is nothing in the confession which shows he entered the home with intent to commit a theft. We disagree. His confession states that no one was at the home; that he put on at least one glove, entered, found and took some foreign money; that he couldn't find anything else. These statements, in the confession, support an inference of an entry with the intent to commit a theft.

Defendant also contends that apart from the confession, there is no probative evidence of his "intent." Again we disagree. Defendant's testimony on the stand admits the entry and that he removed the foreign money from the house. These admissions corroborate the confession. Thus, if corroboration of the confession was required, defendant's own testimony provided the corroboration.

Defendant asserts: "It is established that a conviction cannot be sustained solely on the extra-judicial statement of the accused. There must be independent evidence of a corpus delicti." While this is true, the corpus delicti in this case is the crime of burglary. The victim's testimony established the corpus delicti in this case. 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).

The contention that the corpus delicti is not established unless there is evidence of his intent to commit a theft mixes two concepts. "The corpus delicti of a particular offense is established simply by proof that the crime was committed; the identity of the perpetrator is not material." State v. Nance, supra; State v. Vallo, 81 N.M. 148, 464 P.2d 567 (Ct.App.1970). Here, the corpus delicti was established when there was proof that a burglary had been committed. The confession, and the corroborating evidence, proved that defendant was the burglar, but this proof was not an essential element of the corpus delicti because the fact that the crime had been committed was established by other evidence.

REFUSED INSTRUCTION.

The defendant contends that the trial court erred in refusing defendant's requested instruction No. 1, that the jury must find defendant innocent if a conclusion of innocence could reasonably be drawn from the evidence. Defendant states that instruction No. 3 told the jury only that they must believe the defendant guilty beyond a reasonable doubt and instruction No. 5 told them only that they could find him guilty when there was no other reasonable hypothesis than defendant's guilt, thus the jury remained uninstructed as to its positive duty to return a verdict of not guilty where, from the evidence, two conclusions could be reasonably drawn—one of innocence, the other of guilt.

Jury instructions are to be read as a whole. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct.App.1971). The court's instruction No. 5 stated in part:

> ". . . before you will be authorized to find a verdict of guilty against the defendant, the facts and circumstances shown in evidence must be incompatible, upon any reasonable hypothesis, with the innocence of the defendant, and incapable of explanation, upon any reasonable hypothesis, other than that of the guilt of the defendant."

The court's instruction No. 3 stated:

> "You may find the defendant guilty of burglary only if you believe beyond a reasonable doubt that at the time he entered the Pettingill residence, the defendant intended to commit a theft or a felony.
>
> "If you find it probable that he formed the intent to commit a felony or a theft only after he had entered the Pettingill house, then you must find the defendant innocent."

These instructions when read with the other instructions given fully and fairly stated the law and the defendant's theory of the case. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct.App.1969); State v. Martinez, 36 N.M. 360, 15 P.2d 685 (1932). To give defendant's requested instruction No. 1, which stated that:

> "If two conclusions can reasonably be drawn from the evidence, one of innocence, and one of guilt, you should adopt the one of innocence."

would be to give undue emphasis to a conclusion or presumption of innocence which already had been adequately covered in the instructions given. State v. Deats, supra; State v. Lindwood, 79 N.M. 439, 444 P.2d 766 (Ct.App.1968). Instructions, when considered as a whole, are sufficient if they fairly represent the issues and the applicable law. State v. McFerran, supra.

VERDICT A RESULT OF BIAS AND PREJUDICE.

It is defendant's contention here that the jury disregarded the court's instruction No. 10 and accordingly the verdict was a result of bias and prejudice. Instruction No. 10 states:

> "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."

Defendant's argument is that ". . . where reasonable men could not have been morally convinced of the guilt of the accused under the evidence the resulting jury deliberation can be no more than harmfully prejudicial speculation, guess work and conjecture" and that a verdict of guilty was obviously speculatory since the evidence could not support the verdict.

As we have heretofore stated the record does not support defendant's contention. The jury chose not to believe defendant's story. The jury could infer from the fact of the victim's house being broken into, defendant admitting breaking into the house using gloves, personal property being taken and in possession of defendant immediately after the break-in and defendant's fleeing from the break-in that defendant committed the burglary.

Affirmed,

It is so ordered.

WOOD, C. J., concurs.

SUTIN, J., dissenting.

COWAN, J., did not participate.

SUTIN, Judge (dissenting).

I dissent only on the issue of the admission of Gruender's confession in evidence without a determination by the trial court that the confession was voluntary.

This is an important legal principle for a trial court to follow. It is an important principle for this court to clarify.

During a hearing out of the presence of the jury, Gruender contended that the whole purpose of the hearing was to determine whether the confession was voluntary. The trial court disagreed. It merely found that the evidence was conflicting and held: "I think the matter of evaluating the confession is really for the jury."

In Sims v. Georgia, 385 U.S. 538, 87 S. Ct. 639, 17 L.Ed.2d 593 (1967), the identical problem arose. In reversing the conviction, the court said:

> Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity. Here there has been absolutely no ruling on that issue and it is therefore impossible to know whether the judge thought the confession voluntary or if the jury considered it as such in its determination of guilt.

This rule is binding upon the states. On remand of the Sims case, the trial judge determined that Sims' confession was voluntary and denied a new trial. On a subsequent appeal, the case was again reversed. 389 U.S. 404, 88 S.Ct. 523, 19 L. Ed.2d 634 (1967). The Sims decision was based on Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964). For another case directly in point, see Javor v. United States, 403 F.2d 507 (9th Cir. 1968).

In my opinion, some late New Mexico decisions are not clear on this point. Not one of them states that the conclusion of the trial court "that the confession is voluntary must appear from the record with unmistakable clarity." See State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct.App.1971), application for certiorari docketed and is pending in the Supreme Court of the United States. State v. Soliz, 79 N.M. 263, 442 P.2d 575 (1968), and cases cited; State v. Fagan, 78 N.M. 618, 435 P.2d 771 (Ct. App.1967); State v. Word, 80 N.M. 377, 456 P.2d 210 (Ct.App.1969); State v. Beachum, 78 N.M. 390, 432 P.2d 101 (1967), cert. den. 392 U.S. 911, 88 S.Ct. 2068, 20 L.Ed.2d 1369 (1968).

As early as 1924 in State v. Martinez, 30 N.M. 178, 230 P. 379 (1924), the Supreme Court held:

> A very proper practice in such cases is to inquire into the circumstances under which the confession was alleged to have been made, in the absence of the jury, and for the court to determine from such evidence whether the confession was voluntary.

In Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964), the court said:

> Equally important is the fact that the evidence here presented shows clearly that the trial judge ruled that the confession was voluntary before he submitted it to the jury.

In State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966), Justice Moise said:

> In connection with each of the three items of proof, i. e., the confessions, . . the state was required to lay a foundation before they were submitted to the jury. Based upon the presentation made to the court, *a ruling was made* that the evidence was admissible, . . . [Emphasis added.]

In State v. Gutierrez, 79 N.M. 732, 449 P.2d 334 (Ct.App.1968), the court said:

> After the trial court determined that the confession was voluntary the issue was then submitted to the jury.

The time has come to instruct trial courts to say: "I rule that the confession is voluntary and I will allow it to be submitted to the jury under proper instruction" or "I rule that the confession is involuntary and is not admissible in evidence." Thereafter, this continuous legal problem will end. We are deluged with criminal cases. We must try to be clear and explicit in every principle of criminal law so that we shall not repeat it in various wordy phrases to reach a just result.

Based upon the foregoing, I dissent on the issue of the admission of Gruender's confession as heretofore stated.

491 P.2d 1087

Billy GARRETT by John D. Garrett, his father, natural guardian and next friend, and John D. Garrett, Plaintiffs-Appellants,

v.

NISSEN CORPORATION, an Iowa Corporation, Defendant-Appellee.

No. 655.

Court of Appeals of New Mexico.

Dec. 20, 1971.

James L. Brown, John F. Loehr, Farmington, for plaintiffs-appellants.

Bruce D. Hall, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendant-appellee.

CERTIFICATION TO THE SUPREME COURT

HENDLEY, Judge.

Pursuant to § 16-7-14(C) (2), N.M.S.A. 1953 (Repl.Vol.1970) the Court of Appeals is authorized to certify to the Supreme Court issues of substantial public interest that should be determined by the Supreme Court.

It appearing that certiorari has been granted by the New Mexico Supreme Court in the case of Sister Mary Assunta Stang, Personal Representative and Ancillary Administratrix with the Will Annexed in the Matter of the Last Will and Testament of Catherine Lavan, Deceased; Sister Fidelis O'Connor: Sister James Agnes Hayes: and Sister Mary Dorothy Schmidt v. Hertz Corporation, a corporation, and is now pending in that court as Cause No. 9324 and,

It further appearing that certiorari was granted in that case upon a petition alleging that the issue of strict liability in tort was of substantial public interest and should be determined by the Supreme Court and,

It further appearing that the issue of strict liability in tort is an issue to be decided in the above captioned case.

Now, therefore, pursuant to § 16-7-14 (C) (2), supra, the above captioned case is hereby certified to the New Mexico Supreme Court for decision.

SUTIN and COWAN, JJ., concur.

491 P.2d 1145

Nathan C. GREER et al., Plaintiffs-Appellees,

v.

James P. JOHNSON et ux., Defendants-Appellants.

No. 9289.

Supreme Court of New Mexico.

Dec. 30, 1971.

Zinn & Donnell, Santa Fe, for defendants-appellants.

Kellahin & Fox, Santa Fe, for plaintiffs-appellees.

OPINION

OMAN, Justice.

Defendant, James P. Johnson, appeals from an order finding him in contempt of court and committing him to jail until he purges himself of the contempt. We affirm.

On March 9, 1970, a judgment was entered by the district court in which a portion of defendant's home, designated as the "upper portal," was held to constitute "an additional story above the story beneath it," and, therefore, in violation of a restrictive covenant which reads:

> "That dwelling houses constructed upon the land described in said Deed shall be single-family dwelling houses only. Said houses to consist of only one story above the highest point on said land."

It was also found that a diminution in "* * * plaintiffs' enjoyment of their properties and damage to the value of such properties will continue to occur unless and until defendants [one of whom was the defendant now before us on this appeal] are required to remove the upper portal, * * and are enjoined from maintaining any structure constituting more than one story above the highest point on their land."

As part of its conclusions of law, the trial court held:

> "The 'upper portal' within defendants' dwelling house, * * * constitutes an additional story above the story beneath it. * * *
>
> "* * *
>
> "* * * Plaintiffs are further entitled to enforce said covenant against

defendants and to require them to remove the upper portal from defendants' dwelling house and to refrain from further violations of the covenant."

The court then, in part:

"* * * ORDERED, ADJUDGED AND DECREED that that portion of defendants' dwelling house designated as the 'upper portal' be, and the same hereby is, declared to constitute a violation of the restrictive covenant in defendants' deed limiting the height of dwelling houses to only one story above the highest point on the land embraced by such deed; and

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants be, and they hereby are, required and directed by the Court to remove said portion of their dwelling house so that said house will no longer consist of more than one story above the highest point on defendants' land; * * *"

Defendant, in a purported attempt to comply with the judgment, removed from above the beams supporting the roof over the "upper portal" approximately 20 to 30% of the outer roof, leaving from 70 to 80% of the roof intact, and thickened a portion of one of the outer walls. His claim of compliance with the judgment rests upon his contentions that (1) the words, "so that said house will no longer consist of more than one story above the highest point on defendants' land," above quoted from the decretal portion of the judgment, means only that he was required to make such change as would remove the "upper portal" from the classification of a story, and (2) by removing a portion of the roof therefrom, the "upper portal" was no longer an enclosed room or living area, and thus, no longer a second story. At best this is a very strained construction of just the one sentence of which this language is a part, and is totally inconsistent with and refuted by the other quoted language from the findings, conclusions and decretal portion of the judgment.

It appears entirely clear to us that defendant was ordered to remove the "upper portal," which means all of it, and not merely a very small portion thereof. We find no ambiguity or uncertainty as suggested by defendant. No question has been raised as to the jurisdiction of the court over the subject matter or person of defendant, and no appeal was taken from the judgment. The burden was upon defendant to comply with the judgment. United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969), cert. denied, 396 U.S. 990, 90 S.Ct. 478, 24 L. Ed.2d 452 (1969).

As already stated, we are of the opinion the judgment—the mandatory statement or decretal portion thereof—is clear and unambiguous. However, if defendant felt the one sentence he has seized upon contains some ambiguity or uncertainty, then he was obliged to construe this language in the light of the pleadings, the remaining portions of the judgment, the findings of fact and conclusions of law. See Dunham v. Stitzberg, 53 N.M. 81, 201 P.2d 1000 (1948). He was not at liberty to select one clause from the judgment, place his interpretation thereon, rely entirely upon this interpretation, and disregard all the remainder of the decretal portion of the judgment, the findings of fact and conclusions of law. See Chronister v. State Farm Mutual Automobile Ins. Co., 72 N.M. 159, 381 P.2d 673 (1963); Dunham v. Stitzberg, supra; Ophir Creek Water Co. v. Ophir Hill Consol. Mining Co., 61 Utah 551, 216 P. 490 (1923).

The purposes of the contempt proceedings in the district court, and that court's order that defendant be committed to jail until he purges himself by removal of the "upper portal," were to provide a remedy for the injured plaintiffs and coerce compliance by defendant with the court's prior judgment. Thus, we are here concerned with a civil contempt. State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957). The burden of proof in all civil cases is that of the greater weight of the evidence, or, as it is sometimes called, the preponderance of the evidence. N. M. U.J.I. 3.6 (1966). In contempt pro-

ceedings, as in other cases, the credibility of the witnesses and the weight to be given the evidence is for the trier of the facts. Drake v. National Bank of Commerce of Norfolk, 168 Va. 230, 190 S.E. 302 (1937). See also Durrett v. Petritsis, 82 N.M. 1, 474 P.2d 487 (1970); Crolot v. Maloy, 2 N. M. 198 (1882); Samora v. Bradford, 81 N. M. 205, 465 P.2d 88 (Ct.App.1970); N.M. U.J.I. 17.5 (1966).

By concluding as we have, that the trial court clearly and unambiguously ordered defendant to remove the "upper portal," it is undisputed that defendant failed to comply with the order of the court. Thus, there is no question about his contempt, and the order finding him in contempt from which he has appealed should be affirmed.

It is so ordered.

McMANUS and MONTOYA, JJ., concur.

491 P.2d 1147

John A. WILLIAMSON and Royal Globe Insurance Group, Petitioners,

v.

E. J. SMITH, d/b/a E. J. Smith Plumbing & Heating and J. R. Trenching and Excavating Company, Inc., Respondents.

No. 9243.

Supreme Court of New Mexico.

Dec. 13, 1971.

Rehearing Denied Jan. 10, 1972.

Sutin, Thayer & Browne, Irwin S. Moise, Albuquerque, for petitioners.

Iden & Johnson, J. J. Monroe, Albuquerque, for respondent Smith.

Civerolo, Hansen & Wolf, Albuquerque, for respondent J. R. Trenching & Excavating Co.

OPINION

STEPHENSON, Justice.

The plaintiff, Williamson, a journeyman plumber, sought damages against E. J. Smith, a master plumber, and J. R. Trenching and Excavating Company (J. R.), for injuries which he received from a cave-in while he was laying pipe in the bottom of a trench.

The particular work was part of a construction project of Warren Properties, who had hired Smith to do the plumbing work. Smith, in turn, had hired plaintiff through an arrangement with a local union. J. R. had cut the trench.

Williamson, in his complaint, alleged that his injuries were caused by the negligence of both Smith and J. R. in their failure to shore and crib the trench. Smith and J. R. alleged both contributory negligence and assumption of risk on the part of Williamson. The trial court granted defendants' motion for summary judgment, holding that Mr. Williamson, as a matter of law, had assumed the risk of injury which he suffered. On appeal, the Court of Appeals affirmed. Williamson v. Smith, 82 N.M. 517, 484 P.2d 359 (1971). We granted certiorari and reverse.

Mr. Williamson asserts that the trial court and Court of Appeals have failed to take into account the feature of economic coercion engrafted by our precedents upon the law pertaining to assumption of risk. However, we need not decide this issue in view of our conclusion that a larger question exists which should be resolved by us. That question is whether "assumption of risk" should any longer be recognized as a defense in New Mexico, even assuming that it ever, in truth, differed from ordinary contributory negligence. We have decided that assumption of risk should no longer be recognized as an affirmative defense.

Many courts and writers who have considered the precedents dealing with assumption of risk have commented upon the confusion which attends it. Some courts seem to use the term interchangeably with contributory negligence, others have decided it is synonymous with contributory negligence, while others attempt to distinguish the two defenses. See Annot., 82 A.L.R.2d 1218 (1962). Justice Frankfurter, in a concurring opinion in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943), commented upon this confusion as follows:

> "The phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas."

Numerous reasons doubtless exist for the confusion, entirely apart from the semantical consequences of attempting to distinguish things which are the same. Assumption of risk is supposedly the voluntary exposure of oneself to a danger which is, or should be, known. Uniform Jury Instruction 13.10. What, we inquire, does this amount to other than a failure to exercise ordinary care for one's own safety (i. e., negligence, Uniform Jury Instruction 12.1) which bars recovery by a plaintiff? (Contributory negligence, Uniform Jury Instruction 13.1.) It is sometimes said that contributory negligence involves conduct whereas assumption of risk involves a mental state of willingness or deliberation. We fail to see the significance of a "mental state of willingness" unless it is manifested by "conduct."

Assumption of risk evolved in master and servant cases. As the United States Supreme Court has observed, it developed in response to the general impulse of the common law courts "to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry." Any other rule "would not only subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business," it would also "encourage carelessness on the part of the employee." Opinion of Justice Black in Tiller v. Atlantic Coast Line R. Co., supra, quoting Justice Bradley in Tuttle v. Detroit, Grand Haven and Milwaukee Ry., 122 U.S. 189, 7 S.Ct. 1166, 30 L.Ed. 1114 (1887).

A general rule thus emerged in this country that a servant assumes the risk of: (1) such dangers as are ordinarily and normally incident to the work; and (2) such extraordinary and abnormal risks as (a) he knows and appreciates and faces without complaint or (b) are obvious and apparent. Extraordinary risks have been said to be those which are attributable to the master's negligence. 2 Harper and and James, Law of Torts, § 21.4 at 1178 (1956).

Added to this were the various approaches which were taken when the question of voluntariness as the result of "economic coercion" arose, i. e., the employee's belief that he either had to continue on his particular task or lose his job. Although some courts decided that this prevented a finding of assumption of risk as a matter of law (see Kaplan v. 48th Avenue Corporation, 267 App.Div. 272, 45 N.Y.S.2d 510 (1943) and cases cited thereunder), most of them relied on a more complex rationale: the employee assumed the risk of his employer's negligence until he complained of the situation and received an assurance from his employer that it would be remedied. The employee, however, could only rely upon this assurance for a "reasonable time" until he once again began to assume the risk. 4 Labatt, Master and Servant, § 13.53 at 3894 (2nd ed. 1913); 2 Harper and James, supra, § 21.4 at 1179. Thus, what began as a concept theoretically distinct from contributory negligence, ultimately became so ornamented and adulterated that it relied upon the criterion of contributory negligence: reasonableness.

It was, however, a harsh standard of reasonableness which guided the courts in this general area. In believing that a reasonably prudent man would inevitably refrain from working under dangerous conditions, they often took the matter from the jury and found assumption of risk as a matter of law. And in regard to economic coercion in particular, Prosser states that the harsh position of the courts on this issue has been violently denounced by every writer who has ever dealt with the subject. Prosser, Law of Torts, § 67 at 467 (3rd ed. 1964).

The doctrine, being a manifestation of laissez-faire economics, was a subject of criticism even during its early years. See 3 Labatt, supra, § 960. As Justice Frankfurter later noted in the Tiller case, supra:

> "* * * The notion of assumption of risk as a defense—that is, where the employer concededly failed in his duty of care and nevertheless escaped liability because the employee had 'agreed' to 'assume the risk' of the employer's fault—rested, in the context of our industrial society, upon a pure fiction."

Nevertheless, the concept of assumption of risk did not confine itself to employer-employee relationships, but invaded other areas of negligence law such as guest statute and "slip and fall" cases.

The history, confusion and complexity of this doctrine is evidenced by the law of New Mexico. It was stated very early in this jurisdiction that a servant assumes all of the ordinary risks of his employment, but only those extraordinary risks (those caused by his master's negligence) of which he is aware. Gutierrez v. Valley Irrigation

and Livestock Co., 68 N.M. 6, 357 P.2d 664 (1960); Singer v. Swartz, 22 N.M. 84, 159 P. 745 (1916); Van Kirk v. Butler, 19 N.M. 597, 145 P. 129 (1914). But the effect of "economic coercion" in this state is probably open to question, and there is no doubt that this openness has caused confusion. Demarest v. T. C. Bateson Construction Company, 370 F.2d 281 (10th Cir. 1966); Padilla v. Winsor, 67 N.M. 267, 354 P.2d 740 (1960); Jasper v. Lumpee, 81 N.M. 214, 465 P.2d 97 (Ct.App.1970); Williamson v. Smith, supra.

Gradually, assumption of risk was extended beyond contractual relationships, so that it applied to any relation which was voluntarily assumed. Reed v. Styron, 69 N.M. 262, 365 P.2d 912 (1961). Thus, it has even been successfully pleaded in one "slip and fall" case. Dempsey v. Alamo Hotels, Inc., 76 N.M. 712, 418 P.2d 58 (1966).

New Mexico has occasionally intermingled assumption of risk with contributory negligence. Compare Stephens v. Dulaney, 78 N.M. 53, 428 P.2d 27 (1967) with McMullen v. Ursuline Order of Sisters, 56 N.M. 570, 246 P.2d 1052 (1952). See also Schmidt v. Southwestern Brewery & Ice Co., 15 N.M. 232, 107 P. 677 (1910), aff'd 226 U.S. 162, 33 S.Ct. 68, 57 L.Ed. 170 (1912). It has also recognized their "close relationship." E. g., Gutierrez v. Valley Irrigation and Livestock Co., supra. It has even been claimed by some that this state has "merged" the two defenses. See Demarest v. T. C. Bateson Construction Company, supra. Nevertheless, it seems apparent to us that our appellate courts have steadfastly attempted to distinguish the two. See, e. g., Stephens v. Dulaney, supra; Dempsey v. Alamo Hotels, Inc., supra; Stewart v. Barnes, 80 N.M. 102, 451 P.2d 1006 (Ct.App.1969). The basis of this distinction has usually been that assumption of risk involves "willingness" whereas contributory negligence "excludes the idea of willingness" and concerns itself only with conduct. As stated earlier in this opinion, we find such a distinction to be illusory. On one occasion this court went to great lengths to explain this difference, although in doing so it admitted that "conduct under certain facts and circumstances may amount to an assumption of risk as well as contributory negligence." Stephens v. Dulaney, supra.

The reasonableness of insulating business from human overhead, however valid it may have been during the moment of the industrial revolution, now runs directly counter to current social policy, as typified by the underlying theory of modern workmen's compensation legislation, both general and specifically in regard to the safety of work areas. Section 59-10-5(A), N.M. S.A., 1953. Widespread availability and use of liability and workmen's compensation insurance by employers have now met the need in any case.

Finally, in the employer-employee frame of reference, the concept of assumption of risk is one hundred eighty degrees out of phase with our legal policy of requiring the employer to provide his employees with a reasonably safe place to work. Thompson v. Dale, 59 N.M. 290, 283 P.2d 623 (1955).

For either some or all of these reasons, there is a movement in this country either to restrict this defense or eliminate it completely. See Parker v. Redden, 421 S.W.2d 586 (Ky., 1967); Felgner v. Anderson, 375 Mich. 23, 133 N.W.2d 136 (1965); McGrath v. American Cyanamid Co., 41 N.J. 272, 196 A.2d 238 (1963); Siragusa v. Swedish Hospital, 60 Wash.2d 310, 373 P.2d 767 (1962); Ritter v. Beals, 225 Or. 504, 358 P.2d 1080 (1961); Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90, 82 A.L.R.2d 1208 (1959).

Until now, however, this movement has not been followed in this jurisdiction. Consequently, the confusion in this state continues to exist. Its result can best be described in the words of Chief Judge Murrah, who said, in attempting to apply New Mexico law in the case of Demarest v. T. C. Bateson Construction Company, supra:

> "Courts have long struggled with contributory negligence, assumption of risk, and volenti non fit injuria (a third con-

cept kindred to and sometimes called an alias for assumption of risk) as these doctrines apply in the case of an employee-invitee. As we have said in considering the law of another state, 'An examination of only a small number of the cases which have dealt with these three principles leads one into a maze of confusion and contradiction, from which one emerges only with a conviction that the decisions are irreconcilable.' Swift and Co. v. Schuster, 10 Cir., 192 F.2d 615, 617. Probably because of this 'confusion and contradiction' a number of courts have very recently restricted the scope of affirmative defenses in cases of this type to contributory negligence. * * *"

After quoting from one of these cases, Judge Murrah observed—apparently with some regret—that "despite what may well be the emerging general law in this area, our case is clearly governed by the law of New Mexico."

In interpreting the law of New Mexico as continuing to recognize the defense of assumption of risk, Judge Murrah was strongly influenced by Dempsey v. Alamo Hotels, Inc., supra. As we interpret that case, plaintiff was primarily denied recovery because of contributory negligence as a matter of law. The holding of assumption of risk as a matter of law, although clearly evident in the opinion, was just as clearly unnecessary; the doctrine did not affect the result in the case and served no useful purpose.

We are most impressed with the analysis of the problem which is contained in Meistrich v. Casino Arena Attractions, supra. In that case the court specifically excluded from its analysis express contracts not to sue and situations in which actual consent exists, such as contact sports.

Borrowing both from the Meistrich case and 2 Harper and James, Law of Torts, § 21.1 (1956), we have decided that there are two principal meanings of assumption of risk. In one sense—hereafter called its "primary" sense—"it is an alternate expression for the proposition that the defendant was not negligent; *i. e.*, either owed no duty or did not breach the duty owed." Meistrich v. Casino Arena Attractions, supra; 2 Harper and James, supra, § 21.1 at 1162.

When the rule was advanced, therefore, that the servant assumed the risks which were ordinary and inherent in his work (i. e., not caused by the master's negligence), this was only another way of saying the master was not negligent.

In another sense—hereafter called its secondary sense—it "is an affirmative defense to an established breach of duty." Meistrich v. Casino Arena Attractions, supra; 2 Harper and James, supra, § 21.1 at 1162.

If the servant established that his injury was caused by a risk created by his master's negligence in failing to provide a safe place to work, and the master maintained, as an affirmative defense, that plaintiff should fail because he voluntarily exposed himself to a danger negligently created by the master, that defense was also called assumption of risk. "Thus two utterly distinct thoughts bore the same label with inevitable confusion." Meistrich v. Casino Arena Attractions, supra. Assumption of risk in its secondary sense is in reality nothing more than contributory negligence.

Thereafter, assumption of risk assumed a life of its own, independent of—but usually allied with—contributory negligence. If there arose a question that the plaintiff did not exercise due care for his own safety, and that this exercise came after a mental exercise of "willfulness," defendant was allowed to plead both contributory negligence *and* assumption of risk. E. g., Dempsey v. Alamo Hotels, Inc., supra; Stewart v. Barnes, supra.

We have examined the New Mexico cases on this subject and have concluded that each occasion which has heretofore been the subject of "assumption of risk" in the secondary sense, could have been covered entirely by the reasonable man standard of contributory negligence. Defendant should

not be allowed to plead contributory negligence twice. "Once is enough." Ritter v. Beals, supra.

For these reasons, assumption of risk will no longer be a defense in New Mexico, and Uniform Jury Instruction 13.-10 on that subject will no longer be given. If pleaded and warranted by the evidence, the ground formerly occupied by the doctrine of assumption of risk will be covered by the law pertaining to negligence and contributory negligence. Uniform Jury Instructions in regard to which will be given in jury cases. This holding is applicable to all cases tried hereafter.

By what we have said, we do not mean to infer that a given state of facts which would heretofore have constituted a valid defense on the basis of assumption of risk will no longer prevail. To the contrary, such a set of facts, if properly pleaded and proven, will be as efficacious as formerly. It will however henceforth be regarded as contributory negligence and governed by the principles pertaining to that doctrine.

Contributory negligence is a broad and flexible doctrine keyed to reasonableness of conduct. This court has approved the Second Restatement of Torts, §§ 463–66 at pages 507–11 on this subject. Stephens v. Dulaney, 78 N.M. 53, 428 P.2d 27 (1967).

Section 466 states:

"§ 466. Types of Contributory Negligence

"The plaintiff's contributory negligence may be either

"(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or

"(b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm."

We thus regard the Uniform Jury Instruction definition of negligence (U.J.I. 12.1) as being sufficiently broad to cover the ground formerly occupied by assumption of risk (U.J.I. 13.10), the gist of which is a voluntary exposure to a known danger. We recognize however that experience may indicate the desirability of modifying or expanding our present U.J.I. definitions of negligence (U.J.I. 12.1) and contributory negligence (U.J.I. 13.1).

Similarly, in due course, Rule of Civil Procedure 8(c) [§ 21–1–1(8) (c), N.M.S.A., 1953] will be amended to delete the reference to assumption of risk.

Which brings us to the present case. Williamson alleged that defendants were negligent in their construction and maintenance of the ditch and failed to provide him with a safe place to work. Defendants maintained that Williamson, in appreciating the danger of a cave-in and continuing to work in light of that danger, assumed the risk and was contributorily negligent. Williamson, in turn, claimed that he did not voluntarily assume the risk because he either had to remain in the ditch or lose his job.

The issues remaining on the subject of liability, in light of our decision here, are whether the defendants were negligent and, if so, whether plaintiff was contributorily negligent.

The case was decided at the trial level and upheld by the Court of Appeals solely on the basis that Williamson had "assumed the risk" as a matter of law. Since we have just decided that that doctrine no longer exists, it is obvious that the case cannot be upheld. However, in order to avoid further delays and appeals, we have taken the unusual course of reviewing the entire record to determine whether Mr. Williamson is, as a matter of law, barred from recovery by contributory negligence.

"It is well established that in considering a motion for summary judgment, pleadings, affidavits and depositions must be viewed in their most favorable aspect in support of the party opposing the motion and his right to a trial on the issues. If there is the slightest doubt as to the existence of material factual issues, sum-

mary judgment should be denied." Las Cruces Country Club, Inc. v. City of Las Cruces, 81 N.M. 387, 467 P.2d 403 (1970).

"The burden of showing contributory negligence is upon the defendant and 'when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury.' * * *" Olguin v. Thygesen, 47 N.M. 377, 143 P.2d 585 (1943).

Guided by these standards, our review of the record convinces us that a factual issue exists in regard to contributory negligence.

The summary judgment of the trial court is reversed, and further proceedings shall be had consistent with this opinion.

It is so ordered.

McMANUS and MONTOYA, JJ., concur.

OMAN, Justice (specially concurring).

I concur in the result reached by the majority opinion. I also agree with much of the reasoning of the majority for combining the separate defenses of assumption of risk and contributory negligence into the one defense of contributory negligence.

Unfortunately, the differences between these two concepts seem not to have been fully understood by many of our lawyers and judges, and this lack of understanding has unquestionably caused confusion and doubt in the application of these defenses to many factual situations. However, I do not agree that assumption of risk and contributory negligence, as they have developed and been defined in New Mexico, are mutually inclusive and identical. I only agree that both concepts, in view of the confusion and lack of appreciation of the differences between them, can better be considered, understood and applied as elements of the single affirmative defense of contributory negligence. As the majority have observed, contributory negligence is a broad and flexible doctrine encompassing an intentional and unreasonable exposure of one's self to danger as well as other conduct which falls short of the standard to which a reasonable person should conform for protection from injury or harm.

COMPTON, C. J., concurs.

491 P.2d 1153

Cash T. SKARDA, Plaintiff-Appellant and Cross-Appellee,

v.

Lloyd L. DAVIS, Sr., et al., Defendants-Appellees and Cross-Appellants.

No. 9240.

Supreme Court of New Mexico.
Dec. 27, 1971.

Shipley, Durrett & Conway, Alamogordo, for appellant.

Atwood, Malone, Mann & Cooter, Roswell, for appellees.

OPINION

McMANUS, Justice.

This suit was brought in the District Court of Lincoln County by plaintiff-appellant Skarda, hereinafter referred to as Skarda, to recover damages for breach of contract for failure to complete the developmental work in a subdivision and for damages for loss of anticipated profits arising out of the defendants' inability to deliver title, subdivide and develop additional real estate which plaintiff had an option to purchase. Defendants-cross appellants Davis, hereinafter referred to as Davis, filed their counterclaim originally seeking judgment on a promissory note and foreclosure of a mortgage. On January 8, 1968, Davis filed a supplemental counterclaim alleging a promissory note for $168,600 secured by a mortgage, representing the balance due for the land sold to Skarda, default on the note, and praying for judgment and foreclosure. In a second counterclaim Davis alleged Skarda's failure to make installment payments and prayed damages resulting therefrom of $82,713.34. They also requested that the court retain jurisdiction because the cross appellants believed they would be unable to meet obligations to third persons because of Skarda's default. The trial court, sitting without a jury, after four trials and hearings extending over two and one-half years, entered judgment granting Skarda an offset of $51,369.31 against the sum he owed Davis, $168,600, or a balance due from Skarda to Davis of $117,230.69. Skarda then appealed and Davis cross appealed.

The total purchase price that Skarda was to pay Davis was $248,600. $80,000 was paid on the execution of the contract and the remaining balance of $168,600, evidenced by a note and secured by a mortgage on the subdivision, was payable in semiannual installments of $33,720. These installments were payable, one-half in cash; one-half in contracts on the real estate. In addition, the contract required Davis to complete the developmental work in both subdivisions. It also gave Skarda an option to purchase a third subdivision called Unit No. 3, to be developed by Davis. The option period was from July 27, 1966 to July 27, 1968. It appears that Davis failed to complete the developmental work on the subdivisions and, on January 27, 1967, Skarda filed suit seeking specific performance to compel Davis to perform the developmental work. At the same time Skarda deposited with the court a certificate of deposit in the amount of $16,860, issued by the Ruidoso State Bank, together with an assignment of real estate contracts having an unpaid balance due of $16,940.83. As mentioned before, each installment, at Skarda's option, was payable one-half in cash and one-half in contracts. Davis answered in the way of a general denial, containing a counterclaim based upon the original note, claiming default in the payment of the installment due January 27, 1967, and asserting the right to declare the full amount of the note due and payable. However, on July 24, 1967, Skarda deposited with the court another certificate of deposit and assignment of contracts to cover the installment due July 27, 1967. A similar certificate of deposit and assignment were deposited with the court on January 26, 1968. It must be noted that Davis complained that these certificates of deposit and assignments remained in the name of Skarda even though deposited with the courts.

The contract also required Davis to discharge an outstanding mortgage against the subdivision in favor of Gibralter Mortgage and Investment Company, which they failed to do. The mortgagee instituted foreclosure proceedings on October 27, 1967. This separate proceeding was resolved prior to the conclusion of the litigation before us. Davis' answer to the second amended complaint was, in effect, a general denial as to each claim for relief and contained a counterclaim which set forth two claims for relief. The first claim sought judgment on the promissory note executed by Skarda or foreclosure of the mortgage. The second claim for relief sought damages for injury to Davis' credit reputa-

tion, loss of interest and reimbursement for interest and penalties paid by Davis, along with other claimed damage. Plaintiff's reply to the counterclaim was a general denial. At this point in the litigation, after hearing the cause, the court made some findings of fact and conclusions of law. On March 28, 1969, the court, by letter, announced the withdrawal of the original findings and conclusions. No formal order of withdrawal was entered. Thereafter, on June 4, 1970, additional testimony was taken and all parties filed additional requested findings and conclusions. On June 15, 1970, the court entered its findings, conclusions and decision which are summarized as follows:

(1) Skarda and Davis entered into a contract for the sale of a partially completed subdivision situated in Lincoln County, New Mexico.

(2) Skarda executed a promissory note in the amount of $168,600 payable to Davis in installments and secured by a second mortgage on the subdivision executed by Skarda and delivered to Davis in accordance with the contract.

(3) Davis agreed to perform certain items of work to complete the subdivision, to-wit:

"2. All rough and finish grading to be completed to meet city specifications.

"3. All water lines and laterals to be installed and furnish plaintiff with letter of acceptance by Village of Ruidoso.

"4. Six inches of compacted gravel shall be installed according to city specifications."

(4) Davis failed to complete the contract in that six inches of compacted gravel have not been installed upon all streets within the subdivision in accordance with city specifications and Davis further failed to install numerous culverts and has not properly completed some of the streets and water lines. Davis' failure to complete the work in accordance with terms of the contract constituted a substantial breach of said contract.

(5) The written contract executed by the parties was silent as to when the work should be completed. The court found that a reasonable time for such performance would be prior to January, 1967, as evidenced by finding No. 17, reading:

"It was contemplated by Plaintiff and Defendants that the work required to be performed by the Defendants as set forth in Finding of Fact No. 10 would proceed in a diligent manner and would be completed as rapidly as reasonably possible, under the circumstances."

"A reasonable time for performance by defendants would require the work to be performed prior to the 27th day of January, 1967."

Additional findings held the cost of completing the subdivision developmental work in accordance with the plans and specifications of the Village of Ruidoso, New Mexico, was in the sum of $50,314.30 and that Skarda sustained additional damages by way of expenses incurred in defending the Gibralter Mortgage foreclosure proceeding and the expense of installing culverts delivered to the subdivisions, for a total of $51,369.31.

The contract between the parties gave Skarda an option to purchase approximately 53 acres of additional real estate described as Unit 3 of Town and Country North Subdivision. This real estate was to be subdivided into an additional 163 lots. The option period was July 27, 1966 to July 27, 1968. Skarda, through his attorney, notified Davis' attorney that Skarda intended to exercise the option. On July 26, 1968, Skarda delivered to Davis' office a letter which contained the following:

"Please be advised that I do hereby exercise my option to purchase Unit Number 3 of Town and Country North Subdivision, as more fully described in the contract of sale of real estate executed between us on the 27th day of July, 1966. It is my position that the Court has relieved me from making any further payments or performing any further obligations which may or might be

required to be performed by me, including the payment of the option money, until such time as you perform the contract in accordance with the Court's decision."

In addition to this option to purchase Unit 3 of the subdivision, it was required that Skarda perform other conditions of the contract which provided that in order to exercise the option Skarda must give 30 days' notice in writing and pay $22,000 in cash. Obviously, from the letter, the cash was not paid.

In its findings, the court declared that the buyer, in connection with his option to purchase Unit 3, did not comply with all the prerequisites of the contract, for example, the payment of the $22,000. Skarda contends that the court erred in finding that the plaintiff Skarda, in order to exercise the option, was required to perform the conditions of the contract by giving 30 days' notice in writing of his intent to exercise the option, and pay $22,000 in money. The contention of Skarda under this particular claim of error was that he was relieved of all of the conditions required to exercise the option except the notice because of alleged financial inability of Davis to perform the contract. It is our opinion that the conditions were absolutely clear, and the avoidance of the payment of the $22,000 made his offer to purchase Unit 3 invalid and the court was correct in so holding. An unequivocal and unqualified expression of intention to exercise an option and the affirmative performance of the expressed method of exercising it are well-established legal principles in New Mexico. Northcutt v. McPherson, 81 N.M. 743, 473 P.2d 357 (1970); Cillessen v. Kona Co., 73 N.M. 297, 387 P.2d 867 (1964).

Cross appellant Davis claims error on the part of the trial court's ruling that the developmental work required by the contract of sale was not completed by Davis, and that the court erred in rewriting the contract, imposing additional requirements, and then granting an offset based thereon to Skarda. In this connection, a reference to the court's finding of fact No. 18 would appear to be important. It reads:

"Defendants admit they agreed that part of the work to be performed by them was not completed by 27 January, 1967 and admit that they did not perform the obligations under the contract completely prior to 25 July, 1969. The Defendants contend that they have completed the work in accordance with the terms and provisions of the contract. However, the Court finds that they have not, as yet, completed said contract according to the provisions and specifications in the contract in that they have not installed six inches of compacted gravel upon all streets within the subdivision, in accordance with the City specifications and agreement of the parties and have failed to install numerous culverts contemplated by the original contract and plans and specifications and have not properly completed some of the streets and water lines."

This particular finding is supported by the terms of the contract and evidence submitted at the trial.

The court also noted in one of its many findings the letter of the Village utilities director which stated:

"* * * I have found that the necessary work on the road construction, drainage culvert installation and water line installation, has been completed to the specifications and satisfaction of the requirements as set aside in the Land Subdivision Regulations of the Village of Ruidoso, New Mexico."

A look at the contract does not reveal an intention of the parties to rely solely on the Village's acceptance of the subdivision as conclusive or final proof of performance of the contract by Skarda. This would be one of a two-fold requirement; the other being the provision of the contract itself which the court correctly has held was not complied with. See Fox v. Webb, 268 Ala. 111, 105 So.2d 75, 67 A.L.R.

2d 1007 (1958). Also see Helm v. Speith, 298 Ky. 225, 182 S.W.2d 635 (1944).

The Davises, in their next point, indicate that they believe that all the obligations of cross appellants Davis under the contract have been performed by them and, further, allege or assume that the cross appellants did not breach the contract. The court has found as a fact that the Davises first breached the contract by failure to perform the contract and develop the subdivision within a reasonable time. There is substantial evidence in the transcript to support such a finding. The court further found that the cost of completing the developmental work which the court said should have been performed by the Davises prior to January 27, 1967 was the sum of $50,314.30 plus the additional expenses, for a total of $51,369.31. It also found that the Davis failure to complete the work in accordance with the terms and conditions of the contract constituted a substantial breach of the contract. It appears to us that the contract between the parties was a bilateral one and that the covenants to provide the lot releases and to make the installment payments are in fact mutual and dependent covenants, and that the cross appellants Davis having breached the contract are not entitled to take advantage of the failure to make the installment payments when due without first tendering performance on their part.

In this regard, see Montgomery v. Cook, 76 N.M. 199, 413 P.2d 477 (1966), where the court found that where the vendors had failed to deposit a warranty deed with the named escrow agent within a certain length of time as provided for in the contract, they could not excuse this substantial and material breach on the basis that the vendees had refused to make the first payment until the deed was delivered. The contract provided that the vendors would deposit the deed with the named escrow agent and that the deed would be delivered to the vendees within one year providing they performed certain land improvements to the satisfaction of the escrow agent. The vendors failed to deliver the deed within the one-year period even though the vendees had performed the required land improvements.

The court there also noted that delivery of the deed to the escrow agent was an absolute condition precedent so vital and essential to the contract that a failure to so deliver relieved the vendees of any obligation until such deed was so deposited.

In the present case, another allegation of the cross appellants Davis concerned the issue of reasonable time; that is, the reasonable time for completion by Davis of the road work, water lines, etc. It was the court's problem to determine a reasonable time and in this regard it found that a reasonable time for this work expired prior to the date of the first six months' installment payment due to be made by Skarda; that is, a reasonable time expired between July 27, 1966 and January 26, 1967. There is substantial evidence to support the court's ruling in this regard. Real estate developer Jack Stagner testified as follows:

> "Immediately after or at the time of the signing of the contract, why then we—Mr. Skarda and myself and Lloyd Senior and Junior, got together and called Jack Kannady over and Mr. Davis said, 'Now, Jack,—' we went over what we had been talking about—and said, 'Now, Jack, we've got to have this thing done. How soon do your think you can do it.' Mr. Kannady stated that without any undue delay due to weather, that he thought that he could do it within three or four weeks, and Mr. Davis said, 'Well, I'm hauling the materials now, and with the weather holding, we should be able to finish up here in three or four weeks.'"

In addition, Mr. Danley, a local contractor, testified as follows:

> "Q Mr. Danley, with your other jobs and in your normal course of business as a contractor, if you started work—were told to start work tonight, how long before you would have this job completed?
>
> "A Well, that would depend on how many hours I put in on it.

"Q Well, just in your normal business. You are a road contractor.

"A Yes, sir. On a job this size, how long would it take me?

"A Well, in your operations.

"THE COURT: In other words, if you got this job, when could you have it completed?

"A How long would it take me to complete it?

"THE COURT: Yes.

"A I figured ninety days at the time. I estimated ninety days completion."

In answer to the defendants' contention that Skarda was not adversely affected by the passage of six months, testimony indicates that the facts are to the contrary. Mr. Jack Stagner testified:

"The salesmen were complaining that they couldn't properly show the property to sell without proper staking and improvements in, and, of course, with our business being primarily on weekends, with the roads not completed, we were unable several weekends to properly get in or out, and on at least two occasions, I borrowed Mr. Davis' Wagoneer. We didn't have four-wheel drive vehicles at that time to get our customers in and out, * * *."

The court based its findings and conclusions on such testimony and found that Skarda had been damaged by the delay. The delay caused Skarda to purchase and install culverts, water lines, gravel for roads, etc., in order to satisfy past, present and future purchasers of the lots. The evidence substantially supports the court's findings, thus they will stand.

Another question was raised by cross appellant Davis to the effect that the utilities director of the Village of Ruidoso was designated by the parties as the sole judge to determine whether or not the work performed by Davis had been approved and accepted by the Village. The court found as a fact that the work was not performed and that there had been no acceptance or approval of the installation of the water lines and laterals and other work to be done by the cross appellants. The court was entitled to hear expert testimony, which it did, and the court found that the work was not performed according to the contract. In our opinion, he was correct in his ruling.

The court further found that the developmental work required by the contract of sale was not completed by Davis and was well within the tenor of the lawsuit to impose an offset based thereon to Skarda. The court also found that the obligations of Davis under the contract had not been completed and there is sufficient evidence for this finding. Further, the court found more than reasonable time had passed with respect to completing the improvements on the property and did not apply an erroneous theory of the case. Over-all, the court found that Davis breached the contract primarily and that Skarda was entitled to damages which is substantiated by the evidence adduced herein.

The judgment in this cause was entered by the court on June 30, 1970 and stated, in part:

"It is Therefore Ordered, Adjudged and Decreed that the Plaintiff is entitled to an offset of $51,369.31, which sum is to be offset against the sum owed by Plaintiff to Defendants of $168,600.00, leaving a balance due from Plaintiff to Defendants of $117,230.69, which Plaintiff is entitled to discharge one-half in cash and one-half in contracts, as provided by the contract."

Appellant Skarda claims error in this method of applying the offset. We agree with this contention and remand the cause to the trial court and order that it set aside its former judgment insofar as the method of payment is concerned. Further, the trial court is ordered to grant judgment in favor of Davis in the sum of $168,600, with Skarda entitled to an offset of $51,369.31. Skarda would then, at his option, be entitled to discharge $84,300 (one-half of the amount due under the contract), by the assignment of real estate contracts

and pay the remaining balance of $32,930.69 in cash.

Judgment of the trial court is affirmed in part and reversed in part. It is so ordered.

OMAN and MONTOYA, JJ., concur.

491 P.2d 1160

STATE of New Mexico, Plaintiff-Appellee,

v.

Blas CHAVEZ, Defendant-Appellant.

No. 682.

Court of Appeals of New Mexico.

Dec. 3, 1971.

Carlos Sedillo, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Frank N. Chavez, James B. Mulcock, Jr., Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of armed robbery defendant apeals. He asserts three points for reversal: (1) failure to issue attachment after a subpoenaed witness had failed to appear and the failure of the trial court to continue the case; (2) juror engaged in conversation with a defense witness prior to conclusion of the trial; and, (3) the jury verdict was against the weight of the evidence. We affirm.

Defendant was charged with the armed robbery of a store. Five witnesses allegedly saw defendant. Three of those witnesses testified at trial and identified defendant as the armed robber. The other two witnesses had been subpoenaed but did not appear. According to defendant one of the witnesses would state that he did not recognize defendant as the armed robber.

The trial, not concluding by Friday afternoon, was adjourned to the following Monday. At the time of adjournment defendant stated to the court that if he called any additional witnesses at all it would be one of the two who had witnessed the crime. When court reconvened on Monday, de-

fendant stated that he was unable to locate the witness. Defendant's counsel stated he did not get a bench warrant for him but attempted to contact him himself.

Defendant asserts that the trial court should have asked defendant's trial counsel if he wanted a continuance to enable him to locate the witness or in the alternative the trial court should have asked trial counsel if he wished the court to issue a bench warrant for the arrest of the witness.

These assertions are controlled by State v. Milton, 80 N.M. 727, 460 P.2d 257 (Ct. App.1969) which states in essence that since the defendant did not request a postponement nor an attachment pursuant to § 20-1-3, N.M.S.A.1953 (Repl.Vol.1970) his argument was without merit.

Defendant next asserts that the trial court erred in not permitting him to question a juror about the juror's misconduct. Defendant's contention relates to a conversation between a defense witness and the juror prior to the conclusion of the trial. The defense witness stated that a juror had told him he did not think defendant guilty. Defendant claims that this change in decision (the jury was polled and all affirmed the guilty verdict) must have been caused by outside influence or by pressure exerted by fellow jurors. The trial court refused defendant's request to question the juror. We agree.

Nothing in the record indicates, nor is it claimed, that there was any unauthorized communication with a juror giving rise to a presumption of prejudice. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App.1967). Here, all that is shown is that a juror made a comment about defendant's innocence before the case was submitted for decision and that this juror, upon submission, voted to convict. All that is claimed is that the juror should be questioned about his verdict and how that juror reached his verdict. This issue is controlled by State v. Embrey, 62 N.M. 107, 305 P.2d 723 (1956) where the court stated ". . . that jurors may not impeach their verdicts by testimony later given for that purpose." Because a juror talked to someone outside the trial, although censurable, it does not ". . . require or warrant a reversal of the judgment 'as no harm to the appellant [defendant] was either shown or presumable.'" Territory v. Clark, 15 N.M. 35, 99 P. 697 (1909).

Defendant also asserts that the jury verdict is against the weight of the evidence. We have reviewed the record and although defendant had an alibi supported by several witnesses, three witnesses testified for the State that defendant was the robber who they observed for ten or fifteen minutes unmasked in the store. We cannot say as a matter of law that there was not substantial evidence to support the jury's verdict.

Affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

491 P.2d 1161

STATE of New Mexico, Plaintiff-Appellee,

v.

Timothy P. DURHAM, Defendant-Appellant.

No. 689.

Court of Appeals of New Mexico.

Dec. 3, 1971.

John V. Coan, Jack L. Love, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of murder in the second degree defendant appeals. He asserts seven points for reversal. The second point involving an instruction on involuntary manslaughter is dispositive of the appeal.

We reverse.

Defendant was charged with shooting the decedent. The shooting occurred while decedent, defendant and a witness were riding around in an automobile. There was evidence that defendant was intoxicated at the time of the incident. The trial court instructed the jury on intoxication as a defense to murder in the first degree. The trial court also instructed the jury on manslaughter. That instruction states:

"Manslaughter is the unlawful killing of a human being without malice.

"A. Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion.

"B. Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection.

"The term 'without due caution and circumspection' as used in these instructions means such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life or, in other words, a disregard for human life or an indifference to consequences. The facts must be such that the fatal consequences of the careless or negligent act could reasonably have been foreseen, and it must appear that the death was not the result of misadventure but the natural and probable result of a reckless or culpably negligent act."

As a part of its instructions the court also defined certain terms among which is the term "feloniously":

"FELONIOUSLY is a technical term, and means wrongfully and against the admonition of the law, and that the accused, if convicted, may be punished by imprisonment in the penitentiary."

The trial court refused defendant's tendered instruction on the negligent use of a weapon (§ 40A-7-3, N.M.S.A.1953 (Repl. Vol. 6, 1964)) which among other things sets forth that the ". . . carrying a firearm while under the influence of an

intoxicant . . . " is an offense not amounting to a felony. Defendant asserts that the refusal to give this instruction relating to involuntary manslaughter left the jury without " . . . a definition of, or specification of, an unlawful act not amounting to a felony", and thus " . . . there was no guide by which the jury could determine whether this was a killing while in the commission of a misdemeanor." It is defendant's contention that the instruction was therefore incomplete and inadequate.

We agree.

Defendant was entitled to an instruction on his theory of the case if the evidence reasonably tended to sustain such a theory. State v. Jones, 52 N.M. 235, 195 P.2d 1020 (1948); State v. Waller, 80 N.M. 380, 456 P.2d 213 (Ct.App.1969). One of defendant's theories was involuntary manslaughter. Its application to this case would require the jury to be instructed that the carrying of a firearm while intoxicated is an unlawful act not amounting to a felony. The jury was not so instructed. Defendant's requested instruction on negligent use of a firearm would have supplied that definition. Without the definition the manslaughter instruction as given was incomplete. The only definition given was that of an unlawful act amounting to a felony.

The record is repleto with testimony that defendant was drunk while he, deceased and the witness were riding around in the automobile and while defendant was holding and handling the sawed off shotgun. Section 40A-7-3, supra, defines negligent use of a weapon while under the influence of an intoxicant as a petty misdemeanor. Had the jury been instructed that the unlawful act was a misdemeanor it would have had completed guidelines for the definition of involuntary manslaughter. Omission of the requested instruction necessarily presupposes that defendant's negligent use of the firearm while intoxicated was a felony. See State v. Welch, 37 N.M. 549, 25 P.2d 211 (1933). There being substantial evidence supporting defendant's theory it was error to refuse his requested instruction. State v. Waller, supra.

Reversed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

491 P.2d 1163

Jose SALAZAR, Petitioner-Appellant,

v.

STATE of New Mexico et al., Respondents-Appellees.

No. 767.

Court of Appeals of New Mexico.

Dec. 3, 1971.

Oliver H. Miles, Las Cruces, for petitioner-appellant.

David L. Norvell, Atty. Gen., Prentis Reid Griffith, Jr., Asst. Atty. Gen., Santa Fe, for respondents-appellees.

OPINION

COWAN, Judge.

Following his sentencing as an habitual criminal, from which no appeal was taken, petitioner filed a "Motion to Vacate Judgement (sic) and Sentence under Rule #93". From an order denying this motion without a hearing, the petitioner appeals. We reverse.

Petitioner's motion is based principally upon his assertion that he was denied the right of an appeal from his conviction because he was refused legal counsel. The motion alleges that the petitioner was an indigent; that counsel had been appointed to represent him at the trial, and did so represent him; that after conviction his court-appointed counsel timely filed notice of appeal and thereupon requested to be relieved from further representation of the petitioner; that this request was granted but no counsel was appointed to represent the petitioner in connection with his appeal and the time for perfecting the same has elapsed.

Rule 93(b) of the Rules of Civil Procedure provides:

"*Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief*, the court shall cause notice thereof to be served upon the district attorney, of the judicial district in which such motion is pending, appoint local counsel if the prisoner is indigent, grant a prompt hearing therein, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him, or grant a new trial, or correct the sentence, as may appear appropriate." [Emphasis ours.]

The court's order, denying petitioner's motion without a hearing, is as follows:

"THIS MATTER coming on for hearing before the Court on the Motion of Jose Salazar to vacate judgment and sentence under Rule 93 of the Rules of Civil Procedure for New Mexico District Courts;

"AND THE COURT, having read said Motion and being fully advised as to all matters, facts, and in the premises, finds said Motion should be denied without a hearing.

"IT IS, ACCORDINGLY, ORDERED that the Motion of Jose Salazar to vacate judgment and sentence under Rule 93 be and the same is hereby denied.

"DATED this 5th day of May, 1971."

Since the only record before us is the petitioner's motion and the proceedings in connection therewith, we are unable to determine what the "files and records of the case" show, but the motion itself does not "conclusively show that the prisoner is entitled to no relief". It follows that a hearing should have been held in accordance with Rule 93(b) for a determination of the issues and for the filing of findings of fact and conclusions of law with respect thereto. State v. Patton, 82 N.M. 29, 474 P.2d 711 (Ct.App.1970); State v. Gorton, 79 N.M. 775, 449 P.2d 791 (Ct.App.1969).

Should the trial court determine that an appeal was taken but not perfected because petitioner, as an indigent, did not have counsel to perfect the appeal, the court might well follow the procedure suggested in State v. Barefield, 80 N.M. 265, 454 P. 2d 279 (Ct.App.1969).

Should the trial court determine that no appeal was taken because petitioner did not have counsel for this purpose, the procedure suggested in State v. Gorton, supra, would be proper.

The cause is remanded for further action consistent herewith.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

491 P.2d 1165

STATE of New Mexico, Plaintiff-Appellee,

v.

Ronald Lee WHITE, Defendant-Appellant.

No. 707.

Court of Appeals of New Mexico.

Nov. 12, 1971.

Harvey C. Markley, Lovington, for defendant-appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

COWAN, Judge.

From a judgment and sentence following his conviction in the District Court of Lea County for armed robbery contrary to § 40A–16–2, N.M.S.A.1953 (Repl.Vol. 6), defendant appeals. He was tried jointly with one Mose Lee Gilliam, also convicted.

We affirm.

On the night of October 16, 1970, Mrs. Leo Berry was working alone at the Quick Shop Grocery Store on south Dal Paso Street in Hobbs. About 10:00 P.M. two men entered and one of them asked for a candy bar. When she turned to get the candy, she was struck on the back of the head. She tried to flee to the back of the store but her way was blocked by one of the two men. She was then beaten about the head, and fell. The men tried unsuccessfully to open the cash register and then one of them said "We better get out of

here". Mrs. Berry thought they had gone, but she continued to lie on the floor for a moment longer. She then raised up on one elbow and saw one of the two men. He came up, pushed her back down and she was again struck on the head. The men tried again to open the register, were again unsuccessful, and finally left the store, whereupon she called the police and was taken to the hospital. Her purse was stolen in the robbery.

At the trial Mrs. Berry identified Gilliam as one of the robbers from his previous visits to the store, from his clothing, from his manner and from a photograph shown her while in the hospital. She also made positive identification of him in court as one of the two who came in the store, as the one who blocked her passage as she tried to flee and as the one who pushed her back down as she lay on the floor.

At the hospital Mrs. Berry identified the defendant here from a photograph among some 30 others in a "mug book" and from his size and clothing. She made positive identification of him at the trial as one of the two men who entered the store and as the one who asked for the candy bar.

She was not able to identify the person or persons who struck her.

Defendant urges under point one that the trial court erred in denying him a trial separate from his co-defendant, Gilliam. He predicates his claim of error on the asserted fact that the evidence of identification of his co-defendant was more substantial than was the evidence of his identification and that he was thereby prejudiced by "guilt by association". Whether a separate trial should have been granted him is a matter addressed to and resolved by the sound discretion of the court. State v. Pope, 78 N.M. 282, 430 P.2d 779 (Ct.App. 1967).

While *Pope* has reference principally to separate trials for defendants jointly indicted, the fact that here the co-defendants were separately informed against for the same offense is of no significance. State v. Fagan, 78 N.M. 618, 435 P.2d 771 (Ct.App.1967).

We cannot say that the defendant was prejudiced by the court's refusal to give him a separate trial or that the trial court abused its discretion.

By his second point the defendant asserts that the evidence of his identification was insufficient as a matter of law. This claim is also without merit. In State v. Williamson, 78 N.M. 751, 438 P.2d 161 (1968), cert. denied, 393 U.S. 891, 89 S.Ct. 212, 21 L. Ed.2d 170 (1968), the court stated that a person may properly be identified by size, height, movements, features, mannerisms and clothing. The opinion continued:

> ". . . It is not essential for a conviction that a positive identification be made of the accused. It is sufficient if the witnesses testify that in their belief, opinion or judgment the person accused is the person who perpetrated the crime and want of positiveness goes only to the weight of the testimony. . . ."

The jury believed in the accuracy of Mrs. Berry's identification of the defendant. It was an issue for their determination. State v. Ortega, 79 N.M. 744, 449 P.2d 346 (Ct.App.1968).

Defendant also complains in his brief that the jury should have considered the alibi instruction more carefully and urges fundamental error. This complaint is unsupported by either argument or authority and we find it without merit.

There being no error, the judgment and sentence appealed from is affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

492 P.2d 138

Rebecca Flick MELVIN, Plaintiff-Appellee,

v.

Peter Delton KAZHE, Defendant-Appellant.

No. 9318.

Supreme Court of New Mexico.

Dec. 30, 1971.

Shipley, Durrett, and Conway, Alamogordo, for defendant-appellant.

Jack T. Whorton, Alamogordo, for plaintiff-appellee.

OPINION

McMANUS, Justice.

Plaintiff filed a complaint alleging the defendant to be the father of her twin children. The District Court of Lincoln County, sitting without a jury, found the defendant to be the father of the twins and awarded support moneys and attorney fees. The defendant appeals.

The record reveals that the plaintiff recounted many trysts between herself and the defendant, commencing the latter part of July, 1968 and continuing through the 2nd of July, 1969. Automobiles, bachelor officers quarters and plaintiff's home provided the situs of the many alleged intercoursal rendezvous.

The plaintiff and defendant met a short time prior to the activities alleged. The conception date of the twins was placed by the mother as October 22–23, between 10:00 p. m. and 2:00 a. m., in the year 1968. During this period and for the next month plaintiff was a married woman living in the same household with her then husband. A divorce action ensued, the complaint being filed on November 21, 1968 in the District Court of El Paso County, El Paso, Texas. The final decree of divorce was entered on January 21, 1969. It is noted that the former husband left the home approxi-

mately a month after the alleged conception date and is ostensibly supporting other children born previous to the advent of the twin children. The former husband was not a party to, nor did he appear in this litigation. There was testimony that the defendant told a military chaplain the children were his. Other testimony indicated that members of defendant's family attended the christening of the twin children. Still other testimony reflected that defendant signed a bank deposit book in the names of the two children. The children were given the defendant's last name by their mother, plaintiff herein. Interrogatories of the defendant appearing in the record reflect his denial of paternity.

The earliest New Mexico case treating this subject is Grates v. Garcia, 20 N.M. 158, 148 P. 493 (1915). The case established, in New Mexico, the presumption of law that a child born in wedlock is legitimate.

The later case of Salas v. Olmos, 47 N.M. 409, 143 P.2d 871 (1943), sets down the point that children born in wedlock are presumed to be legitimate. In addition to this presumption both Grates and Salas, supra, either expressly held, or at least so indicated, that the husband or wife, and particularly the wife, is incompetent to testify as to non-access by her husband. This rule had its beginning in dictum announced by Lord Mansfield in 1877. Such a rule has now been largely repudiated by modern scholars and in case law. See 7 Wigmore, Evidence, § 2063–64 (3d Ed. 1940); Ventresco v. Bushey, 159 Me. 241, 191 A.2d 104 (1963), and Moore v. Smith, 178 Miss. 383, 172 So. 317 (1937). In the Moore case, supra, the mother of the child born during wedlock was not allowed to testify as to the non-access of her husband. On appeal of said cause the Supreme Court of Mississippi said, after discussing the Lord Mansfield reasoning for the rule and other reasons:

> "We conclude, therefore, that domestic and social policy does not require the exclusion of the evidence here under consideration, and that justice would be best promoted by admitting it; consequently, the court below erred in excluding it."

Therefore, to the extent that Grates and Salas, supra, stand for the rule that a mother or a father are incompetent to testify as to non-access, those cases are now overruled. As of now our law is clear that the husband and wife are both competent to testify for the purpose of rebutting the presumption of legitimacy, and this includes non-access.

Regardless of which rule any state follows, the child is presumed legitimate. The plaintiff testified that she and her husband were living together at the time of the conception of the children. A showing of circumstances merely creating doubt or suspicion is not sufficient to rebut the presumption of legitimacy arising from conception during marriage. See Grates, supra.

We reaffirm the degree of proof required to overcome the presumption of legitimacy laid down in Torres v. Gonzales, 80 N.M. 35, 450 P.2d 921 (1969), which is that the presumption that a child born in wedlock is legitimate may be rebutted only where the evidence is clear, cogent and convincing. Applying this test to the case at hand, we find no substantial evidence which is sufficiently clear, cogent and convincing to overcome the presumption of legitimacy.

This cause will be reversed and remanded with directions to dismiss plaintiff's complaint. It is so ordered.

OMAN and MONTOYA, JJ., concur.

492 P.2d 140

Raymond L. ROMERO and Lucy S. Romero, his wife, Plaintiffs-Appellants,

v.

Camilo E. SANCHEZ and Ella R. Sanchez, his wife, Defendants-Appellees.

No. 9237.

Supreme Court of New Mexico.

Dec. 30, 1971.

Ahern, Montgomery & Albert, Malcolm L. Shannon, Jr., Albuquerque, for plaintiffs-appellants.

Avelino V. Gutierrez, Raymond G. Sanchez, Albuquerque, for defendants-appellees.

OPINION

STEPHENSON, Justice.

Appellants ("plaintiffs") brought this action to set aside a deed executed by them to appellees ("defendants") on the grounds of fraud, and for damages. Defendants successfully moved for summary judgment and plaintiffs appealed. We reverse.

The complaint alleged that plaintiffs were the owners of certain land in Valencia County which defendants, on March 2, 1953, agreed to purchase for $10,000.00, payable $200.00 per month; that defendants went into possession and have paid a total of $400.00.

The first question presented is whether the allegations of fraud are legally sufficient. In that behalf, the complaint alleges that:

1. The parties are related.
2. Plaintiffs have relied on the advice and judgment of defendants as to business and legal matters.
3. At the outset, defendants falsely and fraudulently represented to plaintiffs that in order to have the property assessed for tax purposes, it would be necessary for plaintiffs to execute a deed.
4. Defendants further falsely and fraudulently represented that the deed would not and could not be used unless it was reexecuted before a notary.
5. Defendants further represented that the deed would not and could not be recorded until they had paid the agreed purchase price.
6. Defendants caused a notary to affix an acknowledgment in ordinary form to the deed, although plaintiffs never appeared before any notary to acknowledge their signatures.
7. Defendants, after about seven years and on November 24, 1961, falsely and fraudulently caused said deed to be recorded in the records of Valencia County.
8. Plaintiffs did not learn of the deed having been recorded until February, 1968.

Additional allegations, about which no question has been raised as to their sufficiency, cover other elements of actionable fraud.

Circumstances constituting fraud must be alleged with particularity. Rule 9(b), Rules of Civil Procedure [§ 21-1-1(9) (b), N.M. S.A., 1953]. Defendants, taking the allegations one by one, argue in a plausible and forceful way that each allegation is deficient. Nevertheless, accepting the allegations as true, as we must at this juncture, we feel that in the aggregate they allege with sufficient particularity a fraudulent plan, scheme or design.

In re Trigg, 46 N.M. 96, 121 P.2d 152 (1942), although decided prior to Rule 9(b), contains more discussion on pleading fraud than any case decided during existence of the rule. It held that it was unnecessary to even use words such as "fraud" or "fraudulent," provided:

> "* * * the facts alleged are such as constitute fraud in themselves, or are facts from which fraud will be necessarily implied." (Quoting 24 Am.Jur., Fraud and Deceit, § 244.)

That standard is met here. See also 2A Moore's Federal Practice, Par. 9.03.

Defendants also claim that plaintiffs' cause of action was, as a matter of law, barred by limitations, based upon the deed having been recorded on November 24, 1961 and suit not having been filed until October 28, 1968, notwithstanding an allegation in the complaint that plaintiffs did not learn that the deed had been recorded until February, 1968. Plaintiffs equate the date of actual discovery of fraud with

their discovery of the fact of recording and defendants do not controvert this assertion.

Resolution of the limitations issue requires consideration of several New Mexico statutes. Section 23-1-7, N.M.S.A., 1953, relied upon by plaintiffs, provides:

> "23-1-7. Accrual of actions for fraud or mistake, injuries or conversion of property.—In actions for relief, on the ground of fraud or mistake, and in actions for injuries to, or conversion of property, the cause of action shall not be deemed to have accrued until the fraud, mistake, injury or conversion complained of, shall have been discovered by the party aggrieved." . . .

Plaintiffs assert the period of limitations does not commence to run until actual discovery of the fraud.

Defendants assert constructive knowledge of any fraud was imputed to plaintiffs by virtue of § 71-2-2, N.M.S.A., 1953, which caused the limitation period to commence running. That statute provides:

> "71-2-2. Constructive notice of contents.—Such records shall be notice to all the world of the existence and contents of the instruments so recorded from the time of recording."

Construction of § 71-2-2 requires consideration of its companion, § 71-2-3, which provides:

> "71-2-3. Unrecorded instruments—Effect.—No deed, mortgage or other instrument in writing, not recorded in accordance with section 4786 [71-2-1], shall affect the title or rights to, in any real estate, of any purchaser, mortgagee in good faith, or judgment lien creditor, without knowledge of the existence of such unrecorded instruments."

Before dealing with questions which are before us, we will briefly mention some which are not. Section 71-1-3, N.M.S.A., 1953 provides in part that instruments not "duly acknowledged" may not be recorded "nor considered of record, though so entered." Was this deed "duly acknowledged"? This question is not raised.

Similarly, § 71-2-2 provides that recording shall be notice of "the existence and contents" of the recorded instrument. Does this carry with it notice of the fact of recording? This question is not raised either.

The position of the parties is predicated upon the literal interpretation of a word or words contained in the statute upon which they rely. Plaintiffs rely upon "discovered" in § 23-1-7 as meaning actual discovery and defendants rely upon "notice to all the world" in § 71-2-2.

We do not agree that the solution is so simple, although each position finds support in adjudicated cases. For support of defendants' theory, see Pinkerton v. Pinkerton, 122 Kan. 131, 251 P. 416 (1926). Plaintiff principally relies on Alexander v. Cleland, 13 N.M. 524, 86 P. 425 (1906). There the court interpreted an earlier—but practically identical statute—and said:

> "The words used in these sections seem to us to be as plain as any in the English language. There can be no doubt as to their meaning. The statute of limitations in cases of fraud is four years and the four years begin to run from the time the fraud is discovered by the party aggrieved."

Although this would apparently be the meaning of the case, it appears that it has never been cited for that proposition. There are, however, cases in other states which require actual discovery of fraud, and which refuse to recognize constructive notice of fraud. E. g., Schoedel v. State Bank of Newburg, 245 Wis. 74, 13 N.W. 2d 534, 152 A.L.R. 459 (1944).

It suffices to say there is a split of authority on the issue with which we are confronted. 37 Am.Jur.2d, Fraud and Deceit, § 411, says:

> "Many decisions either distinctly reject the rule of record notice in limitation cases, or refuse to apply it to particular circumstances in question, or take the view that the public records are notice only when the transaction is of a character requiring the defrauded party to

examine the records, or when the facts put him on inquiry in reference to matters of record."

See also Annot., 137 A.L.R. 268 and Annot., 152 A.L.R. 461.

"Discover" as it relates to fraud is generally defined as discovery of such facts as would, on reasonable diligent investigation, lead to knowledge of fraud. 12A Words and Phrases, "Discovery of Fraud."

A good analysis of the conflicting rules in this area is contained in a passage from 37 Am.Jur.2d, Fraud and Deceit, § 411, at 558–59, where it is observed that there is difficulty in determining the true meaning of those cases which hold that recording by itself will cause the statute of limitations to commence running. For if the general rule is that the statute runs from the time that reasonable diligence would have discovered the fraud, reference to matters of public record adds little if such diligence would naturally have included a search of such records. However, if the party is to be bound by the record even if reasonable diligence would not have led to its examination, he will likely be the victim of "a rule of thumb rather than a live principle of law, [which] takes no account of the numerous forms in which fraud may appear and its varied devices and circumstances of concealment. * * *"

This rationale can be seen in the following decisions: Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959); Abels v. Bennett, 158 Neb. 699, 64 N.W.2d 481 (1954); and Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951), all of which hold that the recording of a deed must be accompanied by other circumstances sufficient to put a reasonable person upon inquiry in order for the recording to act as constructive notice of the fraud.

We are led to the same conclusion by construction of our recording statutes. Section 71–2–2 is rather unique in its sweep in imputing notice to "all the world," although various courts, apparently in the throes of impulses to generalize, have made similar statements. Courts and writers have then been required to consider whether "all of the world" or "the whole world" really means what it says. An examination of this material fairly well destroys the idea that it does. For example:

"Recording acts were passed for the purpose of providing a place and a method by which an intending purchaser or encumbrancer can safely determine just what kind of title he is in fact obtaining." 45 Am.Jur., Records and Recording Laws, § 29.

"The general policy of the law relating to titles to land is to protect bona fide purchasers against loss from secret liens not disclosed by any public record not ascertainable by due diligence." 8 Thompson, On Real Property, § 4291 at 227 (1963 repl.).

"* * * [T]he universal rule is that the record of an instrument is constructive notice to subsequent purchasers and encumbrancers only, and does not affect prior parties * * *." 45 Am.Jur., supra, § 89, citing Armstrong v. Ashley, 204 U.S. 272, 27 S.Ct. 270, 51 L.Ed. 482.

"The proposition is frequently announced that under the recording statutes, the proper record of an instrument authorized to be recorded is notice to all the world. But this means simply that the record is open to all, and is notice to interested parties. The record of an instrument is notice only to those who are bound to search for it. It is not a publication to the world at large. Those who, by the terms of the recording laws, are charged with constructive notice of the record of an instrument affecting land are, therefore, those who are bound to search the records for that particular instrument." Id., § 86.

Section 71–2–2 must be considered with § 71–2–3 with which it is in pari-materia. Obviously constructive notice to all the world cannot mean precisely that; it must be interpreted, defined and limited by the courts. Having done this, we are convinced that our recording statutes ought to be held to have the same purpose and

meaning as those of most other jurisdictions, viz: that they are intended to protect those having subsequent dealings with the property, and that the record imputes notice only to those who are bound to search for it. Certainly the statutes were not intended as an automatic shelter for fraud.

What we have said does no violence to our precedents. New Mexico has long recognized the previously quoted general purpose of recording acts. See Arias v. Springer, 42 N.M. 350, 78 P.2d 153 (1938); Chetham-Strode v. Blake, 19 N.M. 335, 142 P. 1130 (1914); Ilfeld v. Baca, 13 N.M. 32, 79 P. 723 (1905), rev'd on other grounds, 14 N.M. 65, 89 P. 244 (1907). It has also recognized the concept of constructive notice. Taylor v. Hanchett Oil Co., 37 N.M. 606, 27 P.2d 59 (1933).

[redacted] We hold, therefore, that the mere recording of the deed did not impute constructive notice thereof to the plaintiffs. However, if, considering all the surrounding facts and circumstances, a reasonably prudent person in the exercise of ordinary diligence would have made inquiry as to the state of the record, he is chargeable with knowledge that such inquiry would have revealed from the time that it ought to have been made. This raises a factual issue for resolution by the trier of the facts.

[redacted] Finally, defendants assert that the action was barred by laches and adverse possession. The record as it stands does not contain a factual predicate for the granting of summary judgment to defendants on either of those grounds. Moreover, the latter was not pleaded, and cannot be raised here for the first time. Supreme Court Rule 20 [§ 21-2-1(20), N.M.S.A., 1953]; Western Farm Bureau Mutual Ins. Co. v. Barela, 79 N.M. 149, 441 P.2d 47 (1968).

The summary judgment is reversed, with instructions to reinstate the case on the trial docket and to proceed in a manner consistent herewith.

It is so ordered.

McMANUS and OMAN, JJ., concur.

492 P.2d 144

STATE of New Mexico, Plaintiff-Appellee,

v.

Clyde A. WEAVER, Defendant-Appellant.

No. 770.

Court of Appeals of New Mexico.

Dec. 10, 1971.

[redacted]

Jennie Deden Behles, Daniel J. Behles, M. Rosenberg Law Offices, Carlsbad, for defendant-appellant.

David L. Norvell, Atty. Gen., Prentis Reid Griffith, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

COWAN, Judge.

Defendant appeals from a judgment following his conviction for escape from jail contrary to § 40A-22-8, N.M.S.A.1953 (Repl.Vol. 6).

We affirm.

The portion of the statute under which the defendant was convicted is as follows:

"Escape from jail consists of any person who shall have been lawfully committed to any jail, escaping or attempting to escape from such jail."

Defendant had been lawfully committed to the Eddy County jail in Carlsbad, New Mexico, on July 16, 1970. On August 5, 1970, he was assigned duty in a kitchen, located downstairs from the jail cells, in the Eddy County Courthouse. This kitchen was used for preparing meals for prisoners and also for the personal needs of the sheriff and his family. Defendant disappeared from the kitchen sometime during the morning of August 5 and was later apprehended in the State of Maryland.

Defendant urges reversal under six points, five of them being concerned principally with whether, under the facts just related, his departure was an "escape from jail" and whether there was substantial evidence to support the guilty verdict. The defendant argues that his conviction should not stand since he escaped from the jail kitchen and not from the jail proper. We do not determine whether this jurisdiction should adopt a rule of "constructive confinement" or a rule of "strict interpretation", but a short discussion might be in order. The constructive confinement rule is defined in State v. Rardon, 221 Ind. 154, 46 N.E.2d 605 (1943), as the court said:

> ". . . When a person is ordered confined to a given prison that order of confinement does not mean that that person must be kept within a given four walls but it does mean that that person is confined for restraint upon his freedom by the authorities of that institution, and if the proper authorities determine that he may leave the four walls of the institution for the purpose of performing some duty or accomplishing some task given him, and while outside the institution walls he escapes, he is guilty of escape from the correctional institution to which he was committed. . . ."

The rule of strict interpretation would require that the escape be from the jail proper or an integral part thereof. In the one case in this jurisdiction touching on the subject, State v. Peters, 69 N.M. 302, 366 P.2d 148 (1961), the court held that a prisoner's escape from a prison honor farm constituted escape from the State Penitentiary because the prison honor farm is an integral part and parcel of the State Penitentiary. This decision was based upon a statute authorizing the Penitentiary of New Mexico to operate prison farms. There is no statutory provision suggesting that a jail kitchen is a part of a county jail.

The state introduced evidence that the kitchen was used for preparation of the prisoners' meals and that it was part of the jail. The jury, under proper instructions, by their verdict necessarily determined that the jail kitchen was an integral part and parcel of the jail and that the defendant had escaped therefrom. State v. Peters, supra. The verdict was supported by substantial evidence.

The defendant also argues that, because he left the jail kitchen and not the jail proper, he should not have been bound over after the preliminary hearing and the information should have been quashed. Suffice it to say, the record reveals that the defendant was fully advised of the charges against him by preliminary hearing, by the information and by a bill of particulars. There was probable cause to bind him over for trial.

By a sixth point defendant seeks reversal on the ground that the court erred in submitting instruction number 9 to the jury "because it is misleading, confusing, and conflicts with all the instructions when viewed as a whole."

In addition to the standard instruction advising the jury that the defendant was on trial for the offense of escape from jail, the court gave the following instructions:

"8 The Statute of the State of New Mexico provides that escape from jail consists of any person who shall have been lawfully committed to any jail, escaping or attempting to escape from such jail, and further provides that whoever is guilty shall be punished as provided by law.

"9 The term ESCAPE, as used in these instructions, means that a person has unlawfully gained his liberty from lawful custody before he is delivered therefrom by due process of law.

"10 You are instructed that unless you find beyond a reasonable doubt that the kitchen where defendant was last assigned to work was an integal (sic) part of the county jail, you will find the defendant not guilty."

Defendant urges that instruction number 9 would lead the jury to believe that a finding of escape from lawful custody would be sufficient for a conviction of escape from jail. He argues that escape from "lawful custody" is much broader than escape from jail. His argument might have merit were it not for the remainder of the court's instructions, which clearly instructed the jury that they must find not only that the defendant escaped from jail, but that the kitchen was an integral part of that jail.

Each instruction need not contain within its limits all the elements to be considered. The instructions are sufficient if, considered as a whole, they fairly present the issues and the applicable law. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.1969). Reading the instructions as a whole, we do not find them erroneous or that the defendant was prejudiced.

There being no reversible error, the judgment is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

492 P.2d 636

Marion Curtiss KINNEY, Plaintiff-Appellee,

v.

Curtiss Kinney EWING, Defendant-Appellant.

No. 9281.

Supreme Court of New Mexico.

Jan. 7, 1972.

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

Catron, Catron & Donnelly, Santa Fe, for appellee.

OPINION

STEPHENSON, Justice.

Appellee ("Plaintiff") sought a declaratory judgment regarding the rights of the parties with respect to certain securities ("the Securities") in the names of the parties as joint tenants and to a related bank account. From a judgment declaring plaintiff to be the sole owner of these assets, appellant ("defendant") appeals. We affirm.

In 1944 Charles Milton Kinney died, survived by his wife (plaintiff) and his daughter (defendant). His will left all his property to plaintiff. At the time of Mr. Kinney's death, plaintiff and decedent owned their residence in their joint names. Plaintiff sold the residence and with the proceeds of the sale made the first purchase of the Securities in December of 1945. Plaintiff, being concerned about the well-being of defendant who was then a minor, consulted a friend and bank officer about what to do with her money from the sale of the residence. He advised her to register the stock certificate for the first purchase of the Securities in the joint names of plaintiff and defendant as joint tenants with right of survivorship so that the shares would go to defendant upon plaintiff's death without probate. She followed his advice.

Thereafter, plaintiff bought and sold various other corporate securities. Some were registered in plaintiff's name alone while others were registered in plaintiff's and defendant's names as joint tenants. Whenever plaintiff sold any of the Securities registered in joint tenancy, she had to obtain defendant's signature on the certificates or on stock powers. On one occasion part of the Securities were pledged by the parties as security for a bank loan for the benefit of defendant's husband. In 1960 plaintiff commenced purchasing the Securities in another mutual fund. Of these, she made numerous separate purchases with her last purchase taking place in December of 1967. All of the stock certificates acquired from these purchases were similarly registered in joint tenancy.

During the 22-year period over which the Securities were purchased, defendant's name changed from her maiden name of Curtiss Kinney to her first married name and then to her present married name. To keep the Securities correctly registered, plaintiff took the necessary steps to reregister the Securities so that the stock certificates for the Securities all ultimately appeared in defendant's present name. Plaintiff's own funds provided the source for the purchase of all the Securities.

Starting in 1946, plaintiff kept the stock certificates for the Securities in a safe deposit box which was rented in the name of plaintiff and defendant. In 1955 a new

rental agreement for the same safe deposit box was signed by both plaintiff and defendant. In spite of equal access to the safe deposit box under the new rental agreement, plaintiff kept the keys to it and was the only one who ever entered it.

Checks for dividends and other distributions on the Securities were always made payable to plaintiff and defendant as joint tenants with right of survivorship. They were mailed to plaintiff and she deposited them in a joint bank account in the names of plaintiff and defendant. The first record of such a joint bank account appears on a signature card in 1950. In 1955 a new joint bank account signature card was signed by plaintiff and defendant which replaced the one of 1950. Both signature cards were signed by both parties and provided that the funds on deposit in the account were owned by the parties as joint tenants and that either party could withdraw all or any part of the account. Plaintiff kept a checkbook for the joint bank account and was the only party who withdrew any funds from it. Plaintiff also paid all income taxes arising from dividends on the Securities.

During 1967 relations between plaintiff and defendant deteriorated. Plaintiff, without the knowledge of defendant, had the joint bank account changed to her name alone and had defendant's name cancelled from the safe deposit box rental agreement. In spite of the name change, plaintiff continued to deposit dividend checks paid on the Securities in the bank account, either without any endorsement at all or by endorsing both her name and defendant's name on the checks.

In 1968 plaintiff attempted to sell some of the Securities without the prior knowledge of defendant. When defendant learned about it through the parties' mutual stockbroker, she refused to sign the necessary stock powers. Several days later, defendant went to the bank and attempted to withdraw all the funds on deposit in the account and was refused by the bank because of its name change. Defendant, through counsel, then demanded partition of the Securities. Plaintiff refused and instituted this action.

With respect to the Securities, the court found the facts to be generally as we have stated them. Most importantly, it also found: (1) that due to plaintiff's exclusive dealings with the Securities, there was no delivery of them from plaintiff to defendant; and (2) that the registration of the Securities by plaintiff in joint tenancy did not manifest any intention on her part to make a present gift to defendant, but only indicated her intention to have the Securities pass to defendant upon plaintiff's death. Consequently, the court concluded that plaintiff had made no completed gift and that the Securities were "owned by plaintiff as her sole property and defendant has no right, title or interest therein or thereto."

As to the funds on deposit in the bank account, the court found the facts also to be generally as we have stated them. Most importantly, it found that plaintiff, because of her exclusive dealings with the account, had no intention of making a present gift to defendant of any funds in the account, but rather intended to retain sole control over the funds until her death, at which time plaintiff intended for defendant to receive any funds remaining in the account. Consequently, the court found that neither had there been a completed gift of these funds nor did defendant have any "right or interest therein or thereto."

The basic question presented is whether a valid gift was made and completed. The elements of a valid gift were stated in Lusk v. Daugherty, 61 N.M. 196, 297 P.2d 333 (1956) and are:

"1. Property subject to gift.

2. A donor competent to make the gift.

3. A donation intent on the part of the donor, not induced by force or fraud.

4. Delivery to the donee.

5. Acceptance by a competent donee.

6. A present gift fully executed."

See also Espinosa v. Petritis, 70 N.M. 327, 373 P.2d 820 (1962).

Defendant first contends that so far as the Securities are concerned, delivery, within the meaning of the fourth element enumerated in Lusk, was completed by plaintiff having caused the Securities to be registered in defendant's name. More specifically, she asserts that if that portion of the court's fourth finding which states that "there has never been a delivery of any of said securities from plaintiff to defendant" refers to a physical transfer of possession of the certificates, then she has no quarrel with it, but if the court meant that the fourth requirement for a valid gift as stated in Lusk had not been met, an erroneous conclusion of law was made in the guise of a finding.

We cannot determine with certainty the sense in which the quoted words were meant, but will presume it was the former because the latter would have constituted error. Reasonable presumptions will be indulged to support the correctness of judgments. Bradley v. Hap Crawford, General Contractor, 77 N.M. 738, 427 P.2d 255 (1967). See also Petritsis v. Simpier, 82 N.M. 4, 474 P.2d 490 (1970); and Cave v. Cave, 81 N.M. 797, 474 P.2d 480 (1970).

Admittedly, there is a split of authority, consideration of which convinces us that courts have not uniformly distinguished between delivery and donative intent. In our opinion, the better reasoned view is that where a donor purchases corporate stock, or puts his existing corporate stock, in his name and the name of the donee as joint tenants and the certificates therefor are duly issued in such registration, there has been a legal delivery from the donor to the donee of an interest in the corporate stock. Frey v. Wubbena, 26 Ill. 2d 62, 185 N.E.2d 850 (1962); Zander v. Holly, 1 Wis.2d 300, 84 N.W.2d 87 (1957); Allender v. Allender, 199 Md. 541, 87 A.2d 608 (1952); Manning v. United States Nat. Bank of Portland, 174 Or. 118, 148 P.2d 255 (1944); and Eisenhardt v. Lowell, 105 Colo. 417, 98 P.2d 1001 (1940). The fact that the new joint tenancy certificates are delivered to, and retained by, the donor does not defeat the requirement of delivery since the possession of one cotenant is in contemplation of law the possession of the other. Allender v. Allender, supra. A gift through the creation of a joint tenancy does not require a complete surrender of dominion and control since to do so would be inconsistent with the nature of any estate in joint tenancy. Kuebler v. Kuebler, 131 So.2d 211 at 218 (Fla.Ct.App. 1961).

Plaintiff dwells upon facts we have mentioned concerning her continued dominion and control over the certificates. However important such evidentiary matters may be on the subject of the donor's intent, as we shall presently see, in the case of stock certificates, a legal delivery within the meaning of the fourth element for a valid gift as stated in Lusk takes place when stock certificates are registered, at the request of the donor, in the name of the donor and donee as joint tenants.

Stock certificates in joint tenancy differ from the type of joint savings accounts which were considered in Espinosa v. Petritis, supra, and Brown v. Dougherty, 74 N.M. 80, 390 P.2d 665 (1964), which turned upon dominion over the passbook without which funds could not be withdrawn. Dominion over a stock certificate registered in joint tenancy is of little consequence on the legal issue of delivery, since acts of ownership over such certificates must be exercised by both parties in any case. Manning v. United States Nat. Bank of Portland, supra.

Such savings accounts as were discussed in Espinosa and Brown (requiring use of a passbook) differ from checking accounts and perhaps even from the type of savings accounts now in wide use in which passbooks are not issued or used.

The decisive question concerning the Securities is whether there existed the requisite donative intent (the third requirement

for a valid gift as stated in Lusk). The trial court found that:

"6. In registering said securities in the names of herself and defendant as joint tenants, plaintiff did not thereby intend to give defendant any interest in said securities during plaintiff's lifetime, but only to provide for the passing of the ownership of said securities to defendant upon the death of plaintiff; plaintiff's intention was to make a gift of said securities to defendant to take effect upon the death of plaintiff, and not before."

Defendant relies upon § 70–1–14.1, N.M.S.A., 1953, which effected profound changes in our law in the field of joint tenancies, and which provides:

"An instrument conveying or transferring title to real or personal property to two [2] or more persons as joint tenants, to two [2] or more persons and to the survivors of them and the heirs and assigns of the survivor, or to two [2] or more persons with right of survivorship, shall be prima-facie evidence that such property is held in a joint tenancy and shall be conclusive as to purchasers or encumbrancers for value. In any litigation involving the issue of such tenancy a preponderance of the evidence shall be sufficient to establish the same."

She argues that by virtue of this statute, the certificates for the Securities constituted prima facie evidence that the stocks were held in joint tenancy; that since the certificates were so registered at plaintiff's direction without consideration passing from defendant to plaintiff, they are also prima facie evidence of plaintiff's intent to give defendant a gift of a present interest in the securities; that it was therefore incumbent upon plaintiff to meet this prima facie evidence or rebut these presumptions; and that the registration of stock certificates in joint tenancy at the direction of the donor creates a presumption of donative intent. We have no quarrel with defendant's reasoning to this point, but she then argues that it was incumbent upon plaintiff to rebut this presumption by clear and convincing evidence which, as a matter of law, she failed to do, and it is here that we take our departure from her position.

An examination of § 70–1–14.1, particularly in its use of "prima-facie evidence," "conclusive" and "preponderance of the evidence," clearly demonstrates the purpose of the legislature to deal with evidentiary matters, including the required quantum of proof, with specificity in relation to joint tenancies. Defendant assumes that the last sentence of the statute refers only to the affirmative establishment of a joint tenancy. We do not necessarily agree that such is the case. The words "the same" refer back to "the issue of such tenancy." If joint tenancy is "in issue," its existence is to be resolved, and the negative would seem to be as much included as the affirmative. Moreover, we are of the view that if the legislature had intended the negative to require a greater quantum of proof than the affirmative, it is reasonable to suppose that it would have said so.

Similarly our precedents do not seem to require proof by clear and convincing evidence. The decisions have not indicated that any such quantum of proof is necessary. LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969); Espinosa v. Petritis, supra; Menger v. Otero County State Bank, 44 N.M. 82, 98 P.2d 834 (1940). One decision, moreover, upheld the finding of a gift by creation of a joint bank account, citing § 70–1–14.1, supra, and stating that it was unable to say that the appellant's proof "outweighed" that of the donee which the trial court had deemed "preponderant." Brown v. Dougherty, supra. We find the cases of Webb v. Richardson, 69 N.M. 15, 363 P.2d 626 (1961) and Butler v. Butler, 80 N.M. 36, 450 P.2d 922 (1969), relied upon by defendant, to be not in point.

We have no hesitation in holding that the trial court's finding as to lack of donative intent as to the Securities is sustained by substantial evidence. Plaintiff relied on the advice of a banker friend in selecting the joint tenancy vehicle. Legal

advice from bankers, although historically a boon to the legal profession, is attended with hazards to its recipient, albeit likely to no greater degree than financial advice from lawyers. The question posed is not whether the advice was good or bad—accurate or inaccurate. Rather, the issue is what intention the advice engendered as evidenced by plaintiff's subsequent actions and her testimony.

Defendant's next point is:

"EVEN IF THERE IS NO DONATIVE INTENT TO GIVE DEFENDANT A PRESENT INTEREST IN THE SECURITIES, PLAINTIFF ADMITTEDLY INTENDED TO GIVE DEFENDANT A FUTURE INTEREST IN THE SECURITIES AS SHE CAUSED THEM TO BE REGISTERED IN JOINT TENANCY. THUS, BY DECLARING THAT DEFENDANT HAD NO INTEREST WHATSOEVER IN THE SECURITIES, THE DISTRICT COURT ERRED IN FAILING TO CARRY OUT PLAINTIFF'S ADMITTED DONATIVE INTENT."

The difficulty with this argument is that we have just determined that the gift must fail. It is agreed we are concerned with a supposed gift. There being no donative intent (as we have just held), there was no present fully executed gift. Lusk v. Daugherty, supra. There was no "admitted donative intent." Rather, there was an intent that defendant should have nothing during plaintiff's lifetime.

As stated in Brown on Personal Property, § 48 (2d ed.):

"A gift, moreover, is a present passing of the title. * * * If the alleged donee does not receive a present interest in the subject matter, but only one to take effect in the future, the gift is abortive and unenforceable. In addition, if the gift is not to go into effect until the death of the donor it is testamentary in character and void unless executed in accordance with the statutes regulating the making of wills. * * *"

Defendant points to a further statement by Brown in the same section:

"The rule that a gift to take effect in the future is void, is, however, rather easily avoided by the expedient of finding that there was a present gift of the right to the subject matter, with the enjoyment only postponed to a later date. It is held that in chattels, as in land, there may be a present transfer of the title, even though the enjoyment is postponed, provided the right to the future enjoyment is irrevocable. * * *"

Defendant's problem is that the court did not so find.

The true situation is that plaintiff wished to make provision for defendant following the former's death. The means she chose, based upon the advice she received, was inappropriate. She desired to avoid probate proceedings. She is not to be criticized for this. Probate proceedings have not achieved popularity with the laity and are unlikely to do so.

Testamentary intentions are transitory. The lady changed her mind.

The question presented, in its final essence, is whether the court's finding numbered 6, particularly that portion which states that plaintiff did not intend to give defendant "*any* interest in said securities during plaintiff's lifetime" is supported by substantial evidence. We hold that it is.

We finally come to a consideration of the court's ruling regarding the joint bank account. The trial court made findings generally as we have summarized, and in its Finding No. 8 stated:

"In establishing said bank account as a joint account in the names of the parties, plaintiff did not thereby intend to give defendant any interest in the moneys on deposit in said account during plaintiff's lifetime, but on the contrary plaintiff intended to retain sole and complete control over the funds in said account for so long as she should live, and that only the funds remaining in said account at the time of her death, if any, should pass

to defendant at that time, and not before."

The court then concluded that plaintiff was the sole owner of the funds on deposit and defendant had no right or interest therein because there had been no completed gift of any interest in the account.

Defendant's argument is included in one point, but is actually broken down into three separate contentions. Defendant first argues:

REGARDLESS OF THE OWNERSHIP OF THE SECURITIES, DEFENDANT WAS A CO-OWNER OF THE BANK ACCOUNT AND HAD THE RIGHT TO WITHDRAW ALL OF ITS FUNDS.

Her argument proceeds generally along the same lines as that advanced in respect to the Securities, viz: that there was a valid delivery; that plaintiff had the burden of rebutting the presumption of gift and joint tenancy by clear and convincing evidence, and that, as a matter of law, she failed to do so.

Plaintiff questions whether § 70–1–14.1, supra, applies to bank accounts. This court has implicitly found it so applicable in Brown v. Dougherty, supra, an opinion of which we approve. We do not believe that any exceptions should be carved out of this statute.

While agreeing with defendant that there was a valid delivery within the meaning of the fourth requirement of Lusk, and that in fact such delivery is even more clear in respect to the bank account than in regard to the Securities, we are unable to agree that it was a completed gift for the same reasons which we have previously explained.

It is true that defendant had the right to withdraw all funds in the account, but only in a limited sense. As between the parties to this litigation inter se, she had no such right by reason of the trial court's determination, which we are affirming, to the effect that there was no present gift fully executed. As between defendant and the bank, the latter was presumably entitled to rely upon the signature cards and defendant did have the right to withdraw all of the funds. The significance of all this is lost upon us, because in point of fact she never did withdraw the funds or any portion thereof, thereby lending credence to plaintiff's position that she had no right to do so.

Defendant next states:

PLAINTIFF COULD NOT AFFECT DEFENDANT'S OWNERSHIP RIGHTS IN THE BANK ACCOUNT BY CHANGING ITS TITLE.

We are inclined to agree with this statement, but it does not affect our ultimate decision. In view of the trial court's findings of fact, which we are approving, that defendant had no interest in the bank account, her rights could not have been prejudiced thereby.

In any case, plaintiff could have also withdrawn all the funds and deposited them in a new bank account on which only she was authorized to sign. In relation to this phase of defendant's arguments, we are inclined to look past the form and seize upon the substance. We therefore find no merit in this phase of defendant's argument.

Finally, defendant argues:

IN THE ALTERNATIVE, PLAINTIFF COULD NOT LEGALLY DEPOSIT JOINT DIVIDEND CHECKS IN THE BANK ACCOUNT AFTER ITS NAME-CHANGE WITHOUT DEFENDANT'S CONSENT.

Plaintiff could "legally" do as she chose with the dividend checks inasmuch as there having been no present gift fully executed of the Securities from which the dividends emanated, they were her property.

Though the bank's actions in accepting checks drawn payable to two payees for a deposit to an account of one of them only without endorsement by the other may seem peculiar, we will speak no more of this, inasmuch as the bank is not present in this litigation to explain or defend.

We hold that the trial court's Finding of Fact No. 8 is supported by substantial evidence.

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

It is so ordered.

McMANUS and OMAN, JJ., concur.

492 P.2d 643

Arthur SEARS and Joyce Sears, Plaintiffs-Appellees,

v.

BOARD OF TRUSTEES OF the ANTON CHICO LAND GRANT et al., Defendants-Appellants.

No. 9274.

Supreme Court of New Mexico.

Dec. 27, 1971.

Rehearing Denied Jan. 20, 1972.

Donald A. Martinez, Las Vegas, for defendants-appellants.

Sutin, Thayer & Browne, Irwin S. Moise, Albuquerque, Jose E. Armijo, Las Vegas, for plaintiffs-appellees.

OPINION

OMAN, Justice.

Plaintiffs filed suit to quiet title to a certain tract of land situate within the Spiess and Davis Subdivision of the Anton Chico Land Grant. The named defendants were the Board of Trustees of the Anton Chico Land Grant and others. Of these, only the Board has appealed. A group of residents and claimants of the Grant petitioned for leave to intervene, but their petition was denied.

This appeal is by the Board from the Judgment and Decree quieting title in plaintiffs and from the refusal of the trial court to vacate the Board's default or grant a new trial, and by those who sought to intervene (hereinafter called Intervenors) from the denial of their petition to intervene and from the Judgment and Decree quieting title in plaintiffs. We affirm.

The findings of the trial court pertinent to a disposition of this appeal, which are not directly attacked, and, therefore, are conclusive and binding on this court [Springer Corporation v. American Leasing Company, 80 N.M. 609, 459 P.2d 135 (1969)] are as follows:

(A) Findings made in connection with the denial of the Petition in Intervention:

"1. The Anton Chico Land Grant is a pueblo or community land grant to the inhabitants of Anton Chico.

"2. That the petition to the Surveyor General of the United States for a survey and confirmation of the Anton Chico Grant was made by the inhabitants of Anton Chico, New Mexico.

"3. That the Territorial Legislature of New Mexico, by Chapter 42 of the Session Laws of 1907, (Now Chapter 8–Article 1, New Mexico Statutes 1953 Annotated) placed the management of all grants in New Mexico, made by the Governments of Spain or Mexico to any community, town, colony or pueblo or to any individual for the purpose of founding or establishing any community, town, colony or pueblo in a Board of Trustees composed of five members or persons residing within the limits of such Grant and who have an interest in the common lands and further provided for their election and tenure.

"4. That a Board of Trustees was elected by the residents of the Anton Chico Land Grant pursuant to Chapter 42 of the laws of 1907, at an election held on the first Monday of May, 1907, and

said grant has been managed under a board of trustees ever since and such board has also continued to act under the provisions of said act until the present time.

"5. That the said Board of Trustees of the Anton Chico Grant is a defendant in this cause and has filed an answer herein.

"6. That notwithstanding, that the petition to intervene was not timely filed, the court deeming the controversy of importance considered the matter on its merits."

(B) A summary of additional pertinent findings made in connection with the entry of the Judgment and Decree quieting title:

1. A patent to the lands comprising the community land was issued by the United States of America to the Town of Anton Chico in 1883, and the nature of this grant has been adjudicated in Reilly v. Shipman, 266 F. 852 (8th Cir. 1920), and Board of Trustees etc. v. Brown, et al., 33 N.M. 398, 269 P. 51 (1928).

2. In Cause No. 98 in the District Court of Guadalupe County (which became Cause No. 2062 on appeal in this court) title to the Grant lands was quieted in the Town, excepting a portion thereof which conflicted with another grant. A decree was entered by this court in the appeal proceedings on May 15, 1918, whereby Charles A. Spiess and S. B. Davis, Jr. were declared to be the owners of certain Grant lands which have since been known as the Spiess and Davis tract.

3. Thereafter, in Cause No. 2164 in the District Court of Guadalupe County, filed April 18, 1930, the title to all the lands in the Spiess and Davis tract was quieted in the plaintiffs named in said cause. In that cause the Board and the officers and individual members thereof were made parties defendant and were personally served with process, but no appearance was entered by or on behalf of the Board and the plaintiffs' title to the lands was not contested.

4. Thereafter a portion of the Spiess and Davis tract was subdivided, and this subdivision is known as "Unit No. 1 of the Spiess and Davis Tract of the Anton Chico Land Grant." Thereafter the title to a portion of the lands contained in said Unit No. 1 was quieted in Robert H. Wellborn by the District Court of Guadalupe County in Cause No. 2776 on the docket of that court. In that cause the officers and the individual members of the Board of the Grant were made parties defendant, were duly served with process and were represented by an attorney, who approved the decree quieting the title in the said Robert H. Wellborn.

5. Thereafter Robert H. Wellborn and wife conveyed a portion of the lands here in question to Alex Sears and wife and C. F. Sears and wife, who in turn conveyed to Arthur Sears, one of the plaintiffs herein. Arthur Sears also acquired additional tracts in Unit No. 1 from the Treasurer of Guadalupe County and from the New Mexico State Tax Commission.

6. Plaintiffs in the present suit had been in the actual, exclusive and visible possession of all the lands here in question for more than ten years next preceding the filing of their complaint. This possession on their part was continuous, in good faith, under color of title, inconsistent with, and hostile to the claims of all others. During all this period plaintiffs paid all State and County taxes levied and assessed against the lands, and no claim by suit at law or in equity was asserted against plaintiffs' claims to the lands at any time during the said ten years.

7. The Board was represented by an attorney in the present suit and filed an answer denying plaintiffs' title to the lands. On February 9, 1970, notice was given by the Clerk of the Court to the attorney that March 4, 1970 at 10:00 o'clock a. m., at Santa Rosa, New Mexico, had been fixed as the time and place for hearing of the cause on its merits. Pursuant to this notice the attorney caused to be issued subpoenas for 31 witnesses commanding them to be present and testify on behalf of the Board. The cause was called for trial promptly at 10:00 o'clock a. m. on March 4,

1970 in the courtroom of the Guadalupe County Courthouse at Santa Rosa. The attorney for the Board was not present, so the court instructed the clerk to ascertain from the attorney's office in Las Vegas the whereabouts of the attorney. The clerk complied and reported to the court that the attorney was on his way from Las Vegas to Santa Rosa for the trial and would be in the courtroom before 11:00 o'clock a. m. The court thereupon recessed until 11:00 o'clock a. m. At 11:15 o'clock a. m. the attorney had still not arrived, so the court proceeded and directed plaintiffs to begin the presentation of their case. At 12:15 o'clock p. m. plaintiffs had completed their case and the attorney still had not arrived. Thereupon the court adjourned.

On March 10, 1970 the Board, through its attorney, filed a "Motion for New Trial and for Relief from Default." This motion was denied.

On September 4, 1970 plaintiffs filed their requested findings of fact and conclusions of law. All of these requested findings but one were adopted by the court. Appellants made no requests. The Judgment and Decree was entered on October 22, 1970.

Appellants contend that by reason of the trial court's failure to make, sign and file a decision as required by Rule 52(B) (a), Rules of Civil Procedure [§ 21–1–1(52) (B) (a), N.M.S.A. 1953 (Repl. Vol. 4, 1970)] the findings adopted by reference may not be considered by us. We must agree the trial court failed to comply with the rule. Normally we would remand the cause to the trial court to make, sign and file a proper decision as required by the rule. Mora v. Martinez, 80 N.M. 88, 451 P.2d 992 (1969); Moore v. Moore, 68 N.M. 207, 360 P.2d 394 (1961). However, it is apparent the trial judge read and considered the requested findings. He rejected one of the requests, but adopted all the others. In view of this consideration and adoption of the requests by the trial judge, the fact that he has retired as a district judge, and the further fact that appellants made no effort to file requests or to call the now claimed error to the attention of the trial court, we are not inclined to remand the case for the entry of a proper decision by some other judge unfamiliar with the case, or disregard the findings actually adopted and made by the trial judge.

In our opinion the conclusions of law made by the trial judge correctly follow from the findings of fact and support the Judgment and Decree quieting title in plaintiffs. We do not agree with appellants that we must disregard the findings, the conclusions and the Judgment and Decree, because, as they contend, the trial court lacked authority to quiet the title in plaintiffs. Their position is that the decree entered in this court on May 15, 1918, pursuant to stipulation, and which decree is referred to in Paragraph (B) 2 above, was fraudulent and void; that any interest in the lands acquired by Spiess and Davis under the said decree was held by them as constructive trustees for the benefit of the Grant; that all the intervening proceedings to quiet title to these lands were void and of no effect; and that the trial court in the present case was without power or authority to quiet title in plaintiffs. These contentions are entirely inconsistent and incompatible with the issues which are properly before us on this appeal and with the history of the possession and title of these lands since May 15, 1918.

As to the denial by the trial court of the petition to intervene, the Intervenors, in the brief in chief, quoted extensively from their proposed "Complaint in Intervention" and then reviewed at length their contentions as to the law applicable to community grants. However, the Complaint in Intervention is not contained in the record before us on this appeal. We are limited in our review to the facts contained in the record before us. Supreme Court Rule 17 (1) [§ 21–2–1(17) (1), N.M.S.A. 1953 (Repl. Vol. 4, 1970)]; Reger v. Preston, 77 N.M. 196, 420 P.2d 779 (1966).

Intervenors must fail for the further and principal reason that the Board, which is vested with the control, care, management and government of the Grant and the common lands thereof and which may sue and be sued in connection therewith [§ 8–1–3, N.M.S.A. 1953 (Repl.Vol. 2, 1966)], was named as a party, filed answer to the complaint, and was represented by the same attorney who represented Intervenors. No showing was made that the Board's representation of any rights the Intervenors, as residents of the Grant, might have in and to the lands would be inadequate, or that Intervenors could or would properly assert some claim or defense which the Board could not or would not properly assert. They argue that prior members of the Board have failed in the past to adequately represent the residents and holders of interests in the Grant and its lands, but no such contention was made in their petition to intervene. In any event, the fact that prior members of the Board may have failed in their duty to properly represent the Grant does not show or demonstrate that the present membership of the Board was failing or was likely to fail in properly representing the Grant in this suit. Intervenors alleged in their petition to intervene that their interests in and to the lands were not adverse to the claims of the Board, and, as already stated, they made no claim that the Board could not or would not assert all claims and defenses which could properly be asserted.

The final issue to be decided is whether the trial court abused its discretion in refusing to grant the Board a new trial or relief from default. The record reflects the following:

1. The complaint was filed on August 24, 1967.

2. The Board filed answer on January 10, 1968.

3. The case was set for trial on May 29, 1968. It was on this date that the motion to intervene was filed. Consequently, the trial setting was vacated.

4. An order denying intervention was filed on May 22, 1969. A motion to vacate this order was filed on August 26, 1969.

5. The case was set for hearing on the merits at 10:00 o'clock a. m. on March 4, 1970. Appellants' attorney failed to appear as shown above.

6. On March 10, 1970 the Board filed a motion for new trial and relief from default. A hearing was held on this motion and the motion denied on October 20, 1970.

7. The Judgment and Decree quieting title in plaintiffs was entered on October 22, 1970.

The Board acknowledges that rulings on all motions for new trials and relief from defaults are left to the sound discretion of the trial court. Adams & McGahey v. Neill, 58 N.M. 782, 276 P.2d 913 (1954). In the exercise of this discretion, the trial court should bear in mind that default judgments are not favored. Wooley v. Wicker, 75 N.M. 241, 403 P.2d 685 (1965); Rogers v. Lyle Adjustment Company, 70 N.M. 209, 372 P.2d 797 (1962).

By comparing the facts in this case with those in the Wooley and Rogers cases, in which we held the trial courts did not abuse their discretion in refusing to set aside default judgments, we are unable to say, as a matter of law, that the trial court in the present case abused its discretion.

The Orders and the Judgment and Decree from which the appeals were taken are affirmed.

It is so ordered.

McMANUS and MONTOYA, JJ., concur.

492 P.2d 994

Martha Lucille DUNNE, Plaintiff-Appellant,

v.

Edward DUNNE, Defendant-Appellee.

No. 9290.

Supreme Court of New Mexico.
Jan. 14, 1972.

Thomas D. Schall, Jr., Albuquerque, for appellant.

Pat Chowning, Albuquerque, for appellee.

OPINION

STEPHENSON, Justice.

Plaintiff-appellant (wife) appeals from certain actions of the trial court in this curious divorce case which had three additional counts sounding in tort.

Following the entry of the decree, wife filed a many-splendored pleading captioned "Objection To Adequacy Of Notice And Request For A Record And Request For Additional Attorney's Fee And Costs And Default Judgment." This motion, if it tru-

ly be a motion, "prays," inter alia, for increased attorney's fees, allowance as costs of the expense of a transcript of a certain hearing, and judgment by default on the tort counts. The relief sought was denied and wife now seeks review.

The key question is whether or not the case was settled. Defendant-appellee (husband) says it was; that the judgment was entered accordingly; and that it was agreed that the tort counts would be dropped. Wife says the case was not settled, or at least not in respect to the matters of which she now complains.

The record is deficient in that it fails to sustain the factual assertions of either party on the subject of the supposed settlement. As wife wends her way through her argument, she points to a setting here, a certificate of mailing there, a postmark somewhere else, as substantiating some tangential recitation of facts. This is a system of logic or proof comparable to demonstrating that a fish was caught by a subsequent display of a hook. Husband simply recites, de hors the record, his assertions of settlement.

The acrimonious bickerings of the parties on the subject of the agreement, if any, seem to be more or less in balance, but the problems arising from the incomplete record are of the wife. It is the duty of the litigant seeking review to see that the record is completed for review of that which he wishes to present. State Ex Rel. State Highway Commission v. Sherman, 82 N.M. 316, 481 P.2d 104 (1971).

We will first consider the subject of attorney fees. The decree found that the parties had settled the "community property rights." In subsequent findings, it deals with specifics which one would suppose were based upon the agreement, including a finding that husband was to pay "reasonable attorneys fees." The decretal portion directs that husband was to pay "toward Plaintiff's attorneys fees" a specified sum within a certain time. The parties endorsed their approval on the decree. Wife's attorney endorsed the decree "objected to in every respect." Husband's attorney did not endorse it, but does not attack it, doubtless because he prepared it.

Wife concedes discretion in the trial court, but says, or more precisely her attorney says, that the court apparently believed the amount of attorney's fees had been agreed to and that he had not so agreed.

The trial court's power regarding attorney's fees is grounded on § 22-7-6, N.M.S.A., 1953. The court's discretion is implicit in the statute, and has been recognized by this court. Moore v. Moore, 71 N.M. 495, 379 P.2d 784 (1963); Lord v. Lord, 37 N.M. 454, 24 P.2d 292 (1933).

Wife's attorney's concern about the trial court's possible misunderstanding that the amount had been agreed upon is not borne out by the record. The decree indicates that if there was an agreement concerning fees, it was that a reasonable amount would be paid, and the court then fixed the amount. No sensible distinction occurs to us between reasonable fees grounded on the statute or reasonable fees based on an agreement. No distinction is suggested.

From the record, we cannot tell whether wife's attorney agreed to an amount or not, and the assertions of counsel are factually irreconcilable. Whether the wife's attorney agreed to the amount or not is, however, of no interest to us. He overlooks whose lawsuit it was. It was the wife's as far as he was concerned, and wife approved the decree. Awards of attorney fees in divorce actions are to the wife, not the attorney. Lloyd v. Lloyd, 60 N.M. 441, 292 P.2d 121 (1956).

Nothing before us impels us, or even inclines us, to disturb the court's award. If wife's attorney was not adequately compensated, he is free to take the matter up with her. Lloyd v. Lloyd, supra.

Wife next complains that the court erred in failing to tax as costs in her favor the expense of a transcript of a hearing. Assuming, without deciding, that this expense was a cost, the trial court had

discretion as to who should bear it. Rule 54(d) [§ 21-1-1(54) (d), N.M.S.A., 1953]. This discretion of the trial court is not to be tampered with absent an abuse. Hales v. Van Cleave, 78 N.M. 181, 429 P.2d 379 (Ct.App.1967); Farmers Gin Company v. Ward, 73 N.M. 405, 389 P.2d 9 (1964). See also Campbell v. Campbell, 62 N.M. 330, 310 P.2d 266 (1957) in which this court upheld trial court's discretion in directing parties to bear their own costs in a divorce action. Nothing before us would justify our saying that the trial court abused its discretion.

We finally consider the court's denial of the request for judgment by default on the tort counts. Wife asserts that well-pleaded allegations are admitted, and that she was entitled to judgment as a matter of law. Husband says that abandonment of the tort counts was part of the settlement. The court's decree and the findings therein do not deal with the tort counts.

The following observations and queries occur to us:

A. Husband had "appeared" but there was no compliance by wife with the notice requirements of Rule 55(b) [§ 21-1-1(55) (b), N.M.S.A., 1953].

B. The damages sought were unliquidated, but no evidence was offered concerning damages. Rules 8(d), 55(b) and 55(e) [§§ 21-1-1(8) (d), 21-1-1(55) (b) and 21-1-1(55) (e), N.M.S.A., 1953]; 6 Moore's Federal Practice, Par. 55.07.

C. Does not a trial court have a certain discretion as to whether default judgment should be entered, both generally (6 Moore's Federal Practice, Par. 55.05(2)) and in New Mexico (Wagner v. Hunton, 76 N. M. 194, 413 P.2d 474 (1966))?

D. Can a wife sue a husband in tort? Rodgers v. Galindo, 68 N.M. 215, 360 P.2d 400 (1961); Romero v. Romero, 58 N.M. 201, 269 P.2d 748 (1954).

E. The court merely denied a motion for default on the tort counts. It did not dismiss them. Was the court's order appealable? Supreme Court Rule 5(1), (2) [§ 21-2-1(5) (1), (2), N.M.S.A., 1953]; McNutt v. Cardox Corp., 329 F.2d 107 (6th Cir. 1964).

In any case, we see nothing which persuades us that the court erred in declining to enter judgment by default.

Other propositions of law, both substantive and procedural, readily come to mind. From our failure to mention them, it should not be assumed we have overlooked them. Somewhere, the court must draw a line in performing counsel's function. Even now, no authority mentioned in this opinion was cited to us.

The trial court's actions are affirmed. It is so ordered.

McMANUS and OMAN, JJ., concur.

492 P.2d 996

Jesus ARCHULETA, Administrator of the Estate of Raymond B. Romero, Deceased, et al., Petitioners,

v.

Allan R. JOHNSTON and Ervin H. Werner, Respondents.

No. 9378.

Supreme Court of New Mexico.

Dec. 27, 1971.

Further ordered that the record in Court of Appeals Cause No. 683, 83 N.M. 380, 492 P.2d 997, be and the same is hereby returned to the Clerk of the Court of Appeals.

492 P.2d 997

Jesus ARCHULETA, Administrator of the Estate of Raymond B. Romero, Deceased, et al., Plaintiffs-Appellants,

v.

Allan R. JOHNSTON and Ervin H. Werner, Defendants-Appellees.

No. 683.

Court of Appeals of New Mexico.

Nov. 5, 1971.

Rehearing Denied Nov. 30, 1971.

Certiorari Denied Dec. 27, 1971.

Arturo G. Ortega, William E. Snead, Tapia & Prelo, Albuquerque, for appellant.

LeRoi Farlow, Daniel C. Lill, Albuquerque, for appellee Johnston.

Clarence R. Bass, K. Gill Shaffer, Shaffer, Butt & Bass, Albuquerque, for appellee Werner.

OPINION

COWAN, Judge.

The plaintiffs, as personal representatives of three deceased persons, brought their action against the defendants for wrongful death arising out of an automobile accident occurring on U.S. 64, a two-lane highway, 4.2 miles south of Espanola, New Mexico.

The jury returned a verdict for the defendants and plaintiffs appeal. Plaintiffs assert the trial court erred in denying their several motions for a directed verdict and their motion to set aside the verdict and enter judgment on the issue of liability; in instructing on independent intervening cause; in instructing on the care required of the decedents as passengers; and in excluding the testimony of an economist on the question of damages.

We affirm.

MOTIONS FOR DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

"In considering a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the party resisting the motion, indulging every reasonable inference in support of the party resisting, ignoring conflicts in evidence unfavorable to him, and if reasonable minds might differ as to the conclusion to be reached, under the evidence or permissible inferences, the question is for the jury." Garcia v. Barber's Super Markets, Inc., 81 N.M. 92, 463 P.2d 516 (Ct.App.1969); Brown v. Hall, 80 N.M. 556, 458 P.2d 808 (Ct.App.1969).

"A judgment notwithstanding the verdict is proper only when it can be said that there is neither evidence nor inference from which the jury could have arrived at its verdict. A judgment notwithstanding the verdict is improper if different inferences may reasonably be drawn from the evidence. . . . An inference is a logical deduction from facts proven." Flanary v. Transport Trucking Stop, 78 N.M. 797, 438 P.2d 637 (Ct.App.1968).

Defendant Johnston was travelling in a northerly direction followed by defendant Werner. Johnston thought Werner was following too closely and alternately slowed down and speeded up, signalling with his hand for defendant Werner to pass. Defendant Werner was uncertain as to whether he should attempt to pass and, shortly before the accident, the two cars were travelling slowly, about a car length or less apart, in the right-hand lane. Jerry E. Gonzales was operating his vehicle in the same direction as the defendants, with plaintiffs' three decedents as passengers. His car, including the brakes, was in good condition. He rounded a curve and had an unobstructed view of the Werner vehicle approximately 1400 feet ahead of him. The maximum stopping distance of a vehicle travelling at 60 miles per hour under road conditions at the time and place of the accident, including driver reaction time, was 246 feet. Gonzales was driving about 60 miles per hour and according to his testimony:

> "Well, when I was coming around this turn, I saw this car on the road, which appeared to me like it was moving very slow. I glanced down at the road a little further and noticed another car was coming, so I couldn't pass him. Then, I just stepped on my brake."

The right rear tire of his car left a skid mark of 97 feet, 4 inches, the other tires

somewhat less. The skid marks indicated that the vehicle skidded ahead with a slight curve to the left. The right side of the Gonzales vehicle collided with the left rear of the Werner vehicle and then spun off, crossing the left traffic lane and coming to rest on the left edge of the highway. The three passengers were killed.

Plaintiffs contend that the violations of statutes § 64–18–4 (driving so slow as to impede traffic); § 64–18–49 (stopping on a highway); § 64–18–17(a) (following too closely), N.M.S.A.1953 (Repl.Vol. 9, pt. 2), which were enacted for the benefit of the public, of which decedents were members, constitute negligence as a matter of law. Even if there were violations which would constitute negligence as a matter of law, which we do not decide, there would still be the questions of proximate cause and independent intervening cause. From the foregoing evidence, with its permissible inferences, reasonable minds could differ on these issues. They were proper questions for the jury.

Plaintiffs rely upon Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct.App.1970), and Paddock v. Schuelke, 81 N.M. 759, 473 P.2d 373 (Ct.App.1970), in support of their first claim of error. In reversing the action of the trial court in granting a summary judgment, *Kelly* discussed proximate cause and independent intervening cause, and reaffirmed the law in New Mexico that, if reasonable minds might differ on these issues, they are for the jury. *Paddock* is distinguishable not only on its facts but because it was concerned with proximate cause only and not with independent intervening cause.

In view of what has been said, the court properly overruled plaintiffs' motions for a directed verdict and motion for judgment notwithstanding the verdict.

INSTRUCTION ON INDEPENDENT INTERVENING CAUSE

"A party is entitled to an instruction on the theory of his case where there is evidence in support of that theory." Flanary v. Transport Trucking Stop, supra; Lucero v. Torres, 67 N.M. 10, 350 P. 2d 1028 (1960). One of defendants' theories on which the case was tried was that the action of Jerry Gonzales in failing to avoid a collision was an independent intervening cause. There was evidence to support this theory and the instruction given by the court was, therefore, in order. It is not the duty of this court to point out evidentiary matters but we would comment that Jerry Gonzales observed the Werner vehicle approximately 1400 feet ahead of him and yet failed to avoid colliding with it.

INSTRUCTION ON CARE REQUIRED OF PASSENGERS

Plaintiffs claim error in the court's giving its instruction 22A–1 because of the second sentence. The instruction read:

> "Any negligence which you find on the part of the driver of the vehicle in which plaintiffs' decedents were passengers cannot be charged to the plaintiffs. The care required of the plaintiffs' decedents in this case is that which a reasonably careful person riding as a passenger would use under similar circumstances."

The record does not disclose whether this instruction was requested by the plaintiffs, by the defendants, or voluntarily given by the court. The defendants had pled various affirmative defenses, including contributory negligence and assumption of the risk on the part of plaintiffs' decedents. These defenses were unsupported by evidence at the trial and were, therefore, not submitted to the jury. It thus became necessary, there being evidence of negligence on the part of driver Gonzales, to instruct on imputed negligence. The court did so by giving New Mexico Uniform Jury Instruction 9.15. This was not an instruction on contributory negligence of passengers nor does it inject such an issue in the case. It is simply an integral part of the imputed negligence instruction and inseparable therefrom. See Committee Comment, U.J.I. 9.15, p. 117.

In any event, there was no evidence of negligence on the part of plaintiffs' decedents which could have been considered by the jury. The plaintiffs were therefore not prejudiced. Supreme Court Rule 17(10), applicable to this case, 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. . . ."

EXCLUSION OF ECONOMIST'S TESTIMONY

Plaintiffs claim error in the trial court's refusal to permit an economist to give expert testimony concerning the economic loss occasioned by the deaths. In view of our affirmance and the jury's finding for the defendants on the question of liability, we do not consider this point.

The judgment of the trial court and its order denying plaintiffs' motion to set aside the verdict and enter judgment for plaintiffs, and in the alternative for a new trial, is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

492 P.2d 1000

CARTER FARMS COMPANY, a partnership composed of Albert E. Carter, et al., Plaintiffs-Appellants,

v.

HOFFMAN-LAROCHE, INC., Defendant-Appellee.

No. 718.

Court of Appeals of New Mexico.

Dec. 17, 1971.

Milford D. Estill, Walker & Estill, Carlsbad, for plaintiffs-appellants.

Lowell Stout, Hobbs, for defendant-appellee.

OPINION

WOOD, Chief Judge.

In this products liability case, we are not concerned with plaintiffs' theories of liability. The issue is whether there was sufficient evidence that the product was defective and that the product was the proximate cause of plaintiffs' damages. The trial court ruled the evidence was insufficient for submission of the case to the jury and directed a verdict for defendant at the close of plaintiffs' case. Plaintiffs appeal.

The product is "Injacom ADE," a solution for the prevention and correction of certain vitamin deficiencies in cattle, sheep and swine. It is sold to licensed veterinarians. A letter to veterinarian Dr. John Abbott states: "The use of Injacom is characterized by an absence of side effects. Abscesses, necrosis, or pooling under the hide are not to be expected with Injacom ADE."

In the fall of 1966, plaintiff, Albert Carter, purchased over 5000 lambs under one year of age. These "feeders" were to be fattened and sold.

As Carter received the lambs, they were each sheared and given two injections. One was a subcutaneous injection in the neck and was a vaccine to control overeating. The other injection was in the "meaty area of the hip" and was Injacom ADE purchased from the veterinarian. The same method was used in making both injections. No adverse consequence from the neck injection is shown or claimed.

The plaintiff testified that: ". . . The next day, it was quite evident that something was wrong. We had, oh, I can't recall the exact number now, something in the area of four or five hundred sheep [the lambs purchased] that were injected the previous day and we had an abnormal number of stiff legs and soreness in those sheep." Nevertheless, the injections continued; all the lambs were injected with Injacom ADE within two days to one week after they were purchased and unloaded.

The stiff legs and soreness observed on the day following injection of the first five hundred was thought to result from the ". . . size needle that they recommended, . . ." A smaller needle was thereafter used and ". . . we had felt that our problem was solved, . . ." because except for the "first ones" no "affects" were noticed subsequent to the Injacom ADE injection.

However, 192 head died within three weeks after being injected with Injacom. The majority of the deaths ". . . were the first ones that were vaccinated;" that is, out of the first five hundred. As to the death losses, ". . . abscess-

es had formed in the legs at the point of injection and the leg literally rotted off the animal." In addition, 40% of the first 1000 lambs marketed were discovered to have abscesses at the point of injection. Other lambs marketed also had abscesses, but the number of lambs affected was a lesser percentage amount.

Over 100 bottles of the Injacom ADE were used. This vaccine had two different serial numbers, meaning "there were two batches of the material." One of the batches caused no apparent trouble. There is no evidence identifying the serial number of the vaccine used on the first lot of lambs which received the vaccine.

The pathologist who tested residue of the vaccine found in some of the bottles was of the opinion that the residue was sterile, but did not relate this residue to the different serial numbers of the vaccine. There is no evidence correlating the vaccine tested to the lambs that received that vaccine. The pathologist examined tissue from animals used for testing purposes and stated that the tissue samples contained abscesses caused by a bacteria. His opinion was that the abscesses were due to a growth of bacteria within the tissue. His opinion as to the cause or source of the bacteria is admittedly speculative.

Carter was an experienced sheep man, having been in the business fifteen years. He had purchased sheep from the same sellers from whom he purchased the lambs in the fall of 1966 and "had no trouble with them." At the time of the fall 1966 purchases he checked the sheep and there was no ". . . visual evidence of any bad health on the part of the sheep."

The veterinarian testified that it was a reasonable medical probability that an abscess would develop and a leg rot off within two weeks after the leg had been injected; that it was not possible for malignant edema or blackleg to be involved; that it was "[n]ot a very good possibility at all" that the feeders (the lambs that were purchased) may have been diseased; that the existence of organisms (bacteria) on the skin of the sheep before they were purchased would be a "[v]ery faint" explanation; that it isn't very probable that the sheep that died were weaker than the ones that did not die. Asked if he had any proof that the product was defective, the veterinarian answered, "I have no proof except visual aid."

None of the foregoing is direct evidence that the Injacom was defective or that it caused plaintiffs' damages. However, it is not necessary that proof as to these items be shown by direct evidence; proof may be by circumstantial evidence alone. Clower v. Grossman, 55 N.M. 546, 237 P.2d 353 (1951). ". . . Circumstantial evidence consists of proof of facts or circumstances which give rise to a reasonable inference of the truth of the fact sought to be proved." N.M. U.J.I. 17.6.

The requirement upon plaintiffs under the circumstantial evidence rule in this civil case ". . . is that the facts and circumstances . . . together with the inferences that may be legitimately drawn therefrom, shall indicate with reasonable certainty . . ." that the product was defective and the defective product caused plaintiffs' damages. Brown v. Globe Laboratories, 165 Neb. 138, 84 N.W.2d 151 (1957). ". . . It is a matter of probabilities in the light of all the evidence. . . ." O. M. Franklin Serum Company v. C. A. Hoover & Son, 410 S.W.2d 272 (Tex.Civ.App. 1967). See Clower v. Grossman, supra.

Plaintiffs' evidence is that lambs in good health prior to the injection developed abscesses at the point of injection; that the time of the deaths after the injection was medically probable; that the deaths were not due to weakness in the animals; that disease or the existence of bacteria on the skin of the animals were not probabilities. There is evidence that the method of injection did not cause the abscesses.

Two separate inferences that the jury could draw with reasonable certainty from the circumstantial evidence are: that the Injacom ADE contained the bacteria which caused the abscesses and that the Injacom ADE caused plaintiffs' damages. The following decisions support this result: Haberer v. Moorman Mfg. Co., 341 Ill. App. 521, 94 N.E.2d 611 (1950); Brown v. Globe Laboratories, supra; C. A. Hoover and Son v. O. M. Franklin Serum Company, 444 S.W.2d 596 (Tex.1969); O. M. Franklin Serum Company v. C. A. Hoover & Son, supra. Compare Teal v. Potash Company of America, 60 N.M. 409, 292 P. 2d 99 (1956); Reid v. Brown, 56 N.M. 65, 240 P.2d 213 (1952); Clower v. Grossman, supra.

The foregoing answers defendant's claim that no inference could be drawn that its product was defective and that the defective product caused the damages. See Adamson v. Highland Corporation, 80 N.M. 4, 450 P.2d 442 (Ct.App.1969).

[redacted] Defendant also contends that the evidence outlined above does not take into account all the evidence that was introduced. Defendant emphasizes evidence indicating no product defect and no proximate cause. It apparently would have us weigh the evidence. This argument overlooks the fact that the trial court directed a verdict. That more than one inference was available from all the evidence did not entitle defendant to a directed verdict. Under the evidence, the jury could have found that it was more probable than not that the product was defective and the defective product caused plaintiffs' damages. Benjamin v. Hot Shoppes, Inc., 185 A.2d 512 (D.C.Mun.App.1962). Further, where there is a directed verdict, the evidence and inferences most favorable to the party resisting the motion are to be considered and conflicting evidence unfavorable to the resisting party is to be ignored. Archuleta v. Johnston (Ct.App), 83 N.M. 380, 492 P.2d 997, decided November 5, 1971; Brown v. Hall, 80 N.M. 556, 458 P.2d 808 (Ct.App.1969).

[redacted] Defendant also asserts that the evidence is equally consistent with two hypotheses, therefore, it did not tend to prove a defect or causation. See Stambaugh v. Hayes, 44 N.M. 443, 103 P.2d 640 (1940). The answer is that the circumstantial evidence tended to prove a defect and causation to a reasonable certainty; therefore, we cannot say as a matter of law that the evidence was equally consistent with two hypotheses.

The directed verdict was erroneous and is reversed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

[redacted]

492 P.2d 1003

William A. McCONNELL, Appellant,

v.

STATE of New Mexico ex rel. BUREAU OF REVENUE, Appellee.

No. 714.

Court of Appeals of New Mexico.

Dec. 22, 1971.

[redacted]

[redacted]

[redacted]

[redacted]

Larry D. Beall, James R. Toulouse, Toulouse & Moore, P. A., Alburquerque, for appellant.

David L. Norvell, Atty. Gen., Curtis W. Schwartz, Asst. Atty. Gen., John E. Owens, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

This is an appeal by McConnell from a decision and order of the Commissioner of Revenue, which denied the protests made to the Bureau of Revenue assessments.

We affirm.

A formal hearing was held and McConnell appeared pro se. He claims the decision was, as a matter of law, arbitrary, capricious, and constituted an abuse of discretion and thereby resulted in violation of his constitutional rights.

These claims are based on the contention that McConnell was not fully aware of his rights as to the conduct, requirements and conclusiveness of the formal hearing. On the basis of not being "fully aware," McConnell asserts he did not receive "the fair and full hearing to which he is entitled."

The record shows that the hearing officer carefully advised McConnell as to the statutory procedures and his rights in connection with the hearing. The record also shows that McConnell did not come prepared for the hearing. Having been unprepared, McConnell now claims the Bureau should have given him opportunity to present his evidence at a later time, and, although it was his burden to proceed, that he was denied the right to cross-examine a witness who was never called. These claims are necessarily based on McConnell's lack of preparation and do not provide a basis for overturning the Commissioner's decision. The record clearly shows McConnell was given a full and fair hearing.

McConnell had a right to appear by himself or by an attorney or an accountant, § 72-13-38(E), N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1971), but if he chose to appear alone, he appeared at his own peril. New York State Commission for Human Rights v. E. Landau Industries, Inc., 57 Misc.2d 918, 293 N.Y.S.2d 917 (1968). He is not entitled to any special privileges, and the administrative hearing officer is not required to assume the duties of counsel for the protestant. Griswold v. Department of Alcoholic Beverage Control, 141 Cal.App.2d 807, 297 P.2d 762 (1956).

McConnell also contends the decision of the Commissioner is not supported by substantial evidence. This is answered by the statute. "Any assessment of taxes made by the bureau is presumed to be correct." Section 72-13-32(C), N.M.S.A. 1953 (Repl.Vol. 10, pt. 2, Supp.1971). One way in which the presumption may be overcome is ". . . by showing that the Bureau of Revenue failed to follow the statutory provisions contained in the Tax Administration Act." Regents of New Mexico College of Agriculture and Mechanic Arts v. Academy of Aviation, Inc., 83 N.M. 86, 488 P.2d 343 (1971). We conclude that this presumption was not overcome because the record shows the statutory provisions were followed and because McConnell presented no evidence tending

to dispute the factual correctness of the assessments.

Affirmed.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

HENDLEY, J., not participating.

492 P.2d 1005

STATE of New Mexico, Plaintiff-Appellee,

v.

Ernesto VASQUEZ, Defendant-Appellant.

No. 738.

Court of Appeals of New Mexico.

Dec. 22, 1971.

H. Gregg Privette, Las Cruces, for appellant.

David L. Norvell, Atty. Gen., Winston Roberts-Hohl, Asst. Atty., Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

Defendant was charged with and convicted of the crime of aggravated battery contrary to § 40A-3-5, (C) N.M.S.A.1953 (Supp.1969). He asserts two points for reversal.

We affirm.

Just prior to the shooting by defendant of Manuel Chavez, Chavez and his wife were standing on the sidewalk outside of the Casa Manana Bar. Chavez had been drinking for about three and a half hours and wanted to continue drinking. His wife was trying to get him to go home. Defendant was walking by, holding a three-year-old girl in his arms, and as he looked at Chavez, Chavez told him to keep moving. Defendant stated that Chavez used vulgar language directed at defendant. Those vulgar words as translated by defendant were ". . . follow the road, don't go." Chavez then approached defendant with a knife and came within a distance of about eight or nine feet and defendant pulled his pistol and shot Chavez twice. There was evidence that defendant could have retreated into the bar.

It is under the foregoing set of facts that defendant challenges the refusal to give certain requested instructions and the introduction into evidence of the gun.

INSTRUCTIONS

A party is entitled to have an instruction on his theory of the case submitted to the jury if there is evidence reasonably tending to sustain such a theory. State v. Durham, Ct.App., 83 N.M. 350, 491 P.2d 1161, 1971.

A. The defendant submitted an instruction as to the basis upon which the jury could find that the shooting was justified or excusable. However, the trial court modified the instruction by deleting the last sentence of the instruction which read:

> "The shooting of Manuel Chavez by Ernesto Vasquez is excusable if you find that such shooting was committed by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation [sic]."

Defendant contends the instruction is based upon § 40A-2-8, N.M.S.A.1953 (Repl.Vol.1964) (justifiable homicide). The language, however, appears to be taken from § 40A-2-6, N.M.S.A.1953 (Repl. Vol.1964). Even if the above statutes providing for defenses in a homicide case may be read into a non-homicide case, a point we do not decide, we fail to find any evidence which would justify an instruction relating to an ". . . accident or misfortune in the heat of passion, upon any sudden and sufficient provocation [sic]." Had the complete requested instruction been given it would have injected a false issue into the case. State v. Mora, 81 N. M. 631, 471 P.2d 201 (Ct.App.1970).

B. Defendant next contends that the court erred in refusing to give his complete requested instruction as to what

constitutes an assault. The trial court eliminated the last phrase from the requested instruction, which read:

> ". . . or the use of insulting language towards another impuning [sic] his honor, delicacy or reputation."

The Spanish language used does not appear in the record but the translation made by the defendant was ". . . that means follow the road, don't go." We disagree with defendant's contention that the language used comes within § 40A-3-1, N.M.S.A.1953 (Repl.Vol.1964). Defendant's theory of the case must be supported by some evidence. State v. Mora, supra.

As a matter of law the language as translated by defendant does not tend toward impugning the honor, delicacy or reputation of another.

C. The defendant next contends that the trial court erred in refusing his requested instruction which stated:

> "If you find that Manuel Chavez committed an assault upon defendant, and thereby provoked defendant than [sic] you shall find the defendant not guilty as charged."

Defendant's contention here is that there was evidence to support his theory of the case and accordingly it was the duty of the trial court to direct the jury's attention to facts which the defendant contended constituted a defense. We disagree. The requested instruction, in effect, would have told the jury that an assault which provoked defendant would justify or excuse the shooting. No limitation on the provocation is included within the instruction. Since an instruction, which was given, told the jury what would justify or excuse the shooting, this requested instruction, which contained no limitation on the provocation, would have confused the issue of justification or excuse and, therefore, was properly refused. State v. Selgado, 76 N.M. 187, 413 P.2d 469 (1966); State v. Beal, 55 N.M. 382, 234 P.2d 331 (1951); compare State v. Buhr, 82 N.M. 371, 482 P.2d 74 (Ct.App.1971).

D. The trial court instructed the jury that the material allegations must be proven beyond a reasonable doubt and that one of the material allegations of the charge was an "intent to injure." See § 40A-3-5(A), supra. In addition, the jury was instructed that it could consider defendant's "acts, conduct and doings" in resolving the issue of intent. Defendant does not complain of these instructions. He claims that a requested instruction, which was refused, went to an element of intent not covered by the instructions given. The part of the requested instruction on which defendant relies states: "When a specific intent is required to make an act an offense, such as in the charge preferred against the defendant herein, the doing of the act, in and of itself, does not raise any presumption that it was done with such a specific intent."

Refusal of the requested instruction was not error. Since the jury had been instructed that it could consider defendant's acts in resolving the question of intent, to have informed the jury that no presumption of intent results from the doing of an act would have confused the jury unless an explanation was given as to what was meant by "presumption." State v. Selgado. supra. Further, the issue of "intent to injure," as required by the statute, was adequately covered by the instruction given. State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct.App.1970); see State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct.App.1969).

E. The trial court did not instruct the jury on the effect of drunkenness upon the issue of intent. Defendant claims error because the trial court refused his requested instruction on that issue. Assuming there was sufficient evidence for this issue to be considered by the jury, nevertheless, refusal of the requested instruction was not error because its wording was not a correct statement of the law. Section 40A-3-5(C), supra, requires an "Intent to injure." See State v. Turner, 81 N.M. 450, 468 P.2d 421 (Ct.App.1970). The requested instruction referred to "a specific intent

to commit an aggravated battery." Thus, on this issue, the requested instruction referred to a specific intent to have the intent to injure. This would have been misleading to the jury. State v. Beal, supra. The requested instruction was properly refused. State v. Gonzales, 82 N.M. 388, 482 P.2d 252 (Ct.App.1971).

ADMISSION OF THE GUN INTO EVIDENCE

Defendant was arrested some two hours after the shooting and at that time he had a gun in his possession. The arresting officer testified that the pistol he found in defendant's possession had been fired one time. All the testimony furnished by the state established that at the scene of the shooting defendant had fired the gun twice. It is defendant's contention that the gun which was produced as an exhibit and introduced into evidence was not the gun which was used in the shooting.

An examination of the record reveals however that after the close of the state's case the defendant took the stand, admitted possession of the gun and admitted shooting Manuel Chavez twice with the gun introduced into evidence.

[redacted] Although there might have been a deficiency in the foundation laid for the introduction of the gun at the time of its admission into evidence any error which may have been committed was cured when defendant took the stand and testified that the gun introduced was the gun he used. State v. Kidd, 24 N.M. 572, 175 P. 772 (1918). Defendant further contends that because of the state's failure to identify the gun introduced into evidence as the same gun used in the shooting the introduction of the gun into evidence was inflammatory and unduly prejudicial to defendant's right to a fair trial. We fail to see how such introduction was inflammatory and prejudicial since defendant admitted possession of the gun and in using it to twice shoot Mr. Chavez. State v. Coyle, 39 N.M. 151, 42 P. 770 (1935).

The judgment is affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

COWAN, J., not participating.

[redacted]

492 P.2d 1008

STATE of New Mexico, Plaintiff-Appellee,

v.

Alfredo VALENZUELA, Defendant-Appellant.

No. 791.

Court of Appeals of New Mexico.

Dec. 22, 1971.

[redacted]

Walter R. Parr, Las Cruces, New Mexico, for defendant-appellant.

David L. Norvell, Atty. Gen., Ronald Van Amberg, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant was convicted and sentenced for burglary. Section 40A-16-3, N.M.S.A. 1953 (Repl.Vol. 6). Defendant claims he did not voluntarily and understandingly waive his constitutional right to remain silent; consequently his admissions were inadmissible at trial.

There is evidence that on arrest, the police officer read to defendant the "Miranda warnings" and the defendant stated that he understood them. His constitutional right to remain silent was not violated. His admissions could properly be found to be voluntary and were admissible at trial. State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969).

Affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

COWAN, J., not participating.

492 P.2d 1009

STATE of New Mexico, Appellee,

v.

Jackie D. JAMESON, Appellant.

No. 796.

Court of Appeals of New Mexico.

Dec. 22, 1972.

Mel B. O'Reilly, Jay W. Forbes, McCormick, Paine & Forbes, Carlsbad, for appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

Jameson pleaded guilty to three counts of burglary. Section 40A-16-3, N.M.S.A. 1953 (Repl.Vol. 6). The record shows he made this plea willingly with advice of counsel. Sentence was passed, and Jameson appeals.

We affirm.

The trial court sentenced Jameson as follows:

> Not less than one year nor more than five years on Count 1, not less than one year nor more than five years on Count 2, to run *consecutively* to term imposed on Count 1 and not less than one year

nor more than five years on Count 3, to run concurrently with term imposed on Count 2. [Emphasis added.]

Jameson claims his constitutional rights were denied because the trial court demonstrated bias and prejudice. Prior to his election to enter a guilty plea, Jameson read and signed an affidavit explained to him by his attorney which fully advised him of his rights. Prior to sentence, neither he nor his attorney had anything to say.

In passing, the trial judge stated that Jameson got another boy in this mess. This does not constitute bias or prejudice. A trial court may take into consideration the criminal record of one upon whom sentence is to be imposed. State v. Helm, 79 N.M. 305, 442 P.2d 795 (1968). The trial judge sentenced Jameson in accordance with the criminal code. Therefore, there could be no abuse of discretion in sentencig Jameson. State v. Henry, 78 N.M. 573, 434 P.2d 692 (1967).

Affirmed.

HENDLEY and COWAN, JJ., concur.

WOOD, C. J., not participating.

492 P.2d 1010

Luis P. ANDRADA, Petitioner-Appellant,

v.

STATE of New Mexico, Respondent-Appellee.

No. 768.

Court of Appeals of New Mexico.
Dec. 22, 1971.

Oliver H. Miles, Las Cruces, for petitioner-appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

HENDLEY, Judge.

Petitioner's conviction of aggravated burglary was affirmed in State v. Andrada, 82 N.M. 543, 484 P.2d 763 (Ct.App.1971). He now appeals from a denial of post-conviction relief, without hearing, pursuant to § 21-1-1 (93), N.M.S.A. 1953 (Supp.1971).

We affirm.

Petitioner contends that he should not have been charged with and convicted of aggravated burglary; that the state failed to prove criminal intent; and, that he was intoxicated at the time the offense was committed and could not have had the requisite specific intent to commit aggravated burglary. None of these claims were raised by petitioner in his direct appeal. Post-conviction relief is not a method of obtaining consideration of those questions which should have been raised on appeal. Miller v. State, 82 N.M. 68, 475 P.2d 462 (Ct.App.1970). These contentions attack the sufficiency of the evidence to support the conviction. Sufficiency of the evidence does not provide a basis for post-conviction relief. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct.App.1971); Herring v. State, 81 N.M. 21, 462 P.2d 468 (Ct.App. 1969).

Petitioner's assertion that the aggravation of the offense was prompted by discrimination against him because of his Mexican heritage does not present a claim since it is not set forth with adequate specificity or factual basis to afford relief. State v. Clark, Ct.App., 493 P.2d 969, 1971.

Petitioner contends that the facts presented to establish aggravation of the offense were false. Petitioner has done no more than state a vague conclusion. Petitioner must allege a specific factual basis for the relief sought. State v. Guy, 79 N. M. 128, 440 P.2d 803 (Ct.App. 1968). To the extent this is a claim that defendant was convicted on prejudiced testimony, it states no basis for relief. State v. Hibbs, supra, and cases therein cited.

Since the record conclusively shows that petitioner was not entitled to an evidentiary hearing on his Rule 93 motion, the order denying post-conviction relief without hearing is affirmed. State v. Sanders, 82 N.M. 61, 475 P.2d 327 (1970).

Affirmed.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

492 P.2d 1258

ENCINO GARDENS CARE CENTER, INC., a Corporation, Petitioner,

v.

Ella Lee CROCKETT, Respondent.

No. 9391.

Supreme Court of New Mexico.

Jan. 18, 1972.

Further ordered that the record in Court of Appeals Cause No. 699, 83 N.M. 410, 492 P.2d 1273, be and the same is hereby returned to the Clerk of the Court of Appeals.

492 P.2d 1258

INTERNATIONAL MINERALS & CHEMICAL CORPORATION (IMC), Petitioner,

v.

PROPERTY APPRAISAL DEPARTMENT, State of New Mexico, Respondent.

No. 9397.

Supreme Court of New Mexico.

Jan. 18, 1972.

Further ordered that the record in Court of Appeals Cause No. 670, 83 N.M. 402, 492 P.2d 1265, be and the same is hereby returned to the Clerk of the Court of Appeals.

492 P.2d 1258

Juan M. GOMEZ, Respondent,

v.

HAUSMAN CORPORATION, Employer, and Aetna Life & Casualty, Insurer, Petitioners.

No. 9387.

Supreme Court of New Mexico.

Jan. 18, 1972.

Further ordered that the record in Court of Appeals Cause No. 719, 83 N.M. 400, 492 P.2d 1263, be and the same is hereby returned to the Clerk of the Court of Appeals.

492 P.2d 1258

STATE of New Mexico, Respondent,

v.

Sylvester ATWOOD, Petitioner.

No. 9383.

Supreme Court of New Mexico.

Jan. 18, 1972.

Further ordered that the record in Court of Appeals Cause No. 685, 83 N.M. 416, 492 P.2d 1279 be and the same is hereby returned to the Clerk of the Court of Appeals.

492 P.2d 1259

BUDDY TAYLOR AND ARTHUR TAYLOR, a common law partnership, and George Bradford, Petitioners,

v.

Marie Neer CAMPBELL, Executrix of the Last Will and Testament of John W. Campbell, Deceased, Respondent.

No. 9396.

Supreme Court of New Mexico.

Jan. 18, 1972.

Further ordered that the record in Court of Appeals Cause No. 700, 83 N.M. 438, 492 P.2d 1301, be and the same is hereby returned to the Clerk of the Court of Appeals.

492 P.2d 1259

Irene VALDEZ, Deceased, by her surviving spouse, Daniel Valdez, Petitioner,

v.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES of the State of New Mexico, Respondent.

No. 9388.

Supreme Court of New Mexico.

Jan. 18, 1972.

Further ordered that the record in Court of Appeals Cause No. 720, 83 N.M. 434, 492 P.2d 1297, be and the same is hereby returned to the Clerk of the Court of Appeals.

492 P.2d 1259

Sabino RODRIGUEZ et al., Petitioners,

v.

Frank N. DAVILA, Respondent.

No. 9398.

Supreme Court of New Mexico.

Jan. 21, 1972.

Further ordered that the record in Court of Appeals Cause No. 725, 83 N.M. 437, 492 P.2d 1300 be and the same is hereby returned to the Clerk of the Court of Appeals.

492 P.2d 1260

AETNA CASUALTY & SURETY CO. and Charles Leslie Harris, Plaintiffs-Appellees,

v.

Clyde M. WOOLLEY, Defendant-Appellant.

No. 744.

Court of Appeals of New Mexico.

Jan. 7, 1972.

James C. Compton, Portales, for appellant.

Fred T. Hensley, Portales, for appellees.

OPINION

HENDLEY, Judge.

Defendant appeals an adverse judgment arising out of an automobile collision. He contends the trial court's findings of fact are not supported by substantial evidence and that the trial court should have adopted defendant's requested conclusions of law.

We affirm.

On appeal we view 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). It is the function of the fact finder to weigh the evidence and decide on the credibility of the witnesses. Svejcara v. Whitman, 82 N.M. 739, 487 P.2d 167 (Ct.App.1971). Although there is conflicting testimony there is substantial evidence in the record to support the trial court's findings.

Defendant's requested conclusions of law are predicated on his contentions that the trial court's findings of fact are not supported by the record. Conclusions of law which are supported by findings of fact, which in turn are supported by substantial evidence, will not be disturbed on appeal. Yates v. Ferguson, 81 N.M. 613, 471 P.2d 183 (1970).

Affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

492 P.2d 1260

STATE of New Mexico, Plaintiff-Appellee,

v.

Jerry E. GREGG, Defendant-Appellant.

No. 728.

Court of Appeals of New Mexico.

Jan. 7, 1972.

Rehearing Denied Jan. 31, 1972.

David H. Pearlman, Aldridge & Pearlman, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Prentis Reid Griffith, Jr., Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

Convicted of embezzlement, defendant appeals. Section 40A-16-7, N.M.S.A.1953 (Repl.Vol. 6). The various issues raised by defendant group into two points. They are: (1) sufficiency of the evidence and (2) the statute applicable under the facts.

Sufficiency of the evidence.

There is evidence that: defendant sold a motorcycle to the complaining witness; subsequently, the motorcycle was loaned to defendant; although requested to do so, defendant did not return the motorcycle; defendant sold the motorcycle to a third person. This evidence establishes an embezzlement as defined in § 40A-16-7, supra, and is substantial. See State v. Moss, 83 N.M. 42, 487 P.2d 1347 (Ct.App. 1971). This disposes of defendant's contentions that the State failed to prove that defendant did not have an ownership interest in the motorcycle; that the State proved no more than non-payment of a debt; that the State proved larceny but not embezzlement; that the conviction is contrary to the weight of the evidence; and that the failure to direct a verdict of acquittal was fundamental error.

Defendant's basic claim is that the evidence shows a secured transaction; that the complaining witness loaned money and defendant secured the loan with the motorcycle. The evidence is conflicting as to whether the transaction was a sale or a loan. It was for the jury to resolve the conflict. On appeal, we view the evidence and the inferences therefrom in a light most favorable to support the verdict. State v. Sedillo, 82 N.M. 287, 480 P.2d 401 (Ct.App.1971).

Defendant contends his conviction rests on circumstantial evidence and that the evidence does not meet the requirements of the circumstantial evidence rule. This contention is incorrect. There is direct evidence of the sale, the loan of the motorcycle, the request for its return and the sale to a third party. The only aspect of the proof involving the circumstantial evidence rule is the question of defendant's intent. The evidence of fraudulent intent is defendant's non-compliance with the request to return the motorcycle and defendant's sale of the motorcycle to a third person. See State v. Moss, supra. While this evidence is circumstantial, once the jury determined that defendant had sold the motorcycle to the complaining witness, the circumstantial evidence of intent was inconsistent with any reasonable theory of innocence. State v. Beachum, 82 N.M. 204, 477 P.2d 1019 (Ct.App.1970).

Defendant's claims concerning the sufficiency of the evidence are without merit.

The applicable statute.

Defendant asserts his conviction is void because the district court did not have jurisdiction. He asserts his conviction for embezzlement under § 40A–16–7, supra, was under a general statute; that three other statutes specifically applied to the facts of this case. See State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936); State v. McNeece, 82 N.M. 345, 481 P.2d 707 (Ct.App.1971); State v. Riley, 82 N.M. 235, 478 P.2d 563 (Ct.App.1970).

The three statutes, and the reasons they are not applicable, follow.

1. Sale of encumbered property is prohibited by § 40A–16–18, N.M.S.A.1953 (Repl.Vol. 6). This statute would have been applicable if the jury had determined that the dealings between the defendant and the complaining witness amounted to a secured transaction. The jury necessarily determined the dealings did not amount to a secured transaction. Section 40A–16–18, supra, was not applicable under the facts.

2. Fraud is prohibited by § 40A–16–6, N.M.S.A.1953 (Repl.Vol. 6). There must be a ". . . misappropriation or taking . . . by means of fraudulent conduct, practices or representations." There is no evidence of any fraudulent intent on the part of defendant when the motorcycle was loaned to him by the complaining witness. See § 40A–16–7, supra. Section 40A–16–6, supra, was not applicable under the facts.

3. Unlawful taking of a motor vehicle is prohibited by § 64–9–4, N.M.S.A. 1953 (Repl.Vol. 9, pt. 2). This section requires a taking without the consent of the owner of the vehicle. Section 64–9–4, supra, is not applicable because there is substantial evidence that defendant's taking of the motorcycle was by a loan and, thus, with consent.

Section 40A–16–7, supra, was the applicable statute.

The essence of both points—the sufficiency of the evidence and the appropriate statute—is that the facts are as defendant claims them to be. Defendant's presentation of the evidence in the light most favorable to himself is an improper approach. As previously stated, the evidence, on appeal, is to be viewed in the light most favorable to the State. State v. Gonzales, 82 N.M. 388, 482 P.2d 252 (Ct.App.1971).

The judgment and sentence are affirmed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

SUTIN, J., not participating.

492 P.2d 1263

Juan M. GOMEZ, Plaintiff-Appellant,

v.

HAUSMAN CORPORATION, Employer; and Aetna Life & Casualty, Insurer, Defendants-Appellees.

No. 719.

Court of Appeals of New Mexico.

Dec. 10, 1971.

Certiorari Denied Jan. 18, 1972.

Arthur O. Beach, William W. Deaton, Jr., Smith, Ransom & Deaton, Albuquerque, for appellant.

Larry D. Beall, Irving E. Moore, Toulouse & Moore, Albuquerque, for appellees.

OPINION

COWAN, Judge.

Plaintiff appeals from a judgment dismissing his claim for compensation on the ground that it was not timely filed.

We reverse.

In workmen's compensation cases, as in others, we are bound to view the evidence, together with all reasonable inferences, in the light most favorable to support the findings. Duran v. New Jersey Zinc Company, 83 N.M. 38, 487 P.2d 1343 (1971). We now do so.

On April 13, 1966, the plaintiff then 30 years old and with a ninth grade education, went to work for the defendant employer as a helper. On July 23, 1966, he was promoted to machine operator. His job was to place steel reinforcing bars in his machine, where they would be bent to specification for use in buildings, road projects and the like. His job required that he lift up to, and sometimes in excess of, 100 pounds. On July 27, 1966, while lifting a bundle of steel he tripped over a piece of

wood and injured his low back. His employer sent him to a doctor who diagnosed a low back strain. He lost no time from work following the accident.

For the next three years the plaintiff continued working at the same job, although with continuous pain. He did all the work he had done before the accident and there was no change in his work duties. He complained of pain and made periodic trips to various doctors for back examination or treatment. He took pain pills from time to time and some therapeutic baths. He knew that there was something wrong with his back and had known it from the date of his injury in July of 1966, but did not know he had anything more than a strained back.

During the spring and summer of 1969 the pain worsened and he had some radiation of pain down into his legs. In August of 1969 the doctor told him that he had "something between his spinal discs at this time". He continued working but in December of 1969 his doctor told him that he would have to stop working so that he could be treated properly. On January 15, 1970, the plaintiff stopped working and was examined thereafter by several doctors. He was hospitalized in February, 1970, for myelography, then treated as an outpatient. His condition failed to improve and, on April 7, 1970, his low back was operated because of two ruptured discs. These ruptured discs were a result of the accident of July, 1966.

One of the trial court's findings was:

"10. Plaintiff knew at all times, or by the exercise of reasonable diligence should have known, that he suffered a compensable injury on July 27, 1966."

The trial court's conclusions were:

"1. Plaintiff did not suffer a 'latent injury'.

"2. Plaintiff was totally and permanently disabled for the period of January 15, 1970, until December 31, 1970.

"3. Plaintiff presently suffers a 25% partial permanently (sic) disability from January 1, 1971.

"4. Plaintiff did not timely file his claim within one (1) year pursuant to Sec. 59–10–13.6, as said statute existed on July 27, 1966, and he is barred from recovery of compensation.

"5. Defendants are entitled to judgment."

A pertinent portion of the Workmen's Compensation Act (§ 59–10–13.6, N.M.S.A. 1953 [Repl.Vol. 9, pt. 1, Supp.1971]), in effect July 1966, is:

". . . If an employer or his insurer fails or refuses to pay a workman any installment of compensation to which the workman is entitled . . ., it is the duty of the workman insisting on the payment of compensation, to file a claim therefor . . ., not later than one (1) year after the failure or refusal of the employer or insurer to pay compensation. . . ."

Under this statute plaintiff was required to file his claim within one year after the failure or refusal to pay compensation. Cordova v. Union Baking Company, 80 N.M. 241, 453 P.2d 761 (Ct.App.1969).

The period of limitation does not commence to run until it becomes reasonably apparent, or should become reasonably apparent, to the workman that he has an injury for which he is entitled to compensation. Noland v. Young Drilling Company, 79 N.M. 444, 444 P.2d 771 (Ct.App. 1968); Duran v. New Jersey Zinc Company, supra.

The employer cannot have failed or refused to pay compensation until such time as the injured workman ". . . is disabled 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." Section 59–10–12.19, N.M.S.A.1953 (Repl.Vol. 9, pt. 1, Supp.1971); Bowers v. Wayne Lovelady Dodge, Inc., 80 N.M. 475, 457 P.2d 994 (Ct.App.1969).

[redacted] To affirm the judgment of the trial court we would have to hold that non-disabling pain constitutes a compensable injury under the New Mexico Workmen's Compensation Act. This we decline to do. Blancett v. Homestake-Sapin Partners, 73 N.M. 47, 385 P.2d 568 (1963). See also Rayburn v. Boys Super Market, Inc., 74 N.M. 712, 397 P.2d 953 (1964). Compare, however, Gonzales v. Coe, 59 N. M. 1, 277 P.2d 548 (1954). There was no evidence here, as there was in some of the cases cited and relied on by appellees, that the plaintiff's pain prevented him, in any manner whatsoever, from performing all of the duties of his job until January 15, 1970, just as he had prior to the accident. There is no suggestion in the evidence that the plaintiff did not earn the wages paid him after the accident. It follows that there was no failure or refusal to pay compensation prior to January 15, 1970, and the trial court's finding that the plaintiff knew at all times, or by the exercise of reasonable diligence should have known, that he suffered a compensable injury on July 27, 1966, is not supported by substantial evidence and therefore is erroneous. The plaintiff having no disability, under the terms of the Act, prior to January 15, 1970, he could scarcely have "known" of a compensable injury. Conclusions No. 4 and 5, supra, based on the erroneous findings, are also erroneous and are set aside.

The judgment appealed from is reversed and the cause remanded with instructions to vacate the judgment entered March 17, 1971, and to enter a judgment granting the plaintiff weekly compensation benefits in accordance with the trial court's conclusions Nos. 2 and 3. The word "permanently" in each of these conclusions is surplusage.

The appellant is awarded the sum of $1,000 for his attorneys' services in this court and the trial court is instructed to award him fees for his attorneys' services at the trial below.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

492 P.2d 1265

INTERNATIONAL MINERALS & CHEMICAL CORPORATION (IMC), Appellant,

v.

PROPERTY APPRAISAL DEPARTMENT, State of New Mexico, Appellee.

No. 670.

Court of Appeals of New Mexico.
Dec. 3, 1971.
Rehearing Denied Dec. 27, 1971.
Certiorari Denied Jan. 18, 1972.

[redacted]

Clarence E. Hinkle, Hinkle, Bondurant, Cox & Eaton, Roswell, for appellant.

David L. Norvell, Atty. Gen., Anne K. Bingaman, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

This appeal concerns the valuation for ad valorem tax purposes of a portion of the potash products of IMC (International Minerals & Chemical Corporation). The dispute as to the valuation arose because of a formula used in arriving at the valuation. The specific issues are: (1) was the production involved subject to valuation for tax purposes under § 72-6-7.1, N.M.S.A. 1953 (Repl.Vol. 10, pt. 2, Supp.1971); (2) was the formula a method in general use under § 72-25-5, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1971); (3) was the formula a regulation under § 72-25-6, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1971); (4) was use of the formula prohibited be-

cause its use was a change in existing procedure; and (5) was the formula arbitrary?

The potash products involved are sylvanite, also known as muriate, and langbeinite, also known as sulphate of potash magnesium. The processing of these items includes a sorting by size or grades. One of the results of this sorting is material called "fines." The "fines" differ in two ways from the products that IMC sells on the market. They are a smaller particle size and they have a slightly lower potassium oxide content. IMC uses the "fines" as feed material in its postassium sulphate plant.

Section 72-6-7.1, supra, required the state tax commission to value potash mineral property. However, § 72-25-3, N.M.S.A. 1953 (Repl.Vol. 10, pt. 2, Supp.1971) transferred this duty to the property appraisal department. IMC protested the department's assessed value of the "fines." The property appeal board, after a hearing, denied the protest. IMC appeals the decision of the property appeal board. See §§ 72-25-10, 72-25-18 and 72-25-19, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1971).

Was the production involved subject to valuation for tax purposes?

Section 72-6-7.1(B), supra, provides that production from potash mineral property is to be valued ". . . at fifty per cent [50%] of market value of the output of the property for the prior year. . . ." The tax year involved is 1970. The output involved is the "fines" for 1969. The issue under this point concerns "market value" for tax purposes.

It is undisputed that the "fines" have no commercial market; further processing is required. That processing occurs in IMC's potassium sulphate plant. The valuation point involved here occurs prior to the processing; it occurs while the material exists as "fines." Since there is no commercial market at this point, IMC infers that the fines may not be taxable because the valuation for tax purposes under § 72-6-7.1, supra, is based on "market value."

We treat the portion of IMC which produces the "fines" as the seller and IMC's potassium sulphate plant as the buyer. As between this fictional seller and buyer there is an exchange value. The exchange value is the "market value" in this situation. Kaiser Steel Corporation v. Property Appraisal Department, (Ct.App.), 490 P.2d 968, decided September 3, 1971. The "fines" were to be valued for tax purposes under § 72-6-7.1, supra.

Was the formula a method in general use?

Section 72-25-5, supra, provides in part: "When not otherwise determined by law, and without regard to ownership, the taxable value of property shall be determined by methods in general use. . . ." The starting point for determining taxable value is market value. See §§ 72-6-7.1, supra, and 72-25-2, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1971). The property appraisal department determined the market value of the "fines" for tax purposes by using a formula. IMC claims the formula was not a method in general use.

The details of the formula are not involved in this point; the issue is whether the formula was a method of valuation in general use. Findings of the property appeal board, supported by substantial evidence, are: Both IMC and Duval Corporation, another potash company, protested their assessments for the 1969 tax year. An agreement as to the assessments was reached with both companies. In the agreed assessments, the property appraisal department valued the "fines" by using the formula now disputed. For the 1970 tax year, Duval Corporation valued its "fines" by voluntarily using the formula in question. Duval Corporation also used this valuation as a "representative market price" of the "fines" in calculating its depletion allowance on its 1969 federal income tax.

In addition to these findings, the Duval Corporation witness testified that its valuation pursuant to the formula was the "representative market price theory;" that use of this theory was acceptable prac-

tice; that there are other acceptable practices; that these different acceptable practices are those allowed under the Internal Revenue Code in connection with depletion allowances. We do not consider the "acceptable practices" under the federal Internal Revenue Code as a valuation method determined by New Mexico law to be used for our State tax. These acceptable practices under federal law are, however, evidence of a method in general use.

The foregoing evidence supports the conclusion of the property appeal board that the formula used in determining market value of the "fines" was a method in general use in determining taxable value.

Was the formula a regulation?

Section 72-25-6(A), supra, provides in part: "Unless a specific method for appraising property is provided by law, the department shall adopt regulations for appraising each kind of property in the state. . . ." Section 72-25-8, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1971) sets forth a procedure for adopting regulations. It is undisputed that the property appraisal department did not follow the procedure of § 72-25-8, supra, before utilizing the questioned formula.

The issue is whether the formula is to be classified as a regulation. IMC contends the formula amounts to a regulation because it is a device for appraising its property; that is, a method used in determining the taxable value of its property. See § 72-25-2, supra.

The property appraisal department makes two responses. First, it asserts that no regulation is required if a specific method for appraising property is provided by law. The department asserts § 72-6-7.1, supra, provides a specific method. We do not consider this response because it does not appear that this theory was presented to the property appeal board. It may not change its theory of the case on appeal. Board of Education v. State Board of Education, 79 N.M. 332, 443 P.2d 502 (Ct.App.1968). Second, it contends that "fines" do not amount to a "kind of property" within the meaning of § 72-25-6(A), supra.

We agree with IMC to this extent —the formula is a method used in appraising the "fines." It does not follow, however, that a "regulation," adopted pursuant to statutory procedure, was required before the formula could be used. Regulations are required for appraising "each kind of property." "Kind" is not defined in the statute. Accordingly, it is to be given its ordinary meaning. Albuquerque Nat. Bank v. Commissioner of Revenue, 82 N.M. 232, 478 P.2d 560 (Ct.App.1970).

One of the definitions of "kind" as a noun in Webster's New Third International Dictionary (1966) is "category" or "class." Black's Law Dictionary (1951) indicates "kind" means a "generic class" and defines "in kind" as "in the same kind, class, or genus." We hold "kind of property" in § 72-25-6(A), supra, means general categories or generic classes of property. Compare Alabama By-Products Corporation v. Patterson, 258 F.2d 892 (5th Cir. 1958), cert. denied, 358 U.S. 930, 79 S.Ct. 318, 3 L.Ed.2d 303 (1959); Fleming v. Commissioner of Internal Revenue, 241 F.2d 78 (5th Cir. 1957), rev'd, Commissioner of Internal Revenue v. P. G. Lake, Inc., 356 U.S. 260, 78 S.Ct. 691, 2 L.Ed.2d 743 (1958). The property appraisal department is not required, under § 72-25-6 (A), supra, to adopt regulations for specific or individual types of property within general categories or generic classes of property.

In this case we are not concerned with regulations for appraising the general category of potash mineral property. See § 72-6-7.1(B), supra. The issue involves a particular type of potash mineral property; specifically, "fines." We hold that the property appraisal department's use of the formula in determining the market value of the "fines" was not a regulation within the meaning of § 72-25-6(A), supra.

Was use of the formula prohibited because its use was a change in existing procedure?

Section 72-25-6(H), supra, states: "All existing orders, rulings, regulations which have been filed with the state records center, and existing procedures of the state tax commission shall be continued in full force and effect until revoked, superseded or amended by the department; Provided however, that no public hearing shall be required on the repeal of regulations in effect prior to the date of this act."

The issue under this point concerns "existing procedures of the state tax commission." The authority, powers and duties of the state tax commission were transferred to the property appraisal department effective February 26, 1970. See § 72-25-3, supra, and Laws 1970, ch. 31, § 23. IMC contends that the existing procedure of the state tax commission on that date was to value the "fines" at $17.65 per K_2O ton. IMC asserts this valuation must be used and not the valuation derived from the formula.

The evidence is to the effect that the $17.65 per K_2O ton valuation for the "fines" is an arbitrary figure. Even though arbitrary, nevertheless it was the valuation used by the state tax commission through the 1968 tax year. In addition, there is evidence that the state tax commission was using the $17.65 per K_2O ton valuation in connection with the 1969 tax year. We will assume that this valuation was an existing procedure of the state tax commission. At the time the property appraisal department succeeded the state tax commission (February 26, 1970), the valuation for the 1969 tax year was under protest. The compromise settlement for the 1969 taxes was reached later in 1970. This settlement did not use the $17.65 per K_2O ton valuation; rather, the "fines" were valued according to the formula. The dates involved show the formula was employed by the property appraisal department and not by the state tax commission.

Thus, under the assumption that the $17.65 per K_2O ton valuation was an existing procedure, this valuation was the existing procedure under the state tax commission. The change to the formula occurred under the property appraisal department.

IMC seems to assert that the valuation procedure in existence on February 26, 1970 must be applied. The inference is that no change may be made in an existing procedure. Section 72-25-6(H), supra, is to the contrary. Existing procedures were continued but only until revoked, superseded or amended.

IMC also seems to contend that the $17.65 per K_2O ton procedure had not been revoked, superseded or amended. The property appeal board found, however, that the valuing procedure by the property appraisal department for the "fines" in the 1969 tax year was through use of the formula. This formula having superseded the $17.65 per K_2O ton valuation procedure for the 1969 tax year, the $17.65 per K_2O ton valuation was not an existing procedure for the 1970 tax year.

Although the property appraisal department used the formula in valuing the "fines" in the compromise settlement for the 1969 tax year, IMC asserts it did not agree to the formula. It contends it only agreed to the overall settlement figure and argues that ". . . it would not be proper to hold that Appellant [IMC] had in fact agreed to the assessment of the feed material [the fines] on the basis of the formula used. . . ." This argument mistakes the finding of the property appeal board. It did not find that IMC agreed to use of the formula. It found that IMC agreed to an assessment in which the property appraisal department used the formula in valuing the "fines." The significance of this finding is that the $17.65 per K_2O ton valuation was not used in the 1969 tax settlement. It had been superseded.

We hold therefore that § 72-25-6(H), supra, did not require the property appraisal department to use the $17.65 per K_2O ton valuation for the 1970 tax year.

Was the formula arbitrary?

One of the statutory grounds for setting aside the decision of the property appeal board is that the decision is arbitrary. Section 72-25-19(H) (6), supra. IMC contends the decision is arbitrary because the formula was used in determining the market value of the "fines." IMC's position is based on the fact that the sylvanite and langbeinite are graded by particle size. There are "coarse" particles and "standard" particles, and the resultant "fines." There is a difference in the market price for "coarse" and "standard" and no commercial market for the "fines." IMC asserts the formula does not consider the difference in price based on particle size and for this reason is arbitrary.

The formula used ". . . the average value per ton of the potash products sold in the market as either coarse or standard sized sylvanite and langbeinite, adjusted downward to account for the slightly lesser potassium oxide content. . . ." The result was considered to be the market value of the "fines," and was so found by the property appeal board. The issue here is not the adjustment for the lesser potassium oxide content. The issue is "average value" used in the formula when that average is based on "coarse" and "standard" sizes of the ore.

If something is "arbitrary" it is "not . . . according to reason or judgment." Webster's Third New International Dictionary, supra, Black's Law Dictionary, supra. Duval Corporation voluntarily used the formula in valuing the "fines" for its 1970 taxes. There is evidence that the "fines" are ". . . more closely associated with the standard grade than with the other two grades." The two grades, or particle sizes, other than "standard" and "fines" are "coarse" and "granular." There is evidence that ". . . the figures you used for the products sold on the market, the figures of the K_2O content does indicate . . . that you adjusted it for grade differential by taking an average. . . ." We need go no further than this evidence that the average value of market sales indicates an adjustment for the differences in grades or sizes. With this evidence we cannot say, as a matter of law, that the formula was arbitrary.

The order of the property appeal board denying IMC's protest is affirmed.

It is so ordered.

HENDLEY, J., concurs.

SUTIN, Judge (dissenting).

I respectfully dissent.

It would not be helpful to the public, to industry, or to the legal profession to describe the methods used in the potash industry to produce "fines." The problems presented are: (1) Are the fines taxable? (2) If they are taxable, what is the proper method of determining the taxable value of these fines which have no commercial market value? These "fines" are processed and used by International Minerals & Chemical Corporation (IMC) as feed material to create a marketable product.

A conglomeration of statutes is involved. An Act Relating to State Tax Commission, § 72-6-1 to § 72-6-20, including § 72-6-7.1, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.), the Property Appraisal Department Act, § 72-25-1 to § 72-25-21, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.), the Severance Tax Act, § 72-18-1 to § 72-18-4, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.).

One principle of statutory construction must be remembered and emphasized. It is stated in Field Enterprises Education Corporation v. Commissioner of Revenue, 82 N.M. 24, 474 P.2d 510 (Ct.App.1970), as follows:

> 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.

(1) *Are the "Fines" Taxable?*

Sections 72-6-7.1 B and D read as follows:

> Potash mineral property shall be valued by the state tax commission as follows:
>
> * * * * * *
>
> B. The commission shall value the production from potash mineral property at fifty per cent [50%] of *market value of the output of the property for the prior year*. . . . The valuation of such production shall be in lieu of valuations of minerals in place or of any interest therein. [Emphasis added.]
>
> * * * * * *
>
> D. *The method of valuation herein prescribed is exclusive,* and no other valuation, assessment, or tax based thereon, shall be made, fixed or levied against potash mineral property for purposes of ad valorem taxation. Any other ad valorem tax on potash mineral property is void. [Emphasis added.]

Section 72-6-7.1, supra, is a "tax relief package." See 10 Natural Resources Journal 415, July 1970. We assume that "fines" are a portion of the "output" from production of potash mineral property.

The above statute says that "market value" is the exclusive method of valuation.

The majority opinion states that "The exchange value is the 'market value' in this situation." Kaiser Steel Corporation v. Property Appraisal Department, 490 P.2d 968 (Ct.App.), decided September 3, 1971. Kaiser said that exchange value:

> ". . . is determined by the demand for it in relation to the supply, and is proved, when possible, by actual sales. . . ." The steel mill's demand for the mine's supply shows an exchange value exists, but that demand does not determine what the value is. The fact that the steel mill took almost 96% of the mine run coal in 1968 and over 91% of the mine run coal in 1969, does not show that it took, or would have taken, the coal as a willing buyer. . . .

If that rule were applied to IMC, this case would be reversed. The majority did not apply it.

There is no valid distinction between "market value" for sales purposes and market value for tax purposes. McCrory Stores Corp. v. City of Asbury Park, 89 N.J.Super. 234, 214 A.2d 526 (1965).

Section 72-25-5, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.) provides:

> *When not otherwise determined by law,* and without regard to ownership, *the taxable value of property shall be determined by methods in general use.* [Emphasis added.]

Note that this section seeks methods of valuation other than market value. Is this contrary to § 72-6-7.1(D), supra?

Section 72-25-6(A), N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.) provides:

> *Unless a specific method for appraising property is provided by law, the department shall adopt regulations for appraising each kind of property in the state.* Such regulations shall contain findings of fact upon which the method of appraisal is based and a detailed description of the method of appraisal of such property. [Emphasis added.]

Section 72-25-8(A) provides that "No regulation may be adopted, amended or repealed without a public hearing before the director."

From the foregoing statutes, how do we decide whether "fines" are taxable since they have no commercial market value and simply pass from one process of IMC to its plant?

There are three methods provided for determining taxable value: (1) by determining market value; (2) "by methods in general use"; and (3) by departmental regulations where no specific method is provided. These methods are in direct conflict, and they will be separately discussed and interpreted.

It requires a genius in the art of statutory construction to decide this issue.

Pursuant to § 72-6-4(1) (c), the Department shall determine the "actual value" of mineral property as defined in § 72-6-7 and § 72-6-7.1.

Under Article VIII, Section 1 of the State Constitution, the term "value" of tangible property means "reasonable cash market value" if there are sales of comparable property. If there are no comparable sales, and property has no such "market value," then other elements may be used which furnish proper criteria for consideration in determining value of real property. Hardin v. State Tax Commission, 78 N.M. 477, 432 P.2d 833 (1967).

Since "fines" have no market value, how do we determine the elements which may be considered in determining value? None are provided by statute. The majority opinion adopted the phrase "methods in general use."

What is meant by the words: "When not otherwise provided by law, the taxable value of property shall be determined by methods in general use"?

If we want to stretch its meaning, we can say when property has no market value, the Department can state the criteria to be furnished to determine taxable value by methods in general use. What is meant by the phrase "methods in general use"?

The phrase "in general use" is scarce in judicial decisions anywhere. In New Mexico, it is found in § 59-10-7(B), N.M. S.A.1953 (Repl.Vol. 9, pt. 1), the safety device statute of workmen's compensation. When we apply its meaning to "methods in general use" to determine taxable value, the phrase means "a method generally used in the particular potash industry that produces and uses 'fines'." See Dickerson v. Farmer's Electric Coop., Inc., 67 N.M. 23, 350 P.2d 1037 (1960).

In Jones v. International Minerals and Chemical Corporation, 53 N.M. 127, 202 P.2d 1080 (1949), the defendant is IMC in this tax case. Justice McGhee said:

> . . . we do not think that the use by one employer when there are three engaged in the same industry establishes the "general use" required by the statute.

In Apodaca v. Allison & Haney, 57 N.M. 315, 258 P.2d 711 (1953), Justice McGhee, in a dissenting opinion, said in effect that the burden is on the Department to establish that the general use of a method is by a majority of those engaged in the industry.

The Department found that its assessment against IMC was based on a similar assessment made against Duval Corporation. This does not constitute a majority of the industry and is not a method in general use. The Supreme Court has said that the fact that another similar industry has used a different method of severing wires "does not thereby amount to proof that the wires were safety devices *in general use* under the statute." [Emphasis by the court.] Hicks v. Artesia Alfalfa Growers' Association, 66 N.M. 165, 344 P.2d 475 (1959).

The Department has no powers by statute to roam about in the area of methods "in general use" to determine the taxable value of "fines." It also adopted an appraisal method used under the United States Internal Revenue Code which method was not adopted in the Property Appraisal Department Act. It was set forth in a draft bill. See 10 Natural Resources Journal 415.

The "fines" were not taxable by the method used by the Department.

(2) *If "Fines" are Taxable, What is the Proper Method to Determine Market Value?*

Let us assume in passing that "fines" are taxable because elements can be established to determine "exchange value." What is the proper method to use? The second method is set forth in § 72-25-6(A), supra. There is no specific method provided by law for appraising property, for finding the criteria by which market value can be determined. Under this situation, the Department must adopt a regulation to establish the criteria. It failed to do so. It created

a formula of its own. It set forth the criteria by which it "arrived at a representative market value for the feed material." This formula is invalid. It had a duty to establish this criteria by a regulation after a public hearing.

The majority opinion has decided that "Regulations are required for appraising 'each kind of property'," and "fines" do not fall in this class.

In § 72-25-2(A), the word "appraise" is defined as follows:

> "[A]ppraise" means *the method of determining the taxable value of property* for property taxation. [Emphasis added.]

Section 72-25-2(E) says that "property" means "tangible property." The phrase "tangible property" is not defined. "Tangible property" is that which may be felt or touched, and is necessarily corporeal, although it may be either real or personal. H. D. & J. K. Crosswell, Inc. v. Jones, 52 F.2d 880, 883 (D.C.S.C.1931). See 73 C.J.S. Property § 5.

If we apply the above definitions to § 72-25-6(A), supra, it would read:

> Unless a *specific* method for determining the taxable value of tangible property for taxation is provided by law, the department shall adopt regulations for determining the taxable value of tangible property for taxation of *each kind of tangible property* in the state. [Emphasis added.]

There is no *specific* method for determining taxable value.

The only remaining question is: Are "fines" a kind of tangible property?

"Fines" are a kind of tangible property. They are corporeal and can be felt and touched. They stand in a class of their own—a mineral class. "Each kind of tangible property" means each class whether called minerals, realty, goods or vegetables, etc. There is doubt between members of the court as to the meaning of "each kind of property." Therefore, this phrase should be construed against the state and in favor of IMC.

This court does not have the judicial power to emasculate the ordinary language of statutes in order to increase taxation on industry. The power to tax "fines" rests in the regulatory power of the Department. After it has first determined that "fines" have no market value, then it may appraise the taxable value by a formula adopted by way of regulation.

The statute does not define "market value." It is interesting to note that the 1971 New Mexico Legislature amended the Severance Tax Act by defining the "Gross Value of potash products." Section 72-18-2.1, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.).

Since the Department failed to adopt a formula regulation, the fines are not taxable.

However, IMC contends that it should pay a tax on "fines" pursuant to a previous formula used by the State Tax Commission. Since it desires to pay a tax, I would conclude that this tax should be paid.

492 P.2d 1273

Ella Lee CROCKETT, Plaintiff-Appellee,

v.

ENCINO GARDENS CARE CENTER, INC., a corporation, Defendant-Appellant.

No. 699.

Court of Appeals of New Mexico.
Dec. 10, 1971.
Certiorari Denied Jan. 18, 1972.

Michael M. Rueckhaus, Albuquerque, for defendant-appellant.

Robert N. Singer, Albuquerque, for plaintiff-appellee.

OPINION

COWAN, Judge.

Defendant appeals in this slip and fall case from a judgment entered in favor of the plaintiff following trial before the court. Defendant asserts: (1) defendant was not negligent under New Mexico law; (2) the trial court erred in concluding that plaintiff did not assume the risk and was not contributorily negligent; (3) plaintiff failed to show by a preponderance of the evidence that the slip and fall aggravated a preexisting condition; and (4) defendant was prevented from introducing the testimony of a witness.

Although we decide the four issues on the merits, we note the appeal could be dismissed for rule violations. Defendant questions whether substantial evidence supports the trial court's findings of fact. The substance of all evidence bearing on the proposition is not stated in defendant's brief, no findings are directly challenged and only two findings are inferentially challenged in the statement of proceedings.

While the fourth issue is argued in the brief, it is not included in the "points relied on". See respectively § 21-2-1(15) subparagraphs 6, 16(b) and 11, N.M.S.A. 1953 (Repl.Vol. 4); Nance v. Dabau, 78 N.M. 250, 430 P.2d 747 (1967); Cooper v. Bank of New Mexico, 77 N.M. 398, 423 P. 2d 431 (1966); Michael v. Bauman, 76 N. M. 225, 413 P.2d 888 (1966).

We affirm the judgment of the trial court.

The rules which govern our review of the court's findings are stated in Cave v. Cave, 81 N.M. 797, 474 P.2d 480 (1970):

> ". . . If supported by substantial evidence, we will not question them. . . . the evidence is to be viewed in the aspect most favorable to the successful parties. The trial court is to determine credibility and weight. All reasonable inferences are to be indulged in to support the findings made; evidence and inferences to the contrary are disregarded. . . ."

Viewed in this light, and as found by the trial court, the evidence is that on March 30, 1969, the plaintiff was employed as a private duty nurse by one Eunice Green, at that time a patient residing at the premises owned by defendant. At approximately 5:15 in the evening the plaintiff proceeded to the kitchen area to obtain a tray of food for her patient's dinner. As she went down a hall leading to a doorway into the dining room and thus to the kitchen, she noted that some sort of work was being done on the left two-thirds of the hallway floor. One of the defendant's employees was placing a preparation on the floor to strip off the wax, an operation which causes the floor to be extremely slippery. Normally this would not be done in the hall outside the dining room and kitchen during the dinner hour but, for an unexplained reason, on this occasion it was. The right one-third of the hallway was not being worked on as the plaintiff turned to her right to enter the dining room door. She was in the kitchen approximately 10 to 15 minutes while the tray was being prepared and then, carrying the tray with both hands in front of her, she left the kitchen, and walked through the dining room area to the doorway leading into the hall. This was the same route she had followed going to the kitchen. On her first step through the door and into the hall she slipped and fell, injuring herself.

The preparation had been applied "right up to the door" and, although the plaintiff had been aware of the wax stripping operation on one side of the hall, she thought the side by which she approached the kitchen would still be open. At the time she fell there were no warning signs in the area as she approached the door leading into the hall.

The status of plaintiff as a business invitee of the defendant is not disputed. The rule relative to the duties owed by a possessor of land to his invitees is set forth in Mozert v. Noeding, 76 N.M. 396, 415 P.2d 364 (1966).

The peculiar factual situation in this case distinguishes it from the other slip and fall cases decided in this jurisdiction. Here an areaway was in one condition upon entry and in another upon departure. There was no warning of the changed condition and it was not open and obvious to one entering the hall from the dining room area.

We are impressed with the language of the court in Union News Co. v. Freeborn, 111 Ohio St. 105, 144 N.E. 595 (1924). There the plaintiff entered a restaurant near a depot to inquire about a train. After obtaining the requested information she recrossed the restaurant and while doing so slipped and fell. The fall was occasioned by soapy water on the floor, placed there by a workman after she crossed the room and before she returned and of which plaintiff had no knowledge. In affirming a judgment for the plaintiff, the Ohio Supreme Court stated:

> ". . . As heretofore indicated, evidence in the record supports the claim that the dangerous condition described was a new danger, and was created be-

tween the time plaintiff crossed the floor and her return, recrossing the floor of the restaurant at the same place. The claim asserted and supported by evidence was therefore one of . . . negligence on the part of defendant in placing before the plaintiff a new situation of danger, of which she had no knowledge and of which no attempt was made to apprise her. The principle involved is no different than that applicable, if, under the same circumstances, a flight of steps had been removed from the course she was directed to take, between the time she passed over the steps and her return or attempted return the same way. . . . "

The same rule of liability is applicable here, as is the "flight of steps" comparison. See also Atlantic Greyhound Corporation v. Newton, 131 F.2d 845 (4th Cir. 1942) and Hughes v. Anchor Enterprises, 245 N.C. 131, 95 S.E.2d 577, 63 A.L.R.2d 685 (1956). In *Hughes*, when the plaintiff entered a restaurant and walked to a booth where she was served, the floor of the entrance area and aisle was dry and safe. While she was in the restaurant, defendant through its employee, had created the unsafe condition that caused her to slip and fall when she undertook to use again the identical passageways. *Hughes* applied the rule that we apply here.

The finding of negligence on the part of the defendant being supported by substantial evidence, its point one is without merit.

Defendant's point two, purportedly attacking the court's conclusion that plaintiff did not assume the risk and was not contributorily negligent, is also without merit. There is no evidence in the record that the plaintiff knew, or should have known, that during her stay in the kitchen, wax remover had been placed on the portion of the areaway by which she entered the dining room and kitchen area. The doctrine of assumption of the risk is not applicable. On the issue of contributory negligence we find no evidence or inference and the defendant calls none to our attention.

As to defendant's point three, there was medical testimony that the plaintiff's condition was caused by the accident; that she aggravated a preexisting back condition by the fall; and that the fall would be a competent producing cause of the injury. As in most personal injury actions, the medical evidence was conflicting, at least in part, but a determination is for the trier of fact and not for this court. Cave v. Cave, supra.

By defendant's fourth point, an addendum to point one, defendant complains that it was prevented from introducing testimony of the conditions existing immediately after the accident because a defense witness was unavailable because of illness. The record discloses more than ample time during which the defendant could have obtained the deposition of this witness and the trial court, in its order overruling defendant's motion for a vacation of the setting shortly before trial, granted defendant permission to take the witness' deposition during or after trial. The granting or denying of a motion for continuance rests in the discretion of the trial court and will not be interfered with except for abuse. We find none. Tenorio v. Nolen, 80 N.M. 529, 458 P.2d 604 (Ct. App.1969).

Finding no error, we affirm the judgment.

It is so ordered.

WOOD, C. J., concurs.

SUTIN, Judge (dissenting).

I respectfully dissent.

The defendant challenged the trial court's findings of fact Nos. 4, 6, 7, 8 and 9 which read as follows:

4. That Plaintiff slipped and fell on *wax remover* upon stepping into the hall from the area of the dining room and kitchen on the premises of Defendant, which wax remover was extremely

slippery when applied to the *tile floor* on Defendant's premises.

6. That the wax remover *so placed by the employee of defendant corporation* was invisible at the time Plaintiff slipped.

7. That no signs or barriers had been placed by such employee near the doorway leading into the hall where plaintiff slipped to warn persons of the dangerous condition of the floor.

8. That the *wax remover* upon which plaintiff slipped and fell *had been placed in front of the door leading from the dining room and kitchen area into the hallway by an employee of defendant corporation.*

9. That it was not normal procedure for employees to conduct wax removal operations in the hallways of defendant corporation during dinner hours thereat, especially as wax removal operations are dangerous and hazardous to passers-by. [Emphasis added.]

I have carefully reviewed the record. The evidence most favorable to plaintiff shows the following:

On March 30, 1969, plaintiff was employed by one Eunice Green, a patient at defendant's Care Center. She had been employed 15 months prior thereto and this was the first time wax stripping was done on the floor. At about 5:15 p. m., plaintiff walked down a hallway to a doorway which led into the dining room, then through the dining room into the kitchen to obtain a tray of food for Mrs. Green. She wore crepe rubber sole nurse's shoes. She noticed there was either wax or something being applied to two-thirds of the hallway which was glossy and one-third of the hallway was left out and was not glossy. To enter the dining room, she walked down the one-third part of the hallway that was not glossy. About 30 to 40 feet beyond the entrance to the dining room, she saw a wax remover machine with a man standing where the machine was located. No work was being done as she walked to the kitchen. She remained in the kitchen between ten and fifteen minutes, obtained a tray of food which she carried in front of her body even with her waist, and began to walk to Mrs. Green's room. She could not see down at her feet, but she could see out. The first step she took out of the dining room into the hallway, she slipped and fell. After she fell, she noticed a "preparation" or "liquid of some sort" or "some substance right up to the door." She did not see "where else the preparation was in the hall at the time (she) fell," or at any other time. She did not know what the substance was. She did not see the machine. The man who had been with the machine asked if she got cut and she said "no," and that was all of the conversation.

After she fell, the "preparation" was on her uniform. She took off the uniform and put towels under it and washed all she could get off of her uniform. She later told her doctor she "slipped on *waxed* floor and fell against the wall, slid down a wall and went to a sitting position." But she testified that as she stepped out on the floor, she didn't see the *wax*.

Fifteen minutes after her fall, the Care Center's maintenance supervisor arrived. On cross-examination by plaintiff, it was disclosed that, on the supervisor's arrival, Mr. Vargas, an employee, was in the process of stripping the floor of wax. Just one side of the hallway had wax on it. The other side was dry.

Expert testimony established that when emulsion is used on a tile floor for wax removal, the floor is slippery and dangerous.

The trial court found the defendant put an invisible, slippery wax remover on its tile floor near the doorway leading into the hall where plaintiff slipped and fell.

There is no evidence, nor any inferences therefrom, to support these findings. There is no evidence that the floor was tile and the "preparation" invisible, or that the "preparation," the "liquid" or the "substance" at the door was an emulsion or wax remover which created a dangerous

condition, or that the defendant was processing the floor at or near the door during ten or fifteen minutes plaintiff was in the kitchen, or that defendant knew of the "preparation" being on the floor in front of the doorway prior to plaintiff's slip and fall. There is a total absence of any evidence to show how or by whom the "preparation" was placed just outside the door. There is no proof of any act of negligence in maintaining the floor over a period of time, or any notice of the presence of the foreign substance on the floor in front of the door, or the existence of a messy condition or pattern of conduct.

Plaintiff's brief has been carefully reviewed. There is no reference to any evidence or inferences therefrom contrary to what has been heretofore mentioned.

Findings of fact without some substantial evidence to support them cannot be sustained on appeal. DeBaca v. Kahn, 49 N.M. 225, 161 P.2d 630 (1945).

Plaintiff has failed to cite any authority on "slip and fall" to sustain the judgment under the evidence in this case. She relies solely on Mozert v. Noeding, 76 N.M. 396, 415 P.2d 364 (1966), which is not a "slip and fall" case. The majority opinion does not rely on any New Mexico "slip and fall" case.

I have reviewed every slip and fall case in New Mexico to determine whether any one of them supports plaintiff's position. I found none. See DeBaca v. Kahn, supra; Barrans v. Hogan, 62 N.M. 79, 304 P.2d 880 (1956); Kitts v. Shop Rite Foods, 64 N.M. 24, 323 P.2d 282 (1958); Williamson v. Piggly Wiggly Shop Rite Foods, Inc., 80 N.M. 591, 458 P.2d 843 (Ct.App. 1969); Jimenez v. Shop Rite Foods, Inc., 72 N.M. 184, 382 P.2d 181 (1963); Lewis v. Barber's Super Markets, Inc., 72 N.M. 402, 384 P.2d 470 (1963); Barakos v. Sponduris, 64 N.M. 125, 325 P.2d 712 (1958); Sanchez v. Shop Rite Foods, 82 N.M. 369, 482 P.2d 72 (Ct.App.1971); Garcia v. Barber's Super Markets, Inc., 81 N.M. 92, 463 P.2d 516 (Ct.App.1969); Mahoney v. J. C. Penney Company, 71 N.M. 244, 377 P.2d 663 (1962); Edwards v. Ross, 72 N.M. 38, 380 P.2d 188 (1963).

Edwards v. Ross, supra, appears to be a "wax" case. The plaintiff slipped and fell on the floor of defendant's business. After falling she noticed the floor was discolored, yellowish and slick and felt damp to her touch. Plaintiff's verdict was allowed to stand because she introduced evidence tending to prove that defendant had improperly maintained the floor over a considerable period of time. This fact does not appear in the present case.

In Garcia, supra the court said:

> The mere presence of a slick or slippery spot on a floor does not in and of itself establish negligence for this condition may arise temporarily in any place of business. [Cases cited]. Nor does proof of a slippery floor without more give rise to an inference that the proprietor had knowledge of the condition.

It would serve no useful purpose to repeat again the various rules which determine "slip and fall" liability on floors in public premises. Plaintiff's evidence does not come within any rule. This case was tried on two separate hearings: One on May 7, 1970, and the other on November 24, 1970, over six months apart. Perhaps the evidence was not fresh in the trial court's mind after the second hearing. This may have led the trial court to adopt plaintiff's requested findings of fact.

Until the Supreme Court changes the rule in "slip and fall" cases, we should follow the established policy.

492 P.2d 1279

STATE of New Mexico, Plaintiff-Appellee,

v.

Sylvester ATWOOD, Defendant-Appellant.

No. 685.

Court of Appeals of New Mexico.

Dec. 3, 1971.

Certiorari Denied Jan. 18, 1972.

Ronald M. Higginbotham, Hunker, Fedric & Hughes, Roswell, for appellant.

David L. Norvell, Atty. Gen., Ray Sholenbarger, Agency Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge

Convicted of arson, defendant appeals. The issues are: (1) venue; (2) unauthorized contact with a juror; (3) sufficiency of the evidence; and (4) sequestration of the jury.

Venue.

Defendant moved for a change of venue, alleging an impartial jury could not be obtained because of "public excitement or local prejudice." The trial court held a hearing on the motion. Defendant's evidence was to the effect that articles in the Roswell newspaper had prejudiced the residents of Chaves County against defendant so that an impartial jury could not be obtained. The State introduced evidence to the contrary. The trial court denied the motion. No findings of fact on the question of venue were requested and none were made. On the morning of trial, defendant renewed the motion, supporting the renewal with a Roswell newspaper article about the hearing on the venue motion and its denial. The trial court denied the renewed motion.

Where, as here, there was conflicting evidence, it is within the discretion of the trial court to grant or deny the motion for change of venue. State v. Vaughn, 82 N.M. 310, 481 P.2d 98 (1971), cert. denied, 403 U.S. 933, 29 L.Ed.2d 712, 91 S.Ct. 2262 (1971). Defendant contends the trial court abused its discretion in denying the motion. The basis of this argument is that the trial court should have believed the defendant's witnesses and exhibits. Where, as here, the trial court's ruling is supported by substantial evidence, the trial court did not abuse its discretion in not accepting as true the evidence introduced in support of the motion. See Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969). The fact that newspaper articles were introduced in support of the motion does not change the rule. Even with the newspaper articles in support of the motion, the trial court, on the evidence presented, could properly deny the motion. State v. Foster, 82 N.M. 573, 484 P.2d 1283 (Ct.App.1971); State v. Herrera, 82 N.M. 432, 483 P.2d 313 (Ct.App.1971). This is also true as to the renewal of the motion, where there was one newspaper article in support of the motion and no opposing evidence. The uncontested newspaper article supporting the renewed motion did not require that venue be changed because the article in itself did not establish public excitement or prejudice. State v. Foster, supra.

The foregoing assumes the venue issue is properly before this court even though findings were neither requested nor made. See State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952); State v. Mosier, (Ct. App.), 83 N.M. 213, 490 P.2d 471, decided September 17, 1971.

Unauthorized contact with a juror.

A witness, on the stand immediately prior to the noon recess on the first day of trial, rode in a car with some of the jurors who were being taken to lunch. Upon arrival at the cafe, the witness sat down at a table where some of the jurors were seated. Upon being informed of this, the trial court interrogated four of the jurors

and the witness. They were interrogated one at a time, in private. The interrogation was by the judge and by defense counsel.

The testimony at the interrogation was that there was no conversation about the case either in the ride to the cafe or at the cafe. There is evidence that some comment was made about the weather, and possibly, that the witness remarked that it was hard to pick a jury. The evidence is that little, if any, conversation could have occurred at the cafe because as soon as the witness sat down the bailiff moved him away.

After the above evidence was received, defendant moved for a mistrial, which was denied. Defendant claims the trial court erred in denying the motion for a mistrial. He asserts that the contacts between the witness and some of the jurors raised a presumption that defendant was prejudiced and that the State failed to overcome the presumption.

We agree that the unauthorized contacts between the witness and some of the jurors raised a presumption of prejudice. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct.App.1967). We also agree that the burden was on the State to overcome the presumption. State v. Gutierrez, supra. Compare State v. Dickson, 82 N.M. 408, 482 P.2d 916 (Ct.App.1971). The trial court's denial of the motion for mistrial was, in effect, a ruling that the presumption had been overcome. State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct.App.1969), cert. denied 398 U.S. 942, 90 S.Ct. 1860, 26 L.Ed.2d 279 (1970).

Defendant's claim is that the interrogation by the court was insufficient to overcome the presumption of prejudice. He claims the questioning should have been more extensive, and implies that the number of jurors questioned was insufficient. We disagree. Jurors questioned included one who sat by the witness in the car and one beside whom the witness seated himself in the cafe. The four jurors interrogated, as well as the witness, all testified there had been no discussion of the case being tried. The evidence taken by the court is sufficient to sustain the trial court's ruling. State v. McFerran, 80 N. M. 622, 459 P.2d 148 (Ct.App.1969); State v. Thayer, 80 N.M. 579, 458 P.2d 831 (Ct. App.1969); State v. Gutierrez, supra. Compare State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970).

Here, as in the first issue discussed, we have assumed the issue is properly before us. The record fails to show, however, that defendant's claim, that the interrogation was insufficient, was ever called to the trial court's attention; rather, it is raised here for the first time. Compare State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct.App.1970).

Sufficiency of the evidence.

The arson statute, § 40A-17-5(A), N.M. S.A.1953 (Repl.Vol. 6, Supp. 1971) reads:

> "Arson consists of maliciously or willfully starting a fire or causing an explosion with the purpose of destroying or damaging any building, occupied structure or property of another, or bridge, utility line, fence or sign; or with the purpose of destroying or damaging any property, whether the person's own or another's, to collect insurance for such loss."

The instructions told the jury that a material allegation was that defendant ". . . did maliciously or willfully start a fire or cause an explosion with the purpose of destroying or damaging a building located at 802 South Main Street, Roswell, belonging to the New Mexico Savings and Loan Association or with the purpose of destroying or damaging property to collect insurance for such loss." Three "ors" are found within this material allegation. Thus, various alternatives were charged.

No claim is made that the alternative charge was erroneous. See State v. Hollowell, 80 N.M. 756, 461 P.2d 238 (Ct.App. 1969). The alternatives in the charge are pointed out because defendant challenges the sufficiency of the evidence. If the evidence is sufficient as to one of the alterna-

tives, defendant's attack on the evidence fails.

One of the alternatives charged is that defendant willfully caused an explosion with the purpose of damaging the building of the savings and loan association. This alternative does not involve insurance and the evidence pertaining to insurance will not be reviewed.

Defendant's business (television sales and service) was located in the building of the savings and loan association. There was an explosion and fire at defendant's business at approximately 2:00 a. m. on August 5, 1970. There is evidence that the explosion and fire resulted from the use of dynamite and gasoline. Evidence of bottles filled with gasoline, primer cord and the physical arrangement of these items inside defendant's business permits the inference that the explosion was willfully caused and was for the purpose of damaging the building. Specifically, the evidence fully supports a determination that arson did occur under the alternative charge that we are reviewing. Defendant does not claim that arson did not occur.

Defendant's claim is that the evidence is insufficient to show that he was the person who committed the arson. This claim has four aspects: direct evidence that defendant was the arsonist; circumstantial evidence that defendant was the arsonist; direct evidence that defendant aided and abetted the arsonist; circumstantial evidence that defendant aided and abetted the arsonist. As to the first three aspects, we agree that the evidence is insufficient to connect defendant with the arson. We disagree as to the fourth. We hold that the circumstantial evidence that defendant aided and abetted the arsonist, who is unknown, is sufficient to sustain the conviction.

The circumstantial evidence of aiding and abetting follows. The explosion at defendant's business occurred at approximately 2:00 a. m. on Wednesday, August 5, 1970. The building was locked at the time and there is evidence of no forcible entry into the building. Investigators found a five gallon water bottle filled with gasoline with primer cord wrapped around it. A "cap" was attached to the primer cord. This bottle was intact. A second bottle was also found, but it was broken. There is evidence that a similar bottle had been on the premises prior to the arson. Sometime in July, defendant had borrowed another similar bottle from a business acquaintance.

There is evidence that sometime in July, prior to the arson, defendant contacted Mr. Sparks in Hobbs and asked him to come to Roswell. When defendant met Sparks in Roswell, defendant asked Sparks if Sparks could get defendant some fuse and caps. Sparks said he could get whatever defendant wanted. Subsequently, Sparks purchased some caps, dynamite and fuse.

On the Tuesday evening prior to the arson, defendant was in Hobbs. Defendant met with Sparks and asked Sparks if he had any caps. "He told me that his friend was ready for them." According to Sparks, he sold defendant one stick of dynamite, two feet of fuse and about five caps for a price of $100.00. Defendant would not, however, handle these items, but insisted that Sparks bring these items to Roswell. The result was that Sparks rode to Roswell in a car driven by defendant. Sparks had the "stuff" in his pocket. Upon arriving at Roswell, defendant took Sparks to a motel where Sparks registered under an assumed name. As to the items that Sparks sold to defendant: "Well, Atwood told me to just leave it outside the door. The party would pick it up." Defendant left in his car and Sparks, on foot, went to get something to eat. Sparks identified the cap found attached to the primer cord wrapped around the unbroken water bottle as a dynamite cap of the "same type" that he sold to defendant.

The motel operator testified that Sparks registered at the motel about 11 o'clock. He was brought to the motel in a car driven by another man (defendant). Another witness testified that he observed defend-

ant, in defendant's car, at the motel about midnight. At this time a woman was with defendant in the car.

An employee of defendant testified that on Tuesday morning preceding the arson he found six caps similar to the dynamite cap found attached to the primer cord. These items were found on the floor of the premises scattered around the leg of defendant's workbench when the employee came to work that morning. This employee also testified that another employee had found caps, of the same type, that Tuesday morning.

To be an aider and abetter one must share the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking. State v. Harrison, 81 N.M. 324, 466 P.2d 890 (Ct. App.1970). Aiding and abetting may be shown by evidence of acts, conduct, words, signs, or any means sufficient to incite, encourage or instigate commission of the offense. State v. Ochoa, 41 N.M. 589, 72 P. 2d 609 (1937). In this case, the evidence that defendant borrowed a water bottle when one was already at his business, purchased dynamite, fuse and caps for a friend "ready for them," caused these items to be left outside a motel room in Roswell where "[t]he party would pick it up," and was at the motel an hour later (after the material was left outside the motel room door) is sufficient to establish that he aided and abetted the arson at his place of business two hours after he was observed at the motel.

This evidence, of course, is circumstantial and to be sufficient must exclude every reasonable hypothesis other than the guilt of defendant. State v. Hardison, 81 N.M. 430, 467 P.2d 1002 (Ct.App.1970). There is evidence in the record to the effect that defendant did not commit arson; that he was not in Roswell when the explosion occurred. The evidence that defendant did not commit the arson does not, however, provide a reasonable hypothesis that he did not aid and abet the crime.

The hypotheses advanced by defendant that he did not aid and abet the arson are: that there was no motive for defendant to do so (there is evidence that his business was profitable); that other people (employees) had keys to the business; that another person had been seen entering the business earlier in the summer at an improper hour. In our opinion, none of these hypotheses are reasonable in the light of the evidence that defendant procured materials of the type used in the arson, the evidence of the time when these materials were procured, and the time of the arson itself.

The circumstantial evidence is sufficient to sustain defendant's conviction as an aider and abetter.

Sequestration of the jury.

After the jury had been deliberating for some time (the record does not show the hours involved), the trial court decided to allow the jurors to go home for the night and resume their deliberation the following morning. Defendant moved that the jury be kept together ". . . apart from their families and any publicity media. . . ." The motion was denied. Before allowing the jurors to separate, the trial court admonished the jurors "strongly" that: ". . . [y]ou do not talk to anyone or permit anyone to talk to you. Don't talk to each other in pairs or threes or fours. . . . [P]articularly do not let your wife or husband talk to you about it. And, do not read the newspaper or listen to the radio or TV reporters. . . . [D]o not read the local newspaper or listen to news reports. . . ."

In his motion, defendant opposed separation of the jury ". . . in light of the repeated appearance on the front page of the daily newspaper of the stories concerning this case." He asserts that it was error to allow the jury to separate because of the "publicity surrounding the trial;" ". . . that it would be virtually impossible for members of the jury if not sequestered, to be kept free from hearing, reading, or overhearing comments concern-

ing the progress of the trial, notwithstanding the Courts [sic] admonitions to the contrary. . . ."

Defendant's opposition to allowing separation is that the jurors *might* be exposed to publicity about the case. There is no claim that the jurors were so exposed. Thus, the basis for opposing separation is not established and we cannot say the trial court erred in denying the motion on the grounds asserted by defendant. See State v. Sanchez, 79 N.M. 701, 448 P.2d 807 (Ct.App.1968).

A more basic question is whether the jury may be permitted to separate after the cause is submitted to them for decision. During the course of a trial it is discretionary with the trial court as to whether the jurors may be permitted to separate. Even unauthorized separations during trial is not error unless there is a showing that the defendant is prejudiced, State v. Embrey, 62 N.M. 107, 305 P.2d 723 (1956); United States v. Cook, 15 N.M. 124, 103 P. 305 (1909); Territory v. Chenowith, 3 N. M. (Gild.) 318, 5 P. 532 (1885); or that the jury flagrantly disregarded their duties, United States v. Spencer, 8 N.M. 667, 47 P. 715 (1896).

Two New Mexico decisions indicate that separation of the jury after submission raises a presumption of an improper verdict ". . . when there is nothing in the record showing the harmlessness of the separation, . . ." and that it is the State's burden to overcome this presumption. United States v. Spencer, supra; United States v. Swan, 7 N.M. 306, 34 P. 533 (1893). *Spencer* and *Swan* were, however, distinguished in United States v. Cook, supra.

Concerning separation of jurors after submission, Territory v. Chenowith, supra, states:

> ". . . the well-settled doctrine in substantially all the states of the union, as well as in England, now is, that even in cases of capital felony, it is in the sound discretion of the court as to whether the jury, during the trial, may be permitted to separate. It would have been different had the jury been permitted to separate without leave of the court, after the case had been given to them in charge, and before the rendition of their verdict. But, even in such case, before a verdict will be set aside, it must be shown that the prisoner was in some way prejudiced by the separation."

United States v. Cook, supra, approved the foregoing quotation. State v. Romero, 34 N.M. 494, 285 P. 497 (1930) and State v. Blancett, 24 N.M. 433, 174 P. 207 (1918), appeal dismissed, 252 U.S. 574, 40 S.Ct. 395, 64 L.Ed. 723 (1920), held that temporary separation of some jurors after submission was not, in itself, error; an affirmative showing of prejudice was required. State v. Romero, supra, and Territory v. Chenowith, supra, imply that separation of jurors after submission is within the trial court's discretion.

From the foregoing, and finding no statute to the contrary, we hold that it is within the trial court's discretion to permit the separation of jurors after submission of the cause to the jurors. Defendant not having shown any prejudice resulting from the permitted separation in this case, defendant's contention is without merit.

The judgment and sentence is affirmed.

It is so ordered.

HENDLEY, J., concurs.

SUTIN, Judge (dissenting).

I respectfully dissent.

The Supreme Court of the United States adopted Rule 52 of the Rules of Criminal Procedure. 18 U.S.C.A., rule 52. Rule 52(b) reads as follows:

> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

The purpose of this rule is to avoid a clear miscarriage of justice. Moore v. United States, 399 F.2d 318 (C.A.Ga.1967), cert. den. 393 U.S. 1098, 89 S.Ct. 893, 21 L.Ed.2d 789.

In United States v. Atkinson, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936), Justice Stone said:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

See 3 Wright, Federal Practice & Procedure, § 856; Orfield, Criminal Procedure under the Federal Rules, § 52.

In New Mexico, the Supreme Court adopted Rule 20(1), [21-2-1(20) (1), N.M.S.A.1953 (Repl. Vol. 4)], which reads as follows:

> None but jurisdictional questions shall be first raised in the Supreme Court.

Notwithstanding this rule, "the supreme court, in the interest of justice, has not limited to jurisdictional questions those that can be first raised in the supreme court." Mitchell v. Allison, 54 N.M. 56, 213 P.2d 231 (1949). This subject includes civil and criminal cases, and approaches "plain and obvious" error under Federal Rule 52(b), supra.

This is the first arson case to reach an appellate court in New Mexico. Justice demands that we determine obvious errors or those which seriously affect the liberty of a man, even though they were not brought to the attention of this court. We recognize that good legal counsel may overlook important questions.

There are four separate grounds for this dissent:

(1) The arson statute is ambiguous and as construed, Atwood could not be found guilty.

(2) Atwood was entitled to a directed verdict at the close of all the evidence.

(3) Atwood was charged in the disjunctive of two separate crimes in one count, and was convicted of both crimes without instructions on the disjunctive allegations. This is reversible error which requires a new trial.

(4) It was reversible error to permit separation of the jury after submission of the case, and demands a new trial.

1. *The Arson Statute is Ambiguous, and as Construed, Atwood Could not be Found Guilty*

Sections 40A-17-5(A) and (C), N.M.S.A.1953 (Repl. Vol. 6, Supp.), read as follows:

> A. Arson consists of maliciously or willfully starting a fire or causing an explosion with the purpose of destroying or damaging any building, *occupied structure* or property *of another*, or bridge, utility line, fence or sign; *or* with the purpose of destroying or damaging any property, *whether the person's own* or another's, to collect insurance for such loss. [Emphasis added.]
>
> * * * * * *
>
> C. As used in this section, "occupied structure" includes a . . ., structure . . . adapted . . . for carrying on business therein, *whether or not a person is actually present.* [Emphasis added.]

This statute was enacted in 1970 following State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct.App.1969), which held the previous arson statute unconstitutional.

No similar arson statute has been suggested by the state or Atwood. The above statute, being novel and in derogation of the common law, needs clarification.

The trial court instructed the jury that Atwood was charged in the alternative with:

1. Committing arson with the purpose of destroying or damaging a building belonging to New Mexico Savings and Loan Company; *or*

2. Committing arson with the purpose of destroying or damaging property to collect insurance for the loss.

Atwood was not charged with committing arson on an "occupied structure . . . of another."

The arson statute states five separate and distinct crimes in one paragraph. They are: destroying or damaging (1) any building of another; (2) any occupied structure of another; (3) any property of another; (4) any property of the person to collect insurance; (5) any property of another to collect insurance.

The building involved in this case was an "occupied structure." It was owned by New Mexico Savings and Loan Company, and was used to carry on the business of Atwood. Atwood was not charged with this criminal offense. He is, therefore, not guilty of the charge of committing arson on the "building" of New Mexico Savings and Loan Company.

The majority opinion does not determine whether Atwood was guilty of arson to collect insurance for the loss of property. Although I do not believe he was, this offense charged will not be discussed.

2. *Atwood was Entitled to a Directed Verdict at the Close of all the Evidence.*

There are so many varied problems involved in arson that each case must be decided on its own facts. This was one of the odd situations which arose because it involved an accused, the owner of a business, who was charged with aiding and abetting an unknown incendiary who directly caused the explosion and fire.

Atwood is presumed to be innocent, and this presumption remains with him until his guilt is established by the evidence beyond a reasonable doubt. State v. Henderson, 81 N.M. 270, 466 P.2d 116 (Ct.App. 1970).

In State v. Slade, 78 N.M. 581, 434 P.2d 700 (Ct.App.1967), a directed verdict was involved. The court set the rules as follows:

> It is axiomatic that the burden rests upon the state to prove each and every essential element of the offense charged beyond a reasonable doubt. It is not necessary, however, that the charge be established only by direct evidence. Circumstantial evidence is sufficient if the circumstances point unerringly to the defendant and are incompatible with and exclude every reasonable hypothesis other than that of his guilt.

First, in considering the sufficiency of circumstantial evidence, we must constantly bear in mind the doctrine of reasonable doubt. Finch v. State, 249 Ind. 122, 231 N.E.2d 45 (1967). It is also our duty to scrutinize circumstantial evidence more critically in a criminal case than in a civil case. State v. Van Gorder, 196 Iowa 782, 195 N.W. 204 (1923); Murdock v. State, 351 P.2d 674 (Wyo.1970); Smith v. Commonwealth, 171 Va. 480, 198 S.E. 432 (1938); State v. Buckingham, 50 Del. 469, 134 A.2d 568 (1957).

Second, it is not enough that the testimony raise a strong suspicion of guilt, State v. Easterwood, 68 N.M. 464, 362 P.2d 997 (1961), because it does not supply the place of evidence when life or liberty is at stake; State v. Bunton, 453 S.W.2d 949 (S.Ct.Mo.1970); Frederick v. State, 240 Ind. 598, 167 N.E.2d 879 (1960). A mere probability of guilt is insufficient, Brown v. State, 481 P.2d 475 (Okla.Cr.1971), if the circumstantial evidence is also consistent with a reasonable hypothesis of innocence. Watts v. State, 247 So.2d 16 (Fla. Ct.App.1971). A mere showing of motive and opportunity does not overcome the defendant's presumption of innocence and establish, beyond a reasonable doubt, his participation in the criminal act. State v. Paglino, 291 S.W.2d 850 (S.Ct.Mo.1956). "Where different inferences may be drawn from the same state of circumstances, it is the duty of the court to presume in favor of innocence rather than of intentional and guilty misconduct." People v. Kelly, 11 App.Div. 495, 42 N.Y.S. 756 (1896), app. dismissed 153 N.Y. 651, 47 N.E. 1110 (1896).

Furthermore, a jury is not allowed to conjecture whether Atwood *might* have

done something, State v. Grubaugh, 54 N. M. 272, 221 P.2d 1055 (1950), because if evidence must be buttressed by surmise and conjecture, rather than logical inference in order to support a conviction, this court, charged with the protection of civil liberties, cannot allow such conviction to stand. State v. Romero, 67 N.M. 82, 352 P.2d 781 (1960).

Third, the state has the burden of proving each of the essential elements of arson under § 40A-17-5(A), supra. The corpus delicti has been established. In addition, the state must prove that Atwood engaged an unknown incendiary to destroy or damage the building of New Mexico Savings and Loan Company.

I shall not repeat all the evidence most favorable to the state. It is necessary to reach the hiatus in the testimony to determine whether inference on inference can be drawn to nail Atwood to the offense, and determine whether he aided and abetted an incendiary.

(a) *The Hiatus in the Evidence.*

On August 4, 1970, Sparks rode back to Roswell with Atwood and took the "stuff" himself in a brown bag. About 11:00 p. m., Atwood and Sparks arrived in Roswell, and Atwood took Sparks to register at the Downtown Motel. Sparks, at the request of Atwood, left dynamite materials outside the door to his room. Atwood said, "The party would pick it up." There was no evidence that any person actually picked up the items, nor that these items were used to cause the explosion and fire. Sparks and Atwood parted late the night of Tuesday, August 4, 1970. Sparks said he slept at the motel that night and left for Hobbs by bus the next morning about 6:50 A. M. The Downtown Motel manager testified that Sparks' room was not occupied Tuesday night. Sparks did not testify whether the dynamite materials had been picked up.

Just before midnight, Tuesday, August 4, 1970, Atwood was seen driving into the Downtown Motel in Roswell, but there was no evidence he stopped. He was in a Ford Mustang with a woman, or his wife. Sometime between 11:30 p. m. and 1:00 a. m., Atwood, his wife and daughter purchased gasoline at a filling station in Roswell and then left for Las Cruces to visit a sick sister. He stopped in Alamogordo to eat and left Alamogordo around 2:00 a. m., the time of the fire and explosion in Roswell.

Here we have a hiatus in the evidence. There are no facts or evidence of what occurred between 11:00 p. m. and midnight, August 4, 1970, when Atwood drove into the Downtown Motel, and between midnight and 2:00 a. m., the time the explosion and fire occurred. There is no evidence that Atwood stopped at the motel. There is no evidence that the materials were picked up. What was his purpose for driving to the motel? Shall we guess or surmise? Or did Atwood just drive through the motel premises and proceed to the filling station for gasoline? We do not know.

The questions to be answered are: (1) on Tuesday night, August 4, 1970, can a reasonable inference be drawn that Atwood, or someone on his behalf, picked up the dynamite materials outside the door to Sparks' room at the Downtown Motel? (2) Can a further reasonable inference be drawn that the dynamite materials were used to commit arson? Or (3) if Atwood did pick up these items, can another inference be drawn that he delivered them to an incendiary to commit the crime of arson? (4) Can another inference be drawn that Atwood delivered a key to the store to the incendiary? And (5) can a further reasonable inference be drawn that the materials left by Sparks were the materials used in the explosion and fire? There are no facts from which these inferences can be drawn.

In overruling Atwood's motion for a directed verdict, the trial court said: "I think it is pretty weak at this point. But I will let the jury decide it." I believe it was too weak to submit to the jury.

I do not hesitate to say that there is a strong suspicion of guilt or probability of guilt, but this is not sufficient to convict Atwood of arson. He had an opportunity to commit the crime or he might have done so, but this is not substantial evidence. He must be proven guilty of arson by substantial evidence beyond a reasonable doubt.

For definitions of a reasonable inference, see State v. Jones, 39 N.M. 395, 48 P.2d 403 (1935), and Stambaugh v. Hayes, 44 N.M. 443, 103 P.2d 640 (1940).

The *Stambaugh* court held that the jury must not reach its conclusion from conjectures or *probabilities*. If the jury reaches a conclusion by guesses, conjectures or *the weighing of probabilities*, not by logical deduction from facts proved, the conclusion is erroneous.

Inferences are ofttimes a convenience used by courts of review to affirm or reverse criminal cases based on circumstantial evidence. See State v. Browder, (Ct. App.) 83 N.M. 238, 490 P.2d 680, decided October 29, 1971; State v. Baca, (Ct.App.), 83 N.M. 184, 489 P.2d 1182, decided October 8, 1971; State v. Belcher, 83 N.M. 75, 488 P.2d 125 (Ct.App.1971); State v. Betsellie, 82 N.M. 782, 487 P.2d 484 (1971); State v. Phillips, 83 N.M. 5, 487 P.2d 915 (Ct.App.1971). Many more cases can be cited.

It is our duty to presume in favor of innocence where different inferences can be drawn. From the facts proved, an equally logical deduction can be made that the dynamite materials were not picked up; that neither Atwood nor anyone on his behalf picked up the materials; that the materials picked up were not used to commit arson.

Piling inference on inference is not a sufficient basis for reaching a reasonable, logical conclusion. Dull v. Tellez, 83 N.M. 126, 489 P.2d 406 (Ct.App.1971); Adamson v. Highland Corporation, 80 N.M. 4, 450 P.2d 442 (Ct.App.1969); Renfro v. J. D. Coggins Company, 71 N.M. 310, 378 P.2d 130 (1963).

During the trial, Sparks was asked this question [Tr. 244–45]:

Q. That cap—were those caps similar to the one that is on the end of this cord? Are they about the same type?

A. Yeah. That's a dynamite cap. Same type.

The testimony is that the cap was of the same type. There are two types, percussion caps and fuse caps. There are four or five brands of fuse caps. The cap described in evidence can be of the same type as that left by Sparks and yet not be the same cap. There is no evidence that it was the same cap. Neither is the cord to which it was attached, the fuse which Sparks left at his motel room. The items left by Sparks and those items actually used to commit arson must be specifically identified. See State v. Phillips, supra.

(b) *Defense Evidence Which Points Towards Innocence.*

"In applying the circumstantial evidence rule, the State's evidence is accepted as true but the Court may look to defense evidence for the purpose of ascertaining the existence of a reasonable hypothesis other than guilt." State v. Buckingham, supra.

Defense evidence which points toward innocence is as follows:

(1) The record is silent on Atwood's conduct with reference to the dynamite materials left on the outside of Sparks' door at the Downtown Motel the night of Tuesday, August 4, 1970.

(2) The record fails to disclose that the items used to commit arson were the same items left outside of the door of Sparks' room at the Downtown Motel. There is no evidence that anyone picked up the materials.

(3) The lock removed from the back door of Atwood's business after the fire was not the lock left on the back door when it was locked the evening before the fire. There was removal and replacement of the padlock on the back door.

(4) The financial condition of Atwood's business shows that during March and April 1970, Atwood procured a loan for

$23,800 from the Small Business Administration (SBA) which the government used to pay off all of Atwood's creditors. This was four months before the fire and explosion. After payment to creditors, there was $5,000 left over. $3,000 was used to buy Zinks Work Shop. $2,000 was left in SBA. Then, $1,000 was used to remodel the TV shop, and $1,000 was used to purchase new merchandise. During trial, his books and records were made available to the district attorney. In 1969, he testified, he had a gross profit of $29,000; a net profit of $1,421.74. In the first half of 1970, Atwood had gross sales of between $20,000 and $40,000. He was doing more business in 1970 than in 1969. His inventory was around $40,000. He owed creditors about $6,000. He had $6,000 of customers' TV sets in his shop, but his insurance covered these items up to $3,000. When he got out of the penitentiary five years before the fire, he had $25.00. He worked and saved money honestly and built a real nice business.

(5) Atwood had five employees, and two trucks. At the time of the fire, three other people had keys—Marcus Ulabari, Ralph Rodibaugh, and a brother-in-law. Fifty percent of Atwood's business was up for sale, but if the price was right then 100%. He had ulcers and needed a partner.

(6) Atwood had a lot of trouble in the previous six months with Harold Munoz who had worked for him. Munoz threatened to ruin Atwood after Munoz tried to buy into Atwood's business and failed.

(7) On his return from Las Cruces, the morning after the fire, Atwood and his wife went directly to the police station to discuss the fire, but the police told him to leave. The police said if they wanted Atwood, they would see him. The police never spoke with Atwood before the trial.

(8) Atwood built up a good business. At the time of the fire, there is no evidence that Atwood was unable to meet his obligations as they matured. Four months before the fire he procured an SBA loan of $23,800. With $3,000 of this money he bought another business. To protect itself, SBA recommended that Atwood procure insurance in an amount sufficient to cover the loan, with SBA as the mortgagee beneficiary. Two months before the fire, a friend of Atwood's sold him a package of insurance in the amount of $30,000, with SBA as the mortgagee beneficiary. There is no evidence that Atwood's business was overinsured, or that he filed a false claim for insurance. Atwood's claim for insurance, even if granted in full, would pay off the SBA loan and half the claims of customers with TV sets in his store. This evidence points unerringly to the fact that Atwood did not seek fire insurance for illegal purposes, did not seek to pay off the SBA loan in this manner, and leave himself economically destroyed, so that he could not recover the proceeds for his personal use. He preferred to sell all or half of his business. What motive did he have to willfully destroy his own business? Upon what basis would he employ an incendiary to maliciously and willfully burn down the building?

(9) If Atwood provided the incendiary with a key, and the incendiary had two minutes to escape, why did the incendiary place a different lock on the back door? Why were only two feet of fuse provided the incendiary instead of ten or 20 feet? Why were dynamite caps found on Atwood's floor without his knowledge the morning before the fire? These caps provided an alternative source for use in the explosion and fire. Was the dynamite cap found on the end of a cord one of those left on the front door of Sparks' motel room?

(10) There is evidence that the front plate glass window was broken with glass falling on the inside.

(11) Atwood had not removed any merchandise from his store, nor filed any fraudulent claim with the insurance company. He was not present in or about the premises immediately prior to the offense. He did not seek escape or concealment.

This, together with the other facts in the case, does not point unerringly to Atwood and exclude every reasonable hypothesis other than the defendant's guilt.

After a careful review of the evidence, I believe the trial court erred in refusing to direct a verdict for Atwood.

3. *Atwood was Charged in the Disjunctive and was Convicted of both Crimes Without Instructions on the Disjunctive Allegations.*

The trial court instructed the jury that Atwood was charged with arson in the disjunctive with the purpose of (1) damaging or destroying a building belonging to the New Mexico Savings and Loan Company, *or* (2) with the purpose of damaging or destroying property to collect insurance for such loss. Is this permitted by statute? Can Atwood be found guilty of both? This question has not been decided in New Mexico.

Section 41-6-29, N.M.S.A.1953 (Repl. Vol. 6) refers to an indictment or information "for an offense." This statute does not seem to permit the charging of different offenses in the alternative. Disjunctive or alternative allegations of offenses differ from duplicitous allegations. Section 41-6-38, N.M.S.A.1953 (Repl. Vol. 6). "Duplicity in criminal pleading is the joinder of two or more distinct and separate offenses in the same count." State v. Peke, 70 N.M. 108, 371 P.2d 226 (1962); State v. McKinley, 30 N.M. 54, 227 P. 757 (1924). Disjunctive allegations are charges of two or more distinct and separate offenses in the alternative. State v. Williams, 210 N.C. 159, 185 S.E. 661 (1936).

Two offenses alleged alternatively in the same count of the information is reversible error. Since Atwood was charged with committing one felony or another, he cannot be convicted of both. State v. Williams, supra; State v. Albarty, 238 N.C. 130, 76 S.E.2d 381 (1953); Melancon v. State. 367 S.W.2d 690 (Tex.Cr.App.1963); 42 C.J.S. Indictments and Information, §§ 101, 139(b), 166.

The trial court instructed the jury that it could find "the defendant guilty as charged in the information." The jury found the defendant guilty as charged in the information. It is reversible error to instruct the jury that the jury may convict of both offenses. State v. Hudson, 93 W.Va. 435, 117 S.E. 122 (1923). This is obvious and plain error and warrants a reversal of the conviction and sentence, and should award Atwood a new trial.

4. *It was Error to Permit Separation of the Jury After Submission of the Case.*

After submission of the case to the jury for deliberation, Atwood strongly objected to separation of the jury. The trial court allowed the jury to separate for the night. This is reversible error.

Section 21-3-3, N.M.S.A.1953 (Repl. Vol. 4) provides:

> In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision.

This statute was adopted in 1876 and means that a rule of common law remains the rule of practice and decision in New Mexico, except as superseded or abrogated by statute or constitution, or held to be inapplicable to conditions in New Mexico. Ickes v. Brimhall, 42 N.M. 412, 79 P.2d 942 (1938). No exception has abrogated the common law doctrine of separation of juries.

In United States v. Swan, 7 N.M. 306, 34 P. 533 (1893), the court said:

> The rules of the common law require, especially in trials of felonies, that, *after the cause is submitted, and the jury charged by the court, no separation intervene*; that no intermingling with the public be allowed until a verdict is returned. [Emphasis added.]

Spencer and *Swan* are distinguished in United States v. Cook, 15 N.M. 124, 103 P. 305 (1909). The distinction is that in

Cook, separation took place *before* the case was submitted to the jury, and in *Spencer* and *Swan*, the separation took place *after* the cases had been submitted to the jury. I can find no New Mexico citation which overrules *Swan*, supra, on the quoted principle. The dicta cited by the majority in Territory v. Chenowith, 3 N.M. (Gild) 318, 5 P. 532 (1895), precedes *Swan*, and I do not find it necessary to distinguish the other cases cited.

In Abbott Criminal Trial Practice, 4th Ed. Viesselman, § 688, the author states:

> Separation of the jurors may not be permitted between the time of submission of the case and return of their verdict.

The *Swan* case is cited with others as authority. See also 5 Anderson, Wharton's Criminal Law & Procedure, § 2107; 2 Thompson on Trials (Early Ed.), § 2551; 34 A.L.R. 1115 at 1221 where *Swan* is cited; 21 A.L.R.2d 1088 at 1140; 23A C.J.S. Criminal Law, § 1358.

The reasons for the rule are clearly enunciated in United States v. D'Antonio, 342 F.2d 667 (7th Cir. 1965), and United States v. Panczko, 353 F.2d 676 (7th Cir. 1965), cert. den. 383 U.S. 935, 86 S.Ct. 1066, 15 L.Ed.2d 853, as follows:

> At no time is it more essential that the jury should be immunized from outside influences than when it is engaged in deliberating upon what its verdict is to be. During that critical period, when the jurors are engaged in resolving vital issues between the government and the defendant, the judge certainly should not relax the traditional safeguards against outside intrusion. Dispersement into the city at night of a group of men and women who have been deliberating in the security of the courthouse subjects them to the risk of being individually importuned, if not threatened, by telephone calls or personal contacts.

I recognize that there is conflict of authority for various reasons too numerous to mention. Regardless of what is said in other jurisdictions, our duty is to follow *Swan*, supra, until the legislature acts or *Swan* is overruled in the Supreme Court.

Permission, over objection, to allow separation of the jury after submission of the case, is reversible error.

Atwood should be discharged or granted a new trial. The majority feeling otherwise, I respectfully dissent.

492 P.2d 1291

Herbert BENALLY and Wilbert Benally, Plaintiffs-Appellants,

v.

Glenn SILLS, d/b/a Chief Trading Post, Defendant-Appellee.

No. 708.

Court of Appeals of New Mexico.

Dec. 17, 1971.

Rehearing Denied Jan. 5, 1972.

Paul L. Biderman, Crownpoint, for appellants.

Stephen F. Grover, Farmington, for appellee.

OPINION

HENDLEY, Judge.

Wilbert Benally was sued in magistrate court by Glen Sills. A stipulated judgment was signed by the magistrate which recites a hearing, appearances by counsel for both parties and that defendant "consented to the debt." No appeal was taken from that order. Subsequently, execution was issued and the deputy sheriff levied upon forty-nine sheep believed to be owned by Wilbert Benally. Thereafter, Wilbert Benally, through his counsel, filed three motions in the magistrate court which were argued by his counsel and denied by the magistrate.

Thereafter, Herbert Benally and Wilbert Benally filed this action against Sills in the district court. The issues were limited to the (1) validity of the magistrate court's action in entering judgment and subsequently issuing a writ of execution; (2) question of jurisdiction as to whether the sheriff had authority to execute on the sheep that were executed on; and, (3) ownership of the sheep. The trial court found that it had jurisdiction over the parties and the subject matter; that Herbert and Wilbert resided on Indian allotted lands outside the reservation; that a money judgment was entered in favor of Sills against Wilbert in the magistrate court and no appeal taken; that the deputy sheriff levied on forty-nine sheep found on lands occupied by Wilbert and reasonably believed the sheep to be owned by Wilbert; that sixteen of the sheep levied on were in fact owned by Herbert. Wilbert appeals.

We affirm.

Wilbert raises two issues. First, he claims the magistrate court judgment was void because he was served with process on Indian allotted lands. The trial court made no finding on this issue, and the place of service is difficult to ascertain from the findings on the record. Assuming service in the magistrate suit was made as Wilbert contends, it does not benefit Wilbert in this appeal. Assuming the claim could be made in district court without appealing the magistrate court's judgment, and assuming the claim made was justifiable under the circumstances, the record clearly shows that there was a general appearance in the magistrate court both before and after entry of the magistrate court judgment. Thus, magistrate court jurisdiction did not depend on service of its process and the trial court properly dismissed Wilbert's claim attacking the validity of the magistrate court judgment. See State ex rel. Davie v. Bolton, 53 N.M. 256, 206 P.2d 258 (1949); Pickering v. Palmer, 18 N.M. 473, 138 P. 198 (1914).

Second, Wilbert claims that service of the writ of execution occurred on Indian allotted lands and that this service was void because no New Mexico court has jurisdiction over such allotted lands. Wilbert seeks damages against the judgment creditor, Sills, because of this alleged void execution. Wilbert claims that Sills acted as agent for the sheriff in making the levy but the trial court found, on substantial evidence, that the levy was made by the deputy sheriff. See Riggs v. Gardikas, 78 N.M. 5, 427 P.2d 890 (1967). No claim is made that Sills ratified the allegedly void levy. Wilbert dismissed his damage claim against the deputy sheriff. See Gallegos v. Sandoval, 15 N.M. 216, 106 P. 373 (1909). Thus, it is extremely doubtful that any basis for relief against Sills was proved. Assuming that a basis for relief was proved, the claim made against Sills was for damages. Wilbert did not request the trial court to find on the subject of damages and no ruling on damages was made by the trial court. Wilbert has made no argument in this court concerning either a

basis for relief against Sills or damages. The circumstances then are that Wilbert seeks a ruling as to the jurisdiction of the deputy sheriff to make the levy but does so in a damage suit against Sills without ever arguing a basis for Sills' liability. He seeks an advisory opinion which we decline to give. See Bell Telephone Laboratories v. Bureau of Revenue, 78 N.M. 78, 428 P. 2d 617 (1966). We cannot say the trial court erred in dismissing Wilbert's damage claim against Sills.

Affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

492 P.2d 1293

James O. HAMMOND, Plaintiff-Appellant,

v.

Harold KERSEY, d/b/a Kersey & Company, Employer, and Home Indemnity Insurance Company, Insurer, Defendants-Appellees.

No. 736.

Court of Appeals of New Mexico.

Jan. 7, 1972.

Don G. McCormick, McCormick, Paine & Forbes, Carlsbad, for plaintiff-appellant.

Lowell Stout, Hobbs, for defendants-appellees.

OPINION

WOOD, Chief Judge.

Plaintiff appeals the judgment denying him workmen's compensation. The dispositive issues involve: (1) written notice and (2) latent injury.

Written notice.

The trial court found that on December 12, 1969 plaintiff suffered injury by accident arising out of and in the course of his employment. The accident occurred on an oil field location but the log for December

12th does not list an accident or an injury. On December 15, 1969 plaintiff was working at another location, but for the same employer. The log for December 15th reports "'J. O. [plaintiff] injured back.'" The log was delivered to the employer on December 15th, but the notation about plaintiff was overlooked. Apart from the notation in the log, the employer had no knowledge concerning the incident until April 28, 1970. The question is whether the log notation suffices as written notice.

The applicable portion of § 59-10-13.4(A), N.M.S.A.1953 (Repl. Vol. 9, pt. 1) reads:

> "Any workman claiming to be entitled to compensation from any employer shall give notice in writing to his employer of the accident and of the injury within thirty [30] days after their occurrence; . . ."

The statute requires written notice of an accident and of an injury. Bell v. Kenneth P. Thompson Co., 76 N.M. 420, 415 P.2d 546 (1966).

Assuming the employer was charged with notice of the contents of the log within a reasonable time after its receipt, what notice was given to the employer by the notation? There was notice of an injury; was there notice of an accident?

Plaintiff states: ". . . It is customary that any accidents occurring on the rig be entered on the log. If Mr. Kersey had noticed the entry . . . he would have investigated the matter and notified his insurance company. If the entry in the log had been brought to his attention, he would have known that J. O. Hammond claimed to have injured his back and would have done something about it. . . ." This argument goes no further than to state that inquiries would have been made. "Putting on inquiry" is not sufficient as notice. Roberson v. Powell, 78 N.M. 69, 428 P.2d 471 (1967); Ogletree v. Jones, 44 N.M. 567, 106 P.2d 302 (1940).

Plaintiff also states: ". . . When a crew of two men is working on a drilling rig or on related work in an isolated spot, the notation of an injury to the back should be sufficient, since such an injury connotes an accidental injury on the job." As we read the total notation—"Straighten tubing at old Loco Water Flood J. O. injured back"—the implication is that plaintiff hurt his back while straightening tubing at the location where he was working on December 15, 1969. This cannot be construed as notice of an accident at a different location on December 12, 1969.

Since the accident claimed by plaintiff and found by the trial court is an accident of December 12, 1969, the finding of no written notice of that accident is supported by substantial evidence.

Latent injury.

As an alternative to the first point, plaintiff claims that his injury was latent because plaintiff did not know the seriousness of his injury until May 24, 1970. If the injury was latent, the notice requirements would apply ". . . only after he knew, or should have known by the exercise of reasonable diligence, that he had incurred a compensable injury. . . ." Brown v. Safeway Stores, Inc., 82 N.M. 424, 483 P.2d 305 (Ct.App.1970).

The trial court found that plaintiff ". . . knew or should have known he had sustained a compensable injury and that the injury was of such gravity to cause any reasonable person to give notice of the accident and injury to his employer. Plaintiff admitted that he was in constant pain from the date of the accident; he said that he was prevented from performing his work and required assistance from his brother in the performance of his work." Compare Gomez v. Hausman Corp., (Ct.App.), 83 N.M. 400, 492 P.2d 1263, decided December 10, 1971. The trial court concluded the injury was not latent.

Plaintiff's own testimony is substantial evidence supporting the finding and the conclusion based thereon. Since the finding is supported by substantial evidence, the conclusion of no latent injury is to be

affirmed. Gutierrez v. Wellborn Paint Manufacturing Company, 79 N.M. 676, 448 P.2d 477 (Ct.App.1968). However, plaintiff states: "We believe that from the evidence . . . the court should have found that the injury was a latent one. . . ." Admittedly, the evidence on the question of latent injury is conflicting, but it is the trial court that resolves the conflicts. It did so by a finding supported by substantial evidence. Brown v. Safeway Stores, Inc., supra; see Clark v. Duval Corporation, 82 N.M. 720, 487 P.2d 148 (Ct.App.1971).

The judgment is affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

492 P.2d 1295

STATE of New Mexico, Plaintiff-Appellee,

v.

Jerry SEGURA, Defendant-Appellant.

No. 727.

Court of Appeals of New Mexico.

Jan. 7, 1972.

Perry S. Key, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

The appeal attacks the propriety of defendant's enhanced sentence as an habitual offender. See § 40A–29–5, N.M.S.A.1953 (Repl.Vol. 6). The enhanced sentence was imposed on the basis that defendant had two felony convictions in New Mexico. There had been two convictions—robbery and aggravated battery. No claim is made that defendant was not the person convicted of these two crimes. Defendant contends the aggravated battery conviction was not a felony. See § 40A–3–5, N.M.S.A.1953 (Repl.Vol. 6, Supp.1971). He asserts that if the aggravated battery conviction is held to be a felony then § 40A–3–5, supra, is unconstitutional.

Whether the aggravated battery conviction was a felony.

The procedure in connection with an habitual offender charge is set forth in § 40A–29–7, N.M.S.A.1953 (Repl.Vol. 6). The applicable portion of that statute reads: ". . . If the jury finds that the defendant is the same person and that he has in fact been convicted of such previous crimes as charged, . . . then the court shall sentence him to the punishment as prescribed. . . ."

At the hearing before the jury pursuant to § 40A–29–7, supra, the grand jury indictment and the jury verdict in the aggravated battery conviction were read into evidence. At the State's request, the trial court took judicial notice that the aggravated battery conviction was a felony conviction. Subsequently, the trial court instructed the jury "as a matter of law" that the aggravated battery conviction "as set forth in the indictment" was a felony. Consistent with this instruction and with the above quoted statute, the interrogatories required the jury to determine only whether the conviction had occurred and whether defendant was the person convicted.

Defendant contends the verdict in the aggravated battery case did not specify that the conviction was for a felony, that the evidence in the habitual offender proceeding does not support a determination that the aggravated battery conviction was a felony and that the interrogatories answered by the jury in the habitual felony proceeding do not state that the aggravated battery conviction was a felony. None of these contentions are meritorious if the trial court was correct in ruling, as a matter of law, that the aggravated battery conviction was a felony.

The issue is the correctness of the trial court's ruling. 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."

The grand jury indictment charged:

"On or about the 1st day of January, 1970, in the County of Bernalillo, State of New Mexico, the said JERRY SEGURA did unlawfully touch or apply force to the person of Eddie J. Lopez, with intent to injure the said Eddie J. Lopez and did so with a deadly weapon, towit: a knife, and did so in a manner whereby great bodily harm or death could be inflicted."

The verdict reads:

"We, the jury, find the Defendant guilty in the manner and form as charged in the Indictment."

The indictment and verdict show that defendant was charged and convicted under subdivision C of § 40A–3–5, supra. Violation of subdivision C is a third degree felony. The trial court's ruling, as a matter of law, was correct.

Whether Section 40A–3–5, supra, is constitutional.

The constitutional attack is two-fold.

First, defendant asserts that § 40A–3–5, supra, enacted by Laws 1969, ch. 137, § 1, violates the provisions of New Mexico Constitution Article IV, § 16. This provision concerns the titles of legislative acts. The applicable portion of this constitutional provision states:

> "The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed . . .; 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. . . ."

Defendant contends that § 40A–3–5, supra, covers two subjects, felonies and misdemeanors, and these subjects are not clearly expressed in the title. We disagree. The title of § 40A–3–5, supra, reads: *"An Act relating to crime; defining aggravated battery; imposing penalties; and amending section 40A–3–5 NMSA 1953. . . ."* The title clearly shows that the subject of the act is aggravated battery and, since "penalties" is plural, that more than one penalty is provided. Although § 40A–3–5, supra, provides that an aggravated battery may be either a misdemeanor or a felony, depending on the circumstances, New Mexico Constitution Article IV, § 16 was not violated. In re Estate of Welch, 80 N.M. 448, 457 P.2d 380 (1969); State v. Thomson, 79 N.M. 748, 449 P.2d 656 (1969); see Bureau of Revenue v. Dale J. Bellamah Corporation, 82 N.M. 13, 474 P.2d 499 (1970).

Second, defendant claims § 40A–3–5, supra, is void for vagueness because a defendant's aggravated battery may be either a felony or misdemeanor; that it depends entirely on the view of the evidence taken by the trier of facts. This contention was answered adverse to defendant in State v. Chavez, 82 N.M. 569, 484 P.2d 1279 (Ct.App.1971).

The enhanced sentence is affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

492 P.2d 1297

Irene VALDEZ, Deceased, by her surviving spouse, Daniel Valdez, Appellant,

v.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES of the State of New Mexico, Appellee.

No. 720.

Court of Appeals of New Mexico.

Dec. 10, 1971.

Certiorari Denied Jan. 18, 1972.

William J. Torrington, Alameda, for appellant.

David L. Norvell, Atty. Gen., Robert J. Laughlin, Julia C. Southerland, Agency Asst. Attys. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

This appeal concerns the welfare category—Aid to the Disabled. Irene Valdez applied for financial assistance under this category on January 8, 1971. The Sandoval County Office of the Department of Health and Social Services approved the application on January 15, 1971 and forwarded the application to the state office of the department. Mrs. Valdez died on January 22, 1971. This was prior to the date provided by department regulations for issuance of "the January assistance check." No January check was issued. Daniel Valdez is the husband of Irene Valdez. He appealed the failure of the department to issue the January check. A hearing before a hearing officer was held. Section 13-1-18, N.M.S.A.1953 (Repl.Vol. 3, Supp.1971). The appeal was denied. Daniel Valdez appeals directly to this court from that denial. Section 13-1-18.1, N.M.S.A.1953 (Repl.Vol. 3, Supp. 1971).

Daniel Valdez claims the department could not properly refuse to issue the January check and pay that check to the heirs of Irene Valdez because the State of New Mexico "owed" the January check and "a property right had been established." A department regulation, in effect at the time, provided that: "If the client dies before his check has been authorized, payment may not be made. . . ." Daniel Valdez claims the regulation is unreasonable, unlawful, arbitrary, capricious, inconsistent with New Mexico statutes and an unconstitutional deprivation of vested rights.

The basis for these claims is that the application of Irene Valdez, for financial assistance, had been approved. Section 13-1-14, N.M.S.A.1953 (Repl.Vol. 3) provides that the ". . . state department shall decide whether the case is eligible for assistance . . ." or ". . . the state department may allow the local offices to determine whether assistance shall be granted. . . ." The hearing officer's findings state the application was approved on January 15, 1971 but this was the local office approval. It may be inferred from another of the findings that a check would have been issued if Mrs. Valdez had not died, but the evidence in support of this deals only with accounting procedures. There is little, if any, evidence in the record that the state department had approved the application or had authorized the local

office to do so. Our review is based on the record. Section 13–1–18.1(B), supra. Both parties have argued this case on the basis that the application had been approved. Since this is the first appeal to reach this court under § 13–1–18.1, supra, we assume (but do not decide) the application was approved in accordance with § 13–1–14, supra.

At oral argument, Daniel Valdez conceded that his "right" to the January check must be found in the welfare statutes or the right doesn't exist. Thus, we do not consider any "rights" under § 21–7–1, N.M.S.A.1953 (Repl.Vol. 4) or at common law.

The "statutory right" on which Daniel Valdez relies is set forth in the last two sentences of § 13–1–14, supra. He says these sentences ". . . recognized the right of a successor to the deceased's money. . . ." They read:

> ". . . In case any person who is an approved recipient of old age assistance, aid to dependent children, or aid to needy blind, living on the first day of any month and entitled to assistance for that month, dies before any check issued for such assistance has been endorsed or cashed by recipient, the amount of said check may be paid to any person living with or caring for recipient at the time of recipient's death. The state department shall adopt reasonable rules and regulations prescribing the method of payment in such cases, and the manner of ascertaining the person entitled to receive the same."

These sentences do not mention the assistance category involved in this appeal—Aid to the Disabled. Thus, it is doubtful that § 13–1–14, supra, applies to this claim. Daniel Valdez contends the statute applies because welfare statutes are to be liberally construed and because the department regulations involved in this appeal make no distinction between categories of assistance. Since neither party questions the applicability of the quoted sentences to the category of Aid to the Disabled, we assume (but do not decide) that the quoted sentences apply to that category. See, however, NLRB v. Brown, 380 U.S. 278, 85 S. Ct. 980, 13 L.Ed.2d 839 (1965); State ex rel. McCulloch v. Ashby, 73 N.M. 267, 387 P.2d 588 (1963).

Even with the two assumptions made, the quoted sentences confer no statutory right upon Daniel Valdez. The sentences refer to checks that were issued but not endorsed or cashed by the recipient before the recipient's death. Thus, with the assumptions made, the sentences would apply if a check had been issued to Irene Valdez, but not endorsed or cashed by her in her lifetime. The sentences do not cover the factual situation in this case.

Neither the regulations applicable to this case, nor the amended regulations on which Daniel Valdez relies, pertain to the issuance of checks after a recipient's death. Rather, the regulations involved are consistent with the language of the quoted sentences and deal with the endorsement and cashing of checks issued prior to death.

Daniel Valdez had no "right" under § 13–1–14, supra, to the amount of financial assistance check which would have been issued to his wife if she had not died. Compare § 13–1–19, N.M.S.A.1953 (Repl.Vol. 3). Since no such "right" existed by statute, the claim that department regulations deprived him of that "right" is without merit.

The department's order denying the appeal is affirmed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

492 P.2d 1300

Frank N. DAVILA, Individually and as father and Next Friend of David R. Davila, Plaintiff-Appellant,

v.

Sabino RODRIGUEZ et al., Defendants-Appellees.

No. 725.

Court of Appeals of New Mexico.
Dec. 22, 1971.
Certiorari Denied Jan. 21, 1972.

Avelino V. Gutierrez, Albuquerque, for plaintiff-appellant.

Juan G. Burciaga, Ussery, Burciaga & Parrish, Albuquerque, for appellees Rodriguez.

Edward E. Triviz, Las Cruces, for appellees Mott and Ebbs.

OPINION

HENDLEY, Judge.

This is an appeal from an order granting defendants' motion for summary judgment in an action arising out of an automobile collision.

We reverse.

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. Where the slightest doubt exists as to the material facts, summary judgment should not be granted. Binns v. Schoenbrun, 81 N.M. 489, 468 P.2d 890 (Ct.App.1970). Here the facts are based on deposition testimony.

In granting the defendants' motions for summary judgment the trial court assumed there was negligence on the part of the defendants; and found that David was contributorily negligent; and that such contributory negligence was the proximate cause of his injury as a matter of law.

Defendants contend that David was not keeping a proper lookout; that he was under the influence of an intoxicating liquor; that he was speeding; that he was required to stop when he saw someone frantically waving a flashlight; that he did not slow down as soon as it was apparent there was another vehicle in his path; that his actions were an exercise of poor judgment; and that by reason of the foregoing he was guilty of contributory negligence as a matter of law.

Defendants, however, have only pointed to such testimony and inferences that flow therefrom in favor of themselves. They do not point to the testimony and reasonable inferences flowing therefrom in favor of David. That testimony and those inferences in favor of David are contrary to defendants' contentions. In light of the summary judgment rule we only view that testimony and those inferences favoring David. Binns v. Schoenbrun, supra. By so viewing, we conclude the summary judgment must be reversed. We cannot say as a matter of law that David was contributorily negligent.

Reversed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

492 P.2d 1301

BUDDY TAYLOR AND ARTHUR TAYLOR, a common law partnership, and George Bradford, Plaintiffs-Appellants,

v.

Marie Neer CAMPBELL, Executrix of the Last Will and Testament of John W. Campbell, deceased, Defendant-Appellee.

No. 700.

Court of Appeals of New Mexico.
Nov. 19, 1971.
Rehearing Denied Dec. 22, 1971.
Certiorari Denied Jan. 18, 1972.

Warren F. Reynolds, Easley & Reynolds, Hobbs, for plaintiffs-appellants.

Robert W. Ward, Lovington, for defendant-appellee.

OPINION

SUTIN, Judge.

Plaintiffs sued defendant to recover damages for loss of property by wrongful act. The case was tried to the court, and judgment entered for defendant. Plaintiffs appeal.

We affirm.

The trial court made the following findings of fact and conclusions of law:

Campbell, deceased, died testate on June 23, 1966. Prior to his death, Campbell was the president, manager and director of Campbell Grain & Milling Company, Inc., a New Mexico corporation.

On September 27, 1965 and October 23, 1965, the corporation issued to plaintiff Bradford and plaintiffs Taylor, respectively, original negotiable warehouse receipts for grain purchased from the corporation by these plaintiffs.

Between January 1, 1966 and September, 1966, the corporation made deliveries of part of the goods upon request of plaintiffs. In September, 1966, more than two months after Campbell's death, plaintiffs requested the corporation to deliver the balance of the goods represented by the warehouse receipts, and the request was not honored because the corporation did not have the grain. During Campbell's life, every demand on the corporation by plaintiffs for grain represented by plaintiffs' warehouse receipts was promptly honored. Plaintiffs failed to prove that if Campbell continued to live and a demand for grain had been made on the corporation during Campbell's lifetime, the demand would not have been honored.

Through the years, Campbell, either as an individual or as manager of the corporation, encountered financial difficulty and always found solutions. Plaintiffs failed to prove that during Campbell's lifetime the corporation was in grave financial difficulty and was unable to pay its debts as they matured, and they failed to prove any fraud or deceit by Campbell. Except for the proof of their money loss and the issuance of the warehouse receipts, plaintiffs failed to prove any of the material allegations contained in the several counts.

On November 1, 1966, the corporation was adjudged bankrupt. Plaintiffs filed claims and recovered less than one-third of their respective claims.

The trial court concluded Campbell was not guilty of fraud, deceit or conversion; that the plaintiffs' action, as ultimately presented, did not survive Campbell's death and judgment should be entered for defendant.

Plaintiffs challenged the trial court's findings and claimed error in the refusal and failure of the court to make plaintiffs' requested findings.

Plaintiffs contend, (1) the evidence was clear and convincing that Campbell was guilty of fraud; (2) plaintiffs' causes of action for fraud and conversion survived Campbell's death; and (3) there is substantial evidence that the corporation by Campbell converted part of plaintiffs' grain.

This lawsuit is a continuation of Taylor v. Alston, 79 N.M. 643, 447 P.2d 523 (Ct. App.1968), where summary judgment in favor of Campbell, deceased, was reversed, not because there was an actionable wrong on the part of Campbell, but because a genuine, material issue of fact was present.

We are not a trial court. We again remind appellants that our duties are to construe the findings most strongly in support of the judgment. If the findings have substantial support in the evidence, the facts found by the trial court are the facts upon which the case rests in this court. Witt v. Marcum Drilling Company, 73 N.M. 466, 389 P.2d 403 (1964). We must view the evidence and all reasonable inferences therefrom in their most favorable light in support of the findings. All contrary evidence and inferences must be disregarded, Rutledge v. Johnson, 81 N.M. 217, 465 P.2d 274 (1970), because the trial court weighs the evidence, not this court. Cave v. Cave, 81 N.M. 797, 474 P.2d 480 (1970); Jones v. Anderson, 81 N.M. 423, 467 P.2d 995 (1970).

We must be convinced that the findings cannot be sustained by substantial evidence or inferences therefrom. Hoskins v. Albuquerque Bus Company, 72 N.M. 217, 382 P.2d 700 (1963).

We have carefully reviewed the record and conclude that there is evidence which substantially supports the material findings of the trial court. It would serve no useful purpose to detail the evidence. Witt v. Marcum Drilling Company, supra.

On the issue of fraud, plaintiffs had the burden of proof. Each one admits that prior to Campbell's death on June 23, 1966, and thereafter, until September of 1966, every demand for grain was honored. The corporation never defaulted on its obligation because Campbell would go out and raise the money. In plaintiffs' opinion, each agreed without any doubt or question that had Campbell lived, they would have gotten their grain. They always had. Prior to his death, plaintiffs had no idea or notice that there was any danger of not getting their grain as represented by the warehouse receipts.

There is no strong, clear and convincing evidence that between 1965, when the warehouse receipts were purchased, and September, 1966, when demand was made for grain, that Campbell misrepresented any fact with intent to deceive upon which misrepresentation plaintiffs relied. Sauter v. St. Michael's College, 70 N.M. 380, 374 P.2d 134 (1962); Prudential Insurance Company of America v. Anaya, 78 N.M. 101, 428 P.2d 640 (1967). To prove fraud, more than a preponderance of evidence is required. "Evidence is not substantial in support of a finding of fraud unless it is clear, strong and convincing." McLean v. Paddock, 78 N.M. 234, 430 P.2d 392 (1967). On the evidence presented, the trial court could properly find that fraud was not proven.

On the issue of conversion, the definition is stated in Taylor v. McBee, 78 N.M. 503, 433 P.2d 88 (Ct.App.1967), as follows:

> Conversion is the wrongful possession of, or the exercise of dominion over, a chattel to the exclusion or in defiance of the owner's right thereto; or an unauthorized and injurious use thereof; or the wrongful detention after demand therefor by the owner.

Plaintiffs contend that Campbell participated in the corporation converting part of plaintiffs' grain.

All the warehouse receipts issued by the corporation provided that the corporation was "not the owner of the grain covered by this receipt either wholly, jointly or in common with others unless otherwise stated hereon. Upon return of this receipt . . . the said grain or grain of the same or better grade and quality will be delivered to the above named depositor or his order." The plaintiffs each certified that on the date stated on the receipt, he was the owner of the grain.

Under this receipt, the corporation had no duty to purchase grain for plaintiffs and keep this grain isolated in its warehouse until plaintiffs requested a delivery. Upon return of the receipt, its duty was to deliver grain of the same or better grade and quality. When plaintiffs requested delivery in September, 1966, after Campbell's death, the corporation failed to deliver because the corporation did not have the grain. The evidence supports the finding that plaintiffs failed to prove a conversion as defined in Taylor v. McBee, supra, during Campbell's lifetime. Campbell did not participate in any alleged conversion by the corporation which may have occurred long after his death. Since the trial court could properly find, from the evidence, that there was no conversion, we do not consider the arguments concerning the warehouseman statutes and whether a demand was a condition precedent to liability.

It is not necessary to determine whether actions for fraud and conversion survived Campbell's death.

Affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

493 P.2d 407

Mary Ann HARRIS, Administratrix of the Estate of Carl Leroy Harris, Deceased, Plaintiff-Appellee,

v.

Judy Gaye HARRIS, Defendant-Appellant,

v.

MODERN WOODMEN OF AMERICA and Aetna Life Insurance Company, Defendants-Appellees.

No. 9320.

Supreme Court of New Mexico.

Jan. 28, 1972.

Wade Beavers, Farmington, for appellant.

Baggett & Baggett, Farmington, for appellees.

OPINION

STEPHENSON, justice.

Judy Gaye Harris ("appellant"), a former wife of Carl Harris ("decedent"), appeals from a judgment involving the proceeds of two insurance policies on the life of the decedent of which she is the beneficiary.

Decedent and a previous wife, Mary Ann Harris ("appellee"), were divorced in 1963. In 1965 decedent married appellant. During their marriage he used community funds to purchase two insurance policies on his own life, and named appellant as beneficiary under each policy. Appellant and decedent were divorced on December 16, 1970. The divorce decree made no disposition of the life insurance policies, and decedent did not change beneficiaries under either policy prior to his death.

Four days after the divorce, on December 20, 1970, decedent died intestate, survived by both former wives, leaving as his heirs at law three children born to his first marriage.

Appellee, as administratrix of decedent's estate, brought an action for a declaratory judgment as to the rights of the parties to the life insurance proceeds, and defendant insurance companies interpleaded the funds. The court awarded one-half of the proceeds to appellee as administratrix and one-half to appellant. Appellant maintains that she is entitled to all of the proceeds. We agree and reverse.

Although the parties stipulated that decedent was delinquent in certain child support payments, and the court made certain findings as to such delinquencies, appellee did not sue or claim as a creditor of decedent's estate. Rather, she advanced a claim that one-half of the insurance proceeds was owned by decedent's estate. It is clear that the trial court's award was predicated on that theory. Thus decedent's apparent delinquency and appellant's status as a creditor are not factors in our decision.

The parties are in agreement on a number of issues: (1) since the insurance policies were acquired with community funds, they therefore became community property; (2) since the divorce decree made no disposition of the policies, the decedent and appellant owned the policies as tenants in common from the time of the divorce (see In re Miller's Estate, 44 N.M. 214, 100 P.2d 908 (1940); and (3) consequently, appellant, at the least, is entitled to one-half the proceeds by virtue of being a tenant in common as to the policy itself.

The nature of the ownership of the policies, however, does not necessarily resolve the question as to ownership of the proceeds, an issue upon which the parties do not agree. Appellant maintains that she is entitled to the other one-half of the proceeds by virtue of her status as beneficiary. Appellee maintains and convinced the trial court that since decedent owned a one-half interest in the policies as a tenant in common, his right to one-half of the proceeds passed to his estate upon his death.

The majority opinion in In re Miller's Estate, supra, likened an insurance contract to an expressed trust with some attributes of a testamentary distribution without the necessity of probate proceedings. The specially concurring opinion regarded such contract as being choses in action, but both opinions held on the facts there present that the policy itself, including the right to receive the sum named therein (the proceeds) upon the happening of the stated contingency was community property during coverture. The same result is implicit in Hickson v. Herrmann, 77 N.M. 683, 427 P.2d 36 (1967) grounded on the chose in action theory.

The issue here is ownership of the decedent's one-half of the proceeds. It is true, as stated in Hickson, that a person may own some rights in a policy in a manner different from the way in which he owns others, for example, the right to the proceeds. Ownership of rights to the cash surrender value, the right to borrow and the like, may not determine ultimate ownership of the proceeds following the happening of the contingency. This is so because one of the attributes of ownership is the right to designate or change the beneficiary, who owns the proceeds following the happening of the contingency. An insurance policy and rights incident thereto (including a right to the proceeds) is property. Subject to limitations and restrictions which are not present here, an owner may dispose of his real and personal property (including insurance policies), either inter vivos or by testamentary disposition in such manner as he sees fit. An insurance policy is a specialized form of property and a valid mode of disposition of the proceeds is by designation of the beneficiary who will receive them on the happening of a stated event.

Thus, simply because decedent was a tenant in common of the policies,

does not compel us to adopt appellee's conclusion. Decedent, being the owner of half of the policies, had the right to dispose of his half interest in the proceeds as he pleased. Since he did not change the beneficiary prior to his death, however, he exercised the right in favor of appellant. See Stokes v. McDowell, 70 Wash.2d 694, 424 P.2d 910 (1967); Cowan v. Sullivan, 48 Wash.2d 680, 296 P.2d 317 (1956); Northwestern Life Insurance Company v. Perrigo, 47 Wash.2d 291, 287 P.2d 334 (1955). Her divorce from defendant had no effect upon her status as a beneficiary. 5 Couch on Insurance 2d, § 29:4 (1960).

The judgment is reversed. The cause is remanded with instructions to set aside the judgment and proceed in a manner consistent herewith.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

493 P.2d 409

STATE of New Mexico, ex rel. S. E. REYNOLDS, State Engineer, Plaintiff-Appellee,

v.

Lorenzo MIRANDA, Defendant-Appellant.

No. 9325.

Supreme Court of New Mexico.

Jan. 21, 1972.

Rozier E. Sanchez, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Chester H. Walter, Paul L. Bloom, Sp. Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

MONTOYA, Justice.

Plaintiff-appellee State of New Mexico, ex rel., S. E. Reynolds, State Engineer, brought this action in the District Court of Socorro County, New Mexico, seeking a declaration that defendant-appellant Lorenzo Miranda had no right to use water from the Rio Grande Underground Water Basin or waters related thereto. The trial court, together with counsel for both parties, agreed that the case would turn on one legal issue, whether physical efforts of man resulting in visible diversion of water are necessary to the establishment of water

rights in the state of New Mexico. Plaintiff moved for summary judgment and, from the granting of plaintiff's motion, defendant appeals.

Across the defendant's property from east to west runs a water course called the Abo Wash, which has its source in the mountains approximately 18 miles from the Rio Grande River into which it empties. Following certain rains, water would flow intermittently through the wash, across defendant's property, and into the Rio Grande River. In earlier times, farmers would turn their stock into the wash to graze upon the tall, thick grass which grew in the wash and, in the fall season, the farmers would cut and store the grass for winter use. Sometime after World War I, a natural arroyo was formed and water flowing into the wash was naturally diverted from the wash into the arroyo. As a consequence, irrigation of the grassland began to decline. From that time until the present, the wash has diminished as a source of pasture for stock.

In 1969, defendant filed a declaration of ownership of water rights, claiming perfection thereof prior to 1907, and filed two applications to change the point of diversion, seeking to drill two water wells to be used for irrigating lands belonging to defendant.

Defendant's claims evidently are based upon the fact that his predecessors had made beneficial use of the grasses grown in and near the wash and that this would be a sufficient appropriation to entitle him to water rights in the Rio Grande Underground Basin. This contention is bolstered by testimony of two witnesses who can recall defendant's predecessors using the grass from the wash prior to 1907. However, neither witness could recall any man-made diversion of the waters from the wash, nor could defendant offer evidence of man-made diversion.

This court has not previously considered the specific question whether man-made works are essential to legally establish a water right, but we have enunciated principles which clearly state how appropriation of water to establish a water right may be accomplished. In Harkey v. Smith, 31 N. M. 521, 247 P. 550 (1926), this court held:

> "It may be stated generally that, under the arid region doctrine, uncontrolled by statute, the appropriation of water is accomplished by taking or diversion of it from a natural stream or other sources of water supply, with intent to apply it to some beneficial use or purpose, and consummated within a reasonable time by the actual application of the water to the use designed or some other useful purpose. * * *
>
> "Under this doctrine it is quite as necessary to make use of the water as it is to divert it, in fact, no appropriation can be effected without such use. The intent, diversion, and use must coincide."

In support of his contention that man-made diversion is not necessary to appropriate water rights, defendant relies upon Town of Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370 (1960). There an injunction was sought to prohibit the town from diverting waters forming the source of certain springs located on plaintiff's property. The court found that the water being diverted into town wells was a tributary to the springs on plaintiff's land, and that plaintiff, by watering of cattle and domestic use, had appropriated the water for a beneficial use. Defendant in the instant case cites the following language from Town of Genoa v. Westfall, supra:

> "It is not necessary in every case for an appropriator of water to construct ditches or artificial ways through which the water might be taken from the stream in order that a valid appropriation be made. The only indispensable requirements are that the appropriator intends to use the waters for a beneficial purpose and actually applies them to that use."

We believe that defendant's reliance on the Westfall case is misplaced. The Colorado court has established the dual requirements that the appropriator in-

tend to use the water, and that he actually apply it to a beneficial use in order for man-made diversion to be unnecessary to an appropriation of water. Even if man-made diversion were unnecessary, defendant would be required to show that his predecessors in interest intended to appropriate water for beneficial use. The mere cutting of the grasses would not be sufficient to manifest an intention to appropriate the water for beneficial use, nor can it be said that defendant's predecessors applied the waters to beneficial use by grazing cattle upon the grasses in the wash. These acts only manifested an intention to reap nature's bounty gratuitously provided by water flowing through the Abo Wash, not to appropriate the water itself. The lack of intention to appropriate the water in the wash is also buttressed by evidence in the record which shows that defendant and his predecessors in interest made no attempt to divert water from the arroyo into the wash when the waters flowing into the wash became diverted into the arroyo. The grazing on and harvesting of grasses does not constitute appropriation of the water in the Abo Wash.

More in point is Walsh v. Wallace, 26 Nev. 299, 67 P. 914 (1902), wherein the Nevada court faced the question whether man-made diversion was necessary to the appropriation of water. Certain parties had claimed water rights on the basis that they had cut wild grasses produced by the overflow of the Reese River. In rejecting the contention that cutting grasses and grazing cattle were sufficient to claim a valid appropriation, the court stated:

> "* * *. In order, therefore, to constitute a valid appropriation of water, within the meaning of that term as understood by the decisions of this court and the laws of the state, and, as we believe, by the decisions of the courts and laws of other states in the arid region, there must be an actual diversion of the same, with intent to apply it to a beneficial use, followed by an application to such use within a reasonable time. * * *"

The above Nevada case illustrates the better rule with regard to appropriation of water rights for agricultural purposes.

We hold that man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes.

The decision of the trial court is affirmed.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

493 P.2d 411

The BENEVOLENT AND PROTECTIVE ORDER OF ELKS, LODGE NO. 461, Petitioner,

v.

NEW MEXICO PROPERTY APPRAISAL DEPARTMENT, Respondent.

No. 9315.

Supreme Court of New Mexico.

Jan. 28, 1972.

Nordhaus & Moses, Donald B. Moses, James F. Beckley, Albuquerque, for petitioner.

David L. Norvel, Atty. Gen., Anne K. Bingaman, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

OMAN, Justice.

This cause is before us on a writ of certiorari issued to the New Mexico Court of Appeals. That court affirmed the Property Tax Appeal Board in holding plaintiff's property subject to ad valorem taxes. The Benevolent and Protective Order of Elks, Lodge No. 461 v. New Mexico Property Appraisal Department, No. 590, Court of Appeals, decided July 30, 1971. We agree with the opinion of the Court of Appeals and affirm its decision.

Because of some of plaintiff's contentions as to the extent and effect of prior opinions of this court, and because the language in some of those prior opinions may be subject to different interpretations, we comment briefly on some of the guides or rules which should be followed and applied in determining whether or not property is exempt from taxation under that portion of Art. VIII, § 3 of the New Mexico Constitution, which is here in question and which provides: "* * * all property used for * * * charitable purposes * * * shall be exempt from taxation. * * *"

Clearly the sole question to be determined is whether the property is "used" for charitable purposes. Mountain View Homes, Inc. v. State Tax Commission, 77 N.M. 649, 427 P.2d 13 (1967). This determination must necessarily depend on the uses being made of each property which it is claimed comes within the exemption. Except to the extent that the facts as to use are so nearly alike as to logically compel like results, no case can be said to constitute a controlling precedent for another case in this area. Mountain View Homes, Inc. v. State Tax Commission, supra; Albuquerque Lodge, No. 461, B.P.O.E. v. Tierney, 39 N.M. 135, 42 P.2d 206 (1935). The uses made of the property in question, which are set forth in the opinion of the Court of Appeals, differ considerably from the uses with which we were concerned in the cases of Albuquerque Lodge, No. 461, B.P.O.E. v. Tierney, supra, and Temple

Lodge No. 6, A.F. & A.M. v. Tierney, 37 N.M. 178, 20 P.2d 280 (1933), upon which plaintiff largely relies.

The meanings of "charity" and "charitable use" are discussed at length in Mountain View Homes, Inc. v. State Tax Commission, supra.

Although our constitutional provision does not require property to be used exclusively for charitable purposes in order to come within the exemption, the uses for these purposes must be substantial and must be the primary uses made of the property. Temple Lodge No. 6, A.F. & A. M. v. Tierney, supra. See also Mountain View Homes, Inc. v. State Tax Commission, supra; Brockton, Etc. v. Assessors of Brockton, 321 Mass. 110, 72 N.E.2d 406 (1947); Indianapolis Elks Bldg. Corp. v. State Bd. of T. Com'rs., 251 N.E.2d 673 (Ind.App.1969). The primary uses made of the property here in question are not charitable, as found by the Property Tax Appeal Board.

There appears to be some question as to the strictness or the liberality of construction which should be given our constitutional provision. Although the constitutional or statutory provisions involved vary, a number of jurisdictions have applied in this area of charitable uses the rule of strict construction against tax exemptions. See Annot., 39 A.L.R.3d 640, § 3[a] at 648 (1971) and cases therein cited. A fewer number of jurisdictions, including New Mexico, have applied more liberal rules of construction to exemptions from taxation of property used for charitable purposes. See § 3[b] at 650 of the same annotation in 39 A.L.R.3d. The rule in New Mexico is that of reasonable construction, without favor or prejudice to either the taxpayer or the State, to the end that the probable intent of the provision is effectuated and the public interests to be subserved thereby are furthered. Temple Lodge No. 6, A.F. & A.M. v. Tierney, supra. See also Besser Company v. Bureau of Revenue, 74 N.M. 377, 394 P.2d 141 (1964); Chavez v. Commissioner of Revenue, 82 N.M. 97, 476 P.2d 67 (Ct.App. 1970); Evco v. Jones, 81 N.M. 724, 472 P. 2d 987 (Ct.App.1970).

The decision of the Court of Appeals affirming the holding of the Property Tax Appeal Board should be affirmed.

It is so ordered.

COMPTON, C. J., and McMANUS, STEPHENSON and MONTOYA, JJ., concur.

493 P.2d 413

DUVAL CORPORATION, Appellee,

v.

EMPLOYMENT SECURITY COMMISSION of New Mexico, Appellant.

No. 9321.

Supreme Court of New Mexico.

Jan. 28, 1972.

Richard Baumgartner, Albuquerque, for appellant.

Hinkle, Bondurant, Cox & Eaton, Paul Kelly, Jr., Roswell, for appellee.

OPINION

McMANUS, Justice.

Appellee, Duval Corporation, hereinafter called the Company, hired the claimant, Thurman Dewie Pruit, on December 10, 1951. Claimant, at that time, joined the Company's optional retirement plan. He was aware of the fact that the plan made retirement mandatory at age sixty-five. The union joined with the Company in urging that the employees join the plan but the plan was not pursuant to a union agreement and testimony taken from the employment security commission hearing indicated that the plan was strictly devised by the Company.

Claimant worked until April 1, 1970, when he reached the age of sixty-five. Prior to retirement, claimant had requested that he be allowed to continue working after the age of sixty-five. Permission to continue working was denied and he was routinely processed for mandatory retirement.

On April 8, 1970, claimant filed a claim for unemployment insurance and was granted benefits on April 15, 1970. The appellee protested to the claims deputy of the Employment Security Commission of New Mexico on the basis that the Company should not be charged for the benefits since Pruit had voluntarily left his job. On September 21, 1970, the claims deputy determined that Pruit had been involuntarily dismissed within the meaning of the statute and that he qualified to receive unemployment benefits. On September 24, 1970, claimant found and accepted a new job and he is no longer receiving unemployment benefits.

The Company, on October 12, 1970, appealed the deputy's ruling to the appeals referee of the Employment Security Commission. The referee affirmed the deputy's determination. An appeal was taken to the Employment Security Commission as a body on December 4, 1970. Following a hearing on January 14, 1971, the decisions below were affirmed on February 12, 1971.

The Company petitioned the District Court of Eddy County for a writ of certiorari. The writ was granted and, following a hearing based on testimony from the Commission hearing and a memorandum brief submitted by the appellant, the district court reversed the Commission. The court concluded that the New Mexico statute is not intended to apply to persons who draw pensions and social security but only to those who need assistance as the result of business or political fluctuations and who are out of work and are without means to support themselves and their families.

It is from this decision that the Employment Security Commission appeals.

This is the first case of this type in New Mexico, but the problem is not new elsewhere. A number of jurisdictions hold that even though a person must retire under mandatory provisions, he is not eligible for unemployment insurance. On the other hand, some jurisdictions hold that under mandatory retirement provisions of a pension plan, the employee can apply for unemployment benefits. These decisions are irreconcilable with one another.

The District Court of Eddy County, New Mexico, relied on § 59-9-2, N.M.S.A. (1953 Comp.), which is the declaration of the state's public policy toward unemploy-

ment benefits. The pertinent part of that statute is:

"* * * [T]he public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. * * *"

The other pertinent sections of the statute are §§ 59-9-4, 59-9-5 and 59-9-18, N.M.S.A. (1953 Comp.). Section 59-9-4 sets down the conditions for eligibility of benefits; § 59-9-5 establishes the conditions of disqualification for benefits, and § 59-9-18 is the protection of rights and benefits section.

Section 59-9-5(a), N.M.S.A. (1953 Comp.), reads as follows:

"An individual shall be disqualified for benefits—

(a) For the week in which he has left work voluntarily without good cause, if so found by the commission, and for not less than one (1) nor more than thirteen (13) consecutive weeks of unemployment which immediately follow such week (in addition to the waiting period) as determined by the commission according to circumstances in each case, and such individual's total benefit amount shall be reduced in a sum equal to the number of weeks of disqualification multiplied by his weekly benefit amount."

These statutory provisions are identical to or quite similar to unemployment statutes in the states that have litigated the problem now before the Court. In all of the cases, the statutes seem to be the vehicle for the reasoning, rather than the motivating force behind the conclusion.

One of the major cases in this area that discusses both sides of the issue is Employment Security Com'n v. Magma Copper Co., 90 Ariz. 104, 366 P.2d 84 (1961). It was there held that three employees who were forced to leave their employment under a pension plan did not voluntarily leave without good cause and were entitled to unemployment benefits. The Arizona court relied on A.R.S. § 23-775, subsec. 1 (1956), which is the Arizona disqualification statute and is similar in language to § 59-9-5, supra. The court, in Magma, supra, noted that the employees had not left voluntarily without good cause within the meaning of the statute, but, on the contrary, the claimants had met all of the tests of eligibility as provided in A.R.S. § 23-771 (1956) and were entitled to benefits.

The court there discussed the evolution of litigation in the area of mandatory retirees and unemployment benefits beginning with Campbell Soup Co. v. Board of Review, 13 N.J. 431, 100 A.2d 287 (1953), where the New Jersey Supreme Court held that mandatory retirement was not a voluntary leaving of employment under the statute and thus the employees were entitled to benefits. That court further examined the bargaining agreement under which the pension plan had been created and concluded that voluntary acceptance of the agreement did not amount to a voluntary waiver of rights, i.e., a contract cannot operate as an advance surrender of rights. The reasoning here was based on R.S. 43:21-15(a), N.J.S.A. (1950), similar in language to A.R.S. § 23-784 and to our § 59-9-18, supra, which states, in part:

"* * * Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this act [59-9-1 to 59-9-29] shall be void. * * *."

Campbell Soup Co., supra, was followed by Bergseth v. Zinsmaster Baking Co., 252 Minn. 63, 89 N.W.2d 172 (1958), where the court held that two claimants, mandatorily retired at sixty-five, had traded their unemployment benefits for the concessions obtained from the employer under the collective bargaining agreement. Bergseth, supra, was followed by Lamont v. Director of Division of Employ. Security, 337 Mass.

328, 149 N.E.2d 372 (1958), which held that the claimant was not eligible under the same reasoning of Bergseth. Lamont, supra, was later overruled by the Massachusetts legislature.

The final case discussed in Magma, supra, and the one the Arizona court relied on was Warner Co. v. Unemployment Comp. Bd. of Rev., 396 Pa. 545, 153 A.2d 906 (1959). In that case, benefits were allowed as a matter of public policy. The court, in Magma, supra, recognized that the cases are irreconcilable but concluded that the better rule is to allow the benefits.

In the Magma case, supra, the court said:

> "Of course, the short term benefit provided by unemployment insurance is at best a poor substitute for any comprehensive solution of the problem of the aging worker. But if it helps in any small measure to ease the plight of those forced to change occupations after a lifetime of service the legislative purpose is fulfilled."

With this statement we agree. This philosophy, in our opinion, is completely in accord with the Declaration of State Policy as concerns New Mexico in § 59-9-2, N.M.S.A. (1953 Comp.). In Redd v. Texas Employment Commission, 431 S.W.2d 16 (Tex.Civ.App.1968), the Texas Court of Civil Appeals, while holding against the claimant on other grounds, said:

> "We agree with the court in the Magma Copper case, supra, that regardless of the minor factual differences, the decisions in the two divergent lines of authorities cannot be reconciled. See also St. Joe Paper Company v. Gautreaux, supra [Dist.Ct.App.Fla.1965, 180 So.2d 668]. We believe that the better view and the one that is more in line with the holdings of Texas courts in unemployment cases is that expressed in the Pennsylvania, Alabama, Arizona, Florida and Indiana cases cited above."

We find from the circumstances of this case that claimant herein did not leave his employment on a voluntary basis, and was entitled to the benefits of our unemployment compensation laws.

As to the point whether or not the employer's experience rating should be charged if benefits are allowed, we also hold that since it is our opinion that the claimant did not leave his employment voluntarily, the employer cannot be relieved of the charges on its experience rating account.

The cause is reversed with directions to enter an order that claimant was eligible for unemployment compensation benefits during the period of his unemployment, following his retirement, and that the employer's experience rating account is to be charged accordingly.

It is so ordered.

COMPTON, C. J., and MONTOYA, J., concur.

493 P.2d 416

STATE of New Mexico, Plaintiff-Appellee,

v.

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

No. 731.

Court of Appeals of New Mexico.

Jan. 7, 1972.

George P. Jones, III, Albuquerque, for Andrew K. Patton.

Douglas T. Francis, Albuquerque, for Lyle V. Moody.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Under Rule 93, § 21-1-1(93), N.M.S.A. 1953 (Repl. Vol. 4), Patton and Moody sought to vacate a prior judgment and sentence upon conviction for armed robbery with a sawed-off shotgun. This court granted them the right to a hearing on the motion in the trial court. State v. Patton, 82 N.M. 29, 474 P.2d 711 (Ct.App.1970).

The trial court found that in July, 1967, after the arrest, Patton and Moody each gave a written statement to members of the Albuquerque Police Department. Each consulted with his attorney, was competently and effectively represented, and voluntarily pleaded guilty without promises or threats while knowing the consequences thereof. These findings are supported by substantial evidence. Therefore, the plea of guilty is binding. State v. Robbins, 77 N.M. 644, 427 P.2d 10 (1967). Although Patton, answering interrogatories by the court, stated that he did not plead guilty with full knowledge of the consequences, his answer was not conclusive. The record shows that Patton was fully advised by his counsel. State v. Elledge, 81 N.M. 18, 462 P.2d 152 (Ct.App.1969).

The foregoing disposes of Moody's claim that his plea was involuntary and Patton's claim that his plea resulted from threats and promises and was made without an understanding of the consequences.

The claim of both defendants that they did not have effective assistance of counsel is answered by State v. Wilson, 82 N.M. 142, 477 P.2d 318 (Ct.App.1970). Patton's claim that he made an incriminating statement in a manner that violated his constitutional rights and induced his plea is answered by Burton v. State, 82 N.M. 328, 481 P.2d 407 (1971). Patton's claim that he should have been proceeded against by information rather than by indictment is answered by New Mexico Constitution, Art. II, § 14 and State v. Mosley, 79 N.M. 514, 445 P.2d 391 (Ct.App.1968).

Finally, Moody's claim that he was prejudiced because a portion of the record in his case was missing, is also without merit. The missing portion of the record is a hearing on the issue of reduction in bond and a hearing concerning change of coun-

sel. Moody makes no effort to show how he was prejudiced. See State v. Brill, 81 N.M. 785, 474 P.2d 77 (Ct.App.1970). No "colorable need" for the missing records is shown. See Mayer v. City of Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971).

Affirmed.

WOOD, C. J., and HENDLEY, J., concur.

493 P.2d 418

Jose S. ORTIZ, Plaintiff-Appellant,

v.

ORTIZ & TORRES DRI-WALL COMPANY, Employer, and Ohio Casualty Company, Insuror, Defendants-Appellees.

No. 723.

Court of Appeals of New Mexico.

Jan. 7, 1972.

Richard F. LaRoche, Smith, Ransom & Deaton, Albuquerque, for plaintiff-appellant.

Le Roi Farlow, Daniel C. Lill, Albuquerque, for defendants-appellees.

OPINION

WOOD, Chief Judge.

This workmen's compensation case presents two issues: (1) the meaning of accident and (2) notice of an accident. Defendants raised both of these issues in their motion to dismiss at the close of plaintiff's case. The trial court granted the motion, made findings of fact and conclusions of law and entered judgment in favor of defendants. Plaintiff appeals.

At oral argument it was suggested that plaintiff's appeal should not be considered because plaintiff, in his statement of proceedings, did not specifically challenge the findings of fact. See § 21-2-1(15)(16), N.M.S.A.1953 (Repl.Vol. 4). We agree that there is a technical violation of the rule. Plaintiff, in compliance with the rule, did set forth requested findings which he contends should have been found and specifically challenged certain of the trial court's conclusions of law. Also, the wording of the statement of proceedings makes it clear that certain findings were challenged. The only defect is the failure to specifically state that certain findings were challenged. In these circumstances, review of the issues, on the merits, is not to be denied. Section 21-2-1(17), subparagraphs 10, 12 and 14, N.M.S.A.1953 (Repl.Vol. 4).

The testimony of two Ortiz witnesses will be referred to—the plaintiff and the Ortiz who, with his partner Torres, constitute the defendant employer.

The meaning of "accident."

Plaintiff, employed by defendant employer as a "rocker" was installing sheet rock in a house on March 9, 1970. The trial court found that at about 3:30 that afternoon ". . . plaintiff felt a pain in his back at about the belt-line. At the time plaintiff felt the pain he was not in an accident, and the pain was not caused by trauma or by accident." This "finding" clearly holds the "pain in the back" was not an accident because "not caused by trauma or by accident." The record shows the sense in which the trial court used the word "accident." The trial court remarked: ". . . you have to trip or something, you can't just get a pain in the middle of an ordinary occupation and claim accident. . . ."

Lyon v. Catron County Commissioners, 81 N.M. 120, 464 P.2d 410 (Ct.App.1969) states:

> "In the sense of the statute, 'accidental injury' or 'accident' is an unlooked for mishap, or untoward event which is not expected or designed. Gilbert v. E. B. Law and Son, Inc., 60 N.M. 101, 287 P. 2d 992 (1955); Aranbula v. Banner Min. Co., 49 N.M. 253, 161 P.2d 867 (1945); Webb v. New Mexico Pub. Co., 47 N.M. 279, 141 P.2d 333, 148 A.L.R. 1002 (1943); Stevenson v. Lee Moor Con-

tracting Co., 45 N.M. 354, 115 P.2d 342 (1941).

"It is unnecessary that a workman be subjected to an unusual or extraordinary condition or hazard not usual to his employment for an injury to be an accidental injury under the compensation act. Alspaugh v. Mountain States Mutual Casualty Co., 66 N.M. 126, 343 P.2d 697 (1959); Gilbert v. E. B. Law and Son, Inc., supra; Webb v. New Mexico Pub. Co., supra.

"Based upon the reasoning of these cases we take it that a malfunction of the body itself, such as a fracture of the disc or tearing a ligament or blood vessel, caused or accelerated by doing work required or expected in employment is an accidental injury within the meaning and intent of the compensation act.

"Larson in his treatise on the law of workmen's compensation says: 'The "by accident" requirement is now deemed satisfied in most jurisdictions either if the cause was of an accidental character or if the effect was the unexpected result of routine performance of the claimant's duties. Accordingly, if the strain of claimant's usual exertions causes collapse from . . . back weakness, . . . the injury is held accidental.' 1A Larson, Workmen's Compensation Law, § 38.00 (1967)."

Lyon, supra, shows that under our Workmen's Compensation law, an accident can be "a malfunction of the body itself." Two medical witnesses testified to such a malfunction. One testified that plaintiff had "an internal derangement of the lumbosacral disk." The other testified that plaintiff had ". . . a ruptured disk with nerve root pressure, and I think this disk was probably a bulging type and not one that broke out completely, . . ." The first medical witness also testified that such a malfunction could result from lifting, bending or twisting. Plaintiff testified he couldn't remember exactly what he was doing when he felt the back pain; ". . . but either I was lifting sheet rock or carrying sheet rock or bending down, maybe probably all three of them."

"[A] pain in the middle of an ordinary occupation" can be an accident under *Lyon,* supra. The accident, of course, must "arise out of the employment." See Berry v. J. C. Penney Co., 74 N.M. 484, 394 P.2d 996 (1964). There is evidence which, if believed, would have sustained a finding of an accidental injury arising out of plaintiff's employment.

Defendants urge, however, that there is evidence to sustain the finding that plaintiff "was not in an accident." We do not consider the question of whether there is evidence to sustain a finding of "no accident" when the word "accident" is given its proper meaning under our Workmen's Compensation law. See Montoya v. Leavell-Brennand Construction Co., 81 N.M. 616, 471 P.2d 186 (Ct.App. 1970). The question is not considered because in finding "no accident" the trial court used an erroneous meaning of "accident." Compare Marchiondo v. Scheck, 78 N.M. 440, 432 P.2d 405 (1967).

Notice of an accident.

The aspect of "notice to the employer" involved is notice of an accident. See § 59–10–13.4(B), N.M.S.A.1953 (Repl.Vol. 9, pt. 1). The trial court found that the employer did not have actual knowledge of the alleged accident of March 9, 1970.

Plaintiff and Ortiz, the partner, agreed in their testimony that in a conversation on March 19, 1970 plaintiff told the partner about his back pain and when and where the pain came on. Both agreed that the partner told plaintiff to go to a doctor, which plaintiff did on the following day. The partner testified he didn't know whether plaintiff told him how he hurt his back, ". . . but I figured how else but hanging rock, . . ."

The partner also testified that he thought plaintiff was talking about a prior injury to his back. Defendants rely on this testimony to sustain the trial court's finding of no actual knowledge. We as-

sume, but do not decide, that the testimony of the partner would sustain a finding of no actual knowledge of an accident as of March 19, 1970. This does not dispose of the problem of notice because the issue is whether the defendant employer had actual knowledge of an accident within thirty days of March 9, 1970. Rohrer v. Eidal International, 79 N.M. 711, 449 P.2d 81 (Ct.App.1968).

In addition to talking to Ortiz, the partner, plaintiff talked to the other partner, Torres, on either March 20th or March 21st. The details of this conversation are not clear from the record. However, Torres filled out an "Employer's First Report of Injury" and Ortiz, the partner, signed this report. The report was delivered to the insurance agent on either March 22 or 23, 1970. This report identifies an accident and an injury on March 9, 1970.

Defendants recognize that the report, filled out by one partner and signed by the other partner, together with the evidence of plaintiff's conversation with each of the partners, would be sufficient to sustain a finding that defendants had actual knowledge of the alleged accident. Geeslin v. Goodno, Inc., 77 N.M. 408, 423 P.2d 603 (1967); Waymire v. Signal Oil Field Service, Inc., 77 N.M. 297, 422 P.2d 34 (1966). They claim, however, that this evidence does not compel a finding of "actual knowledge;" that this evidence is to be considered with all other evidence going to the employer's actual knowledge.

We, of course, are required to view the evidence in the light most favorable to support the trial court's finding of no actual knowledge. The question is: what evidence are we to view? Ortiz, the partner, understood that plaintiff was referring to a prior injury in their conversation of March 19th. We have assumed that the employer cannot be charged with actual knowledge of the accident as a result of this conversation. Subsequently, however, there is the conversation with Torres and the report in which both partners participated.

This evidence (the Torres conversation and the report) is uncontradicted. Medler v. Henry, 44 N.M. 275, 101 P.2d 398 (1940) sets forth situations where a trial court can disregard uncontradicted testimony. The *Medler* rule has been followed in numerous New Mexico decisions. None of the *Medler* situations apply in this case on the question of actual knowledge of the alleged accident. Thus, the trial court could not properly disregard the uncontradicted evidence that the employer had actual knowledge of the alleged accident by March 23rd. The trial court's finding to the contrary is erroneous

Plaintiff, having been successful in this appeal, asks for an award of attorney fees. The request is premature. Attorney fees are awarded only when there has been an award of compensation and at this point there is no such award. Section 59–10–23(D), N.M.S.A.1953 (Repl.Vol. 9, pt. 1); Keilman v. Dar Tile Company, 74 N.M. 305, 393 P.2d 332 (1964).

Having determined that the trial court used an erroneous definition of "accident" and erroneously disregarded the uncontradicted evidence that the employer had actual knowledge of the alleged accident, the judgment in favor of defendants is reversed. The erroneous judgment having been entered prior to the presentation of defendants' case, the cause is remanded for a new trial.

It is so ordered.

HENDLEY, J., concurs.

COWAN, J., not participating.

SUTIN, Judge (dissenting).

I dissent here solely to illustrate how confusion, contradiction and conflict intermingle in New Mexico decisions. Rules of law and judicial decisions are often interpreted by appellate judges, including the writer of this opinion, to serve a personal sense of justice. That is why conflicting opinions parade down through New Mexico judicial history.

In this case, the plaintiff did not challenge the trial court's findings pursuant to § 21-2-1(15) (16), N.M.S.A.1953 (Repl.Vol. 4). This rule reads in part:

> If any finding is challenged, it *must* be so indicated by a parenthetical note referring to the appropriate numbered point in the argument. [Emphasis added.]

This rule became effective on and after April 15, 1966. Before and after that date, courts of review have continuously held that unchallenged findings were deemed true and controlling. They become the facts of the case for purpose of review. Anderson v. Jenkins Construction Company, 83 N.M. 47, 487 P.2d 1352 (Ct.App. 1971); Trinidad Industrial Bank v. Romero, 81 N.M. 291, 466 P.2d 568 (1970); Ed. Black's Chevrolet Center, Inc. v. Melichar, 81 N.M. 602, 471 P.2d 172 (1970); Farmers and Stockmens Bank of Clayton v. Morrow, 81 N.M. 678, 472 P.2d 643 (1970); Chavez v. Chavez, 54 N.M. 73, 213 P.2d 438 (1950); Case v. Henry, 55 N.M. 154, 228 P.2d 433 (1951); Hopkins v. Martinez, 73 N.M. 275, 387 P.2d 852 (1963). For workmen's compensation cases, see McAfoos v. Borden Implement Co., 75 N.M. 50, 400 P.2d 470 (1965); Scott v. Homestake-Sapin, 72 N.M. 268, 383 P.2d 239 (1963); Kerr v. Akard Brothers Trucking Company, 73 N.M. 50, 385 P.2d 570 (1963). Many more cases can be cited. See New Mexico Digest, Appeal and Error, § 219(2). From at least 1915 through 1971, this rule has been a thorn in the side of attorneys who have not studied trial and appellate procedure. Now, this thorn can be avoided by pleading for justice under Rule 17(10) (12) and (14) mentioned in the majority opinion.

Rule 17(10) provides that this court shall disregard any error or defect in the 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." [Emphasis added.] The majority opinion relies on this rule and then violates it.

Rule 17(12) and (14) fall in the same category. I would not dissent if the Supreme Court would amend its rules of appellate procedure and overrule the past. Plain and obvious errors or mistakes should be noticed if not called to the attention of the trial or appellate court so that each case can be decided on the merits.

This court during 1971 refused to follow this adventure in other types of cases which required some of my dissenting opinions. For example, see State v. Mares, 82 N.M. 682, 486 P.2d 618 (Ct. App.1971), reversed, Mares v. State, 83 N. M. 225, 490 P.2d 667 (1971); Pavlos v. Albuquerque National Bank, 82 N.M. 759, 487 P.2d 187 (Ct.App.1971); Saiz v. City of Albuquerque, 82 N.M. 746, 487 P.2d 174 (Ct.App.1971); State v. Atwood, 83 N.M. 416, 492 P.2d 1279 (Ct.App.1971); International Minerals & Chemical Corporation v. Property Appraisal Department, 83 N.M. 402, 492 P.2d 1265 (Ct.App.1971); State v. Gruender, 83 N.M. 327, 491 P.2d 1082 (Ct. App.1971).

The trial court found that plaintiff was not in an accident, and the pain was not caused by trauma or by accident, and plaintiff did not give statutory notice of any accident. These unchallenged findings support the trial court's conclusions that plaintiff was not entitled to any benefits under the Workmen's Compensation Act.

The Meaning of "Accident."

The majority opinion states that the trial court used an erroneous definition of "accident." The opinion considers the evidence most favorable to plaintiff instead of defendant. Plaintiff testified that he was working on the floor inside a house and had a little pain. The pain "stayed a little bit and then went away," and he "kept on working until four-thirty." That night, plaintiff took a hot bath and the pain went away and he felt fine the next morning and went back to work. He could not remember what he was doing at the time he felt pain and stated he could not remember being involved in an accident on the date the pain started; he was not lifting or

bending, and did not have sheetrock over his head. In fact, plaintiff stated he was not in any accident when he had his pain.

This case does not fall within the bounds of Lyon v. Catron County Commissioners, 81 N.M. 120, 464 P.2d 410 (Ct.App.1969). The undisputed facts in Lyon are different from those in the present case. In *Lyon,* there was an "unlooked for mishap, or untoward event which [was] not expected or designed." In the present case, there were none. There was evidence of no exertions, no unexpected result of routine performance, no pain caused by some thing of an accidental character, no malfunction of the body itself, caused or accelerated by doing work required or expected in employment.

To the contrary, see Montoya v. Leavell-Brennand Construction Company, 81 N.M. 616, 471 P.2d 186 (Ct.App.1970), where *Lyon* is distinguished; Bell v. Kenneth P. Thompson Co., Inc., 76 N.M. 420, 415 P.2d 546 (1966), where "the trial court, who saw and heard the plaintiff, could deny full credence to the testimony of plaintiff."; Jacquez v. McKinney, 78 N.M. 641, 436 P.2d 501 (1968); Williams v. City of Gallup, 77 N.M. 286, 421 P.2d 804 (1966); Montano v. Saavedra, 70 N. M. 332, 373 P.2d 824 (1962).

Notice of an Accident.

It is not necessary to discuss the facts of notice of an accident to the employer. The majority opinion accepts the evidence most unfavorable to the findings of the trial court. The evidence is not undisputed. ". . . [T]his court will not reverse the lower court unless there is no evidence upon which the court could have based its finding." Ham v. Ellis, 42 N.M. 241, 76 P.2d 952 (1937); New Mexico Digest, Appeal & Error, § 1010(1).

493 P.2d 768

STATE of New Mexico, Plaintiff-Appellee,

v.

William B. ORZEN, Allen F. Cooper, Defendants-Appellants.

No. 729.

Court of Appeals of New Mexico.

Jan. 14, 1972.

Charles Driscoll, Albuquerque, for William B. Orzen.

Michael Norwood, Richard Bosson, Albuquerque, for Allen F. Cooper.

David L. Norvell, Atty. Gen., Ray Sholenbarger, Special Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

This appeal is concerned with an incident which occurred at the basketball arena of the University of New Mexico in February, 1970. A basketball game was scheduled between the University and Brigham Young University. During the presentation of the colors and the playing of the national anthem various objects were thrown toward the playing surface of the basketball court. Some of the objects hit spectators, some landed on the court. The start of the game was delayed 35 to 40 minutes while the surface of the court was restored to playing condition.

Orzen was identified as having thrown a paper cup containing either ice, or water or beads, and as having thrown a balloon filled with a liquid. Cooper was identified as having thrown a balloon. Both were convicted of violating § 40A–13–1(B), N.M.S.A.1953 (Repl.Vol. 6). Their appeal raises issues concerning: (1) the applicability of the statute under which they were convicted; (2) the meaning of "disturb"; (3) evidence of a disturbance; (4) extrajudicial identification and (5) the use of a motion picture film by the State during closing argument.

Section 40A–13–1(B), supra, reads:

> "Disturbing lawful assembly consists of:
>
> ". . . .
>
> "B. disturbing any meeting of the people assembled for any legal object."

Applicability of the statute.

Two contentions of defendants are that the statutory phrase "meeting of the people" is inapplicable to their conduct at the basketball arena. These two contentions concern legislative history and the meaning of "meeting of the people." A third, and alternative contention, is that the statutory phrase is unconstitutionally vague.

Legislative history.

Prior to the enactment of the Criminal Code in 1963 (see § 40A–1–1, N.M.S.A. 1953, Repl.Vol. 6), § 40–12–6, N.M.S.A. 1953 made it unlawful to ". . . disturb any meeting of the people assembled for any legal object. . . ." In addition, § 40–12–7, N.M.S.A.1953, among other things, made it ". . . unlawful for any person wilfully to disturb, interrupt, or in any manner interfere with any . . . lawful assembly for the purpose of . . . sport or contest. . . ." Sections 40–12–6 and 40–12–7, supra, were repealed in the statute enacting the Criminal Code. See Laws 1963, ch. 303, § 30–1.

Defendants assert that § 40A–13–1(B), supra, (the statute under which they were convicted) was a re-enactment of former § 40–12–6, supra, but that former § 40–12–7, supra, was not re-enacted. Since § 49–12–7, supra, applied specifically to sporting events they claim that § 40A–13–1(B), supra, as a re-enacted statute, cannot be extended to a sporting event and, therefore, the conduct formerly made unlawful by § 40–12–7, supra, can only be prosecuted under the ". . . general disorderly conduct provision of the Code. . . ." The present disorderly conduct statute is § 40A–20–1, N.M.S.A.1953 (Repl.Vol. 6).

The essence of this argument is that the Legislature did not intend that § 40A–13–1(B), supra, should apply to conduct formerly covered by § 40–12–7, supra. The Report of Criminal Law Study Interim Committee, 1961–1962, shows that defendants' argument is incorrect. The Report recommended the enactment of § 40A–13–1, supra, as a revision of three then existing laws, two of which were §§ 40–12–6 and 40–12–7, supra, upon which defendants rely. The Report negates the claim that conduct prohibited by § 40–12–7, supra, was not to be prohibited by the new § 40A–13–1, supra.

The argument that conduct prohibited by § 40–12–7, supra, is now only covered by the disorderly conduct statute, § 40A–20–1, supra, is also negated by the Report. The Committee recommended the enactment of § 40A–20–1, supra, as a revision of two other then existing laws, neither of which were § 40–12–7, supra. The recommendations of the Committee as to the sections referred to herein were enacted into law without change.

The contention that the legislative history shows that § 40A–13–1(B), supra, is inapplicable to defendants' conduct is without merit.

Meeting of the people.

Defendants assert that the people present at the arena at the time of the incident with which this appeal is concerned were an *assembly* of people but that this assembly was not a *meeting of the people.* They contend that any grouping of people together is an assembly but that a meeting is an assembly for the purpose of discussing and acting on matters in which the group has a common interest. According to defendants, ". . . it is an essential activity of . . . [a meeting] that its members relate to each other, communicate with each other, 'deal' with each other, even *share* silence together. . . ." Defendants state: ". . . Spectators do not come to a basketball game as a 'meeting of the people.' They do not come to the arena to deal with each other. What intercommunication there may be is happenstance and not essential and does not involve the group as a whole. The spectators at a basketball game are an *assembly* and not a *meeting.*"

The statute does not define "meeting." We must, then, ascertain the legislative intent in using that word. The legislative intent is to be determined primarily by the language in the Act. In ad-

dition, the words used are to be given their ordinary meaning unless a different intent is clearly indicated. Albuquerque Nat. Bank v. Commissioner of Revenue, 82 N. M. 232, 478 P.2d 560 (Ct.App.1970). Applying the ordinary meaning, there is no ambiguity in the statute.

The language used is "any meeting of the people assembled for any lawful object." One of the definitions of "meeting," when used as a noun, in Webster's Third New International Dictionary (1966) is "a gathering for business, social or other purposes." Another definition is: "a horse or dog racing session extending for a stated term of days at one track." The people assembled to view a basketball game was a "meeting" within these definitions. Compare Territory v. Davenport, 17 N.M. 214, 124 P. 795, 41 L.R.A.,N.S., 407 (1912).

The foregoing answers defendants' argument that the spectators present at the arena could not be a "meeting." The concept of "meeting" can also be viewed in connection with the players—the participants in the athletic contest. The players certainly act on a matter of common interest—the game; they deal with one another; they communicate with each other. Under defendants' asserted definition of "meeting" the players were a meeting of people assembled for a lawful object.

Defendants' conduct at the arena occurred at a "meeting of the people" within the meaning of § 40A–13–1(B), supra.

Asserted vagueness.

Defendants assert that § 40A–13–1(B), supra, violates due process because the meaning of "meeting" is so vague that "men may not know what to avoid." Due process is violated if a statute which forbids the doing of an act is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. State v. Minns, 80 N.M. 269, 454 P.2d 355 (Ct. App.1969); see Balizer v. Shaver, 82 N.M. 347, 481 P.2d 709 (Ct.App.1971). In determining the question of unconstitutional vagueness, the statute as a whole must be considered. State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct.App.1969).

Persons of common intelligence do not have to guess at the meaning of § 40A–13–1(B), supra, which forbids the disturbance of *any* meeting of the people assembled for *any* legal object. It forbids the disturbance of any gathering for business, social or other purposes if the object of the gathering is legal. The language used conveys a sufficiently definite warning of the proscribed conduct. State v. Ferris, supra; compare State v. Covens, 83 N.M. 175, 489 P.2d 888 (Ct.App.1971).

Meaning of "disturb."

Defendants claim the trial court erred in its definition of "disturb" and there is no substantial evidence that the spectators at the arena were disturbed. If a disturbance is found to have occurred, defendants assert there is no substantial evidence that either defendant was responsible for the disturbance.

The trial court instructed the jury "... that the term 'disturb' means to throw into disorder or confusion, to interrupt." This accords with the ordinary meaning of the word. Webster's Third New International Dictionary (1966) defines "disturb" as a verb to mean: "to interfere with (as by hindering or causing to turn from a course or to stop)" and "to throw into confusion or disorder." "Disturbance" as a noun, is defined as an "interruption" or "commotion." Since the statutory word "disturbing" is not defined, its ordinary meaning was properly applied by the trial court. Albuquerque Nat. Bank v. Commissioner of Revenue, supra.

The basketball game was scheduled to begin at 8:05 p. m. It did not begin until 35 to 40 minutes later. The delay was occasioned by the necessity of removing debris and liquids from the playing surface. This is substantial evidence that the game was hindered, turned from its course, interrupted. Thus, both the meeting of the players and the meeting of the spectators to view the game were interrupted.

State v. Mancini, 91 Vt. 507, 101 A. 581 (1917) states:

> "Speaking generally, the rule applicable to disturbances of public assemblies is that any conduct which, being contrary to the usages of the particular sort of meeting and class of persons assembled, interferes with its due progress, or is annoying to the assembly in whole or in part, is a disturbance." (citation omitted)

See also State v. McNair, 178 Neb. 763, 135 N.W.2d 463 (1965); compare People v. Malone, 156 App.Div. 10, 141 N.Y.S. 149 (1913). There is substantial evidence that the meeting was disturbed.

Evidence of a disturbance.

Defendants contend there is no evidence that any acts of defendants caused the disturbance. Their position is there is no evidence that the objects which defendants threw landed on the playing surface of the basketball court. Assuming, but not deciding, that this is true, the answer to this contention is that the defendants aided and abetted those who threw far enough so that the objects thrown landed on the playing surface of the court.

For a definition of aiding and abetting see State v. Ochoa, 41 N.M. 589, 72 P.2d 609 (1937). There is evidence that the defendants threw objects when others also threw them, and also evidence from which community of intent can be reasonably inferred. Further, the issue of aiding and abetting was submitted to the jury and the only objection of these defendants was on the ground that the evidence was insufficient to submit that issue to the jury. We have held the evidence was sufficient. The claim on appeal is that aiding and abetting was not an issue in the case. This is incorrect. Although charged with disturbing the meeting, defendants could be convicted of aiding and abetting that disturbance. Sections 40A–1–14 and 41–6–34, N.M.S.A.1953 (Repl.Vol. 6); 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).

Extra-judicial identification.

Five witnesses testified that either Orzen or Cooper or both threw objects. Before any identification testimony was received from each of these witnesses, the trial court was requested to permit the witness to be questioned ". . . outside the presence of the jury with respect to anything helping him or assisting him or relating to that event, identification that took place between the time of the game and today."

When defendants made their request to voir dire the witnesses, no claim was made that there had been any extra-judicial identification. What defendants sought was a "fishing expedition." See State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct. App.1970). At this point no issue as to an extra-judicial identification had been raised. Nor was an issue of extra-judicial identification ever raised as to three of the five witnesses. These three concluded their testimony without being questioned as to any identification of defendants other than their observations at the arena and subsequently learning the defendants' names. State v. Turner, supra.

During the examination of two of the witnesses it was ascertained that they had seen a motion picture film taken during the incident at the arena. One witness had seen the film about two weeks after the incident occurred. Both had viewed the film during the course of the trial, but after it had been introduced into evidence and shown to the jury. Assuming (but not deciding) that this evidence raised an issue concerning extra-judicial identification by the two witnesses, defendants conceded at oral argument that there is nothing to indicate that the viewing of the film had any effect on the in-court identification made by these witnesses. Compare State v. Gilliam, (Ct.App.), 83 N.M. 325, 491 P.2d 1080, decided November 19, 1971.

The issue under this point is whether a defendant has the right to explore for the possibilities of an extra-judicial identification. Absent some indication of an improper extra-judicial identification, it was within the discretion of the trial court to permit the trial to be interrupted to allow defendant to voir dire as to the possibilities of such an identification. Compare State v. Manlove, 79 N.M. 189, 441 P.2d 229 (Ct.App.1968) as to voir dire examination as to competency of a witness, and see State v. Turner, supra, as to defendants' "right" to a "fishing expedition."

Use of motion picture film during closing argument.

During closing argument the State reran the motion picture film previously admitted into evidence. In doing so it used a screen different from the one used when the film was originally viewed by the jury. In showing the film during argument the prosecutor, at times, slowed the film, stopped it, reversed it and made comments concerning what was shown. Defendants assert this was prejudicial misconduct on the part of the prosecutor. They claim the trial court erred in denying their motion for a mistrial. We disagree.

The film, admitted into evidence without objection, was demonstrative evidence. See Paradis, The Celluloid Witness, 37 U. of Colo.Law Review 235, at 259 (1965). The prosecutor's comments were no more than comments directing the jury's attention to what the exhibit showed. State v. Blancett, 24 N.M. 433, 174 P. 207 (1918), appeal dismissed 252 U. S. 574, 40 S.Ct. 395, 64 L.Ed. 723 (1920). The comments were based on the evidence and were thus permissible. State v. Santillanes, 81 N.M. 185, 464 P.2d 915 (Ct.App. 1970).

The method in which the film was shown was also a comment on the evidence by the prosecutor. Counsel are allowed a reasonable amount of latitude in their closing remarks to the jury. State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969). The trial court has wide discretion in dealing with and controlling counsel's jury arguments. If no abuse of discretion or prejudice is shown, then there is no error. State v. Pace, supra; see Chavez v. Atchison, Topeka and Santa Fe Railway Co., 77 N.M. 346, 423 P.2d 34 (1967). Here, there is no showing of an abuse of discretion of prejudice to defendants.

The judgment and sentence is affirmed as to each of the defendants with the following two comments: (1) Notice of Appeal was filed in the District Court on July 2, 1970 yet the transcript was not filed in this Court until June 30, 1971; (2) although the trial judge, by order, directed that the District Court Clerk forward all exhibits to the Clerk of this Court, no exhibits were received. Since neither the briefs nor oral arguments relied on the exhibits, the only consequence is that there are no exihbits to be returned by our Clerk upon entry of final order in this cause.

It is so ordered.

SUTIN and COWAN, JJ., concur.

493 P.2d 773

CITY OF ALBUQUERQUE, Plaintiff-Appellee,

v.

Ernest BUTT et al., Defendants-Appellants.

No. 721.

Court of Appeals of New Mexico.

Jan. 14, 1972.

Charles Driscoll, Albuquerque, for defendants-appellants.

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

OPINION

SUTIN, Judge.

This appeal involves the constitutionality of Ordinance No. 171–1969, § 38D(1) of the City of Aubuquerque, providing against lewd, immoral or obscene acts such as distributing obscene material in pictorial magazine form. The City of Albuquerque conceded that the ordinance is unconstitutional and the conviction appealed from must be reversed.

The ordinance is unconstitutional because it does not comply with the threefold test for determining obscenity established by the Supreme Court of the United States in A Book Named "John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Com. of Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), more widely known as the *Fanny Hill* case, and restated in Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967).

This court is bound by the constitutional rule of the Supreme Court of the United States, and, under the Supremacy Clause of Article VI of the Constitution of the United States, it must be obeyed. Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967).

Since the ordinance is unconstitutional, it is not necessary to determine whether the publications are obscene, nor to determine other points raised by the defendants.

The judgment and sentence of each of the defendants is reversed, and each of the defendants discharged.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

WOOD, C. J., not participating.

493 P.2d 950

LONE MOUNTAIN CATTLE COMPANY, Inc., a corporation, et al., Petitioners-Appellees,

v.

NEW MEXICO PUBLIC SERVICE COMMISSION and Plains Electric Generation and Transmission Cooperative, Respondents-Appellants.

No. 9285.

Supreme Court of New Mexico.

Feb. 11, 1972.

Kegel & McCulloh, Santa Fe, for Plains Electric.

James L. Parmelee, Jr., Santa Fe, for N. M. Public Service Commission.

Daniel W. Caldwell, Springer, for appellants.

Mitchell, Mitchell & Alley, Santa Fe, Modrall, Sperling, Roehl, Harris & Sisk, Kenneth L. Harrigan, Albuquerque, for appellees.

OPINION

OMAN, Justice.

The New Mexico Public Service Commission (hereinafter called Commission) and Plains Electric Generation and Transmission Cooperative, Inc. (hereinafter called Plains) have taken this appeal from a judgment of the district court declaring

an order of the Commission to be null and void. We reverse.

The Commission and Plains are in agreement as to two points relied upon for reversal. We reverse on one of these points. We need not and do not decide the other of these points or the points relied upon by Plains alone.

The pertinent facts are:

(1) On February 12, 1968, the Commission issued to Plains a Certificate of Public Convenience and Necessity by which Plains was authorized to construct an electric transmission line from its Algodones Generating Station to Willard—a distance of approximately 71 miles—and related facilities consisting of a substation near Moriarty and a switching station at Algodones.

(2) Petitioners-appellees (hereinafter called Petitioners) are the owners of certain lands across which Plains intends to construct the transmission line.

(3) On September 10, 1969, Petitioners filed a complaint with the Commission by which they sought to have the Commission declare the certificate null and void by reason of the claimed failure of Plains to begin construction within one year as required by § 68-7-2, N.M.S.A. 1953 (Repl. Vol. 10, pt. 1, 1961).

(4) After a hearing on the issues raised by Petitioners' complaint and the answer of Plains thereto, the Commission entered a decision on November 18, 1969, consisting of findings of fact and an order. The portions of this decision essential to a disposition of the appeal now before us were:

"6. Plains Electric began construction of the subject transmission line within one year of the date it was granted its certificate within the meaning of the New Mexico Public Utility Act, the acquisition of rights of way and the preparation of surveys being a necessary part of this construction.

"* * *

"A. The authority granted by the Commission to Plains Electric in Case No. 891 remains in full force and effect."

(5) Petitioners sought a review by the district court of the Commission's order pursuant to the provisions of §§ 68-9-1 to -4, N.M.S.A.1953 (Repl. Vol. 10, pt. 1, 1961, Supp.1971) and § 68-9-5, N.M.S.A. 1953 (Repl. Vol. 10, pt. 1, 1961).

(6) The district court ordered the joinder of Plains as an additional party to the proceedings before that court.

(7) After a trial upon the record made before the Commission, in accordance with § 68-9-3, supra, the district court entered a decision consisting of findings of fact and conclusions of law. The portions of its findings and conclusions pertinent to a disposition of the appeal now before us were:

"7. As of February 25, 1969, Plains Electric had obtained approximately 30 miles of right-of-way for the construction of the 71 mile line, had surveyed the first 42 miles of the line, and had ordered some material and equipment for the Moriarty substation and the Algodones switching station."

"13. Finding number 6 by the Public Service Commission that

'Plains Electric began construction of the subject transmission line within one year of the date it was granted its Certificate within the meaning of the New Mexico Public Utility Act, the acquisition of right-of-way and the preparation of surveys being a necessary part of this construction.'

is not supported by substantial evidence."

"14. The acquisition of rights-of-way and the preparation of surveys does not constitute the beginning of construction within the meaning of Section 68-7-2, N.M.S.A. 1953."

"15. Even if the acquisition of rights-of-way and the preparation of surveys could be construed to constitute the beginning of construction within the meaning of Section 68-7-2, there is not substantial evidence that the same occurred

within one year of the grant of the Certificate."

"16. Plains Electric failed to begin construction of its plant, line, system, works or facilities within one year from the date of the issuance of the Certificate of Public Convenience and Necessity, failed to exercise the authority granted by the Certificate within one year of its issuance, and said Certificate is, therefore, null and void.

"19. The Order of the Public Service Commission in Case number 959, not being supported by substantial evidence, is erroneous, unreasonable, and unlawful and the Order should, therefore, be annulled and vacated."

(8) A judgment declaring the certificate annulled and vacated was entered by the court on February 23, 1971. This appeal is from that judgment.

The question to be resolved is whether the evidence supports Finding No. 6 of the Commission which is quoted above. The trial court, as shown by its above-quoted Conclusions Nos. 13 to 16 and 19, was of the opinion the finding was not supported by substantial evidence.

In considering the evidence, we must also consider upon whom the burden of proof rested in the hearing before the Commission and the nature and scope of the judicial review of the Commission's finding and order. The trial court's Conclusions Nos. 15 and 19 indicate a misapprehension as to where the burden of proof rested.

As we understand Petitioners, they admitted they had the burden of proving the allegations of their complaint filed with the Commission, and they cite as authority for this position International Minerals and Chemical Corp. v. New Mexico Public Service Commission, 81 N.M. 280, 466 P.2d 557 (1970), wherein we stated: "* * * the courts have uniformly imposed on administrative agencies the customary common-law rule that the moving party has the burden of proof. * * *"

Insofar as here material, the Petitioners alleged in their complaint before the Commission that:

"Respondent [Plains] failed to commence construction of the aforesaid transmission line and related facilities within one year from February 12, 1968 in accordance with the Commission's certificate and the Public Utility Act."

Petitioners submitted evidence in support of this allegation by offering a series of progress reports in the form of letters from Plains to the Commission. The first of these letters was dated February 25, 1969 and stated:

"In the matter of construction on the Algodones to Willard 115-kv transmission line, the following progress is reported:

"Approximately 30 miles of right-of-way have been acquired. Twelve miles of right-of-way are being negotiated.

"The site for the substation near Moriarty has been acquired.

"Surveys have been completed on the first 42 miles of the line from Algodones to Moriarty.

"Some material and equipment has been ordered for the Moriarty substation and the Algodones switching station.

"We will keep you advised of further progress on this facility."

It is apparent the information contained in this letter is the sole basis for the Commission's Finding No. 6 and the district court's Finding No. 7, which are quoted above.

No evidence was offered to explain what was meant by "surveys," or what was actually involved therein. No effort was made to clarify what was meant by "some material and equipment." And no evidence was offered to show what, if any, work had actually been done on the ground, except as to what may or may not be inferred from the contents of this letter. Respondents equate the commencement of "construction" with the turning of the first

spade of earth at the site of the first hole to be dug for the placement of the poles upon which the line is to be strung, or at the site where the substation or switching station is to be erected; or with the placing of the first piece of materials in its proper place upon the ground for fabrication into one of these facilities. They urge that all work in making acquisitions of right-of-way, in securing materials for the actual erection of the facilities, and in making surveys—regardless of what may be embraced therein—is merely preparation for construction.

The term "surveys" has a great number of meanings and embraces different activities in different areas of endeavor. See Webster's Third New International Dictionary, Unabridged (1961). The same is true of "construct" or "construction." See Webster's Third New International Dictionary, Unabridged, supra; 16A C.J.S. Construct, at 1231 (1956). See also Hollis v. Erwin, 237 Ark. 605, 374 S.W.2d 828 (1964); In re Anderson's Estate, 244 Iowa 325, 56 N.W.2d 913 (1953); Miller v. Cornell-Young Co., 171 S.C. 228, 171 S.E. 790 (1933); Seymour v. City of Tacoma, 6 Wash. 138, 32 P. 1077 (1893); State ex rel. Lassen v. United States Land Company, 3 Ariz.App. 167, 412 P.2d 736 (1966); National Charity League, Inc. v. County of Los Angeles, 164 Cal.App.2d 241, 330 P.2d 666 (1958).

It is conceded, and there can be no question about the fact that surveys for power transmission lines and other similar lines often include the removal of trees and other vegetation from the area of the line surveys, the staking of the line, and the preparation of the line site for entry thereon for the purpose of placing the poles and other materials to be used in the line. We do not know what actually was involved in the surveys here in question, but the burden was on Petitioners, as the moving parties before the Commission, to demonstrate by substantial evidence, and thereby prove to the Commission, that Plains "failed to commence construction of the aforesaid transmission line and related facilities within one year from February 12, 1968," as alleged in their complaint. In this they failed.

We are unable to agree that the acquisition of rights-of-way and the making of surveys—with all that might properly be included within these terms in connection with the construction of a power transmission line and the said related facilities—do not constitute a commencement of construction. We fail to understand how it can reasonably be said that construction cannot begin until the turning of the first shovel-full of earth in the digging of the first hole for the placement of the first pole, the turning of the first shovel-full of earth at the site where one of the related facilities is to be erected, or the placement of the first piece of materials in its proper place for fabrication into the line or the related facilities. In any event, there was no evidence that such shovel-full of earth had not been turned, or the first piece of materials had not been so placed, unless such can reasonably be inferred from the language of the letter quoted above.

Whether or not the construction had been commenced by February 12, 1969, was a question of fact to be determined by the Commission. As already stated, the burden was on the Petitioners to prove it had not been so commenced. Considering this burden, the nature and extent of the evidence adduced, and the qualifications of the Commission in knowing and understanding what is meant by "surveys" and "construction," in the sense in which these terms are used in the construction of power transmission lines and related facilities, we are of the opinion the Commission's Finding of Fact No. 6 is supported by substantial evidence. It was not the province of the trial court to substitute its judgment for that of the Commission. Seidenberg v. New Mexico Board of Medical Examiners, 80 N.M. 135, 452 P.2d 469 (1969); Llano, Inc. v. Southern Union Gas Company, 75

N.M. 7, 399 P.2d 646 (1964); Ferguson-Steere Motor Co. v. State Corp. Com'n., 63 N.M. 137, 314 P.2d 894 (1957). The Commission's construction of the certificate issued by it and the statutes governing its operation was binding on the district court, unless this construction was unreasonable or unlawful. Section 68-9-5, supra. See also Springer Corporation v. State Corporation Com'n., 81 N.M. 133, 464 P.2d 552 (1969). The only question in this case bearing on the issues of unreasonableness or unlawfulness is that of substantial evidence, and, as already stated, considering the evidence and upon whom the burden of proof lay, we are of the opinion the Commission's finding that construction had been commenced within one year is supported.

Because the letter from Plains was dated February 25, 1969, Petitioners argue, and the trial court held in its Conclusion No. 15, that there is no substantial evidence that construction actually commenced by February 12, 1969, even if the Commission was correct in holding the acquisition of rights-of-way and the making of surveys constitute the beginning of construction. The fallacy in this argument and in the trial court's conclusion lies in the fact that the burden was on Petitioners to prove that the acquisitions were not accomplished and the surveys were not made on or before February 12. This they did not do. It can be reasonably inferred, in the absence of evidence to the contrary, that the right-of-way acquisitions and the surveys were not accomplished between February 12 and February 25. In any event, the date of the letter is not inconsistent with Finding No. 6 of the Commission.

The judgment of the trial court declaring the certificate null and void should be reversed.

It is so ordered.

COMPTON, C. J., and STEPHENSON, J., concur.

493 P.2d 954

Robert W. WINWARD, Plaintiff-Appellant

v.

HOLLY CREEK MILLS, INC., Defendant-Appellee.

No. 9342.

Supreme Court of New Mexico.

Feb. 11, 1972.

Toulouse & Moore, Larry D. Beall, Gallagher & Ruud, Albuquerque, for appellant.

Sutin, Thayer & Browne, Irwin S. Moise, Albuquerque, for appellee.

OPINION

MONTOYA, Justice.

Robert W. Winward, hereinafter referred to as "plaintiff," brought this suit in the District Court of Bernalillo County, New Mexico, to recover wages and commissions allegedly owed by Holly Creek Mills, Inc., hereinafter referred to as "defendant." Defendant entered a special appearance for the purpose of contesting jurisdiction of the court over the defendant. Defendant moved to quash service of process, supporting its motion with an affidavit. Plaintiff responded to the motion with an affidavit of his own. After a hearing on the motion, an order was entered quashing the service and dismissing the action for lack of jurisdiction over the defendant. Plaintiff appeals from that order.

From the affidavits of the parties, it appears that defendant is a Georgia corporation engaged in the manufacture of rugs and carpets. It is not qualified to do business in New Mexico; it does not maintain offices, bank accounts, or inventories here; nor does it own real or personal property in this state. Plaintiff bases his action upon an oral contract between plaintiff and defendant entered into in Phoenix, Arizona, under which he was retained as as agent for the solicitation of orders for the purchase of defendant's products. Pursuant to the contract, plaintiff solicited orders for defendant's products from three businesses in Albuquerque, New Mexico, and one in Santa Fe, New Mexico. It also appears that plaintiff arranged for advertising of defendant's products through customer price reductions, and that plaintiff was paid a salary by defendant, delivered to him by mail or wire within the state of New Mexico.

The basis upon which plaintiff asserts jurisdiction over defendant is § 21-3-16, N.M.S.A., 1953 Comp. (Repl. Vol. 4, 1970), the so-called "long arm statute." Under

the provisions of this statute, the "transaction of any business within this state" is one method by which a person submits himself to the jurisdiction of the courts of New Mexico in any cause arising out of that transaction. Thus, the questions on appeal are whether the acts of defendant were sufficient to bring it within the "transaction of any business" provision of the statute for jurisdictional purposes; and, if so, whether plaintiff's cause of action arose out of those transactions.

This court, in McIntosh v. Navaro Seed Company, 81 N.M. 302, 466 P.2d 868 (1970), restated the constitutional principle that, to subject a defendant to in personam jurisdiction if he is not within the state, there must be certain "minimum contacts" with the state, so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The question is whether the actions of the defendant amounted to a "transaction of any business within this state" so that subjecting the defendant to jurisdiction would not offend traditional notions of fair play and substantial justice. Whether the statute applies must be determined by the facts of each case. Blount v. T D Publishing Corporation, 77 N.M. 384, 423 P.2d 421 (1966).

We hold that the actions of defendant in having plaintiff solicit orders, make delivery to purchasers, advertise its products through plaintiff, and pay plaintiff wages and commissions within the state of New Mexico, constitute the transaction of business within the meaning of § 21–3–16, supra. These actions are minimum contacts which subject defendant to our courts without offending traditional notions of fair play and substantial justice.

Defendant relies upon Grobark v. Addo Machine Co., 16 Ill.2d 426, 158 N.E.2d 73 (1959), for the proposition that merely shipping orders into a state is not sufficient to subject the shipper to in personam jurisdiction under a long arm statute very much like our own. However, that case is distinguishable because Addo Machines employed no agents in Illinois, whereas, in the instant case, it is admitted that plaintiff was acting as defendant's agent here in New Mexico. Therefore, defendant had a "presence" in New Mexico through its agent that Addo did not have in the Illinois case.

Defendant cites cases and the statutory language of § 51–30–1, N.M.S.A., 1953 Comp. (1971 Pocket Supp.), dealing with the solicitation of orders as not constituting transaction of business within New Mexico. However, these provisions, by the statute's own terms, are for "purposes of the Business Corporation Act," and not for testing jurisdiction under § 21–3–16, supra. These provisions establish requirements for corporations should they desire to resort to the courts of this state in seeking remedies. On the other hand, the long arm statute submits a corporation to the jurisdiction of the courts through its acts, regardless of the corporation's intention to use the courts.

Having decided that the acts of defendant constituted transacting business in New Mexico within the terms of § 21–3–16, supra, we turn to the question of whether plaintiff's cause arose out of the business transacted.

Section 21–3–16, supra, establishes two requirements for the assertion of jurisdiction over a non-resident not within the state. First, the defendant must have done one of the acts enumerated in the statute; and second, the plaintiff's cause of action must arise from defendant's doing the act.

On appeal, defendant argues that the trial court correctly quashed service because the suit was upon a contract made in Arizona, not upon acts arising out of transaction of business in New Mexico. In support of this contention, defendant relies upon Koplin v. Thomas, Haab & Botts, 73 Ill.App.2d 242, 219 N.E.2d 646 (1966), citing the following:

> "* * *. Its purpose [arising from language of the long arm statute] is to insure that there is a close relationship between a non-resident defendant's juris-

dictional activities and the cause of action against which he must defend. * * *"

We subscribe to this view. There must be a close relationship between jurisdictional activities and the cause of action. Had defendant read that case further, he would have discovered the test employed by the Illinois court to determine whether there is a close relationship between the jurisdictional activity and the plaintiff's claim. There the court stated:

"* * * [T]he statutory phrase 'arising from' requires only that the plaintiff's claim be one which lies in the wake of the commercial activities by which the defendant submitted to the jurisdiction of the Illinois courts. * * *"

This is the proper method for determining whether a plaintiff's claim arises from defendant's jurisdictional activities. Like the test for determining whether the activities subject a defendant to jurisdiction, the test for determining whether the claims arise from those activities must be decided on a case by case basis.

Thus, the question is whether plaintiff's claim for wages and commissions lies in the wake of defendant's commercial activities in New Mexico. Plaintiff's claim meets the requirements of this test. Defendant's jurisdictional activities consisted of the solicitation of business, advertising its products through customer discounts, having its agent physically present in the state for those purposes, and delivering payment to plaintiff within New Mexico. At oral argument, defendant's counsel admitted that the New Mexico courts would have jurisdiction in any action arising out of the sale of defendant's products in New Mexico in a suit brought by its New Mexico customers. It follows that any dispute arising out of payment to the agent for services in representing the defendant's business transactions in New Mexico would be within the wake of defendant's commercial activity. Plaintiff's claim, therefore, is one "arising from" the transaction of business within New Mexico.

The order of the district court in quashing service upon the defendant is hereby reversed and the case remanded with direction to reinstate plaintiff's complaint upon the docket of said court.

It is so ordered.

McMANUS and OMAN, JJ., concur.

493 P.2d 958

STATE of New Mexico, Respondent,

v.

Jessie CLARK, Petitioner.

No. 9395.

Supreme Court of New Mexico.

Jan. 25, 1972.

Further ordered that the record in Court of Appeals Cause No. 772, 83 N.M. 484, 493 P.2d 969, be and the same is hereby returned to the Clerk of the Court of Appeals.

493 P.2d 958

Ernie J. PAGE and Santiago M. Sanchez, Petitioners,

v.

STATE of New Mexico, Respondent.

No. 9415.

Supreme Court of New Mexico.

Feb. 9, 1972.

Further ordered that the record in Court of Appeals Cause No. 724, 83 N.M. 487, 493 P.2d 972, be and the same is hereby returned to the Clerk of the Court of Appeals.

493 P.2d 958

Velda HOLCOMB et al., Petitioners,

v.

William POWER, Jr., Respondent.

No. 9414.

Supreme Court of New Mexico.

Feb. 9, 1972.

Further ordered that the record in Court of Appeals Cause No. 734, 83 N.M. 496, 493 P.2d 981, be and the same is hereby returned to the Clerk of the Court of Appeals.

493 P.2d 958

Paul GARCIA, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 9416.

Supreme Court of New Mexico.

Feb. 16, 1972.

Further ordered that the record in Court of Appeals Cause No. 690, 83 N.M. 490, 493 P.2d 975, be and the same is hereby returned to the Clerk of the Court of Appeals.

493 P.2d 959

STATE of New Mexico, Appellee,

v.

Thayalin COURTRIGHT, Appellant.

No. 749.

Court of Appeals of New Mexico.
Jan. 21, 1972.

Frank P. Dickson, Jr., Branch & Dickson, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Prentis Reid Griffith, Asst, Atty. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

This is an appeal from a conviction upon two counts of robbery while armed with a deadly weapon, to-wit, a pistol, § 40A–16–2 and § 40A–1–13, N.M.S.A.1953 (Repl.Vol. 6), and one count of aggravated battery, § 40A–3–5, N.M.S.A.1953 (Repl.Vol. 6 (Supp.1971)).

We affirm.

First, Courtright contends the trial court erred in admitting pre-trial oral statements made at the police station because he did not knowingly and intelligently waive his right to remain silent and to consult an attorney. The record shows that Courtright was warned of his rights and signed a waiver. Later he did not want to sign a written statement and stated he would wait until an attorney was present before he signed it. The trial court admitted the pre-trial oral statements in evidence. This was not error. The fact that defendant declined to sign a written statement did not make his oral statement inadmissible as a matter of law. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct.App. 1969); State v. Gutierrez, 79 N.M. 732, 449 P.2d 334 (Ct.App.1968). The evidence on which defendant relies in claiming a lack of waiver is contradicted. There is, however, substantial evidence that defendant knowingly and intelligently waived his rights. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct.App.1971).

Second, Courtright claims prejudicial error occurred in the admission in evidence of his wig which was seized from his car. He claims an unreasonable search

and seizure. The record shows that Courtright fled south from Albuquerque in an automobile after he robbed two businesses and fired upon and wounded a police officer. He was arrested at a filling station where his car was stopped, having just been involved in a collision with another automobile parked there. After the arrest, the automobile was removed to the police station in Albuquerque where it was thoroughly inspected without a search warrant. This search occurred around two hours after the arrest. The evidence is sufficient to show that the police officers had reasonable or probable cause to search the automobile at the place of arrest and, therefore, this right continued to a search at the police station shortly thereafter. The search was not remote. The evidence seized from the car was properly admitted. State v. Reyes, 81 N.M. 404, 467 P.2d 730 (1970); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

The judgment and conviction is affirmed.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

493 P.2d 960

STATE of New Mexico, Plaintiff-Appellee,

v.

Curtis Lee STEVENS, a/k/a Curtis Charles Stephens, Defendant-Appellant.

Nos. 735, 746.

Court of Appeals of New Mexico.

Jan. 21, 1972.

David F. Boyd, Jr., Albuquerque, for appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., and Prentis Reid Griffith, Jr., Asst. Attys. Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

Defendant appeals his burglary conviction (No. 735) and the enhancement of his sentence (No. 746) pursuant to § 40A-29-5, subd. A, N.M.S.A.1953 (Repl.Vol.1964). We affirm.

Burglary Conviction.

Defendant asserts two points for reversal (1) denial of a speedy trial, and (2) failure to establish defendant's identity as the burglar.

(1) Defendant was arrested June 20, 1970; he was indicted July 15, 1970 and an attorney was appointed the same date; he was arraigned on July 23, 1970; he filed a motion on October 30, 1970 ". . . demand[ing] that he be tried on the charges filed against him by the next Judge and Jury assigned to hear criminal cases . . ."; he was tried on February 15, 1971, seven months after the indictment.

The record does not show defendant was denied a speedy trial nor does it show he was not tried ". . . by the next Judge and Jury assigned to hear criminal cases." State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971).

(2) Defendant was seen by Officer Prieto crouched halfway in and halfway out of the bay door of Joe Heaston Motor Company. Prieto testified that he saw defendant get up and "run *west* on Kinley Street. . . . I proceeded after him . . . he continued to run . . . he turned south on 3rd Street. . . . During all this time, I was about five and ten yards behind him . . . he ran right into the other officer." Officer Prieto never lost sight of defendant until defendant was caught by the other officer.

Defendant relies on the fact that Officer Prieto testified defendant ran west. Had defendant run west he would have gone to Fourth rather than Third Street. Defendant contends that this direction testimony casts doubt on his identity and that Officer Prieto's testimony is at best contradictory. We cannot agree. Testimony must be read in context. Words, phrases or sentences may not be selected out of context. Payne v. Tuozzoli, 80 N.M. 214, 453 P.2d 384 (Ct.App.1969). As above set forth defendant was always in the officer's sight.

Viewing the testimony in the light most favorable to support the verdict (State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct. App.1969)) we cannot say as a matter of law that identity was not established

Enhanced Sentence.

Defendant asserts that since the burglary conviction was on appeal, the state could not use it to enhance his sentence.

The Habitual Criminal Act creates no new offense but merely provides a proceeding by which to determine the penalty to be imposed on one previously convicted of a felony. Lott v. Cox, 76 N.M. 76, 412 P.2d 249 (1966). Since we have determined that the burglary conviction (No. 735) was valid we need not decide whether a conviction is final pending appeal. State v. Paul, 82 N.M. 791, 487 P.2d 493 (Ct. App.1971).

The burglary conviction and the enchancement of the sentence are affirmed.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

493 P.2d 962

STATE of New Mexico, Plaintiff-Appellee,

v.

Peter Joseph WILLIAMS, Defendant-Appellant.

No. 747.

Court of Appeals of New Mexico.

Jan. 21, 1972.

Harvey C. Markley, Lovington, for defendant-appellant.

David L. Norvell, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of receiving and concealing stolen property, a television set, when the value was more than $100.00 but less than $2,500.00 contrary to § 40A–16–11, N.M.S.A.1953 (Supp.1971), defendant appeals. Defendant asserts two points for reversal. We affirm.

Defendant first contends that the motel manager was not qualified to testify regarding the value of the television set and his motion to dismiss at the close of defendant's case should have been granted. The motel manager testified that he was familiar with the value of the television sets that are sold to motels and testified that a used set like the one involved was worth between $150.00 and $200.00. We see no reason to distinguish between the opinion evidence of a manager who is familiar with cost and the opinion evidence of an owner. See State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct.App.1970). The testimony of the manager was competent and meets the substantial evidence test. State v. Zarafonetis, supra.

Defendant next contends and he so testified at trial, that the police told him "it might go easier" if he would admit he knew the television set was stolen. Defendant argues his admission of guilt was obtained through deception and should have been excluded. This matter requiring determination on evidence is first raised on appeal and was never raised nor ruled on

by the trial court. This cannot be done. State v. Colvin, 82 N.M. 287, 480 P.2d 401 (Ct.App.1971); State v. Martinez, 52 N.M. 343, 198 P.2d 256 (1948).

Affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

COWAN, J., not participating.

493 P.2d 963

William F. ROCK, Appellant,

v.

COMMISSIONER OF REVENUE, Appellee.

No. 730.

Court of Appeals of New Mexico.

Jan. 21, 1972.

Reginald J. Garcia, Simms & Garcia, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Curtis W. Schwartz, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

The issue is the liability of a jockey for gross receipts tax on a share of the purse received after riding a winning mount in a horse race in September 1969 and, thus, prior to the enactment of § 72–16A–12.28, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp. 1971). Rock, a licensed jockey, was paid 10% of the purse. He reported the amount but protested any gross receipts tax liability on the amount received. Section 72–13–37, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1971). The Commissioner of Revenue denied the protest; Rock appeals directly to this court. Section 72–13–39, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp. 1971). Rock claims the Commissioner's

decision was erroneous because he was an employee. An alternative claim concerning joint venture was abandoned at oral argument.

If Rock were an employee, he would be entitled to the exemption for employees provided by § 72–16A–12.5, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1971).

The facts on which Rock's claim rests were stipulated. The pertinent ones are:

"6. By agreement between the New Mexico horsemen and the Jockeys' Guild, jockey mount fees are definitely fixed and vary according to the purse and the position in which the jockey finishes, the fees being classified as winning mount, second mount, third mount and losing mount.

"7. By established custom in the State of New Mexico the horse owner pays the jockey on his winning mount 10% of the purse. The amount of tax protested by Exhibit B arose as a result of Taxpayer's receipts from the 10% of the purse paid him after he rode a winning mount or winning mounts.

"8. A horse owner is not required to:

a) withhold income tax from the jockey's share of the purse,

b) pay F.I.C.A. tax, or

c) make unemployment insurance contributions for the jockey.

"9. A jockey, during the course of a racing day, may ride in several races. Frequently a jockey rides various different horses, each of which may have a different owner.

"10. A jockey handles a race horse from the time he leaves the paddock until the jockey dismounts after the race. Jockeys, not infrequently, gallop or exercise horses which they are to ride in a race to familiarize themselves with the characteristics of the horse."

Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct.App.1970) states:

"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. * * *"

The type of control essential to an employer-employee relationship has been stated in numerous New Mexico decisions. See Candelaria v. Board of County Commissioners, 77 N.M. 458, 423 P.2d 982 (1967); Roybal v. Bates Lumber Company, 76 N.M. 127, 412 P.2d 555 (1966); Mendoza v. Gallup Southwestern Coal Co., 41 N.M. 161, 66 P.2d 426 (1937), and cases cited in the three decisions. The facts in quoted Paragraphs 8, 9 and 10 are not such that the only reasonable inference is that the jockey is an employee under the above cited cases. Considered in the light most favorable to Rock, more than one inference can be drawn from the stipulated facts. Compare Mittag v. Gulf Refining Company, 64 N.M. 38, 323 P.2d 292 (1958). Therefore, the Commissioner's decision that Rock was not entitled to the employee exemption is binding.

Decisions holding a jockey is an employee for workmen's compensation purposes do not require a different result. See Moore v. Clarke, 171 Md. 39, 187 A. 887, 107 A.L.R. 924 (1936); Biger v. Erwin, 57 N.J. 95, 270 A.2d 12 (1970); Gross v. Pellicane, 65 N.J.Super. 386, 167 A.2d 838 (1961). These decisions concerning jockeys were based on a determination that the workmen's compensation law was to be liberally construed to provide compensation. Compare Graham v. Miera, 59 N.M. 379, 285 P.2d 493 (1955). Such an approach is not applicable. Where, as here, an exemption from taxation is claimed, the exemption is to be strictly construed in favor of the taxing authority. The exemption must be clearly established by the tax-

payer claiming the right thereto. Chavez v. Commissioner of Revenue, 82 N.M. 97, 476 P.2d 67 (Ct.App.1970) and cases therein cited. The stipulated facts do not clearly establish that Rock was entitled to the exemption for employees.

The decision of the Commissioner denying the protest is affirmed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

SUTIN, J., not participating.

493 P.2d 965

STATE of New Mexico, Plaintiff-Appellee,

v.

Terence Glen WESSON, Defendant-Appellant.

No. 764.

Court of Appeals of New Mexico.

Jan. 21, 1972.

H. Gregg Privette, Las Cruces, for appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe., for appellee.

OPINION

COWAN, Judge.

Defendant appeals from judgment and sentence following his conviction on two counts of unlawful sale of marijuana contrary to § 54–5–14, N.M.S.A.1953 (Repl. Vol. 8, pt. 2). We affirm.

Defendant first complains that the court erred in permitting the state to amend the information. The defendant was first charged under § 54–7–14, N.M.S.A.1953 (Repl.Vol. 8, pt. 2). The trial under this charge ended in a mistrial. Just prior to the second trial, the state amended the information to charge the defendant under § 54–5–14, supra, to comply with the decision of this court in State v. Riley, 82 N.M. 235, 478 P.2d 563 (Ct.App.1970), holding that the general narcotic drug statute, § 54–7–14, supra, was improper when a more specific statute was available (§ 54–5–14, supra). *Riley* was decided after the first trial but before the retrial. The information charged defendant with unlawful sale of marijuana. Thus, the allegations in the information, prior to amendment, were sufficient under § 41–6–7, N.M.S.A.1953 (Repl.Vol. 6). The statutory misreference did not make the information fatally defective. State v. Covens, 83 N.M. 175, 489 P.2d 888 (Ct.App.1971). The amendment, to correct the statutory misreference, was proper under § 41–6–37, N.M.S.A.1953 (Repl.Vol. 6).

The defendant claims double jeopardy. The record is silent as to why the first case ended in a mistrial. The record being silent, we cannot say there was no compelling reason for the trial court granting a mistrial. Therefore, we cannot say the trial court erred in denying the claim of double jeopardy. State v. Brooks, 59 N.M. 130, 279 P.2d 1048 (1955).

Defendant also urges under this point that a minimal time for the motion to amend was not given him and that he was not granted a preliminary hearing under the amended information. The court granted the defendant 24 hours in which to plead to the amended information, as required by § 41-6-46, N.M.S.A.1953 (Repl.Vol. 6). Further, the lack of advance notice concerning the motion to amend is not a meritorious claim since the amendment can be made at any time and, absent a showing of prejudice, is not grounds for reversal. Section 41-6-37, supra. No prejudice is shown.

Having been afforded a preliminary hearing on the original information, the defendant was not entitled to another. State v. Vasquez, 80 N.M. 586, 458 P.2d 838 (Ct.App.1969).

Defendant next argues that the court erred in refusing to instruct the jury on the defendant's presumption of innocence, before the introduction of evidence. Rule 21-1-1(51) (2) (e), N.M.S.A.1953 (Repl.Vol. 4), provides that "* * * the judge in all cases shall charge the jury before the argument of counsel." We do not construe this provision to mean that instructions must be given in a criminal case before the introduction of evidence or at any time prior to completion of the evidence. We note that an instruction on the presumption of innocence was given, with other instructions, after the close of the evidence. Since the presumption of innocence was adequately covered in the instruction given, State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct.App.1970), and since there is no requirement upon the trial court to instruct the jury in criminal cases prior to the introduction of evidence, the trial court did not err in refusing the request. Compare Dodson v. United States, 23 F.2d 401 (4th Cir. 1928).

One of the state's witnesses (Kirkwood) was an informer, under conviction for the sale of marijuana, who had formerly worked with the university police in Silver City on marijuana cases. Over defendant's objection, the witness was permitted to reveal this former employment. Defendant asserts that the evidence "tended only to lend credibility to the State's witness and in that respect it militated against the interest of the defendant." The state asserts that this information was necessary for the jury to understand the witness' testimony. Where the materiality of the evidence is doubtful, the admission of such evidence is within the discretion of the trial court and its ruling will not be reversed unless there is an abuse of discretion. State v. Walden, 41 N.M. 418, 70 P. 2d 149 (1937); Control Data Corp. v. Int'l Business Mach. Corp., 421 F.2d 323 (8th Cir. 1970); Beaty Shopping Center, Inc. v. Monarch Ins. Co. of Ohio, 315 F.2d 467 (4th Cir. 1963). There was no abuse of discretion here.

Defendant also complains that the court should not have permitted Kirkwood to testify concerning a telephone conversation he had with the defendant. Defendant's objection at trial was that the testimony was hearsay because of Kirkwood's lack of positive identification of the defendant. This objection is without merit. Kirkwood testified unequivocally that he recognized the defendant's voice over the telephone. The testimony was properly admitted. See Lindsey v. Cranfill, 61 N.M. 228, 297 P.2d 1055 (1956).

The state, in its final argument, in referring to witness Kirkwood, stated "And Craig Kirkwood, I am grateful we have people like him . . .". Defendant objected and moved for a mistrial on the ground that the district attorney was vouching for the credibility of the witness. The court overruled the motion, announc-

ing that he did so because of defendant's argument. The record is silent as to what this argument was, but it is apparent that the trial court was of the opinion that the defendant opened the door for the district attorney's comment. Even if the comment was improper, which we do not determine, it was invited and the court's ruling was not error. State v. Paris, 76 N.M. 291, 414 P.2d 512 (1966).

Defendant raised the issue of substantial evidence by motion for a directed verdict at the close of the state's case. Prior to May 17, 1970, in Las Cruces, New Mexico, Kirkwood had discussed with defendant the possibility of purchasing some marijuana. On that day Kirkwood met with the defendant and paid him $60.00 for six ounces of marijuana. The defendant then gave Kirkwood detailed instructions as to the location of the drug behind a metal shack near the road leading to the airport west of Las Cruces. Kirkwood, accompanied by a New Mexico state policeman, went to the location described by the defendant and found six ounces of sacked marijuana, under a bush. On May 23, 1970, Kirkwood again talked with the defendant and paid him $15.00 for one ounce of marijuana. Told by defendant that it "was at the identical spot as the last sale", Kirkwood, again accompanied by the state policeman, went to the location and found an ounce of marijuana.

The defendant urges that this evidence is insufficient to show "possession" of the marijuana and that there could be no sale without possession. Cases cited by defendant are not in point. They refer to unlawful "possession" of a narcotic and not to the sale thereof. There was ample evidence that the defendant had constructive possession of and sold the marijuana to Kirkwood. State v. Giddings, 67 N.M. 87, 352 P.2d 1003 (1960).

Under his next point, defendant raises two issues. First, he asserts that he was erroneously denied the right to question Kirkwood concerning the amount of narcotic the latter had at the time of his arrest and for the possession of which he was convicted. Kirkwood had admitted to a conviction for the possession of marijuana. The court sustained the state's objection when the defendant attempted to explore into the facts of the case. There was no showing that the pursuit of this line of questioning would have shed any additional light on Kirkwood's possible bias, even if such questioning was permissible. However, see State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966). The limits of cross-examination are within the discretion of the trial court and will be disturbed on appeal only if that discretion is abused. State v. Vargas, 42 N.M. 1, 74 P.2d 62 (1937).

Defendant also complained of the court's striking the testimony of Sam Ortiz, Kirkwood's probation officer, who had testified only that he had compiled a pre-sentence report on Kirkwood. Defendant asked Ortiz no questions concerning the contents of this report and even advised the court that the contents of the report were immaterial. Defendant's theory was that Kirkwood "was building himself a satisfactory pre-sentence report and that this pre-sentence report was dependent upon Kirkwood's success as an informer." Since Kirkwood had earlier testified, in effect, that he hoped to obtain some leniency by cooperating with the police, we cannot see how the defendant was prejudiced. Error, to be reversible, must be prejudicial. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct.App.1969).

Finally, defendant argues error because the court gave a specific instruction to the jury concerning the defendant's testifying on his own behalf. Instructions, couched in almost identical language, were approved by the Supreme Court in Territory v. Taylor, 11 N.M. 588, 71 P. 489 (1903), and State v. Moss, 24 N.M. 59, 172 P. 199 (1918).

The judgment and sentence are affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

493 P.2d 969

STATE of New Mexico, Plaintiff-Appellee,

v.

Jessie CLARK, Defendant-Appellant.

No. 772.

Court of Appeals of New Mexico.
Dec. 10, 1971.
Rehearing Denied Jan. 3, 1972.
Certiorari Denied Jan. 25, 1972.

James F. Warden, Carlsbad, for appellant.

David L. Norvell, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

Convicted of three counts of forgery, defendant appeals. Section 40A-16-9, N.M.S.A.1953 (Repl.Vol. 6). The asserted errors and our answers follow.

Severance.

The three forgery counts are contained in one information. Defendant, through his attorney, moved that each count be the subject of a separate trial so that defendant would not be embarrassed in his defense by the multiplicity of charges. Defendant claims denial of the motion was error.

Prior to, and at the time the motion was heard, defendant indicated he did not want his court-appointed attorney to represent him. The trial court refused to appoint another attorney and stated that defendant could represent himself if he wanted to do so. However, court-appointed counsel was directed to continue in the case and see that defendant's constitutional rights were protected.

Thereafter, ascertaining from defendant that defendant did not want the counts severed, ascertaining that court-appointed counsel had advised defendant of possible prejudice if the counts were not severed and ascertaining that defendant was aware of this possible prejudice, the trial court denied the motion for severance.

The trial court's ruling was not error absent a showing of an abuse of discretion which resulted in prejudice to defendant. State v. Sero, 82 N.M. 17, 474 P.2d 503 (Ct.App.1970); see State v. Andrada, 82 N.M. 543, 484 P.2d 763 (Ct.App.1971). Defendant claims there was an abuse of discretion because the trial court acceded to defendant's express wish not to have the counts severed when court-appointed counsel, directed to remain in the case by the trial court, was asking for a severance. The claim is that the trial court ignored counsel's control over procedural matters. See State v. Selgado, 78 N.M. 165, 429 P.2d 363 (1967). Since defendant was representing himself in connection with the motion and proceeded contrary to counsel's advice, we cannot say that counsel, at the time, was controlling the matter. There was no abuse of discretion in these circumstances.

Bias of the trial court.

The claim is that bias on the part of the trial court denied defendant a fair trial. The basis for the claim is:

(a) In considering some of defendant's motions and petitions, the trial court indicated defendant had filed "too damned many" and that there was nothing in them but a "bunch of wind."

(b) During the trial the court did some questioning of both State and defense witnesses.

(c) Defense counsel's objection to one of the court's questions was overruled. Counsel then commented: "That's for the prosecution." The court stated to defense counsel: ". . . another remark like that and you'll go to jail. . . ."

The trial court's comment concerning the motions and petitions is not approved. However, it did not occur in the presence of the jury.

"A trial judge . . . 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. . . ." State v. Sedillo, 76 N.M. 273, 414 P.2d 500 (1966). Here, the questions were directed almost equally to witnesses on both sides of the case, and none of the questions displayed a bias for or against either side.

The "threat" to counsel was a response to the remark made by counsel.

Assuming the court's remark was improper, it did not deter defense counsel from making further objections. No claim is made that presentation of the defense was in any way hampered. Nor, when the remark is considered in context, can we say that the court's remark could be understood by the jury as indicating the trial court was biased against the defendant.

We cannot say the trial court was biased against defendant as a matter of law.

Habeas corpus petitions.

Defendant (personally, not through counsel) filed two petitions for habeas corpus—one prior and one subsequent to his trial. His appeal asserts error in denying these petitions. In re Forest, 45 N.M. 204, 113 P.2d 582 (1941) holds that the denial of a petition for habeas corpus by the district court is not appealable. We apply the rule of *Forest*. In addition, however, the claims made in the two petitions (fourteen or more) are either factually incorrect or raise legal issues that are without merit. Most of the claims have been previously decided by the New Mexico appellate courts. It would be of no benefit to the public or to the bar to index these claims and cite the dispositive authority. We expressly hold, however, that none of the claims have any merit. Compare State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct.App. 1971) with State v. Bogdan, 83 N.M. 250, 490 P.2d 967 (Ct.App.), decided October 21, 1971.

Petition for writ of mandamus.

This petition of defendant (again personally and not through counsel) is a diatribe against Judge Neal, the New Mexico Courts, the New Mexico Bar and Assistant District Attorney McCormick which alleges generally that defendant is, or will be, deprived of due process because he is poor and black. Judge Neal's characterization of it as a "bunch of wind" is charitable. We disregard the tirade of vitriolic comment. The claim of lack of "due process" is too general to present an issue for review. Pena v. State, 81 N.M. 331, 466 P.2d 897 (Ct.App.1970).

Refusal of trial court to disqualify himself.

The record shows that on May 4, 1971, after defendant had unsuccessfully attempted to get the trial court to change his court-appointed attorney, after the motion for severance had been ruled on, after defendant was partially successful in his motion for a bill of particulars and after he had been arraigned, defendant handed Judge Neal a request that Judge Neal be disqualified. He claims denial of the request was error. It was not; the request was too late. The disqualification affidavit must be filed before the court has acted judicially on a material issue. State ex rel. Howell v. Montoya, 74 N.M. 743, 398 P.2d 263 (1965).

Denial of a request for transcript of proceedings.

Subsequent to trial, defendant requested a copy of all charges, arraignment proceedings, trial transcript and judgment. All these documents are in the record before us and, therefore, were available to his counsel in this appeal. Since in fact they were provided, no error can be predicated on the order of the trial court to the effect that the request was denied. If defendant's request can be construed as a request that he be provided with a personal copy of these records, the order denying the request was proper since the records were available to his counsel.

Defendant also requested a copy of the asserted warrant for extradition and asserted waiver signed at the time of his asserted extradition from Florida. There is nothing to show that these records, if they exist, are a part of the proceedings resulting in defendant's conviction and on which this appeal is based. The clerk's certificate states that the record before us is a "full, true and correct transcript of the

record and proceedings" in this case. There is nothing to show the trial court could have furnished the asserted extradition documents. Thus, denial of the request was not error.

The judgment and sentence is affirmed. It is so ordered.

HENDLEY and COWAN, JJ., concur.

493 P.2d 972

STATE of New Mexico, Plaintiff-Appellee,

v.

Ernie J. PAGE and Santiago M. Sanchez, Defendants-Appellants.

No. 724.

Court of Appeals of New Mexico.

Jan. 14, 1972.

Certiorari Denied Feb. 9, 1972.

Robert E. Sabin, Atwood, Malone, Mann & Cooter, Roswell, for appellant Sanchez.

Paul J. Kelly, Jr., Hinkle, Bondurant, Cox & Eaton, Roswell, for appellant Page.

David L. Norvell, Atty. Gen., James H. Russell, Jr., Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

COWAN, Judge.

Defendants appeal from judgments and sentences following their convictions in Chaves County, New Mexico, of the crime of burglary, contrary to § 40A–16–3, N.M. S.A.1953 (Repl.Vol. 6).

We affirm.

Viewed in a light most favorable to the state and in favor of the verdicts of conviction, the evidence discloses: A liquor store on the west side of south Main Street in Roswell, New Mexico, was equipped with a silent burglar alarm connected with the Roswell Police Department. On Sunday, December 13, 1970, at 3:39 P.M., the police radio operator noted the alarm was activated and broadcast this information to officers on patrol.

An officer was in his patrol car one block north of the liquor store. When he heard the broadcast he started driving south toward the store. He looked in that direction and saw a blue car back from the south side of the liquor store into an alley behind the store, then drive north and turn west onto Wildy Street. The drive-in window of the liquor store, which had been broken to effect entry, was on the south side of the store.

The officer, having travelled one block south on Main, turned right onto Wildy and followed the blue car. At 3:40 he reported by radio that he had started to the scene and at 3:41 he reported that he had sighted and was following the vehicle.

He observed two persons in the front seat of the car and one in the back. He turned on his red light and honked his horn, but did not use his siren. The blue car continued at a slow rate of speed, obeying two stops signs, then turned into a driveway four or five blocks from the liquor store, stopping at 3:44 P.M. The defendants were in the front seat and one Manuel Quinones was in the back. There were nine bottles of various kinds of liquor under a blanket on the floor behind the front seat. This liquor was identified as having been taken from the liquor store.

Quinones pled guilty to burglary and appeared as a witness on behalf of the defendants. He testified that he alone broke into the liquor store, not being aware of the burglar alarm, took the nine bottles of liquor and hid them in the alley behind the store. He saw the defendants, with whom he was acquainted, driving south on Main Street in front of the store. He yelled and whistled at them, getting their attention. They turned west from Main Street onto Oliver Street, south of the store, then entered the alley behind the burglarized store. When they stopped, Quinones asked them for a ride and they consented. He picked up the nine bottles of liquor and got into the car, telling the defendants that he had obtained the liquor from a bootlegger. They then drove north in the alley and turned west on Wildy Street. Shortly thereafter he observed the police car driving behind them.

Both defendants' testimony was substantially the same as that of Quinones. Both denied that they had anything to do with the burglary of the liquor store.

The defendants urge under point one that "the circumstantial evidence upon which the defendants' convictions rest fails to exclude every other reasonable hypothesis except the guilt of the defendants and the court erred in refusing to direct verdicts of acquittal." They argue under point two that the trier of fact cannot disregard the uncontradicted testimony of witnesses and that the trier of fact may not pile inference upon inference to arrive at a verdict of guilt. We cannot agree that the testimony of the defendants' witnesses was uncontradicted. The facts set forth, together with the reasonable inferences flowing therefrom, contradicted that testimony.

Thus, the issue raised under these points is one of substantial evidence to

support, or reasonably tending to support, the convictions. Where circumstances alone are relied upon, they must point unerringly to the defendant and be incompatible with and exclude every reasonable hypothesis other than guilt. State v. Hinojos, 78 N.M. 32, 427 P.2d 683 (Ct.App. 1967). However, as in *Hinojos,* the rule is not applicable here, there being both circumstantial and direct evidence supporting the verdicts.

We are not permitted to weigh the evidence or substitute our judgment for that of the jury and trial court below. Durrett v. Petritsis, 82 N.M. 1, 474 P.2d 487 (1970). With reference to the testimony of Manuel Quinones and the two defendants, we deem persuasive the language of the Supreme Court in Gebby v. Carrillo, 25 N.M. 120, 177 P. 894 (1918):

> "From the above we believe that the credibility of his evidence was for the jury. In addition to the above, the jury saw the witness, observed his manner and demeanor while testifying, his apparent candor and frankness, and upon all the facts, and from personal observation, they refused to give credence to his story, and held, necessarily, that he had failed to meet the burden which the law cast upon him. The trial court, having like opportunities for observation and determining the credibility of the witness and the truthfulness of his story, refused to set aside the verdict."

We cannot say as a matter of law that there was not substantial evidence to support the jury's verdict. See State v. Chavez, 83 N.M. 349, 491 P.2d 1160 (Ct.App.).

Defendants next complain, under point three, that the court erred in separating the jury following submission of the case. The jury deliberated from approximately 3:45 P.M. until 6:45 P.M. Without objection from the defendants, the court, on its own volition, then released the jurors until the following morning at 9:00 A.M. Defendants' objection to this procedure was raised by motion following their convictions. Although there is a question as to whether the issue is properly before this court, which we do not decide, we hold the defendants' position under this point to be without merit, under the rule announced by this court in State v. Atwood, N.M. App., 83 N.M. 416, 492 P.2d 1279 (No. 685) decided December 3, 1971):

> ". . . [I]t is within the trial court's discretion to permit the separation of jurors after submission of the cause to the jurors. Defendant not having shown any prejudice resulting from the permitted separation in this case, defendant's contention is without merit."

Finding no error, we affirm the judgments and sentences.

It is so ordered.

HENDLEY, J., concurs.

SUTIN, J., specially concurring.

WOOD, C. J., not participating.

SUTIN, Judge (specially concurring).

I disagree with the quotation from State v. Atwood, No. 685, N.M.App., 83 N.M. 416, 492 P.2d 1279, decided December 3, 1971, on sequestration of the jury. I specially concur because in this case the separation of jurors after submission of the cause was free of any objection by defendants. The defendants waived their rights. If error could be raised after conviction, no defendant would request sequestration before submission of the cause. It is important in criminal cases to sequester a jury after submission of the cause. The Supreme Court by rule, or the legislature by enactment, should impose this duty on the trial court whether objection to separation is made by defendants or not. Prejudice resulting to defendants is presumed unless the state makes a showing to the contrary.

Defendants also contend the evidence is uncontradicted that defendants did not participate in any way in the burglary and

this uncontradicted evidence must be taken as true. "As a general proposition, unimpeached and uncontradicted sworn testimony must be accepted as true." State v. Chavez, 78 N.M. 446, 432 P.2d 411 (1967). This rule has several exceptions. It loses its effect when facts and circumstances are present, or contradictory inferences arise, which cast some reasonable doubt on the testimony. Samora v. Bradford, 81 N.M. 205, 465 P.2d 88 (Ct.App.1970). The testimony of the defendants and Quinones was positive evidence of innocence, but the facts and circumstances and inferences to be drawn cast some reasonable doubt on the conclusiveness of defendants' testimony. The issue of innocence became a question of fact for the jury.

Perhaps it should be mentioned at this point that it is not wise to avoid the doctrine of circumstantial evidence by ruling that it is not applicable where "there is both circumstantial and testimonial evidence," State v. Hinojos, 78 N.M. 32, 427 P.2d 683 (Ct.App.1967), or where there are "both circumstantial and direct evidence supporting the verdicts" in the majority opinion. See 1 Wigmore on Evidence, §§ 24, 25, 26 (3rd Ed. 1940), and Supplement 1970.

In 3 Wharton's Criminal Evidence, § 980, p. 472 (12th Ed. Anderson 1955), it is stated:

> As a legal matter, however, there is no distinction between direct and circumstantial evidence.

In my opinion, there was no eyewitness testimony that the defendants made an unauthorized entry into the liquor store with intent to commit any felony or theft therein, or aided and abetted Quinones. The testimonial evidence of the police officer was only circumstantial. But the facts proven by the state from which reasonable inferences could be drawn were sufficient to submit the issue of burglary to the jury, and from which the jury could find the defendants guilty beyond a reasonable doubt.

493 P.2d 975

STATE of New Mexico, Plaintiff-Appellee,

v.

Paul GARCIA, Defendant-Appellant.

No. 690.

Court of Appeals of New Mexico.
Dec. 22, 1971.
Rehearing Denied Jan. 14, 1972.
Certiorari Denied Feb. 16, 1972.

F. Stephen Boone, Stockly, Sierra, Smith & Boone, P.A., Santa Fe, for appellant.

David L. Norvell, Atty. Gen., Ronald Van Amberg, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

Defendant was indicted and convicted of "unlawful possession of a narcotic drug" in violation of § 54–7–13, N.M.S.A.1953 (Repl.Vol. 8, pt. 2) as that section was worded prior to its amendment by Laws 1971, ch. 245, § 6. The applicable wording is found in Laws 1968, ch. 32, § 1. Defendant's appeal presents issues concerning: (1) search and seizure and (2) refused instructions. We decide these issues and, in addition, refer to the asserted defect in § 54–7–13, supra, that is raised in the dissent.

Search and seizure.

There is evidence that defendant was in possession of heroin. Defendant moved to suppress the heroin, asserting it was obtained by an unreasonable search and seizure. After an evidentiary hearing, the motion was denied.

Three witnesses testified at the hearing —defendant, his wife and Officer Giron. Defendant's evidence, in support of the motion, is that he had gone to his cousin's house between 8:30 and 9:00 a. m.; that no one answered the door; that he lay down on a couch on the porch and went to sleep. According to defendant he was awakened when Giron "grabbed me by the mouth, and I started fighting;" that Giron told defendant he was under arrest for possession of heroin and Giron had a bottle in his hand. Since this testimony does not refer to a search or seizure, the motion could have been properly denied at this point.

The State, however, called Giron. Giron testified that at 10:30 a. m. ". . . Lieutenant Mier and myself received a call (from an unidentified person) . . . telling us that Paul Garcia could not be awakened, that he was asleep or apparently passed out after a dosage of heroin. That Paul Garcia had been selling heroin the night before. That he had brought this heroin from Albuquerque, and that this man was passed out on a couch at the rear of 617 Kathryn Street, that this man could not be awakened. . . ."

Giron and Mier responded to the call. They went to the street address named and found, on a couch on the porch, a man who Giron recognized as Garcia, the defendant. Since this location was private property, defendant argues that the officers had no right to be there. We disagree; the officers were doing no more than investigating in response to the telephone call.

Giron patted defendant on his knee to see if he was alive; defendant came up fighting. The officers grabbed defendant to hold him back, identified themselves as police officers and told defendant of the telephone call they had received. Defendant started yelling: "You're framing me." They asked defendant if he had any heroin in his possession, ". . . and again he tried to take off from us, . . ." The officers held defendant's arms and turned him loose after he settled down.

At this point, according to Giron, defendant was asked to empty his pockets. Defendant took money from his pants pocket and the officers told him to put the money back. ". . . At this time, he tried to take off again, and this time we had to hold him after that all the time, because all the time he insisted on running. At this time, he started yelling to the neighbors that he was being framed, and 'Look what this officer is doing to me,' and 'They planted this stuff on me.' At this time, I started frisking his pockets from the outside, and I came up to his left shirt pocket where I felt a small bottle, . . ." The officer took the bottle, which contained the heroin.

At the times defendant tried to get away from the officers, and the officers held him back, defendant "took swings" at the officers.

Defendant was "seized" within the meaning of the constitutional prohibition of unreasonable search and seizure, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968). This seizure occurred when the officers restrained defendant after defendant "came up fighting" on being awakened. This seizure [for purposes of investigation, State v. Hilliard, 81 N.M. 407, 467 P.2d 733 (Ct.App.1970)], was not unreasonable. While the hearsay information from the telephone call did not give the officers probable cause to detain defendant, the corroboration of that telephone call did. The corroboration was that the person involved was the defendant, he was at the named address, and on the couch as the caller had said. In addition, Giron was concerned about an overdose from "the way he wanted to run." 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).

After the first instance of physical restraint, defendant was asked if he had heroin in his possession. Defendant yelled that he was being framed and again tried to run. The second physical restraint occurred. At this point, defendant was asked to empty his pockets. This request by the officers, in these circumstances, was a search. Lee v. United States, 98 U.S.App. D.C. 97, 232 F.2d 354 (1956).

The emptying of the pockets was not completed however; defendant again attempted to run away. At this point defendant was again held by the officers. Defendant again started yelling that he was being framed, that the "stuff" had been planted and contemporaneously the heroin was discovered in a shirt pocket. Even if a search for weapons was reasonable when defendant was told to empty his pockets (and there is evidence which sup-

ports a weapon search at this point), defendant contends the search, which resulted in the discovery of the heroin, was unreasonable because the small bottle that Giron felt in the shirt pocket was obviously not a weapon.

In answering this claim we expressly do not consider whether the heroin was discovered and seized as contraband during the course of a lawful search for weapons. See State v. Carlton, 82 N.M. 537, 484 P.2d 757 (Ct.App.1971); compare State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968). In our opinion, Giron had probable cause to arrest defendant for unlawful possession of heroin prior to the seizure of the heroin.

Giron had more information than did the officer in Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). Not only had portions of the telephone call been corroborated, but defendant had fought with the officers, had attempted to flee and was yelling that he had been framed and the "stuff" had been planted. ". . . [D]eliberately furtive actions and flight at the approach of . . . law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest. . . ." Sibron v. New York, supra; see State v. Baxter, 68 Wash.2d 416, 413 P.2d 638 (1966). Here, not only had defendant attempted to flee, he had fought with the officers and yelled that he was being framed. The officers had specific knowledge of these incidents.

The fighting, fleeing and yelling occurred after defendant had been told about the telephone call. These three incidents, together with the portion of the telephone information that had been verified, provided probable cause for an arrest when defendant was asked to empty his pockets. By probable cause we mean, in this case, that the officer had reasonable grounds to believe that the crime of unlawful possession of heroin was being committed in his presence. State v. Ramirez, supra.

There being probable cause for the arrest, the search and seizure, contemporaneous with the arrest, was valid as an incident of the arrest. State v. Deltenre, supra. The trial court did not err in denying the motion to suppress or in admitting the heroin at trial.

Defendant also argues, under this point, that the officers should have gotten a search warrant and, because the search was not under authority of a warrant, it was unreasonable. We disagree. The absence of a warrant is not a controlling factor in the circumstances of this case. State v. Deltenre, supra.

Refused instructions.

Defendant requested an instruction which would have permitted the jury to determine whether the search and seizure was reasonable. This was a matter of law for the court to determine. The request was properly refused. State v. Deltenre, supra.

Defendant also requested an instruction concerning a citizen's right to resist an unlawful arrest. This instruction was properly refused for two reasons. First, the requested instruction would have the jury determine probable cause; this was a matter of law for the court. State v. Deltenre, supra. Second, defendant would justify the requested instruction on the basis that defendant was "arrested" at the time of the first "seizure." This is incorrect; the seizure, when defendant came up fighting after being awakened, was short of an arrest. See Terry v. Ohio, supra. Thus, the refused instruction would have interjected a false issue into the case.

Asserted defect in Section 54-7-13, supra.

The applicable wording of the statute is:

" 'Whoever, not being a manufacturer or wholesaler licensed pursuant to section 54-7-4 New Mexico Statutes Annotated, 1953 Compilation, physician, veter-

inarian, dentist, nurse acting under the direction of a physician, or an employee of a hospital or laboratory acting under the direction of its superintendent or official in immediate charge, or a common carrier or messenger when transporting any drug mentioned herein between parties hereinbefore mentioned in the same package in which the drug was delivered to him for transportation, is found in possession thereof, except by reason of an order or prescription lawfully and properly issued shall be punished as hereinafter provided.' "

The dissent states that with the exceptions eliminated, the statute reads:

"Whoever, . . . is found in possession thereof, . . . shall be punished as hereinafter provided."

The dissent states that "the statute does not state a narcotic drug crime."

The statute is certainly not a model of clarity; nevertheless, it does prohibit the unlawful possession of narcotic drugs and, thus, prohibits the unlawful possession of heroin.

State v. Thompson, 57 N.M. 459, 260 P. 2d 370 (1953) states:

". . . The cardinal rule in the construction of a statute is to ascertain the intention of the Legislature as it is expressed in the words of the statute, and for this purpose the whole act must be considered. The law, it is true, in its tenderness for life and liberty, requires that penal statutes shall be strictly construed, by which is meant that courts will not extend punishment to cases not plainly within the language used. At the same time such statutes are to be fairly and reasonably construed, and the courts will not by a narrow and strained construction exclude from its operation cases plainly within their scope of meaning. . . . "

This rule of construction was recognized in State v. Ortiz, 78 N.M. 507, 433 P.2d 92 (Ct.App.1967). *Ortiz* states:

"If the language of a statute renders its application absurd or unreasonable, it will be construed according to its obvious spirit or reason. . . . But, . . . where the meaning of the language is plain, it must be given effect, and there is no room for construction. . . . "

Ortiz also involved § 54–7–13, supra, but the statutory language there involved was plain and unambiguous. Here, there is an ambiguity and construction is required.

The exceptions within § 54–7–13, supra, which the dissent disregards, refer to "any drug mentioned herein." The "possession thereof" of § 54–7–13, supra, refers to "any drug mentioned." "Herein" means the legislative act of which § 54–7–13, supra, is a part. Section 1 of that act, § 54–7–1, N.M.S.A.1953 (Repl.Vol. 8, pt. 2), refers to "narcotic drug." "Narcotic drug" is defined in § 54–7–2, N.M.S.A.1953 (Repl.Vol. 8, pt. 2) to include opium and opium is defined to include heroin.

The intention of the Legislature, as expressed in the words of the foregoing statutes, is to prohibit the possession of heroin unless that possession comes within stated exceptions not involved in this case. Construing the statute according to its obvious spirit and reason, in a fair and reasonable manner, and to avoid an absurd result, we hold that when defendant was charged with violating § 54–7–13, supra, he was charged with a crime.

The Legislature may have intended a change by its 1971 amendment to § 54–7–13, supra, but we are concerned only with the statute prior, not subsequent, to the amendment. See 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).

Although the context is different, in State v. Lott, 73 N.M. 280, 387 P.2d 855 (1964) the New Mexico Supreme Court judicially noticed that § 54–7–13, supra, is a felony statute.

The judgment and sentence is affirmed.

It is so ordered.

HENDLEY, J., concurs.

SUTIN, Judge (dissenting).

The wisdom used by judges construing criminal statutes often changes from judge to judge and from court to court. This thought has been true throughout judicial history, and it will continue in the decades that lie ahead. Some judges desire to act in a legislative capacity. Some are strict traditionalists. Some are scholars. Some are humanists. Each may have a different sense of justice. If the public and the news media were familiar with this concept, it would lend dignity to the courts instead of criticism.

Garcia was convicted of the crime of unlawful possession of a narcotic drug, to-wit: heroin, under § 54-7-13, N.M.S.A. 1953 (Repl.Vol. 8, pt. 2). This section did not mention the term "narcotic" drug. It was amended by the Laws of 1971, ch. 245, § 6 [§ 54-7-13, N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp.)], to insert the word "narcotic" before the word "drug" in two places, and inserted the words "in possession of a narcotic drug" for "possession thereof." The date of the offense committed by Garcia was July 15, 1970, when the previous section was in effect.

Section 54-7-13, supra, prior to amendment, is set forth in the majority opinion.

Section 54-7-1, N.M.S.A.1953 (Repl.Vol. 8, pt. 2) reads as follows:

> It shall be *unlawful* for *any person* to manufacture, *possess*, have under his control, sell, prescribe, administer, dispense or compound *any narcotic drug* except as authorized or provided in this act. [Emphasis added.]

Garcia was not charged under this statute. Why not? It is plain and unambiguous.

The New Mexico Narcotic Drug Statute, as originally enacted in 1935, was adopted from the Uniform Narcotic Drug Act. Section 54-7-49, N.M.S.A.1953 (Repl.Vol. 8, pt. 2); Martinez v. Cox, 75 N.M. 417, 405 P.2d 659 (1965). However, the Uniform Narcotic Drug Act contained no provision comparable to § 54-7-13, supra. State v. Ortiz, 78 N.M. 507, 433 P.2d 92 (Ct.App.1967).

Prior to the 1971 amendment, § 54-7-13, supra, was not applicable to Garcia, and did not state a narcotic drug offense. Stripped of the exceptions, the statute read:

> Whoever, . . . is found in possession thereof, . . . shall be punished as hereinafter provided.

As amended in 1971, stripped of exceptions, the statute now reads:

> Whoever, . . . is found in possession of a narcotic drug . . . shall be punished as hereinafter provided.

The issue is: Does this court have the power to substitute the phrase "in possession of a narcotic drug," for "in possession thereof," to make possession of "narcotic" drug a crime under § 54-7-13? The answer is "no." Vukovich v. St. Louis, Rocky Mountain & Pacific Co., 40 N.M. 374, 60 P.2d 356 (1936); State v. Ortiz, supra; State v. Prince, 52 N.M. 15, 189 P. 2d 993 (1948); De Graftenreid v. Strong, 28 N.M. 91, 206 P. 694 (1922); State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App.1969). The legislature recognized this fact and amended the statute itself.

The Supreme Court of the United States said that our problem is to construe what the legislature has written because it expresses its purpose in words. "It is for us to ascertain—neither to add nor subtract, neither to delete nor to distort." 62 Cases More or Less, Each containing Six Jars of Jam v. United States, 340 U.S. 593, 71 S. Ct. 515, 92 L.Ed 566 (U.S.N.M.1951). "This would be judicial legislation." Burch v. Foy, 62 N.M. 219, 308 P.2d 199 (1957). We cannot read language into a statute which is otherwise of plain meaning and import. Griffith v. Humble, 46 N.M. 113, 122 P.2d 134 (1942).

Garcia did not raise the issue in the trial court nor in this court. But where the statute does not state a narcotic drug crime, and Garcia cannot be found guilty, then this court, on its own motion, may determine the issue in the interest of justice or under the doctrine of jurisdiction and fundamental error. Mitchell v. Allison, 54 N.M. 56, 213 P.2d 231 (1949); State v. Williams, 50 N.M. 28, 168 P.2d 850 (1946); State v. Walsh, 81 N.M. 65, 463 P.2d 41 (Ct.App.1969); State v. McNeece, 82 N.M. 345, 481 P.2d 707 (Ct.App.1971).

In State v. Ortiz, supra, the state requested this court to insert in § 54–7–13, supra, the words "duly licensed" before the word "manufacturer." This court refused to do so. The legislature in 1968 amended the section and inserted "licensed pursuant to section 54–7–4 NMSA 1953."

Under the 1971 amendment, the legislature itself recognized the invalidity of § 54–7–13 and inserted the word "narcotic," and "possession of a narcotic drug." We are not required to go further because the adoption of a statutory amendment is evidence of an intention of the legislature to change the provision of the original law. Stang v. Hertz Corp., 81 N.M. 69, 463 P.2d 45 (Ct.App.1969), affirmed, 81 N.M. 348, 367 P.2d 14 (1969). The power to define crimes is a legislative function. State v. Allen, 77 N.M. 433, 423 P.2d 867 (1967).

The majority opinion states that there is an ambiguity in § 54–7–13, supra, and construction is required. It quotes from State v. Ortiz, supra, but it omits the following language:

> If there be any ambiguity or doubt concerning the meaning of a criminal statute, it will be construed against the State which enacted it and in favor of the accused. State v. Couch, 52 N.M. 127, 193 P.2d 405 (1948).

State v. Couch speaks in stronger language:

> Since the state makes the laws they should be construed *most strongly* against it and in favor of the prisoner if they are ambiguous. [Emphasis added.]

The majority opinion has construed the statute most favorably to the state and against Garcia.

From *Couch* to *Ortiz* to *Garcia,* the rule of statutory construction rode on a merry-go-round. This is a good illustration of how principles change, 1948–1971, from judge to judge and from court to court.

I refrain from discussing the matter of search and seizure. To me, the motion of Garcia to suppress the heroin should have been sustained.

Garcia was not guilty of the offense charged under § 54–7–13, supra, and should be discharged.

493 P.2d 981

Velda HOLCOMB and Virgil Holcomb, Plaintiffs-Appellees,

v.

William POWER, Jr., Defendant-Appellant.

Dona SUTTON and R. H. Sutton, Plaintiffs-Appellees,

v.

William POWER, Jr., Defendant-Appellant.

No. 734.

Court of Appeals of New Mexico.
Dec. 22, 1971.
Rehearing Denied Jan. 12, 1972.
Certiorari Denied Feb. 9, 1972.

Daniel C. Lill, LeRoi Farlow, Albuquerque, for appellant.

Benjamin Eastburn, James L. Brown, Farmington, for appellee.

OPINION

SUTIN, Judge.

This is an appeal from a summary judgment in favor of plaintiffs on the issue of liability growing out of an automobile accident.

We reverse.

On July 25, 1968, at about 11:30 p. m., Power left the Boon Docks bar, about seven miles east of Farmington, and began to drive westward toward Farmington on State Road 17. Mrs. Holcomb and Mrs. Sutton left the bar and followed Power in a Chevrolet pickup driven by Mrs. Sutton. State Road 17 is a four-lane, divided highway with thirteen foot wide lanes, constructed of asphalt. About halfway between the Boon Docks bar and Farmington, Mrs. Sutton passed Power and resumed travel in the right-hand lane. As she was coming into a curve in the road, she and Mrs. Holcomb were just talking, and all of a sudden the accident happened. All that Mrs. Sutton remembered was that something struck her pickup. She did not know what caused the accident.

Power was in the left-hand passing lane at the time of the accident, and testified that Mrs. Sutton "had to be on the right-hand side lane or part way on the right-hand lane." He knew the accident occurred because he was in the ditch on the right-hand side of the road behind the Sutton pickup. Mrs. Sutton's pickup left a total of 195 feet of skid marks on her side of the road.

"Where the *slightest doubt* exists as to the material facts summary judgment should not be granted." Binns v. Schoenbrun, 81 N.M. 489, 468 P.2d 890 (Ct.App. 1970). [Emphasis added.] Trial courts should not forget that "[t]he summary judgment statute is drastic and its purpose is not to substitute for existing methods in the trial of issues of fact." Zengerle v. Commonwealth Insurance Company of New York, 60 N.M. 379, 291 P.2d 1099 (1955).

We believe the slightest doubt does exist on the issues of negligence and proximate cause.

The summary judgment is reversed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

WOOD, C. J., not participating.

494 P.2d 160

Pat HETH and Joe Garcia, Jr., Contestants-Appellants,

v.

Patty G. ARMIJO and Emiliano Castillo, Jr., Contestees-Appellees.

No. 9313.

Supreme Court of New Mexico.

Feb. 25, 1972.

Rodey, Dickason, Sloan, Akin & Robb, John P. Eastham, L. Lanning Sigler, Albuquerque, for appellants.

F. B. Howden, Joseph Erwin Gants, III, Grants, for appellees.

OPINION

STEPHENSON, Justice.

Contestants-appellants (contestants) were unsuccessful candidates for the offices of Valencia County Clerk and Sheriff, and initiated an election contest. The trial court, pursuant to its decision upon certain motions and legal defenses together with a stipulation of counsel that the number of votes which the decision left undetermined was insufficient to change the result of either election, entered a judgment dismissing the notice of contest. Contestants have appealed.

The notice of contest identifies the parties by stating their residence and political affiliation, and the office sought by each. Presumably these references are to the 1970 general election because it is then alleged that on November 6, 1970 certificates of election were issued to contestees.

The balance of the notice of contest deals with asserted violations of various election laws on a precinct-by-precinct basis in some

nineteen Valencia County precincts. However, it does not appear that any of the ballots asserted to have been illegal were counted or canvassed for contestees, or, in fact, that contestants were in any manner prejudiced. It is not alleged that any particular number of votes were cast, counted or canvassed for any party.

Viewing the notice of contest as a whole, it contains neither allegation nor inference that contestants were lawfully elected to the offices they seek, or that by reason of the asserted illegality of certain votes, the results of the election would be changed, or even that the contestants are entitled to the offices for which they were candidates. We have said that the parties stipulated, following the court's decision, that there were not enough contested votes left to change the result. It is well they did, because there was no information in the notice of contest from which this fact could have been determined.

The briefs are mainly devoted to a discussion of whether the allegations of various violations of election laws sufficiently comply with § 3–14–5, N.M.S.A., 1953, which provides:

> "The notice shall specify the grounds upon which the claim of the contestant is based, and if he claims that illegal votes have been cast or counted for the contestee, he must specify the name of each person whose vote was so illegally cast or counted, the precinct where he voted and the facts showing such illegality."

However, the contestees pleaded and now assert that the notice should be dismissed for its failure to plead facts demonstrating that contestants are entitled to relief.

■ We agree. The legal question presented is whether compliance with § 3–14–5 results in a notice of contest which is legally sufficient, or whether that section merely specifies the manner in which certain facts must be pleaded as part of a notice of contest which must also include allegations showing that the contestant is entitled to relief in accordance with general rules of pleading.

■ Our adoption of the latter view makes unnecessary a consideration of whether or not certain allegations in the notice in fact comply with § 3–14–5. That statute has now been repealed by Laws of 1971, Chapter 210, Section 1 of which (§ 3–14–3, N.M.S.A., 1953, 1971 Pocket Supp.) makes the Rules of Civil Procedure applicable to election contests. Similarly unnecessary for consideration is § 3–14–17, N.M.S.A., 1953, by which all votes in a precinct must be rejected if contestees fail to sufficiently rebut a contestant's prima facie showing of illegality. This statute's effect follows contestant's establishing a prima facie case in respect to certain matters, a point not reached here because of the deficient notice of contest.

In Rogers v. Scott, 35 N.M. 446, 300 P. 441 (1931) this court considered whether the allegations of a notice of contest complied with §§ 41–601, 41–604 and 41–606, 1929 Comp., which, for all practical purposes, are the same as §§ 3–14–1, 3–14–5 and 3–14–7, N.M.S.A., 1953 Comp., which govern this appeal, although the latter two sections have now been repealed. The court gave the statutes a broad construction, succinctly stating that they created a remedy on "any ground or grounds which go to show that *he [contestant] was legally elected to the office.*" (Emphasis supplied.)

Further that:

> "* * * [T]he contestant may set up in his notice any facts showing that *he is legally entitled to the office.*" (Emphasis supplied.)

These statements, general, broad and liberal as they may be, pinpoint the gist of a successful election contest, viz., that the contestant "is legally entitled to the office." This ingredient is wanting here. There is no assertion to that effect in the notice we are considering, nor are facts alleged from which such entitlement could be inferred.

The same result is required by rules of pleading applicable to election contests.

In Ferran v. Trujillo, 50 N.M. 266, 175 P.2d 998 (1946), this court said:

"Under our method of contesting elections, the notice of contest takes the place of a complaint in an ordinary suit. Therefore it must contain a plain statement of the claim showing that the pleader is entitled to relief. See 1941 Comp. 19–101(8) [now § 21–1–1(8)]. The compiler's note says that par. (a) of the rule and Rule 10(a), (c), are deemed to supersede secs. 105–404, 105–501, 105–511, 105–525, Comp.Stat.1929, a portion of which follows:

'Second. A statement of the facts constituting the cause of action, in ordinary and concise language.'

"While the form of the rule has been changed, we do not understand that the necessity for pleading with particularity the facts upon which the claim or conclusion of the pleader is based, so as to give notice of what the adverse party may expect to meet, has been dispensed with."

See also Montoya v. McManus, 68 N.M. 381, 362 P.2d 771 (1961) and Trujillo v. Trujillo, 52 N.M. 258, 197 P.2d 421 (1948).

Since the objective of the contestant in an election contest is to be declared the winner, his notice of contest should allege that he has received more legal votes than the contestee, and a failure to so allege is not a claim showing that the contestant is entitled to relief. It is analogous to a complaint in tort alleging that the defendant negligently struck the plaintiff, but failing to allege that the plaintiff was injured thereby.

Our conclusion as to what is required in the notice of contest finds support both in the general rules and in the specific holdings of other states.

In 26 Am.Jur.2d Elections § 338, it is stated:

"The notice, complaint, or petition in an election contest should state in logical form the facts constituting the grounds of contest. * * *

"Where the contest is based on irregularities, it is generally necessary to allege that they were prejudicial or changed the result of the election, unless this result is necessarily to be inferred from the facts alleged. Therefore, it has been held to be insufficient to aver the casting of illegal votes without also stating in whose favor they were cast."

The notice of contest before us is strikingly similar to the pleading considered in Wheeler v. Jones, 239 Ark. 455, 390 S.W.2d 129 (1965), cert. denied, 382 U.S. 926, 86 S.Ct. 313, 15 L.Ed.2d 339 (1966), in which the contestant alleged in his complaint that the election commissioners had certified his opponent to be the winner of the election for the office of county judge by a vote of 1,701 to 1,691, that 52 named persons who were not qualified electors voted in the absentee box and that an additional 196 named persons voted in precincts in which they did not reside. In the words of the court:

"There is no allegation either that these challenged votes were cast for the appellee [contestee] or that the result of the election would be changed if these votes were set aside. All that the complaint really asks is that the questioned ballots be declared void and that the remaining ballots then be counted to see who actually won the election.

"We have often held that a complaint such as this one does not state a cause of action. Several of these cases were reviewed in McClendon v. McKeown, 230 Ark. 521, 323 S.W.2d 542 (1959). Under these decisions the contestant, to state a cause of action, must show that the outcome of the election would be changed if certain identified illegal votes cast for his opponent were disregarded."

The appellant-contestant contended that McClendon was distinguishable because it dealt with a primary election, while Wheeler involved a general election. Contests for

the respective elections were governed by two different statutes. The court said:

"Neither statute [primary or general election] purports to define the allegations that a contestant must make to state a cause of action. The rule followed in our earlier opinions is not of statutory origin. It is merely an example of the basic principle that a complaint, to be good against demurrer, must state *facts* constituting a cause of action. It is the absence of such facts that makes the present complaint fatally deficient."

Thus the Arkansas cases cannot be distinguished because of any differences in pleading requirements contained in the election contest statutes of that state and New Mexico.

The Illinois court, in Zahray v. Emricson, 25 Ill.2d 121, 182 N.E.2d 756 (1962), might well have been describing the notice before us when it said:

"The amended petition in this case falls far short of affording a basis for the contest sought. It neither alleges that the irregularities complained of changed the result of the election, nor does it allege facts which show that the irregularities would have such a result, and which if proved would render it the duty of the court to declare a defeated candidate elected. The petition does not set out how many votes were cast in the election, how many votes were received by any of the candidates, nor allege that votes cast for one candidate were wrongfully counted for another, and for all that appears in the petition the difference in votes may have been so great that none of the irregularities alleged could have affected the outcome. * * *"

The court held:

"In the absence of an allegation that the results of the election were changed by the alleged irregularities, or facts showing such a result, the petition assumes the proportions of an exploratory process to which neither our courts nor election officials should be subjected."

At oral argument contestants pointed to the prayer appended to the notice of contest as remedying the deficiencies which we have noted. It may be doubted that the prayer contains any direct allegations even to the extent of asserting contestants are entitled to the office, since it merely prays that contestants be adjudged to have been elected. Assuming this does amount to a direct allegation, contestants' problems are not solved thereby. We are not cited to any authority indicating that the office served by a prayer in an election contest differs from that in ordinary civil cases, nor have we noted any. Applying the rule stated in Trujillo v. Trujillo, supra, that the Rules of Civil Procedure apply to election contests except where inconsistent, we hold that the function and effect of the prayer in election contests does not differ from that in ordinary civil actions.

Our cases have rather consistently held that the prayer is either not part of the complaint or not part of the statement of the cause of action. See Chavez v. Potter, 58 N.M. 662, 274 P.2d 308 (1954) (overruled on other grounds by State ex rel. Gary v. Fireman's Fund Indemnity Co., 67 N.M. 360, 355 P.2d 291 (1960)); Durham v. Rasco, 30 N.M. 16, 227 P. 599, 34 A.L.R. 838 (1924); Beals v. Ares, 25 N.M. 459, 185 P. 780 (1919); Dry Goods Co. v. Hill, 17 N.M. 347, 128 P. 62 (1912). Whatever the apparent difference may be between not being part of the complaint and not being a part of the statement of the cause of action, it would appear that any inconsistency in these precedents is more semantic than real. It is clear that the prayer can be looked to and considered only to determine what relief is sought by the complaint, or to interpret any ambiguity in the complaint. Brown v. Romero, 77 N.M. 547, 425 P.2d 310 (1967); Franciscan Hotel Co. v. Albuquerque Hotel Co., 37 N.M. 456, 24 P.2d 718 (1933); Porter v. Alamocitos Land & Livestock Co., 32 N.M. 344, 256 P. 179 (1927). It is equally clear that the prayer cannot be taken into account to determine whether or not the body of the complaint

states a cause of action in ordinary civil cases. We hold the same to be true in election contests.

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

It is so ordered.

OMAN and MONTOYA, JJ., concur.

494 P.2d 164

Rowena S. PINER and Ann Edwards, Plaintiffs-Appellants,

v.

Billie A. PENDER, Defendant-Appellee.

No. 9340.

Supreme Court of New Mexico.

Feb. 18, 1972.

Shipley, Durrett, Conway & Sandenaw, Alamogordo, for plaintiffs-appellants.

Albert J. Rivera, Alamogordo, for defendant-appellee.

OPINION

COMPTON, Chief Justice.

From an order dismissing plaintiffs' complaint for lack of jurisdiction of the subject matter, plaintiffs have appealed.

The facts are rather simple. H. H. Pender left to his two daughters, appellants herein, nine antique guns by his last will and testament. Bud Pender, his son, was appointed his executor. The trial court found that in Probate Cause No. 30 in the District Court of Otero County that said Probate Court ordered the said antique rifles be distributed to the plaintiffs. Robert Pender, Bud Pender's brother, took possession of the guns, stating that he would take them for safekeeping until the appellants, who were then minors, were able to take care of them. Robert Pender subsequently died without delivering the guns to the appellants. Appellee was then appointed administratrix of Robert Pender's estate. Appellants requested appellee to deliver the guns to them but she refused. She had the guns appraised and offered to purchase the guns from the appellants for the appraised price. Thereupon, appellants sought an order directing appellee to deliver the guns to them. The lower court found that appellants were the legal owners of the guns; this finding has not been appealed.

The appellants contend on appeal, on the basis of their requested findings, that they had stated and proved a claim

for relief on the basis of a constructive trust. Such a claim is without merit. The trial court found that no showing had been made in whose possession the antique rifles were at the time the trial was held. This finding has not been challenged and is binding upon us. Even if a constructive trust could be based on possession alone, apart from the other elements of a constructive trust, a point we need not decide, there is nothing in the record to show that defendant had possession of the rifles or any interest therein.

An action in replevin was the proper remedy. See § 22–17–1 et seq., N.M.S.A.Comp. However, as stated above, there was no showing that defendant had either actual or constructive possession of the guns at the time of trial. Thus, the dismissal of the suit by the trial court was proper, even if there was an implied waiver of seizure and delivery of the guns as provided in § 22–17–7, N.M.S.A. Comp. and as urged by plaintiffs.

The order should be affirmed.

It is so ordered.

OMAN and MONTOYA, JJ., concur.

494 P.2d 165

AMERICAN BUILDERS SUPPLY CORPORATION, Plaintiff-Appellee,

v.

ENCHANTED BUILDERS, INC., Defendant-Appellant.

No. 9314.

Supreme Court of New Mexico.

Feb. 25, 1972.

Hannett, Hannett, Cornish & Barnhart, Albuquerque, for defendant-appellant.

Branch & Dickson, Albuquerque, for plaintiff-appellee.

OPINION

COMPTON, Chief Justice.

The appellee (plaintiff) sued the appellant (defendant) on an open account. From a judgment for plaintiff, the defendant has appealed.

Plaintiff contracted to furnish certain kitchen cabinets to an apartment house of defendant. It installed them or arranged for another to do so. The argument here is directed to the question of whether it was necessary for plaintiff to allege and prove that it held a contractor's license by the provisions of § 67–35–33, subd. A, N.M.S.A., 1953 (1971 Supp.)

The complaint was on an open account. It is a perfectly good complaint of that type, and defendant does not assert otherwise. It does not allege that plaintiff held a contractor's license, but nothing in the complaint indicates that it should. Building or construction, or materials therefor, are not mentioned.

The answer consists merely of admissions and denials. Although no issue was formulated by the pleadings regarding whether plaintiff needed a contractor's license, there was evidence touching the question at trial.

If a complaint on its face shows that compliance with § 67–35–33, subd. A, supra, is essential to the cause of action, the issue of noncompliance may be raised and dealt with as a matter of law. And under such circumstances, since a failure to allege the license is fatal to the complaint, it may be asserted at any time that the complaint fails to state a claim on which relief can be granted. See Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965); Campbell v. Smith, 68 N.M. 373, 362 P.2d 523 (1961).

Such is not the case here however. To establish that plaintiff was precluded from recovery by § 67–35–33, subd. A, supra, required proof of facts, viz., that the cabinets were "fabricated" into the structure within the meaning of § 67–35–3, subd. C (1), N.M.S.A., 1953. This, being an issue of fact, is to be treated and resolved as such. E. A. Davis & Co. v. Richards, 120 Cal.App.2d 237, 260 P.2d 805 (1953); Jackson v. Pancake, 266 Cal.App.2d 307, 72 Cal.Rptr. 111 (1968). Thus, under the circumstances of this case, the defense which defendants now seek to assert was affirmative in nature, [Crumpacker v. Adams, 77 N.M. 633, 426 P.2d 781 (1967); Waite v. Burgess, 69 Nev. 312, 250 P.2d 919 (1952); N. Margolys & Co. v. Goldstein, 96 N.Y.S. 185 (Sup.App.T.1905)] and should have been pleaded, although the proceedings at trial injected it as an issue.

However, from the fact that the defense in question was affirmative, it follows that defendant bore the burden of proving the requisite facts. This it failed to do. The trial court found that the cabinets were not fabricated into the structure. This is a determination of fact and no assertion is made that it is without support in the evidence. The court's finding is hence binding upon us.

Thus, defendant failed to establish the requisite factual predicate to establish that defense. It follows that the court did not err in entering judgment for plaintiff, and the judgment should be affirmed.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

494 P.2d 167

The BENEVOLENT AND PROTECTIVE ORDER OF ELKS, LODGE NO. 461, Protestant-Appellant,

v.

NEW MEXICO PROPERTY APPRAISAL DEPARTMENT, Respondent-Appellee.

No. 590.

Court of Appeals of New Mexico.
July 30, 1971.
Certiorari Granted Sept. 20, 1971.

Donald B. Moses, James F. Beckley, Nordhaus & Moses, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Anne K. Bingaman, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

The Benevolent and Protective Order of Elks, Lodge No. 461, (Elks) filed a direct appeal, pursuant to § 72-25-19, N.M.S.A. 1953 (Int.Supp.1970), from an adverse ruling of the Property Tax Appeal Board (State) which relates to (1) the assessment of the Elks' property for 1969 as not being within the taxable exemption portion of Article VIII, Section 3 of the New Mexico Constitution, and (2) the State's decision being arbitrary and capricious in its refusal to accept the Elks' requested findings of fact.

We affirm.

CHARITABLE TAX EXEMPTION.

Article VIII, Section 3 of the New Mexico Constitution, as amended, exempts from taxation "* * * all property used for educational or charitable purposes * * *." It is the Elks' contention that if a proper construction of the specific grant of tax exemption contained in the foregoing section is made it "* * * will yield the conclusion that the exemption should be granted."

The Elks assert that in construing the charitable tax exemption we are controlled by the case of Temple Lodge No. 6, A.F. & A.M. v. Tierney, 37 N.M. 178, 20 P.2d 280 (1933) which was cited approvingly in the subsequent cases of Albuquerque Lodge, No. 461, B.P.O.E. v. Tierney, 39 N.M. 135, 42 P.2d 206 (1935) and Santa Fe Lodge No. 460, B.P.O.E. v. Employment Security Commission, 49 N.M. 149, 159 P.2d 312 (1945) wherein the New Mexico Supreme Court stated that the problem "* * * is to ascertain the reasonable and probable intent" of the constitutional exemption and that "* * * the canon of strict construction cannot afford a sure formula for the decision * * *."

The Elks assert that to ascertain the reasonable and probable intent of the charitable exemption three guide-lines should be followed: (1) Legislative history, (2) Uniformity of administration, and (3) Decisions of the Supreme Court of New Mexico.

1. *Legislative History.*

The Elks contend and we agree that the present constitutional provision is a significant departure from the original territorial provision exempting certain institutions from taxation. See *Temple Lodge.* As the Elks point out the territorial laws stated that the property of charitable institutions "* * * shall be devoted exclusively to the appropriate objects of such institutions." Such is not the language of the present provision.

2. *Uniformity of Administration of Taxation.*

It is the Elks' contention here that the property owned and used by Elks, which was first located at the corner of Fifth and Gold in Albuquerque and is presently located near the corner of University Blvd. and Indian School Road N.E. in Albuquerque, has never been subject to taxation and the one attempt at taxation, as shown by the *Temple Lodge* case in 1933, was not allowed and accordingly it has been an administrative practice for some 58 years for the State to grant the Elks an exemption from taxation. The Elks further cite the *Temple Lodge* and *Albuquerque Lodge* cases for proposition that "This early interpretation and uniform practice is highly persuasive, if not controlling."

Elks also cite Rowan Drilling Company v. Bureau of Revenue, 60 N.M. 123, 288 P.2d 671 (1955) and Rask v. Board of Bar Examiners, 75 N.M. 617, 409 P.2d 256 (1966) wherein the Supreme Court cited the *Temple Lodge* case with approval for the proposition that "This court recognizes, and so should the Board, that long administrative construction is highly persuasive and will not lightly be overturned. * * *"

We agree that a long administrative construction is highly persuasive authority, however, such a rule is predicated upon the premise that the factual issues are similar.

3. *New Mexico Supreme Court Decisions.*

It is the Elks' contention here that the *Temple Lodge* and *Albuquerque Lodge* cases are controlling because there is no material distinction in the facts and accordingly the exemption should be granted.

We disagree.

There are substantial material differences between those cases and the instant case. *Temple Lodge* and *Albuquerque Lodge* state that they lay down no general rule as to

fraternal orders. In *Temple Lodge,* particularly, was this language:

> "We find no fault with the idea that the educational or charitable use must be both substantial and primary. * * *"

This philosophy was also followed in *Albuquerque Lodge* wherein the Supreme Court stated:

> "But here, as there, we confine our decision to the facts before us, not making it a precedent even for other cases involving properties of the B.P.O.E. except as the proven facts disclose a use similar to that here shown. It is the use of property, not the declared objects and purposes of its owner, which determines the right to exemption. * * *"

This language was subsequently adopted and approved in the *Santa Fe Lodge* case and accordingly it behooves us to review the actual use of the property before we can determine the right to exemption.

We examine the use of the property. The Annual Report for the 1968–69 Fiscal Year and the 1969–70 Annual Report which is not significantly different, shows that the Elks Lodge has 4,512 members; that the total assets are $1,860,046.93; that there is indebtedness of $167,737.27; that the total net asset is $1,692,309.66; and that the sum of $25,100.88 was expended on charity.

The record shows that the facilities owned by Elks consists of 8.006 acres which are improved by a 44,000 square foot building together with two swimming pools and an athletic complex. The 44,000 foot complex contains a lodge room which will accommodate 300 people, several small meeting rooms, ladies lounge, billiard room, card room, a bar, a kitchen with a 1,200 evening meal capacity, dining room with a 400 person seating capacity, a ballroom with a capacity of 1,000 people and several smaller rooms.

The record further indicates that there is no regular schedule for charitable use of the facilities and that nowhere close to 50% of the man-hours available for use of the building would be for charitable purposes. The facilities are used, however, for a Christmas party for the cerebral palsy children, by Scout Troops for occasional meetings and other organizations are occasionally permitted to use the facilities including the swimming pools and athletic complex.

Additionally, the Elks point out that the Elks Clowns, the Little Wheels, the Elks Veteran Hospital Committee, the Deer-hide Collection Committee and Christmas Basket Committee spend untold thousands of hours in doing their charitable work. Although these hours of work are largely away from the Elks premises, it may be inferred from the record that the premises are the organizational center and base for these activities. However, the Appeal Board found that less than 5% of the members were engaged in intermittent charitable work. Substantial evidence supports this finding.

In reviewing the charitable contributions of the Elks Lodge which are derived directly from the membership, solicitations and net income, at best 8% of the total income is expended for charitable purposes or less than 2½% of the total net assets are paid out for charitable purposes. When cash paid out for charitable purposes is viewed as against gross income, the record supports the finding that: "The total charitable contribution of protestant, does not exceed 5% of the combined lodge and club gross income annually." As previously noted above, the facilities have a limited charitable-purpose use.

The reader is referred to the *Temple Lodge, Albuquerque Lodge,* and *Santa Fe Lodge* cases for the facts on which those decisions are based. In our opinion, the facts set forth above—the size and extent of the facilities involved, their actual use in charitable activities, the amount of charitable work done by the membership, the membership participation in the work done,

and the income spent on charitable activities—are distinguishable from *Temple Lodge, Albuquerque Lodge* and *Santa Fe Lodge* cases. Those decisions do not require a holding, as a matter of law, that protestant is entitled to a tax exemption in this case. The issue, then, is one of fact. The record in this case provides substantial support for the finding: "The primary use of the property is for the social and fraternal activities of the members and their families and guests of the members of the lodge." Since to be entitled to the exemption the use for charitable purposes must be "substantial and primary," *Temple Lodge,* see Albuquerque Lodge and Mountain View Homes, Inc. v. State Tax Commission, 77 N.M. 649, 427 P.2d 13 (1967), and the Appeal Board found to the contrary on substantial evidence, denial of the exemption is affirmed. Compare Indianapolis Elks Bldg. Corp. v. State Bd. of T. Com'rs, Ind.App., 251 N.E.2d 673 (1969); Brockton, etc. v. Assessors of Brockton, 321 Mass. 110, 72 N. E.2d 406 (1947).

FINDINGS OF FACT.

Having determined that the use must be substantial and primary, and in view of the foregoing facts as established by the record, we conclude that the decision of the Property Tax Appeal Board is not, as the Elks contend, arbitrary or capricious. The record supports the conclusion of law of the Board that the property "* * * is not used for charitable purposes as contemplated by Article VIII, Section 3, of the Constitution of the State of New Mexico, and is therefore, subject to ad valorem taxation." A refusal to accept requested findings and conclusions is not erroneous when the evidence supports the Board's findings which in turn supports its conclusion of law. Le Doux v. Peters, 82 N.M. 661, 486 P.2d 70 (Ct.App.), decided May 21, 1971.

Affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

494 P.2d 170

Celia OJINAGA, Plaintiff-Appellant,

v.

Agnes DRESSMAN, d/b/a Dressman's Flower Nook, Employer, and Maryland Casualty Company, Insurer, Defendants-Appellees.

No. 740.

Court of Appeals of New Mexico.

Jan. 28, 1972.

M. J. Rodriguez, Jones, Gallegos, Snead & Wertheim, Santa Fe, for plaintiff-appellant.

Stanley C. Sager, Menig, Sager & Curran, Albuquerque, for defendants-appellees.

OPINION

COWAN, Judge.

Plaintiff appeals from a judgment dismissing her claim for compensation benefits under the New Mexico Occupational Disease Disablement Law (§§ 59-11-1—59-11-42, N.M.S.A.1953 [Repl.Vol. 9, pt. 1]).

We affirm.

For a period of years prior to and until September 11, 1967, plaintiff was employed by defendant Dressman at the latter's floral shop and curio store in Santa Fe, New Mexico. During the course of her employment plaintiff performed various duties at the place of business, including but not limited to, the preparing of flowers and their care, flower arranging, waiting on trade, making change, answering the telephone and assisting in cleaning the store. Some of the duties and responsibilities performed by the plaintiff required her to squeeze, grasp, and grip with her right hand, and to turn and rotate her hand, but not all of the duties and responsibilities of her employment required these repetitive motions.

During the course of her employment she contracted tenosynovitis, also known as "tennis elbow", in her right arm. She was furnished medical treatment and paid compensation under the act for total disablement until June 4, 1969, from which date her condition has steadily improved.

These were the facts found by the trial court and not challenged by the plaintiff. They thus become the facts in this court. Armijo v. Via Development Corporation, 81 N.M. 262, 466 P.2d 108 (1970).

The following facts found by the trial court were challenged by the plaintiff as being unsupported by substantial evidence:

"9. At no time since June 4, 1970 [1969], has the Plaintiff suffered 'disablement' as defined in Section 59-11-4, NMSA, and elsewhere in the 'New Mexico Occupational Disease Disablement Law' being Article 11 of Chapter 59, NMSA; at no time since said date of June 4, 1970 [1969], has the Plaintiff suffered from a total physical incapacity to perform any work for remuneration in the pursuit in which she was engaged as an employee of the Defendant employer.

"10. Plaintiff at all times material was able to perform some work for remuneration or profit in the pursuit in which she had been engaged in the floral shop and curio store.

"11. Plaintiff has been paid all sums to which she is entitled under the provisions of the Occupational Disease Disablement Act."

Section 59–11–4(a), N.M.S.A.1953 (Repl. Vol. 9, pt. 1), states:

" 'Disablement' means *total physical incapacity* by reason of an occupational disease as defined in this act to perform *any work* for remuneration or profit *in the pursuit* in which he was engaged. * * *" [Emphasis added]

Plaintiff was examined by Dr. Emmett Altman, an orthopedic surgeon, on May 26, 1970, and on November 13, 1970. When called as a witness for the plaintiff at the trial on December 2, 1970, Dr. Altman was asked:

"Do you have an opinion, Dr. Altman, as a result of the synovitis and caused by the synovitis as to whether by reason of that synovitis Mrs. Ojinaga has a physical incapacity to perform any work for pay in her pursuit as a florist or a floral designer?"

His response was:

"This synovitis will not allow her to do this work that she had done before on the basis that she was doing it before, so she has a permanent partial disability with regard to that."

Even though the question was restricted to "pursuit as a florist or a floral designer", the doctor still found less disability than the "total physical incapacity" necessary to constitute "disablement" under § 59–11–4(a), supra. The evidence is substantial that the plaintiff's "pursuit" was not restricted to that of a florist or a floral designer.

The doctor later testified that she could do selling, make change, answer the telephone and write, to a normal extent. The plaintiff also testified that she could do these things. On appeal only that evidence and the reasonable inferences to be drawn therefrom which support the findings will be considered. All evidence unfavorable to the findings will be disregarded. Liberal construction under our Workmen's Compensation Act applies only to the law and not to the facts. Blea v. Lowdermilk Brothers, Inc., 83 N.M. 322, 491 P.2d 539 (Ct.App. 1971). Applying these rules to this occupational disease case, as they should be, we cannot say that the court's findings are unsupported by substantial evidence.

By her second point, plaintiff urges that if she is not totally disabled, she is entitled to recover for partial disability. The court's conclusion No. 5 was:

"A claimant who is not totally physically incapacitated by reason of an occupational disease as defined in the Occupational Disease Disablement Law, to perform any work for remuneration or profit in the pursuit in which he was engaged at the time he contracted an occupational disease, is entitled to no compensation under the said law."

Its conclusion No. 6 was:

"The Plaintiff is partially disabled, but is able to perform some work for remuneration or profit in the pursuit in which she was engaged; there has been no evidence presented as to the percent age [sic] of partial disability."

In view of the latter conclusion, the absence of evidence of wages, earnings or disability percentile, plaintiff's admission at oral argument that there was no proof of a percentage of disability and her failure to refute conclusion No. 6, the court's judgment was not erroneous.

We thus need not decide whether the New Mexico Occupational Disease Law authorizes payment for partial disability or partial physical incapacity [§ 59–11–15(D), N.M.S.A.1953 (Repl.Vol. 9, pt. 1, 1971 Supp.)] or whether conclusion No. 5 is erroneous. Plaintiff's reliance on Holman v. Oriental Refinery, 75 N.M. 52, 400 P.2d 471 (1965), is without avail. There, the Supreme Court held that, although the workman's physical disability was only 30%, he was totally disabled from continuing his "pursuit" as a filling station operator and therefore entitled to compensation. Here,

the trial court found to the contrary. We note also that, in *Holman,* the question of payment for partial disability was not raised or considered as an element of the case on appeal. There being a failure of proof, we do not consider whether cases from other jurisdictions can be applied to the wording of the New Mexico law.

The judgment is affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

494 P.2d 173

STATE of New Mexico, Plaintiff-Appellee,

v.

Salvador TREJO, Defendant-Appellant.

No. 748.

Court of Appeals of New Mexico.

Feb. 4, 1972.

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

David L. Norvell, Atty. Gen., Prentis Reid Griffith, Jr., Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of attempting to commit a felony. Section 40A–28–1, N.M.S.A.1953 (Repl.Vol. 6). The felony was sodomy. Section 40A–9–6, N.M.S.A.1953 (Repl.Vol. 6). His appeal asserts: (1) a lack of substantial evidence to sustain the conviction and (2) a denial of effective assistance of counsel. This case involves a forcible attack upon a minor.

Substantial evidence.

In determining whether there was substantial evidence to support the verdict we view the evidence in the light most favorable to the State, resolving all conflicts in the evidence and indulging all reasonable inferences in favor of the verdict. State v. Betsellie, 82 N.M. 782, 487 P.2d 484 (1971); State v. Sedillo, 82 N.M. 287, 480 P.2d 401 (Ct.App.1971).

Applying this rule, the evidence is as follows. On August 22, 1969, the complaining witness, sixteen year old Ronald Hernandez, was at a drive-in movie near Central, New Mexico with some friends. He left their car and went to the refreshment stand where he met the defendant. Ronald was acquainted with the defendant as the defendant was married to Ronald's cousin. Defendant agreed to take Ronald to Silver City where Ronald's grandmother lived.

After getting into defendant's car, the defendant offered Ronald a dollar if Ronald would "* * * let him screw me." When Ronald refused the defendant said he was "* * * going to screw me [Ronald] or else." Defendant then grabbed Ronald, held him, covered his mouth and drove out of the movie onto a back road and stopped. Defendant then threw Ronald into the back seat and punched and slapped Ronald "real hard" until Ronald passed out. "* * * [W]hen I [Ronald] came to I was partly naked and I was struggling and my trousers were already off and he took everything off and he begin [sic] to kick me * * *." During the struggle defendant was on top of Ronald with his arms around him. During the course of these events the fly on defendant's pants was open.

Shortly thereafter Ronald escaped, and ran naked, to a nearby house.

The owner of the house testified that Ronald was nude except for a pair of socks; that he was "* * * hysterical, crying, terrified * * *;" that he had a "* * * big bruise on the [sic] side of his face * * * bruise marks on his throat and he was * * * spitting a little bit of blood from his teeth. * * *" Other witnesses gave similar descriptions of Ronald's appearance that night.

The defendant was apprehended shortly thereafter on the road Ronald indicated he had taken. Ronald's clothes were found by the side of the road approximately one-half mile from where the attack occurred.

An attempt to commit a felony is defined as consisting "* * * of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission." Section 40A–28–1, supra. The overt act must be more than preparation; it must be in part execution of the intent to commit the crime. However, slight acts in furtherance of that intent will constitute an attempt. State v. Lopez, 81 N.M. 107, 464 P.2d 23 (Ct.App. 1969); see also State v. Bereman, 177 Kan. 141, 276 P.2d 364 (1954).

We found no New Mexico decisions which consider what acts are sufficient to constitute attempted sodomy. Generally, however, see United States v. Kelly, 119 F. Supp. 217 (D.C.1954); State v. Smith, 137 Mo. 25, 38 S.W. 717 (1897); State v. Verganadis, 50 Nev. 1, 248 P. 900 (1926); Garrad v. State, 194 Wis. 391, 216 N.W. 496 (1927).

In Anderson v. State, 75 Ga.App. 643, 44 S.E.2d 178 (1947), the defendant's conviction for attempted sodomy was upheld on evidence that the defendant had enticed the prosecutrix into his car by promising to take her home. Defendant then drove out onto a deserted road and told the prosecutrix to "take his privates in [her] mouth." The prosecutrix refused and defendant took her from the car and beat her until she passed out. The court stated:

> "* * * the jury were authorized to find that the defendant failed in the perpetration of the commission of the crime of sodomy because the prosecutrix refused to take his private parts in her mouth when ordered by him so to do, and that the acts of the defendant in taking the prosecutrix out of the car and beating her were acts done in pursuance

of his intent to commit sodomy, *and directly tending to the commission of the crime.*" [Emphasis added.]

In State v. LeMarr, 83 N.M. 18, 487 P. 2d 1088 (1971), the defendant was convicted of being an aider and abettor to an attempted rape. The evidence of the attempted rape was that the principal had ripped off the victim's shirt and had attempted to remove her pants.

The acts of the defendant herein constituted an active effort to consummate the crime and were more than mere preparation. In addition, defendant's announced intention to "screw" Ronald, and his activities following that announcement, are evidence that defendant intended to commit sodomy. See State v. Nelson, 83 N.M. 269, 490 P.2d 1242 (Ct.App.1971). There is substantial evidence to sustain the conviction.

Effective assistance of counsel.

Defendant contends he was denied effective assistance of counsel. All of his claims go to trial tactics and strategy. Even if the tactics could be considered bad, or the strategy considered improvident (which we do not hold), they would not amount to a denial of effective assistance of counsel. State v. Ramirez, 81 N.M. 150, 464 P.2d 569 (Ct.App.1970). A conviction is not to be reversed on a claim of ineffective assistance of counsel unless the proceedings leading to his conviction amount to a sham or farce or a mockery of justice. State v. Tapia, 80 N.M. 477, 457 P.2d 996 (Ct.App.1969). That is not the situation in this case.

Defendant's specific claims, and the decisions adverse to those claims are: (1) failure to call defendant as a witness—Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct. App.1970); State v. Ramirez, supra; (2) failure to object to certain instructions and a failure to request other instructions—State v. Samora, 82 N.M. 252, 479 P.2d 532 (Ct.App.1970); and (3) asserted deficiencies in counsel's cross-examination—Barela v. State, supra.

The judgment and sentence are affirmed.

It is so ordered.

HENDLEY, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent. The sodomy statute, § 40A-9-6, N.M.S.A.1953 (Repl.Vol. 6), is unconstitutional and void because it regulates private sexual relations between two consenting adults, including husband and wife, both of which adults may be principals. "Force is not an element of the crime." Washington v. Rodriguez, 82 N.M. 428, 483 P.2d 309 (Ct.App.1971).

The Model Penal Code of the American Law Institute, 1962, § 213.2 suggests a proper sodomy statute. Thus far it has been adopted by the States of Connecticut (Conn.Gen.Stat. § 53a-65 et seq., particularly §§ 53a-75, 53a-76, 53a-77 [1958 Rev. 1969 Supp.], as amended, 1971 Conn.Public Acts, P.A. 871, §§ 19, 127, 128), Idaho (Idaho Session Laws 1971, ch. 143, § 1, ch. 9, § 18-901 et seq.), Colorado (Session Laws of Colo.1971, ch. 121, §§ 40-3-403 through 40-3-406, 40-3-410, effective July 1, 1972), and Oregon (Oregon Laws 1971, ch. 743, Art. 13, §§ 104-120). It was adopted partially by the State of New York (Penal Code, McKinney's Consol. Laws, c. 40, § 130.00 et seq.), and Illinois (Ill.Rev.Stat. ch. 38, § 11-1 et seq. [1967 Comp.]). Minnesota has amended its sodomy statutes to provide a lesser penalty for consensual acts. See Minn.Stat.1969 Comp. § 609.293. The Model Penal Code provision is being considered by other states drafting criminal codes. A sodomy statute for New Mexico has been suggested in 8 Natural Resources J. 531 at 540.

Trejo would be guilty under either suggested statute. The Model Penal Code prohibits deviant sexual intercourse only (1) when that act is accomplished through force; (2) when it involves an adult corrupting a minor; or (3) when the act is accompanied by a public offense. None of

these elements appear in the New Mexico sodomy statute.

In the last ten years many law review articles and some books have been written unanimously condemning the present statute and its antecedents. Only twenty articles have been reviewed and are set forth as an Appendix. Professor Walter Barnett of the University of New Mexico Law School is now preparing drafts of a book to be entitled "Sodomy and the Constitution" which covers this subject matter.

The present statute, suggested by the New Mexico Supreme Court in 1953, comes from Manual for Courts-Martial, U.S. Army, 1959. Bennett v. Abram, 57 N.M. 28, 253 P.2d 316 (1953).

The New Mexico sodomy statute reads as follows:

> Sodomy consists of a person intentionally taking into his or her mouth or anus the sexual organ of any other person or animal or intentionally placing his or her sexual organ in the mouth or anus of any other person or animal, or coitus with an animal. Any penetration, however slight, is sufficient to complete the crime of sodomy. Both parties may be principals.
>
> Whoever commits sodomy is guilty of a third degree felony.

A good treatise on the subject of sodomy can be found in Harris v. State, 457 P.2d 638 (Alaska 1969).

The New Mexico statute is unconstitutional for the following reasons:

1. It invades the right of privacy which is a right unspecified in the federal Constitution but it is a right "within the penumbra of specific guaranties of the Bill of Rights" including the IX Amendment to the Constitution of the United States. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968); Buchanan v. Batchelor, 308 F.Supp. 729 (D.C.Texas 1970), vacated and remanded for reconsideration of the jurisdiction of the U. S. District Court to grant equitable relief, Wade v. Buchanan, 401 U.S. 989, 91 S.Ct. 1221, 1222, 28 L.Ed.2d 526. See 49 Texas L.Rev. 400 (Jan.1971); the dissents in Dixon v. State, Ind., 268 N.E.2d 84 (1971); Miller v. State, Ind., 268 N.E.2d 299 (1971).

2. The sodomy statute violates the First Amendment to the Constitution of the United States that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This means at least that neither a state nor the federal government can set up a church, nor pass laws which aid one religion, aid all religions, or prefer one religion over another. Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 91 L. Ed. 711 (1947), reh. den. 330 U.S. 855, 67 S.Ct. 962, 91 L.Ed. 1297 (1947).

The New Mexico sodomy statute reflects a Judeo-Christian principle with origins in Genesis 19:5–8, 24–26; Deuteronomy 23:17; Leviticus 18:22–23, 20–16. Sodomy is deemed sinful and wrongful as a matter of theology. The prohibition is religious in origin and no secular justification exists for enforcement of this religious principle beyond the areas set forth in the Model Penal Code. The legislature would not have the power to make abstinence a felony because it is a religious doctrine. Contraception is constitutional. Griswold v. Connecticut, supra.

Neither the legislature nor the courts have the power to impose with ecclesiastical fury religious principles upon ordinary, innocent adults. For example, in Berryman v. State, 283 P.2d 558, 563 (Okl.Cr. 1955), the court said the statute is not explicit because "the very alleged sexual behavior is such as should not be described among *Christians*." [Emphasis added.]

For decades, this subject has been considered "revolting" and "disgusting" and not subject to discussion in court opinions because of its religious nature. Sodomy does not become a criminal act until the statute inserts elements which make human conduct a crime as set forth in the Model Penal Code.

The sodomy statute is unconstitutional and void because it is vague, overbroad, uncertain, and is an unreasonable exercise of the police power of the state. See State v. Prince, 52 N.M. 15, 189 P.2d 993 (1948); State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct.App.1969); State v. Sanchez, 82 N.M. 585, 484 P.2d 1295 (Ct.App.1971), dissenting opinion; State v. Putman, 78 N.M. 552, 434 P.2d 77 (Ct.App.1967).

In State v. Putman, supra, a dissenting opinion established that three appellate judges could not agree on whether the defendant's conduct was covered by the sodomy statute. If this uncertainty exists, a penal statute is in violation of the Fourteenth Amendment to the Constitution of the United States because it deprives a person of due process. State v. Prince, supra.

A good definition of public policy was adopted in Barwin v. Reidy, 62 N.M. 183, 307 P.2d 175 (1957). It is "uncertain and fluctuating, varying, with the changing economic needs, social customs, and moral aspirations of a people." Appellate courts should not declare public policy without "'the clearest reasons and most pressing necessity.'"

A review of books and articles disclose many sound reasons which declare the present statute contrary to public policy. Public abhorrence of sexual deviation and private morals are not properly within the domain of the criminal law. Judge Learned Hand once wrote "Sodomy is a matter of morals * * * not something for which people should be put in prison." These deviations are widely practiced by married couples and encouraged by modern authorities on marriage. Authors of medical, psychological and sociological books, as well as members of the medical profession, are all placed in the role of advocating the commission of a felony.

No one has ever proven that the various acts involved are physically harmful between two consenting adults engaged in private sexual relations, nor that these acts have a deleterious effect on society.

Marriage contemplates a right of privacy older than the Bill of Rights, and the sanctity of this relationship must be protected from intrusion. Doesn't it seem odd that the statute allows the state to punish consenting adults for private sexual deviations, and married people for the private use of their marital intimacy even though they seek stability instead of divorce? In denying consensual private sex relations between adults, the legislature makes criminals out of a large section of ordinary, normal people in New Mexico who have left the biblical text and seek contentment under modern professional guidance. Public policy cannot sanction this type of legislation.

In Honselman v. People, 168 Ill. 172, 48 N.E. 304 (1897), in referring to sodomy, the court said, "The existence of such an offense is a disgrace to human nature." In 1961, the Illinois legislature removed private consensual sodomy from the category of crime.

In Indiana, the Supreme Court supported a plea of guilty to a charge that the defendant committed the "abominable and detestable crime against nature with a beast: to wit a chicken"!

In Perkins v. State, 234 F.Supp. 333 (W.D.N.C.1964), the judge said: "[P]utting Perkins into the North Carolina Prison system is a little like throwing Brer Rabbit into the briarpatch."

The social revolution on the subject of private consensual sexual relations between two consenting adults has begun legally in the courts and in the legislature. New Mexico should follow this trend.

APPENDIX

Evans, et al., "The Crimes Against Nature," 16 Journal of Public Law 159 (1967).

Goodman, "The Bedroom Should not Be Within the Province of the Law," 4 Cal. West.L.Rev. 115 (1968).

Hefner, "The Legal Enforcement of Morality," 40 U.Colo.L.Rev. 199 (1968).

Hollis, "Criminal Law—Sexual Offenses —Sodomy—Cunnilingus," 8 Natural Resources J. 531 (1968).

Johnsen, "Sodomy Statutes—A Need for Change," 13 S.D.L.Rev. 384 (1968).

Jones, "Sodomy—Crime or Sin?" 12 U.Fla.L.Rev. 83 (1959).

Spence, "The Law of Crime Against Nature," 32 N.C.L.Rev. 312 (1954).

Cantor, "Deviation and the Criminal Law," 55 Journal of Criminal Law, Criminology, and Police Science 441 (1964).

Slovenko, "Sexual Deviation: Response to an Adaptational Crisis," 40 U.Colo.L. Rev. 222 (1968).

Note, 49 Tex.L.Rev. 400 (Jan.1971).

Joplin, "Criminal Law: An Examination of the Oklahoma Laws Concerning Sexual Behavior," 23 Okl.L.Rev. 459 (1970).

Foster & Freed, "Offenses Against the Family," 32 U.M.K.C.L.Rev. 33 (1964).

Lamb, "Criminal Law—Consensual Homosexual Behavior—The Need for Legislative Reform," 57 Ky.L.J. 591.

Farrar, "Constitutional Law—State Interference with Private, Consensual Marital Sexual Relations," 23 U.Miami L.Rev. 231 (1968).

Moran, "Sex Offenses and Penal Code Revision in Michigan," 14 Wayne L.Rev. 934 (1968).

Harris, "Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality." 14 U.C.L.A.L.Rev. 581 (1967).

Couris, "Sexual Freedom For Consenting Adults—Why Not?" 2 Pac.L.J. 206 (1971).

Fisher, "The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior be Excluded?" 30 Md.L.Rev. 91 (1970).

Ploscowe, "Report to the Hague: Suggested Revisions of Penal Law Relating to Sex Crimes and Crimes Against the Family." 50 Cornell L.Q. 425 (1965).

Note, "Deviate Sexual Behavior Under the New Illinois Criminal Code," 1965 Wash.U.L.Q. 220.

494 P.2d 178

STATE FARM FIRE AND CASUALTY COMPANY, Plaintiff-Appellant,

v.

MILLER METAL COMPANY and Lennox Company, Inc., Defendants-Appellees.

No. 679.

Court of Appeals of New Mexico.
Dec. 10, 1971.
Rehearing Denied Jan. 4, 1972.
Certiorari Granted Feb. 23, 1972.

Eugene E. Klecan, Albuquerque, for plaintiff-appellant.

Ranne B. Miller, Dennis M. McCary, Keleher & McLeod, Albuquerque, for Miller Metal Co.

Ray H. Rodey, Bruce D. Hall Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for Lennox Industries.

OPINION

COWAN, Judge.

The plaintiff appeals from a judgment following a verdict for the defendants.

We affirm.

A house in Bernalillo County, New Mexico, belonging to J. D. Poe and Mary B. Poe, his wife, was damaged by fire on January 2, 1967. The fire started at or near a furnace manufactured and sold by defendant Lennox Industries, Inc. and installed by defendant Miller Metal Company.

Pursuant to the provisions of a policy of fire insurance issued by plaintiff to the Poes, plaintiff paid for the fire damage and filed a subrogation suit against the defendants, alleging negligent installation of the furnace by Miller and strict liability on the part of Lennox.

The evidence, viewed in the light most favorable in support of the verdict, is that the house was constructed, and the Poes took possession of it, in 1963. They lived in the house from November of that year until the latter part of July, 1966, when they went to Colorado, intending to stay two or three weeks. However, they took over the management of a friend's motel and stayed in Colorado until after the fire. The house was vacant during their absence but they had left a key with their daughter and son-in-law, Mr. and Mrs. Fred Stalker. The Stalkers lived nearby and Mrs. Stalker entered the house two or three times a week. A key had also been left with a Mrs. Bennett, who lived next door to the Poe residence. At the time of the fire the Stalkers had been out of the state for approximately ten days.

The air conditioner was operating at the time the Poes left for Colorado and, sometime before winter, Mr. Poe telephoned from Colorado, requesting the Stalkers to prepare the house for the coming winter. Mr. Poe testified that he told his daughter "where to find the thing to cut off the evaporative air conditioner", and he gave her specific instructions to open the dampers on the furnace. Mr. Poe was aware of the fact that if the dampers were left closed the heat would not leave the furnace, and there was testimony that, with the dampers closed, the furnace would overheat to as much as 400 degrees. Its normal operating temperature was 150 degrees. Mrs. Stalker passed Mr. Poe's request along to her husband, who went to the house, but Mrs. Stalker did not know what he actually did at the Poe residence. At the time of the trial Mr. Stalker was ill and did not testify.

Defendant Lennox timely moved for a directed verdict on the ground that strict liability is not the law in New Mexico and on the ground of insufficient evidence that the furnace was defective at the time it was sold or that a defect was the proximate cause of the fire. This motion was overruled and the case against Lennox was presented to the jury, who found for Lennox.

Even if the doctrine of strict liability, as urged by plaintiff, did apply in this jurisdiction (see Stang v. Hertz Corp., 83 N.M. 217, 490 P.2d 475, decided September 10, 1971 [Ct.App.], cert. issued N. M.Sup.Ct. October 20, 1971), there is no evidence that the Lennox furnace was defective at the time it was sold or at the time it was installed. A witness who tested the furnace some 17 months after the fire and almost 5 years after its installation expressed an opinion of a defect in, or malfunction of, a high-level heat control which contributed to the furnace overheating. No opinion was asked or expressed as to the condition of this control at the time of the sale or the installation. Under the theory of strict liability, a defect in the product when it leaves the maker's control and the causal connection between the defect and an injury must be proved. Restatement (Second) of Torts § 402A (1966); Pittsburg Coca-Cola Bottling Works v. Ponder, 443 S.W. 2d 546 (Tex.Sup.Ct.1969).

It follows that the trial court should have directed a verdict in favor of the defendant Lennox and it is therefore unnec-

essary for us to review alleged errors of the trial court directed to Lennox. "Where plaintiff fails to make a case for the jury, alleged errors of the trial court are immaterial and deemed harmless." Komeshak v. Missouri Petroleum Products Co., 314 S.W.2d 263 (Mo.App.1958).

> "The function of an appellate court is to correct an erroneous result, and it will not correct errors which, even if corrected, will not change the result."

Morris v. Merchant, 77 N.M. 411, 423 P.2d 606 (1967).

Proceeding now to Miller, plaintiff seeks reversal under six points. Plaintiff first argues that the court erred in permitting testimony about, and in admitting into evidence, a certification by the American Gas Association (AGA). This certification, defendant's Exhibit "E", was a publication of AGA on safety standards and purported to show that this particular furnace needed no clearance between the back of the furnace and the adjacent structure. Experts of both parties admitted that the AGA was pre-eminent in the field of safety standards for gas appliances. Plaintiff's expert had testified that the nameplate on the furnace indicated a requirement of "one-inch clearance" and the certificate was used by defendant Miller in the cross-examination of this witness.

We do not find that the use of this exhibit on cross-examination or its introduction in evidence was error. In Nordstrom v. White Metal Rolling & Stamping Corp., 75 Wash.2d 629, 453 P.2d 619 (1969), the Supreme Court of Washington stated the modern rule to be:

> "* * * [W]here evidence of the contents of a publication must be admitted if the relevant and material information contained therein is to be made available to the trier of the facts, and the publication is one which reasonable minds would agree is trustworthy, there appears to be no sound reason why such evidence should be excluded. The purpose of the hearsay rule is not offended by the introduction of such evidence."

The necessary elements were present in this case and the action of the trial court was not erroneous. Compare Curtis v. Schwartzman Packing Company, 61 N.M. 305, 299 P.2d 776 (1956) and Cal. Sugar & W. P. Co. v. Whitmer Jackson & Co., 33 N.M. 117, 263 P. 504 (1928).

Second, the plaintiff argues that the court erred in instructing on the doctrine of assumption of the risk. The objection was not as to form or content but that there was no evidence justifying an instruction on the subject.

The record contains substantial evidence to support the giving of this instruction. The Poes had turned over the safekeeping of their house to the Stalkers, were away from it some five months before the fire and gave telephone instructions as to what the Stalkers should do in order to protect the house from the hazards of winter, giving detailed instructions as to how this should be done. From his own testimony, it is obvious that Mr. Poe realized there might be danger if the dampers were not in an open position. There is no evidence in the record that Mr. Poe did anything further, after the telephone call, toward determining that the furnace had been put in proper order. There was evidence which would permit the jury to find Mr. Poe had actual knowledge that leaving the dampers closed involved the danger of an overheated furnace. This knowledge requirement would be satisfied if either the Poes or the Stalkers, as agents of the Poes, knew or should have known of the danger. The second point is without merit.

By his third point plaintiff seeks error in the court's finding as a matter of law that any act or omission of the Stalkers was the act or omission of the Poes. From the factual situation we conclude that an agency relationship existed between the Poes and the Stalkers. The court determined this as a matter of law and so instructed the jury. Plaintiff objected to the instruction for the reason that the relationship was a factual matter to be determined by the jury but submitted no instruction on

the issue. Plaintiff does not complain as to the form or content of the instruction—only that it was unsupported by the evidence. As to the latter, we disagree. With respect to the care of the furnace, Mr. Poe gave specific, detailed instructions to his daughter for winterizing the home. Whether the Stalkers be considered agents or servants of the Poes is of little import. Under the facts, the doctrine of respondeat superior applies and the acts or omissions of the Stalkers were imputed to the Poes. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968); Bailey v. Jeffries-Eaves, Inc., 76 N.M. 278, 414 P.2d 503 (1966). We conclude that, under the evidence, the court properly determined the relationship between the Stalkers and the Poes as a matter of law and plaintiff's third point is without merit.

By its fourth and fifth points against Miller, plaintiff urges that the court erred in refusing to permit its expert to testify relative to a dangerous installation while permitting defendant's expert to testify relative to a safe installation. The testimony had to do with opinions as to the safe distance between the furnace or its duct work and adjacent woodwork constituting a dangerous or safe installation. The court sustained a defense objection to such evidence at two points during the testimony of one of plaintiff's experts. However, immediately after the first objection, this same expert answered the question, phrased somewhat differently and without objection. Additionally, substantially the same evidence had been adduced earlier from another of plaintiff's experts. Error, if any, was therefore harmless. See Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Bolen v. Rio Rancho Estates, Inc., 81 N.M. 307, 466 P.2d 873 (Ct.App.1970).

Further possible causes of the fire were fully explored by witnesses from both sides and we cannot say that the experts for either side testified beyond their established qualifications or that the court unfairly restricted their testimony. We find no abuse of the court's discretion or prejudicial error. The admission or exclusion of expert testimony is peculiarly within the discretion of the court and its decision will not be reviewed unless the exercise of that discretion has been abused. Lurie v. Sweedler, 3 Conn.Cir. 17, 206 A.2d 449 (1964); 5A C.J.S. Appeal and Error §§ 1748–1749 (1958).

As to the opinion elicited from defendant's expert, see Lopez v. Heesen, 69 N.M. 206, 365 P.2d 448 (1961); Lopez v. Maes, 81 N.M. 693, 472 P.2d 658 (Ct.App.1970).

By its sixth and last point plaintiff objects to the court's permitting one witness, an official of the State of New Mexico with 20 years experience in plumbing and gas installations, to testify that he had never heard of a fire starting because of hot duct work igniting framework. We do not deem this evidence inadmissible or prejudicial. Lopez v. Heesen, supra; Lopez v. Maes, supra; Nubbe v. Hardy Continental Hotel System of Minn., 225 Minn. 496, 31 N.W.2d 332 (1948).

The judgment is affirmed.

It is so ordered.

WOOD, C. J., concurs.

SUTIN, Judge (dissenting in part).

I concur in the majority opinion which affirms the judgment in favor of Lennox Company, Inc. I dissent as to affirmance of the judgment in favor of Miller Metal Company because it was reversible error to instruct the jury on issue of assumption of risk. The Poes and the Stalkers will be referred to as Poe.

The trial court instructed the jury on the defense of assumption of risk. U.J.I. 13.-10. To warrant this instruction, there must be substantial evidence that (1) a dangerous situation existed; (2) that Poe knew of such dangerous situation; (3) that Poe voluntarily exposed the Poe home to the danger and was damaged thereby. Poe's knowledge can be actual knowledge of the dangerous situation, or, if the risk is obvious, he is presumed to know the danger.

Miller installed a gas furnace in the garage of the Poe residence. It was enclosed in a closet without doors on the front of the closet. There was duct work leading from the furnace. The residence was unoccupied from July 30, 1966 to the date of the fire on January 2, 1967. During his absence, Poe told his daughter to winterize the house, to open the dampers so that the heat would get into the house during the winter. The dampers were not opened by the daughter. The heat was left at 60°. There is no evidence that Poe knew the heat in the furnace with the dampers closed could reach 400° or more, and ignite the wooden frame ⅜″ from the furnace. This was not an obvious risk.

Poe and Stalker were retired men. There was no evidence of any occupation, nor any knowledge of causes of fire from a heated furnace with dampers closed, nor any experience as gas experts or with furnace operations.

A careful review of the record discloses no evidence, nor any facts from which reasonable inferences can be drawn that Poe knew of the dangerous situation, i. e., that a furnace with 60° heat and dampers closed would reach a heat of 400° or more, and ignite a wood frame ⅜″ from the furnace. No questions were asked Poe on the subject. Stalker was physically unable to appear to testify. Poe had no actual knowledge, and the risk was not obvious to any ordinary person. Without such knowledge, Poe could not voluntarily expose the property to the danger. There is no circumstantial evidence which imposes on Poe the doctrine of assumption of risk.

In order for Poe to assume the risk, the *specific* danger must be known. Garcia v. Barber's Super Markets, Inc., 81 N.M. 92, 463 P.2d 516 (Ct.App.1969). An ordinary layman does not know that failure to open dampers will cause a fire. That a fire will take place is as far from his mind as stardom. He ordinarily believes that to open dampers to allow heat in the house will prevent pipes from freezing; that extreme cold weather will not physically damage his home.

Miller seeks to avoid reversal by contending Poe failed to demonstrate how prejudice resulted. Reversible error arises where no evidence supports an instruction on assumption of risk. Stephens v. Dulaney, 76 N.M. 181, 413 P.2d 217 (1966).

Miller further contends that since Poe did not object to instructions on contributory negligence, no prejudice resulted from submission of an instruction on assumption of risk. This contention is based on Restatement of Law of Torts, Second, § 466 (a), Comment (d), that contributory negligence and assumption of risk overlap, and the plaintiff may be barred from recovery by either or both; that "had the jury made a determination that the Poes or Stalkers assumed the risk, such a determination would have necessarily involved a determination that said persons were also contributorily negligent." This argument is speculative, but it is answered to the contrary in Stephens v. Dulaney, 78 N.M. 53, 428 P.2d 27 (1967), where the court said:

> Conduct under certain facts and circumstances may amount to an assumption of risk as well as contributory negligence. [Citing cases]. However, assumption of risk and contributory negligence are not synonymous, but are separate and distinct defenses. [Citing cases].

The error was not harmless.

Furthermore, the Supreme Court has granted certiorari in three cases involving the defense of assumption of risk. Until a decision is reached, this court should follow the established principles on this subject.

494 P.2d 184

STATE of New Mexico, Plaintiff-Appellee,

v.

Don Aaron LEE, Defendant-Appellant.

No. 743.

Court of Appeals of New Mexico.

Feb. 4, 1972.

[redacted]

Harvey C. Markley, Lovington, for defendant-appellant.

David L. Norvell, Atty. Gen., James H. Russell, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

COWAN, Judge.

Defendant appeals from a judgment and sentence following his conviction in Lea County, New Mexico, of the crime of burglary contrary to § 40A–16–3, N.M.S.A., 1953 (Repl.Vol. 6), and the crime of taking a vehicle without the consent of the owner, contrary to § 64–9–4(a), N.M.S.A.1953 (Repl.Vol. 9, pt. 2).

We affirm.

[redacted] The two issues raised by the defendant are insufficiency of the evidence as to both charges and proof of criminal intent as to the charge of auto theft.

Viewed in the light most favorable in support of the verdicts of conviction, the facts are: During the night of February 5, 1971, a building belonging to Levy Auto Sales in Hobbs was burglarized. A key to a 1964 white Ford was taken and the car was subsequently removed from an adjoining lot. Early in the following afternoon, the car lot manager observed the vehicle being driven past the lot and followed it to a nearby filling station. There the police placed the defendant under arrest. His shoes were taken from him at that time and used to make prints for comparison, by photograph, with a footprint found beside the window through which entry into the building was effected. The photographs reflected several similarities, including size and heel markings. They were introduced in evidence for the jury's consideration.

The defendant testified that an acquaintance in a bar had loaned him the vehicle to use for transportation to pick up the defendant's paycheck. This acquaintance could not be located prior to trial.

The defendant admitted dominion, control and possession of the automobile but claimed he did not know it had been stolen.

The question of sufficiency of the evidence in this case is controlled by the opinion of this court in State v. Kennedy, 80 N.M. 152, 452 P.2d 486 (Ct.App.1969), where a stolen television set was found in the defendant's home and a plaster cast of a foot imprint made at the scene of the crime showed marks similar to those on boots found in defendant's home. The court held this evidence sufficient to support a guilty verdict. Where circumstances alone are relied upon by the prosecution, the circumstances must be such as to apply exclusively to defendant, and such as are reconcilable with no other hypothesis than defendant's guilt. However, a guilty verdict, supported by substantial evidence, may not be overturned on appeal. This court, in determining whether there is substantial evidence to support a conviction, will view the evidence and inferences in a light most favorable to the prosecution. State v. Kennedy, supra.

Evidence of both offenses, including testimony and exhibits, was presented to the jury and we are unable to say, as a matter of law, that such evidence was insufficient to support the verdict. It was for the jury to weigh the evidence and pass on the credibility of the witnesses. State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct.App. 1969).

The question of intent is determined by the rule in State v. Hinojos, 78 N.M. 32, 427 P.2d 683 (Ct.App.1967), that evidence of dominion, control or possession of stolen property is admissible on the question of intent. See also State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct.App. 1969), and State v. Ortega, 79 N.M. 707, 448 P.2d 813 (Ct.App.1968). From the evidence presented, together with the reasonable inferences that flow therefrom, the jury could find the requisite criminal intent.

The judgment and sentence is affirmed.

It is so ordered.

HENDLEY, J., concurs.

SUTIN, Judge (concurring in part and dissenting in part).

I concur in the burglary conviction, but dissent from the conviction of violation of § 64-9-4(a) for the reasons stated in my dissenting opinion in State v. Sanchez, 82 N.M. 585, 484 P.2d 1295 (Ct.App.1971).

494 P.2d 185

STATE of New Mexico, Plaintiff-Appellee,

v.

Ernest MONTANO, Defendant-Appellant.

No. 761.

Court of Appeals of New Mexico.

Feb. 4, 1972.

Wycliffe V. Butler, Butler & Colberg, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Winston Roberts-Hohl, Asst. Atty. Gen., Sante Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of burglary defendant appeals. We reverse on defendant's third point regarding an insanity instruction.

During the course of the trial a psychiatrist testified that defendant "* * * gave a history of being mentally ill. * * I would have considered him [defendant] mentally ill then [at the time of the criminal act]" and defendant "* * * would not have been able to distinguish right from wrong. * * *"

The defendant's tendered but refused insanity instruction stated in part:

"Insanity, as the word is used in these Instructions, means such a diseased or deranged condition of the mental faculties of a person as to render that person incapable of knowing the nature and quality of his act, or of distinguishing between right and wrong in relation to the act with which he is charged, or of such character as to deprive one of the powers of his will which would enable him to prevent himself from committing the act even though he might know the nature and quality of the act and that it is wrong."

The trial court instructed the jury on the insanity issue as follows:

"You must find the defendant, Ernest Montano, not guilty if you find that his act of entering the structure was the product of insanity.

"You are instructed that insanity means a true disease of the mind, normally extending over a considerable period of time, as distinguished from a sort of momentary insanity arising from the pressure of circumstances."

The State does not argue that the trial court's instruction was correct nor does it argue that the defendant's requested instruction was erroneous. See State v. James, 83 N.M. 263, 490 P.2d 1236 (Ct.App.1971) and cases cited therein for discussion of insanity. The State argues that State v. Flowers, 83 N.M. 113, 489 P.2d 178 (1971) and State v. Compton, 57 N.M. 227, 257 P.2d 915 (1953) apply. The State asserts that since defendant did not point out the error in the court's instruction which purportedly defined insanity, defendant cannot now complain even though he did submit a correct instruction. *Compton* and *Flowers* are not applicable.

Here, the court's instruction failed to cover the elements of insanity. State v. James, supra. Defendant's requested instruction contained those elements. By the submission of a proper instruction the defendant alerted the trial court to the omission in its instruction. See State v. Rodriguez, 81 N.M. 503, 469 P.2d 148 (1970). The matter was preserved for review. Section 21-1-1 (51) (2) (h), N.M.S.A.1953 (Repl.Vol.1970).

The trial court's failure to instruct on the elements of insanity being erroneous, the case is reversed with directions to grant defendant a new trial.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

494 P.2d 187

George TILL and Irene Till, Plaintiffs-Appellants,

v.

John R. GRAY and Bobbie D. Gray, Defendants-Appellees.

No. 745.

Court of Appeals of New Mexico.

Feb. 4, 1972.

E. Douglas Latimer, John C. Maine, Jr., McAtee, Marchiondo & Michael, Albuquerque, for plaintiffs-appellants.

Clarence R. Bass, Shaffer, Butt & Bass, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

This is a "slip and fall," "mother and daughter" social guest case which occurred in defendants' home. Plaintiff, Mrs. Till, the mother of defendant Bobbie Gray, slipped and fell on a waxed floor and injured herself. The trial court granted defendants summary judgment. Plaintiffs appeal.

We reverse.

The following facts appear from the record:

Mrs. Till, 54 years of age, arrived at her daughter's home with her dog the night before the accident. The following morning, March 18, 1969, mother and daughter were chatting back and forth between two bedrooms. The mother was dressing. Suddenly, with a yell of surprise to the mother, the daughter shouted: "Mother, hurry and get this damn dog, she is going to wet on my carpet." The mother, with one sock on and one sock off, hurried across the hall to the daughter's bedroom. She reached down, scooped up the dog in her left arm and ran out of her daughter's bedroom, turned left in the hall, and when she did, her left foot with the sock on hit the waxed floor. Her feet went straight up and she fell down. She usually watched herself while walking on the floors, but when her daughter hollered "Hurry," she just hurried and jumped and ran. This caused her to give no thought to the floor, nor to the sock on her left foot. The floor had just been waxed the day before, and the daughter believed that if she had not then waxed, the accident may not have happened. She kept the floors too slick and did not warn her mother. However, the daughter had kept her floors highly waxed, slick as glass, for the preceding eleven years, and the mother knew this.

The rule applicable to a social guest is stated in Jellison v. Gleason, 77 N.M. 445, 423 P.2d 876 (1967). The "hurry" situation of this case was not present in Jellison, so there are factual issues concerning the adequacy of the disclosure of a dangerous condition and whether that condition was apparent. Thus, there are issues to be decided by the trier of fact concerning negligence and contributory negligence. There being material issues of fact, summary judgment was improper.

Since the case must be remanded for trial, the assumption of risk defense will be governed by Williamson v. Smith, 83 N. M. 336, 491 P.2d 1147, decided December 13, 1971.

Reversed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

494 P.2d 188

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert Lee BEACHUM, Defendant-Appellant.

No. 762.

Court of Appeals of New Mexico.

Feb. 4, 1972.

Turner W. Branch, Branch & Dickson, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Ronald Van Amberg, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

COWAN, Judge.

Defendant appeals from an order denying three motions, without a hearing, filed pursuant to Rule 93 [§ 21-1-1(93), N.M. S.A.1953 (Repl.Vol. 4)]. His conviction for armed robbery was affirmed by this court in State v. Beachum, 82 N.M. 204, 477 P.2d 1019 (Ct.App.1970), rehearing denied November 25, 1970; second rehearing denied December 23, 1970.

The three motions are directed at the trial in the district court. We affirm.

The trial court, "having examined the files and records in this case", denied the three motions on the ground that the "allegations" contained in the motions had been ruled upon adversely to defendant by the Court of Appeals of New Mexico. The court made no findings of fact or conclusions of law.

Defendant now urges that the allegations of his three motions required the court to hold a hearing on the merits of the claim, which if proved would have entitled him to relief. This argument is without merit.

The matters specified in the motions, which defendant claims were violative of his constitutional right to a fair trial and due process of law, are ones which either were, or should have been, submitted to this court for its consideration

on direct appeal. Proceedings under Rule 93 are not intended as a substitute for an appeal as a means for correcting errors which may have occurred during the course of the trial. State v. Sedillo, 79 N. M. 254, 442 P.2d 212 (Ct.App.1968). Neither is a post-conviction proceeding a method by which one can obtain consideration of questions which might have been raised on appeal. State v. Sanchez, 80 N. M. 688, 459 P.2d 850 (Ct.App.1969). It is noted that defendant not only appealed his conviction but presented two motions for rehearing after decision by this court.

Whether the "allegations contained in the Motions to Set Aside and Vacate Judgment and Sentence have been ruled upon adversely to defendant by the Court of Appeals of New Mexico", as stated in the trial court's order denying the motions, is not determinative of a decision here. The claimed errors were ones which are properly and normally raised and corrected by appeal and they cannot now be raised by this post-conviction proceeding. Miller v. State, 82 N.M. 68, 475 P.2d 462 (Ct.App. 1970).

It follows that the motions and the files and records of the case conclusively show that the defendant was entitled to no relief. Rule 93, supra. Although the defendant claims violations of his constitutional rights, the factual allegations in his motions admittedly refer to evidentiary matters. These do not constitute violations of the Constitution of the United States or of New Mexico nor are they matters forming a basis for collateral attack upon the verdict and sentence. State v. Sisneros, 79 N.M. 600, 446 P.2d 875 (1968).

The trial court did not err in denying the motions without a hearing. State v. Decker, 79 N.M. 41, 439 P.2d 559 (Ct. App.1968). Even if the court's stated grounds for denial may not be entirely correct, the rules herein set out support the court's action. A decision of the trial court will be upheld if it is right for any reason. Scott v. Murphy Corporation, 79 N.M. 697, 448 P.2d 803 (1969); State v. Brill, 81 N.M. 785, 474 P.2d 77 (Ct.App. 1970).

The order denying relief is affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

494 P.2d 189

STATE of New Mexico, Plaintiff-Appellee,

v.

Paulina PAUL, Defendant-Appellant.

No. 809.

Court of Appeals of New Mexico.

Feb. 4, 1972.

Geo. L. Zimmerman, Alamogordo, for defendant-appellant.

David L. Norvell, Atty. Gen., Winston Roberts-Hohl, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

There was an armed robbery at the registration desk and in the lounge of a motel. During the course of the robberies at least two persons were injured. Convicted of two armed robberies and two aggravated batteries, defendant appeals. Section 40A–16–2, N.M.S.A.1953 (Repl.Vol. 6) and § 40A–3–5, N.M.S.A.1953 (Repl.Vol. 6, Supp.1971). The issues concern: (1) actions and remarks of the trial court; (2) identification testimony; (3) due process claims; and (4) sanity at the time of the offenses.

Actions and remarks of trial court.

On the scheduled day for trial, when the trial judge declared that court was in session, defendant remarked: "Oh my Heavenly Father, You know I am your son, get these devils off of me." The remark was ignored. Defendant's case was called and the parties announced they were ready for trial. Twelve prospective jurors were called and while they were being questioned by the court, the record shows "* * * the defendant stood up and there was another outburst from the defendant." The court stated: "You are going to sit down and you are going to stay quiet or I am going to sit you down and keep you quiet * * *."

The court's questioning of the jury was resumed. A third outburst occurred. The trial court sent for a gag and stated: "* * * the very next time he has that outburst I want him tied * * *." Thereupon, the fourth outburst occurred. The State then moved for a mistrial.

While the district attorney was arguing on behalf of a mistrial, defendant continued with comments such as "Who is lying?" At the district attorney's request the courtroom was cleared and the argument on behalf of a mistrial continued. Defendant's interruptions also continued, resulting in the court (out of the presence of the jury) telling defendant to "shut up" and remarking that in the court's opinion defendant was feigning. Defense counsel opposed the motion for mistrial, pointing out that defendant could be controlled with a gag. See Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

The trial court denied the motion for mistrial. It left the defendant without a gag but stated that at the next outburst defendant was to be gagged and shackled. The trial proceeded without further interruptions by defendant.

At the close of the State's case, defendant moved either for a mistrial or a direct-

ed verdict on the basis that the court's remarks in the presence of the jury panel "* * * prejudiced the defense sought to be raised by the defendant, that is insanity, at the time of the commission of the alleged offenses."

We disagree. Certainly a directed verdict in favor of a defendant is not to be granted on the basis of defendant's misconduct. The motion for a mistrial is within the discretion of the trial court and will not be reversed unless that discretion is abused. There was no abuse of discretion in telling the defendant to sit down and stay quiet and, after repeated outbursts, in directing that defendant was to be gagged and tied if the outbursts continued. The administration of criminal justice is not to be delivered into the hands of those who gain only from its subversion. State v. Guy, 82 N.M. 483, 483 P.2d 1323 (Ct.App.1971). If prejudice to the defense resulted from the court's remarks, it was defendant's own doing, and he is not to be permitted to gain from his outbursts.

Identification testimony.

The witness Miranda testified on direct examination as to some of the events occurring during the armed robberies. Miranda, on direct examination, did not identify the defendant as the criminal. On cross-examination he testified the criminal was a Negro on the basis of having seen black hands. Also, on cross-examination, he testified that shortly before the crimes he had seen "two colored persons" outside the motel.

Still later in Miranda's cross-examination, defendant brought out that Miranda had viewed a line-up at the police station at 2:00 a. m. following the crimes; that of the persons viewed, one looked similar to a person Miranda had had dealings with but Miranda couldn't say that person had been at the motel; and that the defendant was not the person in the line-up that looked "similar." However, Miranda was "pretty sure" he saw defendant the next day when taken up to the jail.

The witness Marrone, during her direct examination, also testified to some of the events of the crimes. In doing so, she referred to the criminal as "he" and apparently pointed to the defendant. A reading of her entire examination shows that she never identified the defendant. She testified that she could not say whether the criminal was Negro or white. (The criminal wore a stocking mask).

Defendant claims he was denied due process because his conviction resulted in part on an in-court identification based on a one-man show-up when the defendant was not represented by counsel. This is factually incorrect. Miranda did not identify anybody at the line-up which, according to Miranda, consisted of three or four Negroes, among others. As to seeing defendant at the jail the next day, there is nothing in the record indicating the circumstances of this viewing. There is no factual basis for this claim. Compare State v. Samora, 83 N.M. 222, 490 P.2d 480 (Ct.App.1971); State v. Orzen (Ct.App.), 83 N.M. 458, 493 P.2d 768, decided January 14, 1972.

Defendant also claims the "totality of the circumstances" require a reversal. The circumstances relied on are that the combination of Miranda's and Marrone's testimony makes objectionable the testimony of Miranda about viewing the defendant in jail the next day after the crimes. Again, there is no factual basis for the claim. Neither Miranda nor Marrone ever identified defendant as the criminal. Miranda only testified that he saw defendant in jail. Absent some identification of defendant by these two witnesses, there are no circumstances of identification to be considered. We add that defendant was found hiding outside the motel; a mask, and a traveler's check taken from the motel, were found where defendant had hidden.

Due process claim.

Defendant claims there was a denial of due process. The various contentions and our answers follow.

Delay.

The crimes occurred on August 18, 1970. Counsel was appointed October 14, 1970. On October 27, 1970, defendant moved for a preliminary hearing. A preliminary hearing was held on December 1, 1970. Nothing in the record indicates why the delay occurred in the appointment of counsel or in holding the preliminary examination. The record does not show any prejudice from these delays and no prejudice is claimed. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct.App.1970); Pena v. State, 81 N.M. 331, 466 P.2d 897 (Ct.App. 1970).

Fair trial.

The general claim, of a denial of a fair trial, is too general to provide a basis for relief and presents no issue to review. State v. Clark (Ct.App.), 83 N.M. 484, 493 P.2d 969, decided December 10, 1971.

State's motion for mistrial.

In the first point discussed, we referred to the State's motion for mistrial following defendant's outbursts in the courtroom. Defendant claims the motion for mistrial should have been granted. We have held the trial court did not abuse its discretion in denying the motion. Defendant also asserts that his counsel should not have opposed the motion. This was a matter of trial strategy within the control of counsel. State v. Ramirez, 81 N.M. 150, 464 P.2d 569 (Ct.App.1970).

Sanity at time of offenses.

A defense was that defendant was insane at the time he committed the offenses. This issue was submitted to the jury. Defendant now claims we should find insanity as a matter of law. The claim is without merit. It was for the jury to decide this issue. State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966).

The judgment and sentences are affirmed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

SUTIN, J., not participating.

494 P.2d 192

STATE of New Mexico, Plaintiff-Appellee,

v.

Phillip LATHAM, Defendant-Appellant.

No. 799.

Court of Appeals of New Mexico.

Feb. 4, 1972.

Eugene E. Brockman, Tucumcari, for defendant-appellant.

David L. Norvell, Atty. Gen., Winston Roberts-Hohl, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of unlawful sale of marijuana, defendant appeals. The applicable statute, now repealed, is § 54–5–14, N.M.S.A.1953 (Repl.Vol. 8, pt. 2). See Laws 1971, ch. 245, § 13. The issues concern: (1) disqualification of the trial judge; (2) restriction of cross-examination and (3) lack of foundation for testimony of a witness. We affirm.

Disqualification of trial judge.

An affidavit was filed disqualifying Judge Gallegos. No question is raised concerning the sufficiency of the affidavit or its timeliness. See §§ 21–5–8 and 21–5–9, N.M.S.A.1953 (Repl.Vol. 4); the 1971 amendment to § 21–5–9, supra, is not applicable.

The affidavit was filed at 9:24 a. m. on January 13, 1971. Sometime during that day defendant's wife presented an appearance bond to Judge Gallegos for approval. The judge had defendant brought before the court and asked defendant if he had signed the bond and whether defendant wanted the judge to approve it. Receiving affirmative replies, the judge stated "* * * I find it satisfactory * * *."

On January 21, 1971, defendant appeared before the court for arraignment. Defendant stood mute and a plea of not guilty was entered on his behalf by Judge Gallegos. Defendant's attorney then entered a special appearance to contest the jurisdiction of the court. On this date, according to the record, "* * * the Court permitted the defendant to remain under the bond previously given."

At the opening of a new term of court on March 2, 1971, defendant's attorney, by telephone, informed the court he could not come to Tucumcari because of weather conditions. The attorney inquired what had been done in regard to defendant's bond, which was returnable on that day. "* * * [T]he Court replied * * * that no action had been taken * * * so far that day in connection with said bond, and * * * stated * * * that he would continue and have the defendant kept under his present bond, if that is what Mr. Knott [the attorney] desired, to which Mr. Knott replied to the Court, 'Yes,' and the Court stated that the bond would be continued, * * *"

Defendant claims that Judge Gallegos was without jurisdiction to take further ac-

tion in the case after the affidavit of disqualification was filed. The State asserts that the judge exercised his discretion in both approving the appearance bond and in continuing the bond on two occasions. Accordingly, the State asserts Judge Gallegos proceeded correctly in striking the affidavit of disqualification.

In striking the affidavit, Judge Gallegos noted that at the time he approved the appearance bond, he had no knowledge that the affidavit had been filed. Despite language in State ex rel. Shufeldt v. Armijo, 39 N.M. 502, 50 P.2d 852 (1935) suggesting the affidavit must be called to the attention of the court, Rivera v. Hutchings, 59 N.M. 337, 284 P.2d 222 (1955) expressly holds that the disqualification is effective upon being filed even if not called to the attention of the trial judge.

Judge Gallegos was disqualified effective January 13, 1971, when the affidavit was filed. Thereafter, he had no jurisdiction to act in the case. Norton v. Reese, 76 N.M. 602, 417 P.2d 205 (1966); Rivera v. Hutchings, supra.

The disqualification may, however, be waived. In re Estate of Peck, 80 N.M. 290, 454 P.2d 772 (1969), cert. denied, sub nom., Chambers v. Beauchamp, 396 U.S. 942, 90 S.Ct. 376, 24 L.Ed.2d 242 (1969); reh. denied, 396 U.S. 1031, 90 S.Ct. 549, 24 L.Ed.2d 528 (1970); State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179 (1941).

The State contends a waiver occurred when, pursuant to request, the trial judge took action in connection with the appearance bond. The approving of the bond and its continuance were acts of judicial discretion. State v. Chavez, supra; State v. Nagel, 185 Or. 486, 202 P.2d 640 (1949). Nevertheless, we hesitate to hold that a defendant in a criminal case has waived his disqualification of a trial judge when the only action taken by the trial judge is in connection with bail, to which the defendant has a constitutional right. N.M.Const. Art. II, § 13. See State ex rel. Bowden v. Gallegos, No. 9319, unreported order of the New Mexico Supreme Court, September 15, 1971. We pass this question because there are other facts establishing a waiver.

Judge Gallegos, after striking the affidavit of disqualification, set the case for trial on June 7, 1971. Defendant made no effort to prohibit Judge Gallegos from trying the case. Instead, defendant appeared on June 7, 1971 and requested a continuance. This continuance was granted. This action effectively waived the prior disqualification. In re Estate of Peck, supra. Furthermore, on the date of trial, defendant waived trial by jury and proceeded to trial without objection to Judge Gallegos presiding. This also constituted a waiver. See Rivera v. Hutchings, supra.

Restriction of cross-examination.

A witness for the State testified that he purchased marijuana from the defendant at 5:00 p. m. on October 30, 1970; that he placed it in the trunk of his car and turned it over to the police on November 1, 1970. The witness also testified that this purchase was the only narcotics he had in the trunk of the car.

On cross-examination the witness testified he made no other purchases on the evening of October 30th; that he did not believe he made any other purchases in the next two days but couldn't remember for sure and admitted that he was making lots of purchases "during this particular time."

After the foregoing testimony, an objection was sustained to the question: "Is it possible there could have been other purchases during that, those two days?" Defendant claims the trial court, in sustaining the objection to this question, denied defendant a fair trial by unduly restricting cross-examination on a material element of the case.

We agree that purchases made by the witness, between October 30th and November 1st, were material to the issue of

whether the exhibit admitted into evidence was the alleged purchase from defendant on October 30th. We do not agree there was an undue restriction of cross-examination.

The question, to which the objection was sustained, had already been answered. The witness had admitted making lots of purchases and couldn't remember for sure whether he had made other purchases during the two-day period. Thus, the information sought by the question was already in evidence. The ruling on the question was within the trial court's discretion. There was no abuse of discretion in sustaining an objection to a repetitious question. Pandolfo v. United States, 128 F.2d 917 (10th Cir. 1942), cert. denied, 317 U.S. 651, 63 S.Ct. 47, 87 L.Ed. 524 (1942); Fulks v. State, 481 P.2d 769 (Okl.Cr.App. 1971). See Csanyi v. Csanyi, 82 N.M. 411, 483 P.2d 292 (1971); State v. Apodaca, 81 N.M. 580, 469 P.2d 729 (Ct.App. 1970).

After the objection to the question was sustained, defendant made no effort to cross-examine further. There is nothing showing the trial court prohibited additional cross-examination. See State v. Hudson, 78 N.M. 228, 430 P.2d 386 (1967).

The record does not show any undue restriction of cross-examination.

Foundation for testimony of witness.

A witness for the defense testified that he was present at the apartment where the sale of marijuana was alleged to have occurred and that he "* * * witnessed no sale." On cross-examination by the State, the witness was asked if he saw any "grass." He answered: "I did." Defendant asserts no foundation had been laid for the witness to express an opinion as to whether the substance seen was marijuana and that the overruling of his objection to that effect was error.

There is no ambiguity in the record. Whether called "grass" or "weed" or "marijuana," the testimony of various witnesses was concerned with the substance present in the apartment and allegedly sold by defendant. Defendant had previously stipulated that a qualified chemist, if called to testify, would state that he examined the substance and found it to be marijuana. Thus, even if no foundation had been laid for the witness to characterize the substance as marijuana, the error was harmless because that fact had been stipulated. See State v. Vasquez, (Ct.App.), 492 P.2d 1005, decided December 22, 1971.

The judgment and sentence are affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

494 P.2d 612

SCHULTZ & LINDSAY CONSTRUCTION CO., a North Dakota Corporation, licensed and doing business in the State of New Mexico, Plaintiff-Appellant,

v.

STATE of New Mexico and New Mexico State Highway Commission, Defendants-Appellees.

No. 9305.

Supreme Court of New Mexico.

March 3, 1972.

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[redacted]

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[redacted]

[redacted]

[redacted]

McAtee, Marchiondo & Berry, E. Douglas Latimer, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., George D. Sheldon, Sp. Asst. Atty. Gen., Santa Fe, for appellees.

OPINION

OMAN, Justice.

This is a suit by plaintiff construction company (hereinafter called "Contractor") against the State of New Mexico and the State Highway Department (hereinafter called "State") on a highway construction contract to recover the sum of $62,630.93, plus interest, allegedly due the Contractor for extra work done pursuant to the contract. The trial court found in favor of the State and entered judgment dismissing the Contractor's complaint. The Contractor has appealed. We reverse.

The contract value of the extra work in the amount of $62,630.93 was not disputed at the trial. The State's contentions were that the failures in the cement treated base course (hereinafter called "CTBC"), which occasioned the extra work by the Contractor, were caused by breaches of the contract on the part of the Contractor, and, thus, not compensable.

It is admitted the Contractor complied with the contract requirements in regard to the making of its claim for extra compensation. It is also admitted the claim was denied on October 16, 1969. The Contractor seeks interest at 6% per annum from this date. This is consistent with the provisions of § 50-6-3, N.M.S.A.1953 (Repl. Vol. 8, pt. 1, 1962). See also Montgomery v. Cook, 76 N.M. 199, 413 P.2d 477 (1966). Coseboom v. Marshall Trust, 67 N.M. 405, 356 P.2d 117 (1960).

The contract was drafted by the State and consists of more than 400 pages. It is the function of the court to interpret and enforce the contract as made by the parties. Hopper v. Reynolds, 81 N.M. 255, 466 P.2d 101 (1970). The contract must be considered and construed as a whole, with meaning and significance given to each part in its proper context with all other parts, so as to ascertain the intention of the parties. Thigpen v. Rothwell, 81 N.M. 166, 464 P.2d 896 (1970); Brown v. American Bank of Commerce, 79 N.M. 222, 441 P.2d 751 (1968); Phillips Petroleum Co. v. McCormick, 211 F.2d 361 (10th Cir. 1954). The primary objective in construing a contract is to ascertain the intent of the parties. Leonard v. Barnes, 75 N.M. 331, 404 P.2d 292 (1965); Jones v. Palace Realty Co., 226 N.C. 303, 37 S.E.2d 906 (1946); 4 S. Williston, A Treatise on the Law of Contracts, § 601 (3rd Ed. W. Jaeger 1961).

It is logical to assume that the parties to a contract know best what is meant by its terms, and that whatever is done by them during the performance of the contract is consistent with their intent and the meaning of the contract terms as understood by them. Consequently, the construction of a contract adopted by the parties, as evidenced by their conduct and practices, is entitled to great weight, if not the controlling weight, in ascertaining their intention and their understanding of the contract. Old Colony Trust Company v. City of Omaha, 230 U.S. 100, 33 S.Ct. 967, 57 L.Ed. 1410 (1913); Hinkle v. Blinn, 92 Colo. 302, 19 P.2d 1038 (1933); Jernigan v. New Amsterdam Casualty Company, 69 N.M. 336, 367 P.2d 519 (1961); James Stewart & Co. v. Law, 149 Tex. 392, 233 S.W.2d 558 (1950); First Nat. Bank of Green River v. Ennis, 44 Wyo. 497, 14 P.2d 201 (1932); 4 S. Williston, supra, §

623; 3 A. Corbin, Corbin on Contracts, § 558 at 257–58 (1960). This is particularly true as to the resolution of ambiguities and uncertainties of meaning in the contract [Lutterloh v. Patterson, 211 Ark. 814, 202 S.W.2d 767 (1947); Johnston v. Landucci, 21 Cal.2d 63, 130 P.2d 405 (1942); Heckard v. Park, 164 Kan. 216, 188 P.2d 926 (1948); Maffett v. Emmons, 52 N.M. 115, 192 P.2d 557 (1948); Superior Oil Co. v. Stanolind Oil & Gas Co., 150 Tex. 317, 240 S.W.2d 281 (1951)], and especially so if the conduct of the parties manifesting their construction of the contract occurred prior to the development of a controversy between them. Fanderlik-Locke Co. v. United States For Use of Morgan, 285 F. 2d 939 (10th Cir. 1960), cert. denied, 365 U.S. 860, 81 S.Ct. 826, 5 L.Ed.2d 823 (1961); Hinkle v. Blinn, supra.

The trial court obviously did not consider the conduct and practice of the parties in construing the contract and in arriving at the intent of the parties, but concluded "* * * the issues herein are determined strictly by the terms of the contract between the parties." It is also apparent that the terms of the contract were construed strictly against the Contractor. The applicable rule requires the construction of ambiguities and uncertainties in a contract most strongly against the party who drafted the contract. Boswell v. Chapel, 298 F.2d 502 (10th Cir. 1961); East & West Ins. Co. of New Haven, Conn. v. Fidel, 49 F.2d 35 (10th Cir. 1931).

Since we are reversing a judgment in favor of the State, it would seem appropriate to acknowledge the only authority relied upon by it in this appeal as support for its position. The totality of this authority consists of the following sentence from 17 Am.Jur.2d, Contracts, § 253 at 646 (1961)—not at 446 as cited by appellee in its answer brief: "A contract should be construed liberally to protect the public interest where that is involved in the case."

The only case cited in Am.Jur.2d as authority for this statement is Public Service Co. v. City and County of Denver, 153 Colo. 396, 387 P.2d 33 (1963). That case concerned the granting of a public utilities franchise, and the stated rule was clearly confined to agreements granting such franchises. Even if we were to adopt and apply this stated principle to the facts here, it would not alter the result we reach. This stated rule of liberal construction may not properly be extended to the point of excluding or overriding all other rules of construction or to the point of working an unreasonable and unjust result.

There are obvious ambiguities, inconsistencies and uncertainties in the contract before us. The State's own witnesses placed different constructions on the two areas of performance under the contract which are here in question, and the State's project engineer, who was charged with the responsibility of seeing that the Contractor performed its obligations under the contract, construed the contract as authorizing the Contractor to do what it did in these two areas.

Although the State contended the Contractor improperly routed haul traffic over the CTBC, and this contributed to the failures therein, the trial court apparently rejected these contentions and made no findings relative thereto. No cross-appeal has been taken. Thus, we will not consider this question.

The trial court's Findings 3, 4 and 5 relate to the two areas of claimed improper performance on the part of the Contractor. These findings are:

"3. Under the contract between the parties, Plaintiff was responsible for producing a cement-treated base material mix containing sufficient water so that the material would properly set and for preventing pre-mature [sic] drying of the base in place by applying a moisture evaporation barrier which would prevent the excessive evaporation of moisture before the material had set or cured.

"4. Plaintiff knew at all material times that the cement-treated base mate-

rial mix it was producing from its pug mill was too dry and did not contain sufficient water.

"5. To seal the base in place, Plaintiff used a material which was not designed or suitable for producing a moisture escape barrier and which permitted the escape of excess moisture and, as well, permeated part of the sub base, [sic] to a depth of up to approximately one inch."

The two areas of failure on the part of the Contractor, as found by the trial court, were (1) the failure to mix with the cement and base course aggregate the proper amount of water, and (2) the use of a material on the upper surface of the CTBC unsuitable for forming a membrane or barrier which would prevent the escape of excessive amounts of moisture.

There are provisions in the contract which state the Contractor shall perform in strict accordance with the plans and specifications to the complete approval of and acceptance by the Chief Highway Engineer; all interpretations of the plans, specifications, and special provisions shall be made with regard to the requirements that only the best standard construction methods and practices are to prevail and only material and workmanship of the best quality are to be incorporated in the work; inspections made by the engineer's inspectors will not relieve the Contractor of its obligation to perform the work in accordance with the contract; all work that does not conform to the requirements of the contract shall be considered defective; defective work, whether the result of poor workmanship, use of defective materials, or damage through carelessness, found to exist prior to final acceptance of the work shall be immediately corrected to conform to plans and specifications; and the fact that an inspector may have previously overlooked such defective work shall not constitute an acceptance of any part of it.

There are also provisions to the effect that the engineer, who performs through his project engineer, inspectors and other subordinates, shall decide all questions that may arise as to the quality and acceptability of materials furnished, the work performed, and the manner of performance of the work; all questions that may arise as to the interpretation of the plans and specifications; and all questions as to the satisfactory and acceptable fulfillment of the terms of the contract. He may reject any materials which do not conform to the plans and specifications, and he may order removed and replaced at the Contractor's expense any work performed or materials furnished without inspection by him or his inspectors.

His inspectors are authorized to inspect all work performed and materials furnished, and these inspections may extend to all or any part of the work and to the preparation, fabrication, quality or manufacture of materials to be used in the work. His inspectors are required to call to the attention of the Contractor any failure of the work or materials to conform to the contract, and have the authority to reject materials or suspend the work by written order, until any questions at issue can be referred to and decided by the engineer.

The Contractor is required to abide by the decisions of the engineer; to execute promptly orders and directives issued by the engineer; and to supply such materials, equipment, tools, labor and incidentals as may be required by the engineer.

The State's position, which finds support in some of the language of the contract which it drafted, and particularly in that portion thereof entitled "Interim Specifications" consisting of 297 pages, apparently is that it has complete and total control of the performance by the Contractor, but the Contractor is responsible for all failures in the completed product, even though the failures may have been occasioned partly or entirely by error on the part of the State in the exercise of its right of control. However unjust, unconscionable and inconsistent with other portions of the contract this position may be, we are of the opinion that under the language of the contract

and under the interpretations thereof adopted by the State through its project engineer and chief inspector, the Contractor performed within the terms of the contract and is entitled to payment for the extra work.

As shown above, the engineer—in fact the project engineer—is vested with the sole power to interpret the plans and specifications and to decide all questions as to the quality and acceptability of materials furnished by the Contractor. It is the duty of the inspectors to call to the attention of the Contractor any failure of the work or materials to conform to the contract. Logic and justice require these interpretations and decisions to be made and called to the attention of the Contractor, along with any failures found by the inspectors, as the work progresses and as the materials are prepared and incorporated into the highway construction. The engineer cannot refuse to interpret and decide questions as they arise, nor can he be permitted to change his interpretations and decisions to the prejudice of the Contractor, who is obliged to accept his interpretations and decisions. Nor may an inspector, who is advised of a failure of the work or materials to conform to contract requirements, evade his responsibility to call such failure to the Contractor's attention.

Insofar as the CTBC is concerned, it was prepared by the Contractor in a pug mill. This is a mill in which the proper amounts of cement, aggregate and water are combined and mixed before being incorporated into the highway. The State specifies the percentages of cement, aggregate and water which are to be mixed to form the finished CTBC. To make sure the proper percentages of these materials are mixed, the State calibrates the mill. That is, it sets the devices by which the component parts are fed into the mixer, and these settings control the percentage of each component which goes into the finished CTBC. In the case now before us the mill was calibrated by the State's chief inspector on this project. He testified that in making the calibration he checked the accuracy of the water metering device and the equipment to make sure there was no leakage, and then made a setting which would deliver sufficient water to comply with the specifications.

Thereafter he made several tests each day to ascertain the moisture content of the CTBC. This content was consistently less than the recommended optimum of 7.5%. Although he had authority to reject any of the CTBC, and so testified, none was ever rejected. He also testified he had "control as to whether or not it [CTBC] met specifications" and that it was "within the specification limits."

The project engineer testified that pursuant to the contract and the practice it was his duty to reject any materials which did not meet specifications, and that it was his function "to insure" that the Contractor built the highway according to the plans, specifications and special provisions of the contract. He also testified the CTBC "as it was produced" met specifications; he was aware of the actual moisture content of the CTBC because he had daily reports thereof prepared under his supervision which he signed; the Contractor was permitted only to make minor changes in the moisture content without his consent; and in his judgment the failures in the CTBC, after it was put in place as a part of the highway, were due to the haul traffic over it and the failure of the asphaltic oil used to seal in the moisture.

It is true other witnesses were of the opinion the failures were due largely, if not entirely, to the lack of adequate moisture in the CTBC mix. In fact this was the opinion of the Contractor's employees, as shown by the trial court's Finding #4 above quoted. However, the State's project engineer and chief inspector interpreted the contract specifications as permitting the moisture content shown by their inspections and tests; they had the power of control over the amount of moisture used in the mix; and it was their duty to call to the Contractor's attention

any failures in the materials and to reject the CTBC if it failed to comply with specifications. If there were any mistakes or breaches of the contract in regard to the moisture content in the CTBC, they were the State's mistakes and breaches.

Although the Contractor did not agree that the CTBC contained adequate moisture, it did agree the project engineer had the power of control under the contract and that it had the duty of complying with his interpretations and decisions. Both the State and the Contractor so interpreted and understood the meaning of the contract and performed thereunder with this understanding as to the power of control by the State and the duty of compliance therewith by the Contractor.

As stated earlier herein, the question is not before us as to whether the failures in the CTBC were due in part to the haul traffic over it.

The remaining issue to be decided is whether the Contractor complied with the contract specifications in using SSO—an asphaltic oil—to seal the moisture in the CTBC until it had properly cured. Other asphaltic materials were apparently better suited for this purpose.

However, some time during the week before the Contractor began construction on this project, it notified the project engineer that it proposed to use SSO for this purpose. The engineer reviewed the specifications, determined that the SSO was one of the materials thereby provided as being acceptable for the intended use, and that the Contractor had the option under the contract of using this material for this purpose. As each load of the SSO arrived, a Loading Certificate of Test was furnished the project engineer as required by the contract. He at no time questioned the right of the Contractor to use this material, and, in fact, approved it and testified at trial that he was of the opinion the Contractor had the option under the contract to use SSO. It was not until after failures in the CTBC had occurred that another asphaltic material was used to create the moisture retaining membrane or seal.

[redacted] It is true another of the State's engineers, who was acting only in an advisory capacity to the project engineer, interpreted the contract specifications otherwise and stated in his opinion the project engineer had misinterpreted the specifications. However, this was an after-the-fact interpretation and by one who had actually no authority on behalf of the State in controlling the performance of the Contractor. The one person who had the authority of control, the sole power of insisting that his interpretations and decisions be followed by the Contractor, and the duty of seeing that the Contractor performed within the terms of the contract, was and apparently still is of the opinion that the Contractor properly performed within the contract specifications. Obviously both the Contractor and the State were in accord as to the interpretation and meaning of the contract specifications in this instance and they performed according to this interpretation and understanding.

If the State continues to operate under a contract consisting of about 400 pages and by which it retains the complete control of performance by the Contractor, it would seem advisable that at least all its project engineers and chief inspectors understand and interpret the contract and its almost endless provisions as the State would have them understood and interpreted.

It follows from what has been said that the judgment must be reversed and the trial court directed to enter judgment for the Contractor in the amount of $62,630.93, together with interest thereon at the rate of 6% per annum from October 16, 1969.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

494 P.2d 618

In the Matter of Diana Estrada, a Juvenile.

Diana ESTRADA, Appellant,

v.

JUVENILE COURT Of the State of New Mexico, TWELFTH JUDICIAL DISTRICT, OTERO COUNTY, Appellee.

No. 9362.

Supreme Court of New Mexico.
March 3, 1972.

John S. Spence, Alamogordo, for appellant.

David L. Norvell, Atty. Gen., James H. Russell, Asst. Atty. Gen., Santa Fe, Norman D. Bloom, Jr., Dist. Atty., Twelfth Judicial Dist., Alamogordo, for appellee.

OPINION

OMAN, Justice.

Appellant, a juvenile, was charged with habitually deporting "* * * herself as to injure or endanger the morals, health or welfare of herself or others contrary to Section 13-8-26 [subd. A] (4) of the Juvenile Code of the State of New Mexico, to-wit: Did commit the offense of unlawful use of a Depressant, stimulant, or hallucinogenic drugs (Yellow Jackets—barbiturate) and did violate the conditions of her probation."

After trial the juvenile court entered an order finding appellant "* * * guilty of unlawful use of a depressant in which she endangered the health, welfare and morals of herself." Subsequently another order was entered whereby she was declared to be a juvenile delinquent, made a ward of the court and placed in the care, custody and control of the Girls' Welfare Home located at Albuquerque. She has appealed and we reverse.

Appellant relies upon five points for reversal. We need not and do not consider the last two of these points which relate to claimed errors on the part of the juvenile court in admitting a certain exhibit into evidence and in denying appellant a fair and impartial trial. The first three points relied upon will be discussed in the order of their presentation in the briefs.

By her first and second points, she urges the juvenile court's finding that she used a depressant does not constitute a finding that she violated any law of the State of New Mexico, and the evidence and findings of the juvenile court failed to show she "* * * habitually deported herself as to injure or endanger the morals, health or welfare of herself or others."

The State agrees with these positions. It admits it is unable to find any statute which makes the use of a depressant unlawful or imposes a penalty for the use thereof. The State further concedes there was no evidence of any habitual conduct on her part which was prejudicial to the morals, health or welfare of herself or others. The juvenile attorney admitted the absence of evidence of any such habitual conduct, and no finding was made that appellant was guilty thereof.

By her third point, appellant asserts the failure of the juvenile court to make a finding on the issue of the alleged violation by her of her probation amounts to a finding that she had not in fact violated her probation. She relies upon Lopez v. Barboa, 80 N.M. 338, 455 P.2d 842 (1969); State for Use of Thornton v. Hesselden Const. Co., 80 N.M. 121, 452 P. 2d 190 (1969); Gallegos v. Wilkerson, 79 N.M. 549, 445 P.2d 970 (1968).

The State agrees appellant's third point is well taken and that the authorities cited by her support her position.

We agree with appellant and the State that the orders of the juvenile court are unsupported by the evidence and the law. The orders should be reversed and appellant discharged.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

494 P.2d 619

STATE of New Mexico, Plaintiff-Appellee,

v.

Eddie P. VALLES, Defendant-Appellant.

No. 807.

Court of Appeals of New Mexico.
Feb. 11, 1972.

Leon Taylor, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., James H. Russell, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of three counts of armed robbery, defendant appeals. Section 40A-16-2, N.M.S.A.1953 (Repl.Vol. 6). The issues concern: (1) inspection of grand jury minutes; (2) refusal to allow exhibits in jury room; and (3) fundamental error.

Inspection of grand jury minutes;

On the first trial day the jury was selected and one witness was examined. At the beginning of the second trial day, defendant demanded the production of the grand jury minutes. The request was denied.

State v. Morgan, 67 N.M. 287, 354 P.2d 1002 (1960) states: "* * * the defendant should be accorded the opportunity to examine the transcript of the testimony of the witnesses when the same is used in the trial * * *." Defendant asserts he "* * * sought production of the grand jury minutes after the direct examination of one of the state's witnesses who had gone before the grand jury. * * *" The claim is incorrect. The demand for production of the grand jury minutes did not occur until after one witness had completed his testimony and came at a time when no witness was on the stand. Further, nothing in the record shows the grand jury minutes were used at the trial.

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) discusses another situation when a defendant is accorded the opportunity of inspecting grand jury minutes. That situation is where defendant has shown a "particularized need." Defendant asserts a particularized need was brought to the trial court's attention; his demand was "* * * so that I might make proper cross examination of all [of the State's] witnesses." Such a request is not "particularized;" it is a general request similar to the request held to be insufficient in State v. Tackett, supra.

Defendant also relies on a statement in State v. Morgan, supra, that: "* * * [t]he state has no interest in denying the accused access to all evidence that can throw light on issues in the case. * * *" He argues that disclosure of grand jury minutes should be accorded to aid the search for the truth. This argument attacks the policy of secrecy of grand jury minutes; that policy was affirmed in State v. Morgan, supra, and State v. Tack-

ett, supra. Defendant is required to bring himself within the disclosure situations of the *Morgan* and *Tackett* cases. Not having done so, denial of his demand was not error and the timeliness of defendant's demand need not be discussed. State v. Salazar, 81 N.M. 512, 469 P.2d 157 (Ct.App. 1970).

Refusal to allow exhibits in jury room.

While the jury was deliberating as to its verdict, it requested that "the exhibits" be sent into the jury room. Over defendant's objection, the request was denied. Defendant claims the trial court's action denied him a fair trial at its final and crucial stage "* * * since the exhibits included writings which tended either to prove or disprove identity and presence of the accused. * * *"

State v. Lord, 42 N.M. 638, 84 P.2d 80 (1938) states:

> "* * * it is the general rule of modern practice, in the absence of a statute, that when the jury in a criminal case retires to deliberate on their verdict, they may take with them such books and papers as have been introduced in evidence, as the court in the exercise of a sound discretion may permit whether it be a writing or other exhibit * * *; except in many jurisdictions, even in the absence of a statute, it is held to be error for the jury to have depositions in the jury room during their deliberations. * * *"

The New Mexico statute, § 21–8–23, N.M.S.A.1953 (Repl.Vol. 4) reads:

> "When the jury retires to consider its verdict it shall be allowed to take the pleadings in the cause, the instructions of the court, and any instruments of writing admitted as evidence, except depositions."

In regard to this statute, State v. Lord, supra, states:

> "This statute has been construed both by the territorial Supreme Court and this court. It does not change the general rule, except to make it mandatory upon the trial court to permit the jury to take to the jury room all 'instruments of writing' except depositions."

To the extent it was within the trial court's discretion, under the general rule, to refuse to allow the exhibits to go to the jury room, there was no error. No abuse of discretion is shown.

Defendant relies on the mandatory provisions of § 21–8–23, supra, and Baca v. Board of County Commissioners, 76 N.M. 88, 412 P.2d 389 (1966). *Baca* states that "any instrument in writing" in § 21–8–23, supra, "* * * means any instrument which is the basis of the action. * * *" Defendant claims that certain of the exhibits, pertinent to defendant's presence at the scene of the crimes and his identity, should be considered as the basis of the criminal prosecution. We do not answer this contention because the exhibits do not qualify as "instruments in writing" under § 21–8–23, supra.

State v. Lord, supra, states:

> "We held in State v. Babcock, supra, [22 N.M. 678, 167 P. 275 (1917)] that 'instruments of writing,' as used in the statute, had reference to such instruments as deeds, mortgages, bonds, contracts, notes, bills of exchange, etc., which are the subject of the action; *and not merely written evidence.* This must be so, as otherwise this mandatory statute would deprive the trial court of discretion to withhold from the jury room writings other than depositions, though unjust or unfair to send them." [Our emphasis].

The exhibits in this case consist of photographs, a composite drawing and information concerning a person wanted by the police, the statement of a witness, a physical description of a suspect, a line-up record, drawings, blueprints, and an application for a building permit. None meet the definition of an "instrument in writing" as declared in State v. Lord, supra.

It was not mandatory upon the trial court to allow the exhibits to go to the jury room. There being no abuse of discretion, the claim is without merit.

Fundamental error.

Relying on evidence of the physical description of the criminal and on evidence of an alibi which, if believed, exonerated the defendant, it is claimed that defendant's guilt is so doubtful that it would shock the conscience to permit the conviction to stand. Thus, defendant asserts his convictions are fundamental error. See State v. Browder, 83 N.M. 238, 490 P.2d 680 (Ct.App.1971); State v. Torres, 78 N. M. 597, 435 P.2d 216 (Ct.App.1967).

Having reviewed the evidence, we disagree. Although the evidence is conflicting, the credibility of the witnesses and the weight to be given their testimony was for the jury to determine. State v. Torres, supra. There is substantial evidence to support the verdict; it does not shock the conscience to affirm the convictions.

The judgment and sentences are affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

COWAN, J., not participating.

494 P.2d 622

STATE of New Mexico, Plaintiff-Appellee,

v.

Richard Kelly McADAMS, Defendant-Appellant.

No. 790.

Court of Appeals of New Mexico.

Feb. 18, 1972.

Harvey C. Markley, Lovington, for defendant-appellant.

David L. Norvell, Atty. Gen., James H. Russell, Jr., Asst. Atty. Gen., Sante Fe, for plaintiff-appellee.

OPINION

COWAN, Judge.

Defendant appeals following his conviction of the crime of unlawful possession of LSD (Lysergic Acid Diethylamide) contrary to § 54-5-18, N.M.S.A. 1953, as that statute existed in February, 1971.

We affirm.

On February 6, 1971, a Hobbs Police Department detective, Gary Kennedy, received information from an informant that a sale of illegal drugs would take place that evening at a cafe in Hobbs. On two previous occasions information from this source had proved reliable. The detective was told that 25 tablets would be delivered by individuals in a brown 1965 Oldsmobile car with New Mexico license plates, driven by a man named Billington, at 8:00 P.M. Officers Kennedy, Adams and Alexander drove to the cafe shortly before 8:00 P.M. and parked across the street.

At approximately 8:05 P.M. a vehicle, fitting the description supplied by the informant, drove up and parked in front of the cafe. It was driven by a person identified as Grady Billington and defendant was a passenger in the car. As the officers drove across the street and parked behind the Oldsmobile, the defendant got out and approached the driver's side of another vehicle, reaching into his shirt pocket. Officers Adams and Alexander approached the defendant and observed him making a throwing motion, whereupon they searched him and placed him under arrest. Two tablets were found in his shirt pocket and a packet containing 25 similar tablets was found under the car which defendant had approached after alighting from the Oldsmobile.

A test of some of the tablets in the packet was made by Officer Adams and tests of others of these and the ones taken from the defendant's person were made by Dr. Robert Schoenfeld. These tests established that the pills contained LSD. At the trial, defendant admitted Dr. Schoenfeld's qualifications. Officer Adams, a sergeant with the Narcotics Division of the New Mexico State Police, testified that he had been trained to test for the presence of LSD.

Defendant first complains that the evidence (the pills containing LSD) was obtained through illegal search and seizure. He argues: The court failed to rule on his pre-trial motion to suppress; the motion was renewed during trial and was overruled; there was no testimony that the defendant was armed or dangerous, which would justify a search for weapons; the officers had no search warrant; the defendant was not in a position to effect a "get-away"; no arrest was made until after the search; and there was no real evidence that the defendant was attempting to dispose of the pills. The question thus becomes one of probable cause.

A search without a warrant is lawful when it is incident to a lawful arrest, and the legality of an arrest without a warrant depends upon whether the arrest was based upon probable cause. 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).

Information from a reliable informant constitutes probable cause for search, particularly when the information is detailed and accurate. Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327 (1959); State v. Deltenre, supra.

The evidence in the record supported the officers' actions and reasonably warranted the search and seizure.

Defendant next argues that the trial court erred in overruling defendant's motion to dismiss at the close of the state's case, raising the issue of substantial evi-

dence. Viewing the evidence in the light most favorable to support the verdict, as we must, we deem it substantial. State v. Tafoya, 80 N.M. 494, 458 P.2d 98 (Ct. App.1969).

By his third point, defendant urges error in the court's admission of the results of the tests run on the pills by Officer Adams. Not only does the evidence show that the officer was qualified to perform such a test but Dr. Schoenfeld, whose qualifications defendant admitted, tested the pills and reached the same conclusion. It is for the trial court to determine whether an offered expert witness is qualified to testify. In so determining, the judge exercises his sound discretion, and this discretion will be questioned by this court only when it has been abused. State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966). We find no abuse here.

Under his third point, defendant also claims "entrapment" under the unique theory that, by the defendant's being told the result of the test, he would be induced to make an inculpatory statement. There was no evidence to support the defense of entrapment in this case. State v. Romero, 79 N.M. 522, 445 P.2d 587 (1968). Nor, we might add, was the question raised below and thus preserved for a determination by this court. State v. Williams, 83 N.M. 477, 493 P.2d 962, decided January 21, 1972.

Defendant next questions the recalling of Officer Adams, by the state, to complete the "chain of custody" of the pills. Defendant incorrectly states that in recalling the officer, the state re-opened its case-in-chief. The officer had testified and had been excused from the witness stand when he was recalled, but the state had not rested its case-in-chief when the recall occurred. Allowing the witness to be recalled was within the court's discretion and no abuse of that discretion appears. State v. Rodriguez, 23 N.M. 156, 167 P. 426, L.R.A.1918A, 1016 (1917).

Prior to oral argument, this court noted the fact that the statute under which defendant was charged was repealed by Laws 1971, Ch. 245, § 13, effective April 5, 1971, and replaced by a new law, not applicable here. The offense was committed February 6, 1971; defendant was arrested the same day; an attorney was appointed to represent him on February 8 on the LSD charge which had been filed against him in Magistrate Court on or before that date; the information was filed April 28; and defendant pled not guilty on May 3, 1971. Trial was held on May 25 and defendant was sentenced on June 15, 1971. The question arises: did the repeal of the statute bar or abate the proceedings against the defendant?

We hold that it did not. Article IV, Section 33 of the New Mexico Constitution states:

> "No person shall be exempt from *prosecution and punishment* for any crime or offenses against any law of this state by reason of the subsequent repeal of such law." [Emphasis added]

See also State v. Tipton, 78 N.M. 600, 435 P.2d 430 (1967); State v. Tracy, 64 N.M. 55, 323 P.2d 1096 (1958).

The judgment is affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

494 P.2d 624

STATE of New Mexico, Plaintiff-Appellee,

v.

Billy Joe HUNT, Defendant-Appellant.

No. 760.

Court of Appeals of New Mexico.

Feb. 4, 1972.

Rehearing Denied Feb. 17, 1972.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of armed robbery. Section 40A–16–2, N.M.S.A. 1953 (Repl.Vol. 6). The two issues concern: (1) sufficiency of the evidence and (2) line-up testimony.

Sufficiency of the evidence.

Defendant attacks the sufficiency of the evidence. The challenge is to the identification of the defendant as the person who beat and robbed the victim. Although defendant challenged the identification testimony at the close of the State's case-in-chief, he did not do so at the close of all the evidence. The question of the sufficiency of the evidence, therefore, is not properly before us. State v. Phipps, 47 N.M. 316, 142 P.2d 550 (1943); compare State v. Browder, 83 N.M. 238, 490 P.2d 680 (Ct.App.1971). Nevertheless, the evidence has been reviewed and is sufficient to sustain the conviction. The victim positively identified the defendant. This testimony, alone, is sufficient. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970).

Line-up testimony.

Defendant claims he was prejudiced by testimony concerning a line-up even though the testimony was stricken. An officer testified that a line-up was held. The trial court sustained defendant's objection to testimony concerning the result of the line-up. After the State rested its case-in-chief, defendant moved ". . . to strike all testimony regarding the line-up identification. . . ." The trial court granted the motion, informed the jury that all testimony as to a line-up had been stricken and that they were not to consider the testimony in deciding the case. Although every action requested by defendant in connection with the line-up testimony was granted, he now claims the trial court should ". . . have declared a mistrial of its own motion. . . ." Even though there was no testimony that defendant had been identified in a line-up, defendant claims that any reference to a line-up was

Harvey C. Markley, Lovington, for appellant.

David L. Norvell, Atty. Gen., James H. Russell, Jr., Asst. Atty. Gen., Santa Fe, for appellee.

prejudicial because the inference is that he had been so identified and the trial court's admonition could not remove the prejudicial inference.

In a similar situation, State v. Stewart, 30 N.M. 227, 231 P. 692 (1924) states:

> "* * * The testimony was not, in our opinion, of such a nature as to prejudice the rights of the defendant to such an extent as to require a new trial, in view of its withdrawal from the jury and the instruction by the court to the jury that they should disregard the same. Defendant made no motion for a mistrial, and apparently acquisced [sic] in the action of the court."

See also, Dolan v. United States, 218 F.2d 454 (8th Cir. 1955), cert. denied, 349 U.S. 923, 75 S.Ct. 665, 99 L.Ed. 1255 (1955).

Here, defendant was positively identified by other testimony to which no objection was made. Any inference from the stricken line-up testimony cannot be considered to be so prejudicial that the trial court was required to grant a mistrial when defendant never asked for a mistrial.

The judgment and sentence are affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

494 P.2d 962

TOME LAND & IMPROVEMENT CO., Inc., (No Stockholders' Liability), a New Mexico corporation, Plaintiff-Appellee and Cross-Appellant.

v.

Gillie SILVA et al., Defendants-Appellants and Cross-Appellees,

A. S. Torres et al., Intervenors Parties Plaintiffs-Appellees and Cross-Appellants.

No. 9255.

Supreme Court of New Mexico.

Jan. 21, 1972.

Rehearing Denied March 9, 1972.

McAtee, Marchiondo & Berry, Albuquerque, for appellants.

Ahern, Montgomery & Albert, Albuquerque, for appellee.

OPINION

MONTOYA, Justice.

In November 1968, certain stockholders filed suit in the District Court of Valencia County, New Mexico, against the Tome Land & Improvement Co., Inc., plaintiff-appellee and cross-appellant, hereinafter referred to as "Tome," seeking restraining orders against Tome from disbursing funds obtained from the sale of lands which were Tome's principal asset. In December 1968, certain other stockholders brought suit against Tome in Valencia County alleging inter alia that, pursuant to § 51-28-4, N. M.S.A., 1953 Comp. (Repl. Vol. 8, Pt. 1, 1971 Supp.), an offer by Tome to buy the dissenting stockholders' shares for $7,500 was wholly inadequate, and that Tome should be permanently restrained from disbursing any funds received from the sale of lands. Restraining orders in both cases were issued. An order was also entered allowing intervention of other persons who alleged they were parties to certain other actions against Tome. In January 1969, Tome filed suit in Valencia County praying that the court determine the fair value of the shares of defendants-appellants, the dissenting stockholders, to be $7,500 per share, or that the court appoint appraisers to receive evidence and recommend a decision to the trial court on the issue of fair value.

The trial court issued an order consolidating the above-mentioned causes and continued to restrain Tome from disbursing any funds from the sale of the land. Prior to trial, the parties stipulated that the principal issue for the court to determine was the fair value of the dissenting stockholders' shares as of June 28, 1968, the day prior to the vote of two-thirds of the stockholders approving the sale of the land.

After trial to the court, the judge concluded that the fair value of the Tome stock, as of June 28, 1968, was $12,415.40 per share. In reaching this conclusion, the court assigned a monetary value to market, asset and investment values, then gave each of those three factors a certain weight in determining fair value. The formula used was:

Market value	$ 3,500.00 x 40% =	$ 1,400.00
Asset value	18,359.00 x 60% =	11,015.40
Investment value	0.00 x 0% =	0.00
Per share value	=	$12,415.40

The court also awarded interest at the rate of 6% per annum from June 29, 1968, ordered Tome to pay court costs, but denied a request that Tome pay defendants' legal fees. It is from the decision of the trial court that appellants appeal and Tome cross-appeals.

Appellants' main contention is that the court erred in determining the fair value of the Tome stock to be $12,415.40. In arriving at the fair value of the stock, the court determined the market value to be $3,500 per share. Appellants claim there is no substantial evidence to support this conclusion. In addition, appellants argue that the weight of 40% given market value in the overall determination of fair value was error, because the 40% weight was not supported by substantial evidence. Appellants further contend that Tome should be

estopped from claiming the net asset value of each share of Tome stock was less than the book value established by Tome at $40,000. Appellants assert the court erred by not considering asset value to be the sole determining factor in arriving at fair value. Appellants also seek reversal of the trial court's judgment, because they were not awarded reasonable attorneys' fees and interest at 6½% per annum, instead of the 6% per annum granted by the court in its order.

The only contention of cross-appellant Tome is that the trial court erred in refusing to give investment value any weight in determining the fair value.

It is well settled in New Mexico that the appellate court will not substitute its judgment for that of the trial court in weighing the evidence. If the trial court's findings are supported by substantial evidence, they must be affirmed. Cave v. Cave, 81 N.M. 797, 474 P.2d 480 (1970). Substantial evidence means such relevant evidence as a reasonable mind might find adequate to support a conclusion. Cave v. Cave, supra.

Section 51–28–4, supra, under which this action was brought, does not specify the method by which the court should determine fair value. The statute suggests the court may appoint an appraiser, but in the instant case this was not done.

In arriving at the fair value of the shares of the dissenting stockholders, the courts have been almost unanimous in using a combination of three elements of valuation: (1) Net asset value; (2) market value; and (3) investment or earnings value. Brown v. Hedahl's-Q B & R, Inc., 185 N.W.2d 249 (N.D.1971). Then the three elements of value must be weighted in such proportions as to reasonably reflect the importance and reliability of each to the final determination of fair value. Factors which courts have traditionally considered when apportioning weight among market value, investment value and asset value are the nature of the corporation, market demand for the stock, the business the corporation is engaged in, its earnings, net assets, and other variables such as general economic conditions. See Note, Valuation of Dissenters' Stock under Appraisal Statutes, 79 Harv.L.Rev. 1453 (1966). See also 55 Mich.L.Rev. 689 (1957).

From a reading of the cases, it appears that the appraiser, or the trial court in this case, has discretion in determining market, asset and investment value. The appraiser's valuation is then subject to review by the trial court to determine whether it is supported upon reasonable grounds. If the appraiser's valuation is not so supported, the trial court may substitute its own calculation of any or all of the factors. Sporborg v. City Specialty Stores, 35 Del.Ch. 560, 123 A.2d 121 (1956); Brown v. Hedahl's-Q B & R, Inc., supra. In addition, the trial court may also examine the appraiser's allocation of weight to be given each factor and, if a proportionate weight is unreasonable in light of surrounding circumstances, the trial court may modify the allocated weight. Brown v. Hedahl's-Q B & R, Inc., supra; In re Tudor City, Fifth Unit Inc., 17 App.Div.2d 794, 232 N.Y.S.2d 758 (1962).

The first question facing this court is whether the findings as to market, asset and investment value, as made by the trial court, are supported by substantial evidence.

Appellants contend there is no substantial evidence to support a finding that the market value of Tome stock was $3,500 per share on June 28, 1968. Market value is generally the base price at which a stock could be sold by a willing, informed seller to an informed, willing buyer. See Note, Valuation of Dissenters' Stock under Appraisal Statutes, 79 Harv.L.Rev. supra, at 1460. Even though there was no open market on Tome stock, we believe the evidence in the records reasonably supports the conclusion that the market value of Tome stock on the date specified was $3,500. Appellants, in advancing this contention, assert that the principal source of evidence as to market value, as found by

the trial court, was the testimony of an expert witness who was not qualified or competent to express an opinion as to market value. They further claim the testimony of such expert witness should have been stricken. The question of qualification of an expert to testify on any given proposition is one that lies within the discretion of the trial court, and the trial court's ruling will not be disturbed unless that discretion has been abused. Jaramillo v. Anaconda Co., 71 N.M. 161, 376 P.2d 954 (1962); Sturgeon v. Clark, 69 N.M. 132, 364 P.2d 757 (1961). We hold that the trial court did not abuse its discretion in receiving the expert testimony. Furthermore, the record reveals additional testimony by other witnesses which supports the trial court's conclusion in this regard.

Neither investment nor asset value was challenged by either party on appeal. Therefore, the trial court's findings as to market, asset and investment value of the stock will not be disturbed by this court.

Appellants also contend that the trial court erred in giving market value a weight of 40% in determining the fair value of the shares, because there is no substantial evidence to support this conclusion. We have already held that the reconstructed market value of Tome shares, as found by the trial court, is proper. The query is, did the trial court commit error in assigning a weight of 40% to market value in arriving at fair value? In resolving this question, we must keep in mind that we are not trial judges charged with the responsibility of making an initial determination of the facts. Our duty is to review the record solely for the purpose of determining whether or not error was committed below. If the findings below are supported by the record and are reasonable, we must accept them, even though, independently, we might have reached a different conclusion.

There is no hard and fast rule that has been enunciated by the courts as to what is the proper weight to be given each of the three factors in reaching the fair value of stock. The relative importance of each is different among the various jurisdictions, and the proportional weight assigned to each by appraisers, or by the courts, is usually governed by the nature of the corporation and the type of stock. See 55 Mich.L.Rev., supra, at 691.

In considering the question of weight to be given various elements of value, upon affirming the decision of the Court of Chancery in an appraisal proceeding to fix the value of stock, the Supreme Court of Delaware, in Application of Delaware Racing Association, 42 Del.Ch. 406, 213 A.2d 203 (1965), made the following statement, with which we concur:

> "The question of what weight to give the various elements of value lies always within the realm of judgment. There is no precise criterion to apply to determine the question. It is a matter of discretion with the valuator. In the absence of a clear indication of a mistake of judgment, or a mistake of law, we think this Court should accept the reasoned exercise of judgment of the Vice Chancellor and not substitute its own guess as to what the proper weightings should be. Since there has been no showing of an improper or arbitrary exercise of judgment by the Vice Chancellor, we accept his findings in this respect."

In the above cited Delaware case, the Supreme Court of that state held the weight of 40% given to market value by the Chancery Court was proper. The Chancery Court had disagreed with the appraiser who had assigned only a weight of 25% to market value. In that case, the dissenting stockholders took the same position as appellants herein, contending there was no established market for the shares and the trading in stock was so thin that none could be constructed. However, the Supreme Court of Delaware held:

> "* * *. [I]f there is no reliable established market value for the shares a reconstructed market value, if one can be made, must be given consideration. * * *"

It is apparent from a reading of the cases that the trial court must make a judgment as to the weight to be accorded market value, and must also make clear that the conclusion arrived at as to the proper weighting will vary according to the facts of each case. See Application of Silverman, 282 App.Div. 252, 122 N.Y.S.2d 312 (1953).

In the instant case, appellants have failed to show that the conclusion of the trial court, in assigning a 40% weight to market value, was an improper or arbitrary exercise of its judgment. We hold that the ruling of the trial court is reasonable in the light of surrounding circumstances and is supported by substantial evidence in the record. Accordingly, we will not disturb the trial court's conclusion in assigning a 40% weight to market value.

Cross-appellant Tome argues that the trial court's assigning no weight whatsoever to investment value is error. Tome relies upon Brown v. Hedahl's-Q B & R, Inc., supra, where an investment value of zero was accorded a 25% weight in determining fair value. However, the reason for such an assignment of weight was explained by the North Dakota court when it stated:

> "* * *. We have assigned a weight of 25% to the investment or earnings value of Q B & R. Normally, in a commercial business, earnings are given great weight as the primary purpose of the business is to generate earnings and not to hold assets that will appreciate in value. * * *"

In the instant case, Tome was not engaged in an active business where the primary purpose was to generate earnings. The court found that for the years 1963 and 1964 Tome's net income was barely over $1,000 per year, and that the fair market value of its principal asset was $4,700,000. Tome had never paid a dividend and for three years preceding the sale of its land had sustained a loss. In addition, Tome was engaged in litigation. These facts would clearly distinguish the instant case from the Brown case, supra. We believe that, under the circumstances, the assigned weight of 0% was reasonable. Therefore, cross-appellant's contention is without merit.

Appellants argue that Tome should be estopped from denying that the net asset value of Tome shares was $40,000, the book value established by Tome's board of directors.

It is the rule in New Mexico that estoppel by conduct arises when a party has been induced by the conduct of the other to do, or forbear from doing, something he would not have done but for such conduct. Porter v. Butte Farmers Mutual Insurance Company, 68 N.M. 175, 360 P.2d 372 (1961). In other words, the party asserting the estoppel must rely, to its detriment, on the conduct of the party against whom the estoppel is being asserted.

The court found that the effect of the board's action in changing the book value from $50 to $40,000 was to free the stock of certain restrictions. Nothing in the record indicates that appellants in any way changed their position or otherwise relied, to their detriment, on the basis of the board's action which established the book value at $40,000. In the absence of any detrimental reliance, appellants cannot assert an estoppel against Tome. Their contention is, therefore, without merit.

Appellants contend that the court committed error in concluding that 6% interest per annum should be allowed instead of 6½% interest. Section 51–28–4(F), N.M.S.A., 1953 Comp. (Repl. Vol. 8, Pt. 1, 1971 Supp.), places the awarding of interest within the discretion of the court. The court did not abuse its discretion by awarding 6% interest because such conclusion is supported by substantial evidence. With regard to the statutory interest rate on judgments, see § 50–6–3, N.M.S.A., 1953 Comp. (Repl. Vol. 8, Pt. 1).

Finally, we turn to the question of allowance of attorneys' fees raised

by appellants. The trial court awarded all of the court costs claimed, but denied appellants' claim for reasonable attorneys' fees. The controlling statute, § 51–28–4(G), N.M.S.A., 1953 Comp. (Repl. Vol. 8, Pt. 1, 1971 Supp.), states in part:

> "* * *. [B]ut if the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay therefor, or if no offer was made, the court in its discretion may award to any shareholder who is a party to the proceeding such sum as the court may determine to be reasonable compensation to any *expert or experts* employed by the shareholder in the proceeding, *together with* reasonable fees of legal counsel." (Emphasis added.)

Once the court has determined that the fair value materially exceeds the amount which the corporation has offered for the shares, it may then, in its discretion, award what it may determine to be reasonable compensation by way of expert fees and attorney's fees, but it may not award only expert fees and not attorney's fees if the shareholder has employed both an expert and an attorney in the proceeding. The trial court abused its discretion, or committed error, when it refused to award reasonable fees for legal counsel, having awarded all court costs, including experts' fees, to appellants.

The judgment of the trial court is affirmed, except for the refusal to award attorneys' fees. Accordingly, we remand this case to the trial court for the sole purpose of awarding attorneys' fees to appellants, in accordance with § 51–28–4(G), supra.

Costs of this appeal shall be borne equally, one-half to be assessed against the appellants and one-half against the appellee.

It is so ordered.

McMANUS, and OMAN, JJ., concur.

494 P.2d 968

E. R. COOPER et al., Plaintiffs-Appellees,

v.

Thomas BURROWS et al., Defendants-Appellants.

No. 9360.

Supreme Court of New Mexico.
March 10, 1972.

Roberto L. Armijo, Las Vegas, for appellants.

H. E. Blattman, Las Vegas, for appellees.

OPINION

McMANUS, Justice.

This case arose when E. R. Cooper and Doris E. Cooper, plaintiffs-appellees, filed suit to quiet title to a large tract of land in Mora County, New Mexico. The tract had initially been part of the Mora Land Grant. The patent on the land grant was issued in 1876 and established the general boundaries as north on the Ocate River, south where the Sapello empties, east on the Aguaje de la Yegua, and on the west the Estillero.

In March, 1877, one Stephen B. Elkins, holder of a number of undivided interests in the Grant, brought suit in the District Court of Mora County, in cause No. 632, asking for a partition of the Grant among the owners. William E. Gortner was appointed special master in the cause and he submitted his first report, covering ownership of the interests, in 1894. In 1912, Elkins died and Union Land & Grazing Company was substituted as plaintiff since that company was Elkins' successor in interest and title. In 1914, Gortner submitted a second report which was quite extensive and voluminous. It was this report upon which the trial court in the partition suit based its final decree. On March 16, 1916, a partition sale was held by Gortner upon order of the court and Edward B. Wheeler received title to the land in question under a Master's deed. In 1917, Wheeler quitclaimed the disputed tract of land to Union Land & Grazing Company. The description reads:

> "All that portion of the tract of land commonly known as the Mora Grant lying south of the 5th correction line north, and being all the right, title and interest of the first parties acquired under or by virtue of a certain Master's Deed executed and delivered under and by virtue of the decree in the District Court * * *."

In 1950, Union Land & Grazing Company quitclaimed the section of land now in dispute to E. R. Cooper. This tract was bordered on the west by the Mora Land Grant line, on the south by C. R. Walker and R. C. Kay, on the west by G. R. Linville, and on the north by the Rio de la Casa.

There probably would have been no question as to the correct state of the title if the trustees of the community of Cleveland had not intervened in the original partition suit on December 18, 1916. The intervention occurred after the special master's sale deeding the tract to Wheeler but before Wheeler quitclaimed to Union Land & Grazing Company. In 1918, the court declared the trustees to be the owners of several tracts of land but excepted the tracts owned by Wheeler. This exception included the tract now in dispute.

In 1969, appellees filed their quiet title suit involving the land above described. After hearing the evidence, the trial court found for the appellees. The defendants-appellants, Thomas Burrows and Fidencia Branch, appeal from that judgment.

Both the Burrows and Fidencia Branch are claiming under the Cleveland title. We will discuss the Branch claim at the outset. The Branch claim is based on a 1919 deed from the community of Cleveland to one Fidel G. Trujillo. This was a deed covering a tract of land 75 varas in width and bounded on the south by the Rio de la Casa. Fidel Trujillo purported to deed this land to Pablita Trujillo in 1926. The

description, however, referred to the south boundary as being the Pecos Forest Reserve line. Pablita deeded the same land to Frutoso Archuleta and Emelia Archuleta. These deeds contained the same reference to the south boundary as being the forest reserve line. One Joe Archuleta deeded the same property to Eloy Branch, deceased husband of appellant Fidencia Branch. There is no evidence as to who Joe Archuleta was, a relative or otherwise, consequently there is a break in the chain of title. The later deeds conveyed property south of Rio de la Casa, even though the early deeds conveyed only property north of the river. The Cooper land lies south of the Rio.

As to the Burrows claim, the same confusion prevails. In 1920, the Cleveland trustees conveyed a tract of land 100 varas in width and bordered on the south by the Rio de la Casa to Alejandro Branch. In 1944, Alejandro conveyed this tract along with certain others to Cecil R. Walker. After several mortgage suits, quiet title suits, etc., Amy Walker, wife of Cecil Walker, deeded the land to R. W. Pittman and Thomas Burrows, and their spouses. In 1961, Pittman conveyed his interest to appellants Burrows.

The title was relatively clear until Mrs. Walker brought a quiet title suit in 1960. The decree in that suit gave Mrs. Walker title to the section of land now in issue. That suit did not specifically name either the Union Land & Grazing Company or Cooper. It did name Wheeler but his interest in the lands had long since been eliminated. A second quiet title suit in 1965 also decreed the same land to Mrs. Walker and also failed to name either Union Land & Grazing Company or Cooper.

As previously discussed, the judgment of the court in the Cleveland intervention of 1916 excepted the lands belonging to Edward B. Wheeler. This decree is not to be construed as quieting title to those excepted lands in Wheeler, as claimed by the appellants, but rather the exception in the decree is nothing more than an acknowledgment that certain lands belong to a party other than the Community of Cleveland. The lands excepted had been properly deeded to Wheeler at the special master's sale in early 1916. Wheeler took clear title at that time and consequently Cooper's chain of title is complete back to the patent. The trial court so found this to be the case and since there is substantial evidence to support the findings, i.e., testimony of the abstractor as to the general knowledge that this was Cooper land and testimony to the effect that appellants had attempted to purchase the disputed portions of the tract from the appellees, the judgment must stand affirmed. It has long been established that this Court will not disturb the findings, weigh the evidence, resolve conflicts, or substitute its judgment as to the credibility of the witnesses where the evidence substantially supports the findings of fact and conclusions of law of the trial court. See Sanchez v. Garcia, 72 N.M. 406, 384 P.2d 681 (1963). See also, Edmonds v. Gomez, 63 N.M. 378, 320 P.2d 735 (1958) and Renehan v. Lobato, 55 N.M. 532, 237 P.2d 100 (1951).

The judgment of the trial court is affirmed.

It is so ordered.

COMPTON, C. J., and STEPHENSON, J., concur.

494 P.2d 971

UTE PARK SUMMER HOMES ASSOCIATION, Incorporated, a corporation, et al., Plaintiffs-Appellees,

v.

The MAXWELL LAND GRANT COMPANY, a corporation, et al., Defendants-Appellants.

No. 9351.

Supreme Court of New Mexico.

March 10, 1972.

Paul A. Kastler, Raton, for appellants.

Robert S. Skinner, Raton, for appellees.

OPINION

STEPHENSON, Justice.

Plaintiffs-Appellees (plaintiffs) filed suit alleging that the corporate plaintiff's membership were owners of property in Ute Park cabinsite area as were the individual plaintiffs; that Defendant-Appellant (defendant) had owned, platted and sold the cabinsite area and still owned land designated on the plat as "Golf Course," "Tennis Court" and "Club House"; that the plat "was displayed to plaintiffs and the agents and servants of defendant orally represented to plaintiffs that said tract would be reserved and developed by defendant" for such uses and purposes; that the "representations were part of a plan or scheme of development of such cabinsite area, were material inducing factors in the sale of cabinsites by defendant, and were relied upon by plaintiffs; * * *."

It was further alleged that defendant threatened to sell the tract in question without restriction as to its use or purpose and prayed that defendant be enjoined from making any sale of the tract "without restriction of its use or purpose to golf course, tennis court, and clubhouse uses." Other relief, no longer pertinent, was also sought.

This is a second appeal. See Ute Park Summer Homes Ass'n v. Maxwell Land Gr. Co., 77 N.M. 730, 427 P.2d 249 (1967) (the "first appeal").

On the first appeal, in which plaintiffs sought reversal of an adverse summary judgment, the question presented was:

"* * * [W]hether or not some legal right in, or relative to the use of, the 'golf course' area, which right is properly enforceable by the plaintiffs, came into existence *by the use of the plat and the representations by the defendant's agents in accomplishing the sales of the lots,* and which legally enforceable right is still in existence." 77 N.M. at 733, 427 P.2d at 252. (Emphasis supplied.)

The opinion on the first appeal reversed the summary judgment, holding that:

"* * * [T]he stated facts, if found to be true, would support a right in the lot owners, which is enforceable by plaintiffs, * * *" 77 N.M. at 733–735, 427 P.2d at 252.

Thereafter, trial was had and the court determined the facts to be generally as alleged by plaintiffs and entered judgment in their favor. The court found, inter alia, that some of the lots were sold by use of the plat which bore the alleged notations and that the subject area was referred to by those who showed the lots on behalf of defendant as a place where a golf course would be constructed or which would be used as a playground or recreational area. It is not claimed that these findings were not supported by substantial evidence, although they are attacked on other grounds.

The decree restricted defendant's use of the tract in question "to a golf course, a playground, or a recreation area," and defendant was enjoined from making any sale of the property without such restrictions on its use.

Defendant now draws our attention to the plat, pointing out that it labels the area in question "golf course," as contrasted with the decree, which speaks in terms of "a golf course, a playground, or a recreation area." Whereas in the first appeal defendant asserted that the plat violated the parol evidence rule as being an attempt to vary the deeds, it now asserts that evidence of oral statements and representations made by its agents and servants in conjunction with the plat at the time of sales violates the parol evidence rule in that such evidence tends to vary and enlarge the writing on the plat, the scope of the testimony being broad-

er than the words on the plat. It concludes that the use should have been restricted to "golf course."

There are a number of answers to this line of attack. The first and most obvious, which seems to have been overlooked by the parties, is that the decree is cast in the negative—prohibitory as to defendant.

It does not say that plaintiffs have the right to use the area for a "golf course, a playground, or recreation area." Rather, it restricts defendant to such uses. If "a golf course, a playground, or recreation area" (the decree) is broader than "golf course" (the plat), and we are inclined to agree with defendant that it is, the effect in the context of the decree is to give defendant a broader array of choices as to the use of the land than would have been the case had the decree used only the words written on the plat.

Any error in the choice of words in the decree is thus favorable to defendant, and, so far as we are concerned, harmless in the absence of a cross-appeal.

Entirely apart from what we have said, the admission of testimony regarding such statements and representations was proper under the doctrine of law of the case. If an appellate court has considered and passed upon a question of law and remanded the case for further proceedings, the legal question so resolved will not be determined in a different manner on a subsequent appeal.

The doctrine of law of the case has long been recognized in New Mexico, since before statehood (E. g., Dye v. Crary, 13 N.M. 439, 85 P. 1038 (1906), aff'd 208 U.S. 515, 28 S.Ct. 360, 52 L.Ed. 595 (1908)) and since soon after statehood (E. g., McBee v. O'Connell, 19 N.M. 565, 145 P. 123 (1914)). See also Farmers' State Bank v. Clayton Nat. Bank, 31 N.M. 344, 245 P. 543, 46 A.L.R. 952 (1925) in which the court spoke at length of the doctrine, observing that "the rule applies not only to questions specifically decided, but also to those necessarily involved."

The most recent opinion considering law of the case at length is Varney v. Taylor, 79 N.M. 652, 448 P.2d 164 (1968), in which the court reiterated the "necessary implication" aspect of the doctrine.

The opinion on the first appeal makes repeated references to use of the plat and representations by the defendant's agents in selling the lots. The first opinion is not solely concerned with the words appearing on the plat. Rather, it is concerned with the definition of plaintiffs' rights, as determined not only by the plat itself, but also by the use made of it and the mentioned representations. For example, see the language of the first opinion quoted near the outset of this opinion. Other statements of like import appear in the first opinion. It was thus proper to admit evidence not only of the plat, but of the use made of it and representations made by salespeople. Since the issue is to be resolved as we have described under the first opinion, and the rights of plaintiffs are not determined solely by the words on the plat, the parol evidence rule could not apply to exclude evidence of use made of it and oral statements and representations by defendant's agents.

So far as the statute of frauds is concerned, defendant claims that what has been done here is to create an easement; that this constitutes an alienation of land, and that such is prohibited by the statute of frauds. We are not persuaded that such is the case. In the opinion on the first appeal, the court quoted with approval from Cree Meadows, Inc. (NSL) v. Palmer, 68 N.M. 479, 362 P.2d 1007 (1961) to the effect that rights such as those under consideration here "are created by implied grant, implied covenant, or estoppel. It makes very little difference upon which of the above three theories the holding is based."

Obviously, to create such rights in the mentioned fashion does not require an instrument in writing signed by the party to be charged. E. g., Putnam v. Dickinson, 142 N.W.2d 111 (N.D.1966); Bradley v. Frazier Park Playgrounds, Inc., 110 Cal.

App.2d 436, 242 P.2d 958 (1952); Prescott v. Edwards, 117 Cal. 298, 49 P. 178 (1897). See also 3 Tiffany, The Law of Real Property § 801 (3rd ed. 1939, Supp.1971).

We hold that the evidence of statements and representations of defendant's agents was properly admissible under the law of the case doctrine, that its admission was not precluded by the parol evidence rule or the statute of frauds, and that error, if any, inhering in the expansion of the restricted uses from those appearing on the plat to those stated in the decree, was harmless.

In its second point, defendant contends that the size of the area labeled "golf course" on the plat is insufficient for that purpose, and since use as a golf course is "impossible," the land should be freed of all restrictions. Thus, the first contention, that the restriction should be limited solely to a golf course, is a prelude to the second, that a golf course being impossible, plaintiffs should be denied relief.

Here again there are a number of answers to defendant's argument, among which are:

A. Our decision on the first point does not limit the restriction to use as a golf course. Other uses, not impossible, are permissible.

B. It may be doubted that such impossibility was factually established. No qualified person so testified. The witnesses were equivocal on impossibility and several, at the time of sale, were not interested in a golf course as such, but rather in open spaces and unobstructed views. The court denied findings requested by defendant regarding impossibility.

C. Looking to substance and ignoring form, defendant is seeking equitable relief, viz., to relieve the land of the consequences of the plat and the inducing uses, statements and representations of defendant's agents and servants. If a golf course was impossible, the statements and representations should not have been made. Defendant while seeking equity did not do equity, and should therefore be denied equitable relief. In 27 Am.Jur.2d Equity § 131, it is stated: "The principle under discussion is as applicable to a party defendant who seeks the aid of equity as it is to a party complainant."

Defendant has cited a number of authorities in which developers were relieved of such burdens as we are considering, but in the main they deal with fact situations in which the development or construction for the use in question is sought to be compelled, or substantial changes of circumstances have occurred, or there has been an abandonment, or there has been a dedication to public use or the like. Such fact situations are readily distinguishable from that which confronts us.

The judgment should be affirmed.

It is so ordered.

McMANUS and OMAN, JJ., concur.

494 P.2d 975

Arnold BARNES, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 9427.

Supreme Court of New Mexico.

March 7, 1972.

Further ordered that the record in Court of Appeals Cause No. 802, 83 N.M. 566, 494 P.2d 979, be and the same is hereby returned to the Clerk of the Court of Appeals.

494 P.2d 975

Geronimo BORUNDA, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 9420.

Supreme Court of New Mexico.

March 7, 1972.

Original Proceeding on Certiorari

Further ordered that the record in Court of Appeals Cause No. 659, 83 N.M. 976, 494 P.2d 563, be and the same is hereby returned to the Clerk of the Court of Appeals.

494 P.2d 975

Jerry E. GREGG, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 9421.

Supreme Court of New Mexico.

March 7, 1972.

Further ordered that the record in Court of Appeals Cause, 83 N.M. 397, 492 P.2d 1260, be and the same is hereby returned to the Clerk of the Court of Appeals.

494 P.2d 976

STATE of New Mexico, Plaintiff-Appellee,

v.

Geronimo BORUNDA, Defendant-Appellant.

No. 659.

Court of Appeals of New Mexico.
Jan. 28, 1972.
Rehearing Denied Jan. 31, 1972.
Certiorari Denied March 7, 1972.

Barry Rudolf, Santa Fe, for appellant.

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Jr., Asst. Atty. Gen., Santa Fe., for appellee.

OPINION

HENDLEY, Judge.

During the trial of Juan Valdez, for the shooting of State Police Officer Sais, defendant took the stand and testified he, rather than Valdez shot Sais. Juan Valdez was convicted. Subsequently defendant was indicted for and convicted of perjury (§ 40A-25-1, N.M.S.A.1953 (Repl. Vol.1964)). Defendant appeals asserting: 1) an improper instruction regarding an element of perjury; 2) lack of substantial evidence; and, 3) by allowing the state a continuance defendant was denied his constitutional right to a speedy trial.

We affirm.

INSTRUCTIONS REGARDING THE CRIME OF PERJURY.

Section 40A–25–1, supra, defines perjury as:

"* * * making a false statement under oath or affirmation, material to the issue or matter involved in the course of any judicial, administrative, legislative or other official proceeding, knowing such statement to be untrue."

The trial court instructed the jury on perjury by quoting the statutory definition. Defendant's requested but refused instruction stated in part:

"* * * that the Defendant knew at the time of giving said testimony that it was false, and that he gave said testimony wilfully and for the purpose of corruption."

Defendant contends that "wilfully testifying falsely" is the gravamen of the offense charged and that the jury was denied an opportunity to pass upon the state of mind of the defendant which is an essential element in determining guilt or innocence. Defendant bases this contention upon State v. Reed, 62 N.M. 147, 306 P.2d 640 (1957). *Reed* is not applicable. It was based on the predecessor statute § 40–32–2, N.M.S.A.1953, repealed by the Laws of 1963, ch. 303, § 30–1. "Wilfulness" as an aspect distinct from "knowledge" is not a part of the offense established by § 40A–25–1, supra. The trial court did not err in refusing to instruct on "wilfulness"; it properly instructed in accordance with the statute. See State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct.App. 1969).

This case is controlled by State v. Montoya, 77 N.M. 129, 419 P.2d 970 (1966) which dealt with the statute under which defendant was convicted. *Montoya* stated:

"Knowledge, like intent, is personal in its nature and may not be susceptible of proof by direct evidence. It may, however, be inferred from occurrences and circumstances. The act itself may be such as will warrant an inference of knowledge * * *."

The instructions given provided the jury an adequate standard by which to determine the existence of knowledge when defendant made the false statement under oath, which was material to the issue in the course of a judicial proceeding.

SUBSTANTIAL EVIDENCE.

Defendant contends a special rule of evidence applies in perjury cases and that under that rule the evidence is insufficient to sustain the conviction. Such a special rule was declared in Territory v. Remuzon, 3 N.M. (Gild.) 648, 3 N.M. (John) 368, 9 P. 598 (1886). It is:

"Formerly it required the testimony of two witnesses to prove the falsity of the statements on which perjury was assigned in order to convict * * *.

"This rule has been in later years relaxed to some extent; but it is still necessary to prove the falsity of defendant's sworn statements beyond a reasonable doubt. This may be done by the testimony of one witness supported by corroborating evidence or circumstances. But the corroboration must go beyond slight or indifferent particulars; it must strongly support the accusing witness * * *."

A similar special rule applies in rape cases. State v. Polsky, 82 N.M. 393, 482 P.2d 257 (Ct.App.1971); State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct.App.1970). Such special rules appear contrary to the approach taken in most criminal prosecutions—that a defendant may be convicted on the testimony of a single witness and even when that witness is the victim, an accomplice or an informer. State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970); see State v. Polsky, supra. Although Territory v. Remuzon, supra, was overruled on other grounds in Territory v. Lockhart, 8 N.M. 523, 45 P. 1106 (1896), the special rule as to the necessary evidence was reaffirmed in Territory v. Williams, 9 N.M. 400, 54 P. 232 (1898).

Justification for the special rule is that it is not unreasonable that a conviction for perjury "* * * ought not to rest entirely upon 'an oath against an oath.'" Weiler v. United States, 323 U.S. 606, 65 S.Ct. 548, 89 L.Ed. 495 (1945); Territory v. Williams, supra. *Weiler* also states that a special rule for perjury prosecutions "* * * is well nigh universal." Accordingly, we proceed on the basis that the rule announced in Territory v. Remuzon, supra, is applicable.

The question then is whether the evidence is sufficient under that rule. We hold that it is. There is direct evidence that defendant's testimony in the Valdez trial was false. The "strong support" is the testimony of four witnesses placing Valdez at the scene when Sais was shot. One of the four witnesses testified that Valdez was close to Sais after the shot was fired and that Valdez had a gun in his hand. This evidence is sufficient corroboration under the special rule.

Defendant claims the testimony of the corroborating witnesses is circumstantial and is insufficient under the circumstantial evidence rule; specifically, that the testimony of the corroborating witnesses does not point unerringly to the falsity of defendant's testimony and does not exclude every reasonable hypothesis other than defendant's guilt of perjury. We disagree. The evidence is to be viewed in its most favorable aspect in support of the verdict. Viewed in that light, the circumstantial evidence corroborating the direct evidence of perjury is irreconcilable with any reasonable theory of innocence. State v. Beachum, 82 N.M. 204, 477 P.2d 1019 (Ct. App.1970). What defendant seeks under this point is a declaration that the jury should have believed the defense witnesses rather than the State's witnesses. Credibility of the witnesses is for the jury. The verdict shows the jury believed the State's witnesses, and the testimony of the State's witnesses excludes every reasonable hypothesis other than defendant's guilt.

RIGHT TO SPEEDY TRIAL.

Defendant contends that the lower court violated the rule applicable to trial settings in the Second Judicial District that "no trial will be vacated except by motion, hearing, and order." Defendant contends that by allowing the State a continuance in violation of this rule, he was denied his constitutional right to a speedy trial.

The record shows that defendant filed his first motion to dismiss on July 7, 1970 because the prosecution called the defendant and informed him that the prosecution witnesses were still unavailable. On July 8, 1970 counsel for both parties appeared before the court. There is a lapse in the record concerning what transpired after that. On July 17, 1970 there was an order denying defendant's motion to dismiss.

Section 21-8-11, N.M.S.A.1953 (Repl.Vol.1970) provides in part: "If the application for continuance is * * * held sufficient the cause shall be continued, * * *." Unless the trial court has abused its discretion the reviewing court will not set aside the action of the trial court in the granting of a motion of continuance. See State v. Jaramillo, 82 N.M. 548, 484 P.2d 768 (Ct.App.1971).

From the record we cannot state as a matter of law that the trial court abused its discretion. We note from the record that defendant had received continuances totalling over five months while he now argues for reversal because of a one week continuance for the prosecution.

Defendant argues that he was prejudiced in part because one of his witnesses died between July 7, 1970 and the trial on July 15, 1970. The record shows that this was a character witness and that there was ample testimony by other witnesses concerning defendant's character. There is no indication that the delay by the prosecution was brought about by concerted acts of state officials. Defendant was free on bond during the whole period of the continuances. No undue and oppressive incarceration is involved. Under the circumstances, there was no denial of the right to a speedy trial. See United States v. Ewell,

383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971)

Affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

494 P.2d 979

STATE of New Mexico, Plaintiff-Appellee,

v.

Arnold BARNES, Defendant-Appellant.

No. 802.

Court of Appeals of New Mexico.

Feb. 18, 1972.

Certiorari Denied March 7, 1972.

Alan A. Norwood, Roswell, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of sexual assault, defendant appeals. Section 40A-9-9, N.M.S.A.1953 (Repl.Vol. 6). The contentions, and our answers, follow.

1. Three witnesses were too young to testify.

Two boys age 11 and one boy age 10 testified concerning the sexual assault. Defendant claims the boys were too young to testify. Each of the boys was asked as to his understanding that he was to tell the truth. Each replied affirmatively. Each then testified. No objection was made to their testimony. Whether the boys were competent to testify was a matter to be resolved by the trial court in the exercise of its discretion. Their capacity to testify was not to be determined solely on the basis of their age. State v. Manlove, 79 N.M. 189, 441 P.2d 229 (Ct.App. 1968).

2. The testimony of one witness was false.

The mother of two of the boys testified that her sons reported the incident to her; that she went to the scene of the incident with her sons; that the car the boys described was still at the scene; that the boys identified the man in the car as being the person who committed the sexual assault. The mother also testified that defendant "seems to be" the same person, but she couldn't "say definitely." (The boys positively identified defendant).

Defendant claims the mother's testimony was false in that she testified that she did not see the defendant but had signed a

statement saying she had seen defendant passed out in the car. The falsity is in the claim. There is nothing in the record indicating the mother signed any statement. Her testimony, outlined above, is that she did see the defendant; she got a "[p]retty good look."

3. Court appointed counsel did not call defendant's witnesses to the stand.

Defendant testified in his own defense. No other defense witnesses were called. In the brief, counsel states he conferred with defendant concerning the testimony of two potential witnesses and advised defendant that the two potential witnesses would do more harm than good if they testified. "* * * The decision to call or not to call a witness is a matter of trial tactics and strategy within the control of counsel. * * *" Maimona v. State, 82 N.M. 281, 480 P.2d 171 (Ct.App.1971); see State v. Ramirez, 81 N.M. 150, 464 P.2d 569 (Ct.App.1970).

Defendant's contentions being without merit, the judgment and sentence are affirmed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

494 P.2d 980

Barney LASATER, Claimant-Appellee,

v.

HOME OIL COMPANY, Inc., Employer and Pan-American Fire & Casualty Insurance Company, Insurer, Defendants-Appellants.

No. 739.

Court of Appeals of New Mexico.

Feb. 25, 1972.

Thomas B. Catron III, Catron, Catron & Donnelly, Santa Fe, for defendants-appellants.

James E. Thomson, Zinn & Donnell, Santa Fe, for claimant-appellee.

PER CURIAM:

Upon consideration of appellants' motion for rehearing, the original opinion heretofore filed is withdrawn and the following substituted therefor

OPINION

COWAN, Judge.

The defendants appeal in this workmen's compensation case from a judgment granting the plaintiff compensation benefits, medical expenses and attorneys' fees.

The issues are the status of the plaintiff as independent contractor or employee and the limitation provisions of the Workmen's Compensation Act. We affirm that part of the judgment granting medical expenses. We reverse that part of the judgment granting compensation benefits and attorneys' fees.

On December 18, 1967, plaintiff, Barney Lasater, aged 47 and residing near Santa Fe, New Mexico, was called by Henry Houston, superintendent for defendant Home Oil Company, Inc., to go to one of defendant Home Oil's filling stations in the south part of Santa Fe to clean out a sewer line. While climbing a ladder to check a vent pipe, he fell and was injured.

The plaintiff had been doing odd jobs and performing part-time labor for defendant Home Oil since 1961. For several years he had had an agreement with Mr. Warren, president of Home Oil, that "* * * any of his men call me to go do the work, go do it and I would be paid for it." He was paid at the rate of $2.00 per hour and, if he needed to rent tools or other equipment for a particular job, he would pay the rental and be reimbursed by Home Oil for "any expenses I incur by working." At times Home Oil would deduct social security, withholding taxes and other deductions from his wages, which he would receive after billing for his hours of labor and expenses.

During the several months prior to the accident the plaintiff had, for Home Oil, spent three days in Taos on a gasoline tank installation job, done some mechanical work on trucks, hauled gasoline, worked at different stations in town, installed tanks and pumps in a new station at Rivera, set a pump at a station on the Las Vegas highway, torn down an advertising sign at a gasoline station, and prepared a transport tank for moving from storage.

After the accident Mr. Warren wrote the plaintiff two letters. The first, dated December 28, 1967, mentioned the accident,

contained the information that he had turned in the plaintiff's claim to Home Oil's insurance company and asked the claimant for his hospital and doctor bills, as he was "trying to get something" for the plaintiff. The second letter, postmarked February 1, 1968, discussed the Taos job and contained this language:

> "* * * I tur n [sic] in insurance on you for you had worked for me so much the [sic] have questioned me a lot on it they say there shou,d [sic] be some way getting insurance for you were working at my place * * *."

After the plaintiff entered the hospital on the day of the accident, Mr. Houston called on him and discussed the matter of the plaintiff's expenses and claims. Mr. Houston told him that "the bills would be taken care of." Compare Feldhut v. Latham, 60 N.M. 87, 287 P.2d 615 (1955).

The trial court found that the plaintiff was an employee of defendant Home Oil Company, Inc. at the time of the accident. The defendants, by their first point, question the sufficiency of the evidence to support this finding, asserting that the evidence shows the plaintiff to have been an independent contractor.

A case of this type must stand upon its own particular facts and circumstances. Although there are several New Mexico decisions on the employee v. independent contractor status, none of these decisions are sufficiently similar on the facts to be specifically controlling in this case. In Mendoza v. Gallup Southwestern Coal Co., 41 N.M. 161, 66 P.2d 426 (1937), the Supreme Court stated:

> "The words 'employer and employee' as used in the New Mexico Workman's Compensation Act are used in their natural sense and intended to describe the conventional relation between an employer who pays wages to an employee for his labor * * *."

The payment of $2.00 an hour for labor, together with the other facts, raised a factual issue as to whether plaintiff's status was that of an employee. See Mittag v. Gulf Refining Company, 64 N.M. 38, 323 P.2d 292 (1958). Viewing the evidence in the light most favorable to support the finding of employment, which we are required to do, the evidence substantially supports the finding.

By their second point, defendants argue that the plaintiff's claim was barred because it was not timely filed. The court found that the claim was not filed within one year and 31 days after the accident. The plaintiff seeks to excuse the late filing on the ground that the failure to file within the prescribed period was caused by conduct on the part of the employer which reasonably led him to believe that compensation would be paid. He contends that the Warren letter of February 1, 1968, was such conduct.

Section 59–10–13.6(A), N.M.S.A.1953 (Repl.Vol. 9, pt. 1), in effect at the time of the accident, provided:

> "* * * [I]t 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 (1) year after the failure or refusal of the employer or insurer to pay compensation."

Section 59–10–14, N.M.S.A.1953 (Repl. Vol. 9, pt. 1), states:

> "The failure of any person entitled to compensation * * * to * * * file any claim, or bring suit within the time fixed by the Workmen's Compensation Act shall not deprive such person of the right to compensation where the failure was caused in whole or in part by the conduct of the employer or insurer which reasonably led the person entitled to compensation to believe the compensation would be paid."

This provision for extending the time within which suit must be filed was first enacted by the legislature in 1937, using the words "which *would reasonably lead* the person." By amendment in 1959 the quoted words were substituted by the words "which *reasonably led* the person". [Emphasis added] Given a rational con-

struction the statute requires not only that a claimant *be led* to believe that compensation would be paid but this belief must cause him to delay the filing beyond the statutory period. Some mental reaction must be evidenced. See dissenting opinion in Reed v. Fish Engineering Corporation, 76 N.M. 760, 418 P.2d 537 (1966).

The trial court found:

> "The failure to file claimant-employee's complaint within one year and 31 days from the disability was caused in whole or in part by the conduct of the employer of February 1, 1968 which reasonably led the claimant-employee to believe that compensation would be paid."

There being no evidence in the record that the plaintiff was in any way led to believe that compensation benefits would be paid, this finding was in error. The letter of February 1, 1968, relied on by plaintiff, makes no mention of compensation benefits, as distinguished from medical or hospital expenses, nor does the testimony of the plaintiff himself indicate that he withheld filing his claim, in whole or in part, because of conduct on the part of his employer.

However, the late filing has no affect upon plaintiff's medical expenses, found by the court to be in the sum of $1,029.77, since the limitation provision of § 59–10–13.6(A), supra, does not apply to them. Nasci v. Frank Paxton Lumber Co., 69 N.M. 412, 367 P.2d 913 (1961). The trial court's awarding the plaintiff his medical expenses was not error.

The cause is remanded with instructions to enter judgment for the plaintiff in accordance herewith. Recovery of compensation being a prerequisite to the allowance of attorneys' fees, the plaintiff is not entitled to an award for attorneys' fees here or in the trial court. Cromer v. J. W. Jones Construction Company, 79 N. M. 179, 441 P.2d 219 (Ct.App.1968).

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

494 P.2d 983

Gregorio VALDEZ, Plaintiff-Appellant,

v.

GLOVER PACKING COMPANY and John Doe Workmen's Compensation Insurance Company, Defendants-Appellees.

No. 773

Court of Appeals of New Mexico.
Feb. 25, 1972.

Albert J. Rivera, Alamogordo, for plaintiff-appellant.

John P. Cusack, Frazier, Cusack & Schnedar, Roswell, for defendants-appellees.

OPINION

COWAN, Judge.

Plaintiff appeals from an adverse judgment in a workmen's compensation case.

We affirm.

The trial court found that the injury to plaintiff was the result of personal animosity between the plaintiff and one Robert Brown; that it was not reasonably incident to plaintiff's employment; and that it did not arise out of his employment. Plaintiff's points relied upon for reversal raise the

question of sufficiency of the evidence to support the findings.

We view the evidence in the light most favorable to support the findings, disregarding all evidence unfavorable thereto. Lopez v. Schultz & Lindsay Construction Company, 79 N.M. 485, 444 P.2d 996 (Ct. App.1968).

The plaintiff and Robert Brown were employed by Glover Packing Company in Roswell, working on the kill floor. Just prior to the incident in which plaintiff was injured, he had twice squirted Brown with hot water from a cleaning hose. Brown then started toward the plaintiff, who picked up a meat hook. Brown had some tools in his hands, including a butcher knife. As they came together, a foreman moved in and shoved them 10 to 15 feet apart. The plaintiff "started hollering" and threw the meat hook at Brown, hitting him on the side of the head. Brown, either voluntarily or by reflex action, then threw his tools at the plaintiff. Plaintiff's left arm was cut, resulting in a total loss of use of the arm at the elbow.

The evidence was conflicting and it was for the trial court to determine the credibility of the witnesses and the weight to be given their testimony. Lopez v. Schultz & Lindsay Construction Company, supra. The court resolved the conflict by its findings and such findings were supported by the evidence. Since the injury to plaintiff did not arise out of his employment, it was not compensable. Perez v. Fred Harvey, Inc., 54 N.M. 339, 224 P.2d 524 (1950).

Plaintiff contends that the injury necessarily arose out of the employment, arguing that the question as to who might be the aggressor has no place in workmen's compensation law. *Perez*, supra, answers this contention, pointing out that it is a question of fact whether the injury results from "purely personal motives" or "arises out of the employee's work." The trial court's finding was that the injury in this case was the result of personal animosity. There being substantial evidence to support this finding, no discussion is required as to which of the two men may have been the aggressor.

Plaintiff also contends that his injury cannot be considered to have been "wilfully suffered" under § 59-10-8, N.M.S.A.1953 (Repl.Vol. 9, pt. 1). This was never an issue in the case.

The judgment is affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

[redacted]

494 P.2d 984

STATE of New Mexico, Plaintiff-Appellee,

v.

Frank J. JORDAN, Defendant-Appellant.

No. 771.

Court of Appeals of New Mexico.

Feb. 25, 1972.

[redacted]

James F. Beckley, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., James H. Russell, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

COWAN, Judge.

The defendant appeals following his conviction of homicide by vehicle, contrary to § 64–22–1, subd. A, N.M.S.A.1953 (Repl. Vol. 9, pt. 2, 1971 Supp.).

Trial was to the court. We reverse.

Section 64–22–1, subd. A, supra, states:

"Homicide by vehicle is the killing of a human being in the unlawful operation of a motor vehicle."

The charge against the defendant arose out of an intersectional collision in Albuquerque, New Mexico, when a car driven by the defendant ran a red light and collided with a vehicle driven by Franklin Lee Robinson, who died as a result of the collision. The defendant's automobile left between 15 and 20 feet of skid marks before reaching the beginning of the intersection.

Defendant argues that the trial court erred in ruling that criminal intent is not a necessary element of the crime for which he was convicted. The state counters that the trial court ruled only that a specific intent to operate a motor vehicle unlawfully is not necessary for a conviction.

We agree with the defendant's interpretation of the court's ruling. The issue of criminal intent was first raised by motion prior to presentation of evidence. Defendant argued that "unlawful" means no more than ordinary negligence and that ordinary negligence does not carry with it the specific intent to violate a law. The court then overruled the motion, holding that *specific intent* to operate a vehicle *unlawfully* is not necessary.

The defendant renewed the motion at the conclusion of the testimony. The court, in again overruling the motion, at this time indicated quite clearly, in our opinion, that the defendant's violation of the traffic code was, in itself, sufficient to support his conviction. We conclude, from its language, that the court excluded *any* intent as an element of the crime and thus applied incorrect law to the facts of the accident.

The rule set out in State v. Davis, 80 N.M. 347, 455 P.2d 851 (Ct.App.1969), taken from State v. Shedoudy, 45 N.M. 516, 118 P.2d 280 (1941), is controlling here. The act for which defendant was convicted is one "prohibited and made punishable by statute only." In State v. Davis, supra, this court, quoting from *Shedoudy,* said:

> "Generally speaking, when an act is prohibited and made punishable by statute only, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential, although the terms of the statute do not require it. * * * But the legislature may forbid the doing of an act and make its commission criminal, without regard to the intent with which such act is done; but in such case it must clearly appear from the Act (from its language or clear inference) that such was the legislative intent.
>
> * * * * * *
>
> "It follows that whether a criminal intent is to be regarded as essential, is a matter of construction, to be determined from a consideration of the matters prohibited, and the language of the statute, in the light of the common law rule. * * *"

Here, as in *Davis,* it does not "clearly appear" that the legislature intended to eliminate intent as a necessary element. It follows that criminal intent, *a mental state of conscious wrongdoing,* is a necessary element of the crime for which defendant was convicted and one which must be proven. State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct.App.1969).

We do not decide, nor intend to indicate, whether the evidence is sufficient to support a finding of criminal intent. This is for the fact finder at a new trial. Com-

pare State v. Pedro, 83 N.M. 212, 490 P.2d 470 (Ct.App.1971).

In view of what we have said, it is unnecessary to rule on defendant's second point, proof of the *corpus delecti.*

The cause is remanded with instructions to vacate the judgment and sentence heretofore entered and grant the defendant a new trial.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

HENDLEY, J., not participating.

494 P.2d 1391

Manuela CONTRERAS, Appellant,

v.

NEW MEXICO HEALTH AND SOCIAL SERVICES DEPARTMENT, Appellee.

No. 752.

Court of Appeals of New Mexico.

Feb. 25, 1972.

Charles T. DuMars, Peter C. Mallery, Betty A. Camunez, Legal Aid Society of Albuquerque, Inc., Albuquerque, of counsel, for appellant.

David L. Norvell, Atty. Gen., Robert J. Laughlin, Agency Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

Manuela Contreras, 72 years of age, applied for assistance under the Public Welfare Act of 1937, ch. 18 as amended. The application was denied by a caseworker. Contreras appealed to the State Board of Health and Social Services and requested a fair hearing of the denial of assistance. A hearing was held. Thereafter, the hearing officer recommended that the appeal be upheld. Nevertheless, the Appeals Review Committee denied the application for financial assistance. Contreras appeals to this court under § 13-1-18.1, N.M.S.A. 1953 (Repl.Vol. 3, Supp.1971).

We reverse.

The sole reason the application was denied was "Information presented at the hearing was that [Contreras] had transferred property and the sales contract was worth $2,950 which was in excess of the allowable maximum under Agency regulations." We hold that the decision is not supported by substantial evidence in the record as a whole as provided by § 13-1-18.1(D) (2), N.M.S.A.1953 (Repl.Vol. 1968, Poc.Supp.1971). We need not decide whether "substantial evidence in the record as a whole" changes the traditional view of substantial evidence. See Kaiser Steel Corporation v. Property Appraisal Department, 83 N.M. 251, 490 P.2d 968 (Ct.App. 1971), and discussion therein. Even under the traditional approach [Tapia v. Panhandle Steel Erectors Co., 78 N.M. 86, 428 P.2d 625 (1967)] the evidence is not substantial.

The record of the hearing shows the following:

1. On July 9, 1969, Manuela C. Avelar, a single woman, [now Contreras], for consideration paid, deeded real estate to Esther C. Boseheff.

2. On December 29, 1969, Boseheff, by real estate contract, sold the property to Baca for $4,500.00, $1000 paid, and the balance of $3,500 to be paid at the rate of $50.-00 per month.

3. On March 8, 1971, Contreras made her application for assistance. In answer to Item 43, "income from sale of property," the following words were written in a blank space: "Bal $2950 on contract." Thereafter, under monthly amounts, there was inserted "$50.00."

4. The caseworker read into evidence her letter of denial of the Contreras application. In part, it stated:

> I'm sorry to inform you we must deny your application for financial assistance due to your contract right in excess of our standards of $1,200. This is the provision of the Department in Paragraphs 231.832B regarding Personal Property. * * *

She further testified that she was not "qualified as an expert to tell how much the face value" of the contract was. "In other words—Not what it is actually worth, but what it says in the contract."

5. Contreras offered in evidence without objection the written opinion of an attorney based upon his experience with similar real estate contracts that "this contract has a maximum cash value at this time of $1,200.00."

The hearing officer made findings and concluded that Mrs. Contreras did not sell property to become eligible; that Mrs. Contreras has income of $48.50 per month, and recommended that the appeal be upheld. It is noted that the escrow agent deducts $1.50 per month from the $50.00 payment, leaving a balance of $48.50 per month.

"Agency" regulation 231.832B provides in part:

> To be considered eligible on the condition of need the total personal property owned by the client may not exceed $1,200. The value of personal property owned in excess of this amount is considered a resource and is considered available to meet requirements if it is transferable. * * *

There was no evidence that Contreras owned the real estate contract. To the contrary, the payee under the contract is Esther C. Boseheff rather than Mrs. Contreras. Even if a reasonable inference could be drawn, which we do not concede, that Contreras owned the contract, the only competent evidence established a value not to exceed $1200.00. Additionally, there was no evidence of a present market for the contract. Furthermore, no where does the record show that the real estate contract had a "transferable" value in excess of $1200.00. The only competent evidence as to "transferable" value or actual worth is that the contract has a "maximum cash value" of $1200.00. The denial of financial assistance is not supported by substantial evidence.

The parties agreed that $50.00 per month was not sufficient income to provide Contreras a reasonable subsistence compatible with decency and health.

This case is reversed. Mrs. Contreras is entitled to assistance in accordance with the hearing officer's findings.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

494 P.2d 1392

Elizabeth A. ELLIOTT, Plaintiff-Appellant,

v.

TAOS SKI VALLEY, INC., a Corporation, and American Employers' Insurance Company, a Corporation, Defendants-Appellees.

No. 755.

Court of Appeals of New Mexico.
March 3, 1972.
Certiorari Granted March 23, 1972.

Matias A. Zamora, Santa Fe, Russell Moore, Keleher & McLeod, Albuquerque, for plaintiff-appellant.

John A. Mitchell, Mitchell, Mitchell & Alley, Frank Andrews, Montgomery, Federici, Andrews, Hannahs & Morris, Santa Fe, for defendants-appellees.

OPINION

SUTIN, Judge.

This is an appeal from a directed verdict granted defendants, arising out of a suit to recover damages for aggravation of a personal injury. Elizabeth A. Elliott, while skiing, fell and suffered a compression fracture of the bone of the left leg at the hip joint.

We reverse.

The trial court directed a verdict on the following grounds: (1) the defendants were not negligent as a matter of law; (2) Elliott was contributorily negligent as a matter of law; (3) there was lack of proof as to the extent of the aggravation of the injury.

The rules relating to a motion for a directed verdict are in Garcia v. Barber's Super Markets, Inc., 81 N.M. 92, 463 P.2d 516 (Ct.App.1969). Thus, in our view, we consider the evidence and inferences most favorable to Elliott.

Taos Ski Valley's Negligence and Elliott's Contributory Negligence were Issues of Fact for the Jury.

On and before February 12, 1967, Taos Ski Valley operated for profit, a ski

area in Taos County pursuant to a term Special Use Permit issued by the United States Forest Service. Under this permit, Taos Ski Valley agreed, (1) to provide and maintain a sufficient quantity of first aid supplies to care for all accidents that may occur; (2) provide and place toboggans fully equipped with blankets, splints, etc.; (3) provide a room in which to temporarily care for at least three injured persons; (4) provide for adequate and systematic patrol of the permitted area for the prevention of accidents and for rescue and first aid purposes; (5) the patrol shall meet the qualifications of the National Ski Association; all in accordance with a comprehensive safety plan jointly prepared by Taos Ski Valley and the District Ranger. Taos Ski Valley also agreed to provide a ski school.

On February 11, 1967, Elliott entered into a contract with Taos Ski Valley to take private lessons in the sport or art of skiing, and Taos Ski Valley provided Georgia Hotton as instructor. Miss Hotton was listed as a fully certified ski instructor with knowledge of the contents of the first aid manual. This manual included information about injuries to bones, joints and muscles, signs and symptoms thereof, and essentials of first aid.

On February 12, 1967, for aid and rescue, Taos Ski Valley had eight aluminum akais, sometimes called sleds or toboggans, equipped with sleeping bags, first aid equipment and splints. The akais were located at the top of the ski lift and at the first aid hut where the injured were to be taken. It also maintained a paid and fully equipped ski patrol, utilizing one or two way radios.

On that morning, Elliott, a widow, 49 years of age, accompanied by Hotton, fell on her left hip and injured herself. She told Hotton she injured her leg. Hotton helped her up and then Hotton, moving forward, hollered, "Come on, come on." So Elliott went down the best way she could to a little snow field. Hotton then started on down, and Elliott tried to follow her, but her leg could not carry any weight and she fell on her right side this time. Hotton came back and said, "You have a pulled muscle." Elliott believed her, but said she could not ski anymore, and said, "What shall I do?" Miss Hotton took Elliott's skis and left her with the poles, because the poles would be needed in walking to the lodge. She told Elliott to meet her at the lodge. Then hollered at Elliott, "I know it hurts a little, but it won't quit until you quit what you are doing". Elliott made her way back one half mile to a snow field, stopped and requested a toboggan. After one half hour, a toboggan arrived and she was taken to a warming hut. The instructor had been instructed to check and if the injury prevented a student from skiing any further, the instructor was to notify the ski patrol. If there was any doubt as to the injury, the instructor was to get a toboggan.

We believe this evidence is sufficient to create an issue of fact, (1) whether Taos Ski Valley was negligent in failing to exercise ordinary care toward Elliott after she fell and stated she could not ski anymore, and (2) whether Elliott was contributorily negligent in attempting to walk to the lodge.

There was Sufficient Proof to Submit the Issue of Aggravation of the Injury to the Jury.

Elliott does not claim damages for the original injury, the fracture of the left femur. Her damage claim is for aggravation of this injury.

Dr. Earl McBride of Oklahoma City, a long recognized authority in orthopedic surgery, testified that Elliott did have additional damage to the bone, other than that of the initial injury which made her case worse; that if she had immediately been taken off her feet, the circulation might have had a chance to take care of itself; that the pressure and irritation, the twisting and abnormal forces placed on the hip as a result of walking down the mountain, and bearing weight after the bone was fractured, in his opinion, as a reason-

able medical probability, resulted in aggravation by fifty per cent of her total injury because it gave Elliott a permanent limp and may result in the loss of the head of that bone in the future.

This is sufficient evidence to create an issue of fact on aggravated injury and the extent thereof. Hebenstreit v. Atchison, Topeka & Santa Fe Ry. Co., 65 N.M. 301, 336 P.2d 1057 (1959); Morris v. Rogers, 80 N.M. 389, 456 P.2d 863 (1969); despite any claim of conflict in the doctor's testimony on cross-examination; Alvillar v. Hatfield, 82 N.M. 565, 484 P.2d 1275 (Ct. App.1971).

Taos Ski Valley also contends that the medical testimony is inherently improbable from a factual standpoint and it must be disregarded under the "physical facts and conditions" doctrine of Ortega v. Koury, 55 N.M. 142, 227 P.2d 941 (1951). We see no basis for the application of this rule to the facts of the instant case. We believe that the doctor's testimony and opinion has a factual basis sufficient to create an issue of fact for the jury.

Assumption of Risk as a Defense on Retrial.

Taos Ski Valley raised the defense of assumption of risk. We cannot determine whether the directed verdict included this defense. However, since this case must be tried over, the defense is controlled by Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971).

The judgment is reversed and Elliott is granted a new trial.

It is so ordered.

WOOD, C. J., concurs.

COWAN, J., dissents.

COWAN, Judge (dissenting).

I cannot agree with the majority that Dr. McBride's testimony was sufficient "to create an issue of fact on aggravated injury and the extent thereof."

It is not correct, as stated in the majority opinion, that the doctor testified to an aggravation of fifty percent of plaintiff's *total injury*. The plaintiff fractured the neck of her left femur and later developed aseptic necrosis, a "lack of circulation in the tissues", near the fracture site. It was for aggravation of this condition alone that defendants were alleged to be liable and it was to the aggravation of this condition alone that the doctor testified.

The question posed was "Do you have an opinion, Doctor, from your examination of the X-rays, the medical history taken and your examination of Mrs. Elliott, as to the percentage of *aseptic necrosis* which can be or could be attributed to her activity such as walking after the initial injury?" [Emphasis added] He answered "* * * [I]t would be my opinion that in this case it would be about fifty-fifty." Later in the answer he said "* * * so I think that about fifty per cent [of the aseptic necrosis] was due to the fact that *it was fractured there* and another fifty per cent was probably the aggravation." [Emphasis added] The case concerns itself, then, only with the cause of fifty percent of the aseptic necrosis, the other fifty percent having been a direct result of the fracture.

It appears that the majority stopped their consideration of Dr. McBride's testimony at this point. Unfortunately for the majority's position, the doctor did not stop testifying at this point. With an amazing lack of constancy but with considerable candor, the doctor elaborated upon the causes of the aggravation.

The opinion question was restricted to "activity such as walking", the plaintiff's walk from the site of her fall to the warming hut below being the alleged cause of the claimed aggravation. Before starting her walk, she shook her leg "real hard" and "kind of stomped" so that "I could go on down the hill." It is noted that the plaintiff did not know of the fracture, it being one ordinarily revealed only by x-ray.

The weakness of the doctor's belief in his initial opinion was first evidenced when he replied to a question as to reason-

able medical probability with "Well, I think so." He then testified to aggravative factors in addition to the walking: the twisting motion at the time of her first fall; the impaction of bone into socket at the time of the initial fall; the sitting on the bench at the warming hut; other weight bearing; her bus trip to the Taos hospital; the fitting of the cast in Taos; and the pin inserted in the bone in Oklahoma.

When asked to define the relative contribution of these various factors to the aggravation he used, either by express words of his own or by response to their use in questions, phrases such as: impossible to separate; hard to distinguish; you can't do it; you can't tell; they are not separable; I wouldn't know; there is no way to tell; it's arbitrary; purely a matter of speculation. Even when he once predicated his opinion to some extent on his experience, he added "But I speculate on that."

The rules of law governing this case are:

> "The extent of the aggravation can be established by testimony that the pre-existing condition has been aggravated by a stated percentage amount. * * *" Morris v. Rogers, 80 N.M. 389, 456 P.2d 863 (1969).
>
> "The defendant * * * is liable only for the aggravation * * * and the burden of proving with reasonable certainty the extent of the aggravation was on the plaintiff." Hebenstreit v. Atchison, Topeka & Santa Fe Ry. Co., 65 N.M. 301, 336 P.2d 1057 (1959).
>
> "Difficulty in proving extent of aggravation * * * does not justify non-application of the rule that plaintiff must prove the injury that defendant inflicted. * * * The extent of aggravation of a pre-existing * * * condition must be proved by the plaintiff. * * *" Martin v. Darwin, 77 N.M. 200, 420 P.2d 782 (1966).
>
> The burden of proving with reasonable certainty the causal connection is on the plaintiff. Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962).
>
> The cause of a plaintiff's condition, at the time of trial, must be established by medical testimony. Alvillar v. Hatfield, 82 N.M. 565, 484 P.2d 1275 (Ct.App. 1971).
>
> "* * * The rule is unquestioned that the evidence must show damages to a reasonable certainty." Bokum v. Elkins, 67 N.M. 324, 355 P.2d 137 (1960).
>
> "While it may be true that, generally speaking, if a witness' testimony on direct examination conflicts with that given by him on cross-examination, it is for the jury to decide when, if at all, he has testified truthfully, Armishaw v. Kan., 123 Or. 69, 260 P. 1011; 58 Am.Jur. 492, Witnesses § 863; yet that rule can have no application *if the witness so explains his prior testimony as to leave the facts to which he testifies a mere matter of conjecture, possibility or guess.* * * *" Washburn v. Simmons, 213 Or. 418, [323 P.2d 946], 325 P.2d 255 (1958). [Emphasis added]
>
> "Hence it is that where the plaintiff's case rests upon the testimony of a witness whose further examination *so explains or qualifies his prior testimony as to leave the fact to which he testifies a matter of conjecture, possibility, or guess, his testimony will be construed as a whole to be so lacking in probative force as not to make a case for the jury. In such circumstances, the defendant, as a matter of law, is entitled to the direction of a verdict.*" Annot., 66 A.L.R. 1518 (1930). [Emphasis added]

A fair appraisal of Dr. McBride's entire testimony, upon which the plaintiff's proof of damage rests, convinces me beyond doubt that his evidence is insufficient, as a matter of law, to make a case for the jury.

In directing a verdict for the defendants, the court said: "There is too much vagueness, and I think to submit it to the jury would be submitting it on the pure basis of speculation and conjecture. To me there is a lack of proof to the extent of aggravation of the injury." I agree.

This case goes beyond mere "contradictions in testimony" to be resolved by the

fact finder. The doctor's testimony, after his initial opinion testimony, so undermined the latter that it became not just contradictory evidence, but, probatively, no evidence at all.

Under such circumstances, the defendants, as a matter of law, were entitled to a directed verdict and the judgment of the trial court should be affirmed. The majority feel otherwise and I, therefore, dissent.

494 P.2d 1397

Nancy S. BROCK, as Administratrix of the Estate of Terry Frank Brock, Deceased, Plaintiff-Appellant,

v.

Annie GOODMAN and Sears, Roebuck & Co., a New York corporation, Defendants-Appellees.

No. 758.

Court of Appeals of New Mexico.
Feb. 11, 1972.
Certiorari Granted March 23, 1972.

Dennis M. McCary, Michael L. Keleher, Keleher & McLeod, Albuquerque, for plaintiff-appellant.

Robert M. St. John, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

This is an appeal from summary judgment granted defendants in a suit for wrongful death resulting from one vehicle accident.

We reverse.

The defendant Annie Goodman is not a party to this appeal.

The record supports the following:

On August 2, 1969, Tom Goodman, husband of Annie, purchased four new 6-ply tires from Sears which were manufactured by Armstrong. Sears put Goodman's old tubes in the new tires mounted and in-

stalled the tires on Goodman's 1969 Ford half-ton pickup, and then balanced the new tires. On August 5, 1969, decedent was riding in the pickup driven by Annie Goodman. Mrs. Goodman drove the vehicle so as to cause it to veer off the pavement to the right for approximately 325 feet, at which time it veered 47 feet across the pavement to the left side of the road and was off the pavement for about 55 feet, and when she turned onto the pavement from the left shoulder, it traveled 52 feet, overturning once. The left front tire failed causing the tire to disengage from the rim. As a result, the rim acted as a pivot or fulcrum which caused the pickup to overturn, resulting in the death of decedent.

Brock alleged, (1) that the tire failure resulted from the defective condition of the tire at the time of the accident; (2) that Sears negligently failed to inspect or detect the defective condition of the tire which failed at the time of the mounting of the tire or, in the alternative, that Sears negligently damaged the tire in the process of mounting the tire; (3) that defendant Sears breached express and implied warranties of merchantability; (4) that the tire was in a defective condition which created an unreasonable risk of injury and death creating strict liability against Armstrong; (5) that Armstrong breached express and implied warranties of merchantability; and (6) that the negligent acts of Sears and Armstrong concurred.

The defendants answered in denial with several affirmative defenses.

The defendants filed a motion for summary judgment on the ground that the depositions of Annie Goodman, Tom Goodman, and Leopoldo Gonzales, the Sears employee who mounted the tires, do not support the alleged claims of Brock, and that Brock did not produce any evidence which would show or tend to show that there is any genuine issue as to a material fact and in the absence of such evidence, defendants are entitled to summary judgment.

Based upon the record, including answers to interrogatories, the depositions mentioned, affidavits of two persons, the trial court awarded defendants summary judgment.

We wish to make it clear once again the burden rests on the defendants, not the plaintiffs, to establish that no genuine issue of material fact exists for trial and defendants are entitled to judgment as a matter of law. If the defendants fail to meet this burden, summary judgment is erroneous. Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct.App.1970). Only when the defendants fulfill their burden and make a prima facie showing that no material fact issue exists, does it then become the duty of plaintiffs to show there is a factual issue present. Sanchez v. Shop Rite Foods, 82 N.M. 369, 482 P.2d 72 (Ct. App.1971).

We have carefully read the pleadings, the depositions, answers to interrogatories, and affidavits. We find no evidence that when the tire was manufactured by Armstrong it was a good, sound tire free of defects; that when it was sold by Sears it was carefully inspected for defects or conditions which would cause it to fail, and none were found. The only showing of "no defect" in the tire comes from the two Goodmans. Both testified in their depositions that there was nothing to indicate anything wrong with the tire between the time the tires were mounted and the time of the accident. Mr. Goodman also testified that he had not noticed a cut or scrape on the tires prior to the accident. The foregoing is not a prima facie showing of no defect. Certainly a slight issue of fact remains. Defendants failed to meet their burden of showing an absence of a material factual issue. The trial court erred in granting summary judgment.

Of course, at trial, it will be plaintiff's, not defendants', burden to come forward with evidence and inferences therefrom sufficient to raise a factual issue for submission to the jury. If she fails to do this,

she cannot complain if a verdict is directed against her.

Reversed.

It is so ordered.

WOOD, C. J., concurs.

COWAN, J., dissents.

COWAN, Judge (dissenting).

The plaintiff's cause of action is predicated totally upon the existence of a defect in a tire. The majority state that there is not a "prima facie showing of no defect" and that "certainly a slight issue of fact remains." They point to none and their statement is unsupported by the record. The facts they set out are too sparse for a fair appraisal and therefore must necessarily be supplemented. The Sears employee who installed the tires described the mounting procedure at length. He testified about feeling inside the tires, about putting them on a machine and about balancing them. He stated that they were checked inside and out and testified more than once that, if there was a break in the tire, "it would show". The pickup was driven approximately 300 miles with no tire difficulty prior to the accident. At the time of the occurrence, the driver, Mrs. Goodman, lost control of the vehicle while attempting to light a cigarette. The pickup travelled some 380 feet off the highway, first on one side and then the other. It moved back onto the highway twice and there was no tire failure until it came back onto the road the second time. Both Mr. and Mrs. Goodman testified at deposition that they had no knowledge or evidence of a defect in the tire, and that they had no information tending to support the allegations of a defective tire. The plaintiff produced and filed the affidavit of an expert who had examined the tire shortly after the accident. The affidavit contained the statement "* * * [I]t is affiant's opinion that the tire failed as the vehicle turned onto the highway from the left shoulder of the highway and that the failure proximately caused the accident." Nowhere in the more than two pages of affidavit does the expert opine or even suggest, that the failure was caused by a defect in the tire.

The summary judgment Rule 56 [§ 21-1-1(56), N.M.S.A.1953, Repl.Vol. 40)] is clear and unambiguous. Paragraph (c) states that a judgment:

> "* * * shall be rendered forthwith if the *pleadings, depositions, answers to interrogatories, and admissions on file,* together with the *affidavits,* if any, *show that there is no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law. * * *" [Emphasis added]

Paragraph (e) states:

> ". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate, shall be entered against him." [Emphasis added]

The reasoning behind the rule and the guiding principles are set forth in Surkin v. Charteris, 197 F.2d 77 (5th Cir. 1952), where the court stated:

> "The general principles governing the motion for summary judgment are well established. Rule 56 * * * authorizes its use only where the pleadings, depositions, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Its purpose is not to cut litigants off from their right to trial by jury. On the contrary, it is to carefully test this, *to separate the mere formal from the substantial, to determine what if any issues of fact are*

present for a jury to try, and to enable the court to expeditiously dispose of cases by giving judgment on the law where the material facts are not in dispute. [Citations omitted] The sufficiency of the complaint does not control and, although the burden is on the moving party to demonstrate clearly that there is no genuine issue of fact, *the opposing party must sufficiently disclose what the evidence will be* to show that there is a *genuine issue of fact to be tried.* * * *" [Emphasis added]

The record before the trial court and now before us shows there is "no genuine issue as to any material fact". The majority disregard both the substance of the record and the purpose of Rule 56.

In the face of the record on which the motion for summary judgment was based, it was incumbent upon the plaintiff against whom the summary judgment was directed to "set forth specific facts showing that there is a genuine issue for trial." This she did not do. "If the opposite party has sustained his burden to establish the absence of a fact issue, but there is available *additional proof to the contrary, it is the duty of the party moved against to so apprise the court. He cannot stand silent, but must show its presence.*" [Emphasis added] Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964). The response must set forth *specific facts* showing a genuine issue for trial. Green v. Manpower, Inc., of Albuquerque, 81 N.M. 788, 474 P.2d 80 (Ct.App.1970).

Tacit concession by the majority of the absence of a factual issue appears in the last paragraph of their opinion where they state that, *at the trial,* the plaintiff will have to come forward "with evidence and inferences therefrom sufficient to raise a factual issue * * *". To avoid the summary judgment she should already have done so. Convinced that the trial court did not err in granting the summary judgment, I dissent.

494 P.2d 1400

B. R. CANTRELL and June Cantrell, Plaintiffs-Appellants,

v.

John D. DENDAHL et al., Defendants-Appellees.

No. 765.

Court of Appeals of New Mexico.

Feb. 25, 1972.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Bob Barberousse, Catron, Catron & Donnelly, Santa Fe, for plaintiffs-appellants.

Sumner G. Buell, Montgomery, Federici, Andrews, Hannahs & Morris, Santa Fe, for defendants-appellees.

OPINION

WOOD, Chief Judge.

While her attention was diverted by a display case on the side of a walkway, Mrs. Cantrell fell off of a single step in the walkway. Joined by her husband, she sued for the resulting injuries. Named as defendants were the owners of property where the step was located (the Dendahl defendants) and Burro Alley (Burro Alley Plaza, Inc.), the owner of the property

which joins the Dendahl property. The jury returned a verdict in favor of the Dendahls. Burro Alley was dismissed as a defendant at the close of plaintiffs' case. Plaintiffs' appeal contends: (1) the trial court erred in refusing to permit an amendment to the complaint; (2) two rulings excluding evidence were error; and (3) the dismissal of Burro Alley was erroneous because Burro Alley was a joint tort-feasor.

The walkway extends from San Francisco Street in Santa Fe northward along the western side of the Dendahl store and the eastern side of the Palace Restaurant to Palace Street. There was a single downward step on this route. The vertical rise of the step was 4½ inches. Near the step was a display case which the Dendahls had rented to a customer. Mrs. Cantrell was looking at this display case immediately before her fall.

Refusal to permit the complaint to be amended.

The complaint was filed July 22, 1969. All answers were filed by August 8, 1969. On January 26, 1971 notice was given of settings for a pre-trial conference and for trial. The pre-trial conference was held March 29, 1971. On April 1, 1971 plaintiffs filed a motion which asked for permission to file an amended complaint and add exhibits to the pre-trial order.

The proposed amendment to the complaint alleged the step where Mrs. Cantrell fell was constructed in violation of a Santa Fe City Ordinance which adopted a portion of the State building code. The proposed exhibits were the ordinance and the code. The motion states that plaintiffs learned of the alleged ordinance violation subsequent to the pre-trial conference.

The record reflects that plaintiffs, by letter, called the motion to the attention of the trial court and there had been some discussion of the motion prior to trial. However, no hearing was held on the motion prior to trial and the motion had not been ruled on when the trial began.

Trial before a jury began on April 12, 1971. Five witnesses testified on the first day of trial. On the second trial day, after the testimony of the sixth witness had been concluded (plaintiffs called a total of seven witnesses for the entire trial), plaintiffs stated: "There is a matter pending before the Court with respect to our amended complaint. * * *" Defendants objected to the proposed amendment on the basis that it asserted a new theory of negligence which they were not prepared to defend against. The trial court pointed out that the proposed amendment, if granted, would upset various limitations imposed by the pre-trial order (exhibits, witnesses, etc.) and that the court would feel compelled to grant a continuance to defendants if the amendment was allowed. The trial court then denied the motion to amend.

In claiming the trial court's ruling was error, plaintiffs emphasize remarks of the trial court to the effect that the section of the building code adopted by the ordinance was not applicable to the factual situation in this case. They rely on Vernon Company v. Reed, 78 N.M. 554, 434 P.2d 376 (1967) where the trial court had refused to permit the complaint to be amended. This ruling was reversed because "* * * the denial rested upon an erroneous construction of applicable law." Plaintiffs contend that is the situation in this case. To answer this contention we would have to determine the meaning of the ordinance and the section of the building code relied on as a matter of law. It is unnecessary to do so in this case.

The trial court did not disallow the amendment solely because of its view as to the applicability of the ordinance and building code. After pointing out that the case would have to be continued if the amendment was permitted, it stated: "* * * That is undesirable and I don't believe that the discretion of the Court should be exercised to that extent. * *" If the trial court stated a reason upon which it could properly disallow the amendment, its ruling is not to be reversed be-

cause it stated another allegedly erroneous reason. Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969).

Vernon Company v. Reed, supra, states:

"* * * Amendments of pleadings should be permitted with liberality in the furtherance of justice, but such applications are addressed to the sound discretion of the court and its action in denying permission to amend is subject to review only for a clear abuse of discretion. * * *"

Although plaintiffs moved to amend, according to their motion, as soon as the ordinance and building code came to their attention, they did not invoke a ruling on their motion prior to trial. Instead, they proceeded to trial and only one of plaintiffs' witnesses remained to testify before a ruling was invoked. In these circumstances we cannot say there was an abuse of discretion in denying the amendment at that stage of the trial. In re Stern's Will, 61 N.M. 446, 301 P.2d 1094 (1956); compare Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

Atol v. Schifani, 83 N.M. 316, 491 P.2d 533 (Ct.App.1971) is not to the contrary. In *Atol* the court proceeded to trial over objection of counsel that a motion to amend was pending. Here, plaintiffs proceeded to trial without complaining of the pendency of their motion to amend. In *Atol* the trial court erred in not ruling on a motion to amend which had been called to its attention. Here, when the motion to amend was brought to the attention of the trial court, it ruled on the motion.

The proposed additional exhibits to the pre-trial order were the ordinance and the building code. Their materiality depends on the proposed amendment, which the trial court, in its discretion, properly disallowed. Thus, there was no error in not permitting the addition of these exhibits. Further, the allowance of additions to pre-trial orders is discretionary with the trial court. Monod v. Futura, Inc., 415 F.2d 1170 (10th Cir. 1969); Washington Hospital Center v. Cheeks, 129 U.S.App.D.C. 339, 394 F.2d 964 (1968).

Exclusion of evidence.

Two rulings, excluding evidence, are attacked.

(a) An engineer, testifying as an expert witness for plaintiffs, was asked to state his opinion as to whether the step was safe or unsafe. Defendants' objection to the question was sustained. "* * * The admission or exclusion of expert testimony is peculiarly within the discretion of the court and its decision will not be reviewed unless the exercise of that discretion has been abused. * * *" State Farm Fire and Casualty Company v. Miller Metal Company, (Ct.App.), 83 N.M. 516, 494 P. 2d 178, decided December 10, 1971, and cases therein cited. See Tome Land & Improvement Co., Inc. v. Silva, 83 N.M. 549, 494 P.2d 962, decided January 21, 1972.

Here, the trial court refused to permit expert witnesses on both sides of the case to express an opinion as to whether the step was safe or unsafe. It did, however, permit witnesses on both sides of the case to express opinions as to whether the step was consistent with standard architectural practice. In addition, plaintiff, Mr. Cantrell, who is an architect, was permitted to express his opinion that the step was not consistent with standard architectural practice because it was unsafe. Defendant, Mr. Dendahl, testified, without objection, that he did not consider the step to be dangerous.

In these circumstances we cannot hold, as a matter of law, that the trial court abused its discretion in excluding the engineer's opinion. Rather, if the trial court erred in excluding expert opinions, while admitting the other testimony recited, the error was harmless. State Farm Fire and Casualty Company v. Miller Metal Company, supra.

(b) The engineer had prepared a diagram of the walkway. The top portion of the diagram was a "plan view." The "plan view" was taken from the plans used

in the construction of the walkway. The scale was the same as in the construction plans—⅛ inch to the foot. ". . . [W]e used the same scale so as to not change all of these dimensions on the drawings."

The bottom portion of the diagram was a "profile" of the walkway. The "profile" shows the elevations of the walkway. Although the "drawings work together," the scale on the profile was one inch to two feet. According to the engineer, this "accentuates the difference in elevation."

The engineer testified as to what was shown by both views before the diagram was offered into evidence. There was no objection to the admission of the "plan view." Defendants objected to the "profile" on the basis that the engineer's testimony showed the "profile" was "exaggerated vertically." In argument to the court, plaintiffs agreed that the difference in the scales of the two plans resulted in a distortion and the distortion extended to the part of the "profile" which showed the step where Mrs. Cantrell fell. On the basis ". . . that the distortion may well tend to mislead the Jury . . ." the trial court refused to admit the "profile" portion of the diagram into evidence.

Plaintiffs state: "It was prejudicial to Plaintiffs' case to have the entire drawing before the jury and then, after they were recessed, to return and find one-half of the drawing . . . cut off to leave the impression that Plaintiffs were attempting to mislead them."

We do not agree. The information shown by both the "plan view" and the "profile" had been presented to the jury, without objection, before the drawings were offered into evidence. Thus, the information was before the jury. Only the visual demonstration of the distortion was excluded. Plaintiffs had no "substantial right" to have the jury view the distortion; exclusion of the distortion was not prejudicial. Johnson v. Nickels, 66 N.M. 181, 344 P.2d 697 (1959).

Although diagrams are admissible to illustrate the testimony of a witness, State v. Crumbley, 27 N.M. 226, 199 P. 110 (1921), nevertheless the admission of the exhibit was within the trial court's discretion. State v. Carlton (Ct.App.), 83 N.M. 644, 495 P.2d 1091, decided January 21, 1972. The trial court was of the opinion that the "profile" might mislead the jury. We cannot say, as a matter of law, that this ruling was an abuse of discretion.

Dismissal of defendant Burro Alley—joint tort-feasor claim.

Burro Alley was dismissed as a defendant at the close of plaintiffs' case.

Plaintiffs assert the dismissal was error because the Dendahl defendants and Burro Alley were joint tort-feasors. The record does not show that such a claim was specifically brought to the trial court's attention. However, we will assume a joint tort-feasor claim was presented to the trial court.

The evidence in support of the claim is: The walkway on the Dendahl property was constructed in 1960. At that time the walkway terminated at the northern end of the Dendahl property where a display case was located. The walkway on the Burro Alley property was constructed in 1961. During, or shortly after, construction of the Burro Alley walkway, the display case was moved to the side and the walkways on the two properties were connected. The step involved in this case was installed in connecting the two walkways. The step is entirely on the Dendahl property, being two to five inches on the Dendahl side of the mutual property line of the defendants.

Connection of the two walkways was a joint decision of the property owners. There is no evidence that the property owners ever discussed the step. The discussion went to connecting the walkways; the details of the connection were left to the architect and contractor. Burro Alley did know, however, that the step had been installed.

Dendahl paid for having the display case moved; Dendahl caused the step to be painted and ". . . always assumed the responsibility for the maintenance of that step. . . ."

We do not attempt a definition of joint tort-feasors. See generally 23 Words and Phrases, "Joint Tort-Feasors." Instead, we proceed on the basis of plaintiffs' contention that for parties to be joint tort-feasors there must be a "concert of action" or "joint work." See Alexander v. Hammarberg, 103 Cal.App.2d 872, 230 P.2d 399 (1951); Harper-Turner Oil Company v. Bridge, 311 P.2d 947 (Okl.1957).

Here, the only evidence implicating Burro Alley is that it agreed to connecting the walkways and knew the step had been installed. The remaining evidence is directed to the Dendahls—they paid for moving the display case, the step is on their property, they caused the step to be painted and maintained it. Specifically, the evidence is insufficient to show that Burro Alley was part of any concerned action or joint work in connection with the step.

Plaintiffs rely on cases concerning liability of municipalities and abutting property owners for dangerous conditions of a sidewalk. These cases are inapplicable because in this case plaintiffs failed to come forward with evidence or inference that Burro Alley had anything to do with the step on the Dendahl property. The claim that Burro Alley was a joint tort-feasor is without merit.

Affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

495 P.2d 369

STATE of New Mexico ex rel. Minnie JOHNSON, on behalf of herself and her legal ward, Courtney Dickson, and all others similarly situated, Petitioners-Appellants,

v.

Ben C. HERNANDEZ et al., Respondents-Appellees.

No. 9373.

Supreme Court of New Mexico.

March 24, 1972.

Richard C. Bosson, Albuquerque, Steve Elias, New York City, for petitioners-appellants.

David L. Norvell, Atty. Gen., Robert J. Laughlin, Agency Asst. Atty. Gen., Santa Fe, for respondents-appellees.

OPINION

McMANUS, Justice.

Appellants, Minnie Johnson and her legal ward, Courtney Dickson, petitioned the District Court, County of Santa Fe, on behalf of themselves and those similarly situated for a writ of mandamus against appellees, the Health and Social Services Board of Directors and the Director of the Service, to compel them to perform acts which appellants claim were mandatory under the laws of New Mexico and the United States Constitution. After a hearing before the court without a jury, the court ordered appellants' alternative writ dismissed and appellees, Board and Director, discharged. This appeal followed.

It appears that prior to August 1, 1970, Courtney Dickson was eligible for and receiving general assistance from the New Mexico Department of Health and Social Services through his aforesaid legal guardian and payee, Minnie Johnson, in the amount of $28.00 per month. These payments were made under the authority of the New Mexico Public Welfare Act, § 13-1-4(a), N.M.S.A. (1953 Comp.), reading as follows:

"The state department shall be charged with the administration of all the welfare activities of the state as hereinafter provided, except as otherwise

provided for by law. The state department shall:

"(a) Administer old age assistance, aid to dependent children, assistance to the needy blind and otherwise handicapped, and general relief."

It is under the specific words "general relief" that the appellant grounds her claim, alleging that the term "shall" makes it mandatory that public assistance be provided for Courtney Dickson. See also, §§ 13–1–11 and 13–1–26, N.M.S.A. (1953 Comp.).

The general assistance phase was terminated effective July 1, 1970, on the basis that appropriations made by the 29th Legislature of New Mexico did not allow the department to fund any public assistance programs other than those federally assisted programs operated in cooperation with the United States Government. The assistance program, the subject of this case, was 100% state funded prior to its termination. Chapter 89, p. 343, New Mexico Laws of 1970, reflects the following as concerns the appropriation for the Department of Health and Social Services:

"DEPARTMENT OF HEALTH AND SOCIAL SERVICES:

	General Fund	Other State Funds	Federal Funds	Total
(1) Environmental health (including air and water pollution control)	$ 484,671		$ 242,921	
(2) Public assistance and medical assistance	13,177,905		38,792,473	
(3) Other salaries and operating expenses	5,587,424	$ 1,281,705	8,112,131	
Subtotal				$67,679,230"

The above portion of chapter 89, supra, gives no indication whatsoever as to the use of the state funds in conjunction with federal or any other funds.

There appears no justification for the appellees' position in the briefs, transcript or at the oral argument. Consequently, this Court is left with a prodigious situation. There is a complete lack of evidence to support the appellees' position. In fact, at the close of the appellants' case in the lower court, the following colloquy is reflected in the record:

"THE COURT: Do you have any evidence to present?

"MRS. SOUTHERLAND: No, your Honor."

A presentation of evidence to support appellees' position would have been appropriate at this time. We would point out that counsel for appellees on appeal did not appear in the trial court.

The question presented to us is a narrow one, and our decision is no broader. We express no opinion as to the scope or nature of acts required by Board of Health and Social Services in complying with its statutory duty, seemingly enjoined upon it by § 13–1–4, supra, to "administer" the act in question; the nature and extent of the "public assistance" mentioned in § 13–1–11, supra, or the "aid" to dependent children referred to in § 13–1–26, supra. Resolution of such question is not before us, and may well require further proceedings. However, appellants having stated that they seek no retroactive payments of money, if payments are ultimately required they should not relate to periods prior to the mandate in this appeal.

The case is reversed. It is so ordered.

OMAN and STEPHENSON, JJ., concur.

495 P.2d 371

Mary Alice LUMPKINS, Plaintiff-Appellee,

v.

William T. LUMPKINS, Defendant-Appellant.

No. 9316.

Supreme Court of New Mexico.

March 3, 1972.

Rehearing Denied April 3, 1972.

Bigbee, Byrd, Carpenter & Crout, Paul D. Gerber, Santa Fe, for defendant-appellant.

White, Gilbert, Koch, Kelly & McCarthy, Santa Fe, for plaintiff-appellee.

OPINION

McMANUS, Justice.

This action was brought in the District Court of Santa Fe County under the Uniform Reciprocal Enforcement of Support acts of New Mexico and California. Based

on pleadings, affidavits, answers to interrogatories plus other documents, a summary judgment was entered in favor of plaintiff, Mary Alice Lumpkins. This summary judgment ordered and adjudged as follows:

(1) That $14,125.00 is due plaintiff from defendant, William T. Lumpkins pursuant to an order of the Superior Court of San Diego County, California, entered on April 16, 1968, in cause number 244680;

(2) That $10,500.00 additional is due plaintiff from defendant after the date of and pursuant to that order;

(3) That plaintiff receive interest on each of the $300.00 monthly increments comprising the above sums from the dates due, plus $150.00 attorney fees adjudged by the California Superior Court order;

(4) That under the settlement agreement incorporated into the original California divorce judgment defendant has the obligation and is directed to pay plaintiff the additional sum of $300.00 per month beginning March 6, 1971; and

(5) That defendant's petition to modify the spousal support provisions of said agreement is dismissed with prejudice.

The original complaint was for separate maintenance, filed by the wife in the California Superior Court for San Diego County. Later the pleading was changed to a request for divorce. On December 13, 1961 an interlocutory judgment of divorce was entered ordering that a property settlement agreement between the parties, dated December 6, 1961, be made a part of the order and decree, and the performance thereof was expressly ordered and adjudged. A final judgment of divorce was filed on December 13, 1962, again referring to the 1961 property settlement agreement and ordering the parties to carry out each and every provision and requirement thereof.

On May 11, 1967, plaintiff filed in the Superior Court of California, San Diego County, cause number 301199, a "Complaint for Reimbursement and Support under the Uniform Reciprocal Enforcement of Support Act." The complaint alleged an arrearage in alimony and support payments, further stating that defendant lived in New Mexico and requested that the complaint and other reciprocal documents be forwarded to the District Court, Santa Fe, New Mexico. This was done by order of the California Superior Court on May 11, 1967. On May 26, 1967, a petition was filed in the District Court of Santa Fe County, praying that an order to show cause issue to the defendant, William T. Lumpkins. While this matter was pending in the District Court of Santa Fe County defendant petitioned the Superior Court in San Diego, California for an order modifying his alimony and support payments under the original divorce judgment entered by that court. The California court found that it was without jurisdiction to modify the alimony and support and denied the motion for modification. In responding to the New Mexico action the defendant alleged a change of circumstances and a request for modification of alimony and support. Also, for the first time during these proceedings, the defendant claimed in his pleadings that the plaintiff refused to deliver certain of defendant's property awarded him in the California decree. The defendant alleged the property was valued at a little over $80,000.00. During all of these proceedings defendant petitioned for and was adjudged a bankrupt in California. Ultimately, in the present case, plaintiff was granted a summary judgment in effect affirming the California decree and defendant appeals.

Defendant claims error on the part of the trial court in granting the summary judgment. The issues concerning alimony and support were not only litigated in California but were the subject of a comprehensive property agreement approved and signed by both parties. A portion of this agreement which was incorporated in and made a part of the California decree reads as follows:

> "THIRTEENTH: The husband agrees to pay to the wife as and for alimony and her support the sum of $350.00 per month, commencing on December 6,

1961 and continuing monthly thereafter for a period of one year. At the end of said year period, the husband agrees to pay to the wife as and for alimony and her support the sum of $300.00 per month, said alimony payments are to be made on the 6th day of each and every month until such time as the wife remarries, or until her death. * * *"

The settlement agreement further contained a recital that each of the parties fully understood the instrument and had been advised by their respective attorneys. We are of the opinion that the California judgment was a final, nonmodifiable judgment and entitled to full faith and credit under Art. IV, § 1, United States Constitution. California law on the subject of modification is explained thusly:

"Where a property settlement agreement has been made and incorporated in the divorce decree, a court will modify the alimony provisions of the settlement agreement only after it is satisfied that the provisions as to property settlement and alimony are severable. Without an agreement between the parties to allow modification a court has no power to change provisions that in any way relate to the division of property. If a portion of the agreement is in the nature of alimony, whether in a lump sum or in periodical payments, and is separable from the provisions that divide the property, a court may modify such provisions in accord with its powers over alimony generally. But if the provisions for support and maintenance are in consideration of receiving a more favorable share of the community property, a court cannot change such provisions without changing basically the agreement of the parties as to the division of the property. Since a court cannot change provisions of a valid property settlement it cannot change a support agreement that is an integral part of a property settlement.

"Although a disposition of property in a divorce decree may not be modified, an award of alimony may be modified under appropriate circumstances, and it is the court's right, where an application for modification is received, to determine whether or not the decree involves a settlement of property or is in the nature of alimony." 16 Cal.Jur.2d Divorce, Separation and Annulment, § 245 at 652–54 (2d ed. rev. 1967).

Following this tenet the California court held that the property settlement was not modifiable. See also Beck v. Beck, 208 Kan. 148, 490 P.2d 628 (1971). The New Mexico trial court's decision in this regard, in our opinion, was consistent therewith and correct.

Defendant also complains in the New Mexico action, alleging that plaintiff has detained and refused to turn over to defendant certain personal property he values at somewhat more than $80,000. It is significant that this claim was made for the first time in the New Mexico proceeding. The allegation was not mentioned in any of the numerous California proceedings, nor in the California bankruptcy action. In fact, in the defendant's petition for bankruptcy there appears, under oath, the following statement describing his property:

"Schedule B–2 *Personal Property*

"* * *

"E. Books, prints and pictures $100.00

"* * *

"L. Goods or personal property of any other description, None."

and

"Schedule B–3 *Choses In Action*

"* * *

"C. Unliquidated claims of every nature, with their estimated value. . . . . None."

In light of the above actions of the defendant and since the courts have held that the property settlement merges into the divorce decree which is therefore final as to the property settlement, we find that the California decree is entitled to full

faith and credit by the New Mexico court, Sistare v. Sistare, 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905 (1910); Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701, 132 A.L.R. 1264 (1941), and thus any question regarding the property distribution is final and not subject to attack in a collateral action in New Mexico. No defense available to the defendant at the time of the California proceedings may be considered here. See Tenny v. Tenny, 36 N.Y.S.2d 704 (Sup.Ct. 1942).

The defendant's attempt to claim an "offset of some sort" is not logical under the circumstances of this case.

The statute of limitations for wrongful detention of personal property is three years. Cal.Code Civ.Proc. § 338(3) (West Supp. 1971). This section has been applied to community property questions in California. The cases annotated after the section indicate that where the spouse had knowledge of the other spouse retaining or changing the status of the property after the divorce, then the statute began to run and if the spouse failed to bring an action for recovery within the three-year period, that person was estopped from so asserting at the end of three years.

The New Mexico statute of limitations, § 23-1-4, N.M.S.A. (1953 Comp.), in this area reads:

> "* * * those brought * * * for the conversion of personal property * * * and all other actions not herein otherwise provided for and specified within four [4] years."

Since the defendant failed to bring the action within three years in California and within four year in New Mexico, he is barred from so pleading the cause of action as a defense at this time.

The judgment of the trial court is affirmed.

It is so ordered.

COMPTON, C. J., and OMAN, J., concur.

495 P.2d 374

In the Matter of the Hearing For Officer Manuel Otero, Jr. Before the New Mexico State Police Board.

Manuel OTERO, Jr., Appellee,

v.

NEW MEXICO STATE POLICE BOARD, Appellant.

No. 9346.

Supreme Court of New Mexico.

March 31, 1972.

David L. Norvell, Atty. Gen., Joyce Blalock, Agency Asst. Atty. Gen., Santa Fe, for appellant.

Roy G. Hill, Santa Fe, for appellee.

OPINION

MONTOYA, Justice.

This suit was brought in the District Court of Santa Fe County, appealing the decision of the State Police Board to remove Manuel Otero, Jr. as a New Mexico State Police Officer for incompetence due to physical disability. Following a trial to the court, judgment was entered holding that the order of the State Police Board removing Otero was null and void and should be set aside. The State Police Board has appealed that decision.

The record indicates that Officer Otero, hereinafter referred to as "Appellee," became afflicted with diabetes mellitus while serving as a State Police Officer. In compliance with § 39-2-11, N.M.S.A., 1953 Comp. (1971 Supp.), the State Police Board held a hearing at which time evidence as to Appellee's physical condition was presented. The State Police Board ruled that Appellee was physically incompetent to perform the duties of an officer of the New Mexico State Police and ordered Appellee's removal from office.

Upon appeal to the district court the trial court concluded that there was no substantial evidence to support the finding by the State Police Board that Appellee was incompetent due to physical disability.

The only issue on appeal is whether the trial court was correct in setting aside the order of the State Police Board.

It is the rule that the district court may not, on appeal, substitute its judgment for that of the administrative body, but is restricted to considering whether, as a matter of law, the administrative body acted fraudulently, arbitrarily, or capriciously, whether the administrative order is substantially supported by evidence, and whether the action of the administrative body was within the general scope of its authority. Seidenberg v. New Mexico Board of Medical Examiners, 80 N.M. 135, 452 P. 2d 469 (1969); Llano, Inc. v. Southern Union Gas Company, 75 N.M. 7, 399 P.2d 646 (1964). Substantial evidence means such relevant evidence as a reasonable man might find adequate to support a conclusion. Cave v. Cave, 81 N.M. 797, 474 P.2d 480 (1970). This court, in reviewing the district court's judgment, must, in the first instance, make the same review of the State Police Board's action as did the district court. Reynolds v. Wiggins, 74 N.M. 670, 397 P.2d 469 (1964). The record of the State Police Board's hearing contains substantial evidence reasonably supporting the conclusion that Appellee was incompetent to perform his duties due to a physical disability.

The judgment of the district court is reversed and the order of the State Police Board removing Appellee from office is affirmed.

It is so ordered.

OMAN and STEPHENSON, JJ., concur.

495 P.2d 376

Carlton H. HORGER, Plaintiff-Appellee,

v.

MUTUAL OF OMAHA INSURANCE COMPANY, Defendant-Appellant.

No. 9366.

Supreme Court of New Mexico.

March 31, 1972.

Shipley, Durrett, Conway & Sandenaw, Alamogordo, for defendant-appellant.

S. Thomas Overstreet, Alamogordo, for plaintiff-appellee.

OPINION

McMANUS, Justice.

On July 9, 1969, Carlton H. Horger, plaintiff-appellee, entered into a contract of sickness and accident insurance with Mutual of Omaha Insurance Company, defendant-appellant. On July 11, 1969, plaintiff suffered accidental bodily injury and timely filed a notice of claim and proof of loss but defendant refused to pay the named benefits. Plaintiff then brought suit in the District Court of Otero County, on June 1, 1970 against defendant who answered, setting up two affirmative defenses and a counterclaim.

The first affirmative defense alleged fraud on the part of the plaintiff based on the fact that the monthly income stated on the application for insurance was in excess of his actual monthly income (a contention not pursued on appeal), and that he failed to advise the insurer that a similar sickness and accident policy was in effect with Allstate Insurance Company. The defendant further alleged that it would not have issued the policy had the true facts been disclosed at the time of the application.

The second affirmative defense alleged that the defendant attempted to cancel and rescind the policy, and tendered a return of all premiums to the plaintiff as a result of the fraud perpetrated by the plaintiff.

The counterclaim asked that the court rescind the contract and allow defendant to

recover costs and other relief as the court deemed just. The counterclaim was based on the same allegations stated in the first and second affirmative defenses.

The cause was tried before a jury and judgment entered for the plaintiff in the sum of $6,419.44. The defendant had moved for a directed verdict at the close of the plaintiff's evidence and for judgment non obstante veredicto following trial. Both motions were denied. It is from this verdict and judgment for the plaintiff that the defendant now appeals.

The defendant sets down four major points for reversal. We will discuss only the first two which are as follows:

"POINT I: The court erred in denying defendant-appellant's motion for a directed verdict and for judgment non obstante veredicto because of plaintiff's concealment or misrepresentation of a fact which was material to the risk assumed by defendant and which was proven by uncontradicted testimony upon which reasonable minds could not draw a different conclusion.

"POINT II: Where the insurer's defense in a case is misrepresentation resulting from false answers or omissions to questions given in the insured's application as to matters material to the risk, the insurer is entitled to instructions that actual fraud need not be proved and that misrepresentation as to a fact material to the risk, even though innocently made, would avoid the policy."

Defendant's third point deals with the taxing of the cost of reproduction of a transcript of a deposition and the fourth point concerns the taxing of costs of an expert witness who did not testify. In light of our decision in this case it will be unnecessary to discuss the latter two points.

The pertinent facts follow. Plaintiff mailed a business reply card inquiring about an insurance offer by Mutual of Omaha, defendant herein. The card was answered by the local agent, Ted Forbes, who was authorized to take applications. Forbes discussed the plaintiff's insurance needs and prepared an application for an income disability policy. The application included the now-disputed question No. 9, reading: "What insurance is held or has been applied for by you or your dependents?" The only answer written in was, "Aetna Group Hospital." The policy was issued on the basis of this application. Testimony was also given to the effect that defendant's agent, Forbes, had incorrectly read question No. 9 to the plaintiff in that Forbes asked only what insurance plaintiff actually had, and that the plaintiff had not himself read the application. This testimony was contradicted by that of Forbes.

The plaintiff had applied for similar insurance from Allstate Insurance Company less than one month before his application to Mutual of Omaha. Plaintiff testified to the effect that he applied for the Mutual of Omaha policy because he did not think he was going to be insured by Allstate. He is now collecting benefits under the Allstate policy.

On July 11, 1969, the plaintiff splashed battery acid in his right eye while working at Holloman Air Force Base and he has continued to have trouble with the eye even though the attending physicians have been unable to find anything physically wrong. At any rate, the plaintiff has had numerous emotional problems and continued loss of vision in the right eye, resulting in an inability to return to work as a heavy equipment operator.

One month after the accident, on August 12, 1969, defendant sent a photocopy of the application, with a letter of transmittal, asking the plaintiff to review the application and determine if it was "incomplete in any respect" and, if so, to return it with the additional information. Plaintiff checked the box indicating that he had reviewed the application and found the answers to be correct. Testimony indicated

that he had compared the photocopy with his copy, found them to be the same and returned the letter without actually reading the application.

Mutual of Omaha defended the suit and now asks for reversal of the judgment on the basis that the omission of information on the questionnaire concerning the Allstate insurance was a material omission and thus voids the policy.

Recent New Mexico cases dealing with the present problem include Modisette v. Foundation Reserve Insurance Co., 77 N. M. 661, 427 P.2d. 21 (1967), wherein it was stated:

> "The general rule, and the rule consistent with principles of contract and the duty of fair dealing, which is the duty imposed upon both the insurer and the insured, is that if misrepresentations be made, or information withheld, and such be material to the contract, then it makes no difference whether the party acted fraudulently, negligently, or innocently. * * *
>
> "If the information withheld, or the misrepresentations made, were material, then defendant was entitled to void the policy in the absence of waiver or estoppel. * * *"

The Court went on to state:

> "A representation or concealment of a fact is material if it operates as an inducement to the insurer to enter into the contract, where, except for such inducement, it would not have done so, or would have charged a higher premium. * * *"

The case under discussion dealt with an automobile comprehensive policy. The insured had concealed, by false answers, the facts that a previous policy had been cancelled for non-payment of premiums and that he had been denied coverage during the preceding 36 months.

This differs from the case at bar in that here we are dealing with a policy for income benefits and that there is substantial evidence to the effect that the question asked by the defendant's agent was, "if he had any insurance" and "if so, what insurance did he have," rather than question No. 9 as previously noted. The question propounded by the agent had been truthfully answered, i. e., plaintiff did have insurance and it was with Aetna. That particular question does not lend itself to the answer that plaintiff had applied for insurance with Allstate. The testimony is confused and contradictory but the evidence submitted was adequate to prevent the lower court from granting appellant's motions, as previously stated. The materiality of the misrepresentation is ordinarily a matter for the finder of facts. Tsosie v. Foundation Reserve Insurance Co., 77 N. M. 671, 427 P.2d 29 (1967); Modisette v. Foundation Reserve Insurance Co., supra. Therefore, the court did not err in this regard and the cause was properly submitted to the jury.

Defendant's Point II is well taken, however, because of the evidence adduced at the trial that the misrepresentation made by the plaintiff could have been unintentional and the jury should have been given the opportunity to consider this factor in its overall deliberations. In Tsosie v. Foundation Reserve Insurance Co., supra, Justice Oman's specially concurring opinion, at 77 N.M. 678, 427 P.2d at 33, states:

> "It is recognized in the opinion that the correct rule of law applicable in insurance cases is no different than that applicable in mercantile transactions. The rule is that if a misrepresentation be made, or information be withheld, and such be material to the contract, then it makes no difference whether the party making the misrepresentation or withholding the information acted innocently or with an intent to deceive."

See also, Fierro v. Foundation Reserve Insurance Co., 81 N.M. 225, 465 P.2d 282 (1970); Ham v. Hart, 58 N.M. 550, 273 P.2d 748 (1954); Bennett v. Finley, 54 N. M. 139, 215 P.2d 1013 (1950), and Modisette v. Foundation Reserve Insurance Co., supra.

The instruction given to the jury on the subject was, as follows:

"No. 16. You are instructed that, in order that misrepresentations made in procuring insurance shall have the effect to make the policy void, such misrepresentations must be material to the risk, or influenced the issuing of the policy, are questions for the jury to determine from the evidence.

"The Court instructs the Jury that, in order for the Defendant company in this suit to be entitled to a verdict in its favor, on the ground that the policy was void because of misrepresentation by the plaintiff in procuring the insurance, the defendant company must prove to the satisfaction of the jury that the Plaintiff made such misrepresentations, and that they were as to matters material to the risk."

This instruction does not state all of the alternatives, and it is the duty of the court to instruct the jury on the law applicable to the case. See Floeck v. Hoover, 52 N. M. 193, 195 P.2d 86 (1948); Gallegos v. McKee, 69 N.M. 443, 367 P.2d 934 (1962).

The defendant was prejudiced by the court's failure to instruct the jury that the misrepresentation need not have been intentional to void the policy.

The cause is remanded for a new trial in a manner consistent with this opinion.

It is so ordered.

STEPHENSON and MONTOYA, JJ., concur.

495 P.2d 379

STATE of New Mexico, Plaintiff-Appellee,

v.

John A. SANDOVAL, Defendant-Appellant.

No. 834.

Court of Appeals of New Mexico.

March 10, 1972.

[redacted]

Dennis R. Francish, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., James H. Russell, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of burglary, contrary to § 40A-16-3, N.M.S.A.1953 (Repl.Vol.1964), defendant appeals. He asserts the trial court erred in failing to direct a verdict of acquittal at the close of the State's case.

We affirm.

This case involves the burglary of an automobile. Defendant's witness Montano testified that defendant was unaware that he (Montano) was removing a stereo tape deck from the automobile. State witnesses testified that defendant and Montano looked into another car before Montano broke into the burglarized car; that defendant leaned on the door of the burglarized car and was "looking both ways as if observing for something." This evidence is sufficient to sustain defendant's conviction as an aider and abettor. State v. Atwood, 83 N.M. 416, 492 P.2d 1279 (Ct.App.1971).

Defendant's motion for a directed verdict at the close of the State's case was denied. He then proceeded with his case in chief. After defendant closed he failed to renew his motion for a directed verdict. If there was error in the denial of the motion at the close of the State's case in chief it was waived by the subsequent introduction of evidence and failure to renew the motion. State v. Phipps, 47 N.M. 316, 142 P.2d 550 (1943); State v. Hunt, (Ct.App.) 83 N.M. 546, 494 P.2d 624, 1972.

Defendant's implied contention of fundamental error is without merit. The innocence of defendant is not indisputable and it does not shock the conscience to permit the conviction to stand. State v. Torres, 78 N.M. 597, 435 P.2d 216 (Ct. App.1967).

Affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

495 P.2d 380

STATE of New Mexico, Plaintiff-Appellee,

v.

Ivey JONES, Defendant-Appellant.

No. 788.

Court of Appeals of New Mexico.

March 10, 1972.

W. J. Schnedar, Frazier, Cusack & Schnedar, Roswell, for defendant-appellant.

David L. Norvell, Atty. Gen., Prentis Reid Griffith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of robbery. Section 40A-16-2, N.M.S.A.1953 (Repl.Vol. 6). He complains (1) of the photographic identification procedure employed by the police and (2) of the basis on which the trial court ruled that the procedure was not improper.

Marvin Jones was the night attendant at a service station. His wife and baby were also at the station. At approximately 2:00 a. m., a man came to the station and obtained change for a dollar. Shortly thereafter, he returned with a woman. The woman grabbed the baby, stated that it was a holdup and said: "'Give me the money or I will kill the baby.'" Marvin Jones and his wife described the man and woman by height, weight, dress and race (Negro). The man was also described as wearing a goatee.

The photographic identification procedure.

The detective testified that he showed various pictures to Marvin Jones and his wife some eight or more times. Defendant states they were unable to make positive identification until the last showing. At trial, the wife testified that she identified defendant at the first showing. Defendant contends the repetitive showing of pictures was highly suggestive and that the wife's testimony at trial shows "* * * that the defects in the identification procedure are now irreparable." This claim fails to consider all of the pertinent facts.

The detective testified that he showed a total of 8 to 10 pictures to Marvin Jones and his wife on the day of the robbery. Three or four were women; the rest, men. The pictures were selected on the basis of the general physical description of the robbers. The victims selected pictures of two or three men, but eliminated all but the picture of defendant. They referred to defendant's picture as "being primarily the one," but made no positive identification.

Later that day, the detective added to these photographs the picture of another suspect. Upon this second viewing, the victims eliminated the picture which had been added and stated that defendant's picture looked more like the male robber than any other picture they had seen.

Thereafter, the detective obtained information about the female robber and included, for the first time, a picture of the female who later admitted to being a participant in the robbery. The third viewing occurred, at which time the victims "definitely decided" the new picture was that of the female robber. There is nothing in the record concerning defendant's picture at this third viewing.

Thereafter, there were several more viewings of pictures. Other photographs were included and at times defendant's picture was not included in the pictures being viewed. Through the viewings, which were "eight times, or more," Marvin Jones and his wife were "* * * equally positive that Ivey [defendant] was the one. * * *" At the preliminary hearing, the wife testified she did not identify defendant "for sure" until the last viewing which occurred when she was asked to assist in the preparation of a "composite picture" of the male robber. As to the identification of defendant during the course of the various viewings, the detective testified the victims did not become "* * * more positive, they would refer to the picture stating that looked more like him."

During the course of the viewings, defendant had been questioned by the police. At the questioning, the detective told defendant that the victims were not positive as to their identification; that "* * * they [the victims] had picked this picture out and that was the reason we were talking at that time."

There is nothing in the record indicating that the detective suggested that defend-

ant's picture be selected as the male robber. According to the wife, when she and her husband looked at a picture the detective would comment that the person shown had been in trouble before, or was mean, but that the detective gave no physical description of the person shown and only asked if the victims could identify the person shown in the picture. Not until the wife made her positive identification at the last viewing did the detective reveal the name of the person [defendant] whose picture the victims had characterized as looking most like the male robber at the first viewing. The victims never identified any other person. According to the detective: "They came to a conclusion that that was the picture."

The identification attacked is that made by the wife; Marvin Jones did not testify at trial. Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) holds that each case must be considered on its own facts and states:

> "* * * 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. * * *"

See State v. Gilliam, 83 N.M. 325, 491 P.2d 1080 (Ct.App.1971); State v. Baldonado, 82 N.M. 581, 484 P.2d 1291 (Ct.App.1971).

Under this point we only consider the phrase "impermissibly suggestive." The only suggestiveness in the facts outlined above is the inclusion of defendant's photograph among others in viewings which took place over a period of approximately two weeks. We decline to hold that this was impermissible because: (1) defendant's photograph was singled out on the first viewing which occurred on the day of the crime; (2) no person other than defendant was ever identified as being the male robber; (3) there is nothing indicating the detective influenced the selection of defendant's picture or caused the initial tentative identification to develop into a positive one; (4) part of the viewings were concerned with the female robber; and (5) not all the viewings included defendant's picture. Specifically, the repetitive viewing, in itself, without more, is insufficient for us to hold as a matter of law that the procedure followed by the detective was impermissibly suggestive. Compare State v. Clark, 80 N.M. 91, 451 P.2d 995 (Ct.App.1969), rev'd on other grounds, 80 N.M. 340, 455 P.2d 844 (1969).

Basis for the trial court's ruling.

Defendant's claim, that the photographic identification procedure was improper, was to be "* * * evaluated in light of the totality of surrounding circumstances. * * *" Simmons v. United States, supra. The trial court considered the surrounding circumstances to include the totality of the identification of defendant. The total circumstances before the trial court in ruling on defendant's claim included, in addition to the testimony reviewed under the first point, the testimony of the female robber. She had testified as to details of the robbery and identified defendant as the male robber.

Defendant asserts the trial court erred in considering the female robber's identification. He contends the circumstances to be considered are limited solely to testimony concerning the photographic identification process. Defendant's view would eliminate consideration of circumstances "surrounding" that procedure.

It is unnecessary to decide this contention because we have held the photographic identification procedure was not impermissibly suggestive. However, we note that the ultimate question is whether there was a "substantial likelihood of irreparable misidentification" and that the female robber's identification is material in deciding that question. See United States ex rel. Springle v. Follette, 435 F.2d 1380 (2nd Cir.

1970), cert. denied Springle v. Zelker, 401 U.S. 980, 91 S.Ct. 1214, 28 L.Ed.2d 331 (1971).

The judgment and sentence are affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

495 P.2d 383

STATE of New Mexico, Plaintiff-Appellee,

v.

Reynaldo MADRID, a/k/a Raymond Madrid, Defendant-Appellant.

No. 783.

Court of Appeals of New Mexico.

March 3, 1972.

Jacob Carian and William C. Bowers, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of burglary, defendant appeals. Section 40A–16–3, N.M.S.A.1953 (Repl.Vol. 6, Supp.1971). The issues are: (1) circumstantial evidence; (2) cross-examination as to a specific act of misconduct; (3) failure to admonish jury when an objection was sustained; (4) instructions; (5) closing argument of the prosecution; and (6) procedure for an enhanced sentence.

Circumstantial evidence.

The crime of burglary is complete when the defendant makes an unauthorized entry with intent to commit any felony or theft. State v. Gutierrez, 82 N.M. 578, 484

P.2d 1288 (Ct.App.1971). The occupant of the burglarized apartment testified to an unauthorized entry. The evidence of intent is circumstantial.

The circumstantial evidence of intent is:

The occupant left her apartment at 8:00 a. m. The doors were locked. Two windows, including one adjacent to a door, were left "cracked" for ventilation. At the request of a police officer, she returned to the apartment around 11:00 a. m. "[T]he house was a mess." The screen on the window near the door had a tear of sufficient size "* * * for a hand to reach over and unlatch the door." The door was open. The console stereo had been unplugged and moved several feet toward the door. Knick-knacks had been moved. "The drawers and things were just a mess."

Officer Johnson was dispatched to the address where the apartment is located to investigate a "possible burglary in progress." When he reached the particular apartment involved in this case, he observed the torn screen, the open door and two men inside the apartment. Defendant was one of the men. Defendant was a step or two inside, coming toward the door. Officer Dietz, arriving shortly after Officer Johnson, also observed defendant in the apartment.

The foregoing evidence supports an inference that defendant intended to commit a theft. State v. Andrada, 82 N.M. 543, 484 P.2d 763 (Ct.App.1971); compare State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969). Further, this evidence is substantial.

Defendant claims, however, that the foregoing evidence does not point unerringly to his guilt and fails to exclude every reasonable hypothesis other than guilt. State v. Malouff, 81 N.M. 619, 471 P.2d 189 (Ct.App.1970). A hypothesis which defendant says is not excluded is based on defense evidence That evidence is that defendant went to the apartment with his brother, who was trying to locate a former employer; that when apprehended by police he was knocking on the "screen door;" that neither defendant nor his brother was inside the apartment. This defense evidence raised a conflict in the evidence. The credibility of the witnesses was for the jury. The defense evidence having been rejected by the jury, as shown by its verdict, the State's evidence excludes the defense evidence as a reasonable hypothesis. State v. Borunda, 83 N.M. 563, 494 P.2d 976 (Ct.App.), decided January 7, 1972; State v. Beachum, 82 N.M. 204, 477 P.2d 1019 (Ct.App.1970).

In the brief, defendant advances the hypothesis that the actual burglar had been frightened away by the appearance of defendant. In support of this hypothesis, defendant points out that no evidence was introduced concerning fingerprints and that defendant was not wearing gloves. Further, defendant seems to rely on the fact that the officers found nothing on defendant which they classified as burglar tools. We do not consider this hypothesis to be reasonable in the light of the jury verdict which necessarily determined that defendant was inside the apartment, and in light of the undisputed evidence of the torn screen, the open door and the "mess" inside the apartment. See State v. Atwood, 83 N.M. 416, 492 P.2d 1279 (Ct. App.), decided December 3, 1971.

Although we have answered defendant's "reasonable hypothesis" contentions, we point out that the circumstantial evidence rule is not a concept independent of the question of whether there is substantial evidence to support the verdict. As stated in State v. Clements, 31 N.M. 620, 249 P. 1003 (1926): "The rule in a circumstantial evidence case is but a special application of the general rule of reasonable doubt. The jury having been properly instructed as to the defendant's rights, its decision is final if supported by substantial evidence. * * *"

Cross-examination as to specific act of misconduct.

The State, cross-examining the defendant, asked: "Mr. Madrid, isn't it true that

on November 27, 1970 that you removed a color television set from the residence of Esther Cassell, 1811 Girard [Southeast without authority or permission]?" As originally asked, the bracketed words were not included in the question. After argument, defendant's objection to the question was overruled. The question was restated, including the bracketed words. Defendant answered: "No." The questioning then went on to other matters.

Section 20-2-4, N.M.S.A.1953 (Repl.Vol. 4) authorizes this question concerning specific acts of misconduct. See State v. Baca, 81 N.M. 686, 472 P.2d 651 (Ct.App. 1970); State v. Sharpe, 81 N.M. 637, 471 P.2d 671 (Ct.App.1970); State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct.App.1970). For criticism of the statute, see Jonathan B. Sutin, Impeachment of a Witness's Character in New Mexico, 2 Nat.Res.J. 575 (1962).

Defendant contends the question and answer were improper because the defendant had not opened up the matter of prior misconduct on his part. See State v. Baca, supra. The test for such questioning is set forth in State v. Hargrove, 81 N.M. 145, 464 P.2d 564 (Ct.App.1970). See State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct.App.1969). That test does not require the defendant to have opened up the matter. Specifically, the defendant may be questioned as to specific acts of misconduct even if defendant has not opened up the matter.

Defendant also claims that a mistrial should have been granted because, after allowing the question and answer, the trial court did not direct the jury to disregard the question and answer. Since the question and answer were permissible, there was no occasion to instruct the jury concerning the question.

Failure to admonish jury when objection sustained.

The defendant, cross-examining Officer Johnson, asked the officer to describe what might be burglary tools. The officer included a pocket knife in the items he listed. The officer was asked if "anything like that" (the items listed) was used to gain entrance. The officer stated that apparently a pocket knife had been used. However, the officer did not recall having found a pocket knife.

On redirect examination, responding to a question as to the difference between property found on a person and evidence in a case, the officer interjected that defendant "probably had a pocket knife." An objection to this interjection was sustained.

Defendant, on appeal, asserts that this interjected answer was highly prejudicial "* * * especially when no admonition to disregard the answer was given the Jury. * * *" Defendant did not request such an admonition at the time his objection was sustained. In the instructions to the jury upon submission of the case, the jury was told not to concern itself with the reasons for the court's rulings on evidentiary matters and not to draw any inferences from the rulings. Further, the jury was told that whether evidence is admissible is a question of law.

Since a specific admonition was not requested by defendant, the trial court did not err in not giving a specific admonition. Assuming, but not deciding, that an admonition was required, the general instruction sufficed. State v. McFerran, supra; compare State v. Paul, 83 N.M. 527, 494 P.2d 189 (Ct.App., decided February 4, 1972).

Instructions.

Defendant asserts that two of the instructions to the jury were ambiguous. Instruction 2 concerning intent was objected to. It states that intent is seldom susceptible of direct proof but that intent may be inferred from the acts of a person and the circumstances surrounding the acts at the time they are done. There is no ambiguity; the instruction is consistent with State v. Andrada, supra, and State v. Clark, supra.

Instruction 4 concerns impeachment. It was not objected to. It informed

the jury as to permissible methods of impeachment and stated that if the jury believed a witness had been impeached the jury could take the impeachment into consideration in determining the weight and credibility of the witness' testimony. See N.M.U.J.I. 15.4.

Defendant argues that the impeachment instruction, being ambiguous, and tending to sway the jury toward the prosecutor's question concerning the television set, failed to cure the effect of prejudicial testimony. The asserted prejudicial testimony is the question concerning the television set and the officer's interjection concerning a pocket knife. All but one element of this argument has been previously answered. The instruction is not ambiguous; the testimony did not amount to legal prejudice requiring a reversal.

The remaining element of the argument is that the instruction tends to sway the jury toward the prosecutor's question concerning the television set. This element is speculation. The impeachment instruction is in general terms; it does not single out any particular item of evidence. Further, the record shows there was impeachment evidence other than the question concerning the television set. Defendant admitted to a prior conviction; on the stand he asserted the officers lied in their testimony. Rebuttal evidence of the State permits the inference that defendant had not told the truth when he named the person he assertedly was looking for when he went to the apartment.

The argument concerning instructions is without merit.

Closing argument.

Defendant complains because, in closing argument, the prosecution referred to the prior conviction which had been admitted into evidence. This was a conviction of aggravated assault in 1966, approximately five years prior to the trial leading to the present conviction. Our understanding of this contention is that even though prior convictions are admissible for impeachment purposes, it was error for the prosecution to refer to this conviction because of the time elapsed subsequent to the conviction. This is incorrect; the time factor in itself does not exclude the prior conviction. State v. McFerran, supra.

Defendant also contends that the prosecutor's argument was improper because he stated that defendant was "caught inside moving the furniture around." This comment was within the realm of permissible comment on the evidence introduced in this case. State v. Santillanes, 81 N.M. 185, 464 P.2d 915 (Ct.App.1970); see State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969).

Procedure for enhanced sentence.

Subsequent to the conviction being reviewed in this appeal, a supplemental information was filed seeking an enhanced sentence on the basis of two prior felony convictions in New Mexico.

Defendant asserts the procedural requirements of § 40A-29-7, N.M.S.A.1953 (Repl.Vol. 6) were not met. He states that the transcript fails to show that defendant was ever informed of his rights, or knew the penalties which might accrue under the habitual criminal statute, or that he waived his rights. This is incorrect.

The record shows that the supplemental information, which sought the enhanced sentence, was read in open court with defendant present; that defendant admitted to being the person convicted as charged in the supplemental information. This occurred when defendant was represented by counsel who, immediately after the enhanced sentence was imposed, informed the court that defendant desired to appeal and requested that a bond be set pending the outcome of the appeal.

Although the record does not show that defendant was informed by the trial court that he had a "* * * right to be tried as to the truth * * *" of the supplemental information, his admission, while being represented by counsel, waived this requirement. State v. Knight, 75 N.M. 197, 402 P.2d 380 (1965); compare State v. Brill, 81 N.M. 785, 474 P.2d 77 (Ct.

App.1970); State v. Brusenhan, 78 N.M. 764, 438 P.2d 174 (Ct.App.1968). Section 40A-29-7, supra, does not specifically require the trial court to advise a defendant of the enhanced penalty. As to the general requirement, see Neller v. State, 79 N. M. 528, 445 P.2d 949 (1968).

The judgment and sentence are affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

495 P.2d 388

STATE of New Mexico, Plaintiff-Appellee,

v.

James Thomas HOGAN, Defendant-Appellant.

No. 832.

Court of Appeals of New Mexico.

March 3, 1972.

Robert L. Christensen, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Winston Roberts-Hohl, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant was indicted on two counts of attempted rape of a child (§§ 40A-28-1, 40A-9-4, N.M.S.A.1953 (Repl.Vol.1964)) and one count of contributing to the delinquency of a minor (§ 40A-6-3, N.M.S.A. 1953 (Repl.Vol.1964)). He pled guilty to the latter charge and was sentenced according to the statute. The two counts of attempted rape were then dismissed by the State. Subsequently, defendant filed a motion for a redetermination of the sentence, requesting probation on the basis of a psychiatrist's report which had been made prior to the plea of guilty. The trial court denied the motion and defendant appeals asserting: (1) The trial court erred in disregarding the psychiatrist's recommendation of probation; (2) The trial court erred in not committing defendant up to sixty days for diagnosis and recommendation

pursuant to § 40A-29-15(C), N.M.S.A.1953 (Repl.Vol.1964, Poc.Supp.1971); (3) This court should take judicial notice that no psychiatric or psychological help is available for defendant at the penitentiary.

We affirm.

Defendant's first two points are controlled by the philosophy in State v. Serrano, 76 N.M. 655, 417 P.2d 795 (1966) and Ewing v. State, 80 N.M. 558, 458 P.2d 810 (Ct.App.1969). Deferring or suspending a sentence with subsequent probation "* * * is not a matter of right but is an act of clemency and committed to the discretion of the trial court." The record reveals that the trial court had before it a history of defendant. We cannot say as a matter of law that the trial court abused its discretion by not adopting the report of the psychiatrist or in not requesting diagnosis and recommendation from the Department of Corrections.

Defendant further asks us to take judicial notice that no psychiatric or psychological help is available for him at the penitentiary. Defendant cites neither source nor reference for such a proposition and we have found none in our search. Section 21-1-1(44) (d), N.M.S.A.1953 (Repl.Vol. 1970); compare Boswell v. Rio De Oro Uranium Mines, Inc., 68 N.M. 457, 362 P.2d 991 (1961). Absent a showing that judicial notice can be taken of such asserted facts, the assertion is not a matter for judicial notice.

Affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

495 P.2d 788

Robert Lee LATIMER, as administrator of the estate of Mack Allen Grayes, Deceased, Plaintiff-Appellant,

v.

CITY OF CLOVIS, Defendant-Appellee.

No. 722.

Court of Appeals of New Mexico.

March 10, 1972.

Paul Phillips, Albuquerque, David W. Bonem, Quinn & Bonem, Clovis, for plaintiff-appellant.

Dennis J. Falk, Modrall, Seymour, Sperling, Roehl & Harris, Albuquerque, Harry L. Patton, Clovis, for defendant-appellee.

OPINION

WOOD, Chief Judge.

This is a wrongful death case. The trial court granted defendant's motion for summary judgment. The issue is the propriety of the summary judgment. We discuss each of the reasons the trial court listed in granting the summary judgment. They are: (1) no liability under the doctrine of attractive nuisance; (2) absence of negligence on the part of defendant; (3) assumption of risk by and negligence of decedent; (4) negligence of parents as proximate cause and assumption of risk by parents; and (5) no act of defendant was the proximate cause and there was an independent intervening cause. Issue No. 6, raised by defendant, is that plaintiff failed to attack a basis for granting the summary judgment.

Facts and inferences supported by the record are:

Mack Allen Grayes, age 5, drowned after falling into water in a fenced swimming pool located in defendant's park. The park was across the street from where Mack lived with his mother, brothers and sister. The family had lived at this location for approximately five years.

The park is open the entire year; the pool is open from June to September. A contractor, in connection with submitting a bid for construction work at the pool, inspected the pool on or about April 7, 1969. At the time of this inspection there was no collection of water any place within the pool area. On the accident date, April 18, 1969, water had collected in the deep end of the pool to a depth of slightly less than six feet. There is an "estimate" that the water had collected after a rain.

On the accident date, the mother, accompanied by her children, went to the park to play softball. She gave her sons permission to play on the swings. After playing on the swings, monkey bars and see-saw, running some races and wrestling with one another, the boys' attention was directed to a hole in the fence around the pool.

The boys were: Mike Grayes, age 7, Mack and his twin brother Mark, and a friend named Gregory. Mike saw the hole in the fence and asked the other boys if they wanted to come into the pool with him. They went through the hole in the

fence. They went down into the dry portion of the pool, threw rocks into the water in the deep end and played around the edge of the pool before Mack fell in. The estimated time from entry into the pool area until Mack's fall is ten minutes.

The estimated distance from the pool to where the mother was playing softball varies from 50 feet to one-half block. The pool area was visible from where the mother was playing softball. The mother could have seen the boys enter the pool area if she had kept an eye on them.

The Grayes children had been specifically warned about the hazards of water. According to the mother, they knew or should have known of the dangers related to water. The mother had told Mike not to go into the pool area when it was closed. She had warned Mack to stay away from the pool; that the water was not safe.

Mike had seen other, and older, children climb the fence and go into the pool area, but the time and date of this observation is not clear. On the day of the accident, the mother did not know the boys had entered the pool area, and Mike had forgotten he wasn't supposed to be in the pool area. According to the grandfather, he had explained the danger of water but Mack, the deceased, "wasn't aware of it because he was too young;" he had no knowledge of danger.

There is nothing indicating that prior to April 18, 1969, anyone knew that water had collected in the deep end of the pool. The boys saw the water after entering through the hole in the fence. The affidavit of defendant's superintendent of parks states that he is in charge of the upkeep and maintenance of the park and pool; that he had been in and around the park pursuant to his duties as superintendent and was unaware that water had collected in the deep portion of the pool until subsequent to the drowning.

There is nothing indicating how long the hole had existed in the fence. The grandfather characterized the hole in the fence as a three foot opening and stated that anybody that had been there should have seen the opening. The mother and Mike stated they were unaware of the hole prior to the accident. The park superintendent made no statement in his affidavit concerning the hole. There is nothing in the record indicating either knowledge or lack of knowledge on the part of the City concerning the hole.

The mother and the father of the Grayes boys were divoced; the father had abandoned his family; the father's whereabouts were unknown; the mother had custody of the children.

Is there liability under the doctrine of attractive nuisance?

The elements of the doctrine of attractive nuisance are stated in Saul v. Roman Catholic Church of Arch. of Santa Fe, 75 N.M. 160, 402 P.2d 48 (1965) and Klaus v. Eden, 70 N.M. 371, 374 P.2d 129 (1962). Defendant asserts that three of the elements are absent. Since all elements must concur if the doctrine is to be applied, *Saul*, supra, we consider each of the allegedly missing elements.

1. One element is: The place where the condition is maintained is one upon which the possessor knows or should know that children are likely to trespass. Klaus v. Eden, supra. Defendant asserts the question is whether the City had knowledge of should have had knowledge that children came into the pool area to play at a time when the pool was closed. It asserts: "* * * There is nothing in the record to indicate any actual knowledge of trespassing children on the part of the representatives of the City of Clovis. * * *"

Absent some evidence showing how long the hole in the fence had existed, we agree that there is nothing in the present record showing that the City knew or should have known that children were likely to trespass in the pool area. However, there is also nothing in the record showing the absence of the requisite knowledge.

Defendant had the burden of showing an absence of the requisite knowledge.

Brock v. Goodman, 83 N.M. 580, 494 P.2d 1397, decided February 11, 1972; Sanchez v. Shop Rite Foods, 82 N.M. 369, 482 P.2d 72 (Ct.App.1971). Since no such showing was made, summary judgment on the basis of this element of the doctrine of attractive nuisance was improper.

The City's argument is directed at an absence of a showing by the plaintiff that a factual issue existed as to this element. The argument is misdirected. Until defendant made a prima facie showing that there was no fact issue as to this element, plaintiff was not required to show that a fact issue existed. Brock v. Goodman, supra; Sanchez v. Shop Rite Foods, supra. Summary judgment as to this element was improper.

2. Another allegedly missing element is: The condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to children. Klaus v. Eden, supra.

Defendant states: "For the City of Clovis to be held liable, under this element, the knowledge, actual or implied, had to be of the accumulation of water. The undisputed facts clearly show that there could have been no such knowledge." Further: "It is obvious that the collection of water had accumulated only a very short time prior to the accident, that the water could not be seen unless an individual actually entered the pool area and certainly, under these circumstances, knowledge of the water cannot be imputed to the City of Clovis. * * *"

Assuming, as defendant contends, that the hole in the fence is of no consequence in considering this element (a point we do not decide), the issue is not whether plaintiff has shown that the City knew or should have known of the water in the pool. The issue is whether defendant made a showing that the City did not know or should not have known about the water in the pool.

Defendant's showing is that no water was in the pool on or about April 7th, that almost six feet of water was in the deep end of the pool on April 18th and an "estimate" that the water collected after a rain. The superintendent in charge of upkeep and maintenance of the pool states he was unaware of the water prior to the accident. This is an affirmative indication of lack of knowledge by the City. It is not a showing that the City should not have known about the water since the superintendent states that he was in and around the park pursuant to his duties. Those duties included maintenance of the pool. There is a factual issue as to whether the City should have known about the water in the pool.

Defendant asserts it had no duty to inspect or police the pool "* * * in order to discover whether there is any condition which will be likely to harm trespassing children. * * *" McFall v. Shelley, 70 N.M. 390, 374 P.2d 141 (1962). We agree; however, this statement does not conflict with this element of the doctrine. This element is not concerned with "any condition" but with conditions involving unreasonable risks. The test of foreseeability of harm to a child under the particular circumstances is the crucial consideration. Saul v. Roman Catholic Church of Arch. of Santa Fe, supra. If the water hazard in this case was not an unreasonable risk as a matter of law, see Mellas v. Lowdermilk, 58 N.M. 363, 271 P.2d 399 (1954), certainly a factual question exists concerning that risk.

Summary judgment as to this element was improper.

3. The third allegedly missing element is: The children, because of their youth, do not discover the condition or realize the risk involved in intermeddling in it or coming within the area made dangerous by it. Klaus v. Eden, supra.

Defendant asserts Mack, the deceased, knew or should have known of the perils of water. It asserts that this knowledge is affirmatively shown by the deposition testimony of the mother as to the warnings she gave to her sons, and by

Mike's admission that such warnings had been given. The fact that warnings had been given does not eliminate the question of whether there was a realization of the risk. Selby v. Tolbert, 56 N.M. 718, 249 P.2d 498 (1952) states:

> "* * * Even though cautioned not to go near the trailer by his parent, the natural attraction of the object and its condition outweighed the direction of the parent in the mind of the child. This is a justifiable case for the application of the attractive nuisance doctrine."

Although warnings had been given, Mike stated that he had forgotten he wasn't supposed to go in the pool [area]. Further, the grandfather stated that Mack, the deceased, didn't know of the danger because he was too young. A factual issue existed as to the deceased's appreciation of the risk.

Defendant asserts, however, that as to water hazards, the doctrine of attractive nuisance does not apply as a matter of law. It contends that the doctrine does not apply where the hazard is patent; that there must be a hidden or unusual element of danger. See Barker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480 (1943). The rationale is that waters embody perils that are deemed obvious to children of the tenderest years. Support for this view is found in Mellas v. Lowdermilk, supra; see also, Foster v. United States, 183 F.Supp. 524 (D.N.M.1959). In our opinion, the language in *Mellas,* supra, has been modified by subsequent decisions of the New Mexico Supreme Court. Martinez v. Louis Lyster, General Contractor, Inc., 75 N.M. 639, 409 P.2d 493 (1965) states:

> "* * * this court has never sanctioned attempts to place cases involving the doctrine of attractive nuisance in a rigid category on the basis of the type of condition involved. Whether the maintenance of a specific condition can give rise to liability for harm to trespassing children must necessarily turn on the facts of the particular case."

See also, Saul v. Roman Catholic Church Arch. of Santa Fe, supra.

A related contention is that the doctrine should not apply to water hazards because such "* * * hazards exist everywhere and that children who are old enough to roam without parental supervision should be aware of such hazards. * * *" Annot. 16 A.L.R.3d 25, § 8 at 90 and § 27 at 158 (1967). The answer to this contention is that the attraction may outweigh the awareness of the hazard, even when the child has been warned about the hazard. Selby v. Tolbert, supra. The doctrine of attractive nuisance is a recognition of the habits and characteristics of young children—their natural curiosity and lack of judgment. Klaus v. Eden, supra.

The third element was not missing as a matter of law. There being a factual issue as to this element, summary judgment was improper.

The trial court erred in granting summary judgment on the basis there was no liability under the attractive nuisance doctrine.

Absence of negligence on the part of defendant.

Even though there are factual issues concerning the applicability of the attractive nuisance doctrine, defendant would not be liable in this case unless it was negligent. Mellas v. Lowdermilk, supra, as explained in Martinez v. C. R. Davis Contracting Company, 73 N.M. 474, 389 P.2d 597 (1964). Compare Subsection E, Restatement of Torts 2d § 339 (1965). The trial court ruled that defendant was not negligent under the attractive nuisance doctrine and, also, that defendant was not negligent independent of the doctrine.

"Negligence" encompasses within its meaning the concepts of foreseeability of harm to the person injured and of the duty to use ordinary care. N.M.U.J.I. 12.1 through 12.4. Martin v. Board of Education of City of Albuquerque, 79 N.M. 636, 447 P.2d 516 (1968); Giese v. Mountain

States Telephone & Telegraph Co., 71 N. M. 70, 376 P.2d 24 (1962). In relation to the doctrine of attractive nuisance, see Martinez v. Louis Lyster, General Contractor, Inc., supra; Saul v. Roman Catholic Church of Arch. of Santa Fe, supra. Defendant asserts that the facts in this case show an absence of these concepts and, therefore, an absence of negligence.

There is really "* * * nothing different in the so-called law of attractive nuisance and the general law of negligence, except that involved is a recognition of the habits and characteristics of very young children. * * *" Klaus v. Eden, supra. Where the circumstances provide a factual basis for application of the doctrine then "* * * a higher degree of care is required to be exercised in order that they [young children] may not be injured or killed by property or instrumentalities which they should not approach or become involved with. * * *" *Klaus*, supra. This "higher duty" requirement is simply this: "* * * As the danger that should reasonably be foreseen increases, so the amount of care required also increases." N.M.U.J.I. 12.2. Thus, the attractive nuisance doctrine encompasses the same concepts of "foreseeability" and "duty" that are the basis of the general law of negligence.

Having failed to show that there were no factual issues under the three elements of the doctrine which were attacked, defendant also failed to show there were no factual issues as to negligence based on that doctrine. Summary judgment was improperly granted on the basis that there was no negligence under the doctrine.

We now consider the ruling that, independent of the attractive nuisance doctrine, the defendant was not negligent.

A municipality may be negligent if it has actual or constructive knowledge of the condition causing injury. Bryan v. City of Clovis, 54 N.M. 235, 220 P.2d 703 (1950). Thus, defendant may be negligent if it knew or should have known of the water hazard in this case. Primus v. City of Hot Springs, 57 N.M. 190, 256 P.2d 1065 (1953). In discussing the elements of the attractive nuisance doctrine, we held that defendant failed to make a showing, sufficient for summary judgment, that defendant should not have known of the water collected in the pool and should not have known of the likelihood of children to trespass. Thus, there is a failure to show that defendant could not reasonably foresee the drowning. Summary judgment could not be properly granted on the basis of lack of foreseeability. See Bogart v. Hester, 66 N.M. 311, 347 P.2d 327 (1959).

In addition to the element of foreseeability there is the concept of duty. That duty depends on the status of Mack, the deceased. In discussing the attractive nuisance doctrine, we assumed that plaintiff's status was that of a trespasser. Klaus v. Eden, supra. Our concern here is with decedent's status independent of the doctrine. Again, we assume, but do not decide, that decedent was a trespasser.

Generally speaking, a defendant owes no duty to an undiscovered trespasser except to refrain from wilfully or wantonly injuring the trespasser. Where, however, the trespasser is discovered or reasonably should have been anticipated, the duty is that of ordinary care to prevent injury to the trespasser. These views are illustrated by N.M.U.J.I. 10.3 which states:

> "An owner owes no duty to a trespasser unless his presence on the premises is either known or from facts and circumstances should reasonably have been anticipated. However, the owner is under a duty not to willfully or wantonly injure a trespasser.
>
> "If an owner knows or from facts known to him should reasonably anticipate the presence of a trespasser in a place of danger then the owner is under a duty to use ordinary care to prevent injury to him."

The committee comment to N.M.U.J.I. 10.3 states: "No New Mexico case expressly states the duty owing to a discovered trespasser but the general principles

covered in the foregoing instruction are found in the cases of Chavez v. Torlina, 15 N.M. 53, 99 P. 690 (1909) and Bogart v. Hester, 66 N.M. 311, 347 P.2d 327. * * *"

Before defendant's duty to decedent, as an assumed trespasser, can be decided, it must first be determined whether defendant should reasonably have anticipated the trespasser. In discussing the elements of the attractive nuisance doctrine we held that defendant failed to make a showing, sufficient for summary judgment, that defendant should not have known of the likelihood that children would trespass. Thus, there was a failure to show whether decedent was to be characterized as a discovered or undiscovered trespasser and a failure to show the extent of the duty that defendant owed to decedent. Summary judgment could not be properly granted on the basis of no breach of duty.

There being a failure to show the extent of the duty owed and a failure to show a lack of foreseeability, the trial court erred in granting summary judgment on the basis that there was no negligence independent of the attractive nuisance doctrine.

Assumption of risk by and negligence of decedent.

The trial court ruled that decedent "assumed the risk and was negligent."

In discussing the elements of the attractive nuisance doctrine, we held that defendant failed to show that Mack, age 5, realized the risk involved. In so holding we referred to the statement of the grandfather that Mack did not know of the danger because he was too young. For assumption of risk to apply, Mack must have known of the dangerous situation. O'Neil v. Furr's, Inc., 82 N.M. 793, 487 P.2d 495 (Ct.App.1971); See Hinojosa v. Nielson, 83 N.M. 267, 490 P.2d 1240 (Ct.App.1971). The trial court erred in granting summary judgment on the basis that decedent assumed the risk. On remand, this defense will be controlled by Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971).

New Mexico decisions have held that a seven year old child may be negligent. Marrujo v. Martinez, 65 N.M. 166, 334 P.2d 548 (1959). New Mexico Uniform Jury Instructions limit the question of ordinary care on the part of a child to those seven years of age or older, but presume a child under seven years of age is incapable of contributory negligence. N.M.U.J.I. 12.5 (Directions for Use) and 12.6. Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671 (1952) indicates a five year old child cannot be contributorily negligent. On the basis of the foregoing, we are of the opinion that the five year old decedent could not be contributorily negligent as a matter of law. The trial court erred in granting summary judgment on the basis that decedent was negligent.

Negligence of parents as proximate cause and assumption of risk by parents.

The trial court ruled that the mother and father of decedent were negligent and that such negligence was the proximate cause of the death. It also ruled that the mother and father assumed the risk of the injury or death.

If a statutory beneficiary of the proceeds in a wrongful death action is contributorily negligent, that beneficiary may not share in the proceeds. Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963); see N.M.U.J.I. 13.3 and 13.4; Sanchez v. J. Barron Rice, Inc., 77 N.M. 717, 427 P.2d 240 (1967). Defendant asserts that the mother and father of decedent were the statutory beneficiaries of the decedent. Section 22-20-3, N.M.S.A.1953. It is on this basis that defendant asserts the negligence of the parents was the proximate cause of the death and barred recovery.

Defendant contends the mother was negligent because she was playing softball, forgot to watch out for her children and failed to exercise reasonable parental care. It claims the father was negligent because he abandoned his family and failed to render any type of parental control over the decedent. "* * * To be negligent, * * * [each of the parents]

must have failed to act as a reasonably prudent person in the exercise of ordinary care. 'Ordinary care' is a relative term; it depends upon the circumstances. N.M. UJI 12.2, and cases therein cited." White v. City of Lovington, 78 N.M. 628, 435 P. 2d 1010 (Ct.App.1967). Under the circumstances of this case defendant did not show there was no issue of material fact as to the negligence of the parents.

In addition, even if either of the parents was negligent, reasonable minds could differ as to whether such negligence was the proximate cause of the death. Fitzgerald v. Valdez, 77 N.M. 769, 427 P.2d 655 (1967); Dahl v. Turner, 80 N.M. 564, 458 P.2d 816 (Ct.App.1969). Here, on the showing in the record, reasonable minds could differ on the question of proximate cause.

The trial court erred in granting summary judgment on the basis that the parents were negligent and their negligence was the proximate cause of the death.

As to assumption of risk, defendant failed to show that either of the parents knew of the water hazard. This is sufficient to prevent application of the doctrine of assumption of risk. O'Neil v. Furr's, Inc., supra; Hinojosa v. Nielson, supra. The trial court erred in granting summary judgment on the basis that the parents assumed the risk.

No act of defendant was the proximate cause and there was an independent intervening cause.

The trial court ruled that no act of the defendant was the proximate cause and that "* * * the actions of the mother and other children playing with decedent on the date of the accident constituted independent intervening causes which were the proximate cause of the accident and injury. * * *"

Kelly v. Montoya, 81 N.M. 591, 470 P.2d 563 (Ct.App.1970) states:

"A partial definition of proximate cause is '* * * that which * * * produces the injury, and without which the injury would not have occurred. * * *' Thompson v. Anderman, 59 N.M. 400, 285 P.2d 507 (1955). For an intervening act to be an independent cause, Thompson v. Anderman, supra, states: '* * * Such intervening cause must be sufficient in and of itself to break the natural sequence of the first negligence. * * *'

"* * *

"* * * If reasonable minds might differ on these issues, the matter is for the jury. * * *"

On the record before us, reasonable minds might differ as to what caused the death; thus, there were factual issues as to proximate cause and independent intervening cause. Defendant having failed to show an absence of a material fact issue as to these matters, the trial court erred in ruling that no act of the defendant was the proximate cause and erred in ruling that actions of others were an independent intervening cause.

Failure to attack a basis for granting the summary judgment.

A portion of the summary judgment reads: "* * * [T]he Court * * * finds that the Complaint fails to state a cause of action and that there is no genuine issue as to any material fact in this action and that Defendant * * * is entitled to Summary Judgment as a matter of law for the following reasons." The summary judgment then listed the specific reasons, each of which has been discussed and held to be erroneous.

Defendant contends that the summary judgment was based, in part, on a "finding" that the complaint failed to state a cause of action. It asserts that plaintiff failed to attack this ruling and, therefore, the summary judgment should be affirmed.

The summary judgment does state that the complaint fails to state a cause of action and there is no issue as to any material fact. The reasons for these rulings are stated; they are the five specific rea-

sons held to be erroneous. "* * * Appellant's brief in chief must point up the claimed error with reference to the trial court's reasons. * * *" Wilson v. Albuquerque Board of Realtors, 81 N.M. 657, 472 P.2d 371 (1970). Each of the specific reasons for the summary judgment having been attacked, there is no merit to the claim that plaintiff failed to attack one of the bases for granting the summary judgment.

In conclusion, the granting of the summary judgment was error. In so holding we have answered the contentions advanced by defendant in support of the summary judgment. This does not mean, however, that we have adopted defendant's contentions as to the posture of this case. Specifically, we have not ruled that defendant's liability is to be determined solely on the basis of the water in the pool. Consideration must be given to the fact, undisputed in this appeal, that there was a hole in the fence. Nor have we ruled on decedent's status; specifically, we have not ruled that decedent, playing in a public park, was or was not a trespasser when he entered through the hole in the fence.

The summary judgment is reversed. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUTIN, J., concurs.

COWAN, J., specially concurring.

COWAN, Judge (specially concurring).

I concur with the majority that the summary judgment should be reversed, but solely on the ground that the record shows genuine issues of material fact on the questions of negligence, contributory negligence, proximate cause and intervening cause. In my opinion, the majority misconstrue summary judgment Rule 56(c). Its application is properly applied in Klaus v. Eden, 70 N.M. 371, 374 P.2d 129 (1962). See also my dissent in Brock v. Goodman, 83 N.M. 580, 494 P.2d 1397, decided February 11, 1972. Additionally, the doctrine of attractive nuisance has no application to the facts of this case. That doctrine should not be extended to include swimming pools, either public or private, they having become a now commonplace family recreational facility.

495 P.2d 797

STATE of New Mexico, Plaintiff-Appellee,

v.

John Wesley PAUL, Defendant-Appellant.

No. 732.

Court of Appeals of New Mexico.

March 17, 1972.

Leon Taylor, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant was charged with attempted armed robbery and attempted murder. He was convicted of attempted armed robbery and acquitted of attempted murder. He appeals and we affirm.

The evidence when viewed in the light most favorable to support the verdict discloses the following: Defendant was the driver of a car stationed outside a liquor store and lounge, awaiting commission of an armed robbery by others. Three of defendant's companions went into the lounge. One of them then went into the liquor store, pulled a gun on the manager and told him to lie down behind the counter. A witness walked in from the lounge, saw the gun, started screaming, and ran out. The robbery was abandoned, and the companions fled in the getaway car driven by the defendant.

Specific Intent.

A. Defendant contends that "* * * it was erroneous and prejudicial * * * for the Trial Judge to give instructions of general intent without the inclusion of specific intent * * * in [the given] Instructions. * * * Since armed robbery requires the showing of specific, in addition to general, intent, and since attempt is an overt act done in furtherance of this specific intent without completion of the crime, these instructions were highly prejudicial in their effect. * * *"

Defendant's argument is based on the premise that since he was charged with being an accessory to the attempted act and where there was no evidence of a demand for money or goods, he was entitled to a specific intent instruction within the general intent instruction. We disagree.

The record reveals that a separate instruction on attempt was given as well as an instruction on armed robbery setting forth the requirement of "specific intent." Each instruction need not contain within its limit all the elements to be considered; instructions are sufficient if, considered as a whole, they fairly represent the issues and the applicable law. State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct.App.1970).

B. At the close of the State's case and at the close of all the evidence defendant moved for "a directed verdict of acquittal" on the grounds that the State failed to prove the requisite elements of attempted armed robbery because no demand for money was made and that there is no evidence that anyone was put in fear. We do not agree with defendant's view of the facts.

On appeal we view the evidence and all reasonable inferences that flow therefrom

in the light most favorable to support the verdict. State v. Sedillo, 82 N.M. 287, 480 P.2d 401 (Ct.App.1971). In so viewing the record, although there are conflicts, defendant's position is not substantiated. We find substantial evidence to support the verdict. Compare the factual situation here with the facts in State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969) where the conviction of attempted armed robbery was affirmed.

Statement of a Witness.

Statements had been made by certain co-defendants and because of these statements defendant and the State moved for and were granted a severance.

Defendant then called one of the severed defendants, Thompson, as a witness. Defendant brought out that Thompson made a statement. Thompson then testified that the statement was obtained by coercion. On cross-examination by the State, the statement was used to impeach Thompson's direct testimony. Subsequently, the statement was admitted into evidence under instruction of the court that "* * * the purpose and reason for the admission of this exhibit is impeachment of rebuttal against the witness who testified, Elmas Thompson, and that you are to consider the matters that are in contradiction and contrary to what he testified to here before."

Defendant contends the statement should not have been allowed into evidence and if it was allowed it should have been first subjected to a Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) hearing to determine voluntariness and a cautionary instruction given. We disagree. Our answer to the claims are as follows.

A prior written statement or one reduced to writing may be used on cross-examination when a witness testifies inconsistent with such statement. Section 20–2–1, N.M.S.A. 1953 (Repl. Vol. 1970).

Jackson v. Denno, supra, is not applicable here. It requires a hearing to determine voluntariness of a confession of the accused only, and not of a statement made by a witness.

The record does not show that defendant submitted a cautionary instruction in compliance with § 21–1–1–(51) (2) (h), N.M.S.A. 1953 (Repl. Vol. 1970). Failing this the issue cannot be first raised on appeal. See State v. Rodriguez, 81 N.M. 503, 469 P.2d 148 (1970).

Witness Sequestration Rule.

At the beginning of the trial defendant moved that the witness sequestration rule be invoked. The State requested that a detective of the Albuquerque Police Department be permitted to remain during the course of the trial. Over defendant's objection the trial court granted the request.

It is defendant's contention that it was an abuse of discretion for the trial court to allow the detective to remain and that defendant was prejudiced thereby. Even assuming the trial court did abuse its discretion in permitting the officer to remain in the courtroom defendant has failed to show any prejudice. State v. Romero, 69 N.M. 187, 365 P.2d 58 (1961). The detective's testimony related solely to the finding of a 20 gauge shotgun and a spent 20 gauge shotgun shell. This related only to the attempted murder charge of which defendant was acquitted.

Severance of Charges.

Defendant contends his motion for severance of the attempted murder and attempted armed robbery charges should have been granted. He asserts that (a) the attempted murder charge received over-emphasis and poisoned the minds of the jury and (b) the two charges were not part of the same transaction. We disagree.

(a) Section 41–6–38, N.M.S.A. 1953 (Repl. Vol. 1964) states in part that an indictment shall not be invalid or insufficient because of a misjoinder of offenses charged unless it is affirmatively shown that the defendant was in fact prejudiced in his defense upon the merits. Defendant has failed to make an affirmative showing of

prejudice. State v. Sero, 82 N.M. 17, 474 P.2d 503 (Ct.App.1970).

(b) We need not reach this contention absent defendant's affirmative showing of prejudice, and absent facts which by the "very nature of things" would establish that defendant was prejudiced by joinder of the charges. State v. Sero, supra.

Affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

495 P.2d 800

Joe PACHECO, Plaintiff-Appellant,

v.

SPRINGER CORPORATION, a corporation, and Firemen's Fund American Insurance Company, Defendants-Appellees.

No. 787.

Court of Appeals of New Mexico.

March 17, 1972.

Quincy D. Adams, Adams & Foley, Horton & Aldridge, Albuquerque, for plaintiff-appellant.

Dennis J. Falk, James A. Parker, Allen C. Dewey, Jr., Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendants-appellees.

OPINION

COWAN, Judge.

The plaintiff has appealed from the judgment in this workman's compensation case. We affirm.

Plaintiff was struck in the groin while at work on April 15, 1969, resulting in the loss of a testicle. He was paid maximum compensation through January 3, 1970. He was treated or examined by a general surgeon, a urologist and a psychiatrist, all three of whom testified as plaintiff's witnesses at the trial.

The court awarded plaintiff compensation and medical theretofore paid by the defendant insurer; 25% partial disability from January 4, 1970, to March 23,

1971; and attorney's fees. Plaintiff now urges that "The court should have awarded compensation for partial permanent [sic] disability", thus invoking the substantial evidence rule. The court's findings at issue here are:

"11. Plaintiff was disabled to the extent of 25% of the body as a whole, and the duration thereof was from January 4, 1970 to March 23, 1971, a period of 63 weeks.

"12. Plaintiff is presently capable of performing the usual tasks of employment in which he was engaged on April 15, 1969, including that in which he previously engaged in other employment and for which he is suited by age, education, training, and general physical and mental capacity."

The first day of trial was held July 10, 1970, at which time the three doctors testified. Trial was then recessed until March 23, 1971, at which time the urologist, Dr. Johnson, was recalled by the plaintiff.

The surgeon agreed that, on October 10, 1969, there was no basis, either emotional or physical, why the plaintiff should not have returned to work. He felt the plaintiff had no disability.

The urologist, the only one of the three doctors to have seen the plaintiff after the day of trial on July 10, 1970, testified that he saw the plaintiff on March 22, 1971, and that the plaintiff was fully recovered and physically able to work. He said the plaintiff had had some recurring pain during the previous two years, but that exploratory surgery and removal of some nerve and muscle fibers corrected this condition. He testified to no residual physical disability but stated that there were times in the past when the plaintiff would have had difficulty working.

The psychiatrist, Dr. Taylor, testified that, as of December 2, 1969 and February 6, 1970, the plaintiff had 30% disability "from a psychiatric standpoint". He also described this as a disability "from an emotional standpoint". Dr. Taylor diagnosed the plaintiff's condition as depressive neurosis, characterized by "irritability, questionable impotency, low self esteem, and a distortion of his body image".

The concern of the doctor was with the plaintiff's mental condition from the standpoint of sexual disability, rather than from the standpoint of a disability to work. He did not relate the plaintiff's emotional problem to his working ability, except to say that "he is going to have some difficulty with his anxiety spells". To the contrary, it was Dr. Taylor's opinion that working would be therapeutic and helpful.

The challenged findings are thus supported by the evidence.

■ A claim for compensation for partial disability is properly denied where there is a failure to establish that the claimant has been to some percentage-extent disabled as defined by § 59–10–12.19 of the Act. Gallegos v. Kennedy, 79 N.M. 590, 446 P.2d 642 (1968).

■ Compensation, apart from the scheduled injury section, which does not apply here, is based on disability to work, and a physical impairment is not necessarily a "disability" under the statute. Willcox v. United Nuclear Homestake Sapin Co., 83 N.M. 73, 488 P.2d 123 (Ct.App. 1971). The same is true of a mental or psychiatric impairment. To entitle an injured workman to compensation, impairment is not enough; there must be disability. The court found that the plaintiff was not disabled and the finding is supported by the evidence.

The judgment is affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

495 P.2d 802

STATE of New Mexico, Plaintiff-Appellee,

v.

Donald Lee STOUT, Defendant-Appellant.

No. 829.

Court of Appeals of New Mexico.
March 10, 1972.

David H. Pearlman, Aldridge & Pearlman, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Ronald Van Amberg, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

Convicted of armed robbery (§ 40A–16–2, N.M.S.A. 1953 (Repl.Vol.1964)) defendant appeals. He asserts three grounds for reversal, namely: (1) The trial court abused its discretion in not restricting cross-examination as to defendant's bad moral character; (2) The defendant was denied his Sixth Amendment right to cross-examine a hostile witness by the trial court limiting the use of defendant's exhibit of a photograph of defendant's twin brother; and, (3) The trial court erred in admitting an in-court identification of defendant and in failing to conduct an appropriate evidentiary hearing on such identifications.

We affirm.

CROSS-EXAMINATION AS TO BAD MORAL CHARACTER.

The record discloses that defendant, on cross-examination, gave numerous evasive, contradictory and ambiguous answers. Defendant contends the trial court should have terminated the State's questioning and in

failing to do so abused its discretion. We disagree.

Section 20-2-4, N.M.S.A. 1953 (Repl.Vol.1970) permits cross-examination as to specific acts of misconduct. State v. Hargrove, 81 N.M. 145, 464 P.2d 564 (Ct. App.1970). Broad discretion is given the trial court in restricting such cross-examination. State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966); State v. Hargrove, supra. The record shows the trial court followed the cross-examination carefully by permitting certain questions and disallowing others. Defendant has failed to show an abuse of discretion (State v. Biswell, 83 N.M. 65, 488 P.2d 115 (Ct.App.1971)) or that the trial court did not weigh the probative value of such questions versus their illegitimate tendency to prejudice. State v. Biswell, supra.

LIMITING USE OF EXHIBIT.

Defendant testified it was his twin brother who did the robbery. He offered a picture to show the similarities in appearance. The picture was a profile view—one to one and a half years old. The State objected to the admission and the trial court admitted the picture for "the probative value" it might have for consideration by the jury. Defendant later attempted to use the picture to impeach a prosecution witness. The trial court denied the use in that manner.

As stated in Moore v. Mazon Estate, Inc., 24 N.M. 666, 175 P. 714 (1918):

> "* * * [W]here evidence is received for a stated purpose, the fact that it is inadmissible for a different purpose does not render the action of the court erroneous."

Defendant had been forewarned of the limited purpose for which the evidence would be admitted. Absent an abuse of discretion the limited purpose admission was proper.

The prosecution witness had already identified defendant as the robber, and she, according to other testimony, selected defendant's picture from groups of photographs which included pictures of his twin brother. Defendant had full opportunity to cross-examine the witness regarding these identifications, and exercised this right. The trial court did not err in refusing to allow use of the slide for cross-examination of the witness. Such cumulative cross-examination would not have advanced the accuracy of the truth determining process. State v. Lunn, 82 N.M. 526, 484 P.2d 368 (Ct.App.1971). The identification had been subject to full cross-examination. Compare State v. Stout, 82 N.M. 455, 483 P.2d 510 (Ct.App.1971). The trial court's action in not permitting defendant to use the picture was not a denial of his Sixth Amendment right of confrontation or cross-examination.

IN-COURT IDENTIFICATION.

Defendant contends the trial court erred in admitting the in-court identification and in failing to conduct an appropriate evidentiary hearing on such identifications.

The witnesses testified that the in-court identification was based on their observations of defendant at the scene of the crime. State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971). Both witnesses testified that even though defendant had a stocking over his head his features were distinguishable. The in-court identifications being independent, we do not reach the issue of possible taint by any pre-trial identification activities. State v. Gilliam, 83 N.M. 325, 491 P.2d 1080 (Ct.App.1971); State v. Samora, 83 N.M. 222, 490 P.2d 480 (Ct.App.1971).

Affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

495 P.2d 1073

STATE of New Mexico ex rel. Albert DELGADO and Robert Delgado, Petitioners,

v.

The Honorable Richard A. STANLEY, District Judge of the Twelfth Judicial District, Respondent.

No. 9436.

Supreme Court of New Mexico.

April 14, 1972.

James G. Huber, Alamogordo, for petitioners.

Norman D. Bloom, Jr., Dist. Atty., Alamogordo, for respondent.

OPINION

STEPHENSON, Justice.

Petitioners in this original prohibition proceeding seek a writ prohibiting the trial judge from proceeding further in an Otero County District Court criminal proceeding in which they are defendants.

Petitioners assert that the case must be dismissed with prejudice pursuant to § 41–11–4.1, N.M.S.A., 1953 and Rule 95 of the Rules of Civil Procedure [§ 21–1–1(95), N.M.S.A., 1953 (1971 Pocket Supp.)].

The chronology of the petitioners' vicissitudes in Otero County is as follows:

August 19, 1971: Petitioners were arrested for allegedly possessing heroin.

September 17, 1971: Following a preliminary hearing and bind-over in magistrate court, an information was filed charging petitioners and others with possession of heroin in violation of § 54–7–13, N.M.S.A., 1953.

October 5, 1971: The district attorney filed a *nolle prosequi* as to each of the petitioners.

January 7, 1972: Petitioners were rearrested on newly issued warrants charging each of them with possession of heroin. This was the same charge on the same offense said to have occurred on the same day, August 19, 1971, as that charged in the information.

February 2, 1972: Petitioners were indicted by the Otero County Grand Jury on the same charge allegedly committed on the same day, viz., August 19, 1971.

February 19, 1972: Six-month period commencing with the date of petitioners' first arrest expires, an event to which petitioners seek to attach significance by reason of provisions of § 41–11–4.1, supra.

March 17, 1972: Six months from the date of the filing of the original information, an event to which petitioners seek to tie commencement of the running of Rule 95, supra.

The case, at the time of the filing of the petition for writ of prohibition, had not been tried, but was set for trial on March 22, 1972. No extension of time for the commencement of trial under either § 41–11–4.1, supra, or Rule 95, supra, has been sought or obtained by the State.

Petitioners take the position that the second prosecution, initiated by the indictment, is in truth but a continuation of the first, which was initiated by the filing of an information, and that for purposes of the statute, the time would have commenced running on August 19, 1971, and on September 17, 1971, so far as Rule 95, supra, is concerned.

We need not consider the statute. Under the doctrine of separation of powers, the matter of expediting the flow of criminal cases through the courts is a peculiarly judicial function. Rule 95, supra, covers the field on this behalf. See State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936); State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947); and Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

Concerning the application of Rule 95, supra, it provides for the commencement of trial within six months of the date of filing of *the* information or indictment and for dismissal with prejudice in event trial does not commence within the six-month period or within the period of any extension granted as provided in the rule. We are here concerned with Otero County District Court case No. 3958—the proceeding initiated by indictment. The indictment was not filed until February 3, 1972, and dismissal would not be required, absent trial or extension, until six months from that date. Cause No. 3958 superceded and supplanted No. 3922—the proceeding initiated by information.

It appears that the indictments were obtained following the termination of the first cause as a result of newly obtained evidence which presumably came to light after the filing of the *nolle prosequi*. At least it is not asserted to the contrary, and counsel for petitioners, with commendable frankness, stated in open court that he did not assert that the procedure utilized by the State was followed for purposes of delay or to circumvent the operation of Rule 95, supra.

The petitioners do raise a troublesome point which causes us concern. Petitioners say that the State could easily circumvent the operation of Rule 95, supra, by filing *nolle prosequis* and later filing new information or procuring new indictments, taking the position that each time this occurred the time laid down by the rule would not commence to run until the filing of the latest charge. Such are not the facts of this case. Should such a course of procedure be pursued in other cases, we will know how to deal with it.

We recognize that in the prosecution of criminal cases, because of fluctuations in the stories of witnesses, the unavailability and subsequent reappearance of witnesses, because of newly discovered evidence or for any one of numerous other good and sufficient reasons, a criminal prosecution may be terminated and subsequently reinstituted. However, we recognize it is possible that a district attorney might follow such a course of procedure for delay or to circumvent the operation of Rule 95, supra.

In event a defendant in a criminal case should assert that such a course of procedure has been followed for delay or to circumvent the rule, either in a motion to dismiss under Rule 95(4), supra, or in a response in opposition to the State's petition for extension under Rule 95(3), supra, the State must be prepared to demonstrate by proof the bona fides of the procedure it has utilized and that it has not been followed to delay defendant's trial beyond the six-month period, as it may have been extended, or to circumvent the operation of the rule. In event of failure of the State so to do, we would be inclined to look past the form to the substance and hold that the operative date which commenced the run-

ning of the period laid down in the rule was that on which the original indictment or information was filed.

The petition for prohibition will be denied.

It is so ordered.

COMPTON, C. J., and McMANUS, OMAN and MONTOYA, JJ., concur.

495 P.2d 1075

WAGNER LAND AND INVESTMENT COMPANY et al., Plaintiffs-Appellants,

v.

Ida May HALDERMAN and Ray Halderman, Defendants-Appellees.

No. 9323.

Supreme Court of New Mexico.
March 17, 1972.
Rehearing Denied April 19, 1972.

Arthur H. Coleman, Santa Fe, for plaintiffs-appellants.

David F. Boyd, Jr., Peter J. Broullire, III, Albuquerque, for defendants-appellees.

OPINION

MONTOYA, Justice.

Plaintiffs-appellants brought this suit in the District Court of Torrance County against defendants-appellees seeking to quiet title to certain realty located in that county. Defendant Ida May Halderman filed her answer denying plaintiffs' claim, asserting several affirmative defenses. Both parties filed motions for summary judgment. The trial court made no ruling on the motions and the cause was submitted to the trial court for decision, based upon the pleadings, affidavits and depositions on file. On April 16, 1971, the court entered its judgment containing findings of fact and conclusions of law dismissing the plaintiffs' complaint with prejudice. The judgment included a finding that the defendant Ida May Halderman, during the pendency of the suit, had conveyed her interest to Ray Halderman. By order entered on the same date as the entry of the judgment, Ray Halderman was made a party defendant.

Plaintiffs appeal from the judgment of the trial court, contending that they are the

owners of the property in question; that they were not divested of title to the property by the exercise of an option by the defendants to repurchase the property given by plaintiffs' predecessor in title; and that they were not divested of title by the issuance of a tax deed to defendant Ida May Halderman by the State of New Mexico, or by adverse possession. In summary, plaintiffs seek a review of the evidence, contending that it does not support the judgment entered by the trial court.

Defendants contend inter alia that the plaintiffs, not having timely filed their requested findings of fact and conclusions of law, are not entitled to a review of the evidence by this court.

The chronology of events material to the determination of this appeal is as follows:

(1) March 17, 1971: Requested findings of fact and conclusions of law filed by defendants.

(2) April 16, 1971: Order joining Ray Halderman as a party defendant and granting him leave to adopt amended answer and requested findings theretofore filed as his own.

(3) April 16, 1971: Judgment of dismissal with prejudice entered.

(4) May 17, 1971: Motion by plaintiffs seeking relief from judgment or, in the alternative, allowing them to file requested findings nunc pro tunc, as of April 15, 1971.

(5) May 17, 1971: Notice of appeal filed by plaintiffs.

(6) June 28, 1971: Order both permitting plaintiffs to file their requested findings nunc pro tunc as of April 15, 1971, and refusing to adopt them.

(7) June 28, 1971: Requested findings of fact and conclusions of law filed by plaintiffs.

Defendants argue that the trial court was without jurisdiction to allow the filing of plaintiffs' requested findings of fact subsequent to the entry of judgment. Plaintiffs contend that the trial court's judgment is not supported by the evidence. We have repeatedly held that there can be no review of the evidence on appeal where the party seeking the review has failed to submit requested findings of fact and conclusions of law. McNabb v. Warren, 83 N.M. 247, 490 P.2d 964 (1971); Speechly v. Speechly, 76 N.M. 390, 415 P.2d 360 (1966); Owensby v. Nesbitt, 61 N.M. 3, 293 P.2d 652 (1956).

The crucial question is whether the plaintiffs requested findings were timely filed, and whether the trial court had jurisdiction to permit their filing nunc pro tunc as of April 15, 1971, the day before the entry of the final judgment.

An examination of the record reveals that plaintiffs did not request permission from the trial court to file requested findings until May 17, 1971, some twenty-nine days after the entry of judgment. Rule 52(B)(a)(6), Rules of Civil Procedure (§ 21-1-1(52)(B)(a)(6), N.M.S.A., 1953 Comp.), provides that a party will waive specific findings of fact and conclusions of law if he fails to make a general request therefor in writing, or if he fails to tender specific findings and conclusions. Rule 52(B)(b), Rules of Civil Procedure (§ 21-1-1(52)(B)(b), N.M.S.A., 1953 Comp.), allows only ten days after entry of judgment for the filing of a motion to have the court amend its findings, or make additional findings, and to amend the judgment accordingly. No such motion was filed within ten days in the instant case. Additionally, under the terms of Rule 6(b), Rules of Civil Procedure (§ 21-1-1(6)(b), N.M.S.A., 1953 Comp.), the court cannot extend or enlarge the time for taking any action under Rule 52(B)(b), supra, except under the conditions stated in such Rule. No provision for extending the time is contained in Rule 52(B)(b), supra.

In plaintiffs' motion for relief from judgment, plaintiffs admit that on or about March 17, 1971, the defendants served them with notice that the trial court would settle requested findings of fact and conclusions of law on April 15, 1971.

We next consider the effect of § 21–9–1, N.M.S.A., 1953 Comp. Under the terms of this statute, the district court retains control of its judgments and decrees for a period of thirty days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any motion directed against such judgment. The statute also requires the court to rule upon such motions within thirty days after filing. Under the statute, failure to rule is deemed a denial of the motion. In the instant case, the motion for relief from the judgment was filed in the trial court on May 17, 1971. The motion was not acted upon by the trial court until June 28, 1971. No ruling having been made during the required thirty days, the motion was denied by operation of law. See National American Life Insurance Co. v. Baxter, 73 N.M. 94, 385 P.2d 956 (1963). In view of the foregoing, we hold that the trial court was without jurisdiction to permit the filing of plaintiffs' requested findings of fact and conclusions of law.

Defendants further question the authority of the trial court to permit the filing of requested findings and to rule upon them after the notice of appeal had been filed. This court has held that the trial court loses jurisdiction of the case upon the filing of the notice of appeal, except for the purposes of perfecting such appeal, or of passing upon a motion directed to the judgment pending at the time. Mirabal v. Robert E. McKee, General Contractor, Inc., 74 N.M. 455, 394 P.2d 851 (1964); National American Life Insurance Co. v. Baxter, supra.

We hold that plaintiffs' failure to timely request findings of fact and conclusions of law constitutes a waiver of same, and that they cannot obtain a review of the evidence on appeal. Kipp v. McBee, 78 N.M. 411, 432 P.2d 255 (1967). Therefore, the findings and conclusions, as made by the trial court, are binding upon us. Our ruling forecloses consideration of plaintiffs' contentions which seek a review of the evidence.

The judgment of the trial court is affirmed.

It is so ordered.

COMPTON, C. J., and STEPHENSON, J., concur.

495 P.2d 1078

Dennis Paul CARLTON and Pearl Diana Carlton, Petitioners,

v.

STATE of New Mexico, Respondent.

No. 9430.

Supreme Court of New Mexico.

March 22, 1972.

Further ordered that the record in Court of Appeals Cause No. 688, 83 N.M. 644, 495 P.2d 1091, be and the same is hereby returned to the Clerk of the Court of Appeals.

495 P.2d 1078

Fread L. WARNER, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 9438.

Supreme Court of New Mexico.

April 12, 1972.

Further ordered that the record in Court of Appeals Cause No. 777, 83 N.M. 642, 495 P.2d 1089, be and the same is hereby returned to the Clerk of the Court of Appeals.

495 P.2d 1079

STATE of New Mexico, Plaintiff-Appellee,

v.

Juan VALDEZ, Defendant-Appellant.

No. 490.

Court of Appeals of New Mexico.
Jan. 21, 1972.
Rehearing Denied Feb. 16, 1972.
Certiorari Granted April 10, 1972.

Barry Rudolf, Santa Fe, for appellant.

David L. Norvell, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

COWAN, Judge.

Defendant appeals from a judgment and sentence following his conviction of assault with intent to commit a violent felony, § 40A-3-3, N.M.S.A.1953 (Repl.Vol. 6), and false imprisonment, § 40A-4-3, N.M.S.A. 1953 (Repl.Vol. 6). Trial was in Bernalillo County on a change of venue.

We affirm.

The defendant was one of eleven persons against whom various charges were filed, arising out of a raid on the Rio Arriba County Courthouse on June 5, 1967. The matter was given extensive press coverage and there was a great deal of public excitement, high feeling and prejudice in the area.

After a venue hearing, the court entered findings of fact as follows:

"1. That there exists in the three counties of the First Judicial District, widespread and general local prejudice, knowledge, and public excitement concerning the subject matter of this case.

"2. That there are grounds for a reasonable apprehension, and it is probable, that the parties herein will not secure a trial in the First Judicial District by a fair and impartial jury, due to the widespread and general knowledge, prejudice, and public excitement and public involvment [sic] in the subject matter of this case.

"3. That by reason of the present existence of public excitement, sentiment, and impressions still in the minds of the people generally, and opinions formed and expressed, and the at large knowledge and publicity by word of mouth as well as the news media, the parties cannot receive a trial by a fair and impartial jury in the First Judicial District.

"4. That Bernalillo County is free from exception; and there is not such general and widespread knowledge and involvement and public excitement in connection with the subject matter of this case, as to prevent a fair and impartial trial there by jury, and the parties can receive a trial in Bernalillo County by a fair and impartial jury.

"5. That the county which has the most cosmopolitan population in the State of New Mexico and which from all points of view, is most likely to provide citizens and residents for jury service with minds open and free of preconceived notions as to the guilt or innocence of any of the defendants, and in which the parties to this cause, the State as well as all of the defendants, are the most certain to get a fair and impartial trial is the County of Bernalillo."

Based on these findings, the court concluded:

"1. That the venue herein should be changed from the First Judicial District,

for the reason that the parties herein cannot receive a trial by a fair and impartial jury in said judicial district.

"2. That none of the three counties of the First Judicial District is free from exception; and the County of Bernalillo is in a contiguous judicial district, and is free from exception."

An order was entered changing venue from all counties of the First Judicial District to the County of Bernalillo.

It is this change of venue which defendant first urges as error. For unexplained reasons, the record, while extensive, is not complete. There were various pleadings and motions which do not appear in the record but whose existence is established by dispositive action of the court. Such is true of various motions for changes of venue, including one in cause No. 4028, of which defendant now complains under his first point.

Hearing on the venue question was set for September 9, 1968. When court convened that morning, the attorneys for all the defendants were present and extended conversations were had between the court, defense counsel and the prosecution. The record is clear that there had been several motions for changes of venue by some of the defendants, although none by the defendant here, as well as by the state. The state's original motion for a change of venue did not include cause No. 4028. Most of the morning was taken up with a discussion of venue.

Recessing until 1:00 P.M., the court announced it would at that time proceed with hearing testimony on the venue question, stating its position as follows:

"I'll tell you what I'm going to do, gentlemen, in view of, they have changed their motion for Change of Venue now at this late hour when all the witnesses have been called for the purpose directed at the Motions, as the[y] existed as of 9:00 o'clock this morning. I am going to give the State the right to file whatever Motions or Affidavits they have concerning any change of venue they may feel they want filed. Court will be in recess until 1:00 o'clock this afternoon. I think before the Court takes a recess I want the record to show that one of the reasons, this matter is being put off and not acted upon as it should be is because of these late changes that are being made by the defendants in the case. And that the State is not entirely to blame for the continuances in this case in asking for more time."

The defendant's objection to the venue hearing was couched in the following language:

"The defendants Juan Valdez * * * object to proceeding upon the amended Motion for Change of Venue filed by the State of New Mexico, in cases * * * and 4028 upon the grounds that, one: the District Attorney's Office has had many months to file a Motion for a Change of Venue with respect to Santa Fe County, and has not seen fit to do so, except within the last few minutes. And it is contrary to the Court's order that all Motions be filed by the 19th day of August. Number two: upon the grounds that the amended Motion was served upon counsel for all defendants herein, just within the last few minutes. And we are entitled to five days notice before appearing upon the Motion for Change of Venue."

Defendant's objections were directed to the state's amended motion, which included cause No. 4028, and are of a general nature although the grounds were specific. He made no claim of prejudice because of the time of the venue hearing. He made no claim that he was unprepared or that he was unable to produce witnesses. He made no claim of surprise nor did he ask for a continuance or postponement. He fully participated in the entire hearing. He does not attack the sufficiency of the evidence supporting the court's change of venue order. He has failed to show, in any particular, how the claimed errors surrounding the hearing on the change of venue constituted a denial of due process. Hanson v.

State, 79 N.M. 11, 439 P.2d 228 (1968). In his brief, defendant further argues a constitutional right to be tried in the county of the offense, lack of affidavit under the change of venue statute and lack of timely filing. Section 21-5-3, N.M.S.A.1953 (Repl.Vol. 4). None of these were raised in the trial court; however, the previous discussion hereinabove disposes of them.

Although the foregoing very well disposes of defendant's first point, we believe the inherent power of the court to be even more decisive. Under the facts of the incident out of which the charges against the defendant arose, with the attendant publicity and the fear, unrest and prejudice of the citizens of Rio Arriba and surrounding counties, the trial court's inherent power permitted it to order a change of venue on its own motion.

The right to trial by an impartial jury is a right extending to the public, represented by the state, as well as the criminally accused. State v. Archer, 32 N.M. 319, 255 P. 396 (1927). In State v. Holloway, 19 N.M. 528, 146 P. 1066 (1914), our Supreme Court said:

> "As indicated by this opinion thus far, we agree with those courts which have held that an exception to the general rule [that the accused has a right to trial by an impartial jury in the district in which the offense was alleged to have been committed] must be made when an impartial jury cannot be obtained, assuming that statutory authority for a change of venue exists, and that this was the true rule of the common law.
>
> "While of this opinion we desire to make our position plain, it is our conclusion that by the common law an accused had the right to be tried in the county in which the offense was alleged to have been committed, where the witnesses were supposed to have been accessible, and where he might have the benefit of his good character if he had established one there, but, if an impartial trial could not be had in such county, it was the practice to change the venue upon application of the people to some other county where such trial could be obtained."

While *Holloway* did not answer the question of a trial court's inherent power to change venue, it did answer the question of whether the adoption of our constitution modified or reduced the court's common law power to order a change of venue. The court stated:

> "'* * * Our duty in this case is therefore to ascertain whether it was the understanding of the framers of the constitution, and the people who adopted it, that the right of trial by jury included, as one of its substantial elements, an absolute right to a trial by a jury of the county where the offense was committed. If such was their intent it must be given effect, the same as though it had been expressly written into the constitution. We are unable, however, to find any ground whatever to sustain the existence of any such intent. On the contrary, there is, in our opinion, convincing evidence that the right of a trial by jury as that right was known at the time of the adoption of the constitution, did not include an absolute right to a trial by a jury of the county where the offense was committed, but that the right was conditioned upon the possibility of a fair and impartial trial being had in that county. In other words, the right of trial by jury, as it now exists, with the right on the part of the state to secure a change of venue to another county when necessary for a fair and impartial trial, is the same as existed when the constitution was adopted.'"

A history of the inherent power of the court to order a change of venue is extensively set out in Crocker v. Justices of Superior Court, 208 Mass. 162, 94 N.E. 369 (1911). The following language in that case is most expressive:

> "The weight of opinion in those of the older states, whose judicial history is most nearly like our own, supports the view that it is an inherent power of

common law courts to order a change for the purpose of securing an impartial trial. Cocheco Railroad v. Farrington, 26 N.H. 428, at 436, held that the power of the courts of England to transfer the trial of transitory actions 'became thoroughly ingrafted upon the common law long before the independence of the country; and from that time forth not only has the practice prevailed in the courts of England but the power is now exercised by the courts of very many if not all our states, either by force of direct statute or the adoption of the common law in the jurisprudence of the same.' * * *"

* * * * * *

"* * * 'All laws for removal of causes from one vicinage to another, were passed for the purpose of promoting the ends of justice by getting rid of the influence of some local prejudice which might be supposed to operate detrimentally to the interests and rights of one or the other of the parties to the suit. This is a common-law right belonging to our courts, and as such can be exercised by them in all cases, when not modified or controlled by our constitutional or statutory enactments.' * * *"

* * * * * *

"This review demonstrates that the great weight of authority supports the view that courts, which by statute or custom possess a jurisdiction like that of the King's Bench before our Revolution, have the right to change the place of trial, when justice requires it, to a county where an impartial trial may be had.

"* * * There can be no justice in a trial by jurors inflamed by passion, warped by prejudice, awed by violence, menaced by the virulence of public opinion or manifestly biased by any influences operating either openly or insidiously to such an extent as to poison the judgment and prevent the freedom of fair action. Justice cannot be assured in a trial where other considerations enter the minds of those who are to decide than the single desire to ascertain and declare the truth according to the law and the evidence. A court of general jurisdiction ought not to be left powerless under the law to do within reason all that the conditions of society and human nature permit to provide an unprejudiced panel for a jury trial. Without such a power it might become impossible to do justice either to the general public or to the individual defendant. Our system of government has created the executive, the legislative and the judicial, as three independent and co-ordinate departments, and in strong and comprehensive language has prohibited each from attempting to exercise the functions of either of the others 'to the end that it may be a government of laws and not of men.' The courts of general jurisdiction under such a Constitution have the inherent power to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial, whenever his life, liberty, property or character is at stake. The possession of such power involves its exercise as a duty whenever public or private interests require."

Crocker was cited with approval by the United States Supreme Court in Groppi v. Wisconsin, 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971). In State v. Alfonsi, 33 Wis.2d 469, 147 N.W.2d 550 (1967), it was said:

"When it appears that dispassionate evaluation of the evidence is rendered doubtful because of the pressure of publicity, the trial court must act *sua sponte*. In [Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)] the court observed: '* * * [W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county not so permeated with publicity.'"

New Mexico has adopted the common law. Section 21–3–3, N.M.S.A. 1953 (Repl. Vol. 4); Sandoval v. Albright, 14 N.M. 345, 93 P. 717 (1908), affirmed 216 U.S. 331, 30 S.Ct. 318, 54 L.Ed. 502. We find nothing in the constitution or statutes limiting the inherent power of the court in this respect. There are statutes which provide procedures by which either party may invoke a ruling of the court by motion and affidavit but we do not deem these in any way restrictive of the court's inherent common law powers. State v. Holloway, supra; So. Union Gas Co. v. City of Artesia, 81 N.M. 654, 472 P.2d 368 (1970).

The process of determining whether or not the facts necessary for a change of venue exist is the same as that followed in determining any other fact in a case. McCauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968); State v. Nabors, 32 N.M. 453, 259 P. 616 (1927). The trial court was not in error in ordering a change of venue.

Defendant further argues that he was "unjustly prejudiced by the admission of evidence relating to crimes for which he was not on trial." This argument is predicated upon a remark made during the state's opening statement to the jury and testimony from state's witnesses. The defendant was on trial for assault with intent to commit a violent felony and for false imprisonment of two persons. The prosecution mentioned, in its opening statement, that "a number of people * * * were * * * placed in the County Commissioners' room and held there against their will * * *". Defendant asserts this statement accuses him of additional crimes. If the variance was prejudicial, which is questionable (see State v. Martinez, 83 N.M. 9, 487 P. 2d 919 [Ct.App.1971]), the court's specific admonishment to the jury shortly after the statement was made, together with later general instructions on the subject, was curative. State v. Ferguson, 77 N.M. 441, 423 P.2d 872 (1967). He also asserts that there was objectionable testimony regarding the condition of the premises, the crime of assault, destruction of property and other acts of the defendant which constituted criminal offenses for which he was not on trial.

The testimony of which the defendant complains was evidence tending to throw some light upon the guilt of the defendant and having a logical connection with the crimes with which he was charged. Evidence which is competent, relevant and material cannot be excluded solely because it also tends to prove the person on trial guilty of some other crime. The courthouse disturbance involved numerous persons, including eleven defendants, and covered a substantial period of time and activity. The movements and conduct of the defendant during this period were clearly admissible to establish his identity, to detail his activities and to characterize his attitude of mind at the time. State v. Borrego, 52 N.M. 202, 195 P.2d 622 (1948). State v. Rowell, 77 N.M. 124, 419 P.2d 966 (1966), relied on by the defendant, is distinguishable upon its facts. There, a single question (asked by the prosecution) was in itself so deliberately improper that its effect could not be erased by admonishment of the jury. Here, the questions of the prosecutor do not indicate in any manner that the state was proceeding in bad faith. The court properly admonished the jury when necessary. Admission or exclusion of evidence is a matter within the discretion of the trial court and the court's determination will not be disturbed on appeal in the absence of a clear abuse of that discretion. Garrett v. Howden, 73 N.M. 307, 387 P.2d 874 (1963).

Defendant next complains that he was forced to stand trial on a charge for which he received no notice prior to the day of trial. One of the charges against him was the kidnapping of Pete Jaramillo. Four days before trial he was advised that the charge would be changed to false imprisonment of Pete Jaramillo. The state claimed the substitution was necessary by the decision of the Supreme Court in State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969).

The defendant argues that he did not have "official" notice of the specific charge until the day of trial. His objection to proceeding to trial was *pro forma* only. He requested no continuance; he made no plea of surprise; he made no claim that he was not prepared for trial, nor did he assert prejudice. His claim of error is without merit. State v. Alarid, 40 N.M. 450, 62 P.2d 817 (1936). See also State v. Edwards, 54 N.M. 189, 217 P.2d 854 (1950).

Defendant argues that the court failed to "properly exercise its discretion when it refused to excuse" a prospective juror for cause. This juror, on voir dire, stated that she watched television, listened to the radio and read the newspaper frequently; that she had formed an opinion that violence occurred at the Rio Arriba County courthouse on June 5, 1967, and that any association between the "Alianza" movement and such violence would possibly influence her decision in the case. She stated that she did not know who the defendant was, where he was on June 5, 1967, or that he was an associate of Reis Lopez Tijerina. She testified that it would have to be proved to her that the defendant was there and that he committed the crimes. She advised the court that she would return a verdict based solely on the evidence and the law given her by the court.

The trial court has the duty of seeing that there is a fair and impartial jury. In doing so it must exercise discretion. The trial court's decision will not be disturbed unless there is a manifest error or a clear abuse of discretion. We find none here. 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); see State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969).

Defendant argues finally that he "was deprived, through the cumulative prejudicial errors of the Trial Court below, of a fair trial and thereby of due process of law." Although this argument is not the doctrine of fundamental error stated in his brief as the subject matter of this point, the doctrine of cumulative error exists in New Mexico and may be raised as an issue on direct appeal. State v. Gutierrez, 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967). The defendant seeks a reversal on the grounds that "the cumulative prejudice was so great as to deprive him of a fair trial and thereby deny him due process of law." He does not point to any matter not already raised and answered in this opinion. Compare State v. Roybal, 76 N.M. 337, 414 P.2d 850 (1966). He was afforded a fair trial and his argument is, therefore, without merit.

The judgment and sentence is affirmed. It is so ordered.

WOOD, C. J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

I respectfully dissent. Let us remember that the Constitution of the United States and of the State of New Mexico seek to protect an accused in a criminal case and not the government. We must not place the guilt or innocence of an accused in a judicial district decided by the discretion of a trial court contrary to law.

On April 18, 1968, in Cause *No. 4028,* the state filed a criminal information with twenty-eight separate counts in *Rio Arriba County* against eleven defendants, including Juan Valdez, for events which occurred June 5, 1967.

On change of venue, Valdez was tried and convicted in *Bernalillo County,* and judgment and sentence filed July 14, 1969. Notice of appeal was filed July 14, 1969.

On November 4, 1970, this court ordered the Clerk of the District Court for the Second Judicial District to prepare and file in this court all exhibits and all pleadings relating to change of venue in Cause No. 4028, together with a supplemental transcript to contain hearings on motions for change of venue.

Apart from Cause No. 4028, the record includes a criminal information for kid-

napping in Cause No. 4001 filed in Rio Arriba County on April 18, 1968, and a motion for change of venue in that cause filed by the state on May 13, 1968. *No motion, written, oral, or amended, for change of venue by the state from Rio Arriba County of the First Judicial District in Cause No. 4028 appears in the record.* Valdez did not file a motion for change of venue.

On September 9, 1968, in Cause No. 4028, a hearing occurred on the issues of change of venue and dismissal. Nine attorneys for defendants and three prosecuting attorneys for the state were present. Prior to the hearing, the trial court said:

> * * * I intend to take up whatever motions are pending on change of venue from anybody.

The assistant district attorney said:

> We filed a Motion for Change of Venue in everyone of the cases, 4000, 4001, *all except in 4028.* [Emphasis added.]

The court then said:

> Then as I get it, the Motion you have filed applies to all the cases pending directly.
>
> * * * * * *
>
> The one that is in the court file is dated May 13, 1968. [This is Cause No. 4001.]

After some discussion over a purported motion by the state for change of venue having been filed June 8, 1967, the court said:

> I think the record will show that the Motion for Change of Venue was originally filed by the District Attorney in Cause No. 3938, which was a hearing before a committing Magistrate. That is what this file is, which later resulted in the filing of an Information.

Any claimed motion, oral or written, for change of venue in Cause No. 3938, a hearing before a magistrate, which later became Cause No. 4028, does not appear in the record.

When the testimony began, Valdez objected to the entire line of testimony; that it was mandatory to try the case in Santa Fe County, if the court found Rio Arriba and Los Alamos Counties not free from exception; that a change of venue to the Second Judicial District was moot by reason of an amended motion for change of venue by defendants Madril and Velasquez. The defendants, including Valdez, agreed that this constitutional right demanded they be tried in Rio Arriba County.

The trial court granted the state the right to file whatever motions or affidavits it had concerning change of venue. The trial court excluded Bernalillo County unless the state controverted this issue in the record. The state responded, "We have written pleadings, we have done so." *These written pleadings do not appear in the record.* This entire proceeding was a hodge-podge of dilly-dally by the state.

Nevertheless, the trial court proceeded with testimony, made findings of fact and conclusions of law, and entered an order changing venue from Rio Arriba County in the First Judicial District to Bernalillo County in the Second Judicial District.

This court is bound by the record on appeal. Our duty is to "examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, . . ." Section 21-2-1(17) (1), N.M.S.A.1953 (Repl. Vol. 4).

Under Article II, Section 14 of the New Mexico State Constitution, the accused shall have "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The word "district" does not mean "judicial district," but simply means the county over which a court may have jurisdiction. It is a right or privilege that may be waived. State v. Balles, 24 N.M. 16, 172 P. 196 (1918); State v. Holloway, 19 N.M. 528, 146 P. 1066 (1914).

This constitutional provision is supported by § 40A-1-15, N.M.S.A.1953 (Repl.Vol. 6) which provides in part:

> All trials of crime shall be had in the county in which they were committed.

However, if an impartial jury cannot be obtained in the county in which the offense was committed, the constitutional guaranty for that county no longer controls. It is even the duty of the state to see that a defendant has a fair trial under all the circumstances. State v. Archer, 32 N.M. 319, 255 P. 396 (1927).

In 1965, the legislature amended the venue statutes, §§ 21-5-3 and 21-5-7, N.M.S.A.1953 (Repl.Vol. 4). These amendments allowed a change of venue from one *judicial* district to another. A question arises whether these amendments conflict with the New Mexico Constitution and statute mentioned supra. See State v. Holloway, supra. This question I leave for future consideration.

Questions of venue in criminal cases "raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it." United States v. Johnson, 323 U.S. 273, 65 S.Ct. 249, 89 L.Ed. 236 (1944).

The question now is: Did the trial court have the power to order a change of venue to a different judicial district contrary to statutory law? The answer is "no."

Section 21-5-3(B), supra, reads as follows:

> Any party in any civil or criminal case at issue who desires a change of venue from the county in which the case is pending, and who objects to a change of venue to any other county within the same judicial district for any of the grounds stated in subsection A of this section *shall move for a change of venue on or before the first day of any regular or special term of court.* [Emphasis added.]

It should be noted that the only essential element for the change of venue to a different judicial district is that a party *shall move* for a change of venue at a specific time.

State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. den. 391 U.S. 927, 88 S.Ct. 1829, 20 L.Ed.2d 668, held that the trial court cannot order change of venue to an adjoining judicial district when an amended motion was not timely filed, even though evidence was taken, because (1) the amended motion supersedes the original motion, and the amended motion only can be considered; and (2) the evidence cannot change the rule of § 21-5-3(B), supra.

The regular terms of Rio Arriba County in 1968 commenced on the third Monday of June and the first Monday of December. Laws of 1961, ch. 188, § 2, [§ 16-3-12.1, since repealed]. The criminal information was filed April 26, 1968. The state did not move for change of venue from the first judicial district on or before June 17, 1968. The order granting the change was void.

The change of venue provisions are mandatory. Deats v. State, 80 N.M. 77, 451 P.2d 981 (1969). Where the statute is violated, the conviction cannot stand. State v. Alaniz, 55 N.M. 312, 232 P.2d 982 (1951).

Furthermore, § 21-5-4, N.M.S.A.1953 (Repl.Vol. 4) provides:

> Upon the *filing* of a motion for change of venue, the court may require evidence in support thereof, and upon hearing thereon shall make findings and either grant or overrule said motion. [Emphasis added.]

Where a motion for change of venue is not filed by any party, the trial court does not, under mandatory provisions of a statute, have the inherent power to conduct a hearing and change the venue from one judicial district to another.

The court may require a hearing only "upon the *filing* of a motion for change of venue." Section 21–5–4, supra.

To grant this power in the absence of a motion filed, would deprive the accused of his constitutional right to a speedy, public trial by an impartial jury in the county in which the offense is alleged to have been committed. I believe this principle is strongly indicated in our judicial history. In State v. Holloway, supra, the court said:

> In all that we have had to say upon this subject we desire to be understood as holding that where a trial by an impartial jury can be secured in the county where the crime is committed, *the accused can not be deprived of a trial there, even under the sanction of our legislation upon the subject of change of venue.* This is necessarily so under our legislation as to the right to "a speedy public trial by an *impartial* jury of the county", if one be obtainable. [Prior emphasis added.]

In the absence of a motion filed for change of venue, the trial court must call the case for trial in Rio Arriba County to determine whether Valdez can obtain an impartial jury. If he can, then the trial court does not have the power to change the venue by prior hearing, or otherwise. Under the above circumstances, Valdez cannot be tried in another county without his consent and no act of the legislature can deprive him of that right.

In State v. Lindsey, 81 N.M. 173, 464 P. 2d 903 (Ct.App.1969), there is a discussion of the right to raise the issue of change of venue at a date following that provided by statutory provisions when it is the only manner available under the circumstances.

For example, if, during interrogation of jurors, it was clear that Valdez or the state could not obtain an impartial jury, an oral or written motion for a change of venue could then be made. It would be the only manner available under the circumstances. Even if this exception were applicable here, the record does not show that the state could not have made a motion prior to June 17, 1968, nor does it show that the hearing on September 9, 1968, was the only manner available under the circumstances in which to move for change of venue from one judicial district to another.

The majority opinion relies upon the fact that New Mexico adopted the common law. "This rule does not obtain, however, when the subject matter of any procedural right is fully covered by statute or rule." Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957). To my mind, the statutes related to change of venue abrogated any common law rule of inherent power in the trial court to change venue directly contrary to the language of the statutes. Southern Union Gas Company v. City of Artesia, 81 N.M. 654, 472 P.2d 368 (1970). For a case which distinguishes Crocker v. Justices of Superior Court, 208 Mass. 162, 94 N.E. 369, 21 Ann.Cas. 1061 (1911), see State ex rel. Fox v. LaPorte Circuit Court, 236 Ind. 69, 138 N.E.2d 875 (1956).

In criminal cases, the state cannot piddle around for change of venue from county to county or judicial district to judicial district. "Venue is important as a guaranty of the defendant's right to be tried in the vicinity of his criminal activity, and venue requirements are imposed to prevent the government from choosing a favorable tribunal or one which may be unduly inconvenient for the defendant." United States v. Rivera, 388 F.2d 545 (2nd Cir. 1968), cert. den. 392 U.S. 937, 88 S.Ct. 2308, 20 L.Ed.2d 1396. "* * * [I]t is the public policy of this Country that one must not arbitrarily be sent, without his consent, into a strange locality to defend himself against the powerful prosecutorial resources of the Government." Dupoint v. United States, 388 F.2d 39 (5th Cir. 1967).

It is a sad commentary that more than three years have passed since Valdez was charged with a criminal offense; that twenty-two months were wasted to perfect the appeal; that motions for change of venue and controverted pleadings were not

filed of record; that timeliness, form and substance were absent. This may be charged to the circumstances surrounding an information filed by the state with eleven defendants, twenty-eight separate counts against individuals and groups, sixty-seven listed witnesses, disqualification of district judges, and filed nine months after the alleged offenses were committed. Experience teaches that confusion, error and injustice can arise as easily as the crow flies and as free as the wind.

The conviction and sentence should be reversed. Valdez should be granted a new trial in Rio Arriba County.

495 P.2d 1089

STATE of New Mexico, Plaintiff-Appellee,

v.

Fread L. WARNER and L. C. Warner, Defendants-Appellants.

No. 777.

Court of Appeals of New Mexico.

March 10, 1972.

Certiorari Denied April 12, 1972.

Eugene E. Brockman, Tucumcari, for appellants.

David L. Norvell, Atty. Gen., Winston Roberts-Hohl, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

COWAN, Judge.

Defendants were charged with larceny of property belonging to the Town House Motel and the Amco T. V. Rental Company, contrary to § 40A-16-1, N.M.S.A.1953 [Repl. Vol. 6, 1971 Supp.]

They appeal their convictions and sentences following a trial to the court.

We affirm.

At approximately 2:30 on the morning of April 7, 1971, the defendants, with two other persons, checked into two rooms in the Town House Motel in Tucumcari. They were driving a 1962 blue and white Chrysler automobile, New Mexico license 3-8711. The manager became suspicious after talking with the manager of a nearby motel and called the police, who patrolled the area until shortly after 4:00 A.M. when they noted the car was gone. The manager went to the rooms and discovered that two portable television sets and other items were missing from the rooms. Arrest warrants were issued for the defendants. Officer Perea, of the Santa Rosa Police Department, having received a radio message, stopped the defendants on the west city limits of Santa Rosa and booked them in the Santa Rosa jail. Within half an hour of the defendants' arrival at the jail, Officer Perea and the Santa Rosa desk sergeant looked in the car and found a television set on the back seat, covered by a blanket.

The defendants were then returned to Tucumcari where a warrant to search the car was issued. One Gene Warner, a brother of the defendants, and owner of the car, was present and gave his consent to its search. In addition to the television set in the car, the police found another in the trunk along with miscellaneous items of bedding and equipment belonging to the motel.

Defendants first urge error in the court's permitting testimony from a witness, brother of the defendants, who had been in the courtroom during the trial although the witness sequestration rule had been invoked.

Defendants admit that no new testimony was elicited from this witness and they neither claim nor argue prejudice. We find nothing in the record to indicate an abuse of discretion on the part of the trial court in permitting testimony of the witness. State v. Carrillo, 82 N.M. 257, 479 P.2d 537 (Ct.App.1970), or prejudice to the defendants. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct.App.1969).

Defendants next argue that the court erred in "convicting the defendants with evidence that was the fruit of an illegal search." The arrest of the defendants in Santa Rosa was occasioned by warrants issued in Tucumcari and broadcast by radio to Santa Rosa. There was probable cause for the arrest in Santa Rosa and detention of the vehicle. The Santa Rosa officers looked in the car approximately one-half hour after the defendants were taken into custody and the presence of one of the television sets was noted. The set was not seized at that time. The search was reasonably incident to the arrest. State v. Courtright (Ct.App.), 83 N.M. 474, 493 P.2d 959, decided January 21, 1972. After the defendants and the car were returned to Tucumcari a search warrant was issued and, in addition, the owner of the vehicle consented to a search. This search was independent of any which might have been made in Santa Rosa and was based upon information obtained from the motel manager and the affidavit of a member of the Tucumcari Police Department familiar with the circumstances. The search was lawful. This point is without

merit. State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct.App.1970).

Finally, the defendants urge that the admission of the television sets in evidence was error since they were not properly described in the search warrant. The search warrant issued in Tucumcari was directed to two General Electric portable television sets. The set in the trunk was a General Electric but the one inside the car was a Packard Bell.

The warrant described the place to be searched as "1962 CHRYSLER BEARING LIC. #3-8711 N.M." and described the property as "TWO G. E. PORTABLE TV'S BLACK & WHITE, CH SELECTOR KNOB HAS INSCRIPTION OF MRPH. COLOR OFF WHITE. RENTAL NUMBER IN YELLOW ON BACK OF SETS LEFT REAR. 1 SHOWER CURTAIN. 1 PINK BED SPREAD TOWELS AND PILLOW."

Article II, Section 10 of the New Mexico Constitution states:

> "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation."

Not only did the owner of the vehicle give an unrestricted consent to its search, it is established law in New Mexico that if officers, conducting a lawful search for property illegally possessed (the General Electric television set), discover other property illegally possessed, the latter may be seized also. State v. Carlton, 82 N.M. 537, 484 P.2d 757 (Ct.App.1971). The television sets were admissible in evidence.

The convictions and sentences are affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

495 P.2d 1091

STATE of New Mexico, Plaintiff-Appellee,

v.

Dennis Paul CARLTON and Pearl Diana Carlton, Defendants-Appellants.

No. 688.

Court of Appeals of New Mexico.
Jan. 21, 1972.
Rehearing Denied Feb. 16, 1972.
Certiorari Denied March 22, 1972.

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Fred T. Hensley, Portales, David W. Bonem, Clovis, for defendants-appellants.

David F. Norvell, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

COWAN, Judge.

On September 4, 1968, Dennis Paul Carlton and his wife, Pearl Diana Carlton, were charged with murder in Roosevelt County, New Mexico, contrary to § 40A-2-1, N.M.S.A.1953 (Repl.Vol. 6). A first trial, held in Curry County on a change of venue, resulted in a mistrial after the jury was unable to reach a verdict. A second trial resulted in a conviction for second degree murder, from which conviction defendants appealed. Their conviction was reversed by the Court of Appeals [State v. Carlton, 81 N.M. 753, 473 P.2d 367 (Ct. App.1970)] and a new trial ordered. The third trial was held in Lea County, on a second change of venue, and the defendants were again convicted of second degree murder. From a judgment and sentence entered following this conviction, defendants appeal, urging error under 13 points. We affirm.

On August 18, 1968, at 8:22 P.M., the Portales Police Department was advised

by a witness that a break-in had occurred at the B & J Drug Store in Portales. Officers found the rear door to the drugstore had been broken open and the body of Elbert Muncy, a pharmacist employed by the drugstore, in the storeroom. His death was caused by multiple gun shot wounds. Defendant Pearl had been an employee of the drugstore for a little over six months.

POINT I.

Defendants' first point concerns the admission into evidence of eight photographs and one diagram. Three of the photographs and the diagram depicted the interior of the store in which the crime was committed. Defendants claim error in the admission of the three photographs because the lighting was not the same as at the time of the alleged murder. Another objection was that one of the three photographs showed two persons standing in the counter area while witness testimony was that individuals seen in the drugstore were "moving rapidly". Defendants' objection to the diagram was that, in the two-week interval between the day of the murder and the day of the preparation of the drawing, "some changes may have taken place". This seems to have been predicated on the fact that merchandise would change during the period. Since the diagram was introduced to indicate the height of the counters, there would be no prejudice to the defendants, the amount or position of the merchandise being immaterial.

Four of the photographs were of the body of the deceased and defendants claim these to be "duplicatory, repetitious and highly prejudicial to the defendants."

The eighth photograph was of defendant Pearl taken in the Roosevelt County Sheriff's office with her height indicated by markings in the background. She claims the photograph depicted her as a criminal.

> "The question of admission of photographs into evidence rests largely within the discretion of the trial court; and ordinarily his decision on the question will not be disturbed. * * *"

State v. Sedillo, 76 N.M. 273, 414 P.2d 500 (1966); State v. Johnson, 57 N.M. 716, 263 P.2d 282 (1953). The latter case, quoting from Potts v. People, 114 Colo. 253, 158 P.2d 739, 159 A.L.R. 1410 (1945), states:

> "'Photographs are the pictured expressions of data observed by a witness. They are often more accurate than any description by words, and give a clearer comprehension of the physical facts than can be obtained from the testimony of witnesses. Ordinarily photographs are competent evidence of anything which it is competent for a witness to describe in words. * * *'"

Witnesses testified as to the interior of the store depicted in the three photographs and the diagram. Medical witnesses testified concerning eight bullet wounds in the body shown in four photographs. A witness testified concerning the height of defendant Pearl as measured by the last photograph. "The photographic evidence constituted visual explanations of the testimony of the witnesses and was corroborative of this testimony. The photographs were admissible for these purposes." State v. Webb, 81 N.M. 508, 469 P.2d 153 (Ct.App.1970). We find nothing in the diagram or any of the photographs, or the number thereof, which would tend to mislead the jury or to arouse prejudice or passion. They were reasonably relevant to the issues of the case.

POINT II.

The defendants assert that the trial court erred in allowing the state to present a witness whose name was not endorsed on the information or bill of particulars. The defendants claimed surprise.

Section 41-6-47, N.M.S.A.1953 (Repl. Vol. 6), provides:

> "When an indictment or information is filed, the names of all the witnesses or deponents on which evidence the indictment or information was based shall be endorsed thereon before it is presented, and the district attorney shall endorse on the indictment or information at such

time as the court may by rule or otherwise prescribe the names of such other witnesses as he purposes to call. A failure to so endorse the said names shall not affect the validity or insufficiency of the indictment or information, but the court in which the indictment or information was filed, shall, upon application of the defendant, direct the names of such witnesses to be endorsed. * * *"

State v. Edwards, 54 N.M. 189, 217 P.2d 854 (1950), states:

". . . Whether names of witnesses may be endorsed during trial is a matter resting within the sound discretion of the court. It is not enough that a defendant claim surprise or prejudice in the calling of an adverse witness or one whose name does not appear upon the information charging him with crime. Nor is the mere admission of testimony of such witness, error; rather, error follows from a denial of an opportunity to rebut the objectionable evidence. * *"

The day before the witness was called, defendants advised the court that they had had the opportunity to interview the witness and were aware of the nature of his testimony, thus obviating any claim of surprise. No postponement or continuance was requested nor did defendants show to the court denial of an opportunity to rebut the evidence. State v. Edwards, supra; State v. Maes, 81 N.M. 550, 469 P.2d 529 (Ct. App.1970). The admission of the testimony was within the sound discretion of the trial court and, absent abuse of such discretion, the action of the trial court will not be disturbed on appeal. State v. Lujan, 79 N.M. 200, 441 P.2d 497 (1968); State v. Grice, 47 N.M. 197, 138 P.2d 1016 (1943).

POINT III.

Defendants question three items of evidence. They claim the trial court should have declared a mistrial because of a gratuitous statement from one of the state's witnesses. The question, propounded by the defense, and the answer thereto were as follows:

"Q. Then let me get you straight today; are you saying that you can or cannot identify this defendant?

"A. I am saying that I can as far as I am concerned that person sitting right over there and Mr. Muncy is dead and they definitely had a lot to do with it."

Defendants' later motion for a mistrial was overruled but the court offered to admonish the jury to disregard the answer. This offer was declined by the defendants since the admonishment would necessarily include a repetition of the answer, the objection not having been made at the time of the statement. While the answer is susceptible of more than one construction and, although possibly improper as an opinion of guilt (Territory v. Archuleta, 16 N.M. 219, 114 P. 285 [1911]), the offer of the court to admonish the jury was sufficient. State v. Ferguson, 77 N.M. 441, 423 P.2d 872 (1967); State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct.App.1969).

Defendants argue that the trial court should have sustained a motion for a mistrial because of leading questions asked by the state. The trial lasted five days and the record of testimony is extensive. Our review of that record discloses no abuse of the court's discretion in its control of examination of witnesses. Some leading questions were asked and to those of substance the court sustained objections and admonished the jury. "[W]here evidence erroneously admitted during the progress of the trial is withdrawn or stricken out by the court, the error is cured." State v. Dendy, 34 N.M. 533, 285 P. 486 (1929).

Defendants further complain under point III that their motion for a mistrial should have been granted because a witness testified that one or the other of the defendants had been incarcerated in the state penitentiary. The testimony was that "it's the custom of the personnel in Santa Fe that no one enters their institution up there until they are in handcuffs", with no reference being made to either defendant.

The defendants now argue that this testimony is evidence of a prior conviction and cite cases supporting the rule that such evidence is improper and prejudicial. As to the rule of law we agree as a general proposition, but as to its application to this testimony, we do not. The testimony was in response to a question propounded to the witness, a deputy sheriff, by the defendants concerning some earlier testimony to the effect that he had never seen the "defendant" handcuffed, without particular reference to either defendant. The answer, while not particularly responsive, falls short of being evidence of a prior conviction. Defendants rely on State v. Rowell, 77 N.M. 124, 419 P.2d 966 (1966), a case distinguishable upon its facts. The question asked in that case, in and by itself, was so prejudicial as to be irremediable by admonition. Here, the court's subsequent admonition removed any prejudice which might have been directed against the defendants by reason of the testimony. State v. McFerran, supra; State v. Ferguson, supra.

POINT IV.

Defendants state that the trial court erred in admitting into evidence state's exhibit No. 25, a consent to search signed by the defendants on August 19, 1968, because it was the product of duress or coercion. The claimed coercion is that several police officers were present and the defendants were advised that a search warrant would be obtained if the consent was not voluntarily given. The evidence is that the defendants voluntarily went to the sheriff's office the morning of August 19 to explain their presence, and that of their car, at the drugstore the evening before at the approximate time of the murder. Although not under arrest at the time, defendants were asked if they would consent to a search. They were "most willing" and this was before any comment was made about the officer being able to get a search warrant. The record does not establish, as a matter of law, that the consent was no more than acquiescence. See State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct.App. 1969).

> "The question of whether consent has been given is a question of fact subject to the limitations of judicial review. * * * Each case must stand or fall on its own special facts, and in the trial court's judgment of the credibility of the witnesses. * * *"

State v. Sneed, 76 N.M. 349, 414 P.2d 858 (1966). We cannot hold, as a matter of law, that the trial court erred in admitting the consent to search.

POINT V.

Closely allied to their point IV is defendants' claim that the trial court erred in refusing to give their requested instruction which would have let the jury decide if the consents to search their automobile and other property were voluntarily given. The rule is enunciated in State v. Sneed, supra, as follows:

> "A search and seizure may be made without a search warrant if the individual freely and intelligently gives his unequivocal and specific consent to the search. The consent is not voluntary if it is the product of duress or coercion, actual or implied. The consent must be proven by clear and positive evidence and the burden of proof is on the state. * * *"

During the criminal investigation, and following the initial opening of their automobile trunk, the car was searched twice. Consents to search were signed by the defendants before each of these two searches. At the time of the first search on August 19, 1968, a set of clippers and two syringes, marked with price tags as being from B & J Drug, were found by the officers, but were not removed from the automobile until the second search. The voluntariness of the second consent to search is not in question. At the trial, evidence was introduced on the question of the voluntariness of the two consents to search. Thereafter the court admitted the three seized

items into evidence, thus ruling that both consents were voluntary.

The requested instruction was:

"The fact that the Court has admitted into evidence exhibits showing a waiver of the right against unlawful search and seizure does not prevent you from making a factual determination whether the right against unlawful search and seizure was voluntarily waived. If you find that such right was not voluntarily waived, Exhibits 26, 27, and 28, which are the clippers and the two syringes, would not be admissible into evidence."

In support of their position, defendants cite several cases concerning the admissibility of confessions. We do not deem them applicable to a consent to search.

We apply the rule announced in Maxwell v. Stephens, 348 F.2d 325 (8th Cir. 1965), that:

"* * * [A] consent freely and intelligently given by the proper person may operate to eliminate any question otherwise existing as to the propriety of a search".

The question of consent to search was a matter of law to be determined by the court and was not an issue to be submitted to the jury. State v. Garcia (Ct.App.) 83 N.M. 490, 493 P.2d 975, decided December 22, 1971; see State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966). We conclude that the state carried its burden of proving the defendants' consent to search was voluntary, that the court properly permitted the introduction of the first consent into evidence and correctly refused defendants' requested instruction.

POINT VI.

Law officers recorded a conversation with Dennis on August 19, 1968, at which time he stated the back door of the drugstore was open when he and his wife arrived the evening before. On August 20, 1968, during another conversation with law officers, he stated that he had to force the back door open in order to enter the drugstore. This conversation was unrecorded because of the failure of the law officers to operate the recording machine properly. The only material difference in the two conversations was the method of entry through the back door.

Defendant Dennis contends that the failure to record the conversation of August 20 deprived him of due process because that conversation and the testimony of an eye witness agreed as to how he effected entry into the store. Defendants rely on Trimble v. State, 75 N.M. 183, 402 P.2d 162 (1965), in support of their contention. *Trimble* is factually different. There, law enforcement officers took recordings from the possession of the defendant and erased alleged conversations by grossly mishandling them. Defendant Trimble claimed that the tapes contained conversations which would assist in his defense.

Here, the missing evidence was supplied by the law officer and defendant Dennis when they took the stand. Dennis was not deprived of any evidence. The failure to record the August 20th session was not a denial of due process. State v. McFerran, supra.

POINT VII.

Following the first trial of this case the state removed certain exhibits from evidence and sent them to the Federal Bureau of Investigation for testing. This removal was without court approval or notice to the defendants. The tests were negative and there is no claim that the exhibits were altered in any respect.

Defendants' motion to suppress these evidentiary exhibits in the instant case was denied and properly so, there being no claim or proof of prejudice. We agree with the trial court in admonishing the prosecution for the secret removal of these items, however, the record reveals a chain of custody from removal to return. Assuming it was error to remove the evidence in this manner, prejudice must be shown to warrant reversal. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct.App.1969). No prejudice was shown.

POINT VIII.

Tape recorded conversations between law enforcement officers and the defendants were offered in evidence by the prosecution and admitted by the court. This was done over defendants' objections that the tapes contained officers' irrelevant and prejudicial comments, improper questions and unsworn testimony. The tape recordings were edited, with certain portions deemed inadmissible being stricken by the court. Before the playback, the jury was advised by the court as follows:

> "Before we play this tape recording, I want to admonish the jurors with regard to certain matters. One is that any statements made by the officers who are conducting the interrogation are not to be taken as evidence. In other words, not as the truth of the facts stated. Also, it will be necessary in view of the Court's ruling on certain portions of these tape recordings for this machine to be taken out into the chambers periodically in order to get by certain portions of which the Court rules is inadmissible. There are going to be some interruptions which we can't avoid. I think probably you ought to identify the names by—the name of the officer whose voices appear in this recording, and I am just wondering of course some of us know these officers' voices well enough to identify them pretty well."

In their brief, defendants set out the two comments claimed as being "irrelevant and prejudicial". Neither of these was heard by the jury, both having been deleted from the tape recording. We do not consider these matters. We have, however, reviewed the claimed "improper questions" and "unsworn statements". We cannot agree that the court's permitting them to be played to the jury as part of the tape recordings constitutes reversible error. Defendants did not move the court to strike the questions they deemed objectionable but objected to the admission of the statements in their entirety. Their motion being directed to the entire statements, part of which were good, was properly overruled. See Radcliffe v. Chaves, 15 N.M. 258, 110 P. 699 (1910).

Although some of the questions may have assumed facts of an accusatory nature, these facts were the subject of other testimonial evidence, independent of the statements. Additionally, the answers given by the defendants were, in each case, exculpatory and explanatory. As we read the matters complained of, no prejudice was shown and, absent such prejudice, the admission of the recorded statements was not error. State v. Ranne, supra; see also Paulson v. Scott, 260 Wis. 141, 50 N.W.2d 376 (1951).

POINT IX.

The prosecution offered and the court admitted into evidence, as state's exhibits 52, 53, 54, and 55, personal letters or notes between the defendants while both were confined in the Roosevelt County jail. Defendants objected on the grounds that the exhibits (1) were used in an impeaching manner, (2) were in violation of the marital privilege, (3) contained inadmissible material and personal matters which were irrelevant, and (4) tended to incriminate the co-defendant. The court overruled the objections except as to the personal matters (No. 3), stating that these would be deleted by the state and that the defendants could themselves read to the jury any omitted portions of the correspondence which they considered pertinent. The defendants then announced that they did not "propose to participate in any type of censorship" and that "leaving out this material changes the meaning of the notes".

On appeal, defendants' argument concerns only two of the exhibits. They assert that the court erred in allowing "inflammatory and prejudicial material" to be read to the jury from one of the letters. This claim of error was not included in the grounds for objection below and will not be considered here. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct.App.1969).

Defendants next assert that the deletions and omissions changed the meaning of the letters. Although defendants announced that leaving out certain material changed the meaning of the letters, a ruling or decision on the question by the trial court was not fairly invoked. Supreme Court Rule 20(2) [§ 21-2-1(20) (2), N.M.S.A. 1953]; State v. Sexton, 82 N.M. 648, 485 P.2d 982 (Ct.App.1971); Barnett v. Cal M, Inc., 79 N.M. 553, 445 P.2d 974 (1968). The defendants did not object to any particular parts of the letters nor did they call the trial court's attention to any specific distortion or altered meaning because of the deletions made by the state. Defendants' general objection was insufficient. See State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct.App.1970).

POINT X.

During the early morning hours following the murder, police were searching for an automobile fitting the description of one in the area at the time of the crime. An officer located such an automobile parked in the street in front of the defendants' residence about 4:00 A.M. on August 19, 1968. The Roosevelt County sheriff went to the scene upon notification of the location of this automobile, later identified as belonging to defendant Dennis. The trunk of the car was not locked and the sheriff opened it by pulling a wire extending therefrom. He shined a flashlight into the interior and noticed that the "trunk was quite cluttered. There was [sic] a number of articles that was [sic] just pitched in the trunk." Nothing was taken from the car at this time nor was any particular item identified. The officers had no search warrant or consent to search the car from either of the defendants at this time.

A second search of the Carlton car was conducted that afternoon, after the defendants had executed a consent to its search. The defendants had sought out the officers to explain why they and their car had been in the alley behind the store the night of the murder. They accompanied the sheriff to the police station voluntarily and signed a consent to search their automobile and other property. The officers searched the car in their presence and noted, among other things, two hypodermic syringes and a pair of animal clippers. The trunk was still cluttered and nothing was taken by the officers at that time. The following day another consent to search was obtained and, again in the presence of the defendants, the officers removed the three items just mentioned, later admitted into evidence as state's exhibits 27, 28, and 29. Between the second and third searches the trunk had "been cleaned up and everything was neatly arranged". The exhibits were important at the trial because of a question as to the date and manner of their removal from the drugstore.

Defendants contend that the court erred in permitting the sheriff to testify to the condition of the interior of the trunk of the defendants' automobile when he first opened it and in allowing the introduction of state's exhibits 27, 28, and 29 into evidence, claiming such exhibits to have been the product of an illegal search.

Assuming the first search of the car to have been illegal, what effect, if any, did this have on the admissibility of the three exhibits? Defendants claim that "what was seen by Sheriff Davis on the occasion of the illicit search led to other searches with the subsequent obtaining of evidence." We do not find this supported by the record. The facts appear to be that the two syringes and the animal clippers were noted upon the second search and taken from the car during the third search. There is no evidence that the sheriff saw the items during the first observation of the trunk. It follows that there was no showing of prejudice to the defendants by the sheriff's opening the trunk of the car and observing its interior in the first instance. We need not, therefore, determine the legality of the first search, if search there was. There is no evidence that the first observation in any way led to the next two searches or the three exhibits.

The trial court specifically found, by its admission into evidence of state's exhibits 27, 28, and 29, that there was a voluntary consent to search. We cannot say that its finding was either erroneous or unsupported by substantial evidence. Maxwell v. Stephens, supra.

Defendants' assertion that they were prejudiced by the sheriff's testimony that the trunk was in a cluttered condition is of no import. It was still in a cluttered condition at the time of the second search, although it had been straightened up by the time of the third search and the removal of the exhibits.

POINT XI.

Defendants allege that they were not properly warned of their rights prior to interrogation, and the tape recordings of their conversations with police officers were therefore inadmissible. They argue that they were not properly advised under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), because they were not told that they had a right to "stop questioning at any point and time". They do not assert that the four basic warnings required by *Miranda* were not given them. The record differs to some extent with defendants' claim. Defendant Pearl testified she was told that she could stop talking at any time.

In any event, we do not interpret *Miranda* as requiring such additional advice to be necessary. *Miranda* holds that "if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." This is directive only. The record does not indicate that the defendants at any time wished to stop the questioning or conversation. The rights required by *Miranda* were afforded the defendants. State v. Pace, 80 N.M. 364, 456 P.2d 197 (1969).

Defendant Dennis also argues that he did not effectively waive his right to remain silent, this contention being based on his comment that he couldn't afford an attorney. After this comment, he was reminded that if he wanted an attorney, the court would "appoint and pay" for one. Without further discussion or objection, Dennis stated that he was willing to talk "now." Waiver of the right to remain silent is supported by the record. State v. Pace, supra.

POINT XII.

Defendants urge that the statements obtained from them on August 20, 1968, were inadmissible because they had not been readvised of their rights and the previous warning given them on August 19 was deficient. We have determined that the defendants were properly advised prior to their interrogation on August 19, 1968. We are not constrained to hold that repeated warnings are necessary as a matter of law. Maguire v. United States, 396 F. 2d 327 (9th Cir. 1968).

POINT XIII.

Finally, defendant Pearl argues that the court should not have admitted some of her clothes into evidence "for the reason that * * * proper *Miranda* warnings prior to obtaining the consent were not shown * * *".

There was evidence that a sufficient *Miranda* warning was, in fact, given to defendant Pearl prior to the obtaining of her consent to search. In answering this contention on the basis of the record, we do not hold that the *Miranda* warnings must of necessity be given before there can be a valid consent to search. See State v. Carlton, 82 N.M. 537, 484 P.2d 757 (Ct. App.1971). All that is required is that a consent to search "must be freely and intelligently given, must be voluntary and not the product of duress or coercion, actual or implied, and must be proved by clear and positive evidence with the burden of proof on the state." 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). The state met this burden.

The judgments and sentences are affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

SUTIN, J., not participating.

495 P.2d 1102

STATE of New Mexico, Plaintiff-Appellee,

v.

Don Aaron LEE, Defendant-Appellant.

No. 805.

Court of Appeals of New Mexico.

March 24, 1972.

Donald C. Cox, Easley & Reynolds, Hobbs, for appellant.

David L. Norvell, Atty. Gen., Santa Fe, N. M., Ronald Van Amberg, Asst. Atty. Gen., for appellee.

OPINION

WOOD, Chief Judge.

Defendant's conviction was affirmed on direct appeal. State v. Lee (Ct.App.), 83 N.M. 522, 494 P.2d 184, decided February 4, 1972. He now appeals from a denial of post-conviction relief without a hearing. Section 21-1-1(93), N.M.S.A.1953 (Repl. Vol. 4). In considering the issues raised in this appeal, we take judicial notice of the record in the direct appeal. State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct.App. 1970).

1. Defendant claims his shoes were taken from him by an illegal search and seizure and were used to "manufacture evidence" against him. Another claim is that the $1000.00 amount of the bond set for his appearance at trial was excessive; that he could not make this bond because he was indigent and, because he was not released on bond, he was unable to contact witnesses for his defense.

These contentions could be answered on various grounds—as to search and seizure see State v. Barton, 79 N.M. 70, 439 P.2d 719 (1968); State v. Anaya, 82 N.M. 531, 484 P.2d 373 (Ct.App. 1971); State v. Jacoby, 82 N.M. 447, 483 P.2d 502 (Ct.App. 1971); as to bail see Ex parte Parks, 24 N.M. 491, 174 P. 206 (1918); State v. Jacoby, supra; State v. Lucero, 81 N.M. 578, 469 P.2d 727 (Ct.App. 1970); Hernandez v. State, 81 N.M. 634, 471 P.2d 204 (Ct.App. 1970); United States v. Smith, 444 F.2d 61 (8th Cir. 1971).

We answer the contentions on the basis of the proceeding in which they are raised. "Post conviction proceedings are not a method of obtaining consideration of questions which might have been raised on appeal. * * *" Jones v. State, 81 N.M. 568, 469 P.2d 717 (1970); see also, Miller v. State, 82 N.M. 68, 475 P.2d 462 (Ct.App. 1970). Defendant did not raise these issues on his direct appeal; he may not properly raise them in post-conviction proceedings. State v. Beachum (Ct.App.), 83 N.M. 526, 494 P.2d 188, decided February 4, 1972.

2. This claim concerns the right of a defendant to have compulsory process to compel the attendance of necessary witnesses on his behalf. See N.M. Const. Art. II, § 14. Defendant asserts that no attempt was made, by either the State or defense counsel, to produce a witness requested by defendant. The record conclusively shows to the contrary. Defendant's affidavit, submitted in support of a motion for continuance of the trial date, affirmatively recites that the sheriff's deputies and defense counsel were endeavoring to discover the whereabouts of the witness. There is no factual basis for the claim.

3. Defendant states: "That since the necessary witnesses for Petitioner were not in evidence at the time of his trial, Petitioner was coerced by Defense Counsel to take the stand in his own behalf, and this is a violation of . . ." the right not to incriminate himself. In this appeal, counsel states that defendant is not contending that trial counsel advised defendant to take the stand. See Barela v. State, 81 N.M. 433, 467 P.2d 1005 (Ct.App. 1970). Appellate counsel asserts that defendant was coerced into taking the stand.

In what way? There are no allegations as to the facts of the alleged coercion; specific factual allegations are required. Such factual allegations were lacking in State v. Hansen, 79 N.M. 203, 441 P.2d 500 (Ct.App. 1968) and are also lacking here. Specifically, the coercion claim is too vague to provide a basis for post-conviction relief. Compare the claim that the trial judge condoned perjury in State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct.App. 1971) and the claim that defendant was convicted through harassment and trickery, State v. Martinez, 82 N.M. 51, 475 P.2d 51 (Ct. App. 1970); see also, State v. Tapia, 80 N.M. 477, 457 P.2d 996 (Ct.App. 1969).

4. The claims of defendant in paragraphs numbered 2 and 3 of this opinion imply that defendant's trial counsel was inadequate. There being an absence of allegations amounting to a claim that his trial was a sham, farce or mockery of

justice, the claim provides no basis for post-conviction relief. State v. Trejo (Ct. App.), 83 N.M. 511, 494 P.2d 173, decided February 4, 1972; State v. Ramirez, 81 N.M. 150, 464 P.2d 569 (Ct.App. 1970).

5. It is contended that the trial court erred in not conducting an evidentiary hearing on the motion for post-conviction relief. Since no basis for relief was asserted, an evidentiary hearing was not required. State v. Bruce, 82 N.M. 315, 481 P.2d 103 (1971).

The order denying relief without a hearing is affirmed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

495 P.2d 1104

Richard Anthony BOBRICK and Claude David Swim, Defendants-Appellants,

v.

STATE of New Mexico, Plaintiff-Appellee.

No. 779.

Court of Appeals of New Mexico.

March 24, 1972.

Louis G. Stewart, Jr., Albuquerque, for defendants-appellants.

David L. Norvell, Atty. Gen., Santa Fe, Winston Roberts-Hohl, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendants' petition for post-conviction relief (§ 21-1-1(93), N.M.S.A.1953 (Repl. Vol.1970)) was denied without an evidentiary hearing. This court remanded for an evidentiary hearing "* * * upon the issue of the voluntariness of their pleas of guilty." State v. Swim and Bobrick, 82

N.M. 478, 483 P.2d 1318 (Ct.App.1971). The court's opinion was filed in the district court on April 8, 1971 and on the same day a hearing was set for April 23, 1971. On April 23, 1971 the mandate was issued by this court and filed in the district court on April 27, 1971. On April 22, 1971 defendants each filed motions to terminate their appointed attorney and requested the court to appoint Mr. Stewart of Albuquerque. Defendants stated in the motions that they were indigent. The court denied the motions stating that appointed counsel was competent and also that Mr. Stewart was no longer practicing in McKinley County. Defendants then asked for a continuance on the grounds they could retain Mr. Stewart. The court denied this motion on the grounds that a great number of witnesses from other states and elsewhere were present. Defendants then refused to give any testimony and stood mute. The court declared the cause in default for failure to proceed.

Defendants appeal asserting: (1) the district court did not have jurisdiction to proceed on a hearing until the mandate was filed; (2) defendants were denied the right to a counsel of their own choosing and to due process of law when the trial court refused to grant a continuance so defendants could retain counsel; and, (3) defendants were denied effective assistance of counsel at the hearing because the proceedings were a sham, farce and mockery of justice.

We affirm.

Jurisdiction of the Cause.

It is defendants' contention that the district court did not have jurisdiction until the mandate was filed in district court and thus the district court had no authority to proceed with a hearing on April 23, 1971. We disagree.

Section 21–2–1(18) (2), N.M.S.A.1953 (Repl.Vol.1970) states that: "Unless otherwise ordered, the motion for rehearing shall be filed within twenty [20] days after the filing of the opinion to which the same shall be directed." Section 21–2–1(17) (6), N.M.S.A.1953 (Repl.Vol.1970) states that: "Upon final disposition of a civil cause, mandate will issue to the court below. * * *" Woodson v. Lee, 74 N.M. 227, 392 P.2d 419 (1964) states:

> "Under our practice, a civil case is considered to be finally disposed of and the mandate issues when time for filing a motion for rehearing has expired without a motion being filed or if a motion is filed, when the same is denied. * * *"

In construing the above language, "* * * according to the context and the approved usage * * *" § 1–2–2, N.M.S.A.1953 (Repl.Vol.1970), we find no indication the mandate shall become effective upon the date of filing in the district court. We read § 21–2–1(17) (6), supra, to say the transfer of jurisdiction from the appellate court to the district court is accomplished upon issuance of the mandate. Compare Van Orman v. Nelson, 80 N.M. 119, 452 P.2d 188 (1969).

Right to Counsel of Own Choosing.

The notice of hearing for April 23, 1971 was dated April 8, 1971. The motions to dismiss counsel and appoint Mr. Stewart were dated April 20, 1971 and filed April 22, 1971. The motions stated indigency and a request for free process. On the date of the hearing defendants stated they could retain Mr. Stewart. They offered nothing in support of this claim.

The denial of defendants' motions to dismiss counsel and grant a continuance so they could retain counsel, at this late date, was not an abuse of discretion or was it a denial of due process. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct.App.1971); § 21–8–9, N.M.S.A.1953 (Repl.Vol.1970).

Denial of Effective Assistance of Counsel.

Defendants stated at the hearing "I understand he (appointed counsel) is competent, but he is not familiar with the case. * * *" Defendants then refused to proceed and stood mute. Having failed to cooperate with appointed counsel they

cannot now complain about the consequences of their actions. State v. Gutierrez, 82 N.M. 578, 484 P.2d 1288 (Ct.App. 1971). There is absolutely no showing that the proceedings were a sham, farce or mockery.

Affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

495 P.2d 1106

Jack CLEM, Plaintiff-Appellant,

v.

BOWMAN LUMBER COMPANY, Defendant-Appellee.

No. 774.

Court of Appeals of New Mexico.
March 24, 1972.

J. Lee Cathey, Carlsbad, for plaintiff-appellant.

Charles N. Glass, Threet, Threet, Glass, King & Maxwell, Albuquerque, for defendant-appellee

OPINION

WOOD, Chief Judge.

The claim is that defendant wrongfully and fraudulently discharged plaintiff from employment with defendant. The employment was pursuant to a written contract. The trial court determined there was no wrongful discharge. Plaintiff's appeal attacks the sufficiency of the evidence to support certain of the trial court's findings and challenges the conclusions of law based on the findings made. In answering these contentions, we discuss defendant's authority to discharge under a contract provision providing for employment "* * so long as Clem is able to perform satisfactorily to Bowman. * * *"

The trial court found the parties "* * entered into a contract of employment whereby Defendant hired Plaintiff. * *" It concluded: "The relationship between the parties was at all times that of employer and employee." Plaintiff contends the finding, and the conclusion based thereon, is erroneous because the contract was for "* * * the purchase and sale of a * * * plumbing contracting business * * *," and the agreement to hire plaintiff was a part of the purchase and sale.

The contract could properly be construed as plaintiff contends. The contention, however, is not material. As a part of this purchase and sale, defendant expressly agreed, in the contract, to hire the plaintiff. Whatever the nature of plaintiff's employment, all of the evidence supports the finding that plaintiff was employed pursuant to the contract. It is the discharge from this employment that is in issue; the purchase and sale provisions are not in issue. As to the wrongful discharge claim, the trial court could properly conclude the relationship was that of employer and employee.

The contract, resulting in plaintiff's employment, is dated June 25, 1969. The trial court found that plaintiff was hired to manage defendant's plumbing department, to train plumbers and act as qualifying licensed plumber for defendant. It also found:

"2. The contract of employment was for a period of ten years, upon condition that Plaintiff perform to the satisfaction of Defendant in the capacity for which he was employed.

"3. From June 25, 1970 through September 19, 1970, Plaintiff performed the duties assigned to him by the Defendant.

"4. On or about September 19, 1970, Plaintiff was orally notified, and on September 25, 1970 was notified in writing of the duties assigned to him by the Defendant.

"5. The duties outlined to the Plaintiff by Defendant were consistent with the nature of the employment of the Plaintiff.

"6. Plaintiff refused to perform the duties assigned to him as employee, and on October 19, 1970, Defendant terminated the employment of Plaintiff, with pay through October 31, 1970."

Plaintiff attacks the finding that he was hired as a manager. Although the contract expressly employs him as manager of the plumbing department, plaintiff contends the parties never intended for him to act as manager; that the intent was for plaintiff to act only in an advisory and supervisory capacity. He relies on evidence indicating that prior to September, 1970 he acted only in an advisory and supervisory capacity and asserts this conduct is controlling. See Schultz & Lindsay Construction Co. v. State, 83 N.M. 534, 494 P. 2d 612, 1972. The answer is that in testifying, plaintiff affirmed that he had been hired as a manager. In addition, there is correspondence which affirms his employment as manager, rather than as advisor and supervisor. The finding that plaintiff was employed as a manager is supported by substantial evidence.

The attack on finding 5 is directed to the meaning of "manager." The duties assigned to plaintiff in September, 1970 resulted in the disagreement between the parties. According to plaintiff: "My duties were, as I understood them, were spelled out in my contract and this is a list of things [the September, 1970 assignments] that were completely added to it. * * *" Plaintiff's understanding is incorrect.

The contract employed plaintiff: "* * * in the position of a licensed plumber and manager of the plumbing department. Clem shall procure plumbers necessary to assist in the plumbing department and shall train them, and when necessary, shall recommend to the Board of Directors the dismissal of any plumber." Further: "Clem agrees to assist and teach the personnel of Bowman in the identification, use, and sale of plumbing equipment. * * *" On cross-examination, plaintiff testified to the various duties involved in managing his own plumbing business prior to his contract with defendant. The duties assigned to plaintiff in September, 1970 are consistent with the duties plaintiff contracted to perform and are consistent with duties performed by plaintiff when he managed his own business.

Because the September, 1970 duties had not been specifically assigned prior to that date, plaintiff contends the September, 1970 assignments were new duties that changed the contract. These duties may have been "new" in that defendant had not called on plaintiff to perform them prior to September, 1970, but there is evidence that these "new" duties were those that plaintiff contracted to perform. Substantial evidence supports finding 5.

Finding 6 is also supported by substantial evidence. The record clearly establishes that plaintiff refused to perform the duties assigned in September, 1970.

From the findings set forth above, the trial court concluded:

> "The refusal of Plaintiff to assume the duties of his employment constituted a voluntary abandonment of his employment, and was adequate grounds for his discharge."

It also concluded:

> "The evidence fails to establish any tortious conduct by the Defendant."

Plaintiff asserts these conclusions could not properly be drawn from the findings made by the trial court because his discharge was fraudulent. Specifically, he claims defendant wanted to dispense with plaintiff's services and accomplished that desire by assigning the duties of September, 1970 so that plaintiff would refuse to perform them. Although requested to do so, the trial court specifically refused to find the discharge was fraudulent. It could properly take this action under the evidence.

Plaintiff also seems to assert that the conclusions are improper because his discharge was not in good faith. This argument concerns the terms of his employment. He was employed, at a monthly salary, "* * * for ten years, so long as Clem is able to perform satisfactorily to Bowman in the position of a licensed plumber and manager of the plumbing department. * * *"

Plaintiff contracted "to perform satisfactorily to Bowman." We are to enforce the contract made by the parties. American Inst. of Mktg. Sys., Inc. v. Don Rhoades Corp., 82 N.M. 659, 486 P.2d 68 (1971), cert. denied, 404 U.S. 882, 92 S.Ct. 210, 30 L.Ed.2d 163 (1971). Atma v. Munoz, 48 N.M. 114, 146 P.2d 631 (1944) states: "* * * a promise by one party to a contract to perform on his part to the satisfaction of the other party is binding; but the dissatisfaction must be real and in good faith. * * *"

Corgan v. George F. Lee Coal Co., 218 Pa. 386, 67 A. 655 (1907) states:

> "The contract of employment was for a definite term, provided the duties of the employment were satisfactorily performed; and the only reasonable inference from the language used is that

the services were to be satisfactory to the management of the employer, the defendant company. Under such a contract it is well settled that the employer 'has the absolute right, whenever he becomes in good faith dissatisfied with the services of the employé, to discharge him; and it has been held immaterial in such a case that in fact no valid grounds for discharge exist. Under a contract of this character the dissatisfaction of the master must be genuine.' * * *"

See Mackenzie v. Minis, 132 Ga. 323, 63 S.E. 900 (1909); Schmand v. Jandorf, 175 Mich. 88, 140 N.W. 996 (1913).

If in good faith, defendant was dissatisfied with plaintiff's performance, there was adequate ground for plaintiff's discharge. The findings negate plaintiff's claim that his discharge was not in good faith. The trial court found that defendant terminated the employment after plaintiff refused to perform the duties assigned to him. The trial court's conclusions—of adequate grounds for plaintiff's discharge and a failure of the evidence to establish any tortious conduct on defendant's part—could properly be drawn from the findings made.

In presenting this appeal, plaintiff has viewed the evidence in the light most favorable to his contentions. We cannot follow that approach because we are to view the evidence in the light most favorable to the findings made by the trial court. Petritsis v. Simpier, 82 N.M. 4, 474 P.2d 490 (1970).

Further, plaintiff has consistently argued that the trial court erred in failing to adopt his requested findings. Most of his requests go to evidentiary matters rather than ultimate facts and could be properly refused on that ground. Alvillar v. Hatfield, 82 N.M. 565, 484 P.2d 1275 (Ct.App.1971). In addition, it is not error to refuse requested findings which are contrary to findings made, when those findings are supported by substantial evidence. Moore v. Bean, 82 N.M. 189, 477 P.2d 823 (1970). That is the situation here.

The judgment dismissing plaintiff's complaint is affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

495 P.2d 1379

STATE of New Mexico ex rel. A. L. Happy APODACA and A. L. Happy Apodaca, Relators,

v.

Betty FIORINA, Secretary of State of the State of New Mexico, and David L. Norvell, Attorney General of the State of New Mexico, Respondents.

No. 9454.

Supreme Court of New Mexico.

April 18, 1972.

Standley, Witt & Quinn, Bigbee, Byrd, Carpenter & Crout, Paul D. Gerber, Santa Fe, for relators.

David L. Norvell, Atty. Gen., William S. Dixon, Special Asst. Atty. Gen., Albuquerque, for respondents.

OPINION

PER CURIAM.

Relators petitioned for a writ of mandamus requiring Respondent Secretary of State to certify only the names of persons who paid the filing fees prescribed by § 3-8-26, subd. A, N.M.S.A., 1953 (Repl. Vol. 1, 1970) as candidates in the primary election scheduled to be held June 6, 1972, or, alternatively, to certify only those who would tender such fees within such time and under such conditions and restrictions as we might prescribe. It appears from the petition that the Respondent Attorney General has advised the Secretary of State to proceed in a different manner.

We issued our Alternative Writ which, following a lengthy evidentiary hearing and elaborate briefs and arguments of counsel, was made permanent with provision for permitting persons who had attempted to file as candidates without paying filing fees to pay the fees to the appropriate authority within a prescribed time. Finally, our permanent writ made it clear that Messrs. Orlin Cole, Malcolm Dillon and Clarence Gailard were unaffected by anything we said.

A complex course of events has gone before. In Federal District Court, Messrs. Dillon, Cole and Gailard brought an action against Mrs. Fiorina in which they asserted a desire to become candidates for the Democratic nomination to the office of United States Senator, claiming to be unable to pay the filing fees required by § 3-8-26, subd. A, supra. As a result, they claimed to be deprived of equal protection of the laws. Dillon v. Fiorina, 340 F.Supp. 729, U.S.D.C.N.M., issued March 24, 1972.

Trial was had before a three-judge panel. Attorney General Norvell purportedly defended Mrs. Fiorina. No evidence was tendered to show that the filing fee is "reasonably necessary to the accomplishment of legitimate state objectives." The three-judge panel handed down a Memorandum Opinion and entered a Final Judgment restraining Mrs. Fiorina from enforcing § 3-8-26 subd. A, supra, against the mentioned gentlemen if any of them "files an application to become a candidate for nomination for the office of United States Senator in the next primary election."

The Attorney General did not appeal Dillon nor seek a stay. He has not appeared before us in these proceedings.

On March 20, 1972, Respondent Norvell issued a Memorandum Directive on primary election procedures to the Governor and Mrs. Fiorina which instructed Mrs. Fiorina that "no filing fees should be assessed any candidate, otherwise qualified for the offices covered by Section 3-8-26(A) and (B) * * *." Section 3-8-26, subd. A encompasses all salaried officers to be elected in the upcoming primary. It does not relate to members of the legislature, members of the State Board of Education and County Surveyors, offices with which we are not here concerned.

Filing day, April 4, 1972, was not uneventful. For the office of United States Senator, twenty-eight candidates filed for the Democratic nomination and twelve for the Republican. Of these, three Democrats and one Republican paid filing fees.

Similar activity took place in the races for both congressional districts, the judicial races, and so on through the list. In the race for State Corporation Commission, eleven Democrats and three Republicans filed, of whom four Democrats, including Relator, paid filing fees.

Thereafter, on April 7, 1972, Relator petitioned for an alternative writ, which was issued on the same day.

Article VII, Section 1 of the New Mexico Constitution provides in pertinent part:

> "The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections, and guard against the abuse of elective franchise."

In Bullock v. Carter, 405 U.S. 134, 92 S. Ct. 849, 31 L.Ed.2d 92 (1972), the court said:

> "The Court has recognized that a State has a legitimate interest in regulating

the number of candidates on the ballot. Jenness v. Fortson, 403 U.S. 431, at 442, 91 S.Ct. 1970, 29 L.Ed.2d 554; Williams v. Rhodes, 393 U.S. 23, at 32, 89 S.Ct. 5, 21 L.Ed.2d 24. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting without the expense and burden of runoff elections. Although we have no way of gauging the number of candidates who might enter primaries in Texas if access to the ballot were unimpeded by the large filing fees in question here, we are bound to respect the legitimate objectives of the State in avoiding overcrowded ballots. Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. Jenness v. Fortson, 403 U.S., at 442, 91 S.Ct. 1970, 29 L.Ed.2d 554."

The Chief Justice recognized in a subsequent statement that it is the "serious candidates" with whom we are concerned. He perceptively pointed out that:

"* * * And even assuming that every person paying the large fees required by Texas law takes his own candidacy seriously, that does not make him a 'serious candidate' in the popular sense. * * *"

Taken as a whole, having in mind the constitutional mandates laid down by the New Mexico Constitution, the recognition of the legitimate objectives of avoiding overcrowded ballots and the Chief Justice's comments concerning "serious candidates," the reasonable result is that it is not merely the frivolous or fraudulent candidacies which may constitutionally be excluded, but also those candidates who are not "serious."

We accept the New Mexico constitutional mandate and the pronouncements of the United States Supreme Court in Bullock as our guidelines in arriving at our decision.

The precise question presented in this case for determination concerns § 3-8-26(A), supra, which provides:

"The filing fee for each of the following offices is:

"A. All officers receiving salary ----------6% of the first year's salary."

The Respondents urge that this section is unconstitutional and void as a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. This enactment of the statute constitutes New Mexico "State action." Bullock v. Carter, supra.

For good or ill, this is an elected court. It is thus inevitable that no matter what result we might have reached, there would be those who would say that we had favored one candidate over another, or one party over another, or one social philosophy over another. This is a cross we accepted with our certificates of election. It is, nevertheless, true that our selective process has placed us in contact with the stream of governmental and political life in New Mexico, and in touch with its realities and practical concepts.

New Mexico political history and legislative attempts to regulate elections are fascinating subjects. Three percent filing fees have been tried but found wanting. The modest expenditure was not sufficient to preclude the filing of "stooge" candidates. In New Mexico political parlance, a "stooge candidate" is one who is filed by, or whose filing is caused or procured by a candidate or his adherents with a view to dividing the vote which would presumably be garnered by his opponent. Such efforts often developed along ethnic lines. For instance, a Spanish-speaking candidate would be filed to "split the native vote" to the supposed disadvantage of a serious contender of that lineage, which would be countered by filing a candidate "to split the Anglo vote," and so on and on.

This was an evil which resulted in confusion of the electorate and an abuse of the elective franchise.

The same abuses have been noted in respect to nominating petitions. In Bokum v. Romero, No. 5307 on the docket of this court, it was asserted that nominating petitions containing 1,067 signatures had been signed with the name of the candidate and the office sought left blank, or that the name and office had been erased and the petitions then completed, using the name of an individual apparently seeking the office of governor. The point of this evolution was popularly supposed to be to "split the Anglo vote." This court ruled the candidate off the ballot, and the next legislature returned to a pre-primary arrangement.

The evolution of legislative acts regulating the means of securing party nominations to office is also of interest, reflecting the efforts of the legislature to comply with the constitutional mandate set forth in Article VII, § 1 of the New Mexico Constitution to eliminate abuses and to refine and perfect the selective process.

Prior to 1938, nomination was by convention. In that year, a primary law was adopted which required a filing fee of three percent of the first year's salary. The search for a means of confining the ballot to serious candidates has led us from the original petitions with a three percent fee through pre-primary conventions with a three percent fee after convention selection (and nominating petitions with a similar fee as an alternate to convention selection) to a declaration of candidacy with a three percent fee without petitions.

Ultimately, passing over various intervening legislative episodes, § 3-8-26, subd. A was passed, which requires a filing fee of six percent of the first year's salary, accompanied by § 3-8-27, N.M.S.A., 1953 (Repl. Vol. 1, 1970), which provides for refund of one-half of the filing fee to a candidate who receives at least fifteen percent of the vote cast by members of his party in the race for the office he seeks.

Radically different from the Texas system recounted in Bullock is the filing fee structure in New Mexico and the use made of such fees.

In New Mexico, the parties do not pay for the primary. Rather than a sum arbitrarily fixed by party officials, a statutory six percent of the first year's salary must be initially paid. For candidates receiving fifteen percent of his party's votes in that race, one-half is refunded, leaving a net of three percent.

One-half of the filing fees of the serious candidates and all of the filing fees of candidates who do not receive fifteen percent of the vote are apportioned among the counties to partially defray the costs of conducting the primary election at the county level. In the 1970 primary, for example, $52,140 came from this source. Even at the county level, the fees do not cover the entire costs. Rather, the election fund receives revenues from other sources, including property taxes. In 1970, these funds amounted to $107,969. Thus, of the total sums which went into the county election funds for expenses at the county level, less than one-third was received from filing fees paid to the Secretary of State.

Moreover, no portion of such fees is used to defray the expenses of the Secretary of State's office, the principal function of that office being the administration and coordination of elections, (Chapter 3, Article 2, et seq., N.M.S.A.1953), or of the election bureau, a department or division of that office. The Secretary of State's office is supported by appropriations from the State's general fund.

Thus, as contrasted with Texas, the filing fees of candidates do not pay for primaries, except in part. Rather, the primary process is subsidized in substantial, though undisclosed, amounts by the State and various other sources of revenues which are made available for such purposes.

It is nevertheless true that if budgeted sums are not received by the counties from candidates' filing fees, the conduct of the election will deplete other funds of the counties, requiring curtailment of services

or diminution of other expenses such as personnel or salary cutbacks in most, if not all, of the counties.

Sections 3-8-26 and 3-8-27, supra, represent in significant measure the efforts of our legislature to achieve the legitimate objective of avoiding overcrowded ballots and protecting the integrity of the state's political processes.

A number of conclusions may be drawn from the refund statute. First, it obviously, by imposing a risk, seeks to discourage other than serious candidates. This is a legitimate objective pursued in a reasonable way. Respondents have inveighed against the risk element. Enterprises of consequence are usually accompanied by risk. We perceive no reason why elections should be otherwise.

We further can, and do, construe the refund statute as specifying the legislative measure by which to gauge a serious candidate, viz., one who garners fifteen percent of the vote. We regard this determination as being liberal. The percentage is very modest. It permits six serious candidates to contend for one office. This is ample and consistent with our constitutional mandate and Bullock.

Thus, as to the New Mexico scheme of filing fees, we first hold that the amount required to be paid involves no element of arbitrary or capricious discrimination against or among candidates, as was the case in Bullock. We further hold, in light of present day monetary values, that the amounts are by no means unreasonable. The modest six percent does not leap from the page as does the 99.7 percent Texas fee for one office recounted in Bullock.

Obviously, as to the solvent candidate, the fee required, though by no means unreasonable or exorbitant, is in an amount sufficient to give pause to one who is not a serious candidate. No one seems very much concerned about the solvent individual one way or the other, and we will therefore pass on to a consideration of candidates of lesser means.

Wealth is not a prerequisite to a successful seeking of elective office in New Mexico. In fact, it might reasonably be said that New Mexico has something of a tradition that candidates of modest means can achieve success. The evidence makes this clear.

Mr. Mike Anaya, the State Chairman of the Democratic Party, testified that in his extensive experience at both the county and state levels, no serious candidate has been precluded from seeking office by the filing fee requirement. Mr. Fabian Chavez, who has sought a number of offices, usually successfully at least through the primary stage, testified to like effect. He stated that he had often announced his candidacy and commenced his campaign without funds with which to pay the statutory filing fee, but that raising the fee had never presented a problem. Neither Mr. Anaya nor Mr. Chavez knew of any serious candidate who has ever been precluded from seeking office by lack of funds with which to pay the filing fee.

Thus viewed in its true light vis-a-vis the candidate of modest means, the filing fee requirement is not designed, nor does it have the effect of, precluding his entree to the ballot, provided he is a serious candidate. In the case of the impecunious candidate, the filing fee thus does not test his pocketbook, but rather, the extent of his support. If he does not have the requisite support, he does not gain entree to the ballot and no harm is done because he had no occasion to be there. Yet, if he is a serious candidate, the filing fee is no impediment.

We find as a matter of fact that in New Mexico the serious candidate precluded from entree to the ballot by lack of funds does not exist.

In primary elections, by their nature, more candidates' names appear on the ballot than is the case in general elections. It is clear from the evidence, as well as from the court's personal experience, that this involves longer periods of time in the voting machines for the voter, and that in pri-

maries; polling places become crowded and the waiting lines become long and restive.

In recognition of this, our statutes provide for a maximum of three and one-half minutes as the time period the voter may occupy the machine. Section 3-12-43, N.M.S.A., 1953. It is, nevertheless, common knowledge, and the evidence clearly shows, that in primaries numerous voters, for whatever reason, do not or cannot wait their turn at the polling places and depart without having voted.

These problems would obviously be compounded by the ballot in its present form. A worksheet introduced in evidence which had been prepared for a Bernalillo County precinct, showed a total of 216 spaces would be occupied by candidates' names. The evidence clearly demonstrates and we find that to permit matters to stand as they are would result in a large, though unknown and unascertainable, number of voters being deprived of their elective franchise. Certainly, these would number at least in the hundreds and in all likelihood in the thousands.

Under the guidelines we have announced, more particularly Bullock, the State, in discharging its obligations, may exclude candidates who are not serious. Conversely, the exclusion of non-serious candidates does not deprive them of any federally recognized constitutional right because such exclusion is a discharge of the obligations of the State to provide its electorate with an uncluttered ballot. This leaves to us a resolution of the question as to who is and who is not a serious candidate. Obviously, this is not a matter susceptible to precise definition, but one must be a candidate with some substantial support for his candidacy among the electorate. Section 3-8-27, supra, however, furnishes a figure of fifteen percent of the vote as a prerequisite to refund of one-half of the filing fee. That statute, in conjunction with § 3-8-26, subd. A, supra, requiring payment of the filing fee, working together, have proven an effective means of segregation between the serious and non-serious candidates.

There is certainly a valid interest in requiring some preliminary showing of a "significant modicum" of support before printing the name of a political organization and even more importantly the names of its candidates on the ballot. Jenness, et al. v. Fortson, Secretary of State of Georgia, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554.

It is suggested that we should refrain from all action, leaving corrective measures to the legislature. The inference seems to be that we are only concerned with one primary election—a matter of small consequence, and that somehow the electorate will muddle through.

Certainly alterations in the primary scheme may be appropriate and, if so, legislative action is clearly indicated. But we do not view our responsibilities so lightly. As matters stand, the electorate is in jeopardy of being deprived of the benefits of the constitutional mandates that the elective franchise be free from abuse and to an uncluttered ballot.

It may be true that our immediate concern is with one primary election which will soon be history, but its effects will linger on, because emerging from the miserable shambles which exists will be nominees, depending upon the outcome of the general election, who will serve from January 1, 1973 for a period of eight years in the case of one Supreme Court and one Court of Appeals seat, and six years in the case of a United States Senator, a Corporation Commissioner and every district judge in the State. Other officers would be elected for lesser terms.

Before concluding our opinion, we must decide as to the standard by which to measure or evaluate the question of the constitutionality of our primary election filing fee requirements [§ 3-8-26, subd. A, supra] in the light of our legislative history in the area of political party nominations and our experiences and successes in the

accomplishment of legislative objectives in this area under our filing fee system. Is the proper standard that of "rational relationship," or the more stringent one of "reasonable necessity," to the accomplishment of legitimate State objectives?

The question as to which of these standards was applicable to the Texas filing fee system was discussed and resolved in Bullock. Under the facts of that case, and "* * * [b]ecause the Texas filing fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, * * *" the United States Supreme Court determined that the Texas laws establishing a filing fee system in that State "* * * must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."

In making this determination, the court stated in part:

> "In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.
>
> "Unlike a filing fee requirement which most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character. * * * Not only are voters substantially limited in their choice of candidates, but there is the obvious likelihood of this limitation falling more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. * * * [W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status."

The court in Bullock also stated in considerable detail the legitimate interests and duties which a state has in the regulation of elections as shown by the quotation above from the opinion to this effect.

In the absence of any "evidence of any kind * * * in the record from which a legitimate state objective [could] be found," the three-judge federal court sitting in Dillon held that the statutory filing fee system in New Mexico, as applied to the three plaintiffs seeking to become candidates for nomination to the office of United States Senator, was not "reasonably necessary to the accomplishment of legitimate state objectives."

The legislature of the State of New Mexico is charged with the duty of enacting laws which will secure the purity of elections and guard against the abuse of the elective franchise. Art. VII, § 1, Constitution of New Mexico. As above related, our legislature has pursued, and the electorate of this State has tried, several ways of discharging this duty in regard to the process of nominating candidates for elective offices. New Mexico has legitimate interests in avoiding overcrowded ballots, in protecting the integrity of its political processes from frivolous and fraudulent candidacies, and in relieving, or at least in reducing, the costs to the State and county treasuries of conducting primary elections. Every barrier to candidacy access to the primary ballot, which is created in the accomplishment of these legitimate interests and with the purpose of protecting the right of franchise guaranteed to all qualified voters, is not subject to that degree of scrutiny which will meet the requirement of reasonable necessity. See Bullock v. Carter, supra. Unlike the court in the Bullock case, we know the number of candidates who have sought to enter the New Mexico primary, know the overcrowding of the ballot which will result if the names of all are permitted to be placed on the primary ballots as candidates, and know that a number of those who have filed declarations of candidacy will be fraudulent or frivolous candidates if given candidacy status on the primary ballot. It is apparent to us that the nominee for

many positions will fall far short of having the support of a majority of the voters, or even a substantial plurality thereof. Instead of assuring equal protection of the franchise to New Mexico voters, the potentially overcrowded ballot would result in the protection of clearly foreseeable inequalities in the exercise of this right of franchise.

The evidence in the record before us discloses and convinces us that no serious candidate has ever been barred from the primary ballot by our filing fee system. Unlike the Texas filing fee system which was declared constitutionally invalid in Bullock, our system, as shown by the evidence adduced, makes requirements as to filing fees which any serious candidate could be expected to fulfill from his own resources, or at least through modest contributions from his supporters.

We cannot say that our filing fee system, or any filing fee system, or for that matter any system yet devised to protect the purity of the elective ballot and the right of franchise, falls with absolutely equal weight upon the voters. The weight of the position of every voter, in relation to what must be done by him to successfully exercise his right of franchise, cannot be absolutely equal to the weight which the position of every other voter requires must be done to accomplish the exercise of this right. We can and do say with conviction that the record in this case clearly establishes that no measurable differences between burdens, and no demonstrable differences between the chances of failure or success at the polls, are imposed upon serious candidates, and particularly upon their supporters by reason of their economic status, as a result of the filing fee requirements. We are convinced that in New Mexico at least, the economic status of a serious candidate has no substantially real relationship to the economic status of his supporters, and that matters such as political affiliation, geographic location of residence, uncommonness of name, and social, religious and other relationships and conditions present far greater obstacles to political success than that of raising the required filing fee.

We are of the opinion that the posture of this case, as presently before us, requires only that we determine a rational relationship exists between our filing fee requirements and the legislative duty to protect the purity of elections and guard against abuses of the elective franchise in order to meet the requirements of the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States and of Art. II, § 18 of the Constitution of New Mexico. Clearly a rational basis for our filing fee system is demonstrated by the record in this case.

However, even if the proper standard should be that applied by the court in Bullock, we would still reach the same result, because there is no doubt in our minds that the application to the forthcoming primary election of the filing fee requirements of § 3-8-26, subd. A, supra, is reasonably necessary to protect the purity of the nominating process to be accomplished in that election, to protect against the appearance on the ballots of the names of frivolous and fraudulent candidates, to assure that the nominees elected have the support of at least a substantial plurality of the voters, and to assure the voters equal protection of the law in relation to the exercise of their voting franchise.

Even if we were of the opinion that § 3-8-26, subd. A, supra, fails to meet the constitutional requirement of equal protection, we would not, because of the time element, apply our ruling to the forthcoming primary election, but would follow the course taken by the court in Jenness v. Little, 306 F.Supp. 925 (D.C.N.D.Ga.1969). We would make our decision apply prospectively only to primary elections to be held subsequent to the June 6, 1972 primary election, and we would do so to avoid what we believe will be certain chaos, confusion, frustration and disenfranchisement of a great number of our voters, if the ballots carry the names of all who have filed

declarations of candidacy. Our voting machinery is not geared to handle ballots of this length during the allotted time of 8:00 a.m. to 7:00 p.m. on the same day, as provided by § 3-12-1, N.M.S.A. 1953 (Repl. Vol. 1, 1970).

Finally, a word concerning Dillon. We are not bound by that decision, if we understand it correctly. United States ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), cert. denied, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1971). We have, however, given weight to the specific holding in Dillon by excepting Messrs. Dillon, Cole and Gailard from the purview and operation of our decision. This we are pleased to do, not only under an extension of the doctrine of comity between courts, but by reason of our warm regard and respect for our learned brethren of the three-judge panel.

It has been argued to us that the true effect of Dillon was to exempt the Senate race from the operation of § 3-8-26, subd. A, supra. From a careful reading of the Memorandum Opinion, we do not see how this could be so, although admittedly, there is language in the Memorandum Opinion to this effect. From an examination of the pleadings and the scope of the issues thereby presented, as well as the rationale of the Memorandum Opinion, it is clear that the three-judge panel reached its result predicated upon the fact that the named individuals were unable to pay the filing fee. As carefully pointed out in the Memorandum Opinion, there was no evidence adduced and it would thus have been logically impossible for the court to have determined that all others who might seek to become candidates were without funds with which to pay the required filing fees. In fact, their identities could not even then have been known.

We, on the other hand, have the advantage not only of having this information available, but also of having heard and considered lengthy testimony and other relevant evidence.

While we have readily conceded the supremacy of the United States Supreme Court on federal constitutional questions and recognize the fact that careful consideration ought to be given to decisions of inferior federal courts, we are at the same time mindful of the fact that our decisions are supreme on state constitutional questions and the objectives, purposes, true legislative intent and meaning of state statutes.

We should and do hereby affirm the validity of our decisions and commands stated in the "Order Making Alternative Writ of Mandamus Absolute" which was issued on April 17, 1972.

It is so ordered.

495 P.2d 1388

STATE of New Mexico, Plaintiff-Appellee,

v.

Albert G. ANAYA, Defendant-Appellant.

No. 822.

Court of Appeals of New Mexico.

March 31, 1972.

Malcolm G. Colberg of Butler & Colberg, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Winston Roberts-Hohl, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant filed a Motion for post-conviction relief (§ 21-1-1(93), N.M.S.A.1953 (Repl.Vol.1970)) on the grounds that he was "twice placed in jeopardy" since the crimes (theft from an auto and the Municipal Court charges) "all arose out of the same incident." The trial court denied relief without a hearing and defendant appeals.

We affirm.

Defendant was convicted on two counts of theft from an auto. The convictions were affirmed in State v. Anaya, 82 N.M. 531, 484 P.2d 373 (Ct.App.1971). When the officers arrested defendant for the thefts, he resisted arrest, struck an officer and damaged the police radio in the police car which was being used to take him to the police station. Subsequently, but prior to the theft convictions, defendant was charged, tried and convicted in the Albuquerque Municipal Court of battery, resisting arrest and criminal damage. He received a one year probation.

The constitutional principle that no one shall be put in jeopardy twice for the same offense is broad enough to mean that no one can lawfully be punished twice for the same offense. State v. Baros, 78 N.M. 623, 435 P.2d 1005 (1968); State v. Quintana, 69 N.M. 51, 364 P.2d 120 (1961). If the several offenses are the same as where they arise out of the same transaction and were committed at the same time, and were part of a continuous act, and inspired by the same criminal intent, which is an essential element of each offense, they are susceptible of only one punishment. State v. Quintana, supra.

Factually, defendant's municipal court crime did not "arise out of the same transaction" as the subsequent district court crime of theft from an auto. See Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970), and the concurring opinion of Mr. Justice Brennan in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

The order denying defendant's motion for post-conviction relief without a hearing is affirmed. Section 21-1-1(93) (b), N.M.S.A. 1953 (Repl.Vol.1970).

Affirmed.

It is so ordered.

SUTIN and COWAN, JJ.

496 P.2d 167

STATE of New Mexico, Plaintiff-Appellee,

v.

Michael Eugene CLEMONS and Berry Lee Witt, Defendants-Appellants.

No. 786.

Court of Appeals of New Mexico.

April 7, 1972.

Lee A. Chagra, El Paso, Tex., Charles Berry, McAtee, Marchiondo & Berry, Albuquerque, for defendants-appellants.

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

A jurisdictional question not raised by the parties disposes of this appeal. See State v. McNeece, 82 N.M. 345, 481 P.2d 707 (Ct.App.1971).

Defendants were convicted of unlawful possession of marijuana contrary to § 54-7-13, N.M.S.A.1953 (Repl.Vol. 6). The sentences imposed were in accordance with penalties authorized for violation of § 54-7-13, supra. Shortly after sentences were imposed, this court decided State v. Riley, 82 N.M. 235, 478 P.2d 563 (Ct.App.1970). *Riley* reversed a marijuana conviction under a general statute, holding the general statute was inapplicable because of a special statute covering the same subject matter. This holding was applied to the statute in this case, § 54-7-13, supra, in State v. Thorn, 82 N.M. 431, 483 P.2d 312 (Ct.App.1971).

Because of the *Riley* decision, the State moved for various items of relief. Pursuant to the State's motion, the trial court set aside the judgment and sentence originally imposed, allowed the information to be amended to charge the special statute, and entered a new judgment and sentence in accordance with the special statute. The appeal challenges these actions of the trial court.

We do not reach the contentions of defendants. The original judgment and sentence was filed December 22, 1970. Defendants filed their notice of appeal and an appeal bond the same day. On January 5, 1971, defendants filed a praecipe. The State's motion, and the order granting a portion of the relief requested by the State, were filed January 21, 1971.

Various decisions of the New Mexico Supreme Court hold that once an appeal is taken, the jurisdiction of the trial court to take further action is limited. See Wagner Land and Investment Company v. Halderman, 83 N.Mex. 628, 495 P.2d 1075, decided March 17, 1972; Foreman v. Myers, 79 N.M. 404, 444 P.2d 589 (1968); Hardin v. State Tax Commission, 78 N.M. 477, 432 P.2d 833 (1967); Prudential Insurance Company of America v. Anaya, 78 N.M. 101, 428 P.2d 640 (1967); Mirabal v. Robert E. McKee, General Contractor, 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); Public Service Co. of New Mexico v. First Judicial Dist. Court, 65 N.M. 185, 334 P.2d 713 (1959).

A decision applicable to this case is State v. White, 71 N.M. 342, 378 P.2d 379 (1962). There, it was held that the trial court had no jurisdiction to amend a sentence in order to give defendant credit for the time he had been incarcerated prior to trial. There was an absence of jurisdiction because an appeal had been taken prior to the attempted amendment of the sentence. State v. White, supra, states:

> "* * * the taking of an appeal from a judgment in a civil case completely divests the district court of jurisdiction except for the purpose of perfecting the appeal to this court and for the purpose of passing upon motions pending when the appeal is taken, or for the timely vacating of an order granting appeal.
>
> * * * * * *
>
> "We perceive no difference in this jurisdiction of a district court over its judgments after appeal in criminal and civil cases. * * *"

See also State v. Maples, 82 N.M. 36, 474 P.2d 718 (Ct.App.1970).

Section 21-9-1, N.M.S.A.1953 (Repl.Vol. 4) does not avoid the applicability of State v. White, supra, since that section does not apply to jury cases. Scofield v. J. W. Jones Construction Company, 64 N.M. 319, 328 P.2d 389 (1958).

Elwess v. Elwess, 73 N.M. 400, 389 P.2d 7 (1964) states that at common law, after entry of judgment, the trial court did not lose jurisdiction over the subject matter until the end of the term of court. This common law rule is not applicable where an appeal has been taken because the appeal "completely divests the district court of jurisdiction" except as provided in State v. White, supra. Divestiture occurs by the taking of an appeal because the appeal removes the litigation from the district court. Scott v. Newsom, 74 N.M. 399, 394 P.2d 253 (1964).

In this case no action has been taken to vacate the notice of appeal filed December 22, 1970. No motion was pending at that time. Thus, the trial court was without jurisdiction to set aside the original judgment and sentence.

The original judgment and sentence are improper because under the inapplicable general statute. State v. Thorn, supra; State v. McNeece, supra.

The judgment and sentence are reversed. The cause is remanded with instructions to dismiss the charge against defendants under the inapplicable statute.

It is so ordered.

SUTIN, and COWAN, JJ., concur.

496 P.2d 169

STATE of New Mexico, Plaintiff-Appellee,

v.

Oscar ROGERS, also known as Joe Baker, Defendant-Appellant.

No. 818.

Court of Appeals of New Mexico.

April 7, 1972.

Harvey C. Markley, Lovington, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Jr., Asst. Atty. Gen. Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Rogers was charged, convicted and sentenced for burglary contrary to § 40A-16-3, N.M.S.A.1953 (Repl.Vol. 6, Supp.1971). Rogers appeals.

We reverse.

Section 40A-16-3, supra, reads in part as follows:

> Burglary consists of the unauthorized entry of any * * * structure, * * * with the intent to commit any felony or theft therein.

On April 8, 1971, at 8:30 p. m., Rogers drove into Jim's Conoco Station in Hobbs, New Mexico, walked into the office and asked for a crescent wrench to use to take off a battery. The attendant told him that tools were not lent unless a dollar was deposited. Rogers did not have a dollar. The attendant went out of the office to service a customer and returned to the office. Rogers viewed the attendant opening the cash register. While the attendant serviced another car, Rogers remained in the office. Suddenly, the attendant ran inside. The cash register was open, all of the paper money, about $30 or $35, was gone. The attendant asked Rogers to put the money back, and Rogers said "no."

The trial court instructed the jury that the material allegations of the charge of burglary were:

> 1. That the defendant, without authority, did enter a structure, to-wit: Jim's Conoco Station, Hobbs, New Mexico.

2. That the defendant entered such structure with the intent to commit a theft therein.

3. That said act or acts were committed by the defendant knowingly, unlawfully and feloniously.

This instruction became the law of this case. State v. Rayos, 77 N.M. 204, 420 P.2d 314 (1967). It should be noted that three essential ingredients exist. We are concerned only with the first.

There was no evidence that Rogers entered the Conoco structure "without authority." This was a business which invited the public to enter so that permission or consent of the owner is implied. Rogers' entry was authorized. The criminal offense committed thereafter was not burglary. A person who enters a store open to the public with intent to shoplift [§ 40A-16-20, N.M.S.A.1953 (Repl.Vol. 6, Supp.1971)], or commit larceny [§ 40A-16-1], is not guilty of burglary. Intent at the time of a permissible entry is not the sole element of burglary under the statute. People v. Carstensen, 161 Colo. 249, 420 P.2d 820 (1966).

Our holding is limited to the charge of burglary and we do not decide whether the facts would sustain a conviction under another criminal charge.

The conviction, judgment and sentence are reversed, and the cause remanded with instructions to dismiss the charge against the defendant for which he was convicted.

It is so ordered.

COWAN, and HERNANDEZ, JJ., concur.

496 P.2d 738

STATE of New Mexico, Plaintiff-Appellee,

v.

Jesse SIBOLD, Defendant-Appellant.

No. 778.

Court of Appeals of New Mexico.

April 14, 1972.

Louis G. Stewart, Jr., Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, Prentis Reid Griffith, Jr., Asst. Atty. Gen., for plaintiff-appellee.

OPINION

COWAN, Judge.

The defendant was convicted on two counts of misappropriation of money by means of fraudulent conduct, practices or representations, contrary to § 40A–16–6, N.M.S.A.1953 [Repl.Vol. 6]. His appeal raises the issues of failure to grant a continuance and the admission into evidence of a prior felony conviction. We reverse.

On Tuesday, March 30, 1971, the day of trial, the defendant orally moved for a continuance because of the absence of a material witness. His motion was later reduced to writing in compliance with §§ 21–8–10 and 21–8–11, N.M.S.A.1953 [Repl.Vol. 4], which provide the basis for a continuance because of absence of evidence.

The witness, Jack Holst, resided in Colorado. The events preceding the defendant's motion for continuance are set out in the supporting affidavit of his attorney, as follows:

"3. That affiant has exercised due diligence in attempting to produce the witness, Jack Holst as is more fully described below. (a) That he has complied

with the provisions of the statute compelling the attendence [sic] and testimony of out-of-state witness by seeking and having granted on order by this court requesting the attendance of Jack Holst. Said order was sent to the Sheriff of Pitkin County, Colorado wherein Aspen is located. That the order could not be served upon Mr. Holst until March 23, 1971, because he was outside this [sic] State of Colorado and returned only a day or so before that.

(b) Upon service thereof Mr. Holst called District Judge Charles Stewart, Pitkin County, advising him he could not travel to New Mexico because his wife was critically ill with a terminal disease and needed constant attention and Mr. Holst was required to transport her back and forth to the hospital. Judge Stewart then called affiant and advised me of said circumstances, stating he was inclined not to enter an order requiring Holst's attendance.

(c) Affiant then called Judge Zinn orally requesting a continuance, or taking of testimony by deposition which was denied. Affiant then called Judge Stewart again informing him of the problem. Judge Stewart agreed to talk to Jack Holst, which he did. Affiant was informed by Judge Stewart that Holst would appear and testify in Gallup, New Mexico and an order would be entered to that effect.

(d) Affiant again called Jack Holst who confirmed this stating he would appear Wednesday, March 31, 1971, as is further explained by a letter attached hereto and made a part hereof.

(e) Pm [sic] Tuesday, March 30, 1971, a call was received at the District Court Clerk's office, Gallup requesting to talk to affiant while the trial was already in session. Affiant was given the message about 10 A.M. and immediately returned the call, which was to Mr. Jack Holst, Aspen, Colorado.

(f) Mr. Holst advised affiant that his plans had been changed because he would have to take his wife to the hospital for emergency treatment sometime Tuesday, and therefore would not be available Wednesday to testify. He advised he would be able to appear and testify late Thursday, April 1 or Friday April 2, 1971, and would definitely appear on either date on my instructions. During the course of the phone call I interrupted it to discuss the problem with Judge Zinn, requesting a continuance until Thursday or Friday, it was denied. I then advised Mr. Holst to stand by for further instructions. Affiant has reasonable grounds to believe that Jack Holst would appear to testify April 1st or 2nd, 1971 as he indicated. He has been extremely cooperative throughout in his time of stress, and his testimony could therefore be procured for said time.

"4. That the facts to which Jack Holst would testify are material and essential to the defense and these facts affiant believes to be true, and that he knows of no other witness who could testify thereto."

The trial court, concerned with the condition of the jury docket and the fact that the case had been postponed three times previously, overruled the motion. It is noted, however, that only one of the postponements was at the request of the defendant.

Section 21–8–11, supra, states:

"If the application for continuance is insufficient it shall be overruled; if held sufficient the cause shall be continued, unless the opposite party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated."

There was no objection to the sufficiency of the motion for continuance or its supporting affidavit. Compare Territory v. Kinney, 3 N.M. (Gild) 656, 9 P. 599 (1886). The state did not seek to prevent

a continuance by an admission that the witness, if present, would testify to the facts stated in the application for continuance as provided by § 21–8–11, supra. Under these circumstances the defendant was entitled to a continuance as a matter of right and there was no room for the court to exercise any discretion. Its failure to grant a continuance was error. State v. Gallegos, 46 N.M. 387, 129 P.2d 634 (1942); State v. Riddel, 37 N.M. 148, 19 P.2d 751 (1933).

This opinion is restricted to the facts peculiar to this case. It is not intended to nor does it preclude or restrict the exercise of the court's discretion in cases in which the sufficiency of the application is in question or where the motion for a continuance is not in statutory form. In such cases the granting or denial of a motion for continuance rests in the sound discretion of the trial court and will be disturbed only upon a clear showing of an abuse of that discretion. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct.App.1969).

The defendant has also raised the issue of the propriety of his being questioned by the state concerning a prior felony conviction. By objection, the defendant invoked the court's determination as to whether the probative value of the evidence outweighed the prejudice necessarily resulting to the defendant.

"The only purpose of such cross-examination is to test the witness's credibility. We have long realized its tendency to prejudice the defendant. Because of this tendency it is the trial court's responsibility to determine when cross-examination should be limited because the legitimate probative value on the credibility of the accused is outweighed by its illegitimate tendency, effect or purpose to prejudice him. State v. Holden, 45 N.M. 147, 113 P.2d 171 (1941). The primary responsibility is on the trial court to make this determination. State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966). The trial court must exercise its discretion and having done so, that discretion in making this determination will not be disturbed on appeal, unless the appellate court can say the trial judge's action was erroneous, arbitrary and unwarranted. State v. Williams, supra; State v. Holden, supra." State v. Coca, 80 N.M. 95, 451 P.2d 999 (Ct.App.1969).

The court erroneously took the position that, under the terms of § 20–2–3, N.M.S.A.1953 [Repl.Vol. 4], it lacked discretion to limit such cross-examination and that evidence of the prior conviction was admissible without regard to its probative value. We do not decide whether the evidence should have been admitted but we do hold that the court erred in failing to exercise the discretion required of it by the defendant's objection.

The judgment is reversed and the case remanded with instructions to grant the defendant a new trial.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

496 P.2d 740

Walter Lee WILLIAMS, Plaintiff-Appellant,

v.

Delfin R. HERRERA et al., Defendants-Appellees.

No. 803.

Court of Appeals of New Mexico.

April 14, 1972.

John J. Duhigg, Bruce P. Moore, Albuquerque, for plaintiff-appellant.

J. T. Paulantis, Iden & Johnson, Albuquerque, N. M., for defendants-appellees.

OPINION

SUTIN, Judge.

Williams appeals from a summary judgment granted Herrera and Farmers Insurance Group, arising out of a fall from a ladder with a latent defective rung.

We affirm as to Herrera and reverse as to Farmers Insurance Group.

The trial court found, (1) that there are insufficient facts to establish negligence of Herrera; and (2) that the policy of insurance does not afford medical coverage, and concluded that no genuine issue of material fact was present.

1. *No Issue of Fact Exists on Negligence of Herrera.*

Williams, 38 years of age, was a brick mason and self-employed. In the latter part of September or first part of October, 1969, he did all of the brick masonry work on the outside of the home of Herrera and built the fireplace inside. Herrera fur-

nished all of the materials. After the home was completed, Herrera advised Williams the fireplace was smoking, and asked Williams to extend the chimney and put a flue liner on the chimney. Williams agreed to do this work. There was no charge for this work. On the morning of January 19, 1970, Williams went to the Herrera home and Herrera furnished him with a ladder to use in the performance of the work. Williams was a business invitee. Williams did not want to bring his own ladder because he was on his way to Santa Fe. Herrera then advised Williams he could use Herrera's ladder.

Williams asked Herrera if his ladder was a good ladder because Williams was quite heavy, 196 pounds, and the flue liner was extra weight of 45 pounds, for a total of 241 pounds. Herrera said, "it was a good ladder, and Williams could use it."

Herrera furnished Williams a 12-foot wooden ladder, factory made, with round wooden rungs from top to bottom. Williams carried it around by the fireplace on the outside of the home and leaned it up against the roof. He got the flue liner out of his pickup and was working it up the ladder to take it up to the roof. The flue liner was eight inches by thirteen inches in diameter, 24 inches long, and weighed 45 pounds. To work it up the ladder, he would set the flue liner on a rung ahead of him, then step up and raise it to the next rung. Each rung looked all right. At the time of the accident, Williams put the flue liner on the roof, balanced it with one hand and started to step on the roof. The rung under his left foot broke in two places and Williams with the flue liner, fell to the ground and suffered injuries to his left leg and foot. He did not know what caused the rung to break.

In order to establish a prima facie case in support of summary judgment, Herrera, by affidavit, stated that the ladder was about 10 feet long and was, as far as he could tell, in good condition. He used the ladder whenever necessary, and did not see any defects in the ladder. He used the ladder when working on his house during the construction period and always felt the ladder was safe. He was still using the ladder.

Herrera also relied on the testimony of Williams that Williams did not know what caused the rung to break.

Williams relies upon two points for reversal of the Herrera summary judgment. (1) The trial court based the summary judgment upon erroneous standards; (2) Herrera did not show an absence of material issues of fact.

(a) *Erroneous Standards*

The trial court found "that there are insufficient facts to establish that the accident complained of and resulting injuries were proximately caused by any act of negligence on the part of any of the defendants." This finding by the trial court does not support a summary judgment. It appears to say that the trial court weighed all of the facts and plaintiff failed to present sufficient facts to establish an act of negligence of Herrera.

When the trial court made findings of fact, it had a duty to find that Herrera had met the burden of showing that, as a matter of law, no act of negligence existed, and that Williams did not come forward with any evidence to create an issue of fact. Brock v. Goodman, 83 N.M. 580, 494 P.2d 1397 (Ct.App.), decided February 11, 1972.

It is not proper for the trial court or this court to weigh evidence. A summary judgment may be granted only when the basic facts are clear and undisputed, Johnson v. J. S. & H. Construction Co., 81 N.M. 42, 462 P.2d 627 (Ct.App.1969), but even where the basic facts are undisputed, summary judgment should be denied if equally logical but conflicting inferences can be drawn from the facts in favor of the party opposing a motion for summary judgment. Yeary v. Aztec Discounts, Inc., 83 N.M. 319, 491 P.2d 536 (Ct.App.1971).

However, findings of fact and conclusions of law are not required by our rules except in involved cases where the reason for the summary judgment is not

otherwise clearly apparent from the record. Wilson v. Albuquerque Board of Realtors, 81 N.M. 657, 472 P.2d 371 (1970). Since this is not an involved case, we may disregard the above findings of the trial court and determine whether the finding or statement of the trial court is correct that "there being no genuine issue of material fact present, [Herrera is] entitled to judgment as a matter of law."

(b) *Herrera Showed an Absence of Material Issues of Fact*

Williams claims that Herrera negligently supplied and permitted Williams to use the ladder. He argues that Herrera had a duty to make the ladder safe for the use for which it was supplied, a duty to exercise reasonable care to discover any dangerous conditions and inform Williams of them, and a duty to inspect it for defects prior to supplying it for use.

Herrera's affidavit as to his own use of the ladder and his failure to see any defects in the ladder is a prima facie showing that he did not know and could not have discovered the latent defect; that he did exercise reasonable care to discover any dangerous conditions and could not have discovered any.

Williams relies on Restatement of Torts 2d, § 392 to support his claim. This section applies only where one supplies to another, a chattel like a ladder to be used for the supplier's business purposes or in which the supplier has a business interest. Herrera did not supply the ladder to be used for his business purposes or in which he had a business interest. Section 392, supra, is, therefore, not applicable.

Herrera merely loaned the ladder to Williams for his personal use. This does not of itself impose upon Herrera a duty to inspect the ladder in order to discover whether it is fit for the use for which it is supplied. Restatement of the Law, Torts 2d, § 388, Comment (M) (1965). No New Mexico cases on inspection can be found. Compare Metz v. Haskell, 91 Idaho 160, 417 P.2d 898 (1966).

Restatement of the Law, Torts 2d, § 405, states:

> One who directly or through a third person gives or lends a chattel for another to use, knowing or having reason to know that it is or is likely to be dangerous for the use for which it is given or lent, is subject to the same liability as a supplier of the chattel.

Section 388, Comment (M), supra, is applicable here. Herrera's affidavit establishes that he did not know or have reason to know the ladder was dangerous or likely to be dangerous for the use for which it was lent to Williams. He had no duty to inspect the ladder for defects.

New Mexico decisions indicate no liability on Herrera's part in this "loan" situation unless Herrera "knew or by the exercise of due care should have known" of the defect in the ladder. See Bradley v. Johnson, 60 N.M. 453, 292 P.2d 325 (1955); Ferran v. Jacquez, 68 N.M. 367, 362 P.2d 519 (1961); compare Villanueva v. Nowlin, 77 N.M. 174, 420 P.2d 764 (1966).

After Herrera established a prima facie showing that no genuine issue of material fact existed, it became the duty of Williams to show there was a factual issue present. Sanchez v. Shop Rite Foods, 82 N.M. 369, 482 P.2d 72 (Ct.App.1971). This he failed to do.

Summary judgment in favor of Herrera is affirmed.

2. *The Policy of Insurance Does Afford Medical Coverage.*

The trial court found "that the policy of insurance * * * does not afford medical coverage." A question of law is involved, not a question of fact. Does the insurance policy afford medical coverage?

Farmers Insurance Group issued Herrera a policy of insurance with coverage for medical payments to others. Farmers concedes that Williams' claim falls within this provision of the policy, but contends that Williams is denied medical coverage by

reason of several exclusions set forth in the policy.

First, under Exclusions, Section 1(c), states:

This policy does not apply:

* * * * * *

c. to bodily injury or property damage arising out of the rendering of or failing to render professional services;

Did Williams' bodily injuries arise out of the rendering of professional services? If the provision is unambiguous, we can determine the issue as a matter of law by an application of the policy language to the facts of the case. Baca v. New Mexico State Highway Department, 82 N.M. 689, 486 P.2d 625 (Ct.App.1971). If it is ambiguous, we must construe the policy to determine its coverage. In doing so, any ambiguity must be resolved against the insurer. Ivy Nelson Grain Co. v. Commercial Union Insurance Company, 80 N.M. 224, 453 P.2d 587 (1969).

The policy does not define the words "professional services." Neither has it been defined in New Mexico. A review of the meaning of the word "profession" shows that "it is difficult, if not impossible, to lay down any strict legal definition. * * *" 72 C.J.S. Profession, pp. 1215–1220. The citation of cases would not be helpful. But it is our opinion that the term "professional services" is ambiguous and uncertain.

In Fowler v. First National Life Insurance Co. of America, 71 N.M. 364, 378 P.2d 605 (1963), the court said:

> It is a cardinal principle of insurance law that a policy or contract of insurance is to be construed liberally in favor of insured or his beneficiary and strictly as against insurer. Also, words, phrases or terms will be given their ordinary meaning unless by definitions in the policy or context in which the word is used requires some other meaning be given.

Since, in construing the policy coverage, we must resolve the ambiguity against the insurer, we hold that Williams, a stone mason, was not engaged in "professional services" while climbing a ladder at the time of the accident. Section 1(c), supra, is not applicable.

Second, under Exclusions, Section 1(d) states:

This policy does not apply:

* * * * * *

d. to bodily injury or property damage arising out of business pursuits of any insured except activities therein which are ordinarily incident to non-business pursuits; * * *

Two questions are involved. (1) Did Williams' bodily injury arise out of business pursuits of Herrera? The policy does not define the term "business pursuits." What is a "business pursuit"? (2) After completion of the home, was Herrera engaged in a non-business pursuit?

Under General Condition 8(d) of the insurance policy, "'business' means (1) trade, profession or occupation, including farming, and the use of any premises or portion of residence premises for any such purposes; * * *."

Fowler v. First National Life Insurance Co. of America, supra, was followed in Scott v. New Empire Insurance Company, 75 N.M. 81, 400 P.2d 953 (1965), where the court said:

> We decline to adopt a strict technical or legalistic interpretation of the terms of the policy, when it was fully within the power of the insurance company to affirmatively specify some meaning other than that understood by the average individual.

The rule is now clear that "where there is ambiguity, the test is not what the insurer intended its words to mean, but what a reasonable person in the position of the insured would understand them to mean * * *" and "the ambiguity is resolved against the insurer." Ivy Nelson Grain Co. v. Commercial Union Insurance Company, supra.

(1) Before the accident occurred, Herrera was building his own home. Whether this should be considered a "business pursuit," it is difficult to say. We believe it is ambiguous terminology because the average layman could disagree that in its ordinary meaning, building a home is a business pursuit. We resolve the ambiguity against the insurer and hold it was not a business pursuit.

(2) At the time of the accident, the home was completed. Williams was then doing a repair job on the Herrera home. When the home was completed, it became a non-business pursuit, and Williams' activity thereafter was ordinarily incident to a non-business pursuit and falls within the exception to Section 1(d), supra.

Section 1(d), supra, is not applicable.

The analysis stated above and the conclusions reached as to Exclusions 1(c) and 1(d) are supported by Crane v. State Farm Fire & Casualty Company, 5 Cal.3d 112, 95 Cal.Rptr. 513, 485 P.2d 1129 (1971); Home Insurance Company v. Aurigemma, 45 Misc.2d 875, 257 N.Y.S.2d 980 (1965); Edwards v. Trahan, 168 So.2d 365 (La. App.1964); Marx v. Hartford Accident & Indemnity Company, 183 Neb. 12, 157 N.W.2d 870 (1968); Security National Insurance Company v. Sequoyah Marina, Inc., 246 F.2d 830 (10th Cir. 1957); State Farm Fire & Casualty Company v. National Union Fire Insurance Company, 87 Ill.App.2d 15, 230 N.E.2d 513 (1967).

Third, under Exclusions, Section 3(b)(3) states:

This policy does not apply:

* * * * * *

b. to bodily injury to:

(3) any person while on the insured premises because a business is conducted or professional services are rendered thereon.

From the definitions of "business," supra, no trade, profession or occupation was conducted on the premises while Williams went there to work on the chimney. As heretofore stated, no professional services were rendered. This section is inapplicable.

Since the Exclusions are inapplicable, we hold that the policy of insurance did afford medical coverage to Williams.

The summary judgment granted Herrera is affirmed. The summary judgment granted Farmers Insurance Group is reversed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

496 P.2d 746

Em'ly ATTAWAY, Plaintiff-Appellee,

v.

JIM MILLER, INC., d/b/a Paul Thorp Health Spas and Nadine Lovelady, d/b/a Lovelady Realty and Construction Company, Defendants-Appellants.

No. 750.

Court of Appeals of New Mexico.

April 14, 1972.

R. E. Richards, Girand & Richards, Hobbs, for appellant Lovelady.

L. George Schubert, Hobbs, for appellant Miller.

William J. Heck, Hobbs, for appellee.

OPINION

SUTIN, Judge.

Defendants appeal from judgment entered on a jury verdict against them for personal injuries awarded Attaway.

We affirm.

Each defendant raises separate grounds for reversal.

A. LOVELADY

Lovelady contends, (1) the trial court erred in requiring her counsel to make peremptory challenges and challenges for good cause which were made in the hearing of the jury; (2) the trial court erred in requiring her counsel to make his motion to dismiss in the hearing of the jury.

The record does not support Lovelady's contentions. It is void of any proceedings for which error is claimed. To obtain a review, the record on appeal must show such portions of the proceedings below necessary to raise claimed error on appeal. Section 21-2-1(17) (1), N.M.S.A.1953 (Repl.Vol. 4). Seinsheimer & Co. v. Jacobson, 24 N.M. 84, 172 P. 1042 (1918); State ex rel. State Highway Commission v. Sherman, 82 N.M. 316, 481 P.2d 104 (1971). Since the record does not show that challenges were exercised, or that they were exercised in the hearing of the jury, or that the motion to dismiss in the hearing of the jury was actually heard by the jury, the judgment is affirmed.

B. MILLER

Miller contends "all the evidence" shows the relationship between Miller and Attaway to be that of master-servant and the relationship of Lovelady to Miller was that of an independent contractor. Miller claims he is not responsible for Lovelady's negligence. We do not have to decide this issue. Independent of Lovelady's negligence, substantial evidence of negligence on the part of Miller supports the determination of Miller's liability. The judgment against Miller is affirmed.

At oral argument, Attaway asked that damages for delay be assessed in her favor under Supreme Court Rule 17(3) [§ 21-2-1(17) (3), N.M.S.A.1953 (Repl.Vol. 4)]. However, Attaway did not, thereafter, file a motion with brief in support thereof. Nevertheless, Attaway failed to meet the conditions set forth in Anderson v. Jenkins Construction Company, 83 N.M. 47, 487 P.2d 1352 (Ct.App.1971).

Affirmed.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

496 P.2d 1084

Steve CHAVEZ and Corrine Chavez, his wife, Plaintiffs-Appellees,

v.

John F. GRIBBLE, d/b/a Gribble Construction Company, Defendant-Appellant.

No. 9356.

Supreme Court of New Mexico.

May 5, 1972.

[redacted]

[redacted]

Branch & Dickson, Bill Chappell, Jr., Albuquerque, for defendant-appellant.

Cotter, Hernandez, Atkinson, Campbell & Kelsey, Albuquerque, for plaintiffs-appellees.

OPINION

STEPHENSON, Justice.

The parties entered into a written contract whereby Defendant-Appellant (defendant) agreed to construct an addition to the house of Plaintiffs-Appellees (plaintiffs) for $4,350. Work was commenced and plaintiffs had paid $3,350 when a dispute arose which culminated in this action in which plaintiffs alleged a breach of contract and performance of work by defendant in an unskillful and negligent manner and later, by amendment, fraud.

The trial court entered judgment for plaintiffs for $2,500 and defendant appealed. We affirm.

Defendant first claims the court committed error in admitting into evidence the contract, it not having been filed with the complaint as required by Rule 9(k) [§ 21–1–1(9) (k), N.M.S.A., 1953].

Plaintiffs' complaint pleads the contract and recites a copy of it is attached as an exhibit, but no copy was attached. The same is true of the first amended complaint. This omission was apparently inadvertent. The answer does not deny the allegation of such attachment and in fact makes reference to the contract's having been so attached. Moreover, defendant in his counterclaim pleaded the contract and attached a copy of it as an exhibit. Plaintiffs admitted the allegations in question, including authenticity of the contract, by a failure to deny.

When plaintiffs tendered the contract into evidence, defendant objected to its admission on the basis of Rule 9(k). The objection was overruled, and the court's ruling is now attacked. Plaintiffs did not seek to amend the pleadings.

The contract itself, having been pleaded, attached to the counterclaim and admitted, was before the court. There was no occasion to offer or receive it into evidence. No proof is required as to that which is admitted in the pleadings. City of Hot Springs v. Hot Springs Fair & Racing Ass'n, 56 N.M. 317, 243 P.2d 619 (1952). Any error inherent in the court's ruling was harmless.

Defendant next asserts in a rather cursory way, without argument of substance or citation of authority, that "the undisputed testimony is that the defendant is entitled to recover the sum of $1,000.00."

Defendant simply says that the contract called for payment of $4,350 and that since only $3,350 was paid, the court erred in finding that plaintiffs performed the conditions required of them in the contract and in refusing to conclude, as requested by defendant, that defendant was entitled to recover the sum of $1,000 "as monies not fully paid on the contract." The court found that defendant did not perform the contract as required on his part, to plaintiffs' damage in the sum of $2,500. The latter finding is not attacked.

We see nothing wrong with the court's finding that plaintiffs performed. The contract provided for payments "to be made in full upon final inspection as per loan agreement with Albuquerque Federal Savings and Loan." There is no finding by the court that the time for payment had arrived. No such finding was requested by defendant, nor has he invited our attention to any evidence in the record that the time for payment had arrived. We will not search the record to discover whether such evidence exists. Moreover, the court found that defendant had not performed and, as we have said, this finding was not attacked. Accordingly, we hold that the court did not err in making its finding that plaintiffs had performed.

It may be that defendant is, in truth, contending for the rule of damages set forth in Restatement of Contracts, § 346, quoted by us with approval in Montgomery v. Karavas, 45 N.M. 287, 114 P.2d 776 (1941) as follows:

"'(1) For a breach by one who has contracted to construct a specified product, the other party can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:

'(a) For defective or unfinished construction he can get judgment for either

'(i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or

'(ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in

accordance with the contract would involve unreasonable economic waste. * * *'"

If this be true, the result we reach is not affected, because there is nothing before us to indicate the reasonable cost of construction or completion in accordance with the contract or even whether such completion is possible without unreasonable economic waste.

There is nothing before us to indicate that the court did not take into account the amount of money unpaid on the contract in fixing the amount of the award. A study of the court's findings and conclusions as a whole indicates that it is more likely that this figure was taken into consideration.

Finally, defendant contends that the court erred in fixing the amount of costs to be recovered by plaintiffs. We agree. The proceedings involving costs were unorthodox and prevented defendant from having his day in court. It does not appear that the clerk of the court assessed the costs nor was any notice given that they were being assessed. There was never a hearing on defendant's objections or his motion attacking the judgment.

The chronology is as follows:

February 10, 1971: Plaintiffs filed bill of costs in the amount of $563.98.

March 16, 1971: Defendant filed objection to bill of costs.

April 6, 1971: Judgment entered—including costs in same amount as requested by plaintiffs.

April 14, 1971: Defendant filed motion to set aside judgment based on erroneous award of costs.

May 3, 1971: Defendant filed notice of appeal.

Most of the argument is directed to the issue of whether or not § 20–1–4(b), N.M.S.A., 1953, in its amended form, governs. We do not reach this question because it is not clear to us that it was specifically called to the court's attention or that the court made a direct ruling in this regard.

The award of costs will therefore be set aside, with leave to the parties to seek or resist an award of costs, in strict compliance with the Rules of Civil Procedure. Rule 54(d) [§ 21–1–1(54) (d), N.M.S.A., 1953].

The award of damages is affirmed, but the award of costs is reversed, subject to the right of the parties to proceed further in the manner we have specified.

It is so ordered.

COMPTON, C. J., and MONTOYA, J., concur.

496 P.2d 1086

STATE of New Mexico ex rel. S. E. REYNOLDS, State Engineer, Plaintiff-Appellant and Cross-Appellee,

v.

MOLYBDENUM CORPORATION OF AMERICA, a Delaware Corporation, Defendant-Appellee and Cross-Appellant.

No. 9358.

Supreme Court of New Mexico.

May 5, 1972.

David L. Norvell, Atty. Gen., Paul L. Bloom, Peter Thomas White, Sp. Asst. Attys. Gen., Sante Fe, for appellant and cross-appellee.

Watson, Stillinger & Lunt, Sante Fe, for appellee and cross-appellant.

OPINION

OMAN, Justice.

This is a suit in which plaintiff sought an injunction against defendant. The trial court granted defendant's motion to dismiss pursuant to Rule 41(e), Rules of Civil Procedure for the District Courts [§ 21-1-1 (41) (e), N.M.S.A.1953 (Repl.Vol. 4, 1970)]. Plaintiff appealed from the order dismissing its complaint with prejudice. Defendant cross-appealed on the ground that, notwithstanding any error which might have been committed against plaintiff, the order should be affirmed. Supreme Court Rule 17(2) [§ 21-2-1(17) (2), N.M.S.A.1953 (Repl.Vol. 4, 1970)]. We reverse.

The record shows the following actions to have been taken:

(1) Complaint was filed May 24, 1968.

(2) Answer was filed June 24, 1968. Substantial and complicated legal defenses to the complaint were raised by the answer.

(3) On May 25, 1971, defendant filed its motion to dismiss pursuant to Rule 41 (e), supra.

(4) On July 13, 1971, defendant's motion to dismiss came on for hearing. At this hearing it was pointed out to the present district judge that on May 15, 1969, a pre-trial conference had been conducted and a hearing on the legal issues held by the former district judge who resigned on June 30, 1971. For some unexplained reason the former district judge had made no record of the pre-trial conference and hearing, and had failed to rule upon defendant's legal defenses. The present district judge announced he would permit plaintiff to file of record matters necessary to demonstrate that a pre-trial conference and hearing had been held on May 15, 1969, matters which had been presented to the court at that hearing, and copies of the

briefs which had been submitted by the parties in support of their respective positions. The present district judge did, however, feel compelled to sustain defendant's motion for dismissal and so announced.

(5) On July 22, 1971, plaintiff filed an affidavit by one of its former attorneys who had represented plaintiff at the pretrial conference and hearing. Along with this affidavit there was filed a copy of defendant's "Trial Brief on Legal Defenses," which defendant had submitted to the court on May 15, 1969 at the pretrial conference and hearing; a copy of "Plaintiff's Trial Brief on Legal Defenses," which was subsequently submitted with the court's permission; and "Defendant's Reply Brief on Legal Defenses," which was submitted to the court shortly thereafter.

(6) On July 26, 1971, defendant filed a motion to strike the affidavit and copies of briefs on the grounds that they were "* * * not part of the record or the court file herein at the time of * * *" the hearing on defendant's motion to dismiss under Rule 41(e), supra, which, as shown above, was held on July 13, 1971.

(7) On July 30, 1971, the court entered an order denying defendant's motion to strike the affidavit and briefs.

(8) On August 2, 1971, defendant filed a "Statement Controverting Affidavit of Peter B. Shoenfeld" [attorney for plaintiff whose affidavit had been filed on July 22, 1971]. The controversy between Mr. Shoenfeld's affidavit and defendant's statement relates to whether or not the parties had implicitly agreed that all issues raised by the pleadings had been presented to the court on May 15, 1969, at the pre-trial conference and hearing on legal defenses and in their briefs. Attached to defendant's statement were:

(a) A letter dated August 23, 1968 from Mr. Shoenfeld addressed to the district judge advising that counsel for both parties had conferred and deemed it advisable that a pre-trial conference be held to narrow and familiarize the court with the issues, and advising that defendant wished to argue the legal defenses raised in its answer.

(b) A letter dated October 17, 1968 from the attorney for defendant addressed to the district judge referring to a discussion by counsel for both sides with the court concerning the possible settlement of the legal issues at a pre-trial conference, and urging an early setting at any place at the convenience of the court because of the utmost importance to defendant of getting an early determination of these issues.

(c) A letter dated November 25, 1968 from the attorney for defendant addressed to the district judge referring to the October 17 letter concerning a pre-trial conference and the absence of any response thereto from the court, and reminding and explaining to the court the need for an early disposition of the legal issues and expressing a belief that these issues could be determined at a pre-trial conference.

(d) A letter dated May 21, 1969, from plaintiff's attorney addressed to the district judge requesting to be excused from attending the calling of the docket on June 2, 1969, since the defendant had moved to dismiss the complaint for failure to state a claim, and a decision of the court on that motion was expected after the submission to the court on or before June 15, 1969, of plaintiff's brief.

(9) On August 2, 1971, the court entered the order dismissing the plaintiff's complaint with prejudice under Rule 41(e), supra. It is apparent from the court's findings that he considered only the complaint, answer and defendant's motion to dismiss under Rule 41(e), supra, because these were the only relevant matters in "the court file in this cause" at the time of the filing of defendant's motion on May 25, 1971, as shown above.

That portion of Rule 41(e) here applicable provides:

"(1) In any civil action or proceeding pending in any district court in this state, including actions in which a jury trial has been demanded, when it shall be made to appear to the court that the

plaintiff therein or any defendant filing a cross-complaint therein has failed to take any action to bring such action or proceeding to its final determination for a period of at least three [3] years after the filing of said action or proceeding or of such cross-complaint unless a written stipulation signed by all parties to said action or proceeding has been filed suspending or postponing final action therein beyond three [3] years, any party to such action or proceeding may have the same dismissed with prejudice to the prosecution of any other or further action or proceeding based on the same cause of action set up in the complaint or cross-complaint by filing in such pending action or proceeding a written motion moving the dismissal thereof with prejudice."

As shown by the above recited actions reflected by the record in this cause, there was no stipulation filed suspending or postponing final action beyond three years. Thus, the question presented is whether it was "* * * made to appear to the [district] court that the plaintiff * * * failed to take any action to bring [this cause] to its final determination for a period of at least three [3] years after the filing * * *" of its complaint on May 24, 1968.

The actions recited in Paragraphs numbered 4, 5 and 8 above, except for the hearing on July 13, 1971, the filing of the affidavit on July 22, 1971 and the filing of the statement on August 2, 1971, would seem clearly to be actions taken to bring the suit to its final conclusion. These actions, insofar as plaintiff was concerned, were: (1) The writing of the letter of August 23, 1968 to the district judge suggesting and requesting a pre-trial conference and hearing on defendant's legal defenses; (2) The participation in the pre-trial conference and hearing on defendant's legal defenses on May 15, 1969; (3) The subsequent preparation and furnishing to the court of "Plaintiff's Trial Brief on Legal Defenses"; and (4) Conferences with defendant's counsel for the purpose of getting an early disposition of at least defendant's legal defenses, which was of great importance to defendant.

The failures of the trial court to make a record of the pre-trial conference and hearing and to decide the legal issues presented to the court by oral arguments and the briefs are not chargeable to either party. Both parties had clearly taken actions to bring the suit to its final conclusion long before May 25, 1971. However, a record of these actions did not appear in the court file as of May 25, 1971, and the present district judge, who entered the order of dismissal on August 2, 1971, obviously felt compelled to do so in accordance with the very narrow interpretations that this court has given to the above quoted portion of Rule 41(e), supra,—which interpretations at times appear to us to have been somewhat inconsistent—and particularly to that portion of the rule which provides "* * * when it shall be made to appear to the court [district court] that the plaintiff therein or any defendant filing a cross-complaint therein has failed to take any action to bring such action or proceeding to its final determination. * * *"

The multitudinous problems with the application of this rule, the rule's productivity of disputes and consequent appeals, and, in our opinion, the many injustices worked by the application of this court's constructions of the rule seem to have had their principal beginning with the decision in Ringle Development Corporation v. Chavez, 51 N. M. 156, 180 P.2d 790 (1947). In that case it was held the provisions for dismissal with prejudice are mandatory except when one of the following appears:

(1) "* * * the time is tolled by statute * * *," (2) "* * * process has not been served because of inability to execute it on account of the absence of the defendant from the state, or his concealment within the state, * * *," (3) "* * * from some other good reason, the plaintiff is unable, for causes beyond his control, to bring the case to trial, * * *." This third stated area, which excuses a mandatory dismissal, has proven

extremely troublesome in application to the facts of cases as they have progressed toward their termination, and the constructions placed thereon by this court in subsequent cases has resulted in a total deprivation of all discretion and judgment on the part of the district courts, in mechanically limited views and reviews of actions taken toward bringing a case to its final conclusion, and in complete disregard of this court's often stated concerns for the rights of litigants to have their day in court and their cases decided on the merits and not on trivial technicalities.

The rule was obviously and commendably adopted to keep cases moving with reasonable dispatch through the judicial process, and to bring stale cases to a termination. However, the narrow constructions placed on the rule have unjustly resulted in the termination of many cases in which diligence in the prosecution thereof could have been shown and often has actually been shown, but this diligence was not and could not be considered because it was not capable of demonstration by matters reflected in the court file. We shall not attempt to cite, review, reconcile or distinguish the decisions in the many cases which have reached this court largely by reason of the departure from the plain language of Rule 41(e), supra, and the narrow constructions placed thereon by this court and its determinations as to what is required to constitute delay for causes beyond the control of plaintiff.

The next decision following Ringle Development Corporation v. Chavez, supra, to which we shall refer, is Pettine Bros. v. Rogers, 63 N.M. 457, 321 P.2d 638 (1958). In the Pettine case, the interpretation of the rule previously adopted in the Ringle case was affirmed, but at that time it was still recognized the district court could exercise some discretion in determining whether the delay was occasioned by plaintiff's inability for causes beyond his control to bring the case to trial. It was also stated the rule, if not avoided by stipulation or one of the exceptions recited in the Ringle case, "* * * operates as a statute of limitations. Eager v. Belmore, 1949, 53 N.M. 299, 207 P.2d 519; City of Roswell v. Holmes, 1939, 44 N.M. 1, 96 P.2d 701."

In Featherstone v. Hanson, 65 N.M. 398, 338 P.2d 298 (1959), the decisions in the Ringle and Pettine cases were reaffirmed. The court further stated that the rule "* * * is mandatory and, absent the filing of a stipulation of extension, or some showing in the court file itself which shows diligence on the part of the plaintiff to bring the action to trial, or a definite showing, upon which plaintiff relied, which would estop the defendant from meritoriously filing a motion to dismiss, that after two [now three] years from the date of the filing of the original complaint the trial court has no discretion except to dismiss. * * *" Thus, except for a possible estoppel, the provision in the rule, that a case shall be dismissed if "* * * it shall be made to appear to the court that the plaintiff therein or any defendant filing a cross-complaint therein has failed to take any action to bring such action or proceeding to its final determination * * *," came to mean what appeared solely from an examination of the court file. See the dissent of Judge Wood in Reger v. Preston, 77 N.M. 196, 420 P.2d 779 (1966). The trial court was required to grant the motion and dismiss the case, unless the court file itself contained some pleading or other matter which showed diligence on plaintiff's part. The trial court was required to ignore all written and oral communications between the court and counsel for plaintiff evidencing diligence, including actual promises and settings made by the court, unless a record thereof was made and placed in the court file; actual hearings by the court on motions, etc., unless a record thereof was made and placed in the court file; negotiations and other actions between counsel for the parties looking toward the early conclusion of the case, unless a record thereof was made and placed in the court file; all discovery proceedings by way of depositions on oral examination or written interrogatories, discovery and production of documents and things, mental or physical examinations of

persons, and requests for admission of facts and genuineness of documents, unless a record thereof was made and placed in the court file; and the many other matters which arise and the actions which are taken by counsel in concluding litigation, unless a record thereof was made and placed in the court file. All trial judges and trial attorneys know that many actions are taken by the court and the attorneys in the disposition of cases, but a record of which belatedly, if ever, finds its way into the court file itself. In fact all trial preparations could be accomplished and a case fully tried and concluded, except for the entry of judgment, when the time expires under Rule 41(e), supra, and still there could properly be nothing in the court file other than the complaint, summons and return thereon, and the answer to the complaint.

In Western Timber Products Co. v. W. S. Ranch Company, 69 N.M. 108, 364 P.2d 361 (1961), a dismissal of plaintiff's complaint was upheld despite the fact that during the two-year period following the filing of the complaint plaintiff filed a jury demand; filed interrogatories to be answered by defendant; the resident judge recused himself some four and one-half months after the complaint was filed, and another judge was not designated to try the case until more than seven months had elapsed; and no jury was available during the last seven and one-half months of the two-year period.

In Morris v. Fitzgerald, 73 N.M. 56, 385 P.2d 574 (1963), there was considerable activity, including the taking of depositions. In the opinion in that case it was stated: "All discovery procedures are available to be used or not, as a litigant sees fit, and none are required prerequisites to trial. Accordingly, in our view, they are not 'actions' to bring a proceeding to its final determination so as to toll the statute. * * *"

This position was reaffirmed in Sender v. Montoya, 73 N.M. 287, 387 P.2d 860 (1963).

Although the use of discovery procedures may not be "required prerequisites to trial" these procedures are provided for by rules of this court and are extensively used in bringing cases to a conclusion. We find nothing in Rule 41(e), supra, equating "required prerequisites to trial" with "action to bring" a suit to its final determination, and we are unable to understand why the use of discovery proceedings "are not actions to bring a proceeding to its final determination."

In Schall v. Burks, 74 N.M. 583, 396 P.2d 192 (1964), which came before this court by original action in mandamus, the activities of the parties are detailed at length in the opinion. The complaint was filed on August 3, 1960. On "January 18, 1963, plaintiffs filed notice requesting that trial court set date for hearing on defendant's motion for summary judgment and that a date be set for trial." On February 4 and April 2, 1963, defendant filed similar motions to dismiss for failure to bring the case to trial within two years. A permanent writ of mandamus was issued by this court directing that the trial court had no discretion except to dismiss. Although the opinion does not so state, the refusal to consider plaintiff's request for trial setting, filed more than two years after the filing of the complaint but before the filing of defendant's motions to dismiss, is consistent with the prior holdings that the rule "operates as a statute of limitations." Pettine Bros. v. Rogers, supra.

However, in Martin v. Leonard Motor-El Paso, 75 N.M. 219, 402 P.2d 954 (1965), a directly contrary result was reached. In that case the plaintiff filed a written motion requesting the court to set the case for trial. This motion was filed more than two years after the filing of the complaint but prior to the filing of defendant's motion to dismiss. The trial court sustained the motion and dismissed. This court reversed. The reason given for the reversal was that a defendant is required to elect whether to invoke his right to dismiss under Rule 41(e), supra, before the plaintiff has taken

action to bring the case to its final determination. The action taken was the filing of the motion for trial setting. See in accord Procter v. Fez Club, 76 N.M. 241, 414 P.2d 219 (1966) and cases cited therein.

In State ex rel. City of Las Cruces v. McManus, 75 N.M. 267, 404 P.2d 106 (1965), the trial court was directed by writ of mandamus from this court to dismiss pursuant to Rule 41(e), supra. In that case an amended complaint was filed on January 25, 1961. Shortly thereafter both of the resident district judges were disqualified. On April 5, 1961, a district judge from another district was designated to preside in the case. A motion by defendant to dismiss the complaint was presented to this judge on briefs and he was holding this motion under advisement when he recused himself on February 6, 1962. On May 22, 1962, the respondent district judge from still another district was designated. After his designation he took the motion under advisement and did not rule on it until July 27, 1964. However, an order setting forth the court's ruling on the motion was not filed. Defendant's motion to dismiss was filed on August 5, 1964. The respondent urged that at all times after he was designated he held the motion under advisement and plaintiff was unable, for good cause beyond plaintiff's control, to bring the action to its final determination. This court, in ordering the case dismissed, relied upon the failure of the record to show that respondent had been timely advised by plaintiff of the urgency of a ruling on the motion and upon its prior holdings "* * * that facts not appearing in the court file may not be considered as establishing diligence. * * *"

In Lovato v. Hicks, 75 N.M. 611, 409 P.2d 130 (1965), plaintiff wrote the trial court well within the two-year period as then provided in Rule 41(e), supra, requesting an early setting in the case. The court answered advising plaintiff that funds were not then available to try jury cases, but the case would be set "just as soon as possible." The court mailed plaintiff's letter and a copy of the court's reply thereto to the clerk of the court who placed the letters in the court file for future reference. However, the order dismissing the complaint was affirmed because "* * * this correspondence was not a part of the court record. * * *" A check of the transcript reveals the letters were not stamped and indexed, but were placed in the file by the clerk for the benefit of the court and the court clerk. However, there is no question about the letters having been written or their presence in the court file. They were read into evidence at the hearing on the motion and became a part of the Bill of Exceptions, and subsequently became a part of the record before this court on appeal. It is difficult for us to follow the logic which prompted a result in this case which we view as being directly opposite the results reached in Martin v. Leonard Motor-El Paso, supra, and in Foundation Reserve Ins. Co. v. Johnston Testers, Inc., 77 N.M. 207, 421 P.2d 123 (1966).

In Trujillo v. Harris, 75 N.M. 683, 410 P.2d 401 (1966), plaintiff's attorney had written a district judge three letters several months apart requesting a trial setting long before defendant filed his motion for dismissal, but these letters were not a part of the court record at the time the motion to dismiss was filed, and, therefore, this court stated they could not be considered as efforts to bring the action to its final determination. Again there is no question about the letters having been written and received by the trial judge, and the letters were a part of the record on appeal in this court. In accord with the holding in the Trujillo case see Briesmeister v. Medina, 76 N.M. 606, 417 P.2d 208 (1966) and cases therein cited on this question.

In Foundation Reserve Ins. Co. v. Johnston Testers, Inc., supra, a letter by the trial judge to counsel of record acknowledging a request by plaintiff's counsel to set the case for trial "was filed" before the motion to dismiss was filed. This letter was held sufficient to show "a good-faith attempt had been made to obtain a

setting," and, consequently, satisfied the requirement of Rule 41(e), supra, that action be taken to bring the case to a final determination.

In Dollison v. Fireman's Fund Insurance Company, 77 N.M. 392, 423 P.2d 426 (1966), a pre-trial conference was conducted and the case set for trial, but the setting was vacated by the trial court prior to the filing of the motion to dismiss. However, no record of the pre-trial conference or of the trial setting and its vacation was made prior to the filing of the motion, but was made by way of an uncontroverted affidavit in opposition to the motion to dismiss. It was held that the pre-trial conference and trial setting, even though not reflected by the record prior to the time of filing of the motion to dismiss, constituted action taken toward a final determination of the case, and the order of the trial court dismissing the complaint was reversed.

Justice Moise authored a dissent on the ground that the consideration by the majority of matters not of record prior to the filing of the motion to dismiss amounted to a departure from precedent without expressly overruling them. We concede merit in Justice Moise's contention that there was a departure by the majority from at least many of the earlier decisions of this court, but we are fully convinced the result reached by the majority in the Dollison case was correct and that justice requires a further departure from the earlier decisions of this court and the return to what we understand is clearly intended by Rule 41(e), supra.

The rule contemplates a hearing upon a motion to dismiss at which the parties may present evidence on the issue of whether "* * * the plaintiff therein or any defendant filing a cross-complaint therein has failed to take any action to bring such action or proceeding to its final determination for a period of at least three [3] years after the filing of said action or proceeding or of such cross-complaint. * * *" It is consistent with the purpose and intent of the rule that the movant must also be diligent, and action taken prior to the filing of the motion to dismiss must be considered as timely. Martin v. Leonard Motor-El Paso, supra.

The trial court should determine, upon the basis of the court record and the matters presented at the hearing, whether such action has been timely taken by the plaintiff, the cross-claimant or the counter-claimant against whom the motion is directed, and, if not, whether he has been excusably prevented from taking such action. In making this determination, the discretion of the trial court will be upheld on appeal except for a clear abuse thereof.

It follows from what has been said that the order of dismissal should be reversed and the cause remanded for further proceedings therein, and all prior decisions of this court, insofar as they are inconsistent with our holding and our statements herein as to what is contemplated by Rule 41(e), supra, should be overruled.

It is so ordered.

McMANUS and MONTOYA, JJ., concur.

496 P.2d 1094

Kenneth D. GOUGH, Petitioner,

v.

FAMARISS OIL & REFINING COMPANY, Employer, and Aetna Casualty and Surety Company, Insurer, Respondents.

No. 9451.

Supreme Court of New Mexico.

May 2, 1972.

Further ordered that the record in Court of Appeals Cause No. 753, 83 N.M. 710, 496 P.2d 1106, be and the same is hereby returned to the Clerk of the Court of Appeals.

496 P.2d 1094

Don RUPERT et al., Petitioners,

v.

Hallie C. SANDERS and William W. Sanders, individually, et al., Respondents.

No. 9449.

Supreme Court of New Mexico.

May 2, 1972.

Further ordered that the record in Court of Appeals Cause No. 704, 83 N.M. 706, 496 P.2d 1102, be and the same is hereby returned to the Clerk of the Court of Appeals.

496 P.2d 1094

Hallie C. SANDERS et al., Petitioners,

v.

Don RUPERT et al., Respondents.

No. 9456.

Supreme Court of New Mexico.

May 2, 1972.

Further ordered that the record in Court of Appeals Cause No. 704, 83 N.M. 706, 496 P.2d 1102, be and the same is hereby returned to the Clerk of the Court of Appeals.

496 P.2d 1095

Rumaldo DURAN, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 9465.

Supreme Court of New Mexico.

May 4, 1972.

Further ordered that the record in Court of Appeals Cause No. 823, 83 N.M. 700, 496 P.2d 1096, be and the same is hereby returned to the Clerk of the Court of Appeals.

496 P.2d 1095

NEW MEXICO HEALTH AND SOCIAL SERVICES DEPARTMENT, Petitioner,

v.

Joaquin BACA, Respondent.

No. 9476.

Supreme Court of New Mexico.

May 4, 1972.

Further ordered that the record in Court of Appeals Cause No. 780, 83 N.M. 703, 496 P.2d 1099, be and the same is hereby returned to the Clerk of the Court of Appeals.

496 P.2d 1096

STATE of New Mexico, Plaintiff-Appellee,

v.

Rumaldo DURAN, Defendant-Appellant.

No. 823.

Court of Appeals of New Mexico.

April 14, 1972.

Certiorari Denied May 4, 1972.

Joseph D. Beaty, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of murder in the second degree. Section 40A-2-1,

N.M.S.A.1953 (Repl.Vol. 6). The issues concern: (1) admissibility of lay testimony concerning the condition of the victim's right arm; (2) the constitutionality of § 20–2–3, N.M.S.A.1953 (Repl.Vol. 4); (3) admissibility of rebuttal testimony as to prior statements and conduct of defendant; and (4) the propriety of an instruction on implied malice.

Defendant had been going with Pamela Torres, a stepdaughter of Nash Lucero. Accompanied by two of his brothers, he went to the Lucero residence. Judy Jones, another stepdaughter of Nash, came out and conversed with defendant. During this conversation, the brother driving the Duran car raced its engine. Nash came out of the house and asked that they be quiet.

Benerito Lucero, Nash's brother, followed Nash from the house. After Nash's request for quiet, the Duran brothers started to leave. Benerito made a remark and the Duran brothers got out of their car. A fight ensued between two of the Duran brothers (one of which was defendant) and Benerito and Nash. Benerito received two stab wounds in the fight, one of which caused his death.

The evidence is in dispute as to what Benerito said and as to the details of the fight. However, there is substantial evidence that defendant had a knife and used that knife to stab Benerito.

Admissibility of lay testimony.

Nash Lucero's wife testified that Benerito had "one bad arm;" that he "didn't have no strength," and that he had had an operation on his elbow. Nash Lucero also testified to the operation and that Benerito couldn't work very much because: "His right arm, he couldn't handle that very well."

Defendant claims this evidence was inadmissible "* * * as the witnesses were not qualified to express an opinion as to the extent the impairment interfered with the Decedent's ability to use the arm in a fight. * * *" The answer is that neither witness expressed such an opinion. When the State started to elicit such an opinion, the defense objection was sustained.

Defendant also claims the evidence set forth above was inadmissible "* * * because no evidence was offered as to the capacity of the victim to engage in physical combat * * *" and because there is no evidence that either defendant or his brother knew of the condition or considered it when they responded to Benerito's remark and allegedly threatening gestures. Neither of these claims were presented to the trial court; they are raised here for the first time. Accordingly, they will not be reviewed. State v. Foster, 82 N.M. 573, 484 P.2d 1283 (Ct.App.1971); State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct.App.1970).

Constitutionality of Section 20–2–3, supra.

Section 20–2–3, supra, permits a witness to be questioned as to prior convictions. By pre-trial motion, defendant requested the court to hold § 20–2–3, supra, to be unconstitutional. Defendant states this motion was denied when the trial court "* * * granted Defendant's Motion For Discovery of Prior Convictions. * * *" We accept defendant's characterization of the record.

Defendant, during his direct examination at trial, testified to a prior conviction. He states that he was forced to introduce this evidence himself in order to diminish the prejudicial effect of the State doing so during his cross-examination. His claim is that § 20–2–3, supra, violates due process because testimony as to prior convictions prejudices his right to testify in his own behalf. He cites McCormick, Law of Evidence, at 93–94 (1954) in support of his claim of prejudice.

Aware that 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) is contrary to this contention, defendant seeks to distinguish *Lindsey* on the basis that it "* * * did not relate to the balance between Defendant's rights

to testify and the State's rights to impeach. * * *" We disagree. *Lindsey* states:

> "We concede an accused may hesitate to take the witness stand if his past criminal record is such that his credibility will probably be completely destroyed in the eyes of the jury if this record is made known to the jury. However, this in no way impairs his right against self-incrimination, his right not to be deprived of his life, liberty or property without due process of law, nor his right to a public trial by an impartial jury.
>
> "When an accused takes the witness stand he is in the same position as any other witness. Section 20–2–3, supra. He is not entitled to have his testimony falsely cloaked with reliability by having his credibility protected against the truth-searching process of cross-examination. * * *"

See State v. Sero, 82 N.M. 17, 474 P.2d 503 (Ct.App.1970).

Rebuttal testimony as to prior statements and conduct of defendant.

On cross-examination, the State asked defendant if he had seen Judy Jones the night before the fight. Defendant stated he thought it was a week before the fight. Defendant was asked, and he denied, that he "pulled a knife" at this meeting with Judy. He was asked, and he denied, that he had mistaken Judy for Pamela. He was asked, and he denied, that he had threatened to kill anyone he found with Pamela. On rebuttal, Judy testified that on the evening before the fight defendant was holding a knife five or six inches long, that she asked what he was going to do with it and that defendant said: "* * * he thought Pam was with some other guy and that he was going to get the guy. I asked him if he was going to hurt Pam and he said no, that he wouldn't hurt Pam."

Defendant contends Judy's testimony about the knife was inadmissible. We disagree. The testimony as to the size of the knife at his meeting with Judy was material to the size of the knife that defendant had on the night of the fight. The size of the knife was material because of the pathologist's testimony as to the depth of the fatal wound and because of defendant's characterization of his knife as "little bitty."

Defendant also contends that Judy's testimony as to defendant's threat toward any "guy" with Pamela was inadmissible. As to the merits of this contention see State v. Thompson, 68 N.M. 219, 360 P.2d 637 (1961); State v. Garcia, 83 N.M. 51, 487 P.2d 1356 (Ct.App.1971). We do not reach the merits of this claim because the contention made on appeal was never presented to the trial court. Defendant's only objection was a general one which was made after Judy testified to the date, time and place of the meeting between defendant and Judy, but prior to her testimony, outlined above, as to the details of the meeting.

The general objection was "* * * to this entire line of questioning on the grounds that it is irrelevant and immaterial to any issue, that it is an attempt to impeach on collateral matters not relevant or material and that it shows evidence of another crime without there first being a conviction." Such an objection clearly did not alert the trial court to defendant's threat and, thus, did not preserve the question of its admissibility for review. State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct.App.1970); State v. Harrison, supra; State v. Anaya, 81 N.M. 52, 462 P. 2d 637 (Ct.App.1969). The general objection was insufficient. State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct.App.), decided January 21, 1972.

Defendant asserts that Judy's rebuttal testimony was inadmissible because it was for the purpose of impeaching defendant on the basis of specific acts of wrongdoing after defendant had denied those specific acts. Thus, defendant would invoke cases interpreting § 20–2–4, N.M.S.A.1953 (Repl.Vol. 4) which hold that the cross-examiner is bound by the answers to ques-

tions concerning specific acts of misconduct and may not introduce independent evidence as to that misconduct. See State v. Hargrove, 81 N.M. 145, 464 P.2d 564 (Ct.App.1970).

The act of wrongdoing referred to in Judy's rebuttal testimony was the threat. Defendant's general objection cannot be fairly read as alerting the trial judge to a claim that testimony as to the threat was inadmissible on the basis the State was bound by defendant's denials and could not introduce independent evidence as to the wrongdoing denied. The contention now made is not properly before us for review. State v. Zarafonetis, supra; State v. Harrison, supra.

Instruction on implied malice.

After the trial court defined malice and explained the basis for finding malice, it instructed the jury:

> "It is within the province of the jury to imply malice in a case where a killing with a deadly weapon is established.
>
> "You may imply malice in this case if you find beyond a reasonable doubt that the killing was perpetrated by means of a deadly weapon."

Defendant contends that the instruction is incomplete and provides a lesser standard for malice than that established by § 40A-2-2, N.M.S.A.1953 (Repl. Vol. 6). As to the merits of this contention, the instruction was approved in State v. Anaya, 80 N.M. 695, 460 P.2d 60 (1969) and State v. McFerran, 80 N.M. 622, 459 P. 2d 148 (Ct.App.1969).

Further, the objection to the instruction was: "* * * that this instruction allows the jury to imply malice in a case of a killing with a deadly weapon and that malice is a specific state of mind that cannot be implied by acts done." The contention now made was not presented to the trial court. State v. Harrison, supra.

The judgment and sentence are affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

496 P.2d 1099

Joaquin BACA, Appellant,

v.

NEW MEXICO HEALTH AND SOCIAL SERVICES DEPARTMENT, Appellee.

No. 780.

Court of Appeals of New Mexico.
March 24, 1972.
Rehearing Denied April 11, 1972.
Certiorari Denied May 4, 1972.

[redacted]

Michael B. Browde, Charles T. DuMars, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Santa Fe, Robert J. Laughlin, Agency Asst. Atty. Gen., Health & Social Services Dept., for appellee.

OPINION

HENDLEY, Judge.

Baca appeals the denial of Old Age Assistance. He is seventy years of age and has "* * * excessive medical needs due to a heart block which requires that Mr. Baca use a pacemaker." It is undisputed that without medical care Baca will die.

Prior to June 1, 1971, Baca received monthly Social Security benefits in the amount of $105.80. The Department had determined his monthly needs to be $116.00 and accordingly, paid Baca $10.20. In addition, Baca was eligible for the State's Medicaid program which paid his Medicare premiums and the 20% of his medical expenses not covered by Medicare insurance. We were informed at oral argument that eligibility for Department assistance in connection with the Medicaid program is based on eligibility for Old Age Assistance.

On June 1, 1971, Social Security benefits were increased by 10% which gave Baca monthly Social Security benefits of $116.40. Baca was notified by the Department of a termination of his Old Age Assistance benefits. A termination would mean that in order to continue his medical treatment Baca would have to pay the $5.60 Medicare insurance premiums and the 20% excess not covered by the insurance. Both items had been previously paid for by the Department. Old Age Assistance was terminated after hearing and review by the Appeals Review Committee. The termination was based on Findings of Fact of (1) need of $116.00; (2) Social Security benefits of $116.40; and, (3) no deficit since income is greater than need.

The Department regulations applicable to this appeal are as follows:

Regulation 231.8: Need:

"The determination of whether eligibility exists on the condition of need is the basic and most important single consideration in establishing eligibility for financial assistance. All resources of a person who requests financial assistance, or on behalf of whom financial assistance is requested, must be considered in determining eligibility on the condition of need. The law requires, and it is the objective of the financial assistance programs of the department, that the money payment that a person receives from the department, taken together with all other resources, shall be sufficient to provide a standard of living compatible with decency and health. * * *"

Regulation 231.81: Definitions:

"A. 'Requirements' are the total of the budgetary items allowable under the circumstances of the client's situation, and at the amount fixed by these regulations. Requirements consists of:

"1. 'basic requirements,' which are food, clothing, and personal requirements of one individual within the budget group, and one individual's share of the household supplied;

"2. 'common requirements,' which are shelter, fuel and utilities; and

"3. 'additional requirements,' which include such special items as room and board, and sheltered home care.

"B. 'Resources' includes income, income-producing items, and non-income producing items owned or available to meet the client's requirements. * * *"

Regulation 231.82: Standards for Requirements:

"Standards for requirements are established by the department for the purpose of (1) providing a measure of uniformity in determining the need of applicants for and recipients of financial assistance; (2) assuring that needs will be met with reasonable adequacy. * * *"

Regulation 231.83: Standards for Resources:

"The first step in the determination of the eligibility condition of *need* was determination of the cost of providing for current requirements of the client on a basis that represented a reasonable subsistence. (Section 231.82). The next step is ascertaining the value of resources. The resources presently available and the resources potentially available to a client are important considerations in determining to what extent an individual is or may become self-maintaining. Financial assistance payments are only *supplementations* necessary when resources fall short of requirements. Resources should be considered from the standpoint of their maximum utilization in the interest of the client's welfare. The expenses associated with the use of possession of a resource must be considered as well as the benefit or value of the resource to the client."

The issue is whether there is substantial evidence to support the finding that Baca has income greater than his need. See § 13-1-18.1(D) (2), N.M.S.A. 1953 (Repl. Vol.1968, Supp.1971). We hold he does not.

Section 13-1-11, N.M.S.A. 1953 (Repl.Vol.1968) sets forth the basic philosophy of the Public Welfare Act. It states:

"Public assistance shall be granted under this act to any needy person who: (a) Has not sufficient income or other resources to provide a reasonable subsistence compatible with decency and health. * * *"

Compare Contreras v. New Mexico Health and Social Services Department, (Ct.App.) No. 752, decided February 25, 1972. Regulation 231.8 requires all resources to be considered in determining eligibility on the condition of need. Regulation 231.81(B) defines resources to include income "owned or available to meet the client's requirements." Regulation 231.83 refers to resources "presently available" in determining whether an individual is self maintaining. Compare these regulations with 45 C.F.R. 233.20(a) (3) (ii) (c) which states that in establishing financial eligibility "only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered. * * *" See Sections 13-1-9 and 13-1-43, N.M.S.A. 1953 (Repl.Vol.1968). Under the State regulations, resources which are not in fact available to meet current needs are not to be considered in determining eligibility for public assistance.

Current needs prior to the Social Security benefits increase were established at $116.00. Additionally the Department paid the Medicare insurance premiums and the 20% not covered by insurance. The Department had determined Baca needed $56.00 per month for the common requirement and utilities (Regulation 231.81(A) (2) and $60.00 per month is allotted for the basic requirements (Regulation 231.81(A) (1), thus making a total of $116.00 for "* * * subsistence compatible with decency and health." However, in order to subsist (live) he must continue his medical treatment. The cost of the premium reduces his available resources below his determined need. Baca does not in fact have "resources available" to meet his monthly needs as determined by the Department. Regulation 231.83; Regulation 231.81(B).

The decision of the Department not being supported by substantial evidence (Contreras v. New Mexico Health and Social Services Department, supra) this cause is reversed and remanded for proceedings not inconsistent herewith.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

496 P.2d 1102

Hallie C. SANDERS et al., Plaintiffs-Appellants,

v.

Joseph L. SMITH et al., Defendants-Appellees.

No. 704.

Court of Appeals of New Mexico.
Jan. 21, 1972.
Rehearing Denied March 20, 1972.
Certiorari Denied May 2, 1972.

Dale B. Dilts, Albuquerque, for appellants.

Charles B. Larrabee, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for appellee Joseph L. Smith.

James R. Toulouse, Toulouse & Moore, Albuquerque, for appellees Don Rupert, General Adjustment Bureau, Great American Insurance Co.

OPINION

SUTIN, Judge.

This case involves, (1) a claim to recover damages against an attorney for legal malpractice which allegedly occurred during preparation for, investigation and trial of, a damage suit in Federal Court; and (2) for breach of contract, fraud and deceit against the other defendants. The trial court awarded summary judgment in favor of all defendants. Plaintiffs appeal.

We affirm as to the attorney. We reverse as to the other defendants.

1. *Was Summary Judgment Proper on the Issue of Legal Malpractice?*

The Federal Court trial involved an automobile collision on March 20, 1964, between plaintiffs' vehicle and a defendant's truck in the cross-over of the median on U.S. Highway 66 at Clines Corners. The jury returned a verdict for defendants.

Plaintiffs contend their attorney negligently prepared, investigated and tried the case in Federal Court as follows:

1. The attorney had in his possession but failed to introduce in evidence an aerial photograph of the scene which showed the 55 mph speed sign at the point of impact; that the attorney had such a photograph and it was not placed before the jury. Plaintiffs assert that the jury verdict for the defendants was based on the claim that Mrs. Sanders was speeding. Defendants claimed that Mrs. Sanders was going 60 mph in a 55 mph zone. Plaintiffs claim that the photo would have established that Mrs. Sanders had not yet entered the 55 mph zone when the accident occurred.

2. The attorney failed to obtain and introduce in evidence a New Mexico Highway Department log and diagram of the scene showing that the speed sign was located at the point of impact.

3. The attorney failed to impeach certain witnesses on the issue of the speed Mrs. Sanders was travelling, by use of prior statements they had made.

4. The attorney used the deposition of defendant Gehring instead of calling him as an adverse witness.

5. The attorney failed to use an expert witness to counteract impressions left by diagrams.

6. The attorney failed to call as a witness the Justice of the Peace before whom Gehring pled guilty to the traffic offense, even though the plea of guilty was estab-

lished in evidence by Gehring's deposition.

7. The jury was not polled.

8. The attorney failed to advise the plaintiffs of settlement offers.

9. The attorney negligently failed to take an appeal from an adverse judgment entered in the Federal Court.

To support the defendant attorney's motion for summary judgment, he attached to his motion, (1) his own affidavit, together with all depositions and a complete transcript of the record in the Federal trial; (2) affidavits of three attorneys, two of whom were defense counsel in the Federal trial; (3) the affidavit of the regional claims manager of defendant insurance company.

The plaintiffs did not counter with any affidavits, depositions or testimony of any attorneys.

Plaintiffs filed a first amended complaint; defendants filed a motion for summary judgment.

On November 23, 24, 1970, summary judgment was granted all defendants.

This is a matter of first impression in New Mexico on the subject of liability for legal malpractice.

Plaintiffs do not seek to establish what the standard of legal practice is or should be in New Mexico. They contend in their brief that "we have informed the judge of issues of fact to be presented to the jury when all doubts are resolved in favor of plaintiffs in accord with Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964). In fact the affidavits of the Plaintiff Sanders create issues of fact on all material matters." *Cervantes* is a medical malpractice case in which summary judgment was granted the doctor, and it was affirmed. This is the only citation in plaintiffs' brief and the only argument made on the issue of an attorney's liability for negligence.

We limit this opinion to plaintiffs' claim and argument to determine whether an issue of material fact exists.

In *Cervantes,* the court said:

> 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. [Cases cited]. 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.* [Citations.] *Likewise, expert testimony is generally required to establish causal connection.* [Emphasis added].

On expert testimony, see also Crouch v. Most, 78 N.M. 406, 432 P.2d 250 (1967); Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct.App.1969); Binns v. Schoenbrun, 81 N.M. 489, 468 P.2d 890 (Ct.App.1970).

Expert testimony in claims of legal malpractice means testimony of lawyers. See Dorf v. Relles, 355 F.2d 488, 17 A.L.R.3d 1433 (7th Cir. 1966). The defendant attorney presented affidavits of three lawyers that the preparation, investigation and trial in Federal Court were handled in a professional manner without negligence. These affidavits stand uncontradicted by any expert testimony. Sanders, except for their own affidavits and attachments, presented no evidence in the trial court by way of affidavits, depositions or testimony of any lawyer to substantiate his claims that the trial attorney in the Federal Court case "departed from the recognized standards of [legal] practice in the community, or must have neglected to do something required by those standards." He relies on his own affidavits and attachments. But the facts stated in the affidavits are inadmissible, because departure from or neglect of legal standards lies in the field of knowledge in which only an attorney can give a competent opin-

ion. Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962); U.J.I. 8.1, both applicable to medical malpractice.

"* * * [W]here the facts are not in dispute, but only the legal effect of the facts is presented for determination, summary judgment may be properly granted." Pederson v. Lothman, 63 N.M. 364, 320 P. 2d 378 (1958). After the defendant attorney sustained his burden to establish the absence of a fact issue by expert testimony, the plaintiffs could not remain silent. They must apprise the court of available expert proof to the contrary and then produce it. Cervantes v. Forbis, supra. The plaintiffs did not claim they had any such expert proof.

Two factors are imperative in legal malpractice based upon negligence, (1) that the trial attorney was negligent in the preparation, investigation, or trial of a case; and (2) his negligence was the proximate cause of the injury. Buchanan v. Downing, 74 N.M. 423, 394 P.2d 269 (1964). A lay witness does not have the experience, knowledge and wisdom to opinionate on the complexities of trial practice, including the verdict that a jury will render.

We do not believe that an issue of material fact exists on questions of negligence and proximate cause in the preparation, investigation, trial and failure to appeal the Federal Court case.

We wish to make it clear that this decision does not intend to establish recognized standards of legal practice in New Mexico, nor proof of legal malpractice. We answer only the contention of the plaintiffs in this case. The summary judgment in favor of the defendant attorney is affirmed.

2. *Was Summary Judgment Proper on Plaintiffs' Contention Against the Other Defendants On an Alleged Oral Agreement to Pay Plaintiffs Three Times Their Special Damages?*

Plaintiffs contend on this appeal (1) that "Great American Insurance Company by its agents, Rupert and General Adjustment Bureau, Inc. entered into an oral agreement with the Plaintiffs to pay them three times their special damages resulting from the auto collision in return for the Plaintiffs' agreement not to employ an attorney and sue. After an extended period of time the amount agreed upon was computed and the company refused to pay." (2) That these defendants fraudulently represented that they would pay plaintiffs three times their specials and repudiated the agreement.

By affidavit and by deposition, plaintiffs testified that the defendants' agents "repeatedly admitted liability of the defendant insurance company which they represented beginning on the Monday after the accident. They advised us that the rule of thumb for settlement was three times the medical bills. We worked with Mr. Rupert for about eighteen months under the false impression that he would settle with us for three times the medical. After this amount was figured out at the end of the time he refused to pay accordingly and it was necessary for us to get a lawyer. An offer of $19,000.00 was made by Rupert and he finally showed us a letter from the company giving him permission to offer $20,000.00. At that time our specials and medical was (sic) over $14,000.00; that the plaintiffs arrived at a definite settlement figure * * * Mr. Rupert was given the total of the specials for the entire family and the total was multiplied by three as the offer the mentioned defendants had offered us immediately after the accident." Plaintiffs were told specifically not to obtain a lawyer in order to save both parties money and that the insurance company would settle the case.

The first trial judge overruled defendants' motions for summary judgment because a doubt existed in his mind on whether there was an admission of liability and an offer to settle with plaintiffs for three times the medical expenses. We agree.

The defendants first claim that plaintiffs have no cause of action against defendants for breach of contract or fraud

after plaintiffs sued in Federal Court and lost. The reasons given are that the essential elements of contract and fraud are not present. Reference is made to conflicting evidence of plaintiffs as well as evidence favorable to defendants. Here again, we must repeat that where a factual conflict exists in plaintiffs' testimony, summary judgment is improper because we do not weigh the evidence. A summary judgment may be granted only where the facts are clear and undisputed. Hinojosa v. Nielson, 83 N.M. 267, 490 P.2d 1240 (Ct. App.) decided October 15, 1971. If there is the slightest doubt whether a factual issue exists, summary judgment should be denied. Bostian v. Aspen Wood Products Corporation, 81 N.M. 152, 464 P.2d 882 (1970).

(a) *Breach of Contract*

The record here raises a doubt as to the correctness of the summary judgment. The facts and reasonable inferences to be drawn therefrom establish a genuine issue of material fact as to an offer and acceptance of three times the medical expense in settlement and a breach thereof. There was mutuality of obligation, a meeting of the minds, and consideration. The defendants admitted liability. They specifically told plaintiffs not to obtain a lawyer in order that both parties would save money.

The defendants claim waiver. The record does not show by clear and undisputed facts that plaintiffs actually intended to abandon or relinquish their contractual rights with the defendants. Ed. Black's Chevrolet Center, Inc. v. Melichar, 81 N.M. 602, 471 P.2d 172 (1970). There is evidence that after the contract was breached, plaintiffs pursued activity to sue for damages, not against these defendants, but against other parties. They were forced to do this. Perhaps an issue of fact exists on the question of waiver as a legal defense, but it does not exist as a matter of law.

The defendants mention the defense of the Statute of Frauds. This was not claimed as a defense in the trial court. Edward H. Snow Development Company v. Oxsheer, 62 N.M. 113, 305 P.2d 727 (1956).

Mention is also made that plaintiffs had a choice of remedies. No argument is made or authority cited to support this claim.

(b) *Fraud*

Defendants contend "that at no time did plaintiffs rely on the representation [of Rupert] nor was any injury caused thereby." The facts on these material issues are not clear and undisputed. The Federal Court suit is irrelevant to this contention.

The summary judgment in favor of the defendant attorney is affirmed. The summary judgment against Rupert, General Adjustment Bureau, Inc., and Great American Insurance Company is reversed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

496 P.2d 1106

Kenneth D. GOUGH, Plaintiff-Appellant,

v.

FAMARISS OIL AND REFINING COMPANY, Employer, and Aetna Casualty and Surety Company, Insurer, Defendants-Appellees.

No. 753.

Court of Appeals of New Mexico.

March 17, 1972.

Certiorari Denied May 2, 1972.

Gary D. Reagan, Williams, Johnson, Houston, Reagan & Porter, Hobbs, for plaintiff-appellant.

Lowell Stout, Hobbs, for defendants-appellees.

OPINION

SUTIN, Judge.

This is an appeal by Gough from an adverse judgment in a workmen's compensation case.

We affirm.

The trial court found that Gough, a resident of Lea County, was employed by Famariss Oil as a truck driver; that on January 31, 1970, Gough was assigned to a Famariss truck loaded with 9,000 gallons of gasoline to be delivered to Lordsburg, New Mexico. He had not been feeling well for several days and was taking medicine prescribed by his doctor. By prior arrangement, Gough drove to Arkansas Junction in Lea County where he picked up his brother, Ronnie, and Ray Blair.

On many occasions prior to the time in question, Gough had been instructed by his superiors not to carry passengers in his truck, and that he had no right under any circumstances to permit any unauthorized person to drive the truck, and Gough violated both of these instructions. Gough drove the truck from Arkansas Junction to Artesia, stopped and made inquiries about the weather. His instructions were to go by Cloudcroft on the road to Deming if the weather was good and his jake brake was working. Otherwise to go by Roswell through Ruidoso. After he bumped his tires, the three men went into a liquor store. Blair bought a six-pack of beer and a pint of whiskey. Blair and Ronnie had one beer at the bar.

After leaving Artesia, Gough drove to Mayhill and stopped at a bar and service station where he had one beer, and Blair and Ronnie had two bottles of beer. Blair got rowdy and obnoxious to the waitress and was accused of trying to take some sunglasses. The waitress refused to serve them any more drinks; however, she sold a six-pack of beer to Blair who consumed one on the way. Ronnie had one beer between Mayhill and Cloudcroft. After leaving Mayhill, Gough drove the truck and became groggy. The road was wet and slick, and it was snowing hard. Gough turned the truck over to his brother, Ronnie to drive.

They stopped at a restaurant in Cloudcroft where Ronnie parked the truck improperly and was asked to move it so as not to block the driveway. Gough was feeling bad and groggy, and had three cups of coffee. Ronnie continued to drive when they left Cloudcroft. The large truck with the heavy load of gasoline started down the steep incline between Cloudcroft and Alamogordo. It had numerous hairpin curves. On two occasions, the motor died. Gough attempted to help his brother drive by trying to get the transmission out of gear. He claimed the jake brake was not working and failed, and that the brake on one wheel of the trailer was defective. The truck gained speed and at a point 1.9 miles west of Cloudcroft, it went off the highway, plunged into a canyon and burned up.

The trial court further found that the accident and resulting injuries to Gough were directly and proximately caused by his willful conduct and a deviation from the course of his employment in three respects:

(a) In allowing an unauthorized person to drive the truck in deliberate defiance of instructions given to Plaintiff by his employer.

(b) In permitting a person to take over the operation of the truck whom he knew had engaged in drinking intoxicating beverages.

(c) In permitting another person to drive the truck who had no experience in driving this particular vehicle, making it necessary for the Plaintiff to try to explain how to operate the vehicle which was carrying highly inflammable materials down a mountainous road under very hazardous weather conditions.

The trial court further found that the accident occurred as a result of the improper operation of the truck by Ronnie; that neither prior to or after the accident, did any one complain to Famariss or any of its employees, or to the police officer investigating the accident that there were any defects of any kind in the brakes or the truck; that at the time of the accident there were no defects at all in the truck, trailer, accessory equipment, including the jake brake; that there was no emergency of any kind which warranted or in any way would have authorized Gough to turn the operation of the truck over to somebody else; that Gough admitted he could have stayed in Cloudcroft for a while, called his employer and gotten a substitute driver if he was sick; that Gough violated known rules and regulations of the Interstate Commerce Commission and/or his employer against carrying other passengers in the truck or allowing it to be operated by an unauthorized person; that Gough was acting outside the scope of his duty and employment when he permitted Ronnie to drive; that the accident and injuries sustained by Gough did not arise out of and in the course of his employment with Famariss.

Gough contends, (1) some of the trial court's findings are improper and must be disregarded; (2) the trial court's conclusions are erroneous; and (3) judgment should be entered in accordance with Gough's requested findings and conclusions.

1. *The Trial Court's Findings Need not be Disregarded.*

Gough contends that some of the trial court's "findings of fact" were conclusions of law and not findings of ultimate facts, and the judgment based thereon cannot stand. This contention is not correct because occasional intermixture of matters of fact and conclusions of law do not constitute error where we can see enough, upon a fair construction, to justify the judgment of the court. Hoskins v. Albuquerque Bus Company, 72 N.M. 217, 382 P.2d 700 (1963). Findings of fact are to be liberally construed so as to support the judgment. Plains White Truck Company v. Steele, 75 N.M. 1, 399 P.2d 642 (1965). We must remember that our primary function "is to correct an erroneous result, not to correct errors which could not change the result." Brundage v. K. L. House Construction Company, 74 N.M. 613, 396 P.2d 731 (1964). We can easily separate the alleged conclusions of law from the findings of fact. By placing the alleged conclusions of law in their proper category, we note that the findings of fact support the conclusions of law.

Gough next contends that the findings of fact contain erroneous conclusions of law, and that certain findings are not supported by substantial evidence. We have carefully reviewed the record and conclude that no such error exists.

The trial court's ultimate findings of fact necessary to support the conclusions hereinafter discussed are supported by substantial evidence.

2. *The Trial Court's Conclusions are not Erroneous.*

Gough first contends that the injury was caused in whole or in part by the want of ordinary care of Gough, not willful want of care, § 59-10-5(C), N.M.S.A.1953 (Repl. Vol. 9, pt. 1, Supp.1971); that such conduct, therefore, is not a defense, and the conclusion that Gough's conduct was willful is erroneous.

Section 59-10-5(C), supra, reads as follows:

Defenses to action by employee.—In an action to recover damages for a personal injury sustained by an employee while

engaged in the line of his duty as such, or for death resulting from personal injuries so sustained in which recovery is sought upon the ground of want of ordinary care of the employer, or of the officer, agent or servant of the employer, it shall not be a defense:

* * * * * *

C. that the injury or death was caused, in whole or in part by the want of ordinary care of the injured employee where such want of care was not willful.

This statutory provision has not been heretofore interpreted by our courts of review. In Walker v. Woldridge, 58 N.M. 183, 268 P.2d 579 (1954), the court said:

For an injury to be compensable, it must "arise out of" and in the course of employment and not wilfully suffered or intentionally inflicted.

"Want of ordinary care" means negligent conduct on the part of Gough. See N.M.U.J.I. 12.1 and 12.2; Employers Casualty Company v. Moyston, 80 N.M. 796, 461 P.2d 929 (Ct.App.1969). "Willful" means "the intentioned doing of a harmful act without just cause or excuse or an intentional act done in utter disregard for the consequences." Potomac Insurance Company v. Torres, 75 N.M. 129, 401 P.2d 308 (1965). We believe the legislature intended § 59–10–5(C), supra, to mean that negligent conduct of an employee which causes an injury is not a defense to a claim for workmen's compensation, but willful misconduct is a defense.

The trial court found that Gough, in the absence of an emergency, (1) intentionally violated the instructions of Famariss not to permit anyone else to drive, or to take on passengers, especially those with beer or liquor; (2) intentionally permitted Ronnie to drive knowing he had engaged in drinking intoxicating beverages; (3) intentionally permitted Ronnie to drive a truck carrying 9,000 gallons of gasoline down a mountain road with numerous hair pin curves under very hazardous weather conditions without experience in driving this particular truck. All of these acts were harmful, intentional, without just cause or excuse, or they were done in utter disregard of the consequences. We believe the facts found by the court, with reasonable inferences to be drawn therefrom, are sufficient to come within the definition of willful misconduct on the part of Gough which caused his injuries. The trial court's finding or conclusion of willful misconduct was supported by substantial evidence and was not erroneous.

Gough next contends that his conduct did not take him outside the Workmen's Compensation Act and the trial court erred in concluding that his injuries did not arise out and in the course of his employment. "Arise out of" relates to cause of injury, and "course of employment" refers to the time, place and circumstances under which the injury occurred. Both must co-exist. But, as heretofore pointed out, willful misconduct is a defense which puts Gough outside a workmen's compensation claim. Walker v. Woldridge, supra. Walker was followed in Witt v. Marcum Drilling Company, 73 N.M. 466, 389 P.2d 403 (1964), in which the court said:

Violation of specific instructions which limit the scope or sphere of work which an employee is authorized to do bars recovery of workmen's compensation for an injury so sustained.

Gough relies on Frederick v. Younger Van Lines, 74 N.M. 320, 393 P.2d 438 (1964), where Frederick did not take the shortest route in violation of his employer's instructions. But the court, in its opinion, said, "* * * there is not one word in the proof to establish this as a deviation." The specific instruction did not "limit the scope or sphere of work" which Frederick was authorized to do. The contrary appears in the instant case.

Gough's citations from other states and texts are not in accordance with New Mexico statutes and judicial opinions.

Affirmed.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

496 P.2d 1111

James U. FLEMING, Plaintiff-Appellant,

v.

PHELPS-DODGE CORPORATION, Defendant-Appellee.

No. 797.

Court of Appeals of New Mexico.

April 21, 1972.

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

Ben Shantz, Hilton A. Dickson, Jr., Shantz, Dickson & Young, Silver City, for defendant-appellee.

OPINION

WOOD, Chief Judge.

The dispositive issues involve the Construction Industries Licensing Act. Sec-

tions 67–35–1 through 67–35–63, N.M.S.A. 1953 (Repl.Vol. 10, pt. 1, Supp.1971). They are: (1) whether the plaintiff was a contractor within the meaning of § 67–35–3, supra; (2) whether plaintiff's asserted contract was excluded from § 67–35–3, supra; and (3) whether his damage claim may be maintained even if he is an unlicensed contractor.

The issues are raised by plaintiff's appeal from a summary judgment in favor of defendant. In reviewing the summary judgment, we consider only undisputed facts and determine whether, under those facts, summary judgment was proper as a matter of law. See Worley v. United States Borax and Chemical Corp., 78 N.M. 112, 428 P.2d 651 (1967).

By written contract, plaintiff was to demolish certain residences and other buildings on defendant's property and remove all materials of value by a specified date. Plaintiff contends this contract was orally modified. His damage claim is based on the asserted oral modifications.

Whether plaintiff was a contractor within the meaning of Section 67–35–3, supra.

Section 67–35–3, supra, states in part:

"As used in the Construction Industries Licensing Act [67–35–1 to 67–35–63], 'contractor':

"A. Means any person who undertakes, offers to undertake, or purports to have the capacity to undertake, by himself or through others, contracting. Contracting includes, but is not limited to, constructing, altering, repairing, installing or demolishing any:

"* * *.

"(2) building, stadium or other structures;"

Under the written contract, plaintiff was subject to § 67–35–3, supra; he had agreed to demolish buildings. However, one of the claimed oral modifications to the contract is that plaintiff could remove the residences and buildings without demolition. Assuming such a modification, the issue is whether a contract to remove residences and buildings is within the meaning of § 67–35–3, supra.

Although the removal of structures is not specifically included within the items named, the statute provides that contracting includes the altering of buildings. "Altering" has some meaning other than constructing, repairing, installing or demolishing, otherwise all of the words would not have been used in the statute. See Board of Com'rs of Guadalupe County v. State, 43 N.M. 409, 94 P.2d 515 (1939).

Black's Law Dictionary, 4th Ed. (1951) defines alter: "To make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. * * * To change partially * * *." See, also, Webster's Third New International Dictionary (1966).

The undisputed facts show that as to one of the houses plaintiff "* * * had the porch loose from the house ready to move. * * *" They also show that in preparing to remove the houses he was "* * * knocking out the cement foundations and putting stuff in the foundation to slide the timbers * * *;" that "* * * the biggest end of moving a house is raising it up." These facts establish that removal of the structures necessarily involved a change and, thus, an alteration.

We hold the asserted oral agreement to remove residences and buildings was a contract to alter those items and that in entering this asserted agreement plaintiff was "contracting" within the meaning of § 67–35–3, supra.

Whether the asserted contract was excluded from Section 67–35–3, supra.

Subsection C of § 67–35–3, supra, lists various items excluded from "contracting" and, thus, excluded from the requirements of the Construction Industries Licensing Act. Originally, plaintiff relied on exclusions (10), (11) and (12) of § 67–35–3(C), supra. At oral argument he abandoned his reliance on exclusion (10).

Item (11) reads in part:

"a person who acts on his own account to build or improve a structure for his personal use or for resale; * * *"

Item (12) reads in part:

"a person who, by himself or with the aid of others who are paid wages and receive no other form of compensation, builds or makes installations, repairs or alterations in or to a building or other improvement on a farm or ranch owned, occupied or operated by him, * * *"

The facts asserted by plaintiff in support of these exclusions are facts going to plaintiff's dealing with the structures after they were removed from defendant's property. Whether the Construction Industries Licensing Act would have been applicable to plaintiff's activities in connection with the structures at that point in time is not an issue in this case. Our concern is with the asserted contract for removal.

Neither the asserted contract for removal nor the removal process itself involves building or improving the structures (exclusion 11), or building, installations, repairs or alterations on a farm or ranch owned, occupied or operated by plaintiff (exclusion 12). See Board of Com'rs of Guadalupe County v. State, supra. Neither exclusion (11) nor exclusion (12) of § 67–35–3(C), supra, is applicable to the removal of structures from defendant's land. These exclusions do not exclude the asserted contract of removal from the meaning of "contracting" under § 67–35–3, supra.

Whether the damage claim may be maintained.

We have held the asserted contract on which plaintiff relies is one for alteration of structures; that it is "contracting" under § 67–35–3, supra, and is not excluded. It is undisputed that plaintiff did not have a license. His status is that of an unlicensed contractor. See § 67–35–15, N.M.S.A.1953 (Repl.Vol. 10, pt. 1, Supp.1971).

Section 67–35–33, N.M.S.A.1953 (Repl. Vol. 10, pt. 1, Supp.1971) provides: "No contractor shall * * * maintain any action in any court of the state for the collection of compensation for the performance of any act for which a license is required by the Construction Industries Licensing Act * * * without alleging and proving that such contractor was a duly licensed contractor. * * *"

Plaintiff contends that § 67–35–33, supra, does not bar his suit because he is not seeking compensation for the performance of the asserted contract; rather, he seeks damages for its breach. His damage claim is based on an alleged blocking of roads by defendant and defendant's refusal to permit plaintiff to enter its property to remove some of the structures.

A result contrary to plaintiff's contention appears to have been reached under California statutes similar to § 67–35–33, supra. See West's Annotated California Codes, Business and Professions, § 7031; Proffitt and Durnell Plumbing, Inc. v. David H. Baer Co., 247 Cal.App.2d 518, 55 Cal.Rptr. 764 (1967); Bierman v. Hagstrom Construction Company, 176 Cal.App.2d 771, 1 Cal.Rptr. 826, 82 A.L.R.2d 1424 (1959). We pass the question of whether § 67–35–33, supra, prohibits actions for damages based on breach of contract.

The answer to plaintiff's contention appears in New Mexico decisions. Desmet v. Sublett, 54 N.M. 355, 225 P.2d 141 (1950) states: "* * * a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal * * * transaction to which he is a party, or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws. * * *" In Kaiser v. Thomson, 55 N.M. 270, 232 P.2d 142 (1951) the plaintiff sought recovery for the reasonable value of labor and materials supplied, but failed to allege that he was the holder of a contractor's license. *Kaiser* applied *Desmet* and denied recovery. In so holding, the opinion referred to a statute making it a misdemeanor to act in the capacity of a contractor without a re-

quired license. See Campbell v. Smith, 68 N.M. 373, 362 P.2d 523 (1961); compare Measday v. Sweazea, 78 N.M. 781, 438 P.2d 525, 26 A.L.R.3d 1386 (Ct.App.1968), where plaintiff recovered because, in establishing his claim, he was not required to prove a statutory violation.

Section 67–35–15, supra, provides that no person is to engage in the business of contractor within the State without the appropriate license. Section 67–35–59, supra, makes it a petty misdemeanor to act in the capacity of contractor within the meaning of the Construction Industries Licensing Act without the required license.

To recover damages for breach of contract, plaintiff must rely on an alleged contract entered by him in violation of statutes which prohibit such contracting and provide a criminal penalty for the violation. He may not do so. Kaiser v. Thomson, supra; Desmet v. Sublett, supra. Plaintiff's action for damages for breach of contract may not be maintained.

The summary judgment is affirmed.

It is so ordered.

COWAN and HERNANDEZ, JJ., concur.

497 P.2d 230

Janice FRAZIER, an infant, by Verna Holland, her mother and next friend, Petitioner,

v.

Richard A. STANLEY, Juvenile Judge of the Twelfth Judicial District, Respondent.

No. 9417.

Supreme Court of New Mexico.

May 19, 1972.

James G. Huber, Alamogordo, for petitioner.

Norman D. Bloom, Jr., Dist. Atty., Alamogordo, for respondent.

OPINION

OMAN, Justice.

This is an original proceeding in prohibition. An alternative writ issued on February 8, 1972, and was made permanent on February 29, 1972.

Petitioner was charged on January 26, 1972 in juvenile court with having violated a criminal statute. The juvenile attorney filed a motion on January 28, 1972, pursuant to § 13-8-27, N.M.S.A.1953 (Repl. Vol. 3, 1968), seeking to have petitioner certified to stand trial as an adult. On the same day petitioner appeared and denied the charges filed against her, and shortly thereafter filed an affidavit pursuant to § 21-5-8, N.M.S.A.1953 (Repl. Vol. 4, 1970) by which she sought to disqualify respondent from acting further in the cause.

Respondent refused to acknowledge the affidavit of disqualification and set the certification motion for hearing on February 9, 1972. Thereupon petitioner sought an alternative writ of prohibition from this court directed to respondent. Respondent's position, as set forth in his brief and in oral argument to us in support of his position, was simply that the provisions of § 21-5-8, supra, are not applicable to proceedings under the Juvenile Code, [§§ 13-8-19 to 13-8-73, N.M.S.A.1953 (Repl. Vol. 3, 1968)]. He predicated his position upon the contention that since the "* * * Juvenile Code created special procedures and special handling for minors accused of criminal offenses * * *," and no provision is made in the Juvenile Code for the disqualification of a juvenile judge, the provisions of § 21-5-8, supra, are inapplicable to juvenile court proceedings. The juvenile judge is none other than the district judge serving in another division of the district court. See §§ 13-8-19 and 20, supra; Peyton v. Nord, 78 N.M. 717, 437 P.2d 716 (1968).

Section 21-5-8, supra, provides, insofar as here pertinent:

> "Whenever a party to any action or proceeding, civil or criminal, including proceedings for indirect criminal contempt arising out of oral or written publications, except actions or proceedings for constructive and other indirect contempt or direct contempt, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried and heard, whether he be the resident judge or a judge designated by the resident judge, except by consent of the parties or their counsel, cannot, accord-

ing to the belief of the party making the affidavit, preside over the action or proceeding with impartiality, that judge shall proceed no further. * * *"

Although we have been cited to no case in which this court has heretofore held the provisions of § 21–5–8, supra, applicable to juvenile court judges and to juvenile court actions and proceedings, and we find none, we have repeatedly recognized the applicability of the provisions of this statute to other special actions and proceedings and to judges presiding therein. State ex rel. Pacific Employers Ins. Co. v. Arledge, 54 N.M. 267, 221 P.2d 562 (1950) [workmen's compensation action]; Talbot v. Taylor, 51 N.M. 160, 181 P.2d 159 (1947) [probate proceedings]; State ex rel. Romero v. Armijo, 41 N.M. 40, 63 P.2d 1039 (1936) [proceedings for recount of votes]; State ex rel. Simpson v. Armijo, 38 N.M. 280, 31 P.2d 703 (1934) [constructive contempt proceedings]; State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511 (1933) [proceedings for removal of members of school board].

In State ex rel. Simpson v. Armijo, 38 N.M. 280, 31 P.2d 703, supra, it was stated:

"If the enactment of this law is the declaration of a policy that our courts must be freed from suspicion of unfairness and is grounded upon the truism 'that every citizen is entitled to a fair and impartial trial, and this right is sacred and constitutional, State ex rel. Hannah v. Armijo, supra,' such right is as sacred to a litigant *in a special proceeding* or one cited for contempt as it is to a litigant in a tort or contract action." [Emphasis added]

Procedures followed under the Juvenile Code are described as "actions" and "proceedings" in §§ 13–8–25 and 26, supra, and these actions or proceedings are certainly either civil or criminal. In either case, petitioner was a party to the action or proceeding and entitled to exercise the right of disqualification given her by § 21–5–8, supra. See in accord State ex rel. Jones v. Geckler, 214 Ind. 574, 16 N.E.2d 875 (1938); McDaniel v. McDaniel, 64 Wash. 2d 273, 391 P.2d 191 (1964).

Respondent has made no claim that his actions in fixing, approving, or continuing petitioner's appearance bond in any way operated to defeat her right to disqualify him, but only that the disqualification provisions of § 21–5–8, supra, are not applicable to juvenile proceedings. Consequently, we do not reach the question posed but not decided by the New Mexico Court of Appeals in State v. Latham, 83 N.M. 530, 494 P.2d 192 (Ct.App.1972), in regard to the effect of an approval and a continuance of an appearance bond by a judge on the right of a party to disqualify that judge.

We affirm our actions heretofore taken in making the alternative writ of prohibition permanent.

It is so ordered.

COMPTON, C. J., and McMANUS, STEPHENSON and MONTOYA, JJ., concur.

497 P.2d 231

Juan VALDEZ, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 9432.

Supreme Court of New Mexico.

May 19, 1972.

Joan M. Friedland, Santa Fe, for petitioner.

David L. Norvell, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

STEPHENSON, Justice.

Mr. Valdez (defendant) appealed from a judgment and sentence following conviction of assault with intent to commit a violent felony, § 40A–3–3, N.M.S.A., 1953, and false imprisonment, § 40A–4–3, N.M.S.A., 1953.

The Court of Appeals affirmed and we granted certiorari. While affirming the result reached by the Court of Appeals, we differ with its reasoning in respect to the motion for a change of venue. Although the record is by no means clear, it seems that the State did not file its motion for change of venue within the time prescribed by § 21–5–3(B), N.M.S.A., 1953.

We have held that defendants seeking a change of venue must make a timely filing. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967), cert. den., 391 U.S. 927, 88 S.Ct. 1829, 20 L.Ed.2d 668 (1968). See also State v. Tapia, 81 N.M. 365, 467 P.2d 31 (Ct.App.1970) and State v. Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct.App.1969), cert. den., 398 U.S. 904, 90 S.Ct. 1692, 26 L.Ed.2d 62 (1970).

Defendant's counsel makes the point that a defendant ought not be held to a higher standard of compliance with these statutes than the State. We agree. What we have said in other cases concerning timely filing being mandatory by defendants applies with equal force to motions for change of venue filed by the State. Of course, delayed filing by both the defendant and the State may be allowed under the provisions of § 21–5–7, N.M.S.A., 1953.

The position adopted by the Court of Appeals is scarcely strengthened by Hanson v. State, 79 N.M. 11, 439 P.2d 228 (1968), which it cites. That case states in pertinent part:

"* * * [A] strong, although rebuttable, presumption exists after the verdict in support of constitutional regularity and that official duties in court

proceedings have been regularly performed; and a person seeking relief has the burden of overcoming this presumption. * * *"

No such presumption can obtain here. The State's motion was not timely filed.

However, we agree with the reasoning of the Court of Appeals that a trial court, in a proper case and in the exercise of its discretion, has the power to order a change of venue sua sponte. This power existed at common law, Crocker v. Justices of Superior Court, 208 Mass. 162, 94 N.E. 369 (1911) and the common law is the rule of practice and decision in New Mexico. Section 21–3–3, N.M.S.A., 1953. Although § 21–5–3, supra, and related statutes completely cover the ground as to how, when and by what procedures a party may seek a change of venue, we find nothing in these statutes which precludes sua sponte action by the trial court. The common law is only abrogated or repealed by a statute which is directly and irreconcilably opposed to the common law. Southern Union Gas Company v. City of Artesia, 81 N.M. 654, 472 P.2d 368 (1970).

With the record in the condition described by the Court of Appeals, we must presume that the motion was actually granted sua sponte by the trial court. Here, the quoted portion of Hanson v. State, supra has application.

We would add some cautionary comment. Trial courts should order changes of venue sua sponte only in exceptional cases. This was such a case, as is amply demonstrated by the trial court's findings of fact which are quoted by the Court of Appeals in its opinion and which were not attacked.

The judgment and sentence is affirmed.

It is so ordered.

COMPTON, C. J., and McMANUS and OMAN, JJ., concur.

497 P.2d 233

Taxpayer Seferino E. MARTINEZ, Appellant,

v.

Franklin JONES, Commissioner of the Bureau of Revenue, State of New Mexico, Appellee.

No. 715.

Court of Appeals of New Mexico.

April 7, 1972.

Rehearing Denied May 1, 1972.

Certiorari Denied June 9, 1972.

John N. Patterson, Fred M. Standley, Standley, Witt & Quinn, Santa Fe, for appellant.

David L. Norvell, Atty. Gen., Santa Fe, John E. Owens, Agency Asst. Atty. Gen., for appellee.

OPINION

SUTIN, Judge.

Martinez was assessed a gross receipts tax, penalty and interest, and appeals.

We affirm.

Martinez claims, (1) the decision and order should be set aside because it is not in accordance with the law; and (2) the decision and order should be set aside because it is arbitrary and capricious, and not supported by substantial evidence.

The statute involved herein is § 66, ch. 144, Laws of 1969. It reads as follows:

> Section 66. *Temporary Provision.*— By regulation, the commissioner shall provide a system for *the registration of contracts entered into prior to the passage of this act which do not permit an increase in price to cover an increase in the gross receipts and compensating tax rate* or the elimination of an exemption or deduction allowed in the Gross Receipts and Compensating Tax Act. Receipts from contracts registered with the commissioner shall be taxed according to the laws existent prior to the effective date of this act. Receipts from the sale of services or materials incorporated into a construction project, the contract for which is registered with the commissioner, shall be treated as receipts from sales made under the law as it existed prior to the effective date of this act. [Emphasis added.]

Pursuant to this statute, the Commissioner of Revenue promulgated G.R. 66-1 which provides in part:

a. *Application for Registration.* If the prime contractor elects to register a prime contract or construction project, application for registration must be mailed by him on or before July 1, 1969, unless an extension is granted by the Commissioner. Form GRS-25 or a reproduction of it, a copy of which is attached to and made a part of this temporary regulation, shall be used for such application. All information required by Form GRS-25 must be furnished. The prime contractor shall, at the request of the Bureau of Revenue, furnish a copy of the contract or any other related information to the Bureau of Revenue.

b. *Acceptance or Rejection of Application.* The prime contractor will be furnished with a copy of his application for registration by the Bureau of Revenue, upon which copy the Bureau will indicate whether or not the contract has been accepted for registration.

Martinez attacks the validity of the above regulation as well as the decision and order of the Commissioner. Because of the state of the record, we cannot reach the contentions made.

The issue is whether Martinez' receipts under a contract with the State Highway Department were to be taxed at a lower rate under a pre-1969 tax act or at a higher tax rate established by the 1969 Gross Receipts and Compensating Tax Act. Sections 72-16A-1 through 72-16A-34, N.M. S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1971).

The Commissioner taxed Martinez under the new tax rate of the 1969 Act. Martinez protested. He had the burden of showing the assessment was erroneous. McConnell v. State ex rel. Bureau of Revenue, 83 N.M. 386, 492 P.2d

1003 (Ct.App.1971); Spillers v. Commissioner of Revenue, 82 N.M. 41, 475 P.2d 41 (Ct.App.1970); see Kaiser Steel Corp. v. Property Appraisal Department, 83 N.M. 251, 490 P.2d 968 (Ct.App.1971).

Martinez neither offered in evidence his contract with the State Highway Department, nor did he prove the essential provisions of the contract. We do not know whether his contract did "not permit an increase in price to cover an increase in the gross receipts and compensating tax rate" as provided in § 66, Temporary Provision, supra.

Until it is shown that the contract could be properly registered under § 66, supra, the question of the validity of the system of registration is premature.

Affirmed.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

497 P.2d 727

Wanda GLASCOCK, Plaintiff-Appellee,

v.

Johnnie ANDERSON, Defendant-Appellant.

No. 9357.

Supreme Court of New Mexico.

May 26, 1972.

Ahern, Montgomery & Albert, Malcolm L. Shannon, Jr., Albuquerque, for defendant-appellant.

Shipley, Durrett, Conway & Sandenaw, Alamogordo, for plaintiff-appellee.

OPINION

OMAN, Justice.

Plaintiff brought suit to have defendant declared the father of her child born on March 31, 1970. Defendant denied paternity of the child, and this issue was tried to a jury on March 29, 1971. The jury found for plaintiff and judgment was entered on the verdict. Defendant appeals. We affirm.

The three points relied upon for reversal all relate to the presentation of the child before the jury for the apparent purpose of having the jurors observe similarities and dissimilarities between the features of defendant and the child. Defendant's objection was that:

> "* * * while there is a split in the decisions, we would ask this court, considering the age of the child and the lack of formation of features and the lack, at least to my knowledge, of any specific feature that may be indicative of paternity, any specific unusual characteristics that is had by this child and Mr. Anderson, that it would be prejudicial to us to present the child to the jury."

The jury view of the child lasted about thirty seconds and was followed by testimony of plaintiff that this was the child born to her on March 31, 1970, and which she claimed defendant had fathered.

This court has never passed upon the question of the propriety of presenting or exhibiting a child before the trier of the facts in a paternity suit for the purpose of having the child's features observed and compared with those of the alleged father. However, it has long been the practice in some, if not in all, of our district courts to permit the trier of the facts to view the child and to also hear testimony as to asserted resemblances or lack of resemblances between both the specific features and the features generally of the child and the claimed father.

A reference to the decisions from other jurisdictions in which this question has been presented and decided compels our agreement with defendant that "there is a split in the decisions." They are sharply and seemingly hopelessly divided as to when and if the child may properly be viewed by the trier of the facts; as to whose testimony, if that of anyone, is competent on the question of likeness or unlikeness of appearance between the child and the purported father; and as to whether the evidence concerning resemblance or lack of resemblance—whether the evidence be in the form of observations of the child and the alleged father by the trier of the facts, or testimony as to resemblances or differences between them—must be confined to individual features, or specific traits less than an individual feature, or whether it may embrace general resemblances, resemblances as to individual features and resemblances as to specific traits less than an individual feature. See Flores v. State, 72 Fla. 302, 73 So. 234 (1916); Almeida v. Correa, 51 Hawaii 594, 465 P. 2d 564 (1970); In re Stone's Estate, 77 Idaho 63, 286 P.2d 329 (1955); Merritt v. Leuck, 231 Iowa 777, 2 N.W.2d 49 (1942); Green v. Commonwealth ex rel. Helms, 297 Ky. 675, 180 S.W.2d 865 (1944); Clark v. Bradstreet, 80 Me. 454, 15 A. 56 (1888); Roberts v. State, 205 Okl. 632, 240 P.2d 104 (1951); Boston v. State ex rel. Mayberry, 182 Okl. 181, 77 P.2d 13 (1938); State ex rel. Fitch v. Powers, 75 S.D. 209, 62 N.W.2d 764 (1954); Cook v. State, 172

Tenn. 42, 109 S.W.2d 98 (1937); State v. Anderson, 63 Utah 171, 224 P. 442, 40 A. L.R. 94 (1924); Beattie v. Traynor, 114 Vt. 495, 49 A.2d 200 (1946); State v. Forbes, 108 Vt. 361, 187 A. 422 (1936); Hanawalt v. State, 64 Wis. 84, 24 N.W. 489 (1885); State v. Cabrera, 13 Ariz.App. 527, 478 P.2d 142 (1970); Berry v. Chaplin, 74 Cal.App.2d 652, 169 P.2d 442 (1946); Morris v. Stanford, 58 Ga.App. 726, 199 S.E. 773 (1938); Hall v. Centolanza, 28 N.J.Super. 391, 101 A.2d 44 (App.Div. 1953); Yerian v. Brinker, 35 N.E.2d 878 (Ohio App. 1941); 1 J. Wigmore, Evidence, § 166 (3d Ed. 1940).

By his first and second points relied upon for reversal, defendant urges upon us the adoption of (1) a rule prohibiting the presentation of a child before the trier of the facts in all paternity cases, except perhaps when questions of race or color are involved [See generally to this effect Almeida v. Correa, supra; Cook v. State, supra; Hanawalt v. State, supra; In re Wendel's Estate, 146 Misc. 260, 262 N.Y.S. 41 (Sup.Ct.1933); Bilkovic v. Loeb, 156 App.Div. 719, 141 N.Y.S. 279 (1913)], or (2) a rule, as advocated in 1 J. Wigmore, supra, that the child may be exhibited to the trier of the facts if, in the discretion of the trial court, the child is old enough to possess settled features [See generally to this effect Flores v. State, supra; Boston v. State ex rel. Mayberry supra; State ex rel. Fitch v. Powers, supra; State v. Anderson, supra; Lohsen v. Lawson, 106 Vt. 481, 174 A. 861 (1934); 1 J. Wigmore, supra at 627].

We reject both of these rules and adopt the rule that a child may properly be presented or exhibited to the jury for the purpose of having the jury observe the resemblances or lack of resemblances between the child and the alleged father. In accord see Green v. Commonwealth ex rel. Helms, supra; Berry v. Chaplin, supra; Yerian v. Brinker, supra. The age of the child goes to the weight to be accorded the comparison of features and not to the admissibility thereof. Green v. Commonwealth ex rel. Helms, supra; State v. Cabrera, supra. Jurors are as capable as the average trial judge to decide whether the features of the child are sufficiently settled to support a finding of similarity or dissimilarity between its features and the features of the alleged father. Green v. Commonwealth ex rel. Helms, supra. We also are of the opinion that jurors are generally informed as to the changes in features and traits which occur in children during the early months and years of their lives, and have the capacity to properly relate the age, features and traits of a child in the process of comparing the child's appearance with that of the claimed father. We are not nearly so impressed, as some other courts appear to be, that jurors are so emotionally excited by the appearance of a child exhibited before them that their sympathies for the child replace their intelligence and the obligation of their oath, and they thereupon base their decision as to the paternity of the child solely on emotion and an imagined likeness between the child and the alleged father.

We do, however, feel that the comparisons between the child and the claimed father should be limited to individual features and specific traits, and should not include any fancied general resemblance between them. In accord see 1 J. Wigmore, supra at 626–27; Flores v. State, supra; State v. Anderson, supra. Expert testimony, if offered, should be admitted to identify resemblances or differences in individual features and specific physical traits less than a single feature as discussed in Almeida v. Correa, supra. We do not agree, however, with the Hawaii court that resemblance can properly be discerned only between specific traits and not as between individual features. Nor do we agree that only experts are qualified to inform the jury of significant resemblances and differences between a claimed father and child. Any relevant evidence, whether by way of expert opinion, by way of comparisons of features and traits made by the jury from observations of the features and traits of the child and the features and traits of the purported fa-

ther, or by way of testimony of persons in a position of advantage to observe and draw comparisons between the features and traits of the child and those of the alleged father, should be admitted, and the trier of the facts should then decide as to the credibility of the witnesses and the different items of evidence received and as to the weight to be given each item of evidence.

It is true the jury was not instructed to confine its comparisons to individual features or specific traits, but no such request was made by either side. Thus, it was not reversible error for the court to fail to so instruct the jury. Rule of Civil Procedure 51, subd. 1(i) [§ 21-1-1(51) subd. 1(i), N.M.S.A.1953 (Repl.Vol. 4, 1970)]. The objection by defendant to presenting the child to the jury in no way suggested that the jury should be instructed or cautioned to consider and compare only observable individual features or specific traits less than an individual feature, and we do not understand defendant to so contend.

In his third point relied upon for reversal, defendant contends the presentation or exhibition of the child before the jury was prejudicial because "no proper foundation was laid." His position is that the exhibition of the child to the jury should have been preceded by a foundation consisting of a showing of "specific features or unusual characteristics" in the child which would indicate paternity by defendant. He relies upon Hassler v. District of Columbia, 122 A.2d 827 (Mun.App.D.C.1956), rev'd, on other grounds, 99 U.S.App.D.C. 188, 238 F.2d 264 (1956).

It is obvious defendant's objection to the exhibition of the child before the jury was not directed at any failure to lay the foundation for which he now argues. In any event, this foundation is not an essential to the exhibition of a child to a jury under the rule we adopt. It is for the jury to make determinations as to resemblances or differences between the individual features and specific traits of the child and the alleged father. The jury may be assisted in making these determinations by other relevant evidence as discussed above, but the observation of the child by the jury is not dependent upon a preliminary showing of specific features, traits or unusual characteristics indicative of paternity which defendant now urges upon us.

The judgment should be affirmed.

It is so ordered.

COMPTON, C. J., and MONTOYA, J., concur.

STEPHENSON, Justice (dissenting).

While agreeing with much said by the majority, I do not concur in the result reached.

I agree that the precedents are in hopeless conflict. Respectable authority is readily available for any position which we might adopt. Courts, apparently including this one, find this a difficult problem with which to grapple. This being a case of first impression, we are free to adopt a position which most nearly comports with reason and justice. I would adopt a rule prohibiting presentation of a child before a jury except perhaps where questions of race or color are involved. No such questions are involved here.

In my view, the display of an infant to demonstrate a supposed resemblance to the putative father does not rise to the stature of evidence. Rather, is an injection of speculation and conjecture regarding real or fancied resemblances existing in the eye of the beholder with a dash of old wives' tales in lieu of any basis in fact, scientific or otherwise. If such conjecture emanated from the lips of a witness it would clearly be objectionable. And in the circumstances under discussion, the vice is more insidious in that, instead of emanating from a witness, it is generated in the minds of the jury or court.

I heartily agree with the rejection by the majority of the "settled features" rule which is espoused by Mr. Wigmore and

prevails in many states. Such a rule, by interposing the judge between the child and the jury, raises speculation to the second power.

I recognize that the majority would not permit such displays to demonstrate fancied general resemblance, but would rather limit them to individual features and specific traits. Aside from the question of how the jury's mind is to be riveted to individual features and specific traits to the exclusion of fancied general resemblance when the infant is displayed, and assuming a definite resemblance of an individual feature or a specific trait, what, I inquire, has been proven?

Even if we then further assume that the trier of the facts is fully informed as to the workings of Mendel's law of genetics and the functioning and interplay of the genes of the parents in relation to such feature or trait (knowledge which would apparently place the jury head and shoulders above authorities in the field) we are still left, under the hypothetical assumptions stated, with a mere possibility that the putative father is the father. I do not regard such a possibility as being evidence.

Bearing on the question of policy as to which position we should adopt are difficulties which could well confront us in the appellate process. For example, let us suppose that a paternity case in which the child is displayed to a jury is appealed, and:

A. There is no substantial evidence of paternity in the record, unless it arises from the display, or

B. The evidence of neither party preponderates, unless the scales are tilted by the display, or

C. A display is tendered by one party; the other objects on the grounds that no resemblance exists; the objection is overruled; the display is permitted and on appeal the ruling is attacked as erroneous.

How can an appellate court deal with such problems? How can the rights of the parties be protected on appeal?

Inasmuch as this is a mere dissent, it scarcely seems worthwhile to discuss the authorities at length. Suffice it to say that a recent case which is persuasive to me and which sets forth my views is Almeida v. Correa, 51 Hawaii 594, 465 P.2d 564 (1970). I consider that case to be a well-reasoned review, not only of the diverse rules applied by the courts in various jurisdictions, but also an interesting and learned discussion of some of the scientific considerations in the fields of heredity and genetics. That case concludes:

> "In sum, we agree that the specific resemblance between a child and the person alleged to be the father is a relevant issue in a paternity case but we cannot find any rule of reason, any policy of the law of evidence, or any fact of science which provides a basis for allowing the exhibition of a child to show resemblance. As we have stated, a jury gains nothing from an exhibition even when their attention is focused upon the relevant inherited traits since independent expert interpretation is required. An exhibition can only serve to expose the defendant to proven dangers. Therefore, we hold that the exhibition of a child to the finder of fact in a paternity case is not to be permitted. However, expert testimony concerning the resemblance of a child to the person alleged to be the father is admissible to prove or disprove the paternity of the child."

For the reasons I have given, I respectfully dissent from the result reached by the majority in this case.

McMANUS, J., concurs.

497 P.2d 732

Sister Mary Assunta STANG, Personal Representative and Ancillary Administratrix with the Will Annexed in the Matter of the Last Will and Testament of Catherine Lavan, Deceased, et al., Petitioners,

v.

HERTZ CORPORATION, a corporation, Respondent.

No. 9324.

Supreme Court of New Mexico.

May 26, 1972.

Smith & Ransom, Richard E. Ransom, William G. Gilstrap, Albuquerque, for petitioners.

Rodey, Dickason, Sloan, Akin & Robb, James C. Ritchie, Bruce D. Hall, Albuquerque, for respondent.

Martin & Martin, William L. Lutz, Las Cruces, amicus curiae.

OPINION

McMANUS, Justice.

The automobile accident involved in this case occurred when a tire blew out. The tire, manufactured by Firestone Tire & Rubber Company, was mounted on a car belonging to Hertz Corporation. The car had been rented by a nun; Catherine Lavan, also a nun, was a passenger in the car when the blowout occurred. Catherine Lavan suffered injuries in the accident resulting in her death. Prior appellate decisions were concerned with damages in wrongful death actions. 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). Subsequent to the appellate decisions the case was tried and submitted to a jury as against Firestone. The verdict was in favor of Firestone. There is no appeal from this verdict. The trial court directed a verdict in favor of Hertz. The dispositive issues in this appeal concern the liability of Hertz. Plaintiffs contend there were issues for the jury concerning (1) an express warranty and (2) strict liability in tort. On appeal, the Court of Appeals affirmed the trial court on the basis that there was no evidence of express warranty to be submitted to the jury and that strict liability is not applicable in New Mexico. Stang v. Hertz Corporation, 83 N.M. 217, 490 P.2d 475 (1971). We granted certiorari and now affirm on the issue of express warranty and reverse on the issue of strict liability.

Historically, the buyer of a defective product had two possible theories of recovery against the seller. The first was the basic theory of negligence and in order to recover, the buyer had to establish that the seller "had a duty of care, breached that duty, and that the breach was the cause of the plaintiff's injury." 2 L. Frumer and M. Friedman, Products Liability § 16A [1] (1970). The second theory based recovery on a breach of warranty. This theory did not involve a concept of fault as found in negligence but, rather, required an agreement entered into by the seller.

The main problem with the negligence theory was the practical one of establishing the failure to exercise due care. Breach of warranty, on the other hand, involved the need of privity of contract between parties. That is, there existed a contractual relationship between the parties. The elimination of the privity requirement extended the usefulness of the breach of warranty action to a larger group of parties and the liability for breach did not involve an element of fault as required in negligence. The law involving an action for breach of warranty was hampered, however, by contract and sales rules and other factors, such as the "necessity for a sale, for notice of breach, and disclaimers," Frumer & Friedman, supra, § 16A [2], which restricted the use of the theory of warranty in product liability cases.

Because of the shortcomings of the early theories, the courts developed a third theory of recovery which combined the strict liability of warranty with the broad reach of negligence. This theory is known as strict liability in tort and has been applied throughout the country to products liability cases.

New Mexico has had very little litigation in the area of products liability. In the very early case of Wood v. Sloan, 20 N.M. 127, 148 P. 507 (1915), we recognized the rule that privity of contract is not required in establishing liability where the product involved is imminently dangerous or where it is rendered dangerous by defect and the

defendant knew or should have known of the defect.

In 1968 this Court declared that in cases involving questions of manufacturer or supplier liability, the old factor of privity would no longer be recognized in the State of New Mexico where liability is considered on a negligence theory. Steinberg v. Coda Roberson Const. Co., 79 N.M. 123, 440 P.2d 798 (1968).

Steinberg, supra, was followed by Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct.App.1969). In that case the Court of Appeals discussed the merits of Restatement (Second) of Torts, § 402A (1965), as follows:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> "(a) the seller is engaged in the business of selling such a product, and
>
> "(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> "(2) The rule stated in Subsection (1) applies although
>
> "(a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> "(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

The court did not decide whether the rule applied in New Mexico but did recognize the merits of the rule if it should apply.

Following the language in Schrib, supra, the 10th Circuit Court of Appeals affirmed Judge Bratton's assumption that the New Mexico courts would adopt and apply the rule of strict liability under § 402A to questions concerning the sufficiency of the evidence, assumption of risk, misuse and contributory negligence. See Moomey v. Massey Ferguson, Inc., 429 F.2d 1184 (10th Cir. 1970).

With the above history before it, the New Mexico Court of Appeals, in Stang v. Hertz, supra, rejected Judge Bratton's assumption and decided the case on Restatement (Second) of Torts, §§ 407, 408 (1965). The court then made the point that if New Mexico wished to adopt the Restatement view as to strict liability then the legislature could properly do so. We agree with this contention but we are of the opinion that we should decide whether or not strict liability is properly applicable to sellers and, as an extension, to lessors.

Since New Mexico has little to offer in the area of strict products liability we must turn to other jurisdictions and their development of the law.

The picture of products liability law in this country was first viewed as a result of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng.Rep. 402 (Ex.1842), which held that only the express terms of the contract could provide a basis for recovery for injury resulting from a defect in the product. This was better known as the "privity rule," and persons not parties to the initial contract could not recover for injuries caused by one or the other contracting party. The first case to consolidate the decisions citing the exceptions to the privity rule was MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). It recognized that not only was privity unnecessary in cases involving things which were implements of destruction but the rule requiring privity did not apply to cases dealing with certain products that were dangerous because of negligent manufacturing. After a thorough discussion of these cases, the court, in MacPherson, supra, concluded that, under the same principles, the manufacturer of an automobile was liable for negligence even in the absence of privity.

The next step was to hold the manufacturer and the retailer strictly liable under some theory of implied warranties. Privity was still required, however, under these theories. See 8 Williston on Contracts, § 995A (3rd Ed.1964). See also Products Liability at the Threshold of the Land-

lord-Lessor, 21 Hastings L.J. 458, 462 (1970). An exception to the above was the risk distribution rationale which was developed in order that a third party, not in privity with the manufacturer or retailer, might recover. See Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958).

In the majority of cases, however, the implied warranty approach continued to be the rule of law until the California court abandoned the theory of implied warranty and adopted a theory of strict liability in tort. The case was Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1962), and the court finally settled on a risk distribution approach that had first been enunciated by Justice Traynor in Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 461, 150 P.2d 436 (1944) (concurring opinion). The basis of risk distribution was that the loss should be placed on those most able to bear it and they could then distribute the risk loss to users of the product in the form of higher prices. Finally, in Elmore v. American Motors Corp., 70 Cal.2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969), the California court refined the doctrine to the point that implied warranty no longer existed. In that case, the manufacturer was held liable to a bystander for injury from a defective automobile that left the road and injured the plaintiff. California has developed a theory of strict liability in tort where defective products are at issue and has completely eliminated the need for implied warranties.

While California was maturing toward a strict liability in tort approach, as applied to manufacturers and retailers, other states were extending either the MacPherson doctrine of negligence or the concept of strict liability in tort to defendants other than manufacturers and retailers. The culmination of the extension of strict liability to those other than manufacturers and retailers was Cintrone v. Hertz Truck Leasing and Rental Service, 45 N.J. 434, 212 A.2d 769 (1965), which applied the doctrine to a bailment. In that case, the Supreme Court of New Jersey held Hertz, the lessor of a defective truck, liable to the employee of the lessee for strict liability in tort. In its long and extensively researched opinion, the court stated:

> "A bailor for hire, such as a person in the U-drive-it business, puts motor vehicles in the stream of commerce in a fashion not unlike a manufacturer or retailer. * * * The very nature of the business is such that the bailee, his employees, passengers and the traveling public are exposed to a greater *quantum* of potential danger of harm from defective vehicles than usually arises out of sales by the manufacturer. We held in Santor the liability of the manufacturer might be expressed in terms of strict liability in tort. Santor v. A & M Karagheusian, Inc., supra (44 N.J. [52] at 66–67, 207 A.2d 305); * * * By analogy the same rule should be made applicable to the U-drive-it bailor-bailee relationship. Such a rental must be regarded as accompanied by a representation that the vehicle is fit for operation on the public highways.
>
> "* * *
>
> "* * * [W]e are of the opinion * * * that the nature of the U-drive-it business is such that the responsibility of Hertz may properly be stated in terms of strict liability in tort. * * *"

Cintrone unlocked the door to the application of strict liability to lessors and the California Court of Appeals, in the final step to complete acceptance of strict liability, walked in. In McClaflin v. Bayshore Equipment Rental Co., 274 Cal.App.2d 446, 79 Cal.Rptr. 337 (Cal.Ct.App.1969), a commercial bailor was held strictly liable in tort for injuries sustained by a bailee from a defect in the bailed article, in this case a ladder.

The result in McClaflin was the natural one considering the result of Greenman, supra, and the cases that followed it. It must be remembered, however, that both in McClaflin and Cintrone, supra, the courts

made it very clear that strict liability applies only where the defendant is in the business of leasing products. If the transaction is a casual or isolated one, then the bailor will not be held to strict liability. So long as the bailor is in the business of leasing then he will be held to the same standard of care as a manufacturer or retailer for the protection of the consumer.

Other courts have since followed the lead of New Jersey and California. Hawaii, for instance, has adopted the doctrine of strict liability as applied to automobile cases. In Stewart v. Budget Rent-A-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970), the Supreme Court of Hawaii stated:

> "Therefore we adopt the rule that one who sells or leases a defective product which is dangerous to the user or consumer or to his property is subject to liability for physical harm caused by the defective product to the ultimate user or consumer, or to his property, if (a) the seller or lessor is engaged in the business of selling or leasing such product, and (b) the product is expected to and does reach the user or consumer without substantial change in its condition after it is sold or leased. * * *"

See, also, Bachner v. Pearson, 479 P.2d 319 (Alaska 1970), where the court applied strict liability to lessors and bailors with the usual course of business limitation.

The rule enunciated by Restatement (Second) of Torts, § 402A, supra, is substantially similar to those rules enunciated by the various cases.

Rejecting the above section, the Court of Appeals, in the case now before us, chose to apply §§ 407 and 408 of Restatement (Second) of Torts. Those sections state:

> "A lessor who leases a chattel for the use of others, knowing or having reason to know that it is or is likely to be dangerous for the purpose for which it is to be used, is subject to liability as a supplier of the chattel." § 407.
>
> "One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use, for physical harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it." § 408.

To support its line of reasoning, the Court of Appeals relied on Speyer, Inc. v. Humble Oil & Refining Co., 275 F.Supp. 861 (W.D.Pa.1967), aff'd 403 F.2d 766 (3rd Cir. 1968), cert. denied 394 U.S. 1015, 89 S.Ct. 1634, 23 L.Ed.2d 41 (1969), where the distinction between the above cited sections was applied.

The reasoning in Speyer, supra, limits the application of strict liability and it is with this limitation that the concurring Justice in Lechuga, Inc. v. Montgomery, 12 Ariz.App. 32, 467 P.2d 256 (1970), took issue. In a well-reasoned opinion, the Justice stated:

> "It is apparent from a reading of the Restatement, and the leading cases on this subject, that the doctrine of strict liability was evolved to place liability on the party primarily responsible for the injury occurring, that is, the manufacturer of the defective product. This * * * is based on reasons of public policy. * * *
>
> "Inherent in these policy considerations is not the nature of the transaction by which the consumer obtained possession of the defective product, but the character of the defect itself, that is, one occurring in the manufacturing process and the unavailability of an adequate remedy on behalf of the injured plaintiff.
>
> "For this reason I find no logical basis for differentiating between the liability to an injured consumer of a dealer who is in the business of selling an automobile which is in a defective condition because of the manufacture thereof, and a dealer who is in the business of leasing the same automobile. * * *

"My determination in this matter would appear to be contrary to the Supreme Court's statement that the rule in Arizona is that set forth in the Restatement which refers only to 'sellers.' However, my reading of the Arizona Supreme Court decisions on this subject leads me to the conclusion that the Arizona Supreme Court would not hesitate to hold that the term 'seller' is a term designating a class * * * rather than a designation of limitation."

The reasoning of the Arizona concurring opinion is sound and this Court adopts that reasoning in applying strict liability in the case now before us.

The history of the evolution of strict products liability, its policy basis and prerequisites to recovery does reveal a recognition by the courts of traditional common law concepts of status and responsibility. It was referred to by Professor Keeton as "impressive evidence of continuing reform of tort law through candidly creative judicial action." R. Keeton, Creative Continuity in the Law of Torts, 75 Harv.L.Rev. 463, 485–486 (1962). As Chief Justice Vanderbilt stated:

"* * * One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court." State v. Culver, 23 N. J. 495, 129 A.2d 715 (1957), cert. denied, 354 U.S. 925, 77 S.Ct. 1387, 1 L.Ed.2d 1441 (1957).

We feel that the conditions and the needs of the times makes it appropriate for such changes as we are here making. Most of the states who have adopted strict liability have done so through the judicial system. This has been called "following the leader" and we see nothing wrong with this general principle if the leader is going in the right direction.

We have taken New Mexico from MacPherson to Cintrone, both supra, with very little in between, so we point out that this principle of strict liability which we hereby adopt would also apply in cases involving manufacturers and retailers. For other articles on the subject, see 85 Harv. L.Rev. 537 (1972); 21 Rutgers L.Rev. 426 (1970); 44 So.Cal.L.Rev. 1053 (1971); 24 Vanderbilt L.Rev. 862 (1971); 47 Chicago-Kent L.Rev. 123 (1969–70).

The respondent argues, in point III of the answer brief to the petition for a writ of certiorari, that strict liability should not be applied where the defect has arisen subsequent to the manufacture of the leased product and that the jury verdict for Firestone established that the defect did not exist. Respondent further argues that as to Firestone, the defect did not exist at all and, if it did arise subsequent to the manufacturing, Hertz is not liable for the defect since it cannot pass the liability onto the manufacturer.

The petitioner argues, on the other hand, that Firestone's entire case was presented to the jury on the theory that the unreasonably dangerous condition arose after manufacture of the product. Hertz, however, elected to stand on the erroneous argument that strict liability did not apply to lessors and cannot now argue that the verdict for Firestone operates as res judicata or collateral estoppel to petitioner's theory of strict liability which was erroneously refused by the trial court.

The issues as between the petitioner and Firestone and the petitioner and Hertz are not the same. Consequently, we see no reason why the verdict for Firestone should interfere with the disposition of this case against Hertz.

For the reasons stated, the judgment for the defendant is reversed and the cause is remanded for a new trial to be had in accordance with the views outlined.

It is so ordered.

COMPTON, C. J., and OMAN, STEPHENSON and MONTOYA, JJ., concur.

497 P.2d 738

Lucy M. ROMERO, Petitioner,

v.

Edwin L. FELTER, a District Judge for the First Judicial District of the State of New Mexico, Respondent.

No. 9424.

Supreme Court of New Mexico.

May 26, 1972.

Mitchell, Mitchell & Alley, James B. Alley, Jr., Santa Fe, for petitioner.

Rodey, Dickason, Sloan, Akin & Robb, Ray H. Rodey, Albuquerque, for respondent.

OPINION

OMAN, Justice.

This is an original proceeding in prohibition. The alternative writ was made permanent on March 15, 1972.

Petitioner and her husband [hereinafter referred to as plaintiffs] brought suit for damages they allegedly sustained by reason of a claimed libel against each of them and a claimed interference with contractual relations. Their claims in tort arose out of the writing and publication of a letter by defendant in which reference was made to both plaintiffs. Petitioner sued individually and as administratrix of the estates of two decedents. Her husband joined in the suit in his individual capacity and as the agent of his wife. Each seeks compensatory and punitive damages in different amounts under their respective claims for libel. They did not, however, set forth their respective claims in separate counts, but asserted in "Claim I" of their complaint their respective claims arising out of the alleged libel, and in "Claim II" they asserted a joint claim for damages allegedly arising out of the claimed interference with their contractual relations.

Their suit was filed in the First Judicial District over which three resident district judges preside. The case was first assigned to the judge of Division I. The husband filed an affidavit pursuant to § 21–5–8, N.M.S.A.1953 (Repl.Vol. 4, 1970), by which he disqualified this judge.

The case was then assigned to respondent, who is the judge of Division II. Petitioner then filed an affidavit pursuant to the same statute by which she disqualified respondent.

The case was thereupon assigned to the judge of Division III. The defendant in the tort action thereupon filed an affidavit pursuant to said statute by which he disqualified the judge of Division III. Defendant also filed a motion to quash petitioner's affidavit of disqualification, and respondent entered an order quashing the same.

Petitioner thereupon filed her Petition for Writ of Prohibition in this court by which she sought to have respondent prohibited from proceeding further in the tort action.

The question presented was whether plaintiffs could each disqualify a judge under § 21–5–8, supra. We have already answered that they could, and our purpose in writing this opinion is to make known our decision on this question and our reasons therefor.

It was the contention of respondent in the tort action that plaintiffs, together, are "a party" within the provisions of § 21–5–8, supra, and, therefore, could properly disqualify but one judge under this court's decision in Beall v. Reidy, 80 N.M. 444, 457 P.2d 376 (1969). This contention of respondent was predicated upon the following: (1) plaintiffs are husband and wife; (2) they are on the same side in the tort action; (3) the husband was acting as agent for his wife in her capacity as administratrix; (4) their respective claims arose out of the same transaction; and (5) their claims are not set forth in separate counts in their complaint in the tort action, but are combined in what are denominated as "Claim I" and "Claim II," as shown above.

Section 21–5–8, supra, provides, insofar as pertinent:

> "Whenever a party to any action or proceeding, civil or criminal, * * * shall make and file an affidavit that the judge before whom the action or proceeding is to be tried and heard, * * * cannot, according to the belief of the party making the affidavit, preside over the action or proceeding with impartiality, that judge shall proceed no further. * * *"

The fact that plaintiffs are husband and wife does not destroy their individual identities and make them one person under law, nor does it operate to vest in either of them, or only in them jointly, the right to assert and recover for tortious wrongs suffered personally by each of them. Marital status does give rise to many mutual rights, duties and obligations between a husband and wife; does create in each of them legally enforceable rights

in and arising out of the marital status and in the well-being of the other of them; and for some purposes and under some circumstances, vests in one or the other of them the right and power to manage and control their community interests and rights. However, each retains his or her legal identity and all of his or her rights and powers under the law, except as a marital relationship requires otherwise and as is expressly provided by law. In New Mexico each spouse may recover for tortious wrongs committed against him or her personally by a third person. Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826, 35 A.L.R.2d 1190 (1952); Roberson v. U-Bar Ranch, Inc., 303 F.Supp. 730 (D.C.N.M. 1968). See also Garraway v. Retail Credit Company, 244 Miss. 376, 141 So.2d 727 (1962); Benton v. Knoxville News-Sentinel Co., 174 Tenn. 661, 130 S.W.2d 106 (1939); Alfone v. Newark Umbrella Frame Co., 13 N.J.Super. 526, 80 A.2d 589 (Essex Cty.Ct.1951); Wilson v. Retail Credit Company, 325 F.Supp. 460 (S.D. Miss.1971); 1 W. de Funiak, Principles of Community Property § 82 at 226–31 (1943). Since the alleged libelous letter refers to both of the plaintiffs, each of them has a separate cause of action which he or she may properly pursue against defendant.

Section 21–5–8, supra, provides: "*a party* to any action or proceeding," may disqualify "the judge before whom the action or proceeding is to be tried and heard." [Emphasis added]. Respondent's position was that all plaintiffs must be considered together as "a party," as must all defendants. Consequently, plaintiffs, as "a party," had exercised their right upon the disqualification by the husband of the judge of Division I, and the attempt to disqualify respondent by the wife was of no effect. We do not agree that all plaintiffs to a cause constitute "a party," nor that all defendants are to be considered as one party.

A party to an action or proceeding within the contemplation of our statute has the same meaning as "a party" within the contemplation of our Rules of Civil Procedure. Clearly our rules, as well as the common understanding of what is meant by a party to a lawsuit, are inconsistent with the position that all parties on one side of a lawsuit are but one party. See Rules 5(c); 10(a); 13(a) (g) and (h); 19(a) (b) and (c); 20; 21; 22(a); 23; 24; 25(a) (2); 30(b) (d) and (g); 33; 34; 35; 36(a); 38(a) (b) (c) and (e); 52(A); 54(b); 55(d); 59; 60(a) and 62(h) of the Rules of Civil Procedure for the District Courts [§§ 21–1–1(5) (c); (10) (a); (13) (a) (g) (h); (19) (a) (b) and (c); (20); (21); (22) (a); (23); (24); (25) (a) (2); (30) (b) (d) and (g); (33); (34); (35); (36) (a); (38) (a) (b) (c) and (e); (52) (A); (54) (b); (55) (d); (59); (60) (a) and (62) (h), N.M.S.A.1953 (Repl.Vol. 4, 1970)]. See also Supreme Court Rules 5(1) (2) and (3) and 8(1) [§ 21–2–1(5) (1) (2) and (3); (8) (1), N.M.S.A.1953 (Repl.Vol. 4, 1970)].

Respondent relied upon Morris v. Cartwright, 57 N.M. 328, 258 P.2d 719 (1953), and particularly that portion of the decision at pages 331–332 of the New Mexico Reports referring to "each party" as meaning "each side" of a suit in the exercise of peremptory jury challenges. We do not accept the reasoning or the result reached in that case as being applicable to the statute here in question. Our present statute, concerning the exercise of peremptory challenges of prospective jurors, expressly provides:

> "When there are two [2] or more parties defendant or parties plaintiff, they will exercise their peremptory challenges jointly and if all cannot agree on a challenge desired by one [1] party on a side, then the challenge is forfeited. However, if the relief sought by or against the parties on the same side of a civil case differs, * * * the court shall allow each such party on that side of the suit five [5] peremptory challenges."

Section 19–1–14, N.M.S.A.1953 (Repl. Vol. 4, 1970).

This statute, as do the Rules of Civil Procedure for the District Courts and the

rules of this court, as shown above, clearly recognizes that there may be and often are multiple parties on each side of an action or proceeding. Section 21–5–8, supra, clearly gives to "a party"—that is to each party—the right to disqualify "the judge before whom the action or proceeding is to be tried and heard. * * *" This is precisely what each of the plaintiffs did.

We next consider the effect of the agency relationship between the husband and wife. Other than the mention of this relationship, respondent makes no argument to persuade and cites no authority to show us that this relationship has any bearing upon the right of both the husband and the wife to disqualify a judge, so long as the judge disqualified is the one "before whom the action or proceeding is to be tried and heard."

In the complaint in the libel suit, plaintiffs alleged that the wife is the administratrix of the estate of certain named decedents and her husband acted as her agent in her capacity as such administratrix. However, there is no doubt about their respective claims that each of them was libeled by the letter in question and that each sustained damages in different amounts by reason thereof. We fail to understand how this agency relationship could operate to cause them to be one party to the suit, when each claims a personal tortious act was committed against him or her and each claims damages in different amounts by reason of this personal tort.

We are next confronted with the contention that plaintiffs are "a party" to the libel suit, within the contemplation of the provisions of § 21–5–8, supra, by reason of the fact that their respective claims arose out of the same transaction. We have already pointed out that each claims the commission of a separate tort against him or her. The fact that these claimed torts arose out of the same transaction does not create an identity of interests in plaintiffs, and certainly does not so identify their interests as to make them in effect one party plaintiff. Rule 20 of the Rules of Civil Procedure for the District Courts [§ 21–1–1(20), N.M.S.A.1953 (Repl.Vol. 4, 1970)], clearly provides for the joinder in one action as parties plaintiff of those who severally assert claims arising out of the same transaction or occurrence, if any question of law or fact common to all will arise in the action. This rule clearly considers them as retaining their separate identities as separate parties, since it provides: "* * * Judgment may be given for one [1] or more of the plaintiffs according to their respective rights to relief, and against one [1] or more defendants according to their respective liabilities."

The final claim, upon which the identity of plaintiffs as "a party" is predicated, is that plaintiffs' claims, and particularly their separate claims for libel, are not set forth in separate counts but are combined in what is denominated in the complaint as "Claim I." We agree that simplicity and clarity would have been served had plaintiffs set forth their respective claims in separate counts, but their failure to do so did not make their respective claims a joint or common claim. Each claims damages for asserted libel against him or her, and a reading of "Claim I" of the complaint immediately demonstrates that separate claims are being asserted by plaintiffs, even though the claim of each arises from the one claimed libelous letter written by defendant.

We reaffirm our action in having heretofore made the writ of prohibition permanent.

It is so ordered.

COMPTON, C. J., and McMANUS, STEPHENSON and MONTOYA, JJ., concur.

497 P.2d 742

Paul MABREY, Respondent,

v.

MOBIL OIL CORPORATION, Petitioner,

v.

D. E. SPARGER, d/b/a Jet Construction Company, Respondent.

No. 9463.

Supreme Court of New Mexico.

May 2, 1972.

Further ordered that the record in Court of Appeals Cause No. 838 be and the same is hereby returned to the Clerk of the Court of Appeals.

497 P.2d 742

STATE of New Mexico, Respondent,

v.

Billy Joe HUNT and Charles E. Taylor, Relators.

No. 9472.

Supreme Court of New Mexico.

May 15, 1972.

Further ordered that Court of Appeals record in Cause No. 793, 83 N.M. 753, 497 P.2d 755 be and the same is hereby returned to the Clerk of the Court of Appeals.

497 P.2d 742

George TILL and Ken Gaston, Petitioners,

v.

Franklin JONES, Commissioner of Revenue, State of New Mexico, Respondent.

No. 9477.

Supreme Court of New Mexico.

May 24, 1972.

Further ordered that the record in Court of Appeals Cause Nos. 781 and 782, 83 N.M. 743, 497 P.2d 745, be and the same is hereby returned to the Clerk of the Court of Appeals.

497 P.2d 742

STATE FARM FIRE AND CASUALTY COMPANY, Petitioner,

v.

MILLER METAL COMPANY, and Lennox Industries, Inc., Respondents.

No. 9408.

Supreme Court of New Mexico.

June 1, 1972.

Further ordered that the Court of Appeals record in Cause No. 679, 83 N.M. 516, 494 P.2d 178, be and the same is hereby returned to the Clerk of the Court of Appeals.

497 P.2d 743

Severino MARTINEZ, dba Severino Martinez Construction Company, also dba Severino Construction Company, Petitioner,

v.

Franklin JONES, Commissioner of Revenue, Respondent.

No. 9492.

Supreme Court of New Mexico.

June 9, 1972.

Further ordered that the record in Court of Appeals Cause No. 715, 83 N.M. 722, 497 P.2d 233, be and the same is hereby returned to the Clerk of the Court of Appeals.

497 P.2d 743

Juan VALDEZ, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 9432.

Supreme Court of New Mexico.

June 9, 1972.

Ordered that the record in Court of Appeals Cause No. 490, 83 N.M. 632, 495 P.2d 1079, be and the same is hereby returned to the Clerk of the Court of Appeals.

497 P.2d 744

Billy Doyle FAULKNER, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 845.

Court of Appeals of New Mexico.

May 5, 1972.

David W. Bonem, Quinn & Bonem, Clovis, for petitioner.

David L. Norvell, Atty. Gen., James H. Russell, Jr., Asst. Atty Gen., Santa Fe, for respondent.

OPINION

HENDLEY, Judge.

Defendant was convicted of armed robbery on June 19, 1967. The notice of appeal was subsequently filed on June 26, 1967 and the transcript docketed in this court (Ct.App.No. 89) on September 22, 1967. On November 21, 1967, defendant through his attorney filed a Motion to Dismiss Appeal with an attached affidavit. The affidavit stated in part: "[T]hat he voluntarily of his own free will and without coercion or duress of any manner, desires to dismiss the appeal filed in the State of New Mexico Court of Appeals under the heading, State of New Mexico v. Doyle Faulkner, No. 89; that he is fully aware that the consequence of this dismissal will be to terminate his right to appeal * * *." Pursuant to the motion to dismiss the appeal an order was entered dismissing the appeal on the same day.

On July 30, 1971, defendant filed a Motion to Vacate Judgment and Sentence under Rule 93 (§ 21-1-1(93), N.M.S.A.1953 (Repl.Vol.1970)). In the petition the defendant stated that after his arrest for armed robbery and prior to his armed robbery conviction he was sent to the State Hospital in Las Vegas, New Mexico, for the purpose of an examination to determine if he was competent to stand trial and also to see if he was sane at the time of the commission of the crime. Defendant further stated that he was at Las Vegas for a period of six weeks and was subjected to assorted tests; that while at the hospital he only talked one time to the director of psychiatry, Dr. Bramante, and that this talk only lasted for a period of fifteen minutes; that after six weeks at the hospital he was sent back to stand trial; that the doctor who examined him in the hospital testified at the trial and stated that defendant suffered from various illnesses and psychotic disorders; that the doctor testified that he believed defendant to be sane at the time of trial and was sane at the

time of the commission of the crime. Defendant further stated that after his conviction he was sent directly to the penitentiary and was immediately put on medication and subsequently put on so much medication that he did not realize what was happening around him for over a year and when the medication was reduced he went into a deep depression and was subsequently sent to the State Hospital as an emergency case.

In the words of the defendant he contends: "* * * that in consequence of testimony given by Dr. Bramante and his later actions deprived Petitioner of a fair and impartial trial * * *."

The trial court denied defendant the relief requested without a hearing on the grounds that the motion failed to state a claim upon which relief could be granted and that the matter sought to be raised therein could be raised, if at all, by appeal from the defendant's conviction but that defendant had dismissed his appeal.

Defendant appeals and raises the question of (1) substantial evidence to support the jury's determination of sane at the time of the alleged crime and at the time of trial, (2) that because of the one year medication after confinement defendant was incompetent at the time he dismissed the appeal.

Defendant's claim which relates to the sufficiency of the evidence on sanity is without merit. Insufficiency of the evidence is not a basis for granting post-conviction relief. Jones v. State, 81 N.M. 568, 469 P.2d 717 (1970); State v. Ponney, 82 N.M. 508, 484 P.2d 350 (Ct.App.1971).

The claim that defendant was "subsequently" put on so much medication that he did not realize what was happening "for over a year" is vague and does not raise an issue as to whether he was mentally incompetent when he dismissed his appeal on November 21, 1967. State v. Botello, 80 N.M. 482, 457 P.2d 1001 (Ct.App.1969); State v. Guy, 79 N.M. 128, 440 P.2d 803 (Ct.App.1968). Even if the issue of competency at the time of dismissal of the appeal could be raised for the first time in this appeal, there is no basis for determining the claim. State v. Lucero, 78 N.M. 659, 436 P.2d 519 (Ct.App.1968).

Affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

497 P.2d 745

George TILL, Appellant,

v.

Franklin JONES, Commissioner of Revenue, State of New Mexico, Appellee.

Ken GASTON, Appellant,

v.

Franklin JONES, Commissioner of Revenue, State of New Mexico, Appellee.

Nos. 781, 782.

Court of Appeals of New Mexico.
March 17, 1972.
Rehearing Denied April 12, 1972.
Certiorari Denied May 24, 1972.

John C. Maine, Jr., William C. Marchiondo, McAtee, Marchiondo & Berry, Albuquerque, for appellant.

David L. Norvell, Atty. Gen., Curtis W. Schwartz, John C. Cook, Asst. Attys. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

These cases, consolidated for the appeal, involve the liability of a horse owner and horse trainer for gross receipts tax on their share of winning purses received in connection with a horse race. Each reported gross receipts but protested any tax liability based on the receipts reported. The Commissioner denied the protests and each appealed directly to this court. Section 72–13–39, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1971).

The receipts involved for Gaston are for a winning purse paid to him as a horse owner. The receipts involved for Till are for a "customary" 10% of a winning purse paid to him as a horse trainer. The reporting periods for each are prior to the enactment of § 72–16A–12.28, N.M.S.A. 1953 (Repl.Vol. 10, pt. 2, Supp.1971); thus, no exemption under that section is involved. The issues are whether: (1) the receipts are subject to the Gross Receipts Tax Act [Gross Receipts and Compensating Tax Act—§§ 72–16A–1 to 72–16A–19, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp. 1971)]; (2) the receipts are for a taxable service; (3) there was a joint venture; (4) an administrative ruling was not in accordance with law; (5) the receipts were exempt under § 60–6–9, N.M.S.A.1953 (Repl.Vol. 9, pt. 1, Supp.1971); and (6) the receipts were exempt under § 72–16A–12.7, supra.

Whether the receipts are subject to the Gross Receipts Tax Act.

The taxpayers contend "* * * the legislative history evidences a legislative intent that the receipts by horse trainers and horse owners from purses at New Mexico race tracks do not fall within the scope of the imposition of the gross receipts tax. * * *"

Legislative intent is determined primarily by the language of the act. Albuquerque Nat. Bank v. Commissioner of Revenue, 82 N.M. 232, 478 P.2d 560 (Ct.App. 1970). We review the statutory language. Section 72–16A–2, supra, states the purpose of the tax 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–3, subd. E, supra, defines "engaging in business" to mean "* * * carrying on or causing to be carried on *any activity* with the purpose of direct or indirect *benefit*. * * *" [Emphasis added]. Section 72–16A–3, subd. F, supra, defines "gross receipts" to mean "* * * the total amount of money or the value of other consideration, received from * * * performing services in New Mexico. * * *" Section 72–16A–3, H, supra, defines "person," to include an individual, a joint venture or other entity. Sec-

tion 72–16A–4, supra, imposes a gross receipts tax "* * * on *any person* engaging in business in New Mexico." [Emphasis added]. Section 72–16A–5, supra, states: "* * * it is presumed that all receipts of a person engaging in business are subject to the gross receipts tax. * * *" This language does not demonstrate a legislative intent to exempt the receipts in issue in this appeal.

Prior to the enactment of the Gross Receipts Tax Act (Laws 1966, ch. 47), the tax statute specifically applied to the gross receipts of any amusement enterprise, including horse shows and races. Section 72–16–4.8, N.M.S.A.1953 (Repl.Vol. 10, pt. 2). Because this wording is not specifically included in the Gross Receipts Tax Act the taxpayers assert that the Legislature did not intend to cover receipts from horse races. A specific itemization is not required. Legislative intent is determined primarily by the language of the act and that language, couched in general terms of "all receipts" of "any person," shows an intent to make the tax applicable to the receipts in question.

The taxpayers would apply various rules of construction in their effort to demonstrate an absence of legislative intent to tax the receipts. Judicial construction is not called for unless there is ambiguity or doubt as to the meaning of the tax statute. Martinez v. Research Park, Inc., 75 N.M. 672, 410 P.2d 200 (1965); Westland Corporation v. Commissioner of Revenue, 83 N.M. 29, 487 P.2d 1099 (Ct.App. 1971); New Mexico Electric Service Co. v. Jones, 80 N.M. 791, 461 P.2d 924 (Ct. App. 1969). In this case there is neither ambiguity nor doubt that the language used in the Gross Receipts Tax Act applies to the receipts in question. Since the "scope of the * * * gross receipts tax" (taxpayers' words) is unambiguous, judicial construction based on an asserted long standing administrative interpretation is not applicable. See State ex rel. Deikson v. Aldridge, 66 N.M. 390, 348 P.2d 1002 (1960); Valley Country Club, Inc. v. Mender, 64 N.M. 59, 323 P.2d 1099 (1958).

One aspect of the "construction" argument requires separate consideration. It is that the Legislature itself has construed the Gross Receipts Tax Act. This asserted legislative construction is based on the fact that in 1970 the Legislature enacted § 72–16A–12.28, supra. This section apparently provides an exemption for the receipts in question. The fact that an exemption was subsequently enacted does not show a legislative intent that the receipts were not subject to the gross receipts tax prior to enactment of the exemption. See Valley Country Club v. Mender, supra; Stang v. Hertz Corporation, 81 N.M. 69, 463 P.2d 45 (Ct.App. 1969).

Whether the receipts are for a taxable service.

The issue under this point is whether the receipts were for a type of service that is taxed. Section 72–16A–3, subd. K, supra, states in part: "'service' means all activities engaged in for other persons for a consideration, which activities involve primarily the performance of a service as distinguished from selling property." The taxpayers contend their activites were not engaged in for other persons for a consideration. On this basis they assert they were not engaged in a type of service included in the definition of gross receipts (§ 72–16A–3, subd. F, supra) and, therefore, their receipts were not subject to the gross receipts tax (§ 72–16A–4, supra).

The contention is "* * * that the horse owners and horse trainers participate in the race for themselves and for no other person." The facts, stipulated by the parties, permit a contrary inference.

As to the trainer, it is stipulated that a trainer receives earnings from training horses for many different owners. By "long standing custom and practice" a trainer receives approximately $10.00 "* * * per day per horse from a horse owner for training the horse, as well as 10% of the winning purse that is received by the winning owner."

As to the horse owner, it is stipulated: "Licensees or operators of a horse race track agree with horse owners in advance of each racing year the percentage of * * * commissions * * * which will be paid to the horse owners as winning purses. * * *" It is also stipulated: "A licensee or operator of a horse race track cannot operate a race track without horses to race, trainers to train horses and jockeys to ride horses. Each are an integral part of racing, along with the facility owned by the licensee."

These stipulated facts permit the inference that both the horse trainer and the horse owner are engaged in activities for other persons for a consideration. With this permissible inference, the Commissioner did not err in holding that the receipts in question were receipts from performing a service within the meaning of the Gross Receipts Tax Act. Rock v. Commissioner of Revenue, (Ct.App.), 83 N.M. 478, 493 P.2d 963 decided January 21, 1972.

Whether there was a joint venture.

The taxpayers claim that the horse owner, the trainer and the jockey are joint venturers because of "* * * their combined efforts for the purpose of winning a pre-determined share of the purse." Joint ventures are subject to the tax. Section 72–16A–3, subd. H, supra. The taxpayers assert that if they were engaged in a joint venture they would not be engaged in activities for other persons for a consideration and, thus, not performing taxable services. See the second point discussed in this opinion. We hold the Commissioner could properly determine there was no joint venture; therefore, we do not reach the "services" contention.

Fullerton v. Kaune, 72 N.M. 201, 382 P. 2d 529 (1963) states:

> "* * * A joint adventure is formed when, by agreement between the parties to the joint adventure, the parties combine their money, property or time in the conduct of some particular business deal, agreeing to share jointly in the profits and losses of the venture, and with a right to mutual control over the subject matter of the enterprise or over the property. * * *"

The parties stipulated that by custom the horse owner pays 10% of winning purses to the trainer and 10% to the jockey. Nothing in the stipulation requires the inference that a winning purse is a profit and nothing in the stipulation requires the inference that the owner, trainer and jockey have agreed to share in profits and losses. The parties stipulated that the owner, trainer and jockey are an integral part of racing, but nothing in the stipulation requires the inference that there is mutual control of the horse or the horse race. Since the stipulated facts are not such that the only reasonable inference is that of a joint venture, the Commissioner did not err in ruling that there was no joint venture. Rock v. Commissioner of Revenue, supra; Rust Tractor Co. v. Bureau of Revenue, 82 N.M. 82, 475 P.2d 779 (Ct. App. 1970).

Whether an administrative ruling was not in accordance with law.

The taxpayers assert the Commissioner's decision should be set aside because the controversy with which this appeal is concerned was "generated" by a specified Bureau of Revenue ruling. They contend the ruling was not promulgated in accordance with § 72–13–23, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp. 1971). The argument is directed to the difference between regulations and rulings.

In authorizing appeals to this court from the Commissioner's decision, § 72–13–39, supra, limits the issues "* * * to the same extent and upon the same theory as was asserted in the hearing before the commissioner or his delegate. * * *" The appeal is on the record made at the hearing. The record does not show this issue was raised at the hearing. This issue is not before us for review. See Board of Education v. State Board of Education, 79 N.M. 332, 443 P.2d 502 (Ct.App. 1968).

Whether the receipts were exempt under § 60–6–9, supra.

Chapter 60, article 6, N.M.S.A. 1953 (Repl.Vol. 9, pt. 1), as amended, regulates horse racing. Section 60–6–4, N.M.S.A. 1953 (Repl.Vol. 9, pt. 1, Supp. 1971) provides that an applicant for a license to hold public horse races or race meetings [§ 60–6–1, N.M.S.A. 1953 (Repl.Vol. 9, pt. 1)] shall pay a specified license fee. Section 60–6–9, supra, states that in addition to the license fees, certain additional taxes are imposed "* * * which shall be paid in lieu of all other or further excise or occupational taxes levied by the state or any county or municipality or other political subdivision. * * *"

The taxpayers claim that § 60–6–9, supra, exempts them from the gross receipts tax. The additional taxes authorized by § 60–6–9, supra, are imposed on amounts received by a licensee on tickets sold for admission to the grounds and on gross amounts wagered each day where public horse racing for profit is held. These taxes are to be paid from the commissions of the licensee. The licensee is required to keep records in connection with those taxes. Nothing in the foregoing shows an exemption from gross receipts tax for horse owners or trainers. Nor do the taxpayers claim that § 60–6–9, supra, provides such an exemption.

The exemption claim is not based on the status of being an owner or trainer but on the receipts which the Commissioner held to be subject to the gross receipts tax. The source of the receipts is the winning purses paid to horse owners by the licensee or operator of the horse race track. "Licensees or operators of a horse race track agree with horse owners in advance of each racing year the percentage of the licensees' or operators' commissions on the sale of pari-mutuel tickets and certificates which will be paid to the horse owners as winning purses. * * *" Since the receipts of the owner and trainer come from purses paid by the licensee or operator of the track, and since these purses come from funds which are taxed by § 60–6–9, supra, the taxpayers claim these funds are exempt from the gross receipts tax by the "in lieu of" provision of § 60–6–9, supra, which is quoted above.

The "in lieu of" provision of § 60–6–9, supra, can fairly be read to mean that the *licensee* is exempt from excise or occupational taxes except as provided in that section. Certainly, it does not clearly appear that the *funds* taxed are exempt from further taxation. Since § 60–6–9, supra, does not clearly authorize the exemption claimed, and it being the taxpayers' burden to establish their right to the exemption, the Commissioner did not err in holding the receipts in question were not exempt under § 60–6–9, supra. Reed v. Jones, 81 N.M. 481, 468 P.2d 882 (Ct.App. 1970); see Field Enterprises Ed. Corp. v. Commissioner of Rev., 82 N.M. 24, 474 P. 2d 510 (Ct.App. 1970).

Whether the receipts were exempt under § 72–16A–12.7, supra.

Section 72–16A–12.7, supra, reads:

> "Exempted from the gross receipts tax are the receipts of any person derived from feeding or pasturing livestock.
>
> "Receipts derived from penning or handling livestock prior to sale are receipts derived from feeding livestock for the purposes of this section."

For the purposes of the gross receipts tax, it is stipulated that race horses are included in the word "livestock." It is stipulated: "A claiming race is a horse race in which a claimant makes a bona fide offer to buy the race horse for which a claim is made, and the race horse owner agrees to sell the race horse he owns at a claiming price which is determined when the race horse is entered in the race. * * *" The frequency of claiming races in New Mexico and the number of horses claimed as a result of these races is also stipulated.

The taxpayers contend that the stipulation concerning claiming races shows a "handling [of] livestock prior to sale" and that their receipts are from such handling.

Under this contention, the receipts would be exempt since the statute defines the "handling" receipts to be "feeding" receipts which are exempted.

The answers to this contention are: (1) Nothing in the record shows the receipts in question were in any way derived from a claiming race; (2) the receipts in question derive from winning purses paid for a race and not from any sale, whether or not the horse was subsequently claimed; and (3) § 72–16A–12.7, supra, does not clearly authorize the exemption claimed. Reed v. Jones, supra. On both the facts and the law, the contention is without merit.

The order denying the protest is affirmed.

It is so ordered.

SUTIN and COWAN JJ., concur.

497 P.2d 751

Agneda MASCARENAS, Plaintiff-Appellee,

v.

Isidro GONZALES et al., Defendants-Appellants.

No. 806.

Court of Appeals of New Mexico.

May 5, 1972.

James E. Thomson, Zinn & Donnell, Santa Fe, for defendants-appellants.

Joseph A. Roberts, David Chavez, Jr., Santa Fe, for plaintiff-appellee.

OPINION

HERNANDEZ, Judge.

Defendant Lawrence Rodriguez (the other two defendants having been dismissed), a licensed chiropractor, of Fairview, New Mexico, appeals from a jury verdict against him for alleged medical malpractice resulting in four fractured ribs in his patient, the plaintiff.

These grounds for reversal are urged by defendant: (1) Evidence of plaintiff's medical expenses was erroneously admitted, prejudicing defendant; (2) Plaintiff presented no competent medical evidence establishing a causal connection between the injury to her ribs and her pain and suffering; (3) Plaintiff failed to establish a standard of care required of the defendant; and, (4) The court erred in not instructing the jury on the duty of a doctor pursuant to New Mexico Uniform Jury Instruction 8.1.

Plaintiff consulted defendant on August 8, 1970 complaining of pains in her chest and right shoulder. According to defendant's testimony he took one x-ray of her, which did not indicate any fractured ribs prior to the treatment. After explaining the x-ray, he placed her face down on an "adjusting table." Then, according to plaintiff, "He massaged me for about a minute and, then, with both hands, he pressed down and I felt the crack or pop and my breath sort of stopped." Plaintiff immediately experienced pain in her back and in response to her moaning was told by the defendant that she would have some pain for a while. Still in pain, she was driven home by her daughter, who had accompanied her to the defendant's office. Upon arriving at home, she went to bed but stayed only ten or fifteen minutes when the pain became more severe and she experienced considerable shortness of breath. She was driven to the hospital at Embudo, New Mexico, where she was hospitalized for three days. The medical doctor who examined her at the hospital testified that she complained of pain in the right lower

chest and shortness of breath. He further testified that "she was in acute distress due to pain in the right lower chest * * *" and that the pain could be described as moderately severe. X-rays taken on the day she was admitted did not indicate any fractured ribs. Still experiencing pain, she again went to see the defendant on August 13, 1970 and he advised taking a bath in hot water. Continuing to feel pain, she went to see a medical doctor in Fairview, New Mexico, on August 15, 1970, who in turn sent her to the hospital in Espanola, New Mexico, where several x-rays were taken. These x-rays, according to the radiologist, indicated that the plaintiff's fifth, sixth, seventh and eighth ribs were fractured and that the fractures had been sustained within two weeks.

In considering the question of the correctness of the actions of the lower court we must bear in mind this fundamental rule. 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. Durrett v. Petritsis, 82 N.M. 1, 474 P.2d 487 (1970).

Considering defendant's grounds for reversal in the order set forth above: (1) The court allowed testimony regarding medical expenses with the following admonition to the jury:

> "* * * I have been informed that the Plaintiff did not pay for these bills, that these bills for the medical expenses were paid by this witness and I am going to permit testimony to be elicited from this witness, concerning the amounts of those medical bills but, you will consider it only for a limited purpose and that is this, only as the amount and the nature of these medical bills may have some relevance to the claimed pain and suffering, suffered by the Plaintiff; in other words, no claim, as such, is being made for medical expenses, themselves. * * *"

Then, after the defendant rested, the court instructed the jury as follows:

> "* * * I am going to instruct you to completely disregard any evidence concerning the payment of medical and Doctors' expenses by Sallie Narvaiz, the Plaintiff's daughter."

We cannot agree that the defendant was prejudiced. Apodaca v. Miller, 79 N.M. 160, 441 P.2d 200 (1968). The items of damage submitted for consideration by the jury were the nature, extent and duration of the injury and the pain and suffering experienced. The evidence in support of these items is substantial and fully supports the amount of the verdict.

(2) The principal rules governing the defendant's second and third allegations of error are set forth in Cervantes v. Forbis, 73 N.M. 445, 389 P.2d 210 (1964) wherein the court stated:

> "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. * * * Likewise, expert testimony is generally required to establish causal connection. * * *"

However, where negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required. This rule applies to chiropractors

as well as physicians and surgeons. Lanier v. Trammell, 207 Ark. 372, 180 S.W.2d 818 (1944); Malmstrom v. Olsen, 16 Utah 2d 316, 400 P.2d 209 (1965). Compare Woods v. Brumlop, 71 N.M, 221, 377 P.2d 520 (1962). Should the condition be such that knowledge about it is peculiarly within the knowledge of medical men, then a court should not allow a jury to conjecture or speculate about the matter. A manipulation of the spine which results in four fractured ribs is not a condition peculiarly within the knowledge of medical men.

The negligence of a doctor may be established by his own testimony. Lashley v. Koerber, M.D., 26 Cal.2d 83, 156 P.2d 441 (1945); McCurdy v. Hatfield, 30 Cal. 2d 492, 183 P.2d 269 (1947).

The defendant, called as an adverse witness, testified as follows:

"Q. Alright, would you say, Doctor, that under the practice by reasonably prudent chiropractors in the State of New Mexico, that it is not possible to fracture a rib in the manner described by plaintiff's exhibits nos. 1 through 3?

"A. That is correct.

"Q. Alright, So that, if a rib is fractured, something unusual must have happened, is that correct?

"A. Very unusual."

There is evidence that plaintiff's ribs were not fractured prior to the manipulation by defendant; evidence that subsequent to the manipulation the ribs were fractured; evidence of pressure by defendant followed by a crack or pop and immediate pain; evidence that this pain in relation to the pressure was indicative of trauma; evidence that the location of the pain (here in the back) was not conclusive as to the area of the injury. This evidence, together with defendant's testimony quoted above, raised a jury question as to whether defendant's acts fell below the required standard of care.

The matter of proximate cause was a question of fact for the jury and we conclude that the jury's verdict is supported by substantial evidence.

The defendant, in support of his fourth point of error, states that the giving of N.M.U.J.I. 8.1 was mandatory and that the giving of the instruction in a modified form constituted error. The trial court instructed the jury in accordance with the first paragraph of N.M.U.J.I. 8.1, and stated into the record its reasons for omitting the second paragraph, "* * * since I did not feel that it is necessary that an expert witness testify concerning whether or not defendant used the necessary skill and care, in view of the injuries suffered and the testimony regarding the origin. * * *" Section 21-1-1(51) (1) (c), N. M.S.A.1953 (Repl.Vol. 4).

The directions for use of N.M.U.J.I. 8.1 state: "The second paragraph of this instruction will be used in most cases but occasionally the breach of duty complained of may be a matter of common knowledge and in such cases the second paragraph must be omitted. * * *"

In this case, expert testimony as to the care and skill required of defendant was not necessary and the second paragraph of N.M.U.J.I. 8.1 was properly omitted.

We affirm.

It is so ordered.

WOOD, C. J., and HENDLEY, J., concur.

497 P.2d 755

STATE of New Mexico, Plaintiff-Appellee,

v.

Billy Joe HUNT and Charles E. Taylor, Defendants-Appellants.

No. 793.

Court of Appeals of New Mexico.
April 7, 1972.
Certiorari Denied May 15, 1972.

Jerome D. Matkins, Carlsbad, for appellant Billy Joe Hunt.

Donald C. Cox, Easley & Reynolds, Hobbs, for appellant Charles E. Taylor.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendants appeal their conviction of larceny over $100.00 but less than $2,500.-00. Section 40A–16–1, N.M.S.A. 1953 (Repl.Vol.1964, Supp.1971). Defendants assert three grounds for reversal, namely (1) "self-serving" is no longer a valid reason for exclusion of testimony or the testimony was admissible under the "res gestae" theory; (2) state witnesses were not qualified to testify as to value; and, (3) evidence of value was insufficient.

We affirm.

SELF-SERVING AND RES GESTAE.

Defendants tendered the testimony of a witness in the following manner:

> "I propose to show by this witness that the Defendant, Chuck Taylor, while this witness was at Chuck Taylor's house approximately 9:00 o'clock. October 5, 1970, that Taylor stated to this witness,

the witness, Preston Long, that Bill Hunt had bought some junk and that he, Chuck Taylor, was going to haul the junk for Bill Hunt."

The trial court disallowed the tender.

Defendants contend the tender should have been allowed on the grounds that "self-serving" is no longer a valid reason for exclusion or even if it was excludible as "self-serving" it was admissible under the res gestae rule. We disagree.

Defendants cite the case of State v. Wallace, 97 Ariz. 296, 399 P.2d 909 (1965) for the proposition that "self-serving" is no longer a valid reason for exclusion of testimony. Wallace is not the rule in New Mexico. State v. Klasner, 19 N.M. 474, 145 P. 679 (1914) explains the reasons for the New Mexico rule, and states the rule to be: "* * * declarations made by a defendant in her own favor, unless a part of the res gestae * * * are not admissible for the defense. * * *" See also State v. Russell, 37 N.M. 131, 19 P.2d 742 (1933); State v. Davis, 30 N.M. 395, 234 P. 311 (1925).

Defendants assert that the statements were part of the res gestae. We disagree. As quoted in State v. Apodaca, 80 N.M. 244, 453 P.2d 764 (Ct.App. 1969) from State v. Godwin, 51 N.M. 65, 178 P. 2d 584 (1947):

> "* * * the element of spontaneity is not to be determined by time alone. It is sufficient for the statement to be substantially contemporaneous with the shocked condition, but not necessarily with the startling occurrence. * * *"

Although time alone does not determine the spontaneity, in the instant case the tendered statement took place sometime prior to the taking of the scrap metal. Further, we find nothing in the testimony to show that there were statements contemporaneous with a shocked condition which were spontaneous, which is essential to the res gestae rule. State v. Apodaca, supra.

EXPERT TESTIMONY AND EVIDENCE OF VALUE.

Defendants contend the two state witnesses were not qualified to testify as to the value of the scrap metal. We disagree.

One witness testified he had nine years experience in the scrap iron and metal business. He also testified that he was familiar with the prices in the local area and could give an opinion as to fair market value. The other witness testified he had been in the scrap metal business for fifteen years and was familiar with the reasonable market value of the scrap metal in the local area.

Both witnesses had a knowledge of the fair market value of scrap metal based upon experience in the business of buying and selling scrap metal. See State v. Williams, 83 N.M. 477, 493 P.2d 962 (Ct.App. 1972). The witnesses were qualified as experts and they gave their opinion as to fair market value. Defendants' contention that one of the witnesses was not qualified to testify because he had not dealt with a similar type of scrap metal is without merit. The witness gave his opinion as to the value of the metal as scrap without regard to the type of metal involved. Further, it was the trial court's responsibility to determine whether the witnesses were qualified to testify as experts. There is no showing that the trial court abused its discretion in admitting the testimony challenged by defendants. State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966).

Defendants further contend the evidence of value was insufficient. We disagree. Both witnesses testified as to a fair market value in excess of $100.00. This is substantial evidence to support their conviction.

Affirmed.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

497 P.2d 966

STATE of New Mexico, Plaintiff-Appellant,

v.

44 GUNNY SACKS OF GRAIN, Defendant-Appellee.

No. 9303.

Supreme Court of New Mexico.

May 26, 1972.

David L. Norvell, Atty. Gen., Santa Fe, Norman D. Bloom, Jr., Special Asst. Atty. Gen., Alamogordo, for plaintiff-appellant.

No appearance for appellee.

OPINION

STEPHENSON, Justice.

Mr. Ernest Huckleby purchased grain which he fed to his hogs. The grain was contaminated by mercury poisoning which seriously injured some members of the Huckleby family who consumed meat from the hogs. These circumstances came to the attention of the New Mexico Department of Health and Social Services ("the Department").

Mr. Huckleby also purchased grain at about the same time from the same source for Mr. Gilbert, owner of the grain with which we are now concerned. A few days later, the State, through the Department, detained and embargoed the remaining Gilbert grain and ultimately, in October, 1970, libeled it in this action, acting under the New Mexico Food Act. Sections 54–1–1 to 54–1–19, N.M.S.A., 1953.

Trial was had to the court. It found as a fact that two of the sacks of grain were contaminated according to federal standards and adulterated within the meaning of § 54–1–10, supra. Neither the application of that standard nor that finding is questioned. The trial court, inter alia, awarded

damages to Mr. Gilbert for the value of these two sacks. It is in respect to these two sacks that the only legal issue of consequence is presented for review.

Section 54-1-6(a), *supra*, so far as now pertinent, provides for embargo and detention of articles when an authorized agency finds, or has probable cause to believe, them to be adulterated. Subsection (b) provides, inter alia, for the filing of a district court action "for a libel for condemnation of such article."

Subsection (c) provides in part:

"(c) If the court finds that a detained or embargoed article is adulterated or misbranded, such article shall, after entry of the decree be destroyed at the expense of the claimant thereof, under the supervision of such agent, and all court costs and fees, and storage and other proper expenses, shall be taxed against the claimant of such article or his agent; * * *."

The trial court found that no embargo had been placed against the common source of the Huckleby-Gilbert grain; that Mr. Gilbert was an innocent purchaser, and had cooperated with the Department. It further found that the New Mexico Food Act was intended to apply "only to those persons leading up to the sale and including the seller of foods, and was not intended to apply to innocent purchasers or the consumer."

The latter finding is actually a conclusion of law and is erroneous. The action contemplated by § 54-1-6(c), supra, is in rem. 35 Am.Jur.2d Food § 67. It is against the thing wherever found in whatever ownership. It is an exercise of the police power, as we shall presently see. The issues were whether the material was adulterated and if the New Mexico Food Act applied, matters as to which there seems to be no question. Thus findings on the subject of whether an embargo had been placed upon the source, whether Mr. Gilbert was innocent of wrongdoing or cooperative with the Department and whether he was a seller or consumer are irrelevant in an action brought under §§ 54-1-6(b) and (c).

The court further found § 54-1-6(c), supra, to be unconstitutional. This is also a conclusion and is apparently related to another conclusion that for Mr. Gilbert not to be compensated for the grain would be a violation of Art. II, § 20 of the New Mexico Constitution, which provides:

"Private property shall not be taken or damaged for public use without just compensation."

Article II, § 20 deals with takings "for public use,"—which is to say—by eminent domain. The New Mexico Food Act and similar statutes of like import, on the other hand, have for their objective the protection of public health. The right to seize and destroy unfit or impure foods is a reasonable exercise of the right and duty of the State to protect the public health and is predicated upon the police power. 35 Am.Jur.2d Food §§ 2, 6, 66. North America Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908); Rubenstein & Son Produce v. State, 272 S.W.2d 613 (Tex.Civ.App.1954).

Injury which results from the proper exercise of the police power is not compensable. Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1941); Mitchell v. City of Roswell, 45 N.M. 92, 111 P.2d 41 (1941); State v. Davis, 80 N.M. 347, 455 P.2d 851 (Ct.App.1969). See also Board of County Com'rs, Lincoln County v. Harris, 69 N.M. 315, 366 P.2d 710 (1961).

It therefore follows that the State is not required to make compensation when it seizes and destroys food found to be contaminated within the provisions of The New Mexico Food Act.

The trial court thus erred in respect to the contaminated sacks and its decision is reversed as to them. In all other respects the judgment is affirmed.

It is so ordered.

COMPTON, C. J., and MONTOYA, J., concur.

497 P.2d 968

Hoover WIMBERLY, Relator-Appellee and Cross-Appellant,

v.

NEW MEXICO STATE POLICE BOARD et al., Respondents-Appellants and Cross-Appellees.

No. 9400.

Supreme Court of New Mexico.
May 26, 1972.
Rehearing Denied June 14, 1972.

David L. Norvell, Atty. Gen., Joyce Blalock, Agency Asst. Atty. Gen., Santa Fe, for appellants.

Standley, Witt & Quinn, Santa Fe, for appellee.

OPINION

McMANUS, Justice.

This suit was brought in Santa Fe County District Court to restore relator-appellee, hereinafter called Wimberly, to his position as a lieutenant colonel of the New Mexico State Police. The suit was against the New Mexico State Police Board, the Members of the Board and the Chief of the New Mexico State Police who are respondents-appellants in this cause. They will hereinafter be referred to as the Board. Following a trial to the court, the decision of the court was that the Board illegally demoted Wimberly from the rank of major to captain and further ordered Wimberly restored to the rank of major as of April 16, 1971. The Board appeals from this particular decision and Wimberly cross-appeals from the decision inasmuch as he was not restored to the rank of lieutenant colonel.

A history of events leading up to this matter before us is as follows: Wimberly became a member of the New Mexico State Police in February, 1952, and completed the requisite two-year probationary period in February, 1954. He then achieved permanent status as a New Mexico State Police officer. In August of 1956 Wimberly became a sergeant and in August, 1958, became a lieutenant. On August 16, 1962 Wimberly became a captain. On August 16, 1967 he was appointed to the rank of major and on August 16, 1969 he was appointed a lieutenant colonel. On April 1, 1970, Wimberly was reduced to the rank of major and on April 2, 1971, was reduced to the rank of captain. There was no protest concerning the reduction to major but upon the reduction to captain a hearing was demanded culminating in the district court hearing and, ultimately, this appeal.

Wimberly attacks his reductions in rank as being "demotions" and that inasmuch as specific written charges and attendant hearings were not held, such demotions do not comply with the applicable New Mexico statutes. A look at the pertinent statutes is now in order. We quote them, as follows:

"The New Mexico state police shall consist of a chief of the state police, such patrolmen, sergeants, lieutenants and captains, as the police board may deem advisable within the limits of the funds appropriated for the state police; Provided, however, that the number of captains, lieutenants and sergeants shall not exceed 25% of the total number of said police, exclusive of the chief, but this requirement shall not be interpreted so as to require the demotion of any member of the existing state police." § 39-2-3, N.M.S.A. (1953 Comp.).

"No member of the state police holding a permanent commission shall be removed from office, demoted or suspended except for incompetence, neglect of duty, violation of a published rule of conduct, malfeasance in office, or conduct unbecoming an officer, and only on specific written charges filed with the police board with timely and adequate notice thereof to the person charged, and after a hearing on such charges by the police board. * * *." (The balance of the section discusses the procedures necessary to insure proper and impartial hearings.) § 39-2-11, N.M.S.A. (1953 Comp., 1971 Pocket Supp.).

"The New Mexico state police board shall have authority to make and promulgate rules and regulations for the purpose of carrying out the provisions of this article (New Mexico Compilation of 1941 chapter 40, article 2 [39-2-1 to 39-2-26]). Said board shall establish by rules, from time to time, standards of conduct for members of the New Mexico state police and a copy thereof shall be delivered to each such member and displayed at each station of said department. Such rules shall be filed with the librarian of the Supreme Court library pursuant to New Mexico Compilation of 1941, section 3-713 [4-10-13] as amended." § 39-2-21, N.M.S.A. (1953 Comp.).

Section 39-2-2, N.M.S.A. (1953 Comp.) provides:

"Said department shall be managed and controlled by the New Mexico state police board, * * *."

Following, and effective on May 28, 1970, the Board adopted a regulation providing that "all ranks above captain will be appointments and not permanent."

Until 1967, the New Mexico State Police had no military ranks except those specifically listed in § 39-2-3, supra: patrolman, sergeant, lieutenant, captain and chief. From that time the New Mexico State Police has utilized the ranks of major and lieutenant colonel. The officers who held these ranks were given additional salary and emoluments, but these ranks, according to the record, were considered by the board and the department to be temporary. Wimberly's adjustments in rank from captain to major and major to lieutenant colonel were not promotions as such but were temporary advancements within the framework of administration of the New Mexico State Police. It is our opinion that both Chief Vigil and the Board acted within the scope of their authority under the laws of the State of New Mexico. See Tafoya v. New Mexico State Police Board, 81 N.M. 710, 472 P.2d 973 (1970), holding: "The statutes governing the State Police Department reflect an obvious, well-knit effort to establish a comprehensive plan of administration. In part, they provide that the department shall be 'managed and controlled by the New Mexico state police board' * * *." In Winston v. New Mexico State Police Board, 80 N.M. 310, 454 P.2d 967 (1969), we said, "* * * It is, of course, a fundamental principle of administrative law that the authority of the agency is not limited to those powers expressly granted by statute, but includes, also, all powers that may fairly be implied therefrom. * * *" The

changes in rank affecting Wimberly were made by the executive officer of the State Police and were approved by the Board. The procedures of advancement and reduction in rank such as we have in this cause enable the Chief to shift key personnel to positions where their interest and ability are used to best advantage. Administrative boards are created by legislative enactments. Such boards are required to interpret the statutes to carry out legislative purpose and objectives. It is apparent that the adjustments in Wimberly's rank from captain to major and major to lieutenant colonel were temporary advancements in keeping with proper administrative procedures and served to expedite the work of State Police department. We see no abuse of discretion by the Board or the Chief.

The cross-appeal is denied.

The judgment of the trial court is reversed. It is so ordered.

COMPTON, C. J., and STEPHENSON, J., concur.

497 P.2d 970

Harold L. TURNER et al., Complainants-Appellants,

v.

Charles E. BARNHART et al., Respondents-Appellees,

New Mexico Citizens for Fluoridation, Intervenors.

No. 9367.

Supreme Court of New Mexico.

June 2, 1972.

Patrick Chowning, Albuquerque, for appellants.

Harley A. Lanning, Asst. City Atty., Albuquerque, for appellees.

OPINION

McMANUS, Justice.

This action was brought in the Bernalillo County District Court and involved a complaint asking for declaratory judgment and for an injunction enjoining the City of Albuquerque from proceeding to place fluoride in the water supply. The court granted summary judgment for the defendants, denying any relief to the plaintiffs who perfected this appeal.

An ordinance of the City of Albuquerque, New Mexico, was adopted by the voters of that City on the 3rd day of November 1970. The question on which the voters cast their opinions read as follows:

"Shall the proposed ordinance requiring fluoridation of the City water supply be adopted?"

Below the question were levers labeled "For" and "Against" for the choice of the voters.

The first point appellants raise is that the court should not have granted summary judgment in favor of the defendant since the issues involved were genuine and material issues of fact. In open court, at the trial, we relate the following questions and answers:

"MR. O'BRIEN: May I make a suggestion?

"THE COURT: Now, if you can tell me, if you now take the position that people who voted in this case had no right to vote or people who did not vote and had a right to vote will change the result of the election, maybe we can go into it, but I understand your position—

"MR. O'BRIEN: I can't make any such claim.

"THE COURT: You don't take that position?

"MR. O'BRIEN: No, your Honor, I can't. It could be so but I can't prove it.

"THE COURT: Now, I still don't know what questions of fact you want to take any depositions on.

"MR. O'BRIEN: The suggestion I was going to make to you, what I would like to do, is when I'm drawing this brief on the law to study it out and if I have no objection to points of fact, I'll say so right in my brief.

"THE COURT: Now, I know you have a lot of objections to questions of law, but they're questions of law and you can answer that in your brief, period, and that's it.

"MR. O'BRIEN: Let me put it this way. When we come in on the brief and discuss that at that time—

"THE COURT: Now, I don't know that I'm going to need any further hearing after I get your brief. If I want another

hearing, I will let you know; otherwise, I won't.

"MR. O'BRIEN: The suggestion I was going to make is this, if at that time I'll find a question of fact I'll call it to the attention of the Court.

"THE COURT: Right. Now, you don't know:

"MR. O'BRIEN: Yes. Correct."

The hearing terminated forthwith and no logical or legitimate questions of fact were presented to the court. Questions of fact were alleged for the first time on appeal by the appellants without benefit of presentation to the trial court. Inasmuch as the original attorney, Mr. O'Brien, passed away during the proceedings, there was an adequate period of time during which the plaintiffs could have placed before the trial court any factual issues. Appellants complain that the facsimile signature of the Albuquerque City Clerk was fatal to the cause of the City of Albuquerque. This issue was never raised in the court below and cannot now be raised here for the first time. See Rule 20(1), Supreme Court Rules, § 21-2-1 (20), N.M.S.A.1953 Comp. (Repl. Vol. 3, 1968). There has been no showing by appellants that there were further fact questions subject to the decision of the trial Court. See Spears v. Canon de Carnue Land Grant, 80 N.M. 766, 461 P.2d 415 (1969). Therein it was stated:

"Mere argument or contention of existence of material issue of fact, as in the instant case, does not make it so. Wisehart v. Mountain States Telephone and Telegraph Co., 80 N.M. 251, 453 P.2d 771 (Ct.App.1969). The party opposing a motion for summary judgment cannot defeat the motion and require a trial by the bare contention that an issue of fact exists, but must show that evidence is available which would justify a trial of the issue. Aktiengesellschaft, Etc. v. Lawrence Walker Cotton Co., 60 N.M. 154, 288 P.2d 691 (1955); see Felt [for Use of United States] v. Ronson Art Metal Works, 107 F.Supp. 84 (D.C.Minn. 1952); 3 Barron and Holtzoff, Federal Practice and Procedure, § 1235 at 141. Appellant failed in this important aspect."

Appellants' Point II concerning the holding of a general election at the same time as a municipal election will not be considered because this point was not included in the praecipe as one of the points that the appellant intended to rely on for appeal. Rule 12(1), Supreme Court Rules [§ 21-2-1(12) (1), N.M.S.A.1953 (Repl. Vol. 4, 1968)], reads as follows:

"If the appellant or plaintiff in error does not specify or designate for inclusion in the transcript the complete record and all the proceedings and evidence in the cause, he shall include in his praecipe a concise statement of the points on which he intends to rely, * * *.

"* * *

"The review shall be *limited* to the points as stated, and such statement of points may be amended only in furtherance of justice and on terms and on special leave of the district court before the filing of the transcript and of the Supreme Court thereafter." (Emphasis supplied.)

See, also, City of Hobbs v. Chesport, Ltd., 76 N.M. 609, 417 P.2d 210 (1966); Robinson v. Black, 73 N.M. 116, 385 P.2d 971 (1963).

In their Point III, appellants claim error in that the full text of the ordinance was not placed on the ballot. In that regard, there are some points we will have to make clear. The major one is the language from § 14-13-18(B), N.M.S.A. 1953 (Repl. Vol. 3, 1968), which the appellants quote in their brief. This statute refers to initiative measures which are measures promulgated by the people with amendment by the commission and voted on by the people. This election involved a referendum measure which is an ordinance passed by the commission and voted on by the people. The controlling statutory sec-

tion is § 14-13-17(B), N.M.S.A.1953 (Repl. Vol. 3, 1968), which states:

"The ballot shall contain the text of the ordinance or resolution in question."

The appellants argue that text means the entire ordinance and failure to print the entire ordinance on the ballot amounts to an irregularity in the election that is substantial enough to void the election. The general rule toward election irregularities is:

"Provisions reserving to the people the power of initiative and referendum are to be given a liberal construction to effectuate the policy thereby adopted." City Commission of Albuquerque v. State, 75 N.M. 438, 405 P.2d 924 (1965).

In the City of Fargo v. Sathre, 76 N.D. 341, 36 N.W.2d 39 (1949), the North Dakota court, quoting from a very old Indiana case, stated:

"'All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void. [Jones v. State, 153 Ind. 440, 55 N.E. 229, 233].'

"* * *

"The reason behind this rule is that the will of the people freely and intelligently expressed ought not to be defeated because of the mistake of an officer or of any technical fault."

New Mexico recognizes that technicalities need not disturb the results. See, in particular, State ex rel. Palmer v. Miller, 74 N.M. 129, 391 P.2d 416 (1964), where this Court stated:

"In addition, we accept as correct the statement that election laws should be liberally construed so as to accomplish their purpose and that technicalities should not be permitted to deprive voters of their franchise or render an election void."

See, also, Roberts v. Cleveland, 48 N.M. 226, 149 P.2d 120 (1944), wherein this Court said:

"* * * [T]he regulations imposed are not conditions upon compliance with which the right comes into being, but are regulations intended merely to regulate the exercise of the right in an orderly way."

Roberts, supra, involved candidates and filing petitions and party affiliations but there is no reason to say that the general rule does not still apply to the case before us. The voters in this case did speak on the issue of fluoridation and with the amount of publicity that attended the election on this issue we cannot justify holding the election void because of the so-called irregularities and thus circumventing the will of the voters involved.

This point is well stated in Truman v. Royer, 189 Cal.App.2d 240, 11 Cal.Rptr. 159 (1961):

"Inasmuch as the power of referendum is one reserved to the people, and in order to protect the people in the exercise of this power, statutory and charter provisions dealing with such powers are always liberally construed in favor of the power."

Not only does the law direct protection of the voter but our statutory language could be construed as requiring only a summary of the ordinance to be decided upon. Our statute states "the ballot shall contain the text" while most mandatory statutes state "full text." The court in Opinion of the Justices, 309 Mass. 555, 34 N.E.2d 431 (1941) said:

"The words 'full text,' as used in constitutional provisions, refer to the precise terms of a proposed measure and nothing more."

The use of the word "text" alone, under the circumstances of this case, does not

negate the fact that the voters were adequately protected, and we will not thwart the will of the people on the basis of a technicality.

Point IV, concerning the use of voting machines, and Point V, regarding the printing of the ballot in English and Spanish, were not included in the praecipe and we will not consider these points on this appeal. See Rule 12(1), Supreme Court Rules, supra; City of Hobbs v. Chesport, Ltd., supra.

The decision of the trial court is affirmed.

It is so ordered.

COMPTON, C. J., and OMAN, J., concur.

497 P.2d 974

TAOS SKI VALLEY, INC., a corporation, and American Employers' Insurance Company, a corporation, Petitioners,

v.

Elizabeth A. ELLIOTT, Respondent.

No. 9434.

Supreme Court of New Mexico.

June 2, 1972.

Mitchell, Mitchell & Alley, and Montgomery, Federici, Andrews, Hannahs & Morris, Santa Fe, for petitioners.

Matias A. Zamora, Santa Fe, Russell Moore, Keleher & McLeod, Albuquerque, for respondent.

OPINION

McMANUS, Justice.

By decision dated March 3, 1972, the Court of Appeals reversed the trial court's directed verdict in favor of the defendants herein, and ordered a new trial. Elliott v. Taos Ski Valley, Inc., 83 N.M. 575, 494 P.2d 1392. On March 23, 1972, this Court granted certiorari. After a careful review of the opinion, briefs and all pertinent material, we are of the opinion that the writ of certiorari was improvidently issued and we now affirm the decision of the New Mexico Court of Appeals.

In the decision of the Court of Appeals there appears language as follows:

> "Taos Ski Valley raised the defense of assumption of risk. We cannot determine whether the directed verdict included this defense. However, since this case must be tried over, the defense is controlled by Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971)."

In order that there be no confusion involved we merely state that Williamson, supra, as concerns the defense of assumption of risk, unequivocally stated that such defense was prospective from the date of the

Williamson decision, December 13, 1971, and not retroactive.

The writ previously granted is hereby quashed.

It is so ordered.

COMPTON, C. J., and OMAN and STEPHENSON, JJ., concur.

MONTOYA, J., not participating.

497 P.2d 975

STATE OF CALIFORNIA, Plaintiff-Appellee,

v.

George W. CLEMENTS, Defendant-Appellant.

No. 9345.

Supreme Court of New Mexico.

May 26, 1972.

James L. Dow, Carlsbad, for appellant.

David L. Norvell, Atty. Gen., Winston Roberts-Hohl, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

OMAN, Justice.

This cause is before us on an attempt by defendant to appeal from an order of the district court denying his Petition for Writ of Habeas Corpus. Subsequent to the filing of the brief in chief in this court, the parties entered into and filed a written stipulation that the brief in chief could be considered by us as a petition to this court for a writ of habeas corpus. This stipulation was denied, and the case subsequently came on for hearing on the purported appeal.

Apparently the effort, to have us consider the appeal as a petition for writ of habeas corpus, was prompted by a realization of the parties that petitioner has no right of appeal to this court from the denial by the district court of his petition for writ of habeas corpus. State v. Sisk, 79 N.M. 167, 441 P.2d 207 (1968); In re Forest, 45 N.M. 204, 113 P.2d 582 (1941); Supreme Court Rule 5(2) [§ 21-2-1(5) (2), N.M.S.A.1953 (Repl.Vol. 4, 1970)].

The appeal should be dismissed.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

497 P.2d 975

STATE of New Mexico, Plaintiff-Appellee,

v.

Billy C. HALL, Defendant-Appellant.

No. 824.

Court of Appeals of New Mexico.

May 12, 1972.

F. Randolph Burroughs, Fettinger & Burroughs, Alamogordo, for defendant-appellant.

David L. Norvell, Atty. Gen., James B. Mulcock, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Hall filed a petition to vacate sentence pursuant to rule 93 [§ 21-1-1(93), N.M.S. A.1953 (Repl.Vol. 4)]. After hearing, the petition was denied. Hall appeals.

We affirm.

Hall did not appeal from his original conviction. Later, Hall sought release from prison under Rule 93, supra. He lost on appeal. State v. Hall, 78 N.M. 564, 434 P.2d 386 (1967).

Hall now contends that at the time of his trial in 1965, he was not afforded a complete and proper psychiatric examination because the trial court refused to send him to the State Hospital in Las Vegas, New Mexico, for the examination. The record at the evidentiary hearing in his post conviction proceeding shows Hall was examined by a psychiatrist in Las Cruces while Hall was in jail, and lasted approximately thirty minutes. There is no issue concerning Hall's insanity. There is no evidence bearing on the sufficiency of the examination. The record is void of any reference of requests for a more thorough examination or that Hall be sent to the State Hospital at Las Vegas, New Mexico. The trial court, on the record made, properly denied Hall's contention.

Hall next contends he was denied his constitutional right to a fair and impartial trial due to the remarks and actions of the trial judge in connection with prospective and excused jurors on the issue of impartiality. The trial court found that this point was without merit because this issue should have been raised on appeal following the original trial and is not a proper subject for a Rule 93 appeal. This is cor-

rect. "Post conviction proceedings are not a method of obtaining consideration of questions which might have been raised on appeal." Jones v. State, 81 N.M. 568, 469 P.2d 717 (1970).

Defendant, however, relies on the apparent exception in Jones v. State, supra, to the effect that post conviction relief is available, regardless of whether the issue could have been raised on direct appeal, if the defendant has been "fundamentally deprived of a fair trial." The actions and remarks of the trial judge on which defendant relies do not fall within this exception. They are consistent with an effort by the judge to empanel a fair and impartial jury. There is nothing to show that the jurors who served were other than fair and impartial. See State v. Gonzales, 82 N.M. 388, 482 P.2d 252 (Ct.App. 1971).

Hall next contends he was subject to cruel and unusual punishment during his pre-trial detention, and because of the detention he was denied his constitutional right to effective trial counsel. The basis for this contention is that while confined in the penitentiary for safekeeping after an escape from the county jail, he was placed in a cell block used for disciplinary confinement, and that this type of confinement kept him from effectively communicating with his attorney. The trial court found that no evidence had been presented that the place of defendant's incarceration in any way prejudiced the preparation of the defense. Not only does the record support this finding, the rule in Jones v. State, supra, is applicable to this point. The trial court did not err.

Finally, Hall contends that the sentence imposed constitutes cruel and unusual punishment, and is a deprivation of liberty without due process. The contention is based on the fact that sentences imposed were to run consecutively. The trial court found that this claim was without merit because sentencing was in conformance with the laws and statutes of New Mexico. The fact that Hall was sentenced to the term authorized by law provides no basis for post conviction relief. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct.App.1971); State v. Follis, 81 N.M. 690, 472 P.2d 655 (Ct.App.1970). Hall's contention has no merit.

Affirmed.

It is so ordered.

WOOD, C. J., and COWAN, J., concur.

497 P.2d 977

Gavino SANCHEZ, Plaintiff-Appellant,

v.

KERR McGEE COMPANY, Inc., Defendant-Appellee.

No. 851.

Court of Appeals of New Mexico.

May 5, 1972.

James R. Toulouse, Toulouse & Moore, Alburquerque, for appellant.

H. S. Glascock, Denny, Glascock & McKim, Gallup, for appellee.

OPINION

SUTIN, Judge.

Sanchez, the claimant, while employed by Kerr McGee, was injured in an industrial accident on December 31, 1967. He filed his complaint on September 20, 1971, purportedly under § 59–10–13.5(B), N.M.S.A. 1953 (Repl.Vol. 9, pt. 1, Supp.1971). In his claim for relief, Sanchez requested the district court to hold a hearing and to order Kerr McGee to make a lump sum settlement with him. His complaint alleged that "defendant has paid plaintiff compensation to date." The trial court granted Kerr McGee's motion to dismiss for failure to state a claim, and Sanchez appeals.

We affirm.

Sanchez contends the trial court has both power and authority, (1) to order a lump sum settlement without the consent of Kerr McGee; (2) to order a lump sum settlement despite the fact that Kerr McGee made the bi-monthly payments.

Section 59–10–13.5, N.M.S.A.1953 (Repl. Vol. 9, pt. 1, Supp.1971) reads as follows:

> A. Compensation shall be paid by the employer to the workman in installments. The first installment shall be paid not later than thirty-one [31] days after the date of the occurrence of the disability. Remaining installments shall be paid twice a month at intervals not more than sixteen [16] days apart, in sums as nearly equal as possible.
>
> B. Whenever the court determines in cases of total permanent disability or death that it is for the best interests of the parties entitled to compensation, and after due notice to all parties in interest of a hearing, the liability of the employer for compensation may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation computed at five per cent [5%] discount, compounded annually.

We need not decide the issues raised here on appeal. Section 59–10–13.5(B), supra, has as a prerequisite a determination of "total permanent disability." The claim filed in the trial court was not a case of "total permanent disability." It only sought a lump sum settlement. It was, therefore, subject to dismissal under Rule 12(b) (6) [§ 21–1–1(12) (b) (6), N.M.S.A.1953 (Repl. Vol. 4)]. The question was not preserved for review. Section 21–2–1(20) (2), N.M. S.A.1953 (Repl.Vol. 4).

Affirmed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

497 P.2d 978

Albert O. CALLAWAY and Laurette Callaway, Plaintiffs-Appellants,

v.

Sammy C. OLGUIN, Jr., and State Farm Mutual Insurance Company, a corporation, Defendants-Appellees.

No. 820.

Court of Appeals of New Mexico.

May 12, 1972.

Bill Chappell, Jr., Branch & Dickson, Albuquerque, for plaintiffs-appellants.

R. D. Mann, John W. Bassett, Jr., Atwood, Malone, Mann & Cooter, Roswell, for appellee State Farm Mut. Ins. Co.

OPINION

SUTIN, Judge.

The Callaways sued Olguin for personal injuries arising out of a motor vehicle accident. Olguin was uninsured. They sued State Farm Mutual Insurance Company on the basis of uninsured motorist coverage in policies issued to the Callaways. At the close of Mr. Callaway's testimony, the trial court directed a verdict in favor of defendants and against Mr. Callaway. It found Mr. Callaway was negligent as a matter of law, and such negligence was a contributing proximate cause of his injuries.

At the close of defendant Olguin's case, the trial court on its own motion directed a verdict in favor of Mrs. Callaway against Olguin, stating Olguin was negligent as a matter of law; that his negligence was a proximate cause of injuries alleged to have been suffered by her; that Mrs. Callaway was free of contributory negligence. The issue of the amount of damages allegedly suffered by Mrs. Callaway was submitted to the jury. The jury returned a verdict that Mrs. Callaway suffered no compensable injuries in the accident. Judgment was entered on both verdicts. The Callaways appeal.

We affirm.

Mr. Callaway contends the trial court erred in directing a verdict in favor of defendants on the basis of his contributory negligence. Mr. Callaway admitted that when his automobile was 60 to 70 feet from an intersection, moving north at twenty to twenty-five miles per hour, he looked both ways, but did not see the Olguin vehicle approaching from the east; that at this distance, his vision may have been obscured by mesquite and bushes; that he continued driving at the same rate of speed and did not look again; that when his vision was no longer obscured, he never saw the Olguin car until he was in the center of the intersection and the Olguin vehicle was four or five feet away; that he did not have time to apply his brakes. We affirm the trial court that Mr. Callaway was negligent as a matter of law, and his negligence proximately contributed to cause the accident.

Mrs. Callaway contends the trial court erred in accepting the jury verdict which awarded her damages "in the amount of $-0-Dollars."

Mrs. Callaway claims that the verdict did not comply with instruction No. 14, which reads in part:

> If you find that Lauretta [sic] Callaway has sustained damages as a result of the accident in question, you must then fix the amount of money. * * *
>
> Whether any of these elements of damages have been proved by the evidence is for you to determine. * * *

The instruction left it to the jury to determine whether damages had been proved. The verdict of $0 damages does not conflict with the instruction.

Mrs. Callaway then contends that the verdict of the jury in the amount of zero dollars did not comply with § 21-8-25, N.M.S.A.1953 (Repl. Vol. 4) as construed in Marr v. Nagel, 59 N.M. 21, 278 P.2d 561 (1964).

The statute reads in part:

> When a verdict is found for the plaintiff in an action for the recovery of money, * * * the jury must also assess the amount of the recovery; * * *

The jury did not render a verdict for plaintiff. The trial court directed a verdict as to liability and submitted the question of damages to the jury.

Without objection by Mrs. Callaway, only one form of verdict was submitted to the jury on the question of damages. It read as follows:

> We, the jury, find for Plaintiff Lauretta [sic] Callaway and award her damages in the amount of $———.

Under the verdict submitted to the jury, if it desired to find for defendants, it had no alternative but to enter the amount as $-0-Dollars. This was a verdict for the defendants. There is medical evidence as to Mrs. Callaway's condition on the day of the accident and shortly before trial. This evidence is such that the jury, weighing the credibility of the witnesses, could determine that even nominal damages had not been proved. See Wingerter v. Maryland Casualty Company, 313 F.2d 754 (5th Cir. 1963); Association of Western Railways v. Riss and Company, 112 U.S.App. D.C. 49, 299 F.2d 133 (1962).

Marr v. Nagel, supra, was an involved case, where, in answer to a specific interrogatory, the jury found substantial damages for a wife intervenor, and "$ none" for the husband for consequential damages resulting from loss of her services. This resulted in ambiguity, speculation and uncertainty because the answers of the jury did not clearly point out whether they intended to find for the husband or for the defendants. The factual situation in Marr v. Nagel, supra, distinguishes it from the present case.

Finally, Mrs. Callaway appears to contend that the conduct of the trial court upon receipt of the verdict and discharge of the jury, did not permit her "to poll the jury nor to request the court to return the jury to deliberations to assess damages." The record shows that upon receipt of the verdict, and before the jury was discharged, Mrs. Callaway's attorney did except to the verdict and requested the court to instruct the jury that damages have been proven. This contention has no merit.

Affirmed.

It is so ordered.

WOOD, C. J., and HERNANDEZ, J., concur.

497 P.2d 981

STATE of New Mexico, Plaintiff-Appellee,

v.

Lish WILKERSON, Defendant-Appellant.

No. 875.

Court of Appeals of New Mexico.

May 12, 1972.

Donald C. Cox, Easley & Reynolds, Hobbs, for defendant-appellant.

David L. Norvell, Atty. Gen., Victor Moss, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

COWAN, Judge.

Defendant appeals following his conviction for burglary (§ 40A-16-3, N.M.S.A. 1953 [Repl.Vol. 6, 1971 Supp.]). We affirm.

At the close of the state's case and again at the close of all the evidence the defendant moved for a directed verdict for lack of substantial evidence to support a conviction. The defendant urges error in the denial of these motions.

On July 7, 1971, at about 10:30 P.M., a guest at a motel in Hobbs looked out of her room and saw three men standing at the back of a pick-up truck, who then "got another colored man out of the cab of truck * * *." The area was well lighted. She identified the defendant as the man in the cab. The four men started to walk away when the defendant returned and re-entered the truck cab. The witness then turned away to make a phone call.

When the police arrived they apprehended three persons, including the defendant, near the motel. Certain business papers were found on the ground near the pick-up and others were found in the alley near where the defendant was apprehended.

The owner of the pick-up, also a guest of the motel, testified that some tools were missing from the back of the pick-up truck and identified the business papers as those he kept in the glove compartment of the

truck. He had not given the defendant permission to enter the vehicle.

The statute, supra, under which the defendant was convicted, states in part:

> "Burglary consists of the unauthorized entry of any vehicle, * * * with the intent to commit any felony or theft therein."

By his motions for a directed verdict, the defendant placed before the trial court the question of whether there was any substantial evidence to support, or reasonably tending to support, the charge of burglary. Viewing the record as a whole, we think there is substantial evidence to warrant allowing the case to go to the jury and the trial court did not err in overruling defendant's motions. State v. Ferguson, 77 N.M. 441, 423 P.2d 872 (1967). The identification of the defendant was positive, as was his presence in the cab of the pick-up. The jury could reasonably infer from the defendant's unauthorized presence in the vehicle that he had the necessary intent to commit a felony or theft therein. State v. Ortega, 79 N.M. 707, 448 P.2d 813 (Ct. App.1968). The crime of burglary is complete when there is an unauthorized entry with the intent to commit a felony or theft in the vehicle or structure entered. Proof that property was actually taken is not necessary nor is proof of possession of a stolen item. State v. Ford, 81 N.M. 556, 469 P.2d 535 (Ct.App.1970).

Defendant also urges error in the court's permitting the state to present a rebuttal witness after announcing that there would be no rebuttal. The ground for defendant's objection does not appear in the record but the defendant claims the testimony of the witness "may be summarized as an attempt to impeach the testimony of the defense witness by showing a prior inconsistent statement." The defendant asserts prejudice because the testimony of the witness, being given out of order, was unduly emphasized and "must have appeared to the jury to be of greater importance than that of the other witnesses."

A trial judge has a broad discretion in the matter of reopening a case to permit the taking of additional testimony on behalf of either party. State v. Deaton, 74 N.M. 87, 390 P.2d 966 (1964). While we might admire the defendant's unique argument, we cannot agree that the trial court abused its discretion.

The judgment and sentence is affirmed.

It is so ordered.

SUTIN, and HERNANDEZ, JJ., concur.

497 P.2d 1404

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, his wife, Appellees.

No. 9382.

Supreme Court of New Mexico.

June 9, 1972.

Vaughan, Marek & Paone, Albuquerque, for appellant.

Roberto L. Armijo, Las Vegas, for appellees.

OPINION

OMAN, Justice.

Appellant, Anastacia Garcia Quintana, mother of the two minor children, has appealed from decrees of adoption whereby the children were declared adopted by their paternal grandparents, the appellees. We affirm.

Deborah was born on January 27, 1963 and Marvin on December 30, 1963. The father of the children is the son of appellees, and he was convicted and sent to prison in the early part of 1965. Soon thereafter appellant left the children with acquaintances. On February 24, 1965 appellees received calls from one of these acquaintances with whom the children had been left and from a sister of appellant advising appellees that appellant had left the children and that they were in need, and inquiring of appellees what they were going to do about taking care of the children.

Appellees thereupon took custody of the children. About this time appellant left Las Vegas, where she, the children and the appellees all lived. She went to Albuquerque to look for work. Appellees have had custody of the children since February 24, 1965 and have fully supported and taken care of them. The petition for adoption of the children was filed on April 15, 1970. The father gave his consent to the adoption. On July 21, 1970 a hearing was held at which one of the principal issues tried and the issue then decided was whether appellant's consent to the adoption should and could properly be dispensed with pursuant to the provisions of § 22-2-6(d), N.M.S.A.1953. Sections 22-2-1 to 19, inclusive, were subsequently repealed by Ch. 222, § 18 of the 1971 Laws of New Mexico.

The statutory provision relied upon for dispensing with appellant's consent stated:

"(d) After diligent search and inquiry, the names of the parent or parents or legal guardian, or their whereabouts, are unknown and cannot be ascertained; or where the parent or parents or guardian have wilfully failed to maintain and support the child, when obligated and financially able to do so, or have been guilty of such cruelty, depravity, abuse, or gross neglect toward the child that, in the opinion of the court, the child should be removed from the custody of such parent or guardian."

Section 22-2-6(d), N.M.S.A.1953.

At the time appellant left the children in 1965 she was nineteen years of age. At the time of the hearing on July 21, 1970 appellees were sixty-four and fifty-seven years of age, respectively. In the decision of the court entered subsequent to said hearing the following appear as a portion of the court's findings and conclusions.

"FINDINGS

"5. In 1965, Respondent [appellant] left her said children in the care of acquaintances and soon thereafter Petitioners [appellees] were notified to take said children into their care, which Petitioners did.

"6. The children were undernourished, without adequate clothing and in ill health when Petitioners took them into their care.

"7. The children sought to be adopted have been cared for continuously by Petitioners since 1965.

"8. Petitioners have provided said children with all their needs since 1965.

"9. Respondent resides in Albuquerque, New Mexico, and during the past five years has visited her children infrequently, namely, once or twice a year.

"10. During the past five years, Respondent has not provided for any of the needs of her said children, other than sending an occasional gift or other token of remembrance.

"11. Respondent has given birth to a child since her separation from her husband and is by another man, and this child is now in her custody.

"12. Respondent, during the past five years, has been gainfully employed, or has had other sources of income.

"13. Respondent has for the past five years failed to demonstrate a motherly or parental interest in her two children sought to be adopted by Petitioners.

"CONCLUSIONS

"2. Respondent, Anastacia Garcia Quintana, has been guilty of gross neglect towards her children, Deborah Jean Quintana and Marvin James Quintana.

"3. The consent of Respondent, Anastacia Garcia Quintana, to the proposed adoption of Deborah Jean Quintana and Marvin James Quintana, by Dominico Quintana and Alice Quintana, his wife, should be dispensed with."

The district court thereupon entered an order dispensing with appellant's consent to the adoption and she appealed to this court from the order. The appeal was dismissed. Quintana v. Quintana, 82 N.M. 698, 487 P.2d 126 (1971). The cause was then reinstated on the docket of the district court, and was set for final hearing on the merits on August 27, 1971. The petition for adoption was granted and the decrees of adoption from which this appeal was taken were entered on September 2, 1971.

In addition to receiving evidence at the hearings on July 21, 1970 and August 27, 1971, the district court also received from the Child Welfare Division of the New Mexico Department of Public Welfare a report recommending the granting of the petition of appellees to adopt the children. This report was furnished pursuant to the provisions of § 22-2-7, N.M.S.A.1953.

In addition to the foregoing recited facts, the record shows, without contradiction, that appellant secured work upon going to Albuquerque in February 1965, and has been regularly employed at a salary ranging from $55 to $75 per week, and the annual income of appellees, who have supported and cared for the children since February 24, 1965, is $3,000 per year.

Appellant relies upon two points for reversal. The first of these is her contention that the facts of this case do not fall within the provisions of § 22-2-6(d), supra, and, consequently, the trial court had no basis for dispensing with the consent of appellant or for granting the decrees of adoption.

The first argument made under this point is that: "Abandonment is not one of the specified situations in our statutory provisions," under which the court can dispense with a parent's consent. This and the other two arguments made under her first point are asserted because the trial court, in the preliminary or factual portion of the Order Dispensing with Mother's Consent, found that appellant had abandoned her two children approximately five years ago. The decretal portion of this order is predicated upon the finding of appellant's guilt of gross neglect towards the children. This finding of gross neglect is consistent with the express language of § 22-2-6(d), supra, and with the trial court's conclusion No. 2 quoted above, which is supported by the above quoted and numbered findings of fact. These findings of fact are in turn supported by substantial evidence. Thus, even if we were to concede there is merit to this first argument, it is of no consequence here.

Unquestionably appellant owed her children the duty of support. Section 40A-6-2(B), N.M.S.A.1953 (Repl.Vol. 6, 1964). We know of no reason why the mother's obligation to support her children should be different from the same obligation owed by the father, and the father's duty is "* * * to exhaust his every reasonable resource to meet this obligation resting always upon * * *" him to provide his children support. Wilson v. Wilson, 45 N.M. 224, 114 P.2d 737 (1941). Although appellant's income was not great, it is apparent she could have at least con-

tributed to the support of her children and made some reasonable effort to care for them, rather than completely abandoning her responsibilities to them for a period of five years.

Appellant next argues that "[t]he evidence in this case does not support any conclusion of abandonment, least of all is such proof, if any, clear and indubitable." She relies for support of this argument upon Nevelos v. Railston, 65 N.M. 250, 335 P.2d 573 (1959). Although we are inclined to disagree with her appraisal of the evidence, this question is of no significance here. As already shown above, the district court order is predicated upon a finding and a conclusion by that court of appellant's guilt of gross neglect toward the children, and this finding and conclusion are supported by substantial evidence and by the recommendation of the Child Welfare Division of the New Mexico Department of Public Welfare.

Appellant's final argument under her first point is also insupportable and is of no significance here, because the trial court did not rely solely upon a finding of abandonment, and, even had it done so, we are of the opinion that abandonment does constitute gross neglect, and appellant's gross neglect was not dependent upon her having actual physical custody of the children as she contends.

Appellant asserts as her second point that "[t]he facts of this case completely fail to show that this adoption is in any way beneficial to the welfare or well-being of the children, or in any way in their best interests." Her argument is that the facts in this case are analogous to the facts in Gutierrez v. New Mexico Dept. of Public Welfare, 74 N.M. 273, 393 P.2d 12 (1964), in which this court reversed an order decreeing the adoption by a sixty-six year old grandfather of his two eight year old granddaughters because "[t]he sole purpose of the proposed adoption was to change the legal parentage of the girls so that the social security benefits would be increased because of the grandfather's entitlement thereto, and perhaps because of the entitlement to some benefits of his deceased wife."

The stated purpose for the proposed adoption in the Gutierrez case is in no way analogous to the purposes for the adoption in the case now before us, and we are not here concerned with an adoption in name only. The fact that the natural father of the children, who is the son of appellees, may live close by and continue to see the children as frequently as he did before, in no way detracts from the legal relationship established by the adoption or the benefits thereby conferred on the children. The record in the case before us supports the recommendation of the Child Welfare Division of the New Mexico Department of Public Welfare that the adoption be granted and the judgment of the district court in entering the decrees of adoption.

The decrees of the adoption should be affirmed.

It is so ordered.

COMPTON, C. J., and McMANUS, J., concur.

498 P.2d 305

Americo ROMERO, Administrator of the Estate of Pedro R. Melendez, Deceased, Plaintiff-Appellee,

v.

Celene M. MELENDEZ, Defendant-Appellant.

No. 9375.

Supreme Court of New Mexico.

June 16, 1972.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Sommer, Lawler & Scheuer, Santa Fe, for appellant.

Matias L. Chacon, Espanola, Anthony J. Albert, Santa Fe, for appellee.

OPINION

McMANUS, Justice.

This case was brought in Rio Arriba County requesting a determination that certain life insurance policies, a mutual fund, a savings account and a checking account were the property of the estate of Pedro R. Melendez. The answer of the defendant-appellant, Celene Melendez, denied ownership by the estate and asserted a counterclaim to recover the amount of a savings account withdrawn by the plaintiff-appellee, Americo Romero, administrator of the estate. The cause was tried to

the court without a jury and judgment was entered for the plaintiff; counterclaim of the defendant was denied. This appeal is from that judgment.

The decedent, Pedro Melendez, and the appellant were married on May 26, 1956. They were divorced on October 2, 1970, in Rio Arriba County. The decedent went into a coma on December 3, 1970, and died intestate December 13, 1970. This dispute arose over the determination of ownership of insurance policies and accounts that had been awarded the decedent as his sole and separate property by the divorce.

The divorce decree awarded the decedent:

(a) two insurance policies which named the appellant as the sole beneficiary;

(b) a Keogh plan fund with appellant as beneficiary.

(c) a Financial Industrial Fund Certificate which had been held in joint tenancy with the appellant;

(d) a Los Alamos Building and Loan Association savings account which was payable on death to the appellant and from which the appellee drew money after the decedent's death;

(e) a checking account in the First National Bank of Rio Arriba held in joint tenancy with the appellant and payable on death to a third party. (This account was withdrawn by the defendant after the divorce and prior to the death of Mr. Melendez.)

There was evidence to the effect that the decedent and the appellant had contemplated remarriage around Christmas of 1970. The appellant also requested findings of fact to the effect that the decedent had ample time between the divorce and his death to change the beneficiary under the insurance policies, to change the joint tenancies to his name alone, and to eliminate the names of the appellant and a third party from the payable upon death provisions and that the reason he did not so act was his intention to remarry the appellant. These findings were refused by the court below.

The appellant argues two points to this Court. The first is that:

"The finding that the stipulation and agreement and divorce decree severed the joint tenancy, that decedent did not do anything to make a gift to defendant of assets received in the divorce, is not supported by the evidence. The evidence supported the findings requested by defendant and refused by the trial court, and was uncontradicted and unimpeached."

The second point states:

"Where ownership of a life insurance policy, joint property, or payable on death account is awarded by a divorce decree to a husband and the husband has the opportunity to, but does not, change the joint tenancy, life insurance beneficiary, or payable on death provision, upon his death the surviving ex-wife is entitled to the joint tenancy property, life insurance proceeds, and payable on death account."

In spite of these arguments appellant conceded during oral argument that all interests of the appellant were terminated by the provisions contained in the divorce decree.

Points I and II can be resolved together since the conclusion of both is dependent upon the interpretation of the divorce decree. The final decree, filed on October 2, 1970, made the following distribution of the community property:

"3. Of the community property set forth in Paragraph 4 of the findings of fact, defendant is hereby awarded as his sole and separate property:

"* * *

"(7) Insurance (life) of defendant (two policies)

"(8) Keogh plan fund

"(9) FIF mutual fund

"(10) Los Alamos Building & Loan Association (savings account)

"(11) Checking account

"* * *."

Other property was awarded to the decedent as well as to the appellant but only the prior listed items are in dispute. Appellant claims she is entitled to the benefits of the insurance policies since the decedent made no effort to change the beneficiary and, in fact, wished to remarry appellant, alleging that this is indicative of an intent to retain the appellant as the beneficiary. She also claims she is entitled to the money under the Keogh plan since she was the named beneficiary. Appellant also claims that she takes the FIF mutual fund by virtue of the fact that she and decedent held the fund as joint tenants prior to the divorce and, as well, claims the savings account under the payable upon death provision, and the checking account as the survivor of the joint tenancy.

The joint tenancy issue can be disposed of first. In the case of Carson v. Ellis, 186 Kan. 112, 348 P.2d 807 (1960), joint tenancy was defined as follows:

"The four essential elements of a joint tenancy are unity of interest, title, time and possession. To meet these requirements, the several tenants must have one and the same interest accruing by one and the same conveyance commencing at the same time and held by one and the same undivided possession. * * * A joint tenancy will be severed by the destruction of any one or more of its necessary units. * * *

"* * * [A] joint tenancy may be terminated by a mutual agreement between the parties * * *, or by any conduct or course of dealing sufficient to indicate that all parties have mutually treated their interests as belonging to them in common. * * *."

This case was followed in Baade v. Ratner, 187 Kan. 741, 359 P.2d 877 (1961), which closely parallels the case before us. In Baade, supra, the divorced wife sued the executor of the divorced husband's estate to recover the balance of an account held in joint tenancy prior to the divorce. The divorce decree awarded to the husband, as his sole and separate property, 161 shares of stock in his name, 49 shares of stock in the wife's name to be assigned to the husband, $4,000.00 worth of bonds in possession of the husband, and a $1,000 savings account with an order to the wife to assign such account to the husband if it stood in her name. The decree also barred the wife from claiming or asserting any right, title, or interest in the above described property. At the husband's death, there was over $3,000 in the savings account and the wife's name was still on the account as a joint tenant. In resolving the issue of ownership in favor of the husband's estate, the court said:

"By the very language of the divorce decree there can be no question but that the court intended to dissolve the marital relation between the parties and settle and adjust all their property rights, thereby severing the unity of possession between them. * * * Among other things, the divorce decree was directed to the savings account, which was personal property * * *, and it severed the joint tenancy relationship in the account itself, * * *.

"The fact that Mildred Wilson never assigned the account to W. H. Wilson does not operate to keep the account a joint one. The contract between the parties and the decree of divorce not only severed the joint tenancy, but forever barred the appellee from claiming or asserting any right, title, or interest in the account. That, in itself, would preclude the instant action."

The divorce decree in this cause gave the decedent the Financial Industrial Fund Certificate and the checking account as his sole and separate property. That decree severed and dissolved the joint tenancy. The appellant has no claim to either fund since her rights had been settled by the divorce decree. The moneys in both the Financial Industrial Fund and the checking account belong to the estate. See also Prichard v. Carter, 208 Tenn. 648, 348

S.W.2d 306 (1961) and Smith v. Smith, 460 S.W.2d 204 (Tex.Civ.App.1970) where the Texas court observed:

> "* * * [T]he value of the retirement fund was adjudicated in the divorce case * * *. Furthermore the divorce judgment expressly decreed that the retirement fund should thenceforth be separate property of appellant. It was not necessary for appellee thereafter to indicate her willingness 'to release her rights in the retirement fund.' * * *"

The issue concerning the life insurance policies and the Keogh fund must also be resolved in favor of the appellee. The general rule has been stated in O'Brien v. Elder, 250 F.2d 275 (5th Cir. 1957):

> "It is generally true that divorce alone does not automatically divest the wife of the proceeds of life insurance in which she is the named beneficiary * * *. The beneficiary's interest may be terminated, however, by an agreement between the parties which may reasonably be construed as a relinquishment of the spouse's rights to the insurance * * *."

The weight of competent authority seems to support the proposition that where the divorce decree makes a definite disposition of the insurance policies, the wife's interest as a beneficiary can be defeated by such disposition. See, in particular, Brewer v. Brewer, 239 Ark. 614, 390 S.W.2d 630 (1965), where the Arkansas Supreme Court affirmed the rule that a divorced wife cannot claim as a beneficiary under a life insurance policy that she specifically transferred and released under the property settlement incorporated in the divorce decree. Also, Dudley v. Franklin Life Insurance Co., 250 Or. 51, 440 P.2d 363 (1968), which interpreted California law in this area. Other cases holding conversely to do so on the basis of the absence of a clear divorce decree. See Partin v. de Cordova, 464 S.W.2d 956 (Tex.Civ.App. 1971).

Three New Mexico cases will now be discussed and distinguished from the case now before us.

The first case is Menger v. Otero County State Bank, 44 N.M. 82, 98 P.2d 834 (1940), where the deceased husband opened a joint account out of his separate funds with the right of both parties to withdraw from the account on their individual signature during their lifetimes. Upon the wife's death, the administrator of the deceased husband's estate sought to have the defendant bank pay over the unexpended funds in the account for the benefit of the husband's estate. The court held that the funds had been held in joint tenancy and upon the husband's death became the separate property of the wife rather than giving her a life estate in the account as alleged by the administrator. The court stated:

> "There was sufficient evidence in the case at bar to support the court's findings of fact that the deceased husband put his money into the bank with the intention, well understood, and acquiesced in by the bank, that in case of his death his wife as survivor, would take it all; * * *."

In the present case there is no such evidence. In fact, the conclusion must be to the contrary. The divorce decree dissolved the joint tenancy and vested the ownership of the accounts solely in the decedent. He made no effort to reinstate the appellant as the survivor of the accounts. Inaction cannot be considered an affirmative effort since the decree operates to destroy the joint tenancy by eliminating the unity of possession. There is no correlation between Menger, supra, and the case at bar; on the contrary, the evidence supported the finding of joint tenancy in Menger while in the case before us, the evidence supported the contrary finding that the joint tenancy no longer existed.

The second case, Kinney v. Ewing, 83 N.M. 365, 492 P.2d 636 (1972), arose over the ownership of securities registered in

the names of the mother-appellee and the daughter-appellant. Appellee had purchased the certificates upon the death of her husband and placed them in joint tenancy with right of survivorship to protect the then minor appellant. The case arose when appellee sought a declaratory judgment regarding the rights of the parties with respect to the jointly held securities. The court below found the appellee to be the sole and separate owner of the securities and, on appeal here, we stated:

> "With respect to the Securities, the [trial] court found the facts to be generally as we have stated them. Most importantly, it also found: (1) that due to plaintiff's exclusive dealings with the Securities, there was no delivery of them from plaintiff to defendant; and (2) that the registration of the Securities by plaintiff in joint tenancy did not manifest any intention on her part to make a present gift to defendant, but only indicated her intention to have the Securities pass to defendant upon plaintiff's death. * * *"

The main question that this Court considered there was whether or not there was a valid gift made and completed and we concluded there was not. There was a lack of donative intent necessary for a present gift.

In the present case, the appellant wife has made the argument that she takes the joint accounts under right of survivorship. We have already established that this is not the case. Had she made the argument that decedent intended a gift by failing to remove her from the accounts then the Kinney, supra, reasoning would be applicable and the solution would depend on the existence or lack of substantial evidence going to the presence or absence of the elements necessary for a valid complete gift. As the case now stands, there is no evidence of a gift; therefore, the prior reasoning as to the dissolution of the joint tenancy by the decree holds and controls.

Harris v. Harris, 83 N.M. 441, 493 P.2d 407 (1972), is the third case that must be distinguished. There the divorced wife was allowed to receive the entire benefits of two insurance policies on her former husband's life. The policies had not been disposed of by the divorce decree and since they had been held as community property before the divorce, the parties held them as tenants in common after the divorce. Since the wife owned one-half of the policies by virtue of the tenancy in common, she could collect under her one-half interest as a beneficiary. The deceased husband owned the other half of the policy and attached to that ownership was the right to retain or change the beneficiary. He chose not to change the beneficiary, therefore the wife was entitled to that half as well.

The law, as set down in Harris, supra, is quite clear on this point. Other jurisdictions quite clearly hold that where the insurance policy has been dealt with by the divorce decree, the ownership in the policy and the benefits therefrom reside in the party who takes the policy under the decree. See Brewer v. Brewer, and Dudley v. Franklin Life Insurance Co., both supra. The decree in this case gave the decedent the policies as his sole and separate property and divested the appellant of any and all interest, including the expectancy as a beneficiary. The distinction between this case and Harris, supra, is in the decree itself. In the case before us, the decree disposed of the policies; in Harris, supra, it did not.

The Los Alamos Building and Loan savings account with its payable on death provision must be disposed of in the same manner as the life insurance policies and the Keogh fund. The payable on death provision gave the appellant a beneficial interest similar to that accorded her under the insurance policies. Since the divorce decree disposed of the savings account in favor of the decedent, the appellant is precluded from claiming the account under the payable on death provision. The same reasoning that applies to the insurance policies also applies here.

See Brewer v. Brewer and Dudley v. Franklin Life Insurance Co., both supra.

Because of the foregoing, all of the items discussed in this opinion belong to the estate of Pedro R. Melendez, deceased. In addition, the money withdrawn from the First National Bank of Rio Arriba shall be returned to the estate by the defendant.

The judgment of the trial court is affirmed.

It is so ordered.

OMAN and STEPHENSON, JJ., concur.

498 P.2d 310

Jane Etta LEASE, Plaintiff-Appellant,

v.

The BOARD OF REGENTS OF NEW MEXICO STATE UNIVERSITY, a Body Corporate, Defendant-Appellee.

No. 9394.

Supreme Court of New Mexico.
June 16, 1972.

John S. Spence, Alamogordo, for appellant.

Darden & Sage, John A. Darden, III, Las Cruces, for appellee.

OPINION

COMPTON, Chief Justice.

This is an appeal by the plaintiff from an order of the district court discharging an alternative writ of mandamus theretofore issued.

Appellant was employed on April 3, 1967, by appellee as a full-time member of its professional staff within one of its departments. Appellant continued to be so employed, pursuant to temporary appointment contracts for terms of one year each, beginning on July 1 of each subsequent year and ending on the following June 30, until June 30, 1971, at which time the appellee did not renew her contract. Appellant was notified of appellee's decision not to renew her contract on February 10, 1971. Appellant sought relief by an alternative writ of mandamus against the appellee requiring it to reinstate her in her position with the university because she had attained tenured status three years after the commencement of her employment. When the matter came on for hearing on July 23, 1971, appellee moved to dismiss the alternative writ. From an order discharging the writ the plaintiff has appealed.

Appellant advances four points for our consideration in this matter. First, the lower court erred in dismissing the alternative writ of mandamus in that such

action constituted a summary judgment which should not have been granted in light of the genuine dispute between the parties. Second, the lower court's refusal to permit the introduction of evidence was error. Third, on the basis of the pleadings and certain exhibits appellant had established that she was entitled to tenure status, and the alternative writ should have been made permanent. Fourth, mandamus is the proper action in light of the appellee's clear legal duty owed to the appellant.

Dispositive of all issues before us is whether mandamus is the proper remedy in this instance. We conclude that it is not, and the trial court should be affirmed.

For mandamus to lie there must be a clear legal right sought to be enforced. As we have stated numerous times in the past, the legal right must be clear. See Schreiber v. Baca, 58 N.M. 766, 276 P.2d 902; State ex rel. Walker v. Hinkle, 37 N.M. 444, 24 P.2d 286; State ex rel. Sittler v. Board of Education, 18 N.M. 183, 135 P. 96; also compare, Witt v. Hartman, 82 N.M. 170, 477 P.2d 608. Here the legal right is that of tenure. Appellant contends that the right to tenure status is clear. We do not agree. We do not see that appellant's claimed tenure is as a result of a positive provision of law, without such provision of law, appellant's claimed legal right is not clear. As this court stated in State ex rel. Sittler v. Board of Education, supra:

> "It is only where the teacher, by positive provision of law, has a fixed tenure of office, or can be removed only in a certain prescribed manner, and where, consequently, it is the plain ministerial duty of a school board to retain him, that mandamus can be maintained."

With these unresolved issues before us we do not see any clear legal right to mandamus. The order of the lower court should be affirmed.

It is so ordered.

McMANUS and OMAN, JJ., concur.

498 P.2d 311

Woodie L. RHODES and Melvin J. Hanson, Plaintiffs-Appellants,

v.

Lucille V. WILKINS, Defendant-Appellee.

No. 9401.

Supreme Court of New Mexico.

June 9, 1972.

Aldridge & Pearlman, Albuquerque, for plaintiffs-appellants.

Harry O. Morris, Albuquerque, for defendant-appellee.

OPINION

OMAN, Justice.

Plaintiffs brought suit for specific performance of a purported option agreement to purchase approximately 1.862 acres of land and damages for a claimed breach of this agreement. A copy of the purported agreement, which is illegible in part, was attached to the complaint. The trial court sustained defendant's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The motion was sustained upon the ground that the purported agreement violates the Statute of Frauds in that it does not "contain a sufficient description of the land to be conveyed or furnish the means or data within itself which points to evidence that will identify the property." Plaintiffs appeal from the order of dismissal. We affirm.

The purported agreement was prepared on a printed "Purchase Agreement" form. The parties undertook to convert it into an option agreement by striking certain printed language from the form, substituting therefor other language, and filling in the blanks as to parties, description of the property, purchase price, etc. The property was described as "approx. 1.862 acres being in the SE ¼ of the SW ¼ of SE ¼ of Sec. 10, R 6 E, T 10 N, City of _____, County of Bernalillo, State of New Mexico, including Vacant land."

Plaintiffs rely upon three separately stated points for reversal, but they can properly be summarized as a contention that the trial court erred in holding the alleged contract violated the Statute of Frauds, because (1) the contract or memorandum was in itself sufficient to satisfy the Statute of Frauds, and (2) in any event, the trial court could not properly dismiss the complaint without receiving extrinsic evidence to identify the lands contemplated by the parties.

Unquestionably the fourth section of the English Statute of Frauds and Perjuries has been adopted in this jurisdiction, and one of the requirements of a written contract, or a written memorandum of a contract, essential to compliance with this section of the statute, is that the writing identify with reasonable certainty the property to which the contract relates. This essential description or identification of the property must be contained in a written contract, or in a written memorandum of the contract, or there must be contained in the writing a reference to some means or data by which the property can be identified. Ray v. Jones, 64 N.M. 223, 327 P.2d 301 (1958); Adams v. Cox, 52 N.M. 56, 191 P.2d 352 (1948); Pitek v. McGuire, 51 N.M. 364, 184 P.2d 647, 1 A.L.R.2d 830 (1947). Any collateral means or data by which the property can be identified must necessarily be referred to in a written contract, or in a written memorandum of the contract. If it were otherwise, and parol evidence could be used to supply the defect, the purpose of the Statute of Frauds would at once be defeated and lost.

This court in Pitek v. McGuire, supra, quoted with approval the following from Williams v. Morris, 95 U.S. 444, 24 L.Ed. 360 (1877):

> "'Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective it cannot be supplied by parol proof, for that would at once introduce all the mischief which the statute was intended to prevent.'"

In the Pitek case we held a notation on a check endorsed and cashed by the seller insufficient to identify the property. The notation read: "To be applied on purchase of property on E. Central Ave. Albuquerque, N. M. Bernalillo Co. Leaving balance of 10,500 dollars."

In Adams v. Cox, supra, we stated:

"A written memorandum must contain a sufficient description of the land, or furnish the means or data within itself which points to evidence that will identify it. Pitek v. McGuire et al., 51 N.M. 364, 184 P.2d 647, 655, and cases therein cited."

However, in the Adams case the description was held to be sufficient, because the property was described in the written memorandum by its particular name, to wit: "Lighthouse Laundry with all equipment complete together with two city lots 100 x 168 feet." The written memorandum so describing the property also contained "the date line of Roswell, New Mexico."

We held in Ray v. Jones, supra, that one of the essential terms of the written contract or memorandum is that it "* * * contain a sufficient description of the land to be conveyed *or furnish the means or data within itself which points to evidence that will identify the property.* Adams v. Cox, 52 N.M. 56, 191 P.2d 352; Pitek v. McGuire, supra; see extensive annotation in 23 A.L.R.2d 6."

In the Ray case the description of the property was held to be inadequate, because the exterior boundaries of the tract to be conveyed were not described; the memorandum did not say what ¼ of section 34 was to be conveyed; and it did not furnish the means or data within itself which pointed to evidence by which the property could be identified.

In the present case the description was that of approximately 1.862 acres within a ten acre tract. There was no description in the contract of any particular 1.862 acres; there was no reference in the contract to any data in which these 1.862 acres are described; and there was no reference in the contract to any means or data by which these 1.862 acres could be identified.

Cases decided by this court upon which the parties rely, other than those above cited, are Komadina v. Edmondson, 81 N.M. 467, 468 P.2d 632 (1970); Bintliff v. Setliff, 75 N.M. 448, 405 P.2d 931 (1965); Hughes v. Meem, 70 N.M. 122, 371 P.2d 235 (1962); Garcia v. Pineda et al., 33 N. M. 651, 275 P. 370 (1929). In none of these cases was there involved the question of the adequacy of the description of the property to meet the requirements of the Statute of Frauds. They dealt with the adequacy of a description in a deed or an instrument of conveyance. However, our decisions in those cases are not inconsistent with our holding herein and with our holdings in Ray v. Jones, supra, Adams v. Cox, supra, and Pitek v. McGuire, supra. In Komadina v. Edmondson, supra, it was stated:

"It is fundamental that 'In order to make a valid conveyance of land, it is essential that the land itself, the subject of the conveyance, be capable of identification, and, if the conveyance does not describe the land with such particularity as to render this possible, the conveyance is absolutely nugatory, * * *' 4 Tiffany, Real Property § 990 (3rd ed. Jones 1939).

"* * * *

"The grantor's intent must be ascertained from the description contained in the deed which must itself be certain or capable of being reduced to certainty by something extrinsic to which the deed refers. Hughes v. Meem, supra. Consequently, if extrinsic evidence is to be relied upon to identify the land intended to be conveyed, the deed itself must point to the source from which such evidence is to be sought. Adams v. Cox, 52 N.M. 56, 191 P.2d 352 (1948); Heron v. Ramsey, 45 N.M. 483, 117 P.2d 242 (1941); 6 Thompson, supra, § 3027 at 478; compare Quintana v. Montoya, 64 N.M. 464,

330 P.2d 549, 71 A.L.R.2d 397 (1958); Armijo v. New Mexico Town Co., 3 N. M. (Gild.) 427, 5 P. 709 (1885)."

Since the complaint in the case now before us was predicated and dependent upon the validity of the written contract, and a copy of this contract was attached to the complaint as an exhibit thereto and as a part thereof, the contract was controlling. Adams v. Cox, supra. Obviously the contract did not meet the requirement of the Statute of Frauds as to the description or means of identifying the property, and, therefore, the trial court properly dismissed the complaint for failure to state a claim upon which relief could be granted.

The order of dismissal should be affirmed. It is so ordered.

STEPHENSON and MONTOYA, JJ., concur.

498 P.2d 673

JUAN TAFOYA LAND GRANT by Its Board of Directors, David Martinez, et al., Plaintiffs-Appellees,

v.

Serafin BACA et al., Defendants-Appellants.

No. 9403.

Supreme Court of New Mexico.

June 30, 1972.

Casados & McBride, Albuquerque, for appellant Serafin Baca.

Harold M. Morgan, Albuquerque, for other appellants.

Standley, Witt & Quinn, Santa Fe, amicus curiae.

Edward J. Apodaca, Albuquerque, for appellees.

OPINION

McMANUS, Justice.

On December 22, 1969, suit was filed in the District Court of Valencia County by plaintiffs herein, praying for a declaratory judgment that would determine the legal ownership status of the Juan Tafoya Land Grant. The complaint further requested a ratification of previous actions of the Board of Trustees of said Grant and a request for ratification of certain rules for governing the Grant. Judgment was entered against all of the defendants granting the relief prayed for and also determining the ownership of the Grant. Subsequently, the court approved the proposed rules for the governing of the Grant. Serafin Baca, one of the defendants, appealed from the judgment of the trial court.

While there were two points proferred for appeal, it will only be necessary to discuss the second point. It is as follows:

> "The rules approved by the District Court for the governing of the Grant are void and of no force and effect for the reason that the judgment on which they are founded is void for the reason that the court did not have jurisdiction over the subject matter."

Appellants, by virtue of this point, state that all of the land to which title is sought is situate in either Sandoval or McKinley Counties, and not in Valencia County. Section 21-5-1(d) (1), N.M.S.A. (1953 Comp.), reads as follows:

> "When lands or any interest in lands are the object of any suit in whole or in part, such suit shall be brought in the county where the land or any portion thereof is situate."

Appellees infer that a portion of the land involved lies in Valencia County. The record before us does not so indicate. Inasmuch as the lands or any portion thereof subject to this suit were not shown to be situate in Valencia County the trial court had no jurisdiction over the subject-matter. We take notice of the brief Amicus Curiae filed herein. See Atler v. Stolz, 38 N.M. 529, 37 P.2d 243 (1934); Catron v. Gallup Fire Brick Co. et al., 34 N.M. 45, 277 P. 32 (1929); Pan American Petroleum Corp. v. Candelaria, 403 F.2d 351 (10th Cir. 1968).

The judgment of the trial court is remanded to the trial court for a dismissal of the action, without prejudice to the institution of a new suit in the proper county as the parties may deem advisable.

It is so ordered.

COMPTON, C. J., and MONTOYA, J., concur.

498 P.2d 674

Elton Ray DAVIS, Plaintiff-Appellant,

v.

Justina DAVIS, Defendant-Appellee.

No. 9348.

Supreme Court of New Mexico.

June 30, 1972.

Catron, Catron & Donnelly, Santa Fe, for appellant.

Bigbee, Byrd, Carpenter & Crout, Harl D. Byrd, Paul D. Gerber, Santa Fe, for appellee.

OPINION

COMPTON, Chief Justice.

This is an appeal from an order of the District Court changing custody of three minor children from the father, appellant, to the mother, appellee.

Suit was initially filed by appellant in Santa Fe County, seeking a divorce from appellee, for the custody of the three children of the parties, and for a division of the community property. During pendency of the Santa Fe proceeding, appellee filed suit for divorce in California in which she sought the custody of the children. The California court awarded custody of the children, pendente lite, to the appellant. Upon returning the children to New Mexico appellant was granted a divorce, a division of the community property, and was awarded the custody and control of the children. Some eight months later appellee filed a petition seeking a change of custody of the children from the appellant to her. Following a hearing on the petition,

the court ordered the change of custody to appellee. Appellant superseded the ruling of the court pending the outcome of this appeal.

The trial court found:

1. That since the time of the entry of the Final Decree of Divorce herein, there have been changes in the environment, physical condition, mental attitude and financial condition of Defendant and other changed conditions in regard to the appropriate care, custody, control, welfare and best interests of said minor children.

2. Both Plaintiff and Defendant are fit and proper persons to be awarded the care, custody and control of said minor children.

3. That a period of time should be afforded in order for the Defendant, Justina Hayden, to establish the home recently purchased by said Defendant and her husband Lee Hayden, and to otherwise prepare for the transfer of the custody and control of said minor children.

5. That the best interests and welfare of said minor children would be served by the children continuing to reside with the Plaintiff until the 1971 Christmas school vacation at which time Plaintiff should, at his own expense, deliver custody of said minor children to the Defendant at her residence in California provided there has been no significant adverse change in the living conditions and environment afforded in California by Defendant.

7. From and after delivery of custody of said minor children by Plaintiff to Defendant, as aforesaid, the best interests and welfare of the minor children of the parties would be subserved by awarding the care, custody and control of said minor children to the Defendant subject to the aforesaid rights of visitation in the Plaintiff.

Appellant contends (a) that the findings are not supported by substantial evidence, (b) that the court erred in admitting hearsay evidence and (c) that he was denied the right of cross-examination of a witness.

At the outset it should be restated that the paramount issue before this court is the best interests and welfare of the children. This premise and the fact that the trial court has great discretion in matters of this type, is the point from which we proceed. Terry v. Terry, 82 N.M. 113, 476 P.2d 772.

In Bell v. Odil, 60 N.M. 404, 292 P.2d 96, our court stated:

> "* * * 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. *The discretion of the court in these matters is far-reaching.*" (Emphasis added.)

See also, Urzua v. Urzua, 67 N.M. 304, 355 P.2d 123.

Though there is no statutory requirement that a change of circumstances must be shown before a custody decree will be modified or changed, it is well settled in this jurisdiction that a showing of changed circumstances is a prerequisite to modification or change of custody. Tuttle v. Tuttle, 66 N.M. 134, 343 P.2d 838. The change of circumstance must be shown to be of a material nature before a modification or change is justified. Edington v. Edington, 50 N.M. 349, 176 P.2d 915; Tuttle v. Tuttle, supra, and the burden of showing a material change of circumstances rests upon the moving party. Edington v. Edington, supra. Compare Kerley v. Kerley, 69 N.M. 291, 366 P.2d 141, and Fox v. Doak, 78 N.M. 743, 438 P.2d 153.

From our review of the record, we are convinced that the appellee has sustained the burden required for a change of custody. The testimony of a psychiatrist, coupled with the testimony of other witnesses introduced by appellee, constitutes substantial evidence and supports the order of the court. In Tapia v. Panhandle Steel

Erectors Co., 78 N.M. 86, 428 P.2d 625, this court defined substantial evidence as:

> "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Citing Wilson v. Employment Sec. Com'n, 74 N.M. 3, 389 P.2d 855)

As to appellant's second contention the court admitted into evidence certain letters relating to appellee's standing in California. We agree the admission of the letters violated the hearsay rule, but the error was harmless when viewed in light of all the evidence. There was other substantial evidence which would sustain the findings of the court; the letters were merely cumulative. In Keil v. Wilson, 47 N.M. 43, 133 P.2d 705, this court, citing with approval 5A C.J.S. Appeal and Error § 1724, said:

> "* * * it is said that error in the admission of evidence may not constitute ground for reversal where the evidence which has been admitted is merely corroborative or cumulative. * * * 'Moreover, error committed in the admission of evidence may, on appeal, be considered to be harmless where the legal evidence abundantly established the case.'"

Keil, supra, citing Radcliffe v. Chaves, 15 N.M. 258, 110 P. 699, further stated:

> "'In cases tried before the court, it will be presumed that the court ultimately disregarded inadmissible testimony, and the erroneous admission of testimony will afford no ground of error, unless it is apparent that the court considered such testimony in deciding the case.'"

The burden of establishing prejudicial error was upon the appellant, Keil v. Wilson, supra, and he has failed in that regard.

As to appellant's contention that he was denied the right to cross-examine a witness, we again do not agree. The trial court announced that he was going to call a witness for examination. Thereupon the appellant stated that he reserved the right to cross-examine the witness. After the court had questioned the witness, appellant did not request an opportunity to cross-examine the witness but instead asked if he could present some authority to the court. Appellant can not now be heard to say that he was denied the opportunity to cross-examine the witness.

The order should be affirmed.

It is so ordered.

McMANUS and STEPHENSON, JJ., concur.

498 P.2d 676

Annie GOODMAN et al., Petitioners,

v.

Nancy S. BROCK, as Administratrix of the Estate of Terry Frank Brock, Deceased, Respondent.

No. 9429.

Supreme Court of New Mexico.

June 16, 1972.

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Rodey, Dickason, Sloan, Akin & Robb, Robert M. St. John, Albuquerque, for petitioners.

Keleher & McLeod, Michael L. Keleher, Dennis M. McCary, Albuquerque, for respondent.

OPINION

OMAN, Justice.

This cause is before us on a writ of certiorari directed to the New Mexico Court of Appeals, which reversed a summary judgment entered by the trial court in favor of defendants, Sears, Roebuck & Company and The Armstrong Rubber Company. Brock v. Goodman, 83 N.M. 580, 494 P.2d 1397 (1972). We reverse the decision of the Court of Appeals.

The essential facts are set forth in the majority and dissenting opinions of the Court of Appeals. Brock v. Goodman, supra. Briefly, they are: (1) four tires manufactured by Armstrong were sold by Sears on August 2, 1969 to Tom Goodman, husband of defendant Annie Goodman, and at that time were mounted on Mr. Goodman's pickup truck; (2) the tires were checked at the time they were sold and mounted on the vehicle, and there was no evidence that they were defective in any particular; (3) these tires were used on the vehicle for about 300 miles between August 2 and August 5, 1969, and there was nothing in their appearance or in their use to indicate a defect in any of them; (4) on August 5, Mrs. Goodman was driving the vehicle and had an eleven-year-old boy as her passenger; (5) she encountered no difficulties with the vehicle or the tires until she endeavored to light a cigarette and lost control of the vehicle by reason thereof; (6) she drove off the right side of the highway for a distance of approximately 325 feet; (7) she then turned the vehicle to the left and proceeded completely across the highway for a distance of about 47 feet; (8) she travelled off the left side of the highway for a distance of approximately 55 feet, and then turned to the right and again entered the highway; (9) at the time the left front wheel entered onto the highway something caused a failure of the left front tire, which in turn caused a separation of the tire, or at least a portion thereof, from the rim; (10) the vehicle thereupon overturned once and came to rest at a point approximately 55 feet from the place of entry back onto the left side of the highway; (11) the child was killed and this suit ensued; (12) settlement between plaintiff and Mrs. Goodman was effected, and the trial court granted summary judgment in favor of Sears and Armstrong.

The majority in Brock v. Goodman, supra, reversed the summary judgment on the ground that Sears and Armstrong failed in their duty of establishing "* * * a prima facie showing that no material fact issue exists, * * *", to wit: there was "* * * no evidence that when the tire was manufactured by Armstrong it was a good, sound tire free of defects; that when it was sold by Sears it was carefully inspected for defects or conditions which would cause it to fail and none were found. * * *"

It is true there is no evidence in which it was expressly stated: "* * * that when the tire was manufactured by Armstrong it was a good, sound tire free of defects; * * *" or "* * * that when it was sold by Sears it was carefully inspected for defects or conditions which would cause it to fail. * * *", but all the evidence is to the effect that the tire was new, without defects, and had caused absolutely no trouble until its failure upon reentry onto the highway the second time after Mrs. Goodman lost control of the vehicle by reason of her efforts to light a cigarette while driving. Just why the tire failed is not explained, except as such can reasonably be inferred from the stresses which it was undergoing by reason of the loss of control by Mrs. Goodman of the vehicle, the route taken and the area upon which the vehicle travelled, and the fact that the tire failed upon its second re-entry onto the highway while the vehicle was out

of control. The tire has been lost and is not available for further inspection and examination.

Apparently the majority of the Court of Appeals found "a slight issue of fact" from the absence of express evidence "* * * that when the tire was manufactured by Armstrong it was a good, sound tire free of defects; * * *" and "* * * that when it was sold by Sears it was [not] *carefully* inspected for defects or conditions which would cause it to fail. * * *" [Emphasis added]. They concluded from their finding of this slight issue of fact, based solely upon the absence of express evidence in the two particulars as above stated, that "[d]efendants failed to meet their burden of showing an absence of a material factual issue. * * *"

This Court and the Court of Appeals have repeatedly equated a "genuine issue as to any material fact" with a "slight doubt" or the "slightest doubt." See, e. g., Bostian v. Aspen Wood Products Corporation, 81 N.M. 152, 464 P.2d 882 (1970); Martin v. Board of Education of City of Albuquerque, 79 N.M. 636, 447 P.2d 516 (1968); Cortez v. Martinez, 79 N.M. 506, 445 P.2d 383 (1968); Green v. Manpower, Inc., of Albuquerque, 81 N.M. 788, 474 P. 2d 80 (Ct.App.1970); Binns v. Schoenbrun, 81 N.M. 489, 468 P.2d 890 (Ct.App. 1970). This equation of terms has resulted in a disregard of the clear language and a departure from the meaning and purpose of Rule 56(c), Rules of Civil Procedure [§ 21-1-1(56) (c), N.M.S.A. 1953 (Repl.Vol. 4, 1970)].

We are in accord with the following language and the reasoning thereof taken from 3 Barron & Holtzoff, Federal Practice and Procedure, with Forms, § 1234 at 124-126 (Rev'd. by Wright 1958):

"Though it has been said that summary judgment should not be granted if there is the 'slightest doubt' as to the facts, such statements are a rather misleading gloss on a rule which speaks in terms of 'genuine issue as to any material fact,' and would, if taken literally, mean that there could hardly ever be a summary judgment, for at least a slight doubt can be developed as to practically all things human. A better formulation would be that the party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists. If there are such reasonable doubts, summary judgment should be denied. A substantial dispute as to a material fact forecloses summary judgment."

Unquestionably the burden was on defendants to show an absence of a genuine issue of fact, or that they were entitled as a matter of law for some other reason to a summary judgment in their favor. Rule 56(c), supra; Sanchez v. Public Service Co., 83 N.M. 245, 490 P.2d 962 (1971); Montoya v. City of Albuquerque, 82 N.M. 90, 476 P.2d 60 (1970); Cessna Finance Corp. v. Mesilla Valley Flying Service, Inc., 81 N.M. 10, 462 P.2d 144 (1969), cert. denied, 397 U.S. 1076, 90 S. Ct. 1521, 25 L.Ed.2d 811 (1970); Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co., 77 N.M. 730, 427 P.2d 249 (1967). However, once defendants had made a prima facie showing that they were entitled to summary judgment, the burden was on plaintiff to show that there was a genuine factual issue and that defendants were not entitled as a matter of law to summary judgment. Markwell v. General Tire and Rubber Company, 367 F.2d 748 (7th Cir. 1966); Cessna Finance Corp. v. Mesilla Valley Flying Service Inc., supra; Rael v. American Estate Life Ins. Co., 79 N.M. 379, 444 P.2d 290 (1968); Burden v. Colonial Homes, Inc., 79 N.M. 170, 441 P. 2d 210 (1968); Bertelle v. City of Gallup, 81 N.M. 755, 473 P.2d 369 (Ct.App.1970); Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892, 38 A.L.R.3d 354 (Ct. App.1970). In our opinion, defendants clearly made a prima facie showing that there was no genuine issue of fact as to a claimed defect in the tire. By a prima facie showing is meant such evidence as is sufficient in law to raise a presumption of

fact or establish the fact in question unless rebutted. Webster's Third New International Dictionary Unabridged, 1800 (1961); Black's Law Dictionary, 1353 (4th Ed. 1957); 2 Bouvier's Law Dictionary, 2683 (3d Rev. 1914).

The burden was on the plaintiff, as the party resisting the motion for summary judgment, to come forward and demonstrate that a genuine issue of fact requiring a trial did exist. This burden is contemplated and required by Rule 56(e), and relief from this burden may be granted, at least temporarily, under Rule 56(f), Rules of Civil Procedure [§ 21-1-1(56) (e) and (f), N.M.S.A.1953 (Repl. Vol. 4, 1970)]. The burden on the movant does not require him to show or demonstrate beyond all possibility that no genuine issue of fact exists. See Chambers v. United States, 357 F.2d 224 (8th Cir. 1966); 6 Fed.Rules Serv.2d, Advisory Committee's Notes to Rule 56 at xlix (1963). To place this burden upon him would be contrary to the express provisions of Rule 56(e), supra, and would make Rule 56 almost, if not entirely, useless.

The inferences, which the party opposing the motion for summary judgment is entitled to have drawn from all the matters properly before and considered by the trial court, must be reasonable inferences. Montoya v. City of Albuquerque, supra; Jacobson v. State Farm Mutual Automobile Ins. Co., 81 N.M. 600, 471 P.2d 170 (1970); General Electric Credit Corp. v. Tidenberg, 78 N.M. 59, 428 P.2d 33, 40 A.L.R.3d 1151 (1967); Green v. Manpower, Inc., of Albuquerque, supra. Whether or not a genuine issue of fact exists depends on the peculiar facts of each case. Pen-Ken Gas and Oil Corp. v. Warfield Natural Gas Co., 137 F.2d 871 (6th Cir. 1943), cert. denied, 320 U.S. 800, 64 S.Ct. 431, 88 L.Ed. 483 (1944).

The procedures provided by Rule 56, supra, serve a worthwhile purpose in disposing of groundless claims, or claims which cannot be proved, without putting the parties and the courts through the trouble and expense of full blown trials on these claims. See Dyer v. MacDougall, 201 F.2d 265 (2d Cir. 1952); Surkin v. Charteris, 197 F.2d 77 (5th Cir. 1952); Broderick Wood Products Co. v. United States, 195 F.2d 433 (10th Cir. 1952); Arnstein v. Porter, 154 F.2d 464, 480 (2d Cir. 1946); General Electric Credit Corp. v. Tidenberg, supra; Pederson v. Lothman, 63 N.M. 364, 320 P.2d 378 (1958); Agnew v. Libby, 53 N.M. 56, 201 P.2d 775 (1949); Shramek v. General Motors Corp., Chevrolet M. Div., 69 Ill.App.2d 72, 216 N.E.2d 244 (1966); 6 J. Moore, Moore's Federal Practice § 56.04[1] (2d Ed. 1971).

As above indicated, we are firmly convinced that the matters relied upon by defendants Sears and Armstrong in support of their motion for summary judgment were sufficient to support their burden. We are also convinced that plaintiff failed to come forward with anything which demonstrated that a genuine issue of fact exists as to whether there was a defect in the tire at the time it was sold by Sears to Mr. Goodman. We need not consider the question of proximate cause, since we are convinced there was no genuine issue presented on plaintiff's claim that the tire was defective.

It follows that the decision of the Court of Appeals must be reversed and the summary judgment entered by the trial court affirmed.

It is so ordered.

COMPTON, C. J., and McMANUS, STEPHENSON, and MONTOYA, JJ., concur.

498 P.2d 681

STATE of New Mexico, Plaintiff-Appellee,

v.

Louis GARCIA, Jr., Defendant-Appellant.

No. 843.

Court of Appeals of New Mexico.

June 16, 1972.

Patrick L. Chowning, Albuquerque, for defendant-appellant.

David L. Norvell, Atty. Gen., Santa Fe, Ronald Van Amberg, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

COWAN, Judge.

The defendant appeals following his conviction of second degree murder. He raises the issues of (1) failure to give a requested self-defense instruction, (2) forms of verdict, (3) witnesses, (4) rebuttal witnesses, and (5) sufficiency of the evidence. We affirm.

Defendant's first point, claiming that the court erred in refusing defendant's requested instruction on self-defense, was abandoned on oral argument. It is conceded that the court gave a proper instruction and the issue need not now be considered.

Defendant next claims error on the ground that no written forms of verdict "relating to first degree murder or either grade of manslaughter" were presented to the jury, in violation of §§ 41–11–11 and 41–11–12, N.M.S.A.1953 (Repl.Vol. 6). These sections, however, refer to instructions and not forms of verdict. Defendant cites no authority supporting his contention, nor do we find any. Additionally, the record discloses that the trial judge stated that he would hand the jury forms of verdict relating to first degree murder, second degree murder, manslaughter and innocence. One of them, finding the defendant guilty of second degree murder, was filed as part of the record. The record is silent as to the disposition of the others. The record before us fails to establish the fact asserted as error by appellant and, upon a doubtful or deficient record, every presumption must be indulged by this court in favor of the correctness and regularity of the trial court's judgment. General Services Corp. v. Board of Com'rs, 75 N.M. 550, 408 P.2d 51 (1965).

Defendant also argues error because a witness, whose name was not endorsed on the indictment, was allowed to testify. This was well within the court's discretion and in the absence of abuse of that discretion, permitting the witness to testify was not error. Section 41–6–47, N.M.S.A.1953 (Repl.Vol. 6); State v. Lujan, 79 N.M. 200, 441 P.2d 497 (1968). Furthermore, defendant claims that without this witness's testimony, the state would have failed to prove the corpus delicti. "The corpus delicti of a particular offense is established simply by proof that the crime was committed. . . ." State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966); State v. Gruender, 83 N.M. 327, 491 P.2d 1082 (Ct.App.1971). Witnesses other than the one not endorsed testified regarding the shooting of Archuleta. We find no abuse in the record.

Defendant's next point is concerned with claimed improper rebuttal testimony and collateral impeachment. The testimony related to photographs of the scene which defendant claims should have been introduced in the state's case-in-chief. Defendant also claims that testimony concerning his physical condition was an improper attempt to impeach defense witnesses. Admission of the testimony was clearly within the court's discretion. The record reveals neither an abuse of that discretion nor prejudice to the defendant. State v. Montoya, 78 N.M. 294, 430 P.2d 865 (1967).

Defendant's final point attempts to raise the issue of substantial evidence. Defendant claims that he moved for a directed verdict of acquittal at the close of the state's case, which was improperly denied. Actually, the defendant moved the court to remove the issues of first and second degree murder from the jury's consideration for failure of proof of premeditation and because the shooting occurred during the heat of passion. This did not amount to a motion for a directed verdict. A motion for a directed verdict calls for a ruling by the trial court based on the evidence. It cannot be raised for the first time on appeal. State v. Williams, 83 N.M. 477, 493 P.2d 962 (Ct.App.1972). Fur-

thermore, counsel for defendant advised the jury in his opening statement that the defendant did the shooting and the entire defense was predicated on the theory of self-defense. This point is without merit.

There being no reversible error, the judgment and sentence is affirmed.

It is so ordered.

HENDLEY and HERNANDEZ, JJ., concur.

498 P.2d 683

Bettye NIX, Administratrix of the Estate of William E. Nix, Plaintiff-Appellant,

v.

TIMES ENTERPRISES, INC., Defendant-Appellee.

No. 816.

Court of Appeals of New Mexico.

June 2, 1972.

H. Gregg Privette, Las Cruces, for appellant.

Neil E. Weinbrenner, Bivins & Weinbrenner, Las Cruces, for appellee.

OPINION

HERNANDEZ, Judge.

Plaintiff, administratrix of the estate of her deceased husband, her husband having died during the pendency of the action, seeks a reversal of an order granting defendant's motion for summary judgment.

The original complaint was filed April 8, 1970. On June 3, 1970 plaintiff filed an amended complaint, pleading in the alternative, in two counts, to-wit: (1) for Workmen's Compensation benefits, and, (2) for damages resulting from injuries sustained by Wm. E. Nix, by reason of defendant's negligence.

The first count of plaintiff's amended complaint alleged that on April 5, 1969 at 7:30 a. m., Wm. E. Nix suffered an accidental injury while working cattle on defendant's ranch. Plaintiff also alleged that defendant employed more than four workmen and its commercial activities extended into other states and involved employees other than farm and ranch workers. Finally, plaintiff alleges she has been informed by defendant that defendant carried no workmen's compensation insurance.

The second count alleged that at the time Wm. E. Nix fell from his horse while working cattle in rough and dangerous country that defendant was negligent in failing to fence off this hazardous area and in failing to furnish adequate numbers of personnel to insure safety of operations. Plaintiff also alleged that defendant was negligent in failing to furnish safety devices and in failing to provide a means other than horses for working the cattle in a hazardous area.

Defendant's answer, to the first count of plaintiff's amended complaint, in addition to various denials and the defense of failure to state a claim upon which relief can be granted, alleged that:

> ". . . the operation of said defendant in which William E. Nix was engaged is a ranching enterprise and as such, does not come within the provisions of the New Mexico Workmen's Act. . . ."

Defendant's answer to the second cause of action, in addition to denials, pleaded several affirmative defenses, including assumption of risk, unavoidable accident and contributory negligence.

On June 18, 1971 defendant filed a motion for summary judgment pursuant to § 21-1-1(56) (b), N.M.S.A.1953 (Repl. Vol. 4). An order granting the motion and dismissing plaintiff's amended complaint was entered on July 29, 1971.

On June 24, 1971 plaintiff filed a motion to compel discovery and on August 9, 1971 filed requested findings of fact and conclusions of law and on August 10, 1971 filed notice of appeal. Neither the motion nor the requested findings and conclusions were ruled upon, and apparently plaintiff sought no ruling.

Plaintiff sets out four points upon which she relies for reversal and we quote:

"Point I. The Court erred in dismissing Count I of plaintiff's complaint.

"Point II. The Court erred in dismissing Count II of plaintiff's complaint.

"Point III. The trial court erred in refusing to allow further discovery.

"Point IV. The trial court erred in failing to rule on plaintiff's requested findings of fact."

Our consideration of Points I and II is governed by the following: We are required to view the record in the light most favorable to plaintiff. Reinhart v. Rauscher Pierce Securities Corp., 83 N.M. 194, 490 P.2d 240 (Ct.App.1971). Should the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, then the moving party is entitled to a judgment as a matter of law. Section 21–1–1(56) (c), N.M.S.A.1953 (Repl. Vol. 1970). Williams v. Herrera, 83 N.M. 680, 496 P. 2d 740 (Ct.App.), decided April 14, 1972; Brock v. Goodman, 83 N.M. 580, 494 P.2d 1397 (Ct.App.1972). Should there be such a showing then ". . . an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Section 21–1–56(e), N.M.S.A.1953 (Repl. Vol. 4).

As to Point I, the undisputed facts show that the defendant was engaged in a ranching operation where plaintiff's deceased husband was employed at the time of the accident. An employer of farm or ranch laborers is not subject to the provisions of the Workmen's Compensation Act, § 59–10–4(A), N.M.S.A.1953 (1971 Supp.), unless such employer elects to bring himself within the Act. Section 59–10–4(B), N.M.S.A.1953 (1971 Supp.). There is therefore no material issue of fact as to Point I and the summary judgment was correct as a matter of law.

The facts pertinent to plaintiff's second cause of action as disclosed by the depositions and the affidavits submitted in support of defendant's motion for summary judgment are as follows: that Wm. E. Nix had been employed on the Corralitos Ranch for eighteen years as manager or foreman prior to the date of the accident; that there was no one over him in authority at the ranch; that he was familiar with the ranch and the particular area where the accident occurred; that there were other areas on the ranch similar to the one where the accident occurred; that there were various holes, possible animal holes, in this area; that what probably caused Mr. Nix's horse to stumble was that it stepped into one of these holes; that Mr. Nix was loping his horse at the time he fell; that Mr. Nix was a good and experienced horseman and that the horse he was riding was a good horse; that persons who work in the ranching industry are familiar with the fact that horses do on occasion stumble and fall; that on the day of the accident there were five men, including Mr. Nix, working between twenty and fifty cattle; that at no time did Mr. Nix ever request any type of vehicle for use in the rounding up of cattle and that he had never requested any safety device that had not been provided him; that he had never requested that any portion of the ranch be fenced off as being dangerous and that he had the authority to do so if he considered an area dangerous. He had not requested additional personnel to assist in the roundup being conducted at the time of the accident; that Mr. Nix had the authority to hire additional personnel had he thought it necessary; that there are no safety devices that can be placed on a horse to keep it from stumbling and falling or that would keep the rider from falling if the horse did stumble or fall; that the topography of the Corralitos Ranch is such

that it is not suited to rounding up cattle by means other than horseback; that the usual and customary way of rounding up cattle in Dona Ana County, New Mexico, is by horseback.

These facts effectively controverted all of the allegations of negligence set forth in plaintiff's complaint and showed that there was no genuine issue as to any material fact.

The plaintiff, in opposition to defendant's motion for summary judgment, submitted three affidavits which disclosed that there were ranches in Dona Ana County, New Mexico, comparable to the Corralitos Ranch where they used jeeps and airplanes to work cattle. That there were few competent cowboys available for hire on April 5, 1969, or in the days immediately preceding. That Mr. Nix had on occasion bartered horses and cattle to obtain hay to feed the cattle on the Corralitos Ranch and that he did this because he did not have enough money to run the ranch.

Plaintiff's response failed to set forth specific facts showing that there was a genuine issue for trial.

Plaintiff's third point, that the trial court erred in refusing to allow further discovery, and plaintiff's fourth point, that the trial court erred in failing to rule on plaintiff's requested findings of fact, will be considered together. There is nothing in the record to indicate that these matters were ever presented to the lower court and, if so, what the court's rulings were. The facts necessary to present a question for review by an appellate court are established only through a transcript of the record certified by the clerk of the trial court. Any fact not so established is not before this court. Richardson Ford Sales v. Cummins, 74 N.M. 271, 393 P.2d 11 (1964). Section 20-2-1(20) (2), N.M. S.A.1953 (Repl. Vol. 4).

Affirmed.

It is so ordered.

SUTIN and COWAN, JJ., concur.

498 P.2d 686

Manuel B. LOPEZ, Plaintiff-Appellant,

v.

PHELPS DODGE CORPORATION, Employer and Insurer, Defendant-Appellee.

No. 893.

Court of Appeals of New Mexico.

June 16, 1972.

[redacted]

Patricio S. Sanchez, Serna & Sanchez, Silver City, for plaintiff-appellant.

Robert J. Young, Shantz, Dickson & Young, Silver City, for defendant-appellee.

OPINION

HENDLEY, Judge.

Plaintiff appeals the denial of workmen compensation benefits. It is plaintiff's contention that the uncontradicted evidence shows that plaintiff sustained an injury on October 27, 1970 while in the course and scope of his employment. The trial court found that the injury to planitiff's back did not arise out of and in the course of his employment and that the injury complained of was a natural and direct result of an off-the-job injury. We affirm.

[redacted] 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. Quintana v. East Las Vegas Municipal School District, 82 N.M. 462, 483 P.2d 936 (Ct.App.1971).

There was evidence that plaintiff had been visiting doctors prior to the date of the accident for which compensation is claimed. Plaintiff had seen one doctor on October 26th and "told him . . . [he] was getting running pains up to . . . [his] back." He told another doctor on the date of the purported accident he had had pain in his back for the past two weeks. He told the assistant shift foreman on October 5, 1970 that he had fallen off his house and hurt his back.

[redacted] We think the foregoing evidence to be substantial to support the trial court's finding.

[redacted] Plaintiff further contends that his testimony regarding the happening of the injury is not subject to reasonable doubt and cannot be arbitarily disregarded by the trial court. We would agree with plaintiff if his testimony were to stand alone, however, as we have heretofore stated there was substantial evidence to the contrary which supports the trial court's findings. We do not weigh conflicting evidence or credibility of the witnesses but only view such evidence and inferences to be drawn therefrom as will support the findings. Quintana v. East Las Vegas Municipal School District, supra.

Affirmed.

It is so ordered.

SUTIN, and HERNANDEZ, JJ., concur.

[redacted]

498 P.2d 687

STATE of New Mexico, Plaintiff-Appellant,

v.

Luis JARAMILLO et al., Defendants-Appellees.

No. 858.

Court of Appeals of New Mexico.

June 2, 1972.

[redacted]

David L. Norvell, Atty. Gen., Thomas Patrick Whelan, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

L. Michael Messina, Albuquerque, for defendants-appellees.

OPINION

WOOD, Chief Judge.

Defendants were charged by informations with violating § 40A–14–5, N.M.S.A. 1953 (Repl.Vol. 6, Supp.1971). The trial court held the statute was unconstitutional and quashed the informations. The State appeals. It is unnecessary to consider each of the constitutional issues urged since we hold that the portion of § 40A–14–5, supra, involved is without sufficiently definite standards to be enforceable and, thus, an unlawful delegation of legislative power which violates N.M.Const. Art. III, § 1. City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); see Continental Oil Co. v. Oil Conservation Com'n, 70 N.M. 310, 373 P.2d 809 (1962).

The applicable portion of § 40A–14–5, supra, reads:

> "A. Wrongful use of public property consists of:
>
> ". . . .
>
> "(2) remaining in or occupying any public property after having been requested to leave by the lawful custodian, or his representative, who has determined that the public property is being used or occupied contrary to its intended or customary use. . . ."

According to the State's bill of particulars:

> "The waiting room where defendants were lounging on the floor by sitting on the floor and lying on the floor was a sitting area intended for the appropriate and proper use of those persons whith [sic] appointments who were waiting to see the Governor, this was the intended use and customary use. Defendants were not in this category, nor was sitting on the floor and lying on the floor an intended use or customary use of the waiting room. This waiting room customarily closed at about 5:00 P.M. Defendants declined departure at this hour. The building closed at about 6:00 P.M., the Defendants declined departure at this hour."

There is no question but that a State may regulate the use and occupancy of public buildings. See Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352 (1940). Such regulation must, however, be precise and nar-

rowly drawn ". . . evincing a legislative judgment that certain specific conduct be limited or proscribed. . . ." Edwards v. South Carolina, supra. As examples only, see the South Carolina statute quoted in footnote 11 of Edwards v. South Carolina, supra; compare § 40A-14-5(A) (1), supra.

The statute in question, quoted above, does not declare that "remaining in or occupying" public property "contrary to its intended or customary use" is prohibited. The statute prohibits this conduct *only* after the custodian determines the use or occupancy is "contrary to its intended or customary use."

What is to serve as the basis for this determination? The custodian's own opinion, the prevailing community sentiment, an unknown administrative regulation? The statute does not provide a standard to guide the custodian in making his determination. The attempted delegation to the custodian of the authority to cause the "remaining in or occupancy" of a public property to become a crime fails because no standards have been provided. State ex rel. Holmes v. State Board of Finance, 69 N.M. 430, 367 P.2d 925 (1961).

There is a suggestion that the absence of standards does not bar the application of the statute because the custodian would act reasonably. This suggestion is answered by State ex rel. Holmes v. State Board of Finance, supra, which states:

> ". . . 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. . . ."

The State asserts it is the duty of this court to sustain the statute and that if a narrow interpretation of the statute within constitutional limits is possible, we are obligated to adopt such an interpretation as the meaning of the statute. See State v. McKinley, 53 N.M. 106, 202 P.2d 964 (1949). In connection with this suggested approach, the State urges us to reject words and substitute others. 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).

The State's contention is not directed to the absence of standards but at the meaning of "intended or customary use." This argument is directed to the question of whether "intended or customary use" is so vague as to violate due process. We have not answered this contention.

We hold only that § 40A-14-5(A) (2), supra, cannot be applied because there are no standards by which the custodian could determine a use or occupancy contrary to intended or customary use. In so holding, we recognize our duty to uphold the statute if possible. It is not possible in this case because of the total absence of standards.

The orders quashing the informations are affirmed.

It is so ordered.

SUTIN, and HERNANDEZ, JJ., concur.

498 P.2d 689

Robert H. WITZKE, Plaintiff-Appellant,

v.

John DETTWEILER, Defendant-Appellee.

No. 831.

Court of Appeals of New Mexico.

June 2, 1972.

Phil Krehbiel, James R. Toulouse, Toulouse & Moore, Albuquerque, for plaintiff-appellant.

John B. Tittmann, Keleher & McLeod, Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

Plaintiff's appeal in this medical malpractice case presents issues concerning (1) substantial evidence; (2) burden of proof; and (3) closing argument.

Substantial evidence.

Plaintiff, a long time patient of defendant, went to defendant's office on the morning of February 14, 1968, at which time he told defendant of the onset of pain. Upon the conclusion of the office visit, plaintiff, on the advice of defendant, returned home and went to bed. Around 9:00 a. m. on February 15th, plaintiff's wife telephoned defendant and informed defendant as to developments in plaintiff's condition subsequent to the office visit. About 4:00 p. m. on February 15th, defendant called at plaintiff's home, found plaintiff to be seriously ill, and immediately hospitalized him. An operation discovered and repaired a perforated ulcer.

Plaintiff sued defendant for malpractice. The evidence presented two theories of malpractice. First, a negligent diagnosis at the time of the office visit on February 14th; the diagnosis being pain of a pleuritic nature. Second, a negligent failure to care for plaintiff by failing to either immediately make a house call or hospitalize plaintiff after the wife's telephone call on the morning of February 15th.

The trial court found that defendant was not negligent and that: "In examining, diagnosing and treating plaintiff on February 14 and 15 defendant exercised the usual degree of care and skill common to medical doctors under the same circumstances." See N.M. U.J.I. 8.1. Plaintiff contends these findings are not supported by substantial evidence.

Plaintiff states: "Crucial to Plaintiff's case are the facts as they appeared to Defendant upon his initial examination of Plaintiff on February 14, 1968, when

Plaintiff first came to Defendant complaining of pain. . . . ." We agree. In addition, the information imparted to defendant by the telephone call on February 15th is also of importance. The facts, and defendant's response to them, are established by findings of fact which are not challenged. These unchallenged findings then are the facts before us on appeal. Wood v. Citizens Standard Life Insurance Company, 82 N.M. 271, 480 P.2d 161 (1971).

These unchallenged findings are:

"2. Defendant was plaintiff's family doctor since approximately 1951 and during that time diagnosed and treated plaintiff for various complaints including peptic ulcer, sinusitis, bronchitis, emphysema, pleurisy and heart disease.

"3. On February 14, 1968 plaintiff called at defendant's office accompanied by his then wife, and advised the defendant that while eating milk and toast for breakfast he had a severe epigastric pain which radiated lower into mid abdomen and pain in both costal arches. His main complaint was that he could not breath [sic].

"4. Defendant examined plaintiff in his examining room where plaintiff was seated on the examining table. Plaintiff walked into an outer examination room. He could not specifically locate or describe the pain.

"5. Defendant examined plaintiff's chest with a stethoscope which indicated congestion in both lower lungs. Plaintiff's abdomen was tender but not rigid. Plaintiff was not perspiring, was not pale and stood relaxed. There was no physical indication of extreme disabling pain.

"6. Defendant diagnosed plaintiff's complaints as pain of a pleuritic nature, prescribed medication and directed plaintiff to remain in bed.

"7. The following morning, February 15, 1968, plaintiff's then wife called defendant and advised that plaintiff had vomited during the night a dark substance which defendant assumed could be blood. When asked by defendant what his condition was otherwise, she replied about the same. Defendant advised plaintiff's wife that he would see plaintiff that day but to call him if his condition got worse. Defendant received no further call.

"8. In the afternoon of February 15, 1968, at approximately 4:00 o'clock pm defendant called at plaintiff's home and found him to be in a serious condition. He immediately obtained an ambulance and sent plaintiff to Presbyterian Hospital where later that day he was operated on by Dr. M. Brown. The operation disclosed a perforated duodenal ulcer which was successfully repaired."

The doctor who testified for plaintiff expressed an opinion as to malpractice on the basis of plaintiff's history and the facts as he knew them. This doctor also testified that under circumstances revealed by the unchallenged findings quoted above a diagnosis of perforated ulcer should not be made. This doctor also testified that as to defendant's asserted negligent failure to take immediate action after the telephone call on February 15th, ". . . it would depend on what the conversation was." That conversation, referred to in unchallenged finding 7, differs from the facts which were the basis of the doctor's opinion.

Further, plaintiff's doctor testified as to the standard of care. This standard was based on assumed facts which differ from the facts set forth in the unchallenged findings.

[redacted] We review the evidence in the light most favorable to the successful party in determining whether there is substantial evidence to support the findings. Aetna Casualty & Surety Co. v. Woolley, 83 N.M. 397, 492 P.2d 1260 (Ct.App.1972). The testimony of plaintiff's doctor, on the basis of facts revealed in the unchallenged findings, is substantial evidence which supports the finding of no negligence and the find-

ing that defendant exercised the requisite standard of care.

Since there is substantial evidence supporting the finding of no negligence, we need not review the testimony of other physicians and need not consider other findings challenged by plaintiff.

Burden of proof.

"The basis of Plaintiff's argument on this point is that Defendant failed to present in evidence competent expert testimony establishing that his actions were within the reasonable standards of medical practice for this community to rebut Plaintiff's expert testimony that they were not. . . ."

This contention assumes that plaintiff's evidence established a breach of the standard of care. The breach supported by plaintiff's witnesses is based on assumed facts which were not found to be facts by the trial court. Since the trial court's findings as to the information known to defendant are not challenged, the assumption that plaintiff's expert established a violation of the standard of care is incorrect.

Plaintiff is also incorrect in asserting that defendant had a duty to present evidence that his actions were within the standards of medical practice. Plaintiff had the burden of persuading the trial court that defendant committed malpractice. J. A. Silversmith, Inc. v. Marchiondo, 75 N.M. 290, 404 P.2d 122 (1965); Wallace v. Wanek, 81 N.M. 478, 468 P.2d 879 (Ct.App.1970). This burden of persuasion remained with plaintiff throughout the case. Cornell v. Cornell, 57 N.M. 380, 258 P.2d 1143 (1953); Navajo, etc., Co. v. Gallup St. Bank, 26 N.M. 153, 189 P. 1108 (1920).

Initially, plaintiff also had the burden of producing evidence. Once plaintiff presented evidence of malpractice by defendant, then defendant had the burden of producing conflicting evidence in order to avoid a decision on undisputed facts. See Mayfield v. Keeth Gas Company, 81 N.M. 313, 466 P.2d 879 (Ct.App.1970); compare Brown v. Safeway Stores, Inc., 82 N.M. 424, 483 P.2d 305 (Ct.App.1970). Defendant produced conflicting evidence; a portion of defendant's evidence is reflected in the unchallenged findings. Defendant did not have the burden of persuading the trial court of *no* malpractice; plaintiff did have the burden of persuading the trial court that malpractice occurred. Plaintiff failed in this burden.

Closing argument.

According to plaintiff, his counsel ". . . wanted to make a closing argument, but . . . his request was denied by the court, and the court issued its decision immediately. . . ." We do not reach the question as to the "right" to closing argument in a trial before the court. This question is not reached because plaintiff's contention is not supported by the record.

The record shows that counsel asked the trial court for permission to submit requested findings of fact and conclusions of law, together with legal authorities "rather than argue tonight." Defense counsel had no objection. The trial court then announced that it would find for defendant and told counsel they could submit requested findings if they desired to do so. This record shows that plaintiff did not wish to argue the case at the conclusion of the trial; it does not show a request for closing argument was denied; it does not show that plaintiff would not have been allowed to submit a brief at the time requested findings and conclusions were submitted.

The judgment is affirmed.

It is so ordered.

HENDLEY and COWAN, JJ., concur.

*