536 P.2d 265

STATE of New Mexico, Plaintiff-Appellee,

v.

Frankie Mae ROSS, Defendant-Appellant.

No. 1572.

Court of Appeals of New Mexico.
May 14, 1975.

Betty Read, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Santa Fe, Ira S. Robinson, Special Asst. Atty. Gen., Albuquerque, Louis Druxman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Defendant was convicted of robbery contrary to § 40A–16–2, N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1973), and she appeals. We reverse.

It is undisputed that the complaining witness met the defendant at a bar in Hobbs, that he bought her a drink, that he drove her to a place where they engaged in some sort of sexual activity, and that some of his money wound up in the possession of the defendant. The jury determined that a robbery occurred based upon testimony by the complainant that he was beaten and his billfold taken; based upon testimony by a policeman that when complainant reported the robbery he was "shook up"; based upon identification of defendant by an arresting officer who matched her description with that of the alleged "assailant" given by the complaining witness; and based upon rebuttal testimony concerning answers given by the defendant during cross-examination. It is this last bit of evidence, the admission of which is seriously questioned by defendant on appeal.

On cross-examination, defendant was asked if, on another occasion, she had picked up a Richard Nedler and if she had told a Melvin Miller that she picked up Richard Nedler. She denied any knowledge of these men. Defense counsel objected to this line of questioning.

The prosecution argued successfully to the court that this questioning went to impeachment because the defense had mentioned that two or three other charges were pending against defendant. The record, however, does not support this assertion of an opening by the defense. The defendant was then asked if she knew a Laura Mae Edwards and whether she and Laura Mae had taken money from a man in a

similar situation. Defendant admitted only knowing Laura Mae.

Melvin Miller, a polygraph examiner, was allowed by the court to testify for the prosecution on rebuttal under Rule 613 (b), New Mexico Rules of Evidence, § 20-4-613(b), N.M.S.A.1953 (Repl. Vol. 4, Supp.1973), on the theory that this testimony would be extrinsic evidence of a prior inconsistent statement. Miller testified that the defendant had told him that she and Laura Mae had approached Richard Nedler, that they had agreed on money for prostitution, that defendant had had intercourse with him, that Nedler had accused the two women of stealing his money, that defendant had told Miller she did not know Laura Mae had stolen any money, and that defendant later changed her story to Miller and told him that she had received narcotics bought with money stolen from Nedler.

Defense counsel objected to this testimony on the grounds that Miller was testifying to a collateral matter and that such testimony would be very prejudicial to the defendant.

First, was Miller's testimony about a collateral issue? The general test to determine whether or not an issue is collateral is whether the cross-examining party would be allowed to prove the matter in his case in chief. 2 Wharton, Criminal Evidence § 467 (13th ed. 1972); McCormick, Evidence § 36 (1972). If this test is not met, the tender is immaterial and irrelevant to the case at bar, and generally ought not to be admitted for reasons of litigational fairness and judicial economy.

It is evident from the foregoing description of the testimony of Melvin Miller, that the entire "impeachment" offer by the State concerned matters unconnected with the time, place and circumstances of the crime at bar. This at the very least, places the content of Miller's testimony beyond the scope of admissibility as direct evidence in the State's case in chief. Miller's testimony, therefore, concerned collateral matters.

Second, should Miller's testimony, being collateral, have been excluded? Evidence of a collateral offense is generally inadmissible in a criminal prosecution to establish a specific crime unless the case falls within an applicable exception. See State v. Aragon, 82 N.M. 66, 475 P.2d 460 (Ct.App.1970), and cases cited therein.

The only evidentiary rules under which the State argues that Miller's testimony could have been admitted are: exceptions to character evidence admissible to prove conduct [Rule 404(a) & (b), § 20-4-404, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973)]; habit or routine practice [Rule 406, § 20-4-406, N.M.S.A.1953 (Repl. Vol. 4, Supp. 1973)]; and conduct of the witness [Rule 608(a) & (b), § 20-4-608, N.M.S.A.1953 (Repl. Vol. 4, Supp.1973)]. The testimony was inadmissible under each and every one of these rules.

Rule 404(a), supra, allows the admission of evidence of an accused's character by the prosecution for the purpose of proving that she acted in conformity therewith on a particular occasion only to rebut character evidence offered by the accused. The record shows that the accused offered no such character evidence. Therefore, the State may not avail itself of the rebuttal benefits of this section.

Rule 404(b), supra, does allow, under certain circumstances, evidence of other crimes, wrongs or acts, not to prove that the person had a character trait which she acted in conformity with, but to prove motive, opportunity, intent preparation, plan, knowledge, identity, or absence of mistake or accident. None of these instances are applicable in this case. Even if Miller's testimony is taken as true, it shows only that the defendant hustled Nedler, that someone else stole money from Nedler and, perhaps, that the defendant is a heroin addict. See State v. Rowell, 77 N.M. 124, 419 P.2d 966 (1966); State v. Garcia, 83 N.M. 51, 487 P.2d 1356 (Ct. App.1971).

Rule 406, supra, contemplates the introduction of evidence concerning suffi-

cient instances of routine practice to warrant a finding that the practice was routine. The "sufficient in number" requirement was not satisfied, since only one instance of an arguably similar incident was given.

Rule 608(a), supra, is inapplicable in that it allows an attack upon the credibility of a witness only by reference to evidence of truthfulness or untruthfulness. Miller's testimony was admitted without the proper foundation in that the character of the defendant for truthfulness had not been attacked by opinion or reputation evidence or otherwise.

Rule 608(b), supra, while allowing evidence of specific instances of conduct to attack a witness' credibility, carries with it the requirement that the evidence not be extrinsic. This restriction is supplied to prevent prejudice. See State v. Marquez, 87 N.M. 57, 529 P.2d 283 (Ct. App.1974), for a discussion of this limitation. Miller's testimony in this case was purely extrinsic and inadmissible under Rule 608(b), supra.

It must be noted at this point that the State based its argument for admissibility at trial on Rule 613, supra. This rule provides for the admissibility of extrinsic evidence of a prior inconsistent statement by a witness for impeachment purposes. The scope of this rule is limited by the necessary balancing of probativeness against prejudice. The extrinsic evidence contemplated by the rule must be material and relevant. State v. Clevenger, 27 N.M. 466, 202 P. 687 (1921). Further, when the extrinsic evidence reaches collateral matters, it is not admissible under this rule, but rather, a cross-examiner is bound and limited by whatever answers he elicits from the witness. State v. Clevenger, supra; State v. Mordecai, 83 N.M. 208, 490 P.2d 466 (Ct.App.1971).

It is blatantly apparent from the record that when the State offered Miller's testimony to "impeach" the defendant, the real purpose of the testimony was to show the jury that the defendant was a prostitute, a heroin addict and a thief. In essence, the State succeeded in demonstrating highly prejudicial testimony through rebuttal evidence which it could not prove directly. The prosecution's effort ". . . was to apprise the jury of the defendant's prior involvement in an incident under circumstances the same or amazingly similar to the one before it. The effect could hardly be other than devastating to the defense." Bryant v. State, 301 N.E.2d 179 (Ind. 1973).

Finally, we recognize and do not depart from the standard of Rule 103(a), § 20–4–103(a), N.M.S.A.1953 (Repl. Vol. 4, Supp.1973), that "[e]rror may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected . . .." The question before this court is not whether the defendant is guilty or innocent but whether she had a fair trial. State v. Gomez, 75 N.M. 545, 408 P.2d 48 (1965); State v. Vallejos, 86 N.M. 39, 519 P.2d 135 (Ct. App.1974).

As State v. Garcia, supra, states:

> "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. . . ." 83 N.M. at 53, 487 P.2d at 1358.

The purpose of a trial is to determine the guilt or innocence of a defendant. In line with this, one of the most important principles or policies behind the Rules of Evidence is to insure that the jury bases its verdict on relevant and material facts, and not on collateral information which leads the jury to believe the defendant is of bad character and therefore more likely than not to be guilty of the charge at issue.

We hold that the trial court did not properly balance the probative value of

the collateral testimony against its illegitimate tendency to prejudice. Rule 403, § 20-4-403, N.M.S.A.1953 (Repl. Vol. 4, Supp. 1973); State v. Waller, 80 N.M. 380, 456 P.2d 213 (Ct.App.1969); see State v. Rowell, supra, see State v. Garcia, supra. This is true especially in view of the fact that the case at bar was essentially a swearing contest between the defendant and the complaining witness, both of whose versions of the events of the night were equally plausible or implausible. The improper rebuttal evidence could easily have tipped the balance against the defendant. The defendant's substantial right to a fair trial was thereby violated.

The only way to insure the defendant a fair trial in this case is to award her a new trial at which all objectionable matters shall be excluded, consistent with this opinion.

The judgment and sentence are reversed and the case remanded.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

536 P.2d 269

STATE of New Mexico, Plaintiff-Appellee,

v.

Ricky TANTON, Defendant-Appellant.

No. 1658.

Court of Appeals of New Mexico.

May 7, 1975.

Certiorari Granted June 2, 1975.

Leo C. Kelly, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Ralph W. Muxlow, II, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

This appeal is concerned with the provision of N.M.Const., Art. II, § 15 which provides that no person shall "be twice put in jeopardy for the same offense * * *." The issue presented is whether a muncipal court conviction may bar a subsequent district court prosecution. On the issue presented we hold that the principles of double jeopardy apply.

Betsy Guzman was struck and killed by an automobile in Grants, New Mexico. Defendant was arrested and charged with the violation of several municipal ordinances. While the record is not clear, the stipulation of counsel and the transcript of the municipal court hearing indicate the municipal charges were filed on February 25, 1974. On February 26, 1974 a criminal complaint was filed in magistrate court charging defendant with homicide by vehicle. Section 64–22–1, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2). It does not appear that further action was taken pursuant to the criminal complaint. On March 7, 1974 a grand jury indictment was filed, also charging defendant with homicide by vehicle.

A hearing on the municipal charges was held on March 27, 1974. Defendant was found guilty of: (1) driving while under the influence of intoxicating liquors, (2) leaving the scene of an accident with injuries or death, and (3) failure to report an accident.

On the basis of the municipal court convictions, defendant moved that the indictment be dismissed, claiming the district court prosecution was barred by the constitutional prohibition against double jeopardy. The district court denied the motion after making findings which are not challenged. We granted an interlocutory appeal, § 21–10–2.1(A)(3), N.M.S.A.1953 (Repl.Vol. 4, Supp.1973), to consider whether the prohibition against double jeopardy applies to the issue presented.

The trial court found that the municipal court was a lawfully established court and concluded that the municipal court had jurisdiction to convict and sentence defendant on the three charges of which defendant was found guilty. The conclusion as to

the municipal court's jurisdiction is not attacked.

The trial court also found that defendant had appealed his municipal court convictions to the District Court of Valencia County and that the appeal was pending before that court. The parties did not request and the district court made no finding concerning the effect, if any, of this appeal on the double jeopardy issue. The district court necessarily decided the double jeopardy issue on the basis that the municipal court convictions were valid. Both parties proceed in this appeal on the basis that the municipal court convictions are valid. We decide the issue presented on the same basis. We express no opinion on the applicability of the double jeopardy prohibition to a district court prosecution when a prior municipal court conviction has been reversed on appeal.

The trial court found:

"7. The evidence presented * * * establishes that the traffic violations of which TANTON was found guilty and sentenced and the charge of vehicular homicide in the District Court * * * are based on the same transaction or occurrence.

"8. The charge of vehicular homicide in the District Court * * * is based on the same acts of TANTON as were involved the traffic violations of which he was found guilty and sentenced in the Municipal Court * * *.

"9. The charge of vehicular homicide in the District Court * * * is based on events which occurred at the same time and in the same location as those on which TANTON was convicted in the Municipal Court * * *."

On the basis of these findings, the trial court concluded that prosecution of defendant on the vehicular homicide charge would not subject defendant to double jeopardy because: (1) the municipal court and district court "crimes have different elements that must be proved" and (2) driving while under the influence of intoxicating liquor "as pertains to this case" was not a lesser offense included within the vehicular homicide charge. We agree with these conclusions in this case. These conclusions, however, do not dispose of the double jeopardy issue.

Defendant asserts that a conclusion of double jeopardy was required by the trial court's unchallenged finding that the municipal and district court charges involve the "same transaction".

The constitutional prohibition is against putting a person twice in jeopardy for the "same offense". The difficulty is in determining what is the same offense. Compare the concurring opinion of Justice Brennan with the dissenting opinion of Chief Justice Burger in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Various approaches have been used in determining whether the same offense is involved in a particular case. The result is that the prohibition against double jeopardy is not one rule, but several, each applying to a different situaton. State v. Medina (Ct.App.) 87 N.M. 394, 534 P.2d 486, decided April 2, 1975.

We discuss several of the rules which have been applied in New Mexico.

(a) Collateral estoppel. This test looks to all the relevant matters and determines whether or not the jury, in reaching its verdict in the first trial, necessarily or actually determined the same issues which the State attempts to raise in the second trial. State v. Tijerina, 86 N.M. 31, 519 P. 2d 127 (1973), cert. denied 417 U.S. 956, 94 S.Ct. 3085, 41 L.Ed.2d 674 (1974); State v. Nagel (Ct.App.) 87 N.M. 434, 535 P.2d 641, decided March 5, 1975. Collateral estoppel is not applicable because it bars litigation in a second trial of issues necessarily or actually determined in a first trial. That is not the situation in this case.

(b) Same evidence. The test is whether the facts offered in support of one offense would sustain a conviction of a second offense. If either charge requires the proof of facts to support a conviction which the other does not, the offenses are not the

same. Owens v. Abram, 58 N.M. 682, 274 P.2d 630 (1954), cert. denied 348 U.S. 917, 75 S.Ct. 300, 99 L.Ed. 719 (1955). Additional citations to the same evidence rule appear in the opinions in State v. Maestas, 87 N.M. 6, 528 P.2d 650 (Ct.App.1974). Justice Brennan's concurring opinion in Ashe v. Swenson, supra, characterizes this test as obviously deficient. "It does not enforce but virtually annuls the constitutional guarantee. * * * Even a single criminal act may lead to multiple prosecutions if it is viewed from the perspectives of different statutes. * * *" 397 U.S. at 451, 90 S.Ct. at 1198. The trial court correctly ruled that the same evidence test would not bar the prosecution because the vehicular homicide charge would require proof of facts which were not required for the municipal court conviction.

(c) Lesser included offense. Conviction or acquittal of a lesser offense necessarily included in a greater offense bars prosecution for the greater offense. Ex parte Williams, 58 N.M. 37, 265 P.2d 359 (1954); State v. Medina, supra. The trial court correctly held this test could not be applied. This test could not apply at this stage of the proceedings because the vehicular homicide is charged in the alternative. The indictment charges the homicide occurred "while violating section 64–22–2 or 64–22–3 * * *." Section 64–22–2, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2) pertains to driving while under the influence of intoxicating liquor and while under the influence of any narcotic drug. See State v. Raley, 86 N.M. 190, 521 P.2d 1031 (Ct.App. 1974). Section 64–22–3, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2) pertains to reckless driving. The municipal court conviction for driving while under the influence of intoxicating liquor could be a lesser offense included within the vehicular homicide charge, but because the State has charged the homicide in three alternatives it is not necessarily included. See State v. Trujillo, 85 N.M. 208, 510 P.2d 1079 (Ct.App. 1973).

(d) Merger of offenses. "The test of whether one criminal offense has merged in another is not * * * whether the two criminal acts are successive steps in the same transaction but whether one offense necessarily involves the other." State v. Martinez, 77 N.M. 745, 427 P.2d 260 (1967); State v. Dosier (Ct.App.) 88 N.M. 32, 536 P.2d 1088, decided March 26, 1975. The merger test is not applicable because it is used in cases where multiple charges are brought in a single trial. The merger test is used to determine when the prohibition against double punishment is to be applied.

(e) Same transaction. Although this test was rejected in State v. Goodson, 54 N.M. 184, 217 P.2d 262 (1950), it was applied in State v. Quintana, 69 N.M. 51, 364 P.2d 120 (1961). It is "* * * 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 criminal act, and inspired by the same criminal intent, which is an essential element of each offense, they are susceptible of only one punishment." 69 N.M. at 57, 364 P.2d at 124. Decisions applying this test are cited in State v. Maestas, supra. Justice Brennan urges a form of this approach in his concurring opinion in Ashe v. Swenson, supra.

The principal shortcoming of the "same transaction" test is that any sequence of conduct can be defined as an "act" or "transaction". This test would make the defense of double jeopardy depend on how "act" was defined. Dissenting opinion in State v. Maestas, supra. The utility of "transaction" "depends upon the way we define it." Comment, Twice in Jeopardy, 75 Yale L.J. 262, 277 (1965–66). Thus, State v. Boyd, 527 P.2d 128 (Or.App.1974) held that possession of a stolen television set and illegal possession of amphetamines at the same time and place constituted the same act or transaction. State v. Matischeck, 531 P.2d 737 (Or.App.1975) holds that driving under the influence of intoxi-

cating liquor and possession of drugs at the same time and place constituted a single act or transaction. We fail to understand how drunk driving and possession of drugs can be held to be the same act. We agree with the dissent in *Boyd*, supra, that the result reached is "inappropriate to the ends of justice * * *."

Because of the difficulties in defining "act" or "transaction" we do not apply the "same transaction" test in this case.

We make no attempt to position the above rules within a structure for deciding questions of double jeopardy. We have not attempted to list all the various rules utilized in deciding a double jeopardy issue. As an example, the prohibition against splitting one offense into many parts for the purpose of multiple prosecutions, State v. Romero, 33 N.M. 314, 267 P. 66 (1928). For a general discussion of the problems involved in defining and applying the concept of double jeopardy see Sigler, *Double Jeopardy,* Cornell University Press (1969). What we have attempted to demonstrate is that the concept of double jeopardy has many aspects.

Because of the various aspects of double jeopardy and because of the difficulty in defining "same offense", new approaches have been urged. One such approach urges adoption of the same transaction test as "the" test in multiple prosecution cases. Another approach urged is the single criminal episode test. See Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973), vacated and remanded 414 U.S. 808, 94 S. Ct. 73, 38 L.Ed.2d 44 (1973), on remand 455 Pa. 622, 314 A.2d 854 (1974), cert. denied 417 U.S. 969, 94 S.Ct. 3172, 41 L.Ed.2d 1139 (1974). We do not see how this test would be an improvement on the "same transaction" test; the definitional difficulties remain. There is the view that there should be constitutionally compelled joinder of related offenses. See Comment, Twice in Jeopardy, supra, at 292. This approach has arguable merit as a procedural rule. See A.B.A. Standards, Joinder and Severance, § 1.3 (Approved Draft 1968); 10 U.L.A., Uniform Rules of Criminal Procedure, Rule 471 (1974). Our rules of criminal procedure do not take the compulsory joinder approach. Sections 41–23–10 and 41–23–11, N.M.S.A.1953 (2d Repl.Vol. 6, Supp. 1973). A more basic objection is that procedural rules of joinder are not a part of the Constitution.

Because of its various aspects and its definitional difficulties, we look to the policies behind the prohibition against double jeopardy. Comment, Twice in Jeopardy, supra, 266–267 states:

> "Several policies underlie the double jeopardy prohibition. First, guilt should be established by proving the elements of a crime to the satisfaction of a single jury, not by capitalizing on the increased probability of conviction resulting from repeated prosecutions before many juries. Thus reprosecution for the same offense after an acquittal is prohibited. Second, the prosecutor should not be able to search for an agreeable sentence by bringing successive prosecutions for the same offense before different judges. Thus reprosecution after a conviction is prohibited. Third, criminal trials should not become an instrument for unnecessarily badgering individuals. Thus the Constitution forbids a second trial—a second jeopardy—and not merely a conviction at the second trial. Finally, judges should not impose multiple punishment for a single legislatively defined offense. Thus multiple punishment for the same offense at a single trial is prohibited."

Here we are concerned with the second of the policies in the above quotation—that of multiple prosecutions. Concerning this policy, State v. Tijerina, supra, states:

> "It should not be inferred from this opinion that this Court intends to encourage or approve piecemeal prosecution. Such disorderly criminal procedures involve a myriad of problems which threaten the existence of our judicial system. The risk of prejudice to the accused, and the waste of time inherent in multiple trials, both perpetuate delays in the

judicial process and unconscionable expenditures of public funds, all of which could be avoided by prosecutors getting their facts straight, their theories clearly in mind and trying all charges together."

Commonwealth v. Campana, supra, states the principal purpose of the double jeopardy clause is to prevent multiple prosecutions. Sigler, Double Jeopardy, supra, at 155–156 states: "Double jeopardy is an important limitation upon the discretion of the prosecutor because it determines the number of times that a criminal action can be instituted * * *. The critical question of double jeopardy concerns the number of times that the defendant may be brought to trial." The question of multiple prosecutions is critical because:

> "In more recent times, with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction. * * * As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced."

Ashe v. Swenson, supra, footnote 10.

The policy against multiple prosecutions, in this case, is not sought to be applied in a situation where there are multiple victims. See dissenting opinion of Chief Justice Burger in Ashe v. Swenson, supra. The policy is sought to be applied to events which occurred at the same time and place, which involve only one victim at that time and place; and events which have already provided the basis for three convictions. We hold the policy against multiple prosecutions may prohibit the prosecutor from seeking a fourth conviction.

If the municipal court convictions are affirmed on appeal, the district court prosecution is barred. We cannot decide whether double jeopardy bars the district court prosecution if the municipal court convictions are reversed, because application of the double jeopardy prohibition might depend on the basis for the reversal. Depending on the outcome of the appeal, we hold that the prior municipal court conviction may bar the district court prosecution for vehicular homicide.

We recognize a practical consequence of our decision is to require cooperation between public prosecutors. Such cooperation is required because a municipality, in prosecuting for violation of its ordinances, may by the fact of that prosecution enable a defendant to escape the consequences of an act amounting to a felony. The need for cooperation is demonstrated in this case where a district court felony charge was pending prior to the municipal court convictions.

The conclusion of the trial court that the vehicular homicide charge is not barred by the double jeopardy prohibition is reversed. The cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

536 P.2d 274

BOARD OF EDUCATION OF the CITY OF ALBUQUERQUE, New Mexico, Appellant,

v.

NEW MEXICO STATE BOARD OF EDUCATION and Catherine Whitman, Appellees.

No. 1758.

Court of Appeals of New Mexico.

May 14, 1975.

Graham E. Evans, Botts & Cole, Albuquerque, for appellant.

Jerry Wertheim, Susan P. Graber, Jones, Gallegos, Snead & Wertheim, P. A., Santa Fe, for appellee Whitman.

Toney Anaya, Atty. Gen., Santa Fe, John A. Templeman, Thomas A. Simons, IV, Sp.

Asst. Attys. Gen., for appellee State Dept. of Ed.

OPINION

HENDLEY, Judge.

Catherine Whitman was discharged from her employment as a teacher in the Albuquerque Public School System. After a hearing before the Board of Education of the City of Albuquerque (Local Board), the discharge was sustained. Ms. Whitman appealed to the State Board of Education (State Board), pursuant to § 77-8-17, N.M.S.A.1953 (Repl.Vol. 11, pt. 1, 1968, Supp.1973). A hearing de novo was held before a hearing officer appointed by the State Board. He submitted a detailed narrative of the facts adduced at the hearing to the State Board. The narrative is most favorable to Ms. Whitman's position. However, the hearing officer reluctantly concluded with a recommendation that the Local Board's decision be affirmed because ". . . the State Board is not allowed the luxury of second-guessing the local administration or local board . . . ." The State Board did not follow the recommendation and reversed the Local Board. The Local Board appeals alleging that the State Board's decision is (1) arbitrary, capricious and unreasonable, (2) not supported by substantial evidence and (3) not made in accordance with law. See § 77-8-17 (J), supra. We affirm.

The determination of whether a decision is arbitrary, capricious and unreasonable is not a question separate and apart from whether the decision is supported by substantial evidence. See Wickersham v. New Mexico State Board of Education, 81 N.M. 188, 464 P.2d 918 (Ct. App.1970).

We briefly state the facts and circumstances leading up to the teacher's discharge. Ms. Whitman had been a teacher in the Albuquerque schools for eleven years prior to the 1972-73 school year. Her performance during these years had been exemplary. Due to an unstable blood sugar level, she took leave of absence during the 1972-73 school year and part of the 1973-74 school year. Her physician approved her returning to work in January of 1974. In her absence Ms. Whitman's sixth grade class had been taught by a young, attractive and vibrant first-year teacher with whom the class, as one witness put it, had "a love affair." The students and substitute teacher were given one day's notice that Ms. Whitman would be returning although the principal was aware of this fact for approximately one month. Upon Ms. Whitman's return, the students became hostile and openly rebellious; they were determined to "get rid of her." It is undisputed that Ms. Whitman was unable to control and maintain order and discipline in the class thereafter. However, it is also apparent that circumstances beyond Ms. Whitman's control—the departure of the substitute teacher, whom the youngsters idolized—were at the root of the problem, and that the circumstances therefore were unique. The situation was further compounded by the failure of the principal to prepare the class for Ms. Whitman's return.

The instant case is one of those situations where a decision by the State Board either affirming or reversing the Local Board's determination would be upheld by this court as being supported by substantial evidence and hence, reasonable. The decision with regard to whether to discharge a teacher who admittedly, but excusably and understandably is unable to control her class due to a short-lived problem yet whose performance is otherwise more than satisfactory is basically one of policy to be determined by the State Board in the final analysis. We are not permitted to substitute our judgment for that of the State Board. Wickersham v. New Mexico Board of Education, supra. We accordingly hold that the State Board's decision is supported by substantial evidence and is not arbitrary, capricious or unreasonable.

We next determine whether the State Board's decision was made in accord-

ance with law. The Local Board contends that the statutory and regulatory scheme does not permit the State Board to disregard its designated hearing officer's final recommendation. The Local Board relies on Regulation 74–7, adopted by the State Board, and governing appeals to the State Board under § 77–8–17, supra. The Local Board specifically relies on language which provides that the hearing officer prepare and submit a formal report to the State Board recommending findings of fact and conclusions of law which are suggested as the decision of the State Board and then goes on to provide that, " . . . The State Board shall either adopt the suggested findings of fact and conclusions of law, or modify said findings of fact and conclusions of law, and render its decision. . . ." It is the Local Board's contention that this language only permits modification of the hearing officer's recommendation and that in the instant case the State Board totally disregarded the hearing officer's recommendation.

The State Board replies that the word, modify, in the regulation, is broad enough to encompass the alteration of the hearing officer's recommendation in the manner demonstrated in the case at bar. We agree with the State Board for several reasons, not the least of which is that the record show that the instant hearing officer erroneously misconceived the nature of his decision. In addition, the legislative and administrative scheme indicates that the State Board is in no way bound by the recommendations of its designated hearing officer. Compare Coe v. City of Albuquerque, 76 N.M. 771, 418 P.2d 545 (1966).

That the hearing officer misconceived the nature of his decision is demonstrated by his comment that " . . . the State Board is not allowed the luxury of second-guessing the . . . local board . . . ." He obviously felt that the State Board was merely entitled to *review* the decision of the Local Board and was duty bound to affirm it if supported by substantial evidence. Indeed, this was the case under prior law. Section 77–8–17, N.M.S.A.1953 (Repl.Vol. 11, pt. 1, 1968); Fort Sumner Municipal School Board v. Parsons, 82 N.M. 610, 485 P.2d 366 (Ct.App. 1971). However, Laws 1973, ch. 124, § 2 repealed the old § 77–8–17 and enacted a new § 77–8–17 in its stead which provides that "[a]ppeals from the decision of the local school board shall be decided after a de novo hearing before the state board of education. . . ." Section 77–8–17(C), N.M.S.A.1953 (Repl.Vol. 11, pt. 1, 1968, Supp.1973). "The issues to be determined by the state board are as follows: . . . (2) whether the local school board has established, by a preponderance of the evidence presented, that sufficient cause existed for the decision of the local school board." Section 77–8–17(G), N.M.S.A. 1953 (Repl.Vol. 11, pt. 1, 1968 Supp.1973). The "de novo" provisions of the new law allow the State Board to proceed with the action as if it had been originally commenced at the level of the State Board. Cf. City of Albuquerque v. Sanchez, 81 N. M. 272, 466 P.2d 118 (Ct.App.1970). The State Board is thus allowed to make a decision on the evidence presented to it independent of that of the Local Board. Fort Sumner Irrigation District v. Carlsbad Irrigation District, 87 N.M. 149, 530 P.2d 943 (1974); Southern Union Gas Co. v. Taylor, 82 N.M. 670, 486 P.2d 606 (1971). To the extent that the hearing officer felt obligated to affirm the decision of the Local Board based on a substantial evidence-like test, he was in error. The State Board did not have to follow his recommendation.

Additionally, the text of the very regulation relied upon by the Local Board supports this conclusion. Immediately following the language that the State Board shall either adopt or modify the hearing examiner's suggestions, the regulation goes on to state that "[i]f it is not satisfied with the report, the Board may order the record transcribed, review the evidence independently, hear new evidence if necessary, and then render its decision." Clearly, this

gives the State Board wide latitude with regard to the hearing examiner's recommendations.

We hold that the determination of the State Board to wholly alter the suggestions of its hearing officer was in accordance with law.

Oral argument in this case is deemed to be unnecessary.

We have reviewed appellant's other arguments and find them to be without merit. The cause is affirmed.

It is so ordered.

WOOD, C. J., and HERNANDEZ, J., concur.

536 P.2d 278

STATE of New Mexico, Plaintiff-Appellee,

v.

Gilbert Arthur ALDERETE, Defendant-Appellant.

No. 1646.

Court of Appeals of New Mexico.

May 14, 1975.

Harry N. Relkin, Louis G. Stewart, Jr., Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Santa Fe, Lanny D. Messersmith, Charles E. Roybal, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant was convicted of possession of heroin. Section 54–11–23, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, 1973 Supp.). He appeals. We affirm.

Defendant was first arrested on a criminal complaint for assault with intent to murder. The police officer "patted him down for a weapon", did not find any, put cuffs on him and put him in the back seat of the car. After he was taken to the booking desk at the police station, he was searched and heroin was found on him.

A. *The arrest was legal.*

Defendant moved to suppress the evidence on the grounds that the arrest warrant was not based on probable cause, and, therefore, the subsequent search and seizure was unlawful. The motion was denied.

The arrest warrant was based on the following affidavit of the detective who signed the complaint.

> Affiant states that he is a full time law enforcement officer with the Albuquerque Police Department and that he has examined the official police reports from the Albuquerque Police Department on the above incident and is informed and therefore believes that on November 2, 1973 the Defendants Lorenzo Sedillo and Gilbert Alderette did enter the dwelling at 426 Parkway S. W. while armed with a deadly weapon, to wit: a firearm and did shoot John Rascon. Further, that John Rascon did suffer nine bullet wounds. Affiant further states that Rascon did identify the Defendants as the assailants to both officer G. Cadena and Detective G. Fisk.

Before an arrest warrant may be issued, the magistrate issuing it "must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256 (Ct.App.1974). See § 41–23–14(c), N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1973). The test for "probable cause" is whether the police officer has reasonable grounds for belief of defendant's guilt. State v. Sanchez, 82 N.M. 585, 484 P.2d 1295 (Ct.App.1971).

What constitutes reasonable grounds for belief? It is a state of facts that would lead the police officer, "as a man of reasonable caution," to believe the defendant committed the crime for which he is arrested. State v. Sanchez, supra, 82 N.M. at 587, 484 P.2d at 1297. See, also, State v. Loyd, 92 Idaho 20, 435 P.2d 797 (1967); People v. Montano, 184 Cal.App.2d 199, 7 Cal.Rptr. 307 (Ct.App.2nd Dist.1960).

In the instant case, the facts came from official police reports. "It is well settled that police officers may rely on information coming to them from official sources [citations omitted] as well as other known reliable sources [citations omitted]." People v. Schellin, 227 Cal.App.2d 245, 38 Cal. Rptr. 593, 597 (Ct.App.1st Dist.1964), cert. denied, 379 U.S. 1003, 85 S.Ct. 726, 13 L.Ed. 2d 704 (1965); People v. Melchor, 237 Cal. App.2d 685, 47 Cal.Rptr. 235 (Ct.App.1st Dist.1965).

A telephone call, followed by a letter, received by the police department from the Federal Bureau of Investigation and connecting the defendant with the crime, was held to be information coming from a responsible official source, and, therefore,

it was sufficient to constitute probable cause and reasonable grounds for arrest. Walker v. State, 237 Md. 516, 206 A.2d 795 (1965).

In the instant case, the affidavit discloses that the police reports revealed to the affiant detective that the victim identified defendant as one of two men who shot him. This identification would have provided probable cause if given directly to the affiant detective. United States v. Smith, 467 F.2d 283 (9th Cir. 1972), cert. denied, 410 U.S. 912, 93 S.Ct. 974, 35 L.Ed.2d 274; Jackson v. State, 470 S.W.2d 201 (Tex. Cr.App.1971), cert. denied, 405 U.S. 1068, 92 S.Ct. 1512, 31 L.Ed.2d 798; Allison v. State, 62 Wis.2d 14, 214 N.W.2d 437 (1974), cert. denied 419 U.S. 1071, 95 S.Ct. 659, 42 L.Ed.2d 667. The fact that the affiant detective's information was double hearsay did not keep that information from providing probable cause. State v. Perea, 85 N.M. 505, 513 P.2d 1287 (Ct.App.1973).

The arrest warrant was based on probable cause. It was a legal arrest and the heroin seized was admissible in evidence.

B. *The evidence was probable and believable.*

Defendant contends that the evidence was inherently improbable and unbelievable, and that the conviction denied defendant due process of law. The fact that the police did not find heroin on the defendant's person until they arrived at the station house, merely discloses "unusual circumstances". A pat-down search at the scene of arrest might not disclose small packets of heroin, whereas an inventory, or booking search, more likely would. The falsity of the evidence can be demonstrated only by resort to inferences which are unsupported in the record. Therefore, this claim has no merit. See, State v. Till, 78 N.M. 255, 430 P.2d 752 (1967).

Affirmed.

It is so ordered.

WOOD, C. J., and LOPEZ, J., concur.

536 P.2d 280

STATE of New Mexico, Plaintiff-Appellee,

v.

Guy B. MYERS, Defendant-Appellant.

No. 1545.

Court of Appeals of New Mexico.

May 7, 1975.

Raymond W. Schowers, Horn, Schowers & Ginsburg, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Santa Fe, Jay F. Rosenthal, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Late in the evening of November 23, 1973, at approximately 11:00 p. m., Cheryl Lynn Hosier, the two-year-old child of Howard Bruce Hosier, was a passenger in the front seat of a car being driven by her father. Mr. Hosier was driving a 1968 Buick and was traveling east on Montgomery Boulevard in Albuquerque. The defendant was, at the same time, driving a 1967 Oldsmobile northbound on Wyoming Boulevard. The evidence is undisputed that the defendant ran a red light at the intersection of Montgomery and Wyoming and hit the Hosier vehicle on the passenger side. As a result of this impact, Cheryl Lynn Hosier was thrown from her vehicle and killed.

Defendant was convicted by jury of homicide by vehicle pursuant to § 64–22–1, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 2). This section defines homicide by vehicle as "the killing of a human being in the unlawful operation of a motor vehicle." The acts of unlawful operation relied upon by the state to support the conviction were: (1) driving under the influence of intoxicating liquor or drugs [a separate violation under § 64–22–2, N.M.S.A.1953 (2d Rep.Vol. 9, pt. 2)] and (2) reckless driving [also a separate violation under § 64–22–3, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 2)].

Defendant argues five points for reversal: (1) substantiality of the evidence; (2) violation of defendant's right by procedures followed in testing his blood; (3) court error in refusing certain of defendant's tendered jury instructions; (4) failure of the state to lay a proper foundation for the introduction of evidence relating to defendant's blood alcohol content; and (5) failure of the state to lay a proper foundation for the introduction of evidence involving a "breathalizer" test.

(1) *Substantiality of the evidence*

Defendant asserts the evidence is insufficient as to three items: (a) the evidence of driving while under the influence of intoxicating liquor; (b) evidence of reckless driving; and (c) evidence of criminal intent. We disagree.

(a) Section 64–22–2, supra, states in part:

> "It is unlawful for any person who is under the influence of an intoxicating liquor to drive or be in actual physical control of any vehicle within this state."

Three different types of tests were conducted following defendant's arrest to determine his degree of intoxication. The various tests revealed .05%, .10% and .12% alcohol in the defendant's blood. These tests were made shortly after the defendant's arrest.

The term "under the influence" has been interpreted to mean "* * * that to the slightest degree defendant was less able, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle an automobile with safety to himself and the public." State v. Dutchover, 85 N.M. 72, 509 P.2d 264 (Ct.App.1973).

Section 64–22–2.10, N.M.S.A. 1953 (2d Repl.Vol. 9) reads in part:

> "If the blood of the person tested contains:
>
> "* * *
>
> "(3) one-tenth of one per cent [.10%] or more by weight of alcohol, it shall be presumed that the person was under the influence of intoxicating liquor."

This language has been interpreted to mean that such a test result is prima facie proof, sufficient to go to the jury, that defendant was under the influence of intoxicating liquor. State v. Trujillo, 85 N.M. 208, 510 P.2d 1079 (Ct.App.1973). This case further notes that the evidence giving rise to the presumption is to be considered with other evidence in the case on the question of being under the influence and the presumption may be rebutted by such other evidence. 85 N.M. 208, 213, 510 P.2d 1079.

There was sufficient evidence for a jury to determine as a matter of fact that the defendant was so intoxicated as to be under the influence of alcohol, and thereby guilty of violating § 64–22–2, supra.

(b) Section 64–22–3, supra, states in part:

> "Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard of the rights or safety of others and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property is guilty of reckless driving."

The record shows that defendant was not driving at excessive speed for the area; nor was the defendant's vehicle shown to be operating oddly. We do not depart from reasoning in State v. Harris, 41 N.M. 426, 70 P.2d 757 (1937), to the effect that a death caused by mere negligence, not amounting to a reckless, willful and wanton disregard of consequences to others, lays no foundation for criminal prosecution.

Nevertheless, this court reviews evidence in a conviction for homicide by vehicle in the light most favorable to the verdict. State v. Trujillo, supra; State v. Dutchover, supra. We will not attempt to substitute our view of the facts for that of the jury. And while we agree that the mere running of a red light would not, alone, constitute reckless driving, the circumstances of intoxication attending this act might reasonably lead a jury to a finding of recklessness. There is substantial evidence on the record to indicate that the defendant was either intoxicated or under the influence of alcohol at the time of the accident.

As was stated in State v. Sisneros, 42 N.M. 500, 507–8, 82 P.2d 274, 278 (1938), the act of a person who drives an automobile on the highway in an intoxicat-

ed condition "may be such willful, wanton and criminal negligence and disregard for the safety and lives of others, as that a jury would be warranted in finding him guilty of manslaughter if his operation of the automobile while intoxicated is the proximate cause of the death of another."

There is evidence that defendant, while driving "under the influence," caused an accident; that Cheryl Lynn suffered injuries in the accident; and that Cheryl Lynn died from those injuries. This is substantial evidence of proximate cause. State v. Dutchover, supra.

There is substantial evidence, therefore, of reckless driving.

(c) Defendant next argues that he lacked the requisite criminal intent. "* * * [C]riminal intent, *a mental state of conscious wrongdoing,* is a necessary element of [homicide by vehicle] and one which must be proven." State v. Jordan, 83 N.M. 571, 494 P.2d 984 (Ct.App. 1972). There is really no conflict since the jury was adequately instructed on the element of criminal intent:

> "* * * Voluntarily driving a vehicle while under the influence is an act malum in se and this action is substantial evidence of criminal intent." State v. Dutchover, supra.

Since the jury could have found, under part (a), supra, that the defendant was driving while under the influence, it is also possible for the jury to have concluded that defendant possessed the requisite intent to commit homicide by vehicle.

(2) *Blood testing procedures*

Defendant contends that the procedures followed in the extracting of his blood violated his rights as guaranteed (a) by statute and (b) by state and federal constitutions.

(a) Section 64–22–2.9(B), N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 2), states:

> "B. The person tested shall be given an opportunity to arrange for a physician, licensed professional or practical nurse, or laboratory technician or technologist who is employed by a hospital or physician, of his own choosing to perform a chemical test in addition to any test performed at the direction of a law enforcement officer."

Defendant argues that this section entitles him, first of all, to have a test made, by a person of his choice, using the same sample extracted from his body. Defendant further claims that a denial of this opportunity, for whatever reason, renders the state's results inadmissible. It should be noted at this point that the sample was exhausted by the state in the conduct of its tests, so that no part of it remained for the defendant to test.

The court will not adopt a construction of a statute which will lead to unreasonable results. State v. Trujillo, supra. The record shows neither intent on the part of the state to destroy evidence nor any negligence by the state since all the blood was used in the tests conducted. The statute cannot insulate defendant "against the 'slings and arrows of outrageous fortune', which may strike anyone at any time and are unfortunately incidental to life itself." United States v. Pate, 318 F.2d 559 (7th Cir. 1963); Nunn v. Cupp, 15 Or.App. 212, 515 P.2d 421 (1973).

We conclude that the results of the state's tests were admissible regardless of the fact that defendant had no opportunity to test the same sample.

(b) The second, and more serious, argument under Point 2, concerns the constitutional application of the phrase "shall be given" as it appears in § 64–22–2.9(B), supra. This language is mandatory on its face. Defendant would have us read this to say that the arresting officer or other administrator of the proposed blood test must warn defendant of his right to have additional tests performed by any qualified person of his choosing. The state argues that a person is presumed to know the law and has no right to such a warning. Compare Miranda v. Arizona, 384 U.S. 436, 86

S.Ct. 1602, 16 L.Ed.2d 694, (1966). Neither position seems entirely accurate in this situation.

The record shows that the defendant was given no warning concerning the consequences of refusing a blood test. The statute does not expressly require that such warnings be given. On the other hand, the practice in New Mexico since the time of defendant's arrest appears, again from the record, to be to give such a warning.

New Mexico's statute does not expressly instruct the police or the test administrator to warn the suspect. There is no overriding constitutional requirement that it must be so construed. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, (1966). Further, New Mexico follows that line of reasoning which requires explicit *Miranda*-type warnings only in situations of either testimonial or communicative evidence. State v. Mordecai, 83 N.M. 208, 490 P.2d 466 (Ct.App.1971). No warning provision is needed in statutes of a state where the courts interpret the self-incrimination privilege as giving no protection against compulsory physical evidence. Schmerber v. California, supra. Since New Mexico has consistently excluded physical evidence from the scope of the protection, it follows that an accused has no constitutional right to the warnings sought.

We note that defendant only impliedly argues the Fifth Amendment privilege against self-incrimination. To that end, we hold that there is no statutory provision under which defendant could exclude the evidence obtained in the contested blood test. We further hold that there is no constitutional reason, either state or federal, which confers upon the accused a right to be expressly told that he has an opportunity, under § 64–22–2.9, supra, to have additional tests performed by any qualified person of his choosing.

Nevertheless, as the court said in Schmerber v. California, supra:

> "* * * we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."

See also Justice Douglas' dissent in Schmerber, 384 U.S. at 778, 86 S.Ct. 1826, 16 L.Ed.2d 908, supra.

(3) *Instructions*

Defendant contends that he should have been allowed (a) two instructions on the relevance of character evidence, and (b) one instruction allowing the jury to consider contributory negligence as a factor in determining proximate cause.

(a) The defendant cites State v. McKnight, 21 N.M. 14, 153 P. 76 (1915), and State v. Burkett, 30 N.M. 382, 234 P. 681 (1925), for the proposition that he was entitled to instructions on the relevance of character evidence if there were evidence in the record to support it. Defendant's former wife testified that he did not drink often during their marriage, and that when he did, he did not drink to excess.

While we agree with the general proposition presented, State v. McKnight, supra, concerns the admissibility evidence, a point not here in dispute. In State v. Burkett, supra, the court ruled against another defendant on nearly identical instructions. We believe the defendant has misconstrued the holding in State v. Burkett, supra, and we hold, as did that court, that to give defendant's requested instructions would only have caused the court to comment upon the weight of the evidence. It is also noted that the court in the case at bar did admit the proffered evidence and did instruct the jury on the weight to be given all evidence, in general.

(b) Because Mr. Hosier testified that Cheryl Lynn was not wearing a

seat belt at the time of the accident, defendant requested an instruction that contributory negligence of another can be considered in determining the proximate cause of death. Rules concerning contributory negligence have no application to homicide cases. State v. Romero, 69 N.M. 187, 365 P.2d 58 (1961).

Furthermore, the jury was adequately instructed regarding the necessity of finding proximate cause. As in part (a) of this Point (3), we hold that the court instructed ". . . the jury upon all questions of law necessary for guidance in returning a verdict." See § 41–23–41(a), N.M.S.A. 1953 (2d Repl.Vol. 6, Supp.1973). [As to proximate cause, see supra section (1)(b) of this opinion.]

(4) *Confrontation of a witness*

Defendant next contends that he was denied due process in that he was not able to adequately question the accuracy of the machine which tested his blood. The accuracy of the machine was supported on direct examination by a witness with a degree in business administration who conducted the test with the machine. The witness did not understand the full intricacies of the machine or the source of its claimed accuracy. The testimony was admitted only after objection by the defense as to the qualifications of the witness to testify.

It cannot be disputed that the defendant has the right to cross-examine and confront the witnesses against him. N.M. Const. Art. II, § 14; State v. Martin, 53 N.M. 413, 209 P.2d 525 (1949). A lay witness, not an expert, may testify generally as to what he observes. This capacity extends into those fields generally acknowledged as beyond the knowledge of the jury, where so-called "expertise" is required, if the witness is sufficiently trained and experienced. State v. Chavez, 77 N. M. 274, 421 P.2d 796 (1966); Pavlos v. Albuquerque National Bank, 82 N.M. 759, 487 P.2d 187 (Ct.App.1971).

The witness in this case was neither a chemist nor a medical expert. However, he had been trained to operate the test machine and had performed several hundred similar tests with it. "That he was not a specialist does not go to the admissibility of the evidence elicited from him nor to its sufficiency to support a finding based thereon, but rather to the weight to be accorded it." Frederick v. Younger Van Lines, 74 N.M. 320, 329, 393 P.2d 438, 444 (1964). Further, defendant had ample opportunity to cross-examine the witness.

We hold that the defendant was afforded due process in that the accuracy of the testing machine was supported by lay testimony, subject to full rights of cross-examination by defendant.

(5) *Foundation for results of breathalizer test*

Defendant finally contends that it was error on the part of the trial court to allow Officer Cottle to testify concerning the results of a breathalizer test. It is clear from the record that the officer was not testifying as an expert. Determination of the admissibility of such testimony is within the sound discretion of the court. Garrett v. Howden, 73 N.M. 307, 387 P.2d 874 (1963). We find no abuse of discretion on the part of the trial judge.

We conclude that the trial court committed no error in any of the points urged by the defendant, and the judgment and sentence of that court are hereby affirmed.

It is so ordered.

HERNANDEZ, J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

I dissent.

A. *The indictment was fatally defective.*

The indictment charged defendant with homicide by vehicle in one count. It charged defendant with driving under the

influence of intoxicating liquor *or* drugs, *or* reckless driving, which resulted in the death of a minor child.

The jury returned a verdict:

> We, the jury, find the defendant guilty in the manner and form as charged in the indictment.

The indictment and verdict leave unanswered the following question: Was the defendant convicted of homicide by vehicle while (1) driving under the influence of intoxicating liquor, or (2) driving under the influence of drugs, or (3) driving recklessly? The State must inform a defendant, with certainty, of the offense with which he was charged. It is impossible to sustain a conviction upon an indictment in which the offense charged is indefinite and uncertain. State v. McMath, 34 N.M. 419, 283 P. 51 (1929).

> It is the established rule of the common law * * * that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him. It is the law of every civilized community, and *in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed.* The information which he is to receive is that which will acquaint him with the essential particulars of the offense, so that he may appear in court prepared to meet every feature of the accusation against him. State v. Dutchover, 85 N.M. 72, 77, 509 P.2d 264, 269 (Ct.App.1973) (Sutin, J., dissenting) (quoting Mr. Justice Field's dissent in O'Neil v. Vermont, 144 U.S. 323, 365–66, 12 S.Ct. 693, 709, 36 L.Ed. 450, 468 (1892))

The use of the disjunctive "or" is a fundamental defect and the indictment is fatally defective and void and vulnerable to attack at any time. People v. Heard, 47 Ill.2d 501, 266 N.E.2d 340 (1970); State v. Hook, 433 S.W.2d 41 (Mo.App.1968); State v. Ciocca, 125 Vt. 64, 209 A.2d 507 (1965); State v. Webster, 105 N.H. 415, 200 A.2d 856 (1964). See, also, 42 C.J.S. Indictment and Information, § 101, at 984–86.

B. *The State denied defendant his statutory right to a blood test by a physician of his own choosing. This was prejudicial error.*

The accident occurred at 11:10 p. m. A blood sample was drawn from defendant at about 12:15 a. m. Two breath balloon tests were made. A blood alcohol test on the blood sample was made by the State.

On January 25, 1974, two months before trial, defendant filed a motion for an additional blood test. On the morning of trial, this motion was heard. The court and the State agreed that defendant was entitled to a blood alcohol test of the blood sample pursuant to § 64–22–2.9(B), N.M.S.A.1953 (2nd Repl.Vol. 9, pt. 2). However, the State reported that it exhausted all of the blood sample in making its tests to determine alcoholic content and drugs, if any, in defendant's body. None of the blood sample withdrawn from defendant was available for an additional blood test by a physician chosen by the defendant. The trial court denied defendant's motion to suppress the blood tests taken by the State.

The majority of this Court finds no error in denial of defendant's motion to suppress the results of the State's blood test, even though defendant was unable to introduce his own evidence as to alcohol blood levels at trial. The majority's reason for so holding is that the statute permitting defendant to perform his own blood test "cannot insulate defendant 'against the slings and arrows of outrageous fortune' * * *."

To the contrary, the accused has an absolute right to secure witnesses and *obtain additional evidence* to counteract the evidence obtained by the government, to establish a defense and to seek an acquittal. To hold otherwise is to return to the rack and the stake.

The defendant, not the State, was penalized at trial because the blood sample was used up before defendant could exercise

his right to perform his own blood test. This consequence does not disturb the majority of the Court. It disturbs me greatly because, "Essential fairness is a fundamental due process requirement in criminal prosecutions * * *. [Citations omitted]." United States v. Parish, 152 U.S. App.D.C. 72, 76, 468 F.2d 1129, 1133 (1972), cert. denied, 410 U.S. 957, 93 S.Ct. 1430, 35 L.Ed.2d 690 (1973).

> A fair trial is * * * one where the accused's legal rights are safeguarded and respected. Johnson v. City of Wildwood, 116 N.J.L. 462, 184 A. 616, 617 (Ct.Err. & App.1936).

This is not a case simply of "justice" or "fairness", in the abstract. Denial to defendant of the opportunity to conduct his own blood test was a denial of access to evidence he might have introduced in his own defense. For this reason, it is a denial of his constitutionally guaranteed due process of law. Commonwealth, Dep't of Transp. v. Gallagher, 3 Pa.Cmwlth. 371, 283 A.2d 508 (1971); People v. Burton, 13 Mich.App. 203, 163 N.W.2d 823 (Ct.App. 1968); People v. Koval, 371 Mich. 453, 124 N.W.2d 274 (1963); Application of Newbern, 175 Cal.App.2d 862, 1 Cal.Rptr. 80 (Ct.App. 2nd Dist. 1959).

Full and free access to evidence is fundamental in our adversary system of trial.

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, *even though * * * his action is not "the result of guile," * * *.* [Emphasis added] Brady v. Maryland, 373 U.S. 83, 87–88, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215, 219 (1963).

> [T]he ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases * * *. Wardius v. Oregon, 412 U.S. 470, 473, 93 S.Ct. 2208, 2211, 37 L.Ed.2d 82, 87 (1973).

Imposing a heavier burden on the defendant than on the State contradicts two of the most fundamental principles in our criminal law: (1) An accused is presumed innocent until proven guilty. (2) The State must prove the guilt of an accused beyond a reasonable doubt (the heaviest burden of proof imposed on any litigant in our legal system). On the importance of these principles in our criminal justice system, see State v. Chambers, 86 N.M. 383, 524 P.2d 999 (Ct.App.1974); State v. Henderson, 81 N.M. 270, 466 P.2d 116 (Ct. App.1970); United States v. Bonanno, 180 F.Supp. 71 (S.D.N.Y.1960); R. Anderson, Wharton's Criminal Law and Procedure, v. 5 §§ 2098, 2100, at 267, 271; J. Bentham, A Treatise on Judicial Evidence (1825), at 196–98.

Because the defendant was denied his statutory right to his own blood test and, therefore, his constitutional right to gather evidence in his own defense, introduction of the State's blood test results was a denial of due process to the defendant. The State's blood test results should have been suppressed at trial.

C. *The State had a duty to warn defendant of his statutory right.*

The majority of this Court believes that no warning of defendant's statutory right to have his own blood test performed is required. The reason given by the majority is that blood tests are not covered by the Fifth Amendment privilege against self-incrimination, Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), and, therefore, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), does not apply to the instant case.

It is uncontested that appellant had a statutory right to have his own test performed. It is a fair assumption that the great majority of citizens are unaware of this right. *If a citizen is unaware of his*

right to request an additional blood test, how can he exercise the right?

The problem here revolves around *notice* of a statutory right that might be useful in preparing one's defense to a criminal charge.

> Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. [Citations omitted]. Lambert v. People of the State of California, 355 U.S. 225, 228, 78 S.Ct. 240, 243, 2 L.Ed.2d 228, 231 (1957).

The Fifth Amendment privilege against self-incrimination is irrelevant to blood alcohol test results. *Schmerber,* supra. Even so, the reasoning which led the Supreme Court in *Miranda to choose a warning* as the best method of protecting that privilege applies with equal validity to the statutory right here in question.

> * * * [W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; *a warning is a clearcut fact.* [Emphasis added]. 384 U.S. at 468–69; 86 S.Ct. at 1625, 16 L.Ed.2d at 720.

I conclude that persons compelled to give blood samples pursuant to the Implied Consent Act are deprived of their statutory right to an additional blood test, if they are not advised of that right at the time the blood sample is given to the State.

It is only a short step further to the conclusion that the lack of warning as to his statutory right deprived appellant of his right to due process of law, guaranteed by the state and federal constitutions. The reason is that the results of his own additional blood test might have been used by appellant in his own defense, at trial. Therefore, failure to warn of the right to obtain his own blood test denied appellant his due process right to obtain evidence for use in his own defense in a criminal prosecution. *Gallagher,* supra; *Burton,* supra; *Koval,* supra; *Newbern,* supra.

I conclude that the majority of the Court is correct that appellant was not robbed of his Fifth Amendment privilege against self-incrimination because of the failure to warn of his statutory right to an additional blood test. However, that is not the point. The failure to warn *did* deprive appellant of the opportunity to exercise his statutory right. And deprivation of the statutory right in question has the consequence of depriving accused persons in a criminal proceeding of their due process right to obtain evidence in their own defense.

D. *Accused persons, from whom alcohol blood samples are taken, pursuant to the Implied Consent Act, have a right to the presence of counsel when the blood sample is taken.*

The Sixth Amendment guarantee of the assistance of counsel requires that counsel be present at all "critical stages" of a criminal proceeding. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L. Ed.2d 1149 (1967). Presence of counsel is not constitutionally required at the time of the taking of a blood sample, because this is not a constitutionally protected "critical stage" of a criminal proceeding. *Wade,* supra; *Schmerber,* supra. In New Mexico, however, the time of the taking of the blood sample *must be considered a critical stage,* because a constitutionally protected warning of the right to an additional blood test is required at that time. Therefore, an attorney's presence should be mandatory, in New Mexico.

Even though the right to an additional blood test arises from legislative fiat, *the right to be advised of the statutory right* is protected by the due process clause in the state and federal constitutions. The *Wade*

requirement that counsel be present at "critical stages" makes presence of counsel mandatory at the time when this constitutionally protected warning must be given, i. e., when the blood sample is drawn.

The *Schmerber* holding that the Fifth Amendment privilege against self-incrimination does not cover the giving of a blood sample for a blood alcohol test was concurred in by only five of the nine justices on the Supreme Court. Chief Justice Warren, and Justices Black, Douglas and Fortas wrote, in dissent, that the Fifth Amendment protection *does* apply. The close division of the Supreme Court on that question, coupled with the necessity, in New Mexico, of giving a constitutionally protected warning at that stage of the proceedings, should compel the conclusion that this is a "critical stage" in New Mexico; and that, therefore, presence of counsel is required to protect an accused's constitutional rights.

E. *Defendant is entitled to a fair trial.*

A criminal trial is an adversary procedure in which the State, seeking the conviction of an accused, and the accused, fighting for his liberty, engage in combat. Each side should fight with zeal, yet not without respect for the rules that maintain the fairness of the adversary process. The accused must be given the benefit of all procedural safeguards provided by the Constitution, by statutes, and by case law. This is the essence of a fair trial, one in which evenhanded justice is dispensed.

A sporting contest is analogous to a lawsuit, in that it is an acceptable form of combat in our society, acceptable because the "rules of the game" maintain fairness between the adversaries. In boxing, the rules do not require that one adversary shall fight with one arm strapped to his back. In tennis, the rules do not require a right handed adversary to use the racquet with his left hand.

Similarly, in a criminal trial, the rules do not require an accused to fight for life or liberty without access to evidence to which he is entitled, or without a competent attorney to protect and defend him. The rules do not allow the State to give evidence against an accused, while denying the accused access to the same type of evidence for use in his defense. Yet that is precisely what was done in the instant case, with respect to blood alcohol test results.

Police officers are, or should be, familiar with criminal laws like the Implied Consent Act, having been trained at the New Mexico Law Enforcement Academy. They are aware of their authority to arrest and to direct the performance of a blood alcohol test. Those duties were adequately performed in this case. They should also be aware that the person arrested, from whom blood has been withdrawn, must be given an opportunity to arrange for a physician or other qualified person of his own choosing to perform a chemical test in addition to any test performed at their direction. In the instant case, a police officer's lack of knowledge of the law allowed the State to deprive defendant of his statutory rights.

It is reprehensible that the State should first force the defendant to give blood without his consent, then exhaust the sample, and, finally, use the tests, over objection, with pomp and glory and splendor in the courtroom to convict him. The State has no legal right to say: "It is too bad. We are very sorry that all the blood was exhausted. We have got you now." Such a course of action has no place in our adversary system of litigation.

The State has no right to, "deprive any person of life, liberty, or property, without due process of law; * * *." Amendment XIV, Constitution of the United States; Article II, Section 18, New Mexico Constitution. Yet, in this case, there was no due process of law in respect to the accused's right to gather evidence for use in his own defense.

Defendant did not have a fair trial.

536 P.2d 728

Graham R. SCHILLER, Plaintiff-Appellant,

v.

SOUTHWEST AIR RANGERS, INC., Employer, and Royal-Globe Insurance Company, Insurer, Defendants-Appellees,

and

Health and Social Services Department, Intervenor-Appellee.

No. 1575.

Court of Appeals of New Mexico.

Jan. 15, 1975.

Horton & Werner, Quincy D. Adams, Adams & Foley, Albuquerque, for plaintiff-appellant.

Jerrald J. Roehl, J. Duke Thornton, Shaffer, Butt, Jones & Thornton, Albuquerque, for defendants-appellees.

Toney Anaya, Atty. Gen., Stephen Sprague, Agency Asst. Atty. Gen., Santa Fe, for intervenor-appellee.

MEMORANDUM

HENDLEY, Judge.

Plaintiff was only awarded medical expenses as the result of a work related injury. He appeals claiming: (1) that there was no substantial evidence upon which the court could find that he should have known that he had a compensable injury before the statute of limitations had run, (2) that there was no substantial evidence upon which the court could find that he did not give the requisite notice, and (3) that attorney fees should have been awarded.

We affirm.

1. The trial court found that plaintiff should have known he had a compensable injury immediately after the injury. This finding is supported by substantial evidence. Romero v. American Furniture Company, 86 N.M. 661, 526 P.2d 803 (Ct.App.1974).

2. Having decided plaintiff's first point we need not reach his second point.

3. Attorney fees are only awarded for an award of compensation. Plaintiff was not entitled to attorney fees. Wuenschel v. New Mexico Broadcasting Corp., 84 N.M. 109, 500 P.2d 194 (Ct.App. 1972); Lasater v. Home Oil Company, 83 N.M. 567, 494 P.2d 980 (Ct.App.1972).

This case has been reviewed pursuant to the Supreme Court Order of October 3, 1974. Having considered the record and briefs, the judgment in favor of defendants is affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

536 P.2d 1086

Carolyn GARZA, Christine Ruiz, and Martha Chavez, Plaintiffs-Appellants,

v.

UNITED CHILD CARE, INC., a corporation, Defendant-Appellee.

No. 1659.

Court of Appeals of New Mexico.

May 28, 1975.

James I. Bartholomew, Clyde E. Sullivan, Albuquerque for plaintiffs-appellants.

Michael E. Martinez, Manny M. Aragon, Aragon, Martinez, Garcia & Grass, Albuquerque, for defendant-appellee.

OPINION

SUTIN, Judge.

Plaintiffs recovered one month's net wages for wrongful discharge from employment and appeal. We affirm.

Plaintiffs' complaint sought reinstatement with recovery of salaries from the date of wrongful discharge until the date of reinstatement.

After trial, plaintiffs requested findings of fact and conclusions of law centered around plaintiffs' readiness to return to employment together with reinstatement and back pay.

The trial court did not determine whether plaintiffs were entitled to reinstatement, but this issue was not raised on appeal. The trial court found that plaintiffs were permanent employees and were subject to discharge only for cause; that plaintiffs were wrongfully discharged; and that they were entitled to damages equal to one month's net pay.

Plaintiffs' only contention on appeal is that the trial court applied an erroneous measure of damages.

Plaintiffs misconceive the meaning of "permanent employee". They contend that

as permanent employees they "could assert a continuing employment relationship which would entitle them to an award of damages commensurate with the value of the contract."

Plaintiffs do not rely on the "Employee Handbook" which they introduced in evidence, nor did they cite any authority to support their contention.

"Permanent employees" as used in the "Employee Handbook" simply makes a distinction between probationary and non-probationary employees. Neither does the record show what the duration of plaintiffs' terms of employment would be.

The rule is uniform that a contract for permanent employment, not supported by any consideration other than performance of duties and payment of wages, is a contract for an indefinite period. It is terminable at the will of either party. A discharge without cause does not constitute a breach of such contract justifying recovery of damages. United Security Life Insurance Company v. Gregory, 281 Ala. 264, 201 So.2d 853 (1967); Mathew v. American Family Mutual Ins. Company, 54 Wis. 2d 336, 195 N.W.2d 611 (1972); Russell & Axon v. Handshoe, 176 So.2d 909 (Fla. App.1965); Annot. Validity and duration of contract purporting to be for permanent employment, 135 A.L.R. 646.

Where a contract for permanent employment provides additional consideration, the employee can recover damages for his discharge when made without just cause. Collins v. Parsons College, 203 N. W.2d 594 (Iowa 1973); Bussard v. College of Saint Thomas, Inc., 294 Minn. 215, 200 N.W.2d 155 (1972); Drzewiecki v. H & R Block, Inc., 24 Cal.App.3d 695, 101 Cal. Rptr. 169 (Ct.App. 5th Dist.1972).

In the instant case, there is no evidence that any consideration, other than employment and payment of wages, was given by defendant to plaintiffs.

"The record does not support plaintiffs' claim that the trial court's award was inadequate because of a mistaken measure of damages." Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct.App.1969).

Affirmed.

It is so ordered.

HENDLEY and HERNANDEZ, JJ., concur.

536 P.2d 1087

STATE of New Mexico, Plaintiff-Appellee,

v.

Winston THURMAN, Jr., Defendant-Appellant.

No. 1836.

Court of Appeals of New Mexico.

April 30, 1975.

Certiorari Denied May 27, 1975.

John C. Maine, Jr., Martin, Maine & Hilton, P.A., Albuquerque, for appellant.

Toney Anaya, Atty. Gen., Santa Fe, Andrea Buzzard, Asst. Atty. Gen., for appellee.

OPINION

WOOD, Chief Judge.

Defendant falsely endorsed the names of the payees on two financial assistance checks issued by the Department of Health and Social Services. He was convicted of two counts of forgery. Section 40A–16–9, N.M.S.A.1953 (2d Repl. Vol. 6).

Section 40A–16–9, supra, requires an intent to injure or defraud. Defendant claims there is no substantial evidence of his intent. We disagree. Without considering the State's evidence, the inferences from defendant's own testimony is substantial evidence of the requisite intent. See State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966).

Defendant also claims he was prosecuted under the wrong statute. He contends § 40A–23–3, N.M.S.A.1953 (2d Repl. Vol. 6) is a specific statute applicable to the forgery of public vouchers; that § 40A–16–9, supra, is a general forgery statute. Defendant asserts he should have been prosecuted under § 40A–23–3, supra, because the specific statute controls. We disagree.

Section 40A–23–3, supra, is a part of an article headed "MISCONDUCT BY OFFICIALS". This heading was enacted by the Legislature. See Laws 1963, ch. 303, art. 23 at page 886 of the session laws. This legislatively enacted heading shows a legislative intent that § 40A–23–3, supra, applies only to officials. American Automobile Association, Inc. v. Bureau of Revenue, 88 N.M. 148, 538 P.2d 420 (Ct.App.), decided April 23, 1975. Defendant was not an official; § 40A–23–3, supra, was not applicable.

The judgments and sentences are affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

536 P.2d 1088

STATE of New Mexico, Plaintiff-Appellee,

v.

Danny Jack DOSIER, Louis Lee Butler, and Joe Edward Seate, Defendants-Appellants.

No. 1641.

Court of Appeals of New Mexico.
March 26, 1975.

Rehearing Denied May 5, 1975.

Certiorari Denied May 28, 1975.

Charles J. Crider, Marchiondo & Berry, P.A., Albuquerque, for appellant Butler.

Samuel A. Francis, Albuquerque, for appellant Dosier.

Ronald M. Higginbotham, Hunker, Fedric & Higginbotham, P.A., Roswell, for appellants Dosier and Seate.

Toney Anaya, Atty. Gen., Santa Fe, Andrea Buzzard, Jay F. Rosenthal, Asst. Atty. Gen., for appellee.

OPINION

WOOD, Chief Judge.

Defendants appeal their convictions of fraud and attempted fraud. Sections 40A–16–6 and 40A–28–1, N.M.S.A.1953 (2d Repl. Vol. 6). The issues concern: (1) failure to arraign, (2) admission of defendants' statements, (3) sufficiency of the evidence, (4) instructions, and (5) merger of offenses.

Failure to Arraign

In a pretrial stipulation, Butler waived the time limitations for arraignment and agreed that the arraignment could be held on or before the trial date. No arraignment was held. When the case was called for trial, Butler announced ready for trial and proceeded to trial. By doing so, he effectively waived his right to be arraigned. State v. Parker, 80 N.M. 551, 458 P.2d 803 (Ct.App.1969).

Admission of Defendants' Statements

(a) By pretrial motion, Butler and Dosier moved to suppress statements made by them. They claim the trial court erred in failing to hold an evidentiary hearing on this motion. There is nothing indicating the motion was ever brought to the attention of the trial court. See § 41–23–33(g), N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1973). The trial court did not err in failing to conduct a hearing on the motion when the motion was never brought to its attention. State v. Madrigal, 85 N.M. 496, 513 P.2d 1278 (Ct.App.1973); Compare State v. Soliz, 79 N.M. 263, 442 P.2d 575 (1968).

(b) All of the defendants contend that it was error for the trial court to admit various oral and written statements made by defendants after they were in the custody of the police. They contend: (1) the written statements were tainted by promises of leniency and thus, not voluntary; (2) the oral statements were obtained by deception and subterfuge; (3) the oral statements were obtained without an express waiver of the privilege against self-incrimination and the right to counsel; and (4) the admission of statements by Dosier and Seate denied Butler his right to cross-examination. None of these issues were raised at trial. They cannot be raised on appeal for the first time. State v. Williams, 83 N.M. 477, 493 P.2d 962 (Ct.App.1972); State v. Sexton, 82 N.M. 648, 485 P.2d 982 (Ct.App.1971); § 21–12–11, N.M.S.A.1953 (Interim Supp. 1974).

Sufficiency of the Evidence

The events from which the charges arose took place in Roswell and Artesia. Dosier and Butler, acting throughout as strangers to one another, enticed Harwell into a game of chance. The game, identified as three card monte, involved the use of two red queens and one black queen from a deck of cards. These three queens were turned face down and Harwell was to pick the black one. Harwell claimed he never was gambling, but he lost around $150.00 to Butler over a short period of time.

The final wager was for $20,000.00 which Harwell supposedly won. Before Butler would pay the $20,000.00 or return the $150.00, he demanded to see $20,000.00 of Harwell's money so he could be sure that Harwell could have paid had he lost. Unable to cash a check for that amount in Roswell, Harwell drove to Artesia accompanied by Dosier. When Harwell's bank in Artesia refused to let him have $20,000.-00 in cash without a police escort, Dosier disappeared. Later all three defendants were apprehended in a car travelling north from Artesia.

"Fraud consists of the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations." Section 40A–16–6, supra. Proof that a crime was committed cannot be established solely by the extrajudicial confession of the accused. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S.Ct. 1495, 18 L.Ed.2d 605 (1967); State v. Gruender, 83 N.M. 327, 491 P.2d 1082 (Ct.App. 1971). Butler asserts that if his extrajudicial statement is excluded (the statements of Dosier and Seate were not admitted as evidence against Butler), the only testimony of Butler's fraud is the testimony of Harwell. Butler asserts Harwell's testimony shows only that Harwell gambled with Butler and lost $150.00.

Butler does not accurately describe Harwell's testimony. Harwell's evidence is that Butler made the initial contact with Harwell, that Butler brought Dosier into the picture, that Butler flashed two rolls of bills, that Dosier initiated the game of cards, that the first two or three times Dosier showed Harwell the black queen, that Harwell then "missed" the black queen in a game with a $500.00 pot, that Butler got hold of $150.00 from Harwell in making up the $500.00, that Butler also got Harwell's watch and credit cards, that Butler initiat-

ed the $20,000.00 bet, that Butler refused to give the $150.00 back until Harwell showed his $20,000.00.

Harwell's testimony is sufficient to show that the crime of fraud was committed. State v. Gruender, supra.

As to the attempted fraud, Butler asserts that: (1) apart from his extrajudicial statement, there is no proof that the crime of attempted fraud was committed; and (2) there is no proof of an overt act in part execution of the intent to commit the crime.

Again we disagree. Butler initiated the $20,000.00 bet; Butler insisted that Harwell show his $20,000.00; Dosier went with Harwell to the Roswell bank in his unsuccessful attempt to get the money while Butler and Seate waited for them; Dosier went with Harwell to Artesia; Seate said: "I'll bring Butler behind you"; Dosier went into the Artesia bank with Harwell and stood outside the rail while Harwell talked to the banker; when Harwell told Dosier the banker would not let Harwell have the money without a police escort, Dosier disappeared.

The evidence of an attempted fraud and an overt act in part execution of that intent to defraud does not rest only on Harwell's testimony. The Artesia banker testified that when Harwell told him a story about winning a bunch of money but had to show his own ability to pay off, the banker refused to let Harwell have the money without a police escort. It was the banker who called the police.

This testimony is sufficient to show the crime of attempted fraud was committed, State v. Gruender, supra. This testimony is sufficient to show an overt act in part execution of the intent to defraud. State v. Lopez, 81 N.M. 107, 464 P.2d 23 (Ct. App.1969).

There being evidence that crimes were in fact committed, that evidence together with Butler's extrajudicial statement is substantial evidence that Butler was guilty of both crimes.

Instructions

(a) The jury was instructed on circumstantial evidence and on flight as a fact to be considered with other circumstances. Butler asserts there is no evidence to support these instructions. He misreads the record; there is evidence to support both instructions.

(b) One requested instruction defined gambling as making a bet. Another requested instruction defined a bet. A third requested instruction would have told the jury that if Harwell "was engaged in a game of chance and was making a bet, then you must find that the defendants were not guilty of fraud . . . . ." All defendants contend the trial court erred in refusing these requested instructions because there was evidence of gambling and because these requested instructions stated their theory of the case.

We agree there was evidence of gambling; we do not decide whether the requested instructions were proper theory of the case instructions. See State v. Mireles, 84 N.M. 146, 500 P.2d 431 (Ct.App.1972).

The first two requests would have defined terms used in the third request. Unless the third request should have been given, there was no error in refusing requests which defined terms not otherwise used.

The third request would have told the jury that if Harwell was gambling the defendants must be found not guilty of fraud. Section 40A-16-6, supra, does not exempt fraud perpetrated while gambling. The request being an incorrect statement of law was properly refused. State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973).

(c) Butler contends the trial court failed to "adequately" instruct the jury on the issue of criminal intent. He recognizes that as to both offenses the trial court instructed substantially in the language of the statutes. He claims that the statutory language does not set forth the requisite intent. He is mistaken.

Fraud is defined in § 40A-16-6, supra, as the intentional misappropriation or tak-

ing of anything of value by means of fraudulent conduct. "To do an act fraudulently is to do it with intent to cheat and defraud." State v. Probert, 19 N.M. 13, 140 P. 1108 (1914). Thus, in State v. Gregg, 83 N.M. 397, 492 P.2d 1260 (Ct. App.1972), it was referred to as fraudulent intent. Because an intent to cheat and defraud is required, § 40A–16–6, supra, is a specific intent crime and the language of the statute sets forth the requisite intent.

An attempt under § 40A–28–1, supra, requires an "intent to commit a felony". This is a specific intent crime. State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App.1974). The statutory language states this requisite intent. Compare State v. Gonzales, 86 N.M. 556, 525 P.2d 916 (Ct. App.1974).

Butler also seems to contend that in addition to instructions on specific intent the jury should have been instructed on the general criminal intent of conscious wrongdoing. "When a statute requires a specific intent, the instructions need not be concerned with general criminal intent." State v. Gonzales, supra.

(d) In instructing as to the material allegations of both offenses, the fraud and the attempted fraud, the trial court used the words "fraudulent conduct". See § 40A–16–6, supra. Butler complains because "fraudulent conduct" was not defined in the instructions. Relying on State v. Jones, 85 N.M. 426, 512 P.2d 1262 (Ct. App.1973), he asserts "fraudulent conduct" is a word of art susceptible to different meanings and thus, failure to define those words was jurisdictional error. Butler does not suggest any different meanings.

Absent a clearly expressed legislative intent requiring otherwise, "fraudulent conduct" is to be given its usual, ordinary meaning. State v. Moss, 83 N.M. 42, 487 P.2d 1347 (Ct.App.1971). There is no legislative intent expressed in § 40A–16–6, supra, to prevent application of the usual, ordinary meaning. The ordinary meaning of "fraudulent conduct" is conduct based on fraud. The ordinary meaning of "fraud" is "an instance or act of trickery or deceit, especially when involving misrepresentation". Webster's Third New International Dictionary, Unabridged (1966).

Because the ordinary meaning applies, there was no jurisdictional error in failing to define "fraudulent conduct". If Butler desired those words to be defined, he should have submitted a requested instruction. Section 41–23–41(g), N.M.S.A.1953 (2d Repl. Vol., Supp.1973).

Merger of Offenses

Butler contends he committed but one offense, and not separate offenses. He asserts the sequence of events shows only one transaction, a continuous act inspired by the same criminal intent, that the same facts must be relied on to prove "either charge." He claims the two offenses charged have merged, and to sentence him for two offenses is double punishment. See State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct.App.1969).

Butler's argument is predicated on State v. Quintana, 69 N.M. 51, 364 P.2d 120 (1961). *Quintana* states "this rule" is stated in Commonwealth ex rel. Moszczynski v. Ashe, 343 Pa. 102, 21 A.2d 920 (1941). The quotation in *Quintana* from *Ashe* concludes: " 'When one of two criminal acts committed successively is not a necessary ingredient of the other, there may be a conviction and sentence for *both.* * * *' " Similarly, State v. Martinez, 77 N.M. 745, 427 P.2d 260 (1967) states:

> "The test of whether one criminal offense has merged in another is not, as defendant contends, whether the two criminal acts are successive steps in the same transaction but whether one offense necessarily involves the other."

State v. Maestas, 87 N.M. 6, 528 P.2d 650 (Ct.App.1974) is not to the contrary. *Maestas* did not involve merger; it involved collateral estoppel to bar a second trial. However, even if *Maestas* was applicable, the test utilized in *Maestas* would

not benefit Butler. That test was whether the first trial necessarily or actually determined issues raised in the second trial. In this case, trial on the fraud charge did not necessarily or actually determine the issues involved in the attempted fraud charge.

Returning to the test stated in State v. Martinez, supra, the offense of fraud involving $150.00 of Harwell's money does not necessarily involve the attempt to defraud Harwell of $20,000.00. There was no merger.

The judgments and sentences are affirmed as to each defendant.

It is so ordered.

HERNANDEZ, J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (specially concurring).

I concur in the opinion of the Court.

Defendant Butler contends that the trial court failed to instruct the jury sufficiently on criminal intent, even though the jury was instructed in the language of the statute. New Mexico law on instructions as to intent has been in a state of confusion and flux since State v. Bachicha, 84 N.M. 397, 503 P.2d 1175 (Ct.App.1972), in which this Court held that an instruction in the language of the statute was not sufficient as to criminal intent.

> One of the most pervasive problems for the Bench and Bar in New Mexico in recent years has been dealing with intent as an element of various crimes. The confusion and frustration in this area can be seen in a series of opinions (majority, concurring and dissenting) in the Court of Appeals. Thompson III, M. B. and Gagne, N. L. The Confusing Law of Criminal Intent in New Mexico, 5 N.M.L.Rev. 63 (November, 1974).

In a concurring opinion in State v. Fuentes, 85 N.M. 274, 277, 511 P.2d 760, 761 (Ct.App.1973), I suggested that the problem of specific intent vs. general intent "may be solved if and when the Supreme Court adopts uniform jury instructions in criminal cases."

In a dissenting opinion in State v. Lopez, 84 N.M. 453, 454, 504 P.2d 1086, 1087 (Ct.App.1972), I said:

> I further believe that we should abolish the distinction between "specific intent" and "general intent" in instructions in criminal cases.

Now, however, I believe one can see through the "confusion and frustration" in this area of the law. The law on criminal intent may now come to a workable resting place.

The Supreme Court Committee on Uniform Jury Instructions has submitted its final draft. If adopted the problem is solved. The proposed instructions on criminal intent omit "specific intent". There is one instruction which defines criminal intent. It shall be used in every crime requiring criminal intent, except first and second degree murder and voluntary manslaughter.

If the Supreme Court adopts this pattern of criminal intent instructions, confusion and frustration will disappear. Reversals on criminal intent instructions will be laid to rest.

536 P.2d 1093

STATE of New Mexico, Plaintiff-Appellee,

v.

Don SELF, Defendant-Appellant.

No. 1760.

Court of Appeals of New Mexico.

May 28, 1975.

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[redacted]

George H. Farrah, III, Knott & D'Angelo, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Ralph W. Muxlow II, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant was convicted of the armed robbery of a pawn shop contrary to § 40A–16–2, N.M.S.A.1953 (2d Repl.Vol. 6, 1972, Supp.1973). He appeals alleging two points for reversal: (1) that certain testimony of eyewitness identification should have been suppressed; and (2) that it was reversible error to admit into evidence the out-of-court statements of one Derill Gleim. We affirm the first point, reverse on the second point and remand for a new trial.

(1) *Identification*

The defendant contends that in-court identification testimony of three witnesses was impermissibly tainted by prior suggestion on the part of the state. These three witnesses made positive identification of the defendant as the robber at trial. They were Ron Hicks, Mary Blackwood and Della Julianto. None of the four other persons that were present during the robbery were ever able to make positive identification of the defendant as the robber.

There are two possible sources of impermissible taint with regard to the identifications. First, approximately one month after the incident, the witnesses were asked to view a photo array. The array consisted of eight photographs—two of the defendant, two of another suspect and four of other people. All were of young, white males with long hair and droopy mustaches. The duplication of photographs of the defendant and the other suspect occurred because both face and full-length pictures of them were included. The photographs of the defendant were the second and sixth ones shown.

Only Ron Hicks was able to make a positive identification of the defendant from these photographs. He recognized the defendant immediately upon viewing the second picture. He later identified the defendant at the preliminary hearing and made a positive identification at trial.

We deem it significant, and probative of the alleged "suggestiveness" of the photographs, that only one witness was able to identify the defendant from them. Further, the facts surrounding the instant identification are strongly reminiscent of those in State v. Aguirre, 84 N.M. 376, 503 P.2d 1154 (1972), where the Supreme Court noted that ". . . the procedure followed could very properly suggest care on the part of the officer in making certain the identification by the victim was a correct one. . . ." We accordingly hold that the photo array was not so unduly suggestive as to taint any subsequent identification. State v. Aguirre, supra.

The second source of impermissible taint alleged was the procedures followed with regard to the preliminary hearing. The witnesses were subpoenaed to attend the preliminary hearing. None, with the exception of Mr. Hicks, were called to testify at the hearing. Yet the witnesses were allowed to observe Mr. Hicks identify the defendant as the robber. Defendant contends that it is difficult to imagine a procedure whereby a tainted identification is more likely. While we may tend to agree with the defendant, we find it unnecessary to decide the issue in the instant case since any suggestiveness generated by

the procedures followed at the preliminary hearing did not taint the identification by the two remaining witnesses of whose testimony defendant complains—Mrs. Blackwood and Mrs. Julianto.

Defendant admits that Mrs. Blackwood did not attend the preliminary hearing. Thus, it is difficult to see how any alleged suggestiveness could apply to her. Her in-court identification of the defendant was wholly independent of the preliminary hearing. Mrs. Julianto testified at trial that she saw defendant when he entered the pawn shop, that on his orders she opened the cash register and that at the preliminary hearing she saw and recognized the defendant in the lobby of the court house prior to the time the hearing took place. Defendant makes no claim that the confrontation between the defendant and Mrs. Julianto prior to the hearing was due to any design or arrangement on the part of the state to suggest an identification. His contention is limited to the identification of the defendant by Mr. Hicks during the actual hearing. By that time Mrs. Julianto had already identified the defendant in a manner held to be permissible in State v. Turner, 81 N.M. 571, 469 P.2d 720 (Ct.App.1970). Defendant's first point must fail.

(2) *Admission of Out-of-court Statements*

Defendant contends that the admission into evidence of certain out-of-court statements was unauthorized by our Rules of Evidence, §§ 20-4-101 through 20-4-1102, N.M.S.A.1953 (Repl.Vol. 4, 1970, Supp. 1973), and denied him his constitutional right to confront the witnesses against him. We agree with the defendant that the admission of the statements was unauthorized by the Rules of Evidence and hence do not reach his constitutional claim.

It appeared that one of the items taken from the pawn shop during the robbery was a pistol with a known serial number. This gun later found its way into the hands of Derill Gleim. Approximately a week after the robbery, Gleim met Quill Bradley, a mutual acquaintance of both Gleim and the defendant. Gleim asked Bradley to buy him some .45 caliber shells, which Bradley did. Gleim then asked Bradley if he wanted to see a pistol that Gleim had just obtained. When Bradley responded in the affirmative, Gleim took Bradley home to show him a pistol. Gleim told Bradley he obtained it from the defendant who, in turn, had obtained it from the pawn shop. The state called Gleim as a witness, but Gleim refused to testify on Fifth Amendment grounds because of charges pending against him. The court declared Gleim to be unavailable. The state then called Bradley to testify to the conversation he had with Gleim. The court allowed the testimony, over objection. It was later shown by the evidence that the gun Gleim claimed to have gotten from the defendant was one of the items taken from the pawn shop during the robbery.

The state sought to justify the admission of the Bradley testimony under Rules of Evidence 804(b)(4), § 20-4-804(b)(4), supra, as a declaration against interest. The defendant initially contends that Gleim's assertion of his privilege against self-incrimination does not render him unavailable under Rules of Evidence 804(a)(1), § 20-4-804(a)(1), supra. The weight of authority is against defendant's contention. McCormick on Evidence, § 253 (2d ed., 1972); Annot., 45 A.L.R.2d 1354 (1956). We hold that where, as in the case at bar, the court has ruled that a witness is exempted from testifying concerning a statement made by him, then that person is unavailable within the meaning of Rules of Evidence 804(a)(1), supra.

The defendant next contends that the exception to Rules of Evidence 804(a), supra, which states that a person is not unavailable if his refusal to testify is due to the procurement of the proponent of his statement, applies here. It is defendant's argument that the state's threat of prosecution is such procurement. In the absence of an immunity statute, the state was un-

able to guarantee that Gleim would not be prosecuted. Gleim's claim of privilege was therefore not due to the procurement of the proponent of his statement.

We now come to the crucial inquiry on this appeal, i. e. whether the statements of Gleim, as related by Bradley, were against Gleim's interest. The statements were assertedly against Gleim's penal interest in that they tended to subject him to criminal liability. If the facts bear this out, the statements would be admissible under Rules of Evidence 804(b)(4), supra. The state, at trial, advanced three reasons why Gleim's statements to Bradley would be against his interest: (1) that as part of the conversation, Gleim admitted participation in another robbery, (2) that possession of the gun and ammunition would be against federal law since Gleim is a convicted felon and (3) that the statements could be used to convict Gleim of the crime of knowingly receiving stolen property.

We first note that the first reason was apparently abandoned and that nowhere in the record was a proper foundation laid in order for the state to rely on the second or third reasons. There is no evidence that Gleim is a convicted felon and there is no evidence that Gleim knew the gun to be stolen. All Bradley testified to was that Gleim had a gun that he said he got from the defendant and said the defendant got from the Jewel Box Pawn Shop. We note also that there was no issue as to how Gleim knew that the defendant got the gun from the pawn shop. Thus it appears that Gleim's statements were inadmissible for lack of a foundation. However, we reach the merits of defendant's objection because we assume that the state will lay a proper foundation upon retrial.

The statements were introduced solely for the purpose of tracing the pistol stolen in the robbery to the defendant. Thus the operative portion of Gleim's statements was, "I obtained this gun from the defendant." Clearly, this was an out-of-court statement and it was offered in evidence only to prove the truth of the matter asserted, that Gleim obtained the pistol in question from the defendant. It was hearsay. Rules of Evidence 801(c), § 20–4–801(c), supra.

The danger of admitting hearsay into evidence is that it is not subject to the usual tests that can be applied to ascertain its truthfulness by cross-examination of the declarant. McCormick on Evidence, § 245 (2d ed. 1972). It is not given under oath nor is the declarant subject to cross-examination or to the penalties of perjury. Chiordi v. Jernigan, 46 N.M. 396, 129 P.2d 640 (1942). However, there are exceptions to the hearsay rule which depend on circumstantial guarantees of reliability to substitute for the oath, cross-examination and penalties of perjury. Guarantees of reliability are and must be the key to open the door to the exceptions. In the declaration against interest exception, it is thought that this special trustworthiness is supplied by the fact that people will ordinarily not state facts against their interest unless those facts are true. McCormick on Evidence, § 276 (2d ed.1972). Hence, it is logical that in order to circumvent the usual requirement that testimony be given under oath and subject to cross-examination and the penalties of perjury, the precise matter offered for its truth ought to be against the interest of the declarant. It is not enough that some collateral portion of the conversation is against the interest of the declarant; otherwise the circumstantial indicia of trustworthiness are not present to guarantee the reliability of the very matter being offered.

In the instant case, the identification of the defendant as the person from whom Gleim obtained the gun is irrelevant to the subjection of Gleim to any criminal liability. If the state operates under its second theory of admissibility, the bare fact of possession of the gun and ammunition is sufficient to subject Gleim to criminal penalties. Similarly if the state operates under its third theory, all that is necessary is that Gleim be in possession of a gun that

he knew to be stolen. In both cases, the identity of the donor of the gun and/or identity of the person who stole it has no bearing on the very issue which makes Gleim's statement admissible, i. e. his subjection to criminal liability. Conversely, the portion of the statements which are against his interest are irrelevant to the prosecution of the defendant. A fortiori, this would be the case if the state were to proceed under its first theory of admissibility.

To sum up, in order for a statement to qualify as an exception to the hearsay rule, there must be a nexus between the assertion relevant to the issues in the given case and the circumstances which qualify the assertion as an exception to the hearsay rule. That nexus being absent in the instant case, we can only conclude that the testimony of Quill Bradley was inadmissible and the court erred in admitting it.

The state contends that the error was harmless under State v. Gunthorpe, 81 N.M. 515, 469 P.2d 160 (Ct. App.1970), cert. denied, 401 U.S. 941, 91 S.Ct. 943, 28 L.Ed.2d 221 (1971). In order for us to say that the error was harmless, we must also be able to say that the other evidence was so overwhelming that the improperly admitted evidence did not contribute to the conviction. See State v. Thurman, 84 N.M. 5, 498 P.2d 697 (Ct.App. 1972); State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct.App.1969).

The state presented two lines of evidence to prove defendant's guilt. One was direct evidence by the testimony of eyewitnesses. The other was circumstantial evidence by proving that defendant possessed an item stolen in the robbery. Without the testimony of Bradley, the state's whole line of circumstantial evidence would have to be discarded. While the remaining direct evidence would have been substantial under our cases to support the conviction, see State v. Seaton, 86 N.M. 498, 525 P.2d 858 (1974), it must be noted that three eyewitnesses positively identified the defendant but four eyewitnesses were unable to do so. The defendant also presented a rather lengthy alibi defense. We cannot therefore say the circumstantial evidence did not contribute to the conviction and the judgment must accordingly be reversed.

Reversed and remanded for a new trial.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

536 P.2d 1098

Brenda MARTINEZ and Thomas Martinez, Plaintiffs-Appellants,

v.

David R. KNOWLTON and Reeves E. Knowlton, Defendants-Appellees.

No. 1671.

Court of Appeals of New Mexico.
April 9, 1975.
Rehearing Denied April 22, 1975.
Certiorari Denied June 3, 1975.

Avelino V. Gutierrez, Albuquerque, for plaintiffs-appellants.

Eugene E. Klecan, John A. Klecan, Klecan & Roach, P.A., Albuquerque, for defendants-appellees.

OPINION

HENDLEY, Judge.

Plaintiffs, father and daughter, recovered judgment from defendants in the respective amounts of $2,000.00 and $770.-00. Plaintiffs appeal. Plaintiff, father, asserts that the trial court erred in admitting evidence that he received sick-leave pay during the time he was unable to work due to an automobile accident allegedly caused by defendants' negligence. This amount equaled his regular salary. Plaintiff, father, also contends that the trial court erred in not admitting evidence of lost earnings in addition to his salary. Both plaintiffs appeal asserting it was error to receive evidence, over objection, concerning previous injuries and physical conditions. We reverse.

Plaintiff Father—sick-leave pay.

Plaintiff testified he lost 185 hours of work after the accident and that this amount of time, based on his salary, equated to $1,060.00. He testified on cross-examination, over objection, that he received his regular salary during this time and further that it was in the nature of sick-leave pay.

Defendant contends that this was permissible cross-examination "since it tended to prove whether Mr. Martinez was off work." We disagree. The only relevant issue was whether plaintiff was unable to work, not whether he was paid during the time he was not working. It was error to admit into evidence testimony regarding his employer's payment of wages or sick-leave pay while plaintiff was unable to work due to his injury. Such evidence violates the collateral source rule. Trujillo v. Chavez, 76 N.M. 703, 417 P.2d 893 (1966).

As our Supreme Court stated in Mobley v. Garcia, 54 N.M. 175, 217 P.2d 256 (1950):

> ". . . The right of redress for wrong is fundamental. Charity cannot be made a substitute for such right, nor can benevolence be made a set-off against the acts of the tort-feasor. [Citations omitted]."

To *Mobley* we add that a tort-feasor should not get the benefit of the contract between the employee and the employer. Annot., 52 A.L.R.2d 1451 (1957).

Plaintiff Father—lost earnings.

Since the cause must be remanded for a new trial we answer plaintiff, father's, point relating to lost earnings in addition to his regular salary. Plaintiff had been "moonlighting" as a surveyor. In this connection he attempted to introduce a document which represented his calculations of how much extra money he had earned from surveying in the three months prior to the accident. He also attempted to introduce his Schedule C tax form to show how little he earned from the same source in the year following the accident. The court refused to admit the first document because it covered too short a period of time. Plaintiff then chose not to introduce the Schedule C since its relevance depended on establishing how much the plaintiff earned before the accident.

The general rule with regard to evidence of pre-injury earnings and a subsequent post-injury decrease in earnings is that plaintiff may put in evidence of actual pre-injury earnings for a reasonable period of time and evidence of the post-injury decrease in earnings. However, what is a reasonable period of time depends on the facts of each case. The determination of what is a reasonable period of time is a matter of judicial discretion and will not be overturned in the absence of an abuse of discretion. Jacobsen v. Poland, 163 Neb. 590, 80 N.W.2d 891 (1957); See generally Annot., 81 A.L.R.2d 733 (1962).

Most cases generally speak in terms of years and usually speak in terms of remoteness rather than recency. Here, plaintiff's evidence went to the three months prior to the injury. The trial court held that the time involved was too recent. We cannot say, as a matter of law, that the trial court abused its discretion in not admitting plaintiff's offered evidence.

Plaintiffs, Father and Daughter—prior injuries.

Defendants, over plaintiffs' objection, elicited testimony of prior injuries of both plaintiffs. A review of the record fails to reveal that the previous injuries were medically connected to the subsequent injuries. The uncontradicted testimony by both plaintiffs was that they had completely recovered from the prior injuries. Plaintiffs' medical expert testified that the injuries complained of were caused by the collision with the defendants.

Defendants contend that the inquiry into plaintiffs' prior injuries was proper because it was relevant to the proximate cause of the plaintiffs' complaints and because of the physical proximity of the complaints. Defendants appear to argue on the grounds that plaintiffs had a pre-existing condition. The record only discloses that the plaintiffs were fully recovered from their prior injuries. Failure to find the extent to which a pre-existing condition had been aggravated served as ground for reversal in Alvillar v. Hatfield, 82 N.M. 565, 484 P.2d 1275 (Ct.App.1971). Absent such a showing, testimony about previous injuries and physical conditions, not causally connected to the subject claims is not admissible. Kantor v. Ash, 215 Md. 285, 137 A.2d 661 (1958); See Alvillar v. Hatfield, supra; See generally Annot., 69 A.L.R.2d 593 (1960). The admission of such testimony was prejudicial for it tended to minimize the extent of plaintiffs' injuries by portraying them as constantly beleaguered with medical problems in any event. Cf. Browning v.

King, 159 Cal.App.2d 326, 324 P.2d 14 (1958).

Defendants contend that even if the admission of such testimony was prejudicial, the objections thereto were not sufficient to preserve the issue for review. Defendants contend that a motion for a mistrial was necessary in order to preserve the error. We disagree.

The declaration of a mistrial is a ruling which in effect states, as a matter of law, that the trial cannot stand because of the disregard of some fundamental prerequisite. Illinois Oil Co. v. Grandstaff, 118 Okl. 101, 246 P. 832 (1926); See generally 58 C.J.S. Mistrial p. 833 (1948) and cases cited therein.

Defendants' reliance on Frank Bond & Son, Inc. v. Reserve Minerals Corp., 65 N. M. 257, 335 P.2d 858 (1959), for the proposition that under the circumstances of the instant case a motion for a mistrial is required, is misplaced. The rule in *Bond* is simply that matters which are not of record will not be considered on appeal.

Plaintiffs made their objections in accordance with R.C.P. 46, § 21-1-1(46), N.M.S.A. 1953 (Repl. Vol. 4, 1970). The objections were sufficiently definite to alert the trial court to the claimed vice and to preserve the issue for appeal. Section 21-2-1(20), N.M.S.A.1953 (Repl. Vol. 4, 1970) superseded by § 21-12-11, N.M.S.A. 1953 (InterSupp.1974) effective April 1, 1974. Further, plaintiffs' motion for a new trial also alerted the trial court to the claimed vice. The admission of the testimony was reversible error as to both plaintiffs.

Reversed and remanded.

It is so ordered.

HERNANDEZ, J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

I dissent.

The majority of the Court reversed this case because defendants elicited testimony of prior injuries of both parties. Upon what basis this evidence was prejudicial is a mystery, because this claimed error was not preserved for review.

Defendants are fortified by a jury verdict and by the judgment of the trial court, the most favored position known to the law. The judgment of the trial court must be affirmed if any reasonable basis therefor appears in the record. Mr. Justice Brandeis said long ago:

> Appellate Courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct.
>
> Fairmount Glass Works v. Cub Fork Coal Company, 287 U.S. 474, 485, 53 S. Ct. 252, 255, 77 L.Ed. 439, 445 (1933).

Plaintiffs' sole complaint is that the damages awarded by the jury were too low. I disagree on two grounds: (1) A review of the record satisfies me that no error was preserved for review and that plaintiffs had a fair trial. (2) The amount of damages awarded by the jury was not inadequate.

(1) *Review of the Record.*

On review, our primary objective is to decide whether the parties had a fair trial. The trial of a law suit is an art, the study of a lifetime. Lawyers paint their positions before judge and jury. The painting may be sharp and bitter; or it may be calm and unemotional. The jury decides whose painting wins the contest. A review of the record satisfies me that the plaintiffs won in a fair trial. They have no cause for complaint in this Court. Plaintiffs claim the trial court erred in allowing cross-examination as to plaintiffs' prior injuries.

On evidentiary matters relative to prior injuries, plaintiffs never claimed prejudicial error. Adequate instructions on damages tendered by plaintiffs, were given for their protection. Plaintiffs did not tender an instruction on the issue of prior injuries. No motion for a mistrial was made.

No motion was made to strike any testimony on prior injuries. No motion was made that defendants' cross-examination of plaintiffs was prejudicial error. Neither was any request made that the court admonish the jury. In summary, the trial court was never informed of any claim of prejudice.

The record shows that the plaintiffs embellished the prior injuries on re-direct examination. Prior surgery on Mr. Martinez was developed by plaintiffs, not defendants. Attempts were made to lessen the effect of prior injuries.

No one but the jurors knows the effect upon their verdict of the introduction of this evidence. I outlined the difficulties inherent in applying the "harmless error" rule to the jury process in my concurring opinion in Maxwell v. Santa Fe Public Schools, 87 N.M. 383, 534 P.2d 307 (Ct. App.1975). Differences among the jurors as to how to view the evidence are unknown to appellate judges; these differences are often subtle. The nuances, shades of differences in the minds of a jury are varied and unknown after it arrives at a verdict. Plaintiff had joined issue with defendant on prior injuries and cannot urge error in its admission. See Eickmann v. St. Louis Public Service Co., 363 Mo. 651, 253 S.W.2d 122 (1952). Plaintiffs simply gambled the verdict of the jury. Dissatisfied with that verdict, they now claim it was too low.

The scope and extent of the cross-examination rests largely in the sound discretion of the trial court. Francis v. Johnson, 81 N.M. 648, 471 P.2d 682 (Ct.App.1970). There was no abuse of discretion in this case.

The plaintiffs rely on a series of cases in which error *was* preserved for review. In Kantor v. Ash, 215 Md. 285, 137 A.2d 661, 69 A.L.R.2d 585 (1958), prejudicial error arose because the court denied plaintiff's requested instruction that the evidence of several prior accidents had nothing to do with the issue involved in the case being tried. To the same effect, see Knight v. Hasler, 24 Wis.2d 128, 128 N. W.2d 407 (1964). In Marut v. Costello, 34 Ill.2d 125, 214 N.E.2d 768 (1965), the case was reversed on an improper instruction on prior injuries.

In Nourse v. Welsh, 23 A.D.2d 618, 257 N.Y.S.2d 96 (1965) prejudicial error arose because the court denied plaintiff's motion to strike testimony of injuries received in prior accidents. To the same effect, see Burns v. Shields, 256 Md. 537, 261 A.2d 161 (1970).

In the instant case, no such prejudicial error was preserved for review. See Gildehaus v. Jones, 356 Mo. 8, 200 S.W.2d 523 (1947).

Even if a suggestion were made that the cross-examination of plaintiffs was improper, I am not convinced it was prejudicial error. Phillips v. Kitt, 110 U.S.App. D.C. 186, 290 F.2d 377 (1961); Niles v. Steiden Stores, 301 Ky. 80, 190 S.W.2d 876 (1945).

(2) *The amount of damages awarded was not grossly inadequate.*

After judgment was entered, plaintiffs moved for an additur; in the alternative, for a new trial on the issue of damages alone; in the alternative, for a new trial on all issues. The motions were denied. Ruling as to these motions rests within the sound discretion of the trial court and is not reviewable in the absence of clear abuse. Stehwein v. Olcott, 78 N.M. 95, 428 P.2d 634 (1967). Here, there was no abuse of discretion.

In *Fairmount*, supra, Justice Brandeis said:

> Clearly the mere refusal to grant a new trial where nominal damages were awarded is not an abuse of discretion. This Court has frequently refrained from disturbing the trial court's approval of an award of damages which seemed excessive or inadequate, and the circuit courts of appeals have generally followed a similar [policy]. 287 U.S. at 485, 53 S.Ct. at 255–56, 77 L.Ed. at 446.

In New Mexico, however, on review, we have dropped from consideration the phrase "abuse of discretion" by the trial court in determining whether the verdict was excessive.

Excessive verdicts have been found. Remittiturs have been ordered, or in the alternative, a new trial has been granted on damages only, or a new trial has been granted on all issues. Hanberry v. Fitzgerald, 72 N.M. 383, 384 P.2d 256 (1963); Jackson v. Southwestern Public Service Company, 66 N.M. 458, 349 P.2d 1029 (1960); Vivian v. Atchison, Topeka and Santa Fe Railway Co., 69 N.M. 6, 363 P.2d 620 (1961); Montgomery v. Vigil, 65 N.M. 107, 332 P.2d 1023 (1958); Montgomery Ward v. Larragoite, 81 N.M. 383, 467 P.2d 399 (1970).

Jury verdicts have also been held not to be excessive. Francis v. Johnson, supra; Schrib v. Seidenberg, 80 N.M. 573, 458 P. 2d 825 (Ct.App.1969); Sweitzer v. Sanchez, 80 N.M. 408, 456 P.2d 882 (Ct.App. 1969); Massey v. Beacon Supply Company, 70 N.M. 149, 371 P.2d 798 (1962); Williams v. Yellow Checker Cab Co., 77 N.M. 747, 427 P.2d 261 (1967).

On review of "excessive" verdicts, appellate courts have set themselves up as a jury to determine, from a cold record, the amount of damages to which a plaintiff is entitled. Remittiturs have been ordered in amounts up to $124,000. This has been done without standards from which to work, without comparison with other verdicts, without disclosure by appellate judges of their own experience and capacity to evaluate damages for injuries or death.

Reasons have not been stated why appellate judges feel themselves to be more qualified than juries to determine the amount of damages. If the jury verdict "appears" excessive to appellate judges, they find words in the English language with which to sustain their position. They state: We have determined the issue as a matter of law, not from "weighing" the evidence, but from "reviewing" the evidence. This is a distinction without a difference. What would our attitude be on review in the event that a new trial was requested by a plaintiff and the jury awarded a larger amount in the second trial?

Before we can review the excessiveness of a verdict, the defendant must raise this issue by motion at trial. If the trial court denies the motion, we should then determine if the trial court abused its discretion by acting beyond the bounds of reason.

In the present case, we are confronted with a contention that the verdict was inadequate. The same rule applies here that applies to a contention of an excessive verdict. Hammond v. Blackwell, 77 N.M. 209, 421 P.2d 124 (1966); Schrib v. Seidenberg, supra.

In *Hammond*, the Court stated:

> It is fundamental that the assessment of damages in a case of the kind involved here is a function of the trier of facts. An inadequate award will not be disturbed on appeal unless it appears to have resulted from passion, prejudice, partiality, undue influence or some corrupt cause or motive, where there has been palpable error or the measure of damage has been mistaken. [77 N.M. 212, 421 P.2d 126]

None of these criteria appear in the present case. Paraphrasing Terrel v. Lowdermilk, 74 N.M. 135, 141, 391 P.2d 419, 423–24 (1964), in light of *Hammond*:

> Even though this court, or the individual members thereof, might feel that the award is too [low], this does not, of itself, warrant our interfering with the judgment and we [should] decline to do so.

The jury verdict was not inadequate.

(3) *The admission and exclusion of evidence was not prejudicial error.*

(a) *Admission*

Plaintiffs claim that, on cross-examination, the court allowed evidence, over objection, that Mr. Martinez received sick pay for the amount of lost earnings. This is not supported in the record.

(b) *Exclusion*

Plaintiffs claimed the trial court erred in excluding (1) an exhibit prepared by Mr. Martinez which showed that for three months prior to the accident, he earned $1,074.00 as a surveyor, and that for the remainder of the year he earned $263.50; (2) Schedule C, one page of Mr. Martinez' 1971 income tax return, showing extra earnings of $684.00.

The trial court ruled correctly. See Nichols v. Sefcik, 66 N.M. 449, 349 P.2d 678 (1960); Brown v. General Insurance Company of America, 70 N.M. 46, 369 P.2d 968 (1962).

536 P.2d 1104

Henry NIEDERSTADT, Plaintiff-Appellant,

v.

ANCHO RICO CONSOLIDATED MINES, Employer, and Employers Insurance of Wausau, Insurer, Defendants-Appellees.

No. 1579.

Court of Appeals of New Mexico.

May 14, 1975.

Certiorari denied June 11, 1975.

Jack T. Whorton and Robert M. Doughty II, John S. Spence, Alamogordo, for plaintiff-appellant.

Leland S. Sedberry, Jr., Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendants-appellees.

OPINION

HERNANDEZ, Judge.

Plaintiff seeks review of a judgment under the Workmen's Compensation Act, § 59–10–1 through § 59–10–37, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1), awarding him $1,172.57 for temporary total disability and payments for a 20% partial permanent disability for the remainder of the statutory period. Five points are urged as grounds for reversal. Defendants cross-appeal, alleging one point of error.

We reverse.

(1) Plaintiff's first point is that the trial court erred in ruling that he was not entitled to take the deposition of Dr. Mario Palafox at the expense of defendants. Plaintiff had moved the trial court for an order allowing him to depose Dr. Feagler and Dr. Palafox. The trial court, after a hearing, entered an order granting plaintiff the right to depose Drs. Feagler and Palafox, at his own expense, and denying the right to depose Dr. Spencer. The trial court, in its order, found as follows as to Dr. Palafox's deposition: "4. Plaintiff should be granted leave to take the deposition of Dr. Mario Palafox at his own expense." Plaintiff did not depose Dr. Palafox because he could not afford it.

Section 59–10–13.9, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1) provides in part:

> "* * * that any interrogatories, discovery procedures and depositions authorized by the rules of civil procedure shall be had only after motion of one of the parties therefor and the court having jurisdiction finds, after due hearing, *that good cause exists, that the evidence to be obtained will probably be material to the issues of the cause* and the court enters an order authorizing the same. *The cost and expense of any interrogatory, discovery procedure or deposition ordered by the court shall be paid by the defendants* in the claim or action and in no event shall any unsuccessful claimant be responsible for the cost or expense of any interrogatory, discovery procedure or deposition ordered by the court." [Emphasis ours.]

The order does not recite whether good cause existed for taking Dr. Palafox's deposition or that the evidence to be obtained would probably be material to the issues of the cause. The transcript of the hearing on plaintiff's motion is not included in the record.

This court in Escobedo v. Agriculture Products Co., Inc., 86 N.M. 466, 525 P.2d 393 (Ct.App.1974) stated:

> "The trial court had no authority to order plaintiff to pay the cost of the deposition * * *. Section 59–10–13.9, su-

pra, contains express provisions concerning the cost of depositions in compensation cases. These express provisions directly conflict with any discretion in the trial court concerning cost of depositions under the rules of civil procedure."

We do not know whether the trial court determined that good cause existed for taking Dr. Palafox's deposition and that the evidence to be obtained would probably be material. Paragraph 4 of the trial court's findings could well be interpreted to mean that neither of these factual predicates was present and that if plaintiff wanted to depose the doctor, it would have to be at his own expense. Since we have no record of the hearing, there is no way to determine what was intended by the trial court; and since it was plaintiff's obligation to see to the preparation of the record, he cannot now be heard to complain. "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." Dunne v. Dunne, 83 N.M. 377, 492 P.2d 994 (1972).

Plaintiff's second point is that the trial court abused its discretion in refusing to admit the deposition of Dr. Feagler into evidence as part of the case-in-chief. Plaintiff offered this deposition testimony prior to the close of his case-in-chief. Defendants objected on the ground that Dr. Feagler would be at trial to testify as their witness. Plaintiff contends that since the doctor lived more than 100 miles from the place of trial, Section 21–1–1(26)(d)(3), N.M.S.A.1953 (Repl.Vol. 4), entitled him to offer the deposition testimony regardless of whether the doctor were going to be available to testify later. Rule 26(d)(3), supra, provides:

"The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, That the witness is dead; or 2, *that the witness is at a greater distance than 100 miles from the place of trial or hearing,* or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." [Emphasis ours.]

Implicit in subparagraph 3 of Rule 26(d), supra, is the condition that the witness be unavailable to testify in person. Interpreting the comparable federal Rule of Civil Procedure, the court in G. E. J. Corporation and M. F. Corporation v. Uranium Aire, Inc., 311 F.2d 749 (9th Cir. 1962), had this to say:

"Depositions may only be used when the witness is unavailable or where exceptional circumstances necessitate their use. Rule 26(d) [now Rule 32(a)(3)(b) Fed.Rules of Civ.Pro.] contemplates such use and was not intended to permit depositions to substitute at the trial for the witness himself."

To like effect, see Klepal v. Pennsylvania Railroad Company, 229 F.2d 610 (2d Cir. 1956).

All of the plaintiff's other arguments and contentions on this point are rendered moot by the fact that Dr. Feagler did appear and testify for defendants, and plaintiff was able to elicit his testimony during cross-examination.

(2) Our decision in favor of defendants' cross-appeal renders unnecessary any discussion of plaintiff's points three, four and five.

Defendants' cross-appeal alleges one point of error: that there is no substantial evidence to support any award at all. We agree. Section 59–10–13.3(B),

N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1), provides:

"In all cases where the defendants deny that an alleged disability is a natural and direct result of the accident, the workman must establish that causal connection as a medical probability by expert medical testimony. No award of compensation shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists."

On September 4, 1959 plaintiff was injured while unloading some logs. He was examined by Dr. R. E. Forbis, an orthopedic surgeon, on August 18, 1961. On August 30, 1961, by letter, Dr. Forbis reported his examination and diagnosis which reads in pertinent part as follows:

"* * * When lying on his back with the legs extended he has cramps over the left side of the low back and in the left hip area. * * * Most pain is over the low back, left hip and left leg.

* * * * * *

"X-rays: AP view of the lumbar spine reveals good general alignment, no evidence of fractures. Lateral view reveals satisfactory alignment, no evidence of compression. Spot view reveals narrowing between five-sacrum, posterior alignment is satisfactory.

* * * * * *

"An Electromyogram was done which was positive for nerve involvement of L5–S1 on the left.

* * * * * *

"Diagnosis: * * * Nerve pressure on the left of L5 and S1. Intermittant Sliding Dorsal Disc.

* * * * * *

"In an attempt to rehabilitate this man I feel a Laminectomy and Fusion would be necessary * * *"

Dr. Feagler, an orthopedic surgeon, who examined the plaintiff twice testified in part as follows:

Direct examination:

"Q. * * * did the condition which you diagnosed Mr. Niederstadt as having the last time you saw him, was that a condition which pre-existed September 12, 1972?

"A. In light of the doctor's, Dr. Forbis report, I would have to say yes, this pre-existed.

* * * * * *

"A. I found no additional evidence of disability or injury other than the things that were previously outlined in Dr. Forbis' report."

A report by Dr. Palafox, that was entered into evidence by stipulation, does establish the "causal connection as a medical probability" that plaintiff's disability was the natural and direct result of the accident. However, the record does not show that Dr. Palafox was ever told about or that he saw Dr. Forbis' report of August 30, 1961. To the contrary it might reasonably be assumed that he had no knowledge of Dr. Forbis' report since plaintiff did not inform Dr. Feagler about this previous examination or report. Therefore, since pertinent information existed about which Dr. Palafox apparently had no knowledge, his opinion cannot serve as the basis for compliance with § 59–10–13.3(B), supra. Landers v. Atchison, Topeka & Santa Fe Railway Co., 68 N.M. 130, 359 P.2d 522 (1961).

Finally, we consider defendants' initial contention that plaintiff's appeal should have been dismissed because the plaintiff had accepted the benefits of the award below. The general rule is that one cannot accept a benefit under a judgment and then appeal from it, where the effect of the appeal may be to annul the judgment. State v. Jemez Land Co., 30 N.M. 24, 226 P. 890 (1924). There is an exception to the general rule. Under workmen's compensation law, the prevailing view is that a workman cannot be denied the right

to appeal by his acceptance of a compensation award in an amount less than that to which he is statutorily entitled. Evans v. Stearns-Rogers Manufacturing Co., 253 F. 2d 383 (10th Cir. 1958). To hold otherwise would be contrary to the intent and purposes of the Workmen's Compensation Act.

The judgment is reversed and the cause is remanded with instructions to enter judgment for the defendants.

It is so ordered.

LOPEZ, J., concurs.

HENDLEY, J., specially concurring.

HENDLEY, Judge (specially concurring).

I concur in the majority result. Under plaintiff's first point I would add that the trial court ordered defendants to pay for Doctor Feagler's deposition. Under defendants' cross-appeal I would add that Doctor Palafox' report unequivocally stated that "past history revealed the patient had never had any previous back injuries." Thus, Doctor Palafox had no knowledge whatsoever about plaintiff's prior back injury. Therefore, the predicate to his expert opinion was missing. City of Albuquerque v. Chapman, 76 N.M. 162, 413 P. 2d 204 (1966).

Lastly, the exception to the general rule of those who accept the benefits of an award may not appeal is found in State v. Jemez Land Co., 30 N.M. 24, 226 P. 890 (1924), which holds that where there is no possibility that the appeal may lead to a result whereby the appellant may recover less than has been received under the judgment appealed from, the right to appeal is unimpaired. The exception is inapplicable here since plaintiff asks for a new trial at which he may recover nothing. Our holding is another exception to the general rule and is based on policy considerations.

536 P.2d 1108

STATE of New Mexico, Plaintiff-Appellee,

v.

Isabel BARRERAS, Defendant-Appellant.

No. 1697.

Court of Appeals of New Mexico.

May 28, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, App. Defender, Gerald Chakerian, Asst. App. Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Ralph Muxlow II, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant used a firearm in committing aggravated battery. In imposing sentence, the trial court refused to consider suspending defendant's sentence on the basis that § 40A–29–3.1, N.M.S.A.1953 (2d Repl. Vol. 6) was mandatory. Defendant contends that § 40A–29–3.1, supra, could not be applied in his case. We hold that § 40A–29–3.1, supra, was applicable to defendant's sentence but that it was misapplied. Accordingly, we remand for further hearing as to whether a part of the sentence should be suspended.

Section 40A–29–3.1, supra, reads:

"When a separate finding of fact by the court or jury shows that a firearm was used in the commission of:

"A. murder other than murder in the first degree, rape, statutory rape, rape of a child, sexual assault, escape from jail, escape from penitentiary, escape from custody of a peace officer or assault by prisoner, the minimum and maximum

terms of imprisonment prescribed by the Criminal Code shall each be increased by five [5] years; or

"B. any crime constituting a felony other than a capital felony, the court shall not suspend the first one [1] year of any sentence imposed; or

"C. any crime constituting a second or subsequent felony, other than a capital felony, the imposition or execution of a sentence shall not be suspended or parole shall not be granted unless one-half [½] of the minimum imprisonment provided for the offense shall have been served."

The statute provides for sentencing consequences when a firearm is used in the commission of certain crimes. The enhancement is in various ways. Under Paragraph A the minimum and maximum terms of imprisonment are increased. Paragraph B limits the authority to suspend the sentence. Paragraph C limits the authority either to suspend the sentence or to grant parole. This statute provides for enhanced sentences for specified crimes which are committed with a firearm. See State v. Lard, 86 N.M. 71, 519 P.2d 307 (Ct.App.1974).

Defendant asserts the trial court had no jurisdiction to utilize § 40A–29–3.1, supra, in imposing sentence. He contends that jurisdiction was lost because § 40A–29–3.1, supra, was not charged in the information. This contention is not concerned with the sufficiency of the information to charge the crime of aggravated battery contrary to § 40A–3–5, N.M.S.A.1953 (2d Repl. Vol. 6). See State v. Sanchez, 87 N.M. 140, 530 P.2d 404 (Ct.App.1974). This contention is directed to what must be charged in the information so that the enhanced penalties of § 40A–29–3.1, supra, apply when conviction occurs.

State v. Blea, 84 N.M. 595, 506 P.2d 339 (Ct.App.1973) involved Paragraph A of § 40A–29–3.1, supra. *Blea* states that this statutory provision created a new class of crimes and that defendant must be charged with violating this new crime "so as to enable him to prepare his defense to that crime." This statement is overly broad. On the other hand, State v. Sanchez, supra, indicates that § 40A–29–3.1, supra, creates "no new crime" and is superfluous to the criminal charge. This statement is too narrow. These seemingly contradictory statements are reconcilable because § 40A–29–3.1, supra, contains two major elements. *Blea* and *Sanchez* each emphasize a different element.

One major element in § 40A–29–3.1, supra, is that crimes committed by use of a firearm are to be treated differently than crimes committed without a firearm. *Blea* emphasizes this element. The second major element is the consequence for using a firearm. *Sanchez* emphasizes this element. Both decisions are correct.

Blea holds that a defendant must be given notice, in the criminal charge, that he used a firearm in committing the crime. We reaffirm this holding because, as stated in *Blea,* a defendant is entitled to be informed of the nature of the accusation against him so as to enable him to prepare his defense. *Sanchez* states that a defendant need not be given notice, in the criminal charge, of the enhanced penalty for using a firearm. We reaffirm this holding because the sentence is not an element of the conviction; rather it is a consequence of the conviction. State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct.App. 1969). We add, however, that the reference in *Blea* to a new class of crimes and the reference in *Sanchez* that § 40A–29–3.-1, supra, is superfluous is verbiage unnecessary to the decision in either case. This verbiage is disapproved because § 40A–29–3.1, supra, creates new consequences for criminal conduct committed by using a firearm.

For the enhanced penalties of § 40A–29–3.1, supra, to apply, a defendant must have been put on notice that the crime charged was committed by using a firearm. Direct ways of giving notice is to allege that a firearm was used or that defendant

is charged under § 40A–29–3.1, supra. That was not done in this case. The information charged defendant with committing the aggravated battery "with a deadly weapon". Was this sufficient notice?

The information gave defendant notice that he must be prepared to defend against a charge of using a deadly weapon. Deadly weapon "means any firearm". Section 40A–1–13(B), N.M.S.A.1953 (2d Repl. Vol. 6). The definition of deadly weapon encompasses more than firearms. If defendant was uncertain whether the charge of deadly weapon encompassed a firearm, he could have obtained a description of the weapon under §§ 41–23–8 and 41–23–9, N. M.S.A.1953 (2d Repl. Vol. 6, Supp.1973).

We hold that the information charging that the offense was committed with a deadly weapon was sufficient to put defendant on notice to defend against committing the crime by using a firearm. The charge was sufficient in this case; the trial court had jurisdction and § 40A–29–3.1, supra, was applicable.

Defendant also asserts he was prejudiced by the failure to charge § 40A–29–3.1, supra, in the information. He concedes that a specific mention of the statute or the word "firearm" would not have significantly altered defense strategy at trial. His contention is that the failure to specifically mention the statute or "firearm" severely handicapped his decision as to whether to plead guilty to a lesser offense. This claim is answered by the record. At the sentencing proceeding, his counsel stated that "we did not plead him guilty because he [defendant] didn't feel like he was guilty . . . ." There is no factual basis for a claim of prejudice based on loss of a plea bargain.

Section 40A–29–3.1, supra, requires a separate finding of fact by the court or jury that a firearm was used. State v. Blea, supra, holds that this finding must be made by the fact finder in the case. This case was tried to the court without a jury. The court specifically found that a firearm was used in commission of the aggravated battery. No claim is made that there was insufficient evidence for this finding; it is uncontroverted that defendant shot the victim with a pistol.

Thus, the penalty provisions of § 40A–29–3.1, supra, were mandatory. The applicable provision in this case was Paragraph B—"the court shall not suspend the first one [1] year of any sentence imposed . . . ." Thus, the first one year of defendant's sentence of not less than two nor more than ten years could not properly be suspended.

The trial court, however, was of the view that under § 40A–29–3.1(B), supra, "I have no power to suspend . . . ." "I am faced with the statute that practically ties my hands." Accordingly, the trial court refused to consider whether any part of the sentence after the first year could be suspended. In this the trial court erred.

Oral argument in this case is unnecessary; the cause is submitted for decision on the briefs. The conviction is affirmed. The statutory sentence for a third degree felony is affirmed. The cause is remanded to the trial court with instructions to reopen the sentencing hearing. At that hearing the trial court is to determine, in its discretion, whether any part of the sentence after the first year is to be suspended. See § 40A–29–15(B), N.M.S.A.1953 (2d Repl. Vol. 6).

It is so ordered.

HENDLEY and HERNANDEZ, JJ., concur.

537 P.2d 51

STATE of New Mexico, Plaintiff-Appellee,

v.

Walter K. MAZUREK, Defendant-Appellant.

No. 1639.

Court of Appeals of New Mexico.

June 4, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Sarah M. Singleton, Associate Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Ralph W. Muxlow, II, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

The defendant was convicted of armed robbery contrary to § 40A–16–2, N.M.S.A. 1953 (2d Repl.Vol. 6, Supp.1973). After judgment and sentence the defendant appeals; we affirm.

The defendant raises six issues: (1) error in refusing defendant's requested instruction; (2) double jeopardy; (3) error in instructions given regarding criminal intent; (4) void sentence; (5) violation of defendant's right to a speedy trial; and (6) failure of the trial court to sentence the defendant in his presence.

On October 17, 1973, the victim went to La Entrada Bar in Albuquerque, New Mexico at about 8:10 p. m. As he entered the bar, he spoke to some friends inside and then he went into the bathroom. The co-defendant, Bobby Garcia, then entered the bathroom, pulled a gun, and demanded the victim's money, wallet and other valuables. The defendant entered, looked out the door, and went behind a partition to the toilet. The victim was able to look at the defendant for a full 10 to 20 seconds. The lighting was good and he got a good look at the defendant's face. The bartender at the bar testified that the defendant was the person who had entered the bathroom behind the victim. The bartender also testified that the defendant and Bobby Garcia then left the bar together.

The police arrived about 10 to 15 minutes after a phone call by the victim, and he reported the incident to them. About 15 to 20 minutes later, the police returned to the bar's parking lot with two men in the back seat of the patrol car. The car was about 50 to 75 feet away from the victim. The victim volunteered information at that time that they looked "like the two guys that robbed him." He got a good look at their faces. Two days later the po-

lice showed the victim four photographs from which he was able to identify the defendant as the one without the gun.

The defendant was arrested the same night and remained in jail pending trial. He was indicted as a principal in the offense along with Bobby Garcia. Trial of the joined offenses was continued four times, owing primarily to conflicting obligations of Garcia's counsel. The defendant ultimately sought and was granted a severance, and his separate trial was scheduled for March 29, 1974. The case was called for trial wherein the district attorney elicited evidence consisting of a gun and bullets which a police officer had taken from the defendant's car as a result of an illegal search and seizure. This evidence was shown to the jury. The defendant moved for a mistrial and it was granted.

The defendant was brought to trial a second time and was convicted. It is this trial from which the present appeal is taken.

(1) *Defendant's requested instruction*

The defendant requested the trial court to give the following instruction on the danger of eyewitness identification which was denied:

> "You should receive evidence of eye witness identification with caution. Eye witness identification is frought with inherent dangers, and where eye witness identification alone is relied upon by the State, without corroboration, you should receive this testimony with extreme caution."

The defendant relies on State v. Padilla, 66 N.M. 289, 374 P.2d 312 (1959); and United States v. Barber, 442 F.2d 517 (3d Cir. 1971). Neither case supports the defendant's contention in the case at bar.

In *Barber,* the defendants were picked out of a crowd and were fleeing. In the case at bar, the victim had 10 to 20 seconds to observe the defendant at close range. The victim was positive in his identification of the defendant at each opportunity given him to make an identification.

In *Padilla,* the court failed to instruct fully on the defendant's theory of insanity. In the case at bar, the purpose of the requested instruction by the defendant was to alert the jury to be cautious regarding the testimony of identification by the victim. This ground was covered by the court's instruction on the credibility of witnesses and *on* the instruction *of* reasonable doubt. We believe that if the matter of the requested instruction is adequately covered by other instructions, then the failure of the court to instruct the jury as requested does not constitute any error. State v. Cranford, 83 N.M. 294, 491 P.2d 511 (1971); State v Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct.App.1970).

(2) *Double jeopardy*

Prior to trial, the defendant sought to suppress evidence consisting of a gun and bullets which were taken from the defendant's car which had been secured by the police. This motion was denied. During the trial of the case, this evidence was displayed to the jury. At this point, the defendant moved for a mistrial, which was granted.

Defendant relies upon Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2d 425 (1973); United States v. Glover, 506 F.2d 291 (2d Cir. 1974); and United States v. Dinitz, 504 F.2d 854 (5th Cir. 1974). Defendant's theory is that retrial after a mistrial is barred by double jeopardy where the mistrial was caused by prosecutor misconduct. See § 40A–1–10, N.M. S.A.1953 (2d Repl.Vol. 6); compare State v. Tanton, N.M.App., 536 P.2d 269, decided May 7, 1975.

Double jeopardy, in this instance, normally attaches upon the empaneling of a jury, for it is then that the defendant is "put in jeopardy." Illinois v. Somerville, supra; United States v. Glover, supra. Having been "put in jeopardy", the defendant is thought to have the right to seek a favorable verdict from the jury

which he has accepted as satisfactory. United States v. Jorn, 400 U.S. 470, 91 S. Ct. 547, 27 L.Ed.2d 543 (1971). There are exceptions to this general rule, and the case of a single defendant whose trial has been aborted without his consent turns on its particular facts. Illinois v. Somerville, supra. This is the line of reasoning embodied in the *Glover* and *Dinitz* cases cited by defendant.

The rule is, however, wholly inapplicable in the situation, as in the instant case, where the defendant requests a mistrial. As Justice Frankfurter noted in Gori v. United States, 367 U.S. 364, at 369, 81 S.Ct. 1523, at 1527, 6 L.Ed.2d 901 (1961), speaking for the Court:

> ". . . Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial."

A motion for mistrial by defendant ordinarily removes the barrier to reprosecution. United States v. Jorn, supra. An exception occurs where the motion is the result of prosecutorial overreaching. Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). There is no record of the proceedings in the first trial before this court. The reviewing court will not presume prosecutorial overreaching absent a record. See Montoya v. Moore, 77 N.M. 326, 422 P.2d 363 (1967).

The mistrial in this case was granted for the benefit of the defendant. The motion followed the attempted introduction of tainted evidence and resulted in the necessary exclusion of the evidence. See State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct.App.1973). The proper result of such a motion is a retrial without the tainted evidence, which occurred. We find no grounds in the record for reversing the second trial merely because the state attempted to introduce evidence at the first trial which was inadmissible. The trial court did not abuse its discretion and there is no showing of prosecutorial overreaching amounting to gross misconduct. Illinois v. Somerville, supra.

(3) *Instructions regarding criminal intent*

Defendant has two parts to this argument: (1) that the jury should have been instructed on specific intent; and (2) that the instructions given were insufficient to inform the jury of the requirement of even general intent. We disagree.

The court instructed the jury on criminal intent as follows:

> "The material allegations of the indictment necessary to be proven to your satisfaction and beyond a reasonable doubt before you can find the defendant guilty are that at the county of Bernalillo in the State of New Mexico on the 17th day of October, 1973, the defendant did commit a theft of things of value, to wit: monies and other items of value from the immediate control of Clarence Garcia, 3900 Tulane, NE, Apartment 36, Albuquerque, New Mexico, by use or threatened use of force or violence and while armed with a deadly weapon, to wit: a firearm.
>
> ". . .
>
> "Criminal intent is more than an intentional act; it is a mental state of conscience [sic] wrongdoing. It is an essential element of the crime with which defendant is charged and must be proven beyond a reasonable doubt.
>
> "Intent is seldom susceptible of direct proof and may be inferred from the facts and circumstances surrounding the case.
>
> ". . .
>
> "You are instructed that an accomplice is one who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of the crime.
>
> "Mere presence at the scene of a crime will not support a conviction as either a principal or an aider or abettor. Presence must be accompanied by some

outward manifestation or expression of approval. 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."

We believe that these instructions, including those given in the language of the statute, were sufficient to describe both general and specific criminal intent. See State v. Gunzleman, 85 N.M. 295, 512 P.2d 55 (1973); State v. Puga, 85 N.M. 204, 510 P.2d 1075 (Ct.App.1973).

The court fully instructed the jury regarding all the elements of the crime against the defendant. State v. Gonzales, 86 N.M. 556, 525 P.2d 916 (Ct.App.1974); State v. Martinez, 85 N.M. 198, 510 P.2d 916 (Ct.App.1973).

(4) *Void sentence*

The defendant argues that his sentence was based on both § 40A–16–2, supra, and § 40A–29–3.1(B), N.M.S.A.1953 (2d Repl.Vol. 6), and is void under the holding of State v. Blea, 84 N.M. 595, 506 P.2d 339 (Ct.App.1973). We need not reach the problem addressed by the defendant, since he was sentenced only under § 40A–16–2, supra. State v. Sanchez, 87 N.M. 140, 530 P.2d 404 (Ct.App.1974) [Sutin, J., specially concurring].

(5) *Violation of the defendant's right to a speedy trial*

The alleged denial of the defendant's right to a speedy trial is based upon an extension granted to the prosecution by our Supreme Court under Rule 37. [Rules of Criminal Procedure, § 41–23–37, N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1973)]. This being the case, we cannot review this point. State v. Sedillo, 86 N.M. 382, 524 P.2d 998 (Ct.App.1974).

(6) *The failure of the trial court to sentence the defendant in his presence*

The defendant argues that he was not present when the trial court signed and entered the written judgment and sentence on May 29, 1974. However, the written sentence does show that on May 21, 1974, the defendant and his attorney appeared in person before the trial judge for oral sentencing. The written sentence is merely a reduction to writing of the oral sentence and as such is only a ministerial act. See United States v. Sumpter, 287 F.Supp. 608 (S.D.Tex.1968). Therefore, the sentence was properly imposed by the trial court.

We find no error in any of the points alleged by the defendant. Accordingly, the judgment and the sentence are hereby affirmed.

It is so ordered.

SUTIN and HERNANDEZ, JJ., concur.

537 P.2d 55

STATE of New Mexico, Plaintiff-Appellee,

v.

Frances JARAMILLO, a/k/a Frances Lente, Defendant-Appellant.

No. 1670.

Court of Appeals of New Mexico.

April 30, 1975.

Rehearing Denied May 19, 1975.

Certiorari Denied June 26, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Donald Klein, Jr., Associate Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Harvey B. Fruman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Defendant was indicted and convicted of unlawfully and intentionally trafficking in a controlled substance contrary to § 54–11–20, N.M.S.A.1953 (Repl. Vol. 8, pt. 2,

Supp.1973). She appeals her judgment and sentence and we affirm.

Defendant offers four points for reversal: (1) that the New Mexico courts had no jurisdiction; (2) that the opening remarks of the State were so prejudicial and lacking in foundation that defendant's motion for mistrial ought to have been granted; (3) that the trial court erred in denying defendant a continuance to locate and interview a witness whose identity was disclosed during the course of the trial; and (4) that the defendant was denied a fair trial by cumulative error as a result of remarks by the State during the opening and closing of the case.

(1) *Jurisdiction*

The indictment was filed March 8, 1973. On August 23, 1973, defendant's attorney filed a "waiver" in which he acknowledged that the State had previously petitioned the New Mexico Supreme Court for an extension of time in which to try the case, stated he was cognizant of Rule 37, and voluntarily waived any objection to the petition for extension of time. See § 41–23–37, N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1973). On August 29, 1973, there was a notice of removal to Federal District Court. On September 6, 1973, the New Mexico Supreme Court granted a six month extension for prosecution of the case.

Defendant contends the trial court lost jurisdiction to proceed because the case was removed to the federal court. This contention ignores the record. The federal court remanded the case to the State court on October 18, 1973. Trial in the State court was in January, 1974.

Defendant argues that when the extension of September 6 was granted, the Supreme Court was without authority to grant the extension because the federal court had not yet remanded the case. We do not answer this contention because we are without authority to review Supreme Court orders granting extensions of time to commence trial. State v. Sedillo, 86 N.M. 382, 524 P.2d 998 (Ct.App.1974).

However, the contention concerning Supreme Court jurisdiction is academic. Defendant, in this case, waived "any objection to the Petition for an extension of time requested by the State of New Mexico." This waiver constitutes an intentional abandonment of a known right. State v. Mascarenas, 84 N.M. 153, 500 P.2d 438 (Ct.App.1972). We discern no fundamental right of defendant which would stand in the way of her express waiver, and therefore rule that she may not complain of an action which she foresaw and in which she acquiesced.

(2) *State's opening remarks*

During opening remarks, the prosecution referred to the defendant as a "heroin pusher", "dope peddler" and one who is "plying her trade". The record shows that the defendant was a pusher, a peddler and that she was pursuing her trade. These are not uncommon words nowadays. The mere offer of the State to prove these matters about defendant was in no way prejudicial. Compare State v. Vallejos, 86 N.M. 39, 519 P.2d 135 (Ct.App.1974), where prosecutorial comments involved personal belief in the guilt of the accused.

(3) *Continuance*

During trial, a prosecution witness disclosed the name of another person who was present when an alleged act of trafficking occurred. Defendant moved for a continuance to locate this person. The motion was ultimately denied.

The granting of a continuance is within the discretion of the trial court and will not be overturned absent a showing of abuse of discretion which was injurious to defendant. State v. Brewster, 86 N.M. 462, 525 P.2d 389 (Ct.App.1974). Defendant has not demonstrated either that the witness sought would, in fact, testify or that he could in any way, aid her case. No prejudice has been alleged which would alert the trial court to possible injury to the defendant's case; nor has defendant

shown in what way the trial court may have abused its discretion. State v. Baca, 85 N.M. 55, 508 P.2d 1352 (Ct.App.1973).

Defendant also moved for a new trial on grounds of newly discovered evidence. The new trial was also denied. There is no showing, either on the record or in the defendant's brief, that any new evidence would be such as might produce a different result on the merits. State v. Fuentes, 67 N.M. 31, 351 P.2d 209 (1960); State v. Chavez, 87 N.M. 38, 528 P.2d 897 (Ct.App.1974). The trial court did not abuse its discretion in denying the motion for a new trial.

(4) *Cumulative error*

Defendant contends that she was denied a fair trial because of the opening remarks of the State [see # 2 above], and of a closing remark by the State where the prosecutor stated:

> "It's a little hard to keep cool under the circumstances sometimes, and the thrust of the argument has been that this evidence has been trumped up. The implication of that is that I, too, am dishonest and am a fool, and I don't think I am."

Defendant argues that these comments amounted to "an accumulation of irregularities" which denied defendant a fair trial under the reasoning of State v. Vallejos, supra.

We have previously stated that there is substantial evidence in the record to support the prosecutor's opening remarks. The prosecutor's closing remarks were in response to defendant's closing remarks asserting the State's case had been totally fabricated. The prosecutor's comments were invited by defendant's closing argument. State v. Wesson, 83 N.M. 480, 493 P.2d 965 (Ct.App.1972). We, therefore, decline to apply the cumulative error doctrine as outlined in State v. Vallejos, supra.

The judgment and sentence are affirmed.

It is so ordered.

WOOD, C. J., concurs.

HENDLEY, J., specially concurring.

HENDLEY, Judge (specially concurring).

I concur in the majority opinion except for that part under the Jurisdiction heading which gratuitously discusses waiver. The vice of this part of the opinion is that it is unnecessary and at best advisory. See State v. Barboa, 84 N.M. 675, 506 P.2d 1222 (Ct.App.1973), Special Concurring Opinion. The short answer to the issue is found in State v. Sedillo, 86 N.M. 382, 524 P.2d 998 (Ct.App.1974), (concurred in by the majority herein): we are simply unable to review orders of the Supreme Court.

537 P.2d 672

STATE of New Mexico, Plaintiff-Appellee,

v.

Jerry LUNN, Defendant-Appellant.

No. 1511.

Court of Appeals of New Mexico.
April 30, 1975.

Rehearing denied May 29, 1975.

Certiorari Denied June 26, 1975.

Mary C. Walters, Marchiondo & Berry, P.A., Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Santa Fe, James L. Brandenburg, David R. Lee, Marcia H. Summers, Sp. Asst. Attys. Gen., for plaintiff-appellee.

OPINION

HERNANDEZ, Judge.

This matter has been before this Court on two previous occasions. State v. Lunn, 80 N.M. 383, 456 P.2d 216 (Ct.App.1969); State v. Lunn, 82 N.M. 526, 484 P.2d 368

(Ct.App.1971). In all, the defendant has been tried four times. The second trial resulted in a hung jury. The trial out of which this appeal arises resulted in defendant's conviction of murder in the second degree. Defendant presently comes before us alleging six points of error. We affirm.

Since the facts developed in this trial do not differ markedly from those developed in the first, we refer the reader to State v. Lunn, 80 N.M. 383, 456 P.2d 216, supra, for a statement of the facts.

POINT I:

"DEFENDANT WAS ENTITLED TO INSTRUCTIONS ON THE DEFENSE OF INTOXICATION AS AFFECTING THE REQUISITE ELEMENTS OF SECOND DEGREE MURDER, AND AS AFFECTING A REDUCTION IN THE CHARGES AGAINST DEFENDANT."

This identical point was raised and answered negatively by our Supreme Court in State v. Tapia, 81 N.M. 274, 466 P.2d 551 (1970). In the *Tapia* case, the defendant maintained that since it was necessary for the State to prove beyond a reasonable doubt that the killing had been done unlawfully, willfully, feloniously, with premeditation and with malice aforethought, the jury had to find that a specific intent to unlawfully take a human life had been deliberately formed by defendant before he acted. Thus, the defendant in *Tapia* urged that "voluntary intoxication, of a degree which would prevent formation of a specific intent to kill, should have an effect in law of reducing the offense from second degree murder to voluntary manslaughter." In the insant case, defendant contends that because of his acute intoxication, he was unable to knowingly and willfully commit the act alleged and that the instructions he tendered on the charges of voluntary and involuntary manslaughter and on the question of his ability to harbor the requisite specific intent were improperly denied.

In *Tapia,* supra, the Supreme Court held as follows:

"Appellant recognizes that for him to prevail on this point it is necessary that the court reconsider State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966), where we stated unequivocally that 'voluntary intoxication is no defense to murder in the second degree,' * * *." [Citations Omitted.]

* * * * * *

"Appellant's argument necessarily turns on his view that a specific intent to kill is an element of the crime of murder in the second degree at least under the instructions given by the court in this case. The law of New Mexico, however, is clear that no specific intent to kill is required for a conviction for second degree murder."

We hold that the trial court did not err in refusing the requested instructions in the present case because intoxication is *not a mitigating factor in the current state* of our law. Apart from evidence of intoxication, there is no proof in the record that defendant was otherwise entitled to an instruction on manslaughter.

POINT II:

"THE TESTIMONY OF THE FBI AGENTS INJECTED A FALSE ISSUE INTO THE CASE, WAS IRRELEVANT AND UNCONNECTED TO ANY ISSUE, AND WAS INADMISSIBLE."

The testimony of which defendant complains was given by agents Zimmer and Gallagher. Two slugs, one removed from the body of the deceased and one taken from the wall behind a television set in the deceased's home, together with four cartridges taken from a cartridge belt found in the defendant's den, were sent to the FBI laboratory in Washington, D. C. Agent Zimmer testified that the slugs and the cartridges were of the same type: copper-coated "Western .38 specials". On

cross-examination he acknowledged that this was a very popular size and that the number in distribution could be in the millions. He further testified that a .38 caliber cartridge could not have been fired from the .22 caliber pistol found in the defendant's home. Agent Gallagher testified that the two slugs were composed in the same way and that they were of the same composition as three of the four cartridges taken from defendant's cartridge belt. He said that they could have come from the same batch. Gallagher further testified that there could be a difference in composition of ammunition made by the same manufacturer. Two holsters were found at defendant's home but only one weapon, and it was a .22 caliber pistol. The murder weapon was never found. It was shown that the fatal bullet could not have been fired by defendant's .22 caliber pistol.

On this point, we believe that the agents' testimony was relevant in that it tended to connect defendant with the murder. State v. Thurman, 84 N.M. 5, 498 P.2d 697 (Ct. App.1972). This evidence, albeit inconclusive, was admissible.

Even though Rule 401 of the Rules of Evidence, § 20–4–401, N.M.S.A.1953 (Repl. Vol. 4, Supp.1973), had not yet become effective *at the time of trial* in the instant case, we note it, nonetheless, for its clear statement of the appropriate considerations involved:

> " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

POINT III:

"THE COURT IMPROPERLY REFUSED DEFENDANT'S TENDER OF EXPERT TESTIMONY AS TO THE AFFECT OF ACUTE INTOXICATION ON THE DEFENDANT'S CAPACITY TO FORM ANY INTENT TO COMMIT MURDER IN THE SECOND DEGREE."

The testimony referred to was that of Dr. John A. Salazar, a clinical psychologist. Based on testimony in the record that defendant had drunk two or three ounces less than a quart of vodka in a 5¼ hour period of time, Dr. Salazar would have testified that the defendant was acutely intoxicated and therefore incapable of deliberation, premeditation or malice aforethought.

Defendant's point is without merit. As was pointed out in State v. Tapia, supra:

> "We would agree with the appellant's contention that in crimes where a specific intent is a necessary element, a showing of intoxication to a degree that would make such an intent impossible, would establish a valid defense to the charge. [Citations omitted.] But, as noted above, a specific intent is not required for conviction in second degree murder, thus explaining why voluntary intoxication is no defense to such a charge." [Citations omitted.]

The evidence tendered, then, was properly excluded because it would not have been probative of any fact material to a determination of guilt on the charge of second degree murder.

POINT IV:

"THE TRIAL COURT SHOULD HAVE EXCLUDED TESTIMONY FROM THE TWO MINOR CHILDREN OF THE DECEASED, AS WELL AS EVIDENCE CONCERNING THE CONDITION OF DEFENDANT'S PICK–UP TRUCK."

The evidence concerning defendant's truck consisted of the testimony of two police officers. Officer Golden testified that when he examined the truck at 2:10 a. m., it was "extremely warm", indicating that it had been recently driven. Former Officer Montoya testified that when he examined the cab of the truck at approximately 2:00 a. m., he discovered vomit on the floor board on the drivers side. The widow of the victim testified that during the conversation that occurred

in the kitchen just before the shooting, defendant said that he had vomited and had gotten some of it on the lapel of his coat. She said she gave the defendant a damp cloth and that he used it to clean his lapel. The trial court did not err in refusing to exclude this testimony. The evidence showed that the defendant arrived at the Candelaria home about 1:30 a. m., left about 1:45 or 1:50 a. m., and that the police arrived at defendant's home at about 2:10 a. m. Officer Golden's testimony was relevant in that it tended to corroborate the prosecution's reconstruction of the time sequence involved. Officer Montoya's testimony was relevant in that it tended to corroborate testimony of the victim's widow regarding the presence of the defendant at the Candelaria house on the night in question. State v. Thurman, supra; State v. Wright, 84 N.M. 3, 498 P.2d 695 (Ct. App.1972).

The two sons of the deceased were 7 and 11 years of age, respectively, at the time of the shooting. Neither of them had testified at any of the three prior trials.

In his brief-in-chief, defendant states that he:

> "* * * objected to allowing their [the boys'] testimony upon grounds that the State had indicated on each of the three prior occasions that neither of the children remembered anything; that six years had intervened between the occurrence of their father's death and the trial at which they were called to testify; during which time their mother had married a man with whom she had been keeping company during the prior trials, with the opportunity of prompting the children in their testimony too prevalent to permit its introduction into evidence."

The objection raised, when properly viewed, challenges the credibility of these witnesses, not their competency. The question of their competency was for the trial court to determine. State v. Manlove, 79 N.M. 189, 441 P.2d 229 (Ct.App.1968). The question of their credibility was for the jury. State v. Romero, 34 N.M. 494, 285 P. 497 (1930). The defendant had ample opportunity on cross-examination to question their credibility. The trial court did not err in allowing them to testify.

POINT V:

"PROSECUTION OF DEFENDANT FOR THE FOURTH TIME WAS A DISCRIMINATORY, UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION OF THE LAWS, AND WAS CONDUCTED IN AN IMPROPER MANNER."

Defendant points out that since 1949 only one other defendant has been tried three times for the same offense in the Second Judicial District and that the defendant herein, "* * * was treated differently than any other defendant had been treated in at least twenty-four years." He goes on to conclude that this not only denies him equal protection of the law, but it also constitutes cruel and unusual punishment. We do not agree.

As we stated in State v. Sharp, 79 N.M. 498, 445 P.2d 101 (Ct.App.1968), "The 'equal protection of the law' provisions of the United States and New Mexico Constitutions do not require uniform enforcement of the law and do not protect defendant from the consequences of his crime." [Citations omitted.] To support his contention that the fourth prosecution here constitutes "cruel and unusual punishment", defendant cites Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Furman* involved three different defendants in three different prosecutions. The death penalty had been imposed on one of the defendants for murder, and on the two others for rape. The applicable statutes in each case, left the decision of whether to impose a capital penalty or a lesser punishment to the discretion of the judge or the jury, as the case might be. In his concurrence to the *per curiam* decision declaring such statutes unconstitu-

tional, Justice Douglas noted the following as a basis for decision:

> "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.
>
> * * * * * *
>
> "The words 'cruel and unusual' certainly include penalties that are barbaric. But the words, at least when read in the light of the English proscription against selective and irregular use of penalties, suggest that it is 'cruel and unusual' to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board. * * *" [Footnote omitted.]

As can be seen, *Furman* affords the defendant no support on the facts before us. A similar argument was urged upon the Supreme Court of Arkansas in an identical factual situation. In rejecting the argument, as do we, the Court said the following: "Point III. 'Four murder trials constitute cruel and unusual punishment.' We are cited no authorities for that proposition and we know of none." Mosby v. State, 253 Ark. 904, 489 S.W.2d 799, 801 (1973).

POINT VI:

"DEFENDANT WAS ENTITLED TO A CHANGE OF VENUE."

Underlying defendant's argument on this point is a challenge to the trial court's view of the interrelationship between §§ 21–5–3 and 21–5–4, N.M.S.A.1953 (Repl.Vol. 4). Shortly after it became apparent that defendant would be reprosecuted, his counsel moved for change of venue pursuant to § 21–5–3(A)(2)(c), supra. The section reads:

> "A. The venue in all civil and criminal cases shall be changed, upon motion, to some county free from exception: * * *. (2) when the party moving for a change files in the case an affidavit of himself, his agent or attorney, that he believes he cannot obtain a fair trial in the county in which the case is pending because: * * * (c) because [sic] of public excitement or local prejudice in the county in regard to the case or the questions involved therein, an impartial jury cannot be obtained in the county to try the case; * * *."

The terms of the section are mandatory and require a change of venue when the prescribed steps have been taken. In the present case, counsel's affidavit reads in pertinent part:

> "* * * 3. That affiant believes the defendant Jerry Lunn cannot obtain a fair trial in Bernalillo County because (a) each trial has been attendant with publicity via radio, TV, and newspaper articles; (b) each appeal has been publicized and the results thereof, (c) that by virtue of the publicity that the defendant will be unable to recieve an impartial jury. * * *"

The motion and affidavit were filed on May 26, 1971. Hearing on the motion was held September 3rd, 1971. At the hearing, the trial court announced that it would require presentation of evidence on the motion; and, thus, the question was removed from the mandatory operation of § 21–5–3, supra, to the discretionary operation of § 21–5–4, supra, as follows:

> "Upon 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."

See State v. Atwood, 83 N.M. 416, 492 P. 2d 1279 (Ct.App.1971); State v. Montoya, 80 N.M. 64, 451 P.2d 557 (Ct.App.1968). Pursuant to the trial court's demand, defendant proceeded to introduce evidence from his own investigator to the effect

that the name and prosecution of Jerry Lunn obtained a greater degree of notoriety among residents of the northern counties than the southern counties, that from the date of his initial arrest to the date of the hearing, the Albuquerque Journal had published 33 news articles on the case, and that during the same period, the Albuquerque Tribune had published 34 such stories. Further, defendant produced representatives from two of the Albuquerque television stations and one radio station, each of whom described the area of their broadcasting coverage and acknowledged that numerous reports on the Lunn case had been aired by their stations from time to time during the course of the three previous trials and two appeals. The District Attorney cross-examined the defendant's witnesses and called one of his own. Upon termination of the hearing, the trial court took the motion under advisement.

Defendant thereafter submitted requested findings and conclusions on January 31, 1972. On October 24, 1972, the trial court entered an order denying the Motion for Change of Venue. The order held, *inter alia:*

> "* * * 2. That the Findings of Fact heretofore entered by the Court are the Findings of Fact and Conclusions of Law herein."

The problem raised by defendant on appeal is that there never had been made any findings or conclusions, reference back to which was possible.

The thrust of defendant's argument may be divided into two parts. First, he urges that the trial court committed error in requiring any evidence on the motion beyond the affidavit executed by his attorney; and that but for that error, change of venue should have been granted as a matter of right. State v. Alaniz, 55 N.M. 312, 232 P.2d 982 (1951). Compare, State v. Deats, 80 N.M. 77, 451 P.2d 981 (1969). In this contention, we believe appellant is mistaken because it is for the trial court to determine whether the motion should be granted or whether further evidence on the motion should be required. Section 21–5–4, supra. See State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952). Second, defendant urges that since no findings were ever made on the motion, as required by § 21–5–4, supra, the hearing was a nullity and that the motion should have been considered as if no hearing were ever held. Such treatment would entitle the defendant to a mandatory change of venue under § 21–5–3, supra. In our opinion, two facts apparent on the record dispose of this contention: (a) defendant never brought the oversight implicit from the order to the attention of the trial court, and (b) defendant exercised no challenge to any of the jurors ultimately empanelled. The only juror excused from service on defendant's case was dismissed for cause by the court. Otherwise, none of the jury panel indicated knowledge, predisposition or prejudice after probing *voir dire* by the court, the prosecution and defense counsel. Thus, although we by no means intend to indicate approval of the trial court's failure to make findings in connection with defendant's venue motion, we believe that in this case such error as there was has been waived and that defendant has not met the burden of proof in showing that the error was anything more than harmless.

The judgment and sentence heretofore entered in this case are affirmed.

It is so ordered.

LOPEZ, J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

The reason this case found its way to this Court for the third time is made clear by reason of its prior judicial history.

In State v. Lunn, 80 N.M. 383, 456 P.2d 216 (Ct.App.1969), this Court reversed solely on the ground that the trial court did not permit testimony of defendant's witness as to a telephone conversation which was relevant to the credibility of the

eyewitness to the shooting. The other eight points raised by defendant were not considered.

In State v. Lunn, 82 N.M. 526, 484 P.2d 368 (Ct.App.1971), this Court reversed solely on the ground that defendant was denied his right of confrontation when the trial court allowed the admission of out of court statements by the victim's children. The other eight points raised by defendant were not considered.

In this case, six points are raised for review.

Experience on the bench has taught me that judges are, like all men, "liable to error; and * * * are, in most points, by passion or interest, under temptation to it." [John Locke, Essay Concerning Human Understanding (1690), dedicatory epistle]. Through all of defendant's prosecutions, certain errors have been perpetrated, and overlooked on appeal. These errors confront this Court in the instant appeal; and they should cause reversal of appellant's conviction for a third time.

A. *Manslaughter is an offense necessarily included in the charge of murder.*

Defendant was charged with murder in the first degree in violation of § 40A–2–1(A), N.M.S.A.1953 (2nd Repl.Vol. 6, 1972). However, the jury was not instructed on murder in the first degree. Defendant was convicted of second degree murder.

The court instructed the jury:

> You are not to concern yourself as to whether or not the acts of the defendant may constitute some other crime other than that *for which he stands charged,* keeping in mind that your determination *is confined to the crime described,* and you shall not convict the defendant of this crime solely because you feel that he may be guilty of *some other crime.* [Emphasis added]

The trial court denied several of defendant's requested instructions on manslaughter. Two of them are:

> If, however, you fail to find any one of the necessary elements to establish second degree murder, you may then consider whether or not the defendant is guilty of manslaughter.
>
> * * * * * *
>
> Manslaughter is the unlawful killing of a human being without malice. Manslaughter may be of two degrees:
>
> 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. [Section 40A–2–3]

The Supreme Court and this Court have held many times that manslaughter is included in the charge of murder. State v. Rose, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028, 89 S.Ct. 626, 21 L.Ed.2d 571 (1969); State v. Holden, 85 N.M. 397, 512 P.2d 970 (Ct.App.1973).

Rule 44(d) of the Rules of Criminal Procedure [§ 41–23–44(d), N.M.S.A.1953 (2d Repl.Vol. 6, 1973 Supp.)] provides:

> (d) *Conviction of lesser offense. If so instructed,* the jury may find the defendant guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein. [Emphasis added]

What is meant by the words, "If so instructed"? They have not been interpreted. Section 41–23–41(a) provides:

> The court must instruct the jury upon all questions of law necessary for guidance in returning a verdict.

"Under Rule 41(a), the necessity of guidance to the jury is a mandatory duty of the trial court to avoid guess and speculation in returning a verdict." State v. Mata, 86 N.M. 548, 552, 525 P.2d 908, 912 (Ct.App.1974) (Sutin, J., dissenting).

"[Rule 41(a)] operates only when there is a complete failure to instruct upon a necessary issue." State v. Cardona, 86 N.

M. 373, 374, 524 P.2d 989, 990 (Ct.App. 1974).

Accordingly, the clause "If so instructed", in Rule 44(d), appears to require that when it is mandatory for the trial court to instruct on lesser offenses, and the trial court does so instruct, "the jury may find the defendant guilty of an offense necessarily included in the offense charged * * *."

Defendant was entitled to instructions on manslaughter if there was some evidence tending to establish the lesser included offense. State v. Andrada, 82 N.M. 543, 484 P.2d 763 (Ct.App.1971); State v. Wingate, N.M.App., 534 P.2d 776, decided April 9, 1975).

In Territory v. Lynch, 18 N.M. 15, 35, 133 P. 405, 409 (1913), the Court said:

> It is needless to cite authority for the proposition that, where there is any evidence tending to show such a state of facts as may bring the homicide within the grade of manslaughter, defendant is entitled to an instruction on the law of manslaughter, and it is fatal error to refuse it.

This rule has become established law in New Mexico. State v. Ulibarri, 67 N.M. 336, 355 P.2d 275 (1960).

The facts of this case are set forth in State v. Lunn, 80 N.M. 383, 456 P.2d 216, supra. The facts include "evidence tending to show such a state of facts as may bring the homicide within the grade of manslaughter * * *."

One of the most forthright opinions dealing with a failure to instruct on manslaughter was delivered by Justice Watson in State v. Diaz, 36 N.M. 284, 13 P.2d 883 (1932). In that case, the information charged murder in the first degree. The failure to give an instruction on voluntary manslaughter, which was supported by the evidence, constituted reversible error, even though the accused did not request such an instruction. Why? The Court said:

> In the first place, we consider what the accused has at stake; the forfeiture of his life if convicted of murder in the first degree, or the probable total forfeiture of his liberty if convicted in the second degree. In view of these possible consequences, it is not unreasonable to hold the trial court to a more unerring discharge of duty and to be more indulgent to the accused. 36 N.M. at 291, 13 P.2d at 887.

The basic reason for this conclusion in the instant case grows out of its history. In the second trial the jury was deadlocked. In the third trial the jury said "We recommend the defendant to the clemency of the court." In the fourth trial, during deliberations there were some votes of "not guilty". I am convinced by the tenor of the juries that, if given the opportunity, the juries would have found defendant guilty of manslaughter, the lesser included offense.

B. *Inquiry into numerical division of the jury during their deliberation is reversible error.*

While the jury was deliberating, the court inquired of the foreman of the jury:

> The Court: My information as to where you are on time. I don't want an indication as to how you are split and do not tell me or indicate in any way which way. Do you follow me? Just—I just want the count. I don't want you to indicate which way it is for. I should ask, when was your last vote?
>
> Mr. Hoffman: I would say about 5:30.
>
> The Court: O.K. Mr. Hoffman. Can you give a number talley?
>
> Mr. Hoffman: I would like to preface, there were three different kinds of votes, guilty, not guilty and undecided were the kinds of votes that were given out.
>
> The Court: Let me ask you, are you somewhere like six to six, is that near?
>
> Mr. Hoffman: No, we are kind of lopsided in one direction, kind of.
>
> The Court: I expect you're getting hungry after your cold lunch at 1:30.

Inquiry, as above, into numerical division of the jury during their deliberation is reversible error. Pirch v. Firestone Tire & Rubber Co., 80 N.M. 323, 455 P.2d 189 (Ct.App.1969); State v. Romero, 86 N.M. 674, 526 P.2d 816 (Ct.App.1974) (Sutin, J., dissenting).

In 1972, the Supreme Court adopted the Rules of Criminal Procedure. Section 41–23–43 is the only rule applicable after retirement of the jury. The only authority granted the trial court is to give the jury additional instructions or to correct any erroneous instructions it has given them. To read into this rule the right of district judges to visit with the jury, even with good conscience, makes the rule into a merry-go-round upon which children ride and play.

In homicide cases, we are not involved with money or property where "harmless error" can be used as a crutch. We are involved with human life and liberty. And let it not be said that courts which favor this view encourage homicide. All that the court says is: Give the defendant a fair trial.

C. *Admission of testimony and exhibits is reversible error.*

I agree with defendant that the testimony of the F.B.I. agents and the admission of certain exhibits were inadmissible and reversible error. State v. Kidd, 24 N.M. 572, 175 P. 772 (1917); compare State v. Carrillo, 82 N.M. 257, 479 P.2d 537 (Ct. App.1970); State v. Beachum, 82 N.M. 204, 477 P.2d 1019 (Ct.App.1970); State v. Gray, 79 N.M. 424, 444 P.2d 609 (Ct.App. 1968).

To be admissible, real evidence must be relevant. Sections 20–4–402–403, Wharton's Criminal Evidence, § 635 (13th Ed. Torcia). If it is not relevant, its admission constitutes reversible error. United States v. Reid, 410 F.2d 1223 (7th Cir. 1969); Landsdown v. United States, 348 F.2d 405 (5th Cir. 1965); State v. Wynne, 353 Mo. 276, 182 S.W.2d 294 (1944); Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965).

"Error in the admission of evidence 'should not be declared harmless unless it is so without question.'" Wynne, supra, 182 S.W.2d at 300, quoting from State v. Richards, 334 Mo. 485, 494, 67 S.W.2d 58, 61 (1933).

Defendant is entitled to a new trial.

D. *If the Supreme Court grants a new trial, intoxication should be considered in reducing the crime charged to manslaughter.*

New Mexico has not yet contemplated adopting the California rule that intoxication may be considered by the jury in reducing a charge of second degree murder to manslaughter. People v. Waters, 266 Cal.App.2d 116, 71 Cal.Rptr. 863 (1968); People v. Conley, 64 Cal.2d 310, 49 Cal. Rptr. 815, 411 P.2d 911 (1966).

Manslaughter, like second degree murder, is not a specific intent crime. State v. Utter, 4 Wash.App. 137, 479 P.2d 946 (1971); State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969); 40 C.J.S. Homicide § 37. Therefore, voluntary intoxication is not a defense. State v. Tapia, 81 N.M. 274, 466 P.2d 551 (1970); State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966).

I am not concerned here with voluntary intoxication as a defense to second degree murder or manslaughter. I am concerned with allowing the jury to weigh its effect on defendant's mental capacity to determine whether he was unable to form the malice aforethought necessary for conviction of second degree murder. *Waters*, supra; *Conley*, supra.

The State presented evidence of defendant drinking vodka until midnight, shortly before the alleged crime was committed; and of defendant having drunk almost a quart before arriving at the home of the deceased. The defendant testified that he drank so much he remembered nothing from the time he left the bar. The trial court refused defendant's tender of expert testimony as to the effect of acute intoxication on defendant's capacity to commit murder in the second degree. The defend-

ant tendered several instructions on voluntary intoxication which were denied.

Where a defendant is convicted of second degree murder, it should be prejudicial error for the trial court not to have instructed the jury that voluntary manslaughter may be found to exist if the jury finds that defendant could not have harbored malice aforethought, because of the effects which acute intoxication had on his mental state.

Our Supreme Court should consider adopting this rule. It involves a question of substantial public interest because of the great number of homicides in which there is evidence of intoxication.

I respectfully dissent.

537 P.2d 682

FIRST NATIONAL BANK IN ALBUQUERQUE, as guardian for and on behalf of Dorothy Jean Huckleby, Charles Amos Huckleby, Ernestine Huckleby and Michael Huckleby, minors, Lois Huckleby, and Ernest Huckleby, Plaintiffs-Appellants,

New Mexico Mill & Elevator Co., a corporation, and Ray Pritchett, each individually and d/b/a Golden West Seed Co., Defendants-Appellants,

v.

NOR-AM AGRICULTURAL PRODUCTS, INC., a corporation, Morton International, Inc., a corporation, and Morton Salt Co., a corporation, Defendants-Appellees.

No. 1375.

Court of Appeals of New Mexico.

April 30, 1975.

Certiorari Denied May 28, 1975.

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OPINION

SUTIN, Judge.

This is an appeal from summary judgment granted in favor of defendants Morton International, Inc. and Nor-Am Agricultural Products, Inc. on plaintiffs' complaint and on the cross-claim of the co-defendant New Mexico Mill & Elevator Co., d/b/a Golden West Seed Co.

We reverse.

A. *Parties*

Morton International and Morton Salt Co. are the same entity. Nor-Am is a subsidiary of Morton International and is the national distributor of "Panogen-15", the product manufactured by Morton. These three defendants will be referred to as "Morton".

New Mexico Mill & Elevator Co., d/b/a Golden West Seed Co., is the grain company which received Panogen-15 from Morton. Golden West used Panogen-15 in treating grain for seed purposes. It will be referred to as "Golden West".

Ernest and Lois Huckleby are the father and mother of Dorothy Jean, Charles Amos, Ernestine and Michael Huckleby. They will be referred to as "Huckleby".

Both Huckleby and Golden West now appeal the summary judgment in favor of Morton.

On this appeal, Golden West has adopted all issues and theories raised by Huckleby, as well as all of Huckleby's arguments in support.

B. *Huckleby's Theories for Recovery*

Huckleby's complaint sets forth five theories for recovery. With regard to three of those theories, we agree with the trial court that there is no genuine issue as to any material fact, and that Morton, therefore, is entitled to judgment as a matter of law.

The first theory on which we affirm is: The labelling on Morton's product, and the warnings contained therein, violated the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C.A. § 135 et seq. (1964), as amended, (1975 Supp.); and that such violation constituted negligence per se.

We find nothing in the record to suggest violation of the federal statute. On the contrary, the record contains evidence that the labelling information in question had been registered with and approved by the Department of Agriculture, in compliance with the statute.

The second theory on which we affirm is: Morton was negligent in the formulation, testing and investigation of its product.

The product in question is Panogen-15. Huckleby does not contend that Morton negligently manufactured Panogen-15. Huckleby contends that Morton *should not have manufactured it at all.* In reality, this is a nuisance theory, and not a theory of negligence in manufacture. This theory fails for two reasons. First, Panogen-15 was manufactured pursuant to authority granted by the federal government. Therefore, its manufacture does not constitute a nuisance, as a matter of law. Section 40A–8–1, N.M.S.A.1953 (2d Repl.Vol.

6). Second, our Supreme Court has expressed its unwillingness to allow a personal injury claim to go to trial on a nuisance theory. Jellison v. Gleason, 77 N.M. 445, 423 P.2d 876 (1967).

The third theory on which we affirm is: Morton is absolutely liable for injuries caused by the marketing of an ultrahazardous product.

New Mexico has adopted the rule of absolute liability for ultrahazardous activities given by Restatement, Torts §§ 519, 520, (1938) at 41–47. Thigpen v. Skousen & Hise, 64 N.M. 290, 327 P.2d 802 (1958). Huckleby contends that Panogen grain treatment is an ultrahazardous activity, as defined in the Restatement rule. We disagree. That rule defines an ultrahazardous activity as one (a) that is not a matter of common usage; and (b) in which the danger cannot be eliminated by the exercise of utmost care. Restatement, Torts § 520. The record shows that neither of those conditions are met in the instant case. First, Panogen grain treatment had wide acceptance and use throughout the country at the time of the Huckleby incident. Second, the arguments of all parties recognize that adequate warning would eliminate the danger.

We reverse, and hold that Huckleby and Golden West can go to trial on their complaint and cross-claim on the following two theories for recovery:

(1) Negligence as to the warning, provided by the seller, of dangers associated with use of the seller's product;

(2) Special liability of the seller of a product for physical harm to a user or consumer, pursuant to Restatement, Torts, 2d § 402A, v. 2 (1965), at 347–348.

Golden West may proceed against Morton only on its claim for contribution. See this opinion, *infra.*

C. *Facts*

In the summer of 1969, Ernest Huckleby and a number of his friends in Alamogordo, New Mexico, were raising hogs as a sideline. On August 16, 1969, Huckleby and three friends went to Golden West to buy some grain to feed their hogs. They all bought grain, and in the course of so doing, one friend asked an employee of the company if they could get some of the older, worse-looking grain, that was standing around in sacks towards the rear of the area, for a cheaper price. The employee allowed them to take that grain free of charge.

It appears that mixed in with that poor quality feed grain was grain that had been treated with Panogen-15. Panogen-15 is a liquid treatment for grain that is to be used as seed. The treatment prevents fungus and other seed diseases.

Morton knew the method of processing grain into seed suitable for planting. It knew that "the first step in the treatment of [grain] for planting is the separation of good [grain] from chaff, sticks, dirt, weed seeds, broken seeds, shrivelled seeds and other materials not suited for planting * * *. After cleaning, the good [grain] is routed to the [grain] treater where the Panogen-15 treatement is applied; the treated [grain] is then bagged. In the course of treating and bagging good [grain] a residue of [grain] may collect underneath the treater or in the bagging area. This treated residue is commonly called 'sweepings'."

During the period of the events that gave rise to this case, Panogen-treated grain was widely used for planting throughout the country. Morton sold about 174,000 gallons of liquid Panogen–15 each year. Panogen-15 contains mercury, which makes it very highly toxic. Eight parts of Panogen-treated grain per million parts of untreated grain, by weight, is a lethal dose. Following the Huckleby incident, the government suspended Morton's license to market Panogen-15.

Huckleby fed his hogs from the grain that had been obtained from Golden West, mixing the grain with garbage. He fattened a boar hog on this diet for seven

weeks. On October 4, 1969, he slaughtered the boar hog. For the next two or three months, the family ate meat and internal organs from the slaughtered hog with regularity. In late October, Huckleby's hogs that had been fed from the treated grain became ill. On December 4th, Ernestine became ill; in late December, Charles Amos became ill; and in January, 1970, Dorothy Jean became ill. On March 22, 1970, Mrs. Huckleby gave birth to Michael, who was born with congenital defects.

Medical authorities determined that the children had been stricken by organic mercury poisoning, attributable to their eating meat from the boar hog that had been fed on Panogen-treated grain. As the result, the children all suffered permanent blindness, paralysis and other effects resulting from injuries to the central nervous system.

The only warning information given to Golden West by Morton were labels and tags relative to Panogen-15. Copies of the label and tag are appended to this opinion.

Extensive investigation by experts from the Federal Communicable Disease Center, in Atlanta, Georgia, established the following facts:

Organic mercury poisoning selectively strikes children, which explains why the adult members of the Huckleby family were not stricken. The poisoning of the Huckleby children resulted from a chain or secondary poisoning effect of the Panogen-15. That is, the boar hog which fed on Panogen-treated grain did not, itself, show signs of mercury poisoning at the time it was slaughtered. However, the mercury that the hog had taken in from the treated grain caused organic mercury poisoning in the children who ate meat and internal organs from that hog.

D. *Morton's Admissions*

For purposes of its motion for summary judgment, Morton admits:

(1) The injuries to the Huckleby children;

(2) That the injuries were caused by mercury poisoning traced to the Panogen-treated grain.

(3) That only the Panogen tag and label should be considered to determine what warning information was communicated by Morton to Golden West.

(4) No warning information of any kind was communicated to Ernest Huckleby. He did not receive any tags or labels with the grain he acquired from Golden West. Nor was he otherwise warned of dangers associated with treated grain.

(5) Morton knew about the chain poisoning effect that caused the Huckleby children's injuries.

(6) Misuse of Panogen-treated grain for animal feed was foreseeable by Morton.

(7) Morton had a duty to warn of dangers from any foreseeable misuse of Panogen-treated grain.

E. *The Law on Summary Judgment*

New Mexico uses the following rules for determining whether an issue of fact exists in a summary judgment proceeding.

(1) A summary judgment proceeding is not to decide an issue of fact, but, rather, to determine whether one exists.

(2) Summary judgment can be granted only where the record shows there is no genuine issue as to any material fact.

(3) The party opposing the motion for summary judgment must be given the benefit of all reasonable doubts in determining whether an issue of fact exists.

(4) Summary judgment can be granted only where the moving party is entitled to the judgment as a matter of law, upon clear and undisputed facts.

(5) Summary judgment proceedings must not be used as a substitute for trial.

See, § 21-1-1(56)(c), N.M.S.A.1953 (Repl.Vol. 4); Summers v. American Reliable Insurance Company, 85 N.M. 224, 511 P.2d 550 (1973); Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972); Southern Pacific Company v. Timberlake, 81 N.M.

250, 466 P.2d 96 (1970); Spears v. Canon de Carnue Land Grant, 80 N.M. 766, 461 P.2d 415 (1969); Shumate v. Hillis, 80 N. M. 308, 454 P.2d 965 (1969); Great Western Contruction Co. v. N. C. Ribble Co., 77 N.M. 725, 427 P.2d 246 (1967); Institute for Essential Housing, Inc. v. Keith, 76 N.M. 492, 416 P.2d 157 (1966).

F. *Morton had a duty to warn on negligence theory of dangers associated with use of Panogen-15.*

Morton admits that it had a duty to warn of dangers from the foreseeable misuse of Panogen-treated grain for feed. However, Morton contends that it had no duty to warn Huckleby as a matter of law because it had a *right to rely* on Golden West to use ordinary care to prevent misuse of treated grain.

Whether a duty exists is a pure question of law for the court. Southern Union Gas Co. v. Briner Rust Proofing Co., 65 N.M. 32, 331 P.2d 531 (1958).

In support of its "right to rely" theory, Morton contends:

(1) The courts have recognized the inability of the supplier to police the processor.

(2) The acts or omissions of Golden West, the processor, were an independent (efficient) intervening cause.

(3) Golden West had actual knowledge of the hazards associated with the misuse of Panogen-treated grain for feed.

(4) Constructive knowledge of the hazards from using Panogen-treated grain for feed can be imputed to Golden West, because Morton's tag and label gave adequate warning as a matter of law.

None of these arguments sustains Morton's contention that it had no duty to warn Huckleby as a matter of law.

(1) *Morton's inability to police Golden West is not supported in law.*

Morton relies on several cases to support its position that its inability to police Golden West's operations relieves Morton of the duty to warn Huckleby. However, every case on which Morton relies is distinguishable, for one of the three following reasons:

(a) The court held that the incident causing plaintiff's injuries was unforeseeable. Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967); Stief v. J. A. Sexauer Manufacturing Co., 380 F.2d 453 (2nd Cir. 1967).

(b) An essential fact in plaintiff's case was that the manufacturer had a duty to supervise the middleman's operations. *Stief,* supra (Friendly, J., concurring); City of Villa Rica v. Couch, 281 F.2d 284 (5th Cir. 1960).

(c) The middleman-processor had actual or constructive knowledge of the danger. Parkinson v. California Company, 255 F.2d 265 (10th Cir. 1958); Kapp v. E. I. DuPont de Nemours & Co., Inc., 57 F.Supp. 32 (E.D.Mich.1944); Morris v. Shell Oil Co., 467 S.W.2d 39 (Mo.1971); Hill v. Wilmington Chemical Corp., 279 Minn. 336, 156 N.W.2d 898 (1968); Schneider v. Suhrmann, 8 Utah 2d 35, 327 P.2d 822 (1958). Morton also cites cases in which the middleman is an employer, a physican, or a school, to buttress its argument as to the middleman-processor. In all of these cases the middleman had actual or constructive knowledge of the danger. We hold the opposite in the instant case. See *infra.*

(2) *The acts or omissions of Golden West were not an independent intervening cause.*

Morton states, correctly, that the commingling of Panogen-treated grain with feed supplies, and the giving away of this mixture of treated and untreated grain, was something over which it had no control. Morton then contends that these acts were an independent intervening cause that relieve it of the duty to warn Huckleby.

In New Mexico, "independent intervening cause" is defined in Thompson v. Anderman, 59 N.M. 400, 411–12, 285 P.2d 507, 514 (1955).

> The independent intervening cause that will prevent a recovery of [sic] the act or omission of a wrongdoer must be a cause which * * * produces a different result, that *could not have been reasonably foreseen.* [Emphasis added]

See, also, Harless v. Ewing, 80 N.M. 149, 452 P.2d 483 (Ct.App.1969).

Morton admits that misuse of Panogen-treated grain for feed was foreseeable by Morton. Therefore, the acts by Golden West that caused treated grain to be mixed in with feed supplies do not constitute an independent intervening cause that will relieve Morton of its duty to warn Huckleby. Thompson v. Anderman, supra.

(3) *Golden West did not have actual knowledge of the hazards associated with misuse of Panogen-treated grain for feed.*

"There is no duty to warn of danger actually known to the user of a product * * *." Garrett v. Nissen Corporation, 84 N.M. 16, 21, 498 P.2d 1359, 1364 (1972).

To attempt to establish "actual knowledge", Morton recites the facts which most favor its position. These are not sufficient. To determine the existence of a duty to warn Golden West, as a matter of law, we must view all the facts in arriving at a conclusion on the matter of "actual knowledge". In so viewing the record, we disagree with Morton.

Golden West's men knew that Panogen-15 was "poison". They knew treated grain should not be used for feed. They did *not* know that if treated grain *was*, mistakenly, fed to animals, the poison might be communicated through the meat to human beings. Beyond these points, the record offers no uncontradicted answers to the following questions: Did they know the poison caused serious, permanent injuries to human beings? Did they know it might have no antidote? Did they know the *significance* of the prohibition against using treated grain for feed? Were they aware that even minute quantities (eight parts per million) mixed in with untreated grain might be harmful?

Furthermore, the record provides no answer to the most critical question: Assuming for the purpose of summary judgment that Golden West's employees did not warn Huckleby of the danger from Panogen-treated grain, *was this because the employees, themselves, did not have adequate knowledge of the danger, or because they were negligent in passing on that knowledge?*

The record reveals that there is a "substantial dispute" (*Goodman v. Brock,* supra) as to the degree of knowledge possessed by Golden West's employees of the dangers from Panogen-treated grain. There is no basis on which to conclude, as a matter of law, that Golden West had actual knowledge. This is a question of fact for a jury to determine, by weighing the evidence.

(4) *Golden West did not have constructive knowledge of the hazards associated with misuse of Panogen-treated grain for feed.*

"Constructive knowledge" refers to knowledge that one has the opportunity to possess by the exercise of ordinary care. Attoe v. State Farm Mutual Automobile Ins. Co., 36 Wis.2d 539, 153 N.W.2d 575 (1967); Chase v. Shasta Lake Union Sch. District, 259 Cal.App.2d 612, 66 Cal.Rptr. 517, 37 A.L.R.3d 704 (Ct.App.3d Dist. 1968).

Morton admits that only the Panogen tag and label should be considered for the purpose of determining what warning information Morton communicated to Golden West. Morton contends that the warnings on the tag and label were, as a matter of law, adequate to give Golden West constructive knowledge of the hazards associated with misuse of Panogen-treated grain for feed. That is, by reading the tag and label with ordinary care, Golden West's employees could have become sufficiently aware of the dangers from Panogen to have been able to alert Huckleby to

those dangers. If, as a matter of law, the tag and label were adequate for this purpose, then Golden West did have constructive knowledge, and Morton owed no duty to Huckleby.

Morton provides no authorities to support its contention that the tag and label gave adequate warning, as a matter of law. Morton's argument is that the adequacy of the warning is evident from examination of the tag and label. We disagree. On summary judgment, Huckleby and Golden West must be given the benefit of all reasonable doubts in deciding if a material issue of fact exists. We find seven bases on which to conclude that there is a material issue of fact as to the adequacy of the warning information on Morton's tag and label.

(a) Adequacy of a warning is a question of fact for the jury. Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076 (5th Cir. 1973); Kritser v. Beech Aircraft Corporation, 479 F.2d 1089 (5th Cir. 1973); Weekes v. Michigan Chrome & Chemical Company, 352 F.2d 603 (6th Cir. 1965); Tucson Industries, Inc. v. Schwartz, 108 Ariz. 464, 501 P.2d 936 (1972); Stevens v. Parke, Davis & Company, 9 Cal.3d 51, 107 Cal.Rptr. 45, 507 P.2d 653 (1973); Carmichael v. Reitz, 17 Cal.App.3d 958, 95 Cal.Rptr. 381 (1971); Love v. Wolf, 226 Cal.App.2d 378, 38 Cal.Rptr. 183 (1964); Simonetti v. Rinshed-Mason Company, 41 Mich.App. 446, 200 N.W.2d 354 (1972); Sams v. The Englewood Ready-Mix Corp., 22 Ohio App.2d 168, 259 N.E.2d 507 (1969); Phillips v. Kimwood Machine Company, 525 P.2d 1033 (Or.1974); Anderson v. Klix Chemical Co., 256 Or. 199, 472 P.2d 806 (1970); Incollingo v. Ewing, 444 Pa. 263, 282 A.2d 206 (1971); Maize v. Atlantic Refining Company, 352 Pa. 51, 41 A.2d 850 (1945).

In their landmark article on the duty to warn, H. C. Dillard and H. Hart explain why adequacy of a warning is a fact question that a jury, not a judge, should decide.

> While [the McClanahan court, *infra*] decided, as a matter of law, that the duty to warn of dangers *in use* was not exhausted by giving directions *for use*, it left to the jury the job of determining whether the duty had been fulfilled. * * * This is believed to be proper since, despite all its familiar limitations, the jury remains the institution best suited to reflect the sense of fairness and the conflicting values of a democratic order. *It is best suited to the task because the whole business is a process demanding not so much the authority of the expert as the insight of a layman.* [Emphasis in last sentence added]. H. C. Dillard and H. Hart, II, Product Liability: Directions for Use and the Duty to Warn, 41 Va.L.Rev. 145, 182 (1955).

(b) The warning must adequately indicate the scope of the danger. "The warning must designate specifically all of the dangers that may cause serious injury; a general warning that the product is dangerous is insufficient." Comment: The Manufacturer's Duty to Warn of Dangers Involved in Use of a Product, Wash.U.L. Qrtrly, 206, 210 (Spring, 1967). The warning must indicate latent dangers. Gonzalez v. Virginia-Carolina Chem. Co., 239 F.Supp. 567 (E.D.S.C.1965); McClanahan v. California Spray-Chem. Corp., 194 Va. 842, 75 S.E.2d 712 (1953); Boyl v. California Chem. Co., 221 F.Supp. 669 (D. Or.1963); Simonetti, supra. *Contra*, E. I. DuPont de Nemours and Co. v. Baridon, 73 F.2d 26 (8th Cir. 1934); Kaempfe v. Lehn & Fink Prods. Corp., 21 A.D.2d 197, 249 N.Y.S.2d 840 (1964), appeal dismissed, 18 N.Y.2d 784, 275 N.Y.S.2d 268, 221 N.E. 2d 809 (1966).

Huckleby contends that the scope of Morton's warning was inadequate in three ways: (1) It did not alert the user to possible livestock and other animal poisoning. (2) It did not warn of secondary food chain effects of poisoning. (3) It did not warn of the necessity to safely store treated grain apart from other grain.

(c) "The warning must reasonably communicate the extent or seriousness

of harm that could result from the danger * * *." Duty to Warn, Wash.U.L. Qrtrly, supra, at 212.

> Implicit in the duty to warn is the duty to warn with a degree of intensity that would cause a reasonable man to exercise for his own safety the caution commensurate with the potential danger. Tampa Drug Co. v. Wait, 103 So.2d 603, 609 (Fla.1958).

In accord are: Rumsey v. Freeway Manor Minimax, 423 S.W.2d 387 (Tex. 1968); Haberly v. Reardon Co., 319 S.W. 2d 859 (Mo.1958); Weekes v. Michigan Chrome & Chemical Company, 352 F.2d 603 (6th Cir. 1965) (concurring opinion).

Huckleby contends that the intensity of Morton's warning was inadequate in the following respects: (1) "May be fatal" is insufficient. (2) "[T]oxic" is too vague. (3) The antidote statement is misleading in that it indicates that a simple antidote counteracts the poison. (4) There is no warning that small quantities of treated grain ("sweepings") may be lethal.

(d) The physical aspects of the warning—conspicuousness, prominence, relative size of print, etc.,—must be adequate to alert the reasonably prudent person. Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962); *Maize,* supra; Gardner v. QHS, Inc., 448 F.2d 238 (4th Cir. 1971); Bean v. Ross Mfg. Co., 344 S.W.2d 18 (Mo.1961); Crane v. Sears Roebuck & Co., 218 Cal.App.2d 855, 32 Cal.Rptr. 754 (1963).

Huckleby contends that the Morton warning was inadequate in this respect, as follows. (1) The warning on the label about dangers from treated seed is placed in the midst of other information. (2) The second smallest size type on the label is used for this warning. (3) These warning statements are set apart from the "flamboyant red section" of the label, which contains warnings of other dangers.

(e) The means used to convey the warning must be adequate. Sterling Drug, Inc. v. Yarrow, 408 F.2d 978 (8th Cir. 1969) ("Dear Doctor" letter was inadequate; failure of the company to use its "detail men" to relay the warning was one of the inadequacies in the warning). See, also, Noel, "Products Defective Because of Inadequate Warning," 23 S.W.L.J. 256, 285 (1969).

In general, in selling Panogen, Morton did rely on means other than the label and tag to convey the warning; for example, detail men, posters, circulars, montages. However, the record indicates that these other means were not used in the sale of Panogen to Golden West, and for the purposes of this motion, Morton relies only on the label and tag. Huckleby contends that the absence of these other means made the warning inadequate.

(f) A simple directive warning (e. g., "Do not use * * *") may be inadequate, without some indication of consequences from failure to follow the directive. *Maize,* supra; *Tampa Drug Co.,* supra; *McClanahan,* supra; *Bean,* supra; Saporito v. Purex Corp., 40 Cal.2d 608, 255 P.2d 7 (1953); Williams v. Caterpillar Tractor Co., Inc., 149 So.2d 898 (Ct.App. Fla.1963); Tucson Industries, Inc. v. Schwartz, supra; D'Arienzo v. Clairol, Inc., 125 N.J.Super. 224, 310 A.2d 106 (1973); Murray et al. v. Wilson Oak Flooring Co., Inc., 475 F.2d 129 (7th Cir. 1973); Panther Oil & Grease Manufacturing Company v. Segerstrom, 224 F.2d 216 (9th Cir. 1955); Alman Bros. Farms & Feed Mill, Inc. v. Diamond Lab., Inc., 437 F.2d 1295 (5th Cir. 1971).

Huckleby contends that the label and tag do not give a "full appreciation of the purposes of the directive statements", and that this contributes to the inadequacy of this warning.

(g) Failure to warn of danger from waste products may cause a warning to be inadequate. *Boyl,* supra. Huckleby contends that the only statement which applies to waste, found on the label, refers only to liquid wastes from the Panogen treatment, and does not indicate the danger from "sweepings".

We conclude that the adequacy of Morton's warning information is a question of fact for the jury. Therefore, we cannot say, as a matter of law, that Golden West had constructive knowledge of the dangers from misuse of Panogen-treated grain as feed.

Conclusion on Plaintiffs' Negligence Theory

None of Morton's contentions sustains its position that its right to rely on Golden West to use ordinary care relieved Morton of its duty to warn Huckleby. We conclude that Morton did have a duty to Huckleby. Therefore, Huckleby (and Golden West, on its cross-claim) should go to the jury to determine whether Morton was negligent in meeting that duty.

G. *Huckleby has a claim against Morton on special liability for physical harm to Huckleby (Restatement, Torts, 2d § 402A)*

Liability pursuant to Restatement, Torts, 2d § 402A was adopted in New Mexico in 1972. Stang v. Hertz Corporation, 83 N. M. 730, 497 P.2d 732 (1972). See, also, Standhardt v. Flintkote Company, 84 N.M. 796, 508 P.2d 1283 (1973); Garrett v. Nissen Corporation, supra; Sutton v. Chevron Oil Company, 85 N.M. 604, 514 P.2d 1301 (Ct.App.), aff'd, 85 N.M. 679, 515 P.2d 1283 (1973).

Paraphrasing the pertinent parts of § 402A: A manufacturer of a product (1) in *a defective condition, unreasonably dangerous* (2) *to the user or consumer,* is subject to liability if the manufacturer expects its product to reach the user or consumer, and the product does reach the user or consumer (3) *without substantial change in the condition in which it is sold,* even though the manufacturer has exercised all possible care in the preparation and sale of the product.

(1) *A question of fact for the jury exists as to whether Panogen-15 was in "a defective condition unreasonably dangerous * * *." (§ 402A)*

Where the manufacturer has reason to anticipate danger from a particular use of his product, an adequate warning must be given. A product sold without such a warning is in a "defective condition unreasonably dangerous * * *." Restatement, Torts 2d § 402A, and Comments h, i; Schrib v. Seidenberg, 80 N.M. 573, 458 P.2d 825 (Ct.App.1969); Patch v. Stanley Works (Stanley Chemical Co. Div.) 448 F.2d 483 (2nd Cir. 1971); Alman Bros. Farms & Feed Mill, Inc. v. Diamond Lab., Inc., supra; Brizendine v. Visador Co., 305 F.Supp. 157 (D.Or.1969); Tucson Industries, Inc. v. Schwartz, supra; Barth v. B. F. Goodrich Tire Co., 265 Cal. App.2d 228, 71 Cal.Rptr. 306 (1968); Canifax v. Hercules Powder Co., 237 Cal.App.2d 44, 46 Cal.Rptr. 552 (1965); Crane v. Sears Roebuck & Co., supra; Williams v. Brown Mfg. Co., 93 Ill.App.2d 334, 236 N.E.2d 125 (1968); Anderson v. Klix Chemical Co., supra.

We have already determined that the adequacy of Morton's warning is a question of fact for the jury. An inadequate warning places a product in a "defective condition unreasonably dangerous * * *." We conclude that a question of fact for the jury exists as to whether Panogen-15 was in a "defective condition unreasonably dangerous * * *" under § 402A.

(2) *Huckleby was a "user or consumer".*

The phrase "user or consumer" in § 402A is explained in Comment 1.

In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller * * *. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated

is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant. Restatement, Torts, 2d § 402A, comment 1, at 354.

Morton admits that it owes a duty to one who engages in a foreseeable misuse of its product, and that Huckleby's misuse of Panogen-treated grain was foreseeable. "[T]he benefits of the rule of strict liability extend 'to all whom the manufacturer should reasonably expect to use his product.'" Jackson v. Standard Oil Company of California, 8 Wash.App. 83, 505 P.2d 139, 149 (Ct.App.1972).

Huckleby was a "user or consumer", within the meaning of that phrase in § 402A.

(3) *Panogen-15 reached Huckleby without a substantial change in the condition in which it was sold.*

The only remaining issue to determine is whether Panogen-15 reached Huckleby without substantial change in the condition in which it was sold by Morton.

Comment p to § 402A states (at 357):

> It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section . . . . The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes.

"Comment (p) to Section 402A explains that a substantial change involves situations where the *product itself* will undergo processing or substantial modification such that the product originally sold is not *itself* in a final or remotely usable state * * *." [Emphasis added] Dorsey v. Yoder Company, 331 F.Supp. 753, 764 (E.D.Pa.1971).

Here the product in question is Panogen-15, which was sold by Morton to Golden West in 55 gallon drums. The product obtained by Huckleby from Golden West was treated grain. However, the record reveals that the treatment process was simply a procedure for spraying Panogen-15 onto the grain. *Treated grain = grain + Panogen-15.* Panogen-15, the product sold by Morton, did not undergo change when it was made a part of the treated grain.

Compare Walker v. Stauffer Chemical Corporation, 19 Cal.App.3d 669, 96 Cal. Rptr. 803 (1971), where the physical composition of the product, sulfuric acid, did undergo change in processing. See, also, Dennis v. Ford Motor Company, 332 F.Supp. 901 (W.D.Pa.1971) (for substantial change in the product to relieve a manufacturer of liability, the change must be causally connected to the accident).

It is most accurate to think of Panogen-15 as a *component part* of treated grain, the finished product. In a *Caveat,* the authors of § 402A state that they express no opinion as to whether liability under § 402A attaches to the "seller of a component part of a product to be assembled". However, a guideline is provided in Comment q to § 402A (at 358):

> q. *Component parts.* * * * It is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer.

The courts have followed Comment q in holding that the manufacturer of a component part is subject to liability *if that part has not itself been changed* when added onto the finished product. Symons v. Mueller Company, 493 F.2d 972 (10th Cir. 1974); Greco v. Bucciconi Engineering Co., 407 F.2d 87 (3rd Cir. 1969); Burbage v. Boiler Engineering and Supply Co., 433 Pa. 319, 249 A.2d 563 (1969).

Panogen-15 did not itself undergo change when it was sprayed onto the grain to make it treated grain, the finished product. Therefore, under the reasoning of Comments p and q, and the cases that interpret those Comments, Panogen-15 did

not undergo substantial change in the condition in which it was sold by Morton.

(4) *Public Policy and Liability Under § 402A*

We have determined that the facts of this case meet the criteria for concluding that a question of fact exists on the theory of liability pursuant to § 402A, a manufacturer's special liability.

Social policy has led courts in every jurisdiction to adopt rules allowing plaintiffs to proceed against manufacturers on a theory of strict liability for a defective product. Policy reasons also compel our conclusion in this case. (See W. L. Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1122–23 (1960), on the following policy reasons (1) and (2).)

(1) Public interest in human life, health and safety requires that the law give consumers maximum protection against dangerous product defects.

(2) By placing goods on the market, a manufacturer represents to the public that they are safe; and by packaging and advertising, he does everything possible to further induce that belief. The middleman, in contrast, is no more than a conduit through which the product reaches the ultimate user. The manufacturer should not be permitted to avoid liability by asserting his lack of direct contact with the user.

(3) The marketing of dangerously defective products can have tragic consequences. Allowing injured plaintiffs to proceed on a theory of a manufacturer's liability, without the necessity of proving negligence, will cause manufacturers to take cautionary steps to prevent the marketing of dangerously defective products. Such preventive measures may avert tragedies such as befell the Huckleby family, and thereby save our system the cost of lawsuits such as this one.

> Where a defendant's product is adjudged by a jury to be dangerously defective, imposition of liability on the manufacturer will cause him to take some steps (or at least make calculations) to improve his product . . . . We suspect that, in the final analysis, the imposition of liability has a beneficial effect on manufacturers of defective products both in the care they take and in the warning they give.

Phillips v. Kimwood Machine Company, supra, at 1041–42.

Material issues of fact exist under the doctrine of special liability, § 402A. Morton was not entitled to summary judgment.

H. *Golden West is entitled to proceed on cross-claim against Morton on issue of contribution.*

Golden West filed a cross-claim against Morton on two counts. (1) Contribution and indemnity in the event of a recovery by Huckleby against Golden West; (2) Golden West is entitled to damage caused to its business, both compensatory and exemplary. The trial court awarded Morton summary judgment on the claims of Golden West because there was no genuine issue of material fact. Golden West adopted the position and arguments of Huckleby as set forth in his brief on appeal.

Golden West and Morton agree that Golden West may proceed on its cross-claim against Morton on the issue of contribution, in the event of a recovery by Huckleby against Golden West. Upon this ground the summary judgment is reversed.

The parties disagree on Golden West's right to indemnity. Golden West has presented no argument or authority to show it is entitled to indemnity. We hold that the summary judgment is affirmed on this issue.

Golden West also claims it is entitled to damage caused to its business by Morton, both compensatory and exemplary. It has presented no argument or authority to show that a genuine issue of material fact exists to support its cross-claim against Morton for damages. The summary judgment is affirmed on this claim.

The summary judgment is reversed on the claim of contribution.

I. *Summary*

We hold that summary judgment is reversed with respect to Huckleby's complaint on the theories of: (a) negligence as to the warning; and (b) manufacturer's liability pursuant to Restatement, Torts, 2d § 402A. Summary judgment is reversed with respect to the cross-claim by Golden West, only as to its claim for contribution.

Reversed.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

537 P.2d 698

STATE of New Mexico, Plaintiff-Appellee,

v.

Billy D. ELLIS, Defendant-Appellant.

No. 1700.

Court of Appeals of New Mexico.

June 18, 1975.

James B. Kelly, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Lanny D. Messersmith, Ralph W. Muxlow, II, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Three men forced their way into the Growney residence in Albuquerque. They robbed the occupants. Upon leaving approximately forty-five minutes later, they took an automobile. Defendant was convicted of aggravated burglary, § 40A–16–4, N.M.S.A.1953 (2d Repl.Vol. 6); armed robbery, § 40A–16–2, N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1973); and the unlawful taking of a vehicle, § 64–9–4, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 2). Each count charged the offense was committed with a firearm and the jury so found. Section 40A–29-3.1, N.M.S.A.1953 (2d Repl.Vol. 6). Defendant's appeal raises issues concerning: (1) search and seizure, (2) identification of defendant, and (3) limitation on parole.

Search and Seizure

The Growney vehicle was found by police in El Paso, Texas. The car was on a street in a traffic lane. It had been involved in an accident with a sign. The officer dispatched to investigate the accident found no one in or near the car. The officer learned from a bystander that four men had been in the car but had left approximately twenty minutes before the officer arrived. On the basis of descriptions provided by the bystander and directions provided by other bystanders, four men were located at a shopping center in El Paso.

An officer frisked the men for weapons; no weapon was found on defendant, but Gilchrist (one of the four men) had a pistol in his belt. The men were placed in the police car. The officer then opened a suitcase which had not been in the possession of defendant but in the possession of one of the other men. The suitcase contained a bottle of bourbon, a holster for the pistol found on Gilchrist and ammunition. The men were then returned to the accident scene. Three of the men, including the defendant, "knew nothing" about the Growney car. The car was searched at the scene; an automobile lease agreement and another bottle of bourbon was found in the car.

The lease agreement was made out to Mr. Growney. The bourbon was of the same brand stolen from the Growneys. The pistol was taken from the Growney residence. However, at the time each of the items was seized, the police did not know of the crimes at the Growney residence and did not know the vehicle had been stolen. The police were investigating an automobile accident.

Defendant moved to suppress evidence claiming the evidence was obtained by an

unreasonable search. The three items involved are the pistol obtained from Gilchrist, the contents of the suitcase obtained from an unidentified person, but concededly not from defendant, and the items taken from the car concerning which defendant disclaimed any knowledge.

We do not answer the contentions raised by defendant because defendant has no standing to exclude this evidence. The constitutional prohibition against an unreasonable search is a personal right enforceable by one whose own protection was infringed by the search. "To have standing one must be the victim of the search in the sense that one's right of privacy was invaded." State v. Torres, 81 N.M. 521, 469 P.2d 166 (Ct.App.1970). No right of defendant's was involved in the search of Gilchrist, the suitcase or the car. The evidence seized was not an essential element of any of the offenses with which defendant was charged; only the car search can be considered a premises search and defendant disclaimed any connection with the car; defendant has never claimed a connection with any of the seized evidence—either at the suppression hearing or at trial. See State v. Nemrod, 85 N.M. 118, 509 P.2d 885 (Ct.App.1973), overruled on other grounds, State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct.App. 1974); State v. Torres, supra.

Identification of Defendant

Mr. Growney viewed a lineup in El Paso. He positively identified two of the men in the lineup as participants in the crimes. He was "reasonably certain" that defendant was the third participant. Returning to Albuquerque after the lineup, Detective Crespin told Mr. Growney that defendant had been arrested with the two men that Mr. Growney had positively identified. The detective testified that Mr. Growney knew the police thought defendant was the third participant.

Upon returning home, Mr. Growney discussed his lineup identifications with his wife. The next day, Mrs. Growney identified defendant's photograph. It was one of five photographs handed to her by Albuquerque police.

Defendant sought to exclude any testimony by Mr. or Mrs. Growney, at the trial, which identified defendant as a participant in the crimes. Defendant also sought to exclude any evidence as to Mrs. Growney's photographic identification.

Defendant claims this evidence should have been excluded because of impermissible suggestiveness. He claims the conversation with the detective tainted Mr. Growney's identification and the conversation between husband and wife tainted Mrs. Growney's identification. This claim ignores the totality of the circumstances surrounding the identification made by Mr. and Mrs. Growney. See State v. Jones, 83 N.M. 600, 495 P.2d 380 (Ct.App.1972).

After Mr. Growney's conversation with the detective, his identification testimony had not changed. At the hearing on the motion to suppress, Mr. Growney was still "reasonably certain" that defendant was the third participant. At trial Mr. Growney did testify that he was 99 percent certain in his identification of defendant. This was no change. Explaining his "reasonably certain" identification at the lineup, Mr. Growney testified: "Well, you know, I was ninety-nine percent sure but I couldn't be as positive on him as I was the other two."

Mr. and Mrs. Growney discussed the physical characteristics of the three men but this conversation did not involve "detailed descriptions". There is no evidence of suggestiveness by the police when Mrs. Growney made the photographic identification.

The record does not support the claim of impermissible suggestiveness in connection with the identification testimony of Mr. and Mrs. Growney. See State v. Jones, supra; State v. Baldonado, 82 N.M. 581, 484 P.2d 1291 (Ct.App.1971).

Limitation on Parole

Defendant was given the statutory sentence of not less than ten nor more than fifty years in the penitentiary for the aggravated burglary. An identical sentence was imposed for the armed robbery. His sentence on the vehicle charge was not less than one nor more than five years in the penitentiary. The three sentences were to be served concurrently. The sentence also provides that defendant is to serve at least three years before parole.

Defendant contends the trial court exceeded its statutory authority in sentencing him to serve at least three years before parole.

The trial court's authority to limit parole must be found in the statutes. State v. Hovey, 87 N.M. 398, 534 P.2d 777 (Ct.App.1975). Such authority is found in § 40A-29-3.1, supra. Both parties argue the applicability of Paragraph B of the statute. Paragraph B limits the authority to suspend sentences. State v. Barreras (N.M.Ct.App.) 536 P.2d 1108, 1975. No suspended sentence is involved in this case.

Paragraph C is the applicable portion of § 40A-29-3.1, supra. Whenever a separate finding of fact shows a firearm was used in the commission of:

> "C. any crime constituting a second or subsequent felony, other than a capital felony, the imposition or execution of a sentence shall not be suspended or parole shall not be granted unless one-half [½] of the minimum imprisonment provided for the offense shall have been served."

Paragraph C applies to second or subsequent felonies. The record does not show that defendant had been convicted of any felony prior to the trial at which he was convicted of three felonies. Are the second and third felony convictions at one trial "second or subsequent" felonies within the meaning of § 40A-29-3.1(C), supra?

Our habitual offender statute is similar in that it refers to "second" and "subsequent" felonies. Section 40A-29-5, N.M.S.A.1953 (2d Repl.Vol. 6). State v. Sanchez, 87 N.M. 256, 531 P.2d 1229 (Ct. App.1975) states: ". . . where a conviction on two or more counts arising out of acts committed in the course of a single transaction has been entered, the convictions should count as one for the purpose of sentencing under an habitual offender statute. . . . On the other hand, where multiple convictions are obtained for crimes unrelated to one another, no prohibition has been found to prevent counting each conviction separately in habitual offender proceedings." For there to be a second or subsequent conviction for habitual offender proceedings, there must have been a prior conviction. This prior conviction must precede the commission of the offense for which the enhanced sentence is sought. French v. Cox, 74 N.M. 593, 396 P.2d 423 (1964). The reason for this view is stated in State v. Midell, 40 Wis.2d 516, 162 N.W.2d 54 (1968): "The infliction of a more severe punishment for a repeater is based upon his persistent violation of the law after conviction for previous infractions."

Section 40A-29-3.1(C), supra, is not only similar to our habitual offender statute in the language used, it is also similar in that both statutes provide for enhanced sentences. See State v. Barreras, supra. Accordingly, our view is that the interpretation given to the habitual offender statute is applicable to § 40A-29-3.1(C), supra.

Where convictions on two or more counts in a single trial are based on a unified course of events, the convictions count as one under § 40A-29-3.1(C), supra. That is the situation in this case. The aggravated burglary, the armed robbery and the vehicle offense occurred over approximately forty-five minutes and were successive acts in one course of events involving one set of victims. The convictions all occurred at the same trial. In these circumstances the aggravated bur-

glary is not a prior conviction so as to permit the armed robbery and the vehicle offense to be counted as a second or subsequent conviction.

The trial court erred in limiting parole on the basis of § 40A–29–3.1, supra. The limitation on parole is not a valid part of defendant's sentence. Defendant's eligibility for parole will be determined by the State Board of Probation and Parole. The limitation on parole in the judgment should be considered only as the recommendation of the sentencing judge. State v. Hovey, supra.

A valid sentence having been imposed, the judgment and the valid sentence are affirmed. The cause is remanded with instructions to delete the unauthorized limitation on parole.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

537 P.2d 702

STATE of New Mexico, Plaintiff-Appellee,

v.

Rockee McCUISTION, Defendant-Appellant.

No. 1585.

Court of Appeals of New Mexico.
June 4, 1975.
Rehearing Denied June 12, 1975.
Certiorari Denied July 2, 1975.

Mary C. Walters, Marchiondo & Berry, P. A., Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Lanny Messersmith, Andrea Buzzard, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant was convicted of receiving a stolen vehicle in violation of § 64–9–5, N. M.S.A.1953 (2d Repl.Vol. 9, pt. 2). He appeals. We reverse.

A. *Misconduct of the district attorney denied defendant a fair trial.*

The State called as a rebuttal witness the assistant district attorney. Sometime after commission of the crime, over strenuous objection, he testified about

being at Ned's Lounge in Albuquerque at ten o'clock in the evening. While there, he was approached by defendant. The statements allegedly made by the defendant were critical to the State's case.

The assistant district attorney made a closing argument for the State. He said in part:

> I wouldn't come up here, I can assure you, ladies and gentlemen, and take that stand and fabricate a story like that because that would be perjury. And so if you accept what I said, what he told me, it certainly contradicts what he told the Court when he was on the stand as to how he got that car.

The assistant district attorney argued his own credibility of the jury. This denied the defendant a fair trial.

Under the above circumstances, it is reversible error for a district attorney to be both witness and prosecutor. People v. Spencer, 512 P.2d 260 (Colo.1973); State v. Hayes, 473 S.W.2d 688 (Mo.1971), 53 A.L.R.3d 93 (1971); Frank v. State, 150 Neb. 745, 35 N.W.2d 816 (1949); Annot., Prosecuting Attorney as a Witness in Criminal Case, 54 A.L.R.3d 100, 132–36 (1973).

When a district attorney finds it necessary to testify on behalf of the prosecution, he should withdraw and leave the trial of the case to other counsel. State v. Hayes, supra; Annot., 54 A.L.R.3d, supra, at 118–25.

B. *Denial of change of venue not subject to review.*

Defendant filed a motion for change of venue. A hearing was held and the motion was denied because the court believed the defendant could obtain a fair trial in Quay County.

Under § 21–5–4, N.M.S.A.1953 (Repl. Vol. 4), upon hearing on the motion, the trial court "shall make findings and either grant or overrule said motion." No such findings were made. Defendant contends this was error.

The defendant made no request for findings and did not submit any requested findings. The absence of findings is waived and is not subject to review. State v. Mosier, 83 N.M. 213, 490 P.2d 471 (Ct. App.1971); State v. Fernandez, 56 N.M. 689, 248 P.2d 679 (1952).

Reversed. Defendant is granted a new trial.

It is so ordered.

WOOD, C. J., and LOPEZ, J., concur.

537 P.2d 703

Doyle W. BURTON, Plaintiff-Appellant,

v.

JENNINGS BROTHERS, d/b/a D. J. Cattle Company, and the Mountain States Mutual Casualty Company, Defendants-Appellees.

No. 1778.

Court of Appeals of New Mexico.

June 4, 1975.

Certiorari Denied July 2, 1975.

Harry Relkin, Louis G. Stewart, Jr., Albuquerque, for plaintiff-appellant.

Dan B. Buzzard, Clovis, for defendants-appellees.

OPINION

WOOD, Chief Judge.

After a trial plaintiff was awarded workmen's compensation. The judgment was entered June 12, 1973. Plaintiff executed a release on June 26, 1973. A satisfaction of judgment was filed June 28, 1973. In February, 1974 plaintiff moved for an increase in the compensation award pursuant to § 59–10–25, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1). This motion was denied as a matter of law on the basis that (1) the judgment disposed of all rights of the parties, and (2) the satisfaction of judgment was binding on plaintiff. The appeal contends plaintiff was entitled to an evidentiary hearing on his motion. We agree.

Whether the Judgment Disposed of All Rights of the Parties

Defendants assert the judgment entered in June, 1973 was a final judgment disposing of all rights of the parties. This contention is based on § 59–10–16(B), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1) which provides that judgments in compensation cases shall have the same force and effect as judgments in civil cases. This view was answered in Segura v. Jack Adams General Contractor, 64 N.M. 413, 329 P.2d 432 (1958). *Segura* held that the "ordinary rules of res judicata cannot apply to a judgment rendered on the merits after trial." *Segura* reached this result after considering the provisions of § 59–10–25, supra, which provides for a "hearing upon the issue of claimant's recovery . . . ." Section 59–10–16(B), supra, does not bar hearings expressly authorized by § 59–10–25, supra.

Defendants contend the judgment entered in June, 1973 was a lump sum judgment and such a judgment may not be reopened under Durham v. Gulf Interstate Engineering Company, 74 N.M. 277, 393 P.2d 15 (1964). There was no lump sum judgment in this case and the reliance on *Durham* is misplaced.

In *Durham,* supra, the parties, by stipulation, agreed upon a lump sum settlement. The trial court, after a hearing, approved the settlement and entered a judgment based on the stipulation of the parties. Thereafter a satisfaction of judgment was filed. Two members of the New Mexico Supreme Court held that regardless of § 59–10–25, supra, plaintiff was bound by the lump sum judgment to which he had stipulated. One member of the New Mexico Supreme Court held that plaintiff waived his right to reopen the judgment under § 59–10–25, supra, by executing the satisfaction and release of judgment.

Durham, supra, is not applicable. The lump sum judgment in *Durham* was for the amount of a settlement agreed upon by the parties and approved by the

trial court. There was no agreed settlement nor was there a lump sum judgment in this case. Rather, the judgment was entered after trial and consisted of five separate items: (a) a disability award of 35 percent from March 24, 1972 to March 24, 1973; (b) disability award of 20 percent from March 24, 1973 to August 24, 1973; (c) medical expenses; (d) attorney's fee; and (e) expert witness fee.

Plaintiff's motion pursuant to § 59–10–25, supra, was not barred by the judgment entered in June, 1973.

Whether the Satisfaction of Judgment Barred Plaintiff's Right to Reopen

Defendants paid the judgment of June, 1973. Plaintiff's "Satisfaction of Judgment" stated that the judgment had been satisfied. What had been satisfied—compensation through August 24, 1973, certain medical expenses and fees for plaintiff's attorney and expert witness. Defendants assert this satisfaction bars a motion to reopen under § 59–10–25, supra. It does not.

As previously stated, § 59–10–25, supra, provides for a hearing on the issue of claimant's recovery. "And if it shall appear upon such hearing that the disability of the workman has become more aggravated or has increased without the fault of the workman, the court shall order an increase in the amount of compensation allowable as the facts may warrant."

Plaintiff's motion alleges that he has continued to be disabled since cessation of compensation on August 24, 1973, that his disability has increased, and that he is unable to return to work. These claims are directed to a time period subsequent to the time period covered by the judgment. The judgment refers to specific time periods; plaintiff declared the judgment for those time periods to be satisfied. The satisfaction of judgment cannot be considered as waiving a right to proceed under § 59–10–25, supra, because his motion under § 59–10–25, supra, is concerned with compensation for disability subsequent to the period covered by the judgment. See Linton v. Mauer-Neuer Meat Packers, 71 N. M. 305, 378 P.2d 126 (1963); compare the opinions in Durham v. Gulf Interstate Engineering Company, supra.

The issue raised by plaintiff's motion was "a change in the workman's condition subsequent to the original award." Goolsby v. Pucci Distributing Company, 80 N.M. 59, 451 P.2d 308 (Ct.App.1969). The fact that plaintiff declared the original award to have been satisfied did not bar that issue.

Defendants' brief suggests that the release, executed by plaintiff subsequent to the judgment, bars plaintiff's motion under § 59–10–25, supra. The trial court did not rule on the validity or the effect of the release executed after entry of the judgment. We will not consider the release for the first time on appeal. Section 21–12–11, N. M.S.A.1953 (Interim Supp.1974).

The order of the trial court denying plaintiff's motion as a matter of law is reversed. The cause is remanded with instructions to grant plaintiff an evidentiary hearing on his motion. Questions concerning the release may be litigated at this evidentiary hearing.

It is so ordered.

LOPEZ, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

When is a judgment in a workmen's compensation case a final judgment? It is final when it contains all of the elements of finality as do other civil judgments. Durham v. Gulf Interstate Engineering Company, 74 N.M. 277, 393 P.2d 15 (1964).

When a judgment is payable in installments for disability for a period of weeks, the judgment is final when the full statutory period has elapsed. *Durham*, supra. Churchill v. City of Albuquerque, 66 N.M. 325, 347 P.2d 752 (1959); Segura v. Jack Adams General Contractor, 64 N.M. 413,

329 P.2d 432 (1958); Livingston v. Loffland Brothers Co., 86 N.M. 375, 524 P.2d 991 (Ct.App.1974).

In the instant case, the judgment awarded plaintiff a total of $2,432.92 in compensating costs and expenses. It was not payable in installments. It has all the elements of finality. The judgment was entered June 12, 1974. The plaintiff entered a satisfaction of judgment. This clearly enunciates that the judgment was final. No appeal was taken from the judgment. The trial court lacked jurisdiction to proceed further in the case. Sections 59–10–16(B) and 59–10–16.1, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1). The motion for an increase in the compensation award was properly denied as a matter of law because the judgment and payment thereof by defendants disposed of all the rights of the parties.

In addition to the satisfaction of judgment, plaintiff executed a release. The majority opinion says: "Questions concerning the release may be litigated at this evidentiary hearing." If this issue is heard first, and the release is also sustained, no further evidentiary hearing on the motion will be required.

537 P.2d 706

STATE of New Mexico, Plaintiff-Appellee,

v.

Richard Eugene JACKSON, Defendant-Appellant.

No. 1743.

Court of Appeals of New Mexico.

June 11, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, App. Defender, Robert R. Rothstein, Asst. App. Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe., for plaintiff-appellee.

OPINION

HERNANDEZ, Judge.

Defendant-Appellant was convicted after trial by jury for trafficking in heroin contrary to § 54–11–20, N.M.S.A.1953 (Repl. Vol. 8, pt. 2, Supp.1973). He brings this appeal alleging three points of error. We affirm.

POINT I: "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S CHALLENGE TO THE JURY."

Appellant is a black. He urges reversal under this point on the ground that only one of the thirty-five member panel from which his trial jury was selected shared his racial origins. The ultimate jury selection was accomplished before the name of the one black panel member had been reached, and there was, therefore, no black on the *petit* jury that rendered his conviction.

The challenge to the lack of black representation on appellant's jury came in a rather short statement made by his trial counsel out of the presence of the jury during *voir dire*. It reads in pertinent part as follows: "Mr. Weldon: . . . It is not a true representative of the class and [is] in violation of the constitution in that the defendant is black and is not properly being represented by a percentage of blacks on the jury." The argument has no merit. In State v. Tapia, 81 N.M. 365, 467 P.2d 31 (Ct.App.1970), this court held that in order to gain reversal of a conviction in circumstances such as these, the defendant must show that the jury was chosen by a process of purposeful discrimination aimed at the exclusion of minority representation. In his brief on appeal, appellant argues that we should regard the absence of any black persons on the jury as a *prima facie* showing of purposeful discrimination, thus shifting the

burden to the state to make proof of the nonexistence thereof. In this contention, appellant is mistaken. "The mere absence of persons of a race or class does not give rise to the inference of systematic exclusion." State v. Newman, 83 N.M. 165, 489 P.2d 673 (Ct.App.1971). Appellant did not allege, nor does the record support, an inference of purposeful exclusion of blacks from jury service; we accordingly affirm the trial court's denial of appellant's challenge. State v. Newman, supra.

POINT II: "THE TRIAL COURT ERRED IN SUSTAINING OBJECTION TO DEFENDANT'S INQUIRY OF A WITNESS AS TO HIS LOCATION PRIOR TO TRIAL."

The trial of the charges in this case took a day. The prosecution's case took all morning. In chambers, at the close of the state's case, but before the noon recess, counsel for the defendant moved to continue the proceedings until such time as the attendance of one James E. Serna, the informer through whom the undercover narcotics agent achieved introduction to the defendant, could be obtained. A subpoena had been issued three weeks prior to the date of trial, but no return had been made. In support of the continuance, defense counsel proffered what he expected Serna's testimony would be. The proffer alleged that Serna would testify that defendant was the target of a plan concocted by the Alamogordo police to induce the commission of a trafficking offense. The motion for continuance was denied.

At the resumption of proceedings after lunch, Serna was present and took the stand as defendant's first witness. Counsel for the defendant wanted to know when Serna had returned to Alamogordo and where he had been during the three weeks prior to trial. The District Attorney objected to this inquiry on the grounds of immateriality and irrelevancy. The objection was sustained and Serna went on to testify in terms generally corroborative of the testimony previously elicited from the police witnesses during the state's case-in-chief and in contradiction of defendant's proffer.

The law in New Mexico indicating the method for preserving a proper objection to the exclusion of testimony has been long established.

> "In order for the appellant to raise the question as to the propriety of the ruling of the court upon the sustaining of the objection to the question, it was necessary for him to make a tender of the testimony which he expected to elicit . . . . Counsel failing, however, to make a tender, leaves this court without any information concerning the relevancy of the answer, and under these circumstances it will be assumed that the ruling of the trial court was correct." State v. McCracken, 22 N.M. 588, 166 P. 1174 (1917).

The record before us is void of any indication whatsoever of how Serna might have responded to counsel's inquiry, and the alleged error raised under this point is consequently not capable of resolution on appeal. Kindschi v. Williams, 86 N.M. 458, 525 P.2d 385 (Ct.App.1974); Worthey v. Sedillo Title Guaranty, Inc., 85 N.M. 339, 512 P.2d 667 (1973).

POINT III: "THE INSTRUCTIONS GIVEN TO THE JURY CONCERNING THE DEFENDANT'S THEORY OF ENTRAPMENT WERE ERRONEOUS."

Under this point of error defendant first argues that since State v. Sainz, 84 N.M. 259, 501 P.2d 1247 (Ct.App.1972), jury instructions on entrapment which indicate any concern with the "predisposition" of the accused are impermissible. He is mistaken. For the New Mexico development in this area, compare State v. Sena, 82 N. M. 513, 484 P.2d 355 (Ct.App.1971); State v. Roybal, 65 N.M. 342, 337 P.2d 406 (1959). Underlying this argument is a distinction that has developed in the federal courts between the so-called "subjective test" and "objective test" for entrapment.

Compare United States v. Russell, 459 F.2d 671 (9th Cir. 1972), with United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L. Ed.2d 366 (1973).

The issue in *Sainz* was whether there was entrapment as a matter of law. Speaking to that issue we stated:

> "We agree with defendant's statement that '. . . as the part played by the state increases the importance of the defendant's predisposition and intent decreases, until at some point entrapment as a matter of law is reached . . . .'"

We then set forth the test for determining when that point had been reached:

> "When the state's participation in the criminal enterprise reaches the point where it can be said that except for the conduct of the state a crime would probably not have been committed or because the conduct is such that it is likely to induce those to commit a crime who would normally avoid crime, or, if the conduct is such that if allowed to continue would shake the public's confidence in the fair and honorable administration of justice, this then becomes entrapment as a matter of law."

Indeed, the law of entrapment in New Mexico may be characterized as utilizing both tests, weighing the objective *indicia* of police involvement against the subjectively determined state of mind of the accused. Where it is determined that an accused harbored a strong predisposition for committing the offense charged, a greater degree of governmental participation will be condoned. However, where, as in *Sainz,* the degree of governmental participation is so great that there is serious question as to whether a crime would have been committed without that participation, the extent of the accused's criminal predisposition will be given little, if any, consideration.

At trial, defendant testified that Serna and the state's undercover narcotics agent visited his home on two occasions on May 23, 1974. During the afternoon encounter, defendant testified that: "James Serna asked me did I have any dimes. I knew James Serna was using heroin as well as myself, so I trusted him. I told him I would have some later on." Defendant's recollection of the second encounter later that night reads in pertinent part as follows:

> "I was sitting in the living room and they knocked on the door. I got up and answered the door and let both of them in because I knew Velarde [the undercover narcotics agent], Serna had informed me he was all right. So, I trusted him and let him inside the house. While we was in the house, we proceeded to the kitchen. And 'T', this other friend of mine, he was sitting down at the table. And Serna asked me did I have any stuff. I told him, 'Yeah, I got two dimes.' So, he says, 'I'm sick and I need some.' So I gave him two dimes down on the table."

The indictment in this case charges a sale of a Schedule I controlled substance to undercover agent Velarde. Both Velarde and Serna testified that the sale was to Velarde. Defendant's version, while clearly confessing a sale, differs from the prosecution's version in that it maintains that the sale was made to Serna. At the first meeting, the defendant, by his own testimony, indicated that although he had no heroin for sale at the moment, he would be getting some later on in the day.

It appears that defendant would have us determine that he was entrapped because Serna claimed he was "sick", and that this then constituted an impermissible degree of governmental inducement. See United States v. Sherman, 200 F.2d 880 (2d Cir. 1952), rev'g. appeal after remand, 240 F.2d 949 (2d Cir. 1957), 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). We note, however, that the jury was instructed that it had to find that the sale was made to agent Velarde before it could hold the defendant guilty. The verdict returned was that the defendant was indeed guilty as charged. It is supported

by substantial evidence. We do not consider the governmental activity in this case as even remotely analogous to its involvement in *Sainz,* and we cannot say, as a matter of law, that the defense of entrapment is supported by the record.

"Mere presentation of an opportunity to commit a crime will not satisfy the requirements of the defense. Entrapment 'has no application to a situation where enforcement officers merely permit a violation to occur in order to get sufficient facts to insure conviction'. For example, a simple offer by an officer or agent to buy drugs will not warrant an instruction on entrapment." [Footnotes Omitted.] Entrapment: A Critical Discussion, 37 Mo.L.R. 633 (Fall 1972).

Nevertheless, defendant contends secondly that the giving of instruction 13 constituted jurisdictional error because it laid the burden of proof on the question of entrapment upon the defendant. The challenged instructions read as follow:

"13. The Defendant has raised the defense of entrapment. Entrapment occurs when the criminal design or conduct originates in the mind of the officer and is implanted by him in the mind of an otherwise innocent person. Another way of defining entrapment is to say that the crime originated with the officer who induced the Defendant to commit the crime when he had no previous disposition to do so.

"However, if the Defendant was engaged in similar crimes or was ready and willing to violate the law and the officer merely afforded him an opportunity to do so, then the defense of entrapment is not established.

"It is not permissible for an officer to initiate the criminal act, nor to use undue persuasion or enticement to induce the Defendant to commit the crime, when without such conduct on the part of the officer the Defendant would not have committed the crime.

"You are instructed that if you find that the defense of entrapment has been established by the Defendant, then you must find the Defendant not guilty."

"14. Where a person already has the willingness and the readiness to break the law, the mere fact that the government agent provides what appears to be a favorable opportunity is not entrapment. However, if you have a reasonable doubt whether the Defendant has the previous intent or purpose to commit the offense, and committed the offense only because he was induced or persuaded by Officer Velarde, then you must acquit the Defendant."

Defendant contends that the giving of instruction 13, was erroneous; in that the burden should have been more properly placed upon the state to prove beyond a reasonable doubt that defendant was *not* entrapped. See Reed v. State, 130 Ga. App. 659, 204 S.E.2d 335 (1967); United States v. Banks, 475 F.2d 1367 (5th Cir. 1973); United States v. Sherman, 200 F.2d 880, supra. Without commenting on the merits of the argument, we note that the instructions include some aspects of the so-called objective test and some aspects of the subjective test; and we see no reason to disaffirm these instructions upon any consideration of misplaced focus in that regard because both tests are to be applied to the relevant facts of a particular case under our decision in *Sainz,* supra.

Finally, as to the burden of proof question, we conclude that it is an issue that we need not decide. Instruction 14 told the jury to acquit the defendant if it had a reasonable doubt on the question of entrapment. Instruction 14, thus, substantially instructs the jury as to defendant's contention. The fact that instruction 13 may be viewed as inconsistent with number 14 does not provide a basis for review in the absence of an objection by the defendant. State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973).

The judgment and sentence rendered below are affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

537 P.2d 711

STATE of New Mexico, Plaintiff-Appellee,

v.

Janice FRAZIER, Defendant-Appellant.

No. 1644.

Court of Appeals of New Mexico.
June 11, 1975.

Dahl L. Harris, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Santa Fe, Louis Druxman, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant was convicted in a non-jury trial, of possession of heroin and marijuana, in violation of § 54–11–23, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, 1973 Supp.). She appeals. We reverse.

The only issue on appeal is whether the trial court erred in refusing to suppress contraband seized from the defendant.

A hearing on defendant's motion to suppress was held. The defendant called the owner of the motel and two police officers to testify at the suppression hearing.

The evidence showed that on January 1, 1974, defendant was registered at the Sat-

ellite Motel. An inspection of the room by the owner disclosed cigarette burns on the bedspread. Defendant asked the owner to leave the room and come back later. The police were called and two police officers arrived.

The officers were advised that defendant's room was occupied past check-out time; that the day's rent had not been paid; that there were numerous cigarette burns; that one of the police officers should accompany the owner to the room and defendant would be asked to leave. The owner went into the room again and again was asked to leave.

While using the telephone, the owner told the police officer that defendant ran from her room and out of the motel. The second police officer, Officer Brown, was standing at the southwest corner of the motel and saw defendant run from her room carrying a large blue purse. He pursued defendant in his patrol car because, he said, the owner wanted defendant to leave and defendant did not want to leave. Even though defendant left, the police officer chased her because he did not know why she was running.

Officer Brown stopped defendant and told her he wanted to speak to her, to learn her reasons for being in the room and for running from the room, and to accompany him back to the motel. Defendant said she would go nowhere with him and turned and ran again. After the officer stopped her a second time, defendant whirled around and started hitting him. The officer grabbed her, and placed her under arrest. A second police officer, Lieutenant Stewart, then arrived, and the two police officers forcibly restrained the defendant and escorted her back to the patrol car. Lieutenant Stewart then instructed Officer Brown to take the defendant's handbag from her. His reason for so instructing was, "in case she had a weapon, or something that she could have used after we got her in the car, it was a safety precaution to remove the purse." The defendant resisted as Officer Brown attempted to take away her purse. The purse came open in the struggle; and the police officers observed inside a green, leafy substance, which they recognized to be marijuana.

The defendant was taken to the police station, where she was charged with possession of marijuana, and possession of heroin, which was found inside the purse, upon inspection.

The trial court denied the motion to suppress the contraband found in defendant's purse, giving as reason that the police officer had the legal power to stop her and to request identification. We disagree.

A. *The police did not have the right to make an investigatory stop.*

An investigatory stop, short of an arrest, is lawful when the police approach a person to investigate possible criminal behavior. State v. Lewis, 80 N.M. 274, 454 P.2d 360 (Ct.App.1969). See State v. Rivera, 85 N.M. 723, 516 P.2d 694 (Ct.App. 1973); State v. Hilliard, 81 N.M. 407, 467 P.2d 733 (Ct.App.1970) where the police were dispatched to investigate a burglary; State v. Sedillo, 81 N.M. 47, 462 P.2d 632 (Ct.App.1969) where the police had reasonable cause to investigate criminal behavior; People v. Stephenson, 529 P.2d 1333 (Colo. 1974), where a police officer accosted defendant who was walking toward him smoking a hand rolled cigarette and, when side by side with defendant, the officer smelled burning marijuana.

In the instant case, the police were called to assist the owner in evicting the defendant. The failure of defendant to pay rent did not constitute a criminal offense. The owner did not inform the police that defendant falsely obtained accommodations at the motel in violation of § 40A–16–16, N.M.S.A.1953 (2nd Repl. Vol. 6). Neither were the police informed that defendant committed criminal damage to any property in her room in the motel in violation of § 40A–15–1, N.M.S.A.1953 (2d Repl.Vol. 6). Prior to stopping defendant, the police officer admitted he had

no grounds to believe that defendant was committing or had committed a criminal offense. Neither did he have any general or specific grounds of suspicion that a criminal offense had been committed. No evidence of suspicious activity was offered by the State.

It was not reasonable for the officer to forcibly stop and restrain defendant to inquire of her identification. Defendant's identification was known. The police officer had no legitimate reason for stopping the defendant to talk to her. The police officer exceeded his authority.

B. *The arrest of the defendant was unlawful.*

When the defendant ran from Officer Brown the second time, she resisted the officer, and he then seized her and arrested her.

Section 40A-22-1, N.M.S.A.1953 (2d Repl. Vol. 6) provides in part:

> Resisting or obstructing an officer consists of:
>
> * * * * * *
>
> B. resisting * * * any * * * peace officer in the lawful discharge of his duties.

The police officer was not in the lawful discharge of his duties in stopping and restraining the defendant for identification. Defendant was not acting in any manner to warrant the police officer to use force in order to detain her. There was no justified official intrusion upon the constitutionally protected interest of a private citizen. Her resistance did not provide probable cause for the arrest. Compare, Garden City v. Mesa, 215 Kan. 674, 527 P.2d 1036 (1974).

A person is arrested when his freedom of action is restricted by a police officer and he is subject to the control of the officer. Howell v. State, 530 P.2d 1371 (Okl.Cr.App.1975); State v. Edwards, 111 Ariz. 357, 529 P.2d 1174 (1974). "The burden is on the state to show the requisite probable cause to justify the warrantless arrest." State v. Gorsuch, 87 N.M. 135, 529 P.2d 1256, 1258 (Ct.App.1974).

In United States v. Ward, 488 F.2d 162, 168 (9th Cir. 1973), the court said:

> Although not all street encounters between citizens and law enforcement agents involve Fourth Amendment considerations, when an officer accosts an individual and by physical force or show of authority restrains his liberty short of arrest, the stop becomes a "seizure" of the person. Terry v. Ohio, 392 U.S. 1, 16, 19, n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Such a seizure must then be tested for reasonableness under the Fourth Amendment. This requires the courts to weigh the need for police action against the inconvenience and intrusion which the stop entails. [Citations Omitted].

The "seizure" of defendant constituted an arrest. "A police officer may arrest without a warrant if the circumstances would warrant a reasonable person in believing that an offense had been committed by the person whom he then arrests." State v. Trujillo, 85 N.M. 208, 211, 510 P. 2d 1079, 1082 (Ct.App.1973). "[T]he legality of an arrest without a warrant depends upon whether the arrest was based upon probable cause." State v. Deltenre, 77 N.M. 497, 499, 424 P.2d 782, 783 (1966), cert. denied, 386 U.S. 976, 87 S.Ct. 1171, 18 L.Ed.2d 136 (1967).

The police had no probable cause to believe that defendant was guilty of any criminal offense. We find no reasonable grounds for the seizure and physical restraint of defendant absent a reasonable belief that a criminal offense had been committed.

See also State v. Joao, 533 P.2d 270 (Hawaii 1975); People v. Parisi, 393 Mich. 31, 222 N.W.2d 757 (1974).

If the seizure of the person was unjustified, even though the person fled

from an enforcement officer, any evidence recovered as a result thereof is tainted and must be suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); See State v. Gorsuch, supra.

The motion of defendant to suppress should have been granted. The evidence obtained by the police is inadmissible at trial.

Reversed. Defendant is granted a new trial.

LOPEZ, J., concurs.

HERNANDEZ J., dissents.

537 P.2d 1003

STATE of New Mexico, Plaintiff-Appellee,

v.

Arnold KENARD, Defendant-Appellant.

No. 1645.

Court of Appeals of New Mexico.
June 18, 1975.

Justin Reid, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Ralph W. Muxlow II, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of unlawful possession of heroin, defendant appeals. Section 54–11–23, N.M.S.A.1953 (Repl. Vol. 8, pt. 2, Supp. (1973). The issues concern: (1) sufficiency of the evidence, and (2) search and seizure.

Sufficiency of the Evidence

Upon execution of a search warrant, heroin was found in ten aluminum foil packets. The packets were in an amber vial. The vial was a prescription bottle and the prescription had been made out to defendant. The contention is that this evidence establishes that the heroin was not possessed unlawfully. Defendant relies on § 54–11–23, supra, which prohibits possession "* * * unless the substance was obtained pursuant to a valid prescription or

order of a practitioner while acting in the course of his professional practice * * *."

Defendant advances various legal arguments concerning the above evidence. Each of the arguments bottoms on the inference to be drawn from the evidence. Defendant asserts the evidence "supports a reasonable inference that the substance in the medicine vial was obtained pursuant to a valid prescription." It does not.

A reasonable inference is a conclusion arrived at by a process of reasoning. The conclusion 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 experience. Dull v. Tellez, 83 N.M. 126, 489 P.2d 406 (Ct.App.1971).

The facts extablished by the evidence are that ten aluminum foil packets containing heroin were found in a prescription bottle and that the prescription had been made out to defendant. Viewing these facts in the light of common knowledge or experience, we cannot rationally or logically deduce that the heroin was validly prescribed. Specifically, the presence of ten aluminum foil packets of heroin in a bottle which does not identify defendant's prescription does not permit a rational conclusion based on common knowledge or experience that the heroin either was prescribed or was validly prescribed. Compare State v. Baca, 83 N.M. 184, 489 P.2d 1182 (Ct.App.1971).

Search and Seizure

Defendant claims the heroin was illegally seized. This contention is based on the method used by the officers in entering defendant's home—a trailer house.

A search warrant was obtained. The warrant authorized a search of defendant and his house trailer for heroin and other controlled substances. No attack is made on the warrant; there is no issue as to "probable cause" for issuance of the warrant.

Three officers were assigned to execute the warrant. Two of the three officers took positions where they were not visible from the front door of the trailer. Officer Moore in plain clothes and long hair, affecting the manner and speech of a "hippie" and posing as a heroin user, attempted to get defendant to open the door. The ruse was not successful.

"Defendant Kenard re-entered the interior of his residence without opening the door; shortly thereafter he returned to the door where he was partially visible to Officer Moore. Officer Moore then attempted again to persuade the Defendant to open the door by means of his subterfuge.

"In light of Defendant's apparent refusal. Officer Moore then withdrew his badge from his clothing, held it up visible to the Defendant, and opened his coat displaying his firearm to the Defendant, at the same time stating the words 'police officer.' Officer Moore intended to state that he had a Search Warrant for the residence in his possession; however, before he was able to do so, the Defendant disappeared from the door, turned out the lights, and was heard to run somewhere into the interior of the mobile home.

"At this juncture, Officer Moore entered the residence by force, by breaking out the glass pane in the door, and opening the door out towards him. * * * * * * * * *

"Officer Shaw, stationed at the rear door of the trailer, heard Officer Moore state that he was a police officer. Officer Shaw then heard someone inside the house shout 'it's the damn police,' and run towards him, whereupon the rear door sprang open, and the Defendant appeared, apparently attempting to flee. Officer Shaw, who had his firearm in his hand, directed the Defendant to raise his hands, and return to the interior of the residence."

Thereafter defendant was served with the search warrant, a search was conducted and the heroin found.

The foregoing recital is based on findings made by the trial court. Substantial evidence supports those findings.

The trial court concluded:

"* * * Officer Moore first attempted to persuade Defendant Kenard to open the door to his residence in a peaceable manner via use of a subterfuge. Defendant Kenard refused to open the door whereupon Officer Moore displayed his identification and announced his authority. Defendant Kenard then fled from the door, thereby refusing Officer Moore entrance. At that point, Officer Moore lawfully could, and lawfully did, enter the residence by force."

Defendant claims that Moore's conduct made the search unlawful within the constitutional provision prohibiting unreasonable searches. N.M.Const., Art. II, § 10. The conduct complained of is the ruse and the forcible entry.

Moore did not enter by ruse. Entry by ruse is not an independent issue. See State v. Chavez, 87 N.M. 180, 531 P.2d 603 (Ct.App.1974). The unsuccessful ruse, however, is pertinent to the reasonableness of Moore's entry by force.

The law as to forcible entry is stated in State v. Baca, 87 N.M. 12, 528 P.2d 656 (Ct.App.1974), as follows:

"* * * an officer, prior to forcible entry, must give notice of authority and purpose, and be denied admittance. This is a general standard. Noncompliance with this standard is justified if exigent circumstances exist. Examples, but not a catalogue, of exigent circumstances are: (1) when, prior to entry, officers in good faith believe that they or someone within are in peril of bodily harm; or (2) when prior to entry, officers in good faith believe that the person to be arrested is fleeing or attempting to destroy evidence. These standards apply both to an officer executing a search warrant and to an officer making an arrest on probable cause. * * * The reasonableness of each search and seizure is to be decided upon its own facts and circumstances in light of these general standards. * * *

"If there are exigent circumstances they must be known to the officers beforehand. * * *"

There is evidence that Moore gave notice of his authority and evidence that he was denied admittance. There is no evidence that Moore stated his purpose. The State argues that a statement of purpose was excused because when Moore identified himself as a police officer, defendant ran away from the door. The State contends a statement of purpose would be a useless gesture in these circumstances. See United States v. Singleton, 439 F.2d 381 (3d Cir. 1971); People v. Vasquez, 1 Cal.App.3d 769, 82 Cal.Rptr. 131 (1969), cert. denied 398 U.S. 938, 90 S.Ct. 1840, 26 L.Ed.2d 270 (1970). It is unnecessary to answer this contention. Nor do we consider the State's argument that Moore substantially complied with the notice requirements of State v. Baca, supra.

Our view is that exigent circumstances made the forcible entry lawful. The exigent circumstance is that Moore, in good faith prior to entry, believed that defendant was fleeing.

The evidence is substantial that after Moore stated he was a police officer and showed his badge and gun, defendant disappeared from the door, turned out the lights and was heard running. Defendant asserts these circumstances cannot justify the forcible entry because what defendant fled from was a man appearing as a drug-using hippie.

Defendant relies on Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). *Wong Sun;* supra, expressly did not consider exigent circumstances; it is pertinent only in connection with Moore's ruse. There, an officer attempted entry by ruse which was unsuccessful. The officer identified himself as a narcotics agent, Toy slammed the door and fled. The United States Supreme Court stated

the officer never adequately dispelled the misimpression engendered by his own ruse before Toy fled. That is not the situation in this case. The evidence shows any misimpression as to Moore being a police officer was dispelled. Shaw heard someone shout "it's the damn police" and run toward him. That person was defendant.

The trial court's findings are to the effect that defendant had turned out the lights and fled prior to Moore's forcible entry. Thus the requirement that the officer have prior knowledge of the exigent circumstance was met.

The judgment and sentence are affirmed.

It is so ordered.

SUTIN and HERNANDEZ, JJ., concur.

537 P.2d 1006

STATE of New Mexico, Plaintiff-Appellee,

v.

Clifford JONES, Defendant-Appellant.

No. 1777.

Court of Appeals of New Mexico.
June 18, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Sarah M. Singleton, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

This appeal is concerned with the propriety of instructing the jury with regard to the following presumption:

"B. The requisite knowledge or belief that property has been stolen is presumed in the case of an individual or dealer who:

"(1) is found in possession or control of property stolen from two [2] or more persons on separate occasions * * *" Section 40A-16-11(B), N.M.S.A.1953 (2d Repl.Vol. 6, 1972).

Defendant was convicted of receiving stolen property contrary to § 40A-16-11, N.M.S.A.1953 (2d Repl.Vol. 6, 1972). The trial court instructed the jury pursuant to § 40A-16-11(B), supra. Defendant now appeals contending that the giving of the instruction in the manner in which it was given and under the evidence adduced at trial was error. We affirm.

Defendant's two-fold attack on his conviction is based on the trial court's instruction Nos. 11 and 6 which read as follows:

"11. You are further instructed that the requisite knowledge or belief that the property has been stolen is presumed in the case of an individual who is found in possession or control of property stolen from two or more persons on separate occasions."

"6. * * *

"A presumption is a conclusion which the law requires the jury to make from particular facts, in the absence of convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary; but unless so outweighed the jury is bound to find in accordance with the presumption."

Defendant's initial attack on these instructions is that they fail to comply with Rule of Evidence 303, § 20-4-303, N.M.S.A. 1953 (Repl.Vol. 4, 1970, Supp.1973), and that such failure is violative of his constitutional right to due process of law. Defendant, for purposes of this portion of his argument, makes no contention that the presumption itself is unconstitutional. He argues only that the instructions in the instant case giving mandatory effect to the presumption violates R.Evid. 303(c), supra, which directs the trial court to instruct the jury that it may, but is not required, to find the presumed fact if it finds the existence of the basic facts. Thus, this portion of defendant's argument is essentially directed at instruction No. 6. It is further submitted that R.Evid. 303(c), supra, is a codification of the United States Supreme Court's edict against mandatory presumptions in criminal cases. See Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1945).

The instant instructions clearly violate R.Evid. 303(c), supra. R.Evid. 303(c), supra, specifically mandates an instruction that the jury is not required to find the presumed fact simply because there is sufficient evidence of the basic facts. The state argues that instruction No. 6 substantially complied with this mandate in that it told the jury that the presumption could be overcome by evidence to the contrary. The point, however, of R. Evid. 303(c), supra, is that even if there is no evidence to the contrary, the jury should be instructed that it is not bound to find in accordance with the presumption. See Committee Commentary to R.Evid. 303(b) and (c), supra. R.Evid. 303(c), supra, incorporates the constitutional requirement that presumptions not be conclusive in criminal cases even if unrebutted. See Bollenbach v. United States, supra; United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965); Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed. 2d 380 (1973); Bray v. United States, 113 U.S.App.D.C. 136, 306 F.2d 743 (1962).

In the case at bar, instruction No. 11 told the jury that knowledge is presumed from a certain kind of possession. Instruction No. 6 told the jury that a presumption is a conclusion required to be made unless rebutted, and further that the

jury was bound by the conclusion unless and until evidence to the contrary outweighed it. These instructions were in direct conflict with Rule 303(c), supra. However, defendant did not object to instruction No. 6. Neither did his objection to instruction No. 11 alert the trial court to the vice of instruction No. 6. See infra. Defendant has waived the error. R.Cr.P. 41, § 41–23–41, N.M.S.A.1953 (2d Repl.Vol. 6, 1972 Supp.1973).

The second prong of defendant's argument is directed solely at instruction No. 11. Defendant's objection to this instruction at trial was that "* * * it is not a proper statement of the law and is not supported by the evidence before the jury." On appeal defendant contends only that since the evidence did not demonstrate that the defendant possessed both items of property simultaneously, the instructions were unsupported by the evidence. Defendant contends that instructions pursuant to § 40A–16–11(B), supra, may only be given when the evidence shows simultaneous possession of property stolen from two or more persons on separate occasions.

Defendant is incorrect in this assertion. We first note, however, that the record supports defendant's contention that the evidence did not show simultaneous possession. Police officers recovered a stolen television set from the defendant's possession in late February of 1974. The set must have been stolen shortly before that time although the owner testified that the theft occurred in March or April. In early March, the police obtained information that the defendant had possessed guns stolen in December of 1973, but had already disposed of them. There is no evidence as to when defendant possessed the guns.

It is important to realize that while the legislature (in § 40A–16–11(B), supra), the Supreme Court (in R.Evid. 303, supra), and we (in this opinion thus far) have referred to the rule contained in § 40A–16–11(B), supra, as creating a presumption, it is more appropriately denominated a "standardized inference." See generally McCormick on Evidence, §§ 342–346 (2d Ed. 1972). That is to say that a "true" presumption shifts the burden of proof; if proof of the basic facts are introduced into evidence, the presumed fact is also taken to be proved in the absence of evidence to the contrary. If no evidence to the contrary is forthcoming, the court is compelled to direct a verdict against the party now having the burden of producing such evidence. In other words, a "true" presumption is conclusive on the jury in the absence of evidence to the contrary. Territory v. Lucero, 16 N.M. 652, 120 P. 304 (1911). An inference, on the other hand, is nothing more than a permissible deduction from the evidence. Territory v. Lucero, supra.

The effect of R.Evid. 303(c), supra, is to abolish "true" presumptions in criminal cases. This puts the "presumptions" contained in § 40A–16–11(B), supra, into the category of a mere permissible inference from the evidence provided that the jury is properly instructed under R. Evid. 303(c), supra. This contention is mandated by the constitutional requirements heretofore stated. Thus, the language of § 40A–16–11(B), supra, must be read:

> "B. The requisite knowledge or belief that property has been stolen [may be] presumed * * *."

The question, then, with which we must deal on this appeal is whether it is permissible to infer knowledge that property is stolen from proof of two separate instances of possession of property stolen from two or more persons on different occasions.

It is settled law that evidence of a defendant's prior possession of other stolen property is admissible to establish the knowledge of a defendant that the property was stolen. State v. Sero, 82 N.M. 17, 474 P.2d 503 (Ct.App.1970). The evidence is admissible because it is permissible to infer knowledge from proof of more than one instance of stolen property. See State v.

Lindsey, 81 N.M. 173, 464 P.2d 903 (Ct. App.1969). The reason for this admissibility is that there is a rational connection between the facts proved and the ultimate fact inferred. Barnes v. United States, supra. The possession need not be simultaneous possession but the time span between the non-simultaneous possessions must be reasonable. What is reasonable must be decided on a case by case basis. Under the facts of the instant case we hold the time span reasonable. There was a rational connection between the facts proved and the ultimate fact inferred.

Yet the jury was not properly instructed in the case at bar. Thus defendant concludes his argument with the assertion that a mandatory presumption that attributes guilty knowledge to one in non-simultaneous possession of property stolen from two individuals on separate occasions is unconstitutional. As stated previously, no objection was made to the mandatory aspect of the instructions. We therefore view defendant's final contention as being unreviewable unless it can be said that the error, if any, is fundamental or jurisdictional. State v. Jaramillo, 85 N.M. 19, 508 P.2d 1316 (Ct.App.1973). The doctrine of fundamental error is applicable only if the innocence of the defendant appears indisputable or if the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to stand. State v. Parker, 85 N.M. 80, 509 P.2d 272 (Ct.App. 1973). We have reviewed the record and conclude that the instant one is not such a case.

It is true that some constitutional violations may render a court incompetent to convict a defendant. Such jurisdictional errors may be raised for the first time on appeal. State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct.App.1974). However, in this case, the jury was properly instructed as to all the essential elements of the crime. State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973). The jury was instructed that defendant was presumed to be innocent and that his guilt had to be proved beyond a reasonable doubt. See State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct.App.1970). In short, we do not believe that the error alleged with regard to the instructions in the case at bar is such as divests the trial court of jurisdiction.

Oral argument in this case is unnecessary.

Defendant's conviction is affirmed.

It is so ordered.

WOOD C. J., concurs

LOPEZ, J., dissenting.

LOPEZ, Judge (dissenting).

I respectfully dissent.

There is no question that § 20–4–303, supra, has been violated. The majority opinion fails to remedy this error on the grounds that defendant never clearly and graphically demonstrated to the trial court the total import of his objection. It is rather as if substituting the court's mandatory presumption for the jury's burden of proof beyond a reasonabe doubt were mere harmless error. "The violation of a defendant's constitutional right is never harmless." State v. Barela, 86 N.M. 104, 519 P.2d 1185 (Ct.App.1974).

The majority has completely distorted the issue of this case. The true question for decision is not, as is held above, whether a jury could infer knowledge or belief under § 40A–16–11, supra. Rather, the whole point of defendant's complaint on appeal is that his statutory and constitutional rights were violated by the error of the trial court.

The majority, further, hides the admitted error of the court below in a cloud of dicta concerning "standardized inferences": when the court lets the jury infer when it, arguably, did not know it had the right to infer. The majority might like to have § 40A–16–11(B), supra, read "*may be* presumed", but it is clear that both the actual statute and the instruction given read "*is* presumed", a mandatory directive in anybody's language.

But after all the verbiage about "inferences" and "presumptions" (a distinction

not applicable to this case; contrast Chief Judge Bazelon's opinion in Bray v. United States, cited by the majority) even the rest of this panel must ultimately face the real issue: what to do with the clearly erroneous instruction? Their answer, obviously, is to do nothing.

The error in this case involves an evidentiary ruling, a violation of Rule 303, supra. The defendant, not being in a position to offer another instruction (he wished none), and not being in a position to offer other evidence on the matter (his case was closed), did what he could: he objected. As grounds for his objection, he stated that the trial court erred as a matter of law. Further, the matter involved a substantial right of the defendant: his right to a jury verdict on an essential element of the alleged crime. "* * * a peremptory ruling against the accused in a criminal case, even as to a single element of the crime, is abhorrent to the criminal law * * *." McCormick on Evidence § 342 (2d Ed. 1972).

Nevertheless, granting that reasonable minds might differ as to whether defendant had met the burden of subsection (a) of Rule 103, § 20–4–103, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973), it simply cannot be doubted that subsection (d) of the rule is applicable in this case:

> "(d) *Plain Error.* Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge."

The definitional problem, when you use "plain error", is handled many ways:

> "Thus it is said that 'plain error' means 'error both obvious and substantial,' or 'serious and manifest errors,' or 'seriously prejudicial error,' or 'grave errors which seriously affect substantial rights of the accused.'" Wright & Miller, Federal Practice and Procedure, § 856 (1969).
>
> "This court is reluctant to consider objections raised for the first time on appeal. * * * We are considerably more reluctant to notice on our own motion, errors not raised below when the parties have not even urged us to do so. Nonetheless, we are empowered to notice, in our discretion, '[p]lain errors or defects affecting substantial rights' which were brought neither to our attention nor to the attention of the trial court. * * * We may do so when confronted with 'unusual circumstances involving seriously prejudicial deficiencies in the trial process,' * * * or when 'it appears to be necessary in order to prevent a miscarriage of justice or to preserve the integrity and reputation of the judicial process.'" United States v. Bacall, 443 F.2d 1050, 1063 (9th Cir. 1971).

The Plain Error Rule must be read in conjunction with the timely objection rule (our 103(a)) which provides that no party may assign as error an instruction to which he has not objected before the jury retires. Despite the language of 103(a), a court may notice an erroneous instruction as plain error, particularly when some objection is made, as in the instant case. Apodaca v. United States., 188 F.2d 932, 937 (10th Cir. 1951). See cases in Wright & Miller, supra, at f. n. 97.

The "fundamental right" or "substantial right" denied the defendant in the case at bar was, again, the right to have his case determined by a jury. The mandatory instruction given by the trial court denied this right as to the essential element of intent.

An evidentiary matter being involved, this is precisely the situation for which the Plain Error Rule was designed. Compare State v. Sanchez, 86 N.M. 713, 526 P.2d 1306 (Ct.App.1974).

Rule 303, and both the New Mexico and United States Constitutions were violated. Plain error occurred in its strictest form. Defendant's conviction should be reversed and the cause should be remanded for a new trial.

537 P.2d 1012

STATE of New Mexico, Plaintiff-Appellee,

v.

Joe Edward WILKINS, and Samantha Wilkins, a/k/a Andrea Douglas, a/k/a Samantha Oldfield, Defendants-Appellants.

No. 1745.

Court of Appeals of New Mexico.

June 4, 1975.

Rehearing Denied June 19, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Don Klein, Jr., Asst. Appellate Defender, Santa Fe, for defendants-appellants.

Toney Anaya, Atty. Gen., Lanny D. Messersmith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Both defendants were convicted of robbery while armed with a deadly weapon. Section 40A–16–2, N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1973). Their appeal contends: (1) cross-examination of a witness was unduly restricted, (2) there was undue repetition of a witness's statement, and (3) their sentence was improper.

Cross-Examination

Huckleby testified as a witness for the State. He admitted he was one of the robbers. He implicated the two defendants.

(a) Defendants assert the trial court improperly refused to allow them to inquire into Huckleby's juvenile adjudication and the result of that adjudication. They rely on Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In *Davis*, supra, defense counsel was prohibited from making inquiry as to the witness being on probation under a juvenile court adjudication. *Davis*, supra, held this improperly restricted defense efforts to impeach the credibility of the juvenile by cross-examination directed to possible bias because of the juvenile's probationary status as a juvenile delinquent.

Davis, supra, is not applicable on the facts. In our case, the State's direct examination brought out that Huckleby was a juvenile and had been through a juvenile proceeding. At that point the trial court interrupted the questioning and ruled that the *State* could not go into what happened in juvenile court. The *defense* then objected that this would limit cross-examination. "One of the things that I would want to impeach him on is the fact that nothing did happen to him."

Defendants elicited this testimony on cross-examination. They brought out that Huckleby was arrested, gave a statement to the police, and was released. They brought out that Huckleby spent no time in jail and had no fear of going to prison. The defense did bring out that nothing happened to Huckleby. There was no restriction of the cross-examination.

(b) Defendants contend the trial court improperly restricted the cross-examination of Huckleby concerning letters Huckleby wrote to defendant Samantha. The fact that Huckleby wrote the letters was established. The State objected to introduction of the letters because the defense had violated a court order for discovery. The discovery order directed defendants to permit the State to inspect and copy documents in defendants' possession which they intended to introduce at trial. Section 41–23–28(a)(1), N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1973). This was to be done by April 27, 1974. Trial began July 8, 1974. Defense counsel admitted that they had the letters and when the letters were offered at trial, the State had not seen them. The alleged restriction of cross-examination was the trial court's refusal to admit the letters into evidence. The trial court could properly refuse to admit the letters because of the violation of its discovery order. Section 41–23–30, N.M.S.A. 1953 (2d Repl.Vol. 6, Supp.1973); compare Beverly v. Conquistadores, Inc., (Ct.App.) No. 1771, decided June 4, 1975.

Undue Repetition of Witness's Statement

Detective Garcia identified Huckleby's statement and it was introduced into evidence through him. Garcia testified generally that Huckleby implicated himself

in the statement and implicated other parties as well. The defense objection to this testimony at trial was that the contents of the statement was hearsay as to Garcia because Huckleby was available to testify. This contention is not pursued on appeal. The claim on appeal is that Garcia's general testimony was an undue repetition of Huckleby's statement.

No such claim was raised in the trial court. Section 21–12–11, N.M.S.A.1953 (Interim Supp.1974). Nor could it have been raised with propriety. Nothing shows that Huckleby's statement was read to or read by the jury. The only reference to the contents of the statement within the hearing of the jury was the general testimony of Garcia. There was no repetition. This point is frivolous.

The Proper Sentence for a Robbery Committed With a Firearm

The indictment charged defendants with robbery

> "while armed with a deadly weapon, to wit: a firearm, contrary to Sections 40A–16–2 and 40A–29–3.1, NMSA 1953 as amended."

Robbery while armed with a deadly weapon is a second degree felony. Section 40A–16–2, N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1973).

Section 40A–29–3.1, N.M.S.A.1953 (2d Repl.Vol. 6) provides punishment consequences when a firearm is used in the commission of a crime. A special finding of the jury is that a firearm was used. The provisions of § 40A–29–3.1, supra, were mandatory in this case. State v. Barreras, (Ct.App.) 536 P.2d 1108, decided May 28, 1975. The applicable provision of § 40A–29–3.1, supra, was Paragraph B, which prohibits suspension of the first year of any sentence imposed for "any crime constituting a felony other than a capital felony . . . ."

The trial court sentenced each defendant for a second degree felony; the sentences provide for no suspension of the first year of the sentences.

Defendants do not complain that § 40A–29–3.1(B), supra, was applied to their sentences. Because § 40A–29–3.1(B), supra, was applied, they contend they should have been sentenced for a third degree felony (robbery) rather than a second degree felony (robbery while armed with a deadly weapon). They assert that §§ 40A–16–2, supra, and 40A–29–3.1(B), supra, combine to establish the crime of robbery while armed with a firearm; that this is a specific offense which prohibits the application of the general provision concerning robbery while armed with a deadly weapon.

Defendants' argument is specious in that it disregards the crime charged. Section 40A–16–2, supra, applies to both robbery and robbery while armed with a deadly weapon. Defendants were charged and convicted of the latter. They were also charged and sentenced on the basis that the deadly weapon was a firearm. If this case involved an unarmed robbery, § 40A–29–3.1, supra, would not be involved because it applies only to crimes committed with a firearm. There is a relationship between § 40A–16–2, supra, and § 40A–29–3.1, supra, only when there is a robbery while armed with a deadly weapon and the deadly weapon is a firearm.

The criminal offense is robbery while armed with a deadly weapon. That offense is a second degree felony. Defendants were properly sentenced for a second degree felony. State v. Sanchez, 87 N.M. 140, 530 P.2d 404 (Ct.App.1974). Defendants assert this result is contrary to State v. Blea, 84 N.M. 595, 506 P.2d 339 (Ct.App.1973) and State v. Riley, 82 N.M. 235, 478 P.2d 563 (Ct.App.1970). They are incorrect.

State v. Blea, supra, holds that to apply § 40A–29–3.1, supra, a defendant must be given notice that the crime charged was committed with a firearm. *Blea*, supra,

does state that § 40A–29–3.1, supra, creates a new class of crimes. This language was disapproved in State v. Barreras, supra, because no new crime is created. What § 40A–29–3.1, supra, does is to provide additional punishment consequences if a crime is committed with a firearm.

State v. Riley, supra, deals with the applicability of a special statute over a general statute. To the extent of any necessary repugnancy between two statutes with a common subject, " 'the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, unless it appears that the legislature intended to make the general act controlling . . . .' " However, before applying a special statute over a general statute " 'the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy . . . .' " State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936).

There is no repugnancy between § 40A–16–2, supra, and § 40A–29–3.1, supra. Robbery while armed with a deadly weapon is a second degree felony; the sentence is not less than ten nor more than fifty years in the penitentiary. Section 40A–29–3(B), N.M.S.A.1953 (2d Repl.Vol. 6). Section 40A–29–3.1(B), supra, does not conflict with § 40A–16–2, supra, when it provides that the first year of the statutory sentence shall not be suspended. The two statutes are in harmony; each expresses a separate legislative intent.

Defendants' sentences for a second degree felony with no suspension of the first year of the sentences were in accordance with the statutes.

Oral argument in this case is unnecessary; the case is submitted for decision on the briefs. The judgments and sentences are affirmed.

It is so ordered.

HENDLEY and HERNANDEZ, JJ., concur.

537 P.2d 1015

Mildred BEVERLY and Julius Beverly, Plaintiffs-Appellants,

v.

CONQUISTADORES, INC., a corporation, d/b/a McDonald's Hamburgers, Defendant and Third-Party Plaintiff-Appellee,

v.

COLORADO PACIFIC CONTRACTORS, Third-Party Defendant and Fourth-Party Plaintiff-Appellee,

v.

JAYNES CORPORATION, Fourth-Party Defendant-Appellee.

No. 1771.

Court of Appeals of New Mexico.

June 4, 1975.

Certiorari Denied July 2, 1975.

Carl M. Sparks, Carvajal & Sparks, Albuquerque, for plaintiffs-appellants.

William P. Gralow, Civerolo, Hansen Wolf, Albuquerque, for appellee Conquistadores, Inc.

Irving E. Moore, Albuquerque, for appellee Colorado Pacific Contractors.

James A. Parker, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for appellee Jaynes Corp.

OPINION

WOOD, Chief Judge.

The issue is the propriety of the trial court's order dismissing plaintiffs' complaint with prejudice. The trial court's order reads:

> "That Plaintiffs' attorney, at the Pretrial Conference * * * indicated he had knowledge of a witness whom he might call to testify at trial; that upon the demand of the moving parties for the identity of said potential witness, Plaintiffs' attorney refused to disclose that witness' identity; that the Court ordered Plaintiffs' attorney to disclose the identity of said witness and Plaintiffs' attorney refused; and that the interest of justice requires that the lawsuit against the Defendants be dismissed for failure to reveal the identity of a potential witness."

There are three issues: (1) whether the order to disclose the witness was proper; (2) whether the court had the power to dismiss sua sponte; and (3) whether the dismissal was an abuse of discretion.

Order to Disclose Witness

The pretrial conference was held pursuant to § 21–1–1(16), N.M.S.A.1953 (Repl. Vol. 4). This rule provides that the conference may consider limiting the number of expert witnesses. At a hearing subsequent to the pretrial conference, it was revealed that the undisclosed potential witness was a physician who would have been an expert witness. We expressly do not decide this issue on the basis that the disclosure of expert witnesses may be compelled.

The rule authorizes the conference to consider "[s]uch other matters as may aid in the disposition of the action." The purpose of the rule was to get away from a "sporting" theory of justice. Tobeck v. United Nuclear-Homestake Partners, 85 N.M. 431, 512 P.2d 1267 (Ct.App. 1973). The disclosure of witnesses is a matter which may aid in the disposition of the action. See Benson v. Export Equipment Corporation, 49 N.M. 356, 164 P.2d 380 (1945). The trial court has authority to compel disclosure of witnesses at a pretrial conference. See Wirtz v. Hooper-

Holmes Bureau, Inc., 327 F.2d 939 (5th Cir. 1964).

Sua Sponte Dismissal

Plaintiffs argue that the trial court could not have properly dismissed the complaint under §§ 21-1-1(37)(b) and 41(b), N.M. S.A.1953 (Repl.Vol. 4). We do not consider whether dismissal under these rules would have been proper because nothing in the record indicates the trial court proceeded under these rules.

The trial court dismissed sua sponte. Plaintiffs recognize that a sua sponte power of dismissal exists in the district court, but contends this power is limited and did not authorize a dismissal in this case. This issue is concerned with the existence of the power, not whether the power was properly exercised.

"The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), reh. denied 371 U.S. 873, 83 S.Ct. 115, 9 L.Ed. 2d 112 (1962). New Mexico law is the same. Smith v. Walcott, 85 N.M. 351, 512 P.2d 679 (1973). Birdo v. Rodriguez, 84 N.M. 207, 501 P.2d 195 (1972) holds that a trial court has power to dismiss, sua sponte, a complaint that is patently deficient.

The foregoing cases hold the trial court has the power to dismiss a complaint sua sponte. This power of dismissal extends to dismissals for failure to comply with orders of the court. Flaksa v. Little River Marine Construction Co., 389 F.2d 885 (5th Cir. 1968), cert. denied 392 U.S. 928, 88 S. Ct. 2287, 20 L.Ed.2d 1387 (1968); Meeker v. Rizley, 324 F.2d 269 (10th Cir. 1963).

Dismissal an Abuse of Discretion

Sua sponte dismissal for failure to comply with a court order is a discretionary power. Such a dismissal is reviewed only to determine whether there was an abuse of discretion. Flaksa v. Little River Marine Construction Co., supra.

Plaintiffs assert there was an abuse of discretion because dismissal was a drastic sanction not justified by the circumstances. We agree that dismissal is a drastic sanction. Various decisions hold that "except in extreme circumstances, the court should first resort to the wide range of lesser sanctions which it may impose * * *." Flaksa v. Little River Marine Construction Co., supra; Mann v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 488 F.2d 75 (5th Cir. 1973); see generally Annot., 15 A.L.R. Fed. 407, § 7(b) at 422 (1973). Birdo v. Rodriguez, supra, cautions that sua sponte dismissal should be sparingly exercised.

Accordingly, we decide the abuse of discretion issue on the basis that sua sponte dismissal is to be done sparingly and only in extreme circumstances. What were the circumstances of this dismissal?

An extensive pretrial conference was held; the transcript of the conference covers 65 pages. The conference was held August 29th. Plaintiffs' counsel was directed to prepare the pretrial order; the trial court set September 9th as the date it would sign the order and resolve any differences between counsel as to the contents of the order. The trial court ruled that discovery was to be completed by September 13th. Names of witnesses were disclosed. The trial court ruled that the witnesses which had been identified were to be listed in the pretrial order. It also ruled that if counsel decided not to call a witness or could not locate a witness, notice to that effect was to be given at least ten days prior to trial.

At the conclusion of the conference, plaintiffs' counsel stated that he might have an additional witness which he would disclose ten days prior to trial. The trial court stated that he wanted the pretrial order to contain the names of the witnesses

and reminded counsel that a named witness need not be called if notice was given up until ten days prior to trial. At this point counsel for another party asked for the name of the witness; plaintiffs' counsel declined to disclose the name.

Plaintiffs' counsel then stated he would disclose the name of the witness in the pretrial order which he had been directed to prepare. An opposing counsel pointed out that this would allow only four days for discovery.

The trial court directed plaintiffs' counsel to disclose the name of the possible witness. Counsel refused. The court stated: "You are going to have to disclose the witness or you are going to lose your lawsuit today." After further colloquy between court and counsel, and with the name of the witness still not disclosed, the trial court dismissed plaintiffs' lawsuit. The order of dismissal is quoted at the beginning of this opinion. At a subsequent hearing, the court pointed out that he had warned counsel as to the consequences "if he insisted upon his refusal to obey the order of the Court, and he deliberately did so in an arrogant and the most unprofessional way the Court has ever seen."

Plaintiffs cite cases to the effect that extreme circumstances warranting dismissal do not exist unless the conduct in question is of long standing. They point out that the dismissal in Doanbuy Lease and Co. v. Melcher, 83 N.M. 82, 488 P.2d 339 (1971) was because of persistent failure to permit the taking of a deposition. The fact that persistent misconduct provides the basis for dismissal does not mean that one instance of misconduct may not be sufficiently extreme to warrant dismissal.

Here counsel did not wish to reveal the name of the witness until it would have been almost impossible for opposing counsel to depose the witness within the time remaining for discovery. When directed to disclose the name he refused. He was warned of the consequences of his refusal, but still refused to disclose the name of the witness. The trial court considered this to be extreme conduct justifying dismissal. We cannot say the trial court abused its discretion in so ruling unless we can characterize the ruling as clearly untenable or not justified by reason. See State v. Hargrove, 81 N.M. 145, 464 P.2d 564 (Ct.App.1970).

In the circumstances of this case we cannot say the trial court's dismissal was untenable or unreasonable.

The order of dismissal is affirmed.

It is so ordered.

HENDLEY and HERNANDEZ, JJ., concur.

537 P.2d 1385

George R. HAWTHORNE and Donelle C. Hawthorne, Petitioners-Appellants and Cross-Appellees,

v.

CITY OF SANTA FE, a Municipal Corporation, Respondent-Appellee and Cross-Appellant.

No. 10028.

Supreme Court of New Mexico.
June 25, 1975.

Jasper & Durkovich, John Jasper, Santa Fe, for petitioners-appellants and cross-appellees.

Jones, Gallegos, Snead & Wertheim, Susan P. Graber, Santa Fe, for respondent-appellee and cross-appellant.

OPINION

McMANUS, Chief Justice.

This suit was brought in the District Court of Santa Fe County under a special statutory proceeding to review by writ of certiorari the action of the respondent as Municipal Zoning Authority. After trial by the court, a judgment denying the requested relief was entered. The petitioners Hawthorne, two of the four original petitioners, appeal.

In 1962, the City of Santa Fe passed Ordinance No. 1962–19, § 28–13.2 [Santa Fe, N.M., Code § 36–247 (1973)], which prohibited a change in a zoning classification to a commercial or industrial category when the area involved is less than five acres, and further prohibited the creation of a separate commercial or industrial district of less than five acres by amendment to the ordinance. The respondent, a defendant and cross-appellant (City), pursuant to the above, rezoned a certain tract of land in the City of Santa Fe from residential use to a use that would allow a branch banking operation. The area involved is less than five acres. The petitioners-appellants, Hawthorne, own real estate which is within 100 feet of the rezoned property. The City held a public hearing on the proposed zoning amendment, giving prior no-

tice by general newspaper circulation in the City and County of Santa Fe. Direct mail notice was mailed to all adjoining property owners within 100 feet except to one Fred Martinez. The parties have stipulated that Martinez had actual notice of the public hearing.

After a full hearing, the court, having received evidence, read briefs and heard arguments, entered a memorandum decision, followed by findings of fact and conclusions of law. In effect, the court's decision held that Hawthorne was not a "person aggrieved" and that there were no parties in court with "standing" and consequently dismissed Hawthorne's complaint. While not basing the decision on conclusion of law No. 3, the court did have this to say in that conclusion:

> "Except for the conclusion that Petitioners lack standing to prosecute this action as concluded in Conclusion of Law number 2 above, this action should be decided in petitioners' favor since failure to mail a notice to Fred Martinez, a landowner within 100 feet of the property proposed to be rezoned as required by Section 14–20–4 N.M.S.A., 1953 Comp. is fatal to validity of Ordinance 1973–29."

Appellants rely on three points as basis of their appeal. The first is as follows:

> "The petitioners have standing to sue as 'persons aggrieved' under § 14–20–7 N.M.S.A., 1953."

The law of standing in New Mexico has now been set out in De Vargas Savings & Loan Assoc. v. Campbell, 87 N. M. 469, 535 P.2d 1320 (1975). In that case we construed § 48–15–133, N.M.S.A.1953 (Repl.Vol. 7, Supp.1972), the part of the Savings and Loan Act granting a right of appeal from administrative decisions to the district court to "any association or person aggrieved and directly affected." We held that "to attain standing in a suit arguing the unlawfulness of governmental action, the complainant must allege that he is injured in fact or is imminently threatened with injury, economically or otherwise." De Vargas, supra. Therefore, the Hawthornes have standing.

Appellants' second point asserts:

> "The respondent's failure to give notice in strict compliance with § 14–20–4 N.M.S.A., 1953, invalidated Ordinance No. 1973–29."

In answering point 2, the appellees assert a cross-appeal alleging that it was error for the district court to reach the merits, and further alleging that Ordinance 1973–29 was not invalidated by reason of a minor and technical defect in the notice of hearing given pursuant to § 14–20–4, N.M. S.A.1953 (Repl.Vol. 3, 1968).

Notice, pursuant to § 14–20–4, supra, was given the appellants, and they appeared at the hearing before the zoning authorities without making procedural objections. An objection to the failure to mail a notice of the public hearing to Fred Martinez was made at the trial in the district court. However, as above shown, Martinez was fully aware of the proposed zone changes. Obviously, the reason for such notice is to apprise interested parties of the hearing so that they may attend and state their views on the proposed zoning amendment, pro or con. It is our view that Martinez, having had knowledge of the hearing, was properly notified and this constitutes substantial compliance with the statute in question. The purpose of the statute has been met and that is all that is required in this instance. See City of Alamogordo v. McGee, 64 N.M. 253, 327 P.2d 321 (1958).

The third and last point argued in the trial court was:

> "Respondent's enactment of Ordinance No. 1973–29 was an illegal act because prohibited by section 28–13.2 of respondent's General Zoning Ordinance No. 1962–19."

We hold that the Municipal Zoning Authority had no power to enact an ordinance

binding upon subsequent zoning commissions.

The judgment of the trial court in this cause will be affirmed but for different reasons, as set out herein.

It is so ordered.

OMAN and MONTOYA, JJ., concur.

537 P.2d 1387

STATE of New Mexico, Petitioner,

v.

Ronald PEAVLER and John Casaus, Respondents.

Ronald PEAVLER and John Casaus, Petitioners,

v.

STATE of New Mexico, Respondent.

Nos. 10454 and 10493.

Supreme Court of New Mexico.

July 2, 1975.

James L. Brandenburg, Dist. Atty., James F. Blackmer, Asst. Dist. Atty., Albuquerque, for petitioner No. 10454.

Freedman & Boyd, Albuquerque, for petitioners No. 10493.

Marchiondo & Berry, Roy Anuskewicz, Jr., Albuquerque, for respondents No. 10454.

Toney Anaya, Atty. Gen., Santa Fe, for respondent No. 10493.

OPINION

STEPHENSON, Justice.

The District Court of the Second Judicial District dismissed an indictment charging possession, unlawful distribution and conspiracy to distribute marijuana upon motion of the defendants. The State appealed.

The Court of Appeals affirmed the dismissal of the indictment but directed the district court to see to it that a preliminary hearing be granted the defendants in magistrate court. State v. Peavler and Casaus, (filed April 9, 1975), 87 N.M. 443, 535 P. 2d 650 (Ct.App.1975). We refer to the majority opinion of the Court of Appeals for a statement of the procedural background of the case.

The State petitioned for certiorari which we granted. We now reverse the Court of Appeals and the district court.

We agree with the opinion of the majority of the Court of Appeals insofar as it held that the prosecutor's failure to proceed under the Rules Governing Criminal Actions in Magistrate Court is of no moment and that the failure of the district attorney to appear for the preliminary hearing cannot be elevated to a deprivation of any constitutional right. However, we are in fundamental disagreement with the ultimate result of the majority opinion of the Court of Appeals and with the reasoning by which it was reached.

The Court of Appeals reasoned and we agree that the dismissal of a felony charge by a magistrate does not result in an acquittal because the magistrate court has no jurisdiction to try felony charges. § 36–3–4, N.M.S.A., 1953 (Supp.1973). Consequently, a subsequent indictment is not barred even if the magistrate determines in a preliminary hearing that there is no probable cause to bind over for trial in the district court. United States v. Kysar, 459 F.2d 422 (10th Cir. 1972). Moreover, since the magistrate court has no jurisdiction to try felony charges, no double jeopardy problem can arise.

We also agree that the State can choose whether to proceed by indictment or information. State v. Burk, 82 N.M. 466, 483 P.2d 940 (Ct.App.1971), cert. denied, 404 U.S. 955, 92 S.Ct. 309, 30 L.Ed.2d 271 (1971). If the State chooses to proceed by indictment, the defendant has no right to a preliminary hearing. N.M. Const. art. II, § 14. This is true despite the fact that proceedings against the defendant are initiated by a criminal complaint in magistrate court. State v. Ergenbright, 84 N.M. 662, 506 P.2d 1209 (1973).

The Court of Appeals, however, granted the defendants a preliminary hearing, presumably because the State had not

brought an indictment within the time limits set forth in N.M.R.Crim.P. 20.[1] This is clearly error. Rule 20 only applies to preliminary hearings, not to indictments.

Therefore, when the magistrate discharged the criminal complaint, any rights the defendants had to a preliminary hearing were extinguished. State v. Burk, supra. The slate was clean. A subsequent indictment would be valid and also timely if brought within the statute of limitations.

The Rules of Criminal Procedure for the Magistrate Courts effective October 1, 1974, were not in force when this case arose. N.M.R.Crim.P. for Magistrate Courts 15(d) provides in part:

> "* * *. Failure to comply with the time limits set forth in this paragraph shall not affect the validity of any indictment for the same criminal offense."

This rule codifies what we hold today.

The defendants petitioned for certiorari, asserting the violation of their rights under the Fourth and Fourteenth Amendments to the Constitution of the United States. Inasmuch as we had granted certiorari on the petition of the State, we granted defendants' petition as a matter of course. Upon further consideration, we are of the opinion that the writ of certiorari upon defendants' petition was improvidently issued, and it is hereby quashed.

The Court of Appeals is reversed. The district court order dismissing the indictment is reversed. The case is remanded to the District Court of the Second Judicial District with instructions to set aside its order of dismissal, reinstate the indictment and proceed in the manner prescribed by law. All time deadlines arising under the Rules of Criminal Procedure, including Rule 37,[2] are tolled for the period commencing with the filing of defendants' motions in district court and ending on the date of our mandate.

We scarcely need add that no preliminary hearing need be held.

It is so ordered.

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

537 P.2d 1389

Robert M. LAURA, Plaintiff-Appellee,

v.

Ray E. CHRISTIAN et al., Defendants-Appellants.

No. 9874.

Supreme Court of New Mexico.

July 16, 1975.

1. § 41-23-20(d), N.M.S.A., 1953 (Supp. 1973).

2. § 41-23-37, N.M.S.A., 1953 (Supp.1973).

Robertson & Robertson, G. Gordon Robertson, Raton, for defendants-appellants.

Robert S. Skinner, Raton, for plaintiff-appellee.

OPINION

OMAN, Justice.

This appeal is from a judgment quieting title in plaintiff-appellee (Laura) to a parcel of real property known as Fireside Lodge. We reverse as to appellant (Christian) and remand with directions.

There were several defendants, including Christian, named in the proceedings below, but only he has taken and perfected an appeal pursuant to Supreme Court Rules 5, 7, 10, 12, 14 and 15 [§§ 21-2-1(5), (7), (10), (12), (14) and (15), N.M.S.A. 1953 (Repl. Vol. 4, 1970)], which were applicable to this appeal but which have since been superseded. The other defendants are presumed to have been satisfied with the judgment of the district court. Chavez v. Myers, 11 N.M. 333, 68 P. 917 (1902). In any event, they have failed to perfect an appeal, and, therefore, are bound by the judgment.

Christian claims only a one-fourth interest as a tenant in common with Laura in the Fireside Lodge. Thus, this appeal and our decision relate only to this claim and to the admitted right of Laura as a cotenant to a lien upon Christian's interest to secure the payment by him of his proportionate share of all sums expended by Laura to protect and preserve their common property.

The property was subject to a mortgage lien at the times Laura and Christian acquired their respective interests. Thereafter, one payment on the principal and several payments of interest were made on the mortgage indebtedness which were contributed to by the cotenants. However, the subsequent payments as called for by the mortgage instruments were not paid, and the mortgagee instituted a foreclosure action on August 31, 1971. This suit proceeded to judgment in favor of the mortgagee, and a foreclosure sale was ordered for April 11, 1972. On April 10, 1972, Laura, in order to protect the property from sale, paid the mortgagee the sum of $17,288.40, which represented the amount of the judgment, interest and expenses owing to the mortgagee.

Although Christian and other claimants to an interest in the property had knowledge as early as July, 1971, that foreclosure was being threatened, they failed to

assume their respective obligations to pay their proportionate shares of the mortgage indebtedness as it became due, and failed to take any action to avoid the sale of the property. It was not until after it became apparent that the value of the property had been greatly enhanced by the execution on March 29, 1972 of what in effect amounted to an option to purchase adjoining lands and which was exercised by the optionee on July 19, 1972, that Christian demonstrated any real interest in the property and any willingness to pay any share of the indebtedness which was discharged by Laura on April 10, 1972.

However, the fact remains that Christian had and still has legal title to a one-fourth interest in the property, and on January 9, 1973, at the commencement of the trial in the cause now on appeal, agreed to the payment of his proportionate share of the expenditures made by Laura to protect the property and to the imposition by the district court of a lien upon his interest to secure payment thereof. The general rule as to reimbursement, or contribution, from a cotenant in a situation such as is here presented is as follows:

> "As a general proposition, a cotenant who pays more than his share of a debt secured by a mortgage or other lien on the common property, or of interest falling due on such debt, is entitled to reimbursement (contribution) from his cotenants to the extent to which he paid their shares of the indebtedness." Annot., 48 A.L.R.2d 1295, 1308 (1956).

See also Kaye v. Cooper Grocery Company, 63 N.M. 36, 43, 312 P.2d 798, 802 (1957); Gurule v. DeChacon, 61 N.M. 488, 303 P.2d 696 (1956); Chavez v. Chavez, 56 N.M. 393, 244 P.2d 781, 30 A.L.R.2d 1236 (1952); Smith v. Borradaile et al., 30 N.M. 62, 227 P. 602 (1924).

It is also a general rule that the redemption or prevention from loss by one cotenant of common property by payment of an obligation or the purchase of an outstanding interest, which should be discharged or purchased proportionately by cotenants, inures to the benefit of the cotenants at their option, subject to the right of contribution. However, the option must be exercised within a reasonable time, and what is reasonable depends upon the circumstances in each case. Draper v. Sewell, 263 Ala. 250, 82 So.2d 303 (1955); Mandeville v. Solomon, 39 Cal. 125 (1870); Harrison v. Cole, 50 Colo. 470, 116 P. 1123 (1909); Scanlon v. Parish, 85 Conn. 379, 82 A. 969 (1912); Wilson v. Linder, 21 Idaho 576, 123 P. 487 (1912); Hill v. Coburn, 105 Me. 437, 451, 75 A. 67, 73 (1909); Lee v. Lee, 236 Miss. 260, 109 So.2d 870 (1959); Ridenour v. Duncan, 291 S.W.2d 900, 906–07 (Mo.1956); Smith v. Borradaile et al., supra; Frandson v. Casey, 73 N.W.2d 436, 446–47 (N.D.1955); Andersen v. Griffith, 71 Wyo. 136, 254 P.2d 1001 (1953); Berkan v. Brown, 242 So.2d 207 (Fla.App.1970); Succession of Caldwell, 147 So.2d 448 (La.App.1962); Atlantic Refining Company v. Golson, 127 So.2d 341 (La.App.1961). We do not applaud the failure of Christian to promptly assume his obligation to pay his one-fourth of the amount paid by Laura in protecting their common property, or in waiting until after it became apparent that the payment thereof would be profitable to him before offering payment. However, under all the circumstances of this case, not all of which appear or can reasonably be detailed in this opinion, we conclude that his election to contribute was timely.

We are also mindful of the fact that the legal title to a one-fourth interest in the property was vested and still vests in Christian, and that we have previously held that a constructive trust cannot be imposed in a quiet title suit. Otero et al. v. Toti, 33 N.M. 613, 273 P. 917 (1928). See also Alston v. Clinton, 73 N.M. 341, 388 P.2d 64 (1963) and Clark v. Primus, 62 N. M. 259, 308 P.2d 584 (1957), in which the holding in Otero was cited with approval.

The judgment of the district court should be reversed with instructions to enter a new judgment quieting title to a three-fourths interest in the property in Laura, establishing a one-fourth interest therein in Christian, subject to a lien thereon in favor of Laura to secure repayment to him of all amounts expended for the benefit of Christian, together with interest thereon from the date or dates of such expenditures to date of repayment by Christian, and, insofar as proper, granting Laura such other relief as is necessary to protect his right to contribution for all such expenditures and interest owing to him by Christian.

It is so ordered.

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

537 P.2d 1392

In the Matter of the Last WILL and Testament of A. W. SKARDA, Deceased.

Cash T. SKARDA, Petitioner-Appellant,

v.

Lynell G. SKARDA, Executor-Appellee.

No. 9681.

Supreme Court of New Mexico.

June 18, 1975.

Rehearing Denied July 16, 1975.

Shipley, Durrett, Conway & Sandenaw, Alamogordo, for petitioner-appellant.

Grantham, Spann, Sanchez & Rager, Albuquerque, for executor-appellee.

OPINION

DONNELLY, District Judge.

This is an appeal from the final decree of the District Court of Curry County which approved the Final Account and Report of the executor of the estate of A. W. Skarda, deceased. The proceedings below originated in the probate court and were removed to the district court sitting in probate upon application of Cash T. Skarda, the appellant herein.

During the pendency of the probate proceedings in this case, the appellant filed a separate suit in the District Court of Curry County against Lynell G. Skarda, both individually and in his capacity as executor of the last will and testament of A. W. Skarda. That suit sought relief against other parties praying for an adjudication of certain issues which were in part raised in the probate proceedings in the instant case. From decisions adverse to the appellant in both lower courts, appeals were taken to this court. The appeal in the collateral district court suit has been the subject of a separate opinion of this court. See Skarda v. Skarda, 87 N.M. 497, 536 P.2d 257 (1975).

The decedent, A. W. Skarda, whose estate is the subject of this appeal, died on December 13, 1967, a resident of Curry County, New Mexico. Decedent left a last will and testament dated September 2, 1967, which provided for the disposition of his estate among his three surviving sons, Langdon L. Skarda, Lynell G. Skarda and Cash T. Skarda. The testator was unmarried at the time of his death, having been previously divorced.

Following decedent's death, his last will and testament was filed for probate, and the Probate Court of Curry County, on February 14, 1968, entered its order admitting the will to probate and appointing Lynell G. Skarda as executor. Thereafter, the executor filed an inventory of the assets of the estate, prepared estate tax returns and paid certain debts of the estate. The executor filed his Final Account and

Report in the estate on November 2, 1971. Soon after the Final Account and Report was filed, the appellant removed the cause to the district court, sought a stay of estate proceedings until the separate district court suit initiated by him was concluded and filed objections to the proposed Final Account and Report of the executor.

After a hearing following the filing of objections to the Final Account and Report, the district court sitting in probate denied a motion to strike the objections of the appellant, denied appellant's motion for a stay of proceedings and allowed the executor to file an Amended Final Account and Report.

Following the filing of an Amended Final Account and Report by the executor, appellant once more filed objections thereto and sought the removal of the executor. Appellant again pressed his contention that the district court case filed by him should be concluded prior to the estate proceedings in order to permit an adjudication of several issues involved in the probate of decedent's last will and testament.

Subsequent to the hearing on the Amended Final Account and Report of the executor, the court issued its decision approving such report and denying each of the appellant's objections thereto. From the final decree approving the Amended Final Account and Report of the executor, this appeal was taken.

Appellant has asserted nine separate grounds on appeal. The contentions upon which reversal is sought are that the lower court allegedly erred in the following respects: (1) in finding that the decedent's estate was fully administered, that taxes of the estate were paid, and that only specified property remained in the executor's hands for distribution; (2) in approving the executor's acts of paying unfiled claims which were barred; (3) in approving the executor's conduct of borrowing funds on behalf of the estate and finding that the estate was insolvent; (4) in permitting the executor to exercise an option to purchase stock devised in trust by the will of decedent; (5) in not admitting certain documentary exhibits into evidence; (6) in approving the sale of estate assets to the executor in exchange for the executor assuming certain estate obligations; (7) in closing the estate prior to the payment of all estate and succession taxes; (8) in approving the executor's disbursements of estate money for improvements to a building; and (9) in refusing to remove the executor from acting further for the estate.

Under the first point relied upon for reversal, appellant claims error on the part of the trial court in finding that the estate had been fully administered, all taxes paid, and nothing remained to be accomplished other than the distribution of certain property. The principal basis of the claim is appellant's assertion that a number of transfers consummated by decedent shortly before his death should have been inventoried and distributed as assets of the estate.

Appellant maintains that the various transfers carried out by decedent prior to his death constituted a basis giving rise to the imposition of resulting or constructive trusts in favor of the estate of decedent, and that such trusts should have been inventoried as assets of the estate.

The trial court rejected appellant's contention that resulting or constructive trusts were created and in Finding of Fact No. 17, found that the objections filed by appellant were without merit and should be disallowed. Further, the trial court found, in Findings Nos. 14 and 15, that the executor made certain disbursements of estate funds and paid certain debts and expenses of the estate and that such payments were reasonably necessary to preserve and protect the assets of the estate, and the creditors advancing such funds took the position of and were subrogated to the right of the executor to reimbursement.

In the face of the attack upon these findings by appellant, we must determine whether the evidence supports the findings. The duty of an appellate court,

where findings of ultimate facts are properly challenged, is to examine the evidence and ascertain whether it supports the findings. Martinez v. Trujillo, 81 N.M. 382, 467 P.2d 398 (1970); Trigg v. Riebold, 79 N.M. 399, 444 P.2d 584 (1968). The evidence must be viewed in its most favorable light to support the findings. Trujillo v. Romero, 82 N.M. 301, 481 P.2d 89 (1971). On appeal, every reasonable intendment and presumption is resolved against appellant and in favor of the validity of the proceedings in the trial court. Cochran v. Gordon, 77 N.M. 358, 423 P.2d 43 (1967). A judgment or decree of the trial court is to be upheld if it can be supported by correct legal principles, even though the trial court may have based its decision in whole or in part upon other principles. Morris v. Merchant, 77 N.M. 411, 423 P.2d 606 (1967).

Applying the above principles, we affirm the judgment of the trial court in upholding the actions of the executor and the trial court's findings that the Amended Final Account and Report of the executor should be approved and the estate closed.

Appellant's contentions asserting the existence of constructive or resulting trusts were first asserted at the time of the hearing upon the Amended Final Account and Report of the executor, and at a time when claims alleging the existence of such trusts were subject to bar by the statute of limitations. Section 23–1–4, N.M.S.A.1953, applicable to the claim of such trusts, provided a four year statute of limitations for all actions not otherwise specifically provided. Decedent died on December 13, 1967, and the executor qualified on February 14, 1968. The date of final approval of the Amended Final Account and Report was November 20, 1972. At that date, the estate had no way of compelling the imposition of the alleged trusts and the trial court correctly held that the property in question was not a part of the estate. Moreover, it is apparent that the trial court's findings could also be upheld upon the basis of presumptive gifts by decedent to his children and others by such transfers made prior to his death.

Points 2, 3 and 4 asserted by appellant relate to the manner in which the executor handled and discharged the debts of the decedent. The contention is made that, since no claims were filed by the creditors, these debts became barred by virtue of § 31–8–3, N.M.S.A. 1953.

It is the rule in New Mexico that all claims not filed with the estate and notice given of hearing thereon within the time prescribed after the first publication of the notice of appointment of the executor or administrator are barred as a matter of law. In re Estate of Welch, 80 N.M. 448, 457 P.2d 380 (1969). There are, however, certain well-recognized exceptions to this rule.

The requirement of filing, notice and hearing of claims against an estate does not apply to expenses of administration. In re Kenney's Estate, 41 N.M. 576, 72 P.2d 27 (1937). Nor does the non-claim statute require a secured creditor to file a claim in the estate when such creditor does not look for payment of his debt from the general assets of the estate, but only to the security for the debt itself. In re Estate of Tarlton, 84 N.M. 95, 500 P.2d 180 (1972); In re Kenney's Estate, supra; Shortle v. McCloskey, 38 N.M. 548, 37 P. 2d 800 (1934).

The trial court found, however, that the debts incurred by decedent prior to his death were paid as a cost of administration and not as claims against the estate. The evidence indicates that prior to decedent's death, he incurred a number of substantial debts, including a debt of decedent and others to the First National Bank of Albuquerque, $60,000; a debt to the First National Bank of Lubbock, Texas, $200,000; a debt to the First National Bank of Amarillo, Texas, $60,000; a debt to the Amarillo National Bank, $45,000; and $75,172.63 owed to Citizen's National

Bank of Clovis, New Mexico. Each of these debts was secured.

The $200,000 debt owing to the First National Bank of Lubbock was originally secured by stock owned by decedent in the Citizens Bank of Clovis. After the death of decedent, the stock was reissued in the name of the executor in his capacity as executor, the loan was renewed, and the stock was pledged to secure the renewed indebtedness.

When the notes representing these debts became due, both before and after the executor qualified, the executor assumed personal liability therefor. The trial court found that this was reasonably necessary for the administration and preservation of the estate. The note owing in the amount of $200,000 to the First National Bank at Lubbock was secured by a pledge of bank stock, which was a part of the estate. The payment of this note was also reasonably necessary to protect the collateral given to secure this indebtedness. The filing of a timely claim by the secured creditor was unnecessary and would have accomplished nothing.

Another debt which the executor assumed, and for which no claim was filed under the provisions of § 31–8–3, supra, was a debt of the decedent in the sum of $14,370.30, comprising one-half of the amount owing on the purchase of an interest in the Buzzard Building, located in Clovis, New Mexico.

The executor assumed all of these debts personally, and, during the process of administration of the estate, borrowed $450,000 from the Republic National Bank of Dallas, Texas, and paid them all off. On the latter indebtedness, the executor personally obligated himself and the trial court found that the executor's acts were reasonably necessary to preserve and administer the estate.

The general rule recognized in most jurisdictions is that an executor or administrator has no inherent authority to borrow money or encumber estate assets on behalf of an estate, and any funds borrowed by such personal representative, which are not authorized by either statute, will, or order of the court, do not bind the estate. Columbus Land, Loan & Bldg. Ass'n v. Wolken, 146 Neb. 684, 21 N.W.2d 418 (1946); Evans v. Tucker, 101 Fla. 688, 135 So. 305 (1931). This is the rule applicable in this state and is codified in § 31–5–4, N.M.S.A.1953.

Where an executor or administrator proposes to borrow funds on behalf of an estate, § 31–5–4, supra, requires district court approval. If an executor acts without first obtaining court approval to incur loans, the burden is cast upon the executor to clearly prove the propriety and prudence of each transaction, and, failing such proof, such action is taken at the peril of the personal representative. The district court sitting in probate, upon hearing the final account and report of the executor, may approve or disapprove such acts dependent upon the evidence and in view of the best interests of the decedent's estate.

It is recognized that an administrator of an estate who advances funds for the benefit of the estate is entitled to reimbursement. In re Jaramillo's Estate, 33 N.M. 626, 274 P. 47 (1929). A party who advances money to an administrator for the benefit of the estate is subrogated to the right of the administrator to be reimbursed from the estate. Perez v. Gil's Estate et al., 29 N.M. 313, 222 P. 907 (1924). See also Dixon v. Davis, 31 F. Supp. 912 (W.D.S.C.1940) and cases cited therein which support this rule.

It appears that the trial court carefully scrutinized the transactions to determine whether they came within this subrogation doctrine and then found:

"15. The acts of the Executor during the administration of the estate, and as set forth in the First Amended Final Account and Report, including his acts in

borrowing funds and in refinancing outstanding debts and obligations of the estate, which was insolvent, were reasonably necessary to pay debts and expenses of the estate and to preserve and protect the assets of the estate; that the money borrowed to pay debts and expenses was used for that purpose, and, accordingly, the creditors advancing the funds take the position of, and are subrogated to, the right of the Executor to reimbursement."

In the instant case, although the executor did not apply to the district court for prior authority to borrow money on behalf of the estate or as an incident of the administration of the estate, after the removal of the probate proceedings to the district court sitting in probate, the court did approve the actions of the executor after the fact by adopting general findings and approving the Amended Final Account and Report of the executor. We think the trial court properly adopted these findings and the record amply supports the basis for the court's findings that the actions of the executor were necessary to preserve and protect the assets of the estate.

Appellant's fourth and sixth points raised on this appeal are considered jointly. Asserted as error by the appellant are the claims that the court permitted the executor to exercise an option to purchase stock devised in trust by the will of decedent and that the court approved the sale of estate assets to the executor in exchange for the executor assuming certain estate obligations. Appellant further contends the asserted violations by the executor were contrary to the provisions of § 33–3–5, N.M.S.A.1953.

Section 33–3–5, supra, specifies as follows:

"No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer, or employee of such trustee or of an affiliate; or from or to a relative, employer, partner, or other business associate."

The issues relied upon by appellant under Points 4 and 6 were not raised or litigated before the lower court. Appellant contends the applicability of § 33–3–5, supra, was raised by his requested conclusions of law. However, this contention does not appear to be supported by the record. It is not error to refuse requested conclusions relating to issues which were not tried. Moya v. Chilili Cooperative Association, Inc., 87 N.M. 99, 529 P.2d 1220 (1974). Issues not properly raised in the trial court and on which a ruling by the trial court was not properly invoked will not be considered on appeal. Groendyke Transp., Inc. v. New Mexico St. Corp. Comm'n, 85 N.M. 718, 516 P.2d 689 (1973); Landers v. Board of Education of Town of Hot Springs, 45 N.M. 446, 116 P.2d 690 (1941).

Point 5 concerns itself with claimed error on the part of the trial court in excluding one of petitioner's tendered exhibits. At the hearing upon the Amended Final Account and Report of the executor, appellant moved for the introduction into evidence of a December 29, 1967 financial statement of Langdon L. Skarda, one of decedent's sons. The lower court refused this tender.

Appellant claimed this exhibit was relevant to the question of the value of bank stock of the decedent in the Citizens Bank of Clovis. The value of property in an estate is fixed, however, by the appraisal. Section 31–3–5.5, N.M.S.A.1953 (Supp. 1973), provides in applicable part:

"The appraisal of the estate is final unless the bureau of revenue on behalf of the state or some other person interested in the estate appeals to the court in which the estate is pending. An appeal may be taken within thirty [30] days of the filing of the appraisal. * * *"

The appraisal was filed in the estate January 30, 1969 and no appeal was taken therefrom. The appraisal is final unless appeal is taken therefrom within thirty (30) days. Section 31–3–5.5, supra. Thus, we find the action of the trial court in refusing the tender of appellant was not error.

Point 7 relates to the claim that the trial court erred in closing the estate before the taxes had been paid. Petitioner claims more taxes will be due because of certain transfers made by the decedent. The district court sitting in probate had the power to determine if these transfers were taxable and it decided they were not. The trial court acted under the authority of § 31–16–18, N.M.S.A.1953, since repealed.

The lower court adopted a finding of fact which stated:

> "8. The succession tax to the State of New Mexico, and the federal estate tax have been satisfied, all as appear from Certificate of No Tax Due and Internal Revenue Estate Tax Closing Letter on file herein, and the estate is ready to be closed and the Executor discharged."

Section 31–16–18, supra, provided that the probate court had jurisdiction to hear and determine all questions in relation to taxes that may have arisen incident to the estate. We think the trial court properly adopted its Finding No. 8 and that the record substantiates the finding.

Finally, appellant contends in Point 9, that the executor has performed his duties and dealt with the estate contrary to statute and general law applicable to fiduciaries and should have been removed by the lower court.

Appellant failed to initiate removal proceedings against the executor of decedent's estate pursuant to § 31–1–26, N.M.S.A.1953, but, nevertheless, contends the trial court was obliged as a matter of law to have taken steps to remove the executor prusuant to § 31–1–28, N.M.S.A. 1953. The latter statute clearly invests in the district court the discretion in proper cases to remove an executor who has failed or refused to properly administer the estate or protect the assets of the estate. Here, however, no abuse of the court's discretion has been substantiated and no showing has been made of prejudice to the estate, or loss or damage to appellant. Appellant failed to comply with the provisions of § 31–1–26, supra, in seeking the removal of the executor and the trial court correctly refused such request to remove the executor at a hearing upon the Amended Final Account and Report.

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

It is so ordered.

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

537 P.2d 1399

STATE of New Mexico, Petitioner,

v.

John DOE, a child, Respondent.

No. 10483.

Supreme Court of New Mexico.

June 25, 1975.

Toney Anaya, Atty. Gen., Andrea Buzzard, Asst. Atty. Gen., Santa Fe, for petitioner.

Albert J. Rivera, Alamogordo, for respondent.

OPINION

MONTOYA, Justice.

On February 27, 1975, an amended petition was filed in the Children's Court Division of the District Court of Lincoln County, allegedly pursuant to the Children's Code, §§ 13–14–1 to 45, N.M.S.A., 1953 (Repl.Vol. 3, 1973 Supp.). The petition alleged that John Doe, age sixteen, was a "delinquent child, and in need of care or rehabilitation" in that he had violated the Village of Carrizozo curfew ordinance § 6–9–1 (actually § 6–8–1) and possessed alcoholic beverages contrary to § 45–10–12 (actually §§ 46–10–12 and 46–10–19, N.M.S.A., 1953 (Repl.Vol. 7, 1973 Supp.)).

At the lower court hearing the child and his parents appeared pro se, and the child admitted that he had committed the two violations. Based on these admissions, the court entered a judgment and order stating that "the Child is a Delinquent Child and in need of care and rehabilitation." In addition, the child was ordered committed to the New Mexico Department of Corrections "for no more than sixty (60) days for comprehensive social and psychological evaluation."

On March 20, 1975, the child filed a notice of appeal. The Court of Appeals ruled that the petition filed in Children's Court was jurisdictionally defective on the grounds that neither charge constituted a

"delinquent act" as the term is defined in § 13–14–3(N), supra. The cause was reversed and remanded with instructions to dismiss the petition with prejudice. A petition for writ of certiorari was then filed by the State on May 20, 1975, and granted by this court on May 26, 1975.

The sole issue which this court must decide is whether the Children's Court had jurisdiction over this cause; more specifically, whether count II, possession of alcoholic beverages, can be characterized as a "delinquent act." Petitioner has previously conceded that count I, the curfew violation, does not constitute a delinquent act.

The Court of Appeals stated in its opinion that:

> "Further, the fact that the child did possess alcoholic beverages does not constitute a delinquent act as defined in § 13–14–3(N), supra. The possession of alcoholic beverages would not be a crime under the law if committed by an adult."

This statement is incorrect, as an examination of the relevant statutes reveals.

Generally, the Children's Court has exclusive original jurisdiction of all proceedings under the Children's Code, supra, in which a child is alleged to be (1) a delinquent child; (2) a child in need of supervision; or (3) a neglected child. See § 13–14–9, supra. In this particular case, the child was charged with being a "delinquent child" which is defined in § 13–14–3(*O*), supra, as:

> "* * * a child who has committed a delinquent act and is in need of care or rehabilitation[.]"

In turn, a "delinquent act" is defined in § 13–14–3(N), supra, as:

> "* * * an act committed by a child, which would be designated as a crime under the law if committed by an adult, * * *."

And, according to § 13–14–3(B):

> "'adult' means an individual who is eighteen [18] years of age or older[.]"

Referring to § 46–10–12, supra, the statutory section which concerns possession of alcoholic beverages, subsection "(B)" states:

> "It is a violation of the Liquor Control Act for any minor to buy, receive, possess or permit himself to be served with any alcoholic liquor except when accompanied by his parent, * * *."

Subsections "(E) and (F)" of the same statute read as follows:

> "E. As used in the Liquor Control Act 'minor' means any person under twenty-one [21] years of age.
>
> "F. Violation of this section by a minor with respect to possession is a petty misdemeanor."

When all of these statutory sections are considered together, it appears that an adult, as defined by § 13–14–3(B), supra, between the ages of eighteen and twenty-one, even though a minor, as defined by § 46–10–12(E), supra, may under certain circumstances be guilty of a crime under § 46–10–12(B), supra, when in possession of alcoholic beverages. It certainly cannot apply to any minor under the age of eighteen since, under the Children's Code, the Children's Court has exclusive jurisdiction and any illegal act committed by a child under the age of eighteen is not considered a crime, unless there is a specific exception made in the Code itself. See § 13–14–45, supra. In addition, § 13–14–30, supra, provides in pertinent part as follows:

> "* * *. A judgment in proceedings on a petition under the Children's Code [13–14–1 to 13–14–45] shall not be deemed a conviction of crime nor shall it impose any civil disabilities ordinarily resulting from conviction of a crime, nor shall it operate to disqualify the child in any civil service application or appointment. * * *"

Thus, it logically follows that the act of possession of alcoholic beverages with which the child was charged may be characterized as a "delinquent act," and the allegation of "delinquent child" was proper.

No other conclusion can be reached if the statutes with which we are concerned, and referred to above, are to be harmonized and given a reasonable interpretation. We are unable to discern how the Court of Appeals could hold otherwise.

Also in relation to count II, the Court of Appeals ruled that the mistaken reference to § 45–10–12, supra, constituted a jurisdictional defect. Since that statute concerned the conduct of elections for the creation of a weed control district and § 46–10–19, supra, was only a penalty section, the Court of Appeals felt that violation of neither of these statutes would constitute a "delinquent act" as defined by § 13–14–3(N), supra. We are unable to agree with this treatment of the problem.

In our opinion, the Court of Appeals was overly concerned with technicalities, exalting form over substance. First of all, it would appear that citation of § 45–10–12, supra, was a mere typographical error. By no stretch of the imagination did this child's conduct involve violation of election laws for the creation of weed control districts. And no one has seriously contended that it did. Secondly, count II did state that the specific charge was possession of alcoholic beverages, and the correct penalty provision was cited. Also, during the Children's Court hearing, the judge asked the child:

> "Next, they tell me that on the same date and place you did possess alcoholic beverages contrary to law. Do you admit or deny it?"

The child admitted this charge.

The record reveals that the child and his parents had adequate notice and knowledge of the charge, and there has been no showing of prejudice. We are aware, of course, of § 13–14–17, supra, which states that the petition must present charges with "specificity" and cite the appropriate law when violation of a statute is charged. However, we do not believe that the facts of this case amount to a violation of that statute or amount to jurisdictional defect. Certainly, the Children's Court had jurisdiction over the child, and as far as the second charge is concerned, we conclude that the court was acting within the bounds of its subject matter jurisdiction. See Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 531 P.2d 939 (1975).

In view of the foregoing, the cause is remanded to the Court of Appeals for further proceedings in accordance with the views expressed by this court.

It is so ordered.

McMANUS, C. J., and OMAN and STEPHENSON, JJ., concur.

537 P.2d 1402

KIMBERLY, INC., a Texas Corporation, Plaintiff-Appellant,

v.

S. Leslie HAYS and Helen Louise Hays, his wife, Defendants-Appellees.

No. 10133.

Supreme Court of New Mexico.

July 2, 1975.

Martin, Martin & Lutz, Las Cruces, for plaintiff-appellant.

Darden, Sage & Darden, Las Cruces, for defendants-appellees.

OPINION

FRANK B. ZINN, District Judge.

The decision under review is a judgment reforming portions of a real estate purchase contract and notes and mortgages relating to it. Under review as well is a declaratory judgment determining payments made and balances due on the notes as reformed.

Kimberly, Inc., the plaintiff, is a closely held Texas corporation of James White, an El Paso, Texas, real estate developer. As the parties dealt with him, White was not distinguishable from the corporation.

The defendants Hays, on July 26, 1968, purchased a tract of farm land from persons named Payne. The tract was approximately 170 acres located in Dona Ana County. The Paynes sold the land to Hays subject to an option contract to Kimberly, a first mortgage to Equitable Life Insurance securing a debt of $110,000, and a second mortgage to the same James White securing a note for $16,595.

The Paynes and Kimberly had executed their contract on July 10, 1967. The "Contract of Sale and Option," as it was titled, granted Kimberly a series of options to purchase the entire 170-acre tract in fixed increments which the parties described as parcels and which were composed of numbered "plots" of varying sizes that had been portrayed on a map, made a part of the contract.

Contract terms bearing on the disputed matters are quoted.

"When ½ of the purchase price of any portion of any parcel of land has been paid and the Purchaser is in nowise in default of the Conditions herein set forth, Seller shall execute and deliver to Purchaser a General Warranty Deed conveying that number of acres requested, retaining a Mortgage and Deed of Trust to secure the payment of the balance due on such acres, all in accordance with the terms of this contract * * *.

"In the event Purchaser shall request a Warranty Deed on the 40 acres or any proportionate acreage thereof, Seller shall not be obligated to execute and deliver such Warranty Deed to such Parcel of land unless and until Purchaser shall have paid to Seller for each acre requested, ½ the purchase price of each such acre, and shall further not be obligated to deliver same until said Society shall release its lien on such acres so requested. Purchaser being the holder of the second lien, agrees to release such portion requested upon pre-payment made on his note of a sum per acre proportionate to the total amount of his note.

"To compute when ½ of a portion of a parcel has been paid to Seller, the down payment of $7,000 and any annual installment paid, shall be apportioned among the total acreage of the parcel so being paid for."

Kimberly made payment and took credits of varying amounts until it totaled what was believed to be the necessary sum to be entitled to a deed to the first parcel. A demand for that deed was made of Hays by letter dated January 6, 1971. There had been some disagreement as to just what payments and credits had been made and what remained due. There ensued a lengthy period of negotiation including efforts to restate the details of the parties' respective positions as to all the parcels and plots. This exchange of letters by the parties' attorneys and testimony of their discussions were received in evidence for the court to review contentions of either accord and satisfaction or waiver having resolved some of the areas of dispute. Suit was filed by Kimberly in December of

1971, seeking specific performance by Hays of a conveyance of the parcel covered by the first option as well as for damages arising out of the delay. Counterclaims by Hays for reformation and for declaratory judgment, however, became the principal issues.

Surveys were conducted to obtain satisfactory metes and bounds descriptions of the several plots. The surveys revealed some variances with the acreage figures stated in the contract. The court, finding that the original contract was in error by mutual mistake, reformed it to match the survey acreage. The court also found the parties had intended a per acre price as to all but one of the plots, rather than a gross price per plot, and reformed the purchase price.

During the course of the litigation, the plaintiff Kimberly undertook to exercise the remaining options and demanded conveyance of the several plots, making various payments and tendering the notes and mortgages to secure the unpaid balances. Also during the litigation, a conveyance by Kimberly of one of the parcels covering plots 4 and 9 to third parties occurred.

Before the suit began and for some time thereafter, both Hays and White cooperated in an attempt to obtain the partial releases from Equitable of their mortgage to allow the options to be exercised. Meeting Equitable's requirements to obtain the releases proved difficult and expensive. Which party should bear that expense became an issue in the case, and the court's decision on that point was appealed by both parties, neither being satisfied. Hays did not recover what had been spent and Kimberly was decreed liable for any further such costs. The parties agree and a review of the contract confirms there is no written provision about who would obtain or who would pay for securing the partial releases from Equitable.

Appellant Kimberly's first point on appeal challenged the reformation by the court of the terms relating to plots 4 and 9 increasing the price. After the survey had been made and the error discovered, a warranty deed, note and mortgage were prepared by Kimberly with the survey acreage and description. The amount of the note and mortgage reflected the price set out in the contract. Kimberly contends that the Hays executed the warranty deed and accepted the note and mortgage and cannot now obtain information. This was pled as both an accord and satisfaction and an acceptance and waiver. The trial court ordered Kimberly to pay Hays an added sum to meet the increased purchase price, to increase the promissory note on the balance due and to redo the mortgage to secure the amended note.

Kimberly's defenses of an accord and satisfaction or acceptance and waiver were rejected by the trial court. It did not make the finding requested by Kimberly that Hays had accepted the note and mortgage knowing of the inclusion in the documents of the increased acreage figure. Likewise, the court did not find that at the time the one-half payment and the documents were exchanged the amount claimed due as payment was an issue in dispute between Hays and Kimberly. These affirmative defenses on which Kimberly had the burden of proof must be considered as rejected by the court for lack of adoption of the findings sought by Kimberly. Begay v. First National Bank of Farmington, 84 N. M. 83, 499 P.2d 1005 (1972); Hopkins v. Martinez, 73 N.M. 275, 387 P.2d 852. The facts as found including those negatived by rejection bind this court on review. Alfred v. Anderson, 86 N.M. 227, 522 P.2d 79 (1974); Springer Corporation v. Kirkeby-Natus, 80 N.M. 206, 453 P.2d 376 (1969).

The lack of knowledge on Hays' part with the presence of knowledge and nondisclosure to Hays on Kimberly's part of the acreage difference seems adequately to support the order for reformation of the note and mortgage. An instrument may be reformed if (1) there has been mutual mis-

take, or (2) a mistake by one party accompanied by fraud or other inequitable conduct by the other party. Wright v. Brem, 81 N.M. 410, 467 P.2d 736 (1970) and Morris v. Merchant, 77 N.M. 411, 423 P.2d 606 (1967).

The note, mortgage and deed relating to plots 4 and 9 were prepared at Kimberly's instance and from figures supplied by James White. Hays merely accepted them as presented. Knowing incorporation by Kimberly without disclosure of the varied acreage figures would be inequitable conduct. It is not essential that the inequitable conduct be some serious wrongdoing.

In Restatement of Contracts, § 505 (1932) the rule is expressed:

> "* * * if one party at the time of the execution of a written instrument knows not only that the writing does not accurately express the intention of the other party as to the terms to be embodied therein, but knows what that intention is, the latter can have the writing reformed so that it will express that intention."

The trial court apparently based its ruling on this principle.

Kimberly, however conveyed a parcel of the land to a third party. The interests of a third party purchaser for value necessarily affect the trial court's order to redraft the note and mortgage to secure the higher balance.

> "* * * the reformation of a description in a deed or mortgage will not be allowed as against a subsequent bona fide purchaser or encumbrancer of the land." 66 Am.Jur.2d Reformation of Instruments § 65 (1973).

Both parties on appeal agree that this portion of the judgment needs to be set aside. A remand to correct this problem is necessary. The mortgage and note assumed by the third party cannot now be revised, but payment of the corrected purchase price can be adjudged.

Appellant's second point on appeal urges that an accord and satisfaction of the parties' differences had been concluded and culminated by agreement reached after the series of lawyers' letters and meetings that took place in 1971 after the first option was sought to be exercised and before the suit was commenced at the end of the year to force the conveyance of the first parcel. The court found to the contrary and we find no basis to reject that finding.

Appellant urges similarly the acceptance by Hays of the note and mortgage on the option parcels, plots 2 and 5, 3 and 6, and 7 and 8, with the contract price, and the revised survey acreage closed the door on reformation of those instruments just as it did for plots 4 and 9. Here again, the court's rejection of findings sought by Kimberly on the point of a knowing acceptance by Hays of the varied acreage precludes us from making any other finding in the absence of undisputed facts to require such a contrary result.

Appellant's third point dealt with the trial court's interpretation of the parties' contract as to who would pay the cost of obtaining the partial releases of the Equitable mortgage. Appellant asked for a finding that the contract was ambiguous. The court rejected the finding by not making one.

While appellee Hays filed a notice of cross-appeal, its brief deals only with seeking to uphold the trial court's decision and oppose appellant's contentions. This leaves this court with nothing to review and leaves intact the court's judgment decreeing Hays liable for the sums he had expended in obtaining the Equitable releases.

The court's adjudication of Kimberly's prospective liability for all future costs of securing the Equitable releases is challenged by appellant on the ground that absent ambiguity and a specific finding that such existed the court could not turn to extrinsic evidence to interpret the parties' intent on the uncertain issue. Kimberly asks

that the trial court be required to review its findings of lack of ambiguity and its certainty of Kimberly's obligation to obtain the releases, and to determine that Hays was obliged to obtain the releases, and that Hays having failed in this duty, the court should also review Kimberly's request for damages arising from that breach of contract.

The problem is that the language of the contract does not lend itself to interpretation in either parties' favor on the issue. There are some things the court cannot do and one is to do for the parties what they failed to do for themselves. In interpreting agreements, as was stated by this court in Davies v. Boyd, 73 N.M. 85, 88, 385 P.2d 950, 951 (1963):

> "The court's duty is confined to interpretation of the contract which the parties made for themselves, and [the court] may not alter or make a new agreement for the parties."

James White for Kimberly and Payne, who preceded Hays under the contract, just did not have an agreement on the point and the court cannot write one for them. Accordingly, as to the adjudication of appellant Kimberly's liability for future costs of obtaining releases, this must be reversed.

The cause is reversed in part and affirmed in part as indicated in this opinion and remanded to the trial court for appropriate revision of its judgment.

It is so ordered.

McMANUS, C. J., and STEPHENSON, J., concur.

538 P.2d 418

G. W. BURRIS and Elizabeth M. Burris, his wife, Plaintiffs-Appellants,

v.

STATE of New Mexico ex rel. STATE HIGHWAY COMMISSION, and Alex J. Armijo, as Commissioner of Public Lands of the State of New Mexico, Defendants-Appellees.

No. 10012.

Supreme Court of New Mexico.

July 16, 1975.

Harry O. Morris, Albuquerque, Mayo T. Boucher, Belen, for plaintiffs-appellants.

Toney Anaya, Atty. Gen., James V. Noble, SHD Asst. Atty. Gen., William O. Jordan, Sp. Asst. Atty. Gen., Santa Fe, for defendants-appellees.

OPINION

McMANUS, Chief Justice.

This suit was brought in the District Court of Dona Ana County, New Mexico, to recover (1) damages under inverse condemnation, (2) expenses and costs under the "Highway Litigation Expense Act," and (3) accounting by the Commissioner of Public Lands (hereinafter called Commissioner), for sand and gravel extracted.

The case was tried before the court. At the close of the plaintiffs' case, judgment was entered denying relief. Plaintiffs appeal.

Two points raised by appellants Burris, et al., (hereinafter referred to as Burris), are as follows:

I. The court erred in concluding that sand and gravel are minerals.

II. The court erred in finding that any of the parties intended to reserve sand and gravel.

The land involved is in Dona Ana County, New Mexico. The acreage of Burris was acquired in two ways: (1) a contract with the State in 1931, culminating in a patent in 1965; and (2) a contract with the State covering the rest of Burris' land in 1964. The contract is still in full force and effect. It is from these lands that the 87 acres, the subject of this lawsuit, are to be found. In each instance, the contracts for the land herein involved were entered into on a form prescribed by the Commissioner containing the following:

"* * * it is expressly understood and agreed that this contract is based

upon the express condition that the minerals therein shall be and are reserved to the fund or institution to which the land belongs, together with right of way to the Commissioner, or anyone acting under his authority, at any and all times to enter upon said land and mine and remove the minerals therefrom without let or hindrance. * * *"

In fact, the 1931 contract also stated, "that this land is being purchased for the purpose of grazing and agriculture only."

The patent issued to plaintiffs in 1965 reserved,

"* * * to the state of New Mexico all minerals of whatsoever kind, including oil and gas, in the lands so granted, and to it, or persons authorized by it, the right to prospect for, mine, produce and remove the same, and perform any and all acts necessary in connection therewith, * * *."

The contracts and other documents relating to the lands which are the subject of this suit contain the same or similar reservations to the State. In fact, in the application for the tract in 1964, the "Application to Purchase" contained the following statement by Mr. Burris:

"I further state that the land applied for herein is essentially non-mineral land, and that this application is not made for the purpose of obtaining title to mineral, including but not limited to caliche, *sand and gravel,* coal, oil or gas lands fraudulently but with the sole object of obtaining title to the surface of the land applied for." (Emphasis supplied.)

Burris knew specifically of the intent of the Commissioner by a notice of issuance of a mining lease to others on several occasions. The signing by Burris of many documents containing reservations as to minerals, which we consider to include sand and gravel, further indicates the intent. Postponing a decision on that subject for now, the parties have in effect contracted between themselves that such reservations were meant to include sand and gravel. A further point which supports the fact that sand and gravel was reserved and excepted from the land sales was the failure by the State to appraise and sell the sand and gravel to Burris in the original transactions.

Much is said in the briefs on the subject of whether sand and gravel are considered to be minerals in New Mexico. Such arguments tend to oversimplify the issue. That question is to be resolved according to the applicable statutes and the facts of each case. More precisely stated, apart from any governing statute, the issue is whether the parties intended that sand and gravel are, or are not, to be so classified. This is normally resolved by the pertinent documents and the actions of the parties thereunder.

For example, in *State ex rel. State Highway Commission v. Trujillo,* 82 N.M. 694, 487 P.2d 122 (1971), heavily relied upon by Burris, the only writing of this sort before us, in addition to the statute, was the patent, which simply reserved to the United States "all the coal and other minerals in the lands * * *." For the reasons stated in that opinion, we concluded that sand and gravel were not minerals in that factual context.

In contrast with *State ex rel. State Highway Commission v. Trujillo, supra,* a great deal more documentation, casting light on the intention of the parties, is before us here. Not only the patent, but also the "Application to Purchase" and the contracts, lead us to conclude that this case is readily distinguishable from Trujillo.

Under the terms of the documents involved in the present case the State contracted with Burris for the sale of the land in question expressly reserving all minerals in very clear, unambiguous and all-inclusive language, without qualification, restriction or limitations of any kind. We

hold therefore that the parties intended to reserve sand and gravel, and the judgment of the trial court will be affirmed.

It is so ordered.

STEPHENSON and MONTOYA, JJ., concur.

538 P.2d 420

AMERICAN AUTOMOBILE ASSOCIATION, INC., Appellant,

v.

BUREAU OF REVENUE of the State of New Mexico, Appellee.

No. 1293.

Court of Appeals of New Mexico.

April 23, 1975.

Rehearing Denied June 10, 1975.

Dean S. Zinn, Zinn & Donnell, Santa Fe, Tibo J. Chavez, Chavez & Cowper, Belen, for appellant.

Toney Anaya, Atty. Gen., Joseph T. Sprague, Vernon O. Henning, Bureau of Revenue, Asst. Attys. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

The issue is whether taxpayer is entitled to the tax exemption appearing in § 72-16A-12.27, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1973). We held taxpayer was not a "nonprofit" organization in American Automobile Ass'n, Inc. v. Bureau of Rev., 86 N.M. 569, 525 P.2d 929 (Ct.App.1974). The New Mexico Supreme

Court reversed and remanded "for a determination of . . . whether . . . [taxpayer] is a 'business organization,' and whether . . . the receipts involved are from 'dues and registration fees.'" 87 N.M. 330, 533 P.2d 103, Supreme Court, decided March 21, 1975. The "business organization" issue is dispositive. Taxpayer is not a business organization within the meaning of the statute.

Section 72–16A–12.27, supra, states:

"*Exemption—Gross receipts tax—Fees from social organizations.*—Exempted from the gross receipts tax are the receipts from dues and registration fees of nonprofit social, fraternal, political, trade, business, labor or professional organizations."

"Business organization" is not defined in the Gross Receipts and Compensating Tax Act. See § 72–16A–3, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1973). The term could mean, as the taxpayer urges, any legal or commercial entity engaged in business. See § 50A–1–201(28), N.M.S.A.1953 (Repl.Vol. 8, pt. 1). The term could mean, as the Bureau contends, an organization of business entities or persons engaged in business. Compare Chattanooga Auto. Club v. Commissioner of Int. Rev., 182 F. 2d 551 (6th Cir. 1950); American Automobile Ass'n v. Commissioner of Internal Revenue, 19 T.C. 1146 (1953). Judicial construction is called for because the meaning of the term is ambiguous. Till v. Jones, 83 N.M. 743, 497 P.2d 745 (Ct.App. 1972).

Judicial construction is for the purpose of determining legislative intent. State v. McHorse, 85 N.M. 753, 517 P.2d 75 (Ct. App.1973). Legislative intent is to be determined primarily from the language used in the statute. Dona Ana Develop. Corp. v. Commissioner of Revenue, 84 N.M. 641, 506 P.2d 798 (Ct.App.1973).

One approach to legislative intent involves the heading to the statute. The heading, capitalized in the quotation, was enacted by the Legislature. Laws 1969, ch. 144, § 32. That heading contributes nothing toward an effective legislative enactment. Besser Company v. Bureau of Revenue, 74 N.M. 377, 394 P.2d 141 (1964). What use is there for a legislatively enacted section heading? "The section heading performs the same function for the section as the title does for an act." 1A Sutherland, Statutory Construction § 21.04 (4th ed. 1972). Courts may look to the title of an act in determining legislative intent. State v. Richardson, 48 N.M. 544, 154 P.2d 224 (1944). Accordingly, we may look to the legislatively enacted section heading in determining legislative intent.

The legislatively enacted heading to § 72–16A–12.27, supra, refers only to exemptions of "fees from social organizations." The heading is more limited than the statute. The heading indicates a legislative intent that the exemption is of limited application.

A second approach to legislative intent is the presumption that having enumerated a list of things, the Legislature must have had no other kind in mind. See Grafe v. Delgado, Sheriff, 30 N.M. 150, 228 P. 601 (1924); Cardinal Fence Co., Inc. v. Commissioner, Bur. of Rev., 84 N. M. 314, 502 P.2d 1004 (Ct.App.1972). Section 72–16A–12.27, supra, lists social, fraternal, political, trade, business, labor and professional organizations. "Business organization" is to be given a meaning that is analogous to the meaning of other organizations listed. Compare State v. Morley, 63 N.M. 267, 317 P.2d 317 (1957).

Both approaches exclude the definition of "business organization" urged by the taxpayer. To hold that "business organization" means any legal or commercial entity engaged in business would give the statute an expansive reading contrary to the legislative intent shown by the limited section heading. To hold that "business organization" has the meaning urged by the taxpayer would give that phrase a meaning not analogous to the other organizations listed in the statute. A trade or-

ganization consists only of persons engaged in that trade. A professional organization consists only of persons engaged in the particular profession. Similarly, a business organization consists only of business entities or persons engaged in business. Compare American Automobile Ass'n v. Commissioner of Internal Revenue, supra.

We hold the Bureau's definition of business organization is the definition intended by the Legislature. The taxpayer's membership is not limited to business entities or persons engaged in business. It is not a business organization as that term is used in § 72–16A–12.27, supra.

The Commissioner's decision and order are affirmed.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

538 P.2d 422

STATE of New Mexico, Plaintiff-Appellant,

v.

Gilbert A. ALDERETE, Defendant-Appellee.

No. 1793.

Court of Appeals of New Mexico.

July 2, 1975.

James L. Brandenburg, Dist. Atty., Joseph P. Paone, Asst. Dist. Atty., Albuquerque, for plaintiff-appellant.

Louis G. Stewart, Jr., Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

A supplemental information charged defendant with three prior convictions for unlawful possession of heroin. The State sought enhancement of the sentence for the third conviction under the habitual offender statute. Section 40A:29–5, N.M.S.A. 1953 (2d Repl.Vol. 6). The trial court dismissed the supplemental information. It held:

> ". . . the Legislature, in enacting the Controlled Substances Act and more specifically Section 54–11–23(B)(5), N.M.S.A. 1974 Supp., did not intend to make the Habitual Offender statute, Section 40A–29–5, N.M.S.A. 1953 Supp. as amended, applicable to subjects convicted more than once under referenced Section of the Controlled Substances Act."

The State appeals. The issue is the propriety of the trial court's ruling on legislative intent.

Section 54–11–23(B)(5), supra, states the penalty for unlawful possession of heroin. Neither the original enactment, Laws 1972, ch. 84, § 23, nor the amendment, Laws 1974, ch. 9, § 4, provided for enhanced penalties for subsequent possession offenses. Because of the absence of an enhancement provision in the statute making possession unlawful, the State sought enhancement under the habitual offender statute.

In State v. Lujan, 76 N.M. 111, 412 P.2d 405 (1966) the defendant was convicted under the Narcotic Drug Act which was then applicable. That act had specific enhancement provisions for prior narcotic drug offenses. Enhancement of the sentence was sought on the basis of a prior non-narcotic drug offense. Enhancement was sought under the general habitual offender statute. *Lujan,* supra, held that the specific enhancement provisions of the narcotic drug law applied over the general enhancement provisions of the habitual offender law. Under the applicable specific law a non-narcotic drug offense was not a basis for an enhanced sentence.

State v. Lujan, *supra,* is not applicable to this case because: (1) no prior non-narcotic drug offense is involved, and (2) there are no specific enhancement provisions for repeated possession of heroin.

In State v. Lard, 86 N.M. 71, 519 P.2d 307 (Ct.App.1974) defendant's sentence for larceny was enhanced under the habitual offender law. The prior convictions utilized in connection with the enhancement were two LSD offenses. The then applicable LSD statute had enhanced the penalty for defendant's second LSD offense. Lard contended that because his second LSD conviction had an enhanced sentence, this second conviction could not be utilized to enhance his larceny offense. We held the general provisions of the habitual offender law were applicable because there was no conflict between the penalty provisions involved, and there was no legislative intent to prohibit use of the second LSD conviction in enhancing the larceny sentence under the habitual offender law.

Here, as in State v. Lard, supra, there is no conflict between the specific penalty for unlawful possession of heroin and the enhancement provisions of the habitual offender law. The question is whether the Legislature intended the enhancement provisions of the habitual offender law to apply to subsequent convictions for unlawful possession of heroin.

■ Legislative intent is determined primarily by the language of the act. Each provision of the act is to be considered in relation to every other part; the legislative intent is to be determined from a consideration of the whole act. Winston v. New Mexico State Police Board, 80 N.M. 310, 454 P.2d 967 (1969).

Section 54–11–23(B)(5), supra, is a part of the Controlled Substances Act. The act provides for enhanced penalties for a second or subsequent violation of specific crimes. See the enhanced penalties for second or subsequent convictions for trafficking, distribution to a minor, intentional distribution or possession with intent to distribute. Sections 54–11–20, 54–11–21 and 54–11–22, N.M.S.A. 1953 (2d Repl. Vol. 8, pt. 2, Supp.1973). For straight possessory offenses, an enhanced penalty is provided for a second or subsequent possession of one ounce or less of marijuana. No enhanced penalty is provided for a repetition of other possessory offenses. Compare subparagraph (1) with the other subparagraphs of § 54–11–23(B), N.M.S.A. 1953 (2d Repl.Vol. 8, pt. 2, Supp. 1973).

■ From the foregoing, we conclude that where the Legislature intended an enhanced penalty to apply to a violation of the Controlled Substances Act it so provided within the act.

■ The parties agree that under prior law, enhanced penalties applied to second or subsequent offenses for unlawful possession of heroin. No such enhanced penalties appear in the Controlled Substances Act. By eliminating enhanced penalties

for possession of heroin, the State asserts the Legislature intended the Habitual Offender Act to apply. This contention is answered by the legislative history. What became the Controlled Substances Act was introduced into the Second Session of the Thirtieth State Legislature as Senate Bill 35. As introduced, all possessory offenses were misdemeanors. The habitual offender law applies only to felonies. During passage, possession of eight ounces or more of marijuana and possession of narcotic drugs in Schedules I and II were made felonies. Also during passage, one specific enhancement provision was added for a possessory offense. That enhancement applies only to a second or subsequent possession of one ounce or less of marijuana. This history negates any legislative intent that the provisions of the habitual offender law were to apply to second or subsequent possessory offenses.

A rule of statutory construction also answers the State's contention. In enacting the Controlled Substances Act, we presume the Legislature intended to change the law as it theretofore existed. Bettini v. City of Las Cruces, 82 N.M. 633, 485 P.2d 967 (1971). Not only did the Controlled Substances Act eliminate the general enhancement provisions of the prior law, it provided for enhancement in specific instances; the specific enhancement for possession applies only to one ounce or less of marijuana. In addition, in enacting the Controlled Substances Act, the Legislature substantially reduced the penalty for all possessory offenses. See the penalties for possession in the Narcotic Drug Act prior to its repeal by Laws 1972, ch. 84, § 60.

We hold that the Legislature did not intend that the habitual offender law was to apply to second or subsequent violations of § 54–11–23(B)(5), supra. Oral argument in this case being unnecessary, the scheduled oral argument is vacated. The order of the trial court dismissing the supplemental information is affirmed.

It is so ordered.

SUTIN and LOPEZ, JJ., concur.

538 P.2d 795

STATE of New Mexico, Plaintiff-Appellee,

v.

Everett Charles BRAKEMAN, Defendant-Appellant.

STATE of New Mexico, Plaintiff-Appellee,

v.

Chon ROCHA, Defendant-Appellant.

STATE of New Mexico, Plaintiff-Appellee,

v.

Manuel GRIEGO, Defendant-Appellant.

Nos. 1847, 1848 and 1921.

Court of Appeals of New Mexico.

July 2, 1975.

Certiorari Denied Aug. 5, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Donald Klein, Jr., Associate Appellate Defender, Reginald J. Storment, Asst. Appellate Defender, Santa Fe, for defendants-appellants.

Toney Anaya, Atty. Gen., Santa Fe, Don Montoya, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

In each case, the defendant pled guilty and appealed. The appeals were consolidated because each appeal raises the same issue. That issue is directed to asserted non-compliance with paragraphs (e), (f), and (h) of the Rules of Criminal Procedure 21, as amended October 1, 1974. The amended rule has not yet been included in our compiled statute. The specific claim is that the trial court failed to follow certain provisions in Amended Rule 21 and, therefore, erred in accepting the guilty plea.

We do not answer the various contentions because they are raised for the first time on appeal. See § 21-12-11, N.M.S.A.1953 (Interim Supp.1974). We have held "that the issue of voluntariness of a guilty plea cannot be raised for the first time on appeal." *State v. Vigil*, 85 N.M. 328, 512 P.2d 88 (Ct.App.1973). Similarly, we have held that issues directed to the trial court's procedure in accepting a guilty plea cannot be raised for the first time on appeal. *State v. Jordan*, 85 N.M. 125, 509 P.2d 892 (Ct.App.1973). This rule is applicable to claimed violations of Rules of Criminal Procedure 21.

Defendants ask this Court to reverse their convictions "and allow them to replead." They claim they are entitled to "plead anew". In the Brakeman and Griego cases, a plea and disposition agreement are of record. In the Rocha case, there is of record an affidavit concerning Rocha's election to plead guilty. A colloquy between the trial court and defendant is of record in each case. This colloquy occurred before the guilty plea was accepted. None of the defendants claim their guilty

plea was involuntary. They never sought to withdraw their guilty pleas in the trial court. We decline to review a procedure when defendants had no complaints about that procedure in the trial court.

Defendants intimate there may not be a way of raising, in the trial court, an issue as to the trial court's procedure. The intimation is not correct. See *State v. White,* 71 N.M. 342, 378 P.2d 379 (1962); *State v. Kincheloe,* 87 N.M. 34, 528 P.2d 893 (Ct. App.1974); *State v. McClarron,* 85 N.M. 442, 512 P.2d 1278 (Ct.App.1973); *State v. Ramos,* 85 N.M. 438, 512 P.2d 1274 (Ct. App.1973).

Oral argument is unnecessary. The Judgments and sentences are affirmed.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

538 P.2d 796

STATE of New Mexico, Plaintiff-Appellee,

v.

Lawrence BOJORQUEZ, Defendant-Appellant.

No. 1580.

Court of Appeals of New Mexico.
June 11, 1975.
Rehearing Denied June 23, 1975.

Harry N. Relkin, Louis G. Stewart, Jr., Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Thomas Patrick Whelan, Jr., Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HERNANDEZ, Judge.

Defendant brings this appeal from a conviction by jury and sentence for aggravated battery upon a peace officer contrary to § 40A-22-24, N.M.S.A.1953 (2nd Repl. Vol. 6). We affirm.

Defendant's first point of error is that, "THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT A MISTRIAL, BECAUSE OF THE FAILURE OF THE JUROR, MRS. TONY A. SANCHEZ, TO REVEAL RELEVANT INFORMATION ON *VOIR DIRE* EXAMINATION." Relevant under this point is that at the beginning of the second day of trial, Mrs. Sanchez went to see the trial judge concerning some questions asked on *voir dire*. At the time the jury was being empanelled she had made no response to these questions; but after having reflected thereon and after having heard the evidence during the first day of trial she decided to ask the trial judge whether she should have. The questions sought to learn whether any of the jurors felt that they would be unable to render a fair and impartial verdict in light of the fact that violence was involved in the case. Mrs. Sanchez told the trial judge that there had been a shooting incident involving her sister and her brother-in-law; and she wanted to know whether she should have said something about it. After Mrs. Sanchez's disclosure, the trial judge questioned her at length in the presence of defense counsel and the district attorney. He asked her whether the incident would influence her decision in defendant's case. Mrs. Sanchez responded that she would not be influenced and that she could decide fairly and impartially.

Defense counsel asked for a mistrial on the ground that Mrs. Sanchez's failure to respond to the questions on *voir dire* deprived the defendant of his right to exercise a "peremptory challenge or a challenge for cause." At that point the trial judge offered to excuse Mrs. Sanchez, should the defendant request it, and to replace her with an alternate juror. Counsel for the defendant stated that he did not believe that the trial court's proposal would remedy the situation, and that he would stand on his motion for a mistrial. The motion was denied.

Rule 39(e), R.CRIM.P., § 41-23-39(e), N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1973), provides in pertinent part:

> "Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall- . . . be subject to . . . challenges for cause. . . . The state and the defense are each entitled to one [1] peremptory challenge in addition to those otherwise allowed by this rule if one [1] or two [2] alternate jurors are to be impannelled, two [2] peremptory challenges if three [3] or four [4] alternate jurors are to be impannelled, and three [3] peremptory challenges if five [5] or six [6] alternate jurors are to be impannelled . . . ."

Defendant's argument is that he was deprived of his right to excuse Mrs. Sanchez for cause or by invocation of peremptory challenge as a consequence of her failure to answer or comment in response to his questions during *voir dire*. We believe this argument is misdirected. The remedy prescribed by the rule for situations in which one juror becomes unable or disqualified for service is not a mistrial, but, rather, a substitution of an alternate juror. *Beal v. Southern Union Gas Co.*, 66 N.M. 424, 349 P.2d 337 (1960). Since acceptance of the trial judge's offer would have had the same result as exercise of a peremptory or a for cause challenge during *voir dire*, defendant waived his right to

challenge Mrs. Sanchez here. See *Smith v. New York Life Ins. Co.*, 26 N.M. 408, 193 P. 67 (1920). Furthermore, the prerequisite for dismissing an empanelled juror and substitution of an alternate juror therefor, that is, a showing of inability to perform the duties of a juror and consequent prejudice to the defendant arising therefrom, was not established. Compare *State v. Rivera*, 85 N.M. 723, 516 P.2d 694 (Ct. App.1973).

Defendant's second point was that, "THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF WITNESSES THE DEFENDANT DESIRED TO CALL AND AS A RESULT THEREOF DEFENDANT WAS DEPRIVED OF THE RIGHT OF COMPULSORY PROCESS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION [,] AND ARTICLE II, SECTION 14, NEW MEXICO CONSTITUTION."

The answer to this point is factual. Defendant's claim of error is not substantiated by the record. On February 20, 1974, the trial court issued an order providing, *inter alia,* that, ". . . Defendant be and he hereby is required to comply with the discovery provisions of Rule 28 . . . not less than ten (10) days before the trial or 2/25/74." Rule 28(b), R. CRIM.P., § 41-23-28(b), N.M.S.A.1953 (2d Repl. Vol. 6, Supp. 1973), provides: "Upon motion of the state, the court may order the defendant to furnish the state a list of the names and addresses of the witnesses he intends to call at the trial." On the afternoon of Friday, March 29, 1974, defendant filed a list of six witnesses he intended to call. The district attorney did not receive a copy of the list until April 2, 1974, the day before trial. On the day of trial, the state objected to calling these witnesses based on defendant's failure to comply with the court's order dated February 20, 1974. The trial court granted the state's motion.

Later on the same day, defendant stated to the trial court that he had the telephone numbers for the six witnesses he wanted to call. He said that each of the proposed witnesses was pending his summons and that the district attorney could talk with them at any time. At that point the trial court stated that it would reserve reconsideration of the matter until the district attorney had spoken to the witnesses. Without explanation, however, defendant's presentation did not include calling any of these witnesses to the stand. Thus, we conclude that he voluntarily abandoned any further effort to have these witnesses appear and that he can not now be heard to complain of error in their exclusion.

Defendant's third point is that, "THE STATUTE UPON WHICH THE DEFENDANT WAS CHARGED AND TRIED WAS VAGUE AND INDEFINITE AND VIOLATED DEFENDANT'S RIGHT AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION [,] AND ARTICLE II, SECTION 18 [OF THE] NEW MEXICO CONSTITUTION."

We would first point out that although the indictment charged violation of § 40A-22-22, N.M.S.A.1953 (2d Repl. Vol. 6), defendant was convicted of violating § 40A-22-24, *supra,* which is a lesser, included offense of the crime charged in the indictment. The gist of defendant's argument is that § 40A-22-22, *supra,* "is vague and indefinite, [sic] because it does not sufficiently describe the elements of that particular offense so that a defendant would be placed on notice as to the difference in conduct required in 40-A-22-24 and 40A-22-24." Defendant does not allege that § 40A-22-24, *supra,* is vague and indefinite. To the contrary, in his brief defendant argues that "§ 40A-22-24, is particularly explicit in setting forth the elements required to prove a violation of that section." Not having been convicted under § 40A-22-22, *supra,* defendant's

rights thereunder are not at issue, and he has no standing to challenge its constitutionality. *State v. Sharpe,* 81 N.M. 637, 471 P.2d 671 (Ct.App.1970); *State v. Hines,* 78 N.M. 471, 432 P.2d 827 (1967).

The judgment and sentence entered below are accordingly affirmed.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

538 P.2d 799

Rebecca May ARTHER, Dependent widow of Johnny Wayne Arther, Deceased, Plaintiff-Appellee,

v.

The WESTERN COMPANY OF NORTH AMERICA, Employer, and American Home Assurance Company, its Insurer, Defendants-Appellants.

No. 1882.

Court of Appeals of New Mexico.

July 2, 1975.

Certiorari Denied Aug. 5, 1975.

Neal & Neal, Hobbs, for defendants-appellants.

John T. Porter, Williams, Johnson, Houston, Reagan & Porter, Hobbs for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The trial court ordered a lump-sum award in a workmen's compensation case. Defendants appeal. The two issues are: (1) the authority to direct, and (2) the propriety of directing a lump-sum award under the facts of this case.

Authority to Direct Lump-Sum Award

Defendants' answer admits that plaintiff's husband received injuries arising out of and in the course of his employment which resulted in his death. Weekly compensation benefits had been paid since the date of death. Within three months after the accident, plaintiff petitioned the trial court "for a lump sum settlement of the widow's death benefits . . . ."

Section 59–10–13.5(A), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1) provides for the payment of compensation in installments. This was being done. Section 59–10–13.6, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1) provides that a workman entitled to compensation, or his eligible dependents, may sue for compensation only when the employer or insurer fails or refuses to pay an installment of compensation to which the workman or dependent is entitled. *Moody v. Hastings*, 72 N.M. 132, 381 P.2d 207 (1963); *State v. Swope*, 58 N.M. 553, 273 P.2d 750 (1954); compare *Selgado v. New Mexico State Highway Department*, 66 N. M. 369, 348 P.2d 487 (1960). There is no finding, and none was requested, that defendants had failed or refused to pay an installment of compensation which was due. Section 59–10–36, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1) provides that no claim shall be filed by a workman who is receiving maximum compensation benefits. There is no contention that maximum compensation benefits were not being paid.

By what authority did the trial court direct a lump-sum award? *Livingston v. Loffland Brothers Co.*, 86 N.M. 375, 524 P.2d 991 (Ct.App.1974) holds that § 59–10–25, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 1) authorizes the trial court to direct a lump-sum award and that where compensation is being paid, § 59–10–36, *supra*, does not bar a lump-sum proceeding. Neither *Livingston, supra*, nor § 59–10–25, *supra*, authorizes a lump-sum award in this case.

In *Livingston, supra*, the parties had stipulated to a settlement and the trial court had approved the settlement. Thus there had been a prior award of compensation. See § 59–10–25(A), *supra*. There having been a prior award, there was a right to compensation enforceable by the district court. See § 59–10–25(B), *supra*. Section 59–10–36, *supra*, was not applicable in *Livingston, supra*, because the right to compensation had been established before a lump-sum award was sought. Section 59–10–25, *supra*, does not authorize a lump-sum award when the right to compensation has not been established. *Livingston, supra*, is correct on its facts but is not applicable in this case because of different facts. In this case there has been no settlement.

Section 59–10–13.5(B), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1) authorizes a party in interest to petition for a lump-sum award in cases of total permanent disability or death. The petitioning party must, however, be "entitled to compensation" because the lump-sum award discharges the employer's liability. Until the right to compensation has been established, § 59–10–13.5(B), *supra*, does not authorize a lump-sum award. Compare *Sanchez v. Kerr McGee Company*, 83 N.M. 766, 497 P.2d 977 (Ct.App.1972).

Summarizing, where maximum compensation benefits are being paid, § 59–10–36, *supra*, bars a suit to establish liability for compensation. Sections 59–10–25 and 59–10–13.5(B), authorize lump-sum awards only where the right to compensation has

been previously established. A lump-sum award was authorized in *Livingston, supra,* because the parties had agreed upon a settlement and the court had approved the settlement. The right to compensation having been established, the court could then direct a lump-sum award under § 59–10–25, *supra.*

In this case defendants admitted death from injuries arising out of and in the course of employment. Their answer did not contest liability for the death; it contested only the propriety of a lump-sum award. The admission in the answer established liability for the death. See *Lujan v. Gonzales,* 84 N.M. 229, 501 P.2d 673 (Ct.App.1972). This admission of liability sufficiently established plaintiff's right to compensation and authorized a lump-sum award under § 59–10–25(B), *supra.* Compare *Livingston, supra.* Specifically, defendants' admission provided the factual basis for a lump-sum award in this case.

Propriety of the Lump-Sum Award

Plaintiff was twenty-one years old when she sought the lump-sum award. She had been married to her deceased husband about one month. There were no children of the marriage and she was not pregnant. She had been living with her in-laws since her husband's death and planned to stay there indefinitely. At the time of the lump-sum hearing she was employed at a floral shop earning $1.65 per hour. The parties stipulated that "the only purpose for which she is seeking this lump sum settlement is for investment purposes."

The basis for a lump-sum award is "the best interests of the parties entitled to compensation." Section 59–10–13.5(B), *supra*; *Livingston, supra.* The trial court found:

"10. That Plaintiff's financial interest will be best served by a lump sum settlement in as much as Plaintiff can receive the rate of return upon investments and certificates of deposit at local banks in excess of 5%, as well as other investments in the present money markets.

"11. It would be for Plaintiff's best interest that she obtain a lump sum settlement because she could remarry the day after a lump sum settlement, or die the day after a lump sum settlement, without losing any future payments which, under the law, would ordinarily stop on her death or remarriage."

Although the "best interest" of the plaintiff is the guide in determining whether a lump-sum should be awarded, periodic compensation payments are the rule, and lump-sum awards are the exception. *Laukaitis v. Sisters of Charity of Leavenworth,* 135 Mont. 469, 342 P.2d 752 (1959); *Sullivan v. Mayo,* 121 So.2d 424 (Fla. 1960). Compare §§ 59–10–13.5 and 13.6, *supra,* and §§ 59–10–18.2 and 18.4, N.M.S.A.1953 (2d Repl. Vol. 9, p. 1). In applying this exception the purpose of workmen's compensation must be kept in mind.

"It is the public policy of this state that . . . compensation shall be made in a certain amount, to secure the injured employee against want, and to avoid his becoming a public charge." *Hughey v. Ware et al.,* 34 N.M. 29, 276 P. 27 (1929). See 1 Larson, Workmen's Compensation Law, § 2.20 (1972). Consistent with this policy, compensation paid to a dependent widow terminates upon her death or remarriage. Section 59–10–18.7(F), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1). In holding that a lump-sum award was in plaintiff's best interests "because she could remarry the day after a lump sum settlement" the trial court, in effect, ruled that plaintiff's interest was to be given effect regardless of the legislative intent that compensation was only to be paid while plaintiff was a widow.

"Of all the excuses put forward to justify lump-summing, the worst is that in a particular instance the claimant can, so to speak, beat the actuarial tables by taking a lump sum." 3 Larson, Workmen's Compensation Law, § 82.72 (1973). One rea-

son this excuse is "worst" is because the policy of our statute is to assure periodic payments to help secure the recipient of the payments against want.

Both grounds found by the trial court are inconsistent with the public policy expressed in our statute. A lump-sum award is an exception to the rule of periodic payment; the exception should be applied only in circumstances that accord with the purpose of the compensation statute; the exception should not "eat up" the rule. As stated in 3 Larson, Workmen's Compensation Law, § 82.71 (1973):

> "Since compensation is a segment of a total income-insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings. If a partially or totally disabled worker gives up these reliable periodic payments in exchange for a large sum of cash immediately in hand, experience has shown that in many cases the lump sum is soon dissipated and the workman is right back where he would have been if workmen's compensation had never existed. One reason for the persistence of this problem is that practically everyone associated with the system has an incentive—at least a highly visible short-term incentive—to resort to lump-summing. . . .
>
> "The only solution lies in conscientious administration, with unrelenting insistence that lump-summing be restricted to those exceptional cases in which it can be demonstrated that the purposes of the act will best be served by a lump-sum award."

Plaintiff has shown that it is in her short term financial interest to receive a lump-sum award. This is insufficient. She has not shown that the purposes of our compensation statute will be best served by a lump-sum award. Compare *Livingston supra,* where the evidence showed special circumstances which supported the lump-sum award.

Under the rule announced herein, the trial court's findings are insufficient to support a lump-sum award. Oral argument is unnecessary. The judgment of the trial court is reversed.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

538 P.2d 802

STATE of New Mexico, Plaintiff-Appellee,

v.

Anthony E. PADILLA, Defendant-Appellant.

No. 1741.

Court of Appeals of New Mexico.
July 9, 1975.

Certiorari Denied Aug. 5, 1975.

James E. Thomson, Zinn & Donnell, Santa Fe, for defendant-appellant.

Tony Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HERNANDEZ, Judge.

Defendant appeals his jury conviction and sentence for robbery while armed with a deadly weapon in violation of Section 40A-16-2, N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1973), and of battery in violation of 40A-3-4, N.M.S.A.1953 (2d Repl. Vol. 6). He alleges three points of error. We affirm.

The facts pertinent to defendant's points of error will be set forth in the discussion of each point.

POINT I: "THE COURT ERRED AND ABUSED ITS DISCRETION IN PROHIBITING EVIDENCE SUPPORTING DEFENDANT'S DEFENSE OF INSANITY."

The answer to this point is factual. Defendant abandoned any attempt to introduce evidence on the issue of insanity.

Defendant notified the state pursuant to R.Cr.P. 35(e), § 41-23-35(e), N.M.S.A. 1953 (2d Repl. Vol. 6, 1972, Supp.1973), that he intended to call an expert witness on the issue of capacity to form specific intent. Defendant never gave notice pursuant to R.Cr.P. 35(a), § 41-23-35(a), N.M.S.A.1953 (2d Repl. Vol. 6, 1972, Supp. 1973). Nevertheless, in his opening statement to the jury, defendant said that he intended to show through expert testimony that he was incapable at the time of the acts to distinguish between right and wrong. The state objected and the court sustained the objection. Defendant stated that he should be entitled to raise the defense of insanity because it is a matter of degree which defense would be raised and that he was being denied his constitutional right to call witnesses on his behalf. Defendant alerted the court to his intention to make an offer of proof on the question of insanity.

On appeal defendant contends that the state actually had notice that he would raise the defense of insanity. He never brought this alleged fact to the attention of the trial court. R.Evid. 103, § 20-4-103, N.M.S.A.1953 (Repl. Vol. 4, 1970, Supp. 1973), and R.G.A. 11, § 21-12-11, N.M.S.A. 953 (Inter.Supp.1974), preclude the defendant from raising this ground for reversal on appeal.

In addition, defendant never made an offer of proof on the issue of insanity. Indeed, one of his experts was unable even to give an opinion on whether or not defendant was able to form the specific in-

tent necessary for the crimes for which defendant stood charged. Under the circumstances of this case, defendant abandoned his defense of insanity.

POINT II: "THE TRIAL COURT ERRED IN STRIKING DEFENDANT'S DISQUALIFICATION OF HIM."

Section 21-5-9, N.M.S.A.1953 (Repl. Vol. 4, Supp. 1973), provides:

"The affidavit of disqualification shall be filed within ten [10] days after the cause is *at issue* or within ten [10] days after the time for filing a demand for jury trial has expired, whichever is the later [sic]." [Emphasis Ours.]

A criminal cause is "at issue" when the defendant enters a plea. *Gray v. Sanchez,* 86 N.M. 146, 520 P.2d 1091 (1974); *Territory v. Gonzales,* 13 N.M. 94, 79 P. 705 (1905); *United States v. Aurandt,* 15 N.M. 292, 107 P. 1064 (1910). The case was originally set for jury trial by the trial court on July 30, 1973. It was continued at the request of defendant's counsel to September 10, 1973. Defendant's affidavit of disqualification was not filed until November 21, 1973. It was not timely; and the trial court committed no error in striking it. *Gray v. Sanchez, supra.*

POINT III: "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS AND VACATE."

This point does not merit our consideration. Defendant's argument is less than clear and he cites no authority either to support the argument or to give us a hint as to what he is arguing. Accordingly, we consider the point abandoned. R.G.A. 9, § 21-12-9, N.M.S.A.1953 (Inter. Supp.1974); see *Novak v. Dow,* 82 N.M. 30, 474 P.2d 712 (Ct.App.1970); *Petritsis v. Simpier,* 82 N.M. 4, 474 P.2d 490 (1970).

The judgment and sentence below are affirmed.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

538 P.2d 804

Ralph E. McNUTT and Delia S. McNutt, husband and wife, Leroy Urioste and Dolores M. Urioste, husband and wife, Ted Drennan and Patricia K. Drennan, husband and wife, Rialo Pollo and Elizabeth Ann Pollo, husband and wife, Jose B. Salazar and Doris R. Salazar, husband and wife, Plaintiffs-Appellants,

v.

NEW MEXICO STATE TRIBUNE COMPANY, a New Mexico Corporation, d/b/a the Albuquerque Tribune, Scripps Howard Publishing Company, a foreign Corporation, and Harry Moskos, Defendants-Appellees.

No. 1669.

Court of Appeals of New Mexico.

July 9, 1975.

Certiorari Denied Aug. 5, 1975.

Robert N. Singer, Coors, Singer & Broullire, Albuquerque, for appellants.

John B. Tittman, Keleher & McLeod, Albuquerque, for appellees.

OPINION

HERNANDEZ, Judge.

Plaintiffs filed this case in tort alleging invasion of their right of privacy under three causes of action. The second count related to the Scripps Howard Publishing Company and was dismissed by agreement of counsel. The first count alleged an invasion of the privacy of plaintiffs by the defendant, New Mexico State Tribune Company, d/b/a The Albuquerque Tribune (Tribune). The third count alleged an invasion of the privacy of plaintiffs by the defendant, Harry Moskos. This appeal arises from an order granting defendants' motions for summary judgment. We affirm.

The facts are as follows: Two of the plaintiffs were members of the Albuquerque Police Department; three were members of the New Mexico State Police. The remaining plaintiffs are the respective wives of the officers.

During the early hours of January 29, 1972, these officers became engaged in a gun battle with two individuals who were attempting to steal dynamite from a highway construction site southwest of Albuquerque at a place called Black Mesa. In the aftermath, it was determined that the two individuals were members of a group known as the Black Berets. They were both killed.

On Monday, January 31, 1972, the Tribune carried an article covering the events at Black Mesa which gave the names and home addresses of the plaintiff officers. Defendant Harry Moskos was the city editor of the Tribune, which is published by the defendant, New Mexico State Tribune Company. Prior to publication of the January 31, story, defendant Moskos had called several of the officers, including plaintiffs McNutt and Urioste, seeking information for his article. The officers told Mr. Moskos that they had been instructed not to discuss the matter, and they referred him to their superiors. Urioste

and McNutt stated that Mr. Moskos said that he was going to print their names and addresses because they would not cooperate in giving the details he sought. Officer McNutt urged unsuccessfully that Moskos not publish these facts for his family's sake. Subsequent to publication of the article, several of the officers and members of their families received anonymous phone calls threatening violence.

Plaintiffs alleged that the publication of their names and addresses was done maliciously, and they prayed for punitive as well as actual damages.

Plaintiffs allege four points of error:

POINT I: "THE PLEADINGS RAISE SUBSTANTIAL ISSUES OF MATERIAL FACT WHICH MUST BE DECIDED BY A JURY, PARTICULARLY THE ISSUE OF NEWSWORTHINESS."

At the outset, we wish to clarify a matter concerning some of the pleadings about which we perceive plaintiffs to be confused. On July 11, 1972, defendants Moskos and the Tribune filed a motion pursuant to Rule 12(b)(6), Rules of Civil Procedure, § 21-1-1(12)(b)(6), N.M.S.A. 1953 (Repl.Vol. 4), to dismiss plaintiffs' complaint for failure to state a claim upon which relief could be granted. This motion was denied by the trial court on November 6, 1972. On January 15, 1974, the same defendants filed motions for summary judgment against all plaintiffs pursuant to Rule 56(c), § 21-1-1(56)(c), *supra*. On January 31, 1974, the trial court entered its order dismissing the complaint as to the wives of the police officers for the reason that their allegations failed to state a claim upon which relief could be granted. Thereafter, on February 12, 1974, the trial court granted the motions for summary judgment which dismissed plaintiffs' first and third causes of action with prejudice for the reason that the court could find no genuine issue of material fact warranting a trial. There is nothing in the record to indicate that the motion to dismiss for failure to state a claim was ever renewed by the defendants. We consider the trial court's order of January 31, 1974, a nullity since the prior motion of July 11, 1972, was rendered *functus officio* by its order of November 6, 1972. Therefore, the operant order appealed from is the one entered February 12, 1974, granting summary judgment against all the plaintiffs.

The trial court gave the following reasons for granting defendants' motion for summary judgment:

> "That the names of these individuals and their addresses were within the public domain, or rather a matter of public record as such, if not official records . . .
>
> "The court holds as a matter of law that this is a newsworthy article.
>
> "That . . . to extend the cause of action . . . that is the invasion of privacy . . . would be to deny to the newspaper its Constitutional right of freedom of the press . . .
>
> "Because while it might be a little more difficult to come in contact with an individual whose address has not been published than one who has, if the name is published, the name alone, anyone who would want to contact such an individual for whatever purpose, would have no difficulty in doing so, even by just identifying the individual in other respects, such as the position he holds, if there is only one position of that kind."

We agree with the reasoning of the trial court. New Mexico recognizes the tort of invasion of the right of privacy, i. e., the right to be let alone, as it is sometimes characterized. *Hubbard v. Journal Publishing Company,* 69 N.M. 473, 368 P.2d 147 (1962). However, as Dean Prosser informs us:

> "The early cases in all jurisdictions were understandably preoccupied with the question whether the right of privacy existed at all, and gave little or no consideration to what it would amount to if it did. . . . As it has appeared

in the cases thus far decided, it is not one tort, but a complex of four . . . which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be let alone.'

. . . . . .

"[1] [T]he appropriation, for the defendant's benefit or advantages, of the plaintiff's name or likeness.

. . . . . .

"[2] [I]ntrusion upon the plaintiff's physical solitude or seclusion . . . [or into his private affairs].

. . . . . .

"[3] [P]ublicity, of a highly objectionable kind, given to private information about the plaintiff, even though it is true and no action would lie for defamation.

. . . . . .

"[4] [P]ublicity which places the plaintiff in a false light in the public eye." Prosser, Torts § 117 (4th ed. 1971).

Plaintiffs conceive of the defendants' publication as an invasion of their "right to seclusion" and as "public disclosure of personal matters of private life." Accepting *arguendo*, the correctness of their conception, we conclude that the actions of the defendants did not constitute an invasion of the privacy of the plaintiffs in either regard as a matter of law.

Prosser, Torts, pp. 810–811, *supra*, states:

"The facts disclosed to the public must be private facts, and not public ones. The plaintiff cannot complain when an occupation in which he publicly engages is called to public attention, or when publicity is given to matter such as date of his birth or marriage, or his military service record, which are a matter of public record, and open to public inspection."

The address of most persons appears in many public records: voting registration rolls, property assessment rolls, motor vehicle registration rolls, etc., all of which are open to public inspection. They also usually appear in such places as the telephone directory and city directory which are available to public inspection. We, therefore, hold that an individual's home address is a public fact and that its mere publication, without more, cannot be viewed as an invasion of privacy.

Assuming, but not deciding, that the publication of plaintiffs' addresses in these circumstances and the subsequent threats upon them constituted an intrusion upon plaintiffs' seclusion, we nonetheless believe that the publication was privileged.

The right of privacy is not unqualified. See *Blount v. T. D. Publishing Corporation,* 77 N.M. 384, 423 P.2d 421 (1966). One of the key qualifications to the right is where the individual's right of privacy conflicts with the first amendment's freedom of the press. In such a circumstance, the individual's right of privacy must yield to the greater public interest in the dissemination of newsworthy material. *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964).

Furthermore, it makes no difference whether the person involved is a public official, a public figure or a private individual. Neither is a characterization of the subject matter of the publication as political, public or private concern of determinitive import.

"The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in

a society which places a primary value on freedom of speech and of press.

. . . . . .

"Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc. v. Hill,* 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967).

As to what is "newsworthy", we are impressed with and do hereby adopt the definition found in *Jenkins v. Dell Publishing Company, Inc.,* 251 F.2d 447 (3rd Cir. 1958):

"For present purposes news need be defined as comprehending no more than relatively current events such as in common experience are likely to be of public interest. In the verbal and graphic publication of news, it is clear that information and entertainment are not mutually exclusive categories. A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongruous or ironic aspect. Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged." [Footnotes Omitted.]

"There can be no doubt that reports of current criminal activities are the legitimate province of a free press. The circumstances under which crimes occur, the techniques used by those outside the law, the tragedy that may befall the victims—these are vital bits of information for people coping with the exigencies of modern life." *Briscoe v. Reader's Digest Association,* 4 Cal.3d 529, 93 Cal. Rptr. 866, 483 P.2d 34 (1971).

Plaintiffs, conceding *arguendo* the newsworthiness of the incident in question, assert nonetheless that publication of their addresses was not newsworthy or necessary to the report. We hold that their addresses *were* necessary. If an individual participates in a newsworthy event, proper identification of that individual is an essential part of the story. It is the usual practice in newspaper accounts to identify persons by giving their names and addresses so as to avoid confusion because many individuals have identical names.

Finally under this point, we feel compelled to comment on plaintiffs' allegation of "malice" in their complaint. The Supreme Court of the United States in *Sullivan, supra,* stated the following:

"The constitutional guarantees [First and Fourteenth amendments] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' —that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

In *Time, Inc. v. Hill, supra,* the Supreme Court of the United States extended the privilege created in *Sullivan,* supra, to encompass the tort of invasion of privacy:

"We hold that the constitutional protections for speech and press preclude the application of the New York statute [New York Civil Rights Law] to redress

false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth. . . . We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity.

. . . . . .

"But the constitutional guarantee can tolerate sanctions against calculated falsehood without significant impairment of their essential function."

The use, by the Supreme Court, of the term "malice", in *New York Times Co. v. Sullivan, supra,* has caused some confusion, i. e., an assumption that a showing of "malice" nullifies the privilege. It does not. As Dean Prosser comments:

"It is certainly highly unfortunate that the Court chose to cling to the discredited term 'malice', which has meant all things to all men, and is here highly misleading. A much better word would have been 'scienter', since the state of mind required is obviously the same as in deceit actions for intentional misrepresentations. Where this is proved, there is no doubt that there can still be liability." Prosser, Torts, p. 821, *supra.*

In commenting upon the use of the term, "malice", in the Supreme Court's opinion in *Sullivan, supra,* the Supreme Court of Hawaii has said:

" 'actual malice' has become a term of art clearly distinguishable from the ordinary definition of 'malice' in terms of ill will, . . . 'actual malice' consists of 'deliberate falsification' of facts or 'reckless disregard' of the truth, i. e., reckless publication despite a high degree of awareness, harbored by the publisher, of the probable falsity of the published statements." *Tagawa v. Maui Publishing Company,* 448 P.2d 337 (Haw.1969).

In *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), the Supreme Court of the United States further defined what they had meant by "actual malice" in *Sullivan:*

". . . reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

Accepting that Mr. Moskos may have harbored ill will toward the plaintiff officers; such a harboring does not constitute "actual malice" as is required by *New York Times Co. v. Sullivan, supra.*

POINT II: "THE PLAINTIFFS WERE DENIED DUE PROCESS OF LAW, IN THE COURT'S CONDUCT AND CONSIDERATION OF THE MOTION FOR SUMMARY JUDGMENT, IN THAT:

(A) THE HEARING WAS UNTIMELY, AND CONDUCTED WITHOUT ADEQUATE NOTICE;

(B) THE COURT CONSIDERED MATTER NOT PROPERLY IN EVIDENCE; AND

(C) THE COURT MADE FACTUAL DETERMINATIONS."

First, as to sub-points (A) and (B), there is nothing in the record to indicate that they were raised below; consequently, they cannot be considered here. *Gurule v. Albuquerque-Bernalillo Co. Economic Op. Bd.,* 84 N.M. 196, 500 P.2d 1319 (Ct.App.1972).

As to sub-point (C), plaintiffs argue that, "the court of necessity invaded the function and province of the jury in making its own factual determination on the issue of newsworthiness." Deciding Point I, as we do, we find no error in the trial court's handling of the newsworthiness issue, and we therefore, decide this sub-point adversely to appellants.

POINT III: "THE RULING OF THE COURT ON THE MOTION TO DISMISS WAS *RES-JUDICATA* TO THE MOTION FOR SUMMARY JUDGMENT."

Appellants are mistaken. A motion to dismiss a complaint for failure to state a claim upon which relief can be granted merely tests the legal sufficiency of the complaint. *C & H Constr. & Pav., Inc. v. Foundation Reserve Ins. Co.,* 85 N. M. 374, 512 P.2d 947 (1973). Pursuant to such a motion, only the allegations of the complaint are to be considered, and those allegations that are correctly pleaded are to be viewed as admitted. Legal conclusions or inferences that may be drawn from the allegations by the pleader are not admitted. *First National Bank of Santa Fe v. Ruebush,* 62 N.M. 42, 304 P.2d 569 (1956). Therefore, the denial by the trial court of the defendants' motion did not constitute an adjudication on the merits and did not operate to restrict the trial court's consideration of the subsequent motions for summary judgment.

POINT IV: "THE WIVES HAD A SEPARATE AND ACTIONABLE RIGHT OF PRIVACY STATED IN THE COMPLAINT."

Assuming, but not deciding, that plaintiffs' contention is valid, we have already decided that the publication was privileged; that privilege runs in favor of all defendants and against all of the plaintiffs.

The summary judgment entered below is accordingly affirmed.

It is so ordered.

SUTIN and LOPEZ, JJ., concur.

538 P.2d 1192

James SANDOVAL and Patricia Sandoval, Mike Sandoval, Lisa Sandoval and James E. Sandoval, minors, by their father and next friend, James Sandoval, Plaintiffs-Appellants,

v.

Alex Robert CORTEZ, Defendant-Appellee.

No. 1680.

Court of Appeals of New Mexico.

July 16, 1975.

Jacob Carian and Robert W. Casey, Albuquerque, for plaintiffs-appellants.

John A. Klecan, Klecan & Roach, Albuquerque, for defendant-appellee.

OPINION

LOPEZ, Judge.

This is an appeal from a judgment entered on a jury verdict in favor of the defendant. We affirm.

The plaintiffs raise the following issues on instructions: (1) turn signals of motor vehicles; (2) the "sudden emergency" concept; (3) aggravation of a pre-existing injury; and (4) proper lookout by the defendant. Plaintiffs also contest the denial of their motion for a directed verdict.

The accident that gave rise to this lawsuit involved three vehicles. The parties are designated as plaintiffs (middle car) and defendant (trailing car). The third vehicle is labelled the "lead" car since it was the first car in line.

On June 20, 1971, James Sandoval was operating plaintiffs' automobile in a southerly direction on San Mateo Boulevard, N.E., between Claremont and Los Arboles in Albuquerque, New Mexico. San Mateo at this point was an undivided, multiple lane street. The lead car stopped suddenly without making any signals and turned left into a church parking lot. The plaintiffs' car suddenly stopped and was rear ended by defendant's car. Defendant had been 75 feet behind plaintiffs' car when he first saw the plaintiffs' brake lights go on. Defendant tried to avoid the accident by changing lanes but could not do so because of traffic in the other lanes. The lead car was not hit by either plaintiffs' or defendant's cars.

(1) *Instructions regarding turn signals of motor vehicles*

The plaintiffs claim that it was error for the trial court to instruct the jury in the language of § 64–18–24, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2) which requires the giving of a signal before stopping, decreasing the speed, or turning right or left from a public highway. The instruction reads as follows:

"INSTRUCTION NO. 7. There was in force in the state at the time of the occurrence in question a certain statute which provided that:

"64–18–24. Turning movements and required signals. (a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in section 76 (64–18–21), or turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement.

"(b) A signal of intention to turn right or left when required shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning.

"(c) 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."

Plaintiffs objected to this instruction on the grounds that it interjected a false issue into the case and that it failed to inform the jury that a violation must be a proximate cause of the accident. Plaintiffs then tendered their own substitute instruction which reads as follows:

"2. Alleged negligence of a motorist in failing to give required signal in stopping is not a proximate cause of collision occurring when following plaintiff motorist who had stopped his automobile in time was struck from rear by defendant. *Turner v. McGee*, 68 N.M. 191 [360 P.2d 383]".

The trial court overruled plaintiffs' objection to the court's instruction No. 7 and denied the plaintiffs' tendered instruction.

Plaintiffs base their objection and their authority for their tendered instruction on the case of *Turner v. McGee*, 68 N.M. 191, 360 P.2d 383 (1961). It becomes necessary, therefore, to review the pertinent facts of the *Turner* case.

The *Turner* case also involved three cars. Plaintiff's car stopped behind the lead car (defendant in Turner) and was propelled into it by a third driver who crashed into the rear of the plaintiff's car. The lead car stopped in a line of traffic at a point 250 to 300 yards east of an intersection. The plaintiff (middle car) did not see the lead car slowing down, but did see the car after it was stopped. The evidence was conflicting as to whether the lead car had signalled its stop. Assuming that no signal had been given, the Supreme Court said that there must not only be a violation of a traffic law by the lead car, but there must also be a causal connection between the violation and the accident. Since plaintiff did not see the lead car slowing to a stop, plaintiff would not have seen any signal had it been given. Thus, there was no causal connection.

In the case at bar, the lead car stopped suddenly without making any signals pursuant to law. Plaintiffs suddenly stopped and the defendant, who first saw the plaintiffs' car stopping when it was 75 feet behind, immediately applied his brakes but rear ended plaintiffs' car. The defendant tried to avoid the accident by changing lanes but could not do so due to the danger of other traffic.

We do not believe that the facts of the *Turner* case are applicable to the case at bar.

We agree with plaintiffs that they are entitled to have the jury instructed on all correct legal theories of the case which are supported by substantial evidence. *LaBarge v. Stewart*, 84 N.M. 222, 501 P.2d 666 (Ct.App.1972). However, plaintiffs' tendered instruction was not correct because it would have resolved the proximate cause question as a matter of law. See *Tafoya v. Whitson*, 83 N.M. 23, 487 P.2d 1093 (Ct.App.1971) and *May v. Baklini*, 85 N.M. 150, 509 P.2d 1345 (Ct. App.1973).

The court was correct in denying the tendered instruction of the plaintiffs and it was likewise correct in giving the jury its own instruction No. 7. The trial court correctly instructed the jury as to the law regarding stopping on the highway. The court did not interject a false issue into the case in that the lead car's failure to signal went to the issue of proximate cause with respect to this lawsuit. Another instruction informed the jury that a statutory violation must have been the proximate cause.

(2) *Instructions on "sudden emergency" concept*

The trial court gave its instruction No. 12 to the jury, consistent with U.J.I. Instruction No. 13.14, which reads as follows:

"INSTRUCTION NO. 12. A person who, without negligence on his part, is

suddenly and unexpectedly confronted with peril arising from either the actual presence of or the appearance of imminent danger to himself or another is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments.

"His duty is to exercise only the care that a reasonably prudent person would exercise in the same situation.

"If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any reasonably prudent person under the same conditions, then he has done all the law requires of him, even though in the light of after events it might appear that a different course would have been better and safer."

See *Burkhart v. Corn,* 59 N.M. 343, 284 P.2d 226 (1955).

The plaintiffs objected to this instruction on the basis that there was insufficient evidence to support it. We disagree with the plaintiffs. There is evidence that the lead car came to a sudden stop in the middle of the block without signalling for any turn. Plaintiffs' car also came to a sudden stop and "almost immediately" thereafter defendant's car hit plaintiff's car. When defendant saw the brake lights on plaintiffs' car, he applied his brakes and tried to change traffic lanes. This evidence was sufficient for an instruction on sudden emergency.

(3) *Instruction regarding aggravation of the pre-existing injury*

Since we are affirming this case on points regarding liability it will be unnecessary for us to review the point regarding damages. The court correctly instructed the jury to deliberate the matter of liability before damages, and the jury did not find the necessary causal connection to establish any liability. Therefore, any incorrect instructions on the question of damages do not constitute reversible error. *Britton v. Boulden,* 87 N.M. 474, 535 P.2d 1325, decided June 4, 1975; *Morris v. Rogers,* 80 N.M. 389, 456 P.2d 863 (1969).

(4) *The instructions on proper lookout by the defendant*

The plaintiffs tendered the following requested instruction:

"3. The plaintiff claims that he sustained damages and that the proximate cause thereof was one or more of the following claimed acts of negligence:

". . .

"2. The defendant was not keeping a proper lookout to avoid a collision at the intersection. . . ."

U.J.I. Instruction No. 9.3 reads as follows:

"The duty to keep a proper lookout requires more than merely looking. It also requires a person to actually see what is in plain sight or obviously apparent to one under like or similar circumstances in the exercise of ordinary care.

"Further, with respect to that which is not in plain sight or readily apparent, a person is required to appreciate and realize what is reasonably indicated by that which is in plain sight."

The trial court correctly refused the plaintiffs' tendered instruction on proper lookout on the part of the defendant, due to lack of evidence to support it. *Mills v. Southwest Builders, Inc.,* 70 N.M. 407, 374 P.2d 289 (1962); *LaBarge v. Stewart, supra.*

Motion for a directed verdict as to liability

At the close of the testimony, the plaintiff moved the court for a directed verdict as to liability. The motion was denied.

In ruling on a motion for a directed verdict, the trial court must view the evidence, together with all reasonable inferences, in the light most favorable to the party resisting the motion; and the

court must disregard all conflicts in the evidence unfavorable to the position of that party. *Archuleta v. Pina,* 86 N.M. 94, 519 P.2d 1175 (1974).

Under this standard the evidence was sufficient to deny the motion and submit the issue of defendant's negligence to the jury.

The judgment of the trial court is affirmed.

It is so ordered.

WOOD, C. J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (specially concurring).

I specially concur.

A. *Instruction No. 7 was erroneous, but the error was not preserved for review.*

Plaintiff properly objected to instruction No. 7 for the reason that "it does not apply to any parties to this suit, and that such issue was not concerned with the proximate cause of the accident in question."

This statutory instruction refers to a vehicle at an intersection or private roadway preparing to make a turn. The driver must signal his turn. The statute applies to the vehicle *in "front" of plaintiff's vehicle.* It does not apply to plaintiff or defendant. Plaintiff had no duty to signal a turn. Neither did defendant. The court did not instruct the jury that this statute was applicable to the "front" vehicle and the jury could find a violation thereof was a proximate cause of the accident. The instructions were silent on the "front vehicle". The only issues presented to the jury were: (1) Did the defendant have control of his car? (2) Was the defendant driving too fast for the traffic and road conditions then and there existing?

Furthermore, subsection (c) of the statute, set forth in instruction No. 7, applies to the plaintiff. To establish contributory negligence, he had a duty to give an appropriate signal to the defendant before stopping or suddenly decreasing the speed. This subsection is applicable as an affirmative defense by defendant that plaintiff was guilty of contributory negligence. At the close of the case, plaintiff moved that the affirmative defense of contributory negligence be stricken. The defendant agreed. It was stricken. Defendant gave up its affirmative defense of contributory negligence.

This instruction was plain reversible error. Was it preserved for review?

The majority opinion says: "The trial court overruled plaintiffs' objection to the court's instruction No. 7 . . . ." A search of the record does not disclose this fact. The error is not preserved for review. For two years, I have tried to educate trial lawyers in the art of preserving error when objections are made to jury instructions. *Valencia v. Beaman,* 85 N.M. 82, 509 P.2d 274 (Ct.App.1973); *May v. Baklini,* 85 N.M. 150, 509 P.2d 1345 (Ct.App.1973) (Sutin, J., concurring in part and dissenting in part).

I suggest that trial lawyers read judicial opinions and make notes of pertinent procedural points such as this one. In the present case, even if error was preserved, it would only have succeeded in getting a dissenting opinion. But, perhaps, if these objections had been properly presented to the trial court, the instruction would not have been given to the jury. It is too late in the day to raise this matter for the first time on appeal.

This error could be preserved if trial judges would request that attorneys make all objections to instructions on the record in the presence of the court and obtain rulings thereon. When a trial court refuses instructions, he should give a reason therefor.

The Supreme Court has adopted New Mexico Rules of Evidence. Sections 20–4–101 to 20–4–1102, N.M.S.A.1953 (Repl. Vol. 4, 1973 Supp.). Rule 103 applies to

Rulings on Evidence. Subsection (d) provides:

> Nothing in this rule precludes taking notice of *plain errors* affecting substantial rights *although they were not brought to the attention of the judge.* [Emphasis added]

Instructions to juries are often as important in the trial of cases as the admission or exclusion of evidence. The doctrine of "plain error" which affects the substantial rights of a party should be applicable to instructions. The adoption of this doctrine rests in the Supreme Court.

By this opinion I do not declare that instruction No. 7 affected such substantial rights of plaintiff, that the Supreme Court would call into play its inherent power to prevent fundamental injustice making a virtue of necessity. *Gonzales v. Rivera,* 37 N.M. 562, 25 P.2d 802 (1933); *Saiz v. City of Albuquerque,* 82 N.M. 746, 487 P.2d 174 (Ct.App.1971) (Sutin, J., dissenting), majority opinion overruled, *Galvin v. City of Albuquerque,* 87 N.M. 235, 531 P.2d 1208 (1975).

B. *Plaintiff's requested instruction No. 2 should not be considered.*

Plaintiff's requested instruction No. 2 (1) was not one of the claimed acts of negligence which was a proximate cause of the collision as set forth in the court's instruction No. 1 submitted by plaintiff, and (2) was not a U.J.I. instruction. Only U.J.I. instructions shall be used "unless under the facts or circumstances of the particular case the published Uniform Jury Instruction is erroneous or otherwise improper . . . ." Section 21-1-1(51)(c), N.M.S.A.1953 (Repl.Vol. 4). The trial court can instruct on subject matter not covered by U.J.I., whenever the court determines that the jury should be instructed on that subject. Section 21-1-1(51)(c). The court properly refused the instruction.

Plaintiff's requested instruction No. 2 should not be considered.

C. *Modification of instruction containing "proper lookout" was not erroneous.*

Plaintiff properly objected to the modification of its requested instruction by which the trial court deleted the sentence:

> "The defendant was not keeping a proper lookout to avoid a collision at the intersection."

The collision did not occur "at the intersection." But this phrase does not deny plaintiff's claim of negligence by way of "proper lookout".

The majority opinion says: "The trial court correctly refused the plaintiffs' tendered instruction . . . due to lack of evidence to support it." A search of the record does not disclose this fact. It is silent on this matter. The trial court made no such finding.

Authorities cited by the majority opinion are not in point.

The majority opinion does not state that defendant failed to keep a proper lookout as a matter of law. See *Martinez v. City of Albuquerque,* 84 N.M. 189, 500 P.2d 1312 (Ct.App.1972); *May v. Baklini, supra.* In my opinion the defendant kept a proper lookout at all times pursuant to U.J.I. 9.3. The trial court did not err in the modification of plaintiff's requested instruction No. 3.

Furthermore, this matter was not preserved for review for the reasons set forth *supra.*

538 P.2d 1198

MARKHAM ADVERTISING COMPANY, Appellant,

v.

BUREAU OF REVENUE, State of New Mexico, Appellee.

No. 1756.

Court of Appeals of New Mexico.

June 4, 1975.

Certiorari Denied July 2, 1975.

L. Lamar Parrish, Calvin Hyer, Jr., Ussery, Burciaga & Parrish, Albuquerque, for appellant.

Toney Anaya, Atty. Gen., Santa Fe, Vernon O. Henning, Bureau of Revenue, Asst. Atty. Gen., for appellee.

OPINION

LOPEZ, Judge.

Taxpayer, Markham Advertising Company, appeals the decision and order of the Commissioner of Revenue assessing gross receipts tax and interest for outdoor advertising (billboard) services rendered in New Mexico. Section 72-16A-4, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1973). We affirm.

Taxpayer obtains its gross receipts by posting billboard messages for out-of-state advertisers on signs located within New Mexico. Only New Mexico billboards are involved in this case. The tax in dispute applies to receipts for posting wholly national advertising. Taxpayer claims that this tax is void either (1) because it violates Article I, § 8, Clause 3, of the United States Constitution (the Commerce Clause), or (2) because New Mexico violates the equal protection clause of the United States and New Mexico Constitutions by taxing this taxpayer, while exempting other media forms of advertisers, such as radio and television.

(1) *Multiple taxation*

Taxpayer raises two sub-issues under the Commerce Clause: (a) whether the tax imposed is an undue burden on interstate commerce, and (b) whether the tax is forbidden because of the possibility of multiple taxation.

The short answer to sub-point (a) is that no interstate activity is being taxed. The taxpayer would have us view his activity as a process (i. e. advertising), the end point of which is the posting of messages on billboards, and thus an exempted interstate activity. We see taxpayer's activity as a service taking place only within the taxing state. Taxpayer's billboards do not move; they are located in New Mexico. As the Supreme Court said in *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938):

> ". . . Nor is taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. . . ." 303 U.S. at 253, 58 S.Ct. at 547.

Taxpayer's service is simply to post messages on billboards located in this state. It is being taxed for displaying, not for advertising. This service is intrastate in character, and thus subject to the gross receipts tax. *New Mexico Newspapers, Inc. v. Bureau of Revenue,* 82 N.M. 436, 483 P.2d 317 (Ct.App.1971).

The answer to sub-point (b) follows in that no multiple taxation is possible where the taxable event (i. e., displaying) is not in interstate commerce. The activities of this taxpayer, situated and performing services as it is in New Mexico, are not within the taxing authority of any other state.

The instant tax could be declared invalid upon a showing by the taxpayer that multiple taxation would be likely to result and would be likely to unduly burden interstate commerce. Neither showing has been made. *Western Live Stock v. Bureau of Revenue, supra; New Mexico Newspapers, Inc. v. Bureau of Revenue, supra; Spillers v. Commissioner of Revenue,* 82 N.M. 41, 475 P.2d 41 (Ct.App.1970).

Hypothetical situations raised by the taxpayer (e. g., possible taxation of the foreign advertiser in its home state) do not deal with the reality that it is only taxpayer's activity which is being taxed by New Mexico. Therefore, no basis is demonstrated upon which a claim of potential multiple taxation *as to this taxpayer* can be found. See *General Motors Corp. v. Washington,* 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964).

Absent this possibility of multiple taxation, we find no violation of the Commerce Clause.

(2) *Equal protection*

Under this point, the taxpayer complains because it is taxed for displaying advertising, while other "displayers" are not. Gross receipts regulation 3(F):53 provides:

> "Receipts derived from contracts to place advertising on outdoor billboards located within the state of New Mexico are receipts from performing an advertising service in New Mexico. Such receipts are subject to Gross Receipts Tax, regardless of the location of the advertiser."

On the other hand, Bureau of Revenue Ruling No. 71–105–1 provides in part that:

> "Receipts of radio or television broadcasting company from broadcasting programs supplied by out-of-state national or regional networks may be deducted from gross receipts. . . . Section 72–16A–14.10, N.M.S.A.1953 (Supp. 1969)."

The effect of this ruling is obviously to exempt broadcasting advertisement displayers in New Mexico from the tax imposed upon the taxpayer in this case. We agree, then, with taxpayer's premise that there is discrimination in the treatment of these different media forms.

■ But the burden is upon the taxpayer to negative every conceivable basis which might support the discriminatory classification. *Michael J. Maloof & Co. v. Bureau of Revenue,* 80 N.M. 485, 458 P.2d 89 (1969). This principle lies in taxation, perhaps as in no other area of the law, because of the implied rational basis underlying every tax statute: that the state has the right, power and duty to raise the necessary funds for its public purposes. See § 72–16A–2, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1973).

■ An additional rational basis may be found to apply in this case. Taxpayer's activity of displaying messages takes place entirely within New Mexico. The billboard upon which the sign is posted lies entirely within the physical confines of the state. Broadcasters, on the other hand, generally engage in interstate transmission of their messages. While, in the larger western states, broadcasts by smaller stations *might* not always cross interstate lines, yet the potential exists for radio and television waves to deliver transitory, interstate communications. Unlike a billboard, a radio message moves, by its very nature. *Fisher's Blend Station, Inc., v. Tax Commission,* 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956 (1936). For this reason, national advertising by local broadcasting stations has long been held exempt from state taxation. *Albuquerque Broadcasting Co. v. Bureau of Revenue,* 51 N.M. 332, 184 P.2d 416 (1947).

We hold that the posting of a national message on a local billboard is an event taxable by the state and is not an undue burden on interstate commerce. We further hold that there is a rational basis for this state to discriminate between the broadcast industry and the outdoor advertising industry in the taxation of displays of these national messages. As the penalty has been abated in this case, the decision of the Commissioner as to tax and interest is now affirmed.

It is so ordered.

SUTIN and HERNANDEZ, JJ., concur.

538 P.2d 1201

STATE of New Mexico, Plaintiff-Appellee,

v.

Alonzo JARAMILLO, Defendant-Appellant.

No. 1694.

Court of Appeals of New Mexico.
July 23, 1975.

Bruce S. Garber, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Santa Fe, Louis Druxman, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant was convicted of unlawful possession of heroin in violation of § 54–11–23, N.M.S.A. 1953 (Repl.Vol. 8, pt. 2). He appeals. We affirm.

A. *Defendant had a fair trial.*

The State proved beyond a reasonable doubt that defendant was in unlawful possession of heroin found under the seat of his car.

Defendant contends that his conviction was not based on a clear and correct understanding of the facts; therefore, he was denied a fair trial.

A police officer testified that he found some caps of heroin in defendant's mouth which were tagged in, whereas the State later admitted out of the presence of the jury that the *tinfoil* found in defendant's mouth did not contain heroin. Defendant contends this conflict was not explained to the jury by the court or the district attorney. The defendant did not request that the State's admission be submitted to the jury. It was defendant's duty to request the admission and then explain to the jury in closing argument the conflict, if any, in the officer's testimony.

On this issue, the defendant had a fair trial. His conviction was based on a clear and correct understanding of the fact that heroin was found in defendant's car.

B. *Motion for psychiatric examination was properly denied.*

On March 12, 1974, defendant filed a motion for a psychiatric examination. On March 18, 1974, the motion was denied.

Defendant contends that defense counsel was prevented from making a thorough evaluation of a possible insanity defense at trial.

Rule 35(c) of the Rules of Criminal Procedure [§ 41–23–35(c), N.M.S.A.1953 (2d Repl.Vol. 6, 1973 Supp.)] provides:

> Upon motion of any defendant, and upon good cause shown, the court shall order a mental examination of the defendant before making any determination of competency under this rule. . .

The record is silent on any attempt of defendant to show good cause for a mental examination. The motion was properly denied.

C. *Section 54–11–23 did not violate defendant's constitutional rights.*

Defendant contends that § 54–11–23 violated his constitutional rights because he was a narcotic addict. There was no evidence that defendant was an addict. This point is without merit.

We affirm.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

538 P.2d 1202

DAIRYLAND INSURANCE COMPANY, INC., a Wisconsin Corporation, et al., Plaintiffs-Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF BERNALILLO, New Mexico, Defendants-Appellees.

No. 1684.

Court of Appeals of New Mexico.

July 9, 1975.

Certiorari Granted Aug. 11, 1975.

John S. Campbell, Aldridge, Baron, Pearlman & Campbell, P.A., Albuquerque, for plaintiffs-appellants.

James L. Brandenburg, Dist. Atty., Joe C. Diaz, Vance Mauney, Sp. Asst. Dist. Attys., Albuquerque, for defendants-appellees.

OPINION

HENDLEY, Judge.

Plaintiffs brought suit for personal injuries due to the alleged negligence of defendants in the maintenance of a county road. The specific allegation of negligence was that defendants allowed surface water flowing in an arroyo across the road to cut a deep channel in the road into which plaintiffs' car was driven causing the instant injuries. Upon defendants' motion for summary judgment based on the defense of sovereign immunity, such judgment was granted and plaintiffs appeal. We affirm.

The plaintiffs initially contend that the maintenance of roads is a corporate or proprietary function to which the doctrine of sovereign immunity does not apply. It is settled law, both in this jurisdiction and thoroughout the country, that the maintenance of a road by a county is a governmental and not a corporate function. *Murray v. County Commissioners*, 28 N.M. 309, 210 P. 1067 (1922); Annot., 2 A.L.R. 721 (1919); 39 Am.Jur.2d *Highways, Streets, and Bridges* § 345 (1968); 40 C.J.S. Highways § 250 (1944). As the function alleged to be negligently performed in this instance is governmental, the political subdivision herein sued is immune from liability beyond the extent of its insurance coverage. *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943); Sections 5-6-18 through 5-6-22, N.M.S.A.1953 (Repl.Vol. 2, pt. 1, 1974). It is not disputed that the County of Bernalillo does not carry liability insurance. The defense of sovereign immunity is thus applicable.

The plaintiffs nevertheless urge, in the alternative, that should this court adhere to precedent and authority and hold the maintenance of roads to be governmental, that the doctrine of sovereign immunity be abolished once and for all as being an "outmoded medievalism" or that the doctrine be declared unconstitutional as being in violation of the equal protection clauses of both the United States and New Mexico Constitutions.

In spite of the dicta apparently foreshadowing the abolition of the doctrine of sovereign immunity in some of our Supreme Court's recent cases, that Court has not yet so acted. See *Galvan v. City of Albuquerque*, 87 N.M. 235, 531 P.2d 1208 (1975)—"Historically, this court has persistently clung to that outmoded and archaic doctrine"; *State ex rel. New Mexico Water Quality Control Commission v. City of Hobbs*, 86 N.M. 444, 525 P.2d 371 (1974)—"We are thus not concerned with the outmoded medievalisms embedded in our jurisprudence in the form of judicially created sovereign immunity." That being the case, this court is bound by the precedents of the Supreme Court and we cannot overrule those precedents by the judicial fiat of declaring the doctrine of sovereign immunity abolished. "[I]t is not considered good form for a lower court to reverse a superior one." *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973).

However, the novel argument that the doctrine of sovereign immunity arbitrarily and unreasonably creates two classes of plaintiffs (one that can be made whole for negligently inflicted injuries and one that cannot) has never been presented to our Supreme Court. Thus, we have no New Mexico precedent to guide us on this issue. Yet, such a state of affairs should not raise the instant plaintiffs' hopes. They cite only one case in support of their argument—*Krause v. State*, 28 Ohio App.2d 1, 274 N.E.2d 321 (1971), decided by the Ohio Court of Appeals. This case was later reversed by the Ohio Supreme Court, *Krause v. State*, 31 Ohio St.2d 132, 285 N.E.2d 736 (1972), and appeal to the United States Supreme Court was dismissed for want of a substantial federal question. *Krause v. Ohio*, 409 U.S. 1052, 93 S.Ct. 557, 34 L.Ed.2d 506 (1972). Suffice it to say that we, as the Supreme Court of Ohio, feel that there are substantive differences justifying the special treatment of states and their political subdivisions when

carrying on their governmental functions. *Krause v. State, supra.*

Affirmed.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

538 P.2d 1204

AMERICAN GENERAL COMPANIES, a Maryland Corporation, Plaintiff-Appellee,

v.

Jose Sel JARAMILLO, Defendant-Appellant.

No. 1724.

Court of Appeals of New Mexico.

July 23, 1975.

James A. Branch, Jr., Branch & Branch, Albuquerque, for defendant-appellant.

Steve H. Mazer, Miller & Melton, Ltd., Albuquerque, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Plaintiff recovered judgment against the defendant in the sum of $5,350.80 and defendant appeals. We affirm.

Defendant did not challenge any of the findings of the trial court pursuant to Rule 9(m)(2) of Rules Governing Appeals [§ 21-12-9(m)(2), N.M.S.A.1953 (Int.Supp. 1974)]. "The trial court's findings are conclusive on appeal." *Springer Corporation v. American Leasing Company*, 80 N. M. 609, 610, 459 P.2d 135, 136 (1969).

The trial court found:

1. That Defendant was employed in the fiduciary capacity of salesman and collector by United Wholesale Liquor Company, Inc., in Bernalillo County, New Mexico, during the years 1966 through 1969.

2. That during the course of Defendant's fiduciary employment, Defendant did misappropriate and convert funds in the amount of $5,350.80 belonging to United Wholesale Liquor Company, Inc.

3. That Plaintiff, American General Companies, had entered into an agree-

ment whereby Plaintiff agreed to indemnify United Wholesale Liquor Company, Inc., for any and all losses caused by conversion or misappropriation of funds by an employee of United Wholesale Liquor Company, Inc.

4. That by reason of the conversion and misappropriation of funds of United Wholesale Liquor Company by Defendant while in the fiduciary capacity of salesman and collector during the years 1966 through 1969, Plaintiff became obligated to pay and did pay the sum of Five Thousand Three Hundred Fifty and 80/100 Dollars ($5,350.80) to United Wholesale Liquor Company, Inc.

5. That as a direct and proximate result of said conversion and misappropriation, by Defendant while engaged in the fiduciary capacity Plaintiff was damaged in the sum of Five Thousand Three Hundred Fifty and 80/100 Dollars ($5,350.80).

A. *United Wholesale was not an indispensable party.*

Defendant contends that United Wholesale Liquor Co., Inc. was an indispensable party. This is because United Wholesale submitted a claim in excess of $7,000.00 and was reimbursed for some $5,000.00. An indispensable party is one whose interests will necessarily be affected by the judgment so that complete and final justice cannot be done between the parties to the suit without affecting those rights. *C. de Baca v. Baca,* 73 N.M. 387, 388 P.2d 392 (1964).

Plaintiff indemnified and paid United Wholesale in "full settlement and satisfaction of all liability under bond on behalf of Jose Sel Jaramillo", the defendant. United Wholesale, having been paid in full, has no interest which can be affected by the judgment between the parties. Plaintiff is the real party in interest because plaintiff is the owner of the right sought to be enforced. *Sellman v. Haddock,* 62 N.M. 391, 310 P.2d 1045 (1957).

Complete relief can be accorded between the parties in the absence of United Wholesale because United Wholesale has no interest in the litigation.

Defendant relies on *Sellman v. Haddock.* This case is not in point. The parties are reversed. Plaintiff sued defendant for property damage resulting from a motor vehicle collision. Plaintiff's insurance carrier paid the garage for a part of the cost of repair of plaintiff's vehicle and authorized plaintiff to collect from the defendant. The insurer had an interest in the claim against defendant for damages done to plaintiff's car because it was entitled to the money to be recovered.

In the instant case, plaintiff, the insurer, upon payment of the entire claim of United Wholesale was "subrogated to all the insured's rights of recovery therefore against any person . . . ." Since all of United Wholesale's rights of recovery are in plaintiff, United Wholesale has no interest in the outcome of the litigation and is not an indispensable party. *State Farm Mut. Auto. Ins. Co. v. Foundation R. Ins. Co.,* 78 N.M. 359, 431 P.2d 737 (1967).

B. *Sufficiency of the evidence to sustain the court's findings of fact is not an issue.*

The defendant did not challenge the trial court's findings. "We need only determine if the trial court's conclusions and the judgment are correct, based upon the facts found." *Springer Corporation, supra.*

The trial court concluded, on the basis of the facts found, that plaintiff was entitled to judgment. We hold that the trial court's conclusion and the judgment are correct.

The sufficiency of the evidence to sustain the court's findings of fact is not an issue on this appeal.

Affirmed.

It is so ordered.

HENDLEY and HERNANDEZ, JJ., concur.

539 P.2d 204

STATE of New Mexico, Petitioner,

v.

Sammy T. DORSEY, Respondent.

No. 10361.

Supreme Court of New Mexico.
July 31, 1975.

Toney Anaya, Atty. Gen., Ralph W. Muxlow, II, Asst. Atty. Gen., Santa Fe, for petitioner.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Don Klein, Jr., Associate Appellate Defender, Santa Fe, for respondent.

OPINION

OMAN, Justice.

This case is before us upon a writ of certiorari directed to the New Mexico Court of Appeals, which reversed the judgment and sentence of the district court and remanded with instructions to grant defendant a new trial. *State v. Dorsey,* 87 N.M. 323, 532 P.2d 912 (Ct.App.1975). We affirm the decision of the Court of Appeals. However, we do so for slightly different reasons, and hereby overrule prior decisions of this Court and the Court of Appeals to the extent hereinafter stated.

The Court of Appeals had previously disagreed with our prior decisions concerning the admissibility into evidence of the results of polygraph tests. *State v. Alderete,* 86 N.M. 176, 521 P.2d 138 (Ct.App. 1974). The decisions of the Court of Appeals in Alderete were overruled by us, insofar as they departed from the earlier decisions of this Court announcing and affirming the requirements for the admissibility into evidence of polygraph tests. *State v. Lucero,* 86 N.M. 686, 526 P.2d 1091 (1974). As observed by the Court of Appeals in *State v. Dorsey, supra,* that court was bound by the Lucero decision. *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973).

The inadmissibility into evidence of polygraph tests over objection was first announced by us in *State v. Trimble,* 68 N.M. 406, 362 P.2d 788 (1961). Our rule of inadmissibility, except when the following requirements are met, was reaffirmed and reasserted as follows in *State v. Lucero, supra:*

"1. The tests were stipulated to by both parties to the case; 2. When no objec-

tion is offered at trial; 3. When the court has evidence of the qualifications of the polygraph operator to establish his expertise; 4. Testimony to establish the reliability of the testing procedure employed as approved by the authorities in the field; and 5. The validity of the tests made on the subject. * * *"

As pointed out by the Court of Appeals in *State v. Dorsey, supra,* the district court, in unchallenged findings of fact, held that requirements 3, 4 and 5 had been clearly satisfied. We add that the parties in fact so stipulated, and these findings and the decision of the Court of Appeals concerning them have not been challenged in these proceedings before us. Consequently, as did the Court of Appeals, we confine ourselves to a consideration of the validity of requirements 1 and 2. We agree that these two requirements are:

(1) Mechanistic in nature;

(2) Inconsistent with the concept of due process;

(3) Repugnant to the announced purpose and construction of the New Mexico Rules of Evidence [§§ 20–4–101 to 1102, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973)], that:

"These rules shall be construed to secure fairness in administration * * * and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined"; and

(4) Particularly incompatible with the purposes and scope of Rules 401, 402, 702 and 703 of the New Mexico Rules of Evidence [§§ 20–4–401, 402, 702 and 703, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973)].

Insofar as it requires a stipulation by the parties to a polygraph test or the absence of objection thereto at trial before the results of such a test may be received into evidence, our opinion in *State v. Lucero, supra,* is hereby overruled, as are all other opinions of this Court and Court of Appeals to this effect.

The reversal of the district court judgment and the remand of this cause for a new trial, as ordered by the Court of Appeals, should be affirmed. It is so ordered.

McMANUS, C. J., and STEPHENSON, MONTOYA and SOSA, JJ., concur.

539 P.2d 205

CITY OF ALBUQUERQUE, a Municipal Corporation, Plaintiff-Appellee,

v.

VILLAGE OF CORRALES and Barbara Christianson, Mayor of the Village of Corrales, Defendants-Appellants.

No. 10153.

Supreme Court of New Mexico.
Aug. 11, 1975.

R. Russell Rager, Albuquerque, for defendants-appellants.

Elizabeth N. Love, Asst. City Atty., Albuquerque, for plaintiff-appellee.

OPINION

OMAN, Justice.

This cause is before us on appeal from an interlocutory order entered pursuant to § 21–10–3, N.M.S.A.1953 (Repl. Vol. 4, Supp.1973). The interlocutory order denied defendant's motion to dismiss plaintiff's complaint on the ground of improper venue.

The City of Albuquerque brought suit in Bernalillo County, wherein the City lies, against the Village of Corrales and its mayor. The purpose of the suit was to secure a determination of the City's authority under §§ 14–19–5(A)(2), and 14–20–2(B), N.M.S.A.1953 (Repl. Vol. 3, 1968), over the subdivision, platting and zoning of lands lying within Bernalillo County within five miles of the City's boundary.

Corrales maintains all of its municipal offices in adjoining Sandoval County, and the territory it encompasses lies within that county, except for lands which it has annexed, or at least purportedly annexed, which lie in Bernalillo County and within five miles of Albuquerque's boundary. It is this annexation, or purported annexation, which gave rise to the institution of this declaratory suit by Albuquerque.

The sole question before us and which we decide is whether venue can properly be laid in Bernalillo County or in Sandoval County. The district court held that an "interest in lands" is the object of the suit, and, therefore, the venue is properly laid in Bernalillo County pursuant to § 21–5–1(D)(1), N.M.S.A.1953 (Repl. Vol. 4, 1970), which provides:

> "*21–5–1. County in which civil action in district court may be commenced.*—All civil actions commenced in the district courts shall be brought and shall be commenced in counties as follows, and not otherwise:
>
> "* * * * * *
>
> "D. (1) 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."

Corrales contends venue can properly be laid only in Sandoval County pursuant to § 21–5–2, N.M.S.A.1953 (Repl. Vol. 4, 1970), which provides:

> "*21–5–2. Actions against municipality or board of county commissioners.*—All civil actions not otherwise required by law to be brought in the district court of Santa Fe County, wherein any municipality or board of county commissioners is a party defendant, shall be instituted only in the district court of the county in which such municipality is located, or for which such board of county commissioners is acting."

A comparable venue question was raised and decided by this court in *State v. Board of County Commissioners*, 59 N.M. 9, 277 P.2d 960 (1954). The identical statutes were involved in that case, except at that time what is now § 21–5–2, *supra*, also included the following:

> "All acts and parts of acts in conflict herewith are hereby repealed in so far as the same are inconsistent with the provisions of this act."

In that case a complaint was filed by the Board of County Commissioners of Hard-

ing County in the district court of that county against the Board of County Commissioners of Quay County. The residents of a certain portion of Harding County sought to secede and have that portion of Harding County become a part of Quay County. An election was held, and the majority of the votes cast were in favor of secession and the annexation to Quay County of the Harding County territory involved. Harding County filed suit to have the election and the results thereof declared null and void. One of the questions raised by Quay County was that of venue. It contended the venue could properly be laid only in Quay County and not in Harding County. It contended that venue was controlled by the predecessor of § 21–5–2, *supra*. Harding County relied upon § 21–5–1(D)(1), *supra*, just as Albuquerque does in the present suit. It claimed that it had an interest in the lands in question by reason of its ownership of the roads and bridges located thereon.

After observing that none of the authorities relied upon by Harding County were concerned with a statute such as § 21–5–2, *supra*, we stated:

> "In addition, we do not think the interest in land involved here [land included within the territorial limits of Harding County and upon which were located roads and bridges owned by that county] is of the kind contemplated by the fourth paragraph of § 19–501, *supra* [§ 21–5–1(D)(1), *supra*]."

We are still of the opinion that, under the statutes involved the venue should have been laid in Quay County. The repealing provision then included in § 21–5–2, *supra*, was of no significance. We are also of the opinion that the subdivision, platting and zoning authority of Albuquerque over the land in question in the present suit is no more an interest in land within the contemplation of § 21–5–1(D)(1), *supra*, than was the interest of Harding County in the lands involved in that prior suit by reason of its ownership and maintenance of roads and bridges thereon.

The interlocutory order of the district court is reversed and this cause is remanded with directions to enter an order sustaining the motion to dismiss on the grounds of improper venue.

It is so ordered.

STEPHENSON and MONTOYA, JJ., concur.

539 P.2d 207

STATE of New Mexico, Plaintiff-Appellee,

v.

Donald Ray ELLIOTT, Defendant-Appellant.

No. 1682.

Court of Appeals of New Mexico.
July 9, 1975.
Certiorari Granted Aug. 11, 1975.

Chester H. Walter, Chief Public Defender, Bruce L. Herr, Appellate Defender, Robert R. Rothstein, Asst. App. Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Morton A. Resnick, Bill Primm, Asst. Attys. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

Defendant was convicted of sodomy, § 40A–9–6, and burglary, § 40A–16–3, N.M.S.A.1953 (2nd Repl. Vol. 6, 1972). He appeals. We reverse.

A. *The sodomy statute is unconstitutional.*

In *State v. Trejo,* 83 N.M. 511, 494 P.2d 173 (Ct.App.1972) (Sutin, J., dissenting), and *State v. Armstrong,* 85 N.M. 234, 511 P.2d 560 (Ct.App.1973) (Sutin, J., dissenting), I stated my view that the sodomy statute, § 40A–9–6, is unconstitutional and void. Today, the majority of the Court so holds.

This statute reads:

> 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.

The sodomy statute is unconstitutional because the statutory language provides that consenting adults who commit the acts described therein are guilty of a crime. We hold that (1) this appeal provides a proper forum for this Court to decide this issue. (2) With respect to married persons, the statute violates the right of marital privacy guaranteed by the First and Ninth Amendments to the United States Constitution. (3) The Equal Protection Clause of the Fourteenth Amendment to the Constitution requires that the statute apply equally to married and unmarried persons. (4) The statute unconstitutionally invades the privacy of the home. (5) The police power of the state does not extend to sodomitic acts between consenting adults.

(1) *This appeal provides a proper forum for this Court to decide the issue of the constitutionality of the sodomy statute.*

(a) *Mutual Consent*

The record is ambiguous on the issue of mutual consent.

The defendant was charged with rape and sodomy. He was acquitted of rape and convicted of sodomy. The rape statute, § 40A–9–2, provides that the act be committed *without the victim's consent.* The sodomy statute does not.

The prosecutrix testified that the alleged acts of sodomy and rape all took place in her bedroom on the same evening, in rapid succession. The jury's contrary verdicts as to rape and sodomy indicate that the jurors believed the acts did take place, but that they took place with the consent of the prosecutrix. *Such consent would lead to a not guilty verdict, as to rape; however, it would lead to a guilty verdict as to sodomy.*

The prosecutrix's testimony indicates that she consented to these acts. She believed the defendant was holding a knife; but she never saw the knife. She did not scream when he made advances to her. She did not try to fight him off, although she argued with him. The defendant had been at her house earlier that evening and night, for a party. She had driven with him to take some people home from the party. During her marriage, she had had intercourse with two men other than her husband and the defendant, one of them within a few days of the alleged crimes. She had once before been involved in similar charges (statutory rape) against another man.

From the prosecutrix's testimony and the jury's contrary verdicts as to rape and sodomy, the most reasonable inference is that the jury found the alleged sodomitic acts to have taken place with the consent of the prosecutrix. Therefore, defendant's appeal allows this Court to decide whether the sodomy statute invades the constitutional rights of consenting adults.

(b) *Lack of Mutual Consent*

Even if the prosecutrix did not consent to the alleged sodomitic acts, this appeal nonetheless provides a proper forum for this Court to decide whether the sodomy statute invades the constitutional rights of consenting adults.

In *State v. Armstrong, supra,* this Court held that the constitutionality of § 40A–9–6 could not be decided unless the parties involved are consenting adults. Today we overrule that holding. We hold that an appeal of a conviction under § 40A–9–6 allows this Court to decide the constitutionality of that section on its face, regardless of the presence or absence of consent to the allegedly unlawful acts.

This Court has the power to decide the constitutionality of the sodomy statute on its face without reference to the particular conduct of the litigant whose prosecution calls the statute's validity to the Court's attention. *Coates v. Cincinnati,* 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971); *Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

■ Our power to so rule is clear when the statute violates a First Amendment or other "fundamental right." *United States v. Doe,* 12 Cr.L. 2531 (D.C.Super.Ct.1973). The right to marital privacy and the right to privacy of the home which, we hold today, are violated by § 40A–9–6, are fundamental rights.

■ *The right to marital privacy* is a fundamental right, protected by the First and Ninth Amendments. *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Opinion of the Court; Opinion of Goldberg, J., concurring). Since *Griswold,* the Supreme Court has held that the right to marital privacy, with respect to procreation, sexual practices and family relations, is guaranteed by the Fourth, Fifth, and Fourteenth Amendments, in addition to the First and Ninth Amendments. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). It is a right that is " 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937)." *Roe v. Wade, supra,* 410 U.S. at 152, 93 S.Ct. at 726, 35 L.Ed.2d at 176.

■ *The right to privacy of the home* is, likewise, a fundamental right. *Poe v. Ullman,* 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1969) (Harlan, J., dissenting); *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 93 S.Ct.

2628, 37 L.Ed.2d 446 (1973); *Ravin v. State*, 537 P.2d 494 (Alaska, 1975).

Further authority is provided by analogy to the rule on standing to challenge a statute's constitutionality. That rule is: A defendant cannot attack the statute on the ground that it may be unconstitutional as applied to third parties, if it is constitutional as applied to himself. *United States v. Raines,* 362 U.S. 17, 80 S. Ct. 519, 4 L.Ed.2d 524 (1960). This is a judicial *rule of practice*, which, although weighty, is not inviolable, as are *principles ordained by the Constitution.* Weighty countervailing policies give rise to exceptions to such rules of practice. There are four exceptions to the rule of judicial self-restraint in addressing the question of a statute's constitutionality. One of those exceptions arises in a case in which *the litigation would impair the constitutional rights of one not a party to the action, who has no effective way himself to preserve those rights. Id.*

By analogy to the above exception, this Court has the power to decide, absent consent, the issue involved, if consenting adults have no effective way to prevent infringement of their rights by the sodomy statute.

There is no record in New Mexico of the prosecution of openly consenting adults under the sodomy statute. Because consenting adults are not, in practice, subject to prosecution for sodomy, they are denied a forum in which to assert their own rights. *Griswold, supra*; *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L. Ed.2d 349 (1972).

The fact that consenting adults in New Mexico have not, in practice, been subject to prosecution for sodomy does not demonstrate that their rights are not violated by the sodomy statute. The threat of prosecution remains.

> In the face of a rigid and narrow statute . . . no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion. *Roe v. Wade, supra,* 410 U.S. at 208, 93 S.Ct. at 755, 35 L. Ed.2d at 185 (Burger, C. J., concurring) (1973).

See, also, *Poe v. Ullman, supra* (Douglas J., dissenting). Furthermore, many citizens obey criminal statutes despite the prospect of lax enforcement. *United States v. Doe, supra.*

Since attack by consenting adults against infringement of their constitutional rights is impractical and unlikely, this Court can decide the constitutional question by analogy to the *Raines* exception to the rule of practice on standing to challenge a statute's constitutionality.

We conclude that this appeal provides a proper forum to decide whether the sodomy statute, on its face, invades the constitutional rights of consenting adults for any of the following alternative reasons: (1) This case involves consenting adults. (If this case does not involve consenting adults, reasons (2) to (4) apply.) (2) This Court has the power to decide the constitutionality of a statute on its face without regard to the conduct of the litigants. (3) The fundamental constitutional rights involved give this Court the power to rule upon the constitutionality of the statute. (4) A defendant can assert the rights of consenting adults who are unable to assert their own rights, even if the defendant is not a member of that group.

Our Brother Hendley believes that this Court should not decide the constitutionality of § 40A–9–6 when that issue was not raised or briefed by the litigants on appeal. In his dissent, he cites *Huey v. Lente,* 85 N.M. 597, 514 P.2d 1093 (1973). That case, however, does not support his position.

Huey holds: (1) Where *the same holding can be reached* either by declaring a statute unconstitutional or by upholding the statute, the court's decision should uphold the statute; and (2) where a statute is susceptible to two constructions, one upholding it and the other declaring it void on

constitutional grounds, the court should uphold the statute.

However, in the case at bar, we are not confronted with the *Huey* holding. We have found no grounds on which to overturn defendant's sodomy conviction, apart from constitutional grounds; nor does the dissent suggest any. We are unable to read the statute in any way that would exclude the conduct of consenting adults to preserve the statute's constitutionality. Nor does the dissent suggest a reading to preserve its constitutionality. The *Huey* holdings are, therefore, inapplicable to the instant case.

Judge Hendley objects, in principle, to the policy of deciding an issue *sua sponte,* on appeal, without briefing on that issue by the litigants. Most courts, however, do not balk to *sua sponte* resolution of important legal questions.

Two notable examples are: *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), in which the Supreme Court overruled a long-standing rule when it held that the substantive law of the state of trial must be applied in diversity cases; and *Kilberg v. Northeast Airlines, Inc.,* 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961), in which the Court of Appeals of New York announced that New York would no longer follow the law-of-the-place-of-the-tort rule in conflicts of law cases. In each case, the dissent emphasized that the question decided by the majority had not been placed before the court by the litigants. Nonetheless, a strong majority in both cases rejected that as a reason not to decide the question.

Judge Albert Tate, Jr., of the Louisiana Court of Appeals, later on the Supreme Court, has suggested that courts will decide an issue *sua sponte* for reasons of law-development and judicial administration. If the majority of the members of a court believe a rule to be the correct one, it makes little sense not to enunciate that rule so as to perpetuate an incorrect rule, only because the litigants failed to see the issue. Courts often have more interest in making correct rules of law. They have more opportunity to properly research the issues than appellate lawyers who are pressed by demands on time and work efforts of their law practices. See A. Tate, Jr., Sua Sponte Consideration on Appeal, 9 Trial Lawyers Jour. 68 (1970).

The dissent seems to say that our bone of contention lies in *defendant's standing to raise* the constitutional question. However, standing is not involved here, and is referred to in this opinion only by analogy, because defendant never did raise the question. Rather, the authorities cited make this appeal a proper forum in which to decide whether the sodomy statute is unconstitutional on its face, regardless of the astuteness of defendant's lawyers in seeing the issue.

We follow Justice Parker in holding that the question of the statute's constitutionality determines whether or not this defendant has committed a crime.

> . . . [T]he question of the constitutionality of the act involved determines whether a crime has been committed. If the law is void, no crime has been committed and none can be committed under it . . . .

State v. Diamond, 27 N.M. 477, 488, 202 P. 988, 993, 20 A.L.R. 1527, 1535 (1921).

(2) *Section* 40A–9–6, *on its face, invades the constitutionally-protected right to marital privacy.*

Legislative prohibitions in this country against sodomy arose from the eighteenth century belief that any sexual act not leading to procreation was sinful. *United States v. Brewer,* 363 F.Supp. 606 (M.D. Pa.1973). This belief had roots in the Judeo-Christian heritage, which treated sodomitic acts as an "abomination".

> Thou shalt not lie with mankind, as with womankind; it is abomination. And thou shalt not lie with any beast to defile thyself therewith; neither shall any woman stand before a beast, to lie down

thereto; it is perversion. Leviticus 18:22–23. See, also, Genesis 19:5–8.

On the cultural and historical roots of anti-sodomy legislation, see the citations in the Appendix to the dissent in *State v. Trejo, supra.*

Today, however, in contradistinction to the rationale behind legislation by which the state regulates sexual conduct, our law recognizes a constitutionally-protected right to marital privacy. This right lies within the zone of privacy created by constitutional guarantees in the First, Fourth and Fifth Amendments. *Griswold, supra.* The right to marital privacy is protected by the Ninth Amendment. Id. (Goldberg, J., concurring). It is a right that is "implicit in the concept of ordered liberty". *United States v. Doe, supra; Roe v. Wade, supra.* See, also, *United States v. Orito,* 413 U.S. 139, 142, 93 S.Ct. 2674, 37 L.Ed. 2d 513, 517 (1973).

Section 40A–9–6 regulates the sexual relations of a married couple. In so doing, it invades the constitutionally-protected right of marital privacy. In accord are: *Cotner v. Henry,* 394 F.2d 873 (7th Cir. 1968); *United States v. Brewer, supra; Buchanan v. Batchelor,* 308 F.Supp. 729 (N.D.Tex.1970), vacated on other grounds *sub nom*; *Commonwealth v. Balthazar,* 318 N.E.2d 478 (Mass.1974); *State v. Lair,* 62 N.J. 388, 301 A.2d 748 (1972). *Contra, People v. Baldwin,* 37 Cal.App.3d 385, 112 Cal.Rptr. 290 (Ct.App. 4th Dist. 1974); *State v. Temple,* 192 Neb. 442, 222 N.W.2d 356 (1974).

> The import of the *Griswold* decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty. *Cotner v. Henry, supra,* 394 F.2d at 875.

(3) *The Fourteenth Amendment extends constitutional protection from governmental interference with their sexual relations to unmarried, consenting adults.*

Constitutional protection from governmental interference with sexual relations of married couples must extend also to unmarried, consenting adults. To allow the Legislature to regulate sexual practices between *unmarried* consenting adults, but not between *married* persons, would be to deny equal protection of the laws to the former, contrary to the Fourteenth Amendment. *Eisenstadt v. Baird, supra; People v. Johnson,* 77 Misc.2d 889, 355 N.Y.S.2d 266 (City Ct., Buffalo, 1974). In accord are: *Balthazar, supra; Brewer, supra.* Contra are: *Lair, supra; Baldwin, supra.*

> The question is . . . whether there is any logical basis on which the status of marriage between the participants should make the difference between right and wrong in the engaging in one mode of sexual intercourse rather than another. This Court believes there is no such logical basis, for the simple reason that all the arguments that have ever pertained to the prohibition of "deviate" forms of intercourse prohibited by [the New York statute] have pertained irrespective of the marital status of the participants. The subject statute would make criminals of some citizens, but not others, on the basis of an unsupportable distinction and would constitutionally wrongfully deny to the former the equal protection of the law. *People v. Johnson, supra,* 355 N.Y.S.2d at 267.

In *Eisenstadt, supra,* the Supreme Court stated:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. [Emphasis by the Court]. 405 U.S. at 453, 92 S.Ct. at 1038, 31 L.Ed.2d at 362.

(4) *Section 40A–9–6 unconstitutionally invades the privacy of the home.*

The reach of the sodomy statute to the sexual conduct of consenting adults makes it unconstitutional on yet another ground. The statutory language makes no distinction as to *place*. Sodomitic acts committed both in public and in private may constitute the crime. Accordingly, the sodomy statute regulates the sexual conduct of consenting adults *in the home,* where sexual activity is centered in our society. In reaching into the home, the statute invades a constitutionally-protected zone of privacy—the privacy of the home.

> [T]hroughout the English-speaking world . . . a most fundamental aspect of "liberty," [is] the privacy of the home . . . . *Poe v. Ullman, supra* (Harlan, J., dissenting), 367 U.S. at 548, 81 S.Ct. at 1780, 6 L.Ed.2d at 1022.

> If there is any area of human activity to which a right to privacy pertains more than any other, it is the home. The importance of the home has been amply demonstrated in constitutional law. *Ravin v. State, supra,* 537 P.2d at 503.

For recent statements by the United States Supreme Court that affirm the protection afforded by the Constitution to activities conducted within the home, see: *Griswold, supra*; *Stanley v. Georgia, supra*; *Paris Adult Theatre I, supra*; *United States v. Orito, supra.*

(5) *The power to prohibit sodomitic conduct between consenting adults does not fall within the police power of the State.*

The fatal flaw in the sodomy statute is that it invades constitutionally-protected areas. When it reaches this far, it cannot be validated simply by a showing that it accomplishes a purpose that is within the police power of the State.

> Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama,* 377 U.S. 288, 307, 84 S.Ct. 1302, 12 L.Ed.2d 325, 338.

Griswold, supra, 381 U.S. at 485, 85 S.Ct. at 1682, 14 L.Ed.2d at 515–16.

> In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. Little Rock,* 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed.2d 480, 486.

Griswold, supra (Goldberg, J., concurring), 381 U.S. at 497, 85 S.Ct. at 1688, 14 L.Ed. 2d at 523. See also, *Buchanan, supra.*

We have found nothing in judicial opinions dealing with sodomy statutes which suggests that a compelling necessity to regulate sexual conduct between consenting adults overcomes this statute's violation of constitutionally-protected rights. See, W. Barnett, Sexual Freedom And The Constitution (1973), for the most effective attack on the rationale behind sodomy statutes and other types of oppressive legislation dealing with sexual conduct.

Furthermore, we agree with Chief Justice Rabinowitz, of the Supreme Court of Alaska, that the cases support the "general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free society." *Ravin v. State, supra,* 537 P.2d at 509. The sections of the Criminal Code of New Mexico that regulate sexual conduct other than sodomy [§§ 40A–9–1 to 40A–9–

19, N.M.S.A.1953 (2d Repl. Vol. 6)] can all be validated under *this* general proposition. The sodomy statute, reaching consensual acts between adults and conducted within the home, cannot be so validated.

(6) *Holding as to § 40A–9–6*

We hold that the New Mexico sodomy statute, § 40A–9–6, is unconstitutional on its face. Appellant's conviction under § 40A–9–6 is void.

(7) *The New Sodomy Statute*

In the last legislative session, the New Mexico Legislature repealed § 40A–9–6, and enacted in its place a statute that restricts the State's regulation of sodomitic conduct to that accompanied by force or coercion. New Mexico Laws, 1975, ch. 109 (32nd Legislature, 1st Session). The new law overcomes the constitutional flaws of § 40A–9–6.

B. *The evidence is insufficient to sustain the charge of burglary.*

Burglary of a dwelling house is defined by § 40A–16–3(A) as the entry into a home without authorization and with intent to commit any felony or theft therein.

The question to decide is whether defendant entered the home of the prosecutrix without authorization and with intent to commit rape.

The uncontradicted testimony of the prosecutrix absolves the defendant. She testified that she held a drink and dance party at her house from midnight until 4:30 a. m., to which affair defendant was invited. Defendant first came around midnight, and then left, returning at 2:00 a. m. He then left again, this time with the prosecutrix, to get cokes. He returned and stayed until 4:30 a. m. and left once more to take the party guests home.

The prosecutrix latched the door and went to bed. She had barely dozed off when she awoke to hear a car pulling into the driveway. She heard someone knock at the door two or three times and then heard a hard banging on the door. She looked out of the bedroom door and saw the defendant "standing right inside the livingroom." She demanded that he leave, but he said that the co-hostess "had sent him back over there and told him we were going to have another party and he wanted to party some more." He was drunk. They stood at the door and talked. They then sat down and talked some more, and after some period of time the claimed acts of sodomy and rape occurred.

(1) *Authorization*

The prosecutrix failed to testify that defendant did not have permission to enter her house. The State failed to establish that defendant's entry was unauthorized. *State v. Slade,* 78 N.M. 581, 434 P. 2d 700 (Ct.App.1967). See, *State v. Garcia,* 80 N.M. 247, 453 P.2d 767 (Ct.App. 1969).

(2) *Specific Intent*

"[A] specific intent to commit a felony . . . is an essential element of the state's case to be proved beyond a reasonable doubt. The gravamen of the offense of burglary is the intent with which the [home] is entered." *State v. Ortega,* 79 N.M. 707, 708, 448 P.2d 813, 814 (Ct.App.1968). This specific intent must exist and may be measured at the time of the claimed unauthorized entry into the home of the prosecutrix. *People v. McCombs,* 94 Ill.App.2d 308, 236 N.E.2d 569 (1968). "If the intent relied upon by the state was formed after the entry, the crime of burglary is not shown." *Conrad v. State,* 154 Tex.Cr.R. 624, 230 S.W.2d 225, 226 (1950).

When we speak of specific intent to commit rape, we mean specific intent to have sexual intercourse, without the female's consent, which intent exists at the time that the defendant enters the home. Such intent must be proved by evidence or inference reasonably deducible therefrom. See *People v. Tidmore,* 218 Cal.App.2d 716, 32 Cal.Rptr. 444 (1963). *Taylor v. Commonwealth,* 207 Va. 326, 150 S.E.2d 135 (1966). No such evidence appears in the record.

Defendant was acquitted of rape. The prosecutrix testified that she engaged in sexual intercourse with him. That testimony, along with defendant's acquittal strongly suggests that the jury found that sexual intercourse took place with the consent of the prosecutrix and that he did not enter her home with intent to commit rape. In *People v. McCombs, supra,* the court said:

> . . . [I]f a review of the evidence and a consideration of the entire record leaves us with a grave and serious doubt of the guilt of the accused, it is our duty to reverse the judgment. [Citations omitted]. The record before us does little more than raise a suspicion of the defendant's guilt, and the judgment of conviction cannot be allowed to stand. 236 N.E.2d at 571.

See also, *Easton v. State,* 248 Ind. 338, 228 N.E.2d 6 (1967); *Reed v. State,* 7 Md. App. 200, 253 A.2d 774 (1969); *State v. Rood,* 11 Ariz.App. 102, 462 P.2d 399 (Ct. App. 1969); *Hutton v. People,* 177 Colo. 448, 494 P.2d 822 (1972).

The convictions are reversed and defendant is discharged.

It is so ordered.

LOPEZ, J., concurs in the results only.

HENDLEY, J., dissents.

HENDLEY, Judge (dissenting).

I dissent. I do not feel that this is a proper case in which to adjudicate the constitutionality of the sodomy statute, § 40A-9-6, N.M.S.A.1953 (2d Repl. Vol. 6 1972).

First, neither trial counsel or appellate counsel raised the constitutionality of the statute. This is a *sua sponte* action by the majority. It is, at best, a blatant abuse of judicial power. If for no other reason my dissent would stand upon this ground alone. *Huey v. Lente,* 85 N.M. 597, 514 P.2d 1093 (1973). To decide so serious an issue, without benefit of briefing by the parties makes light of the adversary system —the very foundation of our form of jurisprudence.

Second, even had the defendant requested standing to raise the issue of the constitutionality of the statute (which he did not), time-honored principles of law would mandate the result that defendant has no such standing. The majority assign four reasons for giving defendant such standing: (1) the case involves consenting adults, (2) consenting adults are unable to assert their own rights, (3) the statute is unconstitutional on its face, and (4) fundamental rights are involved.

(1) The case does not involve consenting adults. The record is not ambiguous on the issue of mutual consent. The prosecutrix testified that the defendant *forced* her, under threat of injury and against her will, to perform three acts of oral sodomy and one act of anal sodomy. The fact that the jury acquitted the defendant of the rape charge did not mean that the jury found that the prosecutrix consented to the sodomy. The jury may have thought that she was willing to perform normal sexual intercourse but not deviant sexual intercourse. The jury may have thought that the punishment for five third degree felonies would be sufficient without adding the punishment for a second degree felony. The jury is only answerable to its own conscience. It is settled law in this jurisdiction that appellate courts will not speculate and look behind jury verdicts in criminal cases. *State v. Leyba,* 80 N.M. 190, 453 P.2d 211 (Ct.App.1969). Yet this is exactly what the majority has done. By this magic but forbidden formula they have given the defendant standing under the first assigned reason.

(2) The exception to the standing rule whereby persons who admittedly have standing are unable to assert their rights is inapplicable to the case at bar. The reason for its inapplicability is that the exception is a qualified one. It has been consistently held that the person asserting the rights of others must have some relationship to

those others. In *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) and *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), the persons held to have standing stood in a professional or helping relationship to those unable to assert their rights. Moreover, in *Eisenstadt,* the parties whose rights were being asserted were not subject to criminal liability at all. In *United States v. Doe,* 12 Cr.L. 2531 (D.C.Sup.Ct. 1973), the persons asserting the rights of others had at least some common traits with them. There consenting adults were asserting the rights of other consenting adults. The same cannot be said here. My Brothers Sutin and Lopez may, by their opinion, have allowed one who has forcibly sodomized a child to assert the rights of consenting married adults. No relationship between defendant and those whose rights he is asserting having been shown of record, I would hold defendant ineligible to raise the issue of the statute's unconstitutionality on behalf of the world-at-large due to the majority's second assigned reason.

(3) and (4) The exceptions to the standing rule involving facial unconstitutionality and fundamental rights are not entirely separate. Both the majority opinion and *United States v. Doe, supra,* upon which the majority rely, are grounded in the cases of *Coates v. Cincinnati,* 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) and *Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). Historically, the procedure of declaring a statute unconstitutional without regard to the conduct of the individual litigant has been reserved for those special instances where the allegation of unconstitutionality consists of a due process claim of vagueness in combination with a violation of the First Amendment right of free speech or assembly, (see *Coates v. Cincinnati, supra; Baggett v. Bullitt, supra*), or perhaps where the statute in question has already been declared unconstitutional in the vast majority of its applications. See *United States v. Raines,* 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed. 2d 524 (1960). The statute herein declared unconstitutional is scrupulously specific in its language and has nothing whatsoever to do with freedom of expression. Compare *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975); *Wainwright v. Stone,* 414 U.S. 21, 94 S.Ct. 190, 38 L. Ed.2d 179 (1973). Further, it would be constitutional in the vast majority of its applications and the authorities cited in the majority opinion have only held similar statutes unconstitutional as applied to the single class of consenting, married adults committing the forbidden acts in private. Thus, these exceptions to the standing rule would be inapplicable.

Thirdly, the stretching of the instant case to a discussion of the right to marital privacy is a distortion of the first order.

To my mind, what we have here is a case where defendant was convicted of four counts of sodomy and one count of burglary. He appealed. His counsel very ably alleged points for reversal, which, in my opinion, would have resulted in a reversal and discharge on the burglary count (although for different reasons than those stated in the majority opinion) and a reversal and remand on at least three of the four sodomy counts due to inadequacies in the information. What the majority has done is wholly unnecessarily pulled an issue out of thin air and without even giving the state an opportunity to respond to it, decided the constitutionality of a statute whose constitutionality has never in this litigation been called into question. It has always been the policy of the courts to avoid, if possible, constitutional issues. *Huey v. Lente, supra.* Under principle and authority defendant has no standing to assert the issue of constitutionality in any event.

I dissent.

539 P.2d 218

Alvino S. CHACON, Petitioner-Appellant,

v.

STATE of New Mexico, Respondent-Appellee.

No. 1957.

Court of Appeals of New Mexico.

July 30, 1975.

James R. Beam, Albuquerque, for petitioner-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

WOOD, Chief Judge.

Prior to trial defendant requested disclosure of papers and documents within the possession of the State "which are material to the preparation of the defense . . .." Rule of Criminal Procedure 27(a)(5). The trial court ordered disclosure. The State failed to disclose a supplemental police report and the statement of a witness. Defendant learned of the nondisclosure subsequent to his conviction for burglary. Section 40A–16–3, N.M.S.A.1953 (2d Repl.Vol. 6). He moved for post-conviction relief because of the nondisclosure. The motion was denied; defendant appeals. Where the violation of Rule of Criminal Procedure 27(a)(5) is not discovered until after trial, what standards are to be applied in determining whether defendant is entitled to a new trial because of the nondisclosure?

The rules of criminal procedure do not provide the answer to this fact situation. The rule most nearly applicable is Rule 30, but it applies to disclosure violations discovered prior to or during trial.

The trial court stated two reasons for denying post-conviction relief: (1) there was no deliberate suppression of evidence and no knowing failure to disclose, and

(2) the nondisclosed documents do not favor the defendant. Both reasons are inaccurate statements of the applicable standards.

The nondisclosed documents were in the possession of the district attorney's office, but had been placed in the wrong file. The nondisclosure was inadvertent. No different standard applies because the nondisclosure is negligent rather than deliberate. *Trimble v. State,* 75 N.M. 183, 402 P.2d 162 (1965); compare *State v. Hogervorst,* 87 N.M. 458, 535 P.2d 1084 (Ct.App.1975).

One standard is that the nondisclosed items must be material. Material to what? In discussing suppressed evidence in terms of constitutional due process, *State v. Morris,* 69 N.M. 244, 365 P.2d 668 (1961) refers to evidence "material to the guilt or innocence of the accused, or to the penalty to be imposed." *Trimble v. State, supra,* does not approve a lesser standard because *Trimble* states: "Nothing which follows . . . conflicts with our holding in *State v. Morris, supra.*"

Rule of Criminal Procedure 27(a)(5) is worded differently than the due process standard. The rule concerns items which are material to the preparation of the defense. It is unnecessary to decide whether "material to the preparation of the defense" has a meaning greater in scope than "material to the guilt or innocence of the accused". The rule could not validly diminish the constitutional standard. The constitutional standard is a part of the standard set forth in the rule. Specifically, "material to the preparation of the defense" has as a minimal meaning "material to the guilt or innocence of the accused". We need not go beyond this minimal meaning to decide this case.

The undisclosed witness statement was that of Mrs. Gayton. She observed the truck and its occupants, including defendant, prior to the unauthorized entry into the store. Her statement tended to corroborate defense witnesses as to how entry was obtained. Her statement tended to contradict the testimony of police witnesses, both in the case-in-chief and in rebuttal, as to the method of entry. Her statement was clearly material to that issue.

The undisclosed supplemental police report was by Detective Prestwood. Defendant asserts that if the supplemental report had been disclosed he would have known of another eyewitness—Mr. Gayton. We do not consider this argument further because the supplemental report does not refer to Mr. Gayton or to Detective Prestwood's interview of Mr. Gayton. Instead we consider whether the contents of the report itself was material. "Writer *observed* where force was used to gain entry to place of business . . . glass was inside of place of business and door appeared to have been damaged when truck . . . was used to break the door." (Our emphasis.) This statement also tends to corroborate defense witnesses and to contradict the testimony of police witnesses that entry was by use of a pry bar.

Mrs. Gayton's statement and Detective Prestwood's report were material to the method of entry. These items were material to the preparation of the defense because material to defendant's guilt or innocence.

In applying the constitutional standard in *Trimble v. State, supra,* and *State v. Morris, supra,* those cases discuss whether the defendant was prejudiced. Our understanding of those decisions is that prejudice is a standard separate from the standard of materialness; specifically, even if the undisclosed item was material, there would be no reversal unless defendant had been prejudiced. Consistent with this view, *State v. Quintana,* 86 N.M. 666, 526 P.2d 808 (Ct.App.1974) considered whether a party had been prejudiced by nondisclosure. Compare *State v. Billington,* 86 N.M. 44, 519 P.2d 140 (Ct.App. 1974). We hold that prejudice is an applicable standard, that nondisclosure of items

material to the preparation of the defense is not reversible error in the absence of prejudice.

Was defendant prejudiced? The defense at trial was that, when entering the store, defendant did not have the intent necessary for burglary. Evidence in support of this defense was introduced at trial. This evidence included testimony of defendant's heavy drinking, of defendant suffering from alcoholic amnesia, of defendant's conduct when apprehended at the scene, and of the method of entry into the store. This evidence came from members of defendant's family and friends, and from an examining physician. This evidence was contradicted by police witnesses. The nondisclosed information would have provided the defense with two witnesses—a detective and Mrs. Gayton—who tended to corroborate the defense and tended to contradict police witnesses concerning the method of entry. The method of entry was relevant to defendant's intent upon entry. Compare *State v. Mata,* 86 N.M. 548, 525 P.2d 908 (Ct.App.1974).

The nondisclosure had the effect of depriving defendant of two independent witnesses. Because the witnesses were independent—that is, not connected with defendant or his family—this deprivation was prejudicial.

Oral argument is unnecessary. The order denying post-conviction relief is reversed. The cause is remanded with instructions to set aside the judgment and sentence and grant defendant a new trial.

It is so ordered.

HENDLEY, J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

A. *Rule 93 relief was erroneously denied.*

Defendant filed a motion for Rule 93 relief, § 21-1-1(93), N.M.S.A.1953 (Repl. Vol. 4). Defendant requested the court to direct the State to disclose any documents in its possession or control material to the defense. A hearing was held. It disclosed a written statement by Mary Gayton and a supplementary report by a detective in the Sheriff's department. The trial court entered an order "that the Defendant's motion is denied." In its comments after the hearing, the trial court stated:

> [T]here's been no showing of any deliberate suppression or use of false evidence by the district attorney or any knowingly failing to give a statement that the district attorney had in the file. On its face, the Mary Gayton statement, in any event, would not appear, from a fair reading of that statement, to be in favor of the defendant.

Comments of a trial court after hearing and before entry of a final order cannot be relied on as the basis for error. *Stone v. Stone,* 79 N.M. 351, 443 P.2d 741 (1968). An oral opinion is not a decision, and error cannot be predicated on an oral opinion. *Ellis v. Parmer,* 76 N.M. 626, 417 P. 2d 436 (1966).

Rule 93 relief is a civil proceeding and is governed by the rules of civil procedure. *State v. Martinez,* 77 N.M. 745, 427 P.2d 260 (1967). Rule 93(b) provides that the trial court must make findings of fact and conclusions of law. *Salazar v. State,* 83 N.M. 352, 491 P.2d 1163 (Ct.App.1971).

The defendant submitted findings of fact and conclusions of law. The State did not. The trial court made none. Furthermore, the trial court did not determine whether the failure to disclose the Sheriff's supplemental report was a reason for denying relief.

This case should be remanded to the district court to make findings of fact and conclusions of law. On this ground, I dissent from the majority opinion.

B. *The Meaning of the Majority Opinion.*

The majority opinion states:

> Specifically, "material to the preparation of the defense" has a minimal meaning "material to the guilt or innocence of the accused". We need not go

beyond this minimal meaning to decide this case.

Rule 27(a)(5) of the Rules of Criminal Procedure [§ 41–23–27, N.M.S.A.1953 (2d Repl.Vol. 6, 1973 Supp.)] provides for disclosure by the government. It reads:

> (a) The defendant may serve on the district attorney a request to produce and permit the defendant to inspect, copy or photograph:
>
> * * * * * *
>
> (5) Any books, papers, documents, photographs, [of] [*sic*] tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant; . . ..

The district attorney must, upon request of the defendant, produce any of the above described items which are favorable or unfavorable to the defendant, but which are necessary or essential in aiding the defendant in the preparation of his defense, i. e., which bear upon the guilt or innocence of the accused. This is broad terminology. The district attorney cannot hide behind negligent or deliberate suppression of any one of the items described. To do so denies the defendant a fair trial.

A paper or document which aids the State in proving the defendant's guilt, even though not intended for use by the State as evidence at the trial, may lead the defendant to discover evidence therein that will aid him in attempting to prove his innocence or it may corroborate the testimony of his defense.

The district attorney should not hesitate to show his entire file to the defendant. It is not the primary duty of the district attorney to convict a defendant. It is his primary duty to see that the defendant has a fair trial, that justice is done. *State v. Chambers,* 86 N.M. 383, 524 P.2d 999 (Ct. App.1974).

539 P.2d 221

NEW MEXICO MUNICIPAL LEAGUE, INC., a nonprofit Corporation, City of Gallup, a New Mexico Municipal Corporation, City of Artesia, a New Mexico Municipal Corporation, City of Raton, a New Mexico Municipal Corporation, Appellants,

v.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD, Appellee.

No. 1570.

Court of Appeals of New Mexico.
July 2, 1975.
Certiorari Denied Aug. 5, 1975.

Richard L. C. Virtue, Santa Fe, for appellant New Mexico Municipal League.

Robert S. Skinner, Raton, for appellant City of Raton.

Fred A. Watson, Artesia, for appellant City of Artesia.

James L. Parmalee, Jr., Gallup, for appellant City of Gallup.

Toney Anaya, Atty. Gen., Douglas W. Fraser, Special Asst. Atty. Gen., Environmental Improvement Board, Santa Fe, for appellee.

OPINION

HERNANDEZ, Judge.

This is an appeal from the action of the New Mexico Environmental Improvement Board (Board) adopting solid waste management regulations (regulations).

Appellants challenge these regulations on four points. We will first set forth the Board's statutory authority and its reasons for adopting the regulations and then proceed to a *seriatim* discussion of appellants' points of error.

Section 12–12–11(A)(3), N.M.S.A.1953 (Repl. Vol. 3, Supp.1973) provides:

"The board is responsible for environmental management and consumer protection. In that respect, the board shall promulgate regulations and standards in the following areas: . . . (3) liquid waste; and solid waste sanitation and refuse disposal; . . . ."

Section 12–12–13(A), N.M.S.A.1953 (Repl. Vol. 3, Supp.1973) provides:

"No regulation or amendment or repeal thereof shall be adopted until after a public hearing by the environmental improvement board within the area of the state concerned. Hearings on regulations of state-wide application shall be held at Santa Fe. In making its regulations, the board shall give the weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to: (1) character and degree of injury to, or interference with health, welfare, animal and plant life, property and the environment; (2) the public interest, including the social, economic and cultural value of the regulated activity and the social, economic and cultural effects of environmental degradation; and (3) technical practicability, necessity for, and economic reasonableness of reducing, eliminating or otherwise taking action with respect to environmental degradation."

The Board gave the following reasons for adopting the regulations in the Minutes of its meeting of April 19, 1974:

"1. Section 12–12–11(A)(3) of the Environmental Improvement Act states that the Environmental Improvement Board is responsible for environmental management and consumer protection in the field of liquid waste; and solid waste sanitation and refuse disposal.

"2. The Environmental Improvement Board has not before this date adopted regulations in the field of solid waste management.

"3. The testimony presented at the October 2 and 3, 1973 hearing on solid waste management established that existing storage, collection, transportation and disposal of solid waste in New Mexico is inadequate.

"4. The proposed solid waste regulation will reduce the existing environmental degradation caused by the present improper storage, collection and management of solid waste in New Mexico.

"5. As established by testimony provided in the October 2 and 3, 1973 hearing, the existing procedures used for solid waste management in New Mexico impinge on public health in New Mexico, degrade the land, and pollute New Mexico's air and water.

"6. Local New Mexico communities and counties have looked to the state for direction and have been reluctant to act without state direction.

"7. The proposed regulations will assist the local communities in organizing their solid waste systems and organizing more economically efficient programs.

"8. The testimony provided at the public hearing on October 2 and 3, 1973 established that the proposed regulations will not place an unreasonable economic burden on the communities and counties with the State of New Mexico.

"9. The Environmental Improvement Agency needs the proposed regulations to meet the current demands placed on the Agency by local communities.

"10. The proposed regulations will give field personnel from the Environmental Improvement Agency support in preventing solid waste pollution that leads to vector disease, air and water pollution and land degradation.

"11. As testified to in the October 2 and 3, 1973 hearing, solid waste is the most obvious pollutant in the State of New Mexico.

"12. The proposed regulations are necessary to protect the health, welfare, and environment of the citizens of New Mexico."

POINT I: "SECTIONS 105, 106 and 107 OF THE ENVIRONMENTAL IMPROVMENT BOARD'S SOLID WASTE MANAGEMENT REGULATIONS EXCEED THE STATUTORY AUTHORITY OF THE BOARD AND ARE INAPPLICABLE TO MUNICIPALITIES."

Appellants contend that Sections 14–49–1 through 7, N.M.S.A.1953 (Repl. Vol. 3) grant to municipalities the authority to acquire and maintain refuse disposal areas or plants, to enforce a general system of refuse collection and disposal, to compel the use of specified kinds of refuse receptacles, and to compel the taking of refuse to designated places. They further point out that § 12–12–11(A)(3), supra, grants the Board authority to regulate "only refuse disposal including matters relating to sanitation at disposal sites, but not municipal storage, transportation and collection systems." Their conclusion is that the Board exceeded its authority in promulgating regulations 105, 106 and 107, in conflict with the refuse collection and disposal article of the Municipal Code. We do not agree.

The regulations challenged under this point provide:

"105: STORAGE.—A. By October 19, 1974 any person who generates solid waste shall provide storage facilities for the solid waste except recreational waste, yard waste and large waste appliances. B. By July 1, 1974, any person who is responsible for the control of parks, recreational areas, and highway rest areas shall provide storage facilities for recreational waste. C. Storage facilities shall: 1. if a building is used, be fly proof, and rodent proof; 2. if outside, be tightly covered, fly proof, rodent proof, and leak proof containers; and 3. be kept reasonably clean and sanitary. D. Outside containers shall: 1. if manually handled, have a capacity less than or equal to 32 gallons; and (a) have safe, usable [sic] handles; or (b) be bags which are not filled to an extent that they rupture with reasonably careful handling; or 2. if mechanically handled, be compatible with collection vehicles. E. Any person who generates yard waste or large waste appliances shall store the yard waste or large waste appliances in a manner which prevents unsightliness and rodent harborage."

"106. COLLECTION.—A. By July 1, 1975 any person serving a municipality or any portion thereof with a population greater than 3,000 shall provide at least once weekly collection or as often as otherwise necessary to comply with the minimal requirements of the Environmental Improvement Agency.

"B. By July 1, 1975, any person who is responsible for the control of parks, recreational areas and highway rest areas shall provide collection for recreational waste as often as is necessary to prevent the waste from overflowing the storage containers.

"C. Any person who provides collection shall have collection vehicles by July 1, 1975, which:

1. do not leak;

2. have covers which prevent the solid waste from blowing from the vehicle during travel; and

3. are cleaned at such times and in such manner as to prevent offensive odors and unsightliness."

"107. TRANSPORTATION.—A. By July 1, 1975, any municipality with a population greater than 3,000 or any cooperative association which serves more than 3,000 people shall provide transportation.

"B. By July 1, 1975, any person who is responsible for the control of parks, recreational areas, and highway rest areas shall provide transportation for recreational waste.

"C. Any person who provides transportation shall have by July 1, 1975, transportation vehicles which:

1. do not leak;

2. have covers which prevent the solid waste from blowing from the vehicles during transportation; and

3. are cleaned at such times and in such manner as to prevent offensive odors and unsightliness.

"D. If a transfer station is used, it shall be designed and operated to minimize entry by flies and rodents and to prevent public nuisance and hazards to health or welfare."

All statutes are presumed to be enacted by the legislature with full knowledge of all other statutes in *pari materia* and with reference thereto. *State v. Dist. Ct. of Fourth Judicial Dist.*, 39 N.M. 523, 51 P.2d 239 (1935). Furthermore, statutes which are in *pari materia* should, as far as reasonably possible, be construed together as though they constituted one law so as to give force and effect to each. *State ex rel. State Park and Recreation Commission v. New Mexico State Authority*, 76 N.M. 1, 411 P.2d 984 (1966). This rule applies even though the statutes being construed together were enacted at different times and the latter contains no reference to the former. *State v. Dist. Ct. of Fourth Judicial Dist.*, supra. Applying these rules to this situation, it is our opinion that there is no inconsistency or conflict between these statutes. § 12–12–11(A)(3), supra, gives the Board state-wide responsibility for environmental management and protection; it makes mandatory the promulgation of regulations and standards by the board in the areas of liquid waste, and solid waste sanitation and refuse disposal. Section 14–49–2, supra, of the Municipal Code provides that:

"*Authority to regulate refuse.*—A municipality *may*, by ordinance:

A. Acquire and maintain refuse disposal areas or plants within or without the municipal boundary;

B. Enforce a general system of refuse collection and disposal;

C. Prohibit the deposit of refuse on either public or private property;

D. Compel the taking of refuse to designated places;

E. Specify the kind, size and material of a refuse receptacle;

F. Provide for the destruction of refuse or its use for a beneficial purpose; and

G. Require any person owning or controlling any occupied real property to:

(1) provide and maintain suitable refuse receptacles;

(2) deposit all refuse in the receptacles; and

(3) place a receptacle in a place convenient for removal." [Emphasis Ours.]

This section merely gives municipalities the option or discretion to enact ordinances governing the collection and disposal of refuse. The Environmental Improvement Act, Sections 12–12–1 through 12–12–14, N.M.S.A.1953 (Repl. Vol. 3, Supp.1973) is a comprehensive act which applies not only to liquid waste and solid waste sanitation and refuse disposal, but also to such addi-

tional and diverse fields as "food protection", "water supply and water pollution", "air quality management", "radiation control", "noise control", "nuisance abatement", "vector control", "occupational health and safety", "sanitation of public swimming pools and public baths", and the general sanitation of public buildings. Section 14–49–1 through 14–49–7, of the Municipal Code, supra, cover only "refuse" (as defined in § 14–49–1) collection and disposal. It is manifest that it was the intention of the legislature to give the Environmental Improvement Board state-wide, paramount authority to "enforce regulations and standards" in the various areas listed and that all other entities of government and political subdivisions thereof must conform. That the Board's authority must be paramount is further borne out by the changes made by the 1973 amendment. § 12–12–10, (Rep. Vol. 3, Supp.1971), supra, previously provided in pertinent part:

> "The agency is responsible for environmental management and consumer protection programs and in that respect shall maintain and enforce rules, regulations and standards in the following areas to the extent that these programs are not expressly delegated by law to another agency or political subdivision and are now or hereafter made the responsibility of the agency by law." [Emphasis Ours.], Laws 1971, ch. 277, § 10.

The 1973 amendment, Laws 1973, ch. 340, § 5, struck all of the underscored language.

Appellants make the further argument that the phrase "solid waste sanitation", as used in § 12–12–11(A)(3), supra, is limited or qualified by the phrase, "refuse disposal", which is used in the same paragraph of the section. We do not agree. "Liquid waste", "solid waste", and "refuse", in our opinion, constitute three distinct categories of environmental concern. Subsection (A)(3) might well have been more clearly written as follows: "liquid waste; and solid waste sanitation and refuse disposal." That this was the intention of the legislature is also demonstrated by another change made by the 1973 amendment. This paragraph previously read "D. liquid and solid waste." Laws 1971, ch. 277, supra. That there might be some overlapping among the three categories does nothing to support appellants' contention that one qualifies the other.

POINT II: "CERTAIN REGULATIONS ARE SO VAGUE THAT MEN OF COMMON INTELLIGENCE MUST NECESSARILY GUESS AS TO THEIR MEANING AND ARE, THEREFORE, VOID."

Appellants argue that since § 12–12–14, supra, makes violation of any of the regulations a petty misdemeanor, the vagueness of certain of the terms used make these regulations violative of due process. See *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (Ct.App.1974). Some of the particular language complained of is found in subsections (C)(1) and (2) of § 105, which relate to storage facilities for solid waste and recreational waste. The regulation requires that such storage facilities shall:

> "1. if a building is used, be *fly proof,* and *rodent proof*;
>
> "2. if outside, be tightly covered, *fly proof rodent proof,* and *leak proof* containers; . . ." [Emphasis Ours.]

Appellants argue that without "any guidance as to what the Board and Agency consider to be 'fly proof' and 'rodent proof' storage containers, municipal officials and local citizens are put in the position of having to guess at what kind of containers are required." They urge that whether a particular container is "fly proof" or "rodent proof" depends upon the number of flies and rodents in the area; and they claim that there is no such thing as a "rodent proof" container. We find absolutely nothing vague or obscure about these

terms. The word "proof", when used as an adjective, is very commonly used in combination with other words to indicate that the thing is impenetrable, such as bullet-proof or that the thing is successful in resisting, such as rust-proof. Fly proof clearly means impenetrable by flies. Rat proof means impregnable to rats. Leak proof simply means that the container will not permit the escape of fluids. Appellants further argue that there is no container which is absolutely rat proof and that therefore the regulations establish a standard impossible of accomplishment. The answer to the argument is that it cannot be substantiated in fact. ". . . Technically, rat-proofing, is the application of four fundamental rules of construction and upkeep . . . ." Freedman, *Sanitarian's Handbook*, at p. 193 (1970). We conclude that the term is commonly used and understood in the profession.

Appellants similarly contend that Regulations 106(C)(3), and 107(C)(3), requiring that any vehicle employed in collection or transportation of waste and refuse be ". . . cleaned at such times and in such manner as to prevent *offensive odors* and *unsightliness*" [Emphasis Ours.], are constitutionally repugnant for vagueness. The standard for determining whether a given statute is vague was set forth in *State ex rel. Bliss v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950) as follows:

> "Legislative enactments may be declared void for uncertainty if their meaning is so uncertain that the court is unable, by the application of known and accepted rules of construction, to determine what the legislature intended with any reasonable degree of certainty. But absolute or mathematical certainty is not required in the framing of a statute."

Chief Justice Brice went on to quote from 50 Am.Jur., Statutes, Sec. 473, as follows:

> " 'The use of such terms as "reasonable" or "unreasonable" in defining standards of conduct or in prescribing charges, allowances and the like, . . . have been held not to render a statute invalid for uncertainty and indefiniteness.' "

We believe the same standard applies in the case of administrative regulations, and we find no vagueness in the words "offensive odors" or "unsightliness" when read in conjunction with the stated basic purposes of the regulations. The question to be asked is: what might a reasonable person of average sensibilities consider to be an offensive odor or unsightly condition? *People v. Rubenfeld*, 254 N.Y. 245, 172 N. E. 485 (1930). We believe the answer to such a question is capable of common understanding. See Note, 71 Mich.L.R. 1438 (1973).

Regulation 103(A) provides: "At least thirty days prior to the creation or modification of a system for the collection, transportation, or disposal of solid waste the person who is operating or will operate the system shall obtain a registration certificate from the agency." The definition of the word, "modification", is set forth in Regulation 101(S), as follows: " 'modification' means any *significant* change in the physical characteristics or method of operation of a system for the collection, transportation, or disposal of solid waste; . . . ." [Emphasis Ours.] Appellants contend that the word, "significant", as used in this context is unduly vague. We do not agree. Webster's Third New International Dictionary (1971), defines the term, "significant", as: "having or likely to have influence or effect"; and we do not believe that use of the term here engenders any mystery about when a certificate will be required.

Appellants finally contend under this point that the words, "adequate", as used in Regulation 108(E)(3), requiring, "*adequate* means to prevent and extinguish fires" at sanitary landfill sites and "necessary", as used in Regulation 108(A)(B) and (C), requiring one or more sanitary landfills or other disposal facilities, except modified landfills, for populations exceeding 3000 and one or more sanitary landfills

or other disposal facilities, not excluding modified landfills for populations under 3000 and of those responsible for disposal of waste collected from parks, recreational areas and highway rest areas, "as *necessary*", are vague. Again, we do not agree.

In this field it has long been recognized that it is impossible to anticipate every factual situation that might arise under a given set of regulations. Further, it is important on the record before us to remember that we are dealing with regulations, legislative justification for which is found in such broadly applied terms as *public interest, social well-being, environmental degradation*, and the like. That it is within the power of the legislature to enact legislation for these purposes is well settled. *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272 (1963); and see, *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964). In order to give effect to these broad legislative concerns, however, it is necessary that the standards developed by the administrative agency be somewhat general. Indeed, administrative regulations of this kind are required to hold the difficult line between overbreadth or vagueness on the one hand and inflexibility and unworkable restriction on the other.

By way of example, we note that appellants have suggested that instead of requiring that sanitation vehicles be cleaned when *unsightly*, the board should have required that they be cleaned once a week. The difficulty with such a rigid standard, especially in the field of environmental regulation, is readily apparent. Some vehicles may need cleaning only once a month, while others might need cleaning daily. In this case, we hold that the terms complained of are capable of reasonable application and are sufficient to limit and define the duties of the individuals and entities which will be governed by them.

POINT III: "THE REGULATIONS WERE NOT ADOPTED IN ACCORDANCE WITH LAW IN THAT THE TESTIMONY ADOPTED, THE STANDARDS FOLLOWED, AND THE REASONING USED IN SUPPORT OF THE REGULATIONS WERE NOT PROPERLY INDICATED BY THE BOARD."

Section 12–12–13(I), supra, sets forth the grounds upon which we shall judge an appeal from an administrative determination of this kind:

"Upon appeal, the court of appeals shall set aside the regulation only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the transcript; or

(3) otherwise not in accordance with law."

This court in *City of Roswell v. New Mexico Water Quality Control Commission*, 84 N.M. 561, 505 P.2d 1237 (Ct.App. 1972), stated that in adopting regulations, administrative agencies must give some indication of their reasoning and of the basis upon which the regulations were adopted in order for the courts to be able to perform their reviewing function. However, we also pointed out that formal findings in a judicial sense are not required. See also, *Pharmaceutical Manufacturer's Ass'n v. N. M. Board of Pharmacy*, 86 N.M. 571, 525 P.2d 931 (Ct.App.1974). We believe that the Environmental Improvement Board, here, has given us sufficient indication of its reasoning and of the basis upon which it adopted these regulations. We also believe that the procedure employed demonstrates substantial compliance with § 12–12–13(A), supra. Subsection (1), thereof, requires that the Board, ". . . shall give the weight it deems appropriate to the character and degree of injury to, or interference with health, welfare, animal and

plant life, property and the environment." Paragraphs 3, 4, 5 and 11, of the reasons stated by the Board comply with this requirement.

Subsection (2), of § 12–12–13(A), supra, requires that the Board consider, "the public interest, including the social, economic and cultural value of the regulated activity and the social, economic and cultural effects of environmental degradation." We believe that paragraphs 3, 4, 5, 6, 7, and 12, of the Board's reasons meet this requirement.

Subsection (3), of § 12–12–13(A), supra, provides that the Board consider the, "technical practicability, necessity for, and economic reasonableness of reducing, eliminating or otherwise taking action with respect to environmental degradation." Paragraphs 7, 8, 9, and 10, of the Board's reasons respond to this requirement.

In summary under this point, we note that in its brief, the Board amply demonstrates that each of the twelve reasons listed for adopting the regulations was founded and based upon evidence and testimony it had accumulated during the several meetings it held on the proposed regulations. Thus, not only are the reasons for adopting the regulations clearly indicated, the foundation for those reasons is likewise ascertainable from the record.

POINT IV: "CONTRARY TO THE PROVISIONS OF THE 'OPEN MEETING LAW' (LAWS OF 1974, CH. 91), THE SOLID WASTE REGULATIONS WERE ENACTED BY THE ENVIRONMENTAL IMPROVEMENT BOARD AT A MEETING FOR WHICH REASONABLE NOTICE TO THE PUBLIC WAS NOT GIVEN: THEREFORE, THE REGULATIONS MUST BE SET ASIDE."

Section 5–6–23(A), (B), (C), N.M.S.A. 1953 (1974 Interim Supp.) provides:

"A. The formation of public policy or the conduct of business by vote shall not be conducted in secret.

"B. All meetings of a quorum of members of any board, commission or other policy-making body of any state agency, or any agency or authority of any county, municipality, district or any political subdivision held for the purpose of formulating public policy, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of such board, commission or other policy-making body, are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution or the provisions of this act [5–6–23 to 5–6–26].

"C. Any such meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs, and at which a majority or quorum of the body is in attendance, shall be held only after reasonable notice to the public. The affected body shall determine at least annually in a public meeting what notice shall be reasonable when applied to such body."

Section 5–6–25(A), N.M.S.A.1953 (1974 Interim Supp.) provides:

"A. No resolution, rule, regulation, or ordinance or action of any board, commission, committee or other policy-making body shall be valid unless taken or made at a meeting held in accordance with the requirements of section 1 of this act [5–6–23]. Every resolution, rule, regulation, ordinance or action of any board, commission, committee or other policy-making body shall be presumed to have been taken or made at a meeting held in accordance with the requirements of section 1 of this act [5–6–23]."

The Board adopted the regulations at its meeting on April 19, 1974. Notice of this meeting was mailed at least 10 days

prior to the scheduled date to 64 individuals, committees and organizations. The appellant, New Mexico Municipal League, Inc., received such notice. Furthermore, appellants had and exercised the opportunity to appear at preliminary meetings on October 2 and 3, 1973, at which evidence was taken regarding the proposed regulations. Notice of these preliminary meetings was published in newspapers in Farmington, Clovis, Silver City, Albuquerque, Santa Fe, Roswell, Hobbs, Raton and Las Cruces. In addition, the Board issued a "news release" on April 16, 1974, giving the time and place of the April 19th meeting and stating that the Board would "take action on proposed regulations for solid waste and New Mexico's ambient air standard for sulfur dioxide." Notice of the meeting citing a U.P.I. release appeared in the Clovis News Journal on April 18, 1974, and in the Lovington Daily Leader on April 17, 1974. Moreover, April 19th was the regular monthly meeting date for the Board. We hold that all of these efforts by the Board constituted reasonable notice to the public within the meaning of § 5-6-23(C), supra.

The regulations appealed from are accordingly affirmed.

It is so ordered.

HENDLEY, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

A. *The Board exceeded its authority in adopting regulations 105, 106 and 107.*

(1) *The Board was limited to "refuse disposal" regulations.*

Section 12-12-11(A)(3), N.M.S.A.1953 (Repl.Vol. 3, 1973 Supp.) reads:

> The board is responsible for environmental management and consumer protection. In that respect, the board shall promulgate regulations and standards in the following areas:
>
> * * * * * *
>
> (3) liquid waste; and *solid waste sanitation and refuse disposal.* [Emphasis added].

The Board adopted "SOLID WASTE MANAGEMENT Regulations". Regulation 108 provided for "Disposal".

The Board was limited to regulations and standards affecting "solid waste sanitation and refuse disposal".

The Environmental Improvement Act (E.I.A.) makes no provision for the "storage", "collection" and "transportation" of "solid waste", nor does the statute authorize the adoption of regulations to cover these subjects. Nevertheless, the Board adopted regulations covering "storage", "collection" and "transportation" of solid waste, being Regulations 105, 106 and 107.

The Board's only claim of authority is that the Legislature assigned the power to the Board to fulfill its responsibility for environmental management and consumer protection.

It is a mystery to me how management of "refuse disposal" can be extended by the Board to cover management of the "storage", "collection" and "transportation" of refuse.

The word "refuse" is not defined in the Act or in the regulations. It does not appear elsewhere in the Act or the regulations.

Neither the majority opinion nor the Board has shown any authority by which the Board had the power to adopt regulations concerning "storage", "collection" and "transportation" of refuse, when its authority was limited to "refuse disposal".

It is a fundamental rule in administrative law that an administrative body has only such power as is conferred on it by law. These powers include those expressly granted by statute and those fairly implied therefrom. *Brininstool v. New Mexico State Board of Education*, 81 N.M. 319, 466 P.2d 885 (Ct.App.1970). No matter how well intentioned, administrative bodies must comply with the law to prevent any

abuse of it. *Continental Oil Co. v. Oil Conservation Com'n*, 70 N.M. 310, 373 P.2d 809 (1962).

E.I.A. did not vest unbridled or arbitrary power in the Board to adopt regulations.

The Board exceeded its authority when it adopted Regulations 105, 106 and 107. They are void.

(2) *Gallup and Artesia are not bound.*

Section 12–12–13(C) provides that notices of a public hearing "shall be published in a newspaper of general circulation in the area [affected]". Gallup and Artesia each have a newspaper—The Gallup Independent and The Artesia Daily News. No notice was published in these newspapers. The municipalities were not notified and they were not present at the hearings. The regulations are not binding on them. *Brininstool*, supra.

B. *Regulations are otherwise defective.*

(1) *Regulation 105–STORAGE, is not applicable to municipalities.*

Regulation 105 is not applicable to municipalities. It applies to "any person".

Regulation 107, TRANSPORTATION, says that the municipality "shall provide transportation".

Regulation 108, DISPOSAL, says that the municipality "shall dispose of solid waste".

Regulation 105, STORAGE, does *not* say that the municipality "shall provide storage facilities".

What is meant by the word "person"?

Section 12–12–6 gives the Board authority to adopt regulations applicable "to persons".

"The word 'person' may be extended to firms, associations and corporations." Section 1–2–2(E), N.M.S.A.1953 (Repl.Vol. 1).

The word "corporations" does not include "municipal corporation". It applies only to private corporations. *City of Los Angeles v. Eighth Judicial District Court*, 58 Nev. 1, 67 P.2d 1019 (1937); *State v. Central Power & Light Co.*, 139 Tex. 51, 161 S.W.2d 766 (1942); *City of Dallas v. Halford*, 210 S.W. 725 (Tex.Civ.App. 1919); *In re Mountain View Public Utility District No. 1*, 359 P.2d 951 (Alaska, 1961); *Feemster v. City of Tupelo*, 121 Miss. 733, 83 So. 804 (1920). They are dealt with under separate titles in the statutes. *City of Tyler v. Texas Employers' Ins. 'Ass'n*, 288 S.W. 409 (Tex.Com. of App.1926); *City of Webster Groves v. Smith*, 340 Mo. 798, 102 S.W.2d 618 (1937).

(2) *Regulation 106–COLLECTION, is not applicable to municipalities.*

Regulation 106(A) is not applicable to municipalities. It is applicable only to persons "serving a municipality". It provides for "at least once weekly collection". Collection of what? The regulation is silent.

Regulation 106(b) provides that "any person who is responsible for the control of parks, recreational areas and highway rest areas shall provide collection for recreational wastes . . . ."

By Regulation 101(B), the Board defined the word "person" to include a "political subdivision" such as a municipality. By this power, the Board has displaced the Legislature. This it cannot do. It is not a regulation contemplated by the Act. Even if it were, the Legislature cannot delegate authority to a board to adopt rules or regulations which abridge, enlarge, extend or modify the statute. *State v. Ashby*, 73 N. M. 267, 387 P.2d 588 (1963).

In 1965, the Legislature adopted a Comprehensive Code affecting municipalities. Laws of 1965, ch. 300. Section 14–1–2(G), N.M.S.A.1953 (Repl.Vol. 3) defines a "municipality" as "any incorporated city, town or village, whether incorporated under general act, special act or special charter, and H class counties." From this definition, the Board has no power to create a "municipality" out of the word "person".

When the Legislature wants to define a "person" as a "political subdivision", it will do so. See, § 59–14–3, N.M.S.A.1953 (2nd

Repl.Vol. 9, pt. 1). This falls within the Occupational Health and Safety Act referred to in § 12–12–11, subd. A(9) of Environmental Improvement Act. See § 12–9–4(H) of the Radiation Protection Act; § 12–14–2(C) of the Air Quality Control Act, both of which are also referred to in § 12–12–11, subd. A(9).

The Board's definition of "person" as a "political subdivision" is void.

C. *E.I.A. did not repeal Article 49 of the Municipal Code.*

E.I.A. was adopted in 1971. It makes no reference to "municipalities". It does not declare whether municipalities are subject to or exempt from the regulations of the Board. The Act covers "refuse disposal".

Prior thereto, in 1965, the Legislature enacted Article 49 of the Municipal Code. It covers collection and disposal of "refuse". Sections 14–49–1 to 14–49–7, N.M.S.A.1953 (Repl.Vol. 3).

The Board claims that it has sovereignty over municipalities in this area. The majority opinion grants that power.

The Legislature enacted the Municipal Code and the E.I.A. In the Municipal Code, the Legislature specifically delegated to the municipality the authority and power to regulate the collection and disposal of "refuse". In E.I.A. the Legislature granted to a Board the power to manage and regulate "refuse disposal".

The question to decide is: Did the E.I.A. impliedly repeal Article 49 of the Municipal Code? The answer is "No".

First, it is established law in New Mexico that repeals by implication are not favored, and will not be held to exist where a general statute conflicts with a statute special in scope. *State ex rel. Armijo v. Romero,* 32 N.M. 178, 253 P. 20 (1927); *State v. Lujan,* 76 N.M. 111, 412 P.2d 405 (1966); *Saiz v. City of Albuquerque,* 82 N.M. 746, 487 P.2d 174 (Ct.App.1971); *Santa Fe Downs, Inc. v. Bureau of Revenue,* 85 N.M. 115, 509 P.2d 882 (Ct.App. 1973). This rule is applicable here. The Municipal Code is specific in scope; E.I.A. is general.

Second, the Legislature did not manifest its intention that E.I.A. supercede Article 49 of the Municipal Code.

In *Ellis v. New Mexico Const. Co.,* 27 N.M. 312, 319, 201 P. 487, 490 (1921), the Supreme Court said:

> A statute is repealed by implication, though such repeal is not favored, where the legislative intent is *manifest* that the latter statute should supersede the former, *and such intent is manifest where the Legislature enacts a new and comprehensive body of law which is so inconsistent with and repugnant to the former law on the same subject* as to be irreconcilable with it, *and especially does this result follow where the latter act expressly notices the former in such a way as to indicate an intention to abrogate.* [Emphasis added].

E.I.A. does not manifest a legislative intention to repeal Article 49 of the Municipal Code. It does not cover the same subject. It does not expressly notice Article 49 in any manner to indicate an intention to abrogate.

But if we desire to be comforting to environmental protection, we can say that "refuse disposal" was abrogated by implication. But common sense shows that "collection" of refuse was not abrogated. The Legislature did not grant to the Board any powers of domination whereby it can, by regulation, usurp the authority granted to municipalities. The Board was not intended to be the "Autocrat of the Breakfast Table".

D. *E.I.A. is not a "Solid Waste Disposal Act".*

New Mexico is one of the few states in the union under which "regulations by the appropriate agency constitute the sole basis for state involvement, no solid waste statute having been enacted." 1 Grad, Treatise on Environment Law, § 4.02.

The federal Solid Waste Disposal Act of 1965, 42 U.S.C.A. § 3252(5), defines the

term "solid waste disposal" as "the collection, storage, treatment, utilization processing, or final disposal of solid waste."

E.I.A. does not. If the Legislature had intended to include collection, storage and transportation of solid wastes, it would have adopted a "Solid Waste Disposal Act" and it would have defined solid waste disposal.

Section 12–12–11(A)(3) gave the Board the right to adopt regulations and standards in the area of "liquid waste; and solid waste sanitation and refuse disposal". The Act did not define any of those terms.

The Legislature, not the administrative agency, has the power or authority to legislate on "solid waste disposal".

E. *The Environmental Improvement Act does not provide for any enforcement against municipalities.*

Section 12–12–14 provides:

> A person who violates any regulation of the board is guilty of a petty misdemeanor. This section does not apply to any regulation for which a criminal penalty is otherwise provided by law.

As heretofore shown, a municipality is not a person. If a municipality refuses to abide by the regulations adopted by the Board, the statute makes no provision for the enforcement thereof. Neither is the remedy mandamus. Mandamus is a remedy for a clear legal duty. *State v. Vigil*, 74 N.M. 766, 398 P.2d 987 (1965). No such clear legal duty exists under the Board's regulations to compel a municipality to undertake storage, collection, transportation and disposal of solid waste.

If any municipality fails in its statutory duties in this area, the citizens affected thereby can and will compel compliance.

Conclusion

Environmental improvement and consumer protection is in its infancy. Its purposes are praiseworthy. But in the area of solid waste refuse disposal, the Legislature has imposed the burden on the municipality.

If the Legislature desires to place the municipality under the aegis of the Board, it should amend E.I.A. to include municipalities, repeal Article 49 of the Municipal Code, enact a Solid Waste Disposal Act, define its terms to guide the Board in the adoption of regulations, and provide remedies for enforcement of the Act.

When this is accomplished, citizens will be protected by way of "health, safety, comfort and economic and social well-being".

539 P.2d 234

Roy J. RETHERFORD, Plaintiff-Appellee,

v.

Harry A. DANIELL and Connie Long Daniell, his wife, Chris L. Humphrey and Joan Humphrey, his wife, Defendants-Appellants.

No. 1704.

Court of Appeals of New Mexico.

Aug. 6, 1975.

James B. Cooney, Caton & Hynes, Farmington, for defendants-appellants.

Reed L. Frost, Palmer & Frost, P. A., Farmington, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendants appeal from a judgment for plaintiff which involved a boundary and easement dispute. We affirm.

The trial court made the following pertinent findings and conclusions of law.

1. The north-south fence *now* separating the property owned by plaintiff Retherford designated as tract one, and the property owned by the defendants Humphrey designated as tract two was built by defendant Daniell on the land of plaintiff and does *not* lie upon the correct boundary between the parties' property. [Emphasis added]

2. The defendant Daniell while he owned and occupied tract two constructed the fence along its present alignment without the consent of plaintiff. The new fence extended over onto tract one separating approximately one acre of land from the principal tract . . . .

3. The defendant Daniell removed an older fence which divided the tracts, and which was on a line where a fence had existed for over sixty (60) years.

4. The old fence line had been generally recognized and accepted as the correct boundary dividing the tracts by the persons who preceded all parties to this action in ownership of the tracts.

5. A strip along the west side of tract two had been used openly and adversely to the interests of the owners of tract two by the owners of tract three and of other land to the north as a roadway for general access, for over twenty (20) years.

6. The strip extended from the public road on the south to tract three on the north and was approximately twelve feet wide and was parallel and adjacent to the old fence line which marked the western line of tract two until it was recently removed by defendant Humphrey.

7. The defendant Humphrey caused the free use of the roadway over tract two to be curtailed, by chaining and padlocking gates, without plaintiff's consent and without providing plaintiff with a means of passage.

8. Plaintiff Retherford made no effort to obtain access to tract three after defendant Humphrey closed the road over tract two, nor did he make any effort to harvest or farm the portion of tract one that lay west of the new fence erected by defendant Daniell.

[Conclusions of Law]

1. The true boundary line between tracts one and two is the old fence line.

2. Tract two is subject to an easement created by prescriptive use for the roadway described in finding six (6) above, as servient estate to tract three.

Defendants contend: (A) New Mexico law was not followed in adjudging the boundary line as the old fence line. (B) Plaintiff was not entitled to an easement.

A. *New Mexico law was followed in adjudging boundary line as old fence line.*

Under New Mexico law, where a fence had existed for over 60 years which divided two adjoining tracts of land, and the old fence line had been generally recognized and accepted as the correct boundary by the persons who preceded all parties to this action, did this constitute the true boundary between the two tracts of land? The answer is yes.

The trial court limited its findings to those facts which existed prior to the ownership of the land by the present parties to this lawsuit.

The record shows that for about 60 years, the prior owners of defendants' tract knew that the boundary line was established by the old fence, and this boundary was always accepted with no questions asked. One of plaintiff's predecessors, long before this controversy, rebuilt the fence along this old fence line when the fence was down and he treated this fence line as the boundary between the two tracts. It remained the same boundary until defendant Daniell moved it.

Under New Mexico law, even if there is no dispute, long recognition of the boundary by abutting owners amounts to acquiescence. A boundary may be established in this manner, *Thomas v. Pigman*, 77 N.M. 521, 424 P.2d 799 (1967); *Hobson v. Miller*, 64 N.M. 215, 326 P.2d 1095 (1958), even though the acquiescence results from silence. *McBride v. Allison*, 78 N.M. 84, 428 P.2d 623 (1967); *Woodburn v. Grimes*, 58 N.M. 717, 275 P.2d 850 (1954).

Where this old fence line boundary lies is a question of fact. On review, it is our duty to entertain all reasonable presumptions in favor of the correction of the trial court's findings, conclusions and judgment. *Velasquez v. Cox*, 50 N.M. 338, 176 P.2d 909 (1946).

There is substantial evidence to support the trial court's findings which are supported by law.

B. *Plaintiff was entitled to an easement.*

The only finding on easement challenged by defendants was finding No. 7, *supra*, that defendant Humphrey curtailed the use of the strip roadway on the west side of his tract by chaining and padlocking a gate without the consent of plaintiff and providing no passage to plaintiff.

There is substantial evidence to support the court's finding No. 7. Plaintiff was entitled to an easement.

Affirmed.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

539 P.2d 236

STATE of New Mexico, Plaintiff-Appellee,

v.

Sam HILL, Jr., Defendant-Appellant.

No. 1706.

Court of Appeals of New Mexico.
July 23, 1975.

Mary C. Walters, Marchiondo & Berry, P. A., Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Prentis Reid Griffith, Jr., Special Asst. Atty. Gen., Andrea Buzzard, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant was convicted of involuntary manslaughter. Section 40A-2-3(B), N.M. S.A. 1953 (2d Repl. Vol. 6). He appeals. We reverse.

A. *Presence and participation of private prosecutor in grand jury proceeding is reversible error.*

The indictment was returned on January 9, 1974. On the opening day of trial, defendant announced that it had been called to his attention that the person presenting the matter to the grand jury was Don J. Wilson, the special prosecutor. He moved to dismiss the indictment because Mr. Wilson was not permitted by law to be in the grand jury room. The motion was denied.

Defendant contends that the trial court erred in refusing to dismiss the indictment. We agree. This contention involves three issues: (1) Was Mr. Wilson lawfully au-

thorized to present the facts to the grand jury? (2) Did a conflict of interest render his participation in the presentment unlawful? (3) Must defendant show that Wilson's participation prejudiced defendant's case? These are all matters of first impression in New Mexico.

Two hours before the return of the indictment, the district attorney appointed Mr. Wilson "as associate counsel to assist the District Attorney in prosecution of" the instant case. At the same time, the trial judge signed an order directing that such appointment take place. Mr. Wilson testified that he helped the district attorney present the case to the grand jury. In addition, he testified that at the time of the presentment, he was employed on a fee basis, *not by the State, but by L. M. Miskimen, father-in-law of the deceased.*

(1) *Mr. Wilson was not lawfully authorized to aid in presenting the facts to the grand jury.*

Section 41–5–4, N.M.S.A. 1953 (2d Repl. Vol. 6) relates to the time and place of a grand jury hearing. It provides in part as follows:

> All taking of testimony will be in private with *no persons present other than the grand jury and the persons required or entitled to assist the grand jury,* including the district attorney and the attorney general and their staffs, interpreters, court reporters and the witness. [Emphasis added]

The purpose of this section is to maintain the utmost secrecy. *People v. Minet,* 296 N.Y. 315, 73 N.E.2d 529, 533, 4 A.L.R. 2d 386, 391 (1947) quotes the following from *In Matter of Opinion of Justices,* 232 Mass. 601, 123 N.E. 100:

> The grand jury is an ancient institution. It has always been venerated and highly prized in this country. It has been regarded as the shield of innocence against the plottings of private malice, as the defense of the weak against the oppression of political power, and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source. *These blessings accrue from the grand jury because its proceedings are secret and uninfluenced by the presence of those not officially and necessarily connected with it.* It has been the practice for more than two hundred years for its investigations to be in private, *except that the district attorney and his assistant are present.*
>
> *Secrecy is the vital requisite of grand jury procedure.* [Emphasis added]

In *Moseley v. State,* 510 S.W.2d 298, 299 (Ark.1974) the court said:

> The statute contemplates that the prosecuting attorney will assist the grand jury . . .. *The prosecuting attorney, however, does not appear before the grand jury as a partisan, bent upon obtaining an indictment.* [Emphasis added]

Mr. Wilson's interest in having the grand jury return an indictment against defendant is obvious. He had no reason to be impartial and could hardly have been impartial. He once served as an assistant district attorney. We presume he knew about § 41–5–4, *supra.* This would have suggested to Mr. Wilson that his appearance and participation in the grand jury proceedings was improper.

The State argues that Mr. Wilson was a member of the district attorney's staff, authorized by § 41–5–4, *supra,* to present the facts to a grand jury. The State relies on § 17–1–12, N.M.S.A. 1953 (Repl. Vol. 4). In pertinent part, it states:

> No one shall represent the state . . . *In any matter in which said state . . . is interested* except the . . . district attorney or his legally appointed and qualified assistants, and such associate counsel as may appear on order of the court, with the consent of the . . . district attorney. [Emphasis added].

Mr. Wilson was not appointed to the district attorney's staff. The trial

judge ordered only that Mr. Wilson assist *the district attorney in prosecution of the case.* The prosecution of a case does not begin until after the return of the indictment. Section 41–23–5, N.M.S.A. 1953 (2d Repl. Vol. 6, 1973 Supp.). See, "prosecution", Black's Law Dictionary (Rev. 4th Ed. 1968) at 1385.

Mr. Wilson's presence and participation in the grand jury hearing was unlawful, in violation of § 41–5–4, *supra. Coblentz v. State,* 164 Md. 558, 166 A. 45, 88 A.L.R. 886 (1933); *Viers v. State,* 10 Okl.Cr. 28, 134 P. 80 (1913); *United States v. Goldman,* 28 F.2d 424 (D.C.Conn.1928).

> . . . [I]t is highly improper for counsel employed to prosecute a case to be permitted to go into the grand jury room where the defendant cannot be heard and has no one to represent him. This duty should be performed alone by the proper officer of the law.
> *Viers, supra,* 134 P. at 86.

(2) *A conflict of interest existed which compromised the impartiality of the grand jury proceedings.*

Mr. Wilson testified that he had been retained for a fee paid by the father-in-law of the deceased. Under the indictment returned, he represented private interests against the defendants. His mere presence in the grand jury proceedings involved a conflict of interest which invalidated the indictment. *Coblentz v. State, supra.*

The prosecutor himself is unauthorized to appear before the grand jury if there is a conflict of interest (1) in which his own property is damaged by criminal mischief, *People v. Krstovich,* 72 Misc.2d 90, 338 N.Y.S.2d 132 (1972), or (2) arising from prior employment with the defendant, *Corbin v. Broadman,* 6 Ariz.App. 436, 433 P.2d 289 (1967). From authorities cited, it is generally stated that the prosecutor is a public officer with duties quasi-judicial in nature. His obligation is to protect not only the public interest but also the rights of the accused. In the performance of his duties he must not only be disinterested and impartial but must also appear to be so. It is not necessary that his participation be corrupt or that he use unfair tactics. Public confidence in the office in the exercise of broad powers demands that there be no conflict of interest or the appearance of a conflict.

The same rule applies in the actual trial of a case where an assistant district attorney had represented the defendant prior to trial. *State v. Chambers,* 86 N.M. 383, 524 P.2d 999 (Ct.App.1974). Logic demands that it is unwise for the prosecutor to act in a less disinterested manner in his role during a grand jury hearing.

The law protects the fairness and impartiality of the grand jury hearing. Not only must there be no improper influence exercised, there must be *no opportunity for* improper influence on the grand jury. *Moseley, supra; United States v. Edgerton,* 80 F. 374 (D.C.Mont.1897). The prosecutor must scrupulously refrain from words or conduct that may influence the decision of the grand jury. *Franklin v. State,* 89 Nev. 382, 513 P.2d 1252 (1973). He must observe limits of essential fairness in his work before grand juries. *United States v. Sweig,* 316 F. Supp. 1148 (D.C.N.Y.1970).

We hold that Mr. Wilson's presentment of the facts to the grand jury involved a conflict of interest which compromised the impartiality of the grand jury proceedings.

(3) *No prejudice to the defendant need be shown. Prejudice is presumed.*

Rule 6(d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A.Fed.R. Crim.P. 6(d) (1969), is similar to § 41–5–4, *supra,* of the New Mexico statutes. Under Rule 6(d), it has been held consistently that a showing of prejudice is not required when an unauthorized person is present, in order to have the indictment quashed. Prejudice is presumed. *United States v. Isaacs,* 347 F.Supp. 743 (N.D.Ill.1972);

United States v. Bowdach, 324 F.Supp. 123 (S.D.Fla.1971); *United States v. Borys,* 169 F.Supp. 366 (D.Alaska 1959); *United States v. Carper,* 116 F.Supp. 817 (D.D.C. 1953) *Latham v. United States,* 226 F. 420 (5th Cir. 1915); C. Wright, Federal Practice and Procedure, § 105 (1969) at 168–69.

Likewise, the state courts have held that presence of an unauthorized person before the grand jury requires dismissal of the indictment, without the necessity of showing prejudice. *People v. Minet, supra; State v. Hansen,* 215 N.W.2d 249 (Iowa 1974); *State v. Revere,* 232 La. 184, 94 So.2d 25 (1957).

> The presence and participation in grand jury proceedings of a person assuming the role of a private prosecutor, retained by outside interests for the purpose of obtaining an indictment against particular individuals, is generally considered highly improper.
> 38 Am.Jur.2d Grand Jury § 35.

This rule is supported by *Collier v. State,* 104 Miss. 602, 61 So. 689 (1913); *People v. Scannell,* 36 Misc. 40, 72 N.Y.S. 449 (1901); *State v. District Court of First Judicial Dist.,* 124 Mont. 249, 220 P. 2d 1035 (1950); *State v. Johnson,* 55 N.D. 437, 214 N.W. 39 (1927); *Hartgraves v. State,* 5 Okl.Cr. 266, 114 P. 343 (1911); *State v. Maben,* 5 Okl.Cr. 581, 114 P. 1122 (1911); *Corbin v. Broadman, supra;* Annot., Presence in grand jury room of person other than grand juror as affecting indictment, 4 A.L.R.2d 392, 418 (1949).

In contending that the defendant must prove that he was prejudiced by Mr. Wilson's participation in the grand jury proceedings, the State relies on *United States v. Rath,* 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920, 89 S.Ct. 1196, 22 L.Ed. 2d 453 (1969); *Case v. State,* 220 So.2d 289 (Miss.1969); *Jackson v. State,* 143 Tex.Cr.R. 143, 157 S.W.2d 921 (1942); *Commonwealth v. Brownmiller,* 141 Pa.Super. 107, 14 A.2d 907 (1940).

These cases are all distinguishable. *Rath* involved a technical violation, a fifteen to twenty second interruption of grand jury proceedings by an attorney who inadvertently entered the room. *Case* involved a law enforcement officer, not a private prosecuting attorney. In dictum, the court said: "It is improper for a private prosecuting attorney to go before the grand jury." 220 So.2d at 290. *Jackson* did not involve participation of a private prosecuting attorney in grand jury proceedings, but rather involved defendant's wife, who, from all that appears in the opinion, actually gave testimony. In *Brownmiller* the special assistant prosecutors were appointed by the court at the request of the state's attorney due to the complex nature of the case (misconduct in public office) and the lack of staff.

None of these cases required the defendant to prove prejudicial error.

(4) *Conclusion As To The Grand Jury Proceedings.*

Mr. Wilson's participation in the grand jury proceedings was not lawfully authorized. His compensation by the deceased's father-in-law gave rise to a conflict of interest. These reasons require that the indictment be quashed without proof of prejudice by defendant.

B. *We need not decide other claims of error raised by defendant.*

If the State proceeds with a new indictment, the additional points may or may not be raised in the second trial. Therefore, we decline to review them.

Reversed.

Defendant is discharged.

HENDLEY and HERNANDEZ, JJ., concur.

539 P.2d 611

STATE of New Mexico ex rel. STATE HIGHWAY DEPARTMENT of New Mexico, Petitioner-Appellant,

v.

KISTLER-COLLISTER COMPANY, INC., Defendant-Appellee.

No. 10074.

Supreme Court of New Mexico.

July 16, 1975.

Rehearing Denied Aug. 19, 1975.

Toney Anaya, Atty. Gen., Victor Henry Rothschild, III, SHD Asst. Atty. Gen., Santa Fe, for petitioner-appellant.

Modrall, Sperling, Roehl, Harris & Sisk, George T. Harris, Jr., Leland S. Sedberry, Jr., Bruce D. Black, Albuquerque, for defendant-appellee.

OPINION

OMAN, Justice.

This is a case in which the New Mexico State Highway Department (Highway Department) condemned two strips of land fronting on intersecting Lomas and San Mateo Boulevards in Albuquerque. The defendant, Kistler-Collister Company, Inc. (Kistler-Collister) was the owner of these lands. The case was tried to a jury which awarded Kistler-Collister $250,000 in damages. Judgment was entered on the verdict and the Highway Department has appealed. We reverse and remand for a new trial.

The Highway Department relies upon several points for reversal. We shall consider only those we feel necessary to demonstrate reversible error on the part of the trial court and to perhaps prevent another appeal after retrial. Of course, failure to discuss any other points raised on appeal does not necessarily imply approval of the trial court's actions. We first consider the contention of the Highway Department that: "Frustration of future plans is a non-compensable element of damages."

The particular acts of the district court attacked under this point are: (1) the ad-

mission into evidence of architectural plans offered by Kistler-Collister showing a long-planned enlargement of the improvements on the property, (2) a refusal to strike the testimony of Kistler-Collister's expert witness on the issue of damages, and (3) the giving of an instruction to the jury permitting it to consider the plans for expansion and utilization of the property, along with all other evidence received, in making its determination as to the difference between the fair market value of the entire property immediately before the taking and the fair market value of the remainder thereof immediately after the taking.

Our basic law of eminent domain applicable upon a partial taking appears in N. M.Const., art. II, § 20, and in § 22–9–9.1, N.M.S.A.1953 (Supp.1973). N.M.Const., art. II, § 20, supra, provides: "Private property shall not be taken or damaged for public use without just compensation."

Section 22–9–9.1, supra, provides:

"*Measure of damage to remainder in partial condemnation.*—Notwithstanding provisions of the Relocation Assistance Act [22–9A–1 to 22–9A–16], in any condemnation proceeding in which there is a partial taking of property, the measure of compensation and damages resulting from the taking shall be the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking. In determining such difference, all elements which would enhance or diminish the fair market value before and after the taking shall be considered even though some of the damages sustained by the remaining property, in themselves, might otherwise be deemed noncompensable. Further, in determining such values or differences therein, elements which would enhance or benefit any property not taken shall only be considered for the purpose of offsetting any damages or diminution of value to the property not taken."

N.M.U.J.I. 7.9, Civil (1966), relating to the determination of the value of property taken, is as follows:

"In determining the value of the property taken you will consider its location and the uses and purposes for which the property is suitable or adaptable, having regard not only to the existing conditions, but also to such uses as may be reasonably expected in the near future which would affect its present market value."

The property here in question is commercial property. The total development of this property for commercial purposes was conceived and the plans therefor drafted, at least in substantial part, by an architect employed by Kistler-Collister long before the taking by the Highway Department and even before the construction of the existing mercantile structure and other improvements on the property. The existing structure was so placed and so designed as to serve the initial needs of the Kistler-Collister retail mercantile outlet and to accommodate a large addition thereto. When finally completed, the additional building space was to be leased to other commercial tenants. Leases and options for leases on space in the proposed addition had been secured prior to the time it became apparent that condemnation of a portion of the property was imminent. We agree with the Highway Department that mere frustration of the owner's hopes or plans for the future is a noncompensable element of damages. *United States ex rel. T. V. A. v. Powelson*, 319 U.S. 266, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943); *United States v. Easement & Rt. of Way 100 Ft. Wide*, Tenn., 447 F.2d 1317 (6th Cir. 1971); 4 J. Sackman, Nichols' the Law of Eminent Domain, § 12.314 at 12–206 to 209 (Rev. 3d Ed.1974). However, we cannot agree that we are here concerned with damages for frustration merely because the development envisioned in the plans had not been fully consummated and the property had not been fully utilized for the uses and purposes for which it was clearly suitable and

adaptable. Compensation for frustration of future hopes or plans is not the same as compensation based on planned future uses for which the property is adaptable by reason of location, its state of improvement, or other special elements of value inherent therein.

In *State v. Pelletier*, 76 N.M. 555, 417 P.2d 46 (1966), we were "called upon to consider * * * whether planned uses or future possible uses contemplated when the property was acquired by the owner, and special elements of value incident to location, are proper considerations in arriving at value." Because of its peculiar location, the owner's appraiser assumed that the owner had purchased the property for use in a commercial venture. Under these circumstances, we held that it was "proper to receive evidence of value in which consideration was given by the appraiser to future plans for development, and the highest and best use to which the property could be put, but for which it had not been used in the past."

In the case now before us, we have property already developed for commercial uses with definite plans and provisions in the existing structure having been made for the future development of the property for these uses. It appears clear to us that the trial court properly received into evidence these architectural plans and the testimony of the appraisers relative thereto. The appraisers correctly considered these plans, and the consequent uses to which the property could be put, in arriving at their respective appraisals of the damages suffered by Kistler-Collister in the taking of a portion of its property. See in accord *United States v. 25.406 Acres of Land, Etc.*, 172 F.2d 990 (4th Cir. 1949); *United States v. 243.22 Acres of Land, Etc.*, 48 F.Supp. 177 (E.D.N.Y.1942); *Producers' Wood Preserving Co. v. Com'rs. of Sewerage*, 227 Ky. 159, 12 S.W.2d 292 (1928); *City of Orangeburg v. Buford*, 227 S.C. 280, 87 S.E.2d 822 (1955); *City of Pleasant Hill v. First Baptist Church*, 1 Cal.App.3d 384, 82 Cal. Rptr. 1 (Ct.App.1969); *Arkansas Louisiana Gas Co. v. Morehouse Realty Co.*, 126 So.2d 830 (La.Ct.App.1961); *City of St. Louis v. Paramount Shoe Mfg. Co.*, 237 Mo.App. 200, 168 S.W.2d 149 (1943); 4 J. Sackman, Nichols' The Law of Eminent Domain, § 12.3142(3) at 12–273 to 276 (Rev. 3d Ed.1974).

We find no merit in the Highway Department's contentions under its first point.

We next consider its claim that the trial court erred in refusing to admit into evidence two exhibits tendered for the purpose of demonstrating that Kistler-Collister could realize the consummation of its plans for expansion even after the taking, if the parking area were merely redesigned to utilize 90 degree angle parking rather than 60 degree angle parking in some places, and by reducing the width of the parking stalls from 10 ft. to 8½ ft. If Kistler-Collister's plans for the parking area were utilized, the floor space in the proposed building would have to be reduced by 9,800 square feet, because 49 parking spaces would be lost, since a city ordinance requires one parking space for every 200 square feet of floor space. By utilizing the parking space design contained in the exhibits offered by the Highway Department, the proposed improvements to the building could be fully accomplished according to plans, as no parking spaces would be lost. The projected loss of floor space in the proposed building would amount to a substantial reduction in its value, and constituted a large part of the overall damages attributed to the taking by Kistler-Collister's witnesses.

As above stated, it was proper for the jury in fixing damages to consider the plans of Kistler-Collister for the development of its property. They constituted evidence of a use to which the property could reasonably be put. However, the jury, in its consideration of these plans, was not bound to either fully accept or fully reject them. The plans for the parking area did not immutably determine that the plan for the construction of the additional building

must be altered and the space therein reduced. The jury was entitled to have presented to it for its consideration alternate plans for the further development of the property for commercial purposes, as well as evidence of other uses for which it was suitable or adaptable, in determining the before and after fair market value of the property. The development of the property for commercial purposes was not limited to Kistler-Collister's plans for such development.

The ultimate issue for the jury's determination was the damage sustained by Kistler-Collister, and this was the same as the difference between the fair market value of the entire property before the taking and the fair market value of the remaining property immediately after the taking, considering all elements which would enhance or diminish these before and after fair market values. Section 22-9-9.1, supra. Clearly, a redesign of the parking area and the utilization of this area by reducing the width of the striped stalls from 10 ft. to 8½ ft. was an element to be considered in determining the difference between the before and after fair market values. There was evidence that several comparable commercial establishments in the immediate area used 90 degree as well as 60 degree angle parking stalls ranging in width from 8 ft. to 10 ft., and that the change from 10 ft. to 8½ ft. stalls could be lawfully effected under the applicable city ordinance.

The tendered exhibits were plats or diagrams of the property in question showing the improvements and proposed improvements thereon, but with the parking area redesigned and divided into stalls of 8½ ft. rather than 10 ft. wide. One of the exhibits portrayed the property prior to the taking by condemnation and the other portrayed the remainder of the property after the taking. These exhibits and the testimony and explanation thereof would certainly have thrown light upon the issue of damages. Consequently, they were relevant. *Lopez v. Heesen,* 69 N.M. 206, 365 P.2d 448 (1961); *State v. Thurman,* 84 N. M. 5, 498 P.2d 697 (Ct.App.1972). Although not applicable to this case, see Rule 401, New Mexico Rules of Evidence [§ 20-4-401, N.M.S.A.1953 (Repl. Vol. 4, Supp.1973)] for a further definition of relevant evidence. Since they were relevant to the principal issue in the case, the exhibits should have been admitted. See *Holloway v. Evans,* 55 N.M. 601, 238 P.2d 457 (1951). This was particularly so in view of the fact that Kistler-Collister was permitted to introduce evidence to show that the effect of the taking was to substantially reduce the rental area of the proposed building.

In its answer brief, Kistler-Collister describes these exhibits as "pictorial blueprints" and treats them as "photographs." It urges that they were properly admissible in evidence only in connection with the testimony of a witness with competent knowledge of the circumstances surrounding their preparation. Although the exhibits were not physically prepared by the witness who identified them, they were prepared at his request and he participated in their preparation. No question was raised as to the accuracy of their representation or portrayal of that which they purportedly represented and demonstrated. No further foundation for their admissability was necessary. See 3 S. Gard, Jones on Evidence, § 15.10 (6th Ed.1972). The authentication or verification of photographs prerequisite to their admission into evidence may be made by the photographer or by any witness whose familiarity with the subject matter represented thereby qualifies him to testify as to the correctness of the representation of the objects or scenes which they portray. 3 S. Gard, Jones on Evidence, supra.

It is true that the sufficiency of the foundation or authenticating evidence is a matter largely within the discretion of the trial court, but here there can be no question as to the sufficiency of the foun-

dation and no question was raised as to the accuracy of the exhibits.

The second objection made to the admission of the exhibits was that they were in violation of § 22–9–9.1, supra, in that they ignore the before and after standard. The fallacy with this objection is that the before and after fair market values for the property cannot be controlled by the striping of parking stalls or by a proposed plan for use of a parking area. The jury was fully apprised of the existing striping and of Kistler-Collister's future plans for the use of the parking area. However, the jury was not obliged to accept this parking plan as the only manner in which the area could be utilized for parking, nor was it obliged to find that the reduction in the number of 10 ft. wide parking stalls, by reason of the taking, would necessarily require a reduction in the size of the proposed building.

The final objection made to the exhibits was that they would mislead the jury. We fail to understand how the jury could have been misled. The purpose of a trial of factual issues is to arrive at the truth, insofar as possible, and the exhibits could only have aided the jury in determining the true before and after fair market values. The jury was obliged to determine those values in order to arrive at the damages to which Kistler-Collister was entitled under the law. The fact that the exhibits demonstrated a plan for the use of the parking area different from that proposed by the plans of Kistler-Collister did not make these exhibits misleading or confusing. They are easily understood. Nor were these exhibits merely supplemental to and cumulative of oral testimony, as is urged on this appeal.

The trial court erred in refusing the admission into evidence of these exhibits.

The final point we consider on this appeal is a claim that the trial court erred in permitting the jury to consider evidence as to damages or loss caused to the business of Kistler-Collister by reason and during the period of construction. Over objection, the trial court admitted oral testimony as to the extent of such loss and photographs taken during construction showing interference with the access to Kistler-Collister's property. It also instructed the jury that the jury could properly consider the loss of income and extra expense caused Kistler-Collister by the Highway Department's construction of the street improvements insofar as they would affect the market value of the property before and after the taking.

It is the law of New Mexico, regardless of what other jurisdictions have held, that a condemnee may not recover damages by way of expenses or loss of business for temporary inconvenience, annoyance or interference with access occasioned by construction, unless the period of construction was unduly long or the conduct of the condemnor causing the loss was unreasonable, arbitrary or capricious. *Hill v. State Highway Commission*, 85 N.M. 689, 516 P.2d 199 (1973). There was no evidence which would warrant a finding that the period of construction was unduly long or that the contractor or Highway Department acted unreasonably, arbitrarily or capriciously in accomplishing the construction.

In *Rymkevitch v. State,* 42 Misc.2d 1021, 249 N.Y.S.2d 514 (Ct.Cl.1964), a case relied upon by us in *Hill v. State Highway Commission, supra,* the New York court stated:

> "Certainly, temporary interference with access or noise, dirt, mud, and blasting vibration is not such an interference as to permanently diminish the value of the remaining property. As was stated in *Farrell v. Rose,* 253 N.Y. 73, 76, 170 N.E. 498, 499, 68 A.L.R. 1505:
>
> "'The inconvenience and damage which a property owner suffers from these temporary obstructions are incident to city life and must be endured.

The law gives him no right to relief, recognizing that he recoups his damage in the benefit which he shares with the general public in the ultimate improvement which is being made. The law, however, does afford him a relief, if the city or a contractor interferes with the highway without authority; or, if acting legally, prolongs the work unnecessarily or unreasonably.' See also, *Reis v. City of New York*, 188 N.Y. 58, 69, 80 N.E. 573; *Queensboro Farm Products, Inc. v. State of New York*, 5 A.D.2d 967, 171 N.Y.S.2d 646, aff'd 5 N.Y.2d 977, 184 N.Y.S.2d 844, 157 N.E.2d 719."

Although the trial court instructed that it was proper for the jury to consider loss of income and extra expense caused Kistler-Collister only to the extent that they would affect the market value of the property before and after the taking, this could not cure the error in admitting this evidence. In the absence of evidence that the period of construction was unduly long or that the conduct of the contractor or Highway Department was unreasonable, arbitrary or capricious, the evidence as to loss or damage by reason of construction itself merited no legal recognition, and the effort to relate it to the before and after market values gave it no such recognition. See *Hill v. State Highway Commission, supra; Masheter v. Yake,* 9 Ohio App.2d 327, 224 N.E.2d 540 (1967); 5 J. Sackman, Nichols' The Law of Eminent Domain, § 16.101[1] (Rev. 3d Ed.1974).

The trial court erred in admitting evidence as to damages or loss resulting from temporary inconvenience, annoyance or interference with access occasioned by the actual construction of the street improvements.

The judgment should be reversed and the cause remanded for a new trial.

It is so ordered.

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

539 P.2d 617

STATE of New Mexico, Plaintiff-Appellee,

v.

Jerry Allen MABREY, Defendant-Appellant.

No. 1823.

Court of Appeals of New Mexico.

Aug. 6, 1975.

Leo C. Kelly, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The question is whether defendant's conviction for intentional distribution of marijuana is barred on the basis of double jeopardy. He was convicted of violating § 54–11–22(A), N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp.1973). He claims the conviction is barred by the double jeopardy provision of N.M.Const., Art. II, § 15 because he had been previously tried on a charge of violating § 54–11–20(A), N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp.1973).

It is not disputed that two prosecutions have occurred; it is not disputed that both prosecutions were based on the same sale of marijuana. Defendant contends that whether the "same evidence" or "same transaction" test is applied, he has twice been placed in jeopardy. See *State v. Tanton,* 88 N.M. 5, 536 P.2d 269 (Ct.App. 1975), presently before the Supreme Court on Writ of Certiorari granted June 2, 1975.

The State agrees with defendant's conclusion of double jeopardy. It agrees that the two prosecutions were based on the same incident. The State's concession seems to be based on the view that defendant was placed in jeopardy in the first trial because that trial terminated after a jury was empaneled and sworn, and testimony was taken.

We agree that the State's approach is the correct one and that the question is whether defendant was placed in jeopardy in the first proceeding. If placed in jeopardy in that first proceeding, we would then have to consider on what basis the first proceeding was terminated. There was no jury verdict in the first proceeding; the trial court granted defendant's motion to dismiss for failure to prove a violation of § 54–11–20, supra. Only after considering the basis for termination of the first proceeding would we reach defendant's "same evidence" and "same transaction" arguments.

Although we agree with the State's approach, we do not agree with the State's conclusion. Defendant was not placed in jeopardy in the first proceeding. Two separate lines of New Mexico decisions support this result. Before discussing those decisions, it is pertinent to point out what was charged in each of the prosecutions.

In the first prosecution defendant was charged with intentionally trafficking in marijuana in violation of § 54–11–20, supra. The applicable portion of the statute was § 54–11–20(A)(2), supra, which defines "traffic" to mean the "distribution, sale, barter or giving away any controlled substance enumerated in Schedules I or II which is a narcotic drug". Marijuana is a Schedule I controlled substance. Section 54–11–6(C)(10), N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp.1973). Defendant sold marijuana. However, the controlled substance sold must have been a narcotic drug. "Narcotic drug" is defined in terms of opium, opiates, coca leaves and their salts, compounds, isomers, derivatives and chemical equivalents. "Marijuana" is defined separately, Section 54–11–2, N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp.1973), paragraphs (O) and (P). Schedule I does not list marijuana with opiates or opium derivatives; marijuana is listed with the hallucinogenic substances. Compare paragraphs (A), (B) and (C) of § 54–11–6, supra. Marijuana is not a narcotic drug under the above statutes.

Because marijuana is not a narcotic drug under the above statutes, § 54–11–20(A)(2), supra, does not make it a criminal offense to sell marijuana. The statute which does not make defendant's sale a criminal offense was the statute under

which he was charged and convicted in the second proceeding, § 54–11–22(A), supra.

Because § 54–11–20, supra, does not make it a crime to sell marijuana, the charge in the first proceeding did not charge defendant with a public offense. One line of New Mexico decisions holds that where a defendant is not charged with a public offense, proceedings after a plea to that non-charge does not place a defendant in jeopardy. *State v. Ferguson,* 56 N. M. 398, 244 P.2d 783 (1952); *State v. Ardovino,* 55 N.M. 161, 228 P.2d 947 (1951); *State v. Valdez,* 51 N.M. 393, 185 P.2d 977 (1947).

A person may not be punished for a crime without a sufficient charge even if he voluntarily submits himself to the jurisdiction of the court. *Smith v. Abram,* 58 N.M. 404, 271 P.2d 1010 (1954). If there is no proper charge against a defendant, the court lacks jurisdiction. *State v. Chacon,* 62 N.M. 291, 309 P.2d 230 (1957). The jurisdiction lacking is jurisdiction over a cause. Compare *Smith v. Abram,* supra. Because there was no proper charge, the court lacked jurisdiction in the first proceeding. A second line of New Mexico decisions holds that if jurisdiction was lacking in the first proceeding, there is no basis for a claim of double jeopardy. *Trujillo v. State,* 79 N.M. 618, 447 P.2d 279 (1968); *State v. Paris,* 76 N. M. 291, 414 P.2d 512 (1966); *State v. Goodson,* 54 N.M. 184, 217 P.2d 262 (1950).

Each line of New Mexico decisions "protects the societal interest in trying people accused of a crime, rather than granting them immunization because of legal error at a previous trial . . . ." *United States v. Ewell,* 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966). On the authority of those decisions, we hold that defendant was not placed in jeopardy in the first proceeding and there is no basis for the claim of double jeopardy. *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973).

The authority of the New Mexico decisions, in our opinion, has not been weakened by certain decisions of the United States Supreme Court. Those decisions hold the prohibition against double jeopardy bars a retrial after an acquittal under a defective charge. *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); *Kepner v. United States,* 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114 (1904); *United States v. Ball,* 163 U.S. 662, 16 S. Ct. 1192, 41 L.Ed. 300 (1896); compare dissenting opinion in *Duncan v. Tennessee,* 405 U.S. 127, 92 S.Ct. 785, 31 L.Ed.2d 86 (1972). The difference, in our opinion, is between a charge that is sufficient to support a conviction, although defective, and a charge so deficient that there could not be a legal conviction. See *State v. Davis,* 61 N.J.Super. 536, 161 A.2d 552 (1960). Here, the first proceeding was under an information that did not state a public offense and was so defective that a legal conviction could not result. Compare *Smith v. Abram,* supra, and *Ex parte Williams,* 58 N.M. 37, 265 P.2d 359 (1954).

In *Illinois v. Somerville,* 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973) the indictment contained a defect which could not be cured by amendment. Because of this defect a mistrial was declared. Defendant was reindicted, tried and convicted. The opinion holds that the trial court did not err in declaring a mistrial and conviction at a subsequent trial was not barred by double jeopardy. In this case, the information in the first proceeding could not have been amended because Rule of Criminal Procedure 7(a) prohibits amendments which charge an additional or different offense. Since no offense had been charged, an amendment to charge an offense would necessarily have been an additional offense. Compare *State v. Padilla,* 86 N.M. 282, 523 P.2d 17 (Ct.App.1974). Because no offense was charged in the first proceeding its termination was consistent

with the mistrial in *Somerville*. Defendant's trial and conviction under a proper charge was not double jeopardy.

Oral argument is unnecessary. The judgment and sentence are affirmed.

HENDLEY and HERNANDEZ, JJ., concur.

539 P.2d 620

STATE of New Mexico, Plaintiff-Appellee,

v.

David JORDAN, Defendant-Appellant.

No. 1949.

Court of Appeals of New Mexico.
Aug. 13, 1975.

Scott McCarty, Marchiondo & Berry, P. A., Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of burglary, defendant appeals. He alleges error on the basis of: (1) insufficient evidence; (2) prosecutor misconduct; (3) defects in the habitual offender proceedings; and (4) an improper habitual offender sentence.

Sufficiency of the Evidence

Rhonda was living in her parents' home during their absence. On the evening of August 15th she got married. Returning after the wedding festivities she discovered the back door to her bedroom open and the lights on. The door was locked when she left for her wedding. Several rifles and shotguns had been taken.

Tina was staying at the residence of Susan. Subsequent to the burglary, defendant telephoned Tina at Susan's residence. He told Tina that there were some guns in the back yard in some weeds, to bring them inside the house, that the guns were "hot". Tina brought the guns inside. Susan sold one of the guns to Gurule a couple of weeks after they appeared in the house. Susan and Tina left Farmington for Hobbs the last of August or first of September. This evidence is sufficient to show that defendant had knowledge of the location of the guns and knowledge that the guns had been stolen not later than August 17th. The burglary occurred the evening of August 15th.

Defendant admitted to Susan that he stole the guns. He also told Susan the guns were his.

Rhonda had placed the guns in an inside storage room of the residence about a week prior to the wedding. Johnny saw her place the guns in the storage room.

Johnny and defendant had been invited to the wedding and the subsequent festivities but did not attend. Johnny was to have been "best man" but excused himself on the basis that he had to work. On the evening of the wedding, about 9:30 or 10:00 p. m., Johnny's car was parked near the residence. Johnny was seen looking in through the front windows of the residence; defendant was seen coming around from the side of the house where the storage room was located. The burglary was discovered about midnight.

The guns had been somewhat hidden in the storage room; one had to wade through the rest of the stuff in the storage room to get to the guns. Nothing had been taken except the guns and nothing, other than the guns, had been disturbed.

Johnny's car was parked near a bar at 1:00 a. m. Johnny and defendant left the bar about 1:45 a. m. The car, driven by defendant, was stopped and searched. There were two dusty tires in the trunk. There were marks in the dust on the tires as if long objects had been laid on them. The marks were fresh.

The record shows that defendant possessed recently stolen property and that he came into possession of the property by theft. This evidence, together with evidence of defendant's presence at the scene near the time the crime was committed in the company of a person who knew the precise location of the property, permits the inference that defendant stole the guns during an unauthorized entry of Rhonda's residence. Compare *State v. Heim,* 83 N. M. 260, 490 P.2d 1233 (Ct.App.1971). The evidence is sufficient to sustain the conviction.

Asserted Prosecutor Misconduct

The misconduct claim has two parts; both are directed to the prosecutor's closing argument to the jury.

(a) Defendant asserts the prosecutor told the jurors they could not acquit defendant unless they found the prosecuting attorney guilty of a conspiracy to convict defendant. There was no objection to the allegedly improper remarks. They will not be reviewed. *State v. Vallejos,* 86 N. M. 39, 519 P.2d 135 (Ct.App.1974).

(b) The prosecutor referred to defendant's admission to Susan that he had stolen the guns. Defendant objected, claiming that was not Susan's testimony. It was.

Habitual Offender Proceedings

(a) Defendant was charged as a habitual offender under § 40A–29–5, N.M. S.A.1953 (2d Repl.Vol. 6). He claims the charge was "defective" for failure to name a specific subsection of the statute. No

such claim was made in the trial court and, thus, will not be considered. Rule of Criminal Procedure 33(e)(2); see *State v. Mata,* 86 N.M. 548, 525 P.2d 908 (Ct.App. 1974).

(b) Defendant admitted the allegations in the habitual offender charge. He now claims ineffective assistance of counsel in the habitual offender proceeding because his counsel failed to inform him of the effect of § 40A–29–7, N.M.S.A.1953 (2d Repl.Vol. 6) and his rights under the statute and the Constitution. There is nothing in this record directed to the advice counsel did or did not give defendant. The claim has no support in the record.

(c) Defendant complains of the trial court's procedure prior to his admitting the charge of being a habitual offender. Section 40A–29–7, supra, states the court shall require the defendant to say whether he is the same person as charged in the information. ". . . [I]f he acknowledges or confesses in open court, after being duly cautioned as to his rights, that he is the same person and that he has in fact been convicted of such previous crimes as charged, then the court shall sentence him . . . ." Defendant asserts his admission could not legally be accepted because he was not "duly cautioned as to his rights". The rights he claims he should have been cautioned about are those set forth in *State v. Vigil,* 85 N.M. 328, 512 P.2d 88 (Ct.App.1973). As to the applicability of those rights in a habitual proceeding, see *State v. Bonner,* 86 N.M. 314, 523 P.2d 812 (Ct.App.1974); In re Yurko, 10 Cal.3d 857, 112 Cal.Rptr. 513, 519 P.2d 561 (1974).

Defendant does not claim that his admission was involuntary. His claim is that the trial court's procedure was defective. This issue is raised for the first time on appeal and will not be considered. *State v. Jordan,* 85 N.M. 125, 509 P.2d 892 (Ct.App.1973); See *State v. Brakeman,* 88 N.M. 153, 538 P.2d 795 (Ct.App.), decided July 2, 1975.

Habitual Offender Sentence

The information, charging defendant as a habitual offender on the basis of the burglary, relied on two prior convictions. One of the prior convictions was a burglary in Arizona. No issue is raised concerning utilization of the Arizona burglary to enhance the sentence for the current burglary.

The second of the prior convictions was the sale of LSD. Defendant contends this conviction could not be utilized to enhance his sentence for the current burglary. We disagree.

Defendant claims his LSD conviction was under the Controlled Substances Act enacted in 1972. The claim is not supported by the record. The information charges that the LSD conviction occurred in the District Court of San Juan County in April, 1972. The Controlled Substances Act carried an emergency clause. Laws 1972, ch. 84, § 61. It was effective when approved. N.M.Const., Art. IV, § 23. It was approved February 29, 1972. See footnote to Laws 1972, p. 437. Any offense occurring prior to the effective date was to be prosecuted under prior law. Laws 1972, ch. 84, § 40. We cannot tell from this record when defendant committed the offense of selling LSD and, therefore, do not know which law was applicable to that offense.

Regardless of the law applicable to the LSD offense, the trial court properly used that offense in enhancing defendant's sentence.

The current crime is burglary and the enhanced sentence is for that crime. See *State v. Tipton,* 78 N.M. 600, 435 P.2d 430 (1967). Thus, enhancement for a current narcotic offense or a current offense under the Controlled Substances Act is not involved. *State v. Lujan,* 76 N.M. 111, 412 P.2d 405 (1966); *State v. Alderete,* 88 N. M. 150, 538 P.2d 422 (Ct.App.) decided July 2, 1975.

If defendant's LSD offense was for a conviction under the law prior to the Con-

trolled Substances Act, that conviction was a prior offense which could be utilized in enhancing defendant's current burglary offense. *State v. Lard,* 86 N.M. 71, 519 P.2d 307 (Ct.App. 1974). The reasoning of *Lard* applies to prior offenses under the Controlled Substances Act. There is no conflict between the provisions of § 54–11–22(A), N.M.S.A. 1953 (Repl.Vol. 8, pt. 2, Supp. 1973) and § 40A–29–5, supra. Nor do we discern any legislative intent within the Controlled Substances Act to prohibit use of a Controlled Substances Act conviction to enhance a subsequent burglary conviction. It is the fact of the prior felony that is the basis for the enhanced sentence for the current burglary. *State v. Lard,* supra.

Oral argument is unnecessary. The judgment and sentence are affirmed.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

539 P.2d 623

STATE of New Mexico, Plaintiff-Appellee,

v.

Ishmael Lopez LARA, Defendant-Appellant.

No. 1911.

Court of Appeals of New Mexico.

July 30, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Donald Klein, Jr., Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Don Montoya, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Florentino Guilez was shot to death. Defendant was charged with the killing. Defendant's brother Ronnie was a defense witness. Cross-examining Ronnie, the district attorney asked:

> "In spite of the fact that your brother [defendant] was advised of his rights and signed that [advice of rights form], your brother wouldn't tell the Police anything about the shooting, would he."

The trial court ruled the question improper and, at the defendant's request, instructed the jury to disregard the question. Defendant was convicted of murder in the second degree. Section 40A-2-1(B), N.M.S.A.1953 (2d Repl.Vol. 6). His appeal asserts: (1) the prosecution may not call attention to the silence of the accused at the time of his arrest, and (2) the prosecution having impermissibly done so, there was plain error requiring a new trial. Under the circumstances of this case, we agree.

An issue at trial was who shot Guilez. The State's theory was that defendant did the shooting. The defense theory was that Ronnie did the shooting. Both Ronnie and defendant testified that Ronnie shot Guilez. Ronnie's trial testimony was inconsistent with his statement to the police that defendant did the shooting. Defendant gave no statement to the police. In closing argument the district attorney contended the theory that Ronnie shot Guilez was a fabrication developed subsequent to Ronnie's statement.

United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99, was decided by the United States Supreme Court June 23, 1975. When arrested for robbery and advised of his constitutional rights, Hale remained silent. Hale testified at his trial. His testimony was exculpatory and included an explanation of the money in his possession when arrested. The government asked Hale why he had not explained the possession of the money to the police. The trial court instructed the jury to disregard the question but refused to declare a mistrial. Affirming a reversal of Hale's conviction, the United States Supreme Court held "the probative value of respondent's pretrial silence in this case was outweighed by the prejudicial impact of admitting it into evidence."

There is no claim that defendant's failure to speak could be considered an admission or confession by silence. See *United States v. Hale, supra; State v. Hovey,* 80 N.M. 373, 456 P.2d 206 (Ct. App.1969). There is a tenuous claim that defendant's silence after being arrested was inconsistent with his trial testimony. It was on the basis of such an asserted inconsistency that the government sought to impeach the credibility of Hale. The government claimed that Hale's "silence at the time of his arrest is probative of the falsity of his explanation later proffered at trial * * *." *United States v. Hale, supra,* found alternative explanations for pretrial silence and held the silence was insufficiently probative of an inconsistency to warrant admission. In so holding, *Hale* states: "In most circumstances silence is so ambiguous that it is of little probative *force." United States v. Fairchild,* 505 F.

2d 1378 (5th Cir. 1975) states: "But, to be admissible, keeping silence must be much more than ambiguous. It must appear to be an act blatantly inconsistent with the defendant's trial testimony."

The State argues that such a blatant inconsistency exists in this case. During cross-examination of a police officer, the defense brought out that the defendant voluntarily helped the police locate a gun of the same caliber as the gun used in the shooting. From this one question the State contends defendant raised the question of his cooperation with law enforcement officials and had opened the door to a full development concerning that cooperation. The argument is that defendant's silence is inconsistent with and has probative value on the subject of defendant's cooperation. The State relies on *United State v. Fairchild, supra,* but the facts in *Fairchild* are different. Defense counsel in *Fairchild* "was obviously trying to create the impression that Fairchild *actively* cooperated with the police in order to build up his client in the eyes of the jury * * *." *United States v. Fairchild, supra,* footnote 8. Evidence that defendant helped the police find a gun does not support an inference of full and active cooperation, which was the situation in *Fairchild.*

Defendant's silence in this case was ambiguous and was not blatantly inconsistent with his trial testimony. There is no showing that Defendant's silence had any significant probative value. The district attorney's question was improper. The trial court correctly ruled the question, directing attention to defendant's silence, was not to be answered. Our decisions have consistently held that such questions are improper. *State v. Lopez,* 84 N.M. 402, 503 P.2d 1180 (Ct.App.1972); *State v. Carlton,* 82 N.M. 537, 484 P.2d 757 (Ct. App.1971); *State v. Hovey, supra.* In *State v. Lopez, supra,* we declined to review the error because the issue was raised for the first time on appeal and, at that time, we had no "plain error" rule. We now have a "plain error" rule; it appears as New Mexico Rule of Evidence 103(d). There being no basis for a question concerning defendant's silence, the district attorney's question was "plain error" because it was a comment by the district attorney on defendant's silence. *Deats v. Rodriguez,* 477 F.2d 1023 (10th Cir. 1973).

What results from this error? *State v. Hovey, supra* and *State v. Carlton, supra,* found the question concerning defendant's silence to be improper, but in neither case was there a reversal. Both decisions recognized the danger that the jury might equate defendant's failure to talk with guilt. Both decisions examined the circumstances and ruled defendant was not prejudiced by questions concerning a defendant's silence.

Our understanding of *United States v. Hale, supra,* is that if the reference to a defendant's silence lacks significant probative value, the reference to silence has an intolerable prejudicial impact requiring reversal. *United States v. Hale,* states:

> "The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.
>
> * * * * * *
>
> . . . We now conclude that the respondent's silence during police interrogation lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact."

In this case, the question directing the jury's attention to defendant's silence was asked of the brother and not the defendant. This makes no difference; the prejudicial impact is the same. See *State v. Rowell,* 77 N.M. 124, 419 P.2d 966 (1966).

United States v. Hale, supra, has modified the approach taken in *State v.*

Hovey, supra and *State v. Carlton, supra,* and those decisions are to be applied in the future only to the extent they are consistent with *United States v. Hale, supra.* Specifically, we will no longer weigh the prejudicial impact of improper questions concerning defendant's silence. If defendant's silence lacks significant probative value, any reference to defendant's silence has an intolerable prejudicial impact requiring reversal.

Oral argument is unnecessary. There being no basis in this case for questions concerning defendant's silence, the judgment and sentence are reversed. The cause is remanded with instructions to grant defendant a new trial.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

539 P.2d 626

STATE of New Mexico, Plaintiff-Appellee,

v.

David CARRILLO, Defendant-Appellant.

No. 1950.

Court of Appeals of New Mexico.

Aug. 13, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Reginald J. Storment, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Santa Fe, Ralph W. Muxlow, II, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of two counts of trafficking in heroin, defendant appeals. Section 54–11–20, N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp.1973). He contends the trial court erred in: (1) denying his motion for a polygraph examination, (2) refusing to dismiss because the State could not produce an informer, (3) refusing to strike the testimony of a witness, and (4) refusing to grant a new trial. Appellate counsel has either disregarded the record or appellate rules in each point raised.

Polygraph Examination

Prior to trial defendant sought an order requiring the State "to provide the defendant with the opportunity and means to submit to a polygraph examination. * * *" The contents of the motion make clear that defendant had the opportunity for such an examination; defendant had selected the examiner and alleged the examiner had consented to conduct the examination. What defendant sought by his motion was an order committing the State to pay for the examination before the examination was conducted. See *State v. Frazier*, 85 N.M. 545, 514 P.2d 302 (Ct.App.1973) concerning requests for advance authorization.

The trial court denied the motion. The order recites that the court had "heard from counsel" in connection with the motion. There is nothing in the record showing what contentions were presented to the court. All this record contains on this issue is the motion and the order.

On what basis was defendant entitled to compel the State to pay for such an examination?

The motion alleges that defendant was indigent thus presumably invoking the provisions of the Indigent Defense Act, §§ 41–22–1 through 41–22–10, N.M.S.A.1953 (2d Repl.Vol. 6). At the time the motion was ruled on, there was nothing in the record showing defendant was in fact indigent. The court's finding of indigency was made after trial and for purposes of the appeal. Trial counsel was court-appointed but the only reference to indigency is in defendant's various motions, not in orders of the court. Also appearing in defendant's motions are allegations that defendant had employment and could return

to that employment if released on bail. The record does not support the claim that defendant was indigent when he sought a free polygraph examination.

If we assume indigency, § 41–22–3(A), supra, would apply. That section provides that a needy person is to be provided with necessary services at public expense. Defendant's motion alleges a polygraph examination "is necessary to afford the defendant the full extent of his constitutional rights to due process of law and equal protection. * * *" On what basis such an examination was "necessary" we do not know. See *State v. Frazier*, supra. We need not consider the Indigent Defense Act further because there is nothing showing defendant relied on that act in the trial court and he does not rely on the act in his appeal.

On appeal, defendant asserts the polygraph examination was critical to the defense of alibi and misidentification. Defendant claims he had a constitutional right to be given the examination under *State v. Dorsey*, 87 N.M. 323, 532 P.2d 912 (Ct.App.1975) and *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Our answers are: (a) The record does not show any claim of "critical" evidence was ever raised in the trial court. From the record it appears this contention is raised for the first time on appeal. Section 21–12–11, N.M.S.A.1953 (Int.Supp.1974). (b) There is nothing in this record supporting a claim of "critical" evidence at the time the motion was denied. (c) Defendant claims a polygraph examination was critical because two State Police agents identified defendant as the person who sold the heroin. Defendant also asserts a polygraph examination would either have added weight to his alibi defense or would have destroyed that defense. The trial record shows defendant called at least four alibi witnesses. This is quite different from *State v. Dorsey*, supra, where defense witnesses, apart from the defendant, could testify only to what defendant had stated. The abesnce of a polygraph examination was not critical. (d) The defendant's motion seeking the polygraph examination makes no allegations of any kind concerning requirements for admissibility 4 and 5, as stated in *State v. Lucero*, 86 N.M. 686, 526 P.2d 1091 (1974). These requirements are not questioned in *State v. Dorsey*, supra.

The polygraph contention is without merit on each of the above grounds.

Producing the Informer

Pursuant to Rule of Evidence 510(c)(2), the trial court directed the State to produce the informant for an in camera hearing. See *State v. DeBarry*, 86 N.M. 742, 527 P.2d 505 (Ct.App.1974); *State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct. App.1974).

The State was unable to produce the informer. The Rules of Evidence do not state what happens in this situation. Defendant moved for dismissal, which was denied.

United States v. Williams, 496 F.2d 378 (1st Cir. 1974) states:

> "But should an informer disappear or become unavailable to the defense, we would compel the government, upon timely demand, either to locate him or make an affirmative showing satisfactory to the court why it could not reasonably be expected to do so and of its diligence generally as regards the disappearance."

United States v. Jones, 492 F.2d 239 (3rd Cir. 1974) and *Velarde-Villarreal v. United States*, 354 F.2d 9 (9th Cir. 1965) require the government to demonstrate its inability, through reasonable efforts, to produce the informer. See also *People v. Goliday*, 8 Cal.3d 771, 106 Cal.Rptr. 113, 505 P.2d 537 (1973).

We follow the approach used in *United States v. Williams*, supra. Defendant's demand was made approximately four months prior to trial and was timely. The State could not produce the informer for the in camera hearing ordered by the court. Accordingly the State was required

to satisfy the court as to why it could not reasonably be expected to produce the informer and satisfy the court as to the State's diligence as regards the disappearance. Whether the State has met its burden is a question of fact for the trial court. *Velarde-Villarreal v. United States,* supra.

The evidence produced by the State is uncontradicted. That evidence details the efforts to locate the informer after the trial court ordered the informer to be produced. In addition, Officer Frausto testified: "I had made many efforts prior, however, I was not able to learn, not for the purpose of this case, but for other cases involved."

On the basis of this evidence produced, the trial court ruled the State "has made diligent search and inquiry to ascertain the whereabouts of the informer and I so find. * * *"

In contending the trial court erred in refusing to dismiss, defendant makes only indirect reference to the trial court's ruling. Defendant asserts there should have been a dismissal "[a]bsent a better showing of effort to locate than was made in the instant case. * * *" The answer to this contention is that the State's evidence is uncontradicted and that evidence is sufficient to sustain the trial court's ruling.

Defendant also contends the State's inability to produce the informer was "because of its own procrastination. * * *" The record does not support this claim.

The trial court did not err in refusing to dismiss the indictment because of the State's inability to produce the informer.

Refusal to Strike Witness's Testimony

The witness was the State Police chemist who testified as to the result of the tests he ran on the substances purchased from defendant. Trial objections to this testimony were overruled. On appeal, defendant abandons any claim of error based on objections at trial.

The claim on appeal is that admission of the chemist's testimony concerning the test results was plain error under Rule of Evidence 103(d). The witness testified as to the tests that were run and the result of those tests. The witness testified that in running the various tests the results were recorded on laboratory worksheets. The chemist did not bring the worksheets to court. Defendant asserts the failure of the chemist to bring the worksheets to trial denied defendant the right to cross-examine concerning underlying facts as authorized by Rule of Evidence 705. He contends this asserted denial was plain error requiring a new trial. It was not.

Defendant could have informed himself of the contents of the worksheets by proceeding under Rule of Criminal Procedure 27(a)(6). He did not do so. Not having sought discovery authorized by the Rules of Criminal Procedure, he now complains of nondisclosure which he never requested. The claim is frivolous.

Refusal to Grant a New Trial

The motion for a new trial asserts that one or more jurors in this case had been jurors in the case which tried Ramon Lujan, a defense witness in this case. The motion asserts that information learned by these jurors in the Lujan trial was presented to the rest of the jury panel in this case. He contends the trial court erred in not allowing defendant to call a juror to testify for purposes of impeaching the verdict. We do not reach the issue of when a verdict may be impeached because the record does not show a tender of the excluded evidence. Rule of Evidence 103(a)(2). The issue is not before us for review.

The motion for new trial alleges that upon voir dire none of the jurors stated that they knew Lujan or had sat as jurors in Lujan's trial. Defendant asserts it is the duty of jurors to make full and truthful answers to questions which are asked. There is no record of the voir dire proceedings, thus, we do not know what questions were asked on voir dire. We

note that defendant does not allege that prospective jurors were asked about Lujan, only that none of the jurors stated that they knew Lujan. There is no basis for holding that any juror failed to respond fully and truthfully to an asserted question not supported by the record. *State v. Romero,* 86 N.M. 99, 519 P.2d 1180 (Ct. App.1974).

Oral argument is unnecessary. The judgment and sentence are affirmed.

It is so ordered.

HENDLEY and HERNANDEZ, JJ., concur.

539 P.2d 630

STATE of New Mexico, Plaintiff-Appellee,

v.

Joe SEDILLO, Defendant-Appellant.

No. 1471.

Court of Appeals of New Mexico.

July 16, 1975.

Toney Anaya, Atty. Gen., Charles Roybal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

HENDLEY, Judge.

Defendant was indicted for trafficking in a controlled substance contrary to § 54-11-20, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, 1962, Supp.1973). He was first brought to trial on September 5, 1973. A jury was empaneled and sworn, an opening statement was made, and a police officer had given approximately two and one-half hours of testimony. During defendant's re-cross examination the following ensued:

"*BY MR. HARTKE* [*defense counsel*]:

". . .

"Q Officer, I want to just briefly go back to one point, and that is the question about this informant 722. You say that he did not introduce you even though the grand jury testimony indicates he did, but that he merely pointed him out ?

"A As far as an introduction, there

"Q Yes.

"A As far as the introduction, there could be various introductions. We consider it an introduction as far as just the paper work for ourselves if the man points him out to us and he is there, he is there with us, you know, to an extent that the different defendants, whoever it is, sees us with the informant. That could be an introduction instead of a verbal introduction, you know, on a name basis.

"Q Officer, I have a licensed lie detector man waiting—

"MR. TAYLOR: Your Honor, I will object to this. It is very improper.

"MR. HARTKE: If the District Attorney will stipulate to it, we will admit it into evidence.

"MR. TAYLOR: That is improper.

"MR. HARTKE: I am prepared to do it in front of the jury or out of the presence of the jury.

"MR. TAYLOR: May we approach the bench, please?

"(Thereupon, a discussion was had between the Court and counsel outside the hearing of the jury, and not made a part of the record.)

"THE COURT: Ladies and gentlemen, a polygraph examination is not admissible in evidence in New Mexico. It has never been admissible, and the courts have indicated that it can not be used even if both sides stipulate to its admissibility.

"Based on that and the fact that this might influence you one way or another in this case, the Court is going to declare a mistrial, and I am holding Mr. Hartke in contempt of Court for bringing that up. I feel he should know better than that. So with that you are excused at this time, and we will ask you to come back tomorrow morning at nine o'clock for another case. I want to see counsel in chambers. You are excused, Officer.

"(Thereupon, at 2:10 o'clock p. m., the jury was excused.)"

A motion to dismiss the indictment on grounds of double jeopardy was filed,

heard and denied. Defendant was again brought to trial and this time convicted. His present appeal alleges several points for reversal. One is dispositive; it is that defendant was unconstitutionally placed in jeopardy a second time when he was retried for the same offense. We accordingly reverse the conviction and direct a discharge of the defendant.

We first note that while one judge of the Second Judicial District declared the mistrial at defendant's initial trial, the motion to dismiss on grounds of double jeopardy was presented to another judge of the same district. It appears from the record that this second judge denied defendant's motion because he felt that he did not have the authority to review the first judge's exercise of discretion. It is our view that as a matter of conserving judicial energy, the second judge should have reached the merits of defendant's motion. See *United States v. Whitlow*, 110 F.Supp. 871 (D.D.C.1953); *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).

There is no question but that jeopardy had attached at the September 5, 1973 proceedings. *State v. Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966); *Ex parte Williams*, 58 N.M. 37, 265 P.2d 359 (1954). The state initially contends that since defendant did not object to the sua sponte granting of the mistrial, he is precluded under *State v. Woo Dak San*, 35 N.M. 105, 290 P.2d 322 (1930) from raising the issue on appeal. We do not consider the doctrine of waiver as stated in *Woo Dak San* to be applicable to the instant case. This was a case in which Chief Judge Wood of our Court conducted a pre-appeal hearing for the purpose of limiting the contents of the record on appeal pursuant to Supreme Court Order dated September 6, 1972. The transcript of that hearing is part of the record of this appeal. Counsel was called upon to justify the inclusion of that portion of the record which consisted of the transcript of the September 5, 1973 proceedings. He stated the reason he did not oppose the mistrial was that "I was held in contempt, your honor, which at that point I took to [mean] that I should be silent from then forth, having received the ultimatum of the Court." It would offend our sense of justice to construe defendant's silence after the granting of the mistrial under these circumstances as an intentional relinquishment of a known right, see *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), or as the mere play of wits of the sharp practitioner. See *Woo Dak San, supra.*

We thus reach the merits of defendant's point for reversal. For 150 years, the rule has been that where a mistrial is granted not at the behest of defendant, a second trial is precluded by the double jeopardy clause of the Fifth Amendment to the United States Constitution unless it can be said that there was a "manifest necessity" or "compelling reason" for the granting of a mistrial. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824); *United States v. Jorn, supra; Illinois v. Somerville*, 410 U.S. 458, 93 S. Ct. 1066, 35 L.Ed.2d 425 (1973); *United States v. Whitlow, supra; State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct.App. 1972). Upon appellate review, the question to be decided is whether the trial court exercised sound judicial discretion to ascertain that there was a manifest necessity for the declaration of the mistrial. *United States v. Jorn, supra; People v. Maguire*, 38 Mich.App. 576, 196 N.W.2d 880 (1972).

The reason for the sua sponte declaration of a mistrial in the case at bar was what we surmise to be defense counsel's implicit challenge to the police officer to take a polygraph test. There was but one reference to the "lie detector man." This is not a case of repeated misconduct by defense counsel. Nor do we consider one isolated reference to lie detectors a type of misconduct that would go to the very vitals of the trial itself such as tam-

pering with the jury. See *United States v. Whitlow, supra; People v. Maguire, supra.* It does not appear that any effort was made to cure the error by instruction to the jury. In short, it does not appear that the trial judge made any effort to assure that there was a manifest necessity for the sua sponte declaration of this mistrial. *United States v. Jorn, supra; United States v. Whitlow, supra; People v. Maguire, supra.* Thus, we can only conclude that reprosecution of the defendant would violate his right under the Fifth Amendment of the United States Constitution not to be put in jeopardy twice for the same offense.

Reversed and defendant is discharged. It is so ordered.

SUTIN and HERNANDEZ, JJ., concur.

539 P.2d 1006

STATE of New Mexico ex rel. Toney ANAYA, Attorney General, Petitioner,

v.

The Hon. Robert H. McBRIDE, District Judge, Second Judicial District of New Mexico, Respondent.

No. 10346.

Supreme Court of New Mexico.

June 18, 1975.

Order of Ouster July 1, 1975.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Harry L. Bigbee, Sp. Asst. Atty. Gen., Santa Fe, for petitioner.

Bruce D. Hall, Willard F. Kitts, Albuquerque, Olmsted & Cohen, Charles D. Olmsted, Santa Fe, for respondent.

OPINION

STEPHENSON, Justice.

This is a proceeding in quo warranto filed as an original action before us by the attorney general (petitioner) testing the constitutionality of the appointment of the Honorable Robert H. McBride (respondent) as district judge of the Second Judicial District. The controversy centers on Article IV, Section 28 of the Constitution of New Mexico which restricts the appointment of members of the legislature to civil offices under certain circumstances. Final resolution of the case has been delayed, pending the filing of a stipulation of counsel requested by us and which has now been received.

Respondent was elected to the New Mexico Senate at the general election held November 3, 1970 for a four-year term, and qualified in January, 1971. During the 1972 legislative session, the salaries of district judges were increased by $7,000.00 per annum. Respondent was again a successful candidate for election to the New Mexico Senate at the general election held November 5, 1974. However, before he qualified and prior to the commencement of the 1975 legislative session, Governor Apodaca appointed him to the district bench, filling a vacancy resulting from a resignation. Judge McBride qualified and has ever since been engaged in the discharge of those duties.

Petitioner contends that under the stated facts, respondent's appointment was in violation of N.M.Const. art. IV, § 28 which in part provides:

> "No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; * * *."

A surplus of legal theories have been advanced in regard to this case by lawyers, both amateur and professional. However, the issues have markedly narrowed in scope during its pendency to an extent which reflects considerable credit upon the powers of analysis and breadth of vision of counsel for the parties. The petitioner's brief in chief contains seven points. The respondent's amended answer to the petition and his answer brief conceded the jurisdiction of the court, the propriety of a quo warranto proceeding under these circumstances, and the petitioner's standing to assert the constitutional prohibition to the respondent's appointment. Neither is it contended that the magnitude of the 1972 salary increase is de minimus.

Accordingly, counsel for respondent have answered to only two points raised by petitioner, one of which was an assertion that respondent had been appointed to a civil office during the term for which he had been elected in 1974. Counsel for the attorney general, in the reply brief, have even dropped this assertion, expressing doubt that mere election without subsequent qualification or acceptance of the office would bring the respondent within that portion of art. IV, § 28 which prohibits ap-

pointment during one's term. Moreover, inasmuch as respondent's successor as senator qualified on January 21, 1975 the petitioner now concedes that a holding that respondent should be ousted subject to immediate reappointment would serve no purpose.

Despite respondent's concession of jurisdiction and petitioner's standing to bring this action, the minority view in this case reasons that a procedural requirement in § 22-15-6, N.M.S.A.1953 was not satisfied because "the name of the person rightfully entitled to the office with a statement of his right thereto" was not set forth in the complaint. It is asserted that under State ex rel. Hannett v. Ct. 1st Dist., Santa Fe Co. et al., 30 N.M. 300, 233 P. 1002 (1925), this failure affects the subject matter jurisdiction of the court allowing us to raise the jurisdictional issue on our own accord and dismiss the action.

It is probably sufficient to say that this argument was not advanced by respondent, but in view of the nature of the case and the analysis of the dissent, we are not content to let the matter rest there.

As we understand the dissent, its primary thrust is to urge that quo warranto is "strictly statutory," that the pleading requirements specified in § 22-15-6, particularly the part requiring the name of the person rightfully entitled to the office, is "substantive," and, that allegation being omitted, we lack "jurisdiction."

We do not agree with any of this. Quo warranto is an ancient common law writ the origins of which are obscured by time. See 65 Am.Jur.2d "Quo Warranto" § 2 (1972). More to the point, N.M.Const. art. VI, § 3 states in part:

> "The Supreme Court shall have original jurisdiction in quo warranto * * * against all state officers * * *."

Clearly, this court has power and authority to hear and determine quo warranto cases and to grant relief. There is thus no question at all concerning our jurisdiction. See Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 531 P.2d 939 (1975). Furthermore, the statutory provision requiring the name of the person rightfully entitled to the office is clearly procedural. Our constitutional power under N.M.Const. art. III, § 1 and art. VI, § 3 of superintending control over all inferior courts carries with it the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government. State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936). See also Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973); Sitta v. Zinn, 77 N.M. 146, 420 P.2d 131 (1966); State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947); City of Roswell v. Holmes, 44 N.M. 1, 96 P.2d 701 (1939); cf. State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973).

Under the Constitution, the legislature lacks the power to prescribe by statute rules of practice and procedure, although it has in the past attempted to do so. Certainly statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in this court.

In Alexander v. Delgado, supra, we referred to the statutes purporting to regulate certiorari to the Court of Appeals. We there said that:

> "* * * [t]his court has no quarrel with the statutory arrangements which seem reasonable and workable and has not seen fit to change * * * by rule." 84 N.M. at 718, 507 P.2d at 779.

But we cannot give our approval to the portion of § 22-15-6 under discussion, at least not if it has the meaning attributed to it by the dissent, especially since the statute is inconsistent with Rule 12(a) of the Rules Governing Appeals [§ 21-12-12(a), N.M.S.A.1953 (1974 Interim Supp.)]. How would it be possible to make such an allegation here, or in any situation where a vacancy has been filled by appointment? Under the reasoning of the dissent, art. IV, § 28 would be read out of the Constitution and thus, a governor could make con-

stitutionally invalid appointments at his pleasure. Moreover, we would in such cases be shorn of our constitutional powers vis-a-vis quo warranto, and presumably, with additional bits of legislative ingenuity, of our powers to issue other extraordinary writs as well. Such could not have been the intention of the people when art. III, § 1 and art. VI, § 3 were adopted and we will not construe the Constitution to reach such an absurd result.

The part of the dissent under consideration relies primarily upon State ex rel. Hannett v. Ct. 1st Dist., Santa Fe Co. et al., supra, reasoning that quo warranto statutes must be "strictly applied." This is negated by Hannett's own words. Writing for the court, Chief Justice Parker said:

> "It may be said, preliminarily, that statutes of this kind are remedial in character, and as such should be liberally interpreted to effectuate the objects intended." 30 N.M. at 305, 233 P. at 1004.

Hannett is not authority for the proposition that the procedural requirement under discussion adversely affects the subject matter jurisdiction of this court to determine a quo warranto action questioning the constitutional legality of one's appointment to public office. Hannett was a prohibition proceeding brought to challenge Manuel B. Otero's right to bring a quo warranto action in his own name challenging the propriety of an election contest between him and Arthur T. (A. T.) Hannett. This court properly held, after reviewing the quo warranto statutes, that the state, through the attorney general, is an indispensable party plaintiff in a quo warranto proceeding "of this kind." The reason for this requirement, of course, is that:

> "* * * a private person cannot have the writ to adjudicate his title to an office, and, indeed, the proceeding in the nature of a quo warranto goes only to removing the intruder, and no further." Vigil v. Stroup, 15 N.M. 544, 552, 110 P. 830, 832 (1910).

Quo warranto is to:

> "* * * ascertain whether [the public officer] is constitutionally and legally authorized to perform any act in or exercise any functions of the office to which he lays claim." Holloman v. Lieb, 17 N.M. 270, 273, 125 P. 601, 602 (1912).

Nowhere in Hannett does the court even intimate that the procedural statute under discussion is jurisdictional.

Since the Constitution provides for separate and equal branches of government in New Mexico, any legislative measure which affects pleading, practice or procedure in relation to a power expressly vested by the Constitution in the judiciary, such as quo warranto, cannot be deemed binding. We cannot render inoperative a clause in the Constitution on so slender a reed. One of the primary purposes of quo warranto is to ascertain whether one is constitutionally authorized to hold the office he claims, whether by election or appointment, and we must liberally interpret the quo warranto statutes to effectuate that purpose. See Holloman v. Lieb, supra; State ex rel. Hannett v. Ct. 1st Dist., Santa Fe Co. et al., supra. The petitioner is properly before the court.

Thus, as matters stand, the sole legal issue which we have before us is whether art. IV, § 28, particularly that portion which prohibits appointment of a legislator to civil office within one year following his elected term if the emoluments of that office were increased during such term, was violated. This issue in turn is broken down into two parts.

Respondent's first theory, ingeniously contrived, superbly briefed and forcefully argued, contends that at the time district judges' salaries were raised in 1972, he was not actually a senator. This argument is premised upon a complex and subtle interplay of various legislative acts and court decrees, both federal and state, which reapportioned the New Mexico Senate. It is claimed that the four-year term as senator which respondent commenced to serve in January of 1971, actually terminated prior to the 1972 session, and that because the

area represented by him had been expanded subsequent to the general election in 1970, he was required to run again to serve from 1972 onward, but did not do so.

However, facts discovered subsequent to the briefing and argument in this case clearly demonstrate that the respondent's senatorial district was not expanded subsequent to the 1970 general election. These facts are established by the stipulation of counsel to which we referred to at the outset. Thus, the factual premise upon which respondent's first argument is constructed is faulty and we need consider it no further.

However, it is necessary to again digress to the dissent which seems to find some legal significance in the claimed fact that the boundaries of respondent's senatorial district were expanded after the primary but before the general election in 1970 and, thereafter, contracted by the time of the 1972 general election, concluding on some unstated, and to us unknown, basis that "[a]t the very least, the respondent should have been a candidate for his Senate seat in 1972," and that his "service can obviously be called *de facto* in 1973 and 1974, negating any application" of art. IV, § 28.

There are so many things wrong with this it is difficult to know where to start, or to stop either. Again, this issue was not raised by the parties. The claimed facts about the expansion and contraction of respondent's senate district do not appear in the record. There was no testimony. For present purposes, however, we will accept these facts at face value.

Respondent has never attached any legal significance to any boundary changes other than an expansion of his district after the general election in 1970. As mentioned, this assertion was erroneous. Even the dissent does not claim this occurred. The only legal compulsion for respondent to have run in 1972 would have flowed from the legislation and court decrees we have mentioned. But they had the opposite effect since the glaring fact is that in the 1972 election, respondent's senatorial district lay entirely within the geographical boundaries of the district from which he was elected in 1970. This fact placed respondent's senatorial district squarely within § 10(A)(2) of the 1972 Senate Reapportionment Act (Laws 1972, ch. 79, § 10(A)(2)) quoted in the dissent. That act was upheld constitutionally by the Santa Fe County District Court in Cargo v. King, et al., No. 43123 (filed May 10, 1971; see Amended Order filed in open court, nunc pro tunc, as of March 10, 1972) and respondent was not, under the terms thereof, required to run again in 1972. Whether the district court made a correct decision we do not determine since no appeal was taken and no one, until now, has questioned it. The series of non sequiturs in the dissent urging that respondent should have been a candidate in 1972, therefore, he was a de facto senator for two years, therefore, art. IV, § 28 does not apply, is void of persuasiveness. No reason is suggested as to why art. IV, § 28 does not apply to a legislator who becomes de facto during the term for which he was elected and during which emoluments were increased.

Even if we were to concede that respondent was a de facto senator in 1973 and 1974, which we do not, that status would render him no aid. The immutable facts are that in the fall of 1970 he was elected for a four-year term to the New Mexico Senate, that he qualified and was seated as a senator and acted as a senator throughout the entire four years, serving on various committees and on the floor of the Senate as an active and influential member. At no time has he questioned the constitutionality of the 1972 Senate Reapportionment Act or the court decree which held he did not have to run again in 1972. Having enjoyed the benefit of the law which allowed him to retain his position without contest in 1972, the respondent, even if he had raised it, would not be heard to question its propriety. See Clark v. Smith, 193 Tenn. 194, 245 S.W.2d 197 (1951). A de facto officer is estopped

from taking advantage of his own want of title. State v. Mayeux, 228 La. 6, 11, 81 So.2d 426, 427 (1955).

The final legal proposition advanced by respondent argues that art. IV, § 28 is not applicable to appointments of legislators to fill judicial vacancies. He points out that art. IV, § 28 was adopted as an original provision of our state Constitution on January 21, 1911.[1]

Our original Constitution created the elective executive offices of governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, superintendent of public instruction, commissioner of public lands,[2] and three corporation commissioners,[3] and specified the amounts of compensation each could receive in full payment for all services.[4]

The original Constitution also established the elective offices of supreme court justices[5] and district court judges for specified terms,[6] provided for appointments by the Governor to fill vacancies only until the next general election,[7] and specified the amounts of salary each was to receive[8] ($6,000.00 and $4,500.00 per annum respectively). Only after publication of the 1920 United States Census could the legislature increase the number of supreme court justices[9] and judicial districts.[10] The salaries of all supreme court justices and district court judges, however, remained fixed by the Constitution until art. VI was amended in 1953 to provide:[11]

> "Sec. 11. The justices of the Supreme Court shall each receive such salary as may hereafter be fixed by law.
>
> "* * *.
>
> "Sec. 17. The legislature shall provide by law for the compensation of the judges of the district court."

Thus, the original Constitution itself created all elective executive and judicial offices and fixed the salaries. The legislature had the power to increase or decrease the compensation of executive officers from and after "ten years from the date of the admission of New Mexico as a state."[12] As for judicial officers, the original Constitution conferred no power on the legislature to increase or decrease the salaries of such offices until 1953 when our Constitution was amended, in the manner we have stated, to otherwise provide.

From these constitutional and historical premises, respondent reasons that art. IV, § 28 of the Constitution could not at the time of its adoption have been intended by the people to apply to judicial appointments because the legislature lacked the power to increase judicial salaries.

The primary difficulty with respondent's argument is that it disregards a most fundamental idea in constitutional law. It is through the constitution that the people speak. In applying its provisions, we seek to learn and give effect to their intentions. If a constitutional provision is clear and unambiguous our duty is clear and our task an easy one. We simply apply the constitutional provision. Rather than searching for hidden meanings and nuances, we assume that the people meant and intended what they said. It is not for us to question their wisdom or to judicially convolute clearly expressed intentions.

1. The antecedents of art. IV, § 28 of the Constitution of New Mexico are provided in art. 1, § 6, 2d para. of the Constitution of the United States, and § 9 of the Organic Act establishing the Territory of New Mexico (9 Stats. 446, ch. 49, enacted September 9, 1850).
2. N.M.Const., art. V, § 1 (1911).
3. Id., art. XI, § 2.
4. Id., art. V, § 12 and art. XI, § 5.
5. Id., art. VI, § 4.
6. Id., art. VI, § 12.
7. Id., art. XX, § 4.
8. Id., art. VI, §§ 11 and 17.
9. Id., art. VI, § 10.
10. Id., art. VI, § 16.
11. Proposed by H.J.R. Nos. 15 and 16, Laws 1953, pp. 632–633; adopted at a special election on September 15, 1953.
12. Id., art. V, § 12.

It is not suggested that art. IV, § 28 is ambiguous.

In stark contrast to the dissent's analysis of the musty procedural statute by which we would be bound hand and foot and shorn of our jurisdiction, is the dissent's reasoning as to art. IV, § 28, which it would decline to apply.

It is said that the parallel clause in the federal Constitution had substantial opposition during the constitutional convention; that it is archaic and overbroad; and that it runs counter to the public policy of eligibility for public office. It is also argued that its purpose was to prevent corruption and, since no possibility of that is present here, art. IV, § 28 should not be given effect.

Again, we cannot so lightly brush aside the expressed will of the people. Much of what the dissent has to say would be persuasive were the issue whether, as citizens, we would vote for its repeal in an election called for that purpose. But our obligation as judges is different. Though the history and purpose of the clause be conceded, as well as possibly our own personal views that art. IV, § 28 probably does not comport with present day circumstances, in constitutional adjudication, judges are not free to indulge in their private proclivities. To quote and paraphrase the great proponent of judicial self-restraint, Oliver Wendell Holmes, Jr., "[t]he need or expediency of such [a clause] is not for us to consider." Advisory Opinion of the Justices, 155 Mass. 598, 607, 30 N.E. 1142, 1146 (1892). We are bound to apply the Constitution as it plainly reads to leave to the people the decision as to whether it should be changed.

■ Another infirmity in respondent's argument is that art. IV, § 28 is not couched in terms of salaries but rather speaks of "emoluments." What are "emoluments?" 63 Am.Jur.2d, Public Officers and Employees, § 71 (1972), states in part:

"The term 'emoluments,' as elsewhere defined, covers profits from an office. It does not refer to the fixed salary alone that is attached to the office, but includes such fees and compensation as the incumbent of the office is by law entitled to receive. In determining whether there has been an increase in the emoluments of a particular office, the various items of salary and other compensation which the incumbent was entitled to receive under the statute previously in effect must be taken together."

Clearly, "emolument" is a broader term than "salary." Counsel for the attorney general points out that even prior to the 1953 constitutional amendments, the legislature could have and in fact did, increase the emoluments of the office of district judge. The legislature accomplished this by establishing juvenile courts and providing for an additional salary to be paid to its judges. Only district judges could hold that position. This device was first created by Laws 1921, Ch. 87, § 2 and was utilized until the constitutional amendment in 1953. These additional emoluments were never questioned.

Thus respondent's argument that at the time of adoption of the Constitution, the people could not have intended art. IV, § 28 to apply to appointments to the district court bench rings rather hollow. Being aware of the reservations with which the public regards those in public life, it seems more likely that what the people really intended was what Joseph Story stated in commenting upon the parallel clause in the federal Constitution. In this work on the Constitution, he wrote:

"* * *. The reasons for excluding persons from offices who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure the constituents some solemn pledge of his disinterestedness. * * *" 1 J. Story, Commentaries on the Constitution of the United States § 867 (5th ed. 1905).

No reason appears why art. IV, § 28 should not apply to judicial offices as it does to other civil offices.

Respondent places his principal reliance upon a South Dakota case which involved similar facts, State v. Ostroot, 75 S.D. 319, 64 N.W.2d 62 (1954). Art. III, § 12 of the Constitution of South Dakota provided in part:

> "No member of the Legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased during the term for which he was elected, * * *."

At the general election held on November 4, 1952, Joe J. Foss was elected to the office of state representative for a two year term. He thereafter qualified for the office in January 1953 and served. During the 1953 session of the South Dakota legislature, the salary of the governor was increased. In 1954, Mr. Foss circulated and filed with the Secretary of State his petitions to nominate him as a candidate for governor at the primary election to be held on June 1, 1954. The action ensued when the plaintiff sought a writ of prohibition to prohibit the Secretary of State from certifying the name of Mr. Foss as a candidate for governor in the primary election.

In South Dakota, the governor's salary, as well as those of other constitutional officers, including members of the legislature, was fixed by the Constitution until 1946, when an amendment was passed which enabled the legislature to fix them.

The South Dakota court reasoned that, inasmuch as the governor's salary was initially fixed by art. 21, § 2 the people could not have intended art. 3, § 12 to apply to that office, exactly as respondent would have us do here and in similar disregard of the rule of self-restraint to which we have referred. Special emphasis was placed on the fact that the 1946 amendment to art. 21, § 2 which enabled the legislature to fix such salaries, required a two-thirds vote of both houses in order for them to do so, a feature which is not present in the case at bar. The South Dakota court reasoned that as a result of the 1946 amendment "the whole concept of fixing salaries of constitutional officers * * * was altered." The word "altered" is a singularly apt one to describe what the South Dakota court then did to art. 3, § 12. The holding was that it was to be given no further application to constitutional offices. This amounts to a repeal by implication, although the court did not so label it. This appears to have been in clear violation of another basic rule of construction—that repeals by implication are not favored and only take place when the portions of the constitution or statute under consideration are in irreconcilable conflict. This principle did not receive the attention of the South Dakota court.

The two portions of the South Dakota Constitution under consideration were not in conflict and did not even deal with the same subject matter. Art. 3, § 12 dealt with restrictions on the candidacy or appointment of legislators to civil office. Art. 21, § 2 dealt with the fixing of salaries of constitutional offices.

The cornerstone of the South Dakota court's reasoning was that since the salaries of constitutional officers were fixed by the Constitution "the legislature had no power to increase the salaries of these * * * officers." Yet art. 3, § 12 spoke in terms of "emoluments," a feature we have discussed. Moreover, it does not appear from the opinion whether the emoluments were, or could have been, increased by the legislature prior to the 1946 amendment as was the case in New Mexico prior to the 1953 amendment.

Ostroot concluded by observing, and apparently accorded particular weight to, the proposition that if art. 3, § 12 were applied, legislators who raised their own salaries could not run for reelection. This apparently was unthinkable. There are also features lacking in the case before us since N.M.Const. art. IV, § 28 applies only to

appointments and not to elections. In fact, the opinion in State v. Ostroot specifically limited its application to elections and not to appointments.

We are not persuaded in respondent's favor by State v. Ostroot. Cf. Dickinson v. Holm, 243 Minn. 34, 65 N.W.2d 654 (1954), and State v. Erickson, 180 Minn. 246, 230 N.W. 637 (1930) (in which the Supreme Court of Minnesota held under a similar constitutional provision and facts that a candidate was disqualified for a period of one year following the expiration of his legislative term of office).

Finally, we note the dissent's reasoning that the 1972 act did not increase the emoluments but merely effected a cost of living adjustment for the period following the last preceding increase in 1967.

The respondent conceded that the increase was not de minimus (which it obviously was not) and does not raise this issue. Moreover, the source of the figures is not known to us but, for present purposes, we accept them.

We doubt that when the people adopted art. IV, § 28 in 1911 they were thinking in terms of cost of living adjustments or that they intended to except such increases from the operation of that clause. Certainly, they did not say so. Nor do we understand the significance of the 1967 date. Clearly the emoluments were more after the increase than they were before—$7,000.00 more.

We hold that art. IV, § 28 of the Constitution of New Mexico applies to appointments to the judiciary. We are of the opinion that the appointment of respondent to the office of district judge of the Second Judicial District, under the facts of this case, was in violation of art. IV, § 28 and that it was accordingly invalid.

We have reached this conclusion with regret. We believe that Judge McBride would have discharged the duties of the office in commendable fashion and would have rendered a high order of service to the people of New Mexico.

The relief sought by the attorney general's petition in quo warranto will be granted. A judgment of ouster will be entered.

It is so ordered.

OMAN and MONTOYA, JJ., concur.

McMANUS, C. J., dissenting.

McMANUS, Chief Justice (dissenting).

After viewing the majority opinion it looked as though it was a dissent from a dissent. Rather than create another dissent I will maintain my original position on this case, as follows:

Judge McBride was appointed by the Honorable Jerry Apodaca, Governor of the State of New Mexico, to the said office of District Judge, to fill the vacancy created by the retirement of the Honorable Paul Larrazolo, District Judge of the Second Judicial District, Division VI. The Attorney General asserts that Judge McBride now usurps that office. The Attorney General further alleges that Judge McBride's appointment on January 3, 1975, was made in violation of N.M.Const., art. IV, Sec. 28, which reads:

> "No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term."

This constitutional provision is involved because respondent was elected to the State Senate from Senatorial District 37, in 1970. During respondent's tenure as a

state senator, the emoluments of district judges were changed by the legislature. Laws of New Mexico, ch. 67 (1972).

In 1972, however, there was a reapportionment and the length of then Senator McBride's term, plus his constituency, is subject to different interpretations, and will be discussed later herein, as the term of office and not the office itself is crucial to a determination of the issue at hand. In any event, respondent remained a member of the New Mexico State Senate until December 31, 1974, whether *de facto* or *de gracia.*

I agree that quo warranto is the proper proceeding in a cause such as that before us, i. e., to challenge the right of a person to hold the office of district judge. Whether or not the proceedings have been correctly followed will be a portion of the discussion herein.

In New Mexico, quo warranto actions became statutory proceedings (Laws 1919, ch. 28, § 1) and remain the same today (§§ 22–15–1 to 22–15–16, N.M.S.A.1953). As stated above, the attorney general is the proper party to initiate an action such as this under the provisions of § 22–15–4, supra, which sets out the following:

> "An action may be brought by the attorney general or district attorney in the name of the state, upon his information or upon the complaint of any private person, against the parties offending in the following cases:
>
> "(a) When any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office or offices in a corporation created by authority of this state; * * *."

To properly initiate proceedings in quo warranto, we must look to other provisions in the statutes, specifically § 22–15–1, N. M.S.A.1953. This section describes procedurally how an action in the nature of quo warranto is begun, as follows:

> "The remedies heretofore obtainable by writ of quo warranto and by proceedings by information in the nature of quo warranto shall be commenced by the filing of a complaint as in other civil actions, and it shall not be necessary to sue out such writs in form, but this section shall not prevent nor be construed to prohibit the use by the Supreme Court and the district courts of the state of writs and proceedings in the forms hitherto used in such cases by such courts."

Being satisfied that the requirements of § 22–15–1, supra, have been met, we must now look to the substantive requirements of the complaint as set out in § 22–15–6, supra, which provides:

> "Whenever such action shall be brought against a person for usurping an office, the attorney general, district attorney or person complaining, in addition to the statement of the cause of action, shall also set forth in the complaint the name of the person rightfully entitled to the office with a statement of his right thereto, and in such cases, upon proof by affidavit that the defendant has received or is about to receive the fees and emoluments of the office by virtue of his usurpation thereof, the judge of the district court wherein such proceeding is pending, or a justice of the Supreme Court, if the proceeding be therein pending, may by order require the defendant to furnish a good and sufficient bond, within a designated time not exceeding fifteen [15] days, executed and acknowledged as required by law in the case of supersedeas bonds on appeal, to be approved by said judge, conditioned that in case the person alleged to be entitled to the office should prevail, the defendant will repay to him all fees and emoluments of the office received by him and by means of his usurpation thereof, and in addition to said bond, or in case of a

failure to give said bond, the said judge or justice shall upon good cause shown, issue a writ of injunction directed to the proper disbursing officer enjoining and restraining him from issuing to the defendant or his assigns any warrant, check, certificate or certificates of indebtedness representing fees or emoluments of said office, until the final adjudication of said cause."

It is necessary that the statutory requirements be carefully examined in this case as the remedy sought is *strictly statutory.* This is true in most states, and came about because the original or common-law writ of quo warranto, which evolved from England, involved a lengthy and complicated process and was also criminal in nature, causing it to fall into disuse. See W.L.Q. 1972 at 751.

In examining § 22-15-6, supra, we note that petitioner has failed to allege certain required facts as set out in the statute:

"Whenever such action shall be brought against a person for usurping an office, the attorney general, district attorney or person complaining, in addition to the statement of the cause of action, *shall also set forth in the complaint the name of the person rightfully entitled to the office with a statement of his right thereto, * * *." (Emphasis supplied.)*

Failure to include said allegations is *fatal.*

We dealt with the question of the requirements of the quo warranto statute in State ex rel. Hannett v. District Court of First Judicial Dist., 30 N.M. 300, 233 P. 1002 (1925), and considered the statutory requirements to be jurisdictional, stating at page 306, 233 P. at page 1004:

"* * * 'whenever such action shall be brought against a person for usurping an office, the Attorney General, district attorney or person complaining, in addition to the statement of the cause of action,'—*here follows provisions requiring certain facts to be alleged,* and providing for a bond by the defendant for repayment of fees and emoluments in case he loses the office, and providing for an injunction against the disbursing officers from paying the defendant in case of his failure to give such bond. * * *" (Emphasis added.)

It is apparent from the foregoing review of the statute that the state is an indispensable party plaintiff in a proceeding of this kind. It is so provided by the letter of the statute. While the state, ordinarily, has no substantial interest in such a controversy, the real party in interest being the contestant for the office, who might well be allowed to bring the action in his own name, it is not for us to question the wisdom of the statute. That rests with the legislature.

The determination of when an action in quo warranto should lie is a legislative function, and the doctrine of separation of powers precludes us from engaging in their field.

Other states have dealt with this problem in different ways. Some have written their statutes in very general terms so as to avoid the type of problem before us. See Arkansas, Connecticut, Delaware, Florida, and Georgia. Meanwhile, other states have simply substituted the word "may" for "shall" in the portion of the statute that is of concern to us here. See Alabama, Alaska, and California.

One state which has dealt with the problem of interpretation of quo warranto statutes is Alabama, a state which has permissive rather than mandatory language in its statute. An early case construing the Alabama Statute is Louisville & N. R. Co. v. State, 154 Ala. 156, 45 So. 296 (1907), which held at 299:

"* * * a quo warranto proceeding, it seems to be strongly intimated if not directly held, that the rule in respect to clearness or precision of statement in

pleading should, on account of the requirements of the statute (section 3428), be more strictly applied to information than to pleadings in ordinary cases. * * *"

A more recent Alabama case following this reasoning is found in State v. Key, 276 Ala. 524, 525, 165 So.2d 76, 77 (1964):

"In this state quo warranto is a statutory proceeding and to be maintained it must meet the requirements of the statute as to parties and procedure. * * *"

The two foregoing Alabama cases seem to echo precisely the holding in the Hannett case, supra, which is the only New Mexico case on this point. The extreme nature of the remedy in a quo warranto action requires strict adherence to the statutory requirements.

In determining whether or not a court has jurisdiction of proceedings in quo warranto, reference must be made to the organic law and statutes of the state. Redmond v. State, 152 Miss. 54, 118 So. 360 (1928); Lindsey v. Attorney General, 33 Miss. 508 (1857). The foregoing being true, the attorney general cannot, by consent, confer jurisdiction on a court which it does not possess under the constitution or by statute. State R. R. Commission v. People, 44 Colo. 345, 98 P. 7 (1908). See also, State ex rel. Halfield v. Ireland et al., 130 Ind. 77, 29 N.E. 396 (1891).

State ex rel. Hague v. Slack, 200 Ind. 241, 162 N.E. 670 (1928), involved an action brought by the appellant against appellee in the nature of quo warranto for usurpation of the office of Mayor of Indianapolis. This proceeding was based on an Indiana statute which provided that whenever an information shall be filed by the prosecuting attorney against a person for usurping an office, it shall also set forth therein the name of the person rightfully entitled to the office, with an averment of his right thereto. The case was affirmed.

In Wood v. Arnall, 189 Ga. 362, 365, 6 S.E.2d 722, 724 (1939), the Georgia court said in connection with a quo warranto challenge to the holder of the office of attorney general:

"A quo warranto inquires into the right of any person to any public office the duties of which he is in fact discharging, but must be granted at the suit of some person either claiming the office or interested therein. * * *"

Turning from the procedural issues of the case to the substantive, it might be helpful first to examine the evolution of the constitutional section in question. U. S.Const., art. I, § 6 provides, in part:

"No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

This particular section, quite similar to our own, was adopted at the Constitutional Convention of 1787, and met with considerable opposition. See, Objections to Appointments of Judges, 6 G.W.L.Q. 46, 81–82 (1937). It appears that proponents of the measure were extremely concerned with the possibility of corruption, no matter how remote. The section of the Constitution in question was introduced to include the additional one-year prohibition like New Mexico, but that portion was defeated. See, G.W.L.Q., supra, at 82 fn. 135, which quotes from 1 Farrard, The Records of the Federal Convention of 1787 (1911). It is obvious again that this one-year provision is archaic and over-broad.

Those in opposition to this provision of the Constitution felt that it discouraged merit and would open the door to bad ap-

pointments by the executive. They also believed that the most able men were to be found in the legislature, and the country should not be deprived of their services. See 6 G.W.L.Q., supra at 82, fn. 135. It is also interesting to note that the vote on this provision was very close, passing by a vote of 5 in the affirmative, 4 in the negative, and one state divided. See, 2 Farrand, supra, at 492, cited in 6 G.W.L.Q., supra, at 82 fn. 136.

Today, nearly two hundred years after the adoption of the provision in question, we still have problems with it. The section must be looked at, keeping in mind its purpose and, further, the fundamental rights of citizens in our democratic system. These thoughts were considered by the Utah Supreme Court in Shields v. Toronto, 16 Utah 2d 61, 395 P.2d 829, 830 (1964):

> "If this single provision stated all of the law and covered all of the rights of all of the persons affected, the answer to the problem we confront would be simple enough. But such is not the case. It is obviously not possible to state all of the law necessary to assure a well-ordered society in any such single prohibitory provision. For this reason it cannot properly be regarded as something isolated and absolute but must be considered in the light of its background and the purpose it was designated to serve; and in relation to other fundamental rights of citizens set forth in the entire Constitution which are essential to the proper functioning of our democratic form of government. One of the principal merits of our system of law and justice is that it does not function by casting reason aside and clinging slavishly to a literal application of one single provision of law to the exclusion of all others. Its policy is rather to follow the path of reason in order to avoid arbitrary and unjust results and to give recognition in the highest possible degree to all of the rights assured by all of the Constitutional provisions."

It seems clear that the purpose of the provision in the New Mexico Constitution, art. 4, § 28, is the same as that espoused in regard to the federal version, namely, to eliminate corruption or possibility thereof. An examination of the facts in the case before us leads us to the conclusion that the provision in question must be stretched beyond the intention of even its most vigorous supporters. For example, when respondent was a member of the 1972 Senate which passed the salary increase in question, he could *not* have known whether there would even be a judicial vacancy; nor would he have known that the Honorable Jerry Apodaca would be elected Governor of New Mexico, and, lastly, whether any Governor would appoint the respondent to the vacant judgeship. To contend that there was personal gain involved in respondent's being a member of the Senate when the judicial salary increase was passed is absurd. In Shields v. Toronto, supra, the court stated, with reference to the intent of the provision, at 395 P.2d 830:

> "This purpose is altogether salutary. Let it be said with the greatest of emphasis that the provision referred to should neither be ignored nor evaded, but whenever there is even a remote possibility that the evil it was designed to prevent might exist, it should be applied in such manner as to accomplish its objective. However, when adequate safeguards in that respect are observed, there appears to be no good reason to carry this provision beyond that purpose and make an unreasoning application of it where no such evil, nor any possibility of it exists. This would work injustice by depriving citizens of their basic rights and would also tend to disrupt the orderly processes of democratic government."

We should be mindful that executive appointments should carry the same presumptions of constitutionality as legislative acts.

In a case similar to the present one the Washington Supreme Court stated in State ex rel. O'Connell v. Dubuque, 68 Wash.2d 553, 413 P.2d 972, 980 (1966):

> "A strong public policy exists in favor of eligibility for public office, and the constitution, where the language and context allows, should be construed so as to preserve this eligibility. * * *"

In concluding this discussion, I find the language of the court in Shields v. Toronto, supra, very persuasive, stating at pages 832–833:

> "So important that it cannot be ignored, but must be considered in the composite picture, is the effect the plaintiffs contended for application of this Constitutional provision would have upon the fundamental rights of citizens and upon the overall functioning of our democratic system of government. The foundation and structure which give it life depend upon participation of the citizenry in all aspects of its operation. On patriotic occasions we hear a great deal of oratory declaiming how precious is the right and how essential is the duty to vote for the candidate of one's choice. The emphasis is placed on the first clause—the right to vote; and the second clause—for the candidate of one's choice, is minimized or forgotten. Lost sight of is the fact that the two rights are correlative, and that to make the first meaningful, the second must also be assured. Furthermore, the natural corollary of the right to vote is the right to seek and to serve in public office. Reflection on the matter will reveal that these rights are of vital importance both to individual citizens and to the public. That the framers of our Constitution so regarded them and that these rights are correlated to each other and part of the integral rights and privileges of citizenship is plainly apparent from its numerous references to 'the right to vote and hold office' in the same context.
>
> "For the purpose of seeing these rights in clearer perspective, suppose this were a case initiated by some voter insisting upon his right to 'vote for the candidate of his choice,' or by these candidates, insisting that their rights as citizens to run for office are absolute regardless of any or all other provisions of law. They could so maintain with as much logic as the plaintiff asserts his position here. Yet, there is no question but that other provisions of law can and do limit the rights to vote and to hold office to those properly qualified. The fair and proper adjudication of those rights would have to be that the citizen could insist upon them unless for some good and sufficient reason he is actually not qualified to vote, or for the office he seeks, or he is guilty of some wrong which would justify deprivation of such rights. If he were deprived of the privilege without any such ground existing, he would be unjustly and arbitrarily deprived of a right and privilege of citizenship."

In spite of the stipulation between counsel for the parties herein, which is of record, there are some discrepancies to be noted. The respondent was a candidate in the primary election held on June 6, 1970, and ran from an area designated as Senatorial District No. 37, depicted on Exhibit "A" appended to this opinion. The area from which respondent ran in the primary is shown outlined in black lines, *including* the area marked in red. Later, in September 1970, this area was changed with the addition of the area marked in green. This obviously shows an increase in the area of representation of more than four times the original area. In addition, the total registration in Senatorial District 37 was 14,034 in the 1970 general election, and the total registration in Senatorial District 17 in the 1972 general election was

10,817. Further, seven precincts from the old District 37 were eliminated from the new District 17 at general election time in 1972. It seems obvious that the respondent was representing a significantly different group of people in 1973 and 1974 than prior to that time.

In the 1970 primary there were approximately 1,319 persons who were not allowed to vote in respondent's senate race because they were added to the district after the primary election. None of the facts shown in the above two paragraphs were referred to or shown in the stipulation mentioned above.

It is a fundamental principle of American democracy that the people shall elect their representatives in government and that said representatives shall be responsible to these persons who voted in the election for or against them. In addition, said representatives would be responsible in the electoral process to all those persons who resided in the area who could have voted in said election, were eligible and exercised their privilege. In the fact situation before us this purpose has simply been disregarded as some 4,000 persons were transferred to Senate District 20 and represented by someone other than the respondent whom they elected in 1970. See area blocked in red on Exhibit "B" appended hereto which depicts Senatorial District 17 as it was in the 1972 general election.

In the 1972 Senate Reapportionment Act, Laws 1972, ch. 79, sec. 10, we find the following:

"(1) the 1972 Senate Reapportionment Act provides in the provisional plan for a senatorial district having the same geographical boundaries as the district from which he was elected in 1970; or

"(2) the 1972 Senate Reapportionment Act provides in the provisional reapportionment plan for a senatorial district having geographical boundaries lying entirely within the geographical boundaries of the district from which he was elected in 1970. * * *"

Obviously, the above statutory provisions cannot be interpreted to mean that a senator shall remain in office when a substantial number of people who were under the respondent as constituents have been removed from that status. At the very least, the respondent should have been a candidate for his Senate seat in 1972. His service can obviously be called *de facto* in 1973 and 1974, negating any application of N. M.Const., art. IV, § 28.

Referring to art. IV, § 28, containing the phrase, "the emoluments of which were increased during such term," it is to be noted that the last change in annual compensation was made by the legislature in 1972. But from 1967 to 1972, the consumer price index rose 25.3 per cent. In addition, a district judge in New Mexico in 1967, received an annual salary of $17,500. Assuming the purchasing power of that money to be $17,500 in 1967, after the legislature granted an increase to $27,000 to the district judges, the purchasing power of the $27,000 figure was $17,430, or $70.00 less than it was five years before. (Data obtained from the American Judicature Society and the U.S. Department of Labor.)

I fail to see where the emoluments to the district judges were increased in any way, shape or form. Had the legislature failed to act as it did in 1972 it would have created a gross reduction in salaries. Further, that the raises, emoluments, or "catch-up" involved when considered in lieu of the increases in the cost of living could have induced very few if any qualified members of the bar to seek the office of district judge, but rather those persons with a sincere commitment to our judicial system are attracted to the judiciary based on strong personal beliefs rather than pecuniary gain.

Because of the rather small pecuniary benefits attached to the office of district judge very few persons seek the position

whose rewards are based on self-satisfaction through involvement with a fundamental aspect of our democratic principals. Proof of this can be seen in the number of persons seeking the office of district judge in the 1972 primary elections, the last time all district judges ran for election or re-election. In the democratic primary, in thirteen judicial districts and twenty-six judgeships, only seven of the twenty-six judgeships were contested. On the republican side, only three of the twenty-six judgeships were contested with sixteen of them having no candidate at all.

By way of comparison, twenty-five persons sought the democratic nomination for United States Senator and eight the republican nomination in the same 1972 primary election. In the United States Representative primary, six democrats and four republicans sought the two positions.

These primary elections were held after the judicial salary increase in question had been passed and signed into law. It would seem elementary that if no more than those indicated above showed an interest in seeking the office of district judge, a man of the unquestioned qualifications of respondent who had a very good law practice and served as a powerful leader in the state Senate would not have accepted the office he now holds because of the minute pecuniary gains attached to the office during his tenure as a state Senator.

The Chief Justice of the United States Supreme Court, Warren E. Burger, recently aired his views on the inadequate salaries of judges. Speaking mainly of federal judges, whose salaries are much greater than state judges, the Chief Justice pointed out in his sixth annual State of the Judiciary Address to the American Bar Association that the lack of giving judges raises since 1969 might violate "the spirit of the constitutional prohibition against reduction of salaries of federal judges during their terms of office."

The court, in Shields v. Toronto, supra, at 831, in addressing itself to the emoluments question which involved similar circumstances to those before us now, stated:

> "The important fact here is that the salary increases involved could not by any stretch of the imagination be regarded as partaking of the impropriety just referred to. There are two significant points which emphasize the correctness of this conclusion. In the first place, the raises given were not directed toward the creation of, nor to the increase of emoluments of any particular office, but were part of a general salary overhaul covering executive officers and judges of the state. * * * These relatively small increases, of that character, should properly be regarded as just what they were, a moderate cost of living adjustment on an across-the-board basis in keeping with the steadily rising costs of living. Accordingly, it can be said with assurance that this is not a situation which would lend itself to any ulterior scheme by a legislator to set up a high paying sinecure to take advantage of which Section 7 of Article VI was designed to prevent. Nor is there any reasonable likelihood that such raises would have induced anyone to run for the offices in question who would not otherwise have done so. The fact that some members of the legislature aspired to the named offices is merely coincidental. This is so clear that we believe no fair-minded person would contend to the contrary. Indeed, to the credit of the plaintiff and his counsel, no contention has been made that there was any actual impropriety or ulterior purpose whatsoever in the conduct of these candidates."

In my opinion this reasoning is convincing and applicable here and the writ heretofore issued should be dissolved. The majority ruling otherwise,

I respectfully dissent.

See Appendix on next page

[redacted]

APPENDIX

EXHIBIT "A"

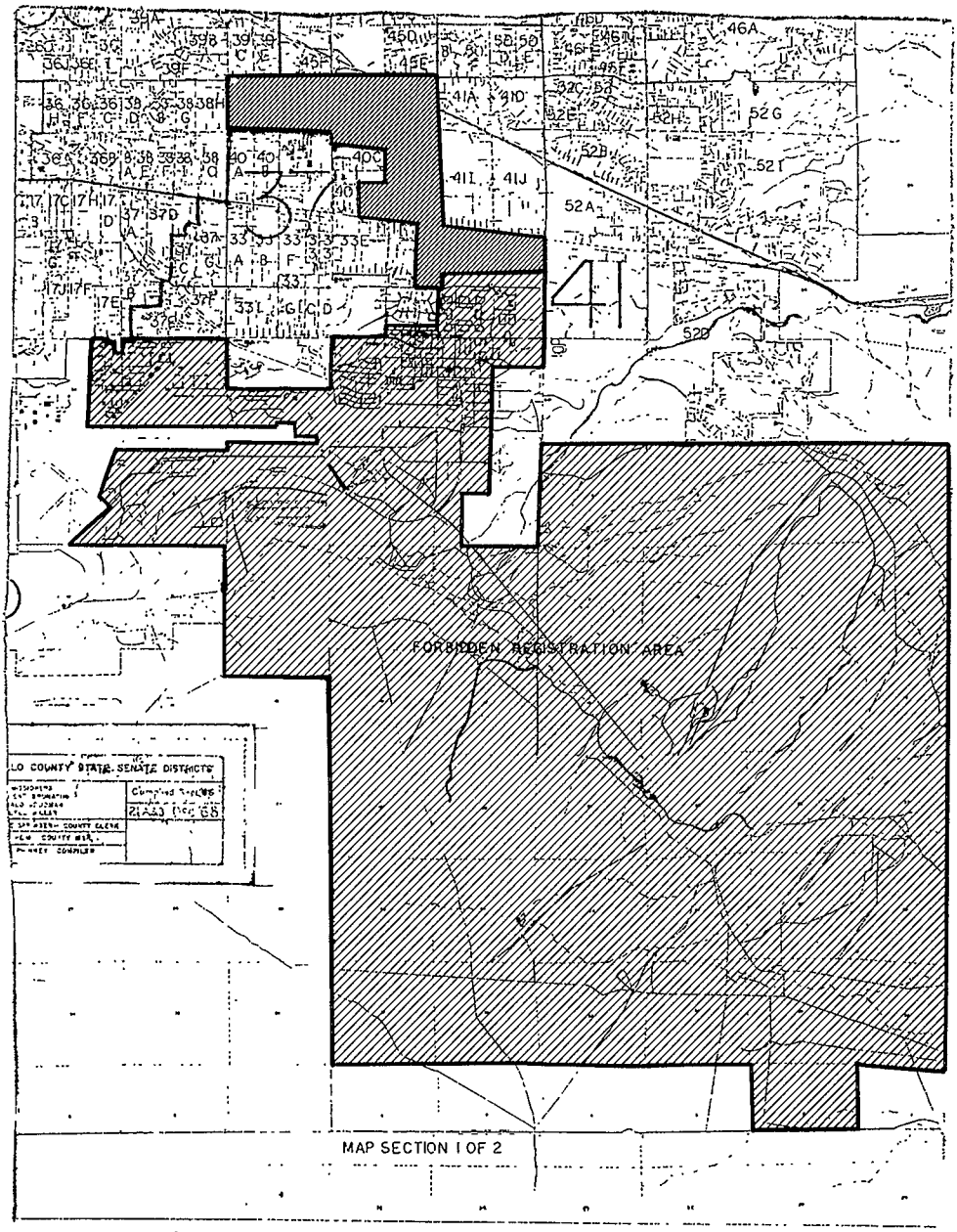

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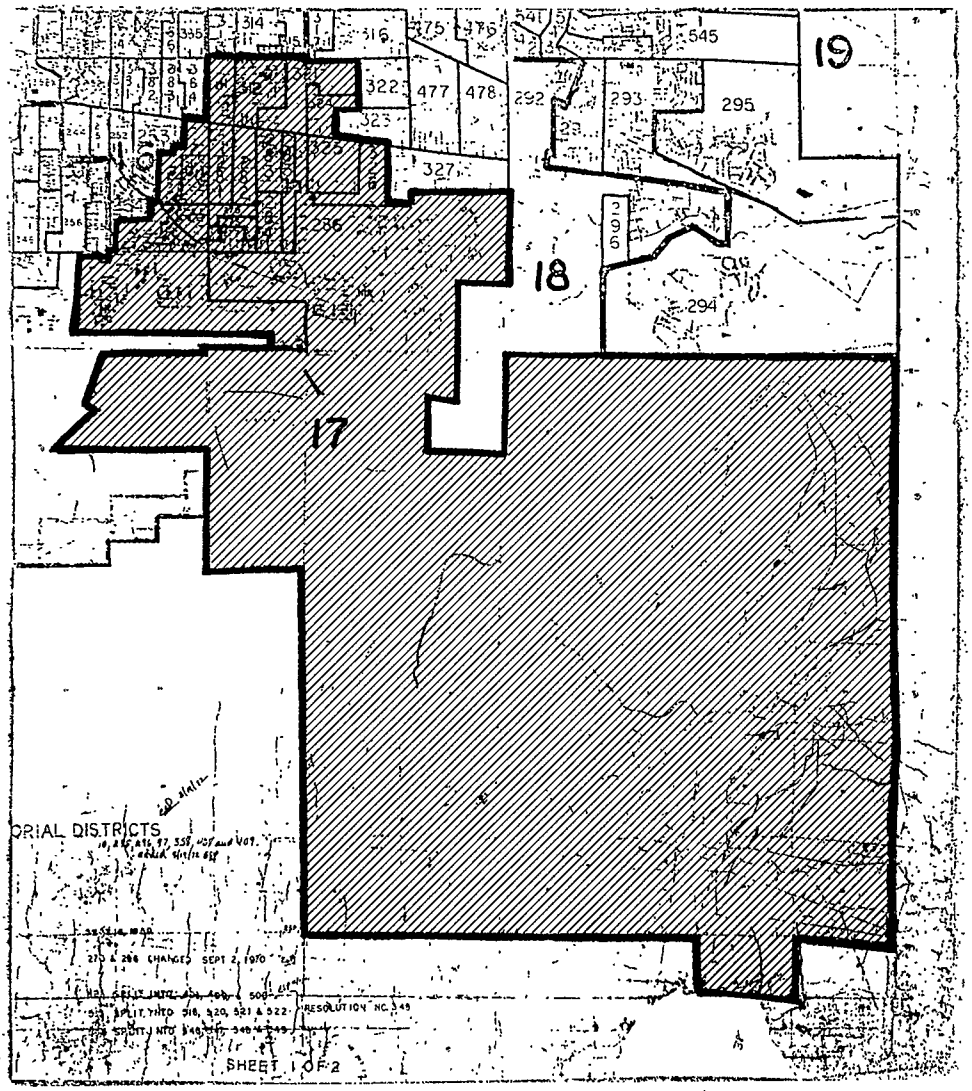
EXHIBIT "B"



GREEN

539 P.2d 1024

Tom WHITE and Bessie White, Plaintiffs-Appellants,

v.

Joe SINGLETON, d/b/a Triple J Mobile Homes Sales, Defendant-Appellee.

No. 1881.

Court of Appeals of New Mexico.

Aug. 13, 1975.

Robert M. Strumor, Richard W. Hughes, Shiprock, for plaintiffs-appellants.

No appearance for defendant-appellee.

OPINION

HERNANDEZ, Judge.

This action was tried in the District Court, without a jury, on plaintiffs' amended complaint alleging: 1) rescission and praying return of their $1,000.00, down payment toward the purchase of a mobile home, and 2) statutory damages as provided by 15 U.S.C. § 1640(a), of the Federal Truth in Lending Act. The trial court found that there had been a novation and the plaintiffs had been given a $1,000.-00 credit toward the purchase of a mobile home in the future and entered judgment accordingly. The defendant has elected not to participate in this appeal.

Plaintiffs appeal alleging three points of error. Points 1 and 3 are dispositive. Initially, however, we feel constrained in light of our brother Sutin's dissent hereto to explain our view of the propriety of accepting jurisdiction in this case. Facts discernable from the record regarding the motion for extension and the filing of the notice of appeal cause him to conclude that these proceedings are jurisdictionally deficient. Neither the motion for extension nor the notice of appeal included in the transcript proper indicate certification of service upon opposing counsel. Although proof of service of the motion for extension does not appear on the copy of the motion in the transcript prepared by the district court clerk for the purposes of

appeal, the copy of the motion in the skeleton transcript prepared by counsel *does* certify that service was made. We note that the skeleton transcript is required as part of the appellate process by Rule 6(a), § 21–12–6(a), N.M.S.A.1953 (Interim Supp.1974); and in light of the requirement that the skeleton be certified by the clerk of the district court, we have no difficulty with relying on the copies of the motion for extension and the notice of appeal included in the skeleton transcript for proof that opposing counsel was served.

Finally, by way of concluding this discussion of the jurisdiction of this court to decide this appeal, we turn to our dissenting colleague's concern with the notice provisions of Rule 3(h), Rules Governing Appeals, supra. The rule says in pertinent part:

> ". . . Such an extension [of the time for filing notice of appeal] may be granted before or after the time otherwise prescribed by this rule has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

Since the new rule on extensions for filing notice of appeal [Rule 3(f)] is exactly the same as the one pertaining here, and since there are to date no New Mexico cases on the operation of the rule, we consider an expression of our understanding on this point to be appropriate. First, we note that the language, ". . . with such notice as the court shall deem appropriate", is unique among the various provisions for notice included in other sections of the Rules Governing Appeals. It appears that nowhere else in the rules is a trial judge given such complete discretion on a point involving the appellate process. Without timely filing of a notice of appeal, there can be no appeal, and the discretion of the trial judge to enlarge the time allowed thus becomes a crucial factor. Second, we believe that insofar as a motion for extension may be filed before the time for filing the notice has expired, the rule actually contemplates *ex parte* proceedings so long as service of notice of those proceedings is otherwise made. Once, however, the time for filing a notice of appeal has elapsed, we believe the rule affords the party not pressing the appeal an opportunity to challenge granting of the motion for extension. Such a challenge could involve an evidentiary hearing on the issue of excusable neglect or circumstances beyond the control of the appellant. In any event, we believe the appellee can waive challenge to the motion. That is what we assume occurred in this case. Appropriate notice here may have consisted of nothing more than a phone call. The motion for extension recited that, ". . . plaintiffs tried, before the time for appeal had expired, to notify their attorney that they wished to appeal the judgment herein, but that they were unable to reach him until the time had expired, and that these circumstances were beyond the control of plaintiffs or constituted excusable neglect." The trial court's order recited that, ". . . for good cause shown . . .", the extension would be granted. The record before us does not demonstrate irregularity in the granting of this motion, and we are bound to presume the correctness of the proceedings in the trial court in the absence of any indication to the contrary. *Romero v. Sanchez,* 86 N.M. 55, 519 P.2d 291 (1974); *Mining Co. v. Hendry,* 9 N.M. 149, 50 P. 330 (1897). The extension of time for filing notice of appeal herein was properly granted, and this court has jurisdiction to decide the issues presented on their merits.

The pertinent facts are that on or about February 22, 1972, the plaintiffs signed a contract agreeing to buy a mobile home from defendant which was to be similar to one shown to them by defendant at his lot, but with certain agreed-upon differences. The contract was neither dated nor signed by the defendant. The trial court found that a copy had been given to plaintiffs. Plaintiffs, in three separate installments, paid $1,000.00 as down payment toward the purchase price of $8,389.48. Shortly after

the mobile home arrived from the factory, plaintiffs went to defendant's place of business to see it. Plaintiff, Bessie White, testified that it was not as ordered in several particulars and that she and her husband asked for a refund of their down payment. Defendant testified that plaintiffs went twice to see the unit and that only on the second visit did they say it was not as ordered, and asked for a refund. Nonetheless, defendant told plaintiffs that he would not refund their money. After some discussion defendant agreed to give them credit toward the purchase of another unit more to their liking. Plaintiffs, although not wanting another unit but fearful of losing their down payment, agreed. Defendant's wife prepared a document recording this alleged compromise which was signed by the plaintiffs but not by the defendant.

The sale of mobile homes in New Mexico is governed by the Motor Vehicle Sales Finance Act, § 50–15–2(A), N.M.S.A.1953 (Repl.Vol. 8, pt. 1, 1962). Section 50–15–7(A)(3), N.M.S.A.1953 (Repl.Vol. 8, pt. 1, 1962) provides in pertinent part:

> "The seller shall deliver to the buyer or mail to him at his address shown on the contract, a copy of the contract *signed by the seller.* Until the seller does so, a buyer who has not received delivery of the motor vehicle shall have the *right to rescind* his agreement *and to receive a refund of all payments made* . . . . Any acknowledgement by the buyer of delivery of a copy of the contract shall be in a size equal to at least ten [10] point bold type and, if contained in the contract, shall appear directly above the buyer's signature." [Emphasis Ours.]

> "The meaning of a statute is to be ascertained primarily from its terms and where they are plain and unambiguous there is no room for construction. Hence, the oft repeated maxim that 'a statute means what it says'." [Citations Omitted.] *Hendricks v. Hendricks,* 55 N.M. 51, 226 P.2d 464 (1950).

The terms of this section, as they apply to the facts of this case, are clear and unequivocal. The contract was not signed by the seller and the unit was never delivered to the buyer; therefore, they had a right to rescind the contract and receive a refund of the payments they had made.

Section 50–15–11(A), of the Act, supra, provides in pertinent part:

> "Any person who shall willfully violate any provision of the Motor Vehicle Sales Finance Act [50–15–1 to 50–15–12] . . . shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding five hundred dollars ($500)."

Section 50–15–12, of the Act, supra, provides:

> "Any waiver of the provisions of this act . . . shall be unenforceable and void."

The judgment of the trial court was based essentially upon the following conclusion of law:

> "3. the parties reached an agreement whereby the refusal of plaintiffs to accept the mobile home and defendant's rights thereafter and the claim for refund of the plaintiff[s] was compromised with the defendant retaining the $1;000 and with plaintiffs receiving a credit in that amount to be applied on another purchase."

The trial court erred in so concluding for two reasons. First, because the effect of the alleged compromise agreement, in our opinion, amounts to an attempted waiver of the provisions of § 50–15–7(A)(3), supra, it is therefore unenforceable and void. Second, "[t]he general rule is that transactions in violation of a statute prescribing penalties are void." *Measday v. Sweazea,* 78 N.M. 781, 438 P.2d 525 (Ct.App.1968). We believe that defendant's refusal to give plaintiffs a refund pursuant to § 50–15–7(A)(3), supra, and his insistence upon their signing the compromise agreement constituted a violation under § 50–15–11(A), supra, and was therefore void.

The judgment is reversed and the cause remanded with instructions to set it aside and enter judgment for the plaintiffs including interest on their money from the date delivery was refused. Cost of this appeal are to be borne by defendant.

It is so ordered.

LOPEZ, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

A. *This Court lacks jurisdiction to decide this case.*

(1) *Extension of time for appeal was erroneous.*

Judgment was entered on November 4, 1974. On December 5, 1974, after the expiration of 30 days, plaintiffs moved to extend the time for appeal pursuant to Rule 3(h) of Rules Governing Appeals. Section 21–12–3(h), N.M.S.A.1953 (Int.Supp.1974). This motion was not served on defendant. The following morning, absent defendant, the trial court granted the motion and extended the time. This order was not served on defendant.

Rule 3(h) provides in part:

> Upon a showing of excusable neglect or circumstances beyond the control of the appellant, the district court may extend the time for filing notice of appeal . . . . [I]f a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

The trial court evidently deemed no notice to be appropriate. No hearing was held.

Plaintiffs' motion claimed Rule 3(h) applied because "plaintiffs tried, before the time for appeal had expired, to notify their attorney that they wished to appeal the judgment herein, but that they were unable to reach him until the time had expired".

Defendant was denied the right to challenge the extension of time granted plaintiffs to appeal.

Defendant was not notified of the notice of appeal, the order settling the bill of exceptions or appellants' brief-in-chief filed March 10, 1975. From all that appears of record, defendant first learned of the appeal on or about April 25, 1975 when this Court was notified that defendant would not file an answer brief in this appeal.

The extension of time granted to file a late notice of appeal is void for lack of due process. Notice of appeal, having been filed late, this Court lacks jurisdiction to determine the merits of this appeal.

(2) *Defendant is not a party to this appeal.*

Rule 4(c) of the Rules Governing Appeals provides:

> Not later than the date of filing the notice of appeal any party appealing *shall make service of a copy thereof* on all other parties whose rights he seeks to have determined on the appeal and promptly file proof of service with the clerk of the district court. *A party not so served shall not be a party to the appeal unless brought in by order of the appellate court.* . . . [Emphasis added].

This rule is mandatory and compliance with it is essential. In the instant case, the notice of appeal was not served on defendant and proof of service of the notice of appeal was not made. Defendant was not brought in by order of this Court.

Defendant is not a party to this appeal. This Court lacks jurisdiction to render an opinion in this case. The appeal must be dismissed. *Hanson v. Zoller,* 174 N.W.2d 354 (N.D.1970); *Seiffert v. Police Commission of City of Helena,* 144 Mont. 52, 394 P.2d 172 (1964); *Rainbow Color Film, Inc. v. Milgram Food Stores, Inc.,* 193 Kan. 168, 392 P.2d 947 (1964); 4A C.J.S. Appeal and Error § 596, n. 36.

539 P.2d 1029

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert SANDOVAL, Defendant-Appellant.

No. 1841.

Court of Appeals of New Mexico.

July 30, 1975.

Rehearing Denied Aug. 20, 1975.

James K. Ribe, Zamora, Ribe & Rael, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Mark Shoesmith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of homicide by vehicle while driving recklessly contrary to §§ 64–22–1 and 64–22–3, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972), defendant appeals. Defendant assigns many points for reversal, some of which are briefed in accordance with Rule 9 of the Rules Governing Appeals, § 21–12–9, N.M.S.A.1953 (Int.Supp.1974), and some of which are not. We dispose of the points in the order that they are raised and affirm.

Defendant first contends that the trial court erred in admitting evidence that defendant had been drinking before the accident because it was never shown that defendant was intoxicated nor that his driving ability was impaired. The rule in criminal cases in New Mexico is that evidence of intoxication is but a circumstance to be considered by the jury in deciding the issue of reckless driving. *State v. Sisneros,* 42 N.M. 500, 82 P.2d 274 (1938). Yet defendant contends that the only evidence bearing at all on the issue of intoxication was in the testimony of an attendant at a garage at which defendant fixed a flat tire about an hour before the accident. He testified that he had seen defendant and another drinking from a quart bottle of beer. He actually saw the defendant take only one sip.

Evidence of intoxication need not be sufficient to support a conviction for driving while under the influence contrary to § 64–22–2, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972). *State v. Sisneros,* supra. Therefore the question becomes how close the evidence of intoxication has to come to being sufficient for a conviction under § 64–22–2, supra, in order to be admissible in a prosecution for violation of § 64–22–3, supra. In our opinion, any evidence of drinking is relevant as a circumstance for the jury to consider on the issue of reckless driving. See *State v. Loyland,* 149 N.W.2d 713 (N.D.1967); *Huff v. State,* 68 Ga.App. 799, 24 S.E.2d 227 (1943). Of course, evidence that a defendant took one drink of beer and then was in an accident would be insufficient to support a conviction. But common sense and common knowledge teaches us that drinking and driving do not mix. Evidence of drinking does have a tendency to make the existence of carelessness or lack of due caution more probable than it would be without the evidence. See R.Evid. 401, § 20–4–401, N.M.S.A.1953 (Repl. Vol. 4, 1970, Supp.1973). Thus evidence of drinking is relevant and is but one circumstance to consider when the prosecution is for reckless driving under § 64–22–3, supra.

Defendant secondly contends that the trial court erred in admitting evidence of the presence of marijuana seeds in the car that defendant was driving. We do not believe the error, if any, to be properly preserved for review in this instance. The state's attorney, toward the end of the first day of trial, asked an investigating officer whether he saw any contraband in defendant's car. The officer answered, "some marijuana seeds." Defendant objected on the grounds of illegal search. The trial court excused the jury and the matter of search was argued and ruled upon adversely to defendant. The defendant then stated two additional grounds of objection, one of which was that the evidence was irrelevant. The trial court made a preliminary ruling that the evidence was, in fact, irrelevant and that unless the state showed him some law, he would not allow further questioning with respect to the marijuana seeds. Trial was then recessed for the day and when resumed the following day, there was no further mention of the marijuana. Under these circumstances, it was incumbent upon defendant to move to strike the testimony complained of or to have asked for a curative instruction. R.Evid. 103(a)(1), § 20–4–103(a)(1), N.M.S.A.1953 (Repl. Vol. 4, 1970, Supp.1973). He did neither.

Defendant thirdly contends that the trial court erred in failing to give two of his requested instructions. These instructions would have precluded the jury from considering the evidence of liquor and marijuana since this was a prosecution based on driving recklessly and not driving while under the influence. Both of the instructions referred to the alcoholic beverages. Both were incorrect statements of the law under *State v. Sisneros,* supra. Since the tendered instructions were erroneous statements of the law, it is not error to fail to give such instructions. *State v. Wilson,* 85 N.M. 552, 514 P.2d 603 (1973).

Defendant next contends that there is insufficient evidence to support his conviction. Specifically he contends that there was no evidence showing a wilful and wanton disregard of the rights or safety of others. Defendant does not argue that the sufficiency of the evidence for a conviction under §§ 64–22–1 and 64–22–3, supra, is a question of first impression in New Mexico. He seems to recognize that the quantum of proof required for such a conviction would be similar to that required for a conviction of involuntary manslaughter under prior law. See *State v. Romero,* 69 N.M. 187, 365 P.2d 58 (1961); *State v. Rice,* 58 N.M. 205, 269 P.2d 751 (1954); *State v. Turney,* 41 N.M. 150, 65 P.2d 869 (1937). Rather, defendant contends that the facts of his case are not in any way analogous to the facts of the previous cases in which convictions have been upheld.

The sum of the evidence in the instant case was that at the precise time of the accident, defendant was travelling at a speed in excess of the legal limit (approximately 45 m.p.h. in a 30 m.p.h. zone) on the main street of Raton. The decedent's vehicle drove out onto the main street after stopping at a stop sign. Defendant revved up his engine, slammed on his brakes, left 74 feet of skid marks and hit the decedent's vehicle broadside. The main street in Raton is heavily trafficked especially during the summer tourist season during which the accident occurred. There was abundant evidence from many witnesses that during the hours and minutes immediately preceding the accident, defendant was engaged in showing off a "hot-rod" type vehicle. He was driving up and down the street at high speeds, switching in and out of lanes, straddling lanes, turning corners very rapidly and making illegal U-turns. In addition, defendant would alternately rev up and slow down the engine and attempt to "leave rubber" when he passed young members of the opposite sex walking along the street. He also had been drinking. It is our opinion that this course of conduct shows, without doubt, that defendant was operating his vehicle carelessly and heedlessly in wilful and wanton disregard of the rights and safety of others, and without due caution and circumspection and in a manner so as to be likely to endanger persons and property. We accordingly find the evidence sufficient to sustain the conviction.

Defendant next contends the trial court erred when it stated it would allow the state to cross-examine him regarding the fact that he did not have permission to drive the car. Defendant did not own the car that he was driving at the time of the accident. The state put on the owner of the car to testify to the car's accessories, power, flashiness and the like. The state also wanted the owner to testify that the defendant was driving the car without his permission. The trial court ruled that it would not allow the state to go into the fact of the stolen car as part of its case in chief but that if defendant took the stand, it would be a proper subject of cross-examination. Defendant ultimately chose not to testify. It is defendant's contention that such evidence would have been irrelevant and highly prejudicial.

Since defendant chose not to take the stand any answer which we would give would of necessity be based on speculation and would be advisory. This court does not give advisory opinions. *Bell Telephone Laboratories v. Bureau of Revenue,* 78 N. M. 78, 428 P.2d 617 (1966); *State v. Her-*

rod, 84 N.M. 418, 504 P.2d 26 (Ct.App. 1972).

Defendant next contends that the trial court erred in admitting evidence of defendant's driving conduct throughout the entire day of the incident. The accident occurred at approximately three o'clock in the afternoon. The record does not support defendant's contention. The only evidence of driving conduct admitted was that occurring immediately before the mishap and that evidence was admissible under R. Evid. 404(b), § 20–4–404(b), N.M.S.A.1953 (Repl. Vol. 4, 1970, Supp.1973), both to show defendant's mental state and also lack of accident. See *State v. McCallum*, 87 N.M. 459, 535 P.2d 1085 (Ct.App.1975).

As part of his statement of proceedings, defendant claims two additional rulings of the trial court to be error. They are the failure to instruct on specific intent and the failure to give five of defendant's requested instructions relating to the proximate cause of decedent's death. However, there is no further mention of either of these allegations of error elsewhere throughout the brief. As these points, if such they be, are neither argued nor supported by authority, they are considered abandoned. *Novak v. Dow*, 82 N. M. 30, 474 P.2d 712 (Ct.App.1970). Further, the last seventeen lines of defendant's brief are devoted to the detailing of some thirty alleged improprieties occurring at trial. Some of these alleged improprieties we have already held not to be error; some were unobjected to; some we entirely fail to find in the record. If, by these lines, defendant is attempting to raise the issue of cumulative or fundamental error under *State v. Vallejos*, 86 N.M. 39, 519 P.2d 135 (Ct.App.1974), it will suffice to say that we have reviewed the record and defendant had a fair trial.

Oral argument in this case is unnecessary. Defendant's conviction is affirmed.

It is so ordered.

WOOD, C. J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

I dissent.

A. *The admission of "one drink" of beer was prejudicial error.*

"Reckless driving" is defined in § 64–22–3(A), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2). It reads:

> Any person who drives any vehicle carelessly and heedlessly in willful or wanton disregard of the rights or safety of others *and* without due caution and circumspection *and* at a speed or in a manner so as to endanger or be likely to endanger any person or property is guilty of reckless driving. [Emphasis added]

Was "one drink" of beer an hour or more before the fatal accident admissible to prove the charge of homicide by vehicle while violating the statute on reckless driving?

There was no evidence that defendant, at any time, was intoxicated, under the influence of intoxicating liquor, or that his ability to drive was impaired in any way by reason of "one drink" of beer consumed. The "one drink" had no bearing upon reckless driving nor was it relevant to the charge.

The majority opinion relies on the phrase "drinking and driving" in order to justify relevancy. My colleagues look at "one drink" of beer with antagonistic eyes.

Defendant's first contention is that the relevancy of the "one drink" was conditional on a showing that the "one drink" played some causal role in the accident. The majority opinion does not answer this contention. Common sense and common knowledge teaches us that one drink of beer, an hour or more before the fatal accident, in the absence of any other evidence bearing on this issue, played no part in the proximate cause thereof via reckless driving.

The question to decide is: Was the admission of the testimony, over objection, prejudicial error?

State v. Martin, 73 Wash.2d 616, 627, 440 P.2d 429, 437 (1968) says:

> A prejudicial error may be defined as one which affects or presumptively affects the final results of the trial. *State v. Britton*, supra [27 Wash.2d 336, 178 P.2d 341 (1947)]. When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial. But, where the defendant's guilt is conclusively proven by competent evidence, and no other rational conclusion can be reached except that the defendant is guilty as charged, then the conviction should not be set aside because of unsubstantial errors. 5 Am.Jur.2d Appeal and Error 786 (1962). To determine whether prejudice has resulted, it is necessary that the appellate court examine the entire record. . . .

An examination of the entire record shows that on June 20, 1974, at 3:10 p. m., defendant was driving north on South Second Street in Raton, approaching a right angle intersection with Apache Avenue. South Second Street is the main through street of Raton. The defendant was driving 40 to 45 m. p. h., 10 to 15 m. p. h. in excess of the speed limit. The deceased's car stopped at the stop sign on Apache facing west. He looked both ways, and then crossed the main street in front of defendant's vehicle. The defendant's car hit the driver's side of the deceased's car broadside while defendant was in his left hand northbound lane. Defendant's car left 74 feet of skid marks up to the point of impact.

The only question is: Does driving at a 40 to 45 m. p. h. speed in the left northbound lane of the multi-lane main street conclusively establish defendant's guilt of reckless driving when the deceased's car drove out in front of him? Of course not.

The reckless driving statute requires three elements: (1) driving carelessly and heedlessly in willful or wanton disregard of the rights and safety of others, *and* (2) without due caution and circumspection, *and* (3) at a speed or in a manner so as to endanger or be likely to endanger any person or property. The State must prove each of these elements beyond a reasonable doubt. The defendant 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).

Reckless driving consists of driving at an excessive speed on the wrong side of the road in a residential neighborhood. *State v. Richerson*, 87 N.M. 437, 535 P.2d 644 (Ct.App.1975). Cases cited therein cover other similar situations.

Under the guest statute, § 64–24–1, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2), a guest has a cause of action if the host drives in a heedless or reckless disregard of the rights of others. *Valencia v. Dixon*, 83 N.M. 70, 488 P.2d 120 (Ct.App.1971) holds that the reckless driving statute falls within this portion of the guest statute.

The Supreme Court has consistently held that speed alone is not sufficient to constitute a heedless or reckless disregard of the rights of others. *McGuire v. Pearson*, 78 N.M. 357, 431 P.2d 735 (1967). And where a driver makes a U turn, fails to keep a lookout for approaching vehicles, fails to yield the right of way and fails to heed a warning, he does not act with heedless or reckless disregard of the rights of others. *Dee v. Buford*, 82 N.M. 642, 485 P.2d 976 (Ct.App.1971).

Furthermore, the Supreme Court has said that the standard of culpability under the guest statute is "not different from that required to secure a conviction for involuntary manslaughter". *Amaro v. Moss*,

65 N.M. 373, 376, 337 P.2d 948, 951 (1959); *Valencia v. Strayer*, 73 N.M. 252, 387 P.2d 456 (1963); *McGuire v. Pearson*, supra.

The facts set forth, supra, do not conclusively establish that defendant was guilty of reckless driving.

We must now determine whether the "one drink" evidence was prejudicial error. This depends upon whether we are unable to say from the record that defendant would or would not have been convicted but for the error committed in the trial court.

Gensemer v. Williams, 419 F.2d 1361 (3rd Cir. 1970) held that, under Pennsylvania law, the mere fact of drinking intoxicating liquor is inadmissible unless it reasonably establishes a degree of intoxication which proves unfitness to drive; that it is highly prejudicial to hear evidence bearing on the subject where the jury could not reach a finding of intoxication.

Gilberto v. Nordtvedt, 1 Ill.App.3d 677, 274 N.E.2d 139 (1971) held, in a civil suit for damages, that "one can of beer" testimony should have been stricken; that the introduction of this irrelevant evidence is cause for reversal only if it results in prejudicing the jury's verdict. The error was not prejudicial because ". . . there was no other reference to drinking in any argument to the jury . . .."

In the instant case, in closing argument, the State did raise this issue before the jury as follows:

> Now, there is evidence here that the defendant was drinking shortly before this wreck. He was drinking from a quart bottle. How much he drank during the afternoon, we don't know for sure, but that fact has been brought into evidence. And if he was drinking from a quart bottle, *we could assume I suppose that he had more than one drink. We all know what drinking does to a driver.* [Emphasis added]

See, *Dominguez v. Albuquerque Bus Co.*, 58 N.M. 562, 273 P.2d 756 (1954) on argument to the jury on inadmissible evidence.

The testimony shows that the vehicle was in a filling station for about ten minutes to have a flat tire repaired. The attendant testified that defendant and Gilbert Martinez were walking around waiting for the repair job; that Gilbert Martinez, not defendant, had a quart bottle of beer. The attendant saw defendant drink once from this bottle, an hour or more before the accident. This was the only evidence of record. The argument of the State on "one drink" was prejudicial error.

The majority opinion follows the argument of the State. It says:

> But common sense and common knowledge teaches us that *drinking and driving* do not mix. Evidence of *drinking* does have a tendency to make the existence of carelessness or lack of due caution more probable than it would be without the evidence. [Emphasis added]

My colleagues, in jumping over prejudicial error, did a pole vault without a pole.

Defendant tried to cure this prejudicial error by a requested instruction that the jury "may not consider any evidence pertaining to drinking . . . for any purpose in reaching your verdict." The requested instruction was refused.

I cannot say from the record whether defendant would or would not have been convicted but for the "one drink" error.

540 P.2d 203

WESCO INSURANCE COMPANY, a corporation, Plaintiff-Appellee,

v.

Helen VELASQUEZ and Adan Velasquez, Defendants-Appellants.

No. 9959.

Supreme Court of New Mexico.

Sept. 3, 1975.

Hinkle, Bondurant, Cox & Eaton, Paul J. Kelly, Jr., Roswell, for appellants.

Atwood, Malone, Mann & Cooter, R. E. Thompson, Roswell, for appellee.

OPINION

MONTOYA, Justice.

This is an appeal by defendants, Helen Velasquez and her husband Adan Velasquez, from a Chaves County District Court judgment that under the provisions of an insurance policy issued by plaintiff Wesco Insurance Company (Wesco), defendants were not entitled to coverage.

At all times material to this controversy, defendants were the owners of an insurance policy issued by plaintiff Wesco. Mr. Velasquez operated an automobile body repair shop in Roswell, New Mexico. On November 11, 1970, Helen Velasquez, while returning an automobile repaired by her husband to a Mr. Bob Waugh in Artesia, New Mexico, was involved in an automobile accident several miles outside the city of Roswell. Mary Lou Torrez, a passenger in the automobile driven by Helen Velasquez, allegedly suffered injuries and subsequently filed suit in the District Court of Chaves County seeking to recover for her alleged injuries. As a result, Wesco filed a petition for declaratory judgment against defendants seeking to have

the court declare that the insurance policy in question did not provide coverage in respect to the accident of November 11, 1970.

The trial court made the following pertinent finding of fact and conclusions of law:

(Finding of Fact)

"17. The trip to Artesia in the 1968 Ford on or about November 11, 1970, was a result of and a part of Adan Velasquez' automobile repair business, and at that time, Helen Velasquez was using the 1968 Ford while engaged in the automobile business of the insured."

(Conclusions of Law)

"3. Helen Velasquez was acting as agent for Adan Velasquez when she was delivering the 1968 Ford to Bob Waugh in Artesia.

"4. The automobile body repair business of Adan Velasquez was within the policy meaning of 'automobile business'.

"5. In delivering the 1968 Ford to Bob Waugh, Helen Velasquez was using or maintaining a non-owned automobile while engaged in the automobile business of the insured and the policy does not apply to the accident in question."

On January 3, 1974, defendants filed a timely notice of appeal.

Other findings made by the trial court are to the effect that defendant Adan Velasquez did automobile repair work for used car dealers, including Mr. Waugh whose business was located at Artesia, New Mexico, and that in some instances he returned the vehicles to Waugh in Artesia as an accommodation. A few days prior to the accident in question, Mr. Waugh delivered the subject automobile to the defendant Adan Velasquez' body shop. On November 10, 1970, Mr. Waugh hired a driver to go to Roswell to drive back the repaired automobile. Because the repairs were not completed, the automobile remained in the body shop and Adan Velasquez agreed to deliver the automobile to Mr. Waugh at Artesia. It was then taken to the Velasquez' home for delivery on November 11, 1970, to Mr. Waugh in Artesia by defendant Helen Velasquez, who had agreed to do so.

Although findings to this effect were refused by the trial court, the evidence shows that Mrs. Velasquez was attending night classes in Artesia and was going to Artesia to attend a class when the accident took place.

Other findings refused by the trial court were to the effect that the policy exclusion did not define the phrase "engaged in" and that therefore an ambiguity exists. The relevant exclusionary provision of the policy reads as follows:

"EXCLUSIONS. This policy does not apply under Part I:

* * *;

(h) to a non-owned automobile while maintained or used by any person while such person is employed or otherwise *engaged in*

(1) *the automobile business* of the insured or of any other person or organization,

* * *." (Emphasis added.)

Under the "DEFINITIONS Under Part I" of the policy "automobile business" is defined as meaning "the business or occupation of selling, repairing, servicing, storing or parking automobiles."

We address ourselves to the questions as to whether the defendant Helen Velasquez was "engaged in the automobile business" as found by the trial court, and whether an ambiguity exists in such a phrase. The answer to those questions is determinative of this appeal.

There is no doubt that Mr. Velasquez was engaged in the automobile business, and the question is whether Mrs. Velasquez, being asked by her husband to drive Mr. Waugh's automobile in question to his place of business in Artesia, under the circumstances herein, would exclude coverage.

We agree with the trial court, that in driving the vehicle to Artesia Mrs. Ve-

lasquez was using Mr. Waugh's vehicle while engaged in the automobile business of the insured Mr. Velasquez. We, therefore, agree that the trial court was correct in concluding that Mrs. Velasquez was acting as an agent of her husband while delivering the car to Mr. Waugh in Artesia. The facts as found by the trial court are amply supported by substantial evidence.

It is clear that unambiguous insurance contracts, like any other contract, must be construed in their usual and ordinary sense unless the language of the policy requires something different. *Couey v. National Benefit Life Insurance Company,* 77 N.M. 512, 424 P.2d 793 (1967). We see no ambiguity in the automobile business exclusion in the policy in question herein. By its terms, it states that the policy will not apply to a non-owned automobile if it is used by any person while such person is employed or otherwise engaged in the automobile business of the insured. The policy also defines "automobile business" to be, among other things, "repairing automobiles."

Defendants Velasquezes contend that the automobile business exclusion did not apply because the trip had a dual purpose. A similar contention was made in *Northern Assurance Co. v. Truck Insurance Exch.,* 151 Mont. 132, 439 P.2d 760 (1968). There, one Goldie Flodberg requested her son Wallace Flodberg, who was in the auto repair business, to do some work on her car. The son drove the mother's car from her house across the street from his home to a garage where a serviceman did the repair work for which $2.00 was charged. At the end of the day, when Wallace Flodberg was driving his mother's car home to return it to her, he was involved in an accident. Goldie Flodberg's insurer denied coverage but undertook the defense to prevent default. The suit was subsequently compromised and suit was brought by Goldie's insurer to declare the insurer of Wallace liable on its own policy. The issue was whether the automobile exclusion clause in the Goldie Flodberg policy excluded Wallace Flodberg from coverage. There the exclusion clause excluded coverage under Part I (151 Mont. at 134, 439 P.2d at 762):

> "* * * (g) to an owned automobile while used by any person while such person is employed or otherwise engaged in the automobile business, * * *."

It further defined automobile business as "the business or occupation of selling, repairing, servicing, storing or parking automobiles." The Montana Court held the exclusion did apply when the automobile was being delivered to the customer. As to the dual purpose theory, the court stated (151 Mont. at 136, 439 P.2d at 763):

> "Appellant next asserts that Wallace Flodberg is not within the terms of the exclusion for his use of the automobile was for his own personal use and convenience. This assertion is based upon the fact that Wallace Flodberg used his mother's car for transportation to and from work on that day. We find that the benefit to Wallace Flodberg was incidental. The basic reason for his use that particular day was to get the automobile to and from the garage for the repairs. There was no showing that Wallace Flodberg did more than drive it to and from work and this one use was not deviated from. His only benefit was transportation to and from work which was merely incidental to the basic purpose."

See also *Haley v. State Farm Mutual Automobile Ins. Co.,* 130 Ga.App. 258, 202 S.E.2d 838 (1973); *Continental Nat. American Gp. v. Allied Mut. Ins. Co.,* 95 Idaho 251, 506 P.2d 478 (1973); *Western Casualty & Surety Company v. Verhulst,* 471 S.W. 2d 187 (Mo.1971).

Accordingly, in view of the foregoing, we hold that the judgment of the trial court was correct and it should be affirmed.

It is so ordered.

McMANUS, C. J., and OMAN, J., concur.

540 P.2d 206

Ruth L. WATKINS, Plaintiff-Appellant,

v.

The LOCAL SCHOOL BOARD OF LOS ALAMOS SCHOOLS, and George O. Bjarke, Eldon L. Christenson, Joseph W. Taylor, Peter G. Salgado and John F. Spalding, its members, and Joseph M. Carroll, Its Superintendent, Defendants-Appellees.

No. 9877.

Supreme Court of New Mexico.

Sept. 4, 1975.

Jones, Gallegos, Snead & Wertheim, Jerry Wertheim, Santa Fe, Byron L. Treaster, Los Alamos, for plaintiff-appellant.

Solomon & Roth, Charles S. Solomon, Santa Fe, Edwin W. Stockly, Los Alamos, for defendants-appellees.

OPINION

MONTOYA, Justice.

This is an appeal by plaintiff Ruth L. Watkins from the granting of a motion to dismiss rendered in favor of defendants in an action brought in the District Court of Los Alamos County seeking injunctive relief and money damages, pursuant to 42 U.S.C. § 1983 (1970), because of defendants' refusal to reemploy the plaintiff as a certified classroom teacher at Los Alamos High School for the school year 1971–1972 and thereafter. For convenience, the parties will be referred to as they appeared below.

The facts alleged in plaintiff's first amended complaint, deemed admitted by the motion to dismiss, are as follows. The Local School Board of Los Alamos Schools, the individual members thereof, and its superintendent, are all named defendants. Plaintiff was a certified school teacher and was employed as a non-tenure teacher by the Los Alamos School Board for the school years 1968–1969, 1969–1970 and 1970–1971. Plaintiff performed her teaching and related duties and assignments during her three years of employment in a competent and satisfactory man-

ner and alleges she had a reasonable and objective expectancy that her teaching contract would be renewed for the 1971–1972 school year and thereafter. Moreover, that because of plaintiff's successful completion of three years of teaching with the Los Alamos Schools and because of the Board's written and unwritten policies and practices, the plaintiff possessed a legitimate claim of entitlement to job tenure and, in the alternative, plaintiff possessed de facto tenure.

Plaintiff further alleges that the Board's decision to terminate her employment was made at a special meeting of the Board on May 18, 1971, which was reconvened into an alleged open meeting which was in fact procedurally defective and in violation of § 5–6–17, N.M.S.A., 1953, and the Los Alamos Schools Regulations. The plaintiff also alleges that because of procedural defects, the defendants' decision to terminate the plaintiff constituted an unlawful exercise of administrative power and "was in violation of Section 5–6–7 [sic], N.M.S.A., 1953 Comp.," and in violation of the regulations of the Los Alamos Schools.

It is further alleged that the Board failed and refused to comply with the State Board of Education Regulations concerning the termination of teachers for unsatisfactory work performance, and that the Board's actions violated the Los Alamos Schools' policy on supervision and correction. Plaintiff also alleges that the non-renewal of plaintiff's employment was founded on plaintiff's expression of opinion on subjects of public interest relating to the Los Alamos school system, and the termination of employment and refusal to reemploy for such reason constitutes a deprivation of plaintiff's right to freedom of speech protected by the United States and New Mexico Constitutions. Plaintiff further alleges that each and all of the wrongful and illegal acts on the part of the Board and defendant Carroll were done under color of statute, regulation, custom or usage of the State of New Mexico. Plaintiff claims that the Board's action to terminate and refusal to reemploy her was unreasonable, arbitrary and capricious and in violation of the objective expectancy of reemployment possessed by the plaintiff. By reason of the foregoing, plaintiff alleges she suffered certain damages and seeks injunctive relief.

Thereafter, defendants Board, board members and its superintendent filed motions to dismiss on grounds that the complaint failed to state a claim for which relief may be granted, that the matter was res judicata because of a previous suit, and that an action pursuant to 42 U.S.C. § 1983 cannot be brought against other than individuals. After hearing oral arguments on the motion to dismiss, the trial court dismissed the action on the grounds that it raised matters which are res judicata, having been settled between the parties by final order in cause No. 44376, Santa Fe County District Court. In its order, the trial court stated, as further reasons for dismissal, that it failed to state a claim upon which relief can be granted, and on the grounds that the complaint, insofar as it sounded in tort against a political subdivision of the State of New Mexico or persons acting in their official capacity as members of the local school board or as superintendent of schools, was barred by the doctrine of sovereign immunity. This appeal followed.

Plaintiff contends (1) that the holding in cause No. 44376, Santa Fe County District Court, which was a dismissal without prejudice of a suit involving identical parties and issues, did not make this matter res judicata; (2) that the plaintiff did not fail to state a claim upon which relief can be granted; (3) that this matter is not barred by the doctrine of sovereign immunity; and (4) that the trial court erred in ruling that the defendant school board was not a person within the language of 42 U. S.C. § 1983.

Perhaps to place the trial court's judgment in proper perspective, it should be pointed out that prior to the instant cause being filed in Los Alamos County District

Court, the same plaintiff had filed a complaint seeking a mandatory injunction and money damages in the District Court of Santa Fe County in cause No. 44376. The Santa Fe County action alleged some but not all of the theories of recovery and relief alleged in the instant case. That cause was heard by District Judge Edwin L. Felter and he dismissed the complaint without prejudice. The same order of dismissal by Judge Felter contained the following language:

> "At the election of the Plaintiff, she shall have 20 days from the date of this Order to file an Amended Complaint in this cause."

In addition, Judge Felter's decision in the Santa Fe County case was based on his holding that the plaintiff was not a tenure teacher, that her claim of entitlement to employment is

> "merely a unilateral expectation, and therefore, the Complaint filed herein fails to state a cause of action * * *."

We first need to consider the effect of Judge Felter's decision in the Santa Fe County District Court case dismissing the action "without prejudice" and which also gave plaintiff an election to file an amended complaint within twenty days. No action to amend the complaint was taken, nor was there an appeal taken from the ruling of dismissal. Accordingly, that ruling stands and is binding upon the parties.

In *Chavez v. Myers,* 11 N.M. 333, 68 P. 917 (1902), we ruled that a party to an action who does not appeal is presumed to be satisfied with the judgment rendered by the court below. See also *Laura v. Christian,* 88 N.M. 127, 537 P.2d 1389 (1975). The plaintiff, not having taken advantage of the election afforded her to amend her complaint, is bound by the judgment entered against her in the Santa Fe County District Court action. See *Meeker v. Walker,* 80 N.M. 280, 454 P.2d 762 (1969); *Board v. Cross,* 12 N.M. 72, 73 P. 615 (1903).

It also appears to us that the first action filed by plaintiff in the Santa Fe County District Court case determined the "right" of the plaintiff to pursue her action based upon her claim of being wrongfully deprived of her "right" to continued employment in the Los Alamos School system. That was decided by the Santa Fe County District Court as a matter of law based upon the facts deemed admitted as contained in the complaint filed in that cause. The Santa Fe County District Court in its order dismissing the action ruled as follows:

> "That the Complaint herein be dismissed on the grounds that the right of a teacher to future employment or the claim of entitlement to employment is governed by the tenure laws of New Mexico and, therefore, unless a teacher has an existing contract that is unexpired; or one that is automatically renewed by failure to give notice; or if the teacher is a tenure teacher, there is no right to future employment under the laws of the State of New Mexico, and any claim of entitlement to employment by the Plaintiff herein is merely a unilateral expectation, and therefore, the Complaint filed herein fails to state a cause of action, and it is hereby Ordered dismissed without prejudice."

In this case filed in the Los Alamos County District Court we have no new "right" alleged that is different from that alleged in the Santa Fe County action. Nothing new is alleged in the new complaint which could not have been stated in the former complaint. In *Board v. Cross,* supra, we quoted from Judge Brewer's opinion in *Patterson v. Wold,* 33 F. 791 (D.Minn.1888), as follows (12 N.M. at 78, 73 P. at 617):

> " 'It is true, the basis of complainant's primary right is, as alleged, different in one case from that in the other; but this is mere difference, in the language of the Supreme Court, "in the grounds of recovery." The mere fact that different

testimony would be necessary to sustain the different allegations in the two bills, does not of itself, necessarily make two distinct causes of action . . . In both of such actions plaintiffs' primary right . . . would be the same; the only difference being in the grounds of recovery. All the grounds of recovery, all the basis of plaintiff's title, must be presented in the first action, or they are lost to him forever.' "

We feel that the dismissal of the suit filed in the Santa Fe County District Court became final and binding when no amended pleadings were filed in the time given, and no appeal was taken from that court's ruling. The ruling of the lower court in the instant cause, based upon all of the foregoing, is correct and should be affirmed.

In view of our disposition, we deem it unnecessary to discuss the other issues argued by the parties. The ruling of the trial court is affirmed.

It is so ordered.

McMANUS, C. J., and OMAN, J., concur.

540 P.2d 209

Gilbert TRUJILLO, Plaintiff-Appellant,

v.

GLEN FALLS INSURANCE COMPANY, Underwriters Adjusting Company and Betty Cooper, Defendants-Appellees.

No. 9947.

Supreme Court of New Mexico.

Aug. 29, 1975.

Marchiondo & Berry, Mary C. Walters, Albuquerque, for plaintiff-appellant.

Modrall, Sperling, Roehl, Harris & Sisk, Bruce D. Black, Albuquerque, for defendants-appellees.

OPINION

MONTOYA, Justice.

This case involves an appeal from a judgment of the District Court of Bernalillo County in favor of defendants, denying a claim by plaintiff Gilbert Trujillo for specific performance of an alleged oral contract.

On August 9, 1971, plaintiff was a passenger in an automobile which was involved in a collision with a truck driven by F. B. Stutz. At the time of the accident, Mr. Stutz was insured by defendant Glen Falls Insurance Company (Glen Falls). Defendant Underwriters Adjusting Company (Underwriters) was hired by Glen Falls to adjust the claim of plaintiff against Mr. Stutz. Defendant Betty Cooper was an employee of Underwriters and was in charge of plaintiff's file. From August 13, 1971, to October 15, 1971, ten advance payments totaling $2,380.13 were made by Glen Falls to plaintiff for lost wages, medical expenses, travel and lodging. Upon receipt of each of the ten checks, plaintiff signed a "Receipt for Advance Payment" which read in part:

> "This is to acknowledge receipt of $_____ paid on behalf of Glen Falls Ins. Co. to be credited to the total amount of any final settlement or judgment in my/our favor * * *."

On or about December 10, 1971, plaintiff retained William Marchiondo to represent him in this matter. After contacting defendant Underwriters, Mr. Marchiondo was furnished copies of the receipts on December 13, 1971. From the time Mr. Marchiondo was retained until October 30, 1972, he engaged in settlement negotiations with Ms. Cooper. On or about October 30, 1972, Ms. Cooper conferred with Mr. Marchiondo by telephone and offered $7,500 in settlement of Mr. Trujillo's claim. During this conversation, there was no mention made by either Ms. Cooper or Mr. Marchiondo as to whether or not the $7,500 would include the payments previously made by defendant Glen Falls. Subsequently, Ms. Cooper forwarded a release and check totaling $4,531.47. The release was based on the check sent to Mr. Marchiondo, $2,380.13 in previous payments, plus an additional amount to be paid to Dr. Myron Rosenbaum for medical expenses. Immediately thereafter, Mr. Marchiondo returned the release and check to Ms. Cooper, indicating that he was under the impression that the $7,500 was "over and above" the previous payments. Suit was then brought by plaintiff against Glen Falls, Underwriters and Betty Cooper for specific performance of the alleged $7,500 oral agreement. Defendants denied the formation of any contract whatsoever.

After trial without a jury, the court concluded that the parties were under a mutual mistake of fact, there was no "meeting of the minds," defendant Betty Cooper was without authority to offer more than a total of $7,500 in settlement, and thus no enforceable contract was entered into. On November 20, 1973, plaintiff filed a timely notice of appeal.

Plaintiff's contention on appeal is that a contract was formed based on the objective manifestations of the parties; that this contract should be interpreted according to the mutually expressed assent of the parties; and that the undisclosed or secret intent of one party is irrelevant.

It is elementary in contract law that mutual assent must be expressed by the parties to the agreement. This court stated in *Lamonica v. Bosenberg,* 73 N.M. 452, 455, 389 P.2d 216, 217 (1964):

> "When the minds of the parties have not met on any part or provision of a proposed contract, all of its portions are a nullity. (Citations omitted.) * * *."

In support of this principle the court cited the case of *West v. Downer,* 218 Ga. 235,

241, 127 S.E.2d 359, 364 (1962), where it is stated:

> "* * *. The first requirement of the law relative to contracts is that there must be a meeting of the minds of the parties, and mutuality, (Citations omitted,) and in order for the contract to be valid the agreement must ordinarily be expressed plainly and explicitly enough to show what the parties agreed upon. (Citations omitted.) * * *."

This mutuality requirement must be found in the objective manifestations of the parties.

> "* * *. The court was bound to look to appellant's express assent. It could not regard his secret or undisclosed intent. * * *"

Higgins v. Cauhape, 33 N.M. 11, 14, 261 P. 813, 814 (1927). See also *State ex rel. Santa Fe Sand & G. Co. v. Pecos Const. Co.*, 86 N.M. 58, 61, 519 P.2d 294, 297 (1974), where this court said:

> "* * *. Also, the controlling intention of the parties is the mutually expressed assent and not the secret intent of a party. * * *"

And according to 17 C.J.S. Contracts § 32, at 640 (1963):

> "The apparent mutual assent, essential to the formation of a contract, must be gathered from the language employed by them, or manifested by their words or acts, and it may be manifested wholly or partly by written or spoken words or by other acts or conduct. * * *"

In its conclusion of law No. 2, the district court concluded that:

> "*The parties to the agreement, Defendant, Betty Cooper, and attorney Marchiondo, were under a mutual mistake of facts which involved an essential element of the supposed agreement;* and, therefore, there was no meeting of the minds and there was no valid contract between the parties." (Emphasis added.)

Based on the words and acts of the parties, the court felt that they attached different meanings to their words, with the difference going to the essence of the contract. The emphasized section of this conclusion, as far as it goes, is based upon the court's findings of fact. These findings are in turn supported by substantial evidence. As this court has stated innumerable times in the past, we cannot overturn findings of the trial court where they are supported by substantial evidence, with "substantial evidence" defined as "such relevant evidence as a reasonable man might find adequate to support a conclusion." *Shirley v. Venaglia,* 86 N.M. 721, 527 P.2d 316 (1974); *Cave v. Cave,* 81 N.M. 797, 474 P.2d 480 (1970).

The parties to the alleged oral contract in the instant case used the same language, but the overt manifestations reveal that they attached different meanings to their words (a latent ambiguity), and there was in fact never a mutual assent. In such a case, the courts usually apply the following principle. Where one party meant one thing and the other party meant another, the difference going to the essence of the supposed contract, the court will find no contract in law or equity unless the court should find that one party knew or had reason to know what the other party meant or understood. See 3A Corbin, Contracts § 538, at 55 (1960); Restatement of Contracts § 71, at 74 (1932); *Deerhurst Estates v. Meadow Homes, Inc.,* 71 N.J.Super. 255, 176 A.2d 555 (1961); *Cresswell v. United States,* 173 F.Supp. 805, 146 Ct.Cl. 119 (1959).

Although technically this is a matter of first impression in New Mexico, the above-mentioned principle is one of widespread application and this court has no hesitation in adopting it. This approach generally fosters the most equitable results.

It is obvious from the testimony in the cause and the findings made that the parties were using an ambiguous phrase in two different senses; that neither party to the oral contract expressed in an objective fashion what they intended the term $7,500 to mean when the alleged settlement was thought to have been arrived at. The trial

court, in effect, found upon the basis of the testimony that both understood the phrase or term $7,500 to mean something different. It is on this basis, after considering all of the testimony including those of objective manifestations that the court concluded that there had been no meeting of the minds and hence no valid contract resulted.

Although this court might have prepared different findings and conclusions than those made, we are satisfied that the trial court reached the correct result, in view of its conclusion that there was no meeting of the minds between the parties to the alleged oral contract.

The decision and judgment of the trial court are affirmed.

It is so ordered.

McMANUS, C. J., and STEPHENSON, J., concur.

540 P.2d 212

Justine SERNA, Ann E. Dietz, Robert A. Koeber and Mela S. Koeber, Julia Tappan, Anne Raymond, Charlie O. Harrison and Corrine Harrison, Harley L. Frietze and Holly R. Frietze, Ralph Chapman and Lloyd L. Goff, Petitioners-Appellees,

v.

BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY, Respondent-Appellant,

and

Duncan A. McLeod, Intervenor-Appellant.

No. 10202.

Supreme Court of New Mexico.
Sept. 5, 1975.
Rehearing Denied Sept. 18, 1975.

Bruce C. Redd, Albuquerque, for respondent.

Adams & Foley, Quincy D. Adams, Albuquerque, for intervenor.

Melvin L. Robins, Albuquerque, for appellees.

OPINION

OMAN, Justice.

This is a suit brought in the district court to review the decision of the zoning authority (Board of County Commissioners) pursuant to the provisions of § 14–20–7, N.M.S.A.1953 (Repl.Vol. 3, 1968). The Board, sitting as the zoning authority, changed the classification of a tract of land from A–1 (agricultural) to M–1 (light industrial). The Petitioners, as persons aggrieved by this decision of the Board, sought a writ of certiorari from the district court for the purpose of having the decision reviewed by the court in accord-

ance with its authority under § 14–20–7, supra.

The writ was granted and the decision reviewed. Whereupon, a judgment was entered commanding the Board to set aside its decision by which the zoning was changed from A–1 to M–1. The Board and the Intervenor, the owner of the tract in question, have appealed. We reverse.

The Board and Intervenor rely upon two separately stated points for reversal. The Petitioners also have sought review of claimed error by the district court pursuant to Rule 3(b) of the Rules of Appellate Procedure for Civil Cases and Rules Governing Original Proceedings in the Supreme Court [§ 21–12–3(b), N.M.S.A.1953 (Int.Supp.1974)]. They claim error was committed by the district court against them which would justify an affirmance of the judgment in their favor, notwithstanding any errors committed by the court against the Board and Intervenor. We decide only the first contention of the Board and Intervenor that the district court lacked authority to review the decision of the Board because of the untimely filing of the petition for writ of certiorari.

Section 14–20–7, supra, provides in pertinent part:

> "*14–20–7. Zoning—Petition for court review—Time limit—Certiorari—Restraining order—Return—Hearing—Reference—Costs—Precedence.*—A. Any person aggrieved by a decision of the zoning authority * * * may present to the district court a petition * * *. The petition shall be presented to the court within thirty [30] days after the decision is entered in the records of the clerk of the zoning authority.
>
> "* * *.
>
> "C. In answering said writ [writ of certiorari issued pursuant to the petition] it shall not be necessary to return the original papers acted upon, but it shall be sufficient to return certified or sworn copies thereof * * *."

The answer, or return, to the writ included a copy of "County Commission Ordinance No. 254" by which the zoning change was effected. This ordinance was signed by all members of the Board and attested to by the county clerk. It reflects an apparent record of filing on April 16, 1974, and recites: "PASSED, ADOPTED, APPROVED AND SIGNED THIS 16th DAY OF April, 1974."

No attack has been made upon the correctness of this copy of the ordinance or upon the form and contents of the return to the writ. No claim is made that the return fails in any way to comply with the requirements of § 14–20–7, supra. This ordinance is obviously the decision, or the formal record of the decision, of the Board by which Petitioners complain they were aggrieved and from which they sought relief. They expressly recited in their petition:

> "Pursuant to Section 14–20–7[B] NMSA 1953, the petitioners respectfully request that the court issue a writ of certiorari directed to the Board of County Commissioners of Bernalillo County to review its decision rendered on April 16, 1974, which changed the zoning from A–1 to M–1 of the following tract of land; [tract in question then described]."

Petitioners did not file their petition for writ of a certiorari until June 4, 1974, which was nineteen days too late. They seek to avoid this late filing by showing that the minutes of the meeting of the Board held on April 16 were not finally approved until May 21. These minutes show twenty-nine separate actions by the Board at the April 16 meeting, only three of which were decisions on zoning questions. The minutes are only a record of the actions taken.

Petitioners also rely upon the fact that a copy of Ordinance No. 254 does not appear in the "ordinance book" kept in the office of the county clerk. The evidence is that the original of the ordinance is filed and kept in the office of the county manager and a copy is sent to the office of the county clerk for filing in the "ordinance book."

In view of the fact that Petitioners sought review of the decision of April 16,

which is evidenced by the copy of the ordinance filed with the return to the writ, the fact that no attack has in any way been made upon the return, and the fact that no showing has been made that the county clerk is the clerk of the Board when serving as the zoning authority, we are unwilling to say that the failure to approve until May 21 the minutes of the meeting of April 16 in any way prevented the decision from becoming final. We are also unwilling to hold that the time within which the petition for writ of certiorari could properly be filed was extended, because a copy of the ordinance failed to find its way into the "ordinance book" in the office of the county clerk. The record clearly shows that the absence of a copy of Ordinance No. 254 from the "ordinance book" came to light on July 19, 1974, at the time of the review by the district court.

In ruling upon the failure to timely file a petition in this court for a writ of certiorari to review a decision of the Court of Appeals, we stated:

> "The twenty-day filing requirement for a writ of certiorari is procedurally similar to the thirty-day filing requirement for appeals found in Rule 5(1), Supreme Court Rules [§ 21-2-1(5)(1)], N. M.S.A.1953 Comp. (Repl. Vol. 4, 1970). In *Associates Discount Corporation v. De Villiers,* 74 N.M. 528, 395 P.2d 453 (1964), this Court in construing Rule 5(1), supra, stated:
>
> > " 'It requires no citation of authority to state our oft-repeated holding that the timely allowance of an appeal is jurisdictional in order to place a case on the docket of the supreme court for review * * *'
>
> "It is clear that the same requirement should be applied to the filing of petitions for writs of certiorari directed to the Court of Appeals. When such a [petition] is filed later than the twenty-day filing requirement, and absent some unusual circumstance justifying such late filing, the petition for writ of certiorari must be denied."

Gulf Oil Corporation v. Rota-Cone Field Operating Company, 85 N.M. 636, 515 P.2d 640 (1973).

There is no reason to hold that the rule announced in the Gulf Oil case should not be applicable to the petition for certiorari in the present case.

The district court found that the final action by the Board on the zoning application was not taken until May 21, and, apparently, that this was the date of the Board's decision. As above stated, we are of the opinion that the decision of the Board was made on April 16. Consequently, we are compelled to disagree with the district court's conclusion that the petition for writ of certiorari was timely filed.

The judgment of the district court should be reversed and the writ quashed as having been improvidently granted.

It is so ordered.

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

540 P.2d 214

Claire FUTRELL, Robert Holliday, James W. King, Thomas James Murray and Julia Thorson, Individually and in behalf of all others similarly situated, Plaintiffs-Appellants,

v.

R. L. AHRENS, Seaborn Collins, Malcolm Garrett, Avelino Gutierrez and William Humphreys, Members of the Board of Regents of N. M. State University, and Gerald Thomas, President of N. M. State and Richard Pesquiera, Vice President for Student Affairs of N. M. State University, and New Mexico State University, Defendants-Appellees.

No. 10094.

Supreme Court of New Mexico.

Aug. 20, 1975.

Paul A. Phillips, John E. Thorson, Albuquerque, for plaintiffs-appellants.

Darden, Sage & Darden, Las Cruces, for appellees.

OPINION

OMAN, Justice.

The plaintiffs, students at New Mexico State University, brought suit to enjoin the defendants, members of the Board of Regents of the University, from enforcing a regulation which prohibited visitation by persons of the opposite sex in residence hall, or dormitory, bedrooms maintained by the Regents on the University campus, except when moving into the residence halls and during annual homecoming celebrations.

We refer to the rooms as bedrooms, because this is primarily the nature and use made of these rooms. However, they are also intended for use and are equipped as private study rooms. Not all of the plaintiffs reside in the residence halls, but, according to the form contract signed by each of those who do, the University is required to furnish the student with a single bed, chest of drawers, desk and chair, closet space, bed linen and towels. The Regents place no restrictions on intervisitation between persons of the opposite sex in the lounges or lobbies of the residence halls, the Student Union Building, library or other buildings, or at any other place on or off the campus. No student is required by the Regents to live in a residence hall.

Plaintiffs' contentions in the district court were that the regulation is constitutionally impermissible and arbitrary, capricious and unreasonable. The district court dismissed the complaint for failure to state

a claim upon which relief could be granted. Plaintiffs have appealed. We affirm.

The grounds relied upon for reversal are that the regulation impinges on plaintiffs' constitutional rights of free association and privacy, violates article II, §§ 4 and 18 of the Constitution of New Mexico, and is invalid as being arbitrary and unreasonable.

The right of association, although not expressly recited in or created by the language of the first amendment to the Constitution of the United States, has long been recognized as implicit within and emanating from the rights therein expressly guaranteed and made applicable to the states by the due process clause of the fourteenth amendment to the Constitution of the United States. *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1958); Annot., 33 L.Ed.2d 865 (1973). This right has received recognition in connection with group associations. Annot., *supra.* Insofar as we are able to ascertain, it has never been held to apply to the right of one individual to associate with another, and certainly it has never been construed as an absolute right of association between a man and woman at any and all places and times.

The cases of *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) and *Martin v. Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), upon which plaintiffs rely, do not give any particular aid or support to their contention. The majority in the Moreno case held an "unrelated person" provision in § 3(e) of the Food Stamp Act of 1964, 7 U.S.C. § 2012(e), as amended in 1971, 84 Stat. 2048, created "an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment." It is true that in his concurring opinion, Justice Douglas relied, at least in part, on the "right of association, protected by the First Amendment," and he found an expression of this right by the poor in "congregating in households where they can better meet the adversities of poverty." Even if we were to agree with the position of Justice Douglas, we would not be persuaded to extend the constitutional right of association so far as to compel us to strike down the limited regulation against intervisitation between men and women with which we are here concerned.

We fully agree with the decision of the majority in the Tinker case, which did not involve the right of association, that neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate; that school officials do not possess absolute authority over their students; and that among the activities to which schools are dedicated is personal communication among students, which is an important part of the educational process. However, we find in none of these expressions of rights, limitations on authority, or purposes of the educational process even a suggestion that the Regents are totally powerless to control intervisitations between men and women students in the residence hall rooms owned and maintained by the Regents.

In the Martin case, a municipal ordinance, forbidding persons to knock on doors, ring doorbells or otherwise summon occupants of residences to their doors for the purpose of delivering to them handbills or circulars, was held invalid as a denial of freedom of speech and of the press, insofar as it sought to forbid the distribution of leaflets advertising a religious meeting. We are unable to read into this holding a right on the part of the students of the opposite sex to unrestrained visitations with each other in the University residence hall bedrooms.

The district court in dismissing plaintiffs' complaint relied in part upon the rationale of the opinion in *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). Plaintiffs argue that the district court misread the opinion in that case, and, consequently, was led

into error. However, the Regents insist this is not so, and that the rationale which prompted the court in that case to uphold the validity of the zoning ordinance there in question should prompt us to uphold the regulation here in question. Frankly, we don't understand how either side can get any appreciable comfort from that opinion. However, we do agree with the district court that the recognition, by the majority in the Belle Terre case, of the right of the municipality under its police power to create environmental conditions conducive to and protective of "family values, youth values, and the blessings of quiet seclusion," suggests authority in the Regents to create in its residence hall rooms areas of quiet seclusion conducive to safety, study and reflection.

Although, as above stated, we agree that personal intercommunication among students at schools, including universities, is an important part of the educational process, it is not the only, or even the most important, part of that process. In any event, we cannot believe that the restraint imposed by the regulation in question appreciably interferes—if at all—with the intercommunication important to the education of the students at the University. Even assuming that the right of association is being infringed by the challenged regulation, such right, emanating from the first amendment, is not absolute. Its exercise, as is the exercise of express First Amendment rights, is subject to some regulation as to time and place. *Adderly v. Florida,* 385 U.S. 39, 87 S.Ct. 242, 17 L. Ed.2d 149 (1966); *Cox v. Louisiana,* 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). The power to control, manage and govern the University is vested in the Regents. N.M.Const. art. XII, § 13; §§ 73–26–4, 5 and 6, N.M.S.A.1953 (Repl.Vol. 11, pt. 1, 1968). The proper exercise of this power necessarily includes the exercise of broad discretion. An inherent part of the power is that of requiring students to adhere to generally accepted standards of conduct. *Healy v. James,* 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); *Esteban v. Central Missouri State College,* 415 F.2d 1077 (8th Cir. 1969), cert. denied, 398 U.S. 965, 90 S.Ct. 2169, 26 L.Ed.2d 548 (1970). We believe, and certainly would not dispute, that the prohibition embodied in the regulation in question is consistent with generally accepted standards of conduct.

In the case of *Lynch v. Savignano,* Civil No. 70–375–F (D.Mass., Oct. 6, 1970), the plaintiffs were students at Westfield State College, an educational institution owned and controlled by the Commonwealth of Massachusetts. An attack was made by plaintiffs upon regulations and policies of the defendants, the president and administrative cabinet of the college. One of these regulations provided: "Residents of dormitories are prohibited from associating with persons of the opposite sex in their rooms." The court's opinion concerning the attack on this regulation, with which we agree, follows:

"It is contended that this regulation unconstitutionally abridges plaintiffs' rights to freedom of assembly and freedom of association.

"The regulation applies only to students rooms and other areas are provided in the dormitory buildings and elsewhere on the campus where students of both sexes can meet.

"Defendants have the right and indeed the duty to adopt reasonable regulations to maintain order and discipline and promote an environment conducive to the educational development of the students. The subject matter of the regulation attacked is clearly a proper one for some regulation by defendants. It is true, as indicated by some evidence produced at the hearing, that the regulation at Westfield is stricter than the similar regulations at other educational institutions. However, the issue here is whether the regulation adopted by defendants is one which for valid purposes relevant to the educational objectives of the institution, imposes a reasonable limitation on stu-

dent activities. The court finds for obvious reasons that the regulation is a reasonable one."

The case of *Buehler v. College of William and Mary,* Civil No. 62–70–NN (E.D. Va., Apr. 6, 1970), involved a violation by two students of the opposite sex of a dormitory intervisitation restriction which provided: "The student will not entertain or receive guests of the opposite sex in his or her room."

As to the authority of the college—a state supported institution—to adopt this "no visitation" rule, the court held:

> "As this Court has stated, it is entirely satisfied that the rule against receiving or entertaining guests of the opposite sex in the dormitory rooms at William and Mary College is entirely consonant with reasonable rules of discipline. The Court is satisfied that such rule does not violate any rights of privacy or association."

In support of their contention that the regulation with which we are concerned in the present suit violates their right of privacy, plaintiffs rely upon *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). None of these cases supports plaintiffs' position.

They next contend the regulation violates their "rights of enjoying * * * life and * * * seeking * * * happiness," as guaranteed by article II, § 4 of the Constitution of New Mexico, and offends against the equal rights amendment found in article II, § 18 of the Constitution of New Mexico, which requires that: "Equality of rights under law shall not be denied on account of the sex of any person." They finally contend that the regulation is arbitrary and unreasonable. However, they cite no authority for their position on any of these grounds.

We are unwilling to hold that the Regents, who have the power and the duty to enact and enforce reasonable rules and regulations for the conduct of the University, have infringed upon the plaintiffs' constitutionally protected rights by its regulation against intervisitation of men and women in a dormitory room. We hold, as did the district court, that the regulation is reasonable, serves legitimate educational purposes, and promotes the welfare of the students at the University.

The order dismissing plaintiffs' complaint should be affirmed.

It is so ordered.

STEPHENSON and MONTOYA, JJ., concur.

540 P.2d 218

DALE J. BELLAMAH CORPORATION,
Plaintiff-Appellant,

v.

CITY OF SANTA FE, a Municipal Corporation, the City Council of the City of Santa Fe, and the City Planning Commission of the City of Santa Fe, Defendants-Appellees.

No. 10226.

Supreme Court of New Mexico.
Aug. 22, 1975.

Rodey, Dickason, Sloan, Akin & Robb, Gene C. Walton, John P. Salazar, Albuquerque, for plaintiff-appellant.

Connelly & Lenssen, Santa Fe, for defendants-appellees.

OPINION

SOSA, Justice.

The City of Santa Fe, by a 3 to 2 council vote, with two councilmen not voting, purportedly passed ordinance 1973–25 on July 11, 1973. § 14–16–3 N.M.S.A.1953 (Repl.Vol. 3) requires that a majority of all the members of the governing body vote in favor of adopting an ordinance or resolution. The ordinance, if properly passed, would have re-zoned Plaintiff's property from R–1 to SC–1, allowing Plaintiff to build a shopping center on property previously zoned residential. The mayor signed the ordinance, and it was filed in the office of the city clerk on July 11, 1973, and was published pursuant to law on July 16, 1973. On August 8, 1973, the city council voted to reconsider ordinance 1973–25, whereupon Plaintiff filed its complaint requesting the trial court to enjoin Defendants from taking any action to reconsider the ordinance and requesting the trial court to declare the actions in reconsidering the ordinance null and void.

On August 16 a temporary restraining order was issued, restraining Defendants from further reconsidering the zoning obtained through the passage of ordinance 1973–25, and the hearing on the application for a preliminary injunction was set for August 23, 1973. On that date the Defendants' counsel orally entered a general denial to the complaint, and by consent of the parties the case was considered on its merits.

The trial court held that the motion to reconsider the ordinance was not timely made. Nevertheless, it held that the ordinance was invalid for lack of an affirmative vote of a majority of all the members of the council. At the time of the purported adoption of the ordinance, the council consisted of seven members. From a judgment in favor of Defendants, Plaintiff appeals. For reversal Plaintiff-appellant argues that:

(1) The validity or invalidity of ordinance 1973–25 was not properly before the court;

(2) The Defendants should not have been allowed to attack collaterally ordinance 1973–25;

(3) The Defendants are equitably estopped from asserting the invalidity of ordinance 1973–25.

With respect to Plaintiff's first point, the trial record shows that the Defendants introduced a new issue into the case after all the evidence had been presented to the court. That new issue raised the validity of the ordinance itself, as prior testimony had indicated that less than a majority of all the members of the council had voted in favor of the ordinance. Plaintiff argued that the proper procedure to attack the validity of the ordinance was through a direct attack under § 14–20–7 N.M.S.A.1953 (Repl.Vol. 3). The trial court found that the issue was properly before it and held the ordinance invalid. The court made the following findings of fact and conclusions of law (among others):

Findings of Fact

13. An ordinance for the re-zoning of the Plaintiff's said property was duly considered and voted upon by the Defendant City Council of the City of Santa Fe, New Mexico, on July 11, 1973, and at such time the said City Council voted by a roll-call vote, with three members of the City Council voting in the affirmative to approve City Ordinance No. 1973–25, for a re-zoning of the subject property from a zoning classification of R–1 to SC–1.

14. At all times material hereto, the Defendant City of Santa Fe was governed by its City Council of the City of Santa Fe, composed of seven (7) members, and a Mayor.

15. Following the vote of the Defendant City Council of the City of Santa Fe to approve Ordinance No. 1973–25, the said ordinance was filed in the office of the City Clerk and subsequently published pursuant to law.

16. Ordinance No. 1973–25, was filed in the office of the City Clerk of Santa Fe, on July 11, 1973, and was published on July 16, 1973.

18. At all times material hereto, Section 14–16–3 N.M.S.A., 1953 Comp., was in force and effect and which said statute provided as follows:

"Ordinances—Roll Call Vote—Adoption.—A. If a majority of all the members of the governing body vote in favor of adopting the ordinance or resolution, it is adopted. The municipal clerk shall record in the minutes book the vote of each member of the governing body on each ordinance or resolution.

B. Within three days after the adoption of an ordinance or resolution, the mayor shall validate the ordinance or resolution by endorsing "Approved" upon the ordinance or resolution and signing the ordinance or resolution."

The Court adopted the following Conclusions:

Conclusions of Law

2. The purported action of the Defendant City of Santa Fe, by its City Council, in voting on July 11, 1973, to adopt by a vote of three city council members in the affirmative, a City Ordinance No. 1973–25, was illegal and void, since state law requires City Ordinances to be adopted by a majority vote of the City Council, and a majority did not vote in the affirmative.

3. The action of the Defendant City Council of the City of Santa Fe, New

Mexico, in voting to re-consider an illegally adopted City Ordinance, was not improper.

Although Defendants failed to plead the invalidity of the ordinance as an affirmative defense but rather entered an oral general denial, and although Defendants failed to amend their answer to include this affirmative defense during or after the hearing on the merits, the evidence as to the invalidity of the ordinance was presented without objection (although its import was not recognized until later), the issue was subsequently argued, and the trial court specifically ruled upon that issue in its findings of fact and conclusions of law.

Rule 15(b), Rules of Civil Procedure [§ 21-1-1(15)(b), N.M.S.A.1953 (Repl.Vol. 4)] provides as follows:

> (b) Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Rule 15(b) is sufficiently broad to allow amendment of the pleadings to conform to the issues and evidence raised during trial in the instant case. See *Terrill v. Western American Life Insurance Company*, 85 N. M. 456, 513 P.2d 390 (1973). Failure to amend does not affect the result of the trial of these issues. Thus, the issue of the invalidity of the ordinance was properly before the court.

In the instant case Plaintiff failed to make timely objection and failed to show prejudice. If Plaintiff had shown prejudice to its case, the trial court could have granted Plaintiff a continuance to enable it to meet the new evidence or issues. Pleadings are the means to assist, not deter, the disposition of litigation on the merits. 3 J. Moore, Federal Practice ¶ 15.02 (2d ed. 1974).

Second, Plaintiff contends that Defendants should not be allowed to attack collaterally ordinance 1973-25; rather, the ordinance must be attacked directly under § 14-20-7, supra. Evidence at trial had shown that ordinance 1973-25 had never been enacted pursuant to the directives of § 14-16-3, supra. The rule is well established that where the statute directs in definite terms the manner in which municipal acts are to be exercised, such statutory method must be substantially followed. *Bibo v. Town of Cubero Land Grant*, 65 N.M. 103, 332 P.2d 1020; 1 C. Antieau, Municipal Corporation Law § 4.19 (1975). Thus, the ordinance was invalid and without force. See *Brumley v. Greeneville*, 38 Tenn.App. 322, 274 S.W.2d 12 (1954); 56 Am.Jur.2d, Municipal Corporations § 346 (1971). Various courts have permitted collateral attacks upon ordinances which are void in the sense that the legislative body had no constitutional or statutory power to pass it or because the ordinance was never legally enacted. *State v. Vargas*, 6 Conn.Cir. 69, 265 A.2d 345 (1969); *Bowling Green-Warren County Airport Bd. v. Long*, 364 S.W.2d 167 (Ky.Ct.App. 1962); *Simmons v. Holm*, 229 Or. 373, 367 P.2d 368 (1961); 6 E. McQuillin, Municipal Corporations § 20.14 (3rd ed. rev. 1969). Since § 14-20-7, supra, does not present the exclusive method for attacking invalid ordinances, we hold that a collater-

al attack upon the ordinance was permissible in the instant case.

Third, Plaintiff urges that Defendants should be equitably estopped from asserting the invalidity of the ordinance against it. However, Plaintiff failed to show a material change in its position after July 21, 1973, the day the ordinance would have become effective had the statutory prerequisites been complied with. Plaintiff's only change in position after July 21 was entering into preliminary negotiations with prospective clients. This by itself is insufficient change in position to invoke equitable estoppel. *Tome Land & Improvement Co. v. Silva*, 83 N.M. 549, 494 P.2d 962 (1972); *Porter v. Butte Farmers Mutual Insurance Company*, 68 N.M. 175, 360 P.2d 372 (1961).

For the reasons above stated the Judgment of the trial court is affirmed.

It is so ordered.

OMAN and STEPHENSON, JJ., concur.

540 P.2d 222

SECURITY INSURANCE COMPANY OF HARTFORD, Plaintiff-Appellant,

v.

Fred L. CHAPMAN, Earline B. Chapman, Presbyterian Hospital Center, Edwin B. Herring, M.D. and George A. Atkinson, M. D., Defendants-Appellees.

No. 10029.

Supreme Court of New Mexico.

Sept. 10, 1975.

Toulouse, Krehbiel & Cheney, James R. Toulouse, J. K. Winchester, Albuquerque, for plaintiff-appellant.

Modrall, Sperling, Roehl, Harris & Sisk, Leland S. Sedberry, Jr., Keleher & McLeod, Russell Moore, Albuquerque, for defendants-appellees.

OPINION

McMANUS, Chief Justice.

This is what remains of a lawsuit originally filed jointly on April 1, 1969 by Fred and Earline Chapman (hereinafter Chapmans), now defendant-appellees, and Security Insurance Company (hereinafter S.I.C.), now plaintiff-appellant, against defendant-appellees, Presbyterian Hospital Center, members of its staff, and Doctors Edwin B. Herring and George Atkinson, for injuries allegedly sustained by Fred Chapman as a result of the negligence of the hospital and doctors in administering the wrong type of blood to him on November 8, 1966, in the course of an operation and other medical treatment. In this initial lawsuit the Chapmans sought damages for injuries and losses allegedly caused by the mismatch of Fred Chapman's blood, while S.I.C. sought reimbursement for medical expenses and compensation benefits allegedy paid out pursuant to New Mexico workmen's compensation laws as a result of the medical negligence which aggravated Chapman's original injury.

The Chapmans settled their lawsuit without notifying or consulting with S.I.C. As a part of this settlement, the hospital and doctors agreed to indemnify Chapman against any subrogation claim on the proceeds of the settlement which S.I.C. might bring against him based upon payments it allegedly made on his behalf because of the mismatch of blood.

Following the settlement, there were numerous motions, orders and claims made by the parties. Ultimately, S.I.C. amended its complaint to include one count against the Chapmans for reimbursement of that portion of the medical expenses and compensation paid out which S.I.C. attributes to the mismatch of blood, and a second count against all the defendants for a declaratory judgment to determine the rights and obligations of the various parties. All defendants moved for dismissal and the trial court dismissed the complaint with prejudice on the basis that it failed to state a claim upon which relief could be granted.

S.I.C. appeals from this decision on two grounds. The first is that § 59–10–19.1(B), N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 1, 1974) upon which defendants rely, is inapplicable to the case at bar. This section of the New Mexico Workmen's Compensation Act provides:

> "In case the employer has made provisions for, and has at the service of the workman at the time of the accident, adequate surgical, hospital and medical facilities and attention and offers to furnish these services during the period

necessary, then the employer shall be under no obligation to furnish additional surgical, medical or hospital services or medicine than those so provided; Provided, however, that the employer furnishing such surgical, medical and hospital services and medicines shall be liable to the workman for injuries resulting from neglect, lack of skill, or care on the part of any person, partnership, corporation or association employed by the employer to care for the workman. In the event however, that any employer becomes so liable to the workman, it shall be optional with the workman injured in such a manner to accept the foregoing provisions and hold the employer liable for the injuries, or to reject these provisions and retain the right to sue the person, partnership, corporation or association employed by the employer who injures the workman through neglect, lack of skill or care. Election to accept or reject the provisions of this section shall be made by a notice in writing, signed and dated, given by the workman to his employer; and, if the workman elects to hold the employer liable for the injuries, the cause of action of the workman against the third person partnership, corporation or association shall be assigned to the employer, who may institute proceedings thereon in any court having jurisdiction, in the workman's name."

We hold that this section does apply to the case at bar. Appellant, S.I.C., argues that this statute was intended to cover only those situations where an employer actually maintains hospital and medical facilities for the employees. Under the facts presented here Chapman was both the employer and the employee. After sustaining an injury during the course of his employment, Chapman was admitted to Presbyterian Hospital for surgery and other medical treatment. Notice of the accident and injury was given to S.I.C., which then undertook its obligation to pay Chapman's medical expenses as well as compensation to him. We conclude that under these circumstances the employer did make provisions for, and furnish hospital and medical facilities to the employee within the meaning of the statute. The employer, through its insurance company, did pay the employee's medical bills, which was all that was necessary under the circumstances. Were this section of the Workmen's Compensation Act only to apply where the employer maintained a hospital or clinic exclusively for its employees, as the appellant argues, then there would rarely be an employee in New Mexico who would benefit from its provisions. It seems to us incredible that the legislature intended such a narrow application of this section. We construe § 59–10–19.1(B) of the New Mexico Workmen's Compensation Act in favor of the claimant, as we are required to do since this act is remedial legislation and must be construed liberally to effect its purpose. *Mascarenas v. Kennedy*, 74 N.M. 665, 667–668, 397 P.2d 312, 314 (1964). The purpose of § 59–10–19.1(B), supra, was to give workmen the option of holding their employers liable for the negligence of the doctors or other medical personnel treating them for their work-related injuries, or to hold the doctors or other medical personnel liable directly. To effect this purpose, we hold that Chapman in this case had that option under the statute.

The second ground upon which the plaintiff-appellant, S.I.C., relies is that it had either an equitable right of subrogation or a statutory right to reimbursement. As to the equitable right of subrogation, the plaintiff has not properly presented that theory here. The first cause of action in the plaintiff's complaint is a claim for reimbursement from Chapman under the Workmen's Compensation Act. The second is a claim for declaratory relief. Plaintiff is now appealing from the dismissal of these two causes of action. The issue of his alleged right of subrogation was not raised in the district court. We have stated that "[i]t is fundamental that matters not brought into issue by the pleadings and upon which no decision of the trial

court was sought, or fairly invoked, cannot be raised on appeal." *Groendyke Transp., Inc. v. New Mexico St. Corp. Com'n,* 85 N.M. 718, 723, 516 P.2d 689, 693 (1973). See also *Romero v. Sanchez,* 86 N.M. 55, 56, 519 P.2d 291, 292 (1974), Supreme Court Rule 20(1),(2), (§ 21-2-1(20)(1), (2), N.M.S.A., Repl. Vol. 4, 1970). Consequently, we will not consider this issue.

S.I.C. bases its statutory right to reimbursement on § 59-10-25(C), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1, 1974) which provides:

> "The right of any workman, or, in case of his death, of those entitled to receive payment or damages for injuries occasioned to him by the negligence or wrong of any person other than the employer or any other employee of the employer, including a management or supervisory employee, shall not be affected by the Workmen's Compensation Act, but he or they, as the case may be, shall not be allowed to receive payment or recover damages therefor and also claim compensation from the employer, and in such case the receipt of compensation from the employer shall operate as an assignment to the employer, his or its insurer, guarantor or surety, as the case may be of any cause of action, to the extent of payment by the employer to the workman for compensation, surgical, medical, osteopathic, chiropractic, and hospital services and medicine occasioned by the injury which the workman or his legal representative or others may have against any other party for the injuries or death."

This section of the New Mexico Workmen's Compensation Act has been consistently interpreted as a reimbursement statute involving only one cause of action. Under it the workman sues the third party tort-feasor for the entire amount of damages and the employer or insurer is reimbursed out of amounts received by the workman. *Herrera v. Springer Corporation,* 85 N.M. 6, 8, 508 P.2d 1303, 1305 (Ct.App.1973), aff'd in part, 85 N.M. 201, 510 P.2d 1072 (1973); *Castro v. Bass,* 74 N.M. 254, 257-58, 392 P.2d 668, 671 (1964); *Kandelin v. Lee Moor Contracting Co.,* 37 N.M. 479, 24 P.2d 731 (1933).

The appellant argues that it is entitled to reimbursement to the extent that it compensated the employee, Chapman, for an injury for which that employee subsequently recovered settlement damages. Appellant stresses that part of § 59-10-25(C), supra, which states that the workman "shall not be allowed to receive payment or recover damages therefor and also claim compensation from the employer." According to the appellant, if the Chapmans were allowed to enjoy the benefits of the compensation, and also retain the entire amount of the settlement made with the hospital and doctors, this would constitute a double recovery.

This court has held that once an employee has recovered a judgment against a third-party tort-feasor, that employee may not thereafter claim compensation for the same injury. *Castro v. Bass,* supra; *White v. New Mexico Highway Commission,* 42 N.M. 626, 83 P.2d 457 (1938). Similarly, we have also held that the employer, or its insurer, has the right to reimbursement of any amounts paid the employee, in the event the employee successfully sues a third-party, since the intent of the Workmen's Compensation Act is to prevent double recovery. *Brown v. Arapahoe Drilling Company,* 70 N.M. 99, 370 P.2d 816 (1962). This is also true where the employee settles the claim against the third-party tort-feasor. *Royal Indemnity Co. v. Southern Cal. Petroleum Corp.,* 67 N.M. 137, 353 P.2d 358 (1960). See also *White v. New Mexico Highway Commission,* supra.

The appellees ask us to distinguish the case at bar from the above cited cases on the basis that § 59-10-25(C), supra, is not applicable to this case since the injury alleged in the complaint is not the same as the one for which S.I.C. began paying compensation and medical benefits. The appellee's theory is that the original injury

for which Chapman was compensated and the subsequent aggravation of that injury by the mismatch of Chapman's blood are separate and distinct injuries. The second injury, according to appellees, is governed strictly by the provisions of § 59–10–19.-1(B), supra, and not by § 59–10–25(C), supra.

In considering the validity of appellees' argument we look to another section of the Workmen's Compensation Act, § 59–10–4(D), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1, 1974), which provides, in part:

> "Nothing in the Workmen's Compensation Act, however, shall affect, or be construed to affect, in any way, the existence of, or the mode of trial of, any claim or cause of action which the workman has against any person other than his employer, or another employee of his employer, including a management or supervisory employee, or the insurer, guarantor or surety of his employer."

Section 59–10–19.1(B), supra, obviously relates to torts of persons other than the employer, or another employee of the employer, or the insurer, guarantor or surety of the employer. Under certain specified circumstances, it extends the tort liability of the employer beyond that recognized in the law of torts, upon an election by the employee, but it in no way affects the tort liability of third persons furnished by the employer to render reasonable medical and hospital services to the injured employee. Normally, under the law of torts, absent a contractual or statutory obligation to furnish medical or hospital services, an employer is not liable for furnishing such services to employees. However, many cases, and we believe the better reasoned, place upon the employer in this situation the duty to use due care in selecting the doctor and hospital. Beyond this there is no liability of the employer for the tortious conduct of the doctor or hospital. Compare Annot., 16 A.L.R.3d 564 (1967) with Annot., 127 A.L.R. 1108 (1940) and Annot., 28 A.L.R.3d 1066 (1969).

However, § 59–10–19.1(B), supra, extends this tort liability of the employer to cover the tortious conduct of the doctor and hospital, if the employer has made provisions for medical and hospital care of the employee at the time of the accident out of which arises the employee's rights to compensation and medical and hospital care under the Workmen's Compensation Act. Section 59–10–19.1(B), supra, nowhere requires the employer to furnish either compensation or medical or hospital care for the employee as a result of the injuries he sustains by reason of this subsequent tortious act of the doctors or the hospital. It provides that the employee may *elect* to hold the employer responsible for the injuries he sustains as a result of this subsequent tortious conduct, and, if he so "elects to hold the employer liable for the injuries, the cause of action of the workman against the third person * * * shall be assigned to the employer, who may institute proceedings thereon in any court having jurisdiction, in the workman's name." This is not a subrogation to the extent of any amounts the employer may have paid. The entire cause of action of the injured workman is assigned to the employer and the injured workman may look to the employer for damages for his injuries, and not for benefits under the Workmen's Compensation Act. The entire tenor of this statute relates to a shifting of tort liability from the tort-feasor to the employer under the circumstances prescribed and upon the election by the employee in the manner provided.

In our opinion, this rather unusual section of our Workmen's Compensation Act, coupled with the foregoing quoted provisions from § 59–10–4(D), and the previously discussed provisions of § 59–10–25(C), clearly demonstrate a legislative intent that ordinary tort law, except as modified by said §§ 59–10–19.1(B) and 59–10–25(C), shall govern the tortious acts of medical personnel and hospitals charged with the care and treatment of an employee for an accident sustained by him

while "performing service arising out of and in the course of his employment" and where the injury which he suffers "is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted." This is the only type of accident for which compensation benefits and medical and hospital benefits are available under our compensation act. § 59-10-6, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 1, 1974).

The New Mexico statute requires a written election by the employee before the employer is liable for additional benefits under the compensation act. Only if the workman makes the election is the cause of action then assigned to the employer who may institute proceedings thereon in any court having jurisdiction in the workman's name.

Other states have similar election statutes and have interpreted them in a manner consistent with our explication of such statute. In Michigan the court has held that acceptance of compensation by the employee for the original injury, does not constitute an election within the statute, precluding recovery for aggravation of the injury by the physician's subsequent malpractice. In *Overbeek v. Nex*, 261 Mich. 156, 246 N.W. 196 (1933), the court said:

> "It has been suggested that the employee may exercise his option to take compensation before he has discovered the effects of malpractice and thus foreclose himself from any right against the physician. However, the acceptance of compensation for the original injury does not in any sense constitute an election under the statute. The employee retains his right against the third party until he has elected to take compensation, not only for the original injury, but also for the aggravated condition resulting from the malpractice."

In that case the physician's malpractice was subsequent to the original injury. The court determined that the acceptance of compensation for the original injury did not constitute an election within the statute and did not preclude the injured employee's recovery for malpractice against the physician. The Michigan statute required an election by the employee to collect additional compensation for the additional injury from the employer similar to the election in the New Mexico statute. See also Annot., 28 A.L.R. 3d 1066, 1084, 1086 (1969). Thus, in those states where there are election provisions the employer or his insurer has no subrogation rights unless the employee has made the appropriate election to receive workmen's compensation benefits from the employer for the additional malpractice. *Steeves v. Irwin,* 233 A.2d 126 (Me.1967).

In the case at hand there was no court determination as to the compensation award and there was no court determination as to whether the compensation paid by the insurer was for the original injury or for the alleged aggravation caused by the alleged improper blood transfusion. S.I.C. paid the employee, Chapman, benefits which were less than a total permanent award. Apparently, he was paid merely for a period and payments then discontinued altogether, without a release having been obtained. The employee did not give the election in writing as required by the statute and did not file suit against the employer for additional workmen's compensation benefits for the alleged malpractice. He instead elected to sue the physicians, technicians and hospital. Any payments made by S.I.C. to the employee must be presumed to be benefits for his original injury. S.I.C. is not entitled to reimbursement from the Chapmans.

We must bear in mind that the Workmen's Compensation Act of New Mexico is sui generis and creates rights, remedies and procedures which are exclusive. *Anaya v. City of Santa Fe,* 80 N.M. 54, 451 P.2d 303 (1969); *Magee v. Albuquerque Gravel Products Company,* 65 N. M. 314, 336 P.2d 1066 (1959). Of course, the decisions of other states, if any, which have statutory provisions comparable to

ours, with which we are here concerned, are persuasive but not binding on us. Any workmen's compensation cases from other jurisdictions, reaching a contrary result from that which we believe our statute compels under the facts before us, are not persuasive. Our law of workmen's compensation in New Mexico is governed by our Workmen's Compensation Act.

The judgment of the trial court will be affirmed.

It is so ordered.

OMAN and MONTOYA, JJ., concur.

540 P.2d 229

DUKE CITY LUMBER COMPANY, INC., a New Mexico Corporation, Petitioner,

v.

William E. TERREL, d/b/a Little Tree Lumber Company, Respondent.

William E. TERREL, d/b/a Little Tree Lumber Company, Petitioner,

v.

DUKE CITY LUMBER COMPANY, INC., a New Mexico Corporation, Respondent.

Nos. 10050, 10051.

Supreme Court of New Mexico.

Aug. 4, 1975.

Rehearing Denied Sept. 11, 1975.

Modrall, Sperling, Roehl, Harris & Sisk, John R. Cooney, George T. Harris, Jr., Albuquerque, for Duke City Lumber Co.

Ortega, Snead, Dixon & Hanna, Arturo G. Ortega, William E. Snead, Albuquerque, for William Terrel.

Lyons, Ottinger & Reynolds, Charles P. Reynolds, Albuquerque, David E. Douglas, Edmund H. Kase, III, Socorro, for Terrel.

OPINION

OMAN, Justice.

This cause is before us upon a writ of certiorari directed to the New Mexico Court of Appeals, which affirmed the judgment of the district court in *Terrel v. Duke City Lumber Company*, 86 N.M. 405, 524 P.2d 1021 (Ct.App.1974). We reverse the decision of the Court of Appeals insofar as it affirmed the judgment of the district court in awarding $367,000 to Terrel for the claimed loss of his saw mill and planing mill by reason of economic compulsion on the part of Duke City.

Although both Duke City and Terrel filed petitions for a writ of certiorari, and have raised several points relied upon for the issuance of the writ and a reversal of both the Court of Appeals and the district court, we confine ourselves to a determination of the following inquiries:

(1) What is the scope of review by an appellate court of evidence adduced at trial upon an issue of fact which must be established by clear and convincing evidence?

(2) May damages for a claimed loss of value of a business enterprise be established by the "before" and "after" market values of the enterprise? If so, was the evidence adduced by plaintiff sufficient to establish these "before" and "after" values?

As to the first of these inquiries, we are concerned with Terrel's burden of proof as to his claims of economic compulsion. The instruction to the jury by the district court on this question, which has not been attacked on appeal or in this court, reads in pertinent part:

> "To establish economic compulsion proof must be clear and convincing. It must be more than a preponderance of the evidence. Plaintiff will not have met the required burden of proof for any one or more claims of economic compulsion that are not established by clear and convincing evidence.

"Evidence is clear and convincing as to an economic compulsion claim if you have an abiding conviction that such a claim is true. Evidence is not clear and convincing if you find the evidence to be evenly balanced, or barely in favor of Plaintiff, or if the evidence leaves a question in your mind as to the alleged economic compulsion."

It is the position of Duke City that on appeal it was the duty of the Court of Appeals to review and weigh all the evidence upon the issue of economic compulsion, and, from this review and weighing of the evidence, then to determine whether the mind of the factfinder—in this case the jury—could have properly reached an abiding conviction as to the truth of Terrel's claim of economic compulsion. This position appears to be supported by the decisions of this court in *McLean v. Paddock,* 78 N.M. 234, 430 P.2d 392 (1967) and *Visic v. Paddock,* 72 N.M. 207, 382 P. 2d 694 (1963). It also appears that language from other decisions by this court may so suggest, although such a holding was neither intended nor expressly stated. See for example *Hockett v. Winks,* 82 N. M. 597, 485 P.2d 353 (1971); *Lumpkins v. McPhee,* 59 N.M. 442, 286 P.2d 299 (1955).

On the other hand, New Mexico decisions involving the burden of proof by clear and convincing evidence have expressly stated or clearly implied that it is for the finder of the facts, and not the appellate courts, to weigh conflicting evidence and decide where the truth lies. The function of the appellate court is to view the evidence in the light most favorable to the prevailing party, and to determine therefrom if the mind of the factfinder could properly have reached an abiding conviction as to the truth of the fact or facts found. *Prudential Insurance Company of America v. Anaya,* 78 N.M. 101, 428 P.2d 640 (1967); *Frear v. Roberts,* 51 N.M. 137, 179 P.2d 998 (1947); *Echols v. N. C. Ribble Company,* 85 N.M. 240, 511 P.2d 566 (Ct.App.), cert. denied, 85 N.M. 229, 511 P.2d 555 (1973).

The Court of Appeals concluded as follows after referring to *Hockett v. Winks,* supra; *McLean v. Paddock,* supra; *Visic v. Paddock,* supra; *Lumpkins v. McPhee,* supra:

"The above cases conform with the ordinary rules of review of the record on appeal. That is, presumptions are in favor of verdicts and reviewing courts will view the facts in the light most favorable to the prevailing party, will indulge in all reasonable inferences in support of the verdict, and will disregard all inferences or evidence to the contrary. Further, it is for the jury and not the reviewing court to weigh the testimony, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of witnesses and say where the truth lies. *Durrett v. Petritsis,* 82 N.M. 1, 474 P.2d 487 (1970); *Sauter v. St. Michael's College,* supra [70 N.M. 380, 374 P.2d 134]. We will review the evidence to determine if it is sufficient to establish, clearly and convincingly, the claim of economic compulsion. *Hockett v. Winks,* supra."

We agree, except as to the appraisal of the decisions in *McLean v. Paddock,* supra, and *Visic v. Paddock,* supra. The decisions in those cases indicate that they were, or at least may have been, based upon an appellate review of all the evidence of record, and, from this view, the court determined that the issues of fraud were not clearly and convincingly established. We hereby disavow and overrule these and all other decisions of this court, or the Court of Appeals, insofar as they state or suggest that on appellate review all the evidence upon an issue of fact, which must be established by clear and convincing evidence, is to be weighed and the appellate court to determine therefrom whether the fact is so established.

The next matter with which we are here concerned is whether the district court and the Court of Appeals correctly ruled that the amount of damages for the

claimed loss by Terrel of his saw mill and planing mill, by reason of economic compulsion on the part of Duke City, could properly be established by the "before" and "after" fair market values of these mills. (We refer to the loss of these mills as a "claimed loss," because it appears that the mills were not lost and are still being operated by Terrel.) He claimed a "[l]oss of saw mill and planing mill in the amount of $600,000." The jury awarded $367,000 for "loss of saw mill and planing mill," and the district court's judgment in behalf of Terrel included this jury award. The Court of Appeals discussed this "before" and "after" method of proving damages at 86 N.M. 426–27, 524 P.2d 1042–43. We agree with the Court of Appeals that the difference between the "before" and "after" fair market values of a business enterprise correctly measures the damages resulting from the destruction of or injury to the enterprise. We have trouble with the authorities cited by the Court of Appeals in support of its decision, but there are authorities so holding. See *Kimball Laundry Co. v. United States,* 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949); *Story Parchment Co. v. Patterson Co.,* 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Lehrman v. Gulf Oil Corporation,* 500 F.2d 659 (5th Cir. 1974), cert. denied, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975); *Brewer v. Uniroyal, Inc.,* 498 F.2d 973 (6th Cir. 1974); *Albrecht v. Herald Company,* 452 F.2d 124 (8th Cir. 1971). However, we do not necessarily agree with the Court of Appeals that this was the only method by which the claimed damages could properly have been measured.

Competent witnesses testified as to the "before" market value of the enterprise, but the only evidence as to the "after" value came in by way of testimony of one of these witnesses. This witness testified that he would have paid $400,000 for the enterprise while Terrel was operating it. However, he also testified that he would pay $400,000, or very close to it, for the mill in place as it was at the time he testified and as it still is. It is true he testified that if the mill were to be dismantled and sold as used machinery he would pay at most only $75,000 to $80,000 for it. However, this was not evidence as to the "after" market value of the mill which was in place and which was not dismantled or to be dismantled for sale as used machinery.

It is true that Terrel testified the business was worthless to him, because he lacked the money to operate it. However, this did not reduce the "market value" of the mill in place to its mere salvage value. We disagree with the assertion by the Court of Appeals that: "The 'after' value of the mill was a salvage value, without capital to operate it or to purchase timber."

The market value, or fair market value, of a business enterprise, or of any other property, is not dependent upon the owner's financial capacity to operate or improve the enterprise or property. It is what a willing buyer would pay and a willing seller would accept for it in its condition at the time and place in question. *Tome Land & Improvement Co. v. Silva,* 83 N.M. 549, 494 P.2d 962 (1972); *City of Albuquerque v. Chapman,* 76 N.M. 162, 413 P.2d 204 (1966); *Board of Com'rs of Dona Ana County v. Gardner,* 57 N.M. 478, 260 P.2d 682 (1953); *Kaiser Steel Corp. v. Property Appraisal Dept.,* 83 N.M. 251, 490 P.2d 968 (Ct.App.), cert. denied, 83 N.M. 258, 490 P.2d 975 (1971). Since Terrel failed to prove the "after" value of his mill was less than the "before" value, the judgment for $367,000 cannot stand.

The decision of the Court of Appeals and the judgment of the district court are reversed to the extent of the award of $367,000 for the "loss of saw mill and planing mill," and the district court is directed to withdraw its judgment heretofore entered and to enter a new judgment accordingly. Otherwise, the judgment of the district court is affirmed.

It is so ordered.

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

540 P.2d 233

George E. BURROUGHS, Petitioner-Appellant,

Ovedio Saiz, Intervenor-Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF BERNALILLO, Respondent-Appellee,

Empire Realty & Trust, Inc., Intervenor-Appellee.

No. 10090.

Supreme Court of New Mexico.

Sept. 8, 1975.

George E. Burroughs, pro se, Betty A. Camunez, J. Brent Ricks, Charles T. DuMars, Albuquerque, for appellants.

Bruce C. Redd, McAtee & Zucht, Albuquerque, for appellees.

OPINION

McMANUS, Chief Justice.

This cause began in 1971 when Empire Realty and Trust, Inc., intervenor-appellee, filed application No. CZ 71–28 with the Bernalillo County Zoning Administrator to change the zone classification of a 9.4-acre tract of land from A–2 residential to C–1 commercial. The request was for the purpose of operating an overnight campground. After four public hearings, the application was eventually denied on November 8, 1972. This decision was based in part upon the following statement made by the Bernalillo County Planning Department: "Due to topographic conditions of excessive slope and varied relief, penetration into forested areas and juxtaposition with a residential subdivision, commercial zoning for the subject property would not be appropriate, nor would it be in the best interest of the public at large." Bernalillo County Board of County Commissioners, Minutes, November 8, 1972.

Empire Realty then asked that an exception be made in their case by requesting a special use permit. The application was labeled CSU 73–24, and its purpose was to obtain permission to build an overnight campground on the same 9.4 acres referred to herein. At a public hearing on July 17, 1973, respondent-appellee, Board of County Commissioners of the County of Bernalillo (hereinafter the Commissioners), approved CSU 73–24.

The petitioner-appellant, George E. Burroughs, petitioned the district court, pursuant to § 14–20–7, N.M.S.A. 1953 (Repl.Vol. 3, 1968), for review of the Commissioners' decision. Empire Realty was allowed to intervene as a party respondent. Ovedio Saiz, intervenor-appellant, was granted leave to intervene as a party petitioner. The court entered judgment for the respondent, thereby approving the special use permit.

The county's authority to promulgate zoning ordinances must come from enabling legislation from the state legislature. Cf. *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964); *City of Carlsbad v. Caviness*, 66 N.M. 230, 346 P.2d 310 (1959). Therefore, any exercise of power under a zoning ordinance must be authorized by statute. The pertinent statutes are §§ 14–20–1 et seq., N.M.S.A.1953 (Repl.Vol. 3, 1968).

Section 14–20–1, supra, provides:

"A. For the purpose of promoting health, safety, morals, or the general welfare, a county or municipality is a zoning authority and may regulate and restrict within its jurisdiction the:

(1) height, number of stories and size of buildings and other structures;

(2) percentage of a lot that may be occupied;

(3) size of yards, courts and other open space;

(4) density of population; and

(5) location and use of buildings, structures and land for trade, industry, residence or other purposes.

"B. The county of municipal zoning authority may:

(1) divide the territory under its jurisdiction into districts of such number, shape, area and form as is necessary to carry out the purposes of sections 14–20–1 through 14–20–12 New Mexico Statutes Annotated, 1953 Compilation; and

(2) regulate or restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land in each district. All such regulations shall be uniform for each class or kinds of buildings within each district but regulation in one district may differ from regulation in another district."

As a result of this statute, the Commissioners adopted a "Comprehensive Zoning Ordinance of Bernalillo County" (hereinafter the Ordinance). This took effect on April 17, 1973. In the Ordinance, pursuant to § 6 thereof, the county was divided into nine [9] zones. The land which is the subject of this suit is zoned A–2 rural agricultural which is provided for in § 9 of the Ordinance.

Section 14–20–6(C), N.M.S.A.1953 (Repl.Vol. 3, 1968), makes allowance for special exceptions to zoning ordinances in the following language:

> "When an appeal alleges that there is error in any order, requirement, decision or determination by an administrative official, commission or committee in the enforcement of sections 14–20–1 through 14–20–12 New Mexico Statutes Annotated, 1953 Compilation, or any ordinance, resolution, rule or regulation adopted pursuant to these sections, the zoning authority by a two-thirds [⅔] vote of all its members may:
>
> (1) authorize, in appropriate cases and subject to appropriate conditions and safeguards special exceptions to the terms of the zoning ordinance or resolution: * * *."

Pursuant to this statute, § 16 of the Ordinance authorizes the Commissioners to issue special use permits in certain specified situations:

> "A. By special Use Permit after receipt of a recommendation from the Bernalillo County Planning Commission, the Board of County Commissioners may authorize the location of uses in any zone in which they are not permitted by other sections of this ordinance; the Board of County Commissioners may likewise authorize the increase in height of buildings beyond the limits set by previous sections of this ordinance. With such permits, the Board of County Commissioners may impose such conditions and limitations as it deems necessary.
>
> * * * * * *
>
> "B. Such Special Use permits may authorize *only* the following uses: * * *
>
> "(13) Planned development area.
>
> * * * * * *
>
> "(18) Trailer court, provided it complies with the following requirements: * * *"

(Emphasis added.)

The question thus raised and to be decided here is whether "Special Use Permits," authorized by § 16 of the Ordinance is equivalent to and authorized by the "Special Exceptions" provision of § 14–20–6(C), supra. Appellant Burroughs contends that the two terms ("special use" and "special exceptions") are synonymous and that the conditions of § 14–20–6(C), supra, must be met by the party seeking a special use permit under § 16(A) of the Ordinance. On the other hand, the appellees contend that the two terms have different meanings. It is our opinion that the two phrases mean one and the same thing. As stated in 3 R. Anderson, American Law of Zoning, § 15.01 (1968):

> "The 'special exception,' the 'special permit,' and the use permitted subject to administrative approval are qualitatively the same. Each involves the use which is permitted rather than proscribed by the zoning regulations."

There were references in the briefs to "variances" but the New Mexico Zoning Regulations refer only to "special exceptions." These terms must be distinguished.

101 C.J.S. Zoning § 273, at 1038–39 (1958), states:

> "Thus, exceptions may be treated as a legislative process or the exercise of a legislative function, the conditions for which must be found in the zoning ordinance and may not be varied, while variances may be treated as an exercise of the judicial function, whereby literal enforcement of ordinances may be disregarded. So, also, a variance is authority extended to the owner to use his property in a manner forbidden by the zoning enactment, while an exception allows

him to put his property to a use which the enactment expressly permits. *Interests served.* Exceptions are allowable to serve the general good and welfare rather than individual interests merely, while a variance is a relaxation of an ordinance to alleviate conditions peculiar to particular property."

The Commissioners and the court below both approved the "special use permit" for the overnight campground on the basis that either the "planned development area" or "trailer court" categories of § 16 of the Ordinance would include by implication the use of the land in question as an overnight campground. By attempting to find an exception within the Ordinance itself, the Commissioners made it clear that they were dealing with this problem as a request for an exception rather than a variance. The consideration of this request for an exception was, therefore, a legislative process involving a determination of whether or not an overnight campground was a use permitted under the terms of the Ordinance, and for the general good and welfare of the community.

The problem before us now is to construe the terms "planned development area" and "trailer court." If we determine that either or both of these terms includes the use of an area as an overnight campground, then we must hold that the Commissioners had the authority under the Ordinance to issue a special use permit therefor. If we determine that an overnight campground is a use not covered by either of these specific categories, then we must hold that the Commissioners had no authority under the Ordinance to grant such a special use permit.

In construing municipal ordinances or county zoning ordinances, such as the one here before us, the same rules of construction are used as when construing statutes of the legislature. *Continental Oil Co. v. Santa Fe,* 25 N.M. 94, 177 P. 742, 3 A.L.R. 398 (1918). One of these rules of construction is to interpret the statute or ordinance to mean what the legislature intended it to mean, and to accomplish the ends sought to be accomplished by it. *State ex rel. Sanchez v. Reese,* 79 N. M. 624, 447 P.2d 504 (1968).

Another rule of construction is that the entire act or ordinance is to be read as a whole and each part construed in connection with every other part so as to produce a harmonious whole. *Trujillo v. Romero,* 82 N.M. 301, 481 P.2d 89 (1971). Still another is that the court will not read into a statute or ordinance language which is not there, particularly if it makes sense as written. *State ex rel. Barela v. New Mexico State Bd. of Ed.,* 80 N.M. 220, 453 P.2d 583 (1969). With these various rules of construction in mind, we approach the problem before us.

If the term "planned development area" were to be construed to include an overnight campground, then that category would include nearly any use. In a previous case this court was asked to consider whether a "planned development area" includes a truck terminal. See *Cinelli v. Whitfield Transportation, Inc.,* 83 N.M. 205, 490 P.2d 463 (1971). Unfortunately, the court did not answer that question because the case turned on another issue. However, that case, together with the one before us now, indicates that "planned development area" is a somewhat vague term which is invoked when a particular use does not fit neatly into any of the other special use categories. Reading the Ordinance as a whole, it seems apparent to us that the term "planned development area" was not intended as an all-inclusive catch-all category, and would not in the ordinary understanding of the words include an overnight campground. Such an interpretation would require reading language into the Ordinance which is not there.

Therefore, if the Commissioners had any authority under § 16B of the Ordinance to issue a special use permit for the construction and maintenance of an overnight campground, they must have done so on the reasoning that the category

of "trailer courts" includes such a use. We also have trouble with this approach.

The Ordinance, § 5, defines "trailer court" as "any lot on which two or more trailers are used for human habitation." That same section defined "trailer" as follows:

> "A vehicle without motive power, designed to be drawn by a motor vehicle and to be used for carrying of persons or property, or as a temporary or permanent human habitation, including trailer coach, trailer home, mobile home, cargo trailer, semi-trailer, and house trailer, whether the same be with or without wheels, and whether or not attached to or incorporated in a building, and that part of any self-propelled vehicle which is designed to be used as a temporary or permanent human habitation, whether or not the same be attached to or incorporated in a self-propelled vehicle, or removed therefrom, whether the same be with or without wheels, and whether or not attached to or incorporated in a building * * *."

Generally, the people living in trailer courts are residing and working in the community, whether they happen to live in a luxurious double-wide mobile home or a small trailer. They vote and pay taxes in the community, including property taxes on their mobile homes (in addition to vehicle registration fees). § 64–11–14 N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 2, 1973 Supp.). They are entitled to participate in the political affairs of the community, and their children attend schools there as well. See generally Annot., 42 A.L.R.3d 598 (1972); B. Hodes and G. Roberson, The Law of Mobile Homes, chs. 1 and 7 (2d ed. 1965); 54 Am.Jur.2d Mobile Homes, Trailer Parks, and Tourist Camps, §§ 1, 5, 13, 14 and 15 (1971).

On the other hand, the people staying in overnight campgrounds are generally transients, whose only contact with New Mexico is that they are stopping over for a night on vacation. Of course, some people may stay in overnight campgrounds for longer periods of time, and some may stay in trailer courts for only a few days, but this is the exception rather than the rule.

There is a clear distinction between a "trailer court" and an overnight campground, and nowhere in the Ordinance can we discern an intention to include overnight campgrounds in the category of "trailer court."

The property on which the proposed overnight campground is to be located is presently classified A–2 rural agricultural. According to the Ordinance, "the purposes of this zone are to preserve the scenic and recreational values in the National Forests and similar adjoining land, to safeguard the future water supply, to provide open and spacious development in areas remote from available public services and to recognize the desirability of carrying on compatible agricultural operations and spacious home developments in areas near the fringes of urban development."

In our opinion, a congested overnight campground with campers, recreational vehicles and travel trailers coming and going daily is totally incompatible with the express purposes of this zone. Of course, a comprehensive zoning ordinance can empower the zoning agency to authorize such uses through the issuance of a special use permit, but the category would have to be much more explicit in permitting such a use than the Ordinance here is.

The New Mexico Zoning Regulations specifically state that, "the regulations and restrictions of the county or municipal zoning authority are to be in accordance with a comprehensive plan. * * *" § 14–20–3, N.M.S.A.1953 (Repl.Vol. 3). The Ordinance is just such a comprehensive plan, and § 16 which establishes certain limited special exceptions, is an integral part of this plan. "[T]he main objectives of requiring that a special permit be obtained before a use of land is commenced are to protect adjoining property, and to insure the orderly and efficient development of the community." 3 R. Anderson, American Law of Zoning, § 15.12 (1968).

It is our opinion that the granting of a special use permit to Empire Realty by the Commissioners, authorizing the construction and maintenance of an overnight campground in an A–2 rural agricultural zone was an improper exercise of power, since such a use is not permitted under § 16 of the Ordinance. The Commissioners had no authority under the specific provisions of the Ordinance to issue this special use permit.

The cause must, therefore, be reversed.

It is so ordered.

STEPHENSON and MONTOYA, JJ., concur.

540 P.2d 238

Elizabeth McGEEHAN, Petitioner,

v.

Thomas B. BUNCH, Respondent.

No. 10223.

Supreme Court of New Mexico.

Sept. 23, 1975.

Horn, Schowers & Ginsburg, Albuquerque, for petitioner.

Keleher & McLeod, William K. Stratvert, Albuquerque, for respondent.

OPINION

MONTOYA, Justice.

On August 1, 1973, petitioner Elizabeth McGeehan (plaintiff) filed suit in the District Court of Bernalillo County alleging that she was injured on March 3, 1972, while a guest in the car of respondent Thomas B. Bunch (defendant). The complaint alleged that defendant failed to use due and ordinary care while operating his vehicle on State Road 90 in Grant County, New Mexico. Defendant moved to dismiss on the ground that the facts as stated in the complaint fell within the terms of New Mexico's "guest statute," § 64–24–1, N.M. S.A., 1953 (Repl.Vol. 9, Pt. 2, 1972). In a memorandum of law submitted in opposition to defendant's motion to dismiss, plaintiff attacked the constitutionality of the guest statute as violative of N.M.Const. art. II, § 18, and U.S.Const. amend. XIV, in that it arbitrarily and unreasonably discriminates between paying and nonpaying guests. The motion to dismiss was heard and granted by the district court on November 27, 1973.

On December 19, 1973, plaintiff filed a notice of appeal, and on October 23, 1974, the Court of Appeals issued its order affirming the trial court. Plaintiff then filed for a writ of certiorari. The writ was subsequently granted by this court on December 5, 1974.

This appeal is limited to the determination of one narrow issue, whether or not our guest statute by creating a distinction between paying and nonpaying automobile guests violates the equal protection clause of the federal and state constitutions.

Section 64–24–1, supra, as presently in force, reads as follows:

> "No person transported by the owner * * * of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner * * * for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner * * * or caused by his heedlessness or his reckless disregard of the rights of others."

This statute, although modified by case law, was enacted in 1935.

The United States Supreme Court considered the constitutionality of the Connecticut guest statute, after which the New Mexico statute was copied verbatim, in *Silver v. Silver,* 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929). Although the equal protection clause was involved, the matter then under consideration was different from what we are faced with here. The Court held the statute to be constitutional and stated (280 U.S. at 123, 50 S.Ct. at 59, 74 L.Ed. at 225):

> "It is said that the vice in the statute is not that it distinguishes between passengers who pay and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say *a priori* that the classification is one forbidden as without basis, and arbitrary. See *State of Ohio ex rel. Clarke v. Deckebach,* 274 U.S. 392, 397, 47 S.Ct. 630, 71 L.Ed. 1115."

The constitutionality of our guest statute has been considered four previous times. *Cortez v. Martinez,* 79 N.M. 506, 445 P.2d

383 (1968); *Gallegos v. Wallace,* 74 N.M. 760, 398 P.2d 982 (1964); *Mwijage v. Kipkemei,* 85 N.M. 360, 512 P.2d 688 (Ct.App. 1973); *Romero v. Tilton,* 78 N.M. 696, 437 P.2d 157 (Ct.App.1967).

In deciding the constitutionality of a statute in general, it must be recognized initially that:

> "We have repeatedly held that every presumption is to be indulged in favor of the validity and regularity of legislative enactments. (Citations omitted.) A statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation. (Citations omitted.)"

City of Raton v. Sproule, 78 N.M. 138, 142, 429 P.2d 336, 340 (1967). In keeping with the traditional self-restraint of this court regarding constitutional challenges, we refuse to inquire into "the wisdom, the policy or the justness of an act of the legislature * * *." *Gruschus v. Bureau of Revenue,* 74 N.M. 775, 777, 399 P.2d 105, 106 (1965). It is not within the realm of this court to question the social or economic policies underlying legislative acts. Only when this court is satisfied that the legislature has wandered outside the confines of the constitution by enacting unequal, oppressive and arbitrary legislation will such legislation be struck down.

■ In particular, when a statute is challenged on the basis of the equal protection clause, specific tests are applicable. Where legislation involves "suspect classifications" (race, etc.) or touches "fundamental interests" (right to vote), it is subject to strict scrutiny. See *Serrano v. Priest,* 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241 (1971). But where, as here, no such concerns are present, legislation is subject to a more liberal critique. As stated by this court in *Gruschus v. Bureau of Revenue,* supra (74 N.M. at 778, 399 P.2d at 107):

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

The current federal constitutional standard was enunciated by the United States Supreme Court in *Reed v. Reed,* 404 U.S. 71, 75–76, 92 S.Ct. 251, 253–54, 30 L.Ed.2d 225, 299 (1971):

> "* * * [T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (Citations omitted.) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' (Citations omitted.)"

See also *James v. Strange,* 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

It seems that from the above cases the Supreme Court of the United States is prepared to acknowledge the existence of substantial claims under the equal protection clause on minimum rationality grounds and has, to some extent, blurred the distinction between strict and minimal scrutiny that characterized the old equal protection formulation by the courts. See generally Gunther, The Supreme Court, 1971 Term: Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a

Newer Equal Protection, 86 Harv.L.Rev. 1 (1972–73).

In *McLaughlin v. Florida,* 379 U.S. 184, 191, 85 S.Ct. 283, 288, 13 L.Ed.2d 222, 228 (1964), the Court stated:

> "Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose— * * *."

In applying this test to our guest statute, it is first necessary to determine the statute's objective. The traditional justifications for the passage of such statutes found in court decisions and academic commentaries are that they (1) promote hospitality, by excluding one who gratuitously provides a ride from suit based on ordinary negligence, and (2) prevent collusion which could result from an admission of liability by an insured driver in order to allow recovery by a family member or friend. *Brown v. Merlo,* 8 Cal.3d 855, 106 Cal.Rptr. 388, 506 P.2d 212 (1973); *Thompson v. Hagan,* 96 Idaho 19, 523 P.2d 1365 (1974); *Henry v. Bauder,* 213 Kan. 751, 518 P.2d 362 (1974); 2 Harper & James, Law of Torts § 16.15 at 961 (1956).

The same objects and purposes of the guest statute were discussed and recognized in the reasoning by our Court of Appeals, which led to the decision holding it constitutional under the equal protection and due process clauses of the U.S. and N.M.Const., *Romero v. Tilton,* supra. There the issue of constitutionality was raised as to the distinction made in the statute providing (78 N.M. at 699, 437 P.2d at 160):

> "* * * protection from liability accorded by our guest statute to the 'owner' of the motor vehicle, while denying the same protection to a non-owner operator, or other non-owners responsible for the operation of the vehicle, * * *."

We do not believe that the protection of hospitality justifies the statute's classification. This "hospitality" rationale asserts that the classification scheme merely provides a higher standard of care for those who pay than for those who do not. This principle has been recognized by the courts in the case of common carriers. But this same reasoning cannot reasonably be applied to guests in passenger cars. There is no principle in our general legal scheme which dictates that one must pay for the right of protection from negligently inflicted injury. See *Brown v. Merlo,* supra; *Henry v. Bauder,* supra. The classification fails not because it draws some distinction between paying and nonpaying guests, but because it penalizes nonpaying guests by depriving them completely of protection from ordinary negligence. The loss of life or limb of a guest should not become less worthy of compensation merely because he has not paid for his ride. No matter how laudable the State's interest in promoting hospitality, it is irrational to reward generosity by allowing the host to abandon ordinary care and by denying to nonpaying guests the common law remedy for negligently inflicted injury. We are unable to discern how the denial of recovery to guests will serve the cause of hospitality.

Also, we can find no rationale for withdrawing protection from a nonpaying guest in the host's vehicle, while at the same time providing full protection to guests in other vehicles even though they paid no compensation. As the Supreme Court of New Jersey has stated:

> "We see no reason why the host should be less vigilant for his own guest than he must be for a guest in another car. The duty to exercise reasonable care is as appropriate in the one situation as in the other."

Cohen v. Kaminetsky, 36 N.J. 276, 283, 176 A.2d 483, 487 (1961).

The other line of reasoning supporting the hospitality rationale is that to sue one's host for negligence is the epitome

of ingratitude. If the doctrine of preventing the ungrateful act of a negligence lawsuit against a hospitable host ever had any rational basis, it has been worn away by changing circumstances. When our guest statute was passed in 1935, it was evidently considered inequitable to place the burden of negligently caused injury of nonpaying guests upon the individual host. Today, this burden would in most cases no longer fall upon the hospitable host, but on his insurance company and in turn on the general motoring public. Liability insurance is widespread throughout the State. The trend today is to require mandatory public liability insurance coverage for all owners of motor vehicles. The Financial Responsibility Act, § 64-24-42 et seq., N.M.S.A., 1953 (2d Repl.Vol. 9, Pt. 2, 1972), also establishes a policy for protection of the public involved in motor vehicle accidents. A classification that may once have had a fair and substantial relation to the objectives of the statute because of an existing factual setting, may lose its relationship due to altered circumstances.

In a Comment entitled "Review of the Past, Preview of the Future: The Viability of Automobile Guest Statutes," 42 U. Cin.L.Rev. 709, 719-20 (1973), the writer in discussing the impact of *Brown v. Merlo,* supra, states:

> "The *Brown* court recognized that 'a classification which once was rational because of a given set of circumstances may lose its rationality if the relevant factual premise is totally altered.' The 'protection of hospitality' rationale was held to provide an insufficient basis for the guest statute's classification. Citing the fact that nearly 85 percent of automobile drivers carry liability insurance, the court found that there is no such being as an ungrateful guest. '[T]here is simply no notion of "ingratitude" in suing your host's *insurer.*' The court refused to recognize the theory that the statute merely provides a lower standard of care for passengers who do not pay for their transportation. Rather, 'it penalizes guests by wholly depriving them of protection against negligent injury.'
>
> "The 'ungrateful guest' rationale has finally been judicially discredited because of the prevalence of automobile liability insurance. But was such a rationale ever viable? If ingratitude were such a horrendous evil to be guarded against, why did not all states find it necessary to pass guest statutes? Moreover, it has been suggested that 'it is none of the state's business what kind of virtuous emotions the citizenry feels or fails to feel.' Indeed, it is questionable whether the protection against ingratitude is a permissible state interest."

The rationale is convincing and we adopt it.

The second justification advanced for the guest statute is the prevention of collusive lawsuits against insurance companies. See *Brown v. Merlo,* supra; Prosser, Torts § 34 at 187 (4th Ed.1971). To effectuate this aim the statute draws a distinction between guests who pay and those who do not. The reasoning behind this classification is that supposedly a host who provides free transportation does so for a guest with whom he is well acquainted. Because of this presumed relationship, the driver may falsely admit liability in order for his guest to recover from the driver's insurance company. In order to eliminate this risk of possible fraud, all negligence causes of action for nonpaying guests have been eliminated.

In the same article appearing in 42 U. Cin.L.Rev., supra, at 720-21, the writer in a discussion of the "prevention of collusion" argument advanced in support of the guest statute, says:

> "The *Brown* court also found the 'prevention of collusion' rationale insufficient to support the guest statute. To eliminate an entire cause of action simply because some people may file fraudulent suits was unreasonable. In terms of promoting this interest, the statute was found to be both overinclusive and un-

derinclusive. It was overinclusive in that it eliminated lawsuits between relatives and close friends even though collusion is absent. It also eliminated causes of action where no reasonable likelihood of collusion exists, for example, between driver and hitchhiker. It was underinclusive in that it 'permits negligence suits by many who have no less reason to collude than those barred from suing' (*i. e.*, friends or relatives who gave compensation). Compensation, then, is not the distinguishing factor between collusive and noncollusive lawsuits.

"Unlike the 'protection of hospitality' rationale, the 'prevention of collusion' premise is unquestionably a legitimate state interest. However, the *Brown* court found that the guest statute is an impermissible means to achieve such an objective. One writer concluded that '[f]raud [and] perjury . . . are to be treated in the penal laws and are not proper considerations where the balancing factors are the economic and social welfare of victims and their families.'

"If automobile guest statutes are an impermissible means to avoid collusive lawsuits, why were such statutes ever granted legislative approval? Insurance companies warned that automobile insurance premiums would increase as verdicts were rendered in favor of injured passengers. The legislatures were convinced by these strong insurance lobbyists that the guest statute would provide a savings to the insurance buying public.

"This argument is based on a faulty premise. One study revealed that factors other than the presence or absence of guest statutes determine insurance rates. Jurisdictions with guest statutes do not display a perceptible trend toward lower insurance premium rates. For example, when the guest statute was enacted in Connecticut in 1927, no reduction in automobile insurance premiums occurred. Neither was there an increase in such premiums upon repeal of the statute ten years later."

We agree.

We believe that it is unreasonable and arbitrary, and thus unconstitutional, to do away with negligence actions for an entire class of persons solely because some undefined portion of the class may instigate fraudulent lawsuits.

The basis underlying the equal protection doctrine is that persons similarly situated shall receive like treatment. This constitutional provision does not require absolute precision or mathematical nicety in the designation of classifications; however, it does not tolerate classifications which are so grossly over inclusive as to defy notions of fairness and reasonableness. The classification scheme employed by our guest statute overreaches merely those "tainted by the mischief" to include many persons free from the evil which the statute seeks to eliminate. As stated by the court in *Brown v. Merlo*, supra (8 Cal.3d at 875, 106 Cal.Rptr. at 402, 506 P.2d at 226):

> "* * *. [T]his classification frequently encompasses close friends or relatives who, for example, share expenses through 'car pool' arrangements (Citations omitted.) or provide some marginal benefit to the driver (Citations omitted.), and yet who pose as great a risk of collusion as nonpaying guests. On the other hand, the 'nonpaying guest' classification ensnares many persons, such as hitchhikers, with whom the driver shares no close relationship and with respect to whom the danger of collusion is remote."

It is evident that the statute permits negligence actions by many who have no less reason to commit fraud than those barred from suing, while also eliminating negligence actions by many honest individuals with no reasonable likelihood of committing fraud.

From a more practical viewpoint, it can be seen that the guest statute does little to prevent collusion. The parties involved can very easily lie about whether any compensation was paid and thus avoid the bar interposed by the statute, just as they could

perjure themselves about the negligence issue if the statute was not in existence. The presence or absence of "compensation" is not a factor which promotes the objective of the statute, the prevention of fraud and collusion, in a reasonable and fair, or even rational manner.

It is recognized that the prevention of fraud and collusion is a valid state interest, and the courts should take notice of fraud and collusion when found to exist in a particular instance.

> "* * *. However, the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases. * * *"

Emery v. Emery, 45 Cal.2d 421, 431, 289 P.2d 218, 225 (1955).

This court, after reviewing our guest statute in accordance with the guidelines established by the equal protection clauses of both the federal and state constitutions as interpreted by the appropriate courts, and with proper regard for the presumptions in favor of constitutionality, is satisfied that such statute is unconstitutional. The classification imposed by our guest statute is unreasonable, arbitrary, and does not rest upon some ground of difference having a fair and substantial relation to either of the objects of the legislation. See *Thompson v. Hagan*, supra; *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974); *Henry v. Bauder*, supra; and *Brown v. Merlo*, supra.

We conclude that the classifications created by our guest statute, as between those who are denied and those who are permitted recovery for negligently inflicted injuries, do not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host driver and of preventing collusive lawsuits.

We hold that the New Mexico guest statute, § 64–24–1, supra, is unconstitutional and void as a denial of equal protection of the law under the Fourteenth Amendment to the U. S. Const. and § 18, art. II, N.M.Const., as amended.

Accordingly, we overrule *Romero v. Tilton*, 78 N.M. 696, 437 P.2d 157 (Ct.App. 1967); *Cortez v. Martinez*, 79 N.M. 506, 445 P.2d 383 (1968); and all other cases insofar as they are in conflict with our decision herein.

After due deliberation, it is the opinion of this court that the decision holding our guest statute unconstitutional shall be given modified prospectivity. That is, this newly announced rule shall apply to the case at bar, all similar pending actions and all cases which may arise in the future.

The cause is remanded to the district court with instructions to vacate its order granting defendant's motion to dismiss and to allow plaintiff to proceed with her action in negligence. It is so ordered.

McMANUS, C. J., and STEPHENSON and SOSA, JJ., concur.

OMAN, J., dissenting.

OMAN, Justice (dissenting).

The issue to be resolved on this appeal is whether our guest statute [§ 64–24–1, N. M.S.A.1953 (Repl.Vol. 9, pt. 2, 1972)] violates the equal protection provisions of article II, § 18 of the Constitution of New Mexico and the fourteenth amendment to the Constitution of the United States, in that liability of the owner of a motor vehicle for injury, death or loss sustained by a guest passenger in such vehicle, who has not paid for his transportation, arises only if the accident resulting in the injury, death or loss was intentional on the part of the owner or caused by his heedlessness or his reckless disregard of the rights of others, while liability for injury, death or loss sustained in an accident by a paying passenger in said vehicle depends upon a dif-

ferent and lesser degree of culpable conduct on the part of the owner, to wit, ordinary negligence. It is contended, and the majority of the court hold, that this legislative classification is arbitrary, unreasonable and violative of the equal protection provisions of our state and federal constitutions. I am unable to agree.

The majority correctly cite the four cases in which the constitutionality of our guest statute has been questioned. However, in my opinion, they erroneously overrule the decisions in two of those cases, *Cortez v. Martinez,* 79 N.M. 506, 445 P.2d 383 (1968) and *Romero v. Tilton,* 78 N.M. 696, 437 P.2d 157 (Ct.App.1967), cert. denied, 78 N.M. 704, 437 P.2d 165 (1968). The case law applicable to a judicial review of an attack upon the constitutionality of legislation is also cited in the majority opinion. However, in my opinion, the majority reach a result totally inconsistent with and contrary to a proper application of the principles stated in those cases. I urge a reading of those authorities and a careful comparison of the legislative classifications which have been upheld with the classification with which we are here concerned and which the majority now strike down.

In support of my position, I call particular attention to the following pronouncements concerned with equal protection attacks upon legislative classifications:

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

Gruschus v. Bureau of Revenue, 74 N.M. 775, 399 P.2d 105 (1965). (The above-quoted language is also quoted in the majority opinion)

> "We examine the language of the act and look to the purposes sought to be achieved thereby to determine whether the case presented can withstand the general attack here made upon constitutional grounds. *We are not concerned with the uncertainty of the effects or wisdom of the legislation.*" (Emphasis added).

Arnold v. Board of Barber Examiners, 45 N.M. 57, 109 P.2d 779 (1941)

> "One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911).

The majority argue that the classification here involved is irrational because no reason appears why the host owner should owe a nonpaying guest a lesser degree of care than nonpassengers. The reason is simply that a reduction in the duty of care owed by him to nonpassengers could not possibly promote the following objectives which are clearly promoted by the classification in our guest statute: (1) hospitality and generosity; (2) multi-passenger use of motor vehicles in order to promote such social and governmental interests as the reduction of energy consumption, air pollution and traffic congestion; (3) prevention, or at least a reduction in the chances, of possible fraud and collusion.

Surprisingly, the majority also argue that these purposes, and particularly that of the promotion of hospitality and generosity, are irrational because of the widespread availability and existence of liability insurance coverage for all owners of motor vehicles. It is true that liability insurance is readily available to most owners and drivers at a price, and it is also true that we have a Financial Responsibility Act in New Mexico, §§ 64-24-42 to 104, N.M.S.A.1953 (Repl.Vol. 9, pt. 2, 1972). However, its provisions apply only to motor vehicle owners or operators who have been previously found to be responsible for damages to another or others for injuries

sustained in a motor vehicle accident and who have not discharged their responsibility. *Larson v. Occidental Fire and Casualty Company,* 79 N.M. 562, 446 P.2d 210 (1968). Even those coming within the act are required only to furnish proof of responsibility in limited amounts. Section 64–24–65, supra. The required amounts are clearly inadequate to protect the insured from personal liability for damages occasioned in many motor vehicle accidents, and in most, if not in all, accidents in which serious personal injuries result. Even in those cases in which the insurance coverage is sufficient to protect the insured against personal liability for any judgment recovered, we must recognize the personal inconvenience, anguish and nonreimbursable expenses inevitably involved in a defense of a personal injury claim.

I agree with the majority that "no principle in our general legal scheme" requires one to pay for the right of protection from negligently inflicted injury. However, this is not the issue. The question is whether the Legislature may properly distinguish between a nonpaying guest and a paying passenger with relation to their host's liability. It is for the Legislature, and not for the judiciary, to determine the risk-spreading, public policy issues behind the partial shielding of generous hosts.

It is not for this court to decide that hospitality is outmoded or not to be encouraged. Much like our guest statute, which is being struck down by the majority, is our so-called "Good Samaritan" Act. Sections 12–25–3 and 4, N.M.S.A.1953 (Repl.Vol. 3, Supp.1973). That statute, like our guest statute, rewards hospitality, generosity and concern for others in need by reducing the exposure to liability of one who freely renders emergency care, and leaves undisturbed the greater duty of ordinary care upon one who performs the same acts of care for remuneration.

The majority rely heavily on the reasoning and analysis of the California court in *Brown v. Merlo,* 8 Cal.3d 855, 106 Cal. Rptr. 388, 506 P.2d 212 (1973). In my judgment, this reliance is clearly misplaced. The California guest statute differed substantially from our statute, in that it provided what the California court called statutory "loopholes." The California statute had the effect of narrowing those covered by the act to those "guests" injured (1) "during the ride" while (2) "upon the highway." The New Mexico statute contains no such limitations. It is clear from the reading of the opinion in *Brown v. Merlo,* supra, that these limitations and their haphazard application were significant factors in the determination that the statute arbitrarily discriminated against a class of guests. See Lascher, Hard Laws Make Bad Cases—Lots of Them, 9 Santa Clara Lawyer 1, 14 (1968).

In a series of decisions, the California court has pursued the course of progressively abolishing common law immunities and distinctions drawn with regard to duty owed based upon the status of the plaintiff relative to the defendant. *Malloy v. Fong,* 37 Cal.2d 356, 232 P.2d 241 (1951) (charitable immunity); *Emery v. Emery,* 45 Cal.2d 421, 289 P.2d 218 (1955) (intrafamily tort immunity); *Rowland v. Christian,* 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561 (1968) (land owner responsibility). The effect of these decisions was to leave the automobile guest virtually isolated under California law as one whose abilities to recover for personal injuries depended upon his status with respect to the defendant. This is not the case in New Mexico. In addition to our automobile guest statute, we have an airplane guest statute. Section 44–1–16, N.M.S.A.1953 (Repl.Vol. 7, 1966). We preserve most of the common law rejected by the California court. E. g., *Nahas v. Noble,* 77 N.M. 139, 420 P.2d 127 (1966) (intrafamily tort immunity); *Mozert v. Noeding,* 76 N.M. 396, 415 P.2d 364 (1966) (duties owed to invitees and licensees); *Latimer v. City of Clovis,* 83 N.M. 610, 495 P.2d 788 (Ct.App.1972) (duty owed to trespassers).

The automobile guest in this state is not singled out as an object of discrimination

as he appears to have been under California law and under the California guest statute. This isolation was a significant factor in the decision of the California court in *Brown v. Merlo,* supra. In addition, for the California court to cite *legislative* repeal of guest statutes in other states and judicial overruling of *court-created* doctrine as authority for the proposition that its statute violated equal protection principles is indicative of a penchant for substituting its policy judgment for that of the Legislature under the banner of equal protection.

For the foregoing reasons and the reasons cited in *Cortez v. Martinez,* supra, and *Romero v. Tilton,* supra, I hereby respectfully dissent.

[redacted]

540 P.2d 250

James STULL, Plaintiff-Appellee,

v.

CITY OF TUCUMCARI, a Municipal Corporation, Defendant-Appellant.

No. 1809.

Court of Appeals of New Mexico.
Aug. 13, 1975.
Certiorari Denied Sept. 11, 1975.

Robert M. Rowley, Tucumcari, for defendant-appellant.

Raymond Villani, Tucumcari, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The trial court held Tucumcari liable for the fraud of its city manager. The dispositive issues concern the basis for holding Tucumcari liable. We discuss: (1) Section 14-9-7, N.M.S.A.1953 (Repl.Vol. 3); (2) Sections 5-6-18 through 5-6-20, N.M.S.A.1953 (Repl.Vol. 2, pt. 1); and (3) liability of a municipality for torts of an employee.

The trial court's findings are not challenged. It found that Tucumcari's City Commissioners authorized the city manager to discuss with plaintiff the acquisition of certain property "and to report back to the said City Commission the results of said discussion * * *." Discussions were held. They culminated in an agreement for a trade, subject to the approval of the City Commission. Tucumcari would accept certain real estate from plaintiff and pay for it by releasing paving liens on certain other property of plaintiff.

Subsequently, the city manager informed plaintiff that the City Commission had ac-

cepted the trade. This statement was false, the city manager knew the statement was false at the time he made the statement. The city manager made the statement with the intent that plaintiff rely thereon and plaintiff did rely on the statement, to his damage. Thus, the unchallenged finding is that the city manager committed fraud. *Prudential Insurance Company of America v. Anaya,* 78 N.M. 101, 428 P.2d 640 (1967).

Section 14–9–7, supra.

Section 14–9–7, supra, provides:

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

Defendant asserts plaintiff's complaint should have been dismissed because plaintiff did not plead that the fraud was done by the authority of the municipality or in execution of its orders. *Valdez v. City of Las Vegas,* 68 N.M. 304, 361 P.2d 613 (1961). Plaintiff, in effect, contends that he had a claim for relief independent of this statute. We do not concern ourselves with the pleading. The trial court did not find that the city manager's fraud was done by the authority of Tucumcari or in execution of its orders. Having reviewed the record, there is no evidence to support such a finding even if it had been made. Plaintiff cannot hold Tucumcari liable for the fraud of its city manager under § 14–9–7, supra. *Montoya v. City of Albuquerque,* 82 N.M. 90, 476 P.2d 60 (1970).

Sections 5–6–18 through 5–6–20, supra

Plaintiff claims he is entitled to recover under these sections. He is not.

Section 5–6–18, supra, states the purpose of the act is to provide a means for recovery of damages "resulting from the employer's or employee's *negligence,* which occur during the course of employment * * *." (Our emphasis.) Plaintiff's complaint alleged both an intentional misrepresentation and a negligent misrepresentation. The trial court did not find negligence, it found the intentional tort of fraud. Section 5–6–18, supra, does not apply to the city manager's fraud. *Orrs v. Rodriguez,* 84 N.M. 355, 503 P.2d 335 (Ct. App.1972).

Section 5–6–20, supra, provides that no judgment shall run against a city "unless there be liability insurance to cover the amount and cost of such judgment." Although the trial court made no finding on the question of insurance, the uncontradicted evidence is that Tucumcari's liability insurance did not cover the city manager's fraud.

Under either of the above reasons, plaintiff cannot hold Tucumcari liable under §§ 5–6–18 through 5–6–20, supra.

Liability for Torts

Plaintiff asserts he has a right to recover which is independent of any statutory provision. That right, he contends, is that municipalities are liable for torts committed in the exercise of corporate or proprietary functions. *Barker v. City of Santa Fe,* 47 N.M. 85, 136 P.2d 480 (1943). Such a basis for relief existed at common law. The several statutes discussed in the decisions appear to be directed to liability for torts committed in the exercise of governmental functions because liability for torts committed in the exercise of corporate or proprietary functions existed apart from those statutes. See *Galvan v. City of Albuquerque,* 87 N.M. 235, 531 P.2d 1208 (1975); *City of Albuquerque v. Garcia,* 84 N.M. 776, 508 P.2d 585 (1973); *Montoya v. City of Albuquerque,* supra; *Baca v. City of Albuquerque,* 19 N.M. 472, 145 P. 110 (1914).

Tucumcari's position is that since the enactment of §§ 5–6–18 through 5–6–20, supra, plaintiff's right of recovery must be based on these statutory provisions. It relies on the following:

(a) The provision in § 5–6–20, supra, stating no judgment shall run against a

city unless there is liability insurance to cover the judgment.

(b) The statement in *City of Albuquerque v. Garcia,* supra, that:

"Even as to torts committed in pursuance of proprietary functions, immunity was not simply created by the statute, although by compliance with it a procedure which amounts to about the same thing is brought about."

(c) The statement in *Galvan v. City of Albuquerque*, supra, that:

"Neither statute permits any situation to arise in which the state or its political subdivisions could suffer any real liability since any judgment has to be limited to the policy limits."

Tucumcari's argument indirectly raises the question of whether §§ 5-6-18 through 5-6-20, supra, impliedly abolished the common law rule of municipality liability for proprietary torts.

Tucumcari's reliance on § 5-6-20, supra, and the above quotations are misplaced; there has been no implied abolition of the common law rule of liability. *City of Albuquerque v. Garcia,* supra, dealt with immunity from suit created by § 64-25-9, N. M.S.A.1953 (2d Repl.Vol. 9, pt. 2) and points out that "court-created immunity already existed except as to proprietary activities." *Galvan v. City of Albuquerque,* supra, dealt with § 64-25-9, supra, and § 5-6-20, supra. *Galvan* points out that these statutes "represent legislative attempts to circumvent and avoid the harsh, unconscionable and unjust results stemming from court-created immunity * * *." Neither § 5-6-20, supra, *Garcia* nor *Galvan* deal with liability for proprietary torts. They are not inconsistent with liability for proprietary torts because of the legislative intent to expand rather than contract municipal liability. Compare *Galvan v. City of Albuquerque,* supra.

Common law liability for proprietary torts has not been abolished and continues to exist. The tort must be a proprietary tort; the trial court ruled the tort was proprietary in this case. Defendant asserts the tort in this case was governmental. There are no express findings as to the type of tort. It is unnecessary to review the findings to determine whether there is support in the findings for the "proprietary" conclusion of the trial court. Such a review is unnecessary because plaintiff's theory of liability is deficient on another ground.

18 McQuillin, Municipal Corporations, § 53.69 (3rd ed. rev.) states:

"To render a municipal corporation liable for the tortious act of an officer or servant, the act must have been performed within the scope of employment. Although generally liable for a tortious act of a servant performed within the scope of his duties, in the absence of written law expressly declaring liability, the general rule is that a municipal corporation is not liable to civil action for the completely personal torts of its officers, employees or agents, and that if the wrongful or negligent act was outside the scope of officer's or servant's duties, and was not ratified by the municipality, it is not liable. * * *

* * * * * *

". . . And if the officer or agent was acting within the scope of his authority, it is immaterial that the contract which he made for the thing in connection with which the alleged negligence existed, was not binding on the municipality * * *."

"Course of employment" like "scope of authority" is not capable of precise definition. It is largely a question of fact. However, one is not in the course of employment unless the conduct in controversy is of the same general nature as that authorized or incidental to the conduct authorized. See *Lang v. Cruz*, 74 N.M. 473, 394 P.2d 988 (1964).

In considering whether the city manager's fraud was within the course of his employment: (1) We make no distinction between negligent or intentional torts. *Mc-*

Cauley v. Ray, 80 N.M. 171, 453 P.2d 192 (1968); *Taylor v. City of Roswell*, 48 N. M. 209, 147 P.2d 814 (1944). (2) *Montoya v. City of Albuquerque*, supra, holds that "authority" as used in § 14–9–7, supra, has a limited meaning. We do not consider that the "authorized conduct" of an employee has the same limited meaning. (3) However, we do consider that factual examples of unauthorized conduct are pertinent in determining whether the city manager's fraud was in the course of his employment even though the examples are taken from cases involving § 14–9–7, supra.

In *Cherry v. Williams,* 60 N.M. 93, 287 P.2d 987 (1955) some of the wrongful arrests by Officer Stroud had been ordered by Williams, the mayor. In holding that the suit was properly brought against the individual defendants, and not the city, the opinion states:

> "* * * when an officer exceeds his official duties and makes an arrest without authority of the municipality, or in execution of orders thereof, he ceases to act in behalf of the city and he assumes the entire responsibility himself."

In *Salazar v. Town of Bernalillo*, 62 N. M. 199, 307 P.2d 186 (1956) the plaintiff was wrongfully assaulted by a marshal, upon orders of the mayor. In holding that the suit against the town should have been dismissed, the opinion states:

> "When he [the mayor] directed the commission of this assault he exceeded his authority and ceased to act in behalf of the town."

The trial court found that the City Commissioners authorized the city manager to discuss the trade with plaintiff and "report back to said City Commission". The trial court found that he did report back. Thereafter the fraud occurred and the City Commission formally denied any intent to consummate the trade. The trial court found that the city manager *stated* that he had full authority to advise the plaintiff whether the City Commissioners had approved the trade. This finding as to the city manager's claimed authority is to be contrasted with plaintiff's requested finding and conclusion which were refused by the trial court. The trial court refused to find that the false statements were made by the city manager "in his capacity as City Manager". The trial court refused to conclude that the city manager had actual or apparent authority "to represent to people that the City Commissioners had either approved or disapproved business transactions."

The trial court made a specific finding as to the city manager's limited authority in connection with the trade—discuss and report back. The trial court made a specific finding that the city manager claimed full authority but refused to conclude that the city manager had either actual or apparent authority. In addition, the trial court refused to find that the city manager's falsehoods were made in the capacity of city manager. In this state of the record, the trial court's decision fails to support the judgment of liability against Tucumcari because there is no finding of authorized conduct or conduct incidental to authorized conduct. Absent such authority, the city manager's fraud was not on behalf of Tucumcari and was not in the course of employment.

Plaintiff cannot hold Tucumcari liable for the city manager's fraud on the theory of a proprietary tort absent a showing that the tort was committed in the course of the city manager's employment. That showing is missing.

Oral argument is unnecessary. The judgment is reversed.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

540 P.2d 254

Clair MILLER and James Thomas Inc., a New Mexico Corporation, Appellees,

and

Albuquerque Home Builders Association, Appellee,

v.

CITY OF ALBUQUERQUE, a Municipal Corporation, the City Commission of the City of Albuquerque, and the Environmental Planning Commission of the City of Albuquerque, Appellants.

No. 1721.

Court of Appeals of New Mexico.

Aug. 6, 1975.

Certiorari Denied Sept. 3, 1975.

Briggs F. Cheney, Toulouse, Krehbiel & Cheney, P. A., Albuquerque, for appellants.

Gene C. Walton, Rodey, Dickason, Sloan, Akin & Robb, P. A., Terrance L. Dolan, Albuquerque, for appellees.

OPINION

WOOD, Chief Judge.

Judge M. Sanchez held Thompson (Attorney James M. Thompson, Assistant City Attorney) in contempt of court. Subsequently Judge M. Sanchez ordered Thompson and the City (City of Albuquerque) to pay certain attorney fees to plaintiffs. The appeal involves the propriety of these two orders. There are five issues: (1) the subject matter jurisdiction of this Court; (2) the appealability of certain orders; (3) the authority of Judge M. Sanchez to enter the orders; (4) the factual basis for the contempt order; and (5) an asserted abuse of discretion in entering both orders.

Subject Matter Jurisdiction

Thompson was held in civil contempt for failing to produce witnesses for depositions pursuant to court order. Thompson and the City were ordered to pay attorney fees for refusing to permit discovery. Thompson and the City appeal.

Plaintiffs moved that we transfer Thompson's appeal to the Supreme Court. Section 16-7-8, N.M.S.A.1953 (Repl.Vol. 4) gives this Court subject matter jurisdiction on appeal in any civil action which includes a count in which one or more parties seek damages on an issue based on tort. Among other claims, plaintiffs sought damages on the basis of asserted "illegal and negligent" actions on the part of defendants. This Court had subject matter jurisdiction of Thompson's appeal. The motion to transfer was properly denied. See *Measday v. Sweazea,* 78 N.M. 781, 438 P.2d 525, 26 A.L.R.3d 1386 (Ct. App.1968); compare *State v. Watson,* 82 N.M. 769, 487 P.2d 197 (Ct.App.1971).

Appealability of Certain Orders

Defendants moved to dismiss plaintiffs' complaint. This motion was argued before Judge Payne. At the conclusion of the motion hearing, Judge Payne directed that counsel submit briefs on three specified legal issues. Judge Payne orally ordered "that any depositions will be held in abeyance pending a determination of these issues." Subsequently, by letter, Judge Payne advised counsel that the motion to dismiss would be denied. The letter directed the preparation of "appropriate orders". Before a formal order was entered, Judge Payne left the state to attend a judicial conference. In Judge Payne's absence, Judge M. Sanchez signed an order denying the motion to dismiss. This order is consistent with Judge Payne's letter.

On the same day that the order denying the motion to dismiss was signed, Judge M. Sanchez orally directed that previously noticed depositions should proceed to be taken. The formal order in connection with the depositions was signed by Judge R. Sanchez in the absence of Judge M. Sanchez. The record is to the effect that the order signed by Judge R. Sanchez was in accord with Judge M. Sanchez' oral ruling.

Thompson and the City did not comply with the order to proceed with the depositions. After various hearings before district judges, Judge M. Sanchez entered an order directing that specified depositions be taken or in the alternative, Thompson

was to show cause why he should not be held in contempt. The result was an order holding Thompson in contempt of court. After proceedings in the Supreme Court were dismissed, an order was entered requiring Thompson and the City to pay certain attorney fees.

On appeal Thompson and the City argue the validity of three orders. This issue is concerned with the appealability of those orders.

The order holding Thompson in civil contempt is appealable under § 21–12–3(a)(4), N.M.S.A.1953 (Int.Supp.1974).

The order in connection with attorney fees holds Thompson and the City "jointly and severally" liable. Thompson is not a party in the main action. The proceeding against Thompson is independent of the main action. Insofar as this order pertains to Thompson, it is a final judgment appealable under § 21–12–3(a)(1), supra. However, the City is a party to the main action. No final judgment has been entered against the City in the main action. Nor have all issues been decided against the City in the main action. See § 21–1–1(54)(b), N.M.S.A.1953 (Repl. Vol. 4, Supp.1973). Insofar as this order pertains to the City, it cannot be considered an appealable order unless the order against the City is also viewed as having been entered in a proceeding independent of the main action. Because the order is joint and several, the order against the City should be viewed the same as the order against Thompson. We hold it appealable on the same basis as the order against Thompson is appealable.

The third order is the one entered by Judge M. Sanchez denying the motion to dismiss. This order does not contain the requisite finding on which to base an application for an interlocutory appeal under § 21–10–3, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973). Thompson and the City have consistently taken the position that a decision whether to make the requisite finding should only have been made by Judge Payne and could not have properly been made by Judge M. Sanchez. This is not an issue in the appeal because the order denying the motion to dismiss is not an appealable order.

The order denying the motion to dismiss is a part of the main action. No final judgment has been entered and no interlocutory order has been entered which practically disposes of the merits. Section 21–12–3, supra.

Accordingly, the issues in this appeal are limited to the contempt order and the order concerning attorney fees.

Authority of Judge M. Sanchez to Enter the Orders

The validity of the two orders involved in this appeal depends upon the authority of Judge M. Sanchez to order that discovery proceed. The claim is that Judge M. Sanchez lacked authority to do so. The contention is that the judge first acquiring jurisdiction retains it to the exclusion of all others of coordinate position; that interference between judges of different divisions of the same court should not be tolerated.

Judge Payne and Judge M. Sanchez are judges of the same court. See *State v. Peters*, 69 N.M. 302, 366 P.2d 148 (1961), cert. denied, 369 U.S. 831 (1962). The judges hold coordinate positions. Section 16–3–5(B), N.M.S.A.1953 (Repl.Vol. 4) provides: "All judges of a judicial district have equal judicial authority, rank and precedence * * *."

We do not agree that Judge M. Sanchez interfered with Judge Payne's ruling concerning discovery. Judge Payne orally stayed the taking of depositions pending a determination of the motion to dismiss. Judge Payne's letter stated the motion to dismiss would be denied. It was subsequent to this letter that Judge M. Sanchez ordered discovery to proceed.

Even though no interference is shown by the record, Thompson and the City claim Judge M. Sanchez had no authority to enter any order in the case because Judge

Payne first acquired jurisdiction in the case. This claim is too broad. Our concern is with Judge M. Sanchez' authority to enter orders concerning discovery. Even with the issue limited to the authority of Judge M. Sanchez to enter orders directed to discovery, the claim is that Judge M. Sanchez lacked authority. The cases on which Thompson and the City rely are not in point because they are concerned with the authority of a second judge to enter an order after an evidentiary hearing was held by the first judge. See *Clanton v. Ryan,* 14 Colo. 419, 24 P. 258 (1890); *McAllen v. Souza,* 24 Cal.App.2d 247, 74 P.2d 853 (1937); *Slaven v. Slaven,* 22 Ohio Op. 230, 35 Ohio L.Abs. 268 (C.P. 1941). No evidentiary hearing had been held in this case.

Judge Payne's oral order staying discovery until the motion to dismiss had been decided was an interlocutory order. Thus we are not concerned with the authority of a judge of concurrent jurisdiction to modify final orders of another judge. "The only restraint upon a second judge in passing upon an interlocutory issue decided by another judge in the same case is one of comity only, which in no way infringes upon the power of the second judge to act." *Bowles v. Wilke,* 175 F.2d 35 (7th Cir. 1949), cert. denied, 338 U.S. 861, 70 S.Ct. 104, 94 L.Ed. 528 (1949). See also, *Brande v. S. & S. Machinery Co.,* 252 F.2d 297 (2d Cir. 1958); *Graci v. United States,* 301 F.Supp. 947 (E.D.La.1969), aff'd 456 F.2d 20 (5th Cir. 1971); *Shawmut, Inc. v. American Viscose Corp.,* 11 F.R.D. 562 (S.D.N.Y.1951); *Lane v. Clein,* 137 So.2d 15 (Fla.App.1962); *People v. Doherty,* 192 N.Y.S.2d 140 (S.Ct.1959); compare In re *Zuber's Estate,* 24 Misc.2d 579, 202 N.Y.S.2d 931 (S.Ct.1960); *Topping v. North Carolina State Board of Education,* 249 N.C. 291, 106 S.E.2d 502 (1959).

Judge Payne's prior oral interlocutory order concerning depositions did not divest Judge M. Sanchez of authority to enter a subsequent interlocutory order concerning depositions in the same case. Judge M. Sanchez had authority as a judge of the district court to enter the orders concerning depositions and thus had authority to enter orders imposing sanctions when his discovery orders were violated.

Factual Basis for the Contempt Order

Thompson was held in contempt "for having failed to produce witnesses pursuant to proper notice and Court Order." The order gives Thompson the opportunity to purge himself of the contempt by producing the witnesses. Thompson was directed to pay $50.00 daily to the court clerk for each day he was in noncompliance with the requirement that witnesses be produced for the taking of their depositions.

Thompson cites cases to the effect that one charged with contempt for failure to comply with a court order makes a complete defense by showing that he is unable to comply. See *McPhaul v. United States,* 364 U.S. 372, 81 S.Ct. 138, 5 L.Ed.2d 136 (1960); *United States v. Bryan,* 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884 (1950). Thompson claims he was unable to comply with the orders of Judge M. Sanchez to produce witnesses.

We do not concern ourselves with the various aspects of the legal rule relied on by Thompson. We do not do so because of the absence of a factual predicate for application of the rule.

Thompson's position is that he had no control over the deponents and that the City's administrative officer had directed the deponents not to appear. This is factually incorrect. The record shows the administrative officer directed the deponents to comply with the directions of Thompson "'with regard to attendance or nonattendance.'"

Asserted Abuse of Discretion in Entering the Orders

Thompson and the City contend generally that the contempt order was an abuse of discretion. The record is clear that Thompson violated the orders of Judge M. Sanchez to produce the witnesses

when depositions had been scheduled. There is nothing showing an abuse of discretion. Compare *Beverly v. Conquistadores, Inc.* (Utah Ct.App.), 537 P.2d 1015, 1975.

Specific claims of an abuse of discretion are directed to the order concerning attorney fees. This order found a willful refusal to permit discovery "without substantial justification despite proper notice, subpoena and Court orders with regard to discovery." The order required reimbursement of plaintiffs "for attorney fees incurred to date with regard to all proceedings at the District Court level with regard to orders compelling discovery and the enforcement thereof * * *." The order also required payment of attorney fees incurred in taking the deposition of Garcia and attorney fees to be incurred in the future in taking three additional depositions.

The specific claims made, and our answers follow:

1. The attorney fee order is an abuse of discretion because it is punitive in nature. Thompson and the City point out that Thompson's contempt was civil, that the primary purpose of the contempt order was to provide a remedy for plaintiffs by coercing compliance with the orders of Judge M. Sanchez in regard to discovery. See *State v. Greenwood,* 63 N.M. 156, 315 P.2d 223 (1957). Thompson and the City recognize that civil contempt may also be employed to compensate the plaintiffs for losses sustained. See *State v. Our Chapel of Memories of New Mexico, Inc.,* 74 N. M. 201, 392 P.2d 347 (1964).

Thompson and the City argue that the order concerning attorney fees went beyond compensation to plaintiffs. They assert the order went beyond the actual losses sustained by plaintiffs as a result of Thompson's noncompliance with court orders concerning discovery and thus became punitive rather than remedial.

The basis for this contention is that the order concerning attorney fees "represents nothing more than a modification of the * * * contempt order." This is factually incorrect. At the hearing in connection with this order, plaintiffs sought attorney fees on the basis of § 21–1–1(37), N.M.S. A.1953 (Repl.Vol. 4). At that hearing Judge M. Sanchez pointed out that the contempt order had been appealed and it was beyond the jurisdiction of the district court to modify the contempt order.

The record shows the order concerning attorney fees was separate and distinct from the contempt order. Accordingly, there is no basis for holding the attorney fee order was an improper modification of the contempt order.

2. The attorney fee order is an abuse of discretion because proceedings pursuant to § 21–1–1(37), supra, were improperly initiated. The contention is that the hearing resulting in the attorney fee order was initiated by Judge M. Sanchez' order to show cause. It is asserted that under § 21–1–1(37)(a), supra, proceedings may be initiated only by an application of counsel and the judge had no authority to initiate proceedings.

It is not at all clear that this issue was raised in the trial court. We assume that it was. We do not answer this contention solely on the basis of paragraph (a) of § 21–1–1(37), supra. Instead our answer applies to all paragraphs of the rule.

Trial courts have inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. See *Beverly v. Conquistadores, Inc.,* supra. "Trial courts have supervisory control over their dockets." *Birdo v. Rodriguez,* 84 N.M. 207, 501 P.2d 195 (1972). This inherent supervisory control was Judge M. Sanchez' authority to initiate proceedings under § 21–1–1(37), supra.

3. The attorney fee award is an abuse of discretion because the award made is unauthorized. This issue involves paragraphs (a), (b) and (d) of § 21–1–1(37), supra.

Paragraph (a) authorizes attorney fees where a deponent refuses to answer

and a court order is obtained compelling an answer. The fees authorized are for those incurred in compelling answers. A part of the attorney fees awarded by Judge M. Sanchez was for an appearance before Judge Fowlie to compel answers to questions propounded during the taking of Garcia's deposition. Thompson and the City do not claim that fees could not be awarded; the claim is that only Judge Fowlie could award the fees. Judge Fowlie was not asked to rule on the question of attorney fees. The matter was presented to and ruled on by Judge M. Sanchez. We have previously held in this opinion that Judge M. Sanchez had authority to enter orders in connection with discovery. That authority extends to awarding attorney fees because of a refusal to answer questions.

Apart from the refusal to answer questions during the Garcia deposition, the refusal to make discovery in this case involves paragraphs (b) and (d). The refusal in this case was a willful refusal to permit discovery to proceed. This refusal was also a violation of direct orders of the court. The refusal was by Thompson, who the record shows was authorized by the City to decide whether the deponents would or would not appear for depositions. In these circumstances, paragraph (d) was applicable.

Although paragraph (d) was violated, that paragraph does not specifically authorize the award of attorney fees. Paragraph (d) does authorize the award of more drastic sanctions. Paragraph (b) authorizes sanctions for violation of specified court orders, but the orders violated in this case are not orders of the type listed in paragraph (b)(2).

The question then is whether the court can impose lesser sanctions for a violation of paragraph (d) than are specifically authorized in that paragraph. The use of the more drastic sanctions of dismissal and default judgment have been approved. See *Doanbuy Lease and Co. v. Melcher,* 83 N. M. 82, 488 P.2d 339 (1971); *Rio Grande Gas Company v. Gilbert,* 83 N.M. 274, 491 P.2d 162 (1971). In this case the sanction of default judgment was available to the court. See paragraph (d). Our opinion is that the trial court is not limited to either imposing the drastic sanction of default judgment or imposing no sanctions at all. We hold that Judge M. Sanchez had authority to impose the lesser sanction of attorney fees for the violation of § 21–1–1(37)(d), supra. See the contention in *Beverly v. Conquistadores, Inc.,* supra, that lesser sanctions are favored.

4. The attorney fee award has three parts. One part was the attorney fees for compelling answers before Judge Fowlie. The second part was for attorney fees actually incurred by plaintiffs because of the failure of Thompson and the City to proceed with discovery in accordance with court orders. It is not an abuse of discretion to require reimbursement of attorney fees incurred because of the failure of Thompson and the City to proceed with court ordered discovery.

The primary attack on the award of attorney fees is directed against the third part of the award. This third part awards attorney fees for the time spent in taking the depositions of four witnesses. These depositions had been directed in Judge M. Sanchez' orders. The depositions were delayed because of noncompliance with the orders. Judge M. Sanchez ruled that under the circumstances of this case it was "appropriate and just" to award attorney fees for the taking of these four depositions. Thompson and the City contend this was an abuse of discretion by Judge M. Sanchez. They assert the "legal fees for these depositions was an expense which would have been incurred by the plaintiffs' counsel irregardless [sic]. This is not compensatory, it is a windfall designed obviously with its punitive nature in mind."

Requiring payment of attorney fees to be incurred in the taking of depositions is a less drastic sanction than those specifically authorized in § 21–1–1(37)(d), supra. This payment was imposed because

of the circumstances of this case. The circumstances include a noncompliance with court orders. That noncompliance continued after the Supreme Court dismissed its alternative writ of superintending control. The circumstances show a sustained and deliberate disobedience of the court orders concerning discovery. Under these circumstances we cannot say that the award of attorney fees for the depositions was unfair, arbitrary, manifest error, or not justified by reason. Accordingly, it was not an abuse of discretion. See *State v. Kincheloe,* 87 N.M. 34, 528 P.2d 893 (Ct.App.1974); *State v. Hargrove,* 81 N.M. 145, 464 P.2d 564 (Ct.App.1970).

5. Even though Judge M. Sanchez had authority to award attorney fees for violation of § 21-1-1(37)(d), supra, and the fees awarded were not an abuse of discretion, Thompson and the City assert there was an abuse of discretion because of Judge M. Sanchez' purpose in making the award. They assert the award was punitive in that the award "has provided to plaintiffs' counsel an open-ended means to finance their lawsuit", that the true intent of the judge was punishment rather than compensation to plaintiffs. This argument renews the first specific attack on the award (see 1. above) but omits the argument that the award was a modification of the contempt order.

We agree the award was punitive. Why was the punishment imposed? Because there was a violation of § 21-1-1(37)(d), supra. The fact that punishment is imposed for the violation does not show an abuse of discretion because § 21-1-1(37)(d), supra, authorizes punishment for its violation. The wording of paragraph (d) answers the contention that "compensation" is the only available sanction for its violation.

The order holding Thompson in contempt and the order awarding attorney fees against Thompson and the City are affirmed.

It is so ordered.

HERNANDEZ, J., concurs.

SUTIN, Judge (dissenting).

I dissent.

A. *Trial court lost jurisdiction to enter second order.*

On July 2, 1974, the trial court entered a contempt order against Assistant City Attorney James Thompson for failure to produce witnesses pursuant to proper notice and court order. It provided that Thompson could purge himself of this contempt by producing, immediately, witnesses already noticed for depositions. The order decreed that Thompson shall pay from his personal funds into the court registry before the close of business each day that the office is open the sum of $50.00 per day as long as Thompson continues with noncompliance. The court said this was a civil contempt order.

On July 30, 1974, Thompson filed a notice of appeal from this order of contempt.

On August 1, 1974, the trial court issued an order to show cause on August 9, 1974 why Thompson and/or the City should not be required to pay attorney fees and costs for failure and refusal to proceed in accordance with the court's prior orders.

On August 9, 1974, a hearing was held.

The court recognized that Thompson had appealed the contempt order.

On August 12, 1974, the court entered its order that Thompson and the City were jointly and severally liable to plaintiffs for attorney fees incurred to date and to be incurred in taking depositions of three witnesses.

Section 21-12-3(a)(4), N.M.S.A.1953 (1974 Int.Supp.) provides:

> In civil actions, any party aggrieved may appeal to the appropriate appellate court within thirty days after entry of
>
> * * * * * *
>
> (4) Judgment in any proceeding for civil contempt.

The order of July 2, 1974 was final and appealable. Upon the filing of the notice

of appeal from the order, the trial court lost jurisdiction of the case, except for purposes of perfecting the appeal to this Court. *State v. Maples,* 82 N.M. 36, 474 P.2d 718 (Ct.App.1970); *State v. Clemons,* 83 N.M. 674, 496 P.2d 167 (Ct.App.1972); *Deats v. State,* 84 N.M. 405, 503 P.2d 1183 (Ct.App.1972) (Sutin, J., specially concurring).

The order of August 12, 1974 was void. *National American Life Insurance Co. v. Baxter,* 73 N.M. 94, 385 P.2d 956 (1963).

B. *Thompson was convicted of criminal contempt, not civil contempt.*

The trial court stated that the contempt order of July 2, 1974 was civil contempt. The contempt order decreed that Thompson shall pay from his personal funds into the court registry the sum of $50.00 per day during noncompliance with the court's order. This is criminal contempt.

Thompson was not a party to the action. He was found guilty of an act in resistance of the order of the court. His case therefore comes more fully within the punitive rather than the remedial class. The fine was payable to the court registry, not to the opposing parties. This is criminal contempt because its primary purpose is punishment. Civil contempt occurs where the purpose of the proceeding is primarily compensatory or by way of reimbursement to the opposite party for expenses growing out of the alleged contempt. *Costilla Land & Investment Co. v. Allen,* 15 N.M. 528, 110 P. 847 (1910); *State v. Greenwood,* 63 N.M. 156, 315 P.2d 223 (1957).

International Min. & C. Corp. v. Local 177, U. S. & A. P. W., 74 N.M. 195, 392 P.2d 343 (1964) says:

> The general rule is that an accused in a criminal contempt proceeding is presumed innocent until found guilty beyond a reasonable doubt by evidence introduced and a defendant in a criminal contempt proceeding cannot be compelled to testify against himself. Since a wilful disobedience of a court's order is punishable by traditional criminal proceedings and is sometimes referred to as quasi-criminal, the essential rights of the accused must be preserved and safeguarded. [Citations omitted]. [74 N.M. at 199, 392 P.2d at 346].

C. *The order of criminal contempt is an appealable order.*

Criminal contempt is a crime in the ordinary sense. Thompson had the right to appeal from that order. *State v. Watson,* 82 N.M. 769, 487 P.2d 197 (Ct.App.1971).

D. *Thompson was not guilty of criminal contempt.*

The record shows that the "hearing" held on July 2, 1974 was not an evidentiary hearing. Thompson was not found guilty beyond a reasonable doubt.

540 P.2d 813

STATE of New Mexico, Petitioner,

v.

Ricky L. TANTON, Respondent.

No. 10489.

Supreme Court of New Mexico.
Sept. 30, 1975.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Ralph W. Muxlow II, Asst. Attys. Gen., David R. Sierra, New Mexico Dist. Attys. Coordinator, Santa Fe, for petitioner.

Leo C. Kelly, Albuquerque, for respondent.

OPINION

STEPHENSON, Justice.

Charged by indictment with homicide by vehicle, Tanton moved for dismissal claiming double jeopardy after conviction of municipal traffic charges. The trial court denied the motion. Upon an interlocutory appeal, the Court of Appeals reversed and remanded for further proceedings. *State v. Tanton,* 88 N.M. 5, 536 P.2d 269 (Ct. App.1975). We granted certiorari and reverse the Court of Appeals.

Betsy Denise Guzman, a small child, was struck and killed by an automobile in Grants, New Mexico on February 25, 1974. Tanton was arrested on the same day and was charged with violations of municipal traffic ordinances. The following day, February 26, a criminal complaint charging Tanton with homicide by vehicle was filed in magistrate court, but no further action was taken upon it.

On March 7, 1974, Tanton was charged by indictment with homicide by vehicle [1] while violating § 64–22–2 N.M.S.A.1953 [2] or § 64–22–3 N.M.S.A.1953.[3] On March 27, 1974, Tanton was found guilty of violation of some of the municipal ordinances with which he had been charged.[4] An appeal was taken and is still pending.

Thereafter Tanton moved in district court to dismiss the indictment for homicide by vehicle, alleging the prosecution violated constitutional prohibitions against double jeopardy. The district court denied the motion. The Court of Appeals granted an interlocutory appeal [5] and held that the double jeopardy prohibition applied to the district court prosecution. We then granted certiorari.

The New Mexico Constitution provides in article II, § 15 that no person shall "be twice put in jeopardy for the same offense * * *." The fifth amendment to the United States Constitution also prohibits double jeopardy and is enforceable against the States through the fourteenth amendment. *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The question in this case is whether the State would violate these guarantees by prosecuting the defendant for homicide by vehicle after a conviction in municipal court of driving while intoxicated. Resolution of the stated issue requires a determination of the constitutional meaning of the words "same offense."

We assume for purposes of this opinion that the municipal court convictions are valid. We also assume the correctness of the trial court's findings that the municipal traffic and the vehicular homicide charges were based on the same occurrence.

Before examining the definition of "same offense" in the double jeopardy clauses, one must first consider the constitutional doctrines of collateral estoppel and necessarily included offenses. The principle of collateral estoppel "bars relitigation between the same parties of issues actually

1. Section 64–22–1 N.M.S.A.1953 provides: "A. Homicide by vehicle is the killing of a human being in the unlawful operation of a motor vehicle. B. Any person who commits homicide by vehicle while violating Section 64–22–2 or 64–22–3 NMSA 1953 is guilty of a felony."

2. This section prohibits control of a vehicle under the influence of liquor, narcotics or other drugs or by habitual users of narcotic drugs.

3. This section in pertinent part defines reckless driving.

4. Driving while under the influence of intoxicating liquors, failing to report an accident and leaving the scene of an accident with injuries or death.

5. Section 21–10–2.1(A)(3) N.M.S.A. (Supp. 1973).

determined at a previous trial * * *." *Ashe v. Swenson,* 397 U.S. 436, 442, 90 S. Ct. 1189, 1193, 25 L.Ed.2d 469 (1970); *State v. Tijerina,* 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S.Ct. 3085, 41 L.Ed.2d 674 (1974); *State v. Nagel,* 87 N.M. 434, 535 P.2d 641 (Ct.App. 1975), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

In a criminal trial context collateral estoppel is a constitutional defense raised by the defendant in a second trial after an acquittal in the first trial on the same issue. In this case the principle is not applicable. The defendant was convicted in municipal court. He has no acquittal to raise in his defense here. Application of the principle of collateral estoppel is therefore inappropriate.

A second consideration in the double jeopardy area is the concept of lesser included offenses. A conviction or acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense. *Ex parte Williams,* 58 N.M. 37, 265 P.2d 359 (1954); *State v. Medina,* 87 N.M. 394, 534 P.2d 486 (Ct.App.1975). We agree with the trial court and the Court of Appeals that this principle is not applicable in this case because the indictment charges in the alternative. The lesser offense of driving while under the influence of intoxicating liquor is not necessarily included in the greater offense of homicide by vehicle. *State v. Trujillo,* 85 N.M. 208, 510 P.2d 1079 (Ct.App.1973).

If the principles of collateral estoppel and necessarily included offenses do not apply, then the definition of "same offense" in the double jeopardy clause must be examined. The generally accepted rule and the one which we approve and apply today is the "same evidence" test which was first stated in New Mexico as "whether the facts offered in support of one [offense], would sustain a conviction of the other." *Owens v. Abram,* 58 N.M. 682, 274 P.2d 630 (1954), cert. denied, 348 U.S. 917, 75 S.Ct. 300, 99 L.Ed. 719 (1955). This rule was followed in *Woods v. State,* 84 N.M. 248, 501 P.2d 692 (Ct.App.1972). But cf. *State v. Goodson,* 54 N.M. 184, 217 P.2d 262 (1950); *State v. Mares,* 79 N.M. 327, 442 P.2d 817 (Ct.App.1968).

The same evidence test has not been abandoned contrary to what was stated in *State v. Maestas,* 87 N.M. 6, 528 P.2d 650 (Ct.App.1974), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974). It should have been used in that case. There the defendant was charged with possession of heroin after a conviction of possession of marijuana. The Court of Appeals held that collateral estoppel prevented the second prosecution. But collateral estoppel is only constitutionally required when there has been a previous acquittal on issues raised in the second prosecution. There had been no acquittal of the marijuana charge which the defendant could raise to prevent a subsequent prosecution. Also the marijuana charge was not necessarily included in the heroin offense. The proper test in *Maestas* was the same evidence rule. *State v. Maestas* is overruled.

In this case the facts offered in municipal court to support a conviction for driving while under the influence of intoxicating liquors would not necessarily sustain a conviction for homicide by vehicle in district court. Therefore, under the same evidence test there was no double jeopardy when the State sought to prosecute the defendant for homicide by vehicle.

We come then finally to the "same transaction" test upon which Tanton principally relies. It is concerned with whether the offenses were committed at the same time, were part of a continuous criminal act and inspired by the same criminal intent. It was eloquently espoused by Justice Brennan in his concurring opinion in *Ashe v. Swenson, supra.* No decision of the United States Supreme Court has construed the fifth amendment to the United States Constitution to impose the same transaction test on the States in double

jeopardy cases. We hold its use is not mandated by article II, § 15 of the New Mexico Constitution. We reject and disapprove the same transaction test. In theory, it has little or nothing to recommend it over the same evidence test, and in practice it is so vague and obscure as to be far more difficult to apply. See Judge Wood's opinion in this case and his dissent in *State v. Maestas, supra.*

In New Mexico, the same transaction test has been stated and supposedly applied in several cases. However, with one exception, the prior convictions raised as a bar to a subsequent prosecution were lesser and necessarily included, which bars double prosecution anyway. *State v. Quintana,* 69 N.M. 51, 364 P.2d 120 (1961) (grand larceny and armed robbery); *State v. Blackwell,* 76 N.M. 445, 415 P.2d 563 (1966) (assault with intent to commit rape and rape); *State v. Everitt,* 80 N.M. 41, 450 P.2d 927 (Ct.App.1969) (possession of burglary tools not necessarily included in burglary). That one exception is *State v. Anaya,* 83 N.M. 672, 495 P.2d 1388 (Ct. App.1972), where the offenses were theft from an automobile and municipal court charges of battery, resisting arrest, and criminal damages. Using the same transaction test the Court of Appeals held that these crimes did not arise out of the same criminal act. We overrule *State v. Anaya* insofar as it applied that test. See *State v. Maestas* (dissenting opinion), *supra.* The same evidence test would have reached the same result and should have been used.

We hold that the prosecution of Tanton in district court for homicide by vehicle is not barred by the double jeopardy prohibition under the same evidence test.

It is somewhat difficult to determine with precision the rule intended to be applied by the Court of Appeals in this case. It appears that the court may have been relying upon statements made by us in *State v. Tijerina, supra,* in which we deprecated "piecemeal prosecutions." We said:

> It should not be inferred from this opinion that this Court intends to encourage or approve piecemeal prosecution. Such disorderly criminal procedures involve a myriad of problems which threaten the existence of our judicial system. The risk of prejudice to the accused, and the waste of time inherent in multiple trials, both perpetuate delays in the judicial process and unconscionable expenditures of public funds, all of which could be avoided by prosecutors getting their facts straight, their theories clearly in mind and trying all charges together.

86 N.M. at 36, 519 P.2d at 132.

The double jeopardy clause only comes to the aid of defendants subjected to multiple prosecutions for the identical offense,[6] or in such situations in which collateral estoppel, the concept of lesser included offenses or the same evidence test apply. By "piecemeal prosecutions" in *Tijerina* we referred to multiple prosecutions to which the double jeopardy clause did not apply. Thus, we intended a statement of judicial policy rather than a rule of law. We adhere to the stated policy.

The situation presented here could easily have been avoided by a modicum of cooperation between the respective prosecutors. Moreover, proceedings pending in an inferior court ought to be abated when charges are instituted in district court in relation to the same episode. A defendant in such a situation would have a right to move the inferior court for an abatement to abide the event in district court. Should a defendant in such a case, for whatever reason, fail to so move, he might well have thereby waived any right to complain of piecemeal prosecution. Such procedures would promote judicial economy. The overriding state interest is the efficient prosecution of all crimes and especially felonies.

6. See *State v. Sedillo,* 88 N.M. 240, 539 P.2d 630 (Ct.App.1975).

In *State v. Goodson, supra,* the defendant pled guilty to charges of assault and battery in justice of the peace court and then sought to bar a prosecution for rape arising out of the same criminal acts. The court allowed the second prosecution. Although we disagree with the double jeopardy test employed in *Goodson,* which appears to be one of identical offenses in law and fact, we support its evaluation of the practical consequences of the double jeopardy claim raised there.

> Reason and logic do not support a rule whereby one guilty of the crime of rape may escape a possible sentence of 99 years in the penitentiary by the expedient of pleading guilty to a charge of assault and battery in a justice court where the penalty may be as low as a fine of $5.00.

54 N.M. at 188, 217 P.2d at 265.

It is gratifying that such an eminently sensible result may still be achieved in the present state of the law.

The Court of Appeals is reversed. The district court is affirmed. The case is remanded to the district court with instructions to proceed with the felony prosecution of homicide by vehicle.

It is so ordered.

McMANUS, C. J., and OMAN and MONTOYA, J., concur.

SOSA, Justice (specially concurring).

I concur generally with the result of the majority opinion. However, as the issue was presented but not resolved by the majority, I would like to clarify my position with respect to the effect of a conviction of a lesser offense necessarily included in a greater offense. The Court of Appeals in *State v. Medina,* 87 N.M. 394, 534 P.2d 486 (1975), held that conviction barred the greater offense, citing *Ex Parte Williams,* 58 N.M. 37, 265 P.2d 359 (1954) and *State v. Goodson,* 54 N.M. 184, 217 P.2d 262 (1950). *Williams supra* was not on point and Goodson supra gave varied reasons for its holding. I would hold that conviction bars prosecution of a greater offense, subject to one exception: If the court does not have jurisdiction to try the crime, double jeopardy cannot attach. Double jeopardy requires that a court have sufficient jurisdiction to try the charge. Goodson at 187, 217 P.2d 262, quoting *State v. Rose,* 89 Ohio St. 383, 106 N.E. 50, 51 (1914); *Crowley v. State,* 94 Ohio St. 88, 113 N.E. 658 (1916).

In the instant case defendant was convicted of driving while intoxicated (DWI) in magistrate court. In district court he was charged in the alternative with vehicular homicide while recklessly driving and vehicular homicide while DWI. A narrow interpretation of the majorities' opinion would preclude the prosecution of defendant for vehicular homicide while DWI since DWI is a necessarily included offense of vehicular homicide while DWI, but it would not preclude the prosecution of the other charge vehicular homicide while driving recklessly. However, since the magistrate court had no jurisdiction to try the charge of vehicular homicide while DWI or recklessly driving (N.M.Const. art. VI, § 13 and § 26; § 36-3-4 N.M.S.A. 1953 (Supp.1973)), double jeopardy should not bar the vehicular homicide by DWI charge. This policy would decrease most problems arising from lack of communication among city attorneys, assistant district attorneys, and the district attorney and will preclude defendants from trying to take advantage of the divided nature of the judicial and prosecutorial branches.

540 P.2d 818

In the Matter of George VALDEZ and Albert Garcia, alleged mentally ill Individuals.

STATE of New Mexico, Plaintiff-Appellee,

v.

George VALDEZ and Albert Garcia, Defendants-Appellants.

No. 10037.

Supreme Court of New Mexico.

Sept. 5, 1975.

Coors, Singer & Broullire, Robert H. Borkenhagen, Albuquerque, for appellants.

David L. Norvell, Atty. Gen., Louis Druxman, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

MONTOYA, Justice.

This is an appeal from a judgment of the Bernalillo County District Court which resulted in the involuntary civil commitment of defendants, Albert Garcia and George Valdez, pursuant to § 34–2–5, N. M.S.A., (Supp.1973).

In June 1959, a jury found George Valdez unable "to understand the nature and object of the proceedings against him or to comprehend his own condition in reference to such proceedings and to make a rational defense, and that the defendant is an insane person or lunatic; * * *." He was ordered to the New Mexico State Penitentiary. On November 27, 1961, Mr. Valdez was ordered transferred to the New Mexico State Hospital.

On August 16, 1961, Albert Garcia was found to be mentally ill and was hospitalized for an indefinite period at the New Mexico State Hospital. Both defendants have remained in the State Hospital since the time of their original commitments, except for a few brief absences.

Motions were filed on behalf of both defendants on August 10, 1973, in the Bernalillo County District Court seeking their discharge from the State Hospital. On December 19, 1973, a consolidated commitment hearing was held in the district court for both defendants. Subsequently, the trial court found that the only issue before it was to determine whether the defendants should continue to be committed to the State Hospital; that the court was without venue to consider employment conditions within the hospital; that to the extent facilities, equipment and personnel are available, defendants received treatment in accordance with the legislative intent required by the statute for the hospitalization of the mentally ill; and that defendants are mentally ill and should continue to remain in the State Hospital.

Further, the trial court concluded that the State offered sufficient evidence that defendants were mentally ill and were in need of care, custody or treatment in a mental health facility and, because of their illness, they lacked sufficient insight or capacity to make responsible decisions with respect to their custody, care or treatment. In addition, the court concluded that both defendants had the constitutional right to be treated in a manner best calculated to return them to society as soon as possible, and that it was the duty of the State to provide them with treatment in accordance with the highest standards accepted in medical practice.

On appeal, defendants raise three major points: That the trial court erred in (1) not granting defendants a hearing to determine whether they would receive treatment consistent with their constitutional rights; (2) committing defendants without proof beyond a reasonable doubt; and (3) refus-

ing to consider the question of employment compensation for patients at the State Hospital.

This court disagrees with defendants' first contention on two grounds. First of all, defendants' pleadings contained no allegation as to the constitutional inadequacy of the treatment they received, but during trial counsel continually attempted to present evidence on this matter over the objections of the State. Such a situation is governed by Rule 15(b), Rules of Civil Procedure for the District Courts of the State of New Mexico,[1] which states in pertinent part:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, * * *. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended * * *."

As can be clearly seen from the record, the State did not give its assent, express or implied, to trial of this issue, neither party made a motion for amendment of the pleadings, nor did the court allow any such amendment sua sponte. Thus, this issue was not properly before the trial court. In the case of *McLean v. Paddock,* 78 N.M. 234, 240–41, 430 P.2d 392, 398–99 (1967), involving fraud and misrepresentation, this court made the following statement which is clearly applicable to the present controversy:

> *"This is not a situation where evidence on the issue was received without objection and the question thus treated as if it had been raised by the pleadings or by trial amendment thereto,* (Citations omitted). *The record before us is replete with objections* to the admission of any evidence concerning fraud, misrepresentations or any parol variance of the written instruments. *No trial amendment was offered either for the purpose of making such evidence and any issue presented thereby admissible or to make the pleadings conform to the proof.* Indeed, Paddocks do not assert that a trial amendment was either offered or permitted. The author, 3 Moore's Federal Practice, p. 996, in discussing Rule 15(b), identical with our rule 15(b) (§ 21–1–1(15)(b), N.M.S.A., 1953) permitting trial amendments, said *'where evidence has been admitted over objection and the pleadings have not been amended, no amendment can be implied.'* (Citation omitted.)" (Emphasis added.)

Secondly, as to this initial point, it is the position of this court that before the constitutional adequacy of treatment at the State Hospital is determined, the State Department of Hospitals and Institutions should be present as a party to the action. Such a result is dictated by Rule 19, Rules of Civil Procedure for the District Courts of the State of New Mexico:

> "(a) Persons to be joined if feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. * * *"

1. Rules of Civil Procedure for the District Courts of the State of New Mexico are contained in §§ 21–1–1(1) through 21–1–1(94), N.M.S.A., 1953 (Repl.Vol. 4, 1970).

In the present case, the Department of Hospitals and Institutions should have been joined under Rule 19, Rules of Civil Procedure, supra, since it obviously has a great deal of interest in a proceeding which could very possibly result in an order greatly affecting its policies and operations. Any disposition of this matter in the department's absence could greatly impair or impede its ability to protect its interest. Because the department was not joined, the trial court was lacking in jurisdiction and was thus correct in not rendering a judgment concerning the constitutional adequacy of treatment provided by the State Hospital.

Next, we will briefly consider defendants' contention that the trial court erred when it refused to consider the question of employment compensation for patients working at the State Hospital. It appears that this question has become moot. Pursuant to the decision in *Souder v. Brennan,* 367 F.Supp. 808 (D.D.C.1973), the Department of Hospitals and Institutions has been ordered by the Secretary of Labor to apply minimum wage and overtime compensation provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1970), to patients employed at all New Mexico institutions providing residential care for the mentally ill. We were advised at oral argument that regulations have been made and implemented concerning patient compensation pursuant to that directive. Accordingly, there is no actual controversy and only a moot question exists; therefore, this court need not determine it. *Reeder v. Bowman,* 64 N.M. 7, 322 P.2d 339 (1958); *State v. Vogel,* 39 N.M. 122, 41 P.2d 1107 (1935).

Lastly, we shall consider the allegation that the trial court erred in committing defendant George Valdez upon evidence which failed to show beyond a reasonable doubt that he was dangerous to himself or others. This is an important legal question which is a matter of first impression in New Mexico. The pertinent statutes do not prescribe the standard of proof. Traditionally, the question of standard of proof has been left for judicial resolution; therefore, this court has no hesitation in finally deciding the matter. See *Woodby v. Immigration Service,* 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966).

Defendant contends that because civil commitment results in a substantial impairment of his rights, the due process requirements of the U.S.Const. amends. V and XIV, would be violated unless the State was required to prove mental illness beyond a reasonable doubt. From the outset it should be recognized that due process is a rather malleable principle which must be molded to the particular situation, considering both the rights of the parties and governmental interests involved. See *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

The civil commitment process, though technically a civil proceeding, has elements of both criminal and civil proceedings, a hybrid procedure, with some of the rights guaranteed to criminal defendants applicable to defendants in commitment hearings. See *Gomes v. Gaughan,* 471 F.2d 794 (1st Cir. 1973). Thus, compliance with the due process requirements, as far as the burden of proof in commitment proceedings for the mentally ill is concerned, is mandated.

The pertinent state statute is § 34–2–5, supra, especially subsection "g" which allows the court several commitment options:

> "If, upon completion of the hearing and consideration of the record, the court finds that the proposed patient:
>
> (1) is mentally ill; and
>
> (2) (a) because of his illness is likely to injure himself or others if allowed to remain at liberty; or
>
> (b) is in need of custody, care or treatment in a mental hospital or mental health facility, or is in need of any

alternative course of mental health care; and

(3) because of his illness, lacks sufficient insight or capacity to make responsible decisions with respect to his custody, care or treatment, * * *."

Nowhere is there mention of exactly what standard of proof must be met by the State in order to justify commitment. Since there has also been no previous New Mexico case law on this particular point, the courts have been without guidance. Undoubtedly, patients have been committed on the basis of a mere preponderance of the evidence, the typical standard for civil actions. This court is of the opinion that this standard is definitely constitutionally unacceptable for civil commitment hearings, in view of the fact that fundamental liberties of the patient are so often at stake.

Decisions in federal court and other state courts have been divided, though probably the majority have adopted the stricter reasonable doubt standard. See *In Re Ballay,* 157 U.S.App.D.C. 59, 482 F.2d 648 (1973); *Lessard v. Schmidt,* 349 F. Supp. 1078 (E.D.Wis.1972); *In Re Pickles' Petition,* 170 So.2d 603 (Fla.App.1965). For several reasons this court declines to accept this viewpoint, and instead adopts the standard of "clear and convincing" evidence as the better rule.

In the civil commitment situation the interests of the State are pitted against restrictions on the liberty of the individual. The specific question which needs to be answered is whether there exists sufficient State interests to counterbalance the loss of individual liberty and justify the application of this particular burden of proof. Based on the language of § 34–2–5, supra, it appears that the aim of the State is to first protect society from the mentally ill, a manifestation of the State's police power, see *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), and also protect the mentally ill from themselves, while at the same time providing care and treatment, as parens patriae.

Mental illness is, of course, not a crime. Thus, patients must be afforded some type of effective treatment since their liberty is abridged; mere custodial care is not sufficient. As the record in this case indicates, the standard of treatment is presently not the highest possible according to contemporary psychiatric standards. But due to financial inadequacies, lack of facilities and personnel and other problems, the standard of treatment is as high as is currently feasible. Besides residential care, the basic treatment for the average patient at the State Hospital consists of medication, a "milieu ward type of environment," work therapy and activities related to and centered around certain members of the hospital staff. Although individuals who are civilly committed lose a good portion of their personal liberty, they are provided with needed treatment and care, while at the same time society is being benefited. Ideally, the individual is rehabilitated, society is being protected from antisocial conduct, the burden and cost of care and treatment is borne by the State, and the individual is eventually returned as a productive member of society. We believe the State's interests are sufficient and the realities of treatment, though not ideal, are adequate to justify subjecting individuals to possible commitment based on this new standard of proof.

Another important factor must also be kept in mind. Psychology and psychiatry are hardly exact sciences. Because our state statute identifies those who are subject to commitment, accurate terminology is of utmost importance. Yet, psychiatrists and psychologists alike are unable to reach a consensus as to what exactly is "mental illness." Where there is sometimes disagreement as to the meaning of a diagnosis of "mental illness," even among the disciplines concerned with human behavior, it would seem that the highest standard of proof would be desirable, but at the same time the question arises whether the reasonable doubt standard is workable within this particular framework. In the

opinion of this court, proof beyond a reasonable doubt is too stringent a standard. As stated by the court in the case of *State ex rel. Hawks v. Lazaro,* 202 S.E.2d 109, 126–27 (W.Va.1974):

> "* * *. At this level of medical knowledge there may be many urgent cases in which it is impossible to exclude every reasonable doubt, and it appears that the likelihood of harm to individuals and society because of a standard of proof which makes commitment almost impossible greatly outweighs the likelihood of harm to the individual attributable to a less restrictive standard. Proof that is clear, cogent, and convincing is the highest standard of proof possible at the current state of the medical arts."

The standard of "clear and convincing" evidence is "no stranger to the civil law." *Woodby v. Immigration Service,* supra. Its application will have no deleterious effect on commitment procedure itself and will assist in avoiding the inherent vagueness and uncertainty in the area of psychological and psychiatric fact-finding, while at the same time providing adequate protection for patients' constitutional liberties. For these reasons, we hold that the standard of "clear and convincing" proof shall be applied in this and all future civil commitment proceedings. We have defined that standard in the case of *In Re Sedillo,* 84 N.M. 10, 12, 498 P.2d 1353, 1355 (1972), where we said:

> "This court has held that clear and convincing evidence is something stronger than a mere 'preponderance' and yet something less than 'beyond a reasonable doubt.' (Citation omitted.) For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true. (Citations omitted.)"

A review of the record reveals that defendant George Valdez was committed in accordance with § 34–2–5, supra. Both finding of fact No. 9 and conclusion of law No. 5 state that George Valdez is:

> "* * * a mentally ill individual and is in need of care, custody or treatment in a mental hospital or mental health facility, and because of his illness lacks sufficient insight or capacity to make responsible decisions with respect to his custody, care or treatment."

The trial court made no mention of the burden of proof which must be met by the State, but states only that "* * * the State has offered sufficient evidence * * *." However, the record indicates that there was sufficient evidence to support this newly enunciated standard of clear and convincing proof, and thus this court cannot overturn the finding of the trial court. It is a long-standing rule in New Mexico that findings of fact which are supported by substantial evidence will not be disturbed on appeal. *Shirley v. Venaglia,* 86 N.M. 721, 527 P.2d 316 (1974). If the evidence shows that the decision of the trial court is based on reasonable, substantial and probative evidence, so that it can be said that a reasonable person might have reached the same conclusion, we hold that the decision of the trial court should be affirmed.

In view of the foregoing, we need not consider defendants' final contention.

The judgment of the trial court is affirmed in all respects.

It is so ordered.

McMANUS, C. J., and OMAN, J., concur.

540 P.2d 824

STATE of New Mexico,, Plaintiff-Appellee,

v.

Samuel David LEDBETTER, Defendant-Appellant.

No. 2018.

Court of Appeals of New Mexico.

Aug. 20, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Gerald Chakerian, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Andrea Buzzard, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant was indicted for possession with intent to distribute marijuana con-

trary to § 54–11–22, N.M.S.A.1953 (Repl. Vol. 8, pt. 2, 1962, Supp.1973). His motion to suppress was denied and included in the order denying the motion was a finding pursuant to § 21–10–2.1, N.M.S.A.1953 (Repl.Vol. 4, 1970, Supp.1973), that an interlocutory appeal was appropriate. We granted defendant's application for interlocutory appeal based upon what defendant considers the controlling question of law:

> "In the absence of an arrest, a warrant, a consent, an inventory or probable cause for any crime except the original careless driving, which was not pursued, did the police violate the prohibition against unreasonable search and seizure when they ordered the occupants out of the car and searched for more beer, thus making the subsequently discovered marijuana subject to suppression as fruit of the poisonous tree?"

Of course, to ask the question is to answer it. We accordingly reverse.

The facts which gave rise to the search, which revealed the evidence sought to be suppressed, are somewhat fuzzy. Officers Nix and Mauldin of the Alamogordo Police Department testified at the hearing on the motion to suppress. The substance of their testimony was that they were on routine patrol and saw a parked car abruptly leave the curb without looking to see if there was any oncoming traffic. They followed the car and stopped it, intending to cite the driver for careless driving. The car contained the defendant-driver Ledbetter and two co-defendants—Smith, in the front passenger seat and Haddock in the rear seat. Nix testified that Ledbetter immediately exited the car. Mauldin said that all three remained in the car until told to exit. The discrepancy is unimportant. Ledbetter was asked to produce his license and Smith handed it to Mauldin who was standing at the passenger's door.

At this point, both officers noticed that the vehicle contained open containers of beer. Nix said that one can was on the floorboard in front of the driver and one was in the back. Mauldin said that one can was on the front passenger side and one was in the back. There was also testimony that Smith was holding one of the cans. Again, the discrepancy is unimportant. We can find no violation of any law to possess an open container of beer in a vehicle. The officers both testified, however, that they became concerned that one of the defendants may have been a minor in which case there existed the possibility of a violation of law. It is unclear what law the officers thought the defendants were violating. The state introduced into evidence at the hearing the Municipal Ordinances of Alamogordo with particular reference to § 12–6–13.11 thereof, prohibiting a minor from operating a motor vehicle while possessing alcoholic beverages. This ordinance parallels § 64–22–17, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2, 1972). From the officers' later testimony that it was mainly the defendant, Ledbetter, about whose age they were concerned, we surmise that it was conduct prohibited by the above enumerated sections in which the officers were interested. We note that it is also a violation of law for any minor to possess alcoholic beverages. Section 46–10–12(B), N.M.S.A.1953 (Repl.Vol. 7, 1966, Supp.1973). The fact is that none of the three defendants were minors at the time in question.

After seeing the first can of beer, the officers asked if there was any more beer in the car, to which the reply was in the negative. They then saw the second can. In the meantime, there was some discussion relating to Ledbetter's license. Apparently he has a permit restricted to driving to and from work. Both officers testified that there was also a discussion as to defendants ages. It was Nix' testimony that he ascertained Ledbetter's age upon viewing the license, Haddock upon questioning prior to his exit of the vehicle and Smith not until booking. Mauldin testified that before the defendants exited the car, he was satisfied that both Smith and Haddock were over the age of majority. It was only Ledbetter with whom he was con-

cerned. Yet Ledbetter's license showed he was over the age of majority.

At any rate, the defendants were ordered out of the car so that the officers might retrieve the beer and look for more beer. While Mauldin was getting into the back seat of the car he noticed debris which he recognized as marijuana on the floor of the car. He pointed this out to Nix. The officers then patted down the defendants and made a thorough search of the car which resulted in the seizure of a quantity of marijuana. Presumably the defendants were then placed under arrest for the violation concerning the marijuana. No citation was made with regard to the original alleged violation.

The trial court denied defendant's motion to suppress and held ". . . a valid search and seizure as not being unreasonable under the plainview doctrine as probable cause to search incidental to a lawful arrest." The state attempts to justify the search on three theories—plain view, probable cause plus exigent circumstances and search incident to arrest. See *State v. Gorsuch,* 87 N.M. 135, 529 P.2d 1256 (Ct. App.1974). None of these theories finds support in the record.

The marijuana was not in plain view until the officers ordered the defendants out of the car and proceeded to enter the car themselves. In order for the plain view rule to be applicable, the officers must lawfully be in the position that enabled them to see what is allegedly in plain view. *State v. Miller,* 80 N.M. 227, 453 P. 2d 590 (Ct.App.1969). The state contends that the officers were lawfully entitled to order the defendants out of the car pursuant to their investigation of a possible violation of § 46–10–12(B), *supra,* [prohibiting the possession of alcoholic beverages by minors], or § 40A–22–5, N.M.S.A.1953 (2d Repl.Vol. 6, 1972), [prohibiting the concealment of any evidence with the intent to prevent the prosecution of any person]. In addition, the state contends that the ordering of the defendants out of the car was the initial stage of a search incident to Ledbetter's detention for careless driving. There is no question but that this intrusion was a search. As there was no search warrant, the search must find its justification in one of the exceptions to the warrant requirement. *State v. Gorsuch, supra.* In *Gorsuch,* we recognized three exceptions to the warrant requirement—plain view, probable cause plus exigent circumstances and search incident to arrest. Three others come to mind—consent [see *State v. Bidegain,* 88 N.M. 384, 540 P.2d 864 (Ct.App.), No. 1637, decided May 28, 1975], inventory [see *State v. Vigil,* 86 N.M. 388, 524 P.2d 1004 (Ct.App.1974)]; however, compare *State v. Nemrod,* 85 N.M. 118, 509 P.2d 885 (Ct.App.1973); and hot pursuit [see *Warden v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967)].

In this case, the officers testified that their entry into the car was not by consent nor to inventory. Clearly the facts of the case make the doctrine of hot pursuit inapplicable. As has already been indicated, there was no marijuana in plain view at the time the officers ordered the defendants out of the car to look for more beer. There was unequivocal testimony that there was no arrest for any charge at the time of the search for the beer. As defendant was not taken into custody for the driving violation, the doctrine in *United States v. Robinson,* 414 U.S. 218, 94 S. Ct. 467, 38 L.Ed.2d 427 (1973), would not be applicable. The search cannot be justified by the search incident to arrest theory. The scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement. *Cupp v. Murphy,* 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973).

The search and seizure must therefore find its justification, if any, in the fact that the officers had probable cause to believe that a crime was being or had been committed plus the existence of exigent circumstances. We will assume that exigent circumstances were present due to the

fact of the car, although such is not always the case. See *State v. Coleman,* 87 N.M. 153, 530 P.2d 947 (Ct.App.1974). It is only that we do not believe that the officers had any probable cause to search and therefore need not concern ourselves with exigent circumstances.

There were two violations for which the officers could have had probable cause for believing that they were committed. These are the traffic offense and the crimes that related to possession of alcoholic beverages by minors. The fact that defendant abruptly left the curb would not give the officers any cause to believe that any seizable evidence was in the car. The case thus boils down to the question of whether or not the officers had probable cause to believe that an offense relating to possession of alcoholic beverages by minors was being committed.

" 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' . . . Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. . . ." *Brinegar v. United States,* 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). The alleged offense herein under investigation related to the possession of alcoholic beverages by minors. The officers saw the alcoholic beverages. The question is whether they had reasonable grounds to believe that any of the defendants were minors.

Officer Mauldin testified that he believed that Smith and Haddock were over the age of majority. He said that he thought Ledbetter was under twenty-one. Nix testified that before the defendants were asked to leave the vehicle, he was satisfied that both Ledbetter and Haddock were over the age of twenty-one. He said that he did not find out Smith's age until booking.

Neither Mauldin nor Nix ever explained why either of them believed any of the three occupants were under twenty-one. *State v. Lewis,* 80 N.M. 274, 454 P.2d 360 (Ct.App.1969) states:

> ". . . To justify such an invasion of a citizen's personal security, the police officer must be able to specify facts which, together with rational inferences therefrom, reasonably warrant the intrusion. . . ."

No facts have been specified in this case warranting the intrusion. Defendant's motion to suppress should have been granted as being conducted without a warrant and not pursuant to any exception to the warrant requirement. *State v. Gorsuch, supra.*

The order of the trial court denying the motion to suppress is reversed and the case is remanded.

It is so ordered.

WOOD, C. J., and HERNANDEZ, J., concur.

540 P.2d 827

In the Matter of John DOE VIII, John Doe IX and John Doe X, children, Defendants-Appellants,

v.

STATE of New Mexico, Plaintiff-Appellee.

No. 1638.

Court of Appeals of New Mexico.
Aug. 20, 1975.
Certiorari Denied Sept. 23, 1975.

Thomas B. Root, Albuquerque, for appellants.

Toney Anaya, Atty. Gen., Jill Z. Cooper, Asst. Atty. Gen., Thomas A. Simons, IV, John A. Templeman, Asst. Attys. Gen., State Board of Ed., Santa Fe (amicus), for appellee.

OPINION

LOPEZ, Judge.

Petitions were filed in the Children's Court of Quay County alleging that each of the three respondents possessed less than one ounce of marijuana contrary to § 54–11–23, N.M.S.A.1953 (Repl. Vol. 8, pt. 2, Supp.1973) and that they were, thereby, delinquent children within the scope of the Children's Code, §§ 13–14–1 to 13–14–45, N.M.S.A.1953 (Repl. Vol. 3, Supp.1973).

The Children's Court found that respondents did, in fact, possess marijuana as charged in the petition and entered its order committing them to the Children's Ward of Quay County for a period of four days.

Respondents appeal from this finding and order, alleging several grounds for reversal: (1) that a continuance was inproperly denied; (2) that the court erred in admitting testimony of a non-expert; (3) that respondents were generally denied a fair trial; (4) that there was an illegal search and seizure as to Respondent X; (5) that a confession of Respondent X was improperly received into evidence; and (6) that Respondents VIII and IX were materially prejudiced as a result of the illegal search and seizure and confession involving Respondent X.

After careful review of the record and briefs of counsel, including an excellent amicus curiae brief filed on behalf of the State Board of Education, we affirm as to

all respondents on all the above issues. We reverse as to Respondents VIII and IX, for reasons stated below.

The record discloses that on March 27, 1974, Raymond Lane, a teacher at Tucumcari Junior High School, observed the respondents smoking a pipe while walking between classes. Lane testified that Respondent X placed the pipe inside his sweater before the boys reached the next class. During this time, the respondents had to pass between buildings, and it was while crossing portions of school property and a street that they were observed.

Lane contacted a vice-principal, Dave Berggren, after the start of the next class period. Berggren, who suspected a violation of school regulations prohibiting smoking, and Lane proceeded to a room where Respondent X was in class. Berggren took the respondent out of the class and into a vacant classroom, where he and Lane talked to him until Respondent X surrendered the pipe. This conversation took approximately 40 minutes. During this time, Respondent X told Berggren that the pipe contained marijuana. This respondent later made the same statement to the principal, Hurley Lovely.

Analysis of the contents of the pipe indicated the presence of marijuana. Respondent X testified that he did, in fact, possess the pipe in question. Respondents VIII and IX testified that they had smoked the pipe. Respondents VIII and IX denied any knowledge that the pipe contained marijuana. Respondent X acknowledged that the pipe was his. Respondents VIII and IX both testified that they knew the substance in the pipe was not tobacco.

(1) *Continuance*

It is the law in this state that the granting of a motion for continuance is within the sound discretion of the trial court and such action will not be disturbed on review unless there is a showing of abuse of that discretion. *State v. Sibold,* 83 N.M. 678, 496 P.2d 738 (Ct.App.1972).

The record shows that respondents requested, and were granted, a first continuance from April 15, 1974, to May 8, 1974, for purposes of allowing an independent test of the contents of the pipe. Counsel for respondents made another motion on the same grounds one day prior to trial. This motion was denied and it is this denial which serves as the subject for appeal on this point.

Counsel, at his oral motion, stated that he had been unexpectedly called out of town on April 30, 1974, and was thereby unable to make a request for a court order to have the district attorney surrender the necessary evidence for testing purposes. The court below ruled, and it is clear from the record, that respondents had ample time to make the necessary tests prior to any unexpected travel by their counsel.

Respondents further argue that the district attorney violated Rule 27, Rules of Criminal Procedure, § 41–23–27, N.M.S.A.1953 (2d Repl. Vol. 6, Supp. 1973), by not giving up the requested pipe residue without a court order (citing *State v. Billington,* 86 N.M. 44, 519 P.2d 140 (Ct.App.1974)). Rule 27, supra, which relates to discovery by governmental disclosure is not applicable to the case at bar. *In Re Doe, III,* 87 N.M. 170, 531 P.2d 218 (Ct.App.1975). The petitions had been pending nearly a month before counsel began his discovery. We conclude that the legislature, by enacting § 13–14–14 and § 13–14–26, supra, intended that there be prompt adjudication of cases under the Children's Code.

We conclude that the court's denial of respondents' motion was not an abuse of discretion.

(2) *Testimony of Expert Witness*

A state police narcotics agent testified for the state concerning the character and identity of the substance found in the pipe. Counsel stated, and the court so found, that the agent had never been qualified to testify in a felony case, but his use as an

expert had been limited to misdemeanor cases, preliminary hearings, and children's cases not involving felonies.

It appears from the record that the agent had conducted between 200 and 300 tests similar to the one in question, and that the results of approximately 80 of these tests had been used in various proceedings.

As the Supreme Court stated in *State v. Garcia,* 76 N.M. 171, 413 P.2d 210 (1966):

> ". . . It is the trial judge's responsibility to determine whether an offered expert is sufficiently qualified to testify in a cause, and he should exercise discretion in allowing or denying the testimony to be introduced. This discretion will be interfered with by us only when it has been abused. . . ."

The agent in this case was not a non-expert, but was sufficiently expert to qualify for the purposes of these petitions. The offense involved, were this not a Children's Court matter would have been a misdemeanor under § 54-11-23, supra. The court did not abuse its discretion in qualifying this witness for the purpose of testifying that the substance in Respondent X's pipe was marijuana.

(3) *General Issue of Fairness*

Respondents argue that the court below generally denied them a fair trial in that several miscellaneous irregularities occurred: (a) that the court never informed respondents of their rights under the Children's Code, supra; (b) that the trial was, in fact, public; (c) that the court was prejudiced in its conduct of the trial; (d) that the "Rule" was violated; [§ 20-4-615, N.M.S.A.1953 (Repl. Vol. 4, Supp.1973)] and (e) that the trial, taken as a whole, demonstrated cumulative error.

None of these points were raised below. While preservation of error is not scrupulously required in situations where the fundamental rights of parties are involved, at least some showing on appeal of the suggested fundamental or jurisdictional nature of the error is helpful. None has been offered. Indeed, the record does not support the fact that some of the irregularities existed.

We find no jurisdictional errors in any of the above alleged discrepancies that do find support in the record. Further, fundamental error will only be heard to prevent a plain miscarriage of justice where someone has been deprived of rights essential to a defense, *State v. Lott,* 73 N. M. 280, 387 P.2d 855 (1963), or to protect 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); *State v. Jaramillo,* 85 N.M. 19, 508 P.2d 1316 (Ct.App. 1973). We have reviewed the record and determined that respondents were not denied a fair trial in any general or cumulative sense. *State v. Gutierrez,* 78 N.M. 529, 433 P.2d 508 (Ct.App.1967).

(4) *Search & Seizure*

The record indicates that Respondent X surrendered a pipe to the assistant principal, Berggren, after 40 minutes of discussion in an empty classroom, in the presence of the teacher, Lane.

This procedure raises Fourth Amendment questions, since it cannot be denied that this action by a public school official is "state action", rendering the Fourth Amendment applicable through the Fourteenth. *Tinker v. Des Moines Community School Dist.,* 393 U.S. 503, 21 L. Ed.2d 731, 89 S.Ct. 733 (1969); *Goss v. Lopez,* 419 U.S. 565, 42 L.Ed.2d 725, 95 S. Ct. 729 (1975).

The Fourth Amendment rights of persons to be secure against unreasonable searches and seizures has been expressly applied to juvenile proceedings in this state by § 13-14-25(C), supra:

> "C. In a proceeding on a petition alleging delinquency . . .
>
> "(2) evidence illegally seized or obtained shall not be received in evidence to establish the allegations of a petition against a child over objection; . . ."

Of course, the Fourth Amendment to the United States Constitution by its words, protects only against unreasonable searches and seizures. It has long been held that what is reasonable depends upon the facts and circumstances of each case. *State v. Kennedy,* 80 N.M. 152, 452 P.2d 486 (Ct.App.1969); *State v. Sedillo,* 79 N. M. 289, 442 P.2d 601 (Ct.App.1968). Ordinarily, government officials are held to a very high standard of reasonableness. Citizens are protected by the fact that police officers must obtain warrants via a procedure whereby reasonableness is determined by someone neutral and detached from the business of solving crime. In the absence of a warrant, exceptional circumstances which are jealously and carefully drawn suffice for the reasonableness requirement. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Our question, therefore, is whether to engraft these very same procedures onto our school system.

The realities of school situation, common sense and the increasing weight of authority in judicial decisions teaches us that something less than the strict standards to which police officers are held is appropriate given the facts and circumstances of school searches. Crime in the schools is reaching epidemic proportions. In the three years between 1970 and 1973, homicides increased by 18.5 percent, rapes and attempted rapes by 40.1 percent, robberies by 36.7 percent, assault by 85.3 percent, drug related offenses by 37.5 percent and the number of weapons confiscated by school authorities increased by 54.4 percent. Birch Bayh, Chairman, Preliminary Report of the Subcommittee to Investigate Juvenile Delinquency of the United States Senate Judiciary Committee (1975). In addition, ordinary school discipline is essential if the educational function is to be performed. *Goss v. Lopez,* supra. Even the majority in *Goss* recognized that events calling for discipline are frequent and sometimes require immediate action. To engraft the cumbersome warrant requirement onto school searches would mean that police assistance would be required for even the most trivial searches, e.g. for chewing gum. See R.Cr.P. 17, § 41–23–17, N.M.S.A.1953 (2d Repl. Vol. 6, 1972 Supp.1973). The normal exceptions to the warrant requirement would have little application in the school situation.

Thus, we adopt the standard that school officials may conduct a search of a student's person if they have a reasonable suspicion that a crime is being or has been committed or they have reasonable cause to believe that the search is necessary in the aid of maintaining school discipline. *People v. D.,* 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974); *People v. Jackson,* 65 Misc.2d 909, 319 N.Y.S.2d 731 (1971); *In re State in Interest of G.C.,* 121 N.J.Super. 108, 296 A.2d 102 (1972); *State v. Baccino,* 282 A.2d 869, 49 A.L.R.3d 973 (Del.Super.1971); See generally, Annot., 49 A.L.R.3d 978 (1973). We believe that this standard, arrived at by balancing the privacy rights of the students against the unique administrative responsibilities of the school officials, should adequately protect the students from arbitrary searches and give the school officials enough leeway to fulfill their duties. *People v. D.,* supra; *State v. Baccino,* supra. Among the factors to be considered in determining the sufficiency to cause to search a student are the child's age, history and record in the school, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay and the probative value and reliability of the information used as a justification for the search. See *People v. D.,* supra.

Judged by the above enunciated standards, it cannot be doubted that the instant search was reasonable. The subject of the search was a thirteen year old boy who was actually seen by the school official smoking a pipe on school property against school regulations. We hold that the search of Respondent X was based

upon reasonable cause to believe that the search was necessary in the aid of maintaining school discipline. The trial court was accordingly correct in admitting into evidence the fruits of that search.

(5) *Confession*

Both the vice-principal, Berggren, and the principal, Lovely, testified the Respondent X told them that the pipe contained marijuana. It is contended that this confession was the result of improper custodial interrogation, and therefore inadmissible. Section 13–14–25(C), supra, states:

> "C. In a proceeding on a petition alleging delinquency . . .
>
> "(1) an extra-judicial statement that would be constitutionally inadmissible in a criminal matter shall not be received in evidence over objection;
>
> ". . .
>
> "(3) an extra-judicial admission or confession made by the child out of court is insufficient to support a finding that the child committed the acts alleged in the petition unless it is corroborated by other evidence."

It is clear from the record, and the court so found, that any confession by Respondent X was corroborated, as to X, by the testimony of the teacher, Lane, who saw the respondent in possession of the pipe and by the expert's testimony as to its contents.

We do not read *Goss v. Lopez,* supra, to require the giving of Miranda-type warnings in cases involving in-school disciplinary matters. See also *People v. Shipp,* 96 Ill.App.2d 364, 239 N.E.2d 296 (1968). The elaborate criminal trial model has no place in the school house.

The purpose of most school-house interrogations is to find facts related to violations of school rules or relating to social maladjustments of the child with a view toward correcting it. Giving Miranda-type warnings would only frustrate this purpose. It would put the school official and student in an adversary position. This would be in direct opposition to the school official's role of counselor.

The question remains, nevertheless, whether the confession was voluntary. *State v. Turnbow,* 67 N.M. 241, 354 P.2d 533, 89 A.L.R.2d 461 (1960). Respondent X does not argue that any negative coercion occurred to render the confession involuntary. See *State v. Ortega,* 77 N.M. 7, 419 P.2d 219 (1966). The respondent contends, rather, that school officials held out inducements to X. *State v. Benavidez,* 87 N.M. 223, 531 P.2d 957 (Ct.App.1975).

The only pertinent statement on this matter occurred during Lane's testimony:

> "He [X], said he told him [Berggren] he hadn't been smoking anything and that he didn't have anything on him, and Mr. Berggren said that, 'It would be better if you give it to me now then if I call the police and have them come down here and get it,' and [X] said, then [X] said, 'What will you do it I give it to you?' And then Mr. Berggren just repeated what he had said. He said, 'It would be better that you give the pipe to me than if I have to get the police down here.' So [X] just kept saying, 'Well what will you do to me if I do give it to you?' And so Mr. Berggren said, 'Well, then, if you won't give it to me, I'll just have to get the police down here.' And he started one time to get the police down here and I said, I told [X] it would be better that he give it to him now and it would cause him a lot less trouble, and therefore, he [gave] it to him. He opened his sweater, he took it out of his pocket and handed it to Mr. Berggren, and it was a brown pipe with a white paper on it and rubber band."

While this conversation, particularly Lane's statement, raises a close question of impropriety under the *Benavidez* Rule, it must be noted that this conversation was strictly related to the production of the pipe which we have already held the school official was entitled to seize. It did not

relate to any questioning pertaining to its contents.

Since this is the only testimony of record dealing with possible inducements, and since the confession was apparently made independently of this line of questioning, we do not find that the confession relating to marijuana was improperly induced, involuntary and, thereby, inadmissible.

(6) *Prejudice to VIII and IX because of the Search and Seizure of X and the Confession by X*

This point, depending as it does on the outcome of points (4) and (5), supra, must be decided adversely to respondents.

Reversal as to Respondents VIII and IX

Counsel at trial adequately notified the court of the lack of evidence to support any finding of respondents having committed the act alleged. This point was not raised on appeal, but our scope of review includes the consideration of questions involving fundamental rights of a party. Rule 11 of Rules Governing Appeals to the Supreme Court and Court of Appeals, § 21–12–11, N.M.S.A.1953 (1974 Interim Supp.); see also dissenting opinion in *State v. Cutnose,* 87 N.M. 307, 532 P.2d 896 (Ct.App.1974); compare *State v. Cutnose,* 87 N.M. 300, 532 P.2d 889 (Ct.App. 1975).

It is a fundamental right of a party to be convicted of a crime, which in this case is a necessary prerequisite to a determination of delinquency, based upon evidence of the elements of the crime. Section 13–14–3(N) and (O), supra. In a prosecution for a violation of § 54–11–23, supra, the state must prove that the respondents had knowledge of the presence and character of the item possessed. *State v. Giddings,* 67 N.M. 87, 352 P.2d 1003 (1960); *State v. Bauske,* 86 N.M. 484, 525 P.2d 411 (Ct.App.1974).

A careful reading of the record disclosed absolutely no evidence of knowledge by Respondents VIII and IX of the character of the item allegedly possessed.

We agree that there is no requirement that the proof of this knowledge be by direct or uncontradicted evidence. But "the evidence must be such as discloses some conduct, declarations or actions on the part of the accused from which the fact finder may fairly infer and which is sufficient to satisfy it beyond a reasonable doubt of knowledge in the accused of the presence and nature of the narcotics." *State v. Garcia,* supra.

The record discloses a degree of furtiveness on the parts of respondents, in that they did their smoking and passed the pipe around between buildings while changing classes. But it is also obvious that the same acts would have obtained for the smoking of tobacco, in light of the school regulation prohibiting such conduct. This does not amount to conduct sufficient to infer that the smokers knew the character of the substance they were using.

We believe that on the evidence in the record, no adult would have been convicted of possession of marijuana under § 54–11–23, supra. See *State v. John Doe,* Supreme Court No. 10,483, decided June 25, 1975. Consequently, we hold that the fundamental rights of Respondents VIII and IX have been violated. This is a matter which raises serious questions as to the innocence of these parties. *State v. Rodriguez,* supra.

In deciding these cases which present issues of first impression in the appellate courts of New Mexico, we have tried judicially to uphold and protect the dignity of the school children. At the same time, we have also considered the rights and duties of those people involved in the school system as much as the New Mexico and United States Constitutions will allow us to do so.

Accordingly, the judgment and order as applied to Respondent X is affirmed. The judgment and order as applied to Respond-

ents VIII and IX is hereby reversed. The causes against Respondents VIII and IX are dismissed and all records thereof are ordered destroyed.

It is so ordered.

HENDLEY, J., concurs.

HERNANDEZ, J., dissents. For dissenting opinion see 542 P.2d 834.

540 P.2d 835

Dwaine BENDORF, Plaintiff-Appellant,

v.

VOLKSWAGENWERK AKTIENGESELLSCHAFT, Defendant-Appellee.

No. 1651.

Court of Appeals of New Mexico.

Aug. 6, 1975.

Rehearing Denied Aug. 22, 1975.

Certiorari Denied Sept. 23, 1975.

Lorenzo A. Chavez, James H. Foley, Albuquerque, for plaintiff-appellant.

John A. Klecan, Klecan & Roach, P. A., Albuquerque, for defendant-appellee.

OPINION

HENDLEY, Judge.

Plaintiff sued defendant, the manufacturer of plaintiff's automobile, for injuries sustained in an automobile accident. Plaintiff's automobile went through a red light and collided with an automobile that had entered the intersection in accordance with the traffic signals from a direction perpendicular to plaintiff's direction of travel. Plaintiff claimed that the collision occurred because of a defect in the seat assembly of his automobile, which caused him to lose control of his car. Plaintiff alleged and introduced proof of the following facts: (1) As he approached the intersection and saw the light change to yellow, he applied his brakes in preparation of stopping for the anticipated red light. (2) When he did this, the seat mechanism slipped, causing the seat to shoot forward. (3) The forward movement of the seat caused his foot to slide off the brake pedal, which resulted in his running the red light and colliding with the other vehicle. Plaintiff ultimately rested his claim on the theory of strict liability of the manufacturer of a defective product as set forth in Restatement, Torts 2d, § 402(A) (1965), at 347–48.

Defendant presented two theories of the case to the jury. It denied that the auto seat assembly was defective and alternatively claimed that even if it was defective, the defect was not the proximate cause of the collision. Defendant alleged and introduced proof of the following facts: (1) As plaintiff approached the intersection, his son, who was seated on the passenger side of the vehicle, had fallen from the passenger seat onto the floor of the car. (2) Plaintiff was attending to his son and did not see the traffic light change color. (3) For this reason, he did not apply his brakes in time to stop for the light, causing him to collide with the oncoming vehicle in the intersection. In other words, defendant's contention was that the proximate cause of the collision was plaintiff's inattentive driving.

The trial court instructed the jury that:

"The plaintiff claims that he sustained damages and that the proximate cause thereof was one or more of the following acts:

"* * * [A]s he was driving across I–40 traffic conditions made it necessary for him to apply the brakes as would be expected under the then existing conditions and as he did so, the seat began to move causing plaintiff to lose control of his car and collide with another car, * * *.

"* * *

"* * * [T]he defendant asserts the following affirmative defense:

"The plaintiff was contributorily negligent in that:

"1. Plaintiff failed to keep a proper lookout * * *.

"2. That the plaintiff failed to yield the right of way * * *.

"3. That the plaintiff failed to stop in obedience to the traffic signals * * *.

"4. That the plaintiff failed to keep his car under proper control * * *.

"If you find that plaintiff has proved those claims required of him and that defendant's affirmative defense has not been proved, then your verdict should be for the plaintiff.

"If on the other hand, you find that any one of the claims required to be proved by plaintiff has not been proved or that defendant's affirmative defense

has been proved, then your verdict should be for the defendant." [Trial Court's Instruction 1]

In addition, the trial court gave ten other challenged instructions which attempted to elucidate the concepts of negligence, contributory negligence, the duty to use ordinary care and the duty to keep a proper lookout and control over one's own car. Included in these instructions was one to the effect the failure to stop in accordance with traffic signals was contributory negligence as a matter of law and another to the effect that contributory negligence meant negligence on the part of the plaintiff that proximately contributed to cause his damages.

The jury returned a verdict for the defendant. Plaintiff appeals contending that the trial court erred in instructing the jury on contributory negligence because ordinary negligence on the part of the plaintiff is not a permissible defense to a § 402(A) liability cause of action. Incorporated in this contention is an allegation that the trial court's instructions bound the jury to find for the defendant without regard to what caused the accident. Causation was one of the most closely contested issues in the lawsuit. Defendant responds that it is entitled to have the jury instructed on its theory of the case, and that the disputed instructions on contributory negligence were thus necessary to apprise the jury of defendant's theory. While we agree with the defendant that it was entitled to instructions on its theory, we also agree with the plaintiff that under the instructions as given, the jury could have found that regardless of a defect which (set into motion the chain of events) which caused the collision, plaintiff drove negligently; and although such negligence was caused by the defect, he was barred from recovery. We accordingly reverse and remand for a new trial.

The plaintiff's brief primarily addresses itself to the proposition that is set forth in Comment (n) to § 402(A) of the Restatement of Torts 2d, *supra*:

"* * * [T]he liability with which this Section deals is not based upon negligence of the seller, but is strict liability * * *. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."

The plaintiff thus argues that the only allowable negligence defense in a § 402(A) cause of action is that form of contributory negligence contained in Restatement, Torts 2d, *supra*, § 466(a)—an intentional, unreasonable exposure to a known danger. Plaintiff tendered to the trial court an instruction in accordance with Comment (n), *supra*.

New Mexico has recognized the theory of a manufacturer's strict liability under § 402(A) since *Stang v. Hertz Corporation*, 83 N.M. 730, 497 P.2d 732 (1972). However, the issue of proper defenses to a § 402(A) case is one of first impression here. Justice Oman alluded to the confusion in the area of available defenses to § 402(A) cases in *Garrett v. Nissen Corporation*, 84 N.M. 16, 498 P.2d 1359 (1972) and explicitly refrained from judgment thereon.

In this appeal, the respective positions of the parties and the choice of cases cited in support thereof have done little to clarify the matter. Two problems are immediately apparent: (1) Comment (n), *supra*, does not purport to be an exhaustive catalogue of all possible defenses grounded in plaintiff's negligent conduct to § 402(A) causes of action and (2) defendant's theory of the

case, or its defense, is not properly denominated an affirmative defense; rather it amounts to a denial of one element of the plaintiff's case, viz. causation. Defendant's theory thus involves a suggestion of an alternative to the plaintiff's allegation of proximate causation. In addressing ourselves to the reasons for reversing the instant case, it is necessary to understand what this case is *not*. We here set out a brief catalogue of possible negligent conduct on the part of the plaintiff that may or may not bar recovery in a § 402(A) case to that end.

We stress, however, that an affirmative defense is that state of facts provable by defendant which will bar plaintiff's recovery once plaintiff's right to recover is otherwise established. It is a "descendant of the common law plea in 'confession and avoidance,' which permitted a defendant who was willing to admit that plaintiff's declaration [or proof] demonstrated a prima facie case to then go on and allege [or prove] additional new material that would defeat plaintiff's otherwise valid cause of action." 5 Wright and Miller, Federal Practice and Procedure, § 1270 (1969). In the field of products liability, or § 402(A), litigation, courts have generally recognized three types of plaintiff conduct that should be considered as possible bars to recovery once plaintiff's right to recover is otherwise established. See Annot., 46 A.L.R. 240 (1972).

The first of these is a negligent failure to discover the defective condition of defendant's product, or to guard against the possibility of its existence. This defense, if available to a manufacturer, would defeat plaintiff's recovery in spite of the fact that plaintiff is able to establish a prima facie case under Restatement, Torts 2d, § 402(A). It would be an affirmative defense in the sense that it avoids a liability otherwise established. However, many jurisdictions throughout the country have removed this defense from the manufacturer's arsenal when the plaintiff pleads under a special liability theory. Restatement, Torts 2d, § 402(A), Comment (n), *supra*; *Williams v. Ford Motor Company*, 454 S.W.2d 611 (Mo.App.1970); *Devaney v. Sarno*, 125 N.J.Super. 414, 311 A.2d 208 (A.D.1973); *Ford Motor Company v. Henderson*, 500 S.W.2d 709 (Tex.Civ.App. 1973); Annot., 46 A.L.R.3d 240 (1972); Annot., 13 A.L.R.3d 1057 (1969). We note pursuant to our desire to make clear what this case is not about, that defendant herein neither alleged nor attempted to prove that the plaintiff negligently failed to discover the defect.

However, we do point out that the underlying purpose for adoption of products liability pursuant to § 402(A), *supra*, militates in our view against recognition of such a defense, and that unless some future fact pattern should demonstrate a contrary necessity, we are inclined to adopt that view set forth in Comment (n) of § 402(A), *supra*.

The second possible defense bars recovery in products liability actions when plaintiff discovers the defect and is aware of the danger but nevertheless unreasonably makes use of the product. See Restatement, Torts 2d, § 466(a), *supra*; *Williamson v. Smith*, 83 N.M. 336, 491 P.2d 1147 (1971). This, too, is an affirmative defense as it would avoid liability even though plaintiff has already established a right to recover. Courts have generally held that this type of plaintiff conduct is available to a manufacturer as a defense in a § 402(A) case. Comment (n), *supra*; *DeFelice v. Ford Motor Company*, 28 Conn.Sup. 164, 255 A.2d 636 (1969); *Williams v. Ford Motor Company, supra; Devaney v. Sarno, supra; Ford Motor Company v. Henderson, supra*; Annot., 46 A.L.R.3d, *supra*; Annot., 13 A.L.R.3d, *supra*. In the case before us the record indicates some evidence that plaintiff had once previously experienced the unexpected slipping forward of the seat. Defendant, at trial, did not attempt to capitalize on this defense, but rather concentrated its efforts on the denial of any defect and the denial of proximate causation. Plaintiff raises

the applicability of this defense in its effort to demonstrate that it is the only available defense under Comment (n), supra. It will become apparent that there are other available defenses to § 402(A) cases than those mentioned in Comment (n), *supra.* Since it is necessary to the disposition of the instant case, we hold that if upon retrial, the defense of unreasonably encountering a known danger becomes an issue, it would properly be an affirmative defense available to the manufacturer. That is to say, it would bar plaintiff's recovery even if plaintiff established a prima facie case which defendant does not deny.

The third type of plaintiff conduct that constitutes an affirmative defense is misuse of the product that proximately contributes to the injuries. This defense is not mentioned in Comment (n), supra. Yet, its availability is one of the most hotly debated issues in products liability litigation today. Again, as with the previous two defenses, this defense may be denominated as an affirmative defense since it bars recovery even when the plaintiff has proved a defect and that the defect proximately caused the claimed injuries. There is much confusion as to whether and when product misuse which contributes to the injuries will be available as a defense. See e.g. *Nanda v. Ford Motor Company,* 509 F.2d 213 (7th Cir. 1974) [Misuse is unavailable as a defense if product subjects users to an unreasonable risk of injury in situations that are not highly extraordinary. Auto accidents are not highly extraordinary and the passenger compartment being unshielded from the fuel tank created an unreasonable risk of injury—held: misuse unavailable as a defense.]; *Larsen v. General Motors Corporation,* 391 F.2d 495 (8th Cir. 1968) [Misuse available as a defense only if misuse is unforeseeable. Auto accidents are foreseeable—held: manufacturer liable for design defect in placement of steering column such that upon head-on collision, steering shaft acted as a spear aimed directly at driver's head.]; *Evans v. General Motors Corporation,* 359 F.2d 822 (7th Cir. 1966), cert. denied, 385 U.S. 836, 87 S.Ct. 83, 17 L.Ed.2d 70 (1966) [The claim was that an "X" body frame without perimeter support, instead of a safer perimeter body frame, was responsible for the death of the user of an auto who was in an accident. Held: misuse available as a defense; a manufacturer is under no duty to make a crashworthy automobile since collisions with other objects are not among the intended uses of a car despite their foreseeability.]; *Culpepper v. Volkswagen of America, Inc.,* 33 Cal.App. 3d 510, 109 Cal.Rptr. 110 (Ct.App. 4th Dist.1973) [Foreseeable misuse will not bar recovery. High speed freeway lane changes are foreseeable. The alleged defect was the car's instability in such situations —held: misuse unavailable as a defense.]

However, in this case, we need not enter the quagmire since neither party has argued that this is a "crashworthiness" (See *Evans, supra*) or "second collision" (See *Larsen, supra*) case. Nor on the record before us can it be considered as one where plaintiff's misuse put the defect into operation (See *Culpepper, supra*). In such cases, plaintiff's proof has shown that the defect itself directly caused or at least exacerbated the injuries. In the instant case, plaintiff has introduced nothing tending to show that the defective seat caused his injuries. His showing was that the defect caused the accident. Plaintiff's doctor testified that plaintiff sustained injury to his spinal cord through some type of stress, impact or force occurring as a result of the accident. However, the doctor testified he had no way of knowing what the impact mechanism was. Had the doctor attributed plaintiff's injuries directly to the peculiar positioning of plaintiff due to the slippage of the seat, we would be obliged to decide whether plaintiff's claim could be barred by the affirmative defense of misuse. Defendant herein alleged plaintiff's negligence not as an affirmative defense but rather as a denial of causation. Thus, our question on appeal is whether the trial

court's styling of defendant's denial of causation as an affirmative defense was error.

Referring back to the trial court's instruction No. 1, *supra*, the last paragraph thereof told the jury to find for the defendant if *either* plaintiff had not proved his case *or* if defendant had proved that plaintiff drove negligently. This would have been a correct instruction if defendant's theory of the case had been a true affirmative defense. In such a case, plaintiff's establishment of a right of recovery would be irrelevant so long as defendant proved its affirmative defense. Consequently, an instruction couched in the disjunctive would be a correct one. However, the jury was incorrectly instructed that plaintiff's negligent driving was contributory negligence, an affirmative defense, and, therefore, that a finding that plaintiff drove negligently required a verdict for the defendant regardless of its findings as to proximate cause. Under instruction No. 1, *supra*, there is no way to know whether the verdict for defendant was based on a finding that plaintiff's negligent driving had proximately caused the collision or a finding that, regardless of the cause of the collision, plaintiff had driven negligently and was therefore barred from recovery. Since defendant's defense should only have prevailed if plaintiff's negligent driving had caused the accident and the court's instruction allowed it to prevail regardless of the cause of the accident, plaintiff is entitled to a new trial.

Upon retrial, defendant is of course entitled to instructions on its theory of the case. *Hill v. Burnworth*, 85 N.M. 615, 514 P.2d 1312 (Ct.App.1973); *Rogers v. Thomas*, 81 N.M. 723, 472 P.2d 986 (Ct. App. 1970). We suggest that defendant's version of the facts be stated immediately after the trial court instructs that defendant denies all the plaintiff's claims and before it instructs as to affirmative defenses, if any. We stress that, in the case at bar, defendant's theory of the case should be stated in terms of causation and not in terms of negligence or contributory negligence. That is not to say that use of such words would be error, a question we reserve for decision at a later date. It is simply that, when the issue is causation in that *either* plaintiff's conduct *or* the product defect caused the injuries, questions of negligence are irrelevant.

Reversed and remanded.

It is so ordered.

HERNANDEZ, J., concurs.

SUTIN, J., specially concurs.

SUTIN, Judge (specially concurring).

I concur in the result.

Plaintiff sued defendant, the manufacturer of plaintiff's automobile, for injuries sustained by plaintiff in an automobile collision with a third party. Plaintiff appeals from a judgment for defendant.

A. *Position of the Parties on Strict Tort Liability*

Plaintiff claimed that the collision occurred because of a defect in the seat assembly of the automobile, which defect caused him to lose control of the car. The defendant denied this claim but it also asserted an *affirmative defense* of conventional contributory negligence in the operation of the car. The position of the parties on the facts and the law applicable thereto is set forth in the instructions to the jury, *infra*.

Plaintiff submitted his claim to the jury on a theory of strict products liability as set forth in Restatement, Torts 2d § 402A (1965) at 347–48.

The critical issue is whether conventional contributory negligence in the operation of a motor vehicle is an *affirmative defense* to the manufacturer of the motor vehicle. It is not available as an *affirmative defense*.

This issue is a matter of first impression in New Mexico. All there is to date is the following comment in *Garrett v. Nissen*

Corporation, 84 N.M. 16, 21, 498 P.2d 1359, 1364 (1972):

> We need not in the present case contribute to the confusion as to whether the defenses of contributory negligence and assumption of risk are available to a defendant under "strict tort liability," * * *.

It is only three years since New Mexico adopted the theory of a manufacturer's liability under Section 402A. *Stang v. Hertz Corporation*, 83 N.M. 730, 497 P.2d 732 (1972). Until this Court's recent opinion in *First National Bank in Albuquerque v. Nor-Am Agricultural Products, Inc.*, (N.M. Ct.App.) 537 P.2d 682, decided April 30, 1975, there was little in the law to indicate how far that liability extends. See *Stang v. Hertz Corporation, supra*; *Standhardt v. Flintkote Company*, 84 N.M. 796, 508 P. 2d 1283 (1973); *Garrett v. Nissen Corporation*, 84 N.M. 16, 498 P.2d 1359 (1972); *Sutton v. Chevron Oil Company*, 85 N.M. 604, 514 P.2d 1301 (Ct.App.1973) aff'd, 85 N.M. 679, 515 P.2d 1283 (1973). In *First National Bank v. Nor-Am, supra*, this Court, in an unanimous opinion, explained the parameters of Section 402A liability in New Mexico, and outlined the policy reasons behind its adoption.

There has been, as yet, no statement in our law to indicate the defenses that are available to a manufacturer defending against a Section 402A liability cause of action.

(1) *Plaintiff's claim*

The court instructed the jury on plaintiff's claim as follows:

> The plaintiff claims that he sustained damages and that *the proximate cause* thereof was one or more of the following acts:
>
> That in designing, constructing and assembling the 1964 Volkswagen, it was so designed, constructed and assembled, that the front seat when used by the driver in the usual type of traffic, would move and on occasions become separated, interfering with the safe operation of the vehicle; that on the 17th day of February, 1969, the plaintiff was driving a 1964 Volkswagen in a northerly direction on San Mateo, N.E. and as he was driving across I–40 traffic conditions made it necessary for him to apply the brakes as would be expected under the then existing conditions and as he did so, *the seat began to move causing plaintiff to lose control of his car* and collide with another car which resulted in injuries * * *. (Emphasis added)

Plaintiff's claim is that the proximate cause of the collision was the defect which caused him to lose control of his car. He does *not* claim that the defect was the proximate cause of his injuries. This claim is known as the "second collision" theory in which the defect caused the body of the passenger to collide with the interior part of the automobile. *Larsen v. General Motors Corporation*, 391 F.2d 495 (8th Cir. 1968); *Arbet v. Gussarson*, 225 N.W. 2d 431 (Wis.1975); *Nanda v. Ford Motor Co.*, 509 F.2d 213 (7th Cir. 1974).

(2) *Defendant's defense*

After stating the plaintiff's claim, the court instructed the jury on defendant's defense as follows:

> The defendant denies all the plaintiff's claims and in particular, that any defect existed in the Volkswagen at the time of its manufacture and further that it is incumbent upon the plaintiff to properly use the product.

Up to this point, the defendant denied that the proximate cause of the collision was the defect which caused plaintiff to lose control of his car. This is a good defense.

However, the trial court further instructed the jury:

> In addition, the defendant asserts the following *affirmative defense*: That plaintiff was contributorily negligent in that:
>
> (1) Plaintiff failed to keep a proper lookout for traffic signals and approaching vehicles.

(2) * * * [P]laintiff failed to yield the right of way at the intersection to the Mustang driven by Mr. Torres.

(3) * * * [P]laintiff failed to stop in obedience to the traffic signals which were operating at the intersection.

(4) * * * [P]laintiff failed to keep his car under proper control as he approached the intersection when he knew there were traffic signals in operation. (Emphasis added)

(3) *Conclusion of instruction*

The instruction concludes as follows:

The defendant has the burden of proving the affirmative defense.

If you find that plaintiff has proved those claims required of him and that defendant's *affirmative defense* has not been proved, then your verdict should be for the plaintiff.

If on the other hand, you find that any one of the claims required to be proved by plaintiff has not been proved *or that defendant's affirmative defense has been proved, then your verdict should be for the defendant.* (Emphasis added)

This affirmative defense is conventional contributory negligence.

B. *The Error of This Instruction was Preserved for Review*

Defendant contends that plaintiff did not object to that portion of the instruction relating to the affirmative defense and therefore "the law of the case is that contributory negligence is a proper defense." Plaintiff did, however, properly object to *nine other instructions* applicable to the defense of conventional contributory negligence. The instructions objected to included two instructions on "proper lookout", one which included "proper control", and the violation of a traffic statute on traffic signals. These objections covered the affirmative defense.

The plaintiff also tendered a proper instruction on contributory negligence in the form of assumption of risk which the trial court refused.

By his objections, plaintiff alerted the trial court to the error involved. The objections stated on the above instruction included:

> * * * Negligence is not an issue in a strict liability case, and the only time that negligence can be considered in a strict liability case is when it involves assumption or [sic] risk on the part of a plaintiff. That assumption of risk consisting of assuming the risk of the defect of the product. In other words, assumption of risk in a secondary sense as the term is ordinarily used.
>
> * * * * * *
>
> * * * Plaintiff has requested an instruction correctly stating the law of contributory negligence in a products liability case, and in particular, an instruction in accord with Comment "N" Section 402–A of Restatement of Torts.

We recognize that "For preservation of any error in the charge, objection must be made, to any instruction given, whether in U.J.I. or not; * * *" § 21–1–1(51)(1)(i), N.M.S.A.1953 (Repl. Vol. 4). *Williams v. Vandenhoven,* 82 N.M. 352, 482 P.2d 55 (1971). The purpose of this rule was stated long ago in *State v. Compton,* 57 N.M. 227, 236, 257 P.2d 915, 921 (1953):

> * * * [*W*]*here the court has instructed erroneously on the subject,* although a *correct instruction* has been tendered on the point, *if it leaves it doubtful whether the trial judge's mind was actually alerted thereby to the defect sought to be corrected by the requested instruction,* the error is not preserved unless, in addition, the specific vice in the instruction given is pointed out to the trial court by proper objection thereto.

This language was followed in *Lucero v. Torres,* 67 N.M. 10, 350 P.2d 1028 (1960); *Beal v. Southern Union Gas Co.,* 66 N.M.

424, 349 P.2d 337 (1960); *State v. Henderson,* 81 N.M. 270, 466 P.2d 116 (Ct.App. 1970).

We have no doubt that the trial judge's mind was alerted to the defect in the instruction which the plaintiff wanted to correct. By the submission of a proper instruction the plaintiff alerted the trial court to the defect. *State v. Montano,* 83 N.M. 523, 494 P.2d 185 (Ct.App.1972). The continuous objections to instructions on the defense, conventional contributory negligence of the plaintiff also alerted the mind of the court.

A manifest injustice occurred. The jury could have found for defendant solely on the ground that plaintiff failed to keep a proper lookout, regardless of the defect in the automobile. The defect in the automobile was the controlling issue in plaintiff's case. To prevent a manifest injustice, we may take note of the error in the instruction. *Sayles v. Lilak & Moore, Inc.,* 32 Mich.App. 721, 189 N.W.2d 118 (1971). "This is the most important single instruction in the lawsuit, and court and counsel should give particular attention to it." U. J.I. 3.1, Directions for Use.

The court's instruction on conventional contributory negligence is preserved for review.

C. *The majority opinion does grievous error in analysis of law.*

The majority opinion states:

> Defendant herein alleged plaintiff's negligence *not as an affirmative defense but rather as a denial of causation.* Thus, our question on appeal is whether the trial court's styling of defendant's denial of causation as an affirmative defense was error. [Emphasis added]

First, defendant asserted plaintiff's negligence as an affirmative defense; that "defendant has the burden of proving the affirmative defense"; that if the "defendant's affirmative defense has been proved, then your verdict should be for the defendant."

Second, the majority opinion explicitly refrains from deciding one of defendant's theories of the case, to wit: *That plaintiff misused the automobile by driving negligently and that this negligent driving is a form of contributory negligence which bars plaintiff's recovery.*

The validity of the italicized theory presents the determinative question on this appeal.

The erroneous assumption of the majority is that the evidence introduced at trial as to plaintiff's negligent driving is relevant only to a denial of proximate cause by defendant's defective vehicle, but not to the affirmative defense of contributory negligence. Defendant's evidence of plaintiff's negligent driving was introduced, not only as a denial of causation, but that evidence was relevant also to defendant's theory of contributory negligence *in the form of misuse of the defendant's product.* Plaintiff's negligent driving does not constitute a misuse of the defendant's product. Negligent driving is not an available form of contributory negligence in a products liability action against an auto manufacturer. See, infra.

D. *Jury instructions on conventional contributory negligence as a defense under strict tort liability are prejudicially erroneous.*

Liability pursuant to Section 402A was adopted in New Mexico. *Stang v. Hertz Corporation, supra.* The defense of contributory negligence is stated in Section 402A, Comment n, at page 356:

> n. *Contributory Negligence.* Since the liability with which this section deals *is not based upon the negligence of the seller,* but is strict liability, the rule applied to strict liability cases (See Section 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. *On the other hand the form of*

contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery. [Emphasis added].

Availability of this defense does not conflict with New Mexico's abandonment of assumption of risk as a defense apart from contributory negligence. See *Williamson v. Smith,* 83 N.M. 336, 491 P.2d 1147 (1971).

The court instructed the jury that four factual grounds existed as a defense of contributory negligence. Those grounds do not state that plaintiff voluntarily and unreasonably proceeded to encounter a known danger. Conventional contributory negligence is not a defense when the doctrine of strict liability applies. On the other hand, contributory negligence in the form of assumption of risk *is* available as a defense. This defense asserts that the plaintiff assumed the risk of his injuries or damages by voluntarily and unreasonably proceeding to encounter a known danger. Restatement, Comment n, *supra.* Cases throughout the country have followed Comment n in removing conventional contributory negligence as a defense. *Messick v. General Motors Corporation,* 460 F.2d 485 (5th Cir. 1972); *DeFelice v. Ford Motor Company,* 28 Conn.Sup. 164, 255 A.2d 636 (1969); *Williams v. Ford Motor Company,* 454 S.W.2d 611 (Mo.App.1970); *Devaney v. Sarno,* 125 N.J.Super. 414, 311 A.2d 208 (A.D.1973); *Ford Motor Company v. Henderson,* 500 S.W.2d 709 (Tex. Civ.App.1973); *Hartzell Propeller Company v. Alexander,* 485 S.W.2d 943 (Tex. Civ.App.1972). Annot., Products Liability: Contributory Negligence or Assumption of Risk as Defense Under Defense of Strict Liability in Tort, 46 A.L.R.3d 240 (1972); Annot., Products Liability: Strict Liability in Tort, 13 A.L.R.3d 1057 (1967).

These courts have uniformly held that if the user or consumer discovers the defect and is aware of the dangers and nonetheless proceeds unreasonably to use the product, he is barred from recovery.

Defendant's affirmative defense avoids the defect as the proximate cause of the collision. It does not claim that conventional negligence in the operation of the vehicle caused plaintiff to lose control of his vehicle. It claims that, *in the absence of the defective seat assembly,* the proximate cause of the collision was the negligence of the plaintiff in the operation of his vehicle. This defense would be proper if it claimed that the defect did not cause plaintiff to lose control of his vehicle; that the defect was not the proximate cause of the collision; that the sole proximate cause of the collision was the negligent operation of the vehicle upon the four factual bases set forth in the instructions.

If we adopted defendant's contention, the jury could believe that the defective seat assembly which caused plaintiff to lose control of his vehicle was a proximate cause of the collision and yet deny plaintiff recovery because he failed to keep a proper lookout. This would destroy the doctrine of special products liability under Section 402A.

For a form of instruction on Assumption of Risk-Products Liability adopted in California, see B.A.J.I. 9.02, 1975 Supplemental Service Pamphlet No. 1.

The trial court's instructions to the jury on conventional contributory negligence were prejudicially erroneous.

E. *In the public interest, we set forth the guidelines on defenses to special products liability cases.*

As a guide to quell the confusion which exists, the following breakdown of contributory negligence into four types explains what defenses *are* available, and what defense is *not* available.

(1) Contributory negligence in the form of assumption of risk *is* available as a defense as stated *supra.*

(2) Plaintiff's misuse of the product in a manner *that could not have been reasonably foreseen by the manufacturer is available as a defense.* Plaintiff's misuse, rather than a product defect, becomes the proximate cause of plaintiff's injuries or damages. Thus, defendant can assert plaintiff's misuse to disprove causation. Strictly speaking, this is part of the denial of plaintiff's case, rather than an affirmative defense. *Brown v. General Motors Corp.,* 355 F.2d 814 (4th Cir. 1966); *Swain v. Boeing Airplane Co.,* 337 F.2d 940 (2nd Cir.), cert. denied, 380 U.S. 951, 85 S.Ct. 1083, 13 L.Ed.2d 969 (1964); *Greeno v. Clark Equipment Co.,* 237 F. Supp. 427 (D.Ind.1965); *Erickson v. Sears, Roebuck & Co.,* 240 Cal.App.2d 793, 50 Cal.Rptr. 143 (Ct.App.2nd Dist. 1966).

Automobile accidents or collisions caused by negligent driving are reasonably foreseeable. Therefore, the defense of product misuse cannot be based on facts tending to prove negligent driving by plaintiff that resulted in a collision. *Culpepper v. Volkswagen of America, Inc.,* 33 Cal.App.3d 510, 109 Cal.Rptr. 110 (Ct.App.4th Dist. 1973); *Cronin v. J.B.E. Olson Corp.,* 8 Cal.3d 121, 104 Cal.Rptr. 433, 501 P.2d 1153 (1972); *Thompson v. Package Machinery Company,* 22 Cal.App.3d 188, 99 Cal.Rptr. 281 (Ct.App.2nd Dist. 1971); *Higgins v. Paul Hardeman, Inc.,* 457 S.W. 2d 943 (Ct.App.1970).

The great weight of authority throughout the country holds that product misuse by the plaintiff that was unforeseeable by the defendant-manufacturer constitutes contributory negligence in a Section 402A liability action. *Foreseeable* product misuse is not contributory negligence Whether a given misuse is foreseeable or unforeseeable is a question of fact for the jury in each case. *General Motors Corporation v. Walden,* 406 F.2d 606 (10th Cir. 1969); *Olsen v. Royal Metals Corp.,* 392 F.2d 116 (5th Cir. 1968); *Helene Curtis Indus., Inc. v. Pruitt,* 385 F.2d 841 (5th Cir. 1967); *Simpson Timber Co. v. Parks,* 369 F.2d 324 (9th Cir. 1966), rev'd in plaintiff's favor, 388 U.S. 459, 87 S.Ct. 2115, 18 L.Ed.2d 1319 (1967), plaintiff ultimately prevailing in 390 F.2d 353 (1968); *Spruill v. Boyle-Midway, Inc.,* 308 F.2d 79 (4th Cir. 1962); *Boyl v. California Chemical Co.,* 221 F.Supp. 669 (D.Or.1963); *Culpepper v. Volkswagen of America, Inc., supra*; *Cronin v. J.B.E. Olson Corp., supra*; *Thompson v. Package Machinery Company, supra*; *Martinez v. Nichols Conveyor & Engineering Co.,* 243 Cal. App.2d 795, 52 Cal.Rptr. 842 (1966); *Phillips v. Ogle Aluminum Furniture, Inc.,* 106 Cal.App.2d 650, 235 P.2d 857 (Cal.App. 1959); *Dunham v. Vaughan & Bushnell Mfg. Co.,* 86 Ill.App.2d 315, 229 N.E.2d 684 (1967); *Higgins v. Paul Hardeman, Inc., supra*; *Haberly v. Reardon Co.,* 319 S.W. 2d 859 (Mo.1958); *Speyer, Inc. v. Humble Oil & Refining Co.,* 275 F.Supp. 861 (W. D.Pa.1967); *Ringstad v. I. Magnin & Co.,* 39 Wash.2d 923, 239 P.2d 848 (Wash. 1952).

(3) Plaintiff's misuse of the product which causes the defect to be put into operation *is* available as a defense. *Culpepper, supra*; *Cronin, supra; Thompson, supra; Higgins, supra.*

(4) A manufacturer may *not* rely on the most common form of contributory negligence—plaintiff's negligent failure to discover the defective condition of defendant's product, or to guard against the possibility of its existence. Jurisdictions throughout the country have removed this defense from the manufacturer's arsenal when the plaintiff pleads a special liability theory. Restatement, Torts 2d § 402A, Comment n, at 356; *Messick v. General Motors Corporation, supra*; *Williams v. Ford Motor Company, supra*; *Devaney v. Sarno, supra; Ford Motor Company v. Henderson, supra; Hartzell Propeller Company v. Alexander, supra;* Annot., Products Liability, *supra*; Annot., Products Liability: Strict Liability in Tort, *supra.*

Contributory negligence in the form commonly known as assumption of risk, and in the form of plaintiff's misuse of the product which was the proximate cause of his injuries, are the only types of defenses that are available in a products liability action that is founded on Section 402A.

540 P.2d 846

Boyce D. EDENS, Plaintiff-Appellant,

v.

NEW MEXICO HEALTH AND SOCIAL SERVICES DEPARTMENT, a Department of the State of New Mexico, Employer, and Mountain States Mutual Casualty Company, a corporation, Insurer, Defendants-Appellees.

No. 1776.

Court of Appeals of New Mexico.

May 28, 1975.

Certiorari Granted June 30, 1975.

David W. Bonem, Clovis, Scott H. Mabry and David F. Boyd, Jr., Albuquerque, for plaintiff-appellant.

James A. Parker, Judy A. Fry, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendants-appellees.

OPINION

HENDLEY, Judge.

Plaintiff is the surviving spouse of decedent who died from injuries sustained in a motor vehicle accident. The court held that plaintiff was not entitled to benefits under the Workmen's Compensation Act (§§ 59–10–1 through 59–10–37, N.M.S.A. 1953 (2d Repl. Vol. 9, 1974, pt. 1)) because decedent was not performing any duties of her employment at the time of the accident. Plaintiff appeals. We affirm.

Decedent was employed by HSSD in Albuquerque. She and other employees were required to attend a two day conference in Santa Fe. To reduce costs they were requested to form car pools and to return to Albuquerque after the meetings. Four employees, including decedent, mutually agreed to meet at a parking lot in Albuquerque. They then proceeded to the conference in Santa Fe in a car driven by decedent.

At the conclusion of the first session in Santa Fe they returned to the parking lot

in Albuquerque. The three other employees disembarked and decedent proceeded on her way home. While decedent was driving from the parking lot she was involved in a collision, sustaining injuries from which she subsequently died.

Section 59–10–13.3, supra, states in part:

"A. Claims for workmen's compensation shall be allowed only:

"(1) when the workman has sustained an accidental injury arising out of, and *in the course of his employment;*

"(2) when the accident was reasonably incident to his employment; and

"(3) when the disability is a natural and direct result of the accident." [Emphasis added].

Section 59–10–12.12, supra, states in part:

"* * * the words 'injuries sustained in extra-hazardous occupations or pursuit' shall include death resulting from injury, and injuries to workmen, as a result of their employment and *while at work* in or about the premises occupied, used or controlled by the employer, and injuries occurring elsewhere *while at work* in any place where their employer's business requires their presence and subjects them to extra-hazardous duties incident to the business, *but shall not include injuries to any workman occurring while on his way to assume the duties of his employment or after leaving such duties, the approximate cause of which injury is not the employer's negligence.*" [Emphasis added].

While at work is synonymous with *in the course of the employment. Hayes v. Ampex Corporation,* 85 N.M. 444, 512 P.2d 1280 (Ct.App.1973).

The trial court found as follows:

"13. Betty Jean Edens had completed all of the duties of her employment with the New Mexico Health & Social Services Department for the day of October 3, 1973, before the time of the accident in which she was involved on the evening of October 3, 1973.

"14. At the time and location of the motor vehicle accident in which Betty Jean Edens was involved on October 3, 1973, Betty Jean Edens was not performing any duties of her employment by the New Mexico Health & Social Services Department, and she was not acting in the scope and course of her employment by the New Mexico Health & Social Services Department.

"15. The accident in which Betty Jean Edens was involved on the evening of October 3, 1973, did not arise out of, nor was it incidental to, her employment by the New Mexico Health & Social Services Department."

Plaintiff contends these findings are not supported by the evidence. Plaintiff relies on "* * * the universally recognized exception to that rule where travel on the employer's business requires the employee to be on the highway after work as a necessary incidental part of that employment * * * *Brown v. Arapahoe Drilling Co.,* 70 N.M. 99, 370 P.2d 816 (1962) * * *."

Viewing the evidence and all reasonable inferences that flow therefrom in a light most favorable to support the verdict, the showing is that the accident occurred after decedent's work was ended and she was going home. Decedent was not at work. *Hayes v. Ampex Corporation,* supra; *McDonald v. Artesia General Hospital,* 73 N.M. 188, 386 P.2d 708 (1963).

Once it was mutually agreed to meet at the parking lot, then it was at this point that their employment started and upon their return from Santa Fe, their employment terminated. Compare *Wilson v. Rowan Drilling Co.,* 55 N.M. 81, 277 P.2d 365 (1950). The service for the employer was not in going from home to the parking lot but in going from the parking lot to the sessions in Santa Fe and returning to the parking lot. It is the service to be performed for the employer that is material. Compare *Brown v. Arapahoe Drilling Co.,* supra. See also *Rinehart v. Mossman-*

Gladden, Inc., 77 N.M. 470, 423 P.2d 991 (1967). Further, at the time of the accident decedent was not charged with any duty or task in connection with her employment. The duties for the day had been finished. *McDonald v. Artesia General Hospital,* supra.

We deem oral argument unnecessary.

Affirmed.

It is so ordered.

WOOD, C. J., and HERNANDEZ, J., concur.

540 P.2d 848

Elias CISNEROS, Petitioner-Appellant,

v.

STATE of New Mexico, Respondent-Appellee.

No. 2057.

Court of Appeals of New Mexico.
Aug. 20, 1975.
Rehearing Denied Sept. 3, 1975.
Certiorari Denied Oct. 3, 1975.

Theodore E. Lauer, Lauer & Lauer, Santa Fe, for petitioner-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

WOOD, Chief Judge.

State v. Gillihan, 86 N.M. 439, 524 P.2d 1335 (1974) holds that grounds for relief

asserted in second or successive post-conviction proceedings will not be considered if those grounds could have been asserted in prior proceedings. The facts in this case demonstrate the wisdom of that decision.

Petitioner was convicted of two counts of incest in 1961. He has sought post-conviction relief by at least two habeas corpus proceedings and five post-conviction motions. He appealed the denial of one of the post-conviction motions. *State v. Cisneros,* 77 N.M. 361, 423 P.2d 45 (1967). This appeal is from the denial of the fifth post-conviction motion.

The holding in *State v. Gillihan,* supra, does not apply to grounds constituting fundamental error. Attempting to avoid the holding in *Gillihan,* petitioner asserts the claims asserted in his fifth motion amount to fundamental error. *Gillihan* defines fundamental error as error which goes to the foundation or basis of a defendant's rights, or error which goes to the foundation of the case, or error which takes from defendant a right which was essential to his defense.

Petitioner's fifth motion alleges three grounds for relief. The first is a vague claim, unsupported by any facts, that his sentence amounts to cruel and unusual punishment. The first claim does not state a basis for relief. *State v. Kenney,* 81 N. M. 368, 467 P.2d 34 (Ct.App.1970).

The second claim is that his conviction "was based on erroneous, inherently improbable and preposterous evidence in that he was accused of having sexual relations with individuals [his daughters] who were physically absent and had never been to the State of New Mexico prior to and including the dates of the alleged offense." This second claim is an attack upon the evidence at petitioner's trial in 1961 and is clearly a claim that could have been raised in a direct appeal. The second claim does not state a basis for relief. *Herring v. State,* 81 N.M. 21, 462 P.2d 468 (Ct.App. 1969).

The third claim is: "This gross hiatus in facts was known to his court-appointed attorney but was never presented at the trial nor raised in his appeal. Consequently he was denied the effective assistance of counsel . . . ." This claim of ineffective assistance of counsel is based on the "facts" asserted in the second claim. Those "facts", as previously stated, attack the sufficiency of the evidence to sustain convictions based on petitioner's sexual intercourse with his daughters in Bernalillo County in June of 1961. This factual predicate for the third claim, and the assertion that the "facts" were never raised to the trial court, were matters which could have been raised on direct appeal. The third claim does not state a basis for relief.

None of the claims made are claims of fundamental error. On the basis of the record, the District Court file and the Brief-in-Chief, the State's motion for summary affirmance is granted. The order denying the fifth motion for post-conviction relief is affirmed.

It is so ordered.

We add a recommendation at this point. The claims made in the fifth motion for post-conviction relief were made under oath. The second and third claims are based on alleged "facts". These allegations should be compared with the affidavit of petitioner's trial attorney. That affidavit appears in the District Court file. Our recommendation is that the District Attorney investigate the possibility of perjury charges because of the second and third claims.

HERNANDEZ and LOPEZ, JJ., concur.

540 P.2d 850

STATE of New Mexico, Plaintiff-Appellee,

v.

Michael J. ORTIZ, Defendant-Appellant.

No. 1751.

Court of Appeals of New Mexico.

Sept. 10, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Sarah M. Singleton, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Charles Roybal, Mark G. Shoesmith, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

The defendant was indicted by the grand jury of Bernalillo County for the murder of Arthur Duran by means of a firearm, contrary to §§ 40A-2-1, 40A-2-3, 40A-29-

3.1, N.M.S.A.1953 (2d Repl.Vol. 6) and for the aggravated battery of Tim Abeyta by means of a firearm, contrary to §§ 40A–3–5 and 40A–29–3.1, N.M.S.A.1953 (2d Repl.Vol. 6). Following a jury trial the defendant was found guilty of voluntary manslaughter and aggravated battery; both offenses were found to have been committed with a firearm. After judgment and sentence were imposed, the defendant appealed. We affirm.

The defendant presents five points for reversal: (1) admission of polygraph evidence; (2) exclusion of jurors who would not return a guilty verdict for first degree murder; (3) restriction of the defendant's cross-examination of a juvenile witness; (4) admission of evidence of a prior crime of defendant; (5) admission of the testimony of a witness who was present in the courtroom in violation of the exclusionary rule.

On the evening of March 4, 1974, Penny Marie Apodaca, 17 years of age, and Lisa Reese, a 14 year old runaway from Oregon, were driving around with the defendant, Michael Ortiz, who was at that time 20 years old. They stopped in front of the Alibi Inn on Fourth Street in Albuquerque. The accounts of what followed differ. The testimony of the two women was that the defendant got out of the car and approached two men, Abeyta and Duran, who were standing outside the Inn. The defendant asked the two men for money. One of the men, Abeyta, had a gun which the defendant asked him to put away. Abeyta gave the gun to the defendant and the defendant proceeded to shoot Abeyta and Duran. The defendant and the women then drove back to the motel where the defendant was living. The police arrived after several hours. The theory advanced by the defense at trial was that the defendant had remained in the car and one of the women had shot the victims.

(1) *Polygraph Evidence*

The defendant's first point is a challenge to the trial judge's order admitting evidence of the results of a polygraph test taken on a rebuttal witness of the defendant. On its face the defendant's challenge is curious because the defendant stipulated to the qualifications of the examiner and did not object to the introduction of the evidence. The defendant's claim on appeal is that the trial judge nonetheless erred in admitting the results because there was insufficient evidence that the examiners were qualified and the tests were reliable. The defendant bases this challenge on dicta in the Supreme Court's opinion in *State v. Lucero*, 86 N.M. 686, 526 P.2d 1091 (1974), where it was said that polygraph results were admissible only when: (1) the tests were stipulated to by both parties, (2) no objections were made, and (3) the entire procedure satisfied general criteria of reliability. In *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975), decided after oral argument in this case, the Supreme Court was faced with a case where the reliability of the test was not contested, yet there was objection to its introduction. The situation in *Dorsey* was the converse of the situation before us. The Supreme Court's opinion is instructive, however, for in reversing their prior stance in *Lucero* the court indicated that henceforth the admissibility of polygraph evidence would be governed by the New Mexico Rules of Evidence. Therefore, we have no reason to suppose that parties who wish to appeal the admissibility of polygraph evidence are excused from challenging its admission at trial. Rule 103 of the Rules of Evidence (§ 20–4–103, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973)).

(2) *Exclusion of Jurors*

The defendant's second point of error is that the trial judge erred in allowing the prosecutor to voir dire the prospective jurors on their feelings regarding capital punishment and in excusing for cause those jurors who were opposed to capital punishment.

The defendant was indicted, and presumably tried, on the charge of first degree murder, which carries a mandatory death sentence. Section 40A–29–2, N.M.S.A.1953

(2d Repl.Vol. 6, Supp.1973). All those jurors who were excused for cause stated during voir dire examination that they could not return a verdict of guilty of first degree murder, regardless of what the facts showed. The defendant contests the exclusion of these jurors on two grounds. The first is that exclusion of the jurors who were opposed to the death penalty deprived the defendant of his right to a trial by a cross-section of the community. The second is that exclusion of these jurors resulted in a jury which was composed of persons who tended to favor the prosecution.

The argument that the defendant was denied his right to a trial by a cross-section of the community by the exclusion of these jurors is based on the reasoning that those excluded form an identifiable and distinct class, and, therefore, cannot be excluded except where there are compelling grounds of state interest. See e. g., *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954).

The difficulty with this argument is voiced in *Taylor v. Louisiana,* supra at 702:

> "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, * * * but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." [Citations omitted]

This same cross-section argument with respect to the elimination of jurors who opposed capital punishment was raised and rejected in *Turberville v. United States,* 112 U.S.App.D.C. 400, 303 F.2d 411, 419 (1962), where the court said:

> "The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn. * * * The rights of an accused in respect to the panel and final jury are (1) that there be no systematic, intentional exclusion of any section of the community and (2) that there be left as fitted for service no biased or prejudiced person."

The defendant's cross-section argument is addressed to the stage at which the final jury is chosen, not the stage at which the panel is chosen, and therefore must fail.

The second prong of the defendant's argument is that those jurors left for jury service after the scrupled jurors are excused, are prejudiced in the sense that they are more likely to favor the prosecution than those who are excused. Support for this general proposition is found in several recent studies, which are discussed in White, The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries, 58 Cornell L.Rev. 1176 (1973).

On the other hand, if jurors who stated they could not return a verdict which carried a mandatory death penalty were allowed to remain on the jury, this would appear to constitute a denial of the state's right to eliminate a juror who has prejudices "* * * which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence * * *." *Logan v. United States,* 144 U. S. 263, 298, 12 S.Ct. 617, 628, 36 L.Ed. 429 (1891). See also *Swain v. Alabama,* 380 U.S. 202, 219–20, 85 S.Ct. 824, 13 L.Ed.2d 759 (1964); *Hayes v. Missouri,* 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578 (1887); *State v. Pace,* 80 N.M. 364, 456 P.2d 197 (1969).

The issue generated by this conflict is "* * * whether the State's interest in submitting the penalty issue to a jury capable of imposing a capital punishment may be vindicated at the expense of the defendant's

interest in a completely fair determination of guilt or innocence * * *." *Witherspoon v. Illinois,* 391 U.S. 510, 520 n. 18, 88 S.Ct. 1770, 1776, 20 L.Ed.2d 776, 784 (1968).

In the case before us, unlike the case in *Witherspoon,* there is no option of using a bifurcated trial as a device to be fair to both sides. See White, The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries, supra at 1217 n. 218.

Before we would want to attempt to resolve the very difficult questions raised by this clash of rights, we would want more information and analysis than is available to us now. Thus, surveys that have been made concerning those who "oppose" and "favor" death penalty must be evaluated to determine whether they are applicable to jurors qualified under a post-Witherspoon standard; that is those jurors who state that there are some conceivable circumstances under which they could return a verdict of guilty of first degree murder. Another area of interest is whether there are any means of excusing jurors who "favor" the prosecution, as shown by their responses about the death penalty, so as to arrive at a jury which is neutral with regard to guilt. Other gaps in the state of current knowledge about the public's attitude towards the death penalty are indicated in Vidmar and Ellsworth, Public Opinion and the Death Penalty, 26 Stan.L.Rev. 1245 (1974).

Given the extreme importance and complexity of the issue involved, we are unable to agree with the defendant that the data is no longer in the "tentative and fragmentary" condition in which the Supreme Court found it in *Witherspoon.* Therefore, neither on the basis of the studies cited to us by the defendant nor on the basis of judicial notice can we conclude that the defendant was denied a jury that was impartial on the issue of guilt or innocence.

The defendant argues that it was improper to voir dire potential jurors on this issue because they do not have, under the present statute, any discretion in imposing the death penalty. We are cited no cases supporting the proposition that jurors cannot be questioned as to whether they will follow the law of the case and would merely observe that the right to an impartial jury "* * * carries with it the concomitant right to take reasonable steps to insure that the jury is impartial." *Ham v. South Carolina,* 409 U.S. 524, 532, 93 S.Ct. 848, 853, 35 L.Ed.2d 46 (1972) (separate opinion of Mr. Justice Marshall, dissenting in part and concurring in part). One of the most important methods of securing this right is the right to challenge, yet "* * * the right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire upon which the challenge for cause can be predicated."

Finally, we are not insensitive to the danger that the state will improperly charge defendants with crimes carrying a mandatory death penalty, so as to take advantage of the greater challenges for cause thereby allowed. This issue was not briefed in this case and we will wait until a more appropriate case is presented to confront it.

(3) *Cross-examination of a Juvenile*

The third point raised by the defendant is that his right of cross-examination was unconstitutionally restricted. The issue arose during the cross-examination of Ms. Reese, who was, as the defendant argues, a crucial witness for the state. The defendant contends that his questioning as to certain tatoos the witness had and the details surrounding the witness' incarceration in a juvenile home should have been allowed. We are unable to reach the merits of either of these arguments because of the defendant's failure to preserve his claimed errors.

The defendant challenges the refusal of the trial judge to allow an answer to the question, "Lisa, I notice that you have got a number of tatoos on your arm. Would you tell us about those?"

In his brief the defendant argues that the tatoos which the witness bore were self-inflicted, and therefore were evidence of conduct relevant to an assessment of the witness' credibility. Rule 608 of the Rules of Evidence (§ 20–4–608, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973)). Whatever the merits of this argument there is no indication in the record that the trial judge was ever informed that the defendant believed the tatoos were self-inflicted, nor was there any proffer to that effect. We cannot hold it was error for the trial judge to sustain an objection to the question given his knowledge of the purpose of asking it. Rule 103 of the Rules of Evidence (§ 20–4–103, N.M.S.A.1953 (Repl.Vol. 4, Supp. 1973)).

The issue of the exclusion of Ms. Reese's juvenile record is a more complicated one. Ms. Reese, at the time of the murder, was a runaway from Hillcrest, a juvenile institution in Oregon. The defendant attempted at trial to discuss her background:

"Q. Now, how long had you been in Hillcrest, or how long had you been there before you ran away?

"A. Altogether or just before?

"Q. Altogether.

"A. Ten months.

"Q. And you were put there because you were incorrigible, is that right?

"A. Yeah, and because I had a drug problem."

At this point the state objected to any further questioning "on this line" and the judge sustained the objection. The defendant made no proffer as to what his next questions would have been, and what he expected to show. Rule 103 of the Rules of Evidence states that error is not preserved in the case of a ruling excluding evidence unless a proffer was made or "* * * the substance of the evidence * * * was apparent from the context within which questions were asked." Because of the difficult evidentiary problems involved in this sort of questioning we are unwilling to guess as to what questions the defendant was prevented from asking. We will explain this result by a summary of the various theories under which the evidence might have been offered.

Before we can determine if evidence of the juvenile adjudication would have been admissible under Rule 609 of the Rules of Evidence, we must know "* * * if conviction of the offense would be admissible to attack the credibility of an adult." (§ 20–4–609, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973)). For evidence of the witness' bad character to have been admissible under Rule 608 of the Rules of Evidence, it would have had to have been evidence of specific conduct which was "* * * probative of truthfulness or untruthfulness and not remote in time * * *." Since we do not know of what offense the juvenile was convicted, nor what conduct the defendant intended to expose, we cannot rule on whether evidence of the conviction should have been admitted under these exceptions to the general rule of inadmissibility of character evidence. The defendant also relies on *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) as proof that their questions were wrongly excluded. The use of *Davis* compounds our problems caused by our lack of knowledge of the excluded questions. In *Davis* the juvenile's record was ordered admitted to show that the witness might have been biased because of a fear that his parole would be revoked. The Court's decision reflects a finding that the particular evidence offered had a bearing on the witness' credibility. Again, in the absence of the rejected questions we cannot speculate on how the defendant would have called into question the witness' credibility.

(4) *Prior Crimes*

The defendant predicates error on the trial court's failure to exclude testimony by a witness that contained references to a prior crime of the defendant. The circumstances surrounding the contested evidence were that Ms. Apodaca, the state's first witness, was describing the ac-

tions that she, Ms. Reese, and the defendant had taken after the shooting incident upon their return to the motel. The prosecutor asked her about the defendant's laughter and she said:

"While we were cooking he was sitting in the chair, and we were cooking and he was laughing and saying that he had gotten away with an armed robbery before, or something."

After further unrelated questioning, the subject was resumed:

"Q. Now, after you cooked up the macaroni, what did you do? What did Mike do.

"A. Then we just ate and he was telling us about the trouble he had gotten in before with armed robbery."

The defendant interjected his unsuccessful objection and then the questioning continued:

"Q. Okay, what other things did Mike Ortiz say to you at that time while you were sitting down eating?

"A. Just that he had friends and for us not to say anything, and that he had gotten away with it before."

The defendant argues that this exchange reveals evidence of a prior crime and, therefore, should have been excluded under Rule 404(b) of the Rules of Evidence (§ 20-4-404, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973)). The state argues that this exchange is admissible under various exceptions to the hearsay rule.

We view this exchange as an admission by the defendant that he had just participated in an armed robbery. The defendant was not tried for armed robbery but he was tried for murder and aggravated battery under the gun enhancement statute and this admission is therefore relevant to this offense. The entire exchange could also be viewed as a statement of the defendant's then existing mental condition. (§ 20-4-803(3), N.M.S.A.1953 (Repl.Vol. 4, Supp.1973)), which is relevant to the defendant's state of mind at the time of the shooting a short time before. *State v. Borrego,* 52 N.M. 202, 195 P.2d 622 (1948).

We do not dispute that it would have been improper for the state to have introduced separately evidence of this prior armed robbery and to that extent are in agreement with the defendant about the meaning of Rule 404(b). See *State v. Ross,* (Ct.App.) 536 P.2d 265 decided May 14, 1975.

When evidence is admissible for one purpose (to establish that the defendant had knowingly used a gun earlier in the evening) but not admissible for another purpose (to show that the defendant had committed prior crimes) how is the decision made whether to admit it or not? Rule 106 of the Rules of Evidence (§ 20-4-106, N.M.S.A.1953 (Repl.Vol. 4, Supp. 1973)) states the general rule:

"When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

This rule does not rest upon a naive faith in curative instructions; there are many instances when the dangers of prejudice, drawn into consideration by Rule 403 might dictate the exclusion of evidence otherwise admissible under Rule 105. See, Advisory Committee Notes for Proposed Rules of Evidence for United States Courts and Magistrates; *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964). In the case before us the mention of the previous armed robbery was off-handed and casual, whereas the evidentiary value of the entire exchange was compelling. Therefore, we are not willing to conclude here that the jury would not have followed limiting instructions, if requested, so that the prejudicial effect of this evidence could have been minimized. See *Spencer v. State of Texas,* 385 U.S. 564, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); *Michelson v. United States,* 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948).

(5) *Witness Exclusion Rule*

The defendant's fifth point of error is that the trial court erred in permitting the testimony of a rebuttal witness for the state who had been in the courtroom during the testimony of other witnesses in violation of the exclusion of witnesses rule.

The rule excluding witnesses takes effect upon the request of any party. Rule 615 of the Rules of Evidence (§ 20-4-615, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973)). The decision as to what remedy is appropriate in the event the rule is violated is in the discretion of the trial judge, *State v. Barboa,* 84 N.M. 675, 506 P.2d 1222 (Ct. App.1973); and the controlling consideration is prejudice to the complaining party. *State v. Barboa,* supra; *State v. Romero,* 69 N.M. 187, 365 P.2d 58 (1961).

In this case we find that the trial court's discretion was properly exercised. The witness who violated the rule, Albert Cordova, testified about a heated confrontation with the defendant that had occurred at a trailer court in the evening of the shooting. One of the prosecution witnesses, Ms. Reese, testified that there had been no argument at the trailer park; the other prosecution witness, Ms. Apodaca, testified that there had. Ms. Apodaca said she hadn't witnessed the incident and gave no details of it. The defendant denied that there had been any argument at the trailer court. Mr. Cordova was present during the two womens' testimony; he was not present during the defendant's testimony.

The purpose of the rule excluding witnesses is to give the adverse party an opportunity "* * * to expose inconsistencies in their testimony." 3 Weinstein's Evidence ¶ 615[01] & n. 1 (1975); and "* * * to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial * * *." *United States v. Leggett,* 326 F.2d 613 (4th Cir. 1964), cert. denied, 377 U.S. 955, 84 S.Ct. 1633, 12 L.Ed.2d 499 (1964).

In this case Mr. Cordova would have had to chose whether to make his testimony conform to that of Ms. Reese or to that of Ms. Apodaca; since he did not hear the defendant's testimony, he would have been unaware of which version would have exposed the defendant's testimony as inaccurate. There was no danger of Mr. Cordova adopting his elaborate story of the trailer court episode from Ms. Apodaca, since she related no details at all about it. Therefore, because in this particular situation the reasons for the exclusionary rule were not involved, it was not an abuse of the trial judge's discretion to allow the witness to testify.

Finally, the defendant is concerned with the suggestion made in *State v. Barboa,* supra, that it would be advisable for the trial judge to determine whether the counsel condoned the witness' violation of the rule. That this suggestion was substantially complied with is evinced by the trial judge's questioning of the prosecutor and the judge's subsequent statement that the prosecutor was unaware that he would be calling the witness.

The judgment and sentence are affirmed.

It is so ordered.

SUTIN, J., concurs.

WOOD, C. J., specially concurring.

WOOD, Chief Judge (specially concurring).

I concur in the result only, the extended discussion is unnecessary.

Defendant stipulated to the qualifications of the polygraph examiner and did not object to introduction of the test results. His contentions concerning the examination results are raised for the first time on appeal and should not be considered under Appellate Rule 11. See *State v. Chavez,* 82 N.M. 238, 478 P.2d 566 (Ct.App.1970).

The prospective jurors excused for cause stated they could not return a verdict of guilty of first degree murder regardless of the facts. They were properly excused.

See *State v. Pace,* 80 N.M. 364, 456 P.2d 197 (1969). At oral argument counsel conceded that the record does not show that the jurors who sat in the case were not in fact representative of a cross-section of the community. See *State v. Gonzales,* 82 N.M. 388, 482 P.2d 252 (Ct.App.1971). The argument that voir diring prospective jurors as to their beliefs concerning the death penalty deprived defendant of a representative jury has no factual support in the record.

There is no basis for the claim that cross-examination concerning a juvenile record was unduly restricted. Defendant made no tender under Rule of Evidence 103(a)(2).

The testimony of a witness that shortly after the crime defendant stated that he had gotten away with armed robbery was admissible under Rule of Evidence 803(3) because the testimony showed defendant's existing state of mind.

In permitting the witness who had remained in the courtroom to testify on rebuttal, the trial court substantially complied with the procedure suggested in *State v. Barboa,* 84 N.M. 675, 506 P.2d 1222 (Ct. App.1973).

540 P.2d 858

STATE of New Mexico, Plaintiff-Appellee,

v.

Clarence SANCHEZ, Defendant-Appellant.

No. 1685.

Court of Appeals of New Mexico.

June 25, 1975.

Certiorari Granted July 21, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Reginald J. Storment, Asst. Appellate Defender, Santa Fe, for appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Mark Gerald Shoesmith, Asst. Attys. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

Defendant was convicted of possessing heroin in violation of § 54–11–23, N.M.S.A.1953 (Repl.Vol. 8, pt. 2, 1973 Supp.). Defendant appeals. We reverse.

The denial of defendant's motion to suppress evidence seized from his apartment was reversible error for the following reasons:

(1) The mode of procedure in which the police officers gained entry into defendant's apartment was unlawful, in violation of defendant's Fourth Amendment guarantee against unreasonable searches and seizures.

(2) The manner of entry was unconstitutional, because: (a) The police officer who knocked did not give notice of his purpose. (b) The police officer did not wait to be denied admission before entering. (c) Exigent circumstances were not present which would excuse non-compliance.

A. *Facts*

About 10:15 a. m., with a search warrant, four police officers approached the rear of defendant's apartment from the alley. One of the officers knocked loudly on the door of defendant's residence. The knock was clearly audible to everyone in the house. One officer said "Police Officers" and nothing else. No one answered at the door. The police officers entered immediately. In the absence of a "no-knock" warrant, it was the customary practice of the police to call out or announce their identity and the fact that they had a search warrant before entering the house. One officer stated there was no reason to deviate from this procedure in the instant case. However, he also testified that "to be perfectly honest with you, when the door didn't immediately open, I was expecting to hear the toilet flush, you see, and what I was thinking about was getting in that house."

Prior to entry, the officers heard a loud yell by a female, and other noise, and they saw some movement of people inside the house. They immediately forced open the door and entered defendant's apartment with guns drawn. The door was unlocked and opened easily. An informant had told the police officer to move very fast or the defendant would flush the heroin down the toilet. Normally, in the officer's experience, there was always an attempt to get rid of heroin. After entering, the police officers found a female subject and two children in the kitchen. In the bedroom, defendant was sitting on the end of the bed dressed in his underwear. The bathroom was off the kitchen area, not the bedroom area. No one was found in the bathroom. A search was made and heroin was found in the top dresser drawer in defendant's bedroom.

B. *Law*

"Our view is that an officer, prior to forcible entry, must give notice of authority and purpose, and be denied admittance . . . . Noncompliance with this standard is justified if exigent circumstances exist. Examples, but not a catalogue, of exigent circumstances are . . . when prior to entry, officers in good faith believe that the person to be arrested is fleeing or attempting to destroy evidence. . . . The reasonableness of each search and seizure is to be decided upon its own facts and circumstances in light of these general standards." (Citations omitted). *State v. Baca,* 87 N.M. 12, 528 P.2d 656, 657–58 (Ct.App.1974).

The *Baca* rule allows the police to act fast and without warning under exigent circumstances when to do otherwise might allow a guilty person to escape conviction. But at the same time, the rule prevents unwarranted intrusion into private dwellings by overzealous police officers eager to execute a search. Rules similar to the one in *Baca* exist in other jurisdictions. However, conflicts have arisen in the interpretation of words and phrases in such rules and the application thereof to the facts of each case.

Conflicts arise because courts try to balance the citizen's Fourth Amendment rights against the legitimate requisites of the police when pursuing suspects, especially in narcotics cases. Some courts interpret the rules in favor of the police to facilitate the apprehending of suspects. Other courts are more sensitive to the violation of citizens' constitutional guarantee against unreasonable searches and seizures. See Note, Unannounced Entry to Search: The Law and the "No-Knock" Bill (S. 3246), 1970 Wash.U.L.Q. 205; Note, No-Knock and the Constitution: The District of Columbia Court Reform and Criminal Procedure Act of 1970, 55 Minn.L.R. 871 (1971); Annot., What Constitutes Violation of 18 U.S.C.S. § 3109 Requiring Federal Officer to Give Notice of his Authority and Purpose Prior to Breaking Open Door or Window or Other Part of House to Execute Search Warrant, 21 A.L.R.Fed. 820 (1974).

Today, we hold that the entry by police in the instant case was unlawful. We explain the critical phrases in the *Baca* rule to guide the police and the lower courts in determining the boundary between lawful and unlawful police conduct in the execution of a search warrant. Those critical phrases are: (a) "forcible entry"; (b) "notice of authority and purpose"; (c) "denial of admittance"; and (d) "exigent circumstances".

(a) *Forcible Entry*

"Forcible entry" is not restricted to breaking down a door or window. Entry through a closed but unlocked door, absent consent, is a forcible entry. Entry through an open door, absent consent, is a forcible entry. In essence, forcible entry refers to an unannounced intrusion. See, *Sabbath v. United States*, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968); *Sears v. State*, 528 P.2d 732 (Okla.Cr.1974); *State v. Miller*, 7 Wash.App. 414, 499 P.2d 241 (1972); *People v. Godinas*, 176 Colo. 1391, 490 P.2d 945 (1971); *People v. Bradley*, 81 Cal. Rptr. 457, 460 P.2d 129 (1969).

(b) *Notice of Authority and Purpose*

"Notice of authority and purpose" means that the enforcement officer must, before entry, knock at the door or announce his presence to the person in the house, and wait for a person to come to the door. He must then state that he is a police officer; that he has a warrant to search the premises and then request permission to enter and serve the warrant. *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958); *Sears v. State*, supra; *Sabbath v. United States*, supra; *State v. Miller*, supra; *Tatman v. Delaware*, 320 A.2d 750 (Del.1974).

In the instant case, the police officer knocked on the door and announced his authority in an audible manner, however, he did not wait for anyone to come to the door. Nor did he state his purpose for being present, or request permission to enter and serve the warrant. He did not, therefore, properly give notice of his authority and purpose.

(c) *Denial of Admittance*

The meaning of "denial of admission" or "refused admittance" has been stated in Annot., 21 A.L.R.Fed. 820, supra, at 834–35, as follows:

> . . . The phrase "refused admittance" has been generally interpreted not to mean an affirmative refusal, and the courts have held that an officer may justifiably conclude that he has been refused entry where after announcement he either becomes aware of activity by the occupants which is inconsistent with

action deemed reasonably necessary to open the door, or where a reasonable interval of time has elapsed without any response by the occupants, although some courts have determined that an entry made too soon after announcement precludes any opportunity by the occupant to refuse the officer admittance.

" 'There are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend upon the circumstances of each case.' " *United States v. Phelps,* 490 F.2d 644, 647 (9th Cir. 1974), quoting *McClure v. United States,* 332 F.2d 19, 22 (9th Cir. 1964), cert. denied, 380 U.S. 945, 85 S.Ct. 1027, 13 L.Ed.2d 963 (1965).

Simultaneous identification and entry is unreasonable and demands the suppression of evidence. *United States v. Doering,* 384 F.Supp. 1307 (W.D.Mich.1974); *State v. Eminowicz,* 21 Ariz.App. 417, 520 P.2d 330 (1974). Where a police officer knocked loudly on the door, stated his identity as a police officer and that he had a search warrant, demanded entry, and repeated this two or more times, waiting 30–60 seconds before breaking in, the officer could reasonably infer that he had been denied admittance. *Davis v. State,* 525 P.2d 541 (Alaska, 1974); *People v. Lujan,* 484 P.2d 1238 (Colo.1971).

In the instant case, the police officer, after announcing his authority, immediately entered. There was no activity or time interval elapse from which the police officer could conclude that admission had been denied. This made the entry unlawful. *United States v. Case,* 435 F.2d 766 (7th Cir. 1970); *United States v. Barrow,* 212 F.Supp. 837 (E.D.Pa.1962).

(d) *Exigent Circumstances*

The exception to the requirements set forth in (a), (b) and (c), supra, is called "exigent circumstances". If, *prior to entry,* a police officer in good faith believes that the person whose home is to be searched and/or the person inside to be arrested is fleeing or is attempting to destroy evidence, the police officer may enter without fulfilling the above requirements. *State v. Baca,* supra. By a good faith belief, we mean a *reasonable* belief, one resting on a reasonable assessment of the facts available to the police officer prior to entry.

The burden of showing the existence of exigent circumstances rests on the State. *People v. Lujan,* supra; *McDaniel v. State,* 54 Ala.App. 314, 307 So.2d 710 (Ala.Cr.App.1974).

Ambiguous conduct cannot provide the basis for a reasonable belief that the person or persons inside are attempting to flee or to destroy evidence.

> Our decisions . . . have held that ambiguous conduct cannot form the basis for a belief of the officers that an escape or the destruction of evidence is being attempted. *Wong Sun v. United States,* 371 U.S. 471, 483, 484, 83 S.Ct. 407, 415, 416, 9 L.Ed.2d 441, 452, 453; *Miller v. United States,* supra, 357 U.S. 301, at 311, 78 S.Ct. 1190, 1196, 1197, 2 L.Ed.2d 1332. *Ker v. California,* 374 U.S. 23, 57, 83 S.Ct. 1623, 1641, 10 L. Ed.2d 726, 752 (1963) (Opinion of Brennan, J., concurred in by Warren, C. J., and Douglas and Goldberg, JJ.).

In the instant case, prior to entry, the officers heard a loud yell by a female, and noise, and they saw some movement of people in the house. This is ambiguous activity. No officer testified that prior to entry some activity occurred which caused him to believe that defendant was fleeing, or was attempting to destroy evidence. To the contrary, one police officer testified that no reason existed to deviate from the general practice announcing authority and purpose prior to entry, even though he expected to hear the toilet flush.

Indeed, no evidence was produced by the State to suggest that defendant was fleeing or attempting to destroy evidence even after the police officers' entry. The officers found defendant sitting on his bed dressed in his underwear.

Exigent circumstances do not exist where the only fact known to the police is the readily disposable nature of the contraband that is the object of the search. *Heaton v. Commonwealth,* 215 Va. 137, 207 S.E.2d 829 (1974).

Neither do we find any other facts known to the police officers that excused compliance with the rule in *Baca.* "There is no evidence of *unusual* activity, noise, or conduct, indicating any circumstances which would bring the facts of this case within the exception. [Emphasis added]." *State v. Lowrie,* 12 Wash.App. 155, 528 P. 2d 1010, 1012 (1974).

There exists a flood of cases in the United States involving police intrusion into the sanctity of the home in search of narcotics and the suppression and nonsuppression thereof. Distinctions can be made on the facts, although we recognize that some courts adopt a more permissive attitude towards the police than we do. See *People v. McIlwain,* 28 A.D.2d 711, 281 N. Y.S.2d 218 (A.D.2d Dep.1967); *Whisnant v. State,* 303 So.2d 397 (Fla.App.3d Dist. 1974); *State v. Thorson,* 302 So.2d 578 (La.1974); *Commonwealth v. McKeever,* 229 Pa.Super. 35, 323 A.2d 44 (1974); *Carratt v. Commonwealth,* 215 Va. 55, 205 S.E.2d 653 (1974); *People v. Arnold,* 527 P.2d 806 (Colo.1974).

We believe that rigid restrictions are essential to enforcement of the *Baca* rule. We agree with Justice Brennan:

> The recognition of exceptions to great principles always creates, of course, the hazard that the exceptions will devour the rule. If mere police experience that some offenders have attempted to destroy contraband justifies unannounced entry in *any* case, and cures the total absence of evidence not only of awareness of the officers' presence but even of such an attempt in the *particular* case, I perceive no logical basis for distinguishing unannounced police entries into homes to make arrests for *any* crime involving evidence of a kind which police experience indicates might be quickly destroyed or jettisoned. Moreover, if such experience, without more, completely excuses the failure of arresting officers before entry, at any hour of the day or night, either to announce their purpose at the threshold or to ascertain that the occupant already knows of their presence, then there is likewise no logical ground for distinguishing between the stealthy manner in which the entry in this case was effected, and the more violent manner usually associated with totalitarian police of breaking down the door or smashing the lock. [Emphasis by Justice Brennan] *Ker,* supra, 374 U.S. at 61–62, 83 S.Ct. at 1644, 10 L.Ed.2d at 754.

The tainted evidence secured by entry into defendant's apartment in the instant case should have been suppressed. The entry was unlawful, in violation of defendant's Fourth Amendment rights.

Reversed. Defendant is granted a new trial.

It is so ordered.

LOPEZ, J., concurs.

HENDLEY, J., dissenting.

HENDLEY, Judge (dissenting).

I dissent.

The police officers in the instant case had reasonable grounds for their good faith belief that the defendant would destroy the evidence if they did not forcibly enter defendant's house. The majority rely on 20/20 hindsight and three cases to hold otherwise. *Ker v. California,* 374 U. S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) (Opinion of Brennan, J.); *Heaton v. Commonwealth,* 215 Va. 137, 207 S.E.2d 829 (1974); *State v. Lowrie,* 12 Wash.App. 155, 528 P.2d 1010 (1974).

The fact that defendant was found in bed and that no one in the house was attempting to destroy evidence is irrelevant to the determination of whether exigent circumstances existed to justify the forcible entry in the instant case. The relevant question is, as stated by the majority, what was in the officers' minds prior to the entry. *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (Ct.App.1974).

As the majority recognizes, the officers minds contained the following information: (1) probable cause to believe that defendant's house had heroin in it, (2) an informant's tip that the officers had better act quickly because defendant had a gun and the heroin would be flushed down the toilet, (3) a loud yell by a female in the house, (4) noise in the house, (5) movement of people in the house and (6) the announcement by the officers that they were the police, which announcement came prior to the yell, noise and movement.

It is true that Mr. Justice Brennan's opinion in *Ker,* states that ambiguous conduct cannot form the basis for a reasonable belief that evidence is being destroyed. However, that opinion recognizes that the same conduct, coupled with a showing of awareness by the occupants of the officers' presence, would be unambiguous conduct justifying a forcible entry. In *Heaton,* the only fact known was the readily disposable nature of the contraband. In *Lowrie,* the officers were in plain clothes and did not announce that they were officers, nor was there any evidence of activity or noise in the house.

In the case at bar, we have all the factors missing from the *Heaton* and *Lowrie* cases. Also, missing is the factor that makes ambiguous conduct unambiguous according to Mr. Justice Brennan in *Ker.*

Accordingly, I would affirm the trial court's decision admitting the evidence as being in compliance with *State v. Baca,* supra.

540 P.2d 864

STATE of New Mexico, Plaintiff-Appellee,

v.

Yetta J. BIDEGAIN and Louis M. Grant, Defendants-Appellants.

No. 1637.

Court of Appeals of New Mexico.
May 28, 1975.
Certiorari Granted July 2, 1975.

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J. W. Anderson, Rowley & Bowen, Tucumcari, for defendants-appellants.

Toney Anaya, Atty. Gen., Jane E. Pendleton, Andrea Buzzard, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

Defendants were convicted of possession of more than 8 ounces of marijuana under § 54-11-23, N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp.1973). We reverse and dismiss.

The defendants' auto was stopped at a state police roadblock for a routine license and registration check. Grant, who was driving, produced a registration indicating ownership in another individual. One of the officers then attempted, unsuccessfully, to find through the national computer network if the car was stolen. During this brief check, another officer asked Grant to open his car trunk, then asked Grant for keys to open footlockers found inside the trunk. These events produced a considerable quantity of marijuana.

Defendants argue, as in their pre-trial motion to suppress, that the search of the trunk was illegal and that the marijuana subsequently seized should have been excluded. Ms. Bidegain also contests the substantiality of the evidence underpinning her conviction.

Exclusion of Evidence

The Fourth Amendment of the United States Constitution encompasses the right of persons to be secure in their effects against unreasonable searches and seizures. And despite exceptions which have been allowed in some vehicular searches, the mere fact that an auto is involved "does not declare a field day for the police in searching automobiles . . . there must be probable cause for the search." *Almeida-Sanchez v. United States*, 413 U.S. 266, 269, 93 S.Ct. 2535, 2538, 37 L.Ed.2d 596 (1973), cited in *State v. Shoemaker*, 11 Wash.App. 187, 522 P.2d 203 (1974); *State v. Brubaker*, 85 N.M. 773, 517 P.2d 908 (Ct.App.1973). See also *State v. Aull*, 78 N.M. 607, 435 P.2d 437 (1967); *State v. Lewis*, 80 N.M. 274, 454 P.2d 360 (Ct.App.1969).

The standard by which all search and seizure cases are to be determined is *reasonableness*. *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). *State v. Hilliard*, 81 N.M. 407, 467 P.2d 733 (Ct.App.1970), states:

> "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). . . ."

This case is no different.

The search initiated in this case was purely exploratory. There was no reason for the officer to make the opening inquiry: "What's in the trunk?" Had the officer sought a search warrant, he would not have been able to show probable cause to justify its issuance. The record shows that the question was asked from pure speculation, which is insufficient probable cause. *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Brinegar v. United States,* supra. See *State v. Miller,* 76 N.M. 62, 412 P.2d 240 (1966).

Police officers cannot just ask anyone for permission to search his effects. As *State v. Lewis*, supra, says:

> "In appropriate circumstances and in an appropriate manner, a police officer may approach a person to investigate possible criminal behavior even though the officer may not have probable cause for an arrest. To justify such an invasion of a citizen's personal security, the police officer must be able to specify facts which, together with rational inferences therefrom, reasonably warrant the intrusion. These facts are to be judged by an objective standard—would the facts available to the officer warrant a person of reasonable caution to believe the action taken was appropriate? *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Slicker*, 79 N.M. 677, 448 P.2d 478 (Ct.App.1968)." 80 N.M. at 276, 454 P.2d at 362.

The police officers claim that they did have a proper reason to ask to look inside the trunk: to check to see if the vehicle were stolen. Their theory is that if there were items in the trunk which the defendants could not identify, or if the jack and spare tire were missing, then there might be an indication that the car had been stolen.

This explanation is insufficient because there is nothing in the record to lead the officers to suspect the car of being stolen. After learning that the local computer outlet was not operating, the officers requested their headquarters to telephone Connecticut, where the car was registered, to check out the registration. This check would have indicated, without a search, whether the car were stolen. All the police knew at the time of asking their question was that the registration was not in the name of the driver. However, a registration was produced; and it happens often enough that a car owner gives the use of his auto to another driver.

The state contends that consent was given which validated the search of defendants' car trunk. It is established in the law of New Mexico that the voluntariness of a consent "must be proved by clear and positive evidence with the burden of proof on the state." *State v. Aull*, supra.

There is a conflict in the record as to when the police officers stated that they would get a search warrant. The officers said it was after the car trunk was opened, and after they smelled marijuana in the footlockers. Grant says it was before the trunk was opened, and that he opened the trunk only because the officers said they would get a warrant, feeling that he had no choice. This conflict does not meet the "reasonableness" test of *State v. Aull*, supra, and *State v. Lewis*, supra. See Justice Marshall's dissent in *Schneckloth v. Bustamonte*, 412 U.S. 218, 891, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

Judge Hendley, in his dissent below, suggests that the seizure of marijuana resulted from a proper convergence of "probable cause" and "exigent circumstances". *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Granting, for the sake of discussion, the presence of "exigent circumstances", we do not agree that the officers' alleged sniffing of the marijuana fragrance constitutes the requisite "probable cause".

Judge Hendley cites abundant case law as authority for the proposition that smell alone constitutes probable cause. In some of these cases, the officials involved had extensive experience or training dealing with the detection of marijuana. In the instant case, there is no evidence on the record as to the training or experience of the police officers making this warrantless search. The other cases cited by the dissent are replete with other types of probable cause and mention smell only in dicta.

Even had the officers in this case properly obtained consent to open the defendants' car trunk, the mere smell of marijuana in unopened footlockers would not have given them probable cause for a further

warrantless search, absent a foundation as to the officer's expertise.

The defendants' conduct at the time of the registration check was no different from that of other motorists. The traveling public has a right to proceed without harassment. *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790 (1925). We find these "stop and snoop" tactics of the state police to be harassment, and conclude that the search was unreasonable.

The exclusionary rule must be applied and the evidence seized should have been suppressed. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961); *State v. Washington*, 82 N.M. 284, 480 P.2d 174 (Ct.App.1971).

Constructive Possession

Ms. Bidegain contests the substantiality of the evidence relating to her conviction for possession of the seized marijuana. There is no evidence on the record indicating that Ms. Bidegain had direct or constructive possession of the marijuana.

"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). There is no evidence that Ms. Bidegain had any control over the keys to the car or to the footlockers, or that she had any knowledge whatsoever of the contents of the car trunk. Mere presence in the absence of some outward manifestation is insufficient to show constructive possession. *State v. Salazar*, 78 N.M. 329, 431 P.2d 62 (1967).

Where a person is not in exclusive possession, it cannot be inferred that she knew that marijuana was present or that she had control over it unless some other incriminating circumstances or statements buttress such an inference. *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct. App.1974). No such circumstances or statements appear in the record of this case. Therefore, the case against Ms. Bidegain must be dismissed under this theory, as well as exclusion of evidence, above.

The trial court should have granted defendants' motion to suppress. Further, the evidence relied upon to sustain the conviction of Ms. Bidegain is totally insubstantial. Since the defendants presented no evidence, choosing to stand upon their motions, and since there is no evidence deemed properly admissible in this case, judgment is reversed and the charges based upon this evidence are dismissed.

It is so ordered.

SUTIN, J., concurs.

HENDLEY, J., concurs in part and dissents in part.

HENDLEY, Judge (concurring in part and dissenting in part).

Had the majority chosen to decide only the case at bar, I would have been inclined to merely register a mild dissent. However, the majority has not only decided Ms. Bidegain's and Mr. Grant's cases, but indeed has changed the law in at least two separate areas by means of an opinion that is wholly advisory. I am compelled to strenuously dissent.

The majority reverses Mr. Grant's conviction on three independent grounds, any and each of which would be sufficient to obtain the desired result. They could as easily have said, "the initial intrusion (the asking of permission to look into the trunk) being unlawful, all fruit of the intrusion is inadmissible." *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). In addition, they state yet a fourth ground for reversal of Ms. Bidegain's conviction which is again unnecessary in view of the holding with regard to the suppression of evidence. At the outset, I wish to note my agreement with the disposition of Ms. Bidegain's case. I, too, feel that the evidence against her is insubstantial. *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct.App.1974).

Mr. Grant's conviction, however, should be affirmed. The majority, in reversing it, virtually abolish the doctrine of searches upon consent, change the standards of appellate review of factual matters and gratuitously formulate law on the sufficiency of "plain smell" for probable cause when such was neither objected to nor litigated below.

Appellate Review

Basic to our review of any lower court decision is that, as to factual determinations, we are bound by the trial court's findings if they be supported by substantial evidence. *State v. Seaton*, 86 N.M. 498, 525 P.2d 858 (1974); *Williams v. New Mexico Department of Corrections*, 84 N. M. 421, 504 P.2d 631 (1972); *State v. Harrison*, 81 N.M. 324, 466 P.2d 890 (Ct. App.1970). Although the test for what will be considered substantial evidence has been variously stated, in practical effect it is that this court will not disturb findings of fact if there is any evidence whatsoever to support them. See *State v. McAfee*, 78 N.M. 108, 428 P.2d 647 (1967). Perhaps the sole exception to this rule is that in a rape case, we will weigh the testimony of the prosecutrix on the scales of inherent probability. *State v. Maestas*, 76 N.M. 215, 413 P.2d 694 (1966). The exception being inapplicable to the case at bar, we are enjoined from using any more lenient test than that of substantial evidence.

As the majority state, the evidence is conflicting as to when the officers threatened the defendants with obtaining a search warrant. The officers said it was after they first opened the trunk of the vehicle and smelled marijuana. Defendant Grant said it was before. The question of credibility of witnesses and the decision as to who to believe and who not to believe is for the trier of fact. *State v. McAfee*, supra. In spite of the fact that the trial court chose to believe the officers' version and there is substantial evidence to support it,[1] the majority do not feel bound because they say, consent must be proved by clear and positive evidence. See *State v. Aull*, 78 N.M. 607, 435 P.2d 437 (1967).

The majority confuse extent of appellate review with differing burdens of persuasion at trial. In New Mexico, while there are several levels of burden of persuasion (e.g. preponderance of the evidence, clear and positive evidence, proof beyond a reasonable doubt), there is only one standard of appellate review with the exception of rape cases. That standard is substantial evidence and it is irrelevant whether at trial a case can be made by a mere preponderance of the evidence or must be made by proof beyond a reasonable doubt. Compare *Sauter v. St. Michael's College*, 70 N. M. 380, 374 P.2d 134 (1962) and *State v. McAfee*, supra. In concluding that a heavier burden of persuasion at trial allows us to substitute our judgment for that of the trier of fact, the majority has changed the law.

"Plain Smell"

The trial court found that the initial consent to open the trunk of the vehicle

1. The trial court made the following finding with regard to when coercion on the part of the officers began:

"With regard to the search, the thing that is critical in the consideration of this matter is the time, in the Court's mind, is the time at which the officers made the statement that, 'Well,' they would get a search warrant, or left the impression with the defendants that if they didn't consent, they would get a search warrant. The testimony of Officer Williams is that he asked Mr. Grant prior to the opening of the trunk of the car if he objected, or had any objection to him looking in the trunk, if he would consent to that. The Officer's testimony is that Mr. Grant said, 'Yes,' that he could. On the other hand, Mr. Grant testified that he told him, well, he thought that he probably should have a search warrant, he wasn't sure, but Mr. Grant's testimony as to specifically when this conversation occurred, whether it was before, whether it was after the trunk was opened, and the chronology of other circumstances was rather, rather fuzzy.

"The Court finds that at that point officer Williams was given a voluntary consent to open the trunk of the vehicle. . . ."

The court's characterization of the testimony is accurate.

was valid and that after the officers smelled the marijuana, there was probable cause to search the footlockers. The majority today hold that the plain smell of marijuana emanating from a vehicle is insufficient probable cause for a search of that vehicle absent a foundation as to the officers' expertise. In light of the cases, some not indicating any expertise whatsoever, holding that the smell of marijuana, both burned and unburned, is sufficient probable cause, it is incumbent upon the defendant to object below to an officer's characterization of what he smells as marijuana in order to be heard to complain that "plain smell" is insufficient probable cause. See *United States v. Bowman*, 487 F.2d 1229 (10th Cir. 1973); *United States v. McCormick*, 468 F.2d 68 (10th Cir. 1972); *United States v. Barron*, 472 F.2d 1215 (9th Cir. 1973); *United States v. Sigal*, 500 F.2d 1118 (10th Cir. 1974); *Porter v. State*, 302 So.2d 481 (Fla.Ct.App.1974); *People v. Erb*, 128 Ill.App.2d 126, 261 N.E.2d 431 (1970); *Culpepper v. State*, 132 Ga.App. 733, 209 S.E.2d 18 (1974); *In re S.E.B.*, 514 S.W.2d 948 (Tex.Civ.App. 1974); *Rose v. City of Enterprise*, 52 Ala. App. 437, 293 So.2d 862 (1974); *Ferguson v. State*, 520 P.2d 819 (Okl.1974); *State v. Romanto*, 190 Neb. 825, 212 N.W.2d 641 (1973); *People v. Chestnut*, 43 A.D.2d 260, 351 N.Y.S.2d 26 (1974). Such was not done in the instant case. In fact, the question of "plain smell" was never mentioned throughout the entire proceedings. The whole case was litigated from the perspective of whether or not there was a valid consent to the search.

In addition, the majority state that there is nothing in the record with regard to the officers' experience with marijuana. I would point out that the defendant instigated a stipulation being entered into the record with regard to the notoriety of marijuana arrests on the highway near Tucumcari.[2] As part of the stipulation, the assistant district attorney submitted that considerable emphasis was placed on education of the officers with regard to these matters. In sum, this is not an appropriate case to review defendants' contention that the "plain smell" of marijuana is insufficient to give state officers probable cause to search vehicles on the highways.

Consent Searches

The majority hold that "police officers cannot just ask anyone for permission to search their effects." There must be a proper reason to do so. First, the record supports that the request was reasonable in the instant case. Second, I believe the law, as it stood before today, allowed such a request even if it was unreasonable.

Viewing the record in the light most favorable to the admission of the evidence, we have the following findings: (1) defendant's car was stopped at a roadblock for a routine license and registration check, (2) defendant Grant produced an Arizona driver's license and a registration indicating ownership of the vehicle in one Estes of Connecticut, (3) the officer suspected that the vehicle might be stolen, (4) one officer went to check the registration on the national computer network, (5) the computer was not operating, (6) another officer asked defendant what he had in the trunk, to which the defendant replied luggage, (7) that officer asked defendant to open the trunk and (8) the defendant opened the trunk at which point the officer recognized the smell of marijuana.

There is nothing unreasonable in suspecting that a vehicle registered to one other than the driver may be stolen.[3] The officers believed that if there were items in the trunk that the defendants could not identify or if the spare tire and jack were missing, their suspicions would be somewhat confirmed. Conversely, if the de-

2. While no statistics were mentioned in the stipulation the New Mexico State Police Annual Report to the Governor, page 33, indicates that 8,660 pounds of marijuana were confiscated in the Tucumcari area during 1974.

3. New Mexico State Police Annual Report, supra, page 63 indicates that in New Mexico alone there was a motor vehicle theft every two hours and 33 minutes or 3,000 plus auto thefts in 1973.

fendants could identify the contents of the car, and if the spare tire apparatus was present, the officers' suspicions may have been dispelled and they may have released the defendants. In my view, this procedure is as reasonable, given the circumstances of this case, as that which we approved in *State v. Lewis*, 80 N.M. 274, 454 P.2d 360 (Ct.App.1969), upon which the majority rely.

Even if it is unreasonable to request that the trunk be opened, it is important to keep in mind that nothing that happened was against the defendant's will until after the trunk was opened and probable cause was established. The officers did not force the defendant to do anything nor did they in any way force themselves into defendant's effects. Compare *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). The officers made an exploratory request and the defendant voluntarily acceded to it.

The majority today hold that such an exploratory request is unlawful. The majority imply that the officers must have within their knowledge facts approaching probable cause in order for such a request to be lawful. I can find nothing in either the *Terry* case, the *Sibron* case or the *Lewis* case to support this position. In fact, to the contrary, the Supreme Court noted in the *Terry* case that:

> ". . . Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred. We cannot tell with any certainty upon this record whether any such 'seizure' took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred."

The upshot of today's decision is to virtually nullify the doctrine of consent searches. The consent justification for searches is only used when the facts and circumstances surrounding the case indicate that the officers did not have probable cause to search. To hold that an officer must have probable cause to even request a person's consent to search is to abolish consent searches entirely.

Yet searches upon a valid and voluntary consent have long been a part of our law. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The Supreme Court in the *Schneckloth* case pointed out that consent searches serve a useful purpose in our law, not only in the solution and prosecution of crime but also as insurance that a wholly innocent person is not wrongly charged with a criminal offense. To my mind the Supreme Court omitted the most compelling reason to allow consent searches and that is respect for the autonomy of our citizens.

Today's decision places law enforcement officers at their peril to request that anyone consent to a search of his effects. To insure the admissibility of any subsequently discovered evidence, it would be good practice for an officer who believes he has probable cause to search to obtain a warrant. However, a suspect, who, in fact, has nothing to hide will often want to consent to an intrusion into his privacy in order to clear himself immediately of suspicion. The majority decision may not allow the innocent person the liberty of clearing himself at the scene of the investigation. Perhaps this is the most substantial justification for allowing consent searches, i. e. respect for the autonomy of the innocent suspect who the authorities have probable cause to believe committed the crime. Unable to consent to a search which would establish his innocence, he would be detained until formal procedures were completed before he could be released.

To the instant officers, Mr. Grant was under suspicion of possessing a stolen au-

tomobile. They asked what he had in the trunk, to which he replied luggage. Perhaps be believed that if he allowed them to see the luggage, they would let him be on his way. Such should be his right. Needless to say, he did not count on them smelling the marijuana. But there is no constitutional protection against the adverse consequences of an effort to clear oneself. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 564 (1971). The purpose of the Fourth Amendment to the United States Constitution is not to protect people from their own foolishness, but rather to protect people from arbitrary and unreasonable police conduct. I see nothing unreasonable in allowing the police an exploratory request and then leaving it up to the citizen to either protect or not protect himself *as he so desires.* Were there any hint of threats or force or show of authority from the trial court's findings, I would feel otherwise. There being none, I would affirm Mr. Grant's conviction.

540 P.2d 872

Rudolph A. FELDMAN, a/k/a Rudy Feldman, Plaintiff-Appellee,

v.

REGENTS OF the UNIVERSITY OF NEW MEXICO, Lavon McDonald and Ferrel Heady, Defendants-Appellants.

No. 2035.

Court of Appeals of New Mexico.

Sept. 3, 1975.

Rehearing Denied Sept. 8, 1975.

Robert G. McCorkle, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendants-appellants.

Thomas A. Tabet, Marchiondo & Berry, P. A., Albuquerque, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Plaintiff and defendant Heady contracted that plaintiff would serve as the head football coach at the University from February 1, 1972 to January 31, 1977. During the contract term, plaintiff was dismissed as head football coach. He sued, alleging five theories for recovery of damages. Defendants moved to dismiss on the basis of the first two defenses stated in the answer. Those defenses were: 1. The complaint failed to state a claim upon which relief could be granted, and 2. Plaintiff failed to exhaust his administrative remedies. When the motion to dismiss came on for hearing, the parties stipulated that the court could consider evidence and treat the motion to dismiss as a motion for summary judgment. The trial court denied the motion. We granted defendants' application for an interlocutory appeal. Section 21–10–3, N.M.S.A.1953 (Repl.Vol. 4, Supp. 1973). We consider the two issues identified above.

Disposition of most of the arguments is governed by summary judgment procedure. See § 21–1–1(12)(b) and 21–1–1(56), N.M.S.A.1953 (Repl.Vol. 4). Defendants, as movants, had the burden of showing an absence of a genuine issue of fact or that they were entitled to summary judgment as a matter of law. Once defendants made a prima facie showing that they were entitled to summary judgment, the burden was then on plaintiff to show there was a genuine factual issue or that defendants were not entitled to summary judgment as a matter of law. *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972).

Failure to state a claim.

Defendants advance two grounds as to why plaintiff's complaint fails to state a claim for relief.

The first ground relied on is that portion of § 73–25–9, N.M.S.A.1953 (Repl.Vol. 11,

pt. 1) which states: "The regents shall have power to remove any officer connected with the university when in their judgment the interests require it." In *Smith v. Directors, Insane Asylum,* 19 N.M. 137, 141 P. 608 (1914), Smith was discharged as medical superintendent of the New Mexico Insane Asylum prior to the expiration of his written contract. It was held that Smith could not recover damages even though "it is probably true that his removal was occasioned solely by political considerations . . . ." Smith could not recover damages because of a statute which was a part of his contract. That statute stated: "'The Board of directors shall have power to remove any officer or employe of said insane asylum when in their judgment it is to the best interest of said institution.'"

Section 73–25–9, supra, gives the regents power to remove any *officer. Smith v. Directors, Insane Asylum,* supra, involved a statute giving the directors power to remove any *officer or employee.* Unless plaintiff, as head football coach, was an officer of the university, § 73–25–9, supra, is not applicable.

We do not concern ourselves with definitions of "officer." See *Lacy v. Silva,* 84 N.M. 43, 499 P.2d 361 (Ct.App.1972) and cases therein cited. We do not do so because whether the head football coach is an "officer" is not something an appellate court can resolve as a matter of law; rather it is a question of fact. Defendants had the burden of showing prima facie that plaintiff was an officer. They did not meet the burden; the record has nothing indicating plaintiff was an officer of the University.

The second ground relied on is that plaintiff's various damage claims are tort claims and the State has not consented to be sued in tort. Defendants rely on *Eyring v. Board of Regents,* 59 N.M. 3, 277 P.2d 550 (1954). No such question was stated in the application for an interlocutory appeal. See Appellate Rule 6(b)(2). The question is raised for the first time in the briefs; it will not be considered. Compare *Hillis v. Meister,* 82 N.M. 474, 483 P.2d 1314 (Ct.App.1971).

Failure to exhaust administrative remedies.

Before plaintiff can apply to the courts for relief, he must first exhaust his administrative remedies. *State Racing Commission v. McManus,* 82 N.M. 108, 476 P.2d 767 (1970).

Plaintiff "objects" to the issue of administrative remedies, contending that the question of administrative remedies is a factual issue which could not be properly resolved in a summary judgment proceeding. The answer is that if defendants made a prima facie showing of no genuine issue of fact, it would have been plaintiff's burden to show a factual issue existed. Plaintiff cannot defeat a prima facie showing for summary judgment by contending that a factual issue exists. *Southern Union Gas Co. v. Briner Rust Proofing Co.,* 65 N.M. 32, 331 P.2d 531 (1958).

Plaintiff asserts he did not have an administrative remedy available. This argument is directed to plaintiff's status. His contract states that his appointment as head football coach was "governed by applicable policies stated in the *Faculty Handbook* or the *Staff Personnel Policies and Practices Manual,* published and distributed by the University . . . ." Plaintiff contends he was neither "faculty" nor "staff" but "an employee independently and separately hired by defendant University." Alternatively, plaintiff contends that if he was either "faculty" or "staff," he was not required to follow the administrative procedure from the applicable handbook or manual because defendants failed to follow the proper procedures for his removal.

Plaintiff's status as faculty, staff or independent employee was a question of fact. Defendants do not contend to the contrary and they do not rely on any particular status in claiming that plaintiff failed to exhaust administrative remedies. According-

ly we do not consider administrative remedies under the handbook or the manual.

Defendants rely on the Regents' statement of "Rights and Responsibilities" appearing in the faculty handbook. The showing is that this statement was also distributed separately from the handbook. This statement recognizes the authority of the administration in all matters relating to the operation of the University but the Regents "reserve unto themselves the right to consider and determine . . . [in the exercise of their discretion] any matter relating to the University." The statement continues:

> "Appeals of Administration, Faculty, or Student decisions should be addressed in writing to the Regents via the President of the University. The Regents will consider such appeals as a body. In their discretion, the Regents may request written briefs or oral argument or both."

Plaintiff states the above quoted appeal provision is not an administrative remedy because he is neither administration, faculty nor student. The answer is that the Regents have reserved themselves the right to consider "any matter relating to the University," and have provided for appeals. Whether his discharge was "administration" or "faculty" we need not decide, because it was one or the other. Defendants made a prima facie showing that an administrative remedy existed.

Relying on *State ex rel. Norvell v. Credit Bur. of Albuquerque,* 85 N.M. 521, 514 P.2d 40 (1973), plaintiff asserts that exhaustion of his administrative remedies would have been vain or futile. The answer is there is nothing in the record supporting this contention. Our concern with this argument is that it comes close to indirectly admitting that plaintiff failed to exhaust his administrative remedy of appealing to the Regents. However, we will consider it as argument short of an admission.

There is nothing in this record indicating that plaintiff did or did not exhaust his administrative remedy. Absent such a showing, defendants failed to make a prima facie showing entitling them to summary judgment. *Goodman v. Brock,* supra.

The order denying summary judgment is affirmed. This affirmance does not foreclose further motions for summary judgment in the trial court.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

540 P.2d 875

STATE of New Mexico, Plaintiff-Appellant,

v.

Donald RASCON, Defendant-Appellee.

No. 1780.

Court of Appeals of New Mexico.
Aug. 6, 1975.

Certiorari Granted Sept. 11, 1975.

James L. Brandenburg, Dist. Atty., James F. Blackmer, Asst. Dist. Atty., Albuquerque, for plaintiff-appellant.

Jerome M. Ginsburg, Santa Fe, for defendant-appellee.

OPINION

HENDLEY, Judge.

The state appeals an order suppressing statements given by defendant to officers of the Albuquerque Police Department. The question to be decided is whether failure to notify the Public Defender's Office that a person is being forcibly detained, under the mandate of § 41–22A–12(C), N.M.S.A.1953 (2d Repl. Vol. 6, 1972, Supp. 1973), constitutes grounds for suppression of statements taken during such forcible detention. We affirm.

The facts disclosed by the record, although somewhat confusing, are not in serious dispute. It appears that on June 15, 1974, defendant was allegedly involved in an assault with intent to rape. On June 16, 1974, Detective Baca of the Albuquerque Police Department was assigned to the case. On June 20, 1974, upon completion of his investigation, Baca obtained an arrest warrant, served it on the defendant and took him into custody. On that day, after twice being advised of his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), and, after having signed a waiver of those rights, defendant made oral and written statements concerning his involvement in the offense. A criminal complaint was also sworn out on June 20, 1974. The record does not indicate whether this was before or after the making of the statements nor does it indicate when the complaint was filed. We will assume a proper chronology.

The confusion in this case concerns defendant's representation by the Public Defender's Office. The transcript of the hearing on the motion to suppress reveals that Assistant Public Defender, John Walker, was somehow assigned to the case

on June 18, 1974. He immediately called the jail in order to ascertain whether the defendant had been taken into custody. Learning that defendant was not yet in jail, Walker called again three days later, at which point defendant had already been in custody for one day and had given the statements which underlie the motion to suppress. Walker appeared at defendant's arraignment and represented him thereafter.

The record indicates that neither the defendant nor Detective Baca knew that Walker had been assigned to the case at the time of the arrest or of the giving of the statements. Indeed, how Walker knew of the case or thought of himself as defendant's attorney is still a complete mystery despite the fact that fully two-thirds of the transcript is devoted to a colloquy between Walker, the trial court and the state's attorney attempting to answer that question. However, it is undisputed that the Public Defender was not called or notified that defendant was being forcibly detained.

Section 41-22A-12, N.M.S.A.1953 (2d Repl. Vol. 6, 1972, Supp.1973) reads as follows:

"41-22A-12. *Explanation of rights—Waiver of counsel.*—A. If any person charged with any crime that carries a possible sentence of imprisonment appears in any court without counsel, the judge shall inform him of his right:

"(1) to confer with the district public defender; and

"(2) if he is financially unable to obtain counsel, to be represented by the district public defender at all stages of the proceedings against him.

"B. Following notification of any person under subsection A of this section, the judge shall notify the district public defender and continue the proceedings until the person has conferred with the district public defender.

"C. Peace officers shall notify the district public defender of any person not represented by counsel who is being forcibly detained and who is charged with, or under suspicion of, the commission of any crime that carries a possible sentence of imprisonment, unless the person has previously appeared in court upon that charge.

"D. Any person entitled to representation by the district public defender may intelligently waive his right to representation. The waiver may be for all or any part of the proceedings. The waiver must be in writing and countersigned by a district public defender."

The trial court's order granting defendant's motion to suppress stated:

"* * * that although the Defendant was advised of his rights, the investigating officer never notified the Public Defender's Office that the Defendant was in custody as required by the provisions of Section 41-22A-12 ([C]), NMSA 1953, 1973 Supp."

The state acknowledges that the police made no attempt to comply with § 41-22A-12(C), supra. Rather, the state argues that there is no requirement for notification of the Public Defender's Office prior to initial appearance. The state bolsters its argument with a plethora of potential complications having nothing to do with the instant case. They mainly concern conflict of interest situations which are simply not present in defendant's case. Should such a situation arise, we will decide it at that time. The state also complicates the instant case by presenting a number of hypothetical dilemmas relating to § 41-22A-12(D), supra. However, we need not resolve them because we decide the case on the narrower ground of a violation of § 41-22A-12(C), supra. In any event, the state's arguments are all commentary on the wisdom of the statute. We express no opinion on the wisdom of the statute. That task is for the legislature and its conscience.

The state neither contends that there was compliance with the statute nor

does it seriously contend that the statute is unconstitutional. Its argument is that rights designed to be protected by the mechanism of § 41-22A-12(C), supra, are protected in other ways. Hence, compliance therewith is unnecessary. Again, this argument should be addressed to the legislature. It is fundamental that this court does not sit to substitute its judgment for that of the legislature. *Village of Deming v. Hosdreg Company,* 62 N.M. 18, 303 P.2d 920 (1956).

We are not concerned here with the normal constitutional rights. Those rights of defendant have been amply protected. For example, the record discloses an exhibit twice signed and multi-initialed by defendant entitled "ADVICE OF RIGHTS YOUR CONSTITUTIONAL RIGHTS" —it reads, omitting the initialing and signing, in part as follows:

"Before we ask you any questions, you must understand your constitutional rights.

"I am a member of the Albuquerque Police Department and our Department is investigating (crime) *ATTEMPTED RAPE* which occurred at *2519 New York N. W. # 50* on the *20th* day of *June* at approximately 0130 AM PM

"You have the right to remain silent.

"Anything you say can be used against you in court.

"You have the right to talk to a lawyer for advice before we ask you any questions and to have a lawyer present with you while we ask you questions.

"If you cannot afford a lawyer, one will be appointed at no cost to you before we ask you any questions, if that is your desire.

"If you decide to answer questions now, without a lawyer present, you will still have the right to stop answering my questions at any time. You also have the right to stop answering my questions at any time until you talk to a lawyer for advice.

"I have been advised of and understand my constitutional rights.

"I have read and understand my constitutional rights."

"WAIVER OF RIGHTS

"I have read this statement of my rights, and understand what my constitutional rights are. (I have been advised of and understand my constitutional rights in this matter).

"I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

What we are concerned with are the additional statutory rights granted by the legislature. Under the facts of the instant case we have a violation of a specific statutory mandate under subsection C. True it does not specify when the Public Defender must be called, however, in light of the mandate of subsection D it is obvious that it is before the waiver is signed if the defendant is indigent. Here, the defendant was indigent. The question is whether suppression of the statements is an appropriate remedy. Our answer is in the affirmative.

The state contends that should we affirm the trial court, we would be excluding perfectly good and relevant evidence for violations of merely ministerial or procedural rules. See *State v. Perea,* 85 N.M. 505, 513 P.2d 1287 (Ct.App.1973). We disagree. The rights granted by the statute are not ministerial or procedural. It cannot be said that advice of counsel at an accusatory stage is ministerial or procedural. A review of the Sixth Amendment of the United States Constitution and the myriad cases decided thereunder totally disputes such a contention. The rights granted by the statute are simply an extension of the various rights guaranteed by the Constitution.

As we have heretofore indicated, we will not attempt to discuss the rationale behind the statute. We simply state that the state can extend, but not lessen, constitutional guarantees. *Cooper v. California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). Having decided to extend the constitutional guarantees by statute, the legislative enactment must be upheld.

As stated in *Village of Deming v. Hosdreg Company,* supra:

> "* * * [T]he public policy of a state is for the legislature whose judgment as to the wisdom, expediency or necessity of any given law is conclusive on the courts unless the declared public policy runs counter to some specific constitutional objection."

It cannot be said that the statute is subject to any specific constitutional objection.

The state asks us to impose some sanction other than the exclusionary rule. We fail to see how any other sanction would be permissible in light of the basic constitutional guarantees. When a statute is so closely related to constitutional guarantees, suppression of evidence obtained in violation of the statute is an appropriate remedy. See *Greven v. Superior Court,* 71 Cal.2d 289, 78 Cal.Rptr. 504, 455 P.2d 432 (1969); *United States v. Brod,* 324 F. Supp. 800 (S.D.Tex.1971).

The order of the trial court suppressing the statements is affirmed.

It is so ordered.

LOPEZ, J., concurs.

SUTIN, J., (dissenting).

SUTIN, Judge (dissenting).

I dissent.

Mr. Justice Abe Fortas opened a dissenting opinion with these words.

> This case calls not for the judgment of Solomon but for the dexterity of Houdini. *Fortnightly Corp. v. United Artists,* 392 U.S. 390, 402, 88 S.Ct. 2084, 2091, 20 L.Ed.2d 1176 (1968).

It takes the dexterity of a Houdini to affirm the instant case on the basis of a violation of § 41-22A-12(C), N.M.S.A.1953 (2d Repl. Vol. 6, 1973 Supp.) set forth in the majority opinion.

A. *The Public Defender Act is an Indigent Defense Act.*

In 1973, the legislature adopted the Public Defender Act. Laws 1973, ch. 156. The title of the Act is: "An act relating to crimes; providing for the *defense* of indigent persons accused of certain crimes; making an appropriation." [Emphasis added].

In criminal law, "The defense of a person charged with crime includes every step in the proceedings from the time of arraignment until his acquittal or conviction, in accordance with the law." *State v. Hudson,* 55 R.I. 141, 179 A. 130, 135, 100 A.L.R. 313 (1935).

In *State v. Murphy,* 87 N.J.L. 515, 530, 94 A. 640, 646 (1915), the court said:

> It is to be observed that the Constitution does not provide that the defendant shall have the right to have assistance of counsel from the time of his arrest, but for his defense. Obviously, the word "defense," as here used, means that a defendant is entitled to be represented and defended by counsel when put in jeopardy on his trial, and that his counsel shall have reasonable access to the prisoner for the purpose of preparing his defense. . . . by no stretch of the imagination can the provision be construed to mean that one accused of crime shall have the benefit of counsel to advise him as to whether or not he shall confess. *Confession is a thing entirely apart from defense upon a trial.* [Emphasis added].

The Public Defender Act was enacted to defend an indigent in the accusatory stage.

B. *Defendant was only entitled to advice of rights.*

Prior to taking any oral or written statements from a defendant, the only duty a

police officer owes defendant is to give defendant effective advice of his constitutional rights, i. e., the *Miranda* warnings. *State v. Avila*, 86 N.M. 783, 527 P.2d 1221 (Ct.App.1974). Advice of these rights can be waived. *State v. Carlton*, 83 N.M. 644, 495 P.2d 1091 (Ct.App.1972). The advice of rights and waiver thereof are as set forth in the majority opinion. Before the confession was given, defendant was twice advised of his constitutional rights and defendant waived them. The defendant could ask for no more.

The trial court erroneously suppressed the confession.

C. *The public defender was not authorized to represent the defendant until defendant was found to be indigent by a court and wanted a lawyer.*

Section 41–22A–12(C), supra, provides that the police officer shall notice the public defender when a person is detained. This is the "notification" stage of the arrest proceedings.

Section 41–22A–10(B), N.M.S.A.1953 (2d Repl. Vol. 6, 1973 Supp.), of the "Public Defender Act" provides that "The district public defender shall represent every person without counsel *who is financially unable to obtain counsel* * * *." [Emphasis added].

Section 41–22–2(C), N.M.S.A.1953 (2d Repl. Vol. 6, 1973 Supp.), of the "Indigent Defense Act" defines a "needy person".

> C. "needy person" means a person who, *at the time his need is determined by the court*, is unable, without undue hardship, to provide for all or a part of the expenses of legal representation from available present income and assets; * * * . [Emphasis added].

This determination is deferred until defendant makes his first appearance in court. Section 41–22–5(A), N.M.S.A.1953 (2d Repl. Vol. 6). This is the "defense" stage of the criminal proceedings.

At the hearing held upon defendant's motion to suppress his confession, no evidence was presented that at the time defendant confessed, he was a "needy person * * * who is financially unable to obtain counsel". Defendant was present and was not called upon to testify.

It is obvious that the public defender had no right as an attorney to advise or to represent the defendant prior to the time the court determined he was a "needy person" or at the time the confession was made. *State v. Anaya*, 76 N.M. 572, 417 P.2d 58 (1966); *State ex rel. Peters v. McIntosh*, 80 N.M. 496, 458 P.2d 222 (1969); *State v. Powers*, 75 N.M. 141, 401 P.2d 775 (1965); Annot., Determination of Indigency of Accused Entitling Him to Appointment of Counsel, 51 A.L.R.3d 1108.

The only purpose that I can conceive of the duty of a peace officer to notify the public defender under § 41–22A–12(C), supra, is to allow the public defender to question whether this person is a "needy person". It does not provide that the public defender, upon notification by a peace officer, shall be attorney for the defendant to advise and represent him. See Annot., Construction and Effect of Statutes Providing for Office of Public Defender, 36 A.L.R.3d 1403.

The majority opinion cannot state one reason why the rights granted a detained person by § 41–22A–12(C), supra, are an extension of the various rights guaranteed by the Constitution. It states:

> *The rights granted by the statute* are not ministerial or procedural. It cannot be said that *advice of counsel* at an accusatory stage is ministerial or procedural." [Emphasis added].

"Advice of counsel" forms no part of the Public Defender Act at the "notification" stage. To adopt the rule of the majority opinion would require a peace officer to notify the public defender if a Rockefeller were detained. We must not apply

the Public Defender Act to a millionaire or the President of the United States at the "notification" stage. The public defender's duties begin as an attorney when a court has determined that the person detained is a "needy person".

The public defender successfully overstepped his rights in the district court. He should be denied that zealous attempt to defend a detained person in this Court.

The defendant relies on the following statement of the assistant public defender at the hearing:

> I was representing Mr. Rascon while this confession was extracted from him * * *.

This conclusion is groundless. Defendant's brief fails to mention any determination of defendant's indigency by any court before the confession was obtained. Defendant's brief and the majority opinion are silent on the pertinent sections of the Public Defender Act and the Indigent Defense Act.

The dexterity of Houdini cannot legally affirm the order of the trial court.

540 P.2d 1291

STATE of New Mexico, Petitioner,

v.

Clarence SANCHEZ, Respondent.

No. 10559.

Supreme Court of New Mexico.
Oct. 8, 1975.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for petitioner.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Reginald J. Storment, Asst. App. Defender, Santa Fe, for respondent.

OPINION

OMAN, Justice.

The question presented to us for review, which is here upon a writ of certiorari directed to the New Mexico Court of Appeals, is whether the entry into the resi-

dence of defendant, pursuant to a lawful search warrant, violated his constitutional rights against unreasonable searches as guaranteed by article II, § 10 of the Constitution of New Mexico and the fourth amendment to the Constitution of the United States, made applicable to the states by the fourteenth amendment to the Constitution of the United States. *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 84 A.L.R.2d 933 (1961). The police officers who entered and searched defendant's home found and seized heroin. He was charged and convicted of possessing heroin in violation of § 54–11–23, N.M.S.A. 1953 (Repl.Vol. 8, pt. 2, Supp.1973).

The district court refused to suppress the seized heroin as evidence. The Court of Appeals reversed defendant's conviction and granted him a new trial on the ground that the evidence should have been suppressed, because the procedures followed by the officers in entering defendant's home were unlawful. *State v. Sanchez,* (Ct.App.), 88 N.M. 378, 540 P.2d 858, opinion issued June 25, 1975. We reverse the Court of Appeals and remand the cause to that court for such further action as it deems appropriate.

As stated in the majority opinion of the Court of Appeals, that court in *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (Ct.App.1974), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974), held "that an officer [armed with a search warrant] prior to forcible entry, must give notice of authority and purpose, and be denied admittance. This is a general standard. Noncompliance with this standard is justified if exigent circumstances exist." An exigent circumstance exists if, prior to entry, officers in good faith believe that the contraband, or other evidence, for which the search is to be made is about to be destroyed.

In the instant case, the officers did knock and did announce that they were police officers, and a few seconds elapsed before they entered through an apparently unlocked door. The State makes no claim that the officers gave notice of their purpose or were denied entrance. At least there was no express denial, and there was no invitation to enter by defendant or other occupant of the house. The State's position is that exigent circumstances justified the entry.

The questions of "good faith belief" and "exigent circumstances" are questions of fact for the trial court to determine, and the findings of the trial court in these regards are entitled to be accorded the same weight and given the same consideration as is generally accorded a trial court's findings by appellate courts. See *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); *Mapp v. Ohio,* supra; *State v. Kenard,* 88 N.M. 107, 537 P.2d 1003 (Ct.App.1975). Substantial evidence is the measure of proof, or the quality and quantity of the evidence, required to support the findings of the trial court. *Williams v. New Mexico Department of Corrections,* 84 N.M. 421, 504 P.2d 631 (1972); *State v. McAfee,* 78 N.M. 108, 428 P.2d 647 (1967); *State v. Kenard,* supra. In determining whether the evidence is substantial in support of the claimed justifiability of the entry, the facts and circumstances of each case must be considered. See *State v. Everitt,* 80 N.M. 41, 450 P.2d 927 (Ct.App. 1969). The exigency of the circumstances, as with the probable cause required to make a search reasonable under the circumstances, depends on practical considerations. *United States v. Romero,* 484 F.2d 1324 (10th Cir. 1973). The circumstances must be evaluated from the point of view of a prudent, cautious and trained police officer. *United States v. McCormick,* 468 F.2d 68 (10th Cir. 1972), cert. denied, 410 U.S. 927, 93 S.Ct. 1361, 35 L.Ed.2d 588 (1973).

Four trained police officers of several years experience made the entry and conducted the search here in question. There is absolutely nothing in the record to suggest they were other than prudent and cautious officers. The exigent circumstances, or the circumstances which the trial court

must have felt made the entry justifiable, which are clearly supported by the evidence adduced at the hearing on the motion to suppress, were:

(1) The officers had probable cause to believe and in good faith did believe that defendant was selling heroin from his home and that there was heroin therein.

(2) They had received information from an informant who had assisted in the investigation leading to the issuance of the warrant and to the search, that defendant kept a weapon in the house and that in executing the warrant the officers would have to move rapidly or defendant would flush the heroin down the toilet.

(3) As above stated, the officers were all experienced and knew from their experience that "normally there is an attempt to get rid of heroin before you [the officers] get into the house."

(4) After knocking on the door and announcing that they were police officers, they could see people moving and hear the sound of voices coming from inside the house. One of these voices was described as yelling or screaming as if someone was calling to another for the purpose of getting attention.

[5] In our judgment, these circumstances justified the officers in entering without waiting to be invited or denied entry. Although the facts are somewhat different in each case, we believe the views expressed in each of the following cases support our position. *United States v. Allende,* 486 F.2d 1351 (9th Cir. 1973); *United States v. West,* 328 F.2d 16 (2nd Cir. 1964); *People v. Arnold,* 527 P.2d 806 (Colo.1974); *Henson v. State,* 236 Md. 518, 204 A.2d 516 (1964); *Commonwealth v. Manduchi,* 203 Pa.Super. 373, 198 A.2d 613 (1964); *Heaton v. Commonwealth,* 215 Va. 137, 207 S.E.2d 829 (1974); *Whisnant v. State,* 303 So.2d 397 (Fla.App.1974).

The decision of the Court of Appeals is reversed and the cause remanded to that court for such further action as it deems appropriate.

It is so ordered.

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

SOSA, J., dissents.

SOSA, Justice (dissenting).

I feel that in the instant case the police failed to show the requisite exigent circumstances necessary to enter a house without identifying themselves and announcing their purpose. *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (Ct.App.1974). First, it is my opinion that exigent circumstances can only manifest themselves at the time the officers appear for the search and should be judged by what a reasonable prudent officer sees and hears at that time. Exigent circumstances cannot be alleged in an affidavit by a "reliable informant". Second, after the officers had arrived at the house in the instant case, the circumstances they encountered there fell short of the requisite exigent circumstances necessary to enter that house without identifying themselves and announcing their purpose. Officer Florio testified that Detective Montoya knocked, said "police officers", and immediately forced the door open and entered. Officer Dwyer testified that he did not hear anything specific to cause concern prior to their entry, that Montoya's knock was not even as loud as a polite knock, and that he did not recall anyone making an announcement or identification. Officer Erickson testified that the voices he had heard coming from inside were children's voices and that he did not remember any statements or announcements made by them prior to bursting into the house.

The constitutional right to be free from unreasonable searches and seizures, I feel, were clearly violated in the instant case. Thus, I would concur in the Court of Appeals' opinion in *State v. Sanchez,* 88 N.M. 378, 540 P.2d 858 (1975), and would affirm that decision.

540 P.2d 1294

AMERICAN BANK OF COMMERCE,
Plaintiff-Appellant,

v.

Italo J. COVOLO, Oliver Marianetti, A. W. Dekker, George T. Harris, Jr., Lloyd Hurley, Joseph R. McNeany and Lawrence Wilkinson, Defendants-Appellees.

Arthur W. DEKKER et al.,
Plaintiffs-Appellees,

v.

AMERICAN BANK OF COMMERCE,
Defendant-Appellant.

No. 10025.

Supreme Court of New Mexico.

Sept. 16, 1975.

Rehearing Denied Oct. 7, 1975.

Coors, Singer & Broullire, Robert N. Singer, Henry G. Coors, IV, Albuquerque, for appellants.

Joseph R. McNeany, pro se.

Modrall, Sperling, Roehl, Harris & Sisk, John R. Cooney, Paul M. Fish, Albuquerque, for Marianetti and others.

Mark B. Thompson, III, Albuquerque, for Hurley.

OPINION

STEPHENSON, Justice.

This appeal involves two consolidated cases in which the district court determined there was no liability on the part of the individual defendants to the American Bank of Commerce (the Bank) upon their guaranties of certain corporate notes and upon other promissory notes.

Desiring to enter the restaurant business, Italo's, Inc. (the Corporation) sought financing from the Bank. As part of the security for a $100,000 loan, the Bank took a first mortgage on the Corporation's real estate, a pledge of and second lien upon the liquor license of Italo Covolo, one of the Corporation's principal stockholders, and personal unconditional guaranties in the amount of $25,000 each, executed by stockholders, the defendants herein (the Guarantors). Thereafter, an additional $10,000 promissory note was executed by Mr. Harris on behalf of the Corporation, and Messrs. Harris, Hurley and Wilkinson also executed separate $4,000 personal notes to the Bank.

The Bank failed to perfect the security interest in the liquor license.[1] The Corporation fell upon evil times and declared bankruptcy. But for the Bank's failure to perfect its security interest in the liquor license, the proceeds of the bankruptcy would have been sufficient to extinguish the Guarantors' liabilities to the Bank.

The Bank sued the Guarantors on the guaranties to recover (1) interest, attorney's fees and costs due on the $100,000 note; (2) the same relief on the $10,000 note; and (3) from defendants Harris, Hurley and Wilkinson the unpaid principal balances, interest, attorney's fees and costs on the three $4,000 notes.

The defenses were essentially that (1) the $100,000 loan was intended by all parties to be secured, in part, by the lien on the liquor license and that by virtue of the Bank's failure to perfect the security interest, the Guarantors lost their right to subrogation and therefore their obligation to the Bank was terminated; (2) the $10,000 note was also intended to be secured by the liquor license and the Bank's omissions similarly discharged the Guarantors' liability on that note; and (3) the three $4,000 notes were intended by both the signators and the Bank to have been corporate obligations, also secured by the liquor license, and hence, unenforceable against the individual signators.

After trial, the district court adjudged the defendants absolved from all liability based upon the three foregoing defenses. The Bank appeals.

We will first deal with the rights and obligations of the parties in regard to the $100,000 note. We must consider the nature of the duty owed by the Bank to the Guarantors in protecting the latter's right of subrogation. The Guarantors argued, and the trial court found, that the Bank had a duty to the Guarantors to act in good faith, to exercise due care and to act in a commercially reasonable manner, and that failure to perfect the security interest was a breach of the duty thus discharging the Guarantors. It was successfully urged that this duty arises not only out of the general law of suretyship[2] but also out of the New Mexico Uniform Commercial Code, §§ 50A-1-101 to 9-507 N.M.S.A.1953 (hereinafter UCC §§ 1-101 to 9-507), specifically, §§ 1-201, 1-203 and 3-606.[3] Much of the Guarantor's argument is couched in terms of the Bank's "fiduciary" obligations to the Guarantors. No authority is cited to support the remarkable proposition that a bank owes fiduciary duties to its debtors and obligors. Notwithstanding the growth of consumerism, this nirvana is yet to be reached.

Section 3-606 codifies certain suretyship defenses. Under UCC § 3-606(1)(b), the surety is discharged when, without his consent, the creditor "unjustifiably impairs any collateral for the instrument." The Guarantors contend that the Bank's failure to perfect the security interest in the liquor license was an unjustifiable impairment because its value became unavailable to the Guarantors when the

1. See *State v. Scarborough*, 78 N.M. 132, 429 P.2d 330 (1967).

2. Several courts have held that under general suretyship principles there is an implied-in-law duty on a creditor to protect a guarantor's right of subrogation by perfecting the security interest, and if he fails to do so, the guarantor will be discharged to the extent of the loss occasioned thereby. *D. W. Jaquays & Co. v. First Security Bank*, 101 Ariz. 301, 419 P.2d 85 (1966); *Behlen Mfg. Co. v. First National Bank of Englewood*, 28 Colo. App. 300, 472 P.2d 703 (1970); *St. Paul Fire & M. Ins. Co. v. New Jersey Bank & T. Co.*, 104 N.J.Super. 367, 250 A.2d 57 (1969); *First Nat. Bank In Grand Forks v. Haugen Ford, Inc.*, 219 N.W.2d 847 (N.D.1974).

3. Under UCC § 1-201(40), "surety" includes guarantors. UCC § 1-203 says: "Every contract or duty within this act [chapter] imposes an obligation of good faith in its performance or enforcement." UCC § 3-606(1) states: "The holder discharges any party to the instrument to the extent that without such party's consent the holder * * * (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse."

Bank's claimed priority was voided in bankruptcy.[4] We agree that the duty imposed on a creditor under UCC § 3-606(1)(b) encompasses the good faith obligation to exercise reasonable means to protect the rights of guarantors; in this case, by timely perfecting the security interest.[5] However, it is elementary that the rights of the guarantor as against the creditor are determined by the terms of the contract between them. *Behlen Mfg. Co. v. First National Bank of Englewood*, supra, n. 2; 38 Am.Jur.2d Guaranty § 126 (1968).

The Bank argues that, under the guaranty contracts, the Guarantors waived any duty and thus any claim to a discharge under UCC § 3-606(1)(b).[6] The Guarantors do not deny they could waive the Bank's duty and thus limit the protection to which they might have otherwise been entitled to under the UCC, but they did convince the trial court to conclude, as a matter of law, that:

> * * * In any event, a bank holding security for indebtedness guaranteed by another may not waive or release such security except in a commercially reasonable manner, and a negligent waiver or release of security, which is not commercially reasonable and which damages the guarantor by impairing rights of subrogation, discharges the guarantor to the extent of impairment notwithstanding a contractual right on the bank's part to waive or release the security, in the absence of a contractual provision clearly exempting the bank from its duty to act in good faith and with reasonable care as respects the security.

This legal conclusion is plainly not the law. The Guarantors have failed to cite a case so holding and we have discovered none. How the standard of commercial reasonableness came to be engrafted into UCC § 3-606 in this case escapes us. The term is used exclusively in Article Nine as the standard by which a creditor must dispose of repossessed collateral. UCC §§ 9-504(3) and 9-507(2).[7] Nowhere does it appear in Article Three. Furthermore, the evidence is clear that the Bank believed, though mistakenly, that the security interest in the liquor license had been properly perfected when it was filed with the Alcoholic Beverage Control Department in Santa Fe. This was apparently considered by the trial court to be commercially unreasonable and in bad faith. "Commercial reasonableness" had nothing to do with the matter. There obviously was not a lack of

4. Under UCC § 9-301(1)(b), an unperfected security interest is subordinate to the rights of a lien creditor who becomes such without knowledge of the security interest and before it is perfected. UCC § 9-301(3) includes within the definition of "lien creditor" "* * * a trustee in bankruptcy from the date of the filing of the petition * * *."

5. See *White v. Household Finance Corporation*, 302 N.E.2d 828 (Ind.Ct.App.1973) and *First Bank and Trust Company, Palatine v. Post*, 10 Ill.App.3d 127, 293 N.E.2d 907 (1973), both holding that impairment of collateral under UCC § 3-606(1) is not limited to depletion of the physical value of the collateral itself, but extends to impairment of the security interest in the collateral. See also J. White & R. Summers, Uniform Commercial Code § 13-14 at 434-35 (1972); Clark, Suretyship In the UCC, 46 Tex.L.Rev. 453, 461-62 (1968).

6. UCC §§ 1-102(3) and 3-606 allow waiver of a surety's defenses. Section 1-102(3) provides: "The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable." According to Comment 2 to UCC § 3-606, the consent which will bar discharge may take many forms and come at any time: "Consent may be given in advance, and is commonly incorporated in the instrument; or it may be given afterward. It requires no consideration, and operates as a waiver of the consenting party's right to claim his own discharge.

7. See *Clark Leasing Corp. v. White Sands Forest Products, Inc.*, 87 N.M. 451, 535 P.2d 1077 (1975), regarding "commercial reasonableness" in its Article Nine context.

good faith on the part of the Bank,[8] although its omissions were arguably negligent.

There was no loan agreement or contract of broader compass touching the Guarantors' obligations, other than the continuing guaranties.[9] Since UCC § 3-606 allows a surety to waive his defenses and UCC § 1-102(3) allows the parties by agreement to determine the standards by which the performance of their good faith obligations are to be measured, the resolution of this case turns simply on reading and interpreting the provisions of the guaranty agreement to determine whether the guarantors should be relieved of liability under the general law of suretyship.

In construing these contracts, we are guided by the principle that a guarantor or surety is entitled to a strict construction of his undertaking, and his liability is not to be extended by implication beyond the express terms of the contract or its plain intent. *Shirley v. Venaglia*, 86 N.M. 721, 527 P.2d 316 (1974). The parties agree the contracts under consideration are unconditional guaranties of payment.[10] See *Pavlantos v. Garoufalis*, 89 F.2d 203 (10th Cir. 1937).

From the documents, we observe that the Bank was not, as a prerequisite to the Guarantors' liability, obliged to take any security, although it had a right to do so. No provision of the guaranties requires the Bank to perfect security taken or otherwise deal with it in any particular way. The Guarantors waive their rights to subrogation, the very right they now claim was impaired, and waive and release any claims to the security and "any benefit of, and any right to participate in any security now or hereafter held by Bank." The Bank has the right to "waive and release" the security at any time without the waiver or release affecting the Guarantors' obligation to pay. We find nothing inherently unreasonable in the terms of the guaranty agreement.[11]

Though we do not go as far as some courts,[12] an examination of the language of the guaranties requires us to hold the Guarantors liable for the amount owed

8. UCC § 1-201(19) defines "Good faith" as "honesty in fact in the conduct or transaction concerned."

9. The pertinent provisions of the contract are paragraphs 4, 5 and 9. Paragraph (4) authorizes the Bank to * * * (b) take and hold security for the payment of this guaranty or the indebtedness guaranteed, and exchange, enforce, waive and release any such security; (c) apply such security and direct the order or manner of sale thereof as Bank in its discretion may determine; * * *." Paragraph (5) states: Guarantors waive any right to require Bank to (a) proceed against Borrowers; (b) proceed against or exhaust any security held from Borrowers; or (c) pursue any other remedy in Bank's power whatsoever. Guarantors waive any defense arising by reason of any disability or other defense of Borrowers or by reason of the cessation from any cause whatsoever of the liability of Borrowers. Until all indebtedness of Borrowers to Bank shall have been paid in full, even though such indebtedness is in excess of Guarantors' liability hereunder, Guarantors have no right of subrogation, and waive any right to enforce any remedy which Bank now has or any hereafter have against Borrowers, and waive any benefit of, and any right to participate in any security now or hereafter held by Bank * * *." Under paragraph (9), "Guarantors agree to pay a reasonable attorneys' fee and all other costs and expenses which may be incurred by Bank in the enforcement of this Guaranty."

10. Under UCC § 3-416(1) "payment guaranteed" means "that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party." The official comment makes clear that, under this section, "the liability of the endorser [guarantor] becomes indistinguishable from that of a comaker." Uniform Commercial Code § 3-416 (1), Comment.

11. UCC § 1-102(3) requires standards of agreement not to be manifestly unreasonable.

12. *United States v. Klebe Tool & Die Co.*, 5 Wis.2d 392, 397, 92 N.W.2d 868, 871 (1958) held that "[a] guarantor of payment, as distinguished from a guarantor of collection, cannot avail himself of the defense that the creditor through negligence, or lack of due diligence, lost or dissipated the collateral furnished by the debtor." See also *Nation Wide, Inc. v. Scullin*, 256 F.Supp. 929 (D.N.J.1966), aff'd 377 F.2d 554 (3d Cir. 1967); *A & T Motors, Inc. v. Roemelmeyer*, 158 So.2d 567 (Fla.Ct.App.1963); *Schaffer v. Acklin*, 205 Iowa 567, 218 N.W. 286 (1928).

to the Bank. As the court said in *Etelson v. Suburban Trust Company*, 263 Md. 376, 283 A.2d 408, 410 (Ct.App.1971):

> It would be illogical to rule that the Bank had a duty to file the financing statement and its failure to do so released the endorsers, when under the endorsement it could have released the collateral with impunity.

Where a guarantor or surety expressly and unequivocally consents to a waiver or release of his rights in the collateral, he will not be heard to complain of the failure of the guarantee to perfect the security interest therein in the first instance. *Joe Heaston Tractor & Imp. Co. v. Securities Accept Corp.*, 243 F.2d 196 (10th Cir. 1957); *Etelson v. Suburban Trust Company*, supra; *Lafayette Bank and Trust Co. of Suffern v. Silver*, 58 Misc.2d 891, 296 N.Y.S.2d 926 (App.T.1969). The cases relied upon by the Guarantors, except for *St. Paul Fire & M. Ins. Co. v. New Jersey Bank & T. Co.*, supra, n.2, a case with which we do not agree, are not to the contrary. Only in that case had the guarantor consented to an exchange, waiver or release of the collateral by the guarantee. See *D. W. Jaquays & Co. v. First Security Bank*, supra, n.2; *Behlen Mfg. Co. v. First National Bank of Englewood*, supra, n.2; *First Bank and Trust Company, Palatine v. Post*, supra, n.5; and *White v. Household Finance Corporation*, supra, n.5.

We turn to a consideration of the $10,000 note which was executed a year later. The Guarantors assert that the security documents in respect to the liquor license constitute the license as additional security for the $100,000 note and securing mortgage; that the latter mortgage secured other liabilities "whether now existing or hereafter arising;" and that inasmuch as the guaranties were continuing in nature, the $10,000 note was secured by the liquor license, and the Guarantors were absolved from liability for all of the reasons they advanced in respect to the $100,000 note.

What we have said regarding the $100,000 note disposes of the issues concerning the one for $10,000, but the facts concerning the latter lend themselves to an even simpler approach leading to the same result. The note upon its face specified that it was unsecured, and, incidentally, was guaranteed by a separate guaranty agreement on its reverse side. These facts, as a matter of law, dispose of the Guarantors' contentions concerning the $10,000 note.

> Where contracts are put into several instruments, each of which has a sensible meaning and may have full operation by itself, it would be a hazardous assumption to put them together for the purpose of making them mean, as one, differently from what they could in this separate state. Certainly, the court cannot do such violence to the intentions of the parties and the language in which they are expressed as to consolidate separate instruments where the effect of doing so would be to avoid an essential part of the contract. 17 Am.Jur.2d Contracts § 264 (1964).

Finally, we consider the three $4,000 notes which were first executed about eight months after the initial $100,000 note and renewed several times. The trial court found that the note proceeds were deposited to the Corporation's bank account "which was known to Bank"; the parties intended that the debt would be treated as "primarily" that of the Corporation; the debt was "secured" in the same manner as the $100,000 note; the makers would only be liable if the Bank were unable to collect from the Corporation; the Bank wrongfully refused to recognize or treat the note as a Corporation debt.

Both the Corporation and the makers made some payments. It appears that the Bank declined to make the loan to the Corporation. How the security arrangements we have described could have inured to the benefit of the individuals who were makers of the notes in their capacity as such is not explained.

The rights of the parties in respect to these notes are so clear as to merit no discussion. Disregarding the chaff, the

makers simply borrowed money on their own credit and turned the proceeds over to the Corporation. Their arrangements with the Corporation as to payment of the notes are of no interest to us. The notes were purely and simply the personal obligations of the makers. The court erred in holding otherwise.

The case is reversed and remanded to the district court. The trial court is directed to set aside the judgment from which this appeal is taken. The court is directed to make findings of fact and conclusions of law as to the unpaid principal balances of the three $4,000 notes, and as to accrued interest and attorney's fees in respect to all of the notes mentioned in this opinion. Whether additional evidence is to be received as to these matters, we leave to the trial court's discretion.

The trial court will thereupon enter judgment granting the Bank the relief summarized in the fourth paragraph of this opinion, and denying relief to the appellees on their various complaints and counterclaims.

The Bank is allowed $2,000 for the services of its attorneys on this appeal.

MONTOYA and SOSA, JJ., concur.

540 P.2d 1300

CHAMPION INTERNATIONAL CORPORATION, Appellant,

v.

BUREAU OF REVENUE, State of New Mexico, Appellee.

No. 1746.

Court of Appeals of New Mexico.
Aug. 13, 1975.
Rehearing Denied Aug. 13, 1975.
Certiorari Denied Oct. 6, 1975.

Benjamin J. Phillips, White, Koch, Kelly & McCarthy, Santa Fe, Dennis J. Barron, David A. Beanblossom, Frost & Jacobs, Cincinnati, Ohio, for appellant.

Toney Anaya, Atty. Gen., Jan E. Unna, Bureau of Revenue, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

Champion International Corporation (Champion) appeals the Decision and Order of the Commissioner of Revenue (Commissioner) which assessed additional corporate income tax for the year 1972.

The Commissioner found that Champion erroneously allocated as "*nonbusiness* income" the income it received in the form of interest, rent, and gains from the sale of assets. The Commissioner found that such income was properly classified as "*business* income" under § 72–15A–17(A), N.M.S.A.1953 (Repl.Vol. 10, pt. 2, 1973 Supp.). This section falls within the Uniform Division of Income for Tax Purposes Act, "UDITPA", [§§ 72–15A–16 to 72–15A–36], which provides the uniform division for income tax purposes, among the states participating in the Multistate Tax Compact, of the income of a multistate business. See § 72–15A–37.

Champion is a New York corporation engaged, in fifty states, in manufacturing and selling a variety of wood products, including building materials, paper, pulp, packaging, and home furnishings.

Champion protested the assessment made. At the hearing on Champion's protest of the assessment, Champion was represented solely by an employee, a tax consultant. He had not prepared the tax re-

turns. He evidenced no knowledge of the conglomerate business operation of Champion. However, Champion relied solely on this tax consultant at the hearing. Champion tendered no business records, documents or other exhibits to support its claims.

This case can be decided by affirmance in two ways: (A) The record leaves us no basis on which to make any determination whether all of Champion's activities were an integral part of their New Mexico operations and (B) an analysis of the statute and its application to Champion's income.

(A) *No Basis to Make Determination*

A multistate business is a "unitary business" for income tax purposes when operations conducted in one state benefit and are in turn benefited by operations in another state. *Great Lakes Pipe Line Co. v. Commissioner of Taxation,* 272 Minn. 403, 138 N.W.2d 612 (1965). "If its various parts are interdependent and of mutual benefit so as to form one integral business rather than several business entities, it is unitary." *Webb Resources, Inc. v. McCoy,* 194 Kan. 758, 766, 401 P.2d 879, 886 (1965).

On the other hand, ". . . [I]f a multistate business enterprise is conducted in a way that one, some or all of the business operations outside [New Mexico] are independent of and do not contribute to the business operations within this State, the factors attributable to the outside activity may be excluded." *Commonwealth v. ACF Industries, Incorporated,* 441 Pa. 129, 271 A.2d 273, 280 (1970). See, Rudolph, State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups, 25 Tax L.Rev. 171 (1970).

"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, 1973 Supp.). The duty rests on Champion to present ". . . evidence tending to dispute the factual correctness of the assessments." *McConnell v. State ex rel. Bureau of Revenue,* 83 N.M. 386, 387–88, 492 P.2d 1003, 1004–05 (Ct. App.1971). Champion had the burden to overcome this presumption. *Mears v. Bureau of Revenue,* 87 N.M. 240, 531 P.2d 1213 (Ct.App.1975).

Champion has failed to produce evidence that its business activity outside of New Mexico was dependent or independent of its instate operations. Champion failed to show that interest, rent, and gains income was not an integral part of its business carried on in New Mexico. On the facts before us, no question is raised whether any of its income is nonbusiness income because there is no evidence that its activities were not part of a unitary business.

The state of the record leaves us no basis on which to make any determination as to whether all the business activity of Champion was an integral part of their New Mexico operations.

By this conclusion, the assessed additional corporate income tax for the year 1972 is affirmed.

(B) *An Analysis of the Statute and its Application to Champion's Income*

Champion contends that:

(1) Its income from interest, rents and the sale of logs constituted "nonbusiness income" which could not lawfully be taxed by the State of New Mexico.

(2) The amount that was attributable to the cutting of its timber, and that was taxed by the federal government as IRC § 631(a) gain, was unrealized income that could not lawfully be taxed by the State of New Mexico.

These questions are matters of first impression in New Mexico.

(1) *Income from interest, rents and log sales constituted "business income".*

Section 72–15A–17 defines "business income" and "nonbusiness income", under UDITPA, as follows:

A. "Business income" means income arising from *transactions and activity in*

> *the regular course of the taxpayer's trade or business* and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations; [Emphasis added]
>
> * * * * * *
>
> D. "Nonbusiness income" means all income other than business income; . . . .

What is meant by the italicized phrase, "transactions and activity in the regular course of the taxpayer's trade or business"? This is broad terminology.

We have been unable to find a technical definition of the phrase. "Transaction" is defined as ". . . something that is transacted: as a: a business deal . . . ." "Activity" is defined as ". . . an organizational unit for performing a specific function; *also*: its duties or function . . . ." "Regular" is defined as ". . . steady or uniform in course, practice, or occurrence . . . steadily pursued . . . . Synonyms: NORMAL, TYPICAL, NATURAL. . . ." "Course" is defined as ". . . accustomed procedure: customary action: usual method of proceeding . . . policy chosen: manner of conducting oneself . . . way of acting . . . ." Webster's Third New International Dictionary (Unabridged, 1961), at 2426, 22, 1913, 522.

Accordingly, we define the phrase "transactions and activity in the regular course of the taxpayer's trade or business" in § 72–15A–17(A) as:

> Business deals and the performance of a specific function in the normal, typical, customary or accustomed policy or procedure of the taxpayer's trade or business.

Cf. *Western Natural Gas Company v. McDonald,* 202 Kan. 98, 446 P.2d 781 (1968).

(a) *Interest Income*

The tax consultant for Champion testified that interest income was derived from capital earned in the business. Rather than have a large cash balance in the bank, Champion purchased short-term investments and highly liquid assets from which interest income was derived. This was a specific function of Champion. The money from these short-term investments was needed for future business activity. It was usual and customary in Champion's business to follow this practice, whenever there was enough money or business income that was not immediately needed in the business.

Champion contends that the determining factor is the nature of the transaction from which the interest income was derived, and its relationship to Champion's business. The interest income was derived from investments. Champion argues that this is not "business income" because Champion is not in the investment business.

We disagree. Champion's representative testified that a normal and customary practice by Champion was to invest excess capital, not needed for business purposes, in short-term securities. Following our definition, supra, this was a specific function done in the regular course of Champion's business. Therefore, Champion's investment income is "business income".

Champion's reliance on *Western Natural Gas Company,* supra, is misplaced. It deals, not with recurring, customary investments, but with a one-time liquidation sale of all of the taxpayer's oil and gas leases.

Sperry and Hutchinson Co. v. Department of Revenue, 527 P.2d 729 (Ore.1974) interprets the reach of a statute almost identical to § 72–15A–17(A). Oregon is a party to the Multistate Tax Compact. The court distinguished, (1) income from short-term investments held to satisfy the corporation's need for capital from (2) long-term investment income that is *used* for other purposes. The former, the court held, arises from the transactions and activity in the regular course of the taxpayer's trade or business, and, therefore is

business income. Champion has failed to distinguish their investments from those found by the Oregon court to be business income.

In the instant case, Champion introduced no evidence as to the *use* to which it put its short-term investment income. This income was needed for future business activity. It necessarily follows that the income was *used* for this purpose. *Great Lakes Pipe Line Co. v. Commissioner of Taxation,* supra. In the light of *Sperry* and *Great Lakes,* that the *use* to which it put this income determines whether it is "business income", we affirm the Commissioner as to Champion's short-term investment income.

(b) *Rents*

Champion rented out approximately five percent of its total office space. It claims that the income derived from rent is not "business income" because Champion was not in the business of renting real estate.

Like "interest" income, supra, the most reasonable inference to be drawn from the record is that rental of available office space was a customary procedure, done in the regular course of Champion's business. We find no evidence in the record which contradicts this inference. Rental income was, therefore, "business income".

There was offered in evidence, without objection, I.T. Regulation 17(b). Subsection (1) is entitled *Rents from real and tangible personal property,* and reads:

> Rental income from real and tangible property is business income if the property with respect to which the rental income was received is used in the taxpayer's trade or business or is incidental thereto and therefore is includable in the property factor under I.T. Regulation 26.

Example iii under I.T. Regulation 17(b)(1) reads as follows:

> The taxpayer operates a multistate chain of men's clothing stores. The taxpayer purchases a five-story office building for use in connection with its trade or business. It uses the street floor as one of its retail stores and the second and third floors for its general corporate headquarters. The remaining two floors are leased to others. The rental of the two floors is incidental to the operation of the taxpayer's trade or business. The rental income is business income.

Champion admits its rental operations fall under this example. However, it claims that the conclusion given—"the rental income is business income"—is "illogical" because an identical Indiana regulation reaches an opposite conclusion.

It is not "illogical" because the States of Arkansas, Idaho, Nebraska, North Dakota, Oregon and Utah, all parties to the Multistate Tax Compact, reach the same conclusion with this example as does New Mexico.

Nevertheless, we reach our holding in favor of the Commissioner without reliance on Regulation 17(b)(1).

(c) *Gains*

Champion obtained the raw materials for its manufacture of wood and paper products from timber on land owned or leased by it. Some of its logs were sold to telephone utilities for use as telephone poles. The gain on the sale of logs was $4,803,652. The tax consultant testified that since total sales were $1,339,000,000 the four million "is a drop in the bucket". Even "a drop in the bucket" must be apportioned if it is "business income". Again, however, Champion claims an exemption, because it is not in the business of selling logs for telephone poles. The sale of logs was a normal, customary procedure in the business of Champion for the year 1972 and had been for several years. The income arising therefrom was "income arising from transactions and activity in the regular course of the taxpayer's trade or business". Substantial evidence supports the Commissioner's decision that this income was business income.

(2) Champion's IRC § 631(a) gain was correctly apportioned as business income.

Section 631(a) [26 U.S.C.A. § 631] of the Internal Revenue Code allows a taxpayer to elect to treat the cutting of timber as a sale or exchange, eligible for taxation at capital gains rates, even though the timber which has been cut has not actually been sold.

On its 1972 federal tax return, Champion reported as a sale or exchange, the fair market value of $950,669 worth of timber cut during 1972, but which remained unsold at the end of that year.

New Mexico does not afford capital gains treatment to taxpayers. Therefore, Champion deducted the fair market value of unsold timber from its business income on its New Mexico tax return because it was not in fact *realized* by timber sales in 1972. The Commissioner disallowed the deduction. We agree.

Champion says:

(a) The cutting of timber which is unsold does not create "income" within any accepted definition of that term.

(b) New Mexico is imposing a tax on an out-of-state activity. This is both unconstitutional and beyond the taxing authority of the State.

We disagree.

(a) *Timber-cutting gain for federal income tax is subject to New Mexico income tax.*

Section 72–15A–3 of the "Income Tax Act" says:

> A tax is hereby imposed . . . upon the net income of . . . every foreign corporation . . . engaged in the transaction of business in . . . this state.

Sections 72–15A–2(S) and (T)(2) says:

> S. "base income" means that part of the taxpayer's income generally defined as *federal taxable income and upon which the federal income tax is calculated;* and
>
> T. "net income" means base income adjusted to exclude:
>
> * * * * * *
>
> (2) amounts that the state is prohibited from taxing because of the laws or Constitution of this state or the United States . . . . [Emphasis added].

We agree that § 631(a) gain does not fit into ordinary definitions of income. See 85 C.J.S. Taxation § 1096a; 71 Am.Jur. 2d State and Local Taxation § 483. But a state has the power to gauge its income tax by reference to the income on which the taxpayer is required to pay a tax to the United States. The constitutionality of state statutes which refer to the Internal Revenue Code definitions have been upheld by the courts. See, *Garlin v. Murphy,* 51 Misc.2d 477, 273 N.Y.S.2d 374 (1966), aff'd 34 N.Y.2d 921, 359 N.Y.S.2d 552 (1974); *Thorpe v. Mahin,* 43 Ill.2d 36, 250 N.E.2d 633 (1969); 85 C.J.S. Taxation § 1096b; Annot., Constitutionality, construction, and application of provisions of state tax law for conformity with Federal income tax law or administrative and judicial interpretation, 166 A.L.R. 516 (1947), supplemented in 42 A.L.R.2d 797 (1955) and its supplement.

Champion elected to make this § 631(a) gain a part of its federal taxable income for 1972. By use of this gain, its federal income tax was calculated. Under the terms of § 72–15A–2(S), the gain is includable in Champion's base income for New Mexico income tax purposes.

(b) *New Mexico is not taxing an out-of-state activity.*

New Mexico has not specifically taxed the § 631(a) gain. It has included that gain in the apportionable business income of Champion. From this business income, New Mexico can tax a percentage like the other states that are parties to the Multistate Tax Compact.

The tax is not levied on the particular business activity of a taxpayer carried on within the borders of the taxing state. The tax is levied on a percentage of the

taxpayer's business income from *all* its business activity. The purpose of this scheme is to make uniform the tax laws of the participating states.

The Commissioner's decision does not tax out-of-state activity. Neither does the tax statute. The taxation is not beyond the State's taxing authority.

Champion's claim of unconstitutionality based on taxation of out-of-state activity, and its claim that the imposition of the tax is beyond the taxing authority of New Mexico, are both groundless.

(c) *Courts uphold inclusion of unrealized gain within "net income" for state taxation.*

The position we take on state taxation of unrealized gain declared as federal taxable income is upheld by the courts. The unrealized gain can be included in "net income" for state tax purposes. *Garlin v. Murphy,* supra; *Marco Associates, Inc. v. Comptroller of Treasury,* 265 Md. 669, 291 A.2d 489 (1972); *Commonwealth v. Electrolux Corporation,* 362 Pa. 333, 67 A.2d 105 (1949); *Ebling Co. v. Graves,* 259 App.Div. 427, 20 N.Y.S.2d 123, aff'd without opinion, 284 N.Y. 688, 30 N.E.2d 726 (1940).

Affirmed.

It is so ordered.

WOOD, C. J., and LOPEZ, J., specially concur.

WOOD, Chief Judge (specially concurring).

I do not join in Judge Sutin's remarks concerning Champion's presentation at the administrative hearing. I do not join in the references to I.T. Regulation 17(b) because that regulation does not apply to the tax year in question.

One issue in this case is whether income from investments, rentals and sale of logs was business income. Under § 72–15A–17(A), supra, it was business income if it arose in the regular course of Champion's business. I do not agree that "regular course" of business is to be determined by whether the business is "unitary" or "one integral business". Such an approach ignores the wording of the statute. Thus, I do not join in Part A of Judge Sutin's opinion.

My approach to the meaning of "regular course" of "trade or business" differs somewhat from the approach taken by Judge Sutin in Part B of his opinion. The taxpayer's evidence makes it clear that the contested income was acquired in the "regular course" of Champion's activities. I do not understand Champion to contend otherwise. Champion's contention is that the contested income was not acquired in the regular course of *trade or business.*

Champion takes a narrow view of the meaning of trade or business. It would limit the meaning of trade or business to the main course of its business which it asserts is "manufacturing and selling finished products". It contends it is not in the business of investments, of renting property or making occasional sales of logs for use as telephone poles. Support for its view is found in Peters, "The Distinction Between Business Income and Nonbusiness Income", 25 S.Cal.Law Center Tax Institute 251 (1973).

The narrow view urged by Champion is not supported by the *wording* of UDITPA. Statutes are to be given effect as written. *Keller v. City of Albuquerque,* 85 N.M. 134, 509 P.2d 1329 (1973). Section 72–15A–17(A), supra, makes no reference to "main business" or "main course of business". As I read § 72–15A–17(A), supra, it makes no difference whether the income derives from the main business, the principal business, the occasional business or the subordinate business so long as the income arises from the "regular course" of business.

Peters, supra, at 278 states: "Although one may quibble with the propriety of referring to income realized by a business organization as nonbusiness income, it is utterly ridiculous to assume that its meaning is limited to gifts or other receipts

having no connection with a profit motive." I agree. In *Sperry and Hutchinson Co. v. Department of Revenue,* supra, interest on long-term and short-term securities held for investment were non-business income because the interest did not arise from transactions in the regular course of business. In *Western Natural Gas Company v. McDonald, supra,* income from a liquidation sale of oil and gas leases was nonbusiness income because the sale was not made in the regular course of business. Thus, all income of a business organization is not "business income"; business income must arise from the regular course of business.

Pertinent in determining whether income arises from transactions in the regular course of business is "the nature of the particular transaction" and "former practices" of the business entity. *Western Natural Gas Company v. McDonald,* supra. Also pertinent is how the income is used. *Sperry and Hutchinson Co. v. Department of Revenue,* supra.

Judge Sutin's opinion reviews the evidence. That evidence supports the Commissioner's conclusion that interest income from short-term investments, income from renting surplus property, and income from sale of logs was income arising in the regular course of Champion's business. Thus, I concur in the result reached as to these items.

I join in that part of Judge Sutin's opinion holding the gain on cut but unsold timber was apportionable as business income because that gain was reported as federal taxable income for the year in question.

LOPEZ, Judge (specially concurring).

I agree with Part A of Judge Sutin's opinion and with the conclusion of Part (B)(2)(a) that the § 631(a) gain reported by the taxpayer was properly taxed by New Mexico. I do not agree with the reasoning employed in Part B of Judge Sutin's opinion, nor with the reasoning employed in Chief Judge Wood's concurring opinion. My reasons for preferring the approach of Part A of Judge Sutin's opinion will be outlined below.

It is my belief that UDITPA does not require that all income of a multiform business be included in the business income from which a state takes its apportioned share. The issue might best be presented by the example of a corporation which manufactures and distributes shoes in New Mexico, Texas, and Colorado. In addition to this business, the corporation also makes a sizable profit from office buildings which it owns and operates for rental purposes in New York. One approach New Mexico could take to the rent received would be to ask whether it was customary for the corporation to rent apartments. On finding that it was customary, the rental income would be classified as business income from which New Mexico would take its proportional share. This would appear to be Judge Sutin's approach. Chief Judge Wood looks instead to the "regular course" of the taxpayer's business; since the corporation regularly rents apartments, the same result would be reached. My approach would be to determine whether the business of renting offices in New York is "independent" of the business of selling shoes. Guidance for the meaning of "independent" should be sought in the law which has developed around the unitary business concept. See e.g., *Commonwealth v. ACF Industries, Inc.,* 441 Pa. 129, 271 A.2d 273 (1970) and Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 Hast.L.J. 42 (1960).

I find support for the position I have taken in the Oregon case of *Sperry and Hutchinson v. Department of Revenue,* 527 P.2d 729 (Or.1974). In deciding how interest from investments was to be classified, the court did not dispute that the taxpayer's "customary" and "regular" practice was to make these investments, but rather examined the relationship of these investments to the business that the taxpayer conducted in Oregon.

The proposition that businesses are indivisible, and hence that all income from

them is business income, goes far beyond the position taken by the Bureau in this case, and in its regulations.

For example, at the hearing below, in response to a question from the taxpayer's representative as to what nonbusiness income was, the Bureau's representative stated:

> "Well, if you took that money out and invested in yachts for an unrelated purpose or bought property not related to your business of logging or whatever it is and you derived income from it, then it would be non-business income."

More significantly, the Bureau's regulations, and the examples illustrating them, indicate that there comes a point where the Bureau feels corporate activity is divisible. Thus, in discussing when rental income is business income the Bureau uses the following example:

> "Example (iv): The Taxpayer operates a multistate chain of grocery stores. It purchases as an investment an office building in another state with surplus funds and leases the entire building to others. The net rental income is not business income of the grocery store trade or business. Therefore, the net rental income is nonbusiness income." I.T. Regulation 17(b)(I).

Finally, constitutional issues of due process come into play when the abolition of the distinction between unitary and multiform businesses is proposed. Those Supreme Court cases which have upheld formulary apportionment have done so on the basis that the business taxed was a unitary business. Rudolph, State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups, 25 Tax L.Rev. 171, 183-84, (1970); see, e. g., *Butler Brothers v. McColgan*, 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991 (1942). Although I have found no Supreme Court cases stating that the multiform concept must be respected by state taxing authorities (there are state court cases so holding; see, e.g., *Hamilton Management Corporation v. State Tax Commission*, 253 Or. 602, 457 P.2d 486 (1969)). I think that a serious constitutional problem is presented by the failure to distinguish between that income of a business originating in the taxing state, and that income which has no real relationship to that state.

Judge Sutin correctly states that we simply cannot tell from the record before us which of the contested items have no connection with New Mexico. Therefore, although my different interpretation of UDITPA may lead to disagreement in future cases, I have no quarrel with the result reached today.

540 P.2d 1308

Modesto GARCIA, Appellant,

v.

HEALTH AND SOCIAL SERVICES DEPARTMENT of the State of New Mexico, Appellee.

CONSOLIDATED WITH

Rosemary SEALE, Appellant,

v.

HEALTH AND SOCIAL SERVICES DEPARTMENT of the State of New Mexico, Appellee.

Nos. 1774, 1918.

Court of Appeals of New Mexico.
July 16, 1975.
Rehearing Denied July 28, 1975.
Certiorari Granted Aug. 27, 1975.

Joseph F. Canepa, Gary J. Martone, Albuquerque, for appellants.

Toney Anaya, Atty. Gen., James G. Huber, Agency Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

LOPEZ, Judge.

These consolidated cases appeal decisions and orders of the director of the New Mexico Health and Social Services Department (HSSD) terminating general assistance (GA) after six months of benefit payments. We reverse.

New Mexico has a comprehensive scheme of public assistance known as the Public Assistance Act. See § 13–17–1, N.M.S.A. 1953 (Repl.Vol. 3, Supp.1973), for enumeration of subchapters and sections. This act provides, among other things, for assistance to needy, disabled persons, whether that disability is permanent or temporary.

Aid to the permanently disabled was initially provided under § 13–17–7, supra. Aid to the permanently disabled was taken over in January 1974, by the federal program known as Supplemental Security Income for Aged, Blind and Disabled (SSI). See 42 U.S.C.A. §§ 1381 to 1383. The federal statute defines a permanent disability as one which lasts not less than twelve months. 42 U.S.C.A. § 1382c(a)(3)(A).

Those temporarily disabled persons who are also needy qualify for GA under § 13–17–10, supra. There is no question in either of these appeals that the petitioners are temporarily disabled and needy.

The combined effect of sections 13–17–7 and 13–17–10, supra, and SSI would seem to be to create at least *some* provision for all needy, disabled people in New Mexico. But HSSD has, by regulation, provided that ". . . [i]n cases of temporarily disabled needy persons . . . cash assistance will be limited to a period of no more than six months in any twelve (12) month period." HSSD Regulation No. 240.2. This restriction of assistance has the effect of creating a "gap", a six month period in which a needy, disabled person may not receive any cash assistance under any available program. See, § 13–17–11(A), supra.

One whose disability lasts more than six months, but less than a year, is not eligible for assistance under either SSI or GA. The problem for this court is to see by what authority HSSD may regulate such a "gap" between coverage under SSI and benefits under GA.

HSSD argues that it has appropriate regulatory authority under either § 13–17–5 or § 13–17–10, supra. The department does not have unlimited rule-making powers, however. An administrative body being a creature of statute, has only such power and authority as are granted to it by statute. *New Mexico Elec. Serv. Co. v. New Mexico Pub. S. Com'n*, 81 N.M. 683, 472 P.2d 648 (1970); *Vermejo Club v. French*, 43 N.M. 45, 85 P.2d 90 (1938); *Maxwell Land Grant Co. v. Jones*, 28 N.M. 427, 213 P. 1034 (1923).

Section 13–17–10, supra, provides in pertinent part:

"A. Subject to the availability of state funds, public assistance shall be provided under a general assistance program to or on behalf of eligible persons who:

". . . . . .

"(2) are over the age of eighteen [18] and are temporarily disabled, according to regulations of the board, and are not receiving aid to families with dependent children; . . .

". . . . . .

"B. . . . The board may by regulation limit the grants that are made to general assistance recipients."

There is no question, under subparagraph (A)(2) that the board could have defined "temporarily disabled" by reasonable regulations. It is not contended that the six month restriction is an attempt by the board to define this term.

The board does argue, rather, that HSSD Regulation No. 240.2 is a reasonable attempt to limit grants under subparagraph (B), for the purpose of efficiently utilizing available state funds pursuant to subparagraph (A).

Section 13–17–5, supra, deals with the realities of limited state funds by providing:

"A. . . . However, if the amount of federal and state funds available for public assistance is insufficient to provide the grants for all eligible persons, the amount of grants to eligible persons may be reduced as necessary.

"B. The board may set individual and family maximum grant levels for each program."

The Public Assistance Act must be read as a whole and each part considered in relation to every other part to produce a harmonious whole. *Trujillo v. Romero*, 82 N.M. 301, 481 P.2d 89 (1971). This court will construe statutory language

with a view to determining legislative intent. *State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (Ct.App.1973). But where there is no ambiguity in the language of the statutes, taken as a whole, judicial construction is unnecessary. *Till v. Jones*, 83 N.M. 743, 497 P.2d 745 (Ct.App.1972).

The legislature has provided a clear answer to HSSD's problem of how to deal with limited funds. It has told the department in exactly which ways HSSD may "limit" funds: by reducing grants under § 13–17–5(A), supra; and by setting maximum grant levels under § 13–17–5(B), supra.. Nowhere in the Act does it appear that HSSD is empowered to otherwise limit the payment of GA benefits. HSSD ". . . is confined to the procedure thus prescribed, and a failure to conform thereto or any substantial departure therefrom vitiates its action. . . ." *Maxwell Land Grant Co. v. Jones*, supra. The meaning is clear and unambiguous, and need not be interpreted by this court. *State v. McHorse,* supra; *Till v. Jones,* supra.

Public assistance programs should be based on an assessment of the risks that are most prevalent in society. It is the mark of a successful society to be able to protect its citizens against the risks of illness, old age, disability, unemployment, birth, death, large families, and other economic pitfalls of life. New Mexico has attempted to set up a comprehensive program designed to shift the burden of these risks to society as a whole, rather than to the individual. General assistance is to be provided to needy persons who are, for some reason, ineligible for aid under any other assistance program. In providing GA to those whose needs could not otherwise be met, the Public Assistance Act mandates that those needs, somehow, *be* met. See, *State ex rel. Johnson v. Hernandez*, 83 N. M. 589, 495 P.2d 369 (1972); see also § 13–17–10(A), supra.

HSSD Regulation No. 240.2 is in conflict with the clear language of § 13–17–5, supra, and is not authorized by any section of the Public Assistance Act. Accordingly, the decisions of the director in both of these cases are not in accordance with law. Section 13–18–4(F)(3), N.M.S.A.1953 (Repl.Vol. 3, Supp.1973).

The decisions and orders of the director of HSSD are hereby set aside with instructions to continue petitioners on the GA program for the extent of their disability or up to twelve (12) total months, whichever is shorter.

It is so ordered.

SUTIN, J., concur.

HERNANDEZ, J., dissents.

HERNANDEZ, Judge (dissenting).

Even though I can and do sympathize with the tragic predicament of the petitioners, I cannot concur in the decision reached by the majority. I, therefore, respectfully dissent.

To begin with, I believe appellants have failed in this appeal procedurely. A comparison between the record of the administrative hearing on the one hand and appellants' points on appeal on the other reveals that those points were never raised below, and, therefore, they cannot properly be considered here. Rule 13, Rules Governing Appeals. Granted that petitioners' counsel, in closing argument, discussed some of them. However, the arguments of counsel, no matter how eloquent, are not evidence. *Hamilton v. Doty*, 65 N.M. 270, 335 P.2d 1067 (1959); Rule 13, supra. The records before us are void of any exhibit or sworn testimony on the points presently under consideration.

A further indication, and one more compelling for me, that the issues raised by this appeal were not adequately pursued below is the fact that although the Department's regulations specifically provide for hearings to challenge policy under Regulation 275.31, appellants never specified that such was the thrust of their appeal. The regulations contemplate two types of fair hearings. The requests filed by the appel-

lants in these cases clearly fall within the ambit contemplated under Regulation 275.-43. Such hearings are provided for examining the factual basis of the Department's action in a particular case, not the policy which dictates that action.

Secondly, I disagree with the majority's analysis that § 13–17–5(B), supra, establishes the authority of the board to set the limit of general assistance program grants under § 13–17–10(A), supra. § 13–17–5, supra, is a general statute which applies to assistance payments made under the Public Assistance Act, except general assistance program grants. The payments made to petitioners were general assistance program grants. § 13–17–10, supra, subparagraph B specifically establishes the authority of the board as to grants made under that section: " . . . The board may by regulation *limit* the grants that are made to general assistance recipients." [Emphasis mine.] To say that the Public Assistance Act should be read as a whole does nothing to refute the obligation of this court to give effect to the specific statute when it is found to conflict with a general one. *Lopez v. Barreras*, 77 N.M. 52, 419 P.2d 251 (1966). The legislature's reason, for granting the board broader authority under § 37–17–10(B), supra, than under § 37–17–5(B), supra, undoubtedly was that general assistance program grants are made from exclusively State funds.

In my opinion, the legislature, cognizant of the limitation of State funds and also cognizant that the H.S.S.D. has a very difficult responsibility in allocating funds to meet needs which do vary in scope and kind, from time to time, intended by the use of the word "limit" to give the board the authority to restrict grants in amount or duration.

Petitioners on appeal challenge the constitutionality of Regulation 240.2 on the ground that it violates the Equal Protection Clause of the Federal and State Constitutions. The test to be applied in resolving such challenges was set down by the Supreme Court of the United States in *Dandridge v. Williams*, 397 U.S. 471 90 S. Ct. 1153, 25 L.Ed.2d 491, reh. den. 398 U.S. 914, 90 S.Ct. 1684, 26 L.Ed.2d 80 (1970).

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' [Citation Omitted.] 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' [Citation Omitted.] 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " [Citation Omitted.]
>
> . . . . . .
>
> ". . . [T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. [Citation Omitted.] It is enough that the State's action be rationally based and free from invidious discrimination."

Petitioners claim of unconstitutionality is without merit. In my opinion the regulation is "rationally based and free from invidious discrimination."

540 P.2d 1313

STATE of New Mexico, Plaintiff-Appellee,

v.

Jessie HERMOSILLO, Defendant-Appellant.

No. 1787.

Court of Appeals of New Mexico.
Sept. 10, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Sarah M. Singleton, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Andrea Buzzard, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

The defendant appeals his conviction for forgery and attempted forgery, § 40A–16–9(B), and § 40A–28–1(C), N.M.S.A.1953 (2d Repl.Vol. 6). We reverse on the basis of one of the claimed errors and do not reach the merits of the others.

The state began its presentation with the testimony of the woman whose checks were forged, Margaret Benavidez. She

testified that she had entered a grocery store, leaving her purse in her car and that when she returned to the car her purse was missing. She suspected three men sitting in a car parked next to hers; she questioned them but declined their offer to let her look in their car. At trial the defendant was identified as one of the men who had been in the car. The record reveals no prosecutions for this theft. Other witnesses for the state included two bank tellers, who said the defendant had driven a car to the drive-in lanes of their respective branches. One witness stated that the woman in the passenger side of the car had handed the defendant a check which he had put in the drawer next to the driver's seat; the other testified to receiving the check in the pneumatic cylinder which the bank used for the distant lanes.

The defendant's main witness was the woman who had been in the passenger side of the car, Ramona Murphy. She is an ex-girl friend of the defendant who was not tried in this case because of a guilty plea in another case. Her testimony was that a Ramon Madrid, who said he had "pulled a job", had given her the checks; that she forged Ms. Benavidez' signature on them; that the defendant knew nothing about the forgeries; that she had handed the checks face down to him when she gave them to him to put into the cylinder and the drawer; that he had not seen the signatures on them; and that she had told him the checks were for welfare and babysitting.

The crime of forgery includes " . . . knowingly issuing or transferring a forged writing with intent to injure or defraud." Section 40A–16–9, supra. The jury was also instructed that one could be convicted of the principal crime if one " . . . procures, counsels, aids or abets in its commission and although [one] did not directly commit the crime . . . ." Section 40A–1–14, N.M.S.A.1953 (2d Repl.Vol. 6).

There are apparently two theories on which the defendant could have been found guilty of forgery. The first is that by inserting the checks into the cylinder he transferred a forged writing. The second is that he procured the checks for Ms. Murphy and helped her get them cashed and therefore was an accessory.

The evidence is insufficient to support a finding that the defendant inserted the checks into the cylinder with the intent to commit a forgery. Ms. Murphy, whose testimony is uncontradicted by direct evidence, testified that the defendant did not know that the checks were forged. The only fact upon which a finding of defendant's guilty knowledge can be based is the defendant's presence in a car next to Ms. Benavidez' at the time that she thinks the checks were stolen. The inference of guilty knowledge from these circumstances requires the inference that the checks were stolen by someone in the car and that the defendant knew that the checks Ms. Murphy later passed to him were the same checks. Thus, it is only by the impermissible device of basing the inference of knowledge on one of these conjectures that the jury could conclude that the defendant knew the checks were bad. See *State v. Peden,* 85 N.M. 363, 512 P.2d 691 (1973); *DeBaca v. Kahn,* 49 N.M. 225, 161 P.2d 630 (1945). The other evidence cited to indicate that the defendant had knowledge that the checks were forged, such as his relationship with Ms. Murphy and his driving her to two different branches of the same bank within three hours, does not form a sufficient basis upon which to rest a conclusion of guilty knowledge. We are aware that "[g]uilty knowledge is rarely susceptible of direct and positive proof and generally can be established only through circumstantial evidence. . . . ." *State v. Zarafonetis,* 81 N.M. 674, 472 P.2d 388 (1970). However, this does not remove the obligation we have to examine the evidence to determine whether there was substantial evidence to support a finding of intent. The comparison of this case with another with similar facts is instructive. In *State v. Martinez,* 85 N.M. 198, 510 P. 2d 916 (Ct.App.1973), the defendant was

convicted of aiding and abetting a forgery. The defendant had driven a woman to the drive-in window of the bank. The woman identified herself by the name of the woman whose checks were forged. The teller then questioned the defendant as to the identity of the woman. The defendant assured the teller that he knew the woman personally and then endorsed the forged checks. The defendant's intent to defraud was revealed by his misrepresentation of the woman's identity. In the case before us there is no act which is similar to this assertion nor is there any other comparable evidence of the defendant's knowledge.

Similar difficulties arise when we trace through the theory that the defendant aided and abetted the commission of the forgery. The fact that the defendant accompanied Ms. Murphy at the time that she cashed the checks is not sufficient to support a finding of aiding and abetting, for "[m]ere presence, of course, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. . . ." *State v. Ochoa,* 41 N.M. 589, 599, 72 P.2d 609, 615 (1937). Thus the theory that the defendant aided and abetted Ms. Murphy is presumably based on the belief that the defendant procured the checks for Ms. Murphy and helped her cash them. In support of this theory there is evidence that the defendant was in the car next to Ms. Benavidez' at the time she thinks her purse was stolen. There is also a statement of the defendant, repeated at trial by a police officer, that he had been present when Ms. Benavidez questioned the men in the car about the theft of the checks.

All of this evidence that points to the defendant as the one who took the checks and gave them to Ms. Murphy is circumstantial. When all of the evidence which establishes the different elements of a crime is circumstantial (See *State v. Peden,* supra) that evidence ". . . must be incompatible with the innocence of the accused upon any rational theory and incapable of explanation upon any reasonable hypothesis of the defendant's innocence. . . ." *State v. Easterwood,* 68 N.M. 464, 466, 362 P.2d 997–998 (1961).

This rule for the treatment of circumstantial evidence is really nothing more than an application of the substantial evidence rule. *State v. Madrid,* 83 N.M. 603, 495 P.2d 383 (Ct.App.1973). Our concern is whether the evidence is sufficient to allow an inference of the disputed act and intent from it, with special rules of inference imposed on the jury when the evidence is circumstantial. See *State v. Elam,* 86 N.M. 595, 526 P.2d 189 (Ct.App. 1974). In this case we do not think the evidence was sufficient to allow a finding that the defendant aided Ms. Murphy by procuring the checks for her because there are too many other explanations which account for Ms. Murphy's possession of Ms. Benavidez' checks.

In reaching this conclusion the promise that we can be controlled by the myriad of New Mexico cases considering the substantial evidence rule and circumstantial evidence is tenuous. Therefore, we will not review the facts in these cases and draw strained comparisons but will rather state that our review of these cases satisfies us that the amount and quality of evidence in this case is far below that found insufficient in several other cases.

The judgment will be reversed and the cause remanded to the district court with instructions to discharge the defendant.

It is so ordered.

SUTIN, J., concurs.

HERNANDEZ, J., dissents.

HERNANDEZ, Judge (dissenting).

I do not agree that there was insufficient evidence to sustain defendant's conviction. I, therefore, respectfully dissent.

I think it necessary for an understanding of my disagreement with the majority to set forth the facts as I glean them from the record.

During the evening of Wednesday, February 20, 1974, Margaret Benavidez had her purse stolen from her car when she momentarily went into a convenience grocery store to make a purchase. Three men were seated in a car parked next to that of Ms. Benavidez. There were no other cars or people in the near vicinity. Upon noticing that her purse was missing, she approached the three men and asked if they had taken her purse which contained, among other things, her drivers license and her check book with several blank checks in it. The men denied having taken the purse and offered to let Ms. Benavidez look around inside their car. She declined.

The next day, February 21, 1974, at about 11:00 a. m., Ramona Murphy accompanied by the defendant, cashed a check ostensibly signed by Ms. Benavidez and written on her check form at a drive up window of the Picacho Street branch of the Farmers and Merchants Bank of Las Cruces. The pass through drawer was on defendant's side of the car. After the check was presented, the teller asked for identification; and Ms. Murphy gave the defendant Ms. Benavidez' driver's license, and he in turn passed it through to the teller.

At about 2:00 p. m. that same day, Ramona Murphy, again accompanied by the defendant, tried to cash another check ostensibly signed by Ms. Benavidez, and also written on her check form, at the Water Street branch of the same bank. The teller had been alerted not to cash any checks drawn on that account. She notified the manager, and he called the police. Defendant and Ms. Murphy were arrested at the scene. Defendant was identified by Ms. Benavidez as one of the three men sitting in the parked car near her own at the time her purse disappeared on the day before.

At trial Ms. Murphy testified in defendant's behalf. She admitted forging three checks: the one cashed during the morning of February 21, at the Picacho Street branch, the one which she was attempting to cash when she and defendant were arrested, and a third which she cashed without defendant. Her testimony was that defendant was not involved in the forgeries. She said she had explained the checks by telling defendant that one check was in payment for some babysitting and that the other was her welfare check.

Ms. Murphy further testified that she had gotten the checks from a person named Ramon Madrid and that he had accompanied her when she cashed the third check. She stated that she had met the defendant on the morning of the 21st and had asked as a favor that he drive her to the bank.

On cross-examination and over objection, Ms. Murphy testified that she had previously lived with the defendant and had borne his child, but that they had been separated for some time before the incidents in question. However, both she and the defendant gave the same home address at the time they were "booked."

Defendant was convicted of one count of forgery, Section 40A–16–9(B), N.M.S.A. 1953 (2d Repl.Vol. 6); and one count of attempted forgery, Section 40A–28–1(C), N.M.S.A.1953 (2d Repl.Vol. 6).

Section 40A–16–9(B), supra, provides: "Forgery consists of: . . . B. knowingly issuing or transferring a forged writing with intent to injure or defraud." This Court in *State v. Tooke,* 81 N.M. 618, 471 P.2d 188 (Ct.App.1970), in construing the terms, "issuing" and "transferring", stated: "Both these terms encompass a delivery to one who is a holder with the passing of interests from one to another." In *State v. Ochoa,* 41 N.M. 589, at 599, 72 P. 2d 609, at 615 (1937), our Supreme Court stated:

> "The evidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs, or by any means sufficient to incite, encourage or instigate commission of the offense or calculated

to make known that commission of an offense already undertaken has the aider's support or approval." [Citation Omitted.]

As can be seen there are three elements to the crime as set forth in Section 40A-16-9(B), supra: (1) the delivery, (2) of a forged writing, with (3) intent to injure or defraud. There was direct evidence by the testimony of the bank tellers that the checks were presented. Ms. Murphy admitted on the stand that she had forged the checks. Proof of the third, or intent element was circumstantial. It was proven, in my opinion, by the reasonable inferences that can be drawn from evidence that defendant accompanied Ms. Murphy to two separate branches of the same bank within three hours time, and presented checks bearing a name other than Ms. Murphy's and a driver's license issued to someone else as proof of her identity. Since the defendant handled the checks and the license he had an opportunity to see the names on the checks and the driver's license. Also to be considered is the past intimate relationship that existed over time between defendant and Ms. Murphy. "Evidence is termed direct which applies immediately to the fact to be proved, without any intervening process . . ." Bouviers Law Dictionary, Rawles' Revision. "'. . . [B]y circumstantial evidence is meant the proof of such facts and circumstances connected with or surrounding the commission of the crime charged, as tend to show the guilt or innocence of the accused.'" *State v. Garcia,* 61 N.M. 291, 299 P.2d 467 (1956). I believe that this evidence is sufficient to establish that defendant aided and abetted Ms. Murphy in the commission of both crimes. Defendant's argument that the jury had to first infer that he had stolen the checks from Ms. Benavidez' car before they could determine that he had aided and abetted her is without merit, in my opinion.

Since I believe that defendant's conviction should be affirmed, I answer his other points of error.

Defendant's second point: that the trial court failed to instruct on the intent necessary to convict him as an accomplice, is without merit.

Section 40A-1-14, N.M.S.A.1953 (2d Repl.Vol. 6), provides:

"A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has been acquitted, or is a child under the Children's Code [13-14-1 to 13-14-45]."

Our Supreme Court when called upon to interpret this section had this to say:

"We find nothing in the statute indicating an intent to make one who aids and abets in the commission of a crime a separate offense distinct and different from the crime committed by the one actually perpetrating it. . . . The statute is to be read as though the words 'as an accessory' were omitted." *State v. Nance,* 77 N.M. 39, at 46, 419 P.2d 242, at 247 (1966).

In this regard, the trial court gave the following instructions:

"A person may be charged with and convicted of a crime if he procures, counsels, aides or abets its commission and although he did not directly commit the crime. Every person concerned in the commission of an offense, whether he directly commits the offense or procures, counsels, aides [sic] or abets in its commission, may be indicted or informed against as a principal." [No. 16.]

With reference to the requisite intent, the trial court instructed as follows:

"You are instructed that the intent with which an act is done is a mental process, and as such generally remains hidden within the mind where it was conceived and is seldom, if ever, susceptible of proof by direct evidence, but must be in-

ferred and established by the acts, conduct and doings of the person having such intent, and from the facts and circumstances surrounding such acts, conduct and doings, and in determining the intent with which the defendant in this case committed the act or acts charged in the Indictment, if you find that he did so, it is proper for you to consider his acts, conduct and doings, together with all the other facts and circumstances proved on the trial of this case." [No. 13.]

"You are instructed that the offenses of forgery and attempted forgery are offenses requiring a specific intent, which our courts have defined as follows:

> 'A person who knowingly does an act which the law forbids or knowingly fails to do an act which the law commands, specifically intending to violate the law or recklessly disregarding the law, acts with specific intent.'

"Specific intent, as the term implies, means more than the general intent to commit the act." [No. 14.]

"You are instructed that forgery consists of knowingly issuing or transferring a forged writing with intent to injure or defraud. A forged writing is a writing made falsely or altered with intent to injure or defraud." [No. 15.]

The trial court correctly instructed the jury as to the element of intent.

Defendant's third point is that the trial court erred in permitting an in-court identification because it was tainted by a pretrial identification which was unnecessarily suggestive and therefore violative of due process.

The day after her purse had been stolen, Ms. Benavidez was notified by the police department that her wallet had been found and that she could pick it up. While she was at the police station, an officer asked her to walk by a given office to see if she recognized any one inside as one of the men she had seen in the car parked next to her own at the convenience market on the night before. There were three persons in the room. One was later identified to her as Detective Davis. At the time in question, he was not in uniform. One of the remaining two was the defendant. Ms. Benavidez could not remember at the time of trial whether the third person in the room was male or female. Detective Davis was seated behind one of the desks in the room. The third person was seated behind another of the desks, and the defendant was seated alongside. Ms. Benavidez immediately recognized the defendant as one of the persons in the car from the night before.

Defendant's point would have merit had he been charged with larceny of Ms. Benavidez' purse. I agree that the circumstances of this identification were highly suggestive. Nevertheless, one cannot ignore that defendant was unequivocally identified by both bank tellers and that following his arrest, he admitted to one of the police officers that he had been at the convenience grocery store on the previous evening when Ms. Benavidez' purse disappeared. Given these circumstances, permitting defendant's in-court identification as one of the persons present at the convenience store incident by Ms. Benavidez was harmless error.

Defendant's fourth point is that the trial court erred in allowing the State to impeach Ramona Murphy on cross-examination.

The pertinent questions and answers were the following:

> "Q. Isn't it true that both you and Jessie gave your residences as 220 Willow?
>
> "A. Uh huh.
>
> "Q. And you had lived with Jessie at that residence, had you not?"

At this point defense counsel asked that the jury be excused so that he could make an objection. The trial court stated that wouldn't be necessary because it was going

to overrule his objection and allow questions concerning where and with whom she lived. The district attorney then resumed his cross-examination.

"MR. WILLIAMS: The two of you gave the same address, isn't that right?

"A. Yes, sir.

"Q. And you were very close to Jessie Hermosillo, weren't you?

"A. Not at the time, we were having our difficulties, our problems, and we weren't together.

. . . . . .

"Q. How long had it been since you had been very close to Jessie, prior to the date that this all happened?

"A. Oh, let's see, he got out of the penitentiary in January, I was with him for a while, around, oh, I would say, the last of February, beginning of March, we just quit.

"Q. Okay, what do you mean, you quit?

"A. Just didn't see each other."

Thereupon, defense counsel renewed his request for a record of his objections to the prosecution's cross-examination of Ms. Murphy, and the trial court excused the jury for that purpose.

Defense counsel moved for a mistrial on the ground that the State had brought out the fact that defendant had been imprisoned and on the additional ground that the prosecution had injected evidence as to defendant's character by eliciting testimony that Ramona Murphy had lived with him. His argument was that:

". . . Rule 608, may it please the Court, says that evidence of character of the witness that affects truthfulness of her character is admissible, but the evidence that she's been living with this man, or that she's had an illegitimate child by him, has no bearing whatsoever on the truthfulness or untruthfulness. The evidence of a crime, comes under Rule 609, but that doesn't, I think, entitle the District Attorney to go into acts of misconduct that will affect the character of this Defendant, because that is not an issue before the Court at this time."

The trial court denied the motion for a mistrial and overruled the objection to Ms. Murphy's testimony on the common law relationship that had existed between herself and the defendant. The district attorney continued his cross-examination, as follows:

"Q. And you say that you and Jessie broke off whatever relationship you had the last of February or the first of March, is that correct?

"A. Yes, sir.

"Q. And you are relatively sure about that?

"A. Yes, sir.

"Q. Can you give me an approximate date, as to when you broke off your relationship?

"A. No, sir.

"Q. Well, do you know with regard to the 28th of February, the last day of February, was it within anytime, or can you give me—Was it within two days or five days of the beginning of February, or ten days?

"A. I think it was before the 28th.

"Q. How long before?

"A. I would say about a week or two.

"Q. All right. Okay, and this relationship that you and Jessie had, you were living together as man and wife, isn't that correct?

"A. Yes, sir.

"Q. As a matter of fact, you have a child by Jessie, correct?

"A. Yes, sir."

Defendant cites our rule of evidence numbered 608, § 20-4-608, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973), which provides:

"(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

"(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609 [20-4-609], may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness.

"The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility."

In his brief defendant argues that this rule is applicable in this situation and that it "limits the ability of a party to attack the credibility of a witness by character evidence only if such evidence relates to truthfulness . . . [and that] specific instances of misconduct must be related to truthfulness to be admissible even if such evidence is introduced through cross-examination of the witness being attacked."

Defendant is mistaken. The applicable Rule is 607, § 20-4-607, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973), which provides: "The credibility of a witness may be attacked by any party, including the party calling him." It has long been established in New Mexico that the possible bias of a witness may be brought out by inquiry into any relationship that might exist between the witness and the parties.

"It is clearly competent on cross-examination to show the relationship existing between the witness and the parties to the case, the friendship or enmity existing between the witness and the parties, and any other fact that will enable the jury to determine whether the witness has any motive for suppressing or discoloring the truth." *Henderson v. Dreyfus,* 26 N.M. 541, at 569, 191 P. 442, at 453 (1919); see, *State v. Talamante,* 50 N. M. 6, 165 P.2d 812 (1946).

I am impressed with the articulation of the basis for this rule of evidence by William G. Hale, *Emeritus* Dean of the law school at the University of Southern California:

"It is accepted doctrine that the bias of a witness will affect his credibility. The existence of bias does not necessarily imply conscious falsehood. It is quite likely however to shade at least, though unwittingly, a witness' testimony, the bias may be in favor of one side or against the other. Granted its existence it may be appropriately taken into consideration in weighing the testimony.

"Since bias is a state of mind, its existence can be determined only circumstantially. These circumstances may consist of relationships (e. g. that [the] witness is the father of the plaintiff) or dealings or encounters calculated to develop a prejudice (e. g. a fight with the party against whom the testimony is given) or conduct, or utterances." 1 Hastings Journal 1 (1950).

Similarly, Wigmore in his treatise on Evidence (Chadbourne Revision 1970), Vol. III A, § 949, p. 784, indicates the kinds of circumstances that may be relevant to show the bias of a witness:

"Among the commoner sorts of circumstances are all those involving some *inti-*

mate family relationship to one of the *parties* by blood or marriage or illicit intercourse, or some such relationship to a person, *other than a party,* who is involved on one or the other side of the litigation, or is otherwise prejudiced for or against one of the parties. The relation of *employment* present or past, by one of the parties, is also usually relevant." [Emphasis in the original.] [Footnotes Omitted.]

Showing the bias of a witness is only one of the several ways of attacking credibility.

"There are five main lines of attack upon the credibility of a witness. The first, and probably the most effective and most frequently employed, is an attack by proof that the witness on a previous occasion has made statements inconsistent with his present testimony. The second is an attack by a showing that the witness is biased on account of emotional influences such as kinship for one party or hostility to another, or motives of pecuniary interest, whether legitimate or corrupt. The third is an attack upon the character of the witness. The fourth is an attack by showing a defect of capacity in the witness to observe, remember or recount the matters testified about. The fifth is proof by other witnesses that material facts are otherwise than as testified to by the witness under attack." [Footnotes Omitted.] McCormick, Evidence, § 33, p. 66 (2d Ed. 1972).

Compare,

"The character of a witness for truthfulness or mendacity is relevant circumstantial evidence on the question of the truth of particular testimony of the witness." McCormick, supra, § 41, p. 81.

The challenged questions propounded by the district attorney at trial went to the question of Ramona Murphy's possible bias, not to the question of her truthfulness or untruthfulness; and the trial court did not err in permitting them.

540 P.2d 1321

MUSIC SERVICE COMPANY, a New Mexico Corporation, Appellant,

v.

BUREAU OF REVENUE of the State of New Mexico, Appellee.

No. 1803.

Court of Appeals of New Mexico.

Sept. 10, 1975.

[redacted]

Jay R. Payne, Schlenker, Parker, Payne & Wellbourn, Albuquerque, for appellant.

Toney Anaya, Atty. Gen., Vernon O. Henning, Bureau of Revenue, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

Music Service Company, taxpayer, appeals from a Decision and Order of the Commissioner of Revenue which did not allow taxpayer a deduction from the compensating tax as provided in § 72–16A–15.1, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, 1973 Supp.). We affirm.

Taxpayer was in the business of providing coin operated, amusement and vending equipment for use by business establishments.

Establishments had use of the machines primarily for the pleasure or amusement of their patrons. Patrons played the pinball machines and juke boxes, and played pool on the coin operated tables.

An establishment had the right to move the machines from one location to another with little or no control over the machine by taxpayer. It could put the machine into and take it out of operation and even put it in storage. It controlled the hours of operation. Taxpayer had no key to the locations involved.

Taxpayer was present when the coin boxes in the equipment were opened and the money counted.

Taxpayer had the right to terminate the arrangement and retake possession of the machine or machines whenever the income fell below a certain amount per month.

The gross receipts tax is not an issue on this appeal. The only contested liability is the deduction allowed from the compensating tax provided in § 72–16A–15.1, supra, In pertinent part it reads:

> The value of tangible personal property, . . . may be deducted in computing the conpensating tax due if the person using the tangible personal property:
>
> A. is engaged in a business which derives a substantial portion of its receipts from leasing . . . tangible personal property of the type leased; and
>
> B. does not use the tangible personal property in any manner other than holding it for lease . . . or leasing . . . it either by itself or in combination with other tangible personal property in the ordinary course of business.

"Leasing is defined in § 72–16A–3(J), N.M.S.A.1953 (Repl.Vol. 10, pt. 2, 1973 Supp.):

> J. "leasing" means any arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property;

The Commissioner determined that the relationship between taxpayer and the owners of the establishments was not one of lessor-lessee. He characterized the relationship as one or more of the following:

> a) the taxpayer granted a license to use the devices and pool tables to the establishment owner;
>
> b) the establishment owner granted a license to use real property to the tax-

payer of the space occupied by the machines to enable the taxpayer to engage in business on the premises of the establishment owner;

c) both the parties engaged in the joint operation of the devices and pool tables.

Taxpayer contends that the agreements for joint operation of these vending machines were leases and the income therefrom was not subject to the compensating tax. We disagree.

What the Commissioner called "joint operation", we deem it to mean, under the facts in this case, a "bailment for mutual benefit of the parties".

The record shows that taxpayer has another type of vending machine agreement with business establishments. It is a lease agreement. The tax on this type of agreement is not at issue. With a lease, payment is made to taxpayer by a flat fee. In the type of agreement here at issue, payment is made by a division of the proceeds from the machines.

The basis of the agreements here in question is, (a) an oral agreement between taxpayer and a business establishment, and (b) receipts. These, in turn, were based on a document called, "Agreement for Joint Operation of Amusement Devices". This document gave no indication of any intent to enter into a lease. The words, "lease", "lessor", or "lessee" are not mentioned. The taxpayer knew the difference between a lease agreement and a bailment for their mutual benefit.

We believe that the type of oral agreement relied on by taxpayer does not meet the definition of the term "leasing". The location of the machines, the hours of operation, the income and method of payment show that the devices and pool tables were not property "employed for or by" the establishment alone. The contract between the taxpayer and the establishment was to facilitate the use of the machines by the patrons of the establishment for the benefit of both the taxpayer and the establishment.

Taxpayer testified that the portion of the proceeds from the devices that went to the establishment was payment by the taxpayer for rental of space in the business establishment. This is inconsistent with a characterization of the agreement as a leasing of the machine to the establishment. A lease would imply that the establishment's proceeds from the machine were its own profits by virtue of the lease *from* the taxpayer.

Even if we conceded that a conflict in the evidence exists, the Commissioner may weigh the testimony of taxpayer, determine his credibility and say where the truth lies. His finding is conclusive. *Mears v. Bureau of Revenue,* 87 N.M. 240, 531 P.2d 1213 (Ct.App.1975).

Taxpayer relies on *Co-Con, Inc. v. Bureau of Revenue,* 87 N.M. 118, 529 P.2d 1239 (Ct.App.1974). This case does not assist the taxpayer. The Court said:

> The characterization of a transaction as a lease may also be determined by looking to the intentions of the parties as evidenced by their actions with respect to the leased property. [Citation omitted.]
>
> . . . [T]he accompanying treatment by both companies of the transactions *as gross rentals for federal corporate income tax purposes* in the same tax year indicates that the intent of the taxpayer was to treat the arrangements as rentals or leases. . . . [Emphasis added.]; [529 P.2d at 1242.]

In the instant case, the intent of the taxpayer is evidenced by his knowledge of the difference between a lease and a bailment for mutual benefit. He chose the latter road to travel. This supports the inference that the relationship between taxpayer and establishment was not a lease and where substantial evidence supports the Commissioner's decision and order, it is affirmed. *Runco Acidizing & Frac. Co., Inc. v. Bureau of Revenue,* 87 N.M. 146, 530 P.2d 410 (Ct.App.1974); *Duke v. Bu-*

reau of Revenue, 87 N.M. 360, 533 P.2d 593 (Ct.App.1975).

Affirmed.

It is so ordered.

HERNANDEZ, J., concurs.

WOOD, C. J., specially concurs.

WOOD, Chief Judge (specially concurring).

I join in the result on the basis that there are conflicting inferences as to whether taxpayer's oral agreements amounted to leases. With such conflicts, the Commissioner's decision is conclusive. See *Mears v. Bureau of Revenue,* 87 N.M. 240, 531 P.2d 1213 (Ct.App.1975).

An issue arising in the briefs and at oral argument concerns the propriety of the Bureau pursuing the taxes in this case. At oral argument we invited affidavits and supporting documentation from the attorneys and such have been filed.

The propriety claim arises because of an alleged concession made by the Bureau's attorney during an informal conference. The material before us supports the view that a concession was in fact made.

But what was the concession? Here the material submitted is in conflict. The taxpayer asserts that the concession was tape recorded. The tape submitted, while supporting that a concession of some sort occurred, does not show the details of the concession. The taxpayer intimates that the tape submitted is incomplete. As to the completeness of the tape, the material submitted is in conflict.

In addition to the conflict in the material submitted, the taxpayer, at the inception of the formal hearing, agreed "to treat the hearing today as the first and only hearing in this matter."

In the light of the foregoing, the case is not an appropriate one to consider whether the concepts of fairness and estoppel may operate independently of the provisions of §§ 72-13-34 and 72-13-73. N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1973).

540 P.2d 1324

STATE of New Mexico, Plaintiff-Appellee,

v.

Charles CARTER, Defendant-Appellant.

No. 1537.

Court of Appeals of New Mexico.

Sept. 10, 1975.

Louis G. Stewart, Jr., Harry N. Relkin, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Sp. Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HERNANDEZ, Judge.

Defendant was indicted and convicted on two counts of armed robbery in violation of Section 40A-16-2, N.M.S.A. 1953 (2d Repl.Vol. 6, Supp. 1973), and one count of rape in violation of Section 40A-9-2, N. M.S.A.1953 (2d Repl.Vol. 6, Supp.1973). He appeals alleging two points of error. We affirm.

Defendant's first point of error is that the trial court erred in refusing to dismiss the indictment because he was not brought to trial within six months in violation of the Sixth Amendment of the United States Constitution and Article II, § 14 of the New Mexico Constitution and Rule 37 of the Rules of Criminal Procedure, § 41-23-37, N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1973). Under this point defendant contends that the extension of time for commencing prosecution granted by our Supreme Court was invalid because the mandatory requirements of notice, hearing and a showing of good cause as provided by Rule 37 were not met and that this constitutes a denial of due process. Defendant further contends that the Supreme Court's consideration of such an extension constitutes a "critical state" of the pre-trial proceedings and that he was entitled to representation of counsel thereat; he argues that failure to appoint counsel to represent him at this stage was also a denial of due process. A majority of the panel assigned to the appeal in this court believed that defendant's first point presented two ostensibly valid and demonstrably fundamental constitutional issues. However, a review of those issues would have involved our review of the Supreme Court's order granting the extension, and that we are prohibited from doing. *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973); *State v. Sedillo,* 86 N.M. 382, 524 P.2d 998 (Ct.App.1974). We therefore certified the appeal to the Supreme Court for its review of the procedure involved in granting the extension. *State v. Carter,* 87 N.M. 41, 528 P.2d 1281 (Ct.App.1974). The Supreme Court has now remanded the cause to us with directions to abide by its order granting the extension. We accordingly abide.

Defendant's second point is that his warrantless arrest was illegal for lack of probable cause and that, therefore, the confession obtained from him was inadmissible, "since it was the fruit of the illegal arrest."

The defendant was arrested in Philadelphia, Pennsylvania, on April 11, 1972 at a bus station by officers from that city's police department. On April 10, 1972, a Detective Dryden of the Phoenix, Arizona police department had spoken to Sergeant Mallet of the Philadelphia department by telephone. Dryden gave Mallet the name and address of the defendant and another man and told him that the two were fugitives from charges stemming from an armed robbery which had occurred in Phoenix on April 7, 1972. Defendant contends the Philadelphia police lacked sufficient probable cause for making the arrest because the Philadelphia police had no information independent of their communications with Phoenix and that the information which the Phoenix police did supply fell short of establishing probable cause in that it set forth no ground for regarding the information reliable or credible.

Even assuming the validity of defendant's contention, we fail to see how it might benefit his case because we believe the law is clear that the Philadelphia police were entitled to act on the Phoenix police department's request and to assume that Phoenix had probable cause for making it. Thus, the suppressibility of defendant's confession to New Mexico crimes during his detention in Philadelphia depends upon

whether the Phoenix police had probable cause to arrest the defendant for crimes they thought he had committed in Arizona. *Whiteley v. Warden of Wyoming Penitentiary,* 401 U.S. 560, 91 S.Ct. 1031, 28 L. Ed.2d 306 (1971); *State v. Alderete,* 88 N.M. 14, 536 P.2d 278 (Ct.App.1975); *State v. Gorsuch,* 87 N.M. 135, 529 P.2d 1256 (Ct.App.1974). Defendant has not and does not contend that the Phoenix police lacked probable cause to arrest the defendant for crimes committed in Arizona.

We believe defendant's arrest by the Philadelphia police was lawful.

The judgment and sentence entered below are affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

540 P.2d 1326

STATE of New Mexico, Plaintiff-Appellee,

v.

James Otis FIECHTER, Defendant-Appellant.

No. 1655.

Court of Appeals of New Mexico.

June 4, 1975.

Certiorari Granted July 2, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Donald Klein, Jr., Associate Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., David Metz McArthur, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

LOPEZ, Judge.

The defendant was convicted of unlawfully possessing over eight ounces of marijuana contrary to § 54–11–23, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, Supp. 1973). We reverse and dismiss.

It is uncontested that the defendant had been enrolled in a methadone maintenance program in Taos, New Mexico. The program was closed and defendant was brought off the methadone rapidly. He moved from Taos to Albuquerque, where he found that a two week waiting require-

ment was established for entry into an Albuquerque methadone program. The alleged incident of possession took place during this time.

The evidence adduced at trial shows that when the defendant moved to Albuquerque, he was very sick due to withdrawal from the methadone. He contacted his former heroin supplier, Floyd Mora, who had since been arrested for narcotics violations. This man supplied defendant with small amounts of heroin to alleviate his withdrawal symptoms. Mora, after several refusals, persuaded the defendant to conclude a sale of marijuana in order to obtain enough money to purchase the heroin that would alleviate defendant's symptoms.

The defendant contends that the record shows entrapment as a matter of law. We agree.

The test for entrapment has been generalized in *State v. Sainz,* 84 N.M. 259, 501 P.2d 1247 (Ct.App. 1972), as follows:

> ". . . When the state's participation in the criminal enterprise reaches the point where it can be said that except for the conduct of the state a crime would probably not have been committed or because the conduct is such that it is likely to induce those to commit a crime who would normally avoid crime, or, if the conduct is such that if allowed to continue would shake the public's confidence in the fair and honorable administration of justice, this then becomes entrapment as a matter of law." [Citations omitted]

In an amazingly similar factual setting, *Sherman v. United States,* 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958), indicates:

> ". . . Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials. [citing *Sorrells v. United States,* 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413, 86 A.L.R. 249 (1932)] To determine whether entrapment has been established, a line must be drawn between the trap for the unawary innocent and the trap for the unwary criminal. . . . " 356 U.S. at 372, 78 S.Ct. at 821.

For entrapment to attach, as a matter of law, the inducement to commit the crime alleged must come from a government agent or someone working under government direction. Entrapment by someone with no connection with the state is not a defense. This is because the focus for entrapment is on the conduct of the government. The purpose of acknowledging this defense at all is our concern with the legitimacy of police conduct. See *State v. Sainz,* supra.

We must then ask: was Mora a person working under government direction? The record shows that Floyd Mora had been arrested and charged with possession of narcotics the summer before the defendant's arrest; that the police obtained a confession from Mora; that, in exchange for the dropping of charges, Mora agreed to work as an informer for the police; and that the charges against Mora were not dropped until four months after the defendant's arrest.

Informers acting under promises of immunity have been treated by the courts as government agents for purposes of the entrapment defense. See cases cited in: Richard C. Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provacateurs, 60 Yale L.J. 1091, 1109 (1951); Reid Carron, Entrapment: A Critical Discussion, 37 Mo.L.Rev. 633, 641–42 (1972).

It is clear from the evidence that Mora was an informer acting under the promise of immunity. It was just such an informer whom the Supreme Court in *Sherman,* supra, regarded as an agent for purposes of entrapment. Mora was at least a "person working under government direction."

Was the informer's activity entrapment, as a matter of law? The record shows that from the moment Mora was contacted

by the defendant upon his return to Albuquerque, Mora pestered him about selling a quantity of marijuana. The defendant rejected these overtures several times before succumbing.

The effects of methadone withdrawal on the defendant's physical and psychological state were severe, making him especially susceptible to Mora's urgings. These effects were evidently known to Mora. It is uncontested on the record that the defendant initiated requests for heroin. It is also undisputed that the informer stood to gain a great deal from inducing the defendant to possess marijuana, the crime of which defendant stands convicted.

The court noted in *State v. Sainz*, supra:

> "'. . . as the part played by the state increases, the importance of the defendant's predisposition and intent decreases, until at some point entrapment as a matter of law is reached. . . .'" 84 N.M. at 259, 501 P.2d at 1249.

We believe that this point has been reached when a state witness discloses that an informer proceeds to induce the commission of crimes of possession and then is excused from criminal prosecution.

We hold that, on the narrow issue of the facts presented in this case, the state's participation amounts to entrapment, as a matter of law.

But for the conduct of the state, a crime would not have been committed. This conduct is such, moreover, that to allow it to continue would shake the public's confidence in the fair and honorable administration of justice. *State v. Sainz*, supra.

In concluding, we note that this defendant is not the sort of person who ought to be sent to jail for the possession of controlled substances. The record shows that he did everything the state ordinarily recommends in order to break his heroin habit. He resisted strenuous urgings by an informer to sell marijuana, while supporting his habit by pawning his own goods during a painful delay before entry into an Albuquerque methadone program. The law does not require heroic standards of conduct. It would be ignoble "doublespeak" for this state to encourage withdrawal and treatment, with one hand, and alternatively punish crimes of possession with the other, when the very means of withdrawal have been eliminated through no fault of the addict, and the means of committing the crime supplied by a police informer.

Reversed and dismissed.

It is so ordered.

SUTIN, J., concurs.

HENDLEY, J., dissenting.

HENDLEY, Judge (dissenting).

I dissent.

What the majority has done today is to go far beyond what I consider to be the rule of "entrapment as a matter of law." See *State v. Sainz*, 84 N.M. 259, 501 P.2d 1247 (Ct.App. 1972).

I do not question the fact that Mora was acting as a governmental agent. Defendant had called Mora, his previous supplier, when he returned to Albuquerque. Defendant was desperate for money to buy heroin. He had pawned all of his own goods to get money. Defendant testified that he and Mora would ". . . pool our thoughts more or less, on where to get money [to buy heroin], and the TV was gone and the radio was gone, and what have you, and there was nothing else, you know." Defendant also stated that Mora raised the subject of marijuana "over three or five [times], maybe more." From this testimony alone it would appear that defendant was going to find some way to get money to buy heroin with or without Mora. Further, defendant was no novice in dealing in marijuana. He testified on direct examination that he had previously been convicted of smuggling marijuana.

I fail to see, under the current state of the record, how such events can be called a "trap for the unwary innocent." *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). Nor do I see "the [government's] conduct [as] such that if allowed to continue would shake the public's confidence in the fair and honorable administration of justice." *State v. Sainz,* supra.

What the majority has concluded today is that whenever a defendant is between methadone treatments *any* activity by the government [Mora], regardless of the defendant's own thoughts, wants or desires, becomes "entrapment as a matter of law." Such a conclusion fails to recognize the true legal meaning of "creative activity."

I dissent.

541 P.2d 430

STATE of New Mexico, Plaintiff-Appellee,

v.

Joe Pat LUCERO and Susan Sena, Defendants-Appellants.

No. 10154.

Supreme Court of New Mexico.

Oct. 9, 1975.

Roy G. Hill, Truth or Consequences, for defendants-appellants.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

OMAN, Justice.

Defendant Lucero was convicted of first degree murder and defendant Sena of harboring or aiding a felon, to wit, Lucero. Both have appealed. We affirm.

Lucero and Sena lived together. Sena, the decedent and decedent's wife were receiving treatments of methadone under a drug rehabilitation program operated by El Vicio Incorporated. On December 27, 1972, a meeting was called at El Vicio headquarters. Sena, decedent and dece-

dent's wife appeared at the headquarters for the meeting, which, for some reason, was aborted. Lucero accompanied Sena.

There are differences in the testimonies of witnesses as to what actually occurred leading up to the shooting of decedent and his wife by Lucero, but the wife testified to a brief exchange of words between her and Sena; a verbal charge by Lucero that decedent was a "rat" (meaning a police informer); the drawing of a gun by Lucero and shooting decedent twice; and the shooting of her in the back by Lucero as she sought to escape and go for help. The shootings were admitted by Lucero. He claimed he did so in defense of himself and Sena. However, Sena denied having seen a gun or having witnessed the shootings.

Some time later in the evening the police went to the home of another person in the immediate area of El Vicio headquarters looking for Lucero. There is evidence that one of the officers knew Lucero and as he approached the house from the rear he saw Lucero and Sena together in a doorway leading from the outside into a rear bedroom. As soon as they saw the officer, Sena began to close the door. The officer identified himself as an officer and ordered them to halt. Sena closed the door, and the officer immediately heard someone running inside the house. The door had not been fully closed, so the officer pushed it open and entered the bedroom. He noticed Sena running into another part of the house and cautiously pursued her.

Upon entering the living room at the front of the house, the officer found Sena, two or three other police officers who had entered from the front, and several other persons. Although this was not the residence of Sena, she so claimed and protested her removal from her home. Another officer later found Lucero crouched in a closet near the bedroom door in which the first officer had seen defendants and which, as above stated, had been closed upon him by Sena after being ordered to halt.

Lucero first contends the evidence against him was insufficient to support his conviction of first degree murder, because "he did not have sufficient time to weigh his actions and consider their consequences." This court views the evidence on appeal in the light most favorable to the verdict, resolving all conflicts therein and indulging all permissible inferences therefrom. *State v. Romero,* 67 N.M. 82, 352 P.2d 781 (1960); *State v. Polsky,* 82 N.M. 393, 482 P.2d 257 (Ct.App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), cert. denied, 404 U.S. 1015, 92 S.Ct. 688, 30 L.Ed. 2d 662 (1972); *State v. Favela,* 79 N.M. 490, 444 P.2d 1001 (Ct.App.1968); *State v. Manlove,* 79 N.M. 189, 441 P.2d 229 (Ct. App.), cert. denied, 79 N.M. 159, 441 P.2d 57 (1968).

Murder in the first degree is a willful, deliberate and premeditated killing. Section 40A–2–1, N.M.S.A., 1953 (2d Repl.Vol. 6, 1972). The precise issue raised is that of the time required to formulate a deliberate intention to kill. Although a deliberate intention means an intention or decision arrived at after careful thought and after a weighing of the reasons for the commission of the killing, such a decision may be reached in a short period of time. Here there is evidence clearly supporting a deliberate intention on the part of Lucero to kill decedent as well as decedent's wife. Although he was receiving no treatments at El Vicio, Lucero went there armed with a loaded pistol, which was concealed on his person; there was a suspected informer or informers among the group who patronized El Vicio; Sena, with whom Lucero lived, was a member of this group; Sena and decedent's wife, in the presence of Lucero, exchanged some unpleasant words; Lucero then charged decedent with being a "rat"; decedent asked Lucero why he was called a "rat"; and Lucero thereupon drew his gun and proceeded to shoot both decedent and his wife.

Under these circumstances, the issue of deliberation, as well as all other issues of fact, was for the jury to decide. *State v. Riggsbee,* 85 N.M. 668, 515 P.2d 964 (1973). The issue of deliberation and all other issues were resolved against defendant.

Lucero also questions the correctness of the district court's action in instructing the jury on first degree murder. However, his objection was that there was insufficient evidence to submit the question of first degree murder to the jury, and this was based upon his claim that there was insufficient evidence to support a finding of a deliberate intention on his part to kill decedent. We have already disposed of this contention.

He also contends he was prejudiced because the district court failed to instruct the jury that implied malice was insufficient upon which to find him guilty of first degree murder. However, he raised no such objection at trial. The instructions defined murder in the first degree as a "willful, deliberate and premediatated killing" and instructed that "premeditated malice exists where the intention to take human life unlawfully is deliberately formed in the mind, and that determination is meditated upon before the fatal stroke is given." Express malice was defined as a "deliberate intention, unlawfully to take the life away of a fellow creature, which is manifested by external circumstances capable of proof."

Even if defendant had properly raised the question he now presents for the first time on appeal, and even if we agreed with his claim that the jury should have been instructed that implied malice was insufficient to sustain a conviction of first degree murder, we would still feel compelled to reject his contention. The instructions can be construed only as requiring express malice as an element of first degree murder, and the evidence clearly supports a finding of express malice.

Lucero next complains that the district court erred in admitting evidence as to the shooting of decedent's wife. He relies upon *State v. Aragon,* 82 N.M. 66, 475 P.2d 460 (Ct.App.1970); *State v. Lindsey,* 81 N.M. 173, 464 P.2d 903 (Ct.App.1969), cert. denied, 81 N.M. 140, 464 P.2d 559, cert. denied, 398 U.S. 904, 90 S.Ct. 1692, 26 L.Ed.2d 62 (1970), and *State v. Mason,* 79 N.M. 663, 448 P.2d 175 (Ct.App.), cert. denied, 79 N.M. 688, 448 P.2d 489 (1968). The opinions in those cases afford him no comfort under the facts and circumstances of this case.

The shooting of decedent's wife occurred within a second or so after the shooting of decedent and as she sought to escape. Shooting her under the circumstances here present obviously had real probative value upon the issues of deliberation and intent. Her shooting immediately following the shooting of her husband constituted evidence of a preconceived plan by Lucero to kill her as well as her husband.

Sena claims the evidence failed to support her conviction of harboring or aiding Lucero. In fact, she urges that there is a complete absence of evidence to support her conviction and relies upon our decisions in *State v. Salazar,* 78 N.M. 329, 431 P.2d 62 (1967); *State v. Armijo,* 35 N.M. 533, 2 P.2d 1075 (1931), and *State v. Garcia,* 19 N.M. 414, 143 P. 1012 (1914). Nothing said in our decisions in any of those cases supports her contention. It is true that in the Salazar and Armijo cases, and particularly in the Salazar case, we considered and applied the doctrine of fundamental error by which we are compelled to reverse a conviction if there is a total absence of evidence to support it as well as evidence of an exculpatory nature. Here we have substantial evidence to support Sena's conviction. The testimonies of her and Lucero, had they been believed by the jury, would have exculpated her, but the jury was not obliged to believe them.

The statute under which she was charged and convicted provides in pertinent part:

> "*Harboring or aiding a felon.* Harboring or aiding a felon consists of any person, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister by consanguinity or affinity, who knowingly conceals any offender or gives such offender any other aid, knowing that he has committed a felony, with the intent that he escape or avoid arrest, trial, conviction or punishment."

Section 40A–22–4, N.M.S.A.1953 (2d Repl. Vol. 6, 1972).

The evidence unquestionably supports findings that Sena was present and witnessed the shootings by Lucero, even though she claimed to have seen no gun and observed no shootings; that she and Lucero were together at El Vicio headquarters after the shooting and later at the home near the headquarters where they were apprehended; that they were standing in or near the open doorway at the rear of this home when one of the police officers approached them, announced he was a police officer and ordered them to halt; that she closed, or at least undertook to close, the door upon the officer; and that she then immediately ran toward the front of the house while Lucero secreted himself in a closet near the door which she had at least partially closed upon the officer.

By viewing this evidence, and all inferences reasonably deducible therefrom, in the light most favorable to the verdict, we are convinced that Sena was guilty of aiding Lucero with the intent that he escape or avoid arrest. To aid means to assist, support or help. Webster's Third New International Dictionary, Unabridged (1961).

Sena next contends that § 40A–22–4, supra, violates article II, § 18 of the Constitution of New Mexico and the fourteenth amendment to the Constitution of the United States. Her claim is that the exemptions from the statute's application of certain named groups of persons on the basis of relationship to the felon constitute unreasonable classifications and deny her equal protection of the law. Her argument is that other relationships by consanguinity and affinity are just as close as those listed in the statute, and that she should be exempt because she was living with Lucero as a wife, even though they were not married.

We are of the opinion that the classifications are reasonable and do not violate the equal protection clauses of the New Mexico and United States Constitutions. See and compare *McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964); *People's Constitutional Party v. Evans,* 83 N.M. 303, 491 P.2d 520 (1971); *Aragon v. Cox,* 75 N.M. 537, 407 P.2d 673 (1965), overruled on other grounds, 77 N.M. 79, 419 P.2d 456 (1966); *Padilla v. Health and Social Services Department,* 84 N.M. 140, 500 P.2d 425 (Ct.App.1972).

Both appellants contend that the district court abused its discretion in giving the following instruction to the jury:

> "It is your duty, as jurors, to consult with one another, and to deliberate with a view of reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict, or solely because of the opinion of other jurors.

"I hope that after further deliberation you may be able to agree upon a verdict. That is why we try cases, to try to dispose of them and to reach a common conclusion, if you can do so, consistent with the conscience of the individual members of the jury. The court suggests that in deliberating you each recognize that you are not infallible, that you hear the opinion of the other jurors, and that you do it conscientiously with a view to reaching a common conclusion, if you can."

N.M.U.J.I. 16.2 (1966).

The jury began its deliberations at approximately 9:00 p. m. The court gave this additional instruction at approximately 12:40 a. m. the following morning. At approximately 1:00 a. m. the court recessed and the jury was sequestered for the night. The jury resumed its deliberations at 9:15 a. m., and the verdicts were returned into open court by the jury shortly after 10:30 a. m.

Appellants concede that the matter of giving this additional instruction rested within the sound discretion of the district court. *State v. Hatley*, 72 N.M. 377, 384 P.2d 252 (1963); *State v. Moore*, 42 N.M. 135, 76 P.2d 19 (1938); *State v. Manlove*, supra. However, they contend that the giving of the instruction, at the time it was given, constituted an abuse of discretion in that it unduly hastened the jury in its consideration of the case and coerced the jury into agreement.

As stated in *State v. Manlove*, supra, it is appropriate to give such an instruction only after the jury has deliberated for some time without reaching a verdict, and that it is improper by such an instruction to unduly hasten a jury in its consideration of the case or coerce the jury into an agreement. However, nothing has been presented to us which indicates that either of these results was even possibly attained or that the district court abused its discretion. The jury had been deliberating for over 3½ hours before the instruction was given, and the verdicts were not returned until the jury had further deliberated as a body for approximately 1¼ hours the next morning.

The judgments should be affirmed.

It is so ordered.

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

541 P.2d 435

STATE of New Mexico, Plaintiff-Appellee,

v.

Daniel Peter BARELA, Defendant-Appellant.

No. 1880.

Court of Appeals of New Mexico.

Sept. 23, 1975.

Larry N. Smith, Moore & Smith, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant was convicted of possession of heroin contrary to § 54–11–23(A), N.M.S.A.1953 (Repl.Vol. 8, pt. 2, 1973 Supp.). He appeals. We affirm.

The only question on appeal that merits consideration is defendant's claim that the trial court erroneously denied defendant's motion to suppress evidence seized from his person.

Defendant was arrested for public drunkenness. This occurred prior to repeal of the offense of drunkenness, § 40A–20–2, N.M.S.A.1953 (2d Repl.Vol. 6). The police officer searched defendant and found a marijuana cigarette and a glasses case which contained heroin.

Defendant contends that the opening of the glasses case was not a permissible search. This claim is a matter of first impression in New Mexico.

The Supreme Court of the United States has now held that the full search of the person of the suspect made incident to a lawful custodial arrest did not violate the Fourth and Fourteenth Amendments of the Constitution of the United States. *Gustafson v. Florida,* 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973); *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

Having authority to search the glasses case, the right to open it naturally followed.

Affirmed.

It is so ordered.

WOOD, C. J., and LOPEZ, J., concur.

541 P.2d 628

STATE of New Mexico, Plaintiff-Appellee,

v.

Frank R. GUTIERREZ, Defendant-Appellant.

Nos. 1955 and 2047.

Court of Appeals of New Mexico.

Oct. 7, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, App. Defender, Reginald J. Storment, Asst. App. Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of murder in the second degree, defendant appeals. The issues concern: (1) the sufficiency of the indictment, and (2) refused instructions on (a) insanity; (b) intoxication; and (c) manslaughter.

Sufficiency of the Indictment

The indictment charged defendant with murder in the first degree. Defendant claims the indictment was void because he was charged under our general murder statute rather than under a specific statute which covered his crime. The general murder statute is § 40A–2–1, N.M.S.A.1953 (2d Repl.Vol. 6). The alleged specific statute is § 40A–6–1(C), N.M.S.A. 1953 (2d Repl.Vol. 6, Supp.1973). Section 40A–6–1(C), supra, pertains to abuse of a child which results in the child's death. The essence of defendant's claim is that in any homicide within the child abuse statute, the killer cannot be tried for first degree murder.

State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936) holds that for the specific statute to apply, the specific and general statute must condemn the same offense. Or, as stated in *State v. Riley,* 82 N.M. 235, 478 P.2d 563 (Ct.App.1970), the same proof is required under either the specific or general statute.

The offense of murder and the offense of child abuse resulting in the child's death are not the same. Nor is the same proof required for the two offenses. Generally speaking, murder requires an intent. See N.M.U.J.I. Criminal, committee commentaries to instructions 2.00 through 2.11. Child abuse does not require an intent. *State v. Lucero,* 87 N.M. 242, 531 P.2d 1215 (Ct.App.1975). There is no basis for

application of the specific versus general statute rule; the indictment was not void.

Refused Instructions

Defendant and his wife were having marital difficulties. In a telephone conversation, his wife told him that she was leaving him. Defendant replied that if she did he would kill himself and the children. After the telephone conversation, defendant kissed his young daughter, picked up his baby boy and slammed the boy's head against the coffee table twice. The baby's injuries were extensive and fatal. There is evidence that defendant has sniffed paint for a number of years and had been sniffing paint over a period of three days before killing his baby boy.

(a) *Insanity*

Defendant requested an instruction on defendant's insanity at the time of commission of the offense. He claims the trial court erred in refusing the request, asserting "there was evidence of insanity, both expert and lay".

For insanity to exist, there must be a disease of the mind. *State v. Chambers,* 84 N.M. 309, 502 P.2d 999 (1972); *State v. White,* 58 N.M. 324, 270 P.2d 727 (1954). *White* states:

> ". . . the insanity of which we speak does not comprehend an insanity which occurs at a crisis and dissipates thereafter. The insanity of which we speak is 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."

State v. Nagel, 87 N.M. 434, 535 P.2d 641 (Ct.App.1975) points out that mental disease includes an abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.

The opinion testimony of lay witnesses was admissible on the question of insanity. *State v. Lujan,* 87 N.M. 400, 534 P.2d 1112 (1975). Their testimony was to the effect that defendant was mentally disturbed, that when committing the offense defendant did not act, or look, normal. Defendant testified that he sniffed paint during periods of stress and when upset, that when he sniffed: "You don't know what you're doing . . . you're not here in the world, you go off on trips." This evidence was insufficient to raise a factual issue concerning true disease of the mind and was insufficient to raise a factual issue concerning a substantial impairment of behavior controls. *State v. Nelson,* 83 N.M. 269, 490 P.2d 1242 (Ct.App.1971); compare *State v. Velasquez,* 76 N.M. 49, 412 P.2d 4 (1966), cert. denied, 385 U.S. 867, 87 S.Ct. 131, 17 L.Ed.2d 95 (1966).

The psychiatrist testified that defendant had no organic brain damage and that he found no evidence of psychological damage. He testified that defendant' history of paint sniffing included instances when defendant would become violent and "feel that devils were chasing him". However, in connection with the killing of the baby boy, the psychiatrist was of the opinion defendant knew what he was doing when he did it; that it was an impulsive act. This evidence was insufficient to raise a factual issue concerning a true disease of the mind and insufficient to raise a factual issue as to substantial impairment of behavior controls. See *State v. Velasquez,* supra.

The trial court did not err in refusing the requested insanity instruction. Compare *State v. Madrigal,* 85 N.M. 496, 513 P.2d 1278 (Ct.App.1973); *State v. Follis,* 81 N.M. 690, 472 P.2d 655 (Ct.App.1970); *State v. Lucero,* 78 N.M. 659, 436 P.2d 519 (Ct.App.1968).

(b) *Intoxication*

Defendant requested instructions to the effect that if defendant was so intoxicated (from the paint sniffing) that he was incapable of malice, he could not be guilty of murder in the second degree. The requests were correctly refused for

the reasons stated in *State v. Tapia,* 81 N. M. 274, 466 P.2d 551 (1970). He claims the *Tapia* rule presents "serious federal constitutional questions" and his argument is that due process was violated in refusing an instruction that intoxication would negate malice. The trial court refused the instructions on the basis of New Mexico law. No constitutional claim was raised in the trial court. It will not be considered for the first time on appeal. Section 21–12–11, N.M.S.A.1953 (Interim Supp.1974).

(c) *Manslaughter*

Defendant requested instructions on manslaughter as a lesser included offense. The right to instructions on lesser included offenses depends on there being some evidence tending to establish the lesser offenses. *State v. Wingate,* 87 N.M. 397, 534 P.2d 776 (Ct.App.1975).

The manslaughter statute is § 40A–2–3, N.M.S.A.1953 (2d Repl.Vol. 6). Voluntary manslaughter requires a killing "upon a sudden quarrel or in the heat of passion." There is no evidence that such a condition existed between defendant and his baby boy. The only evidence of quarrel or heat of passion is between defendant and his wife. Defendant states, without citation: "The weight of authority is against allowing transferrance of one's passion from the object of the passion to a related bystander, however." We accept this statement. There was no evidence tending to establish voluntary manslaughter.

Involuntary manslaughter requires a killing either "in the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death . . . ." Inflicting a beating is an unlawful act. *State v. Holden,* 85 N.M. 397, 512 P.2d 970 (Ct.App. 1973). Accordingly, there is no basis for an instruction on involuntary manslaughter by lawful act. It is not seriously contended that defendant's unlawful act did not amount to a felony. Accordingly, there is no basis for an instruction on involuntary manslaughter by unlawful act not amounting to a felony.

The trial court did not err in refusing the requested manslaughter instructions.

Oral argument is unnecessary. The judgment and sentence are affirmed.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

541 P.2d 631

STATE of New Mexico, Plaintiff-Appellee,

v.

Gene J. CHAVEZ, Defendant-Appellant.

No. 1951.

Court of Appeals of New Mexico.

Sept. 30, 1975.

Kimball R. Udall, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his convictions for kidnapping and rape. The appellate issues are concerned with defendant's competency. Defendant contends (1) he lacked the mental competency to make a statement or consent to search, and (2) the trial court erred in determining that he was competent to stand trial.

Competency to Make a Statement and Consent to Search

After an evidentiary hearing, at which the evidence was conflicting, the trial court denied the motions to suppress defendant's statements and his consent to search. The statement and the gun obtained on the basis of the consent to search were admitted as evidence at the trial. The trial court instructed the jury in connection with the voluntariness of the statement. The issue under this point involves the evidentiary standard applied by the trial court in denying the motions to suppress. That standard was stated in *State v. Sisneros*, 79 N. M. 600, 446 P.2d 875 (1968). See also, *State v. Lujan*, 87 N.M. 400, 534 P.2d 1112 (1975).

[1] The standard follows. For defendant to make a valid statement the defendant must have had sufficient mental capacity at the time he made the statement, to be conscious of the physical acts performed by him, to retain them in his memory, and to state them with reasonable accuracy.

There is evidence which met this standard. The trial court did not err in refusing to suppress the statement and the consent to search.

Trial Court's Determination That Defendant Was Competent to Stand Trial

This issue involves the procedure for determining a defendant's competency to stand trial.

A statute enacted in 1855–56 provided the procedure for determining competency of a defendant to stand trial. This procedure remained substantially unchanged from the time of its enactment until it was repealed by Laws 1967, ch. 231, § 1. See Laws 1855–56, page 106; Compiled Laws 1897, § 1929; Code 1915, § 4448; § 41–13–3, N.M.S.A.1953 (Orig. Vol. 6).

We do not quote the statute because the required procedure under this statute is stated in court opinions.

Territory v. Kennedy, 15 N.M. 556, 110 P. 854 (1910) points out that at common

law the trial court could, in its discretion, determine the question of competency itself or submit the question to the jury. The opinion states that the procedure to be followed would have to conform to New Mexico's statute.

State v. Folk, 56 N.M. 583, 247 P.2d 165 (1952) states:

> "No particular mode or manner of procedure must be followed in raising the issue of the insanity of a defendant existing at the time of arraignment, trial, judgment or execution, so long as there is a sufficient showing to create a reasonable doubt as to the sanity of the accused; and upon the issue being raised the accused is by right under our statute . . . entitled to have the jury pass upon it."

State v. Upton, 60 N.M. 205, 290 P.2d 440 (1955) followed *State v. Folk*, supra. In doing so, *Upton* states that the trial court is to rule whether a reasonable doubt exists as to the accused's sanity and if the trial court rules affirmatively "the issue must be submitted to the jury for determination."

State v. Roybal, 76 N.M. 337, 414 P.2d 850 (1966) points out that the trial court had some discretion in the matter; that the trial court must rule whether reasonable doubt exists, and this determination will not be lightly overturned.

The above cases outlined the procedure to be followed in determining whether a defendant was competent to stand trial. This procedure was based on the 1855–56 statute. As previously pointed out, this statute was repealed in 1967. As a part of the 1967 statute, § 41–13–3.1, N.M.S.A. 1953 (2d Repl. Vol. 6) was enacted. That statute provides that the question of mental competency to stand trial is to be determined by the court without a jury. Rule of Criminal Procedure 35(b) also provides that the question is to be determined by the court without a jury.

Defendant contends that § 41–13–3.1, supra, and R.C.P. 35(b) are unconstitutional to the extent that they deprive a defendant of a jury determination as to his competency to stand trial. We agree.

We are not concerned here with federal constitutional requirements. See *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L. E.2d 815 (1966). Our concern is with N.M.Const., Art. II, § 12. It states: "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate."

State v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957) states that the right to jury trial as it has heretofore existed "refers to the right to jury trial as it existed in the Territory of New Mexico at the time immediately preceding the adoption of the Constitution." *Greenwood*, supra, also states:

> "Clearly, the Constitution continues the right to jury trial in that class of cases in which it existed either at common law *or by statute* at the time of adoption of the Constitution . . . and in that class of cases where the right to a trial by jury existed prior to the Constitution, it cannot be denied by the legislature." (Emphasis in original).

The Supreme Court has power to regulate pleading, practice and procedure. *State v. Roy*, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936); Compare, *Sitta v. Zinn*, 77 N.M. 146, 420 P.2d 131 (1966). This power may be applied to regulate the procedure to be followed in securing the right to a jury trial. *Carlile v. Continental Oil Company*, 81 N.M. 484, 468 P.2d 885 (Ct. App.1970). This power may not, however, be used to prohibit entirely the right to jury trial which, under our Constitution, is to remain inviolate. R.C.P. 35(b) does more than regulate the procedure for securing a jury trial; R.C.P. 35(b) would eliminate that right. *State v. Lujan*, supra, is not to the contrary—*Lujan* states that

R.C.P. 35(b) is the proper procedure, but the constitutional right to a jury trial was not an issue in that case.

To the extent that § 41–13–3.1, supra, and R.C.P. 35(b) eliminate the right to a jury determination on the question of mental capacity to stand trial, they violate Art. II, § 12, and are void. In so holding, we have not overlooked *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973). *Alexander*, supra, does not prevent us from reaching this decision because here we are applying decisions of the Supreme Court.

State v. Folk, supra, and *State v. Upton*, supra, state the procedure to be followed when the question of mental competency to stand trial is raised. In this case defendant moved for a jury trial on the question of his competency. After an evidentiary hearing, the trial court ruled defendant competent to stand trial pursuant to R.C.P. 35(b). That ruling was in error. The trial court should have determined whether there was reasonable doubt as to defendant's competency, and if the trial court ruled there was reasonable doubt, the issue was for the jury to decide.

The evidence as to defendant's mental competency to stand trial was severely conflicting. Because of this conflict, we cannot say that in ruling that defendant was competent to stand trial, the trial court in effect ruled that there was no reasonable doubt. Compare *State v. Roybal*, supra. Accordingly, we do not review the evidence.

In following R.C.P. 35(b), the trial court denied defendant the right to a jury determination of his competency to stand trial once reasonable doubt as to defendant's competency was shown to exist. Oral argument is unnecessary. The judgment and sentence are reversed. The cause is remanded for a new trial. The determination of mental competency to stand trial shall be consistent with this opinion.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

541 P.2d 634

STATE of New Mexico, Plaintiff-Appellee,

v.

Trinidad C. DE BACA, Defendant-Appellant.

No. 2132.

Court of Appeals of New Mexico.
Sept. 30, 1975.
Certiorari Denied Oct. 27, 1975.

Jerome M. Ginsburg, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Mark Shoesmith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

This is an interlocutory appeal following the denial of defendant's motion to dismiss the indictment against him on double jeopardy grounds. We reverse.

Defendant was indicted for burglary, contrary to § 40A-16-3, N.M.S.A.1953 (2d Repl.Vol. 6, 1972). He was brought to trial on June 2, 1975. The trial lasted two days during which time both the state and the defendant presented evidence and rested their cases. Jury instructions had been settled. On the morning of the third day, one of the jurors, Mrs. Alice Naranjo, brought to the attention of the court, in the presence of counsel, that her sister-in-

law had received a phone call from an unidentified man who had asked questions relating to Juror Naranjo's feelings about drug abuse. The phone call placed Juror Naranjo in an extreme state of fear and apprehension. After a discussion which included an attempt to allay Juror Naranjo's fears, an attempt to discover the perpetrator of the phone call and an inquiry into the propriety of a cautionary instruction, the trial court abruptly declared a mistrial. No objection was made to this action by either the defendant or the state. No alternate juror was available.

We quote extensively from the transcript of proceedings in the trial court's chambers in order to clarify the issues on this appeal:

"THE COURT: Let the record show that the court is meeting with counsel in chambers outside the presence of the jury and the court has just been handed a note from Mrs. Alice Naranjo, wherein it states that the juror Alice Naranjo received a telephone call yesterday. Mrs. Naranjo[,] Counsel are present and I wonder if you could explain to this just briefly what happened.

"MRS. ALICE NARANJO: Well, I didn't get the telephone call, my sister-in-law received the call yesterday morning about ten o'clock and she said the person hadn't identified himself or she didn't get the name.

"THE COURT: She didn't ask his?

"MRS. NARANJO: It was a man's voice; a man's voice and he said, he asked her if I had ever been convicted of a felony, if I have ever been in prison and he asked her if, how I felt about drug abuse and if I had ever been on drugs myself and if I knew anybody that had been on drugs. And I think she said he mentioned if I knew about the case they were working on for drug abuse or somebody that had been on drugs and was going to be tried on the trial on drugs or something. And he asked her if I was ever to testify against her like if she had been using drugs, if I was to testify that I knew that she had been using drugs and that if I was to be able to give a fair and impartial opinion about her since she was my sister-in-law. And they asked if I was ever capable of lying on the jury if anybody was to come up and ask me, but I don't know if they meant if they were to pay me if I would lie or if I would lie just for my ownself being you know for my own [consciousness] to save myself, you know. And that was about all that she could remember that he told her.

"* * *

"THE COURT: Mrs. Naranjo, I want to thank you for reporting this matter to the court as the court instructed you and the other jurors at the outset if you did receive any communications about the case, the appropriate thing to do is just as you have done, is to report it. Now, let me just state to you Mrs. Naranjo that this should have no bearing whatsoever upon your verdict as a juror.

"MRS. NARANJO: Oh, yes I understand.

"THE COURT: And you should set this aside and any consideration of the matters that will be presented the jury to consider and you should be fair and impartial to both the State and the Defense and this should not in any manner influence your verdict either for or against the State or the Defense.

"MRS. NARANJO: Yes, I understand that.

"THE COURT: And I would request and direct that you carefully follow the instructions that the court will read you and your consideration of the matters that will be presented to the jury to disregard this and in no way allow it to influence your verdict and either for or against either party.

"* * *

"THE COURT: * * * [A]t this time I will ask that you not discuss the matters with the other jurors and you can return then to the jury room where the other jurors are waiting.

"MRS. NARANJO: Is it customary though for lawyers before a case is coming up that they have a listing of all jurors, do they investigate sometimes so that they can have an impartial jury?

"THE COURT: It is not an uncommon practice for either the State or Defense or even in several cases for an attorney to make a check of the jurors to find out something about them so that it will help them evaluate the matters and this is customary practice. It is followed not only in this district but throughout the state and nation and it in no way indicates any intention on either or any of the parties to in any way influence the verdict of jurors or individual jurors. It's simply a matter that allows the attorney to find out something about the individual juror that may not be contained in the questionaire [sic]. Thank you very much.

"MRS. NARANJO: Well, what would happen, well, like my husband works nights and sometimes if anybody were to go to my house?

"THE COURT: Well, you would have the right to inform the authorities and no one has the right to go to your home without your permission.

"MRS. NARANJO: They can contact you by phone but they can't go to your house and ask you direct questions like that.

"THE COURT: That is correct.

"MRS. NARANJO: Okay.

"THE COURT: Thank you again.

"(WHEREUPON MRS. NARANJO WENT BACK TO THE JURY ROOM AND THE FOLLOWING PROCEEDINGS WERE CONTINUED IN THE JUDGE'S CHAMBERS)

"THE COURT: * * * Now, I would like to get to the bottom of this gentlemen. * * *

"MR. BUDAGHER: Your Honor, the State hasn't contacted anyone nor would we do that.

"MR. GINSBURG: [Defense Counsel] I haven't contacted them but I think from what she said, I have a feeling that it was the Public Defender's Office because I know they have a drug case coming up * * *.

"* * *

"THE COURT: Then gentlemen, I feel in light of the matters that have been disclosed to the court by Mrs. Naranjo, that an appropriate precautionary instruction should be given to the jury regarding inquires [sic] made by counsel prior to the case. From what has been related to the court, it appears that perhaps the Public Defender's Office not incident to this case but to another jury case which is pending on the court's docket which will be brought to trial in a couple of days and it appearing that the Public Defender's Office is in the process of inquiring of neighbors or friends of prospective jurors on the jury panel here in Santa Fe County of certain information about the members on the panel and it appears that this is the type of information that must have been communicated to Mrs. Naranjo. I do feel in order to negate any possible problems either to the State or the Defense, that an additional precautionary instruction be given to the entire jury.

"(WHEREUPON A SHORT RECESS WAS HELD AT THIS POINT)

"(WHEREUPON THE FOLLOWING PROCEEDINGS WERE CONTINUED IN CHAMBERS)

"THE COURT: [After summarizing the proceedings until now, the court asked certain members of the Public Defender's trial staff for explanation.]

"* * *

"MR. SCHMIDT: [Public Defender]: Two people whom I know who are doing investigative work on jury investigation was Mr. Delgado and we have a law clerk Bill Lazar and he was specifically inquiring about Mrs. Naranjo and he found out

she worked at La Posada and he told me this morning—

"THE COURT: About the juror Alice Naranjo[?]

"MR. SCHMIDT: He was assigned to her and I don't know for sure if it was this juror but it was on jury investigation but we assign the jury investigations to Mr. Delgado and Bill Lazar I think was assigned to Mrs. Naranjo and he told me this morning that he had talked to her employer at the La Posada yesterday and had talked to that particular person who she worked with and that is all he told me about what he found out.

"THE COURT: Well, gentlemen, what concerns the court is that this juror communicated this matter to the court and this juror was in tears and I feel that I am going to have to declare a mistrial on this case. The juror was obviously from her appearance extremely upset and frightened and she made the statement to the court about what would happen if someone involved in a drug program would come to 'my home' and whatever has been communicated to her has been in such a manner that this juror was in extreme state of fear and she had tears in both her eyes and I don't think in fairness to the Defendant in this case, which apparently has not been any doing on part of the Defense counsel or the State in this case whatever has been done has been done in such a manner as to place this particular juror in an extreme state of apprehension. I am going to declare a mistrial on this case. * * * [I]t is obvious to the court that this would not be fair either to her or to other members of the jury to go on. * * *"

Retrial was set for July 17, 1975. Defendant, thereafter, moved to dismiss the indictment on the grounds that there was no manifest necessity for the declaration of the mistrial, there was no adequate exploration of alternatives to mistrial and the ends of public justice were not served by the declaration of mistrial, all of which lead to the conclusion that retrial of the defendant would place him twice in jeopardy contrary to the provisions of the United States Constitution, the New Mexico Constitution and § 40A-1-10, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972) which states:

> ". . . Double jeopardy.—No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. When the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he may not again be tried for a crime or degree of the crime greater than the one of which he was originally convicted."

The motion was denied and we granted defendant's application for interlocutory appeal pursuant to § 21-10-2.1, N.M.S.A. 1953 (Repl.Vol. 4, 1970, Supp.1973).

For a century and a half, the touchstone for determining whether a defendant will be placed in double jeopardy following the declaration of a mistrial has been found in the following language of the case of *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824):

> "* * * [T]he law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; * * *."

State v. Sedillo (Ct.App.), 88 N.M. 240, 539 P.2d 630, decided July 16, 1975, held that upon appellant review the question was whether the trial court exercised a sound

discretion to ascertain that there was a manifest necessity for the declaration of a mistrial. In *State v. Sedillo,* supra, the factor precipitating the declaration of the mistrial was one instance of misconduct by defendant's counsel, fairly able to be characterized as evidentiary irregularity, which could be cured by an appropriate cautionary instruction. In the instant case, the irregularity concerned the possibility of a verdict by a jury that was less than impartial or less than rational. As the cases in this area defy meaningful categorization, see *Illinois v. Somerville,* 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973), we enumerate the factors to be taken into consideration in determining whether a defendant's retrial will place him in double jeopardy after a prior trial has been aborted by the declaration of a mistrial not at his request.

First is defendant's interest in having his fate determined by the jury first impaneled. *Illinois v. Somerville,* supra. This not only encompasses defendant's right to have his trial completed by a particular panel, see *Wade v. Hunter,* 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949), but also his interest in ending the dispute then and there with an acquittal. See *United States v. Jorn,* 400 U.S. 470, 91 S.Ct. 547, 27 L. Ed.2d 543 (1971). This factor would weigh heavily against retrial in all situations where jeopardy has attached, i. e. after the jury is sworn to try the case. See *State v. Moreno,* 69 N.M. 113, 364 P.2d 594 (1961).

Related to this is the factor of avoiding giving the state a second bite of the apple in order to either strengthen its case *(Downum v. United States,* 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963)) or to alter its trial strategy to obtain a conviction. See *United States v. Kin Ping Cheung,* 485 F.2d 689 (5th Cir. 1973). We are unable to tell how much this factor is applicable in the instant case because there has been no retrial.

To be balanced against these weighty interests of the defendant are the two considerations outlined in *United States v. Perez,* supra: (1) that there is a manifest necessity for the discharge of the first jury or (2) that the ends of public justice would be defeated by carrying the first trial to final verdict. When the irregularity occurring at trial is of a procedural nature, not rising to the level of jurisdictional error, the necessity to discharge the jury has been held to be not manifest. Compare *State v. Sedillo,* supra, with *Illinois v. Somerville,* supra. However, where the irregularity involves possible partiality within the jury, it has been more often held that the public interest in fair verdicts outweighs defendant's interest in obtaining a verdict by his first choice of jury. *Thompson v. United States,* 155 U.S. 271, 15 S.Ct. 73, 39 L.Ed. 146 (1894); *Simmons v. United States,* 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891); *Whitfield v. Warden of Maryland House of Corrections,* 486 F.2d 1118 (4th Cir. 1973); *Smith v. Mississippi,* 478 F.2d 88 (5th Cir. 1973). And such has been the case even where defendant did not object to a jury where the victim's father was the tipstaff [jury attendant] who was serving the jury. *Commonwealth v. Stewart,* 456 Pa. 447, 317 A.2d 616 (1974), cert. denied, 417 U.S. 949, 94 S.Ct. 3078, 41 L.Ed.2d 670 (1974).

The state asserts that where a continuation of the trial would make reversal on appeal a certainty then a manifest necessity to declare a mistrial existed. *Illinois v. Somerville,* supra. Although we may agree with this statement the record in this case does not indicate a certainty of reversal on appeal. The state would also have us hold that when the judge determines possible bias on the part of a juror, manifest necessity for declaring a mistrial exists. Assuming a possibility of juror bias provides sufficient grounds for declaring a mistrial, the record in this case does not show such a possibility. Juror Naranjo was frightened by the telephone call. The record does not show that the juror's fear involved either the state or the defendant in this case. The record does show that juror Naranjo understood that

the phone call was not to influence her deliberations in this case. The record does not show a manifest necessity and does not show that it was in the ends of public justice to declare a mistrial.

Having decided there was no showing of a manifest necessity for declaring a mistrial we discuss the possible alternatives the trial court should have used before declaring a mistrial. The cases are not clear as to what kind or how much of an inquiry into alternatives is necessary but the trial court clearly has some duty to so inquire. See *United States v. Jorn*, supra. Affecting the scope of inquiry required are the factors of magnitude of prejudice and the point at which the proceedings are terminated. As the magnitude of possible prejudice increases, we would expect less effort to be expended in seeking alternative resolutions. Conversely, as the length of trial wears on, we would expect more effort to be expended.

Two cases shed much light on these matters. They are *United States ex rel. Russo v. Superior Court of New Jersey, etc.*, 483 F.2d 7 (3rd Cir. 1973), cert. den., 414 U.S. 1023, 94 S.Ct. 447, 38 L.Ed.2d 315 (1973) and *United States v. Holland*, 378 F.Supp. 144 (E.D.Pa.1974). Both cases deal with a trial court's response to a jury that had possibly become unable to render the sort of fair and impartial verdict that public justice demands. The cases are instructive because they represent opposite ends of the spectrum of what a trial court can do in such a situation.

In *Russo*, there was a nine day murder trial in which credibility of the witnesses was a key question for the jury. After they had deliberated for one entire day, the jury sent out a note indicating that they were far from reaching a verdict. The trial court told them that time was no problem and had them spend the night in a motel. The next day they requested certain testimony to be read back. This was done and they deliberated for several hours more. At mid-afternoon of this second day of deliberations, the court called the jury back and declared a mistrial because he noticed that the jurors were walking wearily and he felt it would be unfair to both parties for a unanimous verdict to be arrived at because of the exhaustion of the members of the panel. In spite of the fact that the trial court took its action in order to obtain a fair verdict for both parties and in spite of the fact that the trial court had the jury in its presence, the appeals court found that defendant's second trial placed him in double jeopardy.

Holland was a seven day trial at which the jurors commenced deliberations at 5:00 p.m. of the last day. The next morning, during the jury's coffee break, one juror requested to be excused because the emotional burden of "condemning" someone was such that she as a "Christian," "could not take." Shortly thereafter, the court received word that the particular juror had fainted. A doctor was summoned and after ministering to the juror, he testified before the trial court. In his opinion, the juror was in a state of acute hysteria and incapable of carrying out her duties as a juror lest she be "tipped over into . . . a psychotic state." An employee in the building who was acting as a matron to the juror testified as to the juror's emotional state. A psychologist, who had listened to the testimony of the doctor and the matron, testified that the effect of ordering the juror to continue deliberations would likely produce more pathology, not limited to just fainting. Although there appeared to be no question but that the juror could not continue, the trial court, nevertheless, insisted upon meeting with the juror and putting her through an extensive interrogation as to whether or not she would be able to perform her "civil duty." She repeatedly replied in the negative and the court told her to go home for the evening and think it over. She returned the next day and steadfastly refused to continue deliberating. At that juncture, the trial court, believing that the greatest caution under the circumstances had been exercised and that the ends of justice would be disserved by

continuation of the proceedings, declared a mistrial.

We believe that the facts of the instant case more closely approximate those in *Russo* than those in *Holland*. Although this trial lasted substantially less than one week, both sides had gone through considerable expense and effort in presenting their cases in their entirety. Thus the factor of point at which trial is terminated weighs heavily against the declaration of a mistrial.

The magnitude of apparent prejudice to either side seems particularly low in the instant case. Juror Naranjo appeared to recognize that the phone call was unrelated to the case she was to be deciding and she said that it would not influence her verdict in any way. In terms of alternatives, defendant in his brief, suggests the giving of a cautionary instruction, submitting the case to an eleven person jury and bringing the person who made the call before Juror Naranjo to allay any apprehension she may have had. We decline to say that the trial court should have made use of one of the suggested alternatives. We believe that it is enough that he explore them. It is commendable that the trial court did discuss the propriety of a cautionary instruction. However, there is nothing of record to indicate why such an instruction was rejected as inadequate. The record reflects that the declaration of the mistrial came without any advance warning.

While we would not require of the trial court a detailed record of each alternative explored and the reasons for rejecting each one and while we believe that the trial court's action in *Holland* represents the "exercise of great caution" in the extreme, we feel that the trial court in the instant case failed to exercise that sound discretion required of him in determining whether a manifest necessity or proper judicial administration mandated a mistrial.

The order of the trial court denying defendant's motion and setting a date for retrial is accordingly reversed and defendant is ordered discharged.

It is so ordered.

WOOD, C. J., and HERNANDEZ, J., concur.

541 P.2d 967

AMERICAN AUTOMOBILE ASSOCIATION, INC., Petitioner,

v.

BUREAU OF REVENUE of the State of New Mexico, Respondent.

No. 10528.

Supreme Court of New Mexico.

Oct. 3, 1975.

Rehearing Denied Nov. 3, 1975.

Robert L. Christensen, Albuquerque, Zinn & Donnell, Dean S. Zinn, Santa Fe, Chavez & McDonald, Tibo J. Chavez, Belen, for petitioner.

Toney Anaya, Atty. Gen., Vernon O. Henning, Joseph T. Sprague, Asst. Attys. Gen., Santa Fe, for respondent.

OPINION

McMANUS, Chief Justice.

This matter is before the court for the second time, this time being pursuant to a writ issued to the Court of Appeals of the State of New Mexico on July 2, 1975.

By majority of this court in the first cause we reversed the Court of Appeals on the basis that the American Automobile Association, Inc. (A.A.A.) was a non-profit organization, contrary to the opinion of the Court of Appeals. *American Automobile Ass'n, Inc. v. Bureau of Revenue,* 87 N.M. 330, 533 P.2d 103 (1975).

In that case, we concluded as follows:

"The decision of the Court of Appeals is reversed, insofar as it determines that American Automobile Association, Inc. is not a nonprofit organization, and the cause is otherwise remanded to the Court of Appeals for a determination of the other issues raised concerning whether or not American Automobile Association, Inc. is a 'business organization,' and

whether or not the receipts involved are from 'dues and registration fees.' "

Subsequently, on April 23, 1975, the Court of Appeals rendered its second opinion, *American Automobile Ass'n, Inc. v. Bureau of Revenue,* 88 N.M. 148, 538 P.2d 420 (Ct.App.1975), stating:

"The 'business organization' issue is dispositive. Taxpayer is not a business organization within the meaning of the statute. * * *"

The applicable statute is § 72–16A–12.27, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, 1973), which reads:

"Exempted from the gross receipts tax are the receipts from dues and registration fees of nonprofit social, fraternal, political, trade, business, labor or professional organizations."

In the cause before us now, A.A.A. presents the following questions for review:

(1) Did the Court of Appeals err in holding that petitioner is not a business organization within the meaning of § 72–16A–12.27, *supra*?

(2) Did the Court of Appeals err in failing to pass on the issue of whether the receipts involved in petitioner's activities are from dues and registration fees, on the ground that the "business organization" issue is dispositive, notwithstanding the mandate and order of this court in its former opinion, supra?

(3) Did the Court of Appeals err in failing to grant a motion for rehearing?

At a hearing before the Commissioner of Revenue, on July 16, 1973, Mr. Mallory, General Manager of the New Mexico Division of American Automobile Association, testified in part as follows:

"Q. Go ahead and tell the Commissioner just exactly as I said here, tell us about the location and principal nature of the business conducted by the American Automobile Association and you can refer to this, you can refer to any of these documents that we have down here and whatever you need to refer to, just go right ahead.

"A. The individual motor clubs, which includes the New Mexico Division, are semi-autonomous non-profit organizations. They have their own building, offices, Board of Directors and determine their own policies within their respective jurisdictions.

* * * * * *

"Q. Go ahead. Just go right ahead.

"A. However, in order to obtain their A.A.A. affiliation, clubs must meet certain requirements such as providing well defined privileges for members, having within their members a stated proportion registered within their territory. Each club provides services to its own members and by a simple arrangement, each services members of the other clubs visiting in their territory. A.A.A. clubs, including the Protestant, have a two-fold mission: First, to provide specialized services to the members, such as emergency road service, travel and train service and other direct benefits. Among the other direct benefits to members are bail bond protection, guaranteed arrest bonds, personal accident insurance, legal reimbursement, check cashing, license and title service, theft reward protection, and file publications.

"Second, to work for the improvement of motoring and travel conditions generally, particularly in the field of legislation, highway, taxation and street and highway safety at the national, state and local level.

"Q. While you are there, Mr. Mallory, would you give a current example of how you are helping the public with respect to motoring conditions, and I have reference to the gasoline shortage?

"A. At the moment in New Mexico, we solicit from 60 service stations information as to what his actual condition is at the gas pump each Thursday morning. Naturally, we solicit this information from gas stations nation-wide in all of

the states, I believe, except Alabama. We put out national news releases giving the actual conditions for the members' benefit. It so happens this information is beneficial to the State of New Mexico. We are showing a gradual improvement of 2 per cent of the stations staying open longer hours and a reduction in the areas where there is no 24-hour service and so forth. This is very beneficial to—particularly if you are going to Denver where the situation is very critical which is also making our local news media because of its close proximity. Available in our offices are national maps and, incidentally, we are passing these out to the public in general. Last week it contained in the news media—or statements to the fact that any motorist calling our office would be provided with information concerning the gas situation.

* * * * * *

"Q. Also, Mr. Mallory, you have a program in connection with the schools in New Mexico?

"A. Yes, we have two or three programs.

"Q. Would you tell the Commissioner about that?

"A. First of all, we have a film library where we lend to schools or any organization films pertaining to traffic and safety. Six out of seven years prior to around 1965, we won the Oscar for traffic safety film. When you are competing with Walt Disney, we were pretty proud of it.

"We also had a pedestrian safety poster contest. These were made by art students and all students who wished to participate. Thirteen posters were selected, reproduced and distributed to all the schools together. They are broken up in three-year segments starting with kindergarten through second grade and each three years thereafter for the schools. The Buster Brown program which we provide materials for almost all schools who participate—that is the Buster Brown belt, badge and merit system, lifeguard saving medals presented each year by the President. They don't want me to mention that, do they?

"This is on a voluntary basis that Triple A salesmen provide to schools at approximately one-half their cost."

In addition, Mr. Mallory testified that the A.A.A. is nonprofit with no direct benefits to any employee of monetary gains. Further in the hearing proceedings, Mallory testified:

"Q. With respect to your revenues—we will talk about New Mexico—what would you say about your revenues and their uses?

"A. Well, each membership has dues annually. A portion of that is returned to national headquarters to pay for national services, safety legislation and so forth. Immediately upon enrollment or renewal of members there is also a portion allowed to be paid for direct services. We have no control over how much this will be, but we have, on an actuary basis we are able to determine fairly accurately what the cost will be in road service, travel and so forth. We also have a local department. We call it Member Relations Department which takes care of our legislature, safety and ativities local.

"Q. Would you say that any of your funds are used—I am talking about your revenue—in the New Mexico Division are used for anything except improving motoring and traveling conditions and services of members, either directly or indirectly? Is the money used for any other purpose?

"A. No.

* * * * * *

"Q. Mr. Mallory, you stated that the members do not receive any remuneration. Are there any dividends paid to members?

"A. You are speaking of members of the Advisory Board?

"Q. Well, the members that pay dues?

"A. No.

"Q. And the registration fees?

"A. They receive services, but no dividends.

"Q. Is anyone paid any dividends?

"A. No.

"Q. Are any shares issued to any of the members?

"A. No.

"Q. Are any of the directors, officers or members paid any amount of money or receive any profits?

"A. No.

"Q. What if you have a surplus for a year that you have already budgeted? What happens to the surplus?

"A. Well, we haven't been faced with that problem since the inflation began and that is since I have been in New Mexico. As a reality, we normally ask for a dues increase every four to five years. The first year after the dues increase we will realize a profit. The second year, we will realize a small profit and then we go in the hole for the next two or three years and we ask for another dues increase.

"Q. If you have a profit from one year, it is plowed back into the program? I mean, it is not distributed among members?

"A. No.

"Q. Actually, it is contrary to your rules and regulations and your policy and against your charter?

"A. It is forbidden by the minimum national standards for any individual to share monetarily other than through remuneration for salaries.

"Q. So no one derives any profit individually from the operation of Triple A?

"A. No."

Webster's Third New International Dictionary (1966) contains the following definitions:

BUSINESS: "* * * 1 b (1): a usu. commercial or mercantile activity customarily engaged in as a means of livelihood and typically involving some independence of judgment and power of decision * * * (2) a commercial or industrial enterprise * * *."

ORGANIZATION: "* * * 2 b: a group of people that has a more or less constant membership, a body of officers, a purpose, and usu. a set of regulations * * * [one of the examples given is 'tax exemption for religious and charitable (organizations).']"

In our opinion, A.A.A. is a "business organization" in the common understanding of that term. It is a group of people that has a more or less constant membership, a body of officers, a purpose, and a set of regulations. This group engages in a commercial activity, even though it is a nonprofit activity. It is not necessary for all of the members to engage in business in order for a group to constitute a business organization. We conclude from the testimony quoted and the definitions given that A.A.A. is a nonprofit business organization under § 72–16A–12.-27, supra.

The second point raised by A.A.A. refers to the question of whether or not the receipts involved in petitioner's activities are from dues and registration fees. Even though the Court of Appeals failed to pass on this question, we will do so. We hold from the testimony quoted that the receipts involved are from dues and registration fees.

It is not necessary to discuss the third point of A.A.A. in view of our disposition of this matter.

The decision of the Court of Appeals is reversed.

It is so ordered.

STEPHENSON, MONTOYA and SOSA, JJ., concur.

OMAN, J., dissenting.

OMAN, Justice (dissenting).

As observed in the majority opinion, this is the second time this cause has been before us upon a writ of certiorari directed to the New Mexico Court of Appeals. On the first occasion I disagreed with the majority, because I am of the opinion that the prior decision of the Court of Appeals was correct. *American Automobile Ass'n, Inc. v. Bureau of Revenue,* 87 N.M. 330, 533 P.2d 102 (1975). That court has now reached the same result it reached in its prior opinion, but for a different reason. *American Automobile Ass'n, Inc. v. Bureau of Rev.,* 86 N.M. 569, 525 P.2d 929 (Ct.App.1974); *American Automobile Ass'n, Inc. v. Bureau of Revenue,* 88 N.M. 148, 538 P.2d 420 (Ct.App.1975). I again concur in that result and in the reasoning advanced by the Court of Appeals in its latest opinion in support of that result.

In addition to the reasoning of the Court of Appeals, with which I agree, I particularly point out, as did the Court of Appeals in its latest opinion [*American Automobile Ass'n, Inc. v. Bureau of Revenue,* 88 N.M. 148, 538 P.2d 420 (Ct.App.1975)], that the term "business organization," as used in § 72-16A-12.27, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1973), is not defined in the statute and is ambiguous.

Since this is a case involving an exemption from taxation we are bound by the following principles of construction:

(1) Taxation is the rule, and exemption therefrom is the exception. *Flaska v. State,* 51 N.M. 13, 177 P.2d 174 (1946).

(2) A statutory exemption from taxation must be strictly construed against the person claiming the exemption and in favor of the taxing authority. *McKee v. Bureau of Revenue,* 63 N.M. 185, 315 P.2d 832 (1957); *Peisker v. Unemployment Compensation Commission,* 45 N.M. 307, 115 P.2d 62 (1941); *Samosa v. Lopez,* 19 N.M. 312, 142 P. 927 (1914); *Rock v. Commissioner of Revenue,* 83 N.M. 478, 493 P.2d 963 (Ct.App.1972).

(3) Exemptions from taxation are never presumed, and the burden is on one claiming an exemption to clearly establish a right to that exemption. *Flaska v. State, supra; Iden v. Bureau of Revenue,* 43 N.M. 205, 89 P.2d 519 (1939); *Rock v. Commissioner of Revenue, supra; Reed v. Jones,* 81 N.M. 481, 468 P.2d 882 (Ct.App. 1970).

(4) A legislative intention to create an exemption from taxation must be expressed in clear and unambiguous language. *Flaska v. State, supra; Reed v. Jones, supra.*

(5) A claim of exemption from taxation should be sustained only if it comes within the express letter or necessary scope of the exempting language. *McKee v. Bureau of Revenue, supra; Samosa v. Lopez, supra.*

Guided by these rules of construction, which have long been recognized by the courts of this state, I am unable to construe the language in question as embracing the petitioner.

For all the reasons stated by the Court of Appeals, and for the additional reasons herein stated, I respectfully dissent.

541 P.2d 971

STATE of New Mexico,
Petitioner,
v.
Yetta J. BIDEGAIN and Louis M. Grant,
Respondents.
No. 10515.

Supreme Court of New Mexico.
Oct. 8, 1975.

Rehearing Denied Nov. 3, 1975.

Toney Anaya, Atty. Gen., Andrea Buzzard, Asst. Atty. Gen., Santa Fe, for petitioner.

Rowley & Bowen, J. W. Anderson, Tucumcari, for respondents.

OPINION

OMAN, Justice.

This cause is before us upon a writ of certiorari directed to the New Mexico Court of Appeals, which reversed the convictions of the defendants for unlawful possession of 8 ounces or more of marijuana, contrary to the prohibition contained in § 54-11-23, N.M.S.A. 1953 (Repl.Vol. 8, pt. 2, Supp.1973). *State v. Bidegain and Grant*, 540 P.2d 864 (Ct.App.) opinion issued May 28, 1975. No claim is made that the Court of Appeals erred in reversing the conviction of Bidegain. Therefore, we concern ourselves only with the decision of the Court of Appeals insofar as it reversed the judgment of conviction of Grant. We reverse the Court of Appeals to this extent and remand the cause to that court for whatever further action is appropriate.

The question presented is whether the Court of Appeals correctly held that the trial court erred in denying Grant's motion to suppress the marijuana as evidence. The marijuana was seized in a warrantless search of an automobile which Grant was driving. He was stopped by the New Mexico State Police in a routine driver's license and vehicle registration check. He produced an Arizona driver's license and a Connecticut registration certificate, but the registration certificate showed the vehicle to be registered in another person's name. In view of this, the police decided to make a computer check by radio to determine if the vehicle was stolen. This consisted of one of the officers returning to his vehicle, which was parked nearby, and sending a radio message to a computer center known as the N.C.I.C., which would, in approximately six seconds, advise whether or not the vehicle had been reported as stolen. It turned out that the computer was inoperative at the time.

While the one officer had gone to his vehicle to make the computer check, the other officer explained to Grant what was being done and the purpose for the computer check. In the course of their conversation, the officer asked Grant what he had in the trunk of the automobile. At least one of the purposes for asking this question was to determine if Grant knew what was in the trunk. This was relevant to a determination of whether or not the vehicle was stolen. Grant responded that he had "luggage, suitcases." At about this time, the officer who had attempted to make the computer check returned to the Grant vehicle, and the officer, who had been talking with Grant, asked: "Do you mind if we look"? Grant replied, "No, don't mind if you look." He then got out of the automobile and unlocked and opened the trunk. The officers saw three footlockers which were locked. The officers smelled what they both concluded was the aroma of marijuana.

The officers then requested permission to look in the footlockers. Grant replied that he would rather the officers didn't look, because the lockers did not belong to him. Thereupon, the officers told him they smelled marijuana, that they believed marijuana was in the footlockers, and that he would be detained until they could ob-

tain a search warrant. Grant then delivered the keys to the padlocks on the footlockers to the officers who opened the lockers and found them to be filled with bricks of marijuana. The officers then searched two suitcases located in a U-Haul rack on top of the automobile and found marijuana in them.

As we understand their decision, the majority of the Court of Appeals held:

(1) That the officers had no right to inquire as to what was in the trunk of the automobile, because, at that point, they lacked the probable cause necessary to secure a search warrant;

(2) That the conduct of the officers in securing Grant's consent to look into the trunk of the automobile did not meet the requirements for a voluntary consent as announced in *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), and *State v. Lewis,* 80 N.M. 274, 454 P.2d 360 (Ct.App.1969), overruled on other grounds, 85 N.M. 118, 509 P.2d 885 (Ct. App.1973), because there was a conflict in the evidence as to when the officers stated they would get a search warrant. Grant testified that the request was made before he opened the automobile trunk, and the officers testified it was after the trunk was opened, after they had seen the locked footlockers in the trunk, after they had smelled marijuana, after they had arrived at a belief that the marijuana was in the footlockers, after they had requested permission to look in the footlockers, and after Grant had expressed a desire that they not do so because the footlockers did not belong to him;

(3) Apparently, because of this stated conflict in the evidence, that Grant's consent to the officers to look into or search the vehicle trunk was not "proved by clear and positive evidence with the burden of proof on the state" as required by the decision in *State v. Aull,* supra;

(4) That the officers acted unreasonably and without probable cause in requesting permission to look in the footlockers, because the smelling of marijuana by them could not constitute probable cause for a warrantless search in the absence of "a foundation as to [their] expertise."

We disagree with all of the reasoning of the Court of Appeals as we understand it, and disagree that the conduct of the officers constituted "stop and snoop" tactics and "harassment."

The officers were conducting a routine check of driver's license and vehicle registrations; Grant was routinely stopped as a part of this procedure; and there is nothing in the record to indicate, and no contention has been made by Grant, that this check was not being conducted lawfully. Thus, no question of the validity of the conduct of the officers in stopping Grant is presented.

The "snooping," as the majority of Court of Appeals chose to describe the conduct of the officers, began after Grant, who resided in Tucson, Arizona, had produced an Arizona driver's license issued to him and a Connecticut certificate of registration showing the vehicle to be registered in that state in the name of another person. The officers then asked what Grant had in the trunk of the vehicle. He responded that he had luggage. He was then asked if he minded if they looked in the trunk. He replied that he did not mind, got out of the vehicle and personally unlocked and opened the trunk.

The quotation appearing in the majority opinion of the Court of Appeals from *State v. Lewis,* supra, does not support the position that the officers exceeded their authority in asking Grant what he had in the trunk of the automobile. A police officer making a lawful stop of a motorist is not precluded from making reasonable inquiries concerning the purpose or purposes for the stop. An inquiry by an officer is not automatically violative of the right of security of a motorist, because the officer lacks probable cause to secure a warrant, or even because he lacks reasonable grounds for suspecting the motorist to be guilty of a crime. There is nothing

wrong with an officer asking for information or asking for permission to make a search. Permission need not be initially volunteered to constitute consent. *Schneckloth v. Bustamonte*, supra; *United* 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). A search authorized by consent is an exception to the requirements of both a warrant and probable cause and is wholly valid. *Schneckloth v. Bustamonte*, supra; *United States v. Beckham*, 505 F.2d 1316 (5th Cir. 1975); *Meister v. C.I.R.*, 504 F.2d 505 (3d Cir. 1974); *United States v. Heisman*, 503 F.2d 1284 (8th Cir. 1974); *Bradley v. Cowan*, 500 F.2d 380 (6th Cir. 1974); *United States v. Rothman*, 492 F.2d 1260 (9th Cir. 1973); *Maxwell v. Stephens*, 348 F.2d 325 (8th Cir. 1965); *State v. Carlton*, 83 N.M. 644, 495 P.2d 1091 (Ct.App.1972), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972).

The question of the voluntariness of a consent is one of fact to be determined by the trial court from all the evidence adduced upon this issue. *Schneckloth v. Bustamonte*, supra; *State v. Aull*, supra; *State v. Sneed*, 76 N.M. 349, 414 P.2d 858 (1966). It is for that court to weigh the evidence, determine its credibility or plausability, determine the credibility of the witnesses, and decide whether the evidence was sufficient to clearly and positively, or clearly and convincingly, establish that the consent was voluntarily given. *State v. Aull*, supra; *State v. Sneed*, supra. It is for the appellate court to determine only if the evidence, viewed in its most favorable light in support of the finding of the trial court, can be said to clearly and convincingly support the finding. *Terrel v. Duke City Lumber Company, Inc.*, 86 N.M. 405, 524 P.2d 1021 (Ct.App. 1974), aff'd. on this point in *Terrel v. Duke City Lumber Company, Inc.*, 88 N.M. 299, 540 P.2d 229, opinion issued August 4, 1975; *State v. Ballesteros*, 23 Ariz.App. 211, 531 P.2d 1149 (1975). To state it otherwise, it is for the appellate court to determine only whether the evidence, viewed in the light most favorable to the finding and considering the degree of proof required, substantially supports the finding. *State v. Seaton*, 86 N.M. 498, 525 P.2d 858 (1974); *State v. Santillanes*, 86 N.M. 627, 526 P.2d 424 (Ct.App.1974); *State v. Valles*, 83 N.M. 541, 494 P.2d 619 (Ct. App.1972).

The evidence adduced at the hearing on the motion to suppress, when so viewed and considered, clearly supports the trial court's finding that Grant voluntarily consented to the opening of the trunk of the vehicle.

We next consider the determination by the Court of Appeals that the officers acted unreasonably and without probable cause in requesting permission to look in the footlockers, because their smelling of marijuana could not constitute probable cause for a warrantless search in the absence of "a foundation as to [their] expertise." We have above discussed and held that the probable cause required to secure a warrant or to justify a warrantless search is not a prerequisite to a consent search or to a request for consent to search.

The trial court found that the officers had probable cause to conduct a search of the footlockers in that they smelled marijuana upon the opening of the trunk of the vehicle, and the odor was apparently coming from inside the footlockers. There was no evidence of the presence of marijuana inside the trunk of the vehicle but outside the footlockers. The majority of the Court of Appeals disagree with the trial court, because there was no "foundation as to the officer's expertise." Apparently the claimed lack of foundation as to expertise has reference to the lack of evidence as to the expertise, skill or capacity of the officers to correctly identify marijuana by smell. If the holding of the Court of Appeals is that the identification of marijuana by smell is an area of expertise requiring special skills or training and proof of qualifications in that area before evidence of identification of marijuana by smell is admissible, then that court erred,

because that question was not before it. And we do not consider the question, because it is not properly before us.

The testimony of the officers, concerning their identification of the odor of marijuana emanating from the trunk of the vehicle upon being opened, was not the subject of objection or question by Grant, and there was not the slightest suggestion at the hearing on the motion to suppress or at trial that either officer lacked the ability, or qualifications, to identify marijuana by odor. In fact, the testimony concerning the smelling of marijuana by the officers was initially elicited at the hearing on the motion to suppress by counsel for defendants.

[redacted] Opinions by the Court of Appeals, as well as by this Court, holding that none except jurisdictional or fundamental errors will be considered on appeal, unless raised or presented in the trial court, are legion. *State v. Aull,* supra; *State v. Lott,* 73 N. M. 280, 387 P.2d 855 (1963); *State v. Jaramillo,* 85 N.M. 19, 508 P.2d 1316 (Ct. App.1973), cert. denied, 85 N.M. 5, 508 P. 2d 1302 (1973), cert. denied, 414 U.S. 1000, 94 S.Ct. 353, 38 L.Ed.2d 236 (1973); *State v. Tapia,* 79 N.M. 344, 443 P.2d 514 (Ct. App.1968); cases cited in 3A New Mexico Digest, Criminal Law, ⚷1028, 1030 (1969).

We reverse the Court of Appeals, insofar as it sought to reverse the judgment of conviction of Grant, and remand the cause to the court for whatever further action is appropriate.

It is so ordered.

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

SOSA, J., dissents without opinion.

542 P.2d 52

SIERRA BLANCA SALES COMPANY, INC., a New Mexico Corporation, Plaintiff-Appellant,

v.

NEWCO INDUSTRIES, INC., a New Mexico Corporation, Ruidoso Racing Association, Inc., a New Mexico Corporation, now merged and known as Ruidoso Downs, Inc. a New Mexico Corporation, and Fortuna Corporation, Eric N. Culver, R. D. Mosier and Tom Mosier, Defendants-Appellees.

No. 1812.

Court of Appeals of New Mexico.

Sept. 23, 1975.

Certiorari Granted Nov. 6, 1975.

Albert J. Rivera and Wayne A. Jordan, Alamogordo, for plaintiff-appellant.

John P. Eastham, Rex D. Throckmorton, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendants-appellees.

OPINION

HENDLEY, Judge.

This action is a continuation of *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 84 N.M. 524, 505 P.2d 867 (Ct.App. 1972). The facts are fully detailed therein and will be repeated only as necessary to clarify the issues on this appeal. Plaintiff brought suit grounded in tort and contract against several individual and several corporate defendants. The individual defendants were Culver, Mosier and Hubbard. The corporate defendants were Newco Industries, Inc., Ruidoso Downs, Inc., Ruidoso Racing Association, Inc. and Fortuna Corporation. It is settled that Newco, Ruidoso Downs and Ruidoso have been either merged, consolidated or dissolved and that Fortuna is the sole viable corporation remaining as their successor. In the initial action, summary judgment was granted in favor of Mosier and Hubbard on both the fraud and contract claims and in favor of Fortuna and its predecessors on the contract claims; fraud was alleged only against the individual defendants. Plaintiff proceeded to trial solely against Culver on claims of both fraud and breach of contract. The jury returned a general verdict in plaintiff's favor and after a discount remittitur, plaintiff recovered judgment of compensatory damages in the amount of $157,390.92 and punitive damages in the amount of $150,000.00.

Plaintiff appealed and this Court reversed the summary judgment as to Mosier and Hubbard on the fraud claims and reversed summary judgment as to Fortuna on the contract claims which encompassed two theories: (1) that Culver was Fortuna's predecessor's agent and (2) that Fortuna's predecessors ratified the contract between plaintiff and Culver. Subsequently, the trial court allowed plaintiff to amend its complaint to assert a claim for punitive damages in the amount of $150,000.00 against Fortuna on the basis of the alleged ". . . willful and wanton misconduct of Fortuna Corporation in failing to ratify the Employment Agreement and in causing a breach of the contract. . . ."

Pursuant to the judgment rendered in the initial action, plaintiff obtained a lien on certain pledged stock of defendant, Culver. However, plaintiff's financial condition made it incapable of enforcing this lien due to its inability to satisfy certain lienholders. Culver was able to raise $200,000.00 in cash. Plaintiff accepted this $200,000.00 and the following were filed in open court: (1) an order of dismissal, dismissing with prejudice plaintiff's complaint against Culver, Mosier and Hubbard ". . . without affecting the right against Defendant Fortuna, Inc., or its corporate predecessors in interest

. . . ." and (2) a satisfaction of judgment and release of judgment lien in which plaintiff "hereby acknowledge[s] full satisfaction of the Judgment entered in the above-entitled cause on 20 September 1971 against Defendant Eric N. Culver for compensatory damages of $157,390.92, and for punitive damages of $150,000, together with costs, and hereby release[s] the lien thereof. That this satisfaction does not release Fortuna of its indemnities."

Defendant, Fortuna, then moved for summary judgment on the ground that plaintiff's damages had been satisfied in full as a result of the satisfaction of the judgment against the agent, Culver, thereby releasing the principal, Fortuna, from further liability. Summary judgment was granted and plaintiff appeals. We affirm in part and reverse in part.

As we see the issues in this case, it is necessary to discuss compensatory and punitive damages separately. We deal with the compensatory damages first. At the outset, we note that had the trial court not erred in granting summary judgment to Fortuna, plaintiff would have tried its case against both Culver, the alleged agent, and Fortuna, the alleged principal, together. We secondly note that the jury found in favor of plaintiff in the full amount of compensatory damages prayed for, i. e. $215,000.00. The jury had not followed the trial court's discount instruction, the contract being for fifteen years from June, 1969, and the trial court granted a six percent discount rate remittitur in the amount of $57,609.08 to the present value of $157,390.92. See *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, supra.

Compensatory Damages

The first question then becomes whether the payment by Culver of the sum of $200,000.00 in return for an instrument which acknowledged "full satisfaction of the Judgment" against him was a full satisfaction of the compensatory damages for the injury thereby precluding an action by plaintiff against Fortuna for compensatory damages for the same injury. Our answer is in the affirmative.

Section 24-1-14, N.M.S.A.1953 provides:

> "24-1-14. RELEASE—EFFECT ON INJURED PERSON'S CLAIM.—A release by the injured person of one [1] joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid."

However, where the consideration paid by one tortfeasor for the release represents full compensation for the *injury* the other tortfeasor is discharged. Annot., 73 A.L. R.2d 403 (1960); See *Vaca v. Whitaker*, 86 N.M. 79, 519 P.2d 315 (Ct.App.1974). Accordingly, we do not reach the situation set forth in *Herrera v. Uhl*, 80 N.M. 140, 452 P.2d 474 (1969).

Thus, was the judgment for the *injury* satisfied in full? A judgment may only be satisfied by payment in full. *Keeter v. Board of County Com'rs, Guadalupe County*, 67 N.M. 201, 354 P.2d 135 (1960). However, payment in full is not required where there is a lawful agreement discharging the judgment. Freeman on Judgments, 5th Ed., § 1118 (1925); *Keeter v. Board of County Com'rs, Guadalupe County*, supra. It is hornbook law that the essence of a valid agreement is consideration. Plaintiff, herein, accepted a lesser amount than that to which it was entitled by the judgment in order to obtain immediate cash. Further, as we have heretofore stated, plaintiff had been unable to secure funds in order to levy on Culver's stock. In view of the foregoing we hold the full satisfaction of judgment valid. Freeman on Judgments, 5th Ed., § 1140, p. 2376 (1925). There was a lawful agreement

discharging the judgment. Freeman on Judgments, 5th Ed., § 1118, supra. Plaintiff was compensated for the injury in full.

The trial court was correct in granting summary judgment to Fortuna on the issue of compensatory damages.

Punitive Damages

A different result obtains, however, with regard to punitive damages. In New Mexico, punitive damages may be awarded against the wrongdoer in contract actions when his conduct is maliciously intentional, fraudulent, oppressive or committed recklessly or with a wanton disregard of the wronged party's rights. *Fredenburgh v. Allied Van Lines, Inc.,* 79 N. M. 593, 446 P.2d 868 (1968). For a principal to be liable for punitive damages, there must be participation, authorization or ratification of the wrongdoing of the agent. *Stewart v. Potter,* 44 N.M. 460, 104 P.2d 736 (1940).

Punitive damages are not awarded as compensation to the party wronged, but rather as punishment of the offender, *Bank of New Mexico v. Rice,* 78 N.M. 170, 429 P.2d 368 (1967), and as a warning to others. *Sanchez v. Securities Acceptance Corp.,* 57 N.M. 512, 260 P.2d 703 (1953). We believe that the theory behind the award of punitive damages would best be served by adoption of the rule that allows apportionment of such damages among the several wrongdoers according to the degree of culpability or according to the existence or nonexistence of the requisite state of mind for such damages in the several defendants. See Annot., 20 A.L.R.3d 666 (1968). This being the case, the rationale of *Vaca v. Whitaker,* supra, does not apply to an award of punitive damages. A jury might find Fortuna more culpable than Culver. Since punitive damages are not for the purpose of compensation, plaintiff ought not be limited to one amount of punitive recovery. Conversely, a jury might not even find Fortuna culpable. The release of Culver as to the punitive aspect of the damages would logically have no effect on plaintiff's rights against Fortuna for such damages. We are supported in this result by the following cases which hold that a release of one joint wrongdoer will not release others where the cause of action is punitive in nature: *Porter v. Sorrell,* 280 Mass. 457, 182 N.E. 837, 85 A.L.R. 1159 (1932); *Phillips Sheet and Tin Plate Co. v. Griffith,* 98 Ohio St. 73, 120 N.E. 207 (1918).

Of course, punitive damages may only be awarded as an adjunct to compensatory or actual damages. *Montoya v. Moore,* 77 N.M. 326, 422 P.2d 363 (1967). The result we reach may seem somewhat anomalous in that we hold that plaintiff must go to trial against Fortuna on the two theories enumerated in their previous appeal, prove a case for compensatory damages to which we hold plaintiff is not entitled and then prove culpable conduct on Fortuna's part in order to only be able to obtain judgment on the punitive element of damages. However, had the trial court not erred in granting Fortuna summary judgment previously such would have been plaintiff's right under the foregoing reasoning and authority. The trial court therefore erred in granting summary judgment to Fortuna on this go-around with respect to punitive damages.

In so holding we are not unmindful of *State v. Mills,* 23 N.M. 549, 169 P.2d 1171 (1917). We simply do not believe it is applicable to the facts in the instant case.

The case is accordingly reversed and remanded for proceedings not inconsistent with this opinion.

It is so ordered.

HERNANDEZ, J., concurs.

LOPEZ, J., dissents.

LOPEZ, Judge (dissenting).

I dissent from that part of the decision which relates to compensatory damages.

The plaintiff here received $200,000 following a judgment for $357,390.92. There is nothing in the record from which we

can infer that $157,390.92 of that amount represented satisfaction of the claim for compensatory damages nor can we find any support for adopting such a legal fiction. The majority's conclusion that the judgment has been satisfied in full rests on the validity of the discharge of Culver. While we would agree that the agreement between Culver and the plaintiff was binding with respect to the parties to the agreement, the validity of that agreement does not determine the nature of the plaintiff's rights with respect to Fortuna. Satisfaction and discharge of a judgment with respect to one joint tortfeasor does not serve to discharge another where the plaintiff has not received compensation in full. *Herrera v. Uhl*, 80 N.M. 140, 452 P.2d 474 (1969). To introduce the illusion that the plaintiff here has been fully compensated because the discharge is binding will return the courts to the dissension over the release rules which the adoption of the Uniform Contribution Among Tortfeasors Act (§§ 24–1–11 to 24–1–18, N.M.S.A.1953 (Vol. 5) should have silenced.

542 P.2d 56

HALLIBURTON COMPANY, Petitioner-Appellant,

v.

PROPERTY APPRAISAL DEPARTMENT, State of New Mexico, Respondent-Appellee.

No. 1792.

Court of Appeals of New Mexico.

Oct. 21, 1975.

OPINION

WOOD, Chief Judge.

The PAD (Property Appraisal Department—See § 72-25-3, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1973)) valued, for property tax purposes, certain tangible personal property of the Halliburton Services Division and Welex Division of taxpayer, Halliburton (Halliburton Company). Halliburton protested the notices of value; the director of the PAD denied the protest after a hearing; the taxpayer appeals directly to this Court. Sections 72-25-10, 72-25-11, 72-25-12, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1973). Three of the issues are dispositive. They are: (1) PAD's jurisdiction to value the property, (2) exemption of vehicle mounted equipment from property taxation, and (3) exemption of sales inventories from property taxation.

PAD's Jurisdiction

Section 72-6-4(A)(1)(c), N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1973) is the applicable statute. It provides for the PAD to determine the assessed value:

> "of the machinery, equipment and other personal property in this state of all resident or nonresident contractors customarily engaged in contracting business which involves the movement and use of such machinery and equipment in more than one [1] county in the state, when such contractors, in the usual course of business, engage in work involving the use of, but not limited to, machinery and equipment commonly used in highway construction and maintenance, industrial building construction, engineering construction, pipeline construction, steel construction, utilities construction, and oil and gas well drilling."

Halliburton does not contend that it is not a contractor. It asserts that to be a contractor within the meaning of the statute the contractor must be involved in constructing one of the items named in the statute. It argues that it does not drill oil or gas wells but only provides services for those wells. This contention is based on a

Joe R. G. Fulcher, Modrall, Sperling, Roehl, Harris & Sisk, John B. Tittmann, James P. Saunders, Jr., Keleher & McLeod, Albuquerque, for petitioner-appellant.

Toney Anaya, Atty. Gen., John C. Cook, Joseph T. Sprague, Property Tax Dept., Asst. Attys. Gen., Santa Fe, for respondent-appellee.

misreading of the statute. The contractor's work must involve the use of, but is not limited to, machinery and equipment commonly used in oil and gas well drilling. The statute, by its terms, does not require Halliburton Company to be the drilling contractor.

There is evidence that the Halliburton Services Division cements surface casing to the depth required by state regulatory agencies, performs drill stem tests to help determine whether the well can be productive, cements the production casing and stimulates production either by fracturing or acidizing. There is evidence that Welex Division performs various logging services which are used in determining whether production casing should be set. The logging services are performed after reaching "total depth" of the well. Welex also perforates the casing at the production level of the well.

All of the foregoing activities are performed prior to production from the well. These activities are performed in the usual course of business; the activities involve the use of machinery and equipment, and this machinery and equipment is commonly used in the course of drilling an oil and gas well.

Although there is conflicting evidence, it was for the director to choose between conflicting inferences. *Rust Tractor Co. v. Bureau of Revenue*, 82 N.M. 82, 475 P.2d 779 (Ct.App.1970). There being substantial evidence that Halliburton's activities came within § 72-6-4(A)(1)(c), supra, the decision of the director that Halliburton was within PAD's jurisdiction is affirmed. *United Veterans Org. v. New Mexico Prop. App. Dept.*, 84 N.M. 114, 500 P.2d 199 (Ct.App.1972).

Exemption of Vehicle Mounted Equipment

Included within the value determined by the PAD for property taxation purposes was the value of "vehicle mounted machinery and equipment" used in performing the activities previously described in this opinion. The contention is that this machinery and equipment should not have been valued for tax purposes because it is exempt from taxation under § 64-11-14, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, Supp.1973) and § 72-1-23, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1973).

Section 64-11-14, supra, states:

"No vehicle upon which the registration fees provided for in the Motor Vehicle Code have been paid shall be assessed or taxed upon any property assessment rolls in this state for the period for which the fees are paid * * *."

Section 72-1-23, supra, states:

"Motor vehicles registered under the provisions of the Motor Vehicle Code are exempt from property taxation except for mobile homes as defined in section 64-1-8 NMSA 1953."

Halliburton purchases vehicular equipment produced by the manufacturer to Halliburton's specifications. This equipment is delivered to Halliburton in Duncan, Oklahoma. Halliburton then adds the specialized equipment necessary to perform the operations previously referred to in this opinion. The specialized equipment is bolted to the frame of the vehicle's chassis and, according to the evidence, is permanently mounted. The completed vehicle is then delivered to various locations of Halliburton. When delivered to a Halliburton location in New Mexico the vehicle is registered in New Mexico and registration fees are paid.

In denying Halliburton's claim of exemption, the director ruled that none of the property in question was a motor vehicle as that term is defined in the Motor Vehicle Code. The "property in question" is not the cab and chassis of the trucks or the chassis of the trailers; the disagreement is over the equipment mounted on the chassis.

Defending the director's ruling, PAD asserts the equipment was special mobile equipment which was not subject to registration under § 64-3-2, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2). Special mobile equip-

ment is defined in § 64–1–12, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2). *Gibbons & Reed Company v. Bureau of Revenue,* 80 N.M. 462, 457 P.2d 710 (1969). This definition reads in part: "Every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways * * *."

The evidence is undisputed that the equipment in question is added to the chassis for the purpose of carrying that equipment to and from drilling sites over the highways. "Incidental" means subordinate, nonessential, as occurring merely by chance or without intention or calculation. Webster's Third New International Dictionary (1966). The evidence is that the equipment was not incidentally moved over the highways; the equipment is not special mobile equipment under § 64–1–12, supra.

PAD contends the equipment mounted on the chassis is not part of the vehicle and therefore not part of a motor vehicle entitled to the exemption. PAD would distinguish between the part of a vehicle necessary for its propulsion and the part unnecessary for propulsion. It states that "vehicle", as used in our statute "is not intended to include property * * * which is unnecessary to the function of the device in transporting or drawing the property upon a highway." This contention finds no support in the statutory definitions of "vehicle" and "motor vehicle". The definition of these terms in § 64–1–6, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2) does not distinguish between the propulsion and non-propulsion parts of a vehicle.

According to the certificates of registration in evidence, the equipment is mounted either on trucks or freight trailers. We need not determine whether the equipment mounted on the trucks was a part of the trucks for purposes of vehicle registration fees. The registration fees for trucks are determined by declared gross weight. Declared gross weight is defined to include maximum gross vehicle weight "at which a vehicle * * * will be operated during the registration period, as declared by the registrant for registration and fee purposes * * *." Sections 64–11–2 and 64–1–8.1, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, Supp.1973). The evidence is undisputed that a gross weight was declared by Halliburton, that the declared gross weight included the mounted equipment and that registration fees were paid on that gross weight. Having paid the registration fees as provided in the Motor Vehicle Code, the equipment mounted on the trucks was exempt from property tax under § 64–11–14, supra.

The registration fee provisions for freight trailers differ from the provisions for trucks. Section 64–11–2, supra, provides for a permanent registration fee "irrespective of their weight". Accordingly we must determine whether the equipment mounted on the trailers is a part of the trailers. If so, once the permanent registration fee is paid, the trailer, including the equipment which is a part of the trailer, is exempt under § 64–11–14, supra. Although the equipment is bolted to the trailer, the evidence is that the trailer had no use apart from the equipment, that the equipment is an integral part of the trailer, that the trailer and equipment constitute a single unit and is used as such. See *Crown Concrete Company v. Conkling,* 247 Iowa 609, 75 N.W.2d 351 (1956). The evidence in this case shows the equipment was a part of the trailer.

The director erred in denying the exemption.

Exemption of Sales Inventories

Section 72–1–22, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1973) states:

> "Personal property in the possession of a person, whether owned by him or not, and held as part of his inventory for sale or resale at wholesale, retail or on consignment is exempt from property taxation except for:
>
> * * * * * *
>
> "B. personal property inventories held by a person whose property used in con-

nection with the maintenance of personal property inventories is subject to assessment by the property appraisal department."

This statute was recompiled as § 72-29-3.2, N.M.S.A.1953 (Int.Supp.1974) by Laws 1974, ch. 92, § 35.

Halliburton possesses sales inventories. The PAD valued these inventories for property tax purposes. Halliburton protested; the director overruled the protest. The director ruled that Halliburton came within the exception to the exemption and that the exception did not deprive Halliburton of equal protection of the law.

Two requirements must be met before the exception applies. First, Halliburton must have been subject to assessment by PAD. We held Halliburton was subject to assessment by PAD in the first issue of this opinion. Second, Halliburton must have property which is "used in connection with the maintenance of personal property inventories." Halliburton attacks the sufficiency of the evidence to meet this requirement. Although the evidence on this issue is sparse, we assume, but do not decide, that the evidence is sufficient. We do so because of the equal protection issue.

Section 72-1-22, supra, provides a general exemption from property taxation of sales inventories. The exception would take the exemption away from Halliburton because Halliburton's sales inventories are subject to assessment by PAD. Halliburton is subject to assessment by PAD because it is "customarily engaged in contracting business which involves the movement and use of * * * machinery and equipment in more than one [1] county in the state * * *." Section 72-6-4(A)(1)(c), supra.

The effect of § 72-1-22, supra, and § 72-6-4(A)(1)(c), supra, is that contractors whose machinery and equipment is used in more than one county are subject to property tax on sales inventories and contractors whose machinery and equipment is *not* used in more than one county are not subject to property tax on sales inventories.

The equal protection issue is whether there is a rational and natural basis for distinguishing between contractors whose machinery and equipment is used in more than one county and contractors whose machinery and equipment is not used in more than one county. Stated another way, is there a substantial difference between contractors operating in more than one county and contractors who do not? *Gruschus v. Bureau of Revenue,* 74 N.M. 775, 399 P.2d 105 (1965).

In considering the equal protection issue we recognize the Legislature possesses great freedom in classifications in the tax field, that Halliburton has the burden of negating every conceivable basis which might support the classification and that unless the classification is clearly arbitrary and capricious we cannot hold the classification unconstitutional. *Michael J. Maloof & Co. v. Bureau of Revenue,* 80 N.M. 485, 458 P.2d 89 (1969).

Halliburton asserts a classification based solely on the use of machinery and equipment in more than one county is patently unreasonable. PAD asserts the classification has a reasonable basis because "imposition of tax on the inventories of the contractors referred to in Section 72-6-4(A)(1)(c), *supra,* is susceptible to better procedure in order to obtain uniformity and equality in the valuation and assessment of property throughout the state than is imposition of tax on inventories by the county assessor." Thus PAD defends a classification for tax purposes on the basis of assessment procedures. This does no more than show administrative convenience in arriving at a valuation of the property involved; it does not show a rational basis for taxing inventories of contractors who report value to PAD rather than to the county assessor. Specifically the fact that taxpayers may reasonably be required to report their property values to different government offices because of differences in geographic operations does not provide a reasonable basis for a difference in tax treatment on the values reported.

PAD also asserts the difference in tax treatment of single county and multi-county contractors is similar to a difference in tax treatment of professional fees and wages. We do not understand this contention. The tax involved here does not distinguish between type of work or type of payment for work performed; the difference in tax treatment applies solely because a contractor crosses a county line.

At oral argument the suggestion was made that the difference in tax treatment is based on a difference in "size" of contractors, that a single county contractor would do less business than a multi-county contractor. "Size" is used in the sense of the dollar volume of the contractor, and dollar volume could refer to various items such as gross receipts or value of sales inventories. The argument is spurious. The tax difference with which we are concerned is based solely on whether the contractor crosses a county line in doing business; the statutes which establish the difference in tax treatment are not concerned with "size" of the contractor. Compare *Gruschus v. Bureau of Revenue,* supra.

No conceivable basis has been advanced why a contractor operating in San Juan and Rio Arriba Counties should have its sales inventory subject to the property tax and a contractor who operates only in San Juan County should be exempt from that tax. Compare *State v. Sunset Ditch Co.,* 48 N.M. 17, 145 P.2d 219 (1944).

The difference in tax treatment based solely on whether a contractor uses his equipment in more than one county is arbitrary and results in a denial of equal protection of the law. This difference comes about because of the exception from the exemption in § *72–1–22,* supra. Under that statute Halliburton's sales inventories were subject to property tax because their property was valued by PAD rather than the county assessor. To the extent that valuation by the PAD deprives Halliburton of the exemption, § *72–1–22,* supra, is unconstitutional.

The director erred in ruling that taxation of Halliburton's sales inventory was not barred by the equal protection requirements of the Constitution.

The director's decision and order is set aside. The cause is remanded with instructions to give appropriate notices of this result. Section *72–25–12,* N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp.1973).

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

542 P.2d 61

In the Matter of John DOE, a child, Appellant.

No. 2009.

Court of Appeals of New Mexico.
Oct. 21, 1975.

C. A. Bowerman, Albuquerque, for appellant.

Toney Anaya, Atty. Gen., Ralph W. Muxlow, II, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

This is a proceeding under the Children's Code, §§ 13–14–1 to 13–14–45, N.M.S.A. 1953 (Repl.Vol. 3, 1968, Supp.1973). The child appeals a commitment order alleging one ground for reversal; that the trial court erred in its refusal and failure to advise the child of his rights under the Children's Code and other laws. We affirm.

At the hearing the trial judge was apprised by both the Children's Court attorney and the defense attorney that the Children's Code requires that a child be advised of his rights each time that he appears before the court. Section 13–14–28(A), supra. The court refused to do so because the child was represented by counsel. Defense counsel stated: "* * * I believe he does have counsel, he has been advised, but, I think that the Court is directed in all proceedings concerning juveniles to read them their rights and assure itself of their understanding of them."

Section 13–14–25(K), supra, provides:

"* * * Persons afforded rights under the Children's Code shall be advised of these rights and any other rights existing under other laws no later than the time of their first appearance in a proceeding on a petition under the Children's Code and at any other time specified in the Children's Code or other law if that occurs prior to the proceeding. Persons shall be advised of their rights at each appearance before the court."

Section 13–14–28(A), supra, provides:

"* * * The court shall advise persons before the court of their basic rights under the Children's Code [13–14–1 to 13–14–45] and other laws at each separate appearance."

The child does not claim any prejudice nor does he claim that he was not otherwise advised by his attorney of his constitutional or other legal rights. We agree with appellant that the court has an obligation to advise children before the court of their rights under the Children's Code and other laws at each separate appearance. However, the sections do not stand alone or in a vacuum. Those sections of the Children's Code must be read in light of the legislative purposes expressed in the Code. Section 13–14–2(E), supra, states one of the objectives of the legislature.

"* * * to provide judicial and other procedures through which the provisions of the Children's Code are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced."

On the state of the record before us there is no showing that the child's constitutional and other legal rights were not protected. Absent a claim of not being otherwise fully advised of his constitutional or other legal rights, we fail to see how the child was hurt. Compare *State v. Elledge,* 81 N.M. 18, 462 P.2d 152 (Ct.App. 1969).

The judgment and sentence are affirmed.

It is so ordered.

WOOD, C. J., and LOPEZ, J., concur.

542 P.2d 434

Robert Terry PETERSON and Bursch Trucking, Inc., Plaintiffs-Appellees,

v.

J. M. ROMERO, as Administrator of the Estate of Joe M. Romero, Deceased, and J. M. Romero, Individually, Defendants and Third-Party Plaintiffs-Appellants,

v.

The HERTZ CORPORATION and Royal Globe Insurance Company, Third-Party Defendants-Appellees.

No. 1854.

Court of Appeals of New Mexico.

Oct. 28, 1975.

Rolando J. Matteucci, Albuquerque, for defendants and third-party plaintiffs-appellants.

Paul L. Butt, Alan C. Torgerson, Shaffer, Butt, Jones & Thornton, Albuquerque, for third-party defendants-appellees.

OPINION

SUTIN, Judge.

Summary judgment was entered in favor of The Hertz Corporation and Royal Globe Insurance Company, its insurer, third-party defendants, and against J. M. Romero, administrator of the estate of Joe M. Romero, deceased (decedent), and J. M. Romero, individually (Romero), third-party plaintiffs. Romero appeals. We affirm.

On June 10, 1972, decedent was killed in an automobile accident. His estate and Romero were sued by plaintiffs for damages. Romero requested Hertz to defend the action under the rental contract and Hertz refused.

The trial court found that (1) decedent, at the time of the accident, was *18 years of age* and he was driving a Hertz car rented by Romero; that the rental contract provided in part:

7. Vehicle shall NOT be operated by any person except Customer and the following Authorized Operators, each of whom must be duly qualified and licensed to drive and must have received Customer's advance permission:

(a) *persons of full age (21 years)* who are members of the immediate family of Customer and permanently residing in Customer's household. [Emphasis added.]

(2) Because decedent was below 21 years of age, no genuine issue of material fact existed and an interlocutory summary judgment was entered.

Romero and decedent complied with the requirements of paragraph 7, supra, except for the age of decedent.

The first issue is whether Romero and decedent's estate were covered by the insurance provisions of the rental contract. This is a matter of first impression.

A. *Section 13-13-1(A), (B) does not modify the rental contract as to age.*

Section 13-13-1(A), (B), N.M.S.A. 1953 (Repl.Vol. 3, 1973 Supp.) was in effect at the time of the rental contract by virtue of the enactment of the New Mexico Age of Majority Act of 1971. It provided in pertinent part that:

A. Except as provided in Subsection B * * * notwithstanding any law to the contrary:

(1) any person who has reached his eighteenth birthday shall be considered to have reached his majority and is an adult for all purposes the same as if he had reached his twenty-first birthday;

(2) any law conferring any right or privilege, or imposing any duty or obligation, upon any person who has reached his twenty-first birthday shall apply to any person who has reached his eighteenth birthday;

(3) any law which denies any right or privilege to persons who have not reached their twenty-first birthday shall apply only to persons who have not reached their eighteenth birthday; and

(4) any law, except the Liquor Control Act [§§ 46-1-1 to 46-11-4], which differentiates between treatment to be accorded persons who have reached their twenty-first birthday and those who have not, shall differentiate between treatment to be accorded persons who have reached their eighteenth birthday and those who have not.

B. It is the intent of the legislature that this general law shall control over any conflicting prior special law except that it shall not apply to or change any age requirements for exercising the elective franchise.

Does this statute modify the Hertz rental contract by substituting "18 years" for "21 years"? The answer is "no".

Thus far, § 13-13-1 has been applied in two divorce cases. *Phelps v. Phelps*, 85 N.M. 62, 509 P.2d 254 (1973); *Mason v.*

Mason, 84 N.M. 720, 507 P.2d 781 (1973). In each case, it was held that, for purposes of paying support for minor children, support stops when the children reach eighteen years of age.

It has been said that "an unmarried 18-year-old of either sex, . . . under the Age of Majority Act passed by the 1971 New Mexico Legislature, has full powers to contract * * *." Bingaman, The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control, 3 N.M. L.Rev. 11, 39 (1973) (footnote omitted).

No authority has been cited and we have found none which determines what effect, if any, § 13–13–1(A) has on the rental contract entered into by Romero.

Kentucky and Michigan have similar Age of Majority Acts. Ky.Rev.Stat. § 2.-015 (1970); 37 Mich.Compiled Laws Ann. § 722.52 (Supp.1972). The closest analogy we can find comes from Kentucky in a number of divorce cases. These cases involved the situation in which, at the time of the divorce and before the enactment of the Age of Majority Act, the father agreed to support his minor children until they reached "majority". In each case, the court held that the agreement between the parties would control, not the statutory provision, and that the father had to support the children until age 21. *Showalter v. Showalter,* 497 S.W.2d 420 (Ky.1973). "In construing a contract, the intention of the parties govern." *Wilcox v. Wilcox,* 406 S.W.2d 152, 153 (Ky.1966). "The enactment of the statute made no change in this contract." *Collins v. Collins,* 418 S.W.2d 739, 740 (Ky.1967).

The statute is broad when it states that decedent "is an adult for all purposes the same as if he had reached his twenty-first birthday." What is meant by the phrase "for all purposes"? We believe that the phrase "for all purposes" does not bar the right of parties to a contract to agree that "of full age" may be stipulated to mean 21 years.

The intent of the legislature is clear. Subsection B declared that the purpose of the statute was to substitute the age of 18 for the age of 21 when any prior *special law* fixed an adult age of 21 years, subject to the specific exception of liquor control.

"For all purposes" means that when a prior *special law* fixes the age of 21 years, a person of the age of 18 years is an adult, and subject to the provisions of the special law, "for all purposes" of that special law.

We can find no analogical or interpretive basis for the contention that "for all purposes" means that a person 18 years of age is an adult in every phase of law, including the law of contracts and the modification of contracts.

"The phrase 'for any purpose' * * * is not all-encompassing, but is restricted to a reasonable construction by the context of the entire statute and the purposes of the act. [Citation omitted.]" *Pacific Insurance Co., Ltd. v. Oregon Auto Ins. Co.,* 53 Hawaii 208, 212, 490 P.2d 899, 902 (1971). The Hawaiian Court held that where the interpretation of the phrase "for any purpose" was totally inconsistent with the purposes of the Act as well as unreasonable and absurd, a departure from a literal construction is justified even in the absence of statutory ambiguity.

We hold that a reasonable construction of § 13–13–1(A) should not lead to the unreasonable and absurd result that the contract language "of full age (21 years)" means "18 years". Romero and decedent were not covered by the Hertz rental agreement.

B. *Other issues raised do not create an issue of fact.*

Plaintiff contends provisions of the contract which read "full age (21 years)" is ambiguous and on the basis of the asserted ambiguity we should hold that "full age" means 18 years. There is no ambigu-

ity. "Twenty-one years" clearly and unambiguously shows the meaning of "full age".

Plaintiff contends paragraph 6(a) of the rental contract is void and unenforceable because it violates § 64–24–87, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 2). This section contains a provision stating who is to be an insured under our Financial Responsibility Law. There is nothing in this record indicating the Financial Responsibility Law was applicable. *Larson v. Occidental Fire and Casualty Company,* 79 N.M. 562, 446 P.2d 210 (1968).

Plaintiff contends summary judgment was improper because there is nothing showing the presence or absence of a causal connection between the age of the decedent and the accident. This contention is based on decisions to the effect that the purpose was to relieve the insurance company of liability from accidents caused by the exclusion. See *McGee v. Globe Indemnity Co.,* 173 S.C. 380, 175 S.E. 849 (1934); *Bailey v. United States Fidelity & Guarantee Co.,* 185 S.C. 169, 193 S.E. 638 (1937). The "causal connection" argument overlooks the fact that the issue is rights under a contract and not a matter of tort liability. Causal connection between decedent's age and the accident did not have to be shown. *Witzko v. Koenig,* 224 Wis. 674, 272 N.W. 864 (1937); *Giacomo v. State Farm Mut. Automobile Ins. Co.,* 203 Minn. 185, 280 N.W. 653 (1938).

Affirmed.

It is so ordered,

WOOD, C. J., and LOPEZ, J., concur.

542 P.2d 832

STATE of New Mexico, Plaintiff-Appellee,

v.

Eugene GALLEGOS, Defendant-Appellant.

No. 1630.

Court of Appeals of New Mexico.
Oct. 21, 1975.
Certiorari Denied Nov. 20, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Robert R. Rothstein, Asst. Appellate Defender, Santa Fe, for appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, Mark G. Shoesmith, Asst. Attys. Gen., Santa Fe, for appellee.

OPINION

HERNANDEZ, Judge.

Defendant was indicted and convicted of rape in violation of Section 40A–9–2, N.M.S.A.1953 (2d Repl. Vol. 6, Supp. 1973). He appeals alleging five points of error. We reverse.

We consider only point two as it is dispositive of this appeal. Defendant's second point is that the trial court erred in refusing to declare a mistrial because one juror did not understand the proceedings.

Shortly after the jury began its deliberations the foreman sent the following note to the court: "One of the jurors is acquainted with one of the parties in question, and, consequently, we cannot come to an impartial decision. This was not realized until certain witnesses were called." This message was read aloud in open court in the presence of defendant and his attorney and the district attorney, but out of the presence of the jury. The trial court then inquired, "What are the positions of the parties with respect to the note?" The district attorney, Mr. Kaufman, stated that if one of the jurors knew the defendant that there should be a mistrial. Defense counsel said, "I presume in terms of what Mr. Kaufman is speaking of." The trial court then stated that it was going to bring in the jury and inquire what was meant by the use of the word "parties" in the note. If it meant the defendant, the court indicated an inclination toward granting a mistrial, but if it referred merely to a witness, the court would send the jury back for further deliberation. Defense counsel stated, "We have no objections."

The jury was brought back, and the court's questioning of the foreman revealed that "parties" meant one of the witnesses. After telling the jurors that they should not let either their sympathy or prejudice influence them, the trial judge sent them back to deliberate their verdict. The defendant made no objection.

Sometime later, another note was sent by the foreman to the trial court. The second note was read aloud in open court, to-wit: "The juror knows the Defendant[']s parents and lives nearby their home and is fearful of ill feelings between (his/hers [sic]) family and theirs." At this point defense counsel moved for a mistrial because the note indicated that the jury was prejudiced against the defendant. The trial court stated that it was going to call the jury back and instruct that they were bound by their oaths to render a fair and impartial verdict and that they were not to concern themselves with the consequences of their verdict. It would then send the jury back for further deliberations. The court further stated that if after a reasonable time the same problem existed, it would entertain a motion of a mistrial. Defense counsel stated he had no objections. The trial court did as indicated and sent the jury back.

Finally, a third note was delivered to the trial court from the foreman which read: "The juror does not understand English very well, and upon being questioned in Spanish, the jury has found that he/she does not even understand the charges brought against the Defendant." Defense counsel again moved for a mistrial on the ground that since one of the jurors understood neither the reasons for defendant being on trial, nor the evidence presented against him, the defendant had been denied an impartial jury as required by the Sixth Amendment of the Constitution of the United States, and §§ 12 and 14 of Article II of the Constitution of New Mexico. The trial court denied the motion on the grounds, (1) that once the jury was sworn, neither the court nor the attorneys could "go behind the qualifications of the juror", and (2) that it did not regard the note as "an adequate basis for a mistrial." The jury was brought back into the court room and instructed that since they had been questioned by the court and the attorneys and that since none of them had responded to various negative questions which had been asked them, they were qualified. The trial court stated that it would not be proper to go behind and inquire into the qualifications of any of them. The court further informed the jury that the time to check into such matters was before the oath had been administered, and that it was therefore too late to do so after the cause had already been submitted for verdict. The jury was sent back to deliberate.

Article II, § 12 of the Constitution of New Mexico provides:

> "The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate."

Article II, § 14 of the Constitution of New Mexico guarantees defendants an "impartial jury," which means "a jury 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).

Clearly, it would be a violation of these sections to allow one unqualified juror to serve in a criminal cause for the reason that any verdict rendered in such a situation would be less than unanimous. It is self-evident that a juror who does not possess a working knowledge of English would be unable to serve because he cannot possibly understand the issues or evaluate the evidence to arrive at an independent judgment as to the guilt or innocence of the accused. *Morris v. State,* 462 S.W.2d 842 (Ark. 1971); *State v. Scott,* 278 So.2d 121 (La. 1973). Such would not be the case if testimony and evidence were translated. As was pointed out in *Territory of New Mexico v. Romine* (Gild. 1881):

> " . . . In all counties where the jury contains members representing each language [English and Spanish] or where persons speaking each are before the court, all the proceedings are translated by a sworn interpreter, who is a court officer, into the other language from that in which they originally take place. Thus, everyone interested is as fully as possible informed of every proceeding, and no injustice is done."

It is the duty of the trial court to see that an accused is tried by a properly qualified jury. *State v. McFall,* supra. Upon receipt of the third note we believe the trial court should have conducted a summary hearing to determine for itself the ability of the juror in question to understand English. See *State v. C. DeBaca* (Ct.App.) 541 P.2d 634, decided Sept. 30, 1975.

The conviction of the defendant is reversed and the cause is remanded for a new trial.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

542 P.2d 834

In the Matter of John DOE VIII, John Doe IX and John Doe X, children, Defendants-Appellants,

v.

STATE of New Mexico, Plaintiff-Appellee.

No. 1638.

Court of Appeals of New Mexico.
Aug. 20, 1975.
Certiorari Denied Sept. 23, 1975.

For opinion of the Court see 88 N.M. 347, 540 P.2d 827.

HERNANDEZ, Judge (dissenting).

I agree with the majority that, " . . . Lane's observation of the respondent [Doe X], especially his testimony that he saw X place the pipe inside his sweater, provided the necessary probable cause to justify a search and seizure for purposes of maintaining school discipline." I likewise agree that, " . . . it cannot be denied that this action [interrogation and seizure] by a public school official is 'state action' . . . ." But I am not ready to conclude, as do my brothers in the majority, that since the school officials had probable cause to believe an infraction of school discipline, they could proceed to seek to uncover evidence of what they, in a dawning way, came to suspect to be a criminal violation without regard to the constitutional limitations normally required in such investigations. I am unwilling to conclude, as do the majority, that once the "reasonableness" of a seizure has been shown for one purpose, it has *ipse dixit* been shown for all purposes.

Instructive on the unwitting violation of the constitutional rights of juveniles by well intentioned persons is Justice Forta's opinion in *Re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

> "The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed

that society's role was not to ascertain whether the child was 'guilty' or 'innocent', but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' . . . The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.

"These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as parens patriae. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders. In these old days, the state was not deemed to have authority to accord them fewer procedural rights than adults.

"The right of the state, as parens patriae, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.' He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled. On this basis, proceedings involving juveniles were described as 'civil' not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.

"Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice . . . the results have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." [Footnotes Omitted.]

The excerpt quoted above well illustrates the error which I believe will be perpetuated by the decision reached by the majority herein.

The case before us presents questions of first impression in New Mexico. Respondent X was seen to have been the last in a line of three or four junior high school students who were smoking between classes, and he was seen to attempt to secrete the pipe that was used after their gym teacher called out to warn that the misbehavior had not gone unobserved. Twenty minutes later, the gym teacher and the assistant prin-

cipal at the school called respondent X out of his class, ushered him to an empty class room and proceeded to question him about the incident. Although both of the adults testified that they could see the pipe bulging from under the respondent's sweater throughout the questioning, the boy feigned innocence and refused to hand over the pipe for forty minutes. In my opinion the rules of the school and the regulation of the State Board of Education certified as number 73–9, and approved on April 27, 1973,[1] render the forty minute period of questioning entirely unnecessary, although I think the patience which it demonstrates is laudable.

The law is at least demonstrable, if not overwhelming, that a search of the respondent and a seizure of the pipe by these school officials would have been "reasonable" at any point after he had been seen in violation of the school prohibition against smoking; and use of any statements or evidence discovered in the process would have been admissable against respondent X in a consequent school disciplinary proceeding leading to sanctions for the infraction. *In re W.*, supra; *People v. Shipp,* supra. The instant appeal, however, is not from an in-school disciplinary proceeding [Compare *Tinker v. Des Moines Community School Dist.,* supra, where the school rule allegedly violated was, itself, held unconstitutional]; but rather from a finding of a criminal violation and an adjudication of delinquency under our Childrens Code.

After the forty minute period which resulted in respondent X's surrender of the pipe, the assistant principal here took the boy to his office, and there he and the school principal began to interrogate the boy for information about the origin and nature of the pipe's contents. This interrogation led to respondent X's confession that the substance in the pipe was marijuana.

In my opinion, the shift in emphasis between the first interrogation and the second marks the point in the facts presented at which the school officials lost their mantle of discretionary powers under the *in loco parentis* regulation, supra, because they took up an investigation of possible criminal violations with an eye to prosecution beyond the realm of school discipline. The boy then and there became entitled to the same treatment any adult would have enjoyed under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). I believe that it is incumbent upon the courts in general and upon this panel to draw the line between the activities of school officials performed in the place of the parent wherein wide latitude in permissible approaches should be the rule and activities performed by those same officials in the role of accuser, adverse to the interests of the child and wholely inconsistent with the role of protector implied by the *in loco parentis* doctrine. For that reason, I do hereby respectfully enter my dissent.

1. JURISDICTION OVER STUDENTS. Public school authorities, including school boards, administrators, teachers and others in positions where supervision of public school students is part of their responsibility shall stand "in loco parentis" with regard to those students during such times that they have the responsibility of supervising, instructing or otherwise controlling such students. During such periods public school authorities shall have the right of supervision and control over the conduct of such students.

This Regulation is intended to reflect the common law with regard to the rights, duties and liabilities of public school authorities in supervising, controlling and disciplining students and nothing herein shall be construed as enlarging the liability of public school authorities beyond that imposed by statute, common law or regulation of the State Board of Education. . . .

542 P.2d 1182

In the Matter of the Protest of Ira B. MILLER to the 1974 Valuation of the Real Property in Lincoln County, New Mexico.

ERNEST W. HAHN, INC., a corporation, Protestant-Appellant,

v.

COUNTY ASSESSOR FOR BERNALILLO COUNTY, New Mexico, Respondent-Appellee.

CARLO, INC., Petitioner-Appellant,

v.

COUNTY ASSESSOR FOR BERNALILLO COUNTY, New Mexico, Respondent-Appellee.

DALE BELLAMAH LAND CO., INC., Protestant-Appellant,

v.

COUNTY ASSESSOR FOR BERNALILLO COUNTY, New Mexico, Respondent-Appellee.

Nos. 1715, 1725, 1739 and 1767.

Court of Appeals of New Mexico.

Sept. 16, 1975.

Rehearing Denied Oct. 15, 1975.

Certiorari Denied Nov. 20, 1975.

Charles C. Spann, Grantham and Spann, Albuquerque, for Ira B. Miller, protestant.

J. Victor Pongetti, Albuquerque, for appellant Ernest W. Hahn, Inc. and Dale Bellamah Land Co., Inc.

Gene E. Franchini, Matteucci, Franchini, Calkins & Michael, Albuquerque, for appellant Carlo, Inc.

Charles A. Shaw, Asst. Dist. Atty., Alamogordo, for appellee Lincoln County.

Sandra A. Grisham, Vance Mauney, Albuquerque, for appellee.

Toney Anaya, Atty. Gen., John C. Cook, Joseph T. Sprague, Asst. Attys. Gen., Santa Fe, for amicus curiae, Property Tax Dept.

OPINION

SUTIN, Judge.

Four property owners-taxpayers appeal from an Order and Decision of the county valuation protests board located in the county in which each taxpayer's land is situated. These counties are Lincoln and Bernalillo. Because they present the same or related questions, we have consolidated these cases for review.

Each board denied the taxpayer's protest of the valuation of his land by the county assessor.

We reverse the decisions of the county valuation protests boards.

A. *Taxpayers Involved and Location of Land*

(1) Ira B. Miller owns land in Ruidoso Downs, Lincoln County.

(2) Ernest W. Hahn, Inc., Dale Bellamah Land Co., Inc. and Carlo, Inc. each own land in Bernalillo County.

B. *Rules Governing Assessment Procedure*

In 1973 the Legislature enacted the "New Mexico Property Tax Code". Section 72–28–1 et seq. Special 1973 Supplement. This code and the regulations promulgated by the Director of the Property Appraisal Department were declared effective January 1, 1975, and are not applicable to the cases before us. Property Tax Department Regulation 31–27:2 provides for County Protests Board procedures. However, prior to the effective date of the Propty Tax Code, no such procedures were provided for.

In 1970 the Legislature enacted the "Property Appraisal Department Act". Sections 72–25–1 et seq., N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Special 1974 Supp.). Section 72–25–6 provides:

> A. 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].
>
> * * * * * *
>
> H. All existing orders, rulings and 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; . . . .

The New Mexico Property Appraisal Department issued to each New Mexico county assessors, a Land Manual for determining "Methods of Land Valuation". We have reviewed this manual and find nothing therein which constitutes compliance with subdivision (A) of § 72–25–6.

Under the Property Appraisal Department Act, the Supreme Court held that:

> The county taxing authorities have no statutory authority or right to assess taxable tangible property contrary to the directions, rules, regulations and orders of the P.A.D., *as the functions of the local taxing authorities are purely ministerial.* [Emphasis added]. *New Mexico Prop. App. Dept. v. Board of County Com'rs,* 82 N.M. 267, 269, 479 P.2d 771, 773 (1971).

In 1973, the Legislature created a property appraisal department director, § 72–6–12, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, 1973 Supp.). Under this enactment the director has authority to issue regulations, rulings, orders and instructions to county assessors to assure compliance with the laws of property taxation. The director "may promul-

gate all necessary rules and regulations, including standards of assessment, which rules and regulations shall be followed by the county assessors in connection with the assessment and valuation of property for tax purposes." Section 72-6-12.1.

We have reviewed all of the regulations submitted by the Property Appraisal Department to this Court pursuant to the instant appeals. We find none which provides a method to govern the valuation and assessment of the taxpayers' property. We find none which provides a specific method for appraising horse race tracks or shopping centers or that contains "findings of fact . . . and a detailed description of the method of appraisal . . . ." [Section 72-25-6(A)]. We find none issued by the Director of the Property Appraisal Department.

C. *Rules Governing County Valuation Protests Boards Hearings*

Neither Chapter 72, Revenue and Taxation, § 72-2-1 et seq., nor the regulations of the Property Appraisal Department provide for rules of practice before the county valuation protests boards. There is no provision for findings of fact and conclusions of law by the boards, nor any provision for discovery of evidence by the taxpayer.

The only applicable statutory provision is § 72-2-39.1(A) which provides that:

> The technical Rules of Evidence and the Rules of Civil Procedure [§ 21-1-1 (1) et seq.] do not apply at protest hearings before a county valuation protests board.

In the instant cases, hearings were held by the Lincoln and Bernalillo County Valuation Protests Boards regarding appellants' protests. In each case, the board excluded evidence proffered by the taxpayer. In the case of appellant Miller, the Lincoln County Board denied Miller the right to discovery of evidence regarding the method of valuation of his property.

In each of the cases that are part of this appeal, the county valuation protests board entered an order "that no change be made in the valuation records of the county assessor . . . ."

The taxpayers appealed to this Court pursuant to § 72-2-39.2.

D. *The law provides no guidelines for the county assessor*

In each case, the county assessor appraised the value of the taxpayer's property. The method by which a valuation was assessed on each taxpayer's property is unknown.

E. *Taxpayers were denied their constitutional right to procedural due process by (1) the Boards' denial of discovery by deposition, and (2) the Boards' exclusion of relevant evidence*

(1) *Denial of Discovery by Deposition*

Miller, prior to his hearing before the Lincoln County Valuation Protests Board, attempted to take depositions of the county appraiser and a member of the State Reappraisal Department to learn the basis upon which the contested assessment was made. He was denied the right to take depositions by the Board because, it claimed, the law does not provide for this method of discovery on appeal, the Board cites the statement in § 72-2-39.1(A) that the "Rules of Civil Procedure . . . do not apply . . . ." as authority for this ruling. We disagree.

[redacted] Protestants appearing before administrative boards have a right to discovery similar in scope to that granted by Rules 26 to 37 of the Rules of Civil Procedure [§§ 21-1-1(26) to 21-1-1(37), N.M.S.A.1953 (Repl.Vol. 4, 1970)]. See *Equal Employ. Op. Com'n v. Los Alamos Constructors, Inc.*, 382 F.Supp. 1373 (D.N.M. 1974). The right to discovery in administrative proceedings is based on the rule that wide latitude in admission of evidence shall govern these proceedings. The reason for making the Rules of Evidence and Rules of Civil Procedure inapplicable to hearings before county valuation protests

boards is not to restrict the discovery and presentation of evidence, but to *facilitate* it. In recent years, the courts have unwaveringly recognized the right to discovery possessed by citizen-participants in administrative proceedings. See, the excellent opinion of Judge Winner, tracing the development of the law on this question, in *Equal Employ. Op. Com'n.*, supra.

On July 2, 1973, the county assessor approved a valuation on Miller's land of $43,-911. On August 6, 1973, a so-called revised schedule raised the valuation to $272,-884. On March 4, 1974, the valuation was increased to $474,083, approximately ten times the valuation approved a year before. Miller had the right to discover by deposition the reasons for the dramatic increase in the valuations of his properties.

Section 4–32–15, N.M.S.A.1953 (Repl.Vol. 2, pt. 1, 1974) of the "Administative Procedures Act" allows the administrative agency and any party to take depositions at an administrative hearing. This Act does not govern hearings before county valuation protests boards, because such hearings have not been placed under the Act by law. *Mayer v. Public Employees Retirement Board,* 81 N.M. 64, 463 P.2d 40 (Ct.App.1970); *Westland Corporation v. Commissioner of Revenue,* 83 N.M. 29, 487 P.2d 1099 (Ct.App.1971). It has been suggested that the Legislature has a duty to make the Act applicable to all public agencies to protect the public. *Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Ph.,* 86 N.M. 571, 525 P.2d 931 (Ct.App.1974) (Sutin, J., dissenting).

In any case, the Act demonstrates that depositions are permissible under administrative law, to assist the agency and other parties in obtaining a fair hearing.

Depositions are available in, (1) Corporation Commission hearings [§ 69–7–7, N.M.S.A.1953 (2d Repl.Vol. 10, pt. 1, 1974)], (2) Public Service Commission hearings [§ 68–8–10, N.M.S.A.1953 (2d Repl.Vol. 10, pt. 1, 1974)], (3) Arbitration hearings [§ 22–3–15, N.M.S.A.1953 (Vol. 5, 1973 Supp.)], and (4) State Engineering administrative hearings [§ 75–2–12.1, N.M.S.A. 1953 (Repl.Vol. 11, pt. 2, 1973 Supp.)].

At county valuation protests board hearings, it might happen that a taxpayer has key witnesses unable to attend. Or the taxpayer may be bedridden. Or the county appraisers and State Appraisal Board members may not appear at the hearing. To deny the taxpayer the right to take depositions denies him the right to a fair hearing. Such denial constitutes a denial of due process under the Fourteenth Amendment to the Constitution of the United States. *Kaiser Co. v. Industrial Accident Commission,* 109 Cal.App.2d 54, 240 P.2d 57 (Ct. App., 1st Dist. 1952). The Lincoln County Protests Board erred in denying Miller the right to discovery in preparation for his hearing.

(2) *Exclusion of Evidence*

The taxpayers offered in evidence the following:

(a) Miller's land is a horse race track. He offered in evidence, (1) valuations for prior years; (2) copies of tax schedules covering the land owned and used by the horse race tracks at Raton and Sante Fe; (3) a comparison of land values established by the Property Appraisal Department. The chairman announced that all he could consider was "comparable sales or sales of comparable lands", even though there were none of these.

(b) Hahn owned a shopping center and vacant land. It offered in evidence, (1) the market value assigned by the assessor to other comparable properties in the same class; (2) ten regional shopping centers in various parts of the country. The board relied only upon full "actual value", as fixed by the county assessor under § 72–2–3.

(c) Bellamah owned property adjacent to the property of Hahn. It offered in evidence, (1) the market value assigned by the assessor to other comparable properties of the same class; (2) ten regional shopping centers in various parts of the country. The board denied admission for the same reason as with Hahn.

(d) Carlo owned a neighborhood shopping center. It offered in evidence comparative values of the same class placed thereon by the assessor. The board demanded comparable sales.

The evidence submitted by each taxpayer was relevant.

The protests board cannot rely exclusively on the county assessor's valuation of property even though according to § 72–2–3, the assessment must be at "full actual value". Neither can the board rely on comparable sales or sales of comparable lands where none have occurred. Accordingly, the board must allow the admission of the only available relevant evidence which a taxpayer has.

The reasonable cash market value, reflected by sales of comparable property, is relevant for determining the correct valuation of a piece of property, if there have been such sales. In situations where cash market value cannot be determined, earning capacity, cost of reproduction and original cost less depreciation furnish relevant considerations for determining "value". *Hardin v. State Tax Commission,* 78 N.M. 477, 432 P.2d 833 (1967).

The Rules of Evidence and Rules of Civil Procedure do not apply to hearings before county valuation protests boards. Section 72–2–39.1(A). The rules provided by the Administrative Procedures Act likewise do not apply. *Mayer v. Public Employees Retirement Board,* supra; *Westland Corporation,* supra. Since there must be *some* rules to govern admission of evidence in proceedings before the county valuation protests boards, these rules must be found in the body of administrative law that has grown up in the courts.

In stating that the "technical Rules of Evidence . . . do not apply at protest hearings before a county valuation protests board . . .", § 72–2–39.1 uses substantially the same language as: (a) statutes in other jurisdictions, e. g., Federal Power Act, 16 U.S.C.A. § 825g(b) (1974), at 726, and (b) the United States Supreme Court, *Opp Cotton Mills, Inc. v. Administrator,* 312 U.S. 126, 155, 61 S.Ct. 524, 537, 85 L.Ed. 624, 641 (1941). The rationale for such language is to allow wide latitude in the admission of evidence before an administrative board. See *K. Davis, Administrative Law Treatise, v. 2,* § 14.08 (1958) at 282–88.

The New Mexico rules governing exclusion of evidence at an administrative hearing are clear. The State has not given to administrative boards the "authority to catalogue which evidence shall be considered" in deciding a protest. *Eaton v. Bureau of Revenue,* 84 N.M. 226, 228, 501 P. 2d 670, 672 (Ct.App.1972). The rules governing admissibility of evidence are frequently relaxed. When the administrative board has reached a decision and promulgated an order without considering all the evidence presented at the hearing, the "decision and Order" is arbitrary and should be reversed. Id.

Both federal and state courts, like this Court in *Eaton,* supra, have reversed administrative board decisions because of the board's exclusion of evidence. See, *Fleury v. Edwards,* 14 N.Y.2d 334, 251 N.Y.S.2d 647, 200 N.E.2d 550 (1964); *American Rubber Prod. Corp. v. National Labor Rel. Bd.,* 214 F.2d 47 (7th Cir. 1954); *National Labor Relations Board v. Ohio Calcium Co.,* 133 F.2d 721 (6th Cir. 1943); *Davis,* supra, § 14.09, at 288–91. For the admission of evidence under the Administrative Procedures Act, see § 4–32–11, N.M.S.A. 1953 (Repl.Vol. 2, pt. 1, 1974).

Throughout the judicial system, and especially in administrative hearings, the trend is towards a relaxation and replacement of rigid exclusionary rules. See *Davis,* supra, § 14.01 at 250; *National Labor Relations Board v. Remington Rand, Inc.,* 94 F.2d 862, 873 (2d Cir. 1938), cert. denied, 304 U.S. 576, 58 S.Ct. 1046, 82 L. Ed. 1540 (1938).

The Fourteenth Amendment guarantees every citizen the right to procedural due process in state proceedings. By "pro-

cedural due process" we mean the following:

> Procedural due process, that is, the element of the due process provisions of the Fifth and Fourteenth Amendments which relates to the requisite characteristics of proceedings seeking to effect a deprivation of life, liberty, or property, may be described as follows: one whom it is sought to deprive of such rights must be informed of this fact (that is, he must be given notice of the proceedings against him); he must be given an opportunity to defend himself (that is, a hearing); and the proceedings looking toward the deprivation must be essentially fair. Annot.: Suspension or revocation of medical or legal professional license as violating due process—federal cases, 98 L.Ed. 851, 855 (1954).

Embodied in the term, "procedural due process", is the opportunity to be heard and to present any defense. *In Re Nelson,* 78 N.M. 739, 437 P.2d 1008 (1968). On the great significance of procedural due process in our legal system, see Justice Jackson's dissenting opinion in *Shaughnessy v. United States,* 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953).

"Administrative proceedings must conform to fundamental principles of justice and the requirements of due process of law." *Waupoose v. Kusper,* 8 Ill.App.3d 668, 290 N.E.2d 903, 905 (App.Ct. 1st Dist. 1972). A litigant must be given a full opportunity to be heard with all rights related thereto. *In Re S-M-W,* 485 S.W.2d 158 (Mo.App.1972).

As noted by the courts quoted from, supra, a notion of fairness is included within the concept of procedural due process. In a hearing before an administrative agency, the agency must examine both sides of the controversy in order to fairly protect the interests and rights of all who are involved. A refusal to allow witnesses to be called is a denial of procedural due process. *Nichols v. Eckert,* 504 P.2d 1359 (Alaska, 1973). This includes the taking and weighing of evidence that is offered, and a finding of fact based upon consideration of the evidence. *Kentucky Alcoholic Beverage Control Bd. v. Jacobs,* 269 S.W. 2d 189 (Ky.1954).

"The essence of justice is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty." *Mid-Plains Telephone, Inc. v. Public Service Com'n,* 56 Wis.2d 780, 202 N.W.2d 907, 911 (1973).

(3) *Conclusion as to Exclusion of Evidence by the Boards*

By unlawfully excluding evidence and denying the right to discovery, the county valuation protests boards curtailed appellants' right to be heard and to present any defense. In so doing, they deprived appellants of their constitutionally-guaranteed right to procedural due process. *In Re Nelson,* supra.

Taxpayers are entitled to new hearings. Evidence of valuation of comparable properties or other properties of the same class are admissible in evidence and are to be weighed by the boards in arriving at their decisions.

F. *The county valuation protests boards erred by refusing to consider and to decide the constitutionality of unequal assessments as between taxpayers' properties and comparable properties*

Taxpayers claim that assessment of their properties at values higher than assessments of comparable properties violates Article VIII, Section 1 of the New Mexico Constitution, which provides that:

> Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class. N.M.S.A.1953 (Repl.Vol. 1, 1970).

All taxpayers except Miller contend, in addition, that assessment of their properties at values higher than those for comparable properties violates the Equal Protection and Due Process clauses of the Fourteenth

Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution, N.M.S.A.1953 (Repl. Vol. 1, 1970).

The appellee-protests boards contend that they are empowered by § 72–2–37 only to consider whether assessment of a protestant's property was at "full actual value", pursuant to § 72–2–3; and that their statutory authorization does not allow them to determine whether assessment of a protestant's property was done in an unequal or discriminatory fashion, as compared with comparable properties. This contention has no merit.

The protests boards derive their powers from § 72–2–38, as follows:

> D. The county valuation protests board shall hear and decide protests from persons protesting valuations of property for property taxation purposes made by county assessors and protested under section 72–2–37 N.M.S.A.1953.

Section 72–2–37 provides, in pertinent part, that:

> A. . . . [A] person may protest the valuation placed upon his property by the assessor by filing a petition with the assessor. Filing a petition in accordance with this section entitles the property owner to a hearing on his protest.
>
> B. Petitions shall:
>
> * * * * * *
>
> (3) state why the person believes the valuation is incorrect and what he believes the correct valuation to be . . .

The boards distort the plain meaning of words by their contention that the directive in § 72–2–37, to state in one's protest petition why one believes the valuation was "incorrect", precludes a protestant from arguing before the board that the valuation was incorrect because it was discriminatory and unconstitutional.

When the language of a statute is clear and unambiguous, the statute must be given its literal meaning. *Weiser v. Albuquerque Oil & Gasoline Company,* 64 N.M. 137, 325 P.2d 720 (1958); *Fort v. Neal,* 79 N.M. 479, 444 P.2d 990 (1968); *Keller v. City of Albuquerque,* 85 N.M. 134, 509 P.2d 1329 (1973). The language of §§ 72–2–37 and 72–2–38 clearly and unambiguously gives to the county valuation protests boards the duty to hear a protest of the valuation of a taxpayer's property on any grounds whatsoever. This includes the grounds of allegedly unconstitutional discrimination in comparison with assessments of other properties.

Notably, the State of New Mexico Property Appraisal Department, arguing as *amicus curiae* on behalf of the county valuation protests boards, conceded appellants' right to raise the allegation of unconstitutional discrimination before the boards.

The county valuation protests boards erred in denying appellants the right to be heard, and in refusing to render a decision on appellants' claims of unconstitutional discrimination in the assessments of their properties.

G. *Increase in valuation of appellants Hahn's and Bellamah's properties was not contrary to law*

Appellants Hahn and Bellamah contend that upward reappraisal of their properties without similar reappraisal of comparable properties in the county violates the mandate of §§ 72–2–21.1 to 72–2–21.14, pursuant to which reappraisal of their properties was conducted.

The Bernalillo County Valuation Protests Board argues that it is engaging in an "unscheduled continuous reappraisal program, in order to keep values current," and that this does not contravene the statute. We agree. Appellants' contention seems to be that § 72–2–21.1 et seq., require that reappraisal of all comparable properties within each county be completed within the same year. We find nothing in those statutory sections to support that contention. Cf. *Skinner v. New Mexico State Tax Commission,* 66 N.M. 221, 345 P.2d 750 (1959). Increase in valuation of appellants' properties was not contrary to § 72–2–21.1 et seq., which set up the Spe-

cial Reappraisal Program according to which appellants' properties were reappraised.

H. *This Court observes the following rules in deciding whether substantial evidence supports the decision of a county valuation protests board*

Appellants Hahn, Bellamah and Miller argue that substantial evidence does not support the protests board's decision in each of their cases. There is no need to decide the merits of their contentions since we reverse and remand on other grounds. However, the litigants interpret the rules to guide this Court's review of the evidence differently. We set out the law here, to guide future appeals.

If there is substantial evidence in the record to support a decision of a county valuation protests board, we are bound thereby. *United Veterans Org. v. New Mexico Prop. App. Dept.,* 84 N.M. 114, 500 P.2d 199 (Ct.App.1972). In deciding if there is substantial evidence to support the decision,

> . . . we must view the evidence in the most favorable light to support the finding and we will reverse only if convinced that the evidence thus viewed, together with all reasonable inferences to be drawn therefrom, cannot sustain the finding. Further, only favorable evidence and the inferences to be drawn therefrom, will be considered, and any evidence unfavorable to the findings will not be considered.

Id., 84 N.M. at 118, 500 P.2d at 203.

I. *Further contentions by appellant Miller need not be decided*

Appellant Miller contends further that: (1) The Lincoln County Assessor denied him procedural due process by denying him notice of the upward revaluation of his property. (2) The Board's decision was arbitrary and capricious, and an abuse of discretion.

Notice as to the amount of taxation is an essential due process requirement in the collection of property taxes. *Maxwell v. Page,* 23 N.M. 356, 168 P. 492 (1917); *Coulter v. Gough,* 80 N.M. 312, 454 P.2d 969 (1969).

Appellant and appellee each interpret differently the facts in the record that pertain to notice, while, at the same time, they agree on the law. Since we are presented with no issue of law to decide on the question, and we remand on other grounds, it is unnecessary to decide the question.

Appellant Miller contends that the Board's decision was arbitrary and capricious, and an abuse of discretion because: (1) the assessment that was the subject of Miller's protest had increased the valuation of his property to an amount more than ten times the original valuation; and (2) the County Assessor allegedly deprived Miller of notice of this increase.

The basis of the different positions of Miller and the Board on this point is their opposing interpretations of the facts in the record. Because we remand on other grounds, we need not decide this question.

J. *Conclusion*

The Bernalillo County Valuation Protests Board and the Lincoln County Valuation Protests Board denied appellants procedural due process by over-restrictive exclusion of evidence and, in the case of appellant Miller, by denial of the right to discovery.

We reverse and remand to the county valuation protests boards for further proceedings consistent with this opinion.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

542 P.2d 1191

RAINBO BAKING COMPANY OF ALBUQUERQUE, INCORPORATED, a Foreign Corporation, and Kimbell, Incorporated, d/b/a Foodway, a Foreign Corporation, Plaintiffs-Appellees,

v.

Eddie APODACA, Defendant-Appellant.

No. 1769.

Court of Appeals of New Mexico.

Oct. 7, 1975.

Rehearing Denied Oct. 24, 1975.

J. Ronald Boyd, Sanchez & Boyd, P. A., Santa Fe, for defendant-appellant.

David R. Sierra, Santa Fe, for plaintiffs-appellees.

OPINION

SUTIN, Judge.

Plaintiffs were granted summary judgment against defendant in a tort action for fraud, forgery, conversion and embezzlement. Both compensatory and exemplary damages were awarded plaintiffs. Defendant appeals. We reverse.

A. *There was a genuine issue as to a material fact.*

(1) *Plaintiffs' Evidence*

Defendant was a truck salesman for Rainbo Baking Company. He sold bread and cakes and merchandise. Kimbell did business in New Mexico under the name of Foodway. Defendant, as Rainbo's routeman, sold and delivered bread to Foodway stores. Plaintiffs' affidavits and documents show that on June 13, 1973, defendant admitted to the security officer of Kimbell and the district manager of Rainbo that he had forged the signatures on the Rainbo invoices and that Foodway did not receive the products listed on these invoices. Defendant was too nervous to write a statement and preferred that the security officer write the facts.

In this statement, defendant admitted that since July, 1971, he had made false delivery tickets for bread and pastries to the Foodway store, stamped the invoice with Foodway's receiving stamp, and forged the employee's signature to the invoice. Foodway did not receive the bread and pastries, even though it paid for them. Whatever was due on these invoices, defendant kept that amount of cash from his cash customers' sales; by way of forged invoice tickets he embezzled approximately $6,240.00 which he used for his own personal gain. This statement was obtained by question and answer. Defendant looked it over, studied it for awhile and then signed it.

Defendant told the security officer he wanted to reimburse Foodway for the money he had stolen. The officer prepared a promissory note to Kimbell in the sum of $6,240.00. Defendant reviewed it and signed it.

Plaintiffs made a prima facie case. The burden shifted to defendant to show there was a genuine factual issue. *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972).

(2) *Defendant's Evidence*

In response by way of deposition and affidavit, defendant denied that he did anything wrong. He said that when the security officer accused him of forging signatures on the invoices, he did not answer the accusations. At no time did he admit any forgeries, nor admit that he failed to leave merchandise in accordance with the tickets. Defendant became nervous and

upset by reason of the accusations and was unable to follow the conversation and heard only half of what was said. Defendant did not remember being asked any questions, but he did remember that he made no responses to any questions. When defendant was handed the statement, his mind was so confused he looked at the paper as if he were reading it without actually reading or understanding anything that was written down. At this point, the security officer said: "If you don't want to go along with it, we can go see the District Attorney." That scared and confused defendant even more.

Defendant hoped that if he cooperated with these men he would keep his job. So he told them that he would pay back whatever he owed plaintiffs. When the security officer mentioned a figure of $6200, defendant thought he meant $600 and something, not $6000 and something.

Defendant denied making any of the statements attributed to him in the "voluntary statement" prepared for his signature by Kimbell's security officer, which statements amounted to an admission of embezzlement.

With reference to the promissory note, defendant stated he was threatened with the police and the district attorney; that he was in shock at the time and was afraid to question the figures or the reason for the note.

(3) *Defendant met the burden*

Defendant met the burden of showing that there was a genuine issue of fact as to plaintiffs' claim of embezzlement, conversion, fraud and forgery. In his affidavit opposing the motion for summary judgment, defendant contended that he did not voluntarily sign the statement and note prepared by Kimbell's security officer, which note and statement were the sole items of evidence offered by plaintiffs in support of their motion for summary judgment. Defendant claimed he was confused and in shock, and did not understand the contents of the statement or the amount of the note. Further, he stated that he was threatened with prosecution if he refused to sign.

No citation of authority is necessary to state again all of the rules applicable to summary judgment. We need only say that defendant must be given the benefit of all reasonable doubts in determining whether a genuine issue exists. *Goodman v. Brock,* supra. We hold that a genuine issue of material fact exists in plaintiffs' tort action.

B. *The trial court mistakenly struck defendants' response affidavit.*

At the time the summary judgment was entered, the trial court struck defendant's affidavit in response to the motion for summary judgment because the affidavit contained "facts and circumstances which were previously the subject of discovery proceedings by Plaintiffs but that at such discovery proceedings the Defendant refused to furnish to the Plaintiffs the requested information".

1. *Defendant did not refuse to furnish plaintiffs information.*

The discovery proceedings consisted of (1) interrogatories submitted by plaintiffs to defendant, and (2) the deposition of defendant taken by plaintiffs.

(1) Plaintiffs submitted nine written interrogatories to defendant. In answer to seven of the nine interrogatories, defendant answered: "Question asked for privileged information protected by the Fifth Amendment to the United States Constitution." The defendant refused to furnish the requested information to protect a claimed constitutional privilege.

Subsequently, at the second deposition hearing, defendant voluntarily answered all interrogatories orally except three upon which he claimed the Fifth Amendment privilege.

(2) On March 26, 1974, pursuant to notice, plaintiffs took defendant's deposition. In pertinent places, defendant asserted the privilege of the Fifth Amendment. On

May 21, 1974, the trial court ordered defendant to appear at a deposition hearing and answer all questions found on certain pages of the March 26th deposition. The court had this authority. Section 21-1-1(37)(a), N.M.S.A.1953 (Rep.Vol. 4).

On May 29, 1974, defendant appeared at the second deposition hearing and answered all questions except some which extended beyond those ordered by the court. Defendant complied with the order of the court. He did not refuse to furnish plaintiffs the requested information.

2. *Defendant was protected by the Fifth Amendment.*

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be *compelled* in any *criminal case* to be a witness against himself, . . . [Emphasis added.]

See, also, N.M.Const. Art. II, § 15; 20-1-10, N.M.S.A.1953 (Repl.Vol. 4); *State v. Watson,* 82 N.M. 769, 487 P.2d 197 (Ct.App.1971).

The Fifth Amendment privilege protects against compelled self-incrimination. It privileges a defendant not to answer questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might tend to incriminate him in future criminal proceedings. Defendant had the right to refuse to answer until he was protected against the use of his compelled answers, and evidence derived therefrom, in any subsequent criminal case in which he might be a defendant. Absent such protection, if defendant is compelled to answer, his answers are inadmissible against him in a later criminal prosecution. *Lefkowitz v. Turley,* 414 U. S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973). See, *Apodaca v. Viramontes,* 53 N.M. 514, 212 P.2d 425 (1949); *State v. Watson,* supra.

Defendant was not given any protection against any later criminal prosecution. He had the right to refuse to orally answer three of the interrogatories as well as those questions which extended beyond the order of the court.

No authority was cited and we have found none which allows the trial court to strike a response affidavit. On the contrary, the defendant had a duty to resist the motion for summary judgment with whatever evidentiary material which he could produce. *Hamilton v. Hughes,* 64 N.M. 1, 322 P.2d 335 (1958). The trial court must consider such evidentiary material in arriving at its decision to grant or deny the motion for summary judgment.

The trial court mistakenly struck defendant's response affidavit.

C. *The trial court improperly ordered payment of reasonable attorney fees and expenses against defendant.*

In its order of May 21, 1974, the trial court ordered defendant to pay to plaintiffs the amount of $150.00 to cover plaintiffs' attorney fees and costs for procuring an order that defendant answer the questions in the deposition taken on March 26, 1974. The money was ordered paid prior to the deposition taken on May 29, 1974. The money was not paid.

The question is: Did the defendant fail to answer the questions in the deposition and be punished pursuant to Rule 37(a)?

As pointed out, supra, under Rule 37(a) the trial court had the authority to order defendant to answer any question propounded on oral examination. The rule further provides:

> If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees.

The trial court found "that the Defendant did willfully fail to answer questions propounded to the Defendant" during the

deposition of March 26, 1974. This finding falls within the language of Rule 37(a), supra, "that the refusal was without substantial justification."

However, the defendant did not willfully fail to answer questions propounded. He answered that he claimed the privilege of the Fifth Amendment. We hold that the "refusal" to answer specifically was with "substantial justification".

The application of Rule 37(a) to discovery proceedings required the defendant to seek a ruling of the court on the determination of whether the answer to questions propounded would reasonably tend to incriminate him and are privileged. Section 21-1-1(30)(b), N.M.S.A.1953 (Repl.Vol. 4). This procedure was undertaken. After receipt of the notice of taking his deposition, defendant filed a motion in which he sought protection of the Fifth Amendment and requested an order that the deposition not be taken. The motion was denied.

We do not decide whether the trial court erred in denying this motion. We are confronted with punishment of the defendant for refusal to answer depositional questions without substantial justification. We hold that there was substantial justification.

The trial court improperly assessed attorneys' fees and costs against defendant.

D. *The issue of punitive damages not decided.*

The trial court awarded plaintiffs punitive damages. An award of punitive damages via summary judgment is a matter of first impression. We have been unable to find any authority on this subject. This issue can only arise for review on appeal when this Court affirms a summary judgment for compensatory damages.

Because summary judgment is reversed on other grounds, we leave the matter of punitive damages in suspension.

E. *Other points raised on appeal are without merit.*

Defendant also contended (1) that plaintiffs' complaint failed to state a claim upon which relief can be granted, (2) that the court erred in denying defendant's motion to suppress, (3) that plaintiffs' complaint was insufficiently pled. These contentions are without merit.

Reversed.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

542 P.2d 1195

In the Matter of Jane DOE, a child.

No. 2013.

Court of Appeals of New Mexico.

Nov. 12, 1975.

Charles A. Shaw, Asst. Children's Atty., Alamogordo, for appellant.

Albert J. Rivera, Alamogordo, for appellees.

OPINION

HERNANDEZ, Judge.

The state brings this appeal from proceedings held in Lincoln County under the Children's Code, §§ 13–14–1 through 13–14–45, N.M.S.A.1953 (Repl.Vol. 3, Supp. 1973). We affirm.

The record discloses that during early October, 1974, the mother of Jane Doe initiated proceedings in Children's Court to obtain the return of her runaway daughter from the State of Colorado pursuant to the provisions of the Interstate Compact on Juveniles, §§ 13–16–1 through 13–16–8, N.M.S.A.1953 (Repl.Vol. 3, Supp.1973). At the time of filing this petition the mother had previously divorced the child's father, and had remarried. In her petition for requisition to return the runaway juvenile, Jane Doe's mother stated that the sixteen year old child had removed herself from the family home, and was now living with a Ms. Black, in Cortez, Colorado. In lieu of formal return under the interstate compact, Jane consented to voluntarily return herself to the jurisdiction of the Children's Court of Lincoln County, New Mexico.

Shortly thereafter on November 21, 1974, the Children's Court attorney for Lincoln County filed a second petition which states that Jane Doe was then being held in Children's Detention and further that "* * * she is a child in need of supervision in that she habitually disobeys the reasonable and lawful commands of her parents in that she refuses to return to her home in Ruidoso Downs * * *." The petition sought declaration of the girl as a ward of the court.

Following a hearing on the Children's Court attorney's petition, the court entered its order dated November 21, 1974, which provides in pertinent part:

(1) "* * * that the child is a dependent child and in need of supervision.

(2) "* * * that the child be * * * transferred to the custody of the officials * * * at the Girls' Welfare Home in Albuquerque * * * for a period of no more than Sixty days for social and psychiatric evaluation and testing."

Upon completion of this period of evaluation and testing, a second hearing was held on January 16, 1975, at which time the corrections department's diagnosis was considered.

The result of this hearing was a judgment and order dated January 17, 1975, which recites that the child admitted her refusal to return to the home of her mother and stepfather and further provides:

(1) "* * * that the child is a Child in Need of Supervision * * *.

(2) "* * * that * * * the Child be * * * placed on probation for an indeterminate period not to exceed one year, under supervision of the Children's Probation Office of [the] Court * * *.

(3) "* * * that the custody of the Child be * * * temporarily placed with the New Mexico Department of Health and Social Services, for foster home placement."

The record next discloses that Jane Doe left the foster home in which she was placed and moved into the home of Ms. Black, who in the interim had herself returned from Cortez to Ruidoso Downs.

Subsequently, on April 10, 1975, the Children's Court attorney sought revocation of the girl's probation. After hearing on the revocation petition, the Children's Court entered its judgment and order dated April 17, 1975, which holds that Jane Doe

did violate the conditions of her probation agreement and which orders:

"1. That the Child remain on probation for an indeterminate period not to exceed one year, commencing the 20th day of November, 1974.

"2. That the New Mexico Health and Social Services Department be allowed to withdraw from any further custodial supervision * * *.

"3. That the Child be permitted to remain in the custody of Ms. * * * Black, and that the rights of the Mother of the Child to further custody be terminated.

"4. That the Child be permitted to remove to the State of Colorado with her guardian, Ms. * * * Black, after no more than 30 days from the date of hearing * * *."

The state alleges six points of error:

"POINT I: THE CHILDREN'S COURT LACKED JURISDICTION AB INITIO TO PROCEED HEREIN.

"POINT II: AWARD OF CUSTODY OF THE CHILD TO APPELLEE . . . BLACK WAS UNLAWFUL, AS A VIOLATION OF SUB-SECTION 13-14-31(C), N.M.S.A. (1953).

"POINT III: PARENTAL RIGHTS CANNOT BE SEVERED ABSENT A SHOWING OF INCOMPETENCE AS A PARENT, AND THE RECORD SHOWS NO SUCH FINDING BY THE COURT, NOR EVIDENCE ON WHICH TO BASE SUCH A FINDING.

"POINT IV: PROCEEDINGS IN THE CHILDREN'S COURT AMOUNTED TO A DENIAL OF DUE PROCESS OF LAW VIS-A-VIS THE CHILD'S MOTHER.

"POINT V: THE ONLY EVIDENCE IN THE RECORD TO SUPPORT THE DECISION OF THE CHILDREN'S COURT WAS THE STATEMENT OF THE CHILD, AND THIS IS INSUFFICIENT EVIDENCE ON WHICH TO BASE A CHANGE OF CUSTODY.

"POINT VI: THE EXPRESSED INTENT OF THE CHILDREN'S CODE IS TO PRESERVE THE FAMILY UNIT, AND THE DECISION OF THE CHILDREN'S COURT IS A DIRECT VIOLATION OF THAT INTENT."

As to Point I, we note that § 13-14-31(C), supra, provides:

"If a child is found to be in need of supervision the court may enter its judgment making any of the following dispositions for the supervision, care and rehabilitation of the child:

(1) any disposition that is authorized for the disposition of a neglected child; * * *"

We have here the anomalous situation of the state questioning the legal sufficiency of its own pleadings. If this were the usual adversary case, the state could not be heard to complain. Proceedings concerning the custody of minors are not adversary, however, since the court is not merely an arbiter but an advocate seeking to protect the welfare and interests of the minor.

The state contends that the petition filed on November 21, 1974, makes no allegation of "a need for care and rehabilitation" and that absent this allegation the Children's Court did not have jurisdiction. In support of this contention the state cites *In Re Doe III,* 87 N.M. 170, 531 P.2d 218 (Ct.App.1975). The contention misreads *Doe III,* supra. The *Doe III* petition alleged a delinquent act, it did not allege the child was in need of care or rehabilitation. We add that the petition in *Doe III* did not allege that the child was delinquent. Either an allegation that the child was delinquent, or allegations of the two elements defined to mean a delinquent child was required. See § 13-14-3(O), N.M.S.A.1953 (Repl.Vol. 3, Supp.1973). Here the child was alleged to be in need of supervision. A child in need of supervision means a

child in need of care or rehabilitation. Section 13–14–3(M), N.M.S.A.1953 (Repl. Vol. 3, Supp.1973). There is no merit to the claim that the petition was jurisdictionally deficient. Section 13–14–9(A)(2), N. M.S.A.1953 (Repl.Vol. 3, Supp.1973).

Points II through V are likewise without merit and shall be considered together. As indicated at § 13–14–31(C)(1), N.M.S.A.1953 (Repl.Vol. 3, Supp.1973), in proceedings leading to a finding of need of supervision, the Children's Court may enter a judgment making any disposition that is otherwise authorized for the disposition of a neglected child. We note that § 13–14–31(A)(3)(c), N.M.S.A.1953 (Repl.Vol. 3, Supp.1973) provides that the Children's Court may transfer legal custody of a child to: "a relative or other individual who, after study by probation services or another agency designated by the court, is found by the court to be qualified to receive and care for the child."

The Children's Code, § 13–14–3(J), N. M.S.A.1953 (Repl.Vol. 3, Supp.1973), defines "legal custody" as:

> "* * * a legal status created by the order of a court or tribunal of competent jurisdiction that vests in a person the right to have physical custody of the child, the right to determine where and with whom he shall live, the right and duty to protect, train and discipline the child and to provide him with food, shelter, education and ordinary medical care, all subject to the powers, rights, duties and responsibilities of the guardian of the child and *subject to any existing parental rights and responsibilities;* an individual granted legal custody of a child shall exercise his rights and responsibilities as custodian personally unless otherwise authorized by the court or tribunal entering the order." [Emphasis Ours.]

The state contends that the Children's Court order of April 17, 1975, does not comply with § 13–14–31(A)(3)(c), supra. It maintains that all of the social agencies serving the Children's Court, recommended placement of the child with someone other than Ms. Black. The state argues, moreover, that there is no evidence Ms. Black would be "qualified to receive and care for" Jane Doe.

During the time that Jane Doe was at the Girls' Welfare Home in Albuquerque under the diagnostic order of the Children's Court, dated November 21, 1974, she was seen by numerous child development specialists, including the staff psychologist, a consulting psychiatrist, a case worker, a consulting physician and dentist, staff academic and recreational proctors, and the resident nurse. A six page report dated January 2, 1975, was sent from the Girls' Welfare Home to the Children's Court in Lincoln County. This report states in pertinent part:

> "* * * [Jane Doe] is polite and well-mannered with staff and her peers and is responsible in doing whatever is expected of her. * * * [Jane's] biggest problem has been her moral naivete. * * * This naivete has * * * hindered [her] from viewing her mother or Ms. * * * Black in a realistic manner. Mother is seen as all bad since she became pregnant before her marriage to [stepfather]. [Jane] sees this as very unacceptable and maintains a high degree of anger against her mother. She feels a great deal of gratitude towards Ms. * * * Black for in [Jane's] eyes, Ms. Black was the one who kept the family together and her mother in line. After the relationship between Ms. Black and [Jane's mother] was terminated, [Jane] felt very insecure and rejected * * *."

After her divorce from Jane's father and prior to her remarriage in early 1974, the mother and Jane's brothers and sisters had lived together with Ms. Black for some six years. During four of those years Ms. Black and the mother had homosexual relations. However, the record also showed no evidence that at the time of the hearing on revocation of probation Ms. Black was engaging in homosexual activities. The evidence at that hearing was that Ms.

Black treated Jane Doe as a daughter and Jane considered Ms. Black as a mother. The evidence is that there had never been any sexual activity between Ms. Black and Jane.

The diagnostic report on Jane states:

"Ms. Black has been in contact with staff here and does seem genuinely concerned for [Jane's] welfare. Communication was initially allowed by letters only but this was terminated because we feel unsure of Ms. Black's motives and [Jane] seemed to over-identify with Ms. Black.

* * * * * *

* * * * * *

"In summary, [Jane] deals with her environment basically in a rather morally naive, conforming fashion. * * * Because of this approach, [Jane] probably views life currently in terms of black and white, right or wrong and has problems accepting anything that doesn't fit this schema.

* * * * * *

"* * * The only negative responses are to items dealing with her mother. * * * [Jane's] strong feelings and desire to live with Ms. * * * Black come out forcefully.

* * * * * *

"* * * She feels her mother has one set of standards for herself and a different set for [her]. * * * [Jane] sees her mother as more interested in caring for her own needs, placing the needs of her children second. * * * [Jane] has extremely high, idealistic moral standards that originate from two sources. One is the example and [Jane's] identification with it set by her mother's companion for several years, Ms. Black. The other is a reaction to the shame and embarrasment [Jane] has towards her mother's present behavior."

Jane's mother gave birth very soon after her marriage in early 1974.

The state argues that the Children's Court did not comply with § 13–14–31(C)(1), supra, because its order of April 17, 1975, conforms to neither the testimony of Mr. DeLeon, a Social Service worker nor to the testimony of Mrs. Maria Foster the children's Probation Officer for Lincoln County. The state further contends that the court's order of April 17, 1975, was inconsistent with the reports furnished to the court by the other social service agencies, all of which recommended placement of Jane Doe with someone other than Ms. Black. The answer to this argument is that the court was not required to conform its order to their recommendations. Section 13–14–31(A)(3)(c), supra, provides that the court can transfer legal custody to "a relative *or other individual* who, after study by probation services or another agency designated by the court, *is found by the court* to be qualified to receive and care for the child." [Emphasis Ours.] The excerpts quoted from the report of the New Mexico's Girls' School reveal substantial evidence that Ms. Black was as fond of Jane as Jane was of her. The record also reveals that Ms. Black had helped to rear Jane and that she had been a positive influence over her. We believe that these were the factors considered by the Children's Court in reaching its decision, and we find no basis in them for concluding that the court was in error in deciding as it did. The state contends that the award of custody of Jane to Ms. Black violated § 13–14–31(A)(3)(c), supra, in two ways: that no agency designated by the court had made a study of Ms. Black's qualifications to receive and care for Jane and the court did not so find. Our answer is that these contentions were never raised at the revocation hearing and in awarding custody to Ms. Black the court impliedly found Ms. Black qualified to have custody of Jane.

The state's claim that parental rights to custody cannot be taken away absent a showing of incompetence on the part of the parent or parents is an overly narrow reading of the statute.

Section 13–14–31(C), supra, places no such requirement upon the child in need of

supervision. The court in its judgment and order of January 20, 1975, made such a finding and placed Jane on probation.

The state's claims concerning parental rights and "due process" as to Jane's mother are matters which the mother could raise in appropriate proceedings. The mother was summoned, appeared and testified at the proceedings in the Children's Court. She however, has not appealed. See § 13–14–36(A), N.M.S.A.1953 (Repl. Vol. 3, Supp.1973). The court's order transferring custody is authorized under § 13–14–31, supra, "to protect the welfare of the child." The state, prosecuting the revocation petition, can appropriately challenge the custody arrangements made by the court. Those custody arrangements, however, are of limited duration. Section 13–14–35(B), N.M.S.A.1953 (Repl.Vol. 3, Supp.1973). Thus the effect of the custody arrangements on parental rights is of limited duration. Because of this limited effect, we hold the issue of parental rights is one to be raised by the parent and not by the state. "A violation of due process can be urged only by those who can show an impairment of their rights in the application of the statute to them." *State v. Hines,* 78 N.M. 471, 432 P.2d 827 (1967).

The state's sixth and final point is that the court violated the spirit and intent of the Children's Code by placing Jane in the custody of Ms. Black. In support of this contention the state cites § 13–14–2(A), (B), (C), N.M.S.A.1953 (Repl.Vol. 3, Supp.1973):

> "The Children's Code [13–14–1 to 13–14–45] shall be interpreted and construed to effectuate the following expressed legislative purposes:
>
> A. to preserve the unity of the family whenever possible and to provide for the care, protection and wholesome mental and physical development of children coming within the provisions of the Children's Code;
>
> B. consistent with the protection of the public interest, to remove from children committing delinquent acts the consequences of criminal behavior and to substitute therefore a program of supervision, care and rehabilitation;
>
> C. to achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents *only when necessary for his welfare* or in the interests of public safety; . . .." [Emphasis Ours.]

It is implicit in the language of the Children's Code that the Children's Court is vested with a broad discretion in hearing and deciding matters under it. The history of this case amply demonstrates that the subject child felt compelled to run away from her mother's household and that she would in all likelihood continue to refuse to live with her mother. In lieu of the compromise achieved by the Children's Court herein, we believe it can be reasonably predicted that Jane would continue her previous conduct. This being so, it is our opinion that exercise of the court's discretion should not be disturbed on appeal in the absence of a showing of manifest abuse. We find no abuse in this instance. See *In Re Guardianship of Howard,* 66 N. M. 445, 349 P.2d 547 (1960).

The judgment and order appealed from are affirmed.

It is so ordered.

WOOD, C. J., and LOPEZ, J., concur.

542 P.2d 1201

STATE of New Mexico, Plaintiff-Appellee,

v.

Raymond OLGUIN, Defendant-Appellant.

No. 2051.

Court of Appeals of New Mexico.

Nov. 12, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Donald Klein, Jr., Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Mark Shoesmith, Asst. Atty. Gen., Sante Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of receiving stolen property in excess of $100 contrary to § 40A-16-11, N.M.S.A.1953 (2d Rep.Vol. 6). The appeal involves (1) a question asked defendant at trial concerning his statement at time of arrest and the prosecutor's argument to the jury; and (2) the trial court's alleged error in not instructing the jury to disregard the owner's hearsay testimony on the valuation of the stolen property. Defendant contends both issues involve plain error.

Question to Defendant and Prosecutor's Argument

Defendant was charged with receiving two portable electric-powered seed-bag sewing machines and a stock tank water heater stolen from a feed store. He was apprehended in a car with three other persons in possession of the sewing machines. The water heater was found elsewhere. A detective testified that when defendant had been read his rights, he was asked if he wished to make a statement and that defendant replied "he didn't know nothing

about it. He said he just didn't know nothing." Shortly thereafter defendant stated that when the driver of the car picked him up the machines were in the car. At trial, defendant did not deny he had been in possession of the property but testified that he had found it in an abandoned house. On cross-examination he was asked:

"Q Okay, if you found all these goodies out here where you said you did, when the police asked you about it why didn't you tell them so?"

Defendant contends this question was an improper comment on his silence at the time of arrest, contrary to *State v. Lara*, 88 N.M. 233, 539 P.2d 623 (Ct.App. 1975) and *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975). These cases have no application. In both of them the defendants remained silent. Here the defendant did not. Defendant not only stated that he did not know anything, he offered an explanation which tended to deny his possession. At the trial defendant testified he did tell the police he found the property but did not tell them where because they did not ask, refuting any silence on his part at time of arrest. The question was proper cross-examination under Rule of Evidence 611, and was elicited for the purpose of impeaching defendant's credibility by showing prior inconsistent statements. It was, therefore, admissible. *United States v. Hale*, supra, and *State v. Carlton*, 82 N.M. 537, 484 P.2d 757 (Ct.App.1971).

The prosecutor's comments in his closing argument were based on the inconsistencies between defendant's pretrial statements and trial testimony, and between defendant's testimony and that of other witnesses. The comments were proper.

Owner's Hearsay Testimony

The owner of the stolen seed-bag sewing machines testified he did not know what they were worth but, in his opinion, based upon what he had been told by an Albuquerque man in the sewing machine business, they would cost between $500 and $600 each. This opinion was allowed over objection. *State v. Romero*, 87 N.M. 279, 532 P.2d 208 (Ct.App.1975) holds that an owner's testimony regarding the value of an item stolen is admissible. Defendant contends the admission of this hearsay valuation could have made a difference in the conviction of a felony and a misdemeanor and, therefore, he was prejudiced.

Another seed store owner testified that the combined market value of the two stolen sewing machines was $75.00. The market value of the water heater was $60.-00. The jury was instructed on market value. Excluding the evidence complained of, the market value evidence supported a valuation of stolen property in excess of $100 and, therefore, a felony conviction. Consequently, no prejudice can be shown.

Oral argument is unnecessary. There was no plain error. See Rule of Evidence 103(d). The judgment and sentence are affirmed.

It is so ordered.

HENDLEY and HERNANDEZ, JJ., concur.

543 P.2d 482

NATIONAL INVESTMENT TRUST, a Massachusetts Business Trust, Plaintiff-Appellee,

v.

FIRST NATIONAL BANK IN ALBUQUERQUE, Defendant-Appellant.

No. 10307.

Supreme Court of New Mexico.

Dec. 9, 1975.

Ashby, Rose & Sholer, Stewart Rose III, Robert J. Torvestad, Albuquerque, for plaintiff-appellee.

Rodey, Dickason, Sloan, Akin & Robb, P. A., Jonathan W. Hewes, Albuquerque, for defendant-appellant.

OPINION

STEPHENSON, Justice.

The plaintiff, National Investment Trust (Trust) brought this action in district court to foreclose a landlord's lien arising from its lease with G. H. and Jeanne Lyons (Lyons). First National Bank in Albuquerque (Bank) asserted a security interest in the inventory of Lyons, who had been adjudged bankrupt. The trial court ruled that the landlord's lien was prior to the security interest. The Bank appeals. We reverse.

On July 11, 1970, John Schuckert entered into a business lease with Trust. In April, 1972, Lyons borrowed money from the Bank to purchase Schuckert's furniture business. Lyons gave a security interest in all inventory "now owned and hereafter acquired." The document was filed on April 3, 1972. In May, Lyons purchased the business and on May 17, 1972 took an assignment of Schuckert's lease with Trust. Thereafter, during the course of Lyons' business, certain inventory, which is the subject of this claim, was purchased from Flexsteele Industries, Inc. The Bank asserts its priority by virtue of its security interest in after-acquired inventory, while Trust relies on the statutory landlord's lien.[1]

The preliminary question before us is whether the landlord's lien was affected by the assignment of the lease in May, 1972. By written agreement on May 17, 1972, Lyons assumed all obligations under the lease except for liability incurred before the date of the assignment. An assignment of a lease creates the landlord-tenant relationship between the lessor and assignee, and the lessor retains all rights, including landlord's liens. *Johnson v. Thompson*, 185 Ala. 666, 64 So. 554 (1914); 49 Am.Jur.2d Landlord and Tenant §§ 452, 459 (1970). But by agreement here, Trust agreed to hold Lyons responsible only for liabilities incurred after May 17, 1972. The primary liability sought to be avoided by Lyons was any rent due from the previous lessee Schuckert.[2] Thus, Trust could enforce a landlord's lien against Lyons for rent due or to become due only after May 17, 1972.

In order to determine which interest has priority, we must decide which interest was first to attach. Generally, a landlord's lien attaches at the beginning of a tenancy for the rent due or to become due under the terms of the lease. *Gathman v. First American Indian Land, Inc.*, 74 N.M. 729, 398 P.2d 57 (1965). But in *Gathman* it is clear that the property subject to the lien was present on the property when the tenancy began. That is not true in this case. Lyons acquired the Flexsteele inventory after his term began, and the landlord's lien could only attach at the time the property came onto the premises.[3] Cf. *Wolcott v. Ashenfelter*, 5 N.M. 442, 23 P. 780 (1890); *Cochran v. Canty*, 176 Iowa 713, 158 N.W. 559 (1916). Trust's lien attached then when the Flexsteele inventory was delivered to the property.

We turn now to the Bank's security interest. It was filed on April 3, 1972, but a security interest must also attach to the collateral before it is perfected. § 50A–9–303 N.M.S.A.1953 (UCC § 9–303). A security interest in after-acquired property attaches when there is an agreement that it attach, value is given, and the debtor has rights in the collateral. UCC § 9–204(1). The question here is when did Lyons have rights in the collateral, the goods sold by Flexsteele? The trial court found that Flexsteele provided delivery of the items in its own trucks and at its own risk, and that all sales were for cash on delivery. Lyons thus acquired rights in the collateral when it was delivered to Lyons. The security interest attached at that point and it was perfected.

1. Section 61–3–4 N.M.S.A.1953 provides: "Landlords shall have a lien on the property of their tenants which remains in the house rented, for the rent due, or to become due by the terms of any lease or other agreement in writing, and said property may not be removed from said house without the consent of the landlord, until the rent is paid or secured."

2. The assignment states in part: "Lessor and Schuckert represent to Lyons that insofar as Lessor is concerned Schuckert is current on the lease and Lyons will have absolutely no liability on this lease up to and including the date of this assignment."

3. According to § 61–3–4 N.M.S.A.1953, a landlord's lien extends only to property "which remains in the house rented." By implication it could not attach to property not on the premises.

The dilemma we face then is the priority between a landlord's lien and a security interest which attached at the same time, namely when the Flexsteele inventory was delivered to Lyons. In *Chessport Millworks, Inc. v. Solie*, 86 N.M. 265, 522 P.2d 812 (Ct.App.1974), the Court of Appeals held, and we agree, that there is no statutory provision, including the UCC, to cover the priority between a statutory landlord's lien and a perfected security interest. 86 N.M. at 268, 522 P.2d at 815. In that case the landlord's lien attached before the security interest was perfected, and the lien was given priority, on the basis of the "first in time, first in right" doctrine. In the case before us, however, the interests attached at the same time.

We must rely then on existing New Mexico case law to determine the priority between the interests. *Universal C.I.T. Credit Corp. v. Congressional Motors*, 246 Md. 380, 228 A.2d 463 (Md.1967); *In re Einhorn Bros., Inc.*, 171 F.Supp. 655 (E.D.Pa.1959), aff'd 272 F.2d 434 (3rd Cir. 1959). The court in *Dees v. Dismuke*, 30 N.M. 528, 240 P. 198 (1925), held that the holder of a valid chattel mortgage had priority over a landlord who entered into a new lease after the mortgage was recorded. The decision was based on the policy that a secured creditor whose interest was created and recorded before a tenancy began should be protected from a subsequently created landlord's lien. We agree, and hold it to apply to the priority between a perfected security interest under the UCC and a statutory landlord's lien which attach at the same time. The Bank loaned their money to Lyons over a month before he entered into the assignment with Schuckert and Trust. Trust's landlord's lien against Lyons for rent due, or to become due did not even exist on April 3, 1972, as against Lyons; it arose on May 17, 1972. The Bank cannot be charged with notice of an interest which did not exist; on the other hand, Trust had notice of the recorded security interest at the time of the assignment. Therefore, the security interest of the Bank has priority over the landlord's lien of Trust.

The judgment of the trial court is reversed. The case is remanded to the trial court to set aside its judgment and enter judgment for the appellant.

McMANUS, C. J., and SOSA, J., concur.

543 P.2d 484

Juliamarie LANGHAM, Executrix of the Last Will and Testament of Wright H. Langham, Deceased, Appellees,

v.

BEECH AIRCRAFT CORPORATION, a Delaware Corporation, Appellants.

No. 10586.

Supreme Court of New Mexico.
Nov. 18, 1975.
Rehearing Denied Dec. 10, 1975.

Rodey, Dickason, Sloan, Akin & Robb, Bruce D. Hall, Albuquerque, for appellant Beech Aircraft.

Willard F. Kitts, Albuquerque, for appellees Frye.

Jones, Gallegos, Snead & Wertheim, Jerry Wertheim, Steven L. Tucker, Santa Fe, for appellees.

OPINION

OMAN, Justice.

This cause has been certified to this court by the United States Court of Appeals for the Tenth Circuit, pursuant to § 16–2–7, N.M.S.A.1953 (Interim Supp., pt. 1, 1975), which provides in pertinent part:

"The Supreme Court may answer by written opinion questions certified to it by the Supreme Court of the United States, any circuit court of appeals of the United States, the court of appeals of the District of Columbia, any district court of the United States or the district court of the District of Columbia if:

"A. the questions involve propositions of New Mexico law which are determinative of the cause before the federal court; and

"B. there are no controlling precedents in decisions of the New Mexico Supreme Court or the New Mexico court of appeals."

It is recited in the order of certification that there are no controlling precedents in the decisions of this court or the New Mexico Court of Appeals upon the following proposition of New Mexico law:

"Can the manufacturer of a 'public conveyance' be held liable for damages where the passengers died as a result of defects in the conveyance; and does the remedy provided in N.M.Stat.Ann. § 22–20–4 [§ 22–20–4, N.M.S.A.1953 (Supp. 1973)][1] against the 'owner' of a defective public conveyance provide the only remedy?"

We agree that there are no controlling decisional precedents by the New Mexico courts upon this question. However, as will hereinafter be discussed, there is language in the decisions of this court and of the Court of Appeals for the Tenth Circuit which suggests that the remedy provided in § 22–20–4, supra, against "the owner of a defective conveyance" is the exclusive remedy, and that the "manufacturer of the defective public conveyance" is not subject to liability for a wrongful death caused or contributed to by the defective manufacture of the vehicle. Very briefly, the facts giving rise to the certification to this court by the Court of Appeals are:

(1) Suits seeking damages for the alleged wrongful death of seven passengers in an airplane were filed in the United States District Court for the District of New Mexico. One of these suits was against Beech Aircraft Corporation (Beech) alone, since these plaintiffs had settled with Ross Aviation, Inc. (Ross), owner and operator of the aircraft. The other suit was against both Ross and

1. This section includes some legislative changes adopted in 1973 not applicable at the time of the accident out of which this cause arose, but these changes are of no significance to our resolution of the proposition of law under consideration.

Beech. Since then, the plaintiff in this suit has now settled with Ross.

(2) Beech was the manufacturer of the airplane and Ross was the owner and operator thereof at the time of its crash on takeoff from the Albuquerque International Airport.

(3) The Court of Appeals has already concluded that the airplane was a "public conveyance" and the decedents were "passengers" therein at the time of the crash which resulted in their deaths. *Langham v. Beech Aircraft Corporation,* No. 74–1650 (10th Cir., Aug. 7, 1975). Thus, suits could properly have been brought against Ross pursuant to § 22–20–4, supra, which provides in pertinent part:

> "Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car, or train of cars, or of any driver of any stage coach or other public conveyance, while in charge of the same as driver; and when any passenger shall die from injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any stage coach or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach or other public conveyance, at the time any injury is received resulting from or occasioned by any defect, insufficiency, negligence, unskillfulness or criminal intent above declared, shall be liable in damages * * *."

(4) Plaintiffs seek recovery against Beech as the manufacturer of the airplane upon the theories of (1) negligence in design, manufacture, assembly, inspection, and instructions for use; (2) breach of warranty; and (3) strict liability in tort.

Although it is suggested that plaintiffs rely upon a right to bring suit for recovery from Beech under § 22–20–4, supra, their real and clearly stated contention is that they are entitled to sue and recover from Beech under § 22–20–1, N.M.S.A.1953 (Vol. 5, 1954) which provides:

> "Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

The first question presented by the certification is whether Beech may be sued under the provisions of § 22–20–4, supra. We answer this question in the negative. The relevant language of that statute, as shown above, is:

> "[*T*]*he corporation, individual or individuals, in whose employ* any such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, *or who owns* any such railroad, locomotive, car, stage coach or other public conveyance, at the time any injury is received resulting from or occasioned by any defect, insufficiency, negligence, unskillfulness or criminal intent above declared, *shall be liable in damages* * * *." (emphasis added).

Although the language of this statute was slightly different at the time of our opinion in *Ickes v. Brimhall,* 42 N.M. 412, 79 P.2d 942 (1938), these differences are of no significance insofar as a resolution of the question now under consideration is concerned. Also, the question there presented was whether the cause of action survived the wrongdoer, who was the owner and operator of the public conveyance.

However, the answer to this question and to the question we are now considering depends entirely upon who may be sued under § 22–20–4, supra. In the Ickes case, in paraphrasing language of the Missouri Supreme Court in *Bates v. Sylvester,* 205 Mo. 493, 104 S.W. 73 (1907), we held:

"The first syllabus in that case [*Bates v. Sylvester*] dealing with this statute reads:

" 'Where a statute gives the cause of action, and designates the persons who may sue, they alone are authorized to bring suit.'

"We epitomize our holding as applied to the point under consideration by paraphrasing same to read:

" 'Where a statute gives the cause of action and designates *the persons who may be sued,* they alone are authorized to be sued.' " (emphasis added).

The following language from our opinion, in *In re Reilly's Estate,* 63 N.M. 352, 357, 319 P.2d 1069, 1072 (1957), confirms this position:

"Since from the express language of § 22–20–4, supra, an action thereunder is limited to recovery only from the employer common carrier, * * * no recovery thereunder may be had against the pilot who may be in charge of the airplane 'public conveyance', as driver."

Clearly the language of § 22–20–4, supra, limits those from whom recovery may be had thereunder to the "employer" of the person whose negligence, unskillfulness or criminal intent in running, conducting, managing or driving the public conveyance caused or occasioned death or to the "owner" of the public conveyance. Beech was neither such "employer" nor "owner."

Although the issue in *Tilly v. Flippin,* 237 F.2d 364 (10th Cir. 1956), as in *In re Reilly's Estate,* supra, was broader than the one we are now considering, in that in those cases the issue also embraced the question of whether or not the "employee-driver" of the vehicle or public conveyance could be sued under § 22–20–1, supra, nevertheless, the result reached in the *Flippin* case is consistent with our present holding that Beech cannot be sued under § 22–20–4, supra, since it was not an "employer" or "owner" within the contemplation of those terms as used in that statute.

We now consider whether Beech can be sued under § 22–20–1, supra. It contends that since § 22–20–4, supra, gives plaintiffs a cause of action against Ross as the "employer" and "owner" of a "public conveyance," this is plaintiffs' exclusive remedy and they may not recover against Beech under § 22–20–1, supra. We disagree.

As above stated, there is language in some of the opinions of the Court of Appeals for the Tenth Circuit and this court which supports Beech's position.

In *Tilly v. Flippin,* supra, it was stated:

"[W]e think the implications of the decisions by the New Mexico courts, and by this court, lead to the conclusion *that the remedy provided for in § 22–20–4* is an exception to the general death statute [§ 22–20–1, supra] and *is exclusive when death is caused* under facts bringing the case within that section." (emphasis added).

This language was quoted with approval by this court in *In re Reilly's Estate,* supra. There is also language found in other cases which support this position. See, e. g., *Schloss v. Matteucci,* 260 F.2d 16 (10th Cir. 1958); *Mallory v. Pioneer Southwestern Stages,* 54 F.2d 559 (10th Cir. 1931); *Ickes v. Brimhall,* supra. However, the question now presented was not involved in any of those cases.

The decisions in *Tilly v. Flippin,* supra, and *In re Reilly's Estate,* supra, clearly held that recovery against the "employee-driver" of a "public conveyance" may not be had under either § 22–20–1, supra, or § 22–20–4, supra. The rationale for this holding, as announced by the court of appeals in the *Tilly v. Flippin* case and quoted with approval by us in the case of *In re Reilly's Estate,* was:

"To construe the statute otherwise would permit a double recovery for the same

death and might well under the doctrine of respondeat superior require a driver-employee to pay twice."

This same rationale was repeated in the *Tilly v. Flippin* opinion by quoting as follows from *Romero v. Railroad,* 11 N.M. 679, 72 P. 37 (1903):

"[I]t is incomprehensible that the Legislature should intend to provide a double remedy in damages for one and the same injury, and between practically the same parties."

We need not, and do not, depart from these decisions, that recovery may not be had under either section of our wrongful death statutes against the "employee-driver" of a "public conveyance," in holding that plaintiffs have the right to sue Beech under § 22–20–1, supra, since this rationale is not applicable to it. If Beech and Ross both are to be held responsible to plaintiffs for the wrongful death of the passengers in the airplane, it will be because they are joint tortfeasors. As such, they are not "practically the same parties" and recovery against both under our Joint Tortfeasors Act [§§ 24–1–11 to –18, N.M.S.A.1953 (Vol. 5, 1954)] will not require either to pay twice or result in double recovery to plaintiffs. Section 24–1–14, supra; *Garrison v. Navajo Freight Lines, Inc.,* 74 N.M. 238, 392 P.2d 580 (1964).

Although the precise question now before us was not involved in *White v. Montoya,* 46 N.M. 241, 126 P.2d 471 (1942), it was held in that case that a suit could be brought against the "owner-driver" of a "public conveyance" under § 22–20–1, supra, predicated upon his alleged negligence. This decision is consistent with the decision in *Tilly v. Flippin,* supra, and *In re Reilly's Estate,* supra, in that the "driver" in the *White* case was the "employer" and not a "driver-employee." It is also consistent with the position we now take, and contrary to the position Beech takes, in that the tortfeasor was held to be responsible for his negligence under § 22–20–1, supra, even though a "public conveyance" was involved. It is true that in the *White* case, the decedent was not a passenger in the public conveyance, but the holding therein is inconsistent with the following language from *Mallory v. Pioneer Southwestern Stages,* supra, which is quoted and relied upon by Beech: "[Section 22–20–1] did not cover persons killed as a result of the *improper operation* of a locomotive, car, stage coach or other public conveyance * * *." (emphasis added).

We fail to understand why a joint tortfeasor, such as Beech is alleged to be, should be exempt from liability under § 22–20–1, supra, simply because Ross, the owner, was liable under § 22–20–4, supra. Such a holding would be contrary to the purposes for creating liability for wrongful death as provided in our wrongful death statutes. In some cases falling under § 22–20–4, supra, it would completely defeat the right to recover compensatory and exemplary damages from the only one whose culpable conduct caused the death. In others, it would defeat the right to recover against a joint tortfeasor whose culpable conduct contributed to the death. These results would defeat rather than accomplish the following long and often announced purpose of our wrongful death statutes:

"The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb, by making negligence that causes death costly to the wrongdoer."

Whitmer v. El Paso & S. W. Co., 201 F. 193, 198 (5th Cir. 1912); *Stang v. Hertz Corporation,* 81 N.M. 348, 350–51, 467 P.2d 14, 16 (1970); *Tauch v. Ferguson-Steere Motor Company,* 62 N.M. 429, 435, 312 P. 2d 83, 87 (1957); *Trujillo v. Prince,* 42 N.M. 337, 345–46, 78 P.2d 145, 150 (1938).

Our wrongful death statutes were taken from Missouri and this court has often followed the views of the Missouri Supreme Court in its interpretations of these statutes. See, e.g., *Sanchez v. Contract Trucking Co.,* 45 N.M. 506, 117 P.2d 815 (1941); *Hogsett v. Hanna,* 41 N.M. 22, 63 P.2d 540 (1936); *Romero v. Railroad,* supra.

Although the factual situations and the questions presented in the hereinafter cited Missouri cases were not precisely the same as the facts or the question we are now considering, the view we adopt is in accord with the views of the Missouri court as stated in *Meyer v. Pevely Dairy Co.*, 333 Mo. 1109, 64 S.W.2d 696 (1933); *Myers v. Kennedy*, 306 Mo. 268, 267 S.W. 810 (1924), and *Culbertson v. Metropolitan St. Ry. Co.*, 140 Mo. 35, 36 S.W. 834 (1896).

In responding directly to the question concerning New Mexico law which was certified to us by the United States Court of Appeals for the Tenth Circuit, we answer:

The manufacturer of a "public conveyance" can be held liable for damages where the passengers died as a result of defects in the conveyance, and the remedy provided by § 22-20-4, supra, against the "owner" of a defective "public conveyance" does not provide the only remedy.

It is so ordered.

McMANUS, C. J., and STEPHENSON, MONTOYA and SOSA, JJ., concur.

543 P.2d 489

McVEAN & BARLOW, INC., Appellant,

v.

NEW MEXICO BUREAU OF REVENUE, Appellee.

No. 1794.

Court of Appeals of New Mexico.

Oct. 28, 1975.

Rehearing Denied Nov. 7, 1975.

Certiorari Denied Dec. 11, 1975.

Seth D. Montgomery, Montgomery, Federici, Andrews, Hannahs & Buell, Santa Fe, for appellant.

Toney Anaya, Atty. Gen., Daniel H. Friedman, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

Taxpayer appeals the order and decision of the Commissioner of Revenue assessing a deficiency on taxpayer's corporate income tax for 1973. We reverse.

The question to be decided by this case is the meaning to be given to the term "business income" as it is used in the Uniform Division of Income for Tax Purposes Act (UDITPA) § 72–15A–16 to § 72–15A–36, N.M.S.A.1953 (2d Repl.Vol. 10, pt. 2, Supp.1973).

Section 72–15A–17(A), supra, provides:

> "* * * 'Business income' means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations."

Taxpayer is a foreign corporation engaged in the business of laying pipelines. Their pipeline work was of two varieties. One type, pursued for about twenty-five years prior to the transaction in question, involved the laying of small diameter pipelines (little-inch work). The other type, pursued for four or five years before the transaction in question, involved the laying of large diameter pipelines (big-inch work).

In 1973 the corporation experienced a major re-organization, with the principal shareholder selling out to three management employees. This transaction was partially accomplished by the liquidation of the big-inch pipeline business. The pipeline equipment was sold by auction in Texas and Nevada. Taxpayer, viewing the income derived from the sale as nonbusiness income, decided that UDITPA provided for allocation of that income either to Nevada or Texas, under § 72–15A–22, supra.

The Commissioner in his decision and order found that:

> "4. Taxpayer testified that he regularly bought and/or sold as much as five hundred thousand dollars worth of equipment annually, of the types the receipts of which are taxed in the instant assessment. The acquisition, management, and disposition of this equipment constituted an integral part of the taxpayer's regular trade or business. In addition, said equipment was used by taxpayer to produce business income and was so utilized until the time said equipment was sold. Therefore, the receipts from the sale of this equipment was business income within the meaning of § 72–15A–17(A), N.M.S.A.1953."

The Commissioner's factual view of taxpayer's testimony regarding the buying and selling of equipment is taken out of context and does not properly characterize the nature of taxpayer's transactions. As we stated in *Payne v. Tuozzoli,* 80 N. M. 214, 453 P.2d 384 (Ct.App.1969):

> "In resolving conflicts in the evidence in support of the findings, it is not contemplated, nor is it consistent with reason, that words, phrases, clauses or sentences may be selected out of context and then combined to give support for a conclusion which is not supportable by the entire text of the testimony of the witnesses on the particular subject or subjects from which the selections are taken."

Taxpayer did testify that he regularly bought and/or sold as much as five hundred thousand dollars worth of equipment annually. However, this buying and selling of equipment was done in the course of replacing used or scrapped equipment used in the business with new. Taxpayer testified that "* * * [w]e have ditching machines and loading back hoes * * * and we want to trade one in for another, or scrap one and buy a new piece of equipment * * *."

We agree with the Bureau that § 72–15A–17(A), supra, can be broken down

into two parts, each with distinct meanings; (1) "* * * transactions and activity in the regular course of the taxpayer's trade or business * * *" and (2) situations in which "* * * the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations * * *." In his decision, the Commissioner relies on the second part of this section.

One of the few cases construing this section of the Act is *Western Natural Gas Company v. McDonald,* 202 Kan. 98, 446 P.2d 781 (1968). (However, see W. J. Voit Rubber Co., C.C.H. State Tax Cas. Rep. para. 202–435 (Cal.Bd. of Equalization 1964)). In that case the taxpayer was an oil company engaged in various facets of petroleum resource development. It owned a substantial number of oil and gas leases in Kansas. These leases were held for exploration and development and not for resale. In fact, the company had not sold any of their leases from 1947, the time it began operations in Kansas, until 1963, when the company underwent a total liquidation. The income tax return of the company for 1963 excluded gains attributable to the sale of the oil and gas leases. The court in deciding that the income realized by Western Natural Gas Company on the sale of the leases was not business income under UDITPA stated:

> "* * * To constitute business income it must arise from transactions and activity in the regular course of a trade or business. Business income includes income from intangible property if the acquisition, management and disposition giving rise to the income constitute integral parts of the regular trade or business operations. It is not the use of the property in the business which is the determining factor under the statute. *The controlling factor by which the statute identifies business income is the nature of the particular transaction giving rise to the income.* To be business income the transaction and activity must have been in the *regular course* of taxpayer's business operations." [Emphasis Added].

The court went on to hold that:

> "The present sale of leases cannot be considered made in the regular course of business operations. This sale by Western included all of its assets. A complete plan of liquidation was carried out requiring the affirmative vote of its stockholders. The sale was not made in the regular course of taxpayer's business operations when measured by its former practices. It had not sold oil and gas leases. The sale contemplated cessation rather than operation of the business."

Western Natural Gas Company v. McDonald, supra, is distinguished from *Sperry and Hutchinson Co. v. Department of Revenue,* Or., 527 P.2d 729 (1974). In *Sperry and Hutchinson Co. v. Department of Revenue,* supra, the court considered whether investment income received by the taxpayer company, which had as its primary business the sale of trading stamp promotional services to retailers, was business income. The court in deciding this case under the first part of the statute held that the interest paid on the short term securities held to satisfy the needs for liquid capital in the stamp business was business income:

> "The short-term securities held to satisfy the needs for liquid capital in the stamp business are apportionable. These securities are purchased during periods of cash flow surplus and are liquidated when the proceeds, both interest and capital, are needed to meet business obligations during periods of cash flow deficit. Thus, this is business income 'arising from transactions and activity in the regular course of the taxpayer's trade or business' and is part of S & H's unitary business."

Thus, the court in *Sperry and Hutchinson Co. v. Department of Revenue,* supra, decided that taxpayer had expanded its business to include investment in short term securities and that it regularly engaged in the activity.

The foregoing cannot be said of taxpayer. Taxpayer testified that this partial liquidation transaction in question was "* * * a very unusual transaction; one that would only happen to a company once in its entire history * * *" and "* * * it changed the basic nature of our business; it changed the geographical environment of where our business could operate in * * *." Thus, we fail to see how the acquisition, management and disposition of the property constituted integral parts of the taxpayer's regular trade or business.

We agree with the court's decision in *Western Natural Gas Company v. McDonald,* supra. In the present case, taxpayer was not in the business of buying and selling pipeline equipment and, in fact, the transaction in question was a partial liquidation of taxpayer's business and a total liquidation of taxpayer's big inch business. The sale of equipment did not constitute an integral part of the regular trade or business operations of taxpayer. This sale contemplated a cessation of taxpayer's big inch business.

Accordingly, we reverse the decision and order of the Commissioner.

It is so ordered.

HERNANDEZ, J., concurs.

LOPEZ, J., dissents.

LOPEZ, Judge (dissenting).

I dissent.

The majority's opinion rests on the rationale that this was an unusual transaction for the taxpayer. I do not think that the question of novelty has anything to do with the question of whether the property sold formed an integral part of the taxpayer's business.

The taxpayer presented his appeal by two alternative modes of argument. The first was the proposition that the sale of property that was "equipment" to the taxpayer (not held for the purpose of sale) could never result in business income. The majority rejects this thesis, apparently on the basis that if equipment were sold with regularity, the proceeds would constitute business income. The taxpayer's second theory, which met with approval by the court, was that this particular sale produced business income because it was extraordinary, both in its size and in that it ended the taxpayer's involvement in big-inch work.

The "unusual" criterion established by the majority lacks support in case law and the statute. I submit that the issue is whether the property was used to produce business income—that is, whether it formed, in its "acquisition, management, and disposition" part of the taxpayer's business.

Sperry and Hutchinson Co. v. Department of Revenue, supra, is helpful in elucidating this test. The issue there was whether various types of investment income were business income of a trading stamp company. The court held, with respect to two of the types of investments, that the taxpayer was engaged in the separate business of making investments and that income from these investments was business income of this separate business. With regard to other investments held for us in the stamp business, the court did not find that this income came from a separate business of the taxpayer's, but rather found the contrary—that the investments were held as part of the stamp business and the interest was therefore business income.

Sperry and Hutchinson supplies the framework with which we should look at sales of equipment. The issue is not how frequent the sales are, nor how substantial the income from them may be, but rather what the relationship of the property sold is to the business.

Western Natural Gas Company v. McDonald, supra, is not to the contrary. This case may be understood as being concerned with the meaning of "disposition"; in the peculiar context of a liquidation there is no

business which the sale of the property can benefit. The "partial liquidation" involved in our case is not encompassed by this rationale because there was an ongoing business after the sale. The Commissioner found that, "[t]axpayer was a single entity engaging in two related types of a single activity." The evidence supporting this finding included the common management, purchasing, accounting, payroll, record-keeping, and supervision of the two activities. See, *Butler Brothers v. McColgan*, 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991 (1942). This evidence is not affected by the corporate reorganization because the taxpayer stipulated at the hearing below that it was the same entity before the reorganization as after. The "partial liquidation" raised by the taxpayer is no different in this context than if the taxpayer had sold half their big-inch and half their little-inch equipment.

Finally, the statute itself negates any requirement that the transaction must be regular to produce business income. The statement in *Western Natural* that the "transaction and activity must have been in the regular course of taxpayer's business operations" I consider to be a critically inaccurate paraphrase of the statutory requirement that the transaction involving the property be "an integral part of the taxpayer's regular trade or business". By pulling income from tangible and intangible property into business income, the legislature has shown its intent to include more than income from inventory within the term. Once it is conceded that noninventory items are to be included, the frequency and regularity with which a business produces income from these collateral sources is irrelevant.

Under the test of whether the equipment's use and sale benefited the taxpayer, it is clear that these proceeds were business income. The taxpayer had used this equipment in his business. It sold the equipment for a business purpose, which was to enable it to maintain the corporation after the withdrawal of the principal shareholder. The income it received should have been included in the income which was apportioned as business income.

543 P.2d 493

MESCALERO APACHE TRIBE, Appellant,

v.

The BUREAU OF REVENUE of the State of New Mexico, Appellee.

No. 2124.

Court of Appeals of New Mexico.

Nov. 4, 1975.

Certiorari Granted Dec. 12, 1975.

Norman D. Bloom, Jr., Fettinger & Bloom, Alamogordo, for appellant.

Toney Anaya, Atty. Gen., Richard M. Kopel, Bureau of Revenue, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

Mescalero (Mescalero Apache Tribe) contracted with Burn (Burn Construction Company) for Burn to construct certain improvements in connection with the construction of a motel. The place of performance of the contract was within the Mescalero Indian Reservation. The Bureau of Revenue assessed gross receipts tax on the receipts of Burn under the contract with Mescalero. Burn protested. That protest has not been heard nor decided by the Commissioner. Mescalero sought to intervene in connection with the protest of Burn. Intervention was sought on the basis that any tax liability of Burn would eventually be paid by Mescalero because of indemnity provisions in the contract between Mescalero and Burn. The Commissioner denied Mescalero's motion to intervene. Mescalero has appealed to this Court. Statutory citations are to Repl.Vol. 10, pt. 2, Supp.1973.

Direct appeals may be brought to this Court by a "protestant or claimant . . . dissatisfied with the action and order of the commissioner after a hearing . . . ." Section 72–13–39, N.M.S.A. 1953.

"Claimant" refers to one seeking a refund of taxes paid. Sections 72–13–36 and 72–13–40, N.M.S.A.1953. The taxes have not been paid in this case. Mescalero is not a claimant.

Section 72–13–38, N.M.S.A.1953 provides that a taxpayer may dispute an assessment by filing a protest. Section 72–13–15(O), N.M.S.A.1953 defines "taxpayer" as a person liable for payment of a tax or a person to whom an assessment has been made. Under this record, Mescalero's involvement in Burn's taxes is under a contract of indemnity. The taxes have been assessed to Burn and Burn is liable for any taxes due. Mescalero is not a protestant.

Because Mescalero is neither a claimant nor protestant, this Court has no jurisdiction over Mescalero's appeal.

The appeal is dismissed.

It is so ordered.

SUTIN and LOPEZ, J., concur.

543 P.2d 820

Johnnie ARCHIBEQUE, as personal representative and administrator of the Estate of James F. Perkins, Deceased, Plaintiff-Appellant,

v.

B. J. HOMRICH, Administrator of the Estate of Felix J. Roberson, Jr., Deceased, Defendant-Appellee.

No. 10366.

Supreme Court of New Mexico.

Dec. 15, 1975.

Smith, Ransom & Gilstrap, Michael Fitzpatrick, Albuquerque, for plaintiff-appellant.

Farlow & Lill, Sarah M. Bradley, Albuquerque, for defendant-appellee.

OPINION

SOSA, Justice.

Plaintiff-appellant, personal representative and administrator of the estate of James F. Perkins, deceased, filed suit against the administrator of the estate of Felix J. Roberson, Jr., also deceased. The suit was for damages for wrongful death. From a jury verdict for the defendant, plaintiff appealed to the Court of Appeals. That court pursuant to section 16–7–14(C)(2) N.M.S.A.1953 (Repl.Vol. 4) certified the case to this court for final decision.

Plaintiff's decedent and defendant's decedent were both killed in a one car accident. Defendant's decedent was found on the driver's side of the front seat slumped over the steering wheel and plaintiff's decedent was on the passenger's side. It is apparent that the two died instantly, since there was no indication that either had moved after the accident. Plaintiff's decedent, a 21-year-old serviceman stationed in Idaho, was driving to Texas to be married. In the afternoon of July 15, 1970, he called his fiance to advise her of the possibility of his earlier arrival because he had picked up a hitchhiker, the defendant's decedent, who had offered to help with the driving.

There were no eyewitnesses to the accident and the evidence at trial consisted of the testimony of the investigating officer and experts on accident reconstruction. The state police investigation revealed that the 1969 Opel Kadette stationwagon was headed in a southerly direction on State Road 44 when it ran off the west side of the highway. It traveled 274 feet on the shoulder, returned to the highway, crossed over the north-bound traffic lane and onto the east shoulder, and plunged into a 14-foot-deep arroyo. From the point it returned to the highway to the point it left on the east side, the car traversed an arc measuring 73 feet diagonally (the highway was only 22 feet wide at this point). The car traveled 83 feet along the east edge of the pavement before plunging into the arroyo, which was some 24 feet from the east edge of the road. The car rolled over once in the arroyo and was found facing west in an upright position. The highway was straight and level at the site of the accident, and it was dry on the day of the ac-

cident. The distance from where the vehicle first left the highway to its final resting place was 430 feet.

Officer Viramontes testified that based upon his past experience in investigation it was his opinion that "the driver apparently dozed off, fell asleep at the wheel, at which time the vehicle went off the right hand side of the road in a gradual manner and the tires started kicking up gravel or weeds underneath the car, which apparently woke the driver up, at which time he realized he was off the road and tried to get back on the road, and when he did he overcorrected and his car went sideways, partially sideways, across the road and down the embankment."

The court instructed the jury on res ipsa loquitur, contributory negligence, sudden emergency, and agency. Upon appeal the plaintiff urges the following points for reversal:

POINT I The court's statement of the defendant's "defenses" did not comply with the requirement of New Mexico Uniform Jury Instructions and deprived plaintiff of a fair trial. The possibility that the injury occurred without negligence on the part of the defendant's decedent is not an affirmative defense to an action based on the doctrine of res ipsa loquitur.

POINT II The court improperly instructed the jury on the issue of contributory negligence. There was no evidence in the record to support a finding by the jury that the plaintiff's decedent, the passenger in the vehicle, failed to exercise ordinary care for his own safety.

POINT III There was no evidence that defendant's decedent was confronted with a sudden emergency at the time the vehicle left the roadway. The court's instruction on the concept of sudden emergency encouraged the jury to engage in guess and speculation and deprived plaintiff of a fair trial.

POINT IV The court's instruction that there was a presumption that defendant's driver was acting as the agent of plaintiff's decedent in driving the vehicle interjected a false issue in the case and deprived plaintiff of a fair trial.

POINT V Defendant's decedent was guilty of negligence per se. Plaintiff was entitled to have the jury instructed on the driver's statutory duty to drive on the right hand of the roadway and to keep the vehicle within a single traffic lane.

POINT VI Plaintiff was entitled to a directed verdict on the issue of liability because defendant failed to show that the driver's failure to keep the vehicle on the roadway was due to something other than the driver's negligence.

I. Jury Instructions

As points 1, 2, 3 and 4 deal primarily with objections to instructions as given we will deal with them all under one point. Plaintiff-appellant argued that the first jury instruction included an improper affirmative defense, and the instructions on contributory negligence and sudden emergency were improperly given because there was no evidence to support them. We have difficulty with the following jury instructions:

INSTRUCTION NO. 1. For the benefit of Marie Perkins Foust, plaintiff Johnnie Archibeque, Sr., claims damages from defendant B. J. Homrich for the death of James Perkins which plaintiff claims was proximately caused by the negligence of Felix Roberson, Jr., in that:

1. The death of James Perkins was proximately caused by the fact that the automobile, which was under the exclusive control and management of Felix Roberson, Jr., ran off the side of the highway.

2. The event causing the death of James Perkins was of a kind which ordinarily does not occur in the absence of negligence on the part of the person driving the automobile.

Plaintiff has the burden of proving that damages were sustained and that the negligence of Felix Roberson, Jr. was the proximate cause thereof.

The defendant denies that the doctrine of res ipsa loquitur applies in this case and denies that there is any proof on the part of the defendant's decedent that he was negligent and affirmatively states that the accident in question could have occurred without negligence on the part of the defendant's decedent and that there is not any proof or facts available as to the cause of the accident in question. And further the defendant claims James Perkins was guilty of contributory negligence which was the proximate cause of his death.

The defendant has the burden of proving his allegations and defenses stated herein. . . .

INSTRUCTION NO. 2. Plaintiff relies in part upon the doctrine of "res ipsa loquitur" which is a Latin phrase and means "the thing speaks for itself."

In order for the jury to find Felix Roberson, Jr., negligent under this doctrine, plaintiff has the burden of proving each of the following propositions:

1. That the death of James Perkins was proximately caused by an automobile, which was under the exclusive control and management of Felix Roberson, Jr.

2. That the event causing the death of James Perkins was of a kind which ordinarily does not occur in the absence of negligence on the part of the person in control of the automobile.

If you find that each of these propositions has been proved, then the law permits you to infer that Felix Roberson, Jr., was negligent and that the death of James Perkins proximately resulted from such negligence.

If, on the other hand, you find that any one of the propositions have not been proved, or if you find, notwithstanding the proof of these propositions, that Felix Roberson, Jr., used ordinary care for the safety of others in his control and management of the automobile, then plaintiff cannot recover under the doctrine of res ipsa loquitur.

INSTRUCTION NO. 8. Where a non-owner is driving and the owner is present in the car a presumption exists that the driver is the agent of the owner. This presumption is based on the theory that the owner present in the car has the right to control the driver. Such presumption may be overcome by evidence to the contrary.

INSTRUCTION NO. 14. A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence of or the appearance of imminent danger to himself or another, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments.

His duty is to exercise only the care that a reasonably prudent person would exercise in the same situation.

If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any reasonably prudent person under the same conditions then he has done all the law requires of him, even though in the light of after events, it might appear that a different course would have been better and safer.

[redacted] We find that the first instruction was improper. First, the ". . . [defendant] affirmatively states . . ." part is postured as an affirmative defense. However, it is not an affirmative defense but in effect, merely a denial and should have been stated as such. In the second jury instruction the "in part" must be deleted since the trial court only allowed one theory to go to the jury. We have reviewed the trial record and find no evidence to the effect that the plaintiff was contributorily negligent. Similarly, with respect

to jury instruction number 14, there was no evidence to the effect that a sudden emergency arose. We have held that it is error to instruct on issues which are unsupported by the evidence or which present a false issue. *State v. Atchison, Topeka and Santa Fe Railway Co.,* 76 N.M. 587, 417 P.2d 68 (1966); *Terry v. Biswell,* 66 N.M. 201, 345 P.2d 217 (1959). The testimony of defendant's expert, Don Evans, amounted to speculation and conjecture as to how the accident might have occurred. He stated that in accidents such as this one an insect could have been in the car; cigarette ashes could have blown into the eyes of the driver; an animal could have run out in front of the driver; the driver could have been ill; or another vehicle could have run this vehicle off the road. To base a jury instruction on speculation or conjecture is not proper, and the interjection of a false issue and the giving of instructions not warranted by the evidence require a reversal. *Reed v. Styron,* 69 N.M. 262, 365 P.2d 912 (1961); *Delgado v. Alexander,* 84 N.M. 456, 504 P.2d 1089 (Ct.App.1972), aff'd on other grounds, 84 N.M. 717, 507 P.2d 778 (1973); *Aragon v. Speelman,* 83 N.M. 285, 491 P.2d 173 (Ct.App.1971); *Garcia v. Barber's Super Markets, Inc.,* 81 N.M. 92, 463 P.2d 516 (Ct.App.1969).

II. Res Ipsa Loquitur

The instant case presents the classic problem of whether the circumstantial evidence is sufficient to prove negligence on the part of the defendant. Negligence must be proved, and generally never will be presumed. *Kemp v. McNeill Cooperage Co.,* 7 Del. (Boyce) 146, 104 A. 639 (1918). The mere fact that accidents, injuries, or damages have occurred is not evidence that someone has been negligent. *Waterman v. Ciesielski,* 87 N.M. 25, 528 P.2d 884 (1974). Some form of proof, or evidence, must be presented which would lead reasonable men to conclude that it is more likely that the event was caused by negligence than that it was not. The evidence must meet the burden of proof by making it appear more likely than not. There is no such thing as a causeless accident; accidents are caused occurrences. The crucial fact question is whether or not the cause of the accident was negligence. One of the theories the plaintiff sought to rely upon to prove defendant's negligence was res ipsa loquitur.

The traditional elements of res ipsa loquitur, derived from 4 J. Wigmore, Evidence § 2509 (1st ed. 1905), are the following: (1) the event must be a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. The first two elements are most often considered to be the elements of res ipsa loquitur in New Mexico, while the third element is subsumed under contributory negligence. See *Waterman v. Ciesielski,* supra; *Mitchell v. Ridgway,* 77 N.M. 249, 421 P.2d 778 (1966); *Renfro v. J. D. Coggins Company,* 71 N.M. 310, 378 P.2d 130 (1963); *Tafoya v. Las Cruces Coca-Cola Bottling Company,* 59 N.M. 43, 278 P.2d 575 (1955); *Tapia v. McKenzie,* 85 N.M. 567, 514 P.2d 618 (Ct.App.1973).

Appellant argued that instruction number 8 interjected the false issue of agency, whereby the jury could conjecture that the driver's negligence could be imputed to the passenger. Appellee countered that the instruction was relevant to the issue of exclusive control, part of the second element of res ipsa loquitur. Appellee's theory has generally only been used by third parties against the driver and the driver's passenger, not between driver and passenger. See *Mein v. Reed,* 224 Iowa 1274, 278 N.W. 307 (1938); *Price v. McDonald,* 7 Cal.App.2d 77, 45 P.2d 425 (1935). "Exclusive control" is not a rigid, inflexible term as appellee would have us believe. See W. Prosser, Law of Torts § 39 (4th ed. 1971). In this case agency principles should not have been interjected into the issue of exclusive control. The trial court erred in submitting this instruction to the jury.

Appellant asserts that once the elements of res ipsa loquitur have been established, it compels the inference of negligence by the fact finder. This is not so. Once the elements of res ipsa loquitur have been established, it merely permits and does not compel the inference of negligence by the fact finder. *Tuso v. Markey,* 61 N.M. 77, 294 P.2d 1102 (1956). The fact finder is free to accept or to reject the inference.

III. Negligence Per Se

The plaintiff argued that the trial court improperly denied his instruction on negligence per se. Plaintiff argued that the defendant, by running off the highway, had violated § 64–18–8 and § 64–18–16 N.M.S.A.1953 (2d. Repl.Vol. 9, pt. 2, 1972) and should be found negligent as a matter of law.

The test for negligence per se is the following: (1) there must be a statute which prescribes certain actions or defines a standard of conduct, either explicitly or implicitly, (2) the defendant must violate the statute, (3) the plaintiff must be in the class of persons sought to be protected by the statute, and (4) the harm or injury to the plaintiff must generally be of the type the legislature through the statute sought to prevent. See *Fitzgerald v. Valdez,* 77 N.M. 769, 427 P.2d 655 (1967) (failure to put lamp near vehicle at night); *Sanchez v. J. Barron Rice, Inc.,* 77 N.M. 717, 427 P.2d 240 (1967) (failure to adjust furnace); *Hisaw v. Hendrix,* 54 N.M. 119, 215 P.2d 598 (1950) (failure to put flares out on road and failure to park off pavement); *Turrietta v. Wyche,* 54 N.M. 5, 212 P.2d 1041 (1949) (sideswiping); *Clay v. Texas-Arizona Motor Freight,* 49 N.M. 157, 159 P.2d 317 (1945) (speeding); *Dahl v. Turner,* 80 N.M. 564, 458 P.2d 816 (Ct. App.1969) (speeding); Prosser § 36, *supra.*

Sections 64–18–8 and –16 *supra* require that all motorists drive on the right hand side of the road except in certain instances. This the defendant, at least for part of the final 347 feet, failed to do. Whom the legislature sought to protect is not explicitly stated; however, it is reasonable to assume that it is the motoring public in general, including passengers such as the plaintiff. The harm sought to be prevented by the statutes apparently is head-on collisions or sideswiping the opposite moving traffic. It is doubtful that the statute could have been intended by the legislature to apply to a situation such as this. Thus, the district court properly refused to submit this instruction to the jury.

Plaintiff argued that the trial court should have granted plaintiff a directed verdict on the issue of liability because defendant was negligent per se. Once negligence per se is found, the fact finders would still have to determine whether the negligence per se was the actual and proximate cause of the accident. *Sanchez v. J. Barron Rice, Inc.,* supra; *Fitzgerald v. Valdez,* supra. Thus, the judge could not have granted a directed verdict on the issue of liability.

The trial court is reversed and the cause is remanded with instructions for a new trial to proceed in a manner not inconsistent herewith.

STEPHENSON and MONTOYA, JJ., concur.

543 P.2d 825

TELEPHONIC, INC., a New Mexico Corporation, Plaintiff-Appellant,

v.

Murray R. ROSENBLUM, Defendant-Appellee.

No. 10502.

Supreme Court of New Mexico.

Dec. 17, 1975.

Adams & Foley, Albuquerque, for plaintiff-appellant.

Richard B. Addis, Albuquerque, for defendant-appellee.

OPINION

OMAN, Justice.

This is a suit by a New Mexico corporation, whose principal office is in Albuquerque, against a resident of the State of California. A copy of the summons and complaint were served upon defendant, Rosenblum, in Santa Clara County, California. The district court quashed the service and dismissed the complaint upon the ground of lack of jurisdiction over the person of Rosenblum. Plaintiff, Telephonic, has appealed. We affirm.

The resolution of the question of in personam jurisdiction over Rosenblum depends entirely upon (1) whether he intentionally agreed to waive his constitutional right of due process with respect to his right to be sued in a forum properly having jurisdiction over his person, or (2) whether he transacted business in New

Mexico and thereby submitted himself to the jurisdiction of the New Mexico courts within the contemplation of the provisions of § 21-3-16, N.M.S.A.1953 (Repl. Vol. 4, Supp.1973). This statute provides in pertinent part that a person, whether or not a citizen or resident of this State, who in person or through an agent transacts any business within this State, thereby submits himself to the jurisdiction of this State as to any cause of action arising from the transaction of such business.

Our statute was taken from Illinois, and the interpretations by the Illinois courts of the Illinois statute are persuasive. *Blount v. T D Publishing Corporation,* 77 N.M. 384, 423 P.2d 421 (1966); *Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co.,* 77 N.M. 92, 419 P.2d 465 (1966); *Gray v. Armijo,* 70 N.M. 245, 372 P.2d 821 (1962); *Melfi v. Goodman,* 69 N.M. 488, 368 P.2d 582 (1962).

We have repeatedly equated the "transaction of business"—insofar as the acquisition of long-arm jurisdiction under our statute is concerned—with the due process standard of "minimum contacts" sufficient to satisfy the "traditional conception of fair play and substantial justice" announced in *International Shoe Co. v. State of Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). *Diamond A Cattle Company v. Broadbent,* 84 N.M. 469, 505 P.2d 64 (1973); *Winward v. Holly Creek Mills, Inc.,* 83 N.M. 469, 493 P.2d 954 (1972); *Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co.,* supra; *Melfi v. Goodman,* supra.

We have also repeatedly held that whether or not the statute applies—meaning whether the party did transact business in New Mexico within the contemplation of our statute—must be determined by the facts in each case. *Diamond A Cattle Company v. Broadbent,* supra; *Winward v. Holly Creek Mills, Inc.,* supra; *Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co.,* supra. The doing or transacting of business, in the context of that term as we are now concerned with it, has been defined as follows:

> "Doing business is doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts."

Restatement (Second) of Conflict of Laws § 35, comment a at 142 (1971).

In the present case the facts are:

(1) Telephonic is a mortgage investment broker in Albuquerque, New Mexico.

(2) Rosenblum is apparently a resident of California. In any event, at no time within the past ten years has he been in the State of New Mexico.

(3) In or about July of 1974, Telephonic began communicating by telephone and mail with a person who was then associated with or subsequently became associated with Rosenblum at Rosenblum's address in San Jose, California.

(4) Subsequently, a written contract, entitled "Authorization to Obtain Loan," was prepared by Telephonic and sent by it to Rosenblum at his San Jose address. He accepted and signed the contract in California on August 24, 1974, and returned it to Telephonic in New Mexico. The contract was signed in New Mexico on August 26, 1974 by an officer of Telephonic.

(5) The provision of the contract upon which Telephonic particularly relies, in support of its position that New Mexico courts have jurisdiction over the person of Rosenblum, reads:

> "The undersigned acknowledges that in exclusively employing, commissioning and authorizing Telephonic to obtaining financing, loans or commitments thereof, that the undersigned is transacting business within the state of New Mexico and that this Agreement and Authorization was negotiated and accepted in and shall be governed by the laws of the State of New Mexico."

(6) Telephonic allegedly procured a loan commitment pursuant to the contract, but Rosenblum failed and refused to pay the claimed commission in the amount of $20,000. This suit ensued.

In *Diamond A Cattle Company v. Broadbent*, supra, we denied long-arm jurisdiction over a nonresident defendant served with process outside New Mexico who had entered into a joint venture with a New Mexico resident for the purpose of buying and selling cattle. None of the cattle purchased or sold pursuant to the joint venture were purchased or sold in New Mexico, but the nonresident defendant made payments to the resident plaintiff at its New Mexico office and made a trip to New Mexico to meet with plaintiff for the purpose of concluding the affairs of the joint venture and settling his obligation to plaintiff. We held under these facts it would be neither fair nor just to subject the defendant to in personam jurisdiction in the New Mexico courts.

In *Winward v. Holly Creek Mills, Inc.*, supra, we held the nonresident defendant was subject to jurisdiction over his person by the New Mexico courts. In that case, however, the nonresident defendant, a Georgia corporation, had entered into a contract of employment with plaintiff in the State of Arizona. By that contract, plaintiff was retained as defendant's 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 four businesses in New Mexico, arranged for advertising of defendant's products in New Mexico, and was paid a salary by defendant which was delivered to him in New Mexico. Defendant also shipped its products into New Mexico pursuant to the orders secured by plantiff. We held that these contacts were sufficient to satisfy the traditional notions of fair play and substantial justice and warranted the exercise over defendant of in personam jurisdiction by the New Mexico courts. Accord, *Pope v. Lydick Roofing Company of Albuquerque*, 81 N.M. 661, 472 P.2d 375 (1970); *Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co.*, supra; *Melfi v. Goodman*, supra.

Telephonic contends that the fact that the contract was signed by it in New Mexico after Rosenblum had signed it in California makes it a New Mexico contract and this has some overriding significance. Although under the facts there may be some question as to when and where the contract was actually consummated, we assume plaintiff's position to be correct, that the contract was executed in New Mexico at the time Telephonic signed it. However, the place of execution of the contract, although a circumstance to be considered in determining whether or not a person is transacting business in this State within the contemplation of § 21–3–16, supra, it is certainly not a controlling, an essential, or even a highly significant fact in making this determination. See *Melfi v. Goodman*, supra (contract executed in New Mexico, jurisdiction upheld). See also *Winward v. Holly Creek Mills, Inc.*, supra; *Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co.*, supra (contracts executed outside of New Mexico, jurisdiction upheld); *Diamond A Cattle Company v. Broadbent*, supra (place of contract not stated, jurisdiction denied).

A case involving facts almost identical to those in the present case, upon the issue of "transacting business," was *Tudesco v. Publishers Company*, 232 F.Supp. 638 (E.D.Pa.1964). The court in that case held that the Pennsylvania statute providing long-arm jurisdiction over those "doing business" in Pennsylvania was not applicable.

Analogous situations have resulted from suits by real estate brokers. These suits have been brought in State A by real estate brokers of that state who have found tenants or buyers in that state for real estate owned in State B by residents of that state. In *Davis v. Nehf*, 14 Ill.App.3d 318, 302 N.E.2d 382 (1973), the Illinois court refused to give effect to a New York

judgment obtained by the plaintiff, a New York real estate broker who had secured a New York tenant for Illinois property belonging to defendant, an Illinois resident. The New York long-arm statute, as is the New Mexico statute, was modeled upon the Illinois statute, and insofar as the question presently being considered is concerned, the language of the statutes are identical. The Illinois court held that under New York precedent there had been a failure to establish the "purposeful act" or "minimum contact" sufficient to constitute "transacting business" and, thus, to sustain jurisdiction in the New York court.

In the earlier New York case of *Glassman v. Hyder,* 23 N.Y.2d 354, 296 N.Y.S. 2d 783, 244 N.E.2d 259 (1968), the plaintiff, a real estate broker in New York, brought suit in New York against the defendants, residents of New Mexico, for a real estate commission claimed as a result of securing a New York buyer for the defendants' New Mexico property. In our opinion, contacts of the defendants with New York in that case were comparable to those of Rosenblum with New Mexico in the present case. The New York Court of Appeals upheld the reversal of the judgment for the broker on the ground that there was no transaction of business by defendants in New York within the contemplation of the long-arm statute.

In the concluding footnote of the later case of *Parke-Bernet Galleries, Inc. v. Franklyn,* 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970), the New York Court of Appeals distinguished *Glassman v. Hyder,* supra, and its progeny by stating:

> "It is sufficient to point out that in each of those cases, all of which involved agents who were suing their principals, the *plaintiff was relying on his own activities within the State,* and not those of the defendant, as the basis for jurisdiction. In other words, *in no one of these cases had the defendant himself engaged in purposeful activity within the State nor had the cause of action arisen out of transactions with third parties conducted through an agent.*" (emphasis added).

In *A. Millner Company v. Noudar, Lda.,* 24 A.D.2d 326, 266 N.Y.S.2d 289 (1966), the Appellate Division of the New York Supreme Court opined:

> "If the plaintiff were an employee of or an agent acting exclusively for the defendant, plaintiff's acts, in and of themselves, performed for the defendant in New York would suffice to establish jurisdiction of the action against the defendant. [citations omitted. Accord, *Winward v. Holly Creek Mills, Inc.,* supra.] But it is asserted and not denied that the plaintiff is an independent broker representing many different companies on a commission basis, in no way under the defendant's control. In such circumstances the acts of the broker representative, the plaintiff herein, are not the acts of the so-called principal, and do not create a basis for jurisdiction against this defendant. [citations omitted.]"

In *Orton v. Woods Oil and Gas Co.,* 249 F.2d 198 (7th Cir. 1957), it was held that jurisdiction under the Illinois long-arm statute was not acquired over the Louisiana defendant by reason of the performance in Illinois by plaintiffs of professional services for defendant. The said professional services consisted of legal and engineering services rendered in connection with the incorporation of defendant under Delaware law, registration of defendant's securities in Washington, D.C. for public sale, the procurement of an underwriter for the sale of registered stock, and a designation of plaintiffs as "agents for service" in the registration statement filed with the Securites and Exchange Commission. The court observed and held:

> "[D]efendant's sole business contact with the State of Illinois was its dealings with plaintiffs.
>
> "* * *.
>
> "* * *. The fact that plaintiffs did most of their actual work in Chicago in accomplishing their assignments seems to

us to be a slender thread on which to hang their claim for jurisdiction over defendant in Illinois. We do not believe that defendant had such 'minimum contacts' with the territory of the forum chosen by plaintiffs to subject it to a judgment *in personam*. To do so, would 'offend traditional notions of fair play and substantial justice.'

"* * *.

"We shall not engage in a further definition of 'the transaction of any business within this State.' It is sufficient here to hold that the performance of the professional services by plaintiffs for the benefit of defendant as herein outlined, standing alone, are insufficient to bring defendant within any reasonable construction of the Act in question. To rule otherwise would be to stretch the doctrine of the International Shoe case to the breaking point, and to expand the Illinois concept of state jurisdiction over nonresidents beyond the limit imposed by due process."

See also *Bonan v. Leach*, 22 F.R.D. 117 (E.D.Ill.1957); *Belmont Industries, Inc. v. Superior Ct. of Stanislaus Cty.*, 31 Cal. App.3d 281, 107 Cal.Rptr. 237 (1973); *Winick v. Jackson*, 49 Misc.2d 1009, 268 N.Y.S.2d 768 (Sup.Ct.1966).

Rosenblum did not transact business within New Mexico and thereby submit himself to the jurisdiction of the New Mexico courts under the provisions of § 21–3–16, supra.

As to the effect of the above quoted provision of the contract, that the "undersigned acknowledges * * * that the undersigned is transacting business within the state of New Mexico and that this Agreement and Authorization was negotiated and accepted in and shall be governed by the laws of the State of New Mexico," we first observe that there is some ambiguity and grammatical inaccuracy in the language thereof. Telephonic urges that a construction of this language is equivalent to saying that Rosenblum voluntarily submitted himself to the jurisdiction of the New Mexico courts in the event a controversy should arise under the contract. We disagree.

One may agree in advance to submit to the jurisdiction of the courts of a certain state. *National Equipment Rental v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964); *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F.Supp. 1 (S.D.N.Y.), aff'd 489 F.2d 1313 (2d Cir.), cert. denied, 416 U.S. 986, 94 S. Ct. 2389, 40 L.Ed.2d 763 (1973); *Bowles v. J. J. Schmitt & Co.*, 170 F.2d 617 (2d Cir. 1948); *Paragon Homes, Inc. v. Gagnon*, 110 N.H. 279, 266 A.2d 207 (1970); *Battle v. General Cellulose Co.*, 23 N.J. 538, 129 A.2d 865 (1957); *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931); Restatement (Second) of Conflict of Laws § 32 (1971). However, we are of the opinion that a contractual agreement by a nonresident of this State, that the contract "shall be governed by the laws of New Mexico" and that the nonresident is "transacting business within New Mexico" by entering into the contract, is not sufficiently definite, or so unequivocal upon the issue of submission to the jurisdiction of our courts, to constitute an effective waiver of the constitutional right of due process with respect to the right to be sued in a forum wherein in personam jurisdiction may clearly and properly be obtained in accordance with traditional notions of fair play and substantial justice. An agreement to waive this constitutional right must be deliberately and understandingly made, and language relied upon to constitute such a waiver must clearly, unequivocally and unambiguously express a waiver of this right. See generally *Bowles v. J. J. Schmitt & Co.*, supra; *American Inst. of Mktg. Sys. v. Willard Realty Co.*, 8 N.C.App. 43, 173 S.E.2d 519, rev'd on other grounds, 277 N. C. 230, 176 S.E.2d 775 (1970); A.A.R. *Realty Corp. v. United States Fire Ins. Co.*, 335 A.2d 271 (Del.Super.1975).

Telephonic's argument, that, if one can unknowingly "submit" to the jurisdiction

of the New Mexico courts by actually doing business in the State, surely an agreement to knowingly submit thereto should be equally effective, is not only erroneous but misconceives the purpose of our statute. The validity of this argument must depend upon the premise that Rosenblum agreed to submit to the jurisdiction of the New Mexico courts. We have already stated that in our opinion he did not so agree. Additionally, the statute relates to the "minimum contacts" with New Mexico which are required to constitute the transaction of business within this State. It is the transaction of such business within the State which makes the exercise of in personam jurisdiction under our statute consistent with "traditional notions of fair play and substantial justice" and secures unto the defendant his constitutional right to due process.

The judgment of the trial court should be affirmed.

It is so ordered.

McMANUS, C. J., and SOSA, J., concur.

543 P.2d 831

STATE of New Mexico, Plaintiff-Appellee,

v.

Leandro BLEA, Defendant-Appellant.

No. 1984.

Court of Appeals of New Mexico.
Oct. 28, 1975.
Rehearing Denied Nov. 10, 1975.
Certiorari Denied Dec. 11, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Reginald J. Storment, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Mark Shoesmith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant appeals from his conviction of possession of heroin. The issues raised on appeal are the trial court's asserted errors in denying (a) Motion to Suppress the Evidence for lack of probable cause, and (b) Motion for Continuance to make use of newly discovered evidence favorable to the defense. We affirm.

Motion to Suppress

Bernalillo County Sheriff's narcotic officers Lundy and Sanchez were patrolling in a part of Albuquerque that is known as a "very high narcotic area." Lundy had been acquainted with defendant for two or three years and knew him to be a narcotic user. Defendant had just come from a group of people that Lundy knew to be pushing in the area. While walking away from the group defendant was observed holding his right hand as if he were holding something. Lundy told Sanchez, ". . . '[t]here goes a guy that is holding', ..."

The officer went into considerable detail as to what is meant by the term "holding" and the significance of the term.

"A Well, to me, like I said, I just knew that he was carrying some heroin, I mean, I couldn't see it or anything, but, I felt that that was what it was, and this is from being down there almost every day, this is the way that they do when an addict goes somewhere and scores, 99 times out of a hundred, they will generally carry it in their hand that way, because we had been down there everyday, and they were really watching for us, you know.

"Q And why would they carry it in their hand as opposed as to putting it in their pant pocket?

"A Well, if they got it in their pocket, I have had a lot of addicts tell me that they carry it in their hand because if a narc drives up, it takes them too long to get it out of their pocket, and you can grab them and, if they carry it in their hand, they can throw it on the ground or away or generally they can swallow it, and you can't recover the evidence.

"Q In your experience, have you encountered situations where you see a narcotic user carrying something in his hand in a high narcotic area?

"A We were down there almost everyday, you see it everyday, it is a daily routine thing down there, for months.

"Q In those situations where you see that, how often did it happen when you stopped somebody that was doing something like that, and that he had something other than heroin in his hand?

"A I don't recall as ever stopping somebody like that that had something beside heroin. You can generally tell by the way they look at you, the way that they act when they see you, their reactions to seeing a narc, and, you know whether or not they've got heroin or something else."

The officers then drove around the block and saw defendant standing by the back of his pickup. They saw defendant reach into the back of the pickup and remove "a Lota' Burger cup." He then held his right hand over the cup as if he was putting something into the cup. Defendant then

". . . smashed the cup on the sides and he rolled it up and he took his right hand and he placed it in the left front corner of the bed and then he got into his vehicle."

The officer then described how narcotics are hidden.

"Q When a narcotic addict has got some heroin on him and he for some reason suspects that somebody is on to him, is there some common place that they try to hide it, some common place that they would try to?

"A They either run or they swallow it if they are carrying and they see a narcotic agent start to approach them.

"Q If they had time to try to hide it, what would be the most common place?

"A Well, there's a lot of pushing that goes on in the street corners there, standing out in the streets, and they generally will get a can or a cup, or a cigarette package, anything, and they put the heroin in there and they hide it a little ways off from them because in that area there is a lot of cans, paper, everything laying around, and they will lay it down somewhere away from them so that if you approach them you can't find it. Even if you would find it, you couldn't prove whose it was, and that is generally the way that they do it down there."

The officers coasted up behind the defendant's pickup as he was about to drive away. They got out of their car and approached the pickup. Officer Sanchez informed defendant they were police officers. Officer Lundy reached into the back of the pickup, took out and unfolded the paper cup, and found the heroin wrapped in a "brown piece of paper." The truck bed was clean except for that one cup.

Probable cause exists when the facts and circumstances within the officers knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Brinegar v. United States,* 338 U.S. 160, 68 S.Ct. 1302, 93 L.Ed. 1879 (1949); *State v. Riggsbee,* 85 N.M. 668, 515 P.2d 964 (1973); See *State v. Hilliard,* 81 N.M. 407, 467 P.2d 733 (Ct.App.1970). The question is whether the facts before the trial court were sufficient for that court to determine that probable cause existed for defendant's arrest. *State v. Deltenre,* 77 N.M. 497, 424 P.2d 782 (1966).

In addition to the foregoing evidence Officer Lundy testified he had been working in narcotics for approximately four years; that he had made numerous arrests in the area; that for the year prior to defendant's arrest he had spent almost every day in the area; that he was acquainted with many addicts and had discussed methods of carrying and hiding small quantities of narcotics. Based on all of the foregoing facts we hold the officers had reasonable grounds for belief in defendant's guilt and therefore had probable cause for the detention, and search and seizure which disclosed the heroin.

Having found that the officers had probable cause we need not discuss defendant's issue of "Stop and Frisk." With regard to the Motion for Continuance made at the trial, the record reflects that defendant filed his Motion for Disclosure one week prior to trial. After granting the motion three days before trial the district attorney disclosed the name of a polygraph examiner who had been investigating accusations by an informant against one of the witness officers. Defendant contends he was only able to speak with the polygrapher the morning of the trial and asked for the continuance in order to more properly prepare the defense to impeach the credibility of the officer.

The granting of a continuance is within the discretion of the court. Absent a showing of abuse of discretion the trial court's decision will stand. *State v. Belcher,* 83 N.M. 75, 488 P.2d 125 (Ct.App. 1971).

The defendant offered no explanation why he was unable earlier to be in touch with the polygrapher whose name was disclosed by the district attorney. The polygrapher testified as part of defendant's tender that his testing of the informant was inconclusive. The court granted defendant an opportunity to produce a further witness to complete his tender, but that witness was not brought in. Under these circumstances the court did not abuse its discretion in denying the Motion for a Continuance.

Oral argument is deemed unnecessary. The conviction is affirmed.

It is so ordered.

WOOD, C. J., and SUTIN, J., concur.

543 P.2d 834

STATE of New Mexico, Plaintiff-Appellee,

v.

Larry SMITH and Mel Smith, Defendants-Appellants.

No. 1989.

Court of Appeals of New Mexico.

Dec. 2, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Santa Fe, for defendants-appellants.

Toney Anaya, Atty. Gen., Mark Shoesmith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Both defendants were convicted of robbery. Section 40A–16–2, N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1973). Their appeals raise issues involving: (1) refusal of the trial court to allow alibi evidence; (2) continuing duty of disclosure; (3) cross-examination concerning juvenile offenses; and (4) refused instructions concerning evaluation of a witness's testimony.

Refusal to Allow Alibi Evidence

Rule of Criminal Procedure 32(a) provides that upon written demand of the district attorney detailing the place, date and time of the crime charged a defendant who intends to offer alibi evidence shall serve upon the district attorney a notice in writing of defendant's intention to claim an alibi. "Such notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi."

By letter dated January 31, 1975 defendants informed the district attorney that they would offer alibi evidence. Defendants did not, however, provide the specific information required by Rule of Criminal Procedure 32(a). The trial court refused to allow defendants to present evidence of alibi other than defendants' own testimony. The trial court's authority to exclude the alibi evidence is Rule of Criminal Procedure 32(c) which states: "If a defendant fails to serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the

purpose of proving an alibi, except the testimony of the defendant himself."

Defendants claim the exclusion of their alibi evidence was error for four reasons.

First, defendants assert the district attorney's written demand under Rule of Criminal Procedure 32(a) was deficient and, therefore, defendants were never required to supply alibi information to the district attorney. The district attorney filed in the district court on January 9, 1975 a demand for alibi defense information and a motion for disclosure under Rule of Criminal Procedure 28. As of January 9, 1975 neither of these documents were a written demand under Rule of Criminal Procedure 32(a) because there was no certificate of service and nothing showing defendants received these documents. On January 29, 1975 the district attorney wrote to defense counsel stating that a demand for alibi information had been filed and that there had been no response. This letter, by its reference to the demand filed on January 9, 1975, was a written demand.

The defense responded by the letter of January 31, 1975. In that letter counsel stated: "I am currently compiling a list of witnesses and a list of other items which may be introduced as evidence and will forward to you on completion." In addition, on January 13, 1975 the State responded to the defense request for disclosure by the government. That response identified the place, date and time of the crime charged.

In light of the foregoing, it is understandable that when the trial court was considering defendants' failure to disclose alibi information, no claim was made that the State's written demand was deficient. Such a claim was raised for the first time by a motion for new trial. We do not decide whether the sufficiency of the district attorney's written demand was waived because not raised until after trial. We do not do so because the record affirmatively shows that the defense was provided the information allegedly missing from the written demand. Defendants were not prejudiced by any technical deficiency in the demand. *State v. Quintana*, 86 N.M. 666, 526 P.2d 808 (Ct.App.1974); see *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct.App.1975).

Second, defendants contend that in precluding the testimony of an available alibi witness whose testimony would have been relevant to the defense "the trial court violated their rights to have compulsory process for the obtaining of witnesses in their favor and to due process of law."

Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) states: "* * * the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) held that Florida's alibi rule did not violate due process because the rule "* * * is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." New Mexico's alibi rule provides for reciprocal discovery rights and provides ample opportunity for an investigation of the facts. There is no claim to the contrary. The alibi rule does not violate due process.

The compulsory process claim was not decided in either *Wardius* or *Williams*. See *Wardius*, supra, footnote 4 and *Williams*, supra, footnote 14. Cases deciding this issue have found no violation of the right to compulsory process. The reasoning is that the alibi rule does not prevent a defendant from compelling the attendance of witnesses; rather, the rule provides reasonable conditions for the presentation of alibi evidence. *Rider v. Crouse*, 357 F.2d 317 (10th Cir. 1966); *State v. Dodd*, 101 Ariz. 234, 418 P.2d 571 (1966); *Commonwealth v. Vecchiolli*, 208 Pa.Super. 483, 224 A.2d 96 (1966); *State ex rel. Simos v. Burke*, 41 Wis.2d 129, 163 N.W.2d 177 (1968). Compare *Carlile v. Continental*

Oil Company, 81 N.M. 484, 468 P.2d 885 (Ct.App.1970) which held a constitutional guaranty of a right to trial by jury does not preclude the adoption of reasonable rules providing that a litigant is not entitled to a jury trial unless the litigant demands the jury trial within the time and in the manner specified by the rule. The alibi rule does not violate the constitutional right to have compulsory process for obtaining witnesses.

Rule of Criminal Procedure 32(c) does not require the exclusion of alibi evidence when the alibi rule has been violated; rather the court *may* exclude. Defendants' third claim under this issue is that "the most onerous possible sanction was applied arbitrarily and without adequate inquiry into the circumstances surrounding the violation of the notice of alibi rule."

The record shows the parties were given opportunity to present their contentions to the trial court and that after certain exhibits were admitted, attorneys for the parties argued to the court. The record does not show what was argued. This record does not show that the trial court proceeded arbitrarily or ruled without an adequate inquiry. The answer to this third claim is twofold: (1) the record does not support the contention made, and (2) the record does not show the contention was raised in the trial court. *State v. Wingate,* 87 N.M. 397, 534 P.2d 776 (Ct.App.1975); Rule 11 of the Rules Governing Appeals.

Characterizing the decision in *Williams v. Florida,* supra, as an emasculation of the Fifth Amendment, defendants nevertheless concede that the *Williams* decision holds that the alibi rule, in itself, does not violate the privilege against self-incrimination. Defendants' fourth contention under this issue is that in applying the alibi rule their privilege against self-incrimination was violated. Defendants assert that in excluding the alibi testimony of any witness other than the defendants, the trial court gave the defendants a choice of either taking the stand or foregoing the only defense they had. Defendants claim: "The effect of the trial court's ruling was to deprive the defendants of the choice whether or not to take the stand."

Williams v. Florida, supra, states that nothing in the alibi rule "requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice." Concerning the decision as to whether a defendant should testify, *Williams* states: "That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination." In applying the alibi rule the trial court did not violate defendants' privilege against self-incrimination. Compare, *State v. Duran,* 83 N.M. 700, 496 P.2d 1096 (Ct.App. 1972); *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)

Continuing Duty of Disclosure

During his cross-examination, defendant Larry Smith identified a letter he had written. When the district attorney sought admission of the letter into evidence, the defendant objected because the State had a continuing duty of disclosure and the letter had not been provided to the defense "prior to trial". The district attorney explained that he "just got it yesterday". The trial court overruled the objection and admitted the letter into evidence. The contents of the letter raise a serious question as to the truth of the alibi defense.

The State was under a continuing duty to disclose. Rule of Criminal Procedure 30 states alternative actions available to the trial court when the duty to disclose has been violated. The contention is that the trial court cannot properly exercise its discretion as to the alternatives without an adequate inquiry into the circumstances of the nondisclosure. Defendants claim the trial court did not make an adequate inquiry. They point out that the standard is whether a defendant has been prejudiced by the nondisclosure. *Chacon v. State,* su-

pra. They assert that without an adequate inquiry one cannot know whether a defendant has been prejudiced.

Defendants' arguments bottom on assertions not supported by the record. Their brief asserts that defendants were surprised; no such claim was made to the trial court. Their brief contends they were entitled to a continuance; none was sought. Defendants did not claim they did not know the contents of the letter; their objection was the letter was not provided prior to trial.

Defendants did not ask the trial court to conduct the "adequate inquiry" which they assert was required. Not having sought an inquiry by the trial court, we will not consider the appellate claim that the trial court's inquiry was inadequate. Rule 11 of the Rules Governing Appeals.

Cross-Examination Concerning Juvenile Offenses

Defendants claim the trial court erred in refusing to allow impeachment of Steve Ridley by evidence of juvenile offenses. Steve was a rebuttal witness. He testified that he saw his father and the defendants rob the victim. On cross-examination he testified that he had been picked up by the police on two occasions and "talked to" about the robbery. The police had also talked to Steve the morning of trial. Steve admitted that he had been in trouble for curfew violation, shoplifting, assault and battery. The defense then asked: "What was the disposition of that; what did the police do?" The district attorney objected that they were juvenile matters and not felonies. "They are not under the rule and he has admitted that he's been involved." The objection was sustained. Defense counsel stated he had "no more questions."

The district attorney's objection was on the basis of Rule of Evidence 609. The trial court's ruling was on the basis of that evidentiary rule. We do not consider whether *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) was applicable to the cross-examination because defendant did not claim that his right to cross-examine was being improperly restricted. Compare, *State v. Wilkins*, 88 N.M. 116, 537 P.2d 1012 (Ct.App.1975). The asserted improper limitation of cross-examination is raised for the first time on appeal and will not be considered. Rule 11 of the Rules Governing Appeals.

Refused Instructions Concerning Evaluation of Witness's Testimony

The trial court gave a general instruction on the credibility of witnesses. This instruction informed the jury that it was the sole judge of credibility and the weight to be given the testimony of a witness. This instruction stated that in determining the weight to be given to the testimony, the jury "should take into consideration" the interest of a witness in the result of the trial, the apparent fairness or bias of the witness, the reasonableness or unreasonableness of the story told by the witness and the facts and circumstances tending to corroborate or contradict the witness. Although not applicable to this case, U.J.I. Crim. 40.20 is a similar instruction.

Defendants assert that this general instruction was inadequate in that the phrase "take into consideration" did not sufficiently inform the jury how to evaluate the testimony of a witness who was induced to testify by a promise of immunity from further punishment or by a hope that he would be rewarded for his testimony. Defendants' requested instruction, which was refused, would have told the jury that any such promise or hope "is a strong impelling reason for the witness to color and fabricate his testimony, and that such testimony must be weighed with a great deal of care and circumspection." Defendants claim this requested instruction should have been given.

In considering this contention we do not consider an obvious conflict in the instruction given and the instruction refused. The general credibility instruction stated that the jury was the sole judge of credibility and that the jury determined the

weight to be given the testimony of any witness. The refused instruction contradicted this general instruction because it would have required the jury to consider the testimony of the particular witness as suspect and to weigh the testimony of the particular witness "with a great deal of care and circumspection."

In addition to the general instruction on credibility, the trial court instructed that: "The motives of an accomplice or co-conspirator in testifying, and the circumstances under which his testimony is given should be considered in determining how much weight and credibility his testimony should be given."

This instruction told the jury to consider the fact that the witness was an accomplice. Defendants assert that the instruction was inadequate because it did not tell the jury *how* to evaluate the accomplice's testimony. Defendants' requested instruction stated: "The testimony of an alleged accomplice must be weighted [sic] with great care and be scrutinized closely, carefully and cautiously. This testimony, which is subject to great suspicion, must be viewed with distrust and acted on only after due and careful deliberation." Defendants contend this requested instruction should have been given.

Again we note, but do not consider, the conflict between the general credibility instruction and the refused instruction.

State v. Turnbow, 67 N.M. 241, 354 P.2d 533, 89 A.L.R.2d 461 (1960) states that it is proper to instruct the jury to view the testimony with suspicion and receive it with caution. See also *State v. Baca,* 85 N.M. 55, 508 P.2d 1352 (Ct.App.1973). Defendants contend that since such an instruction would be *proper,* that they had a *right* to have their requested instructions given in this case. We disagree; the requested instructions were properly refused. Before discussing our reasons, we note: (1) decisions of the Tenth Circuit which tend to support defendants' argument do not reflect New Mexico law, and (2) the approach to instructions concerning witnesses in U.J.I.Crim. (admittedly not applicable to this case) is that instructions dealing with specific categories of witnesses should not be given unless required by statute or rule of court. See Committee Commentaries to Chapter 40, U.J.I.Crim.

Territory v. Meredith, 14 N.M. 288, 91 P. 731 (1907) is authority for holding that the requested instruction concerning an accomplice was properly refused. An issue in *Meredith* was that the court failed to instruct the jury on the law of accomplices. Holding there was no error, the opinion states:

> "* * * the court was not bound to give instructions on that point, beyond the general one that they, (the jury) were the sole judges of the weight of the evidence and the credibility of the witnesses, and that in passing on the credibility of any witness or the weight to be given to his testimony, they should consider the relationship of the parties, if any, and the interest which he may have in the result of the case."

State v. Massey, 32 N.M. 500, 258 P. 1009 (1927) is authority for holding that the requested instruction concerning promise of immunity or hope of reward was properly refused. In *Massey,* the requested instruction would have told the jury that the testimony of a sheriff who cooperated with the district attorney should be scrutinized and that the jury should determine whether the interest of the sheriff had influenced him to the extent it would affect his testimony. *Massey* held that the general instruction on credibility was sufficient for argument by counsel concerning the interest of the sheriff and that there was no error in refusing the requested instruction.

The requested instructions involved in *State v. Poich,* 34 N.M. 423, 282 P. 870 (1929) went to evaluation of the testimony of detectives. In holding that refusal of the requests was proper, the opinion states:

> "* * * there seems to be a difference of authority and practice as to the duty of the trial court to caution as to the testimony of informers. In this jurisdic-

tion it is * * * well understood that the jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony * * *." *There is no different rule for weighing the testimony of different classes of witnesses.* The jury should always consider bias, prejudice, or interest * * * . The only purpose of cautionary instructions is to point out, what counsel are at perfect liberty to argue, and what any intelligent juror will readily grasp, that the bias or interest, whatever it may be, detracts from credibility. * * *

"* * * [*W*]*e doubt if it would be proper to direct the jury as a matter of law to exercise greater care with respect to such testimony* * * *." (Our emphasis.)

From the above decisions we conclude: (1) there is no requirement that an instruction be given concerning weighing the testimony of particular categories of witnesses; (2) the validity of special instructions concerning the evaluation of certain witnesses is doubtful; and (3) the basic instruction on credibility of witnesses sufficiently instructs on witness evaluation. Recent Court of Appeals decisions are consistent with this approach. *State v. Mazurek,* 88 N.M. 56, 537 P.2d 51 (Ct.App. 1975); *State v. Myers,* 88 N.M. 16, 536 P. 2d 280 (Ct.App.1975).

The trial court did not err in refusing the requested instructions. So holding, we do not reach and, therefore, do not decide two additional matters. These are: (1) whether the type of instructions requested by defendants would be an improper comment under Rule of Evidence 105; and (2) whether *State v. Turnbow,* supra, is incorrect in stating that special instructions on credibility are proper.

Oral argument is unnecessary. The judgments and sentences are affirmed.

It is so ordered.

HENDLEY and HERNANDEZ, JJ., concur.

543 P.2d 1176

Walter PRINCE, Phil Foutz, Lawrence J. Stock, Karl G. Ashcroft, Jr., Raymond Comstock, Clarence H. Williams, Charles E. Beavers, John Brimhall and Bill Davie, Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF CENTRAL CONSOLIDATED INDEPENDENT SCHOOL DISTRICT NO. 22, Defendant-Appellee.

No. 10061.

Supreme Court of New Mexico.

Dec. 22, 1975.

Tansey, Rosebrough, Roberts & Gerding, Charles M. Tansey, Jr., Farmington, for plaintiffs-appellants.

Caton & Hynes, Byron Caton, Farmington, for defendant-appellee.

OPINION

McMANUS, Chief Justice.

The plaintiffs herein all reside in the Central Consolidated Independent School District No. 22 (District) in northern New Mexico. Plaintiffs brought suit against the District in San Juan County District Court asking, first, that the court set aside a school board election and determine that a six million dollar bond issue proposed was defeated because illegal votes were cast; and, second, that the court enter a declaratory judgment finding that the District could not legally construct or improve buildings on Indian reservation land neither owned by it nor under its exclusive jurisdiction. Defendant filed a motion to dismiss both claims. After a hearing, the court granted the motion to dismiss the first claim and denied the motion as to the second claim. Trial was then held on the second claim and judgment was entered in favor of the District. Plaintiffs appeal from the court's order dismissing the first claim, and from the judgment entered in favor of the District on the second claim. We affirm.

The District in which the general obligation bond issue was passed contains land both on and off the Navajo reservation, though entirely within New Mexico. Approximately two-thirds of the pupils in the District are Indian children who reside on the reservation. In accordance with the provisions of the New Mexico Enabling Act, which is embodied in article XXI of the state constitution, and also in accord-

ance with the interpretation of our Enabling Act by the United States Supreme Court in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973), the lands within the Navajo Reservation are not subject to the taxes of New Mexico. The appellants argue that the Indian citizens who reside on this nontaxable land should not have been allowed to vote in the District bond election since they do not share the burden of repayment of the indebtedness created by the issuance of the bonds. In effect, they contend that there should be no representation without taxation.

In support of this argument, the appellants cite N.M.Const. art. IX, § 11, which provides:

> "No school district shall borrow money except for the purpose of erecting, remodeling, making additions to and furnishing school buildings or purchasing or improving school grounds or any combination of these purposes, and in such cases *only when the proposition to create the debt has been submitted to a vote of such qualified electors of the district as are owners of real estate within the school district and a majority of those voting on the question have voted in favor of creating such debt.* No school district shall ever become indebted in an amount exceeding six per cent [6%] on the assessed valuation of the taxable property within the school district as shown by the preceding general assessment." (Emphasis added.)

On four separate occasions the U. S. Supreme Court has declared unconstitutional similar statutory schemes restricting the franchise to property owners as violative of the equal protection clause. *Hill v. Stone,* 421 U.S. 289, 95 S.Ct. 1637, 44 L. Ed.2d 172 (1975); *Phoenix v. Kolodziejski,* 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970); *Cipriano v. City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); *Kramer v. Union School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969). In addition, the Supreme Court of New Mexico has specifically declared this provision in our state constitution to be violative of the equal protection clause of the United States Constitution. *Board of Education of Vil. of Cimarron v. Maloney,* 82 N.M. 167, 477 P.2d 605 (1970). The only issue concerning this state constitutional provision which remains to be resolved here is whether the state has a compelling interest to exclude the reservation residents from the bond election and should, therefore, have excluded them. We look to the various U. S. Supreme Court cases cited above to answer this question.

In *Phoenix v. Kolodziejski,* supra, the City of Phoenix, Arizona, held an election to authorize the issuance of $60,450,000 in general obligation bonds as well as certain revenue bonds. The general obligation bonds were to be issued to finance various municipal improvements. Pursuant to an Arizona constitutional provision, only otherwise qualified voters who were also real property taxpayers were permitted to vote on these bond issues. In *Phoenix v. Kolodziejski,* supra, 399 U.S., at 212–13, 90 S.Ct. at 1995, it was stated:

> "We thus conclude that, although owners of real property have interests somewhat different from the interests of nonproperty owners in the issuance of general obligation bonds, there is no basis for concluding that nonproperty owners are substantially less interested in the issuance of these securities than are property owners. That there is no adequate reason to restrict the franchise on the issuance of general obligation bonds to property owners is further evidenced by the fact that only 14 States now restrict the franchise in this way; most States find it possible to protect property owners from excessive property tax burdens by means other than restricting the franchise to property owners. The States now allowing all qualified voters to vote in general obligation bond elections do not appear to have been significantly less successful in protecting property values

and in soundly financing their municipal improvements. Nor have we been shown that the 14 States now restricting the franchise have unique problems that make it necessary to limit the vote to property owners. We must therefore affirm the District Court's declaratory judgment that the challenged provisions of the Arizona Constitution and statutes, as applied to exclude nonproperty owners from elections for the approval of the issuance of general obligation bonds, violate the Equal Protection Clause of the United States Constitution. (Footnote omitted.)"

Our own New Mexico case, *Board of Education of Vil. of Cimarron v. Maloney,* supra, involved a special school bond election for the purpose of voting on the question of whether the school district there involved should create a debt by issuing its general obligation bonds in the sum of $97,000 for the purpose of erecting, furnishing, remodeling and making additions to school buildings.

The vote was in favor of the issuance of the bonds. When the Board of Education sought a certification of approval from the attorney general, it was refused on the grounds that there was no showing that a majority of the then owners of real estate within the school district had voted in favor of creating the general obligation bond debt as required by N.M.Const. art. IX, § 11. This court granted the petition of the Board of Education for a writ of mandamus requiring the attorney general to approve the bond issue. Citing *Phoenix v. Kolodziejski,* supra, as controlling, the court stated, in *Board of Education of Vil. of Cimarron v. Maloney,* supra:

"The Supreme Court of the United States has considered the very same question now before this court and has declared that a provision in a state constitution, which only allows owners of real estate to vote on the question of creating a debt through the issuance of bonds, is unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States." 82 N.M. at 167, 477 P.2d at 607.

The United States Supreme Court applied this same reasoning in the case of *Kramer v. Union School District,* supra, which involved a New York law providing that in order to be eligible to vote in certain school district elections, an otherwise qualified district resident had to be (1) the owner or lessee of taxable real property located in the district, (2) the spouse of one who owns or leases qualifying property, or (3) the parent or guardian of a child enrolled for a specified time during the preceding year in a local district school. The court held that law violated the equal protection clause of the fourteenth amendment to the U. S. Constitution because such a classification permitted inclusion of many persons who had only a remote and indirect interest in school affairs, and excluded others who had a distinct interest in school district affairs. The court went on to say:

"Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. * * *" 395 U.S. at 626–27, 89 S.Ct. at 1889–1890 (1969).

As recently as May, 1975, the United States Supreme Court held unconstitutional a Texas statute that limited voting on local bond issues to persons who had "rendered" (i. e. listed) real, mixed or personal property with the local tax assessor-collector for taxation in the election district in the year of the election. *Hill v. Stone,* supra. Referring to *Phoenix v. Kolodziejski,* supra; *Kramer v. Union School*

District, supra, and *Cipriano v. City of Houma,* supra, the court stated:

> "The basic principle expressed in these cases is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest." 95 S.Ct. at 1643.

We conclude that, as in *Kramer v. Union School District,* supra, the election involved in this case was one of general rather than special interest. The State of New Mexico had no compelling interest in the exclusion of Reservation residents from the district bond election, and properly included them. The parents of the children who live on the Reservation have a distinct interest in the district affairs.

We also conclude that art. IX, § 11, of our state constitution violates the equal protection clause of the U. S. Constitution by restricting the right to vote in school district bond elections to real estate owners. Likewise, that section of our statutes which implements art. IX, § 11, of our constitution, § 77-15-2, N.M.S.A.1953, conflicts with the equal protection clause of the U. S. Constitution insofar as it restricts the franchise in school district bond elections to real estate owners or to those who have paid a property tax on property in the school district for the preceding year. Both attempted restrictions on the franchise are unconstitutional and must fall.

While the above considerations are determinative of the issue, there is another observation which should be made in response to appellants' claim that they will be liable for the retirement of a six million dollar bond issue despite the fact that many of the schools to be constructed and maintained with the proceeds of the bond issue will be built on the Reservation. While it is true that the Reservation Indians in the District do not pay any property taxes, it is not true that the off-Reservation property owners pay the bulk of the District taxes which will be used to repay the bonds.

The appellants and appellee stipulated to the fact that the bonds will be repaid from taxes on both taxable real and taxable personal property in the District. They further stipulated that the valuation of the District's property is as follows:

A. Corporate Property	
Arizona Public Service	$ 38,632,981.00
Salt River Project	5,484,230.00
Southern California Edison	26,040,794.00
Tucson Electric	9,755,130.00
El Paso and other corporate	38,284,000.00
Production Equipment	619,405.00
	$118,816,540.00
B. Non-Corporate Property	
Valuation of fee land and non-corporate personal property	3,470,427.00
Total	$122,286,967.00
Corporate property in District	97%
Non-corporate property and fee land	3%

Not all of this corporate property is located on the Navajo Reservation, but most of it is. Those corporations which do have property located on the Reservation lease their land from the Navajo tribe. The land itself is not taxable property, but the corporate buildings and equipment on the leased land are assessed and taxed by the San Juan Board of County Commissioners as taxable personal property. Thus much of the money which will be used to repay the bond debt will be derived from corporations that lease Navajo Reservation lands.

Appellants argue that the Navajo Reservation Indians will not share, either directly or indirectly, in the burden of repaying the bond debt. In support of this argument appellants cite that part of the New Mexico Enabling Act which is contained in art. XXI, § 2 of the State Constitution, and *McClanahan v. Arizona State Tax Comm'n.,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). This argument raises but fails to articulate the main issue which

is whether the tax imposed by the State of New Mexico on the property of corporations leasing land on the Reservation from the Navajo tribe is somehow precluded by the New Mexico Enabling Act and *McClanahan,* supra.

Article XXI, § 2 of the New Mexico Constitution provides:

> "The people inhabiting this state do agree and declare that they forever disclaim all right and title * * * to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; * * * [and] that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; * * *."

This section of our constitution clearly precludes the state from taxing Indian lands and Indian property on the reservation. In *McClanahan,* supra, the U. S. Supreme Court interpreted an identical provision in the Arizona Constitution as prohibiting the State of Arizona from imposing its personal income tax on a Reservation Indian whose entire income derived from Reservation sources. Neither that section of the New Mexico Enabling Act quoted above, nor the *McClanahan* case, supra, would prevent the State of New Mexico from imposing a tax on the property of non-Indian corporations leasing land from the Navajo tribe, despite the fact that the property might be located on the Reservation. The land itself cannot be taxed, but the non-Indian property can, because such property does not belong to, nor may it be acquired by the United States or reserved for its use. It is private property owned by non-Indians who are not performing a federal function. It is subject to the taxing powers of this state. Private non-Indian corporations cannot escape their obligation to pay state taxes by locating their property on Indian reservations. Nothing that the U. S. Supreme Court has ever held would imply such an absurd result, nor is there any federal statute or treaty which forbids the imposition of such a tax, since it does not in any way infringe on the right of reservation Indians to make their own laws and be ruled by them. See *Mescalero Apache Tribe v. Jones,* supra; *Oklahoma Tax Comm'n. v. Texas Co.,* 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949); *United States v. Rickert,* 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903); *Thomas v. Gay,* 169 U.S. 264 (1885); *Agua Caliente Band of Mission Ind. v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972); *Norvell v. Sangre de Cristo Development Company, Inc.,* 372 F.Supp. 348 (D.N.M.1974). Cf. *United States v. City of Detroit,* 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958).

For all of these reasons the district court was correct in dismissing plaintiff's first cause of action, and we affirm that dismissal.

The second point upon which the appellants rely is that the District has no authority to apply the proceeds obtained from the issuance of the bond towards the construction and maintenance of school buildings on the Navajo Reservation. Appellants argue that art. XII, § 3, of the New Mexico Constitution precludes school districts from building and maintaining schools on lands located on the Navajo Reservation and leased from the Navajo tribe. That section of our constitution provides:

> "The schools, colleges, universities and other educational institutions provided for by this Constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands

granted to the state by Congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university."

The purpose of this section of our constitution is to insure exclusive control by the state over our public educational system, and to insure that none of the state's public schools ever become sectarian or denominational. Were the state public schools to become sectarian, or even overly controlled by sectarian influences, that might well be violative of the first amendment to the U. S. Constitution which prohibits Congress and, through the fourteenth amendment, the states, from making any law respecting an establishment of religion, or prohibiting the free exercise thereof. See *Lemon v. Kurtzman,* 403 U. S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); *Engel v. Vitale,* 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); *Zellers v. Huff,* 55 N.M. 501, 236 P.2d 949 (1951).

However, even assuming that art. XII, § 3, N.M.Const., would apply to the situation here, we see no reason to doubt that any schools built by this state on leased lands shall remain under the exclusive control of the state for so long as the term of the lease. We interpret "control" to mean control over the curriculum, disciplinary control, financial control, administrative control and, in general, control over all of the affairs of the school. The fact that some of the schools to be constructed from the proceeds of the bond issue will be located on Reservation lands leased from the Navajo tribe will not prevent the state from exercising exclusive control over such schools.

The District does not deny that a substantial portion of the proceeds from the bond issue would be used to construct and maintain schools located on Reservation lands leased from the Navajo tribe. In fact, they offered into evidence at the trial a fifty-year lease with a fifteen-year option between the District and the Navajo tribe relating to a certain piece of property on the Reservation on which the District intends to build a new elementary school. The lease has been approved by the Secretary of the Interior as required by 25 U.S. C. § 415 (1970) which allows the Navajo tribe to lease land on their Reservation for educational purposes for a term not to exceed ninety-nine years. The District also introduced evidence that the useful life of a school building as established by the State Board of Education is thirty years.

The appellants argue that the District will be precluded from exercising exclusive control over the schools because they will be built on land leased rather than owned by the District. We disagree. See *Harris v. Keehn,* 25 N.M. 447, 451, 184 P. 527, 529 (1919), where the court said:

"[A] tenant in possession has the right to such possession against the world during the continuance of his lease and may maintain an action for damages for the disturbance or deprivation of such possession. * * *"

See also *White v. Board of Education of Silver City,* 42 N.M. 94, 75 P.2d 712 (1938).

In addition, the District offered into evidence four other leases between the District and the Navajo tribe for Reservation lands, on which schools are presently located. Unlike the situation here, those schools were built primarily with federal funds rather than bond proceeds. After reviewing these leases, as well as the other evidence introduced concerning them, the trial court found that the Board of Education "as an agent of the State of New Mexico has such exclusive control of the school system throughout the District as required by the Constitution and Laws of the State of New Mexico." In our opinion, that finding of fact was amply supported by the evidence introduced at the trial.

The United States Supreme Court summarized its various decisions concern-

ing the states' power and jurisdiction on Indian reservations in the following way:

> "The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. * * *"

Mescalero Apache Tribe v. Jones, supra. We fail to see how Navajo tribal self-government, or the rights granted or reserved by federal law would be in conflict with the state's operation and exclusive control of the schools located on Reservation lands leased by the District with the approval of both the Navajo tribe and the Secretary of the Interior.

In fact, our impression is that it has long been the policy of the federal government to encourage and support the states in providing public education to Indian children, whether they live on or off a reservation. By 25 U.S.C. § 231 (1970), Congress authorized the Secretary of the Interior to permit the states "to enforce the penalties of State compulsory school attendance laws against Indian children, and parents, * * *." The tribe must, however, first adopt a resolution consenting to such enforcement.

In this connection we quote from 10 Navajo Tribal Code, § 103 (1969), as follows:

> "The Tribal Council consents to the application of state compulsory school attendance laws to the Indians of the Navajo Tribe and their enforcement on Indian lands of the Navajo Indian Reservation wherever an established public school district lies or extends within such Reservation."

Through the years, Congress has also provided substantial financial assistance to state and local educational agencies for the purpose of educating Indians, such as: Impact Aid funds, granted pursuant to 20 U.S.C. §§ 236–40 (1970), to compensate the local agency for the tax loss it suffers due to the non-taxable Indian lands in the district; Johnson-O'Malley funds, granted pursuant to 25 U.S.C. § 452 (1970), to be expended for the education (and other needs) of Indians in the state; Title I (of the Elementary and Secondary Education Act) funds, granted pursuant to 20 U.S.C. § 241a et seq. (1970), to assist local educational agencies serving areas with concentrations of children from low-income families; "Public Law 815" funds, granted pursuant to 20 U.S.C. § 644 (1970), to assist those local educational agencies which suffer "impairment in financing abilities created by immunity from taxation of Indian lands," in the cost of constructing schools; and Emergency School Aid Act funds, granted pursuant to 20 U.S.C. §§ 1601–19 (Supp. II, III 1973), to provide financial assistance to local educational agencies to eliminate or prevent minority group (specifically including Indians) isolation and to improve the quality of education for all children.

In accordance with these programs, school districts in New Mexico containing concentration of Reservation and non-Reservation Indians have applied for and received millions of dollars of assistance in providing public education to Indian children. See *Natonabah v. Board of Ed. of Gallup-McKinley Cty. Sch. D.,* 355 F.Supp. 716 (D.N.M.1973); NAACP Legal Defense & Education Fund, An Even Chance (Jan. 1971).

A further indication of the Congressional policy of encouraging New Mexico to provide public education to all of its citizens, including Indians, is that part of the state's enabling act which orders that "provision shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control, * * *." Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557.

The New Mexico Constitution recites this promise in two separate places: N.M. Const. art. XII, § 1, and N.M.Const. art. XXI, § 4. Other states with similar con-

stitutional provisions have concluded that Indian children are entitled to attend state public schools, even though Indian or federal schools might also be available in the same district. *Jones v. Ellis,* 8 Alaska 146 (1929); *Piper v. Big Pine School Dist. of Inyo County,* 193 Cal. 664, 226 P. 926 (1924); *Grant v. Michaels,* 94 Mont. 452, 23 P.2d 266 (1933); *Crawford v. District School Board for School Dist. No. 7,* 68 Or. 388, 137 P. 217 (1913).

We recognize that the federal government, in compliance with its treaty obligations to the Navajo Tribe, has a duty to provide for education and other services needed by Indians. See *Warren Trad. Post Co. v. Arizona State Tax Com'n.,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). In the instant case, we need not decide whether the federal government or the State of New Mexico has the primary responsibility to provide education for the Navajo children. It is only necessary to acknowledge that under our state constitution we have some responsibility, without deciding that it is exclusively one belonging to our state.

In order to provide public schools for the Reservation children, the District has built and maintained schools on the Reservation for many years. In fact, approximately 4,100 of the 5,400 District students presently attend schools located on the Reservation. Were these children to be bused to schools located off the Reservation, as the appellants urge, some of them would be making a 150-mile round trip each day. As this court has previously stated:

> "If the districts are made so large that school children are unable to make the trip to school and back home each day, then they would be denied a free school just as effectively as if no school existed."

Strawn v. Russell, 54 N.M. 221, 219 P.2d 292 (1950). Furthermore, were we to hold in favor of the appellants, the District would be required to make provisions off the Reservation for these 4,100 students who presently attend schools on the Reservation.

The Navajo Tribe has also supported State public education as shown in 10 Navajo Tribal Code (adopted 1969), which provides as follows:

> "(a) No rent shall ever be charged or accepted for withdrawals, permits, or leases of tax exempt Tribal land used primarily for school or other legitimate educational purposes; provided, that Navajo children or adults be admitted without discrimination to schools or other educational activities conducted on such lands.
>
> "(b) Such withdrawals, permits, or leases shall expressly provide that they are rent-free in consideration of the tax-exempt status of the Tribal land embraced within them and other Navajo Tribal land in the same state, and that rent on the land embraced must be paid at the reasonable appraised rental value, but at not less than $10 per acre annually, whenever any Tribal land in the same state as withdrawal, permit, or lease ceases to be tax exempt."

The judgment of the trial court will be affirmed.

It is so ordered.

STEPHENSON and MONTOYA, JJ., concur.

543 P.2d 1185

Edgar C. BELL and Steve L. Bell, Plaintiffs-Appellants,

v.

Karl WEINACKER and American Family Life Assurance Company of Columbus, Georgia, Defendants-Appellees.

No. 1938.

Court of Appeals of New Mexico.

Nov. 25, 1975.

Robert K. Patten, William N. Henderson, Gallagher, Ruud & Casados, Albuquerque, for plaintiffs-appellants.

James P. Houghton, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendants-appellees.

OPINION

WOOD, Chief Judge.

Plaintiffs sought relief against defendants in connection with an insurance policy issued by Assurance Company (American Family Life Assurance Company). The trial court granted summary judgment for defendants. Plaintiffs' appeal attacks the propriety of summary judgment as to each of the four theories stated in the complaint. They are: (1) recovery on the policy, (2) waiver of a policy provision, (3) estoppel to prevent reliance on a policy provision, and (4) fraud in selling the policy.

Assurance Company issued two policies of "cancer care" insurance. One was an individual policy to Steve. The other was a family policy to Edgar, the father of Steve. Steve submitted a claim for benefits under his individual cancer care policy. Assurance Company paid benefits pursuant to this claim. Plaintiffs allege that Assurance Company has refused to pay benefits (on the basis of Steve's cancer) under Edgar's family policy. On the record before us, it is a disputed issue of fact whether Steve was covered under Edgar's family policy. Assuming such coverage, defendants contend that summary judgment was proper as a matter of law as to each of plaintiffs' theories. See *Worley v. United States Borax and Chemical Corp.*, 78 N.M. 112, 428 P.2d 651 (1967).

Recovery on the Policy

Both policies have an "other insurance" clause. It provides:

"Insurance effective at any one time on the insured under a like policy or policies in this insurer is limited to the one such policy elected by the insured, his beneficiary or his estate, as the case may be, and the insurer will return all premiums paid for all other such policies."

Section 58-11-5(3), N.M.S.A.1953 (Repl. Vol. 8, pt. 2) authorizes the use of such a policy provision. Apart from statutory authority, such a provision is not against public policy. *Gibson v. Metropolitan Life Insurance Company*, 213 Kan. 764, 518 P.2d 422 (1974).

Plaintiffs do not claim the policy provision is invalid. They assert there was a difference between the policies and therefore the "other insurance" clause does not apply. The only difference in the policies shown in this record is type of coverage. One was an individual policy and one was a family policy, but the provisions of the two policies are identical. There is no issue of fact as to whether the two policies were "like" policies under the "other insurance" provision.

The "other insurance" provision barred recovery for Steve's cancer under Edgar's policy. The summary judgment on this issue is affirmed.

Waiver, Estoppel and Fraud

The uncontradicted showing is that Weinacker is an insurance agent licensed by New Mexico and authorized by Assurance Company "to sell" cancer care coverage on behalf of Assurance Company. There is no showing in the record as to the meaning of "to sell". It is uncontradicted that Weinacker took Edgar's application for cancer care coverage, processed the applications of both Edgar and Steve and mailed both applications to Assurance Company. There is a factual dispute as to whether Weinacker or another insurance agent took Steve's application for cancer care coverage.

Plaintiffs assert that Weinacker knew of the "other insurance" provision in the two policies, that by his actions in selling two

policies with a provision allowing Steve to recover only under one policy the defendants either waived the "other insurance" provision, or were estopped to rely on it, or committed fraud in selling policies containing the provision.

We emphasize that each of these three theories rely on the conduct of Weinacker in selling the policies. Defendants assert that plaintiffs' showing in connection with these theories is insufficient to defeat the summary judgment motion. This argument is not pertinent unless defendants make a prima facie showing that they were entitled to summary judgment. *Steadman v. Turner,* 84 N.M. 738, 507 P.2d 799 (Ct. App.1973).

An insurance agent can waive policy provisions. *Pribble v. Aetna Life Insurance Company,* 84 N.M. 211, 501 P.2d 255 (1972). An insurance company may be estopped to rely on policy provisions. *Homestead Invest., Inc. v. Foundation Reserve Ins. Co.,* 83 N.M. 242, 490 P.2d 959 (1971). Whether there was a waiver or an estoppel depends on the facts. *State Farm Mutual Automobile Ins. Co. v. Gonzales,* 83 N.M. 296, 491 P.2d 513 (1971). Defendants made a prima facie showing, in its affidavits, of no waiver and of no estoppel. This showing is based on an alleged meeting with Edgar four days subsequent to the applications for insurance. Edgar's affidavit is that no such meeting occurred. The date of this disputed meeting is prior to the time the applications were mailed to Assurance Company, and, thus, are pertinent to the "selling" of the insurance. Since there is an issue of fact as to whether the meeting occurred, defendants were not entitled to summary judgment on the issues of waiver and estoppel. Summary judgment as to those issues is reversed.

We do not reach the question of the sufficiency of defendants' showing on the fraud claim because that claim is insufficient to state a basis for relief. Section 21–1–1(9)(b), N.M.S.A.1953 (Repl. Vol. 4) requires that the circumstances constituting fraud shall be stated with particularity. This requirement is satisfied if the facts alleged are facts from which fraud will be necessarily implied. *Romero v. Sanchez,* 83 N.M. 358, 492 P.2d 140 (1971). The requirement is also satisfied if the allegations leave no doubt in the defendants' minds as to the claim asserted against them. *Maxey v. Quintana,* 84 N.M. 38, 499 P.2d 356 (Ct.App.1972). The claim is that the conduct of Weinacker in selling two policies, each of which contained an "other insurance" provision, amounted to fraud. Fraud will not necessarily be implied from such an allegation and the allegation does not inform defendants of the claim asserted against them. For the elements of fraud, see *Prudential Insurance Company of America v. Anaya,* 78 N.M. 101, 428 P.2d 640 (1967). The claim of fraud is insufficient. Compare *Steadman v. Turner,* supra. Accordingly, we do not reach the issue of the sufficiency of the facts. Upon remand, plaintiffs are given leave to amend the claim of fraud.

The cause is remanded with instructions to enter a new judgment as follows: (a) enter summary judgment in favor of defendants on the claim based on Edgar's policy; (b) deny the summary judgment on the claims of waiver and estoppel; and (c) give plaintiffs leave to amend the claim of fraud.

It is so ordered.

SUTIN and HERNANDEZ, JJ., concur.

543 P.2d 1188

STATE of New Mexico, Plaintiff-Appellee,

v.

Victor Marcelino MATA, Defendant-Appellant.

No. 2146.

Court of Appeals of New Mexico.
Nov. 25, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Donald Klein, Jr., Associate Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Don Montoya, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant's conviction was affirmed in *State v. Mata,* 86 N.M. 548, 525 P.2d 908 (Ct.App.1974). He now appeals from a denial of post-conviction relief. His motion for relief was filed in February, 1975 and therefore is not subject to Rule of Criminal Procedure 57.

Five of the six claims for relief were either answered or could have been raised in the direct appeal. They will not be considered further. *State v. Gillihan,* 86 N.M. 439, 524 P.2d 1335 (1974).

One claim requires discussion. It is that defendant is entitled to a new trial as a matter of law because when defendant was tried, his former defense attorney was an employee of the district attorney's office which prosecuted the case. After an evidentiary hearing the trial court ruled that this claim did not provide a basis for relief. We agree.

State v. Chambers, 86 N.M. 383, 524 P. 2d 999 (Ct.App.1974) held, in a similar situation, that the district attorney's office was disqualified from prosecuting the case. No claim was made in *Chambers* that the attorney had divulged any privileged communications. The decision was based on the appearance of unfairness which resulted from the former defense attorney becoming a member of the prosecutor's staff. Other decisions concerned with an appearance of conflicting interests are *State v. Hill,* 88 N.M. 216, 539 P.2d 236 (Ct.App. 1975) and *State v. Aguilar,* 87 N.M. 503, 536 P.2d 263 (Ct.App.1975).

The concern for the appearance of unfairness has been met in this case. The trial court conducted an evidentiary hearing. The court's findings, which are unchallenged, are: 1. Attorney Kelly was ap-

pointed to represent defendant and did represent him at his preliminary hearing July 13, 1972 and at arraignment July 24, 1972. 2. Kelly was employed as an assistant district attorney August 16, 1972. 3. Kelly was relieved as defense attorney August 23, 1972 and, on the same date, attorney Young was appointed to represent defendant. 4. Kelly never discussed the case with the district attorney or any of the district attorney's assistants or employees. 5. Kelly had nothing to do with the trial of defendant's case, never entered the courtroom when the case was tried, never talked or consulted with the prosecutor and lent no assistance in the prosecution. The record in the direct appeal shows Young represented defendant at trial. The appearance of unfairness is dissipated by the above facts.

Defendant's claim was not raised either at trial or on appeal. Compare the time when the issue was raised in *Chambers, Hill* and *Aguilar, supra.* The unchallenged finding is that at no time "until April 28, 1975, did the Defendant or any of his last five (5) attorneys raise any question or issue concerning the District Attorneys [sic] office of the Sixth Judicial District prosecuting the trial of this case on October 25, 1972."

Defendant asserts it is of no moment that he raises a stale claim. He relies on *Young v. State,* 177 So.2d 345 (Ct.App. Fla.1965). *Young* held: (1) if in fact the prior defense attorney did confer with Young, it would be fundamental error because the attorney prosecuted defendant at his trial; (2) there should be an evidentiary hearing to determine whether the attorney had in fact conferred with Young; and (3) the issue was not waived by the fact that Young did not appeal his conviction.

We agree with *Young, supra,* to the extent it required an evidentiary hearing. We do not apply *Young* on the issue of a stale claim because it does not state New Mexico law. *State v. Gillihan, supra,* points out that post-conviction proceedings cannot be utilized as a substitute for an appeal or as a means for correcting errors which occurred during trial; that this is true even though the claimed errors relate to constitutional grounds and that these rules apply with even greater force when an issue in a post-conviction proceeding was not raised on direct appeal.

What we have here is a stale claim. That claim is not based on any unfairness in the proceedings against defendant. Rather the claim is based on an appearance of unfairness. That appearance was shown to be untrue in an evidentiary hearing. The trial court properly denied post-conviction relief.

Oral argument is unnecessary. The order denying relief is affirmed.

It is so ordered.

HENDLEY and HERNANDEZ, JJ., concur.

543 P.2d 1189

STATE of New Mexico, Plaintiff-Appellee,

v.

Jay Lee WATKINS, Defendant-Appellant.

No. 1990.

Court of Appeals of New Mexico.
Oct. 21, 1975.
Rehearing Denied Nov. 3, 1975.
Certiorari Denied Dec. 5, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Donald Klein, Jr., Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Mark Shoesmith, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of conspiracy to commit burglary and burglary, defendant appeals. Sections 40A–28–2 and 40A–16–3, N.M.S.A. 1953 (2d Repl.Vol. 6).

Defendant asserts he cannot be convicted of both crimes because they are in effect either the same crime or are so similar that multiple convictions are prohibited. We need not discuss defendant's various theories because the contention ignores the facts. The evidence is that the conspiracy was entered on the evening of November 16th and the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p. m. of that day. The evidence is that the burglary was performed between 9:00 and 9:30 a. m. of November 17th. The evidence is of two distinct crimes. There is no factual basis for the contention. See *State v. Woods,* 85 N.M. 452, 513 P.2d 189 (Ct.App.1973).

Defendant claims the trial court erred in refusing to instruct the jury on the defense of drug intoxication. See *State v. Nelson,* 83 N.M. 269, 490 P.2d 1242 (Ct.App.1971). There is evidence that defendant used demerol on the evening of November 16th, but no testimony as to the amount used or when it was used. Defendant is characterized as "stoned" or "high" but the only evidence explaining these conclusions is that he could not walk or communicate "too good". "I just had to lay down and take it easy." Defendant says he went to sleep and awoke the next morning at 4:00 a. m. "and did some more drugs", that at 6:00 or 6:30 a. m. he was "getting high". Defendant stated he was "high" when he left the house en route to the burglary. There is no evidence of what drug was taken or the amount. The evidence of the effect of the unspecified drugs, taken in the morning, does not support defendant. He claimed he drove the car on one errand before driving to the scene of the burglary and climbed a pipe to the roof of the burglarized store with the intention of warning his comrades about the presence of the police.

This evidence was vague and was insufficient to raise a jury question as to drug intoxication in connection with either crime. Compare, *State v. Gutierrez,* 88 N.M. 448, 541 P.2d 628 (Ct.App.), decided October 7, 1975. Contrast, *State v. Crespin,* 86 N.M. 689, 526 P.2d 1282 (Ct.App. 1974).

Oral argument is unnecessary. The judgment and sentence are affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

544 P.2d 278

RIDGE PARK HOME OWNERS, William and Sarah Jane Blackstad, et al., Plaintiffs-Appellants,

v.

Dennis S. and Patricia J. PENA, Defendants-Appellees.

No. 10265.

Supreme Court of New Mexico.

Nov. 17, 1975.

As Amended Dec. 5, 1975.

Branch & Branch, Turner W. Branch, Albuquerque, for plaintiffs-appellants.

Rodey, Dickason, Sloan, Akin & Robb, Gene C. Walton, Albuquerque, for defendants-appellees.

OPINION

SOSA, Justice.

This is a case involving building and use restrictions in a subdivision and concerns the effect of amending restrictive covenants of that subdivision. Plaintiffs-appellants filed an action in the district court of Bernalillo County to enjoin the construction of a drug store and physician's office on two lots in the Ridge Park Addition subdivision in Albuquerque. The lots in question were subject to residential restrictions of record that forbade such construction.

After granting a preliminary injunction, in a subsequent hearing the district court ruled that the restrictions had been amended by a vote of the majority of the owners in the Ridge Park Addition, and that such amendment allowed the construction of the drug store and physician's office on the two lots, and found that the objection was moot. From the dismissal of the complaint and their request for a permanent injunction, the plaintiffs appeal.

Since the amendment relieved only a small portion of the residential lots from the residential restrictions, changing them to multiple dwelling or commercial, it altered the existing restrictions to less than all of the property in the subdivision. The plaintiffs urge for reversal that the district court erred as a matter of law in upholding such amendment. We agree. This issue being dispositive of the appeal, we do not need to reach the other points raised by the appellants.

Building and use restrictions for the Ridge Park Addition were filed with the county clerk of Bernalillo County on January 18, 1951. The Ridge Park Addition to the city of Albuquerque provided for both a commercial and a residential area. The restrictions provided that all lots in all blocks would be used for residential, single dwelling purposes, except for blocks 4 and 9 which could be commercial or residential. Subsequent to the filing of the building and use restrictions, the city of Albuquerque zoned the two lots in question, lots 9 and 10 of block 8 (among others) as commercial, although these two lots were covered with the residential restrictive covenants. The general rule is that zoning ordinances if less stringent do not diminish the legal effect of more restrictive private building restrictions, and the rezoning of property for purposes other than residential does not supersede the original plat restrictions so as to prevent the enforcement of such restrictions. *Kosel v. Stone*, 146 Mont. 218, 404 P.2d 894 (1965); 20 Am.Jur.2d Covenants, Conditions, and Restrictions § 277 at 837–41 (1965).

Since the zoning did not abrogate the restrictive covenants, defendants assert that the consent of a majority of the owners of all of the lots in the Ridge Park Addition to the changing of lots 9 and 10 in block 8 from residential to commercial abrogated those covenants with respect to the two lots. The method for amending the restrictive covenants was contained in Provision VI of the restrictions which provided as follows:

> 1. All protective covenants herein shall apply to and be binding upon all parties to this agreement, and their successors in interest, from the date of recording of this agreement with the County Clerk of Bernalillo County, State of New Mexico, for a period of twenty years and shall run with the land. At the expiration of twenty years said covenants shall be extended automatically for successive ten year periods unless a majority of the then owners of the lots vote to alter or eliminate said covenants.

The twenty year period had expired at the time the vote was taken. Passing by

approximately an 85% majority, the amendment allowed all lots zoned C-1 by the city to be taken out of the residential restrictions and put under the business restrictions section of the subdivision agreement. The dissenting minority consisted mostly of the individuals living near and around the lots subject to the amendment.

The issue is whether the majority (or whatever percentage is required by an agreement) can amend or delete restrictive covenants on fewer than all lots subject thereto. Absent a specific provision in the agreement stating otherwise, we hold that the requisite vote cannot change the applicability of restrictive covenants to a few of the lots; the change must apply to all lots. *Montoya v. Barreras*, 81 N.M. 749, 473 P.2d 363 (1970). Defendants seek to distinguish Montoya supra by pointing out that the subdivision in that case was solely residential whereas Ridge Park is residential and commercial. This argument has little merit. "Restrictions as to the use of land are mutual, reciprocal, equitable easements in the nature of servitudes in favor of owners of other lots within the restricted area, and constitute property rights which run with the land." *Montoya*, 81 N.M. at 751, 473 P.2d at 365. In the instant case the residential restrictions burdened all residential lots; the commercial restrictions burden all commercial lots. The mutuality of restrictive covenants would be destroyed if we were to allow the majority of owners, who might not be adversely affected because of their insulated location in the subdivision, to authorize offensive consequences for the minority by removing or imposing restrictions only on certain lots within the minority's area. Thus, we find that the fact that the Ridge Park Addition was not merely residential, but was residential and commercial, makes no difference. No changes may be made with respect to any one lot without affecting all the others subject to the restrictions.

This cause is remanded to the district court with directions to continue the proceedings consistent with this opinion.

STEPHENSON and MONTOYA, JJ., concur.

544 P.2d 280

Vidal MOYA, Plaintiff-Appellant,

v.

Ann WARREN, Defendant-Appellee.

No. 2033.

Court of Appeals of New Mexico.

Dec. 23, 1975.

John J. Duhigg, Duhigg & Cronin, Albuquerque, for plaintiff-appellant.

John A. Klecan, Klecan & Roach, P.A., Albuquerque, for defendant-appellee.

OPINION

SUTIN, Judge.

Moya appeals an adverse judgment rendered in favor of Warren by way of a directed verdict at the close of plaintiff's case. We affirm.

A. *Facts Most Favorable to Plaintiff*

Ann Warren and Walter Miller were employed at Spartan Southwest, Inc. Warren was supervisor of shipping and receiving. Miller was a driver and helper and his work was under Warren's supervision.

Warren and Miller drove their own cars on alternate weeks to and from Albuquerque, departing from Los Lunas, New Mexico. At the time of the accident, they were going home from work. Miller was driving his car; Warren sat in the front seat as a passenger. After proceeding south on Coors Road in Albuquerque about three miles, Warren noticed that she had forgotten her purse at Spartan. She told Miller. He continued down the road to a point where he drove off the road on the right-hand shoulder to make a U-turn and drive back to Spartan. Miller's car was facing east.

While waiting to make the turn back, they waited for traffic to subside. Both Miller and Warren were looking for traffic both ways. Warren looked for traffic coming from the north. She saw a yellow and black car coming from a distance of about a quarter of a mile or more. She looked south also and told Miller it was clear from the south and he had time to make it. "It is clear, you can go," she said. Miller pulled out on the roadway. Miller relied upon Warren's observations as much as his own. He did not rely on her completely because they were both looking. He relied upon her "more or less". The moment Warren looked back north, plaintiff's motorcycle, coming from the north, hit the left front of Miller's car.

B. *A Directed Verdict was Properly Entered.*

Moya, the driver of the motorcycle, brought suit against Warren who was the passenger in the car.

This case is a matter of first impression in New Mexico.

First, plaintiff claims that Restatement, Torts(2d) 324 A (1965) is applicable in this case. It reads:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

By placing Warren in the position of the gratuitous actor, and plaintiff in the position of the third person, plaintiff has tried to make § 324 A applicable.

[redacted] Plaintiff has misconstrued the word "undertake" in § 324 A. To "undertake" means "take upon oneself solemnly or expressly: put oneself under obligation to perform: contract, covenant . . . guarantee, promise". Webster's Third New International Dictionary, Unabridged (1966) at 2491. To make § 324 A applicable, plaintiff must first show that Warren, the actor, with or without compensation, promised or agreed to render services for and on behalf of Miller, the driver of the automobile, for the protection of Moya. No such evidence appears of record.

The most familiar types of litigation under which § 324 A has been cited and discussed are workmen's compensation cases and federal tort claims acts, all of which involve contractual obligations. See *Watson v. Employers Insurance Company of Wausau,* 50 Mich.App. 597, 213 N.W.2d 765 (1973); *Ray v. Transamerica Insurance Company,* 46 Mich.App. 647, 208 N.W.2d 610 (1973); *Stacy v. Aetna Casualty*

& Surety Company, 484 F.2d 289 (5th Cir. 1973); *Jeffries v. United States,* 477 F.2d 52 (9th Cir. 1973); *Kennard v. Liberty Mutual Insurance Co.,* 277 So.2d 170 (La. App.1973). Section 324 A has been cited and discussed where the actor was an employee of a construction contractor, *Craven v. Oggero,* 213 N.W.2d 678 (Iowa 1973), or cattleowner, *Ellsworth Brothers, Inc. v. Crook,* 406 P.2d 520 (Wyo.1965). See also, *Buszta v. Souther,* 102 R.I. 609, 232 A.2d 396 (1967); *Hempstead v. General Fire Extinguisher Corporation,* 269 F. Supp. 109 (D.Del.1967).

No authority has been cited and we have found none which suggests that § 324 A is applicable to the fact situation in this case.

Second, plaintiff contends there was a joint venture. The only authority cited is 60A C.J.S. Motor Vehicles § 444, a portion of which discusses "Joint enterprise; joint control." We add, 8 Am.Jur. 2d Automobiles and Highway Traffic § 679. One of the factors missing from the Miller-Warren relationship necessary to the creation of a joint venture was the lack of authority or control by Warren over Miller or any authority of Warren to control the Miller vehicle. *Silva v. Waldie,* 42 N.M. 514, 82 P.2d 282 (1938); See *Schall v. Mondragon,* 74 N.M. 348, 393 P. 2d 457 (1964). No joint venture, enterprise or control existed between Warren and Miller.

Third, plaintiff contends that some language in *Georgiadis v. Fuenfstueck,* 31 Leh.L.J. 121, Pa.Com.Pl. (1964) is controlling in the instant case. Here, a motion for judgment on the pleadings was made on behalf of the occupants of one of the vehicles engaged in racing with another vehicle on the public highways. The motion was dismissed because the occupants "not only acquiesced in the creation of an extremely perilous situation, it is alleged, but also incited and spurred on the drivers and thereby caused the accident which has resulted in injuries to the minor plaintiff." By reason of this *wrongful* conduct, the trial judge concluded that an issue of fact existed whether the conduct of the occupants proximately contributed to cause plaintiff's injuries. The difference between the wrongful conduct of the occupants of the racing car and Warren's conduct adequately distinguishes the case.

Warren can be held liable for negligence only when she owed a duty to plaintiff and failed to observe that standard of care which the law requires of her in the performance of that duty. *Giese v. Mountain States Telephone & Telegraph Co.,* 71 N.M. 70, 376 P.2d 24 (1962); *Neff v. Woodmen of World Life Insurance Society,* 87 N.M. 68, 529 P.2d 294 (Ct.App. 1974).

Warren owed no duty to Moya. *West v. Soto,* 85 Ariz. 255, 336 P.2d 153 (1959); *Sloan v. Flack,* 150 So.2d 646 (La.App. 1963); *Cain v. Dougherty,* 54 Wash.2d 466, 341 P.2d 879 (1959).

Affirmed.

It is so ordered.

WOOD, C. J., and LOPEZ, J., concur.

544 P.2d 283

George BRISCOE, Plaintiff-Appellant,

v.

HYDRO CONDUIT CORPORATION and Montgomery Ward and Company, Defendants-Appellees.

No. 2072.

Court of Appeals of New Mexico.

Dec. 16, 1975.

James A. Mungle, Smith, Ransom & Gilstrap Law Offices, Albuquerque, for plaintiff-appellant.

Vance Mauney, P. A., Albuquerque, for defendants-appellees.

OPINION

HENDLEY, Judge.

Plaintiff filed an action pursuant to the Workmen's Compensation Act (Sections 59–10–1 through 59–10–37, N.M.S.A.1953 (2d Repl. Vol. 9, 1974, pt. 1)) alleging total disability and seeking a lump sum award pursuant to § 59–10–18.2, supra.

Plaintiff's affidavit admitted the $75.00 weekly payment and the following sworn statements were set forth:

"That defendants have failed to make payment of a bill in the amount of $50.-00 for diagnostic studies made of the plaintiff at the direction of Dr. Chester, one of the physicians to whom plaintiff has been referred by defendants.

"That plaintiff has not been employed or able to do any type of work since on or about July 1, 1974 except attempting to perform work as a bartender for a few hours under a rehabilitation program and that he has performed no other work because of said disability, except in attempting to sell Indian jewlery on a limited part time basis for himself.

"That plaintiff is married but that his wife is not and has not been employed and is dependent upon him for support, in addition to his four children: Gerald, born February 8, 1959; George, Jr., born August 24, 1960; Georgianna, born December 16, 1961; and Mike, born November 22, 1964, who reside with him in a mobile home. That he has lost his mobile home and car because of inability to make payment of installments due, and is temporarily housed in a mobile home owned by a friend."

The trial court, after hearing ordered: ". . . that the Complaint herein should be, and is hereby dismissed, on the ground that said Complaint is prematurely filed." The majority disagree but for different reasons. My reasoning is as follows.

Section 59–10–36, supra, states in part:

". . . No claim shall be filed by any workman who is receiving *maximum compensation* benefits; . . ." [Emphasis added].

Schiller v. Southwest Air Rangers, Inc., 87 N.M. 476, 535 P.2d 1327 (1975) held:

"When we consider the long recognized principle that the workman's compensation act is to be liberally construed in favor of the employee (*Kosmicki v. Aspen Drilling Company*, 76 N.M. 234, 414 P.2d 214 (1966)), together with the implicit recognition in Rayburn [*Rayburn v. Boys Super Market, Inc.*, 74 N. M. 712, 397 P.2d 953] and Nasci [*Nasci v. Frank Paxton Lumber Co.*, 69 N.M. 412, 367 P.2d 913] that medical expenses

are 'compensation', we conclude that medical expenses are compensation for the purpose of allowing attorney fees under § 59–10–23(D). . . ."

In light of *Schiller* and the liberal construction philosophy stated therein plaintiff's claim was not premature. The $50.00 medical bill had not been paid. Medical payments have been ruled to be compensation for the purpose of allowing attorney fees under § 59–10–23(D), supra. If medical bills are compensation for one purpose they should be compensation for all purposes. I fail to find within the Workmen's Compensation Act statutory language which would lead one to believe there are differing kinds of compensation.

Having decided the issue as I have I need not reach the questions decided by Judge Sutin, in the affirmative, of whether a party in interest (plaintiff), who is being paid maximum compensation benefits, is entitled pursuant to § 59–10–13.5(B), supra, to a determination of total permanent disability, and if so, then to a determination of a lump sum award.

Reversed.

It is so ordered.

SUTIN, J., specially concurs.

HERNANDEZ, J., dissents.

SUTIN, Judge (specially concurring).

I specially concur.

The question for decision is whether the complaint for a lump-sum award was prematurely filed.

In 1969, the legislature amended § 59–10–13 of the Workmen's Compensation Act. It added a subsection B. It read:

> *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 . . . . [Emphasis added.]

In 1973, this subsection was amended. The word "Whenever" was deleted. The following italicized words were substituted:

> *If, upon petition of the party in interest,* the court determines in cases of total permanent disability . . . that it is for the best interests of the parties entitled to compensation, . . . the liability of the employer for compensation may be discharged by the payment of a lump sum . . . .

What is meant by the phrase "in cases of total permanent disability"? Defendants rely on *Sanchez v. Kerr McGee Company, Inc.*, 83 N.M. 766, 497 P.2d 977 (Ct. App.1972). Here we held:

> 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."* [Emphasis added.] [83 N.M. at 767, 497 P.2d at 978].

We did not determine the meaning of the phrase. We refused to do so because the claim filed did not give rise to the application of § 59–10–13.5(B).

Now, we are confronted with a case "of total permanent disability". The legislative intent is clear. It gave to plaintiff the right to file a petition, a separate claim, a separate proceeding, under the Workmen's Compensation Act. Why? For what purpose? To determine two questions: (1) Is this a case of "total permanent disability"? If it is not, the Court need proceed no further. If it is, (2) Is it "for the best interests of the parties entitled to compensation" to grant a lump sum award?

The purpose of § 59–10–13.5 is clear. It gives to a workman an early opportunity to solve an economic problem. If successful, he may not be forced to accept maximum installment payments for 550 weeks under § 59–10–18.2.

If we do not adopt this meaning, § 59–10–13.5(B) has no purpose.

Under this section, a petition is not prematurely filed when a workman contends that he is totally and permanently disabled.

Plaintiff's complaint and affidavit established that plaintiff was totally and permanently disabled at the time the petition was filed. The defendants did not answer. The defendants admitted, by affidavit, they were paying plaintiff the maximum amount of compensation benefits provided by law. This is an admission of total disability. They did not deny that plaintiff was permanently disabled. The claim filed was a case of "total permanent disability".

Section 59–10–25(B) provides:

> The district court in which the right to compensation is enforceable at all times has the right and power to authorize, direct or approve *any settlement or compromise of any claim for compensation* . . . for the amount and payable in . . . *lump sum* or in any other way and manner as the court may approve. [Emphasis added.]

No settlement or compromise is present. Section 59–10–25(B) is not applicable.

The only other problem to resolve is the relationship between § 59–10–13.5 and § 59–10–36. The latter section reads:

> No *claim* shall be filed by any workman who is receiving maximum compensation benefits; . . . . [Emphasis added.]

This section "bars a suit to establish liability for compensation." *Arther v. Western Company of North America*, 88 N.M. 157, 538 P.2d 799, 780 (Ct.App.1975). Section 59–10–36 is not applicable because liability was admitted by payment of workmen's compensation benefits.

Defendants also rely on *Arther*, supra. This case is contra to defendant's contentions. Here, a death occurred. The admission in the answer established liability for death. The Court said:

> This admission of liability sufficiently established plaintiff's right to compensation and authorized a lump-sum award under *§ 59–10–25 (B), supra.* [Emphasis added.] [538 P.2d at 801].

I would agree with this conclusion if § 59–10–13.5(B) were substituted for § 59–10–25(B).

In *Arther*, the Court concluded that the findings of the trial court of directing a lump-sum award were not in the best interests of plaintiff, the dependent widow.

Plaintiff's petition is not a claim for compensation. *Schiller v. Southwest Air Rangers, Inc.*, 87 N.M. 476, 535 P.2d 1327 (1975) is not in point. This case holds that medical expenses are "compensation" for purposes of allowing attorney fees where the claimant recovers medical and hospital expenses. In the instant case, plaintiff does not seek such recovery. He would have no claim for such recovery.

This case should be reversed. The plaintiff is entitled to a hearing (1) for a determination of "total permanent disability", and if so found, then (2) a determination of a lump-sum award according to the best interests of the plaintiff.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

Appellant based his petition for a lump sum payment of benefits upon §§ 59–10–13.5(B) and 59–10–25(B) of the New Mexico Workmen's Compensation Act, N.M.S.A.1953 (2d Repl. Vol. 9, 1974, pt. 1).

The appellant has received maximum compensation benefits allowable under the Workmen's Compensation Act which the employer has paid without default. Therefore appellant's petition was prematurely filed under the provisions of § 59–10–36, N.M.S.A.1953 (2d Repl. Vol. 9, 1974, pt. 1) which states, in part:

> ". . . No claim shall be filed by any workman who is receiving *maximum compensation* benefits; . . ." [Emphasis added.]

The majority rely upon the holding in *Schiller v. Southwest Air Rangers, Inc.*, 87 N.M. 476, 535 P.2d 1327 (1975). The issue

presented in that case was whether, under the New Mexico Workmen's Compensation Act, §§ 59–10–1 through 59–10–37, supra, the trial court could award attorney fees to the claimant when only medical and hospital expenses are recovered by the plaintiff. The Supreme Court concluded "that medical expenses are compensation for the purpose of allowing attorney fees under § 59–10–23(D)." *Schiller*, supra, at 478, 535 P. 2d at 1329. [But cf. *Wuenschel v. New Mexico Broadcasting Corp.*, 84 N.M. 109, 500 P.2d 194 (Ct.App.1972) and *Lasater v. Home Oil Company*, 83 N.M. 567, 494 P.2d 980 (Ct.App.1972)].

Another distinction in *Schiller*, is that the plaintiff sued for and recovered medical and hospital expenses incurred by him. In the instant case, the unpaid medical bill was incurred at the direction of the defendant. It remains the defendant's obligation. I do not see that *Schiller* is applicable here.

544 P.2d 287

Ralph S. ROLLER and Rosemary Roller, his wife, Plaintiffs-Appellants,

v.

Spencer SMITH and Alice Luna, Defendants-Appellees.

No. 1999.

Court of Appeals of New Mexico.
Nov. 18, 1975.

Certiorari Denied Dec. 29, 1975.

James B. Kelly, Albuquerque, for plaintiffs-appellants.

Richard W. Hughes, Robert M. Strumor, Claudeen B. Arthur, Shiprock, for defendants-appellees.

OPINION

HERNANDEZ, Judge.

This case involves the responsibility of an agent acting for a disclosed principal to the third party. Plaintiffs, the third parties, appeal from a judgment dismissing their complaint. We affirm.

Plaintiffs and defendants entered into a written agreement for the sale of a Toyota

automobile. The agreement, dated November 11, 1971, reads in pertinent part as follows:

"The undersigned Ralph S. Roller hereby acknowledges receipt of $150. cash from Alice Luna and Spencer Smith as agents for the Committee to Save Black Mesa, said $150. being downpayment on the purchase of 1963 Toyota Land Cruiser * * *. Total purchase price to be $950. The balance of $800. shall be due and payable on or before December 12, 1971.

"Seller agrees to transfer title to said vehicle to such persons or organizations as purchaser—agents as above shall direct when the balance of $800. is paid in full."

Plaintiffs in their complaint alleged that the balance due on December 12, 1971, had not been paid and that defendants had also refused to deliver possession of the automobile to plaintiffs. Other allegations were that the defendants had damaged the vehicle and that all of those acts constituted a conversion of it.

Plaintiffs also alleged that defendants' acts were done with malice and prayed for exemplary as well as compensatory damages.

We note at the outset that defendant Alice Luna was never served with process and never entered an appearance; she was therefore not a party in this matter.

The principal issue, although well-nigh concealed in plaintiffs' alleged seven points of error, is whether the trial court erred in not finding the defendant Smith personally liable under the contract. We recognize that plaintiffs in their brief-in-chief state that they did not sue for breach of contract but for wrongful conversion. Plaintiffs' loosely worded complaint and their direct examination of the sole witness we believe led the trial court to understand that they were pleading in the alternative. To conclude otherwise would make most of the trial court's findings and conclusions meaningless. Furthermore, were we to accept plaintiffs' disavowal this appeal could very easily be resolved because there is not one scintilla of evidence that the defendant Smith converted plaintiffs' automobile. To constitute a conversion of the personal property of another there must be some repudiation of the owner's rights or some exercise of the rights of ownership over them inconsistent with the owner's rights or some act done which destroys them or alters their condition. *Kitchen v. Schuster,* 14 N.M. 164, 89 P. 261 (1907).

As to Smith's liability under the contract, it is well established that an agent acting within his authority for a disclosed principal is not personally liable unless he was expressly made a party to the contract or unless he conducts himself in such a manner as to indicate an intent to be bound. *Lake City Stevedores, Inc. v. East West Shipping Ag., Inc.,* 474 F.2d 1060 (5th Cir. 1973). .Compare *Ellis v. Stone,* 21 N.M. 730, 158 P. 480 (1916). There is substantial evidence that Smith acted solely as agent for the Committee to Save Black Mesa. There is no evidence that Smith conducted himself in such a way as to indicate an intent to be bound. The trial court properly concluded that Smith was not personally bound.

We do not deem it necessary to set forth plaintiffs' points of error or to discuss each specifically, suffice to say that they are all without merit.

The decision of the trial court is affirmed.

It is so ordered.

WOOD, C. J., concurs.

SUTIN, J., specially concurs.

SUTIN, Judge (specially concurring).

The agreement shows that Spencer Smith signed as an agent for the Committee to Save Black Mesa. The principal was disclosed. Smith was not a party to the contract and he was not liable for the failure of the Committee to perform the

contract. To hold Smith personally liable, plaintiffs must prove that the agent lacked authority to bind the Committee. *Corps Construction, Ltd. v. Hasegawa,* 522 P.2d 694 (Hawaii, 1974); *Mr. Steak, Inc. v. Ken-Mar Steaks, Inc.,* 522 P.2d 1246 (Colo.App.1974); *Fink v. Montgomery Elevator Company of Colorado,* 161 Colo. 342, 421 P.2d 735 (1966); *Moran v. Loeffler-Greene Supply Company,* 316 P.2d 132 (Okl.1957). Plaintiffs did not prove that Smith lacked authority to sign the contract.

Ellis v. Stone, 21 N.M. 730, 158 P. 480, L.R.A.1916F, 1228 (1916) holds that the mere fact that a person sustains an agency relation to another does not prevent him from being personally liable on a contract with a third person. If it appears from the contract that he bound himself personally, he is liable. *Ricker v. B-W Acceptance Corporation,* 349 F.2d 892 (10th Cir. 1965).

The contract in question does not show that Smith bound himself personally to pay for the vehicle.

544 P.2d 289

STATE of New Mexico, Plaintiff-Appellee,

v.

Hilario Rodriguez TORRES, Defendant-Appellant.

No. 2043.

Court of Appeals of New Mexico.

Dec. 16, 1975.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Reginald J. Storment, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Jay F. Rosenthal, 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 (2d Repl. Vol. 6). The two issues are: (1) identification procedure, and (2) jury determination of voluntariness of defendant's statement.

Identification Procedure

Defendant was seen entering the victim's yard. About twenty minutes later defendant was seen leaving the yard carrying a brown paper sack. The witness gave a description of defendant to the police. The time from the witness' first observation until stopped by police was approximately one hour. When stopped, defendant had in his possession various items taken from the victim's house.

Defendant was taken to the scene, where the witness viewed defendant. The evidence is conflicting as to whether defendant stood outside of or remained inside the police car while being viewed. "They [the police] said, 'Is this the man you saw coming out of Mr. Pullaro's driveway?' And it was the same man * * *."

Defendant contends this identification procedure was invalid and the witness' identification testimony should have been suppressed. He claims "that this one to one confrontation wherein he was presented to the only witness while sitting in or standing by a police car, was so inherently and impermissibly suggestive as to violate due process." The "impermissibly suggestive" argument is directed to the legal standard of whether there is a substantial likelihood of irreparable misidentification. *State v. Gilliam*, 83 N.M. 325, 491 P.2d 1080 (Ct.App.1971).

The one-to-one confrontation is known as a showup. *State v. Samora*, 83 N.M. 222, 490 P.2d 480 (Ct.App.1971). Defendant asserts this type of confrontation is inherently suggestive and therefore improper. The answer is that a claimed violation of due process in the conduct of a confrontation depends on the totality of the circumstances surrounding it. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *State v. McCarty*, 82 N.M. 515, 484 P.2d 357 (Ct.App.1971).

The fact that defendant was either the sole occupant of the police car, or was standing alongside the police car, and the fact that he was in the presence of police officers during the confrontation, are simply the usual elements in any police conducted on-the-scene confrontation. *Dillard v. State*, 257 Ind. 282, 274 N.E.2d 387 (1971). While these elements are suggestive, they were not unnecessarily suggestive. These elements are to be considered by the trial court in evaluating the totality of the circumstances. These elements in themselves do not require exclusion of the evidence. *Bates v. United States*, 132 U.S.App.D.C. 36, 405 F.2d 1104 (1968); *Dillard v. State*, supra; *Davis v. State*, 13 Md.App. 394, 283 A.2d 432 (1971).

Defendant asserts the one-to-one confrontation is an unwarranted practice and the only effective deterrent is a per se exclusionary rule. Such a confrontation is not an unwarranted practice, because, under some circumstances, it may tend to insure accuracy in the identification. *Bates v. United States*, supra. There is no basis for a per se exclusionary rule because such confrontations are not per se violative of due process. *Roper v. Beto*, 454 F.2d 499 (5th Cir. 1972); *People v. Williams*, 183

Colo. 241, 516 P.2d 114 (1973). Absent special elements of unfairness, prompt on-the-scene confrontations do not violate due process. *Russell v. United States,* 133 U.S.App.D.C. 77, 408 F.2d 1280 (1969), cert. denied, 395 U.S. 928, 89 S.Ct. 1786, 23 L.Ed.2d 245 (1969).

The trial court did not violate due process in refusing to suppress the evidence of the identification because of the one-to-one confrontation.

Jury Determination of Voluntariness of Defendant's Statement

There is evidence that after defendant was advised of his "Miranda" rights, he made an oral statement. That statement admitted entry into the victim's house. The trial court made a preliminary determination of the voluntariness of the statement before admitting it as evidence. *State v. Armstrong,* 82 N.M. 358, 482 P.2d 61 (1971).

There was no special instruction informing the jury how to determine the voluntariness of the statement. Defendant did not request such an instruction. *State v. Romero,* 87 N.M. 279, 532 P.2d 208 (Ct. App.1975). Defendant states that the issue of voluntariness of the statement was submitted to the jury by the general instruction concerning the credibility of witnesses.

[redacted] "Defendant contends that the jury could not have adequately performed their required function [of determining voluntariness] because they were never informed as to what 'Miranda rights' are. All through the trial, the attorneys, witnesses and the court referred to 'Miranda rights'. They never advised the jury what these rights are * * *."

The answer is that defendant never requested an instruction defining "Miranda rights". The asserted error was waived. Rule of Criminal Procedure 41(g); *State v. Lujan,* 87 N.M. 400, 534 P.2d 1112 (1975).

Oral argument is unnecessary. The judgment and sentence are affirmed.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

544 P.2d 291

FLOYD & BERRY DAVIS COMPANY, Appellant,

v.

BUREAU OF REVENUE of the State of New Mexico, Appellee.

No. 1913.

Court of Appeals of New Mexico.

Dec. 9, 1975.

[redacted]

Kendall O. Schlenker, Schlenker, Parker, Payne & Wellborn, Albuquerque, for appellant.

Toney Anaya, Atty. Gen., Daniel H. Friedman, Bureau of Revenue, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

LOPEZ, Judge.

The taxpayer appeals a decision and order of the Bureau assessing gross receipts taxes. Sections 72–13–39 and 72–16A–4, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp. 1973). We affirm.

The taxpayer's contention on appeal is that the Bureau incorrectly determined the base on which a gross receipts tax was assessed.

The taxpayer is a partnership consisting of Floyd Davis and Berry F. Davis. It is engaged in the contracting business. The receipts which gave rise to the assessments at issue were payments to the taxpayer by North Park Apartments, Inc., for the construction of North Park Apartments by the taxpayer. The shareholders and officers of North Park Apartments, Inc. consist of Floyd Davis, Berry F. Davis and two other individuals. This construction was performed pursuant to a contract between the taxpayer and North Park Apartments, Inc., entitled, "Construction Contract-Cost Plus".

The sole contention of the taxpayer before the Bureau was that all receipts paid by North Park Apartments, Inc. to it were received in the capacity of an agent for North Park Apartments. However, this argument has been abandoned on appeal.

The taxpayer did not raise the argument before the Bureau that the base figure for the gross receipts tax was not correct and therefore it need not be considered on appeal. Section 72–13–39(A), N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp. 1973). *New Mexico Sheriffs and Police Association v. Bureau of Revenue,* 85 N.M. 565, 514 P.2d 616 (Ct.App.1973); *Archuleta v. O'Cheskey,* 84 N.M. 428, 504 P.2d 638 (Ct.App.1972); *Till v. Jones,* 83 N.M. 743, 497 P.2d 745 (Ct.App.1972). We shall discuss the merits nonetheless.

On appeal the taxpayer argues that the tax base should be $682,994.09 as stated on their own certificate of actual costs. Alternatively, they argue that the figure of $719,058.00, which is found in the construction contract between the taxpayer and the North Park Apartments, Inc. should control.

The Bureau contends that all the amounts listed in the document entitled, "Mortgagor's Certificate of Actual Costs", which was a document the taxpayer submitted to the Federal Housing Authority, constituted gross receipts to the taxpayer. These amounts totaled $797,686.00. (The contract total was actually $823,433.59, yet both parties agree $25,757.00 of that amount was not received by the taxpayer. There is also a less than $3,000.00 discrepancy between the Bureau's and the taxpayer's base figures which is not at issue.)

The assessment by the Bureau is presumed to be correct. Section 72–13–32(C), N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp. 1973). *Torridge Corporation v. Commissioner of Revenue,* 84 N.M. 610, 506 P.2d 354 (Ct.App.1972); *McConnell v. Bureau of Revenue,* 83 N.M. 386, 492 P.2d 1003 (Ct.App.1971). One way for the taxpayer to overcome the presumption of correctness of the assessment is to present evidence and to show that the decision of the Bureau is not supported by substantial evi-

dence. Our duty in this case is to determine whether there is substantial evidence in the record to support the Bureau's order. In so doing, we must view all evidence in the light most favorable to the Commissioner's decision. *United Veterans Organization v. New Mexico Property Appraisal Department,* 84 N.M. 114, 500 P.2d 199 (Ct.App.1972); *Westland Corporation v. Commissioner of Revenue,* 84 N.M. 327, 503 P.2d 151 (Ct.App.1972).

The evidence before the Commissioner included: A letter from Robert H. Mott, a certified public accountant, addressed to the Federal Housing Commissioner in Albuquerque which said in part:

> "In my opinion, the accompanying Form 2330 and 2330A presents fairly the actual cost, in the amount of $819,492.73 of the North Park Apartments, Inc., in conformity with generally accepted accounting principles, giving effect to the instructions issued by the Federal Housing Commissioner for the recognition of such costs."

Form 2330, which the certified public accountant attached in his letter to the Federal Housing Commissioner and which is part of Exhibit Q, reveals the mortgagor's costs to have been $819,492.73. In addition, the taxpayer's president testified that the architect fees, mortgage expenses and Federal Housing Administration expenses were received and paid out by the taxpayer. The Bureau concluded that the taxpayer received $797,686.00 in accordance with the previously mentioned $25,000.00 contractor's fee.

The only evidence helpful to the taxpayer was a copy of the contract. The taxpayer argues that the contract creates a ceiling in the total cash payable to it of $719,058.00 and that this contract should control the decision of the Bureau of Revenue. The Bureau concluded that this evidence is not compelling in view of the contradictory evidence, and our standard of review requires our assent to this conclusion.

We conclude that the presumption of correctness of the assessment was not overcome and the decision of the Bureau is supported by substantial evidence. *Torridge Corporation v. Commissioner of Revenue,* supra, and *McConnell v. Bureau of Revenue,* supra.

The decision of the Bureau is affirmed.

It is so ordered.

SUTIN, J., concurs.

HENDLEY, J., specially concurs.

HENDLEY, Judge (specially concurring).

I concur in the result of the majority opinion. My reason is that once it is decided that the issue was not raised before the Commissioner any further discussion on the merits is dictum. Further, this case is a perfect example of the reason and philosophy for memorandum opinions which are not published. The rule of law on which this case should terminate (failure to raise the issue before the Commissioner or the trial court) is so well established that the majority opinion serves no useful function for the bench, bar or the law reporter system.

544 P.2d 719

Martin SELGADO and Lorencita W. Selgado, Plaintiffs-Appellees,

v.

COMMERCIAL WAREHOUSE COMPANY and Gary T. Cordes, Defendants-Appellants.

No. 1884.

Court of Appeals of New Mexico.

Dec. 9, 1975.

Rehearing Denied Dec. 22, 1975.

Briggs F. Cheney, Toulouse, Krehbiel & Cheney, P. A., Albuquerque, for defendants-appellants.

Lorenzo A. Chavez, Robert G. Wines, Albuquerque, for plaintiffs-appellees.

OPINION

SUTIN, Judge.

Defendants appeal an adverse judgment of $71,000 awarded plaintiffs for personal injuries and damages suffered in an automobile accident. We affirm.

Liability was established in *Selgado v. Commercial Warehouse Company,* 86 N.M. 633, 526 P.2d 430 (Ct.App.1974) (*Selgado* # 1). In *Selgado* # 1, the jury awarded plaintiffs the sum of $18,000. Defendants appealed. We reversed on the issue of damages and remanded for a new trial on the question of damages alone.

In the second trial, the jury returned a verdict of $71,000 for personal injuries and damages suffered by plaintiffs.

Defendants appeal on two grounds: (A) The use, or non-use of seat belts, and expert testimony, if any, in relation thereto, is a circumstance which the jury may consider to determine whether the plaintiff exercised due care, not only to avoid injury to herself, but to mitigate any injury she would likely sustain. (B) The trial court erred in refusing to set aside the verdict and grant a new trial, or grant a remittitur.

A. *The non-use of seat belts was properly rejected by the trial court.*

On the issue of non-use of seat belts, defendants divided their first point in two directions: (1) The trial court erred in refusing two of their instructions and in giving one. (2) The trial court erred in ruling inadmissible expert testimony on seat belts and its application to the instant case. We shall unite these two subdivisions into one. We find no error.

The defendants tendered the following instructions which were refused. These instructions were tendered and refused in *Selgado* # 1.

> You are instructed that if you find from all the evidence that, if Mrs. Selgado had been wearing a seat belt, and that all or any part of her injuries could have been prevented if she had worn a seat belt, she cannot recover for such injuries so caused and you cannot assess damages against the defendants for all such injuries so caused.
>
> You are further instructed that the plaintiff, Mrs. Selgado cannot recover for any injuries, and damages cannot be granted, for any injuries which she received which could have been prevented by wearing a seat belt.

The defendants objected to the court's failure to give these instructions on the ground that they are applicable in mitigation of damages; that these instructions and evidence to support it were approved in *Selgado* # 1.

In *Selgado* # 1, on the issue of "mitigation of damages", this Court said:

> Defendants submitted a requested instruction to the effect that Mrs. Selgado could not recover for any injuries she could have prevented if she had worn her seat belt. The refusal of this requested instruction is asserted as error. There was no testimony, expert or otherwise, which tended to show the extent, if any, to which Mrs. Selgado's injuries would have been mitigated had she been

wearing seat belts. There was testimony to the effect that her injuries resulted from the striking of her head on the windshield. The jury could not have been allowed to speculate that this would not have happened or might have happened with a less severity had she been wearing seat belts. The instruction was properly refused because there was no evidence on which to base the instruction. *Boyd v. Cleveland,* 81 N.M. 732, 472 P.2d 995 (Ct.App.1970). [86 N.M. at 639, 526 P.2d at 436].

Selgado # 1 did not reach the validity of the instruction. It refused to consider defendants' instruction for lack of evidence to support it. If there was evidence to support it, this Court would then determine the validity of the instruction. *Selgado* # 1 left open the question: Is the instruction valid if there is evidence to support it? We say "No."

On the second trial, defendants threw these fast ball instructions at the plaintiffs a second time with an offer of evidence to support it. The trial judge called it a "ball", not a "strike". Was he right or wrong? We conclude that he was right.

The only instruction allowed on mitigation of damages for personal injuries is U.J.I. 14.26. It reads as follows:

> In fixing the amount of money which will reasonably and fairly compensate plaintiff, you are to consider that an injured person must exercise ordinary care to minimize or lessen his damages. Damages caused by his failure to exercise such care cannot be recovered.

The trial court gave this instruction. It was adopted because it was based on *Mitchell v. Jones,* 47 N.M. 169, 173, 138 P. 2d 522, 524 (1943). See U.J.I. 14.26, Committee Comment. The Court said:

> It is well settled that a party must use reasonable diligence to mitigate the damages about to be suffered either from tort or breach of contract.

Under this doctrine, plaintiff cannot recover damages for injuries resulting from consequences after the accident occurred if plaintiff could reasonably have avoided these consequences. This is called the doctrine of "avoidable consequences". *Rutledge v. Johnson,* 81 N.M. 217, 465 P.2d 274 (1970); 22 Am.Jur.2d Damages, § 30, cited as 15 Am.Jur. 420, § 27 "Damages" in *Mitchell,* supra. This doctrine is clearly indicated by U.J.I. 14.26.

The trial court instead gave the following instruction:

> You are instructed that any testimony pertaining to the use and non-use of seat belts is to be disregarded and not considered as evidence on any issue submitted to you by these instructions.

By giving this instruction, the court removed from the doctrine of "avoidable consequences", the use or non-use of seat belts. The use of seat belts was pre-accident, not post-accident, and non-use thereof has no bearing on the issue of damages.

Until the Supreme Court modifies the doctrine of "avoidable consequences", we are bound to follow this rule.

Due care in the use or non-use of a seat belt is pre-accident conduct and does not fall within the doctrine of "avoidable consequences". As a result, evidence of non-use of a seat belt is irrelevant on the minimization of damages.

A review of the civil war on this recent innovation in tort law discloses a strong and vibrant majority which follow this rule. *Nash v. Kamrath,* 21 Ariz.App. 530, 521 P.2d 161 (1974); *Carnation Company v. Wong,* 516 S.W.2d 116 (Tex.1974); *Fischer v. Moore,* 183 Colo. 392, 517 P.2d 458 (1973); *Britton v. Doehring,* 286 Ala. 498, 242 So.2d 666 (1970); *Hampton v. State Highway Commission,* 209 Kan. 565, 498 P.2d 236 (1972); *Derheim v. N. Fiorito Co.,* 80 Wash.2d 161, 492 P.2d 1030 (1972); *Miller v. Miller,* 273 N.C. 228, 160 S.E.2d 65 (1968); *Placek v. City of Sterling Heights,* 52 Mich.App. 619, 217 N.W.

2d 900 (1974). See the survey made in *Britton*, supra.

Defendants suggest that we follow the contrary view. It grows out of Prosser, Law of Torts, 4th Ed., § 65, p. 424 (1971). He said:

> It is suggested, therefore, that the doctrines of contributory negligence and avoidable consequences are in reality the same, and that the distinction which exists is rather one between damages which are capable of assignment to separate causes, and damages which are not.

Based on *Prosser*, the application of the doctrine of "avoidable consequences" to the seat belt defense was stimulated in *Spier v. Barker*, 35 N.Y.2d 444, 363 N.Y.S.2d 916, 323 N.E.2d 164 (1974). This Court permitted the seat belt mitigation of damages theory upon proof thereof. No consideration was given to existing authority.

For additional cases, see *Josel v. Rossi*, 7 Ill.App.3d 1091, 288 N.E.2d 677 (1972); *Truman v. Vargas*, 275 Cal.App.2d 976, 80 Cal.Rptr. 373 (1969).

These cases are contrary to the "avoidable consequences" theory of mitigation of damages in New Mexico. We can find no authority, statutory or otherwise, which imposes a duty upon the operator of a motor vehicle to fasten a seat belt. The failure to fasten a seat belt at the time of the accident is not a breach of duty which would authorize a mitigation of damages.

In *Fischer v. Moore*, supra, Justice Erickson said:

> . . . [T]he common law dictates that the tortfeasor may not rely upon the injured party's failure to utilize a voluntary protective device to escape all or a portion of the damages which the plaintiff incurred as a consequence of the defendant's negligence. [517 P.2d at 459].

Neither is there any statutory duty to fasten a seat belt under § 64–20–75, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2). Here, automobiles commencing with the 1964 models, not older cars, must be equipped with safety belts, but no duty is imposed upon a driver or passenger to use a safety belt. Plaintiff did not violate a statutory duty. *Hampton*, supra; *Romankewiz v. Black*, 16 Mich.App. 119, 167 N.W.2d 606 (1969); *Miller v. Haynes*, 454 S.W.2d 293 (Mo.App.1970). In Illinois, the statute imposes a duty on the operator only, but not the passenger. *Josel v. Rossi*, supra. In Tennessee, the legislature specifically absolved a person of contributory negligence and disallowed mitigation of damages, for failure to wear the seat belt. *Stallcup v. Taylor*, 463 S.W.2d 416 (Tenn.App.1970).

The public policy of a state fixing a statutory duty to fasten a seat belt rests with the legislature.

The trial court properly rejected defendants' requested instructions. It properly instructed the jury to disregard any testimony pertaining to the non-use of the seat belt, and it properly denied defendants' offer of expert testimony on seat belts and its application to the instant case.

B. *The award of damages is affirmed.*

On November 15, 1974, defendants filed a motion for a new trial or in the alternative for a remittitur. The motion was set for hearing on November 22, 1974, but the record is silent thereafter until the entry of a final judgment on November 27, 1974. Defendants filed a notice of appeal on December 13, 1974. The trial court did not dispose of the motion. See *National American Life Insurance Co. v. Baxter*, 73 N.M. 94, 385 P.2d 956 (1963). By serving the notice of appeal, the defendants abandoned the motion by depriving the trial court of jurisdiction. *State v. White*, 71 N.M. 342, 378 P.2d 379 (1962). This amounts to an election to waive the motion and proceed with the appeal as though the motion had not been made. *Owen v. Terrell*, 21 N.M. 647, 157 P. 672 (1916); *Martin v. District Court of Comanche County*, 460 P.2d 898 (Okl.1969); *Brandes v. Illinois Protestant Children's Home, Inc.*, 33 Ill.App.2d 319, 179 N.E.2d 425 (1962).

Defendants now claim error because the trial court "refused" to grant the

relief sought by their motion. No refusal appears of record. This claim of error is not subject to review.

On the issue of damages, we have held that ". . . wide latitude is allowed for the exercise of the judgment of the jury in fixing the amount of such an award. An appellate court should not hold an award of damages to be excessive except in extreme cases." *Baca v. Baca*, 81 N.M. 734, 741, 472 P.2d 997, 1004 (Ct. App.1970).

This is not an extreme case. Where the same results occurred on a retrial for damages, see *Arnold v. Loose*, 352 F.2d 959 (3d Cir. 1965).

Affirmed.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

544 P.2d 723

Luciano MONTOYA and Ephrain Garza, Individually, and as next of friend of Pete Montoya, a minor, Plaintiffs-Appellants,

v.

GENERAL MOTORS CORPORATION and Galles Chevrolet, Defendants-Appellees.

No. 1908.

Court of Appeals of New Mexico.

Nov. 25, 1975.

Rehearing Granted Dec. 4, 1975.

Certiorari Denied Jan. 15, 1976.

Paul S. Cronin and James I. Bartholomew, Hunter L. Geer and Thomas A. Handley, Albuquerque, for plaintiffs-appellants.

R. D. Mann, Bob F. Turner, Ralph D. Shamas, Atwood, Malone, Mann & Cooter, Roswell, for defendants-appellees.

OPINION

LOPEZ, Judge.

The plaintiffs in this case, Luciano and Pete Montoya, were seriously injured when the car which Luciano Montoya was driving left the road and rolled over several times. They brought suit against the dealer, Galles Chevrolet, and the manufacturer, General Motors Corporation, under a theory of strict products liability. Galles Chevrolet successfully moved against General Motors for indemnification in the event the plaintiffs won a judgment against Galles. The case was tried to a jury, which awarded damages to both plaintiffs in the total sum of $40,000.00. The trial judge then granted the defendants a judgment notwithstanding the verdict. The plaintiffs appeal. We reverse.

The standard for granting a judgment notwithstanding the verdict is the same as that for granting a directed verdict. *Francis v. Johnson*, 81 N.M. 648, 471 P.2d 682 (Ct.App.1970). The party who prevails in the jury's verdict "'* * * is entitled to have the testimony considered in a light most favorable to him and is entitled to every inference of fact fairly deducible from the evidence * * *.'" *Leonard Motor Company, Inc. v. Roberts Corporation*, 85 N.M. 320, 512 P.2d 80 (1973).

Three issues must be considered on the question of whether the jury's verdict should be reinstated: (1) the sufficiency of the evidence of a defect, (2) the inherent improbability of the plaintiffs' theory of the origin of the defect, and (3) the inherent improbability of the plaintiffs' theory of the accident.

I. The plaintiffs argue that the decision of the trial court was incorrect because there was sufficient evidence of a defect to allow the case to go to the jury. The issue is one of the quantum of proof required in a strict products liability case.

The evidence in this case focused on a broken axle. The plaintiffs contended that the broken axle caused the accident; the defendants contended that the axle was broken as a result of the accident.

The plaintiff, Luciano Montoya, purchased the car from Galles Chevrolet. The rear wheel assembly was in the same condition that it was in when Galles received it from General Motors. No mechanical work was done on the car from the time that it was purchased until the accident. The accident occurred three weeks after the automobile was purchased, when the car had been driven about 2,000 miles.

The plaintiffs testified that they were attempting to pass a truck when they heard a dragging sound and the car went out of control. They presented expert testimony that the axle had broken before the car crashed.

Mr. McCamey, one of the plaintiffs' experts, had worked twenty years in the field of brakes, axles, and wheels, and had analyzed hundreds of axle fractures. In ex-

amining the axle, he conducted a magniflux test from which he concluded that the fracture was torsional. He also concluded that the fracture was an unusual type and occurred at an unusual place for a torsional fracture. The plaintiffs' other expert, Mr. Matuszeki, was a metallurgist who had twenty-two years of experience in that field. He had conducted examinations on bearings and misalignments on many axle shafts. A series of examinations had convinced him that the fracture was a torsional one. In addition he stated that the presence of a notch on the axle led him to conclude that a misalignment of the bearing containment hardware caused the notch which in turn caused the axle to fracture at that spot. On cross-examination, the witness further explained his theory to be that something had caused the axle to "freeze", thus causing the twisting motion.

The standard of proof of a defect in strict liability cases is a well-litigated and debated area. See cases cited in Anno., Strict Products Liability-Proof of Defects, 51 A.L.R.3d 8 and discussion in 50 N.C.L. Rev. 417 (1972)

Carter Farms Co. v. Hoffman-LaRoche, Inc., 83 N.M. 383, 492 P.2d 1000 (Ct.App. 1971) established that circumstantial evidence is sufficient to show the existence of a defect. In *Carter Farms* the court held that it was permissible for a jury to infer that a vaccine given sheep was defective where the sheep had been shown to be in good health prior to the injections and other causes of death had been shown to be improbable.

In automobile cases courts have varied widely in their requirements of proof of a defect. Several courts have held that testimony of the driver that the car was uncontrollable, coupled with evidence that an accident occurred and the car was being used properly, constitutes a sufficient basis upon which to infer a defective condition. See, e. g., *Brownell v. White Motor Corp.*, 260 Or. 251, 490 P.2d 184, 51 A.L.R.3d 1 (1971); *McCann v. Atlas Supply Co.*, 325 F.Supp. 701 (W.D.Pa.1971); *Stewart v. Budget Rent-A-Car Corp.*, 52 Haw. 71, 470 P.2d 240 (1970); cf., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). This trend has been roundly criticized. Freedman, "Defect" in the Product: The Necessary Basis for Products Liability in Tort and in Warranty, 33 Tenn.L.Rev. 323 (1966); See, 22 Me. L.Rev. 189 (1970). To be distinguished from this form of proof is expert testimony based on an examination of the automobile after the accident. See, e. g., *Elmore v. American Motors Corp.*, 70 Cal.2d 578, 75 Cal.Rptr. 652, 451 P.2d 84 (1969); *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971); Keeton, Manufacturer's Liability, The Meaning of "Defect" in the Manufacture and Design of Products, 20 Syracuse L.Rev. 559, 564 (1969) ("This type of evidence is virtually always regarded as sufficient.")

The evidence available in this case is of the second type; there is evidence that the car was defective based on the experts' examination of the defective mechanism. The plaintiffs have demonstrated that their use was not improper, that the car went out of control, and that a broken axle caused the lack of control. *Carter Farms* established a defect in drug cases can be demonstrated by reasonable inferences drawn from the facts. In the instant case, plaintiffs submitted direct evidence of a defect. Based upon *Carter Farms*, plaintiffs exceeded the standard of proof and presented sufficient evidence of a defect.

Although the defendants take issue with all plaintiffs' evidence, we reiterate that on appeal from a judgment notwithstanding the verdict we must view the evidence in the light most favorable to the verdict. We conclude that the plaintiffs presented sufficient evidence of a defect to be allowed to go to a jury.

II. The defendants also argue that the plaintiffs' theory of how the defect occurred is inherently improbable. The theo-

ry of inherent improbability is directed to the theory of misalignment and resulting malfunction of the bearing containment in the left axle assembly. The defendants argue that the notch observed by Mr. Matuszeki was not present immediately after the accident; that there was no evidence of misalignment immediately after the accident; and, that even after welding the bearing rollers to the axle shaft, (an experiment offered by the defendants), the shaft still turned. None of this evidence is sufficient to make plaintiffs' evidence inherently improbable. First, it cannot overcome plaintiffs' experts' testimony that the axle *did* in fact break while the car was being driven. Secondly, the evidence relied on by the defendants is all met by contradictory evidence of the plaintiffs, so that the resulting conflict was properly one for the jury.

III. The defendants also argue that the "physical facts" rule demonstrates that the plaintiffs' theory of the case is inherently improbable.

The physical facts rule is found in *Ortega v. Koury*, 55 N.M. 142, 227 P.2d 941 (1951):

> "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. When the surrounding facts and circumstances make the story of a witness incredible, or when the testimony is inherently improbable, such evidence is not substantial."

In the first place it should be noted that a great deal of the plaintiffs' evidence was physical, so that this case does not present the traditional conflict between unsubstantiated oral testimony and compelling physical fact. See, *Bolt v. Davis*, 70 N.M. 449, 374 P.2d 648 (1962). The defendants amass a large amount of evidence to demonstrate that the collision was not caused by a broken axle. In doing so they indirectly propound the theory that the accident was caused by the plaintiffs having driven on the shoulder, swinging sharply to get back on the highway and thereby losing control. We cannot on appeal consider the likelihood of this theory because we must take all evidence in a light most favorable to the plaintiffs. The physical fact emerging from this theory which the defendants say contradicts the plaintiffs' theory is that the truck driver saw the plaintiff turn the wheel and there was testimony that a car with a broken axle is impossible to control. In citing the testimony of the truck driver, the defendants are relying on the same sort of "non-physical" fact which he claims physical facts overcome. In any event the evidence that the plaintiff was trying to control the car does not demonstrate that he "steered" the car to the right side of the road since the plaintiffs' expert testified that the car could go anywhere if it lost a wheel.

The other physical fact relied on by the defendants as showing inherent improbability was the presence of four skid marks on the highway. The defendants reason that when the axle broke the car's corner would drop to the ground, leaving a gouge or scrape mark on the highway. However, the plaintiffs intoduced expert testimony that the tire might have been wedged in front of the fender, thus leaving skid marks on the ground. The defendants deride this explanation as impossible because one witness testified that the tire was unscathed. The only evidence that the tire should have had marks on it came from one of the plaintiffs' witnesses, who said it was "possible" that there would be marks on the tire.

The physical evidence relied on by the defendants as demonstrating the inherent improbability of the plaintiffs' case can be explained by the plaintiffs as not inconsistent with their theory. Thus, the physical

evidence does not contradict oral testimony, but presents ". . . a case of conflicting inferences to be drawn from the undisputed evidence. . . ." *Wilson v. Wylie*, 86 N.M. 9, 518 P.2d 1213 (Ct.App. 1973).

We reverse and remand this cause with instructions to enter judgment for plaintiffs consistent with the jury verdict.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

WRIT OF CERTIORARI

The Supreme Court of the State of New Mexico having considered a Petition for Writ of Certiorari directed to the Court of Appeals, and having on the 15th day of January, 1976, entered its Order denying the Petition for Writ of Certiorari and returned the records in this cause to the Clerk of the Court of Appeals,

It is ordered That the Clerk of the Court of Appeals issue the Mandate in this cause forthwith.

544 P.2d 1153

Ron E. HICKS, Personal Representative and Administrator of the Estate of Beverly Jan Hicks, Deceased, and Robin E. Hicks, Deceased, Plaintiff-Appellant,

v.

STATE of New Mexico, State Highway Commission, State Highway Department, State Highway Engineer, DeBaca County and the DeBaca County Commission, Defendants-Appellees.

No. 10134.

Supreme Court of New Mexico.

Sept. 26, 1975.

On Rehearings Jan. 16 and Jan. 19, 1976.

Rehearing Denied Feb. 11, 1976.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Branch & Branch, Turner W. Branch, Albuquerque, for plaintiff-appellant.

Toney Anaya, Atty. Gen., Thomas Lea Dunigan, Deputy Atty. Gen., Richard L. Russell, Chief Counsel, State Highway Dept., Henry Rothschild, James V. Noble, State Highway Dept. Asst. Attys. Gen., Santa Fe, for defendants-appellees.

OPINION

MONTOYA, Justice.

This appeal arises from an order of the Santa Fe County District Court granting the motion of defendant State of New Mexico to dismiss on the ground that the action of plaintiff Ron E. Hicks was barred by the doctrine of sovereign immunity.

Suit was originally brought in the District Court of Santa Fe County on August 6, 1973, to recover damages for the wrongful death of plaintiff's wife and minor daughter due allegedly to the negligence of the State Highway Department. These deaths were the result of an accident near Fort Sumner, New Mexico, on December 26, 1972, when a school bus collided with a cattle truck on a narrow bridge constructed and maintained by the State Highway Department. Subsequently, defendant filed a

motion to dismiss. After a hearing, the motion was granted by order of the trial court on May 31, 1974. On June 21, 1974, plaintiff filed a notice of appeal.

In a memorandum decision, the district court stated that the doctrine of sovereign immunity was a long-standing common law principle which could now be changed only by legislative action. We do not agree that a change in this age-old doctrine can only be made by the legislature.

As recognized by the district court, the doctrine of sovereign immunity is one of common law, judicially created. This court stated in the case of *Dougherty v. Vidal*, 37 N.M. 256, 257–58, 21 P.2d 90, 91 (1933), that:

> " 'It is a fundamental doctrine *at common law* and everywhere in America that no sovereign state can be sued in its own courts or in any other without its consent and permission.' *State ex rel. Evans v. Field*, 27 N.M. 384, 201 P. 1059, 1060 [1921]. * * *" (Emphasis added.)

See also *Arnold v. State*, 48 N.M. 596, 154 P.2d 257 (1944).

Over the years, we have tenaciously retained this archaic principle in spite of changing circumstances. See *Sangre De Cristo Dev. Corp., Inc. v. City of Santa Fe*, 84 N.M. 343, 503 P.2d 323 (1972). Not until 1941 did the legislature enact any law directly relating to the matter of sovereign immunity. However, under §§ 64–25–8 and 9, N.M.S.A., 1953 (2d Repl. Vol. 9 Pt. 2, 1972), authority was provided for the State Board of Finance to require the purchase of liability insurance in respect to the negligent operation of motor vehicles by the State and its political subdivisions. Additionally, "no action shall be brought" against the State or its political subdivisions, only against the operator of the vehicle. The insurer may not raise sovereign immunity as a defense, but the plaintiff must provide a release of any judgment over the limits of the insurance policy. Eventually, these sections were probably repealed by implication by §§ 5–6–18 through 22, N.M.S.A., 1953 (Repl. Vol. 2 Pt. 1, 1974), which were more comprehensive in nature. See *Galvan v. City of Albuquerque*, 87 N.M. 235, 531 P.2d 1208 (1975). Both of these statutory schemes were in harmony with the common law doctrine of sovereign immunity, but had the effect of lessening, to a certain extent, the oftentimes harsh results of that doctrine. They definitely did not, as argued by defendants, create statutory sovereign immunity. It is to be noted that after the filing of this action our legislature in its last session, Ch. 334, Laws 1975, repealed §§ 5–6–18 through 5–6–21, supra, § 14–9–7, N.M.S.A., 1953 (Repl. Vol. 3, 1968), §§ 64–25–8 and 64–25–9, supra, and made the laws effective as of July 1, 1975. Under § 2 of said Act the legislature states the purpose to be as follows:

> "The purpose of this act is to modify the common-law doctrine of sovereign immunity by providing a permissive method whereby the state or a local public body may elect to protect itself and its officers and employees from personal liability arising out of certain acts committed during the performance of governmental and proprietary activities and to compensate the individuals wrongfully harmed by these actions."

The legislature itself recognizes that sovereign immunity is a common law doctrine and this should dispel the argument or contention that sovereign immunity was statutorily created, either by the repealed statutes, supra, or by the statute adopting the common law in New Mexico. See § 21–3–3, N.M.S.A., 1953 (Repl. Vol. 4, 1970).

Defendants also argue that § 21–3–3, supra, transformed sovereign immunity into a statutorily created principle. With this we cannot agree. This statute was originally passed not for the purpose of integrating sovereign immunity into the statutory body of law, but for the purpose of providing the judiciary of the New Mexico Territory with some precedential foundation on which to rely. The doctrine

of sovereign immunity has always been a judicial creation without statutory codification and, therefore, can also be put to rest by the judiciary. *Clark v. Ruidoso-Hondo Valley Hospital*, 72 N.M. 9, 380 P.2d 168 (1963); *Elliott v. Lea County*, 58 N.M. 147, 267 P.2d 131 (1954); and all other cases holding that the legislature and not the judiciary is the proper forum to decide the fate of sovereign immunity are expressly overruled. Merely because a court made rule has been in effect for many years does not render it invulnerable to judicial attack once it reaches a point of obsolescence.

The power of this court to do away with common law principles was stated in *Flores v. Flores*, 84 N.M. 601, 603, 506 P. 2d 345, 347 (Ct.App.1973), a case involving common law interspousal tort immunity:

> "Defendant contends the common law rule must be applied because by statute the common law is the rule of practice and decision in New Mexico. (Citation omitted.) The answer is that *the common law is not the rule of practice and decision if 'inapplicable to conditions in New Mexico.' Ickes v. Brimhall*, 42 N. M. 412, 79 P.2d 942 (1938). *If the common law is not 'applicable to our condition and circumstances' it is not to be given effect.* (Citations omitted.) * * *" (Emphasis added.)

The original justification for the doctrine of sovereign immunity was the archaic view that "the sovereign can do no wrong." It is hardly necessary for this court to spend time to refute this feudalistic contention. This and all other rationalizations which have been advanced to justify continued adherence to this doctrine are no longer valid in New Mexico. The argument has been presented that the elimination of sovereign immunity will result in an intolerable financial burden upon the State. We believe it is safe to say that adequate insurance can be secured to eliminate that possible burden in a satisfactory manner. In addition, it would appear that placing the financial burden upon the State, which is able to distribute its losses throughout the populace, is more just and equitable than forcing the individual who is injured to bear the entire burden alone. There are presently in New Mexico no conditions or circumstances which could rationally support the doctrine of sovereign immunity. We have long recognized that the doctrine is not applicable to municipalities when engaged in a proprietary function. *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480 (1943).

Several times in the recent past this court has cast aspersions upon sovereign immunity:

> "As to sovereign immunity, that doctrine, insofar as it has been created by courts, seems headed for a deserved repose. Courts and scholars can find little reason for it, and its historical basis is of doubtful validity. * * *"

City of Albuquerque v. Garcia, 84 N.M. 776, 778, 508 P.2d 585, 587 (1973).

> "* * *. We are thus not concerned with the outmoded medievalisms embedded in our jurisprudence in the form of judicially-created sovereign immunity."

State ex rel. N.M. Water Qual. C.C. v. City of Hobbs, 86 N.M. 444, 445, 525 P.2d 371, 372 (1974). But unfortunately, in those cases, the issue was not squarely before us, as it is today. Thus, we take this opportunity to rid the State of this legal anachronism. Common law sovereign immunity may no longer be interposed as a defense by the State, or any of its political subdivisions, in tort actions. Sovereign immunity was born out of the judicial branch of government, and it is the same branch which may dispose of the doctrine. It can no longer be justified by existing circumstances and has long been devoid of any valid justification. In so doing, we

join the growing number of States which have judicially abolished it.[1]

We recognize that this is a far-reaching decision which, at first blush, does violence to the doctrine of "stare decisis." However, we do not feel that "stare decisis" should be used to perpetuate the harsh and unjust results which blind adherence to sovereign immunity rules mandated. We concede that there was ample authority which influenced our predecessors in adopting and upholding the doctrine of sovereign immunity. We also say that there is better reasoned authority to overturn it. We simply conclude that its continuance is causing a great degree of injustice.

In today's world, we cannot discount the extent of governmental intervention and actions which affect the conduct of human affairs. We agree with the reasoning of the Supreme Court of Pennsylvania in its discussion of the doctrine in *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 592, 305 A.2d 877, 881–82 (1973), when it stated:

> "Today we conclude that no reasons whatsoever exist for continuing to adhere to the doctrine of governmental immunity. Whatever may have been the basis for the inception of the doctrine, it is clear that no public policy considerations presently justify its retention.
>
> "Governmental immunity can no longer be justified on 'an amorphous mass of cumbrous language about sovereignty. . . .' Leflar and Kantrowitz, Tort Liability of the States, 29 N.Y.U.L.Rev. 1363, 1364 (1954). As one court has stated:
>
> > '"'. . . it is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.' *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480, 482. Likewise, we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that 'divine right of kings' on which the theory is based."'
>
> *Molitor v. Kaneland Community Unit District No. 302*, * * * [18 Ill.2d 11, 21–22, 163 N.E.2d 89, 94 (1959)]. See also *Evans v. Board of County Commissioners*, * * * [174 Colo. 97, 482 P. 2d 968 (1971)]; *Hargrove v. Town of Cocoa Beach*, * * * [96 So.2d 130 (Fla.1957)].
>
> "Moreover, we are unwilling to perpetuate the motion that 'it is better that an individual should sustain an injury than that the public should suffer an inconvenience.' *Russell v. Men of Devon*, * * * [2 T.R. 667, 673, 100 Eng.Rep. 359, 362 (1788)]. This social philosophy of nonliability is 'an anachronism in the law of today.' *Flagiello v. Pennsylvania Hospital*, 417 Pa. 486, 502, 208 A.2d 193, 201 (1965). As has been noted:
>
> > '"The social climate which fostered the growth of absolutism and the divine right of kings in England has long since been tempered with the warm winds of humanitarianism and individual freedom. The changes which have occurred in the last century with respect to the imposition of liability upon private corporate enterprises of any kind are well-known. Work-

1. See attached Appendix for a compilation of States that have abolished the doctrine of governmental immunity.

men's compensation laws have replaced the old theories which permitted the corporate organizations to escape liability under the fellow-servant rule or the doctrine of assumption of risk. Liability may now be predicated without fault merely on grounds that potential injuries to individuals must be calculated as a part of the cost of doing business, and must be paid for by the business enterprise. *There is widespread acceptance of a philosophy that those who enjoy the fruits of the enterprise must also accept its risks and attendant responsibilities.*" '

Smith, Municipal Tort Liability, 48 Mich.L.Rev. 41, 48 (1949) (emphasis added) (footnote omitted).

"Recently, this Court reiterated the prevailing philosophy that liability follows tortious conduct. In *Niederman v. Brodsky*, 436 Pa. 401, 403, 261 A.2d 84, 85 (1970), we said:

' " 'It is fundamental to our common law system that one may seek redress for every substantial wrong. "The best statement of the rule is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct. . . . " ' *Battalla v. State*, 10 N.Y.2d 237, 240, 219 N.Y.S.2d 34, 36, 176 N.E.2d 729, 730 (1961)." '

See also *Stone v. Arizona Highway Commission*, * * * [93 Ariz. 384, 392, 381 P.2d 107, 112 (1963); *Muskopf v. Corning Hospital District*, * * * [55 Cal.2d 211, 220, 11 Cal.Rptr. 89, 94, 359 P.2d 457, 462 (1961)].

"Appellee offers no reason—and we are unable to discern one—for permitting governmental units to escape the effect of this fundamental principle."

Though the foregoing case decided by the Pennsylvania Supreme Court related to liability of a local school board, we believe that the principles and reasoning enunciated therein apply equally to a State agency.

We, therefore, conclude that the ancient doctrine of sovereign immunity has lost its underpinnings by the social and governmental changes which have occurred. This view was expressed with great clarity by Justice Cardozo in the following words:

" 'A rule which in its origins was the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by the courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience.'

Cardozo, The Growth of the Law 136–37 (1924)."

Ayala v. Philadelphia Board of Public Education, supra, 453 Pa. at 602, 305 A.2d at 886.

In view of our disposition of this matter, we deem it unnecessary to consider the constitutional challenges presented by plaintiff.

Accordingly all prior cases wherein governmental immunity from tort liability was recognized are expressly overruled and shall no longer be considered precedents in tort actions filed against governmental agencies.

Since this action involves a significant and major change in tort liability for governmental agencies, the question of its applicability to past, pending and future cases must be determined. The factors to be considered concerning retroactivity of court decisions are set out in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L. Ed.2d 601 (1965). The United States Supreme Court there concluded that no distinction is drawn between civil and criminal litigation. It further held that there are no constitutional requirements concerning retroactivity, and that in each case the court may determine whether retroactive or prospective application is appropriate. After considering the factors as announced in *Linkletter v. Walker*, supra, it is our considered opinion that the rule of law announced herein shall have modified prospectivity. Consequently, the decision we announce herein applies to the case at bar, all similar pending actions and all cases which may arise in the future.

Consequently, the order of the district court is reversed. This matter is remanded to the district court with instructions to proceed with the action initiated by plaintiff in accordance with the views expressed herein.

It is so ordered.

McMANUS, C. J., and STEPHENSON, J., concur.

APPENDIX: List of States in their respective positions regarding governmental immunity.*

"* * *. The columns are as follows: (1) General abolition of immunity, subject to the normal exceptions, (2) Partial abolition, (3) Abolition (or waiver) in case of insurance, and (4) Full retention of immunity. It is harder to classify the states here, but the following is at least a bona fide effort to be objective.

"§ 895B

Abolished	Partial	Insurance	Immunity
Alaska	Conn.	Ga.	Ala.
J Ariz.	Ky.	Kan.	Ark.
J Cal.	Mich.	Me.	Del.
J Colo.	Minn.	Mont.	Fla.
Haw.	Tenn.	N.H.	Md.
J Ida.	N.C.	N.M.	Mass.
Ill.	S.C.	N.D.	Miss.
J Ind.	Tex.	Okla.	Mo.
Ia.	W.Va.		Ohio
La.			Pa.
Neb.			S.D.
Nev.			Va.
J N.J.			Wyo.
N.Y.			
Ore.			
R.I.			
Utah			
Vt.			
Wash.			
J Wis.			
J D.C.			
21 (8 J)	9	8	13 "

(A "J" in front of a state means that change was made judicially.)

* Source: Restatement (Second) Torts, Special Note § 895B at 21 (Tent.Draft No. 19, March 30, 1973).

Since the above information was published, Kansas, Pennsylvania and West Virginia have judicially abolished governmental immunity as to all or some governmental agencies.

ORDER ON REHEARING

Defendants-appellees sought and were granted a rehearing limited to the clarification of the Court's ruling on "modified prospectivity," as set forth in the original opinion, and secondly, seeking a modification of the opinion so as to apply the ruling prospectively as of July 1, 1976.

The Court having requested briefs and having heard argument on the issues raised at rehearing, by majority vote, is of the opinion that the motion made by the Attorney General is well taken and that the ruling heretofore announced as to prospectivity should be modified. The Court accordingly holds that the ruling announced on September 26, 1975, is not to take effect or apply to the case at bar or to any other cause or action in tort against any governmental agency if the alleged tort occurred or occurs prior to July 1, 1976.

Accordingly, the order of the District Court granting the motion to dismiss the State of New Mexico, State Highway Commission and State Highway Department, is affirmed.

This matter is remanded to the District Court of Santa Fe County with instructions to proceed in accordance with the views expressed in this Order on Rehearing.

Entered nunc pro tunc as of January 5, 1976.

OMAN, C. J., and McMANUS and STEPHENSON, JJ., concur.

MONTOYA and SOSA, JJ., dissenting.

OPINION ON MOTION FOR REHEARING

McMANUS, Justice.

By Order effective January 5, 1976, we modified our decision in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153, filed September 26, 1975, by holding that it is not to take

effect nor apply to the case at bar or to any other cause or action in tort against any governmental agency if the alleged tort has occurred or occurs prior to July 1, 1976. We based this modification upon the briefs and arguments presented in the rehearing which we granted to the State. The rehearing was limited to the issue of whether the *Hicks* decision should apply: (1) only to cases arising in the future; (2) to cases arising in the future and to the case at bar; or (3) to cases arising in the future, to the case at bar and to all similar pending actions.

In the original *Hicks* decision we selected the third option. The briefs and arguments presented on rehearing developed this issue much more fully than had been done in the briefs and arguments on the appeal. We now conclude that the *Hicks* decision should apply only to cases arising in the future.

Many courts abolishing sovereign immunity have applied their decisions to cases arising in the future and to the case under consideration (the second option mentioned above). *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968); *Molitor v. Kaneland Community Unit District No. 302*, 18 Ill.2d 11, 163 N.E.2d 89 (1959); *Willis v. Department of Conservation & Econ. Dev.*, 55 N.J. 534, 264 A.2d 34 (1970; *Becker v. Beaudoin*, 106 R.I. 562, 261 A.2d 896 (1970).

At least two other courts have abolished sovereign immunity on a purely prospective basis, denying relief even to the plaintiffs who brought the action. *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Spanel v. Mounds View School District No. 621*, 264 Minn. 279, 118 N.W.2d 795 (1962). In support of their decision the Minnesota Supreme Court in *Spanel* quoted Mr. Justice Cardozo from an article at 109 Pa.L.Rev. 13, as follows:

> "The rule that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the repeal might work hardship to those who have trusted to its existence. We give notice, however, that any one trusting to it hereafter will do so at his peril." 264 Minn. at 294, 118 N.W.2d at 804.

The Minnesota court went on to conclude:

> "It may appear unfair to deprive the present claimant of his day in court. However, we are of the opinion it would work an even greater injustice to deny defendant and other units of government a defense on which they have had a right to rely. We believe that it is more equitable if they are permitted to plan in advance by securing liability insurance or by creating funds necessary for self-insurance. In addition, provision must be made for routinely and promptly investigating personal injury and other tort claims at the time of their occurrence in order that defendants may marshal and preserve whatever evidence is available for the proper conduct of their defense." 264 Minn. at 294–95, 118 N.W.2d at 804.

We find this reasoning persuasive.

It is so ordered.

STEPHENSON, J., concurs.

OMAN, C. J., concurring specially.

MONTOYA and SOSA, JJ., dissenting.

OMAN, Chief Justice (specially concurring).

I have heretofore concurred in the Order of January 5, 1976 and now concur in the reasoning advanced by Justices McManus and Stephenson for giving prospective effect only as of July 1, 1976 to the majority opinion filed on September 26, 1975.

However, I did not agree with the majority that the doctrine of sovereign immunity should or could properly be abolished by a ruling of this Court in view of our repeated declarations that a change in the doctrine could and should be accomplished only through legislative action. *Sangre De Cristo Dev. Corp., Inc. v. City of Santa Fe*, 84 N.M. 343, 503 P.2d 323 (1972); *Montoya v. City of Albuquerque*, 82 N.M. 90, 476 P. 2d 60 (1970); *Clark v. Ruidoso-Hondo Valley Hospital*, 72 N.M. 9, 380 P.2d 168

(1963); *City of Albuquerque v. Campbell*, 68 N.M. 75, 358 P.2d 698 (1960); *Livingston v. Regents of New Mexico Col. of A. & M. A.*, 64 N.M. 306, 328 P.2d 78 (1958); *Elliott v. Lea County*, 58 N.M. 147, 267 P.2d 131 (1954).

I agree with the majority opinion that this Court has the power to do away with court-created common law principles. However, if sovereign immunity was in fact court-created, this Court has repeatedly declined to so treat it and has repeatedly held any change in the doctrine was to be made by the Legislature. I am of the opinion that the people of New Mexico, and particularly the New Mexico Legislature, had the right to rely upon our repeated disclaimers of power to overrule the doctrine. In fact, the Legislature has repeatedly relied upon these disclaimers and has assumed the power to effect changes in the doctrine.

Also, because of our long and oft-repeated declarations that the matter of change in sovereign immunity was for the Legislature, I have always been of the opinion that if the doctrine were to be abolished by action of this Court it should be done prospectively only, in order to give the Legislature a fair opportunity to take whatever action it should deem advisable before the abolishment of the long accepted immunity.

MONTOYA, Justice (dissenting).

I respectfully disagree with the conclusion reached by the majority on rehearing, that the ruling previously made in this case should not take effect until July 1, 1976. The "modified prospectivity" rule, as announced in our opinion, is in accord with well-recognized principles of justice. The terms "similar pending actions" and "causes arising in the future," alleged to be ambiguous, have a definite legal meaning and are not subject to interpretation as claimed. It recognizes the oft-stated principle of law that all citizens should have access to the courts in seeking redress for every substantial wrong. The spectre that the effects of this ruling will bankrupt the State is, at best, based on pure conjecture and speculation. Before the State can be held liable for any claim the liability must be established and the damages proven in a court of law. I do not believe that reliance, convenience or expediency should outweigh the just objective that an aggrieved party be compensated for injuries suffered when incurred through the negligence of the State or any of its political subdivisions. In *Barker v. City of Santa Fe*, 47 N.M. 85, 88, 136 P.2d 480, 482, (1943), we referred to an Annot. in 75 A.L.R. at 1196, which said that the sovereign immunity doctrine should not exempt the various branches of the government from liability for their torts, and that the entire burden of damages resulting from the wrongful acts of the government should not be imposed upon the single individual that is injured,

> "'* * * rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.'"

Though in that case we were dealing with a tort allegedly committed by a municipality in the exercise of a proprietary function, the same principle should apply to all torts committed by any governmental agency acting in any capacity. In today's world, consideration of the extent of governmental intervention and the many regulations which affect the actions of the individual citizens, should compel the adoption of the reasoning in *Barker v. City of Santa Fe*, supra, and thus permit an injured person to hold the wrongdoer responsible for the proximate consequences of the wrongdoer's misconduct, whether it be the government or a person or private corporation. To insulate the government from responsibility for its negligence, even for a short period of time, once we have declared that anyone injured by a tortious act of the government should have the opportunity and right to litigate their claims in the court, is not only devoid of logic but disregards the very reasoning which prompted this Court to eliminate "the harsh and unjust results which blind adherence to sovereign immunity rules mandated."

The least this Court should do is to apply the ruling to the case at bar where, through the efforts of the appellant, we have been afforded an opportunity to change an outmoded and unjust rule of law. The majority of cases dealing with the problem, excepting two, have applied the ruling to the case which resulted in the abolishment of the doctrine of sovereign immunity. To do otherwise would prevent case law or decisions from keeping up with the changing needs of society, when we deprive the litigant who was successful in making the change possible of the opportunity to completely litigate his claim on the merits. To be left only with the distinction of causing a change in the rule of law seems manifestly unfair.

The majority feeling otherwise, I respectfully dissent from the order on rehearing for the reasons above stated.

SOSA, Justice (dissenting).

I respectfully disagree with the majority's opinion that the ruling made in this case should not take effect until July 1, 1976. I feel that to deprive the parties who were responsible for the abolishment of the antiquated and anachronistic doctrine of sovereign immunity of having their day in court is like leaving a grieving widow at the grave of her deceased husband, killed through someone's negligence, without a cause of action or a remedy. I think this ruling is harsh and unjust. I would have made the ruling applicable to the case at bar and all those cases actually filed prior to our decision, which were undisposed. They were filed based on dicta that the doctrine's demise was near. I would not penalize those that took this court at its word.

The main reason for the abolishment of sovereign immunity was that it created an injustice in the law. I feel that the majority ruling making the ruling in the case effective beginning July 1, 1976, creates another injustice.

I respectfully dissent from the order on rehearing for the above stated reasons.

544 P.2d 1161

ALBUQUERQUE-PHOENIX EXPRESS, INC., Petitioner-Appellant,

v.

EMPLOYMENT SECURITY COMMISSION of New Mexico, Respondent-Appellee,

and

Robert R. Burgess et al., Claimants-Appellees.

No. 10247.

Supreme Court of New Mexico.

Dec. 24, 1975.

Rehearing Denied Jan. 15, 1976.

Pickering & Mahon, Albuquerque, for appellant.

R. Baumgartner, Albuquerque, for Employment Security Commission.

Kool, Kool, Bloomfield & Eaves, Albuquerque, for claimants.

OPINION

McMANUS, Chief Justice.

This matter was brought in the District Court of Bernalillo County for review upon certiorari of a decision of the Employment Security Commission (Commission) that certain claimants for unemployment compensation benefits, employees of Albuquerque-Phoenix Express, Inc., petitioner-appellant (Company), who were unemployed as a result of a labor dispute were eligible to receive unemployment benefits. This matter was presented to the court upon briefs and oral argument. From a judgment of the district court dismissing the Company's appeal and affirming the judgment of the Commission, the Company appeals to this court.

After receiving the decision of the court adverse to it, the Company, by this appeal requests review of the following points:

1. Claimants were not available for work nor were they actively seeking work as required by § 59-9-4(A)(3), N.M.S.A. 1953 Comp.
2. Claimants were disqualified under § 59-9-5(a), N.M.S.A. 1953 Comp., as they left work voluntarily without good cause.
3. The employees should have been disqualified under § 59-9-5(d), N.M.S.A. 1953 Comp., as there was a "stoppage of work" at the Company's premises.
4. Even if "stoppage of work" is defined as a substantial curtailment of the

employer's business, such a curtailment did occur.

The first issue raised concerns § 59-9-4(A)(3), supra, which provides, in part, as follows:

"A. An unemployed individual shall be eligible to receive benefits with respect to any week *only* if he:

. . . . . .

"(3) is able to work and is *available for work* and is *actively seeking work*; * * *" (Emphasis added.)

The Appeals Tribunal for the Commission and the Commission itself, which adopted the ruling of the Appeals Tribunal, determined that twelve of the seventeen claimants were available for and actively seeking work. On this issue, the finding of the Appeals Tribunal, being representative of each of the twelve claimants, read in relevant part, as follows:

"The claimant was required to register for work with the New Mexico State Employment Service as a prerequisite to filing for unemployment benefits. The claimant also sought work through the union ([Teamsters] Local 492), which maintains an out-of-work list and a hiring hall. During several weeks while filing continued claims, he was successful in obtaining temporary work through the union. During about seven of these weeks, he earned more than his weekly benefit amount ($56.00). The evidence shows that the claimant was available for full-time work had such been offered to him."

The Commission and the court below adopted this finding and we conclude that there was substantial evidence to support such a finding.

The employer seeks to have us interpret the availability and active search for work provisions of § 59-9-4(A)(3), supra, as establishing an absolute standard of availability for permanent new work with no limitations or restrictions of any kind, regardless of the circumstances prevailing in particular cases. Applying this standard to persons whose unemployment results from a labor dispute and holding them unavailable because they will not immediately return to their jobs with the employer with whom they are disputing, or will not sever their employment relationship with that employer and seek permanent new work, would in all cases make such persons ineligible and render the labor dispute disqualification provisions of § 59-9-5(d), N.M.S.A.1953 Comp., totally superfluous. (That section will be discussed in more detail in our consideration of "stoppage of work.")

On the basis of individual interviews with each claimant by Commission personnel, written documents and other reports in each claimant's file, and the record before the Commission's Appeals Tribunal, where all parties were represented, the Commission found that the claimants were available for and actively seeking work as required by § 59-9-4(A)(3), supra. The Commission further found that a number of claimants had obtained temporary intervening work, and that picket line duty was not mandatory and did not interfere with the claimants' search for or acceptance of work.

It seems obvious that the claimants herein were already employed by the Company. They expected only a temporary unemployment period and, therefore, could be available only for temporary intervening work. It would not make much sense for the Commission to demand that they, in fact, quit their job and really join the ranks of the unemployed, or that they abandon their legal rights and economic interest in the labor dispute and return to their jobs with the employer with whom they were disputing on the premise that their dispute was without merit.

In fact, § 59-9-5(c)(2), N.M.S.A.1953 Comp., expressly provides:

"Notwithstanding any other provisions of this act [59-9-1 to 59-9-29], no work shall be deemed suitable and benefits shall not be denied under this act to any otherwise eligible individual for refusing

to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; * * *."

Another point for review concerns whether or not claimants left work voluntarily without good cause. The Commission held inapplicable, in the case of labor disputes such as we find here, the voluntary leaving provision of § 59-9-5(a), N. M.S.A.1953 Comp., reading:

"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."

In *Inter-Island Resorts, Ltd. v. Akahane,* 46 Haw. 140, 156-58, 377 P.2d 715, 724-25 (1962), the Supreme Court of Hawaii analyzed a provision in the Hawaii Employment Security Law quite similar to our provision, § 59-9-5(a), supra, in the following way:

"This argument [that claimants unemployed as the result of a labor dispute should be disqualified under the voluntary leaving provisions of the unemployment compensation law] is in direct conflict with the generally accepted interpretation of the voluntary leaving and the labor dispute disqualification provisions of the various state laws. The consensus supports the conclusion that the two disqualification provisions are mutually exclusive and that an individual whose unemployment is due to a 'stoppage of work' which exists because of a 'labor dispute' cannot be said to have 'left his work voluntarily' within the meaning of the voluntary separation provision. *T. R. Miller Mill Co. v. Johns,* 261 Ala. 615, 75 So.2d 675; *Intertown Corp. v. Appeal Board of Mich. Unemployment Comp. Comm.,* supra, 328 Mich. 363, 43 N.W.2d 888; *Little Rock Furniture Mfg. Co. v. Commissioner of Labor,* 227 Ark. 288, 298 S.W.2d 56; *Marathon Electric Mfg. Corp. v. Industrial Comm.,* 269 Wis. 394, 69 N.W.2d 573, 70 N.W.2d 576; *Lesser, Labor Dispute and Unemployment Compensation,* 55 Yale Law Journal 167.

"It is one of the fundamental tenets of the unemployment compensation law that the administering agency remain neutral in the labor dispute and refrain from passing on the merits of the dispute. Courts almost unanimously hold that the merits of a labor dispute are immaterial in determining the existence of the dispute, the rationale being that the unemployment compensation fund should not be used for the purpose of financing a labor dispute any more than it should be withheld for the purpose of enabling an employer to break a strike. *Sakrison v. Pierce,* supra, 66 Ariz. 162, 185 P.2d 528; *In re Steelman,* supra, 219 N.C. 306, 13 S.E.2d 544; *Amory Worsted Mills, Inc. v. Riley,* 96 N.H. 162, 71 A.2d 788; *W. R. Grace & Co. v. California Employment Comm.,* 24 Cal.2d 720, 151 P.2d 215; *Byerly v. Unemployment Comp. Board of Review,* 171 Pa.Super. 303, 90 A.2d 322; *Lawrence Baking Co. v. Michigan Unemployment Comp. Comm.,* supra, 308 Mich. 198, 13 N.W.2d 260; *T. R. Miller Mill Co. v. Johns,* supra, 261 Ala. 615, 75 So.2d 675.

* * * * * *

"Moreover, the terms 'leaving work' or 'left his work' as used in unemployment compensation laws refer only to a severance of the employment relation and do not include a temporary interruption in the performance of services. Kempfer, Disqualifications for Voluntary Leaving and Misconduct, 55 Yale Law Journal

147, 154. Absence from the job is not a leaving of work where the worker intends merely a temporary interruption in the employment and not a severance of the employment relation. Such is the case of strikers who have temporarily interrupted their employment because of a labor dispute. Under the prevailing view, they have not been deemed to have terminated the employment relationship and the voluntary leaving disqualification has no application to them. *T. R. Miller Mill Co. v. Johns,* supra, 261 Ala. 615, 75 So.2d 675; *Mark Hopkins, Inc. v. California Employment Comm.,* 24 Cal.2d 744, 151 P.2d 229, 154 A.L.R. 1081; *Knight-Morley Corp. v. Michigan Employment Security Comm.,* 352 Mich. 331, 89 N.W.2d 541; *Marathon Electric Mfg. Corp. v. Industrial Comm.,* supra, 269 Wis. 394, 69 N.W.2d 573, 70 N.W.2d 576."

We fully adopt this reasoning.

The third point upon which appellants rely is that the employees should have been disqualified for unemployment compensation benefits under § 59-9-5(d), N.M.S.A. 1953 Comp., which provides, in part, that:

"An individual shall be disqualified for benefits—* * *

"(d) For any week with respect to which the commission finds that his unemployment is due to a *stoppage of work* which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; Provided, that this subsection shall not apply if it is shown to the satisfaction of the commission that—

"(1) He is not participating in or directly interested in the labor dispute which caused the *stoppage of work*; and

"(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the *stoppage,* there were members employed at the premises at which the *stoppage* occurs, any of whom are participating in or directly interested in the dispute; * * *." (Emphasis added.)

The appellants claim that the term "stoppage of work" refers to the individual efforts of the employee, while the appellees argue that "stoppage of work" refers to a cessation or substantial curtailment of the employer's business. We are thus called upon to interpret this term.

We are not the first state supreme court to be confronted with this question. All fifty states have adopted unemployment compensation laws, and a majority of them have a provision disqualifying employees from benefits if the "unemployment is due to a stoppage of work which exists because of a labor dispute * * *." Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, 17 U.Chi.L.Rev. 294 (1950); Lewis, The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence, 45 J.Urban L. 319 (1967); Annot., 61 A.L.R.3d 693 (1975). About twenty of the states have interpreted the term "stoppage of work" to mean a cessation or a substantial curtailment of the employer's business, while only one—Oklahoma—has interpreted the term to mean a stoppage of the individual work of the employee. Annot., 61 A.L.R.3d 693 (1975). We agree with the majority of states and conclude that the term "stoppage of work," as it is used in the context of our Unemployment Compensation Act, refers to the employer's business rather than the employee's work.[1]

1. We note the recent case of *Hawaiian Tel. Co. v. State of Hawaii Dept. of L. & I. Rel.,* 405 F.Supp. 275 (D.Hawaii 1975), wherein the Federal District Court of Hawaii declared that the State of Hawaii's interpretation and application of the "stoppage of work" clause in its Unemployment Compensation Act so impermissably alters the relative economic strength of union versus employer in their bargaining relationship as to thereby encroach upon the field preempted by the National Labor Relations Act in violation of the supremacy clause of the U. S. Constitution. We do not find this decision persuasive because it totally overlooks the fact that in order to qualify for unemployment compensation a striker must be available for, and actively seeking work.

The term "stoppage of work" was originally taken from "Draft Bills" prepared by the Committee on Economic Security, which in turn borrowed the phrase from British Unemployment Insurance Acts. Shadur, Unemployment Benefits and the "Labor Dispute" Disqualification, supra. Therefore, it is significant to note that:

> "When this country's fifty-one statutes were adopted, the phrase had long since acquired a settled construction from the British Umpires as referring 'not to the cessation of the workman's labour, but to a stoppage of the work carried on in the factory, workshop or other premises at which the workman is employed.' "

Id. at 308.

Were the phrase "stoppage of work" to refer to the employee's work, it would be redundant in the sentence "his unemployment is due to a stoppage of work which exists because of a labor dispute * * *." If the statute read "his unemployment is due to a labor dispute," or "he stopped working because of a labor dispute," then it would be clear that the legislature intended to disqualify from receiving benefits all those employees who stop work because of a labor dispute, no matter how minimal the impact of their stopping is on the employer's operations.

Furthermore, the sentence "He is not participating in or directly interested in the labor dispute which caused the stoppage of work * * *" would be an extremely clumsy way of phrasing the idea, if "stoppage of work" referred to the employee's individual work. In fact, if we interpreted "stoppage of work" in this way, the whole of section (d) would read awkwardly at best. Therefore, a common sense approach to the words in their context leads us to the same conclusion that nearly all other courts have reached—that "stoppage of work" refers to the employer's business.

Finally, it must be stressed that our role in this situation is not to usurp the legislative function. As the Supreme Court of Arizona aptly pointed out in *Sakrison v. Pierce*, 66 Ariz. 162, 165–66, 185 P.2d 528, 530–31 (1947):

> "* * * Much is made in counsels' briefs of policy considerations. For example, on the one hand lies the charge that to allow compensation in such a case as this would be, in effect, to force employers and the state to finance a strike. On the other hand, it is claimed that to deny it would be to deny aid to those who among others, the Act was designed to protect (i. e., those who had participated in a labor dispute and lost —at least to the extent that others now had their jobs and their former employer's operations had been fully resumed). And that finally, a denial of compensation would seriously cripple their unquestioned right to strike. At the outset it should be made clear that this court is not concerned with any questions relative to the merits of the labor controversy itself. Our decision is not and cannot be determined by such factors. Instead it is determined by the choice that the elected legislative representatives of the people of this state have made for us. And whether or not the Act should compensate employees in this position is properly a choice for the legislature. * * * The function of this court, then, is simply to point out which route our legislature has chosen to travel."

Having then concluded that "stoppage of work" means a cessation or substantial curtailment of the employer's business, we are next confronted with the question of whether the employer's business was substantially curtailed at any time during the period from July 20, 1970 until November 30, 1970 when these workers went out on strike. What constitutes a substantial curtailment of work or operations at the employing establishment has generally been regarded by the courts as a question dependent upon the facts and circumstances of each case. Annot., 61 A.L.R.3d 693, 705 (1975). We agree.

The district court determined that the Commission's findings were supported

by substantial evidence in the record as a whole, and accordingly adopted and entered the following findings of fact, among others, just as they had appeared in the Commission's decision of August 9, 1971:

"7. Members of Teamster's Local No. 492 who struck the employer's place of business comprised about twenty percent of the employer's total work force.

"8. Immediately after commencement of the strike, the employer began hiring replacements for the striking employees and had replaced as many as necessary to continue normal operations within a few days.

"9. With the exception of some impact on the employer's interline freight business, there was no cessation of normal business activity or curtailment of the work force or productivity at the employer's place of business or establishment during the labor dispute."

The appellant challenges findings 8 and 9 and argues that the labor dispute did cause a substantial curtailment of the employer's business, thereby permitting the labor dispute disqualification provision, § 59-9-5(d), supra, to apply to the claimants here involved. In support of this challenge, appellant refers us to two letters from the attorney for the Company sent to the Commission in which certain unsubstantiated and unsupported figures relating to the curtailment of the Company's business are contained.

In contradistinction to these unverified figures we have the sworn testimony of Duncan A. McLeod, president of the Company, from the transcript of the hearings before the Commission on November 16, 1970. On direct examination, he testified as follows:

"Q Wasn't there any cessation of productive activity at your place of business resulting from this strike at any time?

"A No, not necessarily. We got back and it was operating.

"Q Well, when all these men who are employed, who apparently were employed by you prior to July 20th, who left their work, didn't that interfere with your production at all?

"A Oh, we were a little slow for a few days."

Appellant also refers us to certain pages in the supplemental transcript of record, but we have yet to find any evidence there which casts any doubt upon the accuracy of the district court's findings.

In short, the appellant has failed to demonstrate to us that there is any reason to reject the findings of the Commission and the district court with regard to the impact that the labor dispute had on the employer's business. There was substantial evidence to support the district court's findings 7, 8 and 9, and we conclude that the employer's business did not suffer any substantial curtailment when the employees involved here walked off their jobs.

The judgment of the trial court will be affirmed.

It is so ordered.

MONTOYA and SOSA, JJ., concur.

OMAN and STEPHENSON, JJ., dissenting.

STEPHENSON, Justice (dissenting).

I am unable to agree with the construction placed by the majority upon the Labor Dispute Disqualification section of the New Mexico Unemployment Compensation Law. § 59-9-5(d) N.M.S.A.1953. The construction of that statute which I believe to be correct would require a decision for the company without reaching the other issues dealt with by the majority. I will accordingly confine my comments to that issue.

The court below found that the claimants were employees of the company and members of a labor union. Failing to reach a mutually satisfactory collective bargaining agreement with the company on

economic issues, the union and the employees struck the company's place of business. All of the claimants participated in the strike. Union members who struck the company comprised about twenty percent of the company's total work force. However, under the construction I would place upon the cited statute, this fact is irrelevant.

The Commission contends that "stoppage of work," as that term is used in § 59–9–5(d), refers not to the claimant's work, but to a stoppage or curtailment of the employer's operation. The question is one of first impression in this state. The majority has opted for the Commission's interpretation, but in my opinion the phrase refers to a cessation of work by the employees as a result of a labor dispute, viz. a strike.

I would concede that the statute is awkwardly worded. By parsing the sentence in differing ways and substituting words for phrases, proponents of the two contending theories can endlessly argue that the theory which they espouse is the more reasonable, as the parties have done in their briefs. For example, one could point out that in § 59–9–5 the word "work" is used in each subsection. In the earlier ones the word clearly refers to the employee, and it would be anomolous to apply a different meaning to the work in subsection (d). I eschew this argument as the basis for my opinion, although I agree with the reasoning of the majority in *Board of Review v. Mid-Continent Petroleum Corp.*, 193 Okla. 36, 141 P.2d 69 (1943). I do not think the statute, however inartfully worded, is that opaque.

I premise my opinion on rather simple and well-settled rules of statutory construction and grammar. This court in its opinion in *In re Goldsworthy's Estate*, 45 N.M. 406, 115 P.2d 627 (1941), quoting from Sutherland on Statutory Construction § 408 (2 ed. 1904), said:

> "Statutes as well as other writings are to be read and understood primarily according to their grammatical sense, unless it is apparent that the author intended something different. In other words, it is presumed that the writer intended to be understood according to the grammatical purport of the language he has employed to express his meaning."

The court then proceeded to define the doctrine of the last antecedent by quoting from 59 C.J. Statutes § 583 (1932) as follows:

> "By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote."

See also *Hughes v. Samedan Oil Corporation*, 166 F.2d 871 (10th Cir. 1948). Applying these rules to the statute before us, we observe that a "labor dispute" and not a "stoppage of work" must exist at the factory, establishment or other premises.

I agree with the reasoning of the special concurring opinion of Justice Davison in *Board of Review v. Mid-Continent Petroleum Corp.*, supra. Justice Davison stated the definition of the last antecedent rule, quoting from a prior Oklahoma case, to be:

> "A limiting clause in a statute is generally to be restrained to the last antecedent, unless the subject-matter requires a different construction."

Certainly there is nothing about the subject matter here which requires a different construction. He then continued:

> The last antecedent in the statute before us is the "labor dispute," not the "stoppage of work".
>
> A labor dispute may exist at the factory without a "shutdown". Of course, if a labor dispute does result in a shutdown or stoppage of operations at the plant or factory it may result in a stoppage of

work for individuals not involved in the labor dispute. Individuals not so involved are the subject of consideration by the legislature in the statutory provisions immediately succeeding the above-quoted language.

It is thus my opinion that the thing which must exist at the factory is, under the terms of the statute, the labor dispute, not the stoppage of work; that when the labor dispute exists at the factory resulting in a stoppage of work by the individual he is disqualified to receive benefits if he is a participant in the labor dispute and not working by reason of his own voluntary desire, regardless of whether the factory stops or does not stop operating.

My opinion is bolstered by other considerations, though I reach the above conclusion without their aid. I note the statement of policy which the Legislature included in the Act in § 59–9–2 N.M.S.A. 1953.[1] I cannot read the phrase "through no fault of their own" as meaning or implying evil or wrongdoing or that an employee's work stoppage was subject to censure. *Board of Review v. Mid-Continent Petroleum Corp.*, supra. In ordinary parlance it would mean unemployment due to the employee's own volition or at his decision or election. Considering the phrase in § 59–9–2 in that light, it is clear to me that the very purpose of the Act is to provide compensation for those who are involuntarily unemployed. That certainly does not include strikers.

As the majority has pointed out, the conclusion that they have reached is supported by a majority of cases which have passed upon the issue. Most of these cases trace their way back to *Lawrence Baking Co. v. Michigan Unemployment C. Com'n,* 308 Mich. 198, 13 N.W.2d 260 (1944). That case appears to rely heavily on the English National Insurance Act of 1911 and on cases construing it. Bearing in mind that we are now in the year 1976 and that the issue presented is one of first impression in New Mexico, no reason has been suggested to me as to why we should now adopt a construction placed upon a statute of a foreign country by authorities charged with its administration not long after the turn of the century. In fact I am not at all sure why the Michigan court in *Lawrence Banking Co.* even addressed the problem which confronts us. The claimants there were not at any material time unemployed because of a labor dispute so far as I can determine from the opinion. To the contrary, they were unemployed because they had been discharged and replaced by others. The strike for all practical purposes, only lasted about fifteen minutes. I further observe that two strong dissents were filed in *Lawrence Banking Co.* with which I generally agree.

Much is said in the briefs about whether or not a governmental policy of neutral-

1. Declaration of state public policy. As a guide to interpretation and application of this act [59–9–1 to 59–9–29], the 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 achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state requires the enactment of this measure, for the compulsory *setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own*". (emphasis added)

ity exists in relation to strikes, a subject touched upon by the majority in its discussion of *Sakrison v. Pierce,* 66 Ariz. 162, 185 P.2d 528 (1947). Since I do not predicate my opinion upon the existence or non-existence of such a policy, I express no opinion as to its existence. I will content myself with saying that if it does not exist, it should.

Still bearing in mind that we are confronted with an issue of first impression and that we are free to adopt an interpretation of the statute which now best suits our situation, I find it interesting that in more modern times several states have refused to adopt "stoppage of work" language, or have eliminated that language after state courts have allowed unemployment compensation to be paid to strikers. In New York and California "stoppage of work" language is absent and strikers are generally ineligible for benefits. For example, see Cal.Unep.Ins. § 1262 (West 1972); N.Y. Labor Law § 592 (McKinney 1965) (seven week waiting period); Colo. Rev.Stat.Ann. § 8–73–109 (1974). There are about fifteen such states. The Texas statute reads "claimant's work stoppage." Vernon's Tex.Stat. art. 5221b–3 (1971). Two cases decided in the 1950's in Arizona held that stoppage of work referred to the employer's business. *Sakrison v. Pierce,* supra; *Mountain States Tel. & Tel. Co. v. Sakrison,* 71 Ariz. 219, 225 P.2d 707 (1950). Soon thereafter in 1952 the Arizona Legislature deleted "stoppage of work" and disqualified those employees involved in a labor dispute. Ariz.Rev.Stat. Ann. § 23–777 (1971). Michigan also changed its statute after the courts interpreted stoppage of work as the employer's operation. *Lawrence Banking Co. v. Michigan Unemployment C. Com'n,* supra, and Mich.Comp. Laws Ann. § 421.29 (1967).

For the reasons stated, I respectfully dissent.

OMAN, J., concurs.

544 P.2d 1170

KIRBY CATTLE COMPANY, Plaintiff-Appellant,

v.

SHRINERS HOSPITALS FOR CRIPPLED CHILDREN, Defendant-Appellee.

No. 1969.

Court of Appeals of New Mexico.
Dec. 2, 1975.
Certiorari Granted Jan. 16, 1976.

Patrick James Kirby, Taos, N. M., Joseph A. Sommer, Sommer, Lawler & Scheuer, P. A., Santa Fe, for plaintiff-appellant.

Raymond A. Baehr, Shaffer, Butt, Jones & Thornton, Albuquerque, for defendant-appellee.

OPINION

SUTIN, Judge.

Plaintiff, Kirby Cattle Company, a limited partnership (Kirby), appeals from an Order of Dismissal and Final Judgment which granted summary judgment to defendant, Shriners Hospitals for Crippled Children (Shriners). We reverse.

Kirby's appeal arises out of a denial of (1) its claim to a "first refusal" to purchase Shriners' land in Taos County, New Mexico, and (2) its right to file a first amended complaint.

We are confronted with a series of legal questions raised on appeal surrounding the adverse result.

A. *The Record of the Proceedings*

On November 2, 1973, Kirby filed its complaint seeking specific performance of its right to bid competitively for two sections of land owned by Shriners in Taos County, New Mexico. It alleged Shriners had decided to sell this property to a third person, without notice of any kind to Kirby.

The complaint alleged a series of negotiations between Kirby and Shriners for the lease or purchase by Kirby of the subject property which culminated in Shriners giving Kirby a right of first refusal on the property.

The claim of this right arose out of the following events: (1) Kirby offered to purchase or lease the subject property, by letter dated September 7, 1966. (2) Kirby had a telephone conversation with the Secretary of Shriners or a representative of Shriners in which that person ". . . assured Kirby in most positive terms that Kirby Cattle Company would be given first consideration in the event that the Shriners were to decide to sell or otherwise dispose of the property." (3) Shriners wrote Kirby a letter, dated March 3, 1967, stating that it did not want to take "any action at this time" with respect to Kirby's offer of September 7, 1966, and "that if the present position of our committee changes you will be so informed immediately."

Shriners filed an answer on December 12, 1973. It admitted the authenticity of the letters, but it denied Kirby's version of the telephone conversation and the interpretation given by Kirby of the letter it sent. As affirmative defenses, Shriners alleged: (1) that Kirby's complaint failed to state a claim upon which relief could be granted, (2) that the statute of limitations had run, and (3) that Kirby was guilty of laches.

On the same day, Shriners filed a motion to dismiss alleging that the statute of limitations had run, and that the complaint

on its face showed that there never was any binding and existing contract between the parties. In the proceedings to date, however, Shriners relied only upon Kirby's failure to state a claim for which relief could be granted. It is upon that basis that the trial court ruled in Shriners' favor, and upon that basis that we review.

On February 15, 1974, by letter, the court informed the parties:

> In my view the language contained in the correspondence is not subject to the construction placed thereon by the Plaintiff, and accordingly defendant's Motion to Dismiss should be granted.

Subsequent to such letter, but before any order of dismissal was entered, protracted proceedings were had. These included: (1) motion by Kirby (granted) for production of documents for inspection by Kirby; (2) motion by Shriners for entry of judgment; (3) notice by Kirby of taking of deposition of Louis Menyhert (the party to whom Shriners was allegedly selling the subject property) and two officers of Shriners; (4) motion by Menyhert for a protective order; (5) motion by Shriners for a protective order either terminating discovery or limiting further discovery; (6) motion by Shriners for an order pursuant to Rule 30(b) of the Rules of Civil Procedure [§ 21–1–1(30)(b), N.M.S.A.1953 (Repl.Vol. 4)] that Shriners file with the court, in a sealed envelope, a certain document ordered to be produced by Shriners by the previous court order.

On October 9, 1974, a hearing was held on the motions filed by Menyhert and Shriners. After arguments were made, the court orally ruled (1) that the sale price to Menyhert was irrelevant and a protective order would be entered, (2) that Shriners' motion for entry of judgment would be granted because there was no contract between the parties and nothing touching this property was enforceable. Shriners moved for entry of judgment "on the grounds that the plaintiff has failed to state a claim". The motion was granted and Shriners was requested to prepare the order dismissing the case.

On December 11, 1974, prior to the entry of judgment, Kirby filed a motion for an order granting leave to file a first amended complaint. The first cause of action substantially restated Kirby's original complaint. The second cause of action stated a claim against Louis Menyhert No. 3, a limited partnership, and against Louis Menyhert. The third cause of action in the alternative claimed a conspiracy among all defendants to interfere with and cause a breach of the Kirby-Shriners contractual relationship.

On February 3, 1975, a hearing was held on this motion. After argument, the court stated that he could not "find any consideration passing from Kirby Cattle Company to Shriners". In open court, the following orders were signed and filed: (1) "Order of Dismissal and Final Judgment", (2) an order denying Kirby's motion to file an amended complaint, (3) an order granting defendant's and Menyhert's motions for protective orders and denying Kirby the right to take the depositions of the persons mentioned supra. The court also found that the contents of the sealed envelope filed with it by Shriners, which contained details of its transaction with Menyhert, was irrelevant to Kirby's claim, and ordered the envelope returned unopened to Shriners.

In the Order of Dismissal and Final Judgment, the court found (1) that there was no genuine issue of material fact raised by the pleadings or by Kirby's affidavits and Exhibits "A" and "B" attached thereto and in support thereof; (2) that none of the documents and correspondence produced by Shriners, by order of the court, supported Kirby's contentions for relief as alleged in its complaint; (3) that the plaintiff failed as a matter of law to state a claim upon which relief can be granted. The court ordered:

(1) Shriners' motion for entry of judgment be granted pursuant to Rule 58 of the Rules of Civil Procedure;

(2) Kirby's complaint be dismissed with prejudice; and

(3) Shriners be granted summary judgment pursuant to Rule "56(b)" (sic) [56(c)] of the Rules of Civil Procedure.

We interpret the Order of Dismissal and Final Judgment to mean:

(1) Kirby's complaint was dismissed with prejudice in that it failed to state a claim upon which relief can be granted because the complaint on its face did not show that a binding contract existed between the parties.

(2) Shriners was granted summary judgment under Rule 56(c) of the Rules of Civil Procedure because there was no genuine issue of material fact that a contract existed between the parties.

B. *Kirby's complaint stated a claim upon which relief could be granted.*

Kirby's complaint sought specific performance of an agreement made with Shriners that Kirby has the right to a "first refusal" to purchase Shriners' land upon such terms as Shriners decided to dispose of it to a third party.

This complaint states a claim upon which relief can be granted. It is only necessary for the complaint to allege "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Section 21–1–1(8)(a)(2), N.M.S.A.1953 (Repl.Vol. 4). "In considering whether a complaint states a claim upon which relief can be granted, courts accept as true all facts well pleaded." *Ramsey v. Zeigner*, 79 N.M. 457, 458, 444 P.2d 968, 969 (1968). ". . . [T]he complaint will only be dismissed where it appears that under no state of facts provable under the claim could plaintiff recover or be entitled to relief . . . ." *Rubenstein v. Weil*, 75 N.M. 562, 564, 408 P.2d 140, 141 (1965).

The "first refusal" theory relied on by Kirby is established in law as a basis upon which a claim for relief can be granted. *Eagle Thrifty Dr. & Mkts., Inc. v. Incline Village, Inc.*, 517 P.2d 786 (Nev.1973); *Turner v. Mendenhall*, 95 Idaho 426, 510 P.2d 490 (1973); See, *Dalton v. Balum*, 13 Wash.App. 160, 534 P.2d 56 (1975); *Ammerman v. City Stores Company*, 129 U.S. App.D.C. 325, 394 F.2d 950 (1968); Annot., 40 A.L.R.3d 920 (1971). In *Eagle Thrifty Dr. & Mkts., Inc. v. Incline Village, Inc.*, supra, the Court said:

> A right of first refusal is sometimes said to be a right to elect to take specified property at the same price and on the same terms and conditions as those contained in a good-faith offer by a third person if the owner manifests a willingness to accept the offer. Once the owner manifests such willingness, the right of first refusal, heretofore an executory right, ripens into an option. . . . [517 P.2d at 788].

It appears from the transcript of the argument made at the final hearing on February 3, 1975, that the trial court stated the basis of its ruling that the complaint failed to state a claim for relief. The trial court could not "find any consideration passing from Kirby Cattle Company to Shriners." This conclusion is answered in *Rubenstein v. Weil*, supra:

> Section 20–2–8, N.M.S.A.1953, reading:
>
> > "Every contract in writing hereafter made shall import a consideration in the same manner and as fully as sealed instruments have heretofore done[,]"
>
> makes the option agreement sufficient to withstand the attack of a motion to dismiss for failure to allege consideration. [Citation omitted]. [75 N.M. at 564, 408 P.2d at 141].

See, *May v. Walters*, 67 N.M. 297, 354 P. 2d 1114 (1960).

We hold that Kirby's complaint stated a claim upon which relief can be granted.

C. *Shriners was not entitled to summary judgment under Rule 56(c) of the Rules of Civil Procedure.*

From December 12, 1973, the time Shriners filed its motion to dismiss, to February 3, 1975, the time summary judgment

was entered, there was no indication that the matter of summary judgment in any form was considered by the parties or the court.

None of the provisions of Rule 56 of the Rules of Civil Procedure [§ 21–1–1(56), N.M.S.A.1953 (Repl.Vol. 4)] on summary judgment were complied with. No motion for summary judgment was served or filed. Neither was Kirby given a reasonable opportunity to present evidence pertinent to his claim.

Kirby attempted to obtain additional evidence to establish a genuine issue of material fact on the "first refusal" theory. Notice was given to take the depositions of Menyhert and Shriners' officers.

Menyhert filed a motion for a protective order under Rule 30(b) of the Rules of Civil Procedure [§ 21–1–1(30)(b), N.M.S.A.1953 (Repl.Vol. 4)]. The grounds stated were (1) that Menyhert was not a party; (2) that he would be subject to annoyance, embarassment and oppression based upon an affidavit that Kirby wanted to upset and frustrate the sale of the land.

After judgment was entered, the trial court found that Menyhert's motion should be granted, and ordered that the deposition not be taken.

We find nothing in the record that justified the finding and the order. Under the "first refusal" theory, Kirby had the right to discover whether Menyhert made a bona fide offer to Shriners to purchase its land, and all matters relevant thereto.

Shriners filed a motion for a protective order under Rule 30(b) to terminate discovery or limit further discovery. Primarily, Shriners sought a change in the time and place for the taking of the deposition.

The trial court granted Shriners' motion that the depositions not be taken; that any discovery by Kirby concerning Shriners' sale of its land was irrelevant and immaterial.

Upon what basis the sale was irrelevant and immaterial, the record is silent. Under Rule 30(b) "good cause" is necessary to support an order of denial. No good cause was shown. Rule 26(b) permits Kirby to examine the witnesses "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." No citation of authority is necessary to determine the scope of the examination.

Under Rule 56, Kirby was denied a reasonable opportunity to present all material pertinent to the action to establish a genuine issue of material fact on the "first refusal" theory.

Shriners also contends that Kirby's letter to Shriners was an offer, which offer was rejected, and that this was the extent of the transaction between the parties. This contention only creates an issue of fact when contrasted with Kirby's contention that Shriners had given Kirby a binding option of "first refusal" to purchase the land. Kirby contends that Shriners is now confronted with a binding, enforceable unilateral contract; that it is now no longer a question of an attempt by Kirby to conclude a bilateral purchase contract. "An option is more than an offer, . . . it is itself a contract and is not to be confused with the bilateral contract which it gives the optionee the power to bring into being." *Ammerman*, supra, 394 F.2d at 954.

We have reviewed the other arguments made by Shriners and we find them without merit.

The trial court erred in granting summary judgment.

D. *Kirby is entitled to file a first amended complaint.*

On December 11, 1974, about 54 days before final judgment was entered, Kirby filed its motion for an order granting leave to file a first amended complaint. The court denied the motion. It believed that Kirby could not state a claim for relief because it could find no consideration passing from Kirby to Shriners. As pointed out supra, this will not support a motion to dismiss the complaint. Whether consid-

eration did pass is a question of fact. Were this matter believed by the trial court, it would probably have granted Kirby the right to file an amended complaint.

Rule 15(a) of the Rules of Civil Procedure [§ 21-1-1(15)(a), N.M.S.A.1953 (Repl.Vol. 4)] permits the amendment of a complaint by leave of court; ". . . and leave shall be freely given when justice so requires." The right to amend should be permitted with liberality in the furtherance of justice. *Bynum v. Bynum,* 87 N.M. 195, 531 P.2d 618 (Ct.App.1975). But such leave to amend is addressed to the sound discretion of the trial court. *Vernon Company v. Reed,* 78 N.M. 554, 434 P.2d 376 (1967). However, where the trial court denies the request to amend upon an erroneous construction of applicable law, it is not a denial in the exercise of a sound judicial discretion. Id.

Based upon the court's erroneous construction of the law applicable to questions of consideration in stating a claim for relief, we grant to Kirby the right to file its first amended complaint in furtherance of justice.

This case is reversed and remanded with directions that it be reinstated and that further proceedings be had therein consonant with views expressed herein.

It is so ordered.

LOPEZ, J., concurs.

HERNANDEZ, J., dissents.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

Defendants filed a motion to dismiss for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6) of the New Mexico Rules of Civil Procedure, [§ 21-1-1(12), N.M.S.A.1953 (Repl. Vol. 4)]. The court granted defendants' motion on February 14, 1974, but the judgment was not entered pending further discovery at plaintiff's request. The judgment was finally entered on February 3, 1975, as a summary judgment pursuant to Rule 56(b), New Mexico Rules of Civil Procedure, supra.

Rule 12(b)(6), New Mexico Rules of Civil Procedure, supra, states clearly and in unequivocal terms that:

> ". . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, *the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,* and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." [Emphasis Mine.]

Matters outside the pleadings were presented to the trial court. No separate motion for summary judgment under Rule 56, New Mexico Rules of Civil Procedure, supra, need be made. The rules establishing the conditions under which summary judgment will be granted are well established in New Mexico. See *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972). In my opinion the trial court properly granted the Shriners summary judgment.

It is also my opinion that the trial court did not err in granting a motion for protective orders, or for refusing a motion for further discovery. These matters, the trial court properly concluded, fell outside the parameters of the allegations in plaintiff's complaint and were, accordingly, irrelevant. Extensive discovery had been permitted plaintiff during the year this suit was litigated. The trial court did not abuse its discretion by finding further discovery of a third party's possible interest irrelevant.

Finally, the court's refusal to grant plaintiff's motion to amend its complaint was entirely within the discretion of the trial court.

544 P.2d 1176

Patricia BERTRAND, Appellant,

v.

NEW MEXICO STATE BOARD OF EDUCATION, Appellee (two cases).

Nos. 1930, 2067.

Court of Appeals of New Mexico.

Dec. 9, 1975.

Certiorari Denied Jan. 16, 1976.

John P. Davidson, Kastler, Erwin & Davidson, Raton, for appellant.

Toney Anaya, Atty. Gen., William A. L'Esperance, John A. Templeman, Sp. Asst. Attys. Gen., Santa Fe, for appellee.

Robert S. Skinner, Raton, for amicus curiae.

OPINION

LOPEZ, Judge.

This case involves two appeals arising out of the Raton School Board's decision to discharge a teacher, Patricia Bertrand, for her conviction for distributing marijuana. The first appeal discussed (No. 2067) concerns the due process obligation owed by local school boards when they decide not to renew a contract. The second appeal (No. 1930) raises issues relating to the Criminal Offender Employment Act (§§ 41–24–1 through 41–24–6, N.M.S.A. 1953 (Interim Supp.1974) (hereinafter COEA)) and the relationship between the State Board of Education and local school boards.

No. 2067

This appeal concerns the Local Board's refusal to give Ms. Bertrand a hearing and a statement of reasons for its refusal to rehire her. The teacher appealed the Local Board's refusal to the State Board, asking them to reverse the Local Board and to give her a hearing. The State Board refused to accept the appeal or grant a hearing.

We do not reach the merits of the teacher's claim because we do not have jurisdiction. Our decision in this matter is controlled by the decision of this court in *Quintana v. State Board of Education,* 81 N.M. 671, 472 P.2d 385 (Ct.App.1970), cert. denied 81 N.M. 668, 472 P.2d 382 (1970). In *Quintana* this court refused to decide an appeal from a decision of the State Board because the Local Board had not held a hearing. The jurisdiction of the State Board is limited to review of decisions of the local school board made after an informal hearing conducted pursuant to § 77–8–16, N.M.S.A.1953 (Repl. Vol. 11, pt. 1, Supp.1973). Section 77–8–17(A), N.M.S.A.1953 (Repl. Vol. 11, pt. 1, Supp. 1973). The jurisdiction of the Court of Appeals is limited to review of decisions of the State Board made under § 77–8–17, N. M.S.A.1953 (Repl. Vol. 11, pt. 1, Supp. 1973). The teacher's remedy in this situation was to pursue mandamus. *Quintana v. State Board of Education,* supra; *Brown v. Romero,* 77 N.M. 547, 425 P.2d 310 (1967).

No. 1930

Ms. Bertrand was twenty-two years old at the time she began work for the Raton School Board in August of 1974 as a special education teacher for children seven to twelve years old. While a student at the University of New Mexico the preceding spring, she pled guilty to one count of unlawful distribution of marijuana and was placed on probation for one year. When Ms. Bertrand applied for a position with the Raton schools, she answered all questions asked her but did not volunteer any information about her conviction and probationary status. After she had been employed for approximately one month, her probation officer, Mr. Pacheco, contacted the school for an unspecified purpose. Following a meeting of the Superintendent of the Raton Public Schools, Russell Knudson, with the probation officer and Ms. Bertrand, the School Board decided to discharge the teacher, and so informed her. An informal hearing was then held to de-

termine if cause existed for discharging her at which time the decision was affirmed.

The teacher appealed this decision to the State Board. Section 77–8–17, supra. The Board appointed a hearing officer, Leon Karelitz, who determined that the Local Board had failed to act in accordance with the applicable law. He recommended reversal of the Local Board's decision. The State Board heard new evidence, made new findings, and affirmed the Local Board's decision.

The school authorities' ability to discharge is found in two sources. One source is the teacher's employment contract which states that employment can be terminated for "good and just cause". The other source is the Criminal Offender Employment Act. Sections 41–24–1 through 41–24–6, supra. COEA is addressed to the problems of employment of those with criminal records. The purpose of COEA is stated to be:

> "The legislature finds that the public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible." Section 41–24–2, supra.

The general principle is that the state may take convictions into account in making employment decisions, but ". . . such conviction shall not operate as an automatic bar to obtaining public employment." Section 41–24–3(A), supra.

The specific provision regarding termination of employment is framed in terms of two alternative causes:

> "(1) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction directly relates to the particular employment, trade, business or profession; or
>
> "(2) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction does not directly relate to the particular employment, trade, business or profession, if the board or other agency determines, after investigation, that the person so convicted has not been sufficiently rehabilitated to warrant the public trust." Section 41–24–4(A), supra.

The Local Board told Ms. Bertrand that the reason for firing her was her conviction and probationary status. The Local Board was unaware of COEA and it is not contended that it complied with it.

The hearing officer noted the Local Board's noncompliance with COEA. He concluded that there was no direct relationship between the conviction and her employment; that the Local Board had not investigated and determined whether the teacher was rehabilitated; and that, therefore, there was insufficient evidence of good cause to support her discharge.

The State Board affirmed the decision of the Local Board. Before doing so the Board held an evidentiary hearing limited to determining the validity of the Local Board's actions under COEA. As a result of this hearing the State Board made findings that "Bertrand's criminal conviction directly relates to her employment, or profession as a teacher," and that "Bertrand had not been sufficiently rehabilitated to warrant the public trust."

The relationship between the State Board, its hearing officer, and the Local Board forms the pivotal issue of this appeal. The statute which governs appeal from a decision of a local board to the State Board has led to confusion because reference is made in it to both a review function performed by the State Board (§ 77–8–17(G), supra) and to its ability to conduct a hearing de novo (§ 77–8–17(C), supra). The confusion engendered by this peculiar administrative procedure was substantially dispelled by this court's recent decision in *Board of Education of the City of Albuquerque v. New Mexico State Board of*

Education, 88 N.M. 10, 536 P.2d 274 (Ct. App.1975) (hereinafter referred to as the *Whitman* case). In that case the court held that the State Board owed no deference to the decision of the local board and it could " . . . proceed with the action as if it had been originally commenced at the level of the State Board."

Having concluded that the State Board can remedy the defects in the Local Board's methods by holding a de novo hearing, we must decide whether the Board's findings under COEA were supported by substantial evidence and were in accordance with law. Section 77–8–17(J), supra.

The State Board was subject to the provisions of COEA, because it is an agency which determines eligibility for employment with the state. Section 41–24–3, supra. The Board made two findings under COEA. The findings were that the teacher had not been rehabilitated and that her criminal conviction was directly related to her employment. Either of these grounds alone would have been sufficient to support her discharge. We affirm on the basis of the rehabilitation finding.

The Board found that Ms. Bertrand was not sufficiently rehabilitated to warrant the public trust. The evidence before it was conflicting and a decision in either direction could have been supported by substantial evidence. *Whitman,* supra; *Wickersham v. New Mexico State Board of Education,* 81 N.M. 188, 464 P.2d 918 (Ct.App.1970).

Superintendent Knudson testified about two incidents from which the Board may have concluded that the teacher was not rehabilitated. The first was the meeting with the superintendent and the probation officer. Ms. Bertrand became angry when the probation officer wouldn't let her see her file and made a derogatory comment about the laws and "narcs". The second was the superintendent's recollection of a conversation with her in which he asked how she would handle students asking her about drugs. She told him that she had been confronted with such a situation and that she had told the child that " 'he could get in some trouble because of some bad laws, but for him to do what he wanted' ". Ms. Bertrand also testified and explained that she had meant that the laws were bad in that one could get in trouble because of them, and that she had handled the situation the way that she had to maintain rapport with the child.

"Rehabilitation" is not defined in the statute. The statute does create a presumption of rehabilitation after completion of parole, or after a certain period has elapsed after release from prison (§ 41–24–4(B), supra) but Ms. Bertrand is not aided by this section since neither condition applies to her. The term has not been defined in this context by case law. The dictionary definition is "to restore a condition of good health, ability to work, or the like". Random House Dictionary of the English Language (1969). Probative evidence of rehabilitation would include Ms. Bertrand's conscientious and successful performance at both jobs and the parents' perception of her as a person with whom they would trust their children. The incidents described by the superintendent are also probative of what the Board could conclude was a poor attitude towards criminal offenses for one who was a teacher. Finally, the State Board members spoke to Ms. Bertrand at some length themselves and were able to draw their own impressions of her progress towards rehabilitation. In this posture we cannot substitute our judgment for that of the State Board. *Whitman,* supra; *Wickersham v. New Mexico State Board of Education,* supra.

The State Board also found that the criminal conviction directly related to Ms. Bertrand's profession. In COEA it is specifically provided that when a decision is made on this basis, the reasons for such a decision must be explicitly stated in writ-

ing. The Board failed to meet this requirement. It is not sufficient for the Board to merely recite the language of § 41–24–4(A)(1), supra. The statute requires that the *"reasons"* for the conclusion that there is a direct relation must be given. It is especially important for a reviewing body to know the reasons for the administrative body's conclusion because the statute here states that an entirely different criterion is relevant when the crime is not related. If the conviction of a crime is to operate as other than an "automatic bar" to employment, the administrative agencies must explain what they perceive the detrimental effect of her employment to be. (See *Comings v. State Board of Education,* 23 Cal.App.3d 94, 100 Cal.Rptr. 73, 47 A.L.R.3d 754 (1972) (conviction of crime alone insufficient for revocation of certification)).

The teacher also argues that because the conduct which formed the basis of her dismissal occurred before she was hired, the school board was therefore estopped from dismissing her because of the conduct. The teacher cites *Roberson v. Board of Education of City of Santa Fe,* 80 N.M. 672, 459 P.2d 834 (1969), in support of this contention. In *Roberson* the school board had actual knowledge of the conduct. In this case it is undisputed that the Local Board did not have knowledge of the conviction until approached by the probation officer. Although the teacher's conviction was a matter of public record, we decline to impute this knowledge to the Board.

The decision is affirmed.

It is so ordered.

HERNANDEZ, J., concurs.

HENDLEY, J., specially concurs.

HENDLEY, Judge (specially concurring).

I specially concur. The main reason for my special concurrence is that the majority after affirming on the basis of the finding that the teacher had not been rehabilitated, which is the only discussion necessary to the decision, proceeds to discuss the other alternative of the COEA. That discussion is not germane to the decision.

544 P.2d 1180

Frank MEDINA, Plaintiff-Appellant,

v.

The ZIA COMPANY, Employer and United States Fidelity and Guaranty Company, Insurer, Defendants-Appellees.

No. 1897.

Court of Appeals of New Mexico.
Nov. 25, 1975.
Rehearing Denied Dec. 9, 1975.
Certiorari Denied Jan. 15, 1976.

Patrick A. Casey, Bachicha, Corlett & Casey, P.A., Santa Fe, for plaintiff-appellant.

John B. Pound, Montgomery, Federici, Andrews, Hannahs & Buell, Santa Fe, for defendants-appellees.

OPINION

SUTIN, Judge.

Plaintiff appeals an adverse judgment in a workman's compensation case growing out of a hernia injury. We affirm.

A. *The trial court applied the proper legal test.*

Plaintiff contends the district court failed to apply the proper legal test of total and partial disability under §§ 59–10–12.18 and 59–10–12.19, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1).

These sections read as follows:

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

The definition of total and partial disability under these sections contain two tests: (1) the workman must be totally or partially unable to perform the work he was doing at the time of the injury, AND, (2) the workman is wholly or partially unable to perform ANY work for which he is fitted. *Quintana v. Trotz Construction*

Company, 79 N.M. 109, 440 P.2d 301 (1968).

The trial court's findings, based upon substantial evidence, show: (1) plaintiff was partially *unable* to perform the work he was doing at the time of the injury due to the fact that plaintiff could no longer lift heavy objects, AND, (2) plaintiff was wholly *able* to perform the existing work, available to him at The Zia Company, his employer, for which he was fitted and qualified. Based upon this finding, the trial court denied plaintiff workmen's compensation.

The question for decision is: If a workman is partially unable to perform the work he was doing at the time of injury because of weight lifting limitations, but is totally able to perform work for which he is fitted and does not return to work, is the workman entitled to compensation?

This question is a matter of first impression. We answer the question as "No", for two reasons:

First, it is now established that the primary test for disability is the capacity to perform work. *Adams v. Loffland Brothers Drilling Company,* 82 N.M. 72, 475 P.2d 466 (Ct.App.1970). For a history of the "disability" sections of the Workmen's Compensation Act, see *Quintana v. Trotz Construction Company,* supra. Here, Justice Moise wrote:

> Without any evident purpose to in any way alter the desirable objectives of workmen's compensation insurance, the 1963 amendment of the 1959 definition *changed the primary test of disability from wage-earning ability to capacity to perform work* as delineated in the statute. [Emphasis added]. [79 N.M. at 111, 440 P.2d at 303].

Under the doctrine of "capacity to perform work", we are not concerned with the physical injury itself. In this case it is a satisfactorily repaired hernia. Under the second test set forth in the beginning of this opinion, plaintiff must establish that the injury totally or partially prevented him from doing ANY work for which he was fitted. Plaintiff did not comply with this test when he was fit to do the work, but, instead, he leaves his work, goes home, and does not return to work.

Second, the tests stated in the disability statutes are divided by the word "and". *Quintana v. Trotz Construction Company,* supra, states: ". . . it is quite evident that the legislature adopted as the tests for total disability, (1) complete inability 'to perform the usual tasks in the work he was performing at the time of his injury'; and (2) absolute inability 'to perform any work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience.'" Compare *Willcox v. United Nuclear Homestake Sapin Co.,* 83 N.M. 73, 488 P. 2d 123 (Ct.App. 1971) where the claimant could perform under both tests, and *Gallegos v. Duke City Lumber Co., Inc.,* 87 N. M. 404, 534 P.2d 1116 (Ct.App. 1975) where the claimant could perform under neither test. Plaintiff must establish that he was totally or partially unable to perform the work he was doing at the time of the injury. In addition thereto, he must establish that he was totally or partially unable to perform ANY work for which he was fitted. Plaintiff did not establish both tests.

Plaintiff earned about $114 per week at the time of the injury. Although he suffered some physical handicap from the injury, he was wholly able to perform the work for which he was fitted after recovery from the hernia operation, and at the same wage.

B. *The trial court's findings were sustained by substantial evidence.*

Plaintiff contends that the two crucial findings of the trial court are not sustained by sufficient evidence. The trial court found:

> 4. The Plaintiff is presently able to perform his usual and customary duties as a manual laborer, . . . not involving the lifting of heavy objects, all of

which he is fitted for by age, education, training, previous work experience and physical condition.

5. There is available to Plaintiff, existing work of the nature and type for which the Plaintiff is fitted to perform by reason of his education, training and previous work experience and physical condition.

Plaintiff, 64 years of age, was employed by The Zia Company on a seasonal basis for over 17 years. He worked in the spring and summer months and terminated his employment in the autumn and fall season when gardening and manual labor needs of his employer slackened.

On April 23, 1973, the time of the accident, plaintiff was educated through the sixth grade, and was experienced in doing work as a manual laborer, general farm laborer, gardening, watering, tree pruning, maintaining yards and lawns and similar tasks.

On April 25, 1973, plaintiff returned to work with The Zia Company and performed light duty work on lawns until September 24, 1973, when he entered the hospital to undergo corrective surgery to repair his hernia. He was discharged September 30, 1973. His hernia was repaired and healed in a satisfactory manner. He was advised not to lift anything over 25 pounds. After plaintiff was thus medically advised, he was also assigned light work on lawns. He worked a full eight-hour day satisfactorily. He was discharged from further medical treatment on October 29, 1973. No future medical care or treatment was anticipated. Plaintiff was paid compensation benefits through November 25, 1973, and defendants have paid all medical costs and expenses of plaintiff.

Plaintiff's supervisor testified that plaintiff only worked in the summertime and his work was lawn work. This light work was available to plaintiff if he had returned to his job.

After discharge from the hospital September 30, 1973, plaintiff never returned to work.

There was substantial evidence to support the two findings of the trial court, as well as all of the court's findings.

Plaintiff makes strong arguments on his inability to do heavy lifting, the testimony of his expert witnesses, the permanency of his hernia handicap, his robustness prior to the injury, his previous work experience, and the claimed uncontradicted evidence. Once again, we must remind appellant that a long-standing rule exists on appeal. In *Worthey v. Sedillo Title Guaranty, Inc.*, 85 N.M. 339, 341, 512 P.2d 667, 669 (1973), the Supreme Court said:

> Only the trier of the facts may weigh the evidence, determine the credibility of the witnesses, reconcile inconsistent or contradictory statements of a witness or of witnesses, and decide where the truth lies.

C. *Trial court's consideration of medical deposition not error.*

The plaintiff claims reversible error because the trial court considered medical depositions which were not properly before it. The depositions were not introduced into evidence. They were filed in the clerk's office, and the defendants' attorney handed them to the trial court.

On July 12, 1974, three days before trial, the defendants moved for an order allowing them to take the deposition of one doctor who was out of the country and would return at the end of July, 1974. At the close of trial on July 15, 1974, defendants desired to take the deposition of an additional doctor. After some discussion, plaintiff's attorney said: "I do not care if he does take the deposition, that is fine with me." The trial court set the plan for the presentation of this evidence and rebuttal testimony. A recess was declared. On July 17, 1974, the court entered its order that the depositions be taken on August 5, 1974 and later extended to August 15, 1974. Notice was given to plaintiff. The depositions were filed on September 4, 1974.

On September 10, 1974, plaintiff mailed to defendants a notice that a hearing on final arguments would be held on September

27, 1974. At the time of the hearing on that date, the trial court announced that depositional testimony was submitted for the court's consideration. The court then said:

> . . . I believe the matter, gentlemen, before the Court today is closing arguments on the matters that have been presented, is that correct?
>
> [Plaintiff's attorney]: That is correct Your Honor.

After closing argument, the court requested findings of fact and conclusions of law. He then announced that since he permitted defendants to take the depositions, he wished to go over them "a little more carefully . . . . Are there any other matters gentlemen?"

[Plaintiff's attorney]: No, Your Honor.

Plaintiff cannot complain. *First,* no objection was made to the use of the depositions as evidence by the trial court. This matter cannot be raised for the first time on appeal. *Second,* the plaintiff did not object to the trial court receiving the depositions in evidence. Section 21-1-1(26)(a), N.M.S.A. 1953 (Repl.Vol. 4). *Third,* plaintiff relied on a part of one of the depositions. He pointed to nothing in the depositions which, he claims, the court considered and relied upon in reaching his findings of fact. *Fourth,* he pointed to nothing in the depositions which we might consider as prejudicial error. *Fifth,* without objection, plaintiff waived his claim of error. Plaintiff cannot stand silently beside the case after the decision is rendered and claim error.

There being sufficient competent evidence to support the findings and judgment, the admission of incompetent evidence not error. *Martin et al. v. Village of Hot Springs et al.,* 34 N.M. 411, 282 P. 273 (1929).

Affirmed.

It is so ordered.

WOOD, C. J., and HERNANDEZ, J., concur.

544 P.2d 1184

STATE of New Mexico, Plaintiff-Appellant,

v.

George ALDERETE, Jr., Defendant-Appellee.

No. 2265.

Court of Appeals of New Mexico.

Jan. 6, 1976.

James L. Brandenburg, Dist. Atty., James F. Blackmer, Asst. Dist. Atty., Albuquerque, for plaintiff-appellant.

Louis G. Stewart, Jr., Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

The trial court suppressed certain evidence taken from defendant's residence on the basis that the "search and seizure of the evidence taken was beyond the scope of the consent" given by defendant. The State appeals.

We are not concerned with the authority of the officers to conduct a search of defendant's premises. The unchallenged findings of the trial court are to the effect that defendant voluntarily gave his written consent to search. Nor are we concerned with the premises searched. The consent was to search a house at a designated address. The evidence suppressed was found inside the house. The consent given by defendant was limited to a search for heroin. The evidence suppressed was not heroin. The items seized during the search were amphetamines and methadone. The issue is whether the officers could lawfully seize amphetamines and methadone when their search was pursuant to defendant's consent to search for heroin.

No claim is made that the amphetamines and the methadone were not items unlawfully possessed under our Controlled Substances Act. See § 54–11–1, N.M.S.A. 1953 (Repl.Vol. 8, pt. 2, Supp.1973).

Defendant claims the contraband was seized pursuant to a prohibited general search. The trial court's unchallenged findings are to the effect that the contraband was discovered and seized during the course of the unsuccessful search for heroin. There is nothing indicating the search was a general search.

Defendant asserts that the officers had no reason or no probable cause to seize the contraband because the fact that the items were contraband was "not apparent on a mere surface inspection". Compare *State v. Paul,* 80 N.M. 521, 458 P.2d 596 (Ct.App.1969), cert. denied, 397 U.S. 1044, 90 S.Ct. 1354, 25 L.Ed.2d 654 (1970). No such contention was raised in defendant's motion to suppress nor did the trial court rule on such a contention. The State asserts that such evidence was before the trial court and that this Court cannot properly consider whether the officers had cause for seizing the contraband without that evidence being before us for review. We agree with the State. This case was assigned to the legal calendar on the basis of a docketing statement which identified the appellate issue as the "scope of consent" ruling by the trial court. See N.M. Crim.App. 205 and 207(c). The issue of "cause" for seizure of the contraband is not before us for review. N.M.Crim.App. 308.

The State asserts that the contraband was properly seized because during the officers' search for heroin the contraband was discovered in "plain view". The trial court correctly ruled to the contrary. The contraband was discovered when officers opened a cedar chest, a metal pill box in a purse, and an overnight case while searching for heroin. The "plain view" doctrine does not justify seizure of the contraband in this case. See *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

The contraband was subject to seizure. *Coolidge v. New Hampshire,* supra; *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). The question is whether the sei-

zure was permissible under the facts of this case.

Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960) states:

> "When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for."

New Mexico decisions have applied the quotation from *Abel,* supra, where the evidence seized was incident to a lawful arrest—*State v. Ramirez,* 79 N.M. 475, 444 P.2d 986 (1968); *State v. Slicker,* 79 N.M. 677, 448 P.2d 478 (Ct.App.1968) and where the evidence seized was in the course of a lawful search pursuant to a search warrant —*State v. Carlton,* 82 N.M. 537, 484 P.2d 757 (Ct.App.1971). The rule is no different where drugs are involved. Where the search is for one drug and a second drug is discovered, seizure of the second drug is lawful. *United States v. Pacelli,* 470 F.2d 67 (2d Cir. 1972), cert. denied, 410 U.S. 983, 93 S.Ct. 1501, 36 L.Ed.2d 178 (1973); *State v. Davenport,* 55 Haw. 90, 516 P.2d 65 (1973); *State v. Olson,* 15 Or.App. 393, 515 P.2d 1342 (1973). Contraband found during a search within the scope permitted by the search warrant was properly seized. *Government of Virgin Islands v. Lopez,* 459 F.2d 5 (3rd Cir. 1972).

The rule is not different when the item seized is discovered during the course of a consent search. The scope of a consent search is limited, and determined, by the actual consent given. "Where permission has been given to search for a particular object, the ensuing search remains valid as long as its scope is consistent with an effort to locate that object. . . . [O]ther evidence observed in the course of such a lawful search may also be seized." *State v. Koucoules,* Me., 343 A.2d 860 (1974); see *United States v. Dichiarinte,* 445 F.2d 126 (7th Cir. 1971).

Defendant consented to a search for heroin. There is no claim that the search for heroin was in impermissible areas. While searching for heroin the officers found the contraband in question. The *search* being within the scope of the consent given, the officers could lawfully *seize* contraband discovered during that search.

The order suppressing the evidence is reversed; the cause is remanded for trial.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

545 P.2d 88

Nathan W. WINDER, Plaintiff-Appellant,

v.

Patricia Medina MARTINEZ and Epiminio Medina, Defendants-Appellees.

No. 2002.

Court of Appeals of New Mexico.

Dec. 16, 1975.

Certiorari Denied Jan. 15, 1976.

Tandy L. Hunt, Turpen, Hunt & Booth, Albuquerque, for plaintiff-appellant.

Charles A. Pharris, Keleher & McLeod, Albuquerque, for defendants-appellees.

OPINION

WOOD, Chief Judge.

This lawsuit arose out of a motor vehicle collision. There is no issue concerning defendants' liability. The jury returned a verdict for plaintiff, who appeals. Plaintiff tendered testimony from a psychologist on the issue of damages. The dispositive issue is whether the trial court erred in excluding this testimony. This issue involves consideration of (1) evidence of brain damage; (2) hypothetical questions; (3) irrelevant and immaterial evidence; and (4) qualifications of a psychologist to testify.

In the presence of the jury the psychologist testified as to his training and experience. In addition, he testified that he was "certified" to practice psychology in New Mexico. See §§ 67–30–5(B)(4) and 67–30–11, N.M.S.A.1953 (2d Repl.Vol. 10, pt. 1). He testified that he had evaluated the plaintiff and identified the factors involved in arriving at an evaluation.

These factors included: (a) an intensive interview, (b) various tests which were identified and explained, (c) plaintiff's age, education and work experience, (d) plaintiff's social and economic situation, and (e) the job market. There is no dispute about these factors.

Another factor considered was evaluations of plaintiff by others. The result of tests administered by the psychologist and the result of psychological tests administered by others were essentially the same.

In explaining the result of one of the tests, the psychologist referred to the "defective range of intellectual function." Defendants' objection was sustained; the trial court informed the jury: "There is no connection whatsoever between this man's intelligence and this automobile accident which we are concerned about here."

Plaintiff made a tender of proof outside the presence of the jury. Defendants made a series of objections to the tendered testimony. The trial court ruled: "The objection will be sustained, and for the further reason that this witness is not qualified to testify concerning brain damage, nor can such an evaluation or conclusion be made from psychological tests."

Brain Damage

The only reference to brain damage was two questions. The first question asked was whether the tests were capable of revealing brain damage. The psychologist answered: ". . . there are indicators on these instruments which would point to brain damage possibility." The second question, answered in the affirmative, was whether it was commonly accepted in the psychologist's profession that the tests "can indicate brain damage". Damages based on surmise, conjecture or speculation cannot be sustained. Damages

must be proved with reasonable certainty. *Hebenstreit v. Atchison, Topeka & Santa Fe Ry. Co.*, 65 N.M. 301, 336 P.2d 1057 (1959). The two questions and answers concerning brain damage raised no issue concerning brain damage for two reasons: (1) the answers showed there was no more than a possibility that the tests could show brain damage, and (2) there was no attempt to show that the plaintiff had suffered brain damage.

Neither counsel contended that the tendered testimony went to brain damage. Concern with whether the tendered testimony of the psychologist raised an issue as to brain damage was interjected by the trial court. Since the tendered testimony did not raise an issue as to brain damage, we are not concerned with whether the psychologist was qualified to testify on the subject. See *Woods v. Brumlop*, 71 N.M. 221, 377 P.2d 520 (1962).

Hypothetical Questions

The tendered testimony went to plaintiff's mental ability and his employment prospects. Plaintiff obtained the psychologist's opinion on these subjects by asking hypothetical questions. Defendants objected that the hypotheticals were not proper hypotheticals on three grounds. Since the trial court sustained the defense objections with a general ruling, we consider each of the grounds stated by defendants.

The first objection was that there were items included in the hypotheticals for which there had been no proof and for which there will be no proof. The second objection was there were statements in the hypotheticals which were factually incorrect. The third objection was that items were omitted from the hypotheticals which would have to be taken into consideration "for an intelligent or reasonable answer to be given."

What item had been included for which there was no proof? What was included that was factually inaccurate? What necessary item had been omitted? An objection which does not specify the particular ground on which the evidence is objectionable does not call the trial court's attention to the matter to be decided. *Williams v. Vandenhoven*, 82 N.M. 352, 482 P.2d 55 (1971). We doubt that the objections were sufficiently specific to be treated as objections; however, we do not decide the objections on that ground.

Our answer to the first two objections is factual. There was proof as to the items included in the hypotheticals; the items were not factually incorrect. All the items included in the hypotheticals can be found in evidence introduced prior to the tender.

The third objection went to items omitted from the hypothetical questions. II Wigmore on Evidence, 3d Ed., § 682(b) states:

> "The question, on principle, *need not include* any particular number of facts; *i. e.* it may assume any one or more facts whatever, and *need not cover all the facts which the questioner alleges* in his case. The questioner is entitled to the witness' opinion on any combination of facts that he may choose. . . . [T]he questioner need not cover in his hypothesis the entire body of testimony put forward on that point by him or by the opponent, but may take as limited a selection as he pleases and obtain an opinion on that basis. Such is the orthodox doctrine as applied by most Courts." (Emphasis in Original.)

Wigmore, supra, states that the court may interfere to prevent questions which are valueless or are fairly likely to mislead the jury. Such is not the situation in this case. On the basis of plaintiff's work history, the psychologist's tests, and tests of others available to the psychologist, the psychologist was asked: ". . . would you have an opinion as to whether Mr. Winder's mental abilities were changed as a result of this collision?" After answering that he had an opinion, the psychologist was asked to state it. The opinion was: ". . . that his mental abilities

were changed . . . we have to deal with the whole person concept and the functions that you indicate in the question are such that he was utilizing certain abilities, which according to the test results that I have, he no longer would be able to perform those functions." Subsequently the psychologist was asked to assume that an orthopedic surgeon had testified concerning plaintiff's ability to return to work upon restoration of muscle tone and conditioning. With this additional factor, the psychologist's opinion was that plaintiff's employment prospects were "relatively nil." The psychologist also testified that "there is no demonstrable residual functional capacity for employability." These questions and answers were not valueless and, in the context in which the questions were asked, would not have misled the jury.

State v. La Boon, 67 N.M. 466, 357 P.2d 54 (1960) states that counsel "may propound a hypothetical question based upon his theory provided it is based upon evidence which the jury could reasonably believe to be true . . . ." The jury could reasonably have believed the psychologist's testimony to be true.

The third objection to the hypothetical question was without merit. The trial court erred in sustaining the objections to the hypothetical questions. In so ruling, we have not considered Rule of Evidence 705 because neither side argues that rule.

Irrelevant and Immaterial

Defendants twice claimed that the psychologist's testimony was irrelevant and immaterial. Defendants never went beyond this general objection. This general objection was insufficient. *Tobeck v. United Nuclear-Homestake Partners,* 85 N.M. 431, 512 P.2d 1267 (Ct.App.1973).

Qualification of the Psychologist to Testify

Defendants objected to the tendered testimony: ". . . on the grounds there's no proper foundation laid for the testimony of the witness as to the opinions given, either as to the existence of any psychological disability or in terms of the causation of that disability."

From the record before us we do not know when this lawsuit was filed and, therefore, do not know whether the Rules of Evidence are applicable to this case. See Supreme Court order as to effective date of the Rules of Evidence appearing in the annotation to § 20-4-101, N.M.S.A.1953 (Repl.Vol. 4, Supp.1973). Accordingly, in discussing the objection concerning the qualifications of the psychologist to testify, we do not consider Rules of Evidence 702, 703 and 704.

State v. Padilla, 66 N.M. 289, 347 P.2d 312, 78 A.L.R.2d 908 (1959) states:

> "We adopt the modern trend of authority in allowing a properly qualified psychologist to give his opinion as an expert as to the result of tests made by him, but that such testimony should be limited to that which the witness is qualified to offer on the basis of his professional training and experience and which he can substantiate by evidence that would be acceptable to recognized specialists in the same field."

State v. Padilla, supra, held the admission of the psychologist's testimony in that case was error because the evidence was insufficient as to the witness's training and experience. That is not the situation in this case. Apart from the testimony concerning the psychologist's training and experience, it is undisputed that the psychologist has been certified by the State of New Mexico to practice psychology. Section 67-30-3(D), N.M.S.A.1953 (2d Repl.Vol. 10, pt. 1) defines the practice of psychology to mean:

> ". . . the application of established methods or procedures of understanding, predicting or modifying behavior. The application of said principles includes counseling, guidance, and behavior modification with individuals or groups with problems in the areas of work, family, school, and personal relationships; measuring and testing of personality, intelli-

gence, aptitudes, emotions, public opinion, attitudes, skills; teaching or lecturing in psychology; and doing research on problems relating to human behavior; . . ."

Since the psychologist's practice is defined to include the testing of intelligence, aptitudes and skills, and since the witness in this case was certified by the State to practice psychology, the *Padilla* requirement of training and experience was met.

The psychologist testified that his test results were essentially the same as tests conducted by others. He testified that two of the tests were "reliable instruments . . . for the kinds of data that I obtained. Both of these are recognized by professional psychologists as being standard instruments that are traditionally used." There was nothing to the contrary. The *Padilla* requirement of acceptability by recognized specialists in the same field was met. We add that defendants' own evidence also shows the acceptability requirement was met. Included within various medical records introduced by defendant were the reports of Dr. Leiding, a clinical psychologist, and Dr. Maier who conducted a neurological examination. Dr. Leiding's report refers to a "low level of intellectual functioning". Dr. Maier's report refers to "apparent mental subnormality".

The psychologist was qualified to give his opinion as to the results of his tests. *State v. Padilla*, supra. Defendants assert, however, that he was not qualified to express an opinion that change in mental abilities was caused by the accident or that plaintiff was unemployable as a result of the accident. *Beal v. Southern Union Gas Co.*, 66 N.M. 424, 349 P.2d 337, 84 A. L.R.2d 1269 (1960) states: "From a number of given facts an expert witness may give his opinion as to what may or could have caused a certain result." Qualified as an expert in a speciality which includes the testing of intelligence, aptitudes and skills, the psychologist was qualified to express his opinion as to the cause of any change in plaintiff's mental ability and employment prospects.

We recognize that the trial court determines whether an expert has the necessary qualifications to testify, and that the trial court's determination will not be overturned unless an abuse of discretion is shown. *State ex rel. State Hwy. Dept. v. Fox Trailer Court*, 83 N.M. 178, 489 P.2d 1176 (1971). In this case there is nothing indicating the psychologist was not qualified to testify; there was an affirmative showing that he was qualified, and the trial court had admitted reports of other doctors going to the same propositions for which the psychologist's testimony was tendered.

At oral argument, defendants argued that the psychologist's testimony was properly excluded because his opinion was expressed in terms of "possibility" rather than "probability". No such contention was raised in the trial court. It will not be considered. Rule 11 of the Rules Governing Appeals.

The trial court abused its discretion in sustaining defendants' objections to the tendered testimony with this exception —exclusion of the testimony concerning the possibility of brain damage was not error.

The judgment is reversed because of the wrongful exclusion of evidence pertaining to plaintiff's damages. The cause is remanded with instructions to grant plaintiff a new trial limited to the question of damages. *Martin v. Darwin*, 77 N.M. 200, 420 P.2d 782 (1966).

It is so ordered.

LOPEZ, J., concurs.

HERNANDEZ, J., dissenting.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

There is one factual matter not mentioned in the opinion which is necessary to an understanding of my disagreement with

the majority. The plaintiff was examined twice by a neurologist. The report of the first examination is dated June 18, 1971, and concludes in part: "The neurological examination is totally normal. . . . I think that some of his complaints, other than the headache and neck pain, are unrelated to any fixed, demonstrable neurological lesion." The second report dated March 28, 1972, concluded in part: "The neurological examination is again totally normal, this includes gait and station, fields of vision and fundi. . . . I think it is likely that Mr. Winder simply fits into the lower part of the 'bell-shaped curve' regarding mental function. I feel that his apparent mental subnormality is a combination of heredity and possible cultural depravation."

In my opinion, the trial court was correct in ruling that Dr. Fishburn, the psychologist, was not qualified to answer the following question: "Further assume that during the collision that his head struck the interior of the vehicle he was in. Assuming all of these different facts and things that were done prior to the collision, and taking into consideration your experience in vocational rehabilitation and your education, and all of the other information you have available on Mr. Winder, do you have an opinion as to whether Mr. Winder's mental abilities were changed as a result of this collision." Considering that no causal connection between the accident and the plaintiff's mental condition after the accident had been established, asking Dr. Fishburn this question was, in effect, asking him to establish that connection. I believe that the trial court was correct when it ruled that he was not qualified to give such an opinion. Granted, Dr. Fishburn was eminently qualified to testify as to the plaintiff's mental ability, that is, whether he was sub-normal or abnormal. He was also qualified to give an opinion as to the mental and emotional ability to perform a given kind of work. However, to have allowed him to answer such a question was to allow him to speculate as to a connection. Just how speculative his answer would have been is pointed out by the reports of the neurologist, which were subsequently introduced into evidence.

I also disagree with the conclusion that only general objections were made by the defendant: to my mind, the following objections were sufficiently specific to be sustained:

> "I object on the grounds that the testimony of this witness is irrelevent and immaterial, to this case. This case involves a claim for personal injuries, and this is not within the issues of the lawsuit. I further object on the grounds there's no proper foundation laid for the testimony of the witness as to the opinions given, either as to existence of any psychological disability or in terms of the causation of that disability."

545 P.2d 93

In the Matter of William DOE, a child, Appellant,

v.

STATE of New Mexico, Appellee.

No. 2106.

Court of Appeals of New Mexico.
Jan. 6, 1976.

John Ronald Boyd, Sanchez & Boyd, P. A., Santa Fe, for appellant.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, Theodore E. Lauer, Lauer, & Lauer, Santa Fe, for Public Defender Dept., amicus curiae.

Toney Anaya, Atty. Gen., Ralph W. Muxlow, II, Asst. Atty. Gen., Santa Fe., for appellee.

OPINION

WOOD, Chief Judge.

The petition in the Children's Court charged William Doe was a "juvenile delinquent" in that he committed the offense of reckless driving. The matter was heard before a "referee" who found William "guilty" of the matters stated in the petition, recommended a fine of $125.00 with $100.00 suspended. The trial court approved the referee's report and adopted the referee's findings and conclusions as the order of the court. William appeals.

We do not reach the various procedural issues raised by William and the amicus curiae. Nor do we consider whether the order of the trial court is a valid judgment because of absence of any findings as to whether William was in need of care or rehabilitation. Section 13–14–28(E) and (F), N.M.S.A.1953 (Repl.Vol. 3, Supp. 1973). Nor do we consider whether the Children's Court has any authority to impose a fine on a juvenile. See § 13–14–31, N.M.S.A.1953 (Repl.Vol. 3, Supp.1973).

We dispose of the appeal on a jurisdictional ground.

The State asserts the petition was jurisdictionally defective because it does not allege that William was in need of care or rehabilitation. See *In Re Doe, III*, 87 N.M. 170, 531 P.2d 218 (Ct.App.1975). This argument overlooks the fact that the petition alleges William was a juvenile delinquent. This is an allegation that William was a delinquent child. Section 13–14–3(O), N.M.S.A.1953 (Repl.Vol. 3, Supp. 1973) defines delinquent child to mean a child who has committed a delinquent act and is in need of care or rehabilitation. *In the Matter of Jane Doe, a Child*, N.M. App., 542 P.2d 1195, decided November 12, 1975. The State's jurisdictional contention is without merit.

The jurisdictional defect is that, in this case, reckless driving is not a delinquent act wthin the original jurisdiction of the Children's Court. Section 13–14–3(N), N.M.S.A.1953 (Repl.Vol. 3, Supp. 1973) defines delinquent act as follows:

> " 'delinquent act' means an act committed by a child, which would be designated as a crime under the law if committed by an adult, except for offenses under municipal traffic codes or the Motor Vehicle Code other than the following offenses when committed by a child who has not reached his fifteenth birthday:
>
> * * * * * *
>
> "(3) reckless driving;"

Under the above-quoted provision, a delinquent act does not include reckless driving by a child who has reached his fifteenth birthday. The petition shows that William was fifteen years old at the time he drove recklessly.

There being no delinquent act charged, the Children's Court did not have original jurisdiction in this matter. We need not

consider in which court William could have been originally charged for the alleged reckless driving. See § 13–14–45, N.M.S.A.1953 (Repl.Vol. 3, Supp.1973).

The order of the trial court is reversed. The cause is remanded with instructions to dismiss the petition.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

545 P.2d 95

Bob WILKINSON, Individually and as father and next friend of Robert L. Wilkinson, a minor, Plaintiff-Appellant,

v.

Ralph M. RANDEL and James O. Randel, Co-Executors of the Estate of Oliver Holmes Randel, Deceased, Defendants-Appellees.

No. 2065.

Court of Appeals of New Mexico.

Dec. 30, 1975.

John W. Fisk, Jerome D. Matkins, Matkins & Martin, Carlsbad, for plaintiff-appellant.

James L. Bruin, Sanders, Bruin & Baldock, Roswell, for defendants-appellees.

OPINION

SUTIN, Judge.

Plaintiff appeals from a summary judgment granted defendants in a unicycle-motor vehicle accident. The motion for summary judgment, and the judgment thereon, determined that Robert L. Wilkinson, aged 14 years, was contributorily negligent as a matter of law. We reverse.

The undisputed facts most favorable to plaintiff show that on February 28, 1972, Oliver Holmes Randel, 85 years of age, now deceased, was driving at 15 m.p.h. west on the right side of West Orchard Lane in Carlsbad. It was dusk.

Randel did not see Robert until the front portion of his car was against Robert. After striking Robert, Randel's car stopped within five feet of the point of the accident. Robert and his unicycle were seen on the pavement under the Randel car and at the center thereof.

The unicycle was a vehicle that had a single wheel and it was propelled by pedals. It was three feet in heighth from the ground to the seat. The top of the wheel was 18 inches from the ground. There were no lights nor red reflectors on the unicycle.

Robert lost his memory and remembered nothing about the accident. His memory faded from a point about five blocks from the place of the accident. At that point, Robert was riding his unicycle and carrying a plastic bag with his clothes in it.

From this evidence, we do not know and we cannot conjecture whether Robert was riding his unicycle, or walking along with it, or standing with it at the time and place of the accident. These are questions of fact for the jury to determine under proper instructions of the court.

Contributory negligence is an affirmative defense. To be awarded summary judgment, Randel must show not only that Robert was contributorily negligent but that such negligence, if any, was a proximate contributing factor to his injuries. *Fitzgerald v. Valdez*, 77 N.M. 769, 427 P. 2d 655 (1967). We hold that this has not been established.

The defendant claims (1) that *if* Robert was riding the unicycle, he violated the specific bicycle provisions of the Motor Vehicle Code: §§ 64–19–5, 64–19–6, 64–19–7, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2). Therefore, Robert was negligent per se. This is a fact for the jury to determine.

Defendant claims (2) that *if* Robert was walking along the highway, he must, where practicable, walk only on the left shoulder facing traffic. Section 64–18–38, supra. Robert was on the right hand side of the street. Was he walking with traffic or against traffic or standing still? This is for the jury to determine.

Reversed.

It is so ordered.

HENDLEY and HERNANDEZ JJ., concur.

545 P.2d 490

STATE of New Mexico, Plaintiff-Appellee,

v.

Jorge Antonio SILVA, Defendant-Appellant.

No. 2133.

Court of Appeals of New Mexico.
Jan. 6, 1976.
Certiorari Denied Feb. 6, 1976.

Mary Jo Snyder, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Louis Valencia, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his convictions for armed robbery and aggravated assault. The appellate issues concern the trial court's exclusion of defendant's asserted defense of insanity at the time of commission of the offenses. Rule of Criminal Procedure 35(a)(1) provides that notice of this defense must be given at arraignment or within twenty days thereafter unless upon good cause shown the court waives this time requirement. Defendant contends (1) that notice was given, or (2) in the alternative, that good cause was shown for waiver of the time requirement.

Notice

Defendant was arraigned on May 9, 1975. By "motion" filed June 11, 1975 defendant stated he would rely on the defense of temporary insanity at his trial. This notice was not within twenty days of his arraignment.

Defendant contends that "constructive" notice of the insanity defense was given by his motion for a psychiatric examination filed on May 18, 1975. The motion stated that counsel did not know whether defendant was sane when he committed the acts resulting in criminal charges and that the examination was sought for the purpose of making such a determination. This cannot be construed as giving notice that an insanity defense would be raised.

Notice within the time provided by the rule was not given.

Waiver of Time Requirement

Defendant contends that he showed good cause why the time requirement should be waived. Because the trial court refused to waive the time requirement, defendant asserts either that there was manifest error or that the trial court abused its discretion.

The items asserted to be good cause are: (1) the State had notice of the defense five days before trial; (2) the State could not show prejudice by lack of timely notice; (3) defendant could not determine whether to raise an insanity defense until after he was examined by the psychiatrist and the report of the examination had been submitted; (4) the psychiatrist's report was not determinative of defendant's sanity; and (5) the time requirement of the rule is not a strict requirement because the rule expressly provides for waiver.

Assuming but not deciding that the five items relied on are true (in the trial court the State claimed prejudice by the late notice), the items give a one-sided view of the proceedings in the trial court.

The psychiatric examination was May 28, 1975; the report is dated May 30, 1975; an evidentiary hearing on defendant's competency to stand trial was held June 11, 1975. Trial was June 16, 1975. The report and the testimony at the evidentiary hearing was that defendant was not insane at the time of the offenses and was competent to stand trial. Defendant admitted that he had nothing to rebut the psychiatric evidence. On the morning of trial defendant sought a continuance until certain records concerning defendant's mental condition could be obtained. The transcript indicates these records were out of state. This was denied. The insanity defense that the defense wished to present consisted solely of the testimony of the defendant.

A letter in the file from defendant indicates the defense should be based on defendant's psychiatric history and a factual defense that defendant characterized as bordering on the absurd. The record is clear that the idea of an insanity defense came from defendant and not his counsel, and that the idea was first raised by defendant on June 9, 1975, a week before trial.

The record shows that defense counsel considered but did not raise the insanity defense within the time provided by the rule because even with defendant's psychiatric history he had an insufficient basis for such a defense. When the defense was raised, out of time, it was to have a spurious factual basis. In these circumstances there was no error and no abuse of discretion. Accordingly, we need not specifically discuss the five items relied on by defendant.

Oral argument is unnecessary. The judgment and sentences are affirmed.

It is so ordered.

HENDLEY and LOPEZ, JJ., concur.

545 P.2d 491

In the Matter of John DOE, a child.

No. 2118.

Court of Appeals of New Mexico.
Dec. 30, 1975.
Certiorari Denied Feb. 6, 1976.

Toney Anaya, Atty. Gen., Richard A. Griscom, David S. Cohen, Sp. Asst. Attys. Gen., Santa Fe, Stephen J. E. Sprague, Sp. Asst. Atty. Gen., Albuquerque, for appellant.

James L. Brandenburg, Dist. Atty., Robert R. Rickard, Asst. Dist. Atty., Albuquerque, for appellee.

OPINION

HENDLEY, Judge.

The Health and Social Services Department appeals an order of the Children's Court involving a minor child alleged to be in need of supervision. The court found that the child was in need of psychiatric treatment; that the child's stepfather could not afford to pay the child's psychiatric treatment; and, that the State of New Mexico did not have an appropriate facility to treat the child. The court then ordered the child, pursuant to § 13–14–32, N.M.S.A.1953 (Repl.Vol. 3, 1968, Supp.1973) of the Children's Code to be committed to Nazareth Sanitorium, a private hospital, for a period of thirty days; placed the child in the temporary custody of the department; and ordered the department to pay the entire cost of the child's stay in the Nazareth Sanitorium. The points on appeal are: (1) that the district court did not have jurisdiction over the department when it issued its order; (2) that the judge exceeded the jurisdiction of the Children's Court in ordering the department to pay the cost of the child's stay at Nazareth Sanitorium; and, (3) that the

court's order violates Art. III, § 1, of the New Mexico Constitution. We affirm as to point one, reverse as to point two and do not reach point three.

Jurisdiction

The department contends that the court did not have jurisdiction in that the department had no prior involvement in the case, had no knowledge of the case, was not served with notice or other service of process concerning the hearing held in the case and did not make any appearance at the hearing. Section 13–14–32(B), N. M.S.A.1953 (Repl.Vol. 3, 1968, Supp.1973) provides:

> ". . . If in a hearing at any stage of a proceeding on a petition under the Children's Code the evidence indicates that the child may be suffering from mental retardation or mental illness, *the court may transfer legal custody of the child for a period not exceeding thirty [30] days to an appropriate agency for further study and a report on the child's condition.* If it appears from the report and study that the child is committable under the laws of this state as a mentally retarded or mentally ill minor, the court may order the child detained if appropriate under the criteria established by the Children's Code and shall initiate proceedings for the commitment of the child as a mentally retarded or mentally ill minor." (Emphasis added).

This section of the Children's Code confers a legislative grant of jurisdiction to the courts. The court has jurisdiction to transfer the child to the appropriate agency for further study and a report on the child's condition. Compare *Melfi v. Goodman*, 69 N.M. 488, 368 P.2d 582 (1962).

The department also asserts it is a "person" within the meaning of § 13–14–3(K), N.M.S.A.1953 (Repl.Vol. 3, 1968, Supp.1973) and accordingly, must be made a party to any action whereby it will be affected. The answer to this assertion is simply that the department is not a "person" within the meaning of the Children's Code. Thus, the department need not be made a party to nor is its presence required in any action filed pursuant to the Children's Code where it may be ordered to assume certain responsibilities pursuant to the Children's Code.

Court Exceeding Jurisdiction

As an introduction to this argument the department urges that it is not *the* "appropriate agency." "Appropriate agency" is not defined by the Children's Code. We need only decide whether the department is *an* "appropriate agency."

Section 12–34–23, N.M.S.A.1953 (Repl. Vol. 3, 1968, Supp.1973) states in part:

> ". . . The health and social services department has authority to:
>
> "A. establish, administer and supervise child welfare activities and social services to children, including, but not limited to:
>
> "(1) crippled children and children suffering from conditions which lead to crippling. The health and social services department also may supervise the administration of those services to crippled children which are not administered directly by it;
>
> "(2) children placed for adoption;
>
> "(3) homeless, dependent and neglected children;
>
> "(4) children in foster family homes or institutions because of dependency or neglect; and
>
> "(5) children who because of physical or mental defect may need such services;"

From the foregoing it is abundantly clear that the department is within the definition of an appropriate agency.

The department contends that even if it is an appropriate agency the Children's Court exceeded its jurisdiction in ordering it to pay the costs of the child's stay at the Nazareth Sanitorium. We agree.

Section 13–14–32(B), supra, provides in part that:

> ". . . the court may transfer legal custody of the child for a period not exceeding thirty [30] days to an appropriate agency for further study and a report on the child's condition. . . ."

This section of the Children's Code limits the court's jurisdiction to a transfer of legal custody for a limited time and purpose. The court is not empowered to commit the child to a private psychiatric hospital and then order the department to pay the cost of such treatment.

Section 13–14–38, N.M.S.A.1953 (Repl. Vol. 3, 1968, Supp.1973), provides who is to pay when the court orders medical and other examinations of a child. This section states in part:

> ". . . A. The following expenses shall be a charge upon the funds of the court upon their certification by the court:
>
> "(1) the costs of medical and other examinations and treatment of a child ordered by the court;"

Accordingly, we hold that the Children's Court has jurisdiction to transfer custody of the child to the department without the department being made a party to the action. However, once this transfer has been accomplished the Children's Court has no authority to go beyond the powers granted by § 13–14–32(B), supra. Should the Children's Court exceed that grant of authority and order "medical and other examinations and treatment of [the] child", the expenses charged shall be paid from the funds of the court.

It is so ordered.

SUTIN and LOPEZ, JJ., concur.

545 P.2d 1014

STATE of New Mexico on the relation of S. E. REYNOLDS, State Engineer and Pecos Valley Artesian Conservancy District, Plaintiffs-Appellants,

v.

L. T. LEWIS et al., Defendants-Appellees.

No. 10146.

Supreme Court of New Mexico.

Feb. 9, 1976.

Toney Anaya, Atty. Gen., Paul L. Bloom, Peter Thomas White, Richard A. Simms, Agency Asst. Attys. Gen., Santa Fe, John F. Russell, Roswell, for plaintiffs-appellants.

Victor Ortega, U. S. Atty., Albuquerque, Robert L. Klarquist, Asst. Atty. Gen., Dept. of Justice, Washington, D. C., Donald Redd, Asst. Atty. Gen., Land & Natural Resources, Dept. of Justice, Washington, D. C., George E. Fettinger, Kim J. Gottschalk, Alamogordo, amicus curiae, for defendants-appellees.

OPINION

STEPHENSON, Justice.

This appeal arises out of the granting of a motion to dismiss the United States, a fiduciary for the Mescalero Apache Tribe, as a defendant in a general adjudication [1] of the Rio Hondo River System. The District Court of Chaves County ruled that New Mexico courts do not have jurisdiction to adjudicate the reserved water rights of the Mescalero Apache Indian Reservation. The plaintiffs, State Engineer and Pecos Valley Conservancy District (Pecos Valley), appeal. We reverse.

1. Sections 75-4-4 through -8 N.M.S.A.1953.

On December 5, 1973, the State Engineer and Pecos Valley filed a motion to reopen and file a consolidated petition to adjudicate the waters of the Rio Hondo River System, a part of the Roswell Artesian Basin adjudication begun in 1956. This motion was granted on January 10, 1974. The plaintiffs then sought temporary restraining orders against the United States, to prevent diversion of the waters of the Rio Ruidoso, a part of the river system, within the Mescalero Apache Reservation. These orders were entered. The defendant United States then moved to dismiss or to rescind the restraining orders. On July 8, 1974, a final order was entered by the district court dismissing the United States as a defendant based on a lack of jurisdiction under the McCarran Amendment,[2] the federal statute in which the United States consents to state adjudications of water rights.

The sole issue before us is whether the McCarran Amendment grants jurisdiction to state courts over the United States in general stream adjudications[3] involving reserved water rights on an Indian reservation. It must be emphasized that the question we decide today is purely jurisdictional. We do not decide the extent of the water rights of the Mescalero Tribe, the measure by which they should be determined, or the enforceability of any state adjudication decrees. We only consider whether the Mecalero Tribe through the United States can be joined in a general stream adjudication by virtue of the McCarran Amendment.

A related question is the applicability of Article XXI, Section 2 of the New Mexico Constitution, in which the State disclaims all right and title to Indian lands and submits to the jurisdiction and control of the United States over them. The United States argues that this section prohibits state adjudication of Indian water rights. This argument is incorrect for two reasons. The State is not asserting a proprietary interest in Indian lands. See *Kake Village v. Egan*, 369 U.S. 60, 82 S. Ct. 562, 7 L.Ed.2d 573 (1962). Moreover, the State can exercise power over the Indians if the federal government has specifically granted it. *Your Food Stores, Inc. (NSL) v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961), cert. denied, 368 U.S. 915, 82 S.Ct. 194, 7 L.Ed.2d 131 (1961). Therefore, Article XXI, Section 2 of the New Mexico Constitution is not relevant to the issue presented here.

The McCarran Amendment was enacted in 1952 and provides in part:

> Joinder of United States as defendant; costs
>
> (a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation by State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

It is clear that the purpose of this statute is to facilitate state adjudication of a

2. 43 U.S.C. § 666(a) (1970) (originally enacted as Act of July 10, 1952, ch. 651, § 208(a), 66 Stat. 560).

3. See supra note 1.

stream system. As the sponsor of the bill, Senator McCarran, stated:

> [It is] to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

S.Rep.No.755, 82nd Congress, 1st Sess. 9 (1951). Certainly, in the case before us that is the purpose for which the McCarran Amendment is sought to be used by the State Engineer and Pecos Valley.

The United States argues that the McCarran Amendment does not apply to reserved Indian water rights due to the subsequent enactment of Public Law 280 (25 U.S.C. §§ 1321–23 (1970), originally enacted as Act of August 15, 1953, ch. 505, §§ 1–7, 67 Stat. 588). Public Law 280 granted certain states general civil and criminal jurisdiction over Indian reservations and made provisions for other states to assume such jurisdiction if they so wished. That Act reads in part:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

25 U.S.C. § 1321(b) (1970).

Public Law 280 is irrelevant to the present controversy for two reasons. First, New Mexico was not granted, nor has it assumed general civil and criminal jurisdiction over Indian reservations located within the state. Second, Public Law 280 did not repeal or affect in any way the McCarran Amendment, which granted to all states jurisdiction to adjudicate federally reserved water rights, including those reserved for Indians. Jurisdiction over water rights was apparently excluded from Public Law 280 because it had already been conferred by the McCarran Amendment.

The McCarran Amendment has been interpreted several times since its enactment. It is established that the Amendment confers concurrent jurisdiction of the federal and state courts for adjudication of United States water claims. *In re Green River Drainage Area,* 147 F.Supp. 127 (D.Utah 1956); see also *United States v. Akin,* 504 F.2d 115 (10th Cir. 1974), cert. granted, 421 U.S. 946, 95 S.Ct. 1674, 44 L.Ed.2d 99 (1975). Normally then, the state district court is a proper forum for these suits.

The case at bar, however, involves reserved water rights held by the United States for the Mescalero Apache Tribe. In *U. S. v. District Court for Eagle County,* 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971), the Supreme Court allowed state adjudication of reserved water rights of the United States. The State of Colorado sought a general adjudication of the Eagle River, a tributary of the Colorado River, in state court. The reserved water rights for the White River National Forest were part of the stream system. The United States, just as in this case, moved to be dismissed as a party, claiming the McCarran Amendment did not extend to reserved water rights. The United States Supreme Court held that the state courts had jurisdiction over reserved water rights of the United States. The Court characterized the McCarran Amendment as "an all-inclusive statute concerning 'the adjudication of rights to the use of water of a river system' which . . . has no exceptions and which, as we read it, includes appropriative rights, riparian rights, and reserved rights." 401 U.S. at 524, 91 S.Ct.

at 1002. Thus, it is clear from previous decisions that the state courts have jurisdiction over all water claims, including reserved rights, against the United States in general stream adjudications.

The more difficult question is whether jurisdiction exists under the McCarran Amendment when reserved water rights of Indians are at issue. The statute itself refers to water rights "where it appears that the United States is the owner of or is in the process of acquiring . . .." Does the United States "own" the reserved water rights of the Mescalero Tribe within the context of the statute? This question has been superficially answered by federal or state courts only once.[4]

In order to answer this question, we must examine the nature of a reserved water right of an Indian tribe. *Winters v. United States,* 207 U.S. 564, 28 S.Ct. 564, 52 L.Ed. 340 (1908) held that the United States reserved water rights for the Indians by implication when the reservations were created. This position has not been seriously questioned. In more recent times the Supreme Court has appropriately described the nature of a reserved water right:

> The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians *by reserving for them* the waters without which their lands would have been useless. . . . We follow it now and agree that *the United States did reserve the water rights for the Indians* effective as of the time that Indian Reservations were created (emphasis added).

Arizona v. California, 373 U.S. 546, 600, 83 S.Ct. 1468, 1498, 10 L.Ed.2d 542 (1963). We agree with this description of reserved rights. It reaffirms the principle that the United States reserved these rights for the Indians. Obviously, the United States could not reserve rights it did not own. Thus, the United States, as fiduciary for the Indians, holds legal title or "owns" reserved water rights much like a trustee who holds legal title to the res of a trust.[5] The appellees admit this in their own brief.[6] This special trust relationship between the United States and the Indian tribes has long been recognized. See, e. g., *Seminole Nation v. U. S.,* 316 U.S. 286, 296–97, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942); *United States v. Kagama,* 118 U.S. 375, 381–84, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831).

The Supreme Court in *Arizona v. California,* supra, logically equated principles governing reserved water rights of Indians with those of other federal reservations.

> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for future requirements of the

4. On October 23, 1975, the United States District Court for the District of New Mexico ordered that a general adjudication brought in state court could not be removed to federal court by the defendant United States. *State ex rel. Reynolds v. United States,* No. 75–199 M Civil (D.N.M.1975). The United States was joined under the McCarran Amendment as trustee for various Indian lands along the San Juan River. This order has not been appealed.

5. This concept has been adopted when Indian lands were involved. In *Nadeau v. Union Pacific R.R. Co.,* 253 U.S. 442, 446, 40 S.Ct. 570, 571, 64 L.Ed. 1002 (1920), involving the right of way of a railroad on former Indian reservation lands, the Court stated: "It seems plain that . . . the lands were but part of the domain held by the Tribe under the ordinary Indian claim—the right of possession and occupancy—with fee in the United States."

6. "In its role as trustee for the Indian tribes, the United States holds legal title and administers tribal water rights, but beneficial 'ownership' remains with the Indian Tribes." Appellee's Brief at 8.

> Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.
>
> 373 U.S. at 601, 83 S.Ct. at 1498.

Justice Douglas speaking for the Court, in *U. S. v. District Court for Eagle County,* supra, also suggested that Indian reservations should be treated like other federal reservations.

> As we said in *Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefit of federally reserved lands." *Id.,* at 597, 83 S.Ct. 1496. *The federally reserved lands include any federal enclave. In Arizona v. California we were primarily concerned with Indian reservations. Id.,* at 598–601, 83 S.Ct. 1496–1498. (emphasis added).
>
> 401 U.S. at 522–23, 91 S.Ct. at 1001.

Therefore, the Supreme Court of the United States had held or suggested that (1) reserved Indian water rights were reserved by the United States at the creation of the reservations; (2) the United States holds these rights in trust as legal "owners" for the Indians as beneficiaries; and (3) the McCarran Amendment extends to all reserved rights of federal enclaves, including Indian reservations. We then have no choice but to conclude that the United States, as "owner" of reserved Indian water rights, can be joined as a defendant in general stream adjudications in state courts under the McCarran Amendment. We so hold. The Rio Hondo River System can now be adjudicated in an orderly and efficient manner.

The procedural question concerning the timeliness of the motion to reopen this suit is without merit.

The temporary restraining orders which were entered by the court below are not before us. The trial court did not directly rule upon the government's motion to rescind them, but rather granted the greater alternative relief sought by the government in dismissing the case. The propriety of their issuance is neither briefed nor argued here. Whether the State will seek to reassert or reinstate these orders we do not know. Such a course seems somewhat unlikely, since the State Engineer and Pecos Valley have said in their reply brief:

> 1 We have not asked the trial court to declare that either the United States or the Mescalero Apache Tribe is subject to the jurisdiction of the New Mexico State Engineer in respect to the diversion and use of the surface or underground waters of the Rio Hondo Stream System.

In any case, we do not wish to be understood by anything we have said to infer that such orders were properly entered.

The district court is reversed, and the case is remanded to the trial court with instructions to reinstate the case upon its docket and to proceed in a manner consistent with this opinion.

It is so ordered.

OMAN, C. J., and McMANUS, J., concur.

545 P.2d 1018

HEALTH & SOCIAL SERVICES DEPARTMENT of the State of New Mexico, Petitioner,

v.

Modesto GARCIA, Respondent.

HEALTH & SOCIAL SERVICES DEPARTMENT of the State of New Mexico, Petitioner,

v.

Rosemary SEALE, Respondent.

No. 10594.

Supreme Court of New Mexico.

Feb. 13, 1976.

Toney Anaya, Atty. Gen., James G. Huber, HSSD Asst. Atty. Gen., Santa Fe, for petitioner.

Gary J. Martone, Joseph F. Canepa, Albuquerque, for respondents.

OPINION

OMAN, Chief Justice.

These consolidated causes are before us upon a writ of certiorari directed to the New Mexico Court of Appeals, which reversed and set aside decisions and orders of the Director of the Health and Social Services Department of the State of New

Mexico (H.S.S.D.) and instructed the continuation of payments to respondents of benefits under the wholly State funded General Assistance Program until the termination of respondents' respective temporary disabilities or until benefits have been paid to them for a total period of twelve months, whichever shall be the lesser. *Garcia v. Health and Social Services Department,* 88 N.M. 419, 540 P.2d 1308 (Ct. App.1975). We reverse the Court of Appeals and order that it affirm the decisions and orders of the Director.

In accordance with an agreement of the parties and an order of dismissal of one of the two issues initially presented to the Court of Appeals, the only issue finally presented to and decided by that court was: "whether the six-month limitation on General Assistance benefits in H.S.S.D. Manual Regulation 240.2 is legal."

This regulation, which was adopted by the Health and Social Services Board and which has since been amended, read in pertinent part:

> "General Assistance cash payments are limited to payments * * * (2) to temporarily disabled needy persons with no minor dependents. In cases of temporarily disabled needy persons with no dependent children cash assistance will be limited to a period of no more than six months in any twelve (12) month period."

There is no doubt that each of the respondents received general assistance benefits at the established rate for a period of six months during a twelve month period, as provided in Regulation 240.2, supra, and was terminated pursuant to the clearly stated limitation on benefits as provided in the regulation. As shown by the foregoing stated issue presented to the Court of Appeals, and as shown by the record on the hearings before the administrative agency, we are not concerned with the correctness of the resolution of any issue of fact. We are concerned only with the question of the authority of the Health and Social Services Board to adopt Regulation 240.2, supra.

By this regulation, the Board determined that a certain monthly amount—not here in question—would be payable to temporarily disabled persons with no dependent children during the period of disability, but not to exceed six months during any twelve month period. Upon the basis of its construction of §§ 13–17–5 and –10, N.M.S.A. 1953 (Supp.1975), the Court of Appeals concluded that H.S.S.D. must continue to pay the respondents "for the extent of their disability or up to twelve (12) total months, whichever is shorter." Obviously this would impose upon H.S.S.D. additional financial burdens for which it might not have legislatively appropriated funds. In its brief before us, H.S.S.D. says it lacks funds to finance a program which would impose upon it such a burden, but this does not so appear in the record properly before us. However, there is nothing in the record to demonstrate that funds are available, or that the Health and Social Services Board in adopting Regulation 240.2, supra, did not act properly and within its legislative authority. One attacking a legislative regulation or regulatory scheme has the burden of demonstrating the invalidity thereof. *Condor Operating Company v. Sawhill,* 514 F.2d 351 (Em. App.), cert. denied, 421 U.S. 976, 95 S.Ct. 1975, 44 L.Ed.2d 467 (1975); *Grubbs v. Butz,* 169 U.S.App.D.C. 82, 514 F.2d 1323 (1975); *United States v. Boyd,* 491 F.2d 1163 (9th Cir. 1973); *Ralphs Grocery Co. v. Reimel,* 69 Cal.2d 172, 70 Cal.Rptr. 407, 444 P.2d 79 (1968); *Moore v. District Court In & For City & Cty. of Denver,* Colo., 518 P.2d 948 (1974); *Hohnke v. Commonwealth,* 451 S.W.2d 162 (Ky. 1970); *Commonwealth Edison Co. v. Pollution Control Bd.,* 25 Ill.App.3d 271, 323 N.E.2d 84 (1974); *Cooper River Convalescent Ctr., Inc. v. Dougherty,* 133 N.J.Super. 226, 336 A.2d 35 (1975); *Texas Liquor Control Board v. Attic Club, Inc.,* 457

S.W.2d 41 (Tex.1970), appeal dismissed, 400 U.S. 986, 91 S.Ct. 459, 27 L.Ed.2d 435 (1971); 1 K. Davis, Administrative Law Treatise, § 5.03 (1958).

We again state that courts must be extremely careful in creating programs which must be funded by legislative appropriations. *New Mexico Health & Social Services Dept. v. Chavez,* 85 N.M. 447, 513 P.2d 184 (1973).

Respondents have sought to raise in their briefs before the Court of Appeals and in their brief before this court constitutional objections to Regulation 240.2, supra. However, the constitutional issues they sought to raise in the Court of Appeals were not properly raised and were not considered by that court, except that reference was made to one of them in the dissenting opinion. The claim respondents seek to raise in this court is that Regulation 240.2, supra, offends against the equal protection clauses of the State and Federal constitutions in that it creates the following two classes which are treated unequally: (1) temporarily disabled and needy persons who come within the regulation, but who have received cash assistance for six months of a twelve month period; and (2) temporarily disabled and needy persons who come within the regulation, but who have not yet received cash assistance for six months of a twelve month period.

That is, they claim temporarily disabled and needy persons can be treated equally under the law only by receiving cash assistance during the entirety of their temporary disability, and they apparently claim temporary disability may last up to but not exceeding twelve months. As we view Regulation 240.2, supra, it treats all temporarily disabled and needy persons exactly the same. Equal protection does not require but one classification based solely upon the length of time a temporary disability is suffered, and does not prohibit a single classification related to the availability of funds and a time period less than the entire period of the temporary disability, so long as the classification treats all who fall therein equally. Thus, we would hold against the respondents on this question even if it were properly before us.

The majority of the panel of the Court of Appeals has decided to place a limitation upon the period of payments for temporary disability. It would fix the maximum period, during which a temporarily disabled and needy person could receive benefits, at twelve months rather than six months, even though the temporary disability might extend beyond twelve months, just as it might extend beyond six months. The majority's apparent justification for substituting its judgment for that of the Health and Social Services Board, without regard to the unavailability of funds with which to make payments during the period of temporary disability for a possible additional six months, is that a temporarily disabled and needy person whose disability and needs exceed twelve months may be eligible under the wholly federally funded Supplemental Security Income Program as provided in 42 U.S.C. §§ 1381–1383c (Supp. IV, 1974) and particularly in § 1382c(a)(3)(A). A court may not, on appeal, substitute its judgment for that of an administrative body charged with the responsibility of administering a legislatively created program. *Kelly v. Zamarello,* 486 P.2d 906 (Alaska 1971).

We fail to understand how the Court of Appeals can reason that §§ 13–17–7 and –10, N.M.S.A.1953 (Supp.1975) and S.S.I. (Supplemental Security Income) "would seem to create at least *some* provision for all needy, disabled people in New Mexico." The clearly expressed purpose of § 13–17–7, supra, was to terminate the payment of public assistance benefits to the permanently and totally disabled as of January 1, 1974. We are not here concerned with total disability or any disability prior to January 1, 1974.

Section 13–17–10, supra, insofar as here pertinent, provides:

"*General assistance program—Qualifications and payments.*—A. Subject to the

availability of state funds, public assistance shall be provided under a general assistance program to or on behalf of eligible persons * * *. B. * * *. The board may by regulation limit the grants that are made to general assistance recipients."

As stated above, there is no evidence that State funds are available to support a program in which the benefits would exceed that established by Regulation 240.2, supra, and clearly the Legislature has granted authority to the Health and Social Services Board to limit grants to recipients. We cannot believe that the limitation contemplated by the Legislature must be confined to a limitation on the amount of the periodic payments and not on the number or length of time such payments are made. Assuming State funds are limited, as we must under the record before us, the regulation which the Court of Appeals sought to impose would result in a reduction of the total amount of benefits payable to all who are temporarily disabled and needy but whose temporary disability does not continue for twelve months. This would, in particular, adversely affect the overall amount of benefits which would be received by those who are disabled and needy for six months or less and eligible for benefits under Regulation 240.2, supra.

We again repeat that courts must be extremely careful in creating programs which must be funded by legislative appropriations. *New Mexico Health & Social Services Dept. v. Chavez,* supra.

The decision of the Court of Appeals is hereby reversed and these causes are remanded to that Court with directions to affirm the decisions and orders of the Director of H.S.S.D.

It is so ordered.

McMANUS, STEPHENSON and MONTOYA, JJ., concur.

SOSA, J., dissenting without opinion.

545 P.2d 1022

In the Matter of John DOE, a child, Defendant-Appellant,

v.

STATE of New Mexico, Plaintiff-Appellee.

No. 2101.

Court of Appeals of New Mexico.

Jan. 20, 1976.

Daniel E. Pedrick, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Don Montoya, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Section 13–14–26, N.M.S.A.1953 (Repl. Vol. 3, Supp.1975) provides a time limitation for beginning a hearing on petitions under the Children's Code alleging delinquency or need of supervision. Paragraph A states that "on motion by or in behalf of the child, the petition shall be dismissed with prejudice if a hearing on the allegations in the petition is not begun" within the time period stated. The applicable time period in this case is the twenty-day period stated in § 13–14–26, supra, prior to its amendment by Laws 1975, ch. 320, § 2. A hearing was not begun within this twenty-day period. The child moved to dismiss; he appeals the denial of his motion.

The case was set for trial at a date after expiration of the time period. The child had notice of this setting before the time period had expired and did not object to the trial date. The State contends that by failing to object, the child waived any objection to trial beyond the statutory time period.

Cases cited by the State do not support the contention. *Sykes v. Superior Court of Orange County,* 9 Cal.3d 83, 106 Cal. Rptr. 786, 507 P.2d 90 (1973) held the statute limiting the time for trial was inapplicable. The case was decided on the basis of the constitutional right to a speedy trial. *Chambers v. District Court In & For Cty. of Arapahoe,* 180 Colo. 241, 504 P.2d 340 (1972) equated the statute with the constitutional right to a speedy trial and held the time limitation was waived by various actions of counsel. *State v. Ruud,* 6 Wash. App. 57, 491 P.2d 1351 (1971) held that counsel had agreed to a trial date beyond the time limitations.

We decline to hold that the child waived his right to a dismissal by failing to object to a trial date beyond the statutory time period because the statute affirmatively states that he was entitled to a dismissal with prejudice if the hearing was not begun within the time period. The child is not to be deemed to have waived this statutory right by failing to object to the State's delay in beginning the hearing within the statutory time period.

A hearing could be delayed for a variety of reasons. We need not adopt a theory of waiver to accommodate justifiable delay. The statute provides for time periods which are to be excluded in computing the time period in which a hearing on the petition must be begun. Paragraph B of § 13–14–26, supra, lists eight items of delay which are to be excluded. Item (4) pertains to delay resulting from a continuance granted at the request of the Children's

Court attorney. The record does not show a continuance was sought.

Section 13–14–26, supra, Paragraph B, item (8) provides for exclusion of "other periods of delay for good cause in the discretion of the court." The child requested a jury trial. The State contends that once a jury trial was requested the matter was turned over to the court for a trial setting at the court's discretion. The State asserts that in setting the matter for a jury trial on a date after the time limitation had expired, the court implicitly found a delay was necessary for good cause. If the court had found that the case was set for the earliest available jury, good cause for the delay would have been shown. There is no such express finding. Nor is such a finding implicit in this record. The record does not show that any consideration was given to delay caused because the matter was to be tried by a jury.

The motion to dismiss was denied on the basis the motion was untimely. The child had notice of the trial setting within the twenty-day period. The motion to dismiss was filed within two days after the time period expired. The Children's Court considered the motion was untimely because the child waited until expiration of the time period to file the motion. The motion was not untimely; if the motion had been filed before the time period had expired it would have been premature.

The State points out that the 1975 amendment to § 13–14–26, supra, expanded the maximum time limitation to forty-five days. If this is an argument that we should not enforce the time limitation applicable to this case, it is without merit. Paragraph A of the statute, both before and after the 1975 amendment, provides for a dismissal with prejudice if the statutory time limitation is not met. Paragraph B of the statute refers to the time when the hearing "must be begun". Paragraph C of the statute refers to the interest of the public in the prompt disposition of cases. The legislative intent is unambiguous; the hearing was to be begun within the time limitation stated. If not, upon motion by or in behalf of the child, the petition was to be dismissed with prejudice. Compare *State v. Vigil,* 85 N.M. 328, 512 P.2d 88 (Ct.App.1973).

The State contends that the statutory time limitation should not be enforced because the child was not prejudiced by the delay in this case. Where a child had counsel and had been advised of his rights, we required a showing of prejudice when the claim was that the child was not repeatedly advised of his rights. *Matter of Doe,* 88 N.M. 481, 542 P.2d 61 (Ct.App. 1975). This case is not similar. Here we are concerned with a legislatively declared time limit for beginning a hearing; a legislative intent for prompt adjudication. *Doe v. State,* 88 N.M. 347, 540 P.2d 827 (Ct.App.1975). In applying this legislatively declared time limitation, we are not concerned with prejudice to the child but with the concept of prompt adjudication. Under the statute, the child is not required to make an affirmative showing that he has been prejudiced by the delay. *Sykes v. Superior Court of Orange County,* supra.

We point out that there is no issue in this case concerning the validity of a legislatively declared time limitation. See *State ex rel. Delgado v. Stanley,* 83 N.M. 626, 495 P.2d 1073 (1972); *State v. Arnold,* 51 N.M. 311, 183 P.2d 845 (1947); compare *Sitta v. Zinn,* 77 N.M. 146, 420 P.2d 131 (1966). Nor is there any issue in this case concerning the constitutional right to a speedy trial. See *State v. Harvey,* 85 N. M. 214, 510 P.2d 1085 (Ct.App.1973).

The sole issue is whether the child was entitled to dismissal under § 13–14–26, supra. He was. The judgment of the Children's Court is reversed. The cause is remanded with instructions to dismiss the petition with prejudice.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

545 P.2d 1025

STATE of New Mexico, Plaintiff-Appellee,

v.

Gerald S. BOLEN, Defendant-Appellant.

No. 2162.

Court of Appeals of New Mexico.
Jan. 13, 1976.
Certiorari Denied Feb. 11, 1976.

Chester H. Walter, Jr., Chief Public Defender, Bruce L. Herr, Appellate Defender, John Zavitz, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., F. Scott MacGillivray, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of burglary and two larcenies. He was sentenced to three prison terms, to be served consecutively. His appeal raises three issues: (1) the single larceny doctrine; (2) double jeopardy; and (3) consecutive sentencing.

A bicycle shop and a ski shop, separately owned, were located in one room divided by low walls. Each shop had a separate cash register. Defendant stole money from each cash register.

Single Larceny Doctrine

2 Anderson, Wharton's Criminal Law and Procedure, § 451 (1957) states: "The stealing of property from different owners at the same time and at the same place constitutes but one larceny." The annotation at 37 A.L.R.3d 1407 (1971), page 1409 states that the overwhelming majority of jurisdictions follow this doctrine. The issue in this case has not been specifically decided in New Mexico although several decisions have considered aspects of the doctrine. See *State v. Allen,* 59 N.M. 139, 280 P.2d 298 (1955); *State v. Romero,* 33

N.M. 314, 267 P. 66 (1928); *State v. Klasner,* 19 N.M. 474, 145 P. 679 (1914).

The doctrine has been rationalized on the ground that the "taking is one continuous act or transaction" and on the ground of double jeopardy. Annot. 37 A.L.R.2d, supra, pages 1409–1410. Such rationalizations may not be valid in New Mexico because the same transaction test has been repudiated and because of the approved tests for determining double jeopardy in New Mexico. *State v. Tanton,* 88 N.M. 333, 540 P.2d 813 (1975).

However, we need not determine whether the single larceny doctrine is valid. We need not do so because the doctrine is not applicable to the facts of this case. The doctrine is limited to cases wherein the taking occurred at one time and one place. Annot. 37 A.L.R.3d, supra, page 1414. Wharton's Criminal Law and Procedure, supra, states:

> "If different articles are taken from different owners at different times, the defendant is guilty of separate larcenies. Accordingly, if on the same expedition there are several distinct larcenous takings, as taking the goods of one person at one place, and afterward taking the goods of another person at another place, and so on, as many crimes are committed as there are several and distinct takings, and this is true although the thefts may all have been committed in rapid succession and in pursuance of a formed design to steal."

Although committed at the same place and in rapid succession, the robbery of three stagecoach passengers was three distinct offenses. *In Re Allison,* 13 Colo. 525, 22 P. 820 (1889). Where articles are stolen from different rooms of the same house from different owners, each theft is a separate offense. *People v. Sichofsky,* 58 Cal.App. 257, 208 P. 340 (1922). The taking of cattle belonging to different owners at the same time and from the same place is one larceny; the taking of cattle belonging to different owners from different pastures is more than one larceny. *Hall v. State,* 66 So.2d 863 (Fla.1953). Property taken from five different owners from different places in the same wagon-yard was five larcenies because each taking was a distinct offense. *State v. Maggard,* 160 Mo. 469, 61 S.W. 184 (1901).

The facts show a taking from each cash register. The registers were in different locations; the money taken was the property of separate owners. The factual predicate for the doctrine is lacking because taking the money from two cash registers did not occur at the same time and place.

Double Jeopardy

Relying on the same evidence test reaffirmed in *State v. Tanton,* supra, defendant asserts that conviction of two larcenies amounts to double jeopardy. The State proved thefts from separate cash registers. Proof of theft of money from the bicycle shop would not have proved theft of money from the ski shop. The evidence was not the same.

Consecutive Sentencing

Defendant claims his consecutive sentences violate the prohibition against double jeopardy and the prohibition against cruel and unusual punishment. These contentions were not raised in the trial court; they will not be considered. *State v. Brakeman,* 88 N.M. 153, 538 P.2d 795 (Ct. App.1975).

Oral argument is unnecessary. The judgment and sentence are affirmed.

It is so ordered.

HENDLEY and SUTIN, JJ., concur.

545 P.2d 1027

S & S SALES, INC., Appellant,

v.

BUREAU OF REVENUE, Appellee.

No. 2198.

Court of Appeals of New Mexico.
Jan. 20, 1976.

Stephen Durkovich, John Jasper and Stephen Durkovich, Albuquerque, for appellant.

Toney Anaya, Atty. Gen., Vernon O. Henning, Bureau of Revenue Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

SUTIN, Judge.

Taxpayer appeals a decision of the Commissioner which imposed a gross receipts tax on the sale of mobile homes.

The facts were stipulated. Taxpayer is engaged in the business of selling mobile homes to people throughout the state. It maintains an inventory of mobile homes from which sales are made.

Section 72–16A–12.10, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, 1973 Supp.) of the Gross Receipts and Compensating Tax Act reads:

> Exempted from the gross receipts tax are the receipts from selling vehicles on which a tax is imposed by section 64–11–15 N.M.S.A.1953.

Section 64–11–15, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1975 Supp.) of the Motor Vehicle Code reads in pertinent part:

> . . . [T]here is imposed an excise tax on the issuance of every original and subsequent certificate of title for vehicles of a type required to be registered in this state, *except mobile homes,* in the case of sales or resales thereof. . . . [Emphasis added]

Section 64–1–8 provides:

> As used in the Motor Vehicle Code:
> * * * * * *
> E. "mobile home" means a house trailer, *other than one* [*1*] *held as inventory for sale or resale,* that exceeds either a width of eight [8] feet or a length of forty [40] feet when equipped for the road; [Emphasis added]

Taxpayer's syllogistic reasoning of statutory construction sounds meritorious. They contend that mobile homes are not subject to the excise tax, but since trailers held as inventory are not mobile homes, they must be subject to the excise tax. Therefore, since an excise tax is imposed, receipts from sales of mobile homes held in inventory are exempt from the gross receipts tax. We disagree.

Mobile homes held as inventory are not required to be registered. Therefore, the excise tax is *not* imposed on mobile homes whether "held as inventory for sale or resale", or not. The purpose of the inventory exception in the definition of "mobile home" was to exclude this class from imposition of the property tax, which also utilizes this definitional section.

We, therefore, conclude:

The tax on gross receipts exempts that class of mobile homes on which the excise

tax is imposed. The excise tax is not imposed on mobile homes. Therefore, the gross receipts from the sale of mobile homes held as inventory are not exempt from the gross receipts tax.

Taxpayer's receipts from sale of mobile homes are subject to the gross receipts tax.

Affirmed.

It is so ordered.

HERNANDEZ and LOPEZ, JJ., concur.

545 P.2d 1028

STATE of New Mexico, Plaintiff-Appellee,

v.

Leatch Allen HELKER, Defendant-Appellant.

No. 1798.

Court of Appeals of New Mexico.

Dec. 2, 1975.

Certiorari Denied Jan. 7, 1976.

Joan M. Friedland, Morton S. Simon, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Ralph W. Muxlow, III, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant appeals a conviction of attempted rape, sodomy and aggravated burglary. He alleges four points for reversal which relate to: (1) lack of a full voluntariness hearing on a confession; (2) ineffective assistance of counsel; (3) commenting on defendant's failure to testify; and, (4) the unconstitutionality of the sodomy statute.

Voluntariness Hearing

Defendant's trial attorney had known of the purported confession several months prior to trial. He did not file a motion to suppress within the time prescribed by R.Cr.P. 18, § 41-23-18, N.M.S.A. 1953 (2d Repl. Vol. 6, 1972, Supp. 1973). During the trial the state offered the confession into evidence. Defendant then requested a hearing be held out of the presence of the jury concerning voluntariness. The jury was excused and two police officers testified as to the voluntariness of the confession. Defendant extensively cross-examined the officers. The state then moved that the testimony and confession be presented to the jury. Defendant then moved to examine other witnesses as to whether the confession was voluntary. The motion was denied as untimely.

Defendant then moved to make an offer of proof as to the voluntary nature of this confession. The trial court granted the motion but defendant did not call any witnesses to make his offer of proof. Further, defendant did not testify at trial nor did he call any witnesses.

This court has clearly recognized that defendant has a constitutional right to have a fair hearing and a reliable determination on the issue of voluntariness. In *State v. Word*, 80 N.M. 377, 456 P.2d 210 (Ct.App.1969) this court stated:

> "Defendant has the constitutional right at some stage in the proceeding to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness; a determination uninfluenced by the truth or falsity of the confession. *State v. Ortega*, 77 N.M. 7, 419 P.2d 219 (1966); *Pece v. Cox*, 74 N.M. 591, 396 P.2d 422 (1964); see *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964). When a defendant makes it known he has something to say touching the integrity of a claimed confession, however incredible as it may appear to the trial court, the defendant must be heard. The trial judge has no choice."

See *State v. Gurule*, 84 N.M. 142, 500 P.2d 427 (Ct.App.1972); and *State v. Gruender*, 83 N.M. 327, 491 P.2d 1082 (Ct.App.1971).

Subsequently, our Supreme Court adopted Rule 18(c), supra, which provides:

> "(c) *Time for Filing.* A motion to suppress shall be made within twenty days after the entry of a plea, unless, upon good cause shown, the trial court waives the time requirement of this rule."

Defendant contends that rules of criminal procedure that set time limitations cannot deprive defendant of his constitutionally protected right to a voluntariness hearing.

18 U.S.C.A. § 41(e) (1961) was very similar to Rule 18. Prior Rule 41(e) provided in part:

> ". . . The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant

was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Although Rule 41, supra, has been amended, there is a long line of cases that have construed the effect of the prior Rule 41(e), supra. In *Small v. United States,* 396 F.2d 764 (5th Cir. 1968), the court upheld a trial court's denial of a motion to suppress evidence as untimely when the motion to suppress was not submitted until the government offered the evidence at trial. In upholding the trial court's denial the *Small* court stated:

"The purpose of Rule 41(e) in requiring Motions to Suppress to be introduced prior to trial is to facilitate a uniform presentation of the facts and law to the jury with as few disruptive intervals as possible. Although the trial judge is free to exercise judicial discretion when a motion is offered for the first time during the trial where there would be obvious prejudice to the defendant, the granting of such a motion is disfavored where counsel was fully aware of the facts prior to trial and had ample opportunity to present the motion. [Citations omitted]."

Similarily, the United States Supreme Court in *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) stated:

". . . This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt. [Citations omitted]."

See also *United States v. Hamilton,* 469 F.2d 880 (9th Cir. 1972); *United States v. Robinson,* 470 F.2d 121 (7th Cir. 1972); *United States v. Ceraso,* 467 F.2d 653 (3rd Cir. 1972); *United States v. Cranson,* 453 F.2d 123 (4th Cir. 1971), cert. denied, 406 U.S. 909, 92 S.Ct. 1607, 31 L.Ed.2d 821 (1972); *United States v. Bennett,* 409 F.2d 888 (2d Cir. 1969), cert. denied, 396 U.S. 852, 90 S.Ct. 117, 24 L.Ed.2d 101 (1969). For the reasons enumerated in the above cases we hold that rules of criminal procedure can put a time limitation on the exercise of a constitutionally protected right.

Ineffective Assistance of Counsel

Under this point defendant contends that even if he waived his right to have a full hearing on the admissability of the confession then failure to move to suppress constitutes ineffective assistance of counsel. He also contends that failure to offer a defense of and submit a requested instruction on voluntariness, intoxication and diminished capacity constitutes ineffective assistance of counsel.

Defendant was not denied his right to have witnesses at trial to testify on the question of voluntariness. Defendant was only denied the right to have a suppression hearing as discussed in the first point. However, he chose not to do so for reasons which are not disclosed by the record. We will not attempt to second guess trial counsel on appeal. Counsel must be given a wide latitude in his representation of his client. *State v. Moser,* 78 N.M. 212, 430 P.2d 106 (1967). All the claims here, including the failure to request instructions, go to trial tactics and strategy. An attorney has the exclusive power and control with respect to procedural and remedial matters over the litigation with which he is charged. *State v. Selgado,* 78 N.M. 165, 429 P.2d 363 (1967). Our review of the record does not show that defendant was denied the effective assistance of counsel.

As to the failure to request instructions on the issues of voluntariness, intoxication and diminished capacity we can only state that the record would not support the giving of any such instructions. See *State v. Armstrong,* 85 N.M. 234, 511 P.2d 560 (Ct.App.1973). *State v. Watkins,* 543 P.2d 1189 (Ct.App.)

Defendant asserts that the instant case compares with *State v. Kincheloe,* 87 N.M.

34, 528 P.2d 893 (Ct.App.1974). We do not agree. *Kincheloe* is entirely different and is distinguished from the instant case. The composite of the alleged errors asserted here do not approach those in *Kincheloe.*

Defendant's Failure to Testify Comment

Defendant attempts to elevate the following statement into a comment by the trial court on defendant's failure to testify. That comment states in part:

> "THE COURT: Ladies and gentlemen of the jury, at the lunch recess the State had announced rest at that time and then coming back this afternoon the defendant has chosen not to submit any defense which is his constitutional right so to do and they the State closed, which means, [there] will be no more testimony, ..."

The statement by the court was no more than a summary of the happenings in the trial. It was not a comment on defendant's failure to testify. No issue is presented as in *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

Unconstitutionality of the Sodomy Statute

The majority of this panel abides by the decisions of this court prior to *State v. Elliott,* 88 N.M. 187, 539 P.2d 207 (Ct. App.1975) on certiorari to the New Mexico Supreme Court. A Supreme Court determination in Elliott will settle the constitutionality question of the sodomy statute.

Affirmed.

It is so ordered.

HERNANDEZ, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

The trial court denied defendant a fair hearing on admissibility of confession.

During the direct examination of a police officer, defendant requested a hearing *in camera* on the voluntariness and admissibility of defendant's alleged confession. The jury was excused and a hearing was held. After the examination and cross-examination of two police officers on behalf of the State, defendant requested permission to call evidence on his behalf. The State objected because of defendant's failure to comply with Rule 18 of the Rules of Criminal Procedure on suppression of evidence. Defendant called to the attention of the trial court that Rule 18 was not applicable on the admissibility of evidence at trial. On oral argument, the district attorney strongly disagreed and won. The trial court said:

> Upon the admissions made by Mr. Williams [public defender] that he had notice of this . . . confession . . . for several months, the Court finds that the defense had been dilitory [sic] in asserting its rights under Rule 18 of the Rules of Civil Procedure. . . . It was not timely filed and any motion against the admissibility of this into evidence at this time is overruled.

This is reversible error.

Rule 18 of the Rules of Criminal Procedure reads:

> (a) *Property.* A person aggrieved by a search and seizure may move for a return of the property and to suppress its use as evidence.
>
> (b) *Suppression of Other Evidence.* A person aggrieved by a confession, admission or other evidence may move to suppress such evidence.
>
> (c) *Time for Filing.* A motion to suppress shall be made within twenty [20] days after the entry of a plea, unless, upon good cause shown, the trial court waives the time requirement of this rule.
>
> (d) *Hearing.* The court shall receive evidence on any issue of fact necessary to the decision of the motion.

It is obvious that this rule applies to pre-trial criminal proceedings. It has no

relationship to the admission of evidence during the trial of a case.

Rule 104(a), (c) of the Rules of Evidence [§ 20-4-104(a), (c), N.M.S.A.1953 (Repl.Vol. 4, 1973 Supp.)] provides for a hearing on the admissibility of confessions during trial. The rule states in pertinent part: "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the judge . . . . Hearings on the admissibility of confessions shall *in all cases* be conducted out of the hearing of the jury." [Emphasis added].

Under Rule 18(b) the defendant *may* move to suppress the confession. This is not mandatory. Defendant has an alternative right to challenge the admission of the confession under Rule 104(c). When this challenge is made, it is mandatory that the hearing *shall* be conducted absent the jury.

Defendant had a choice. The public defender chose the trial procedure, not the pre-trial procedure, to accomplish his challenge of the admissibility of the confession. To even suggest that this choice constituted ineffective assistance of counsel is to insult the integrity of the public defender.

By adoption of Rule 18(b), the Supreme Court did not intend to violate the Due Process Clause of the Constitution of the United States as stated in *State v. Cranford*, 83 N.M. 294, 491 P.2d 511 (1971).

When the State offers a confession in evidence, the burden of proof is on the State to show that it was voluntary. *State v. Barnett,* 85 N.M. 301, 512 P.2d 61 (1973). The trial judge heard the evidence submitted by the State in support of the admission of the confession. It was his duty to hear and consider any evidence offered by the defendant, however incredible it might appear. The trial judge has no choice. Id.; *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958). A full inquiry must be made as to all the circumstances under which the confession was obtained, and from this inquiry, a determination of voluntariness or otherwise must be made. *State v. Martinez*, 30 N.M. 178, 230 P. 379 (1924). In *State v. Ortega*, 77 N.M. 7, 419 P.2d 219 (1966), Justice Moise set forth specifically eight circumstances to be considered by the court in determining whether the confession was voluntary. This determination rests within the court's discretion, but this discretion must be exercised with great caution. *Dodd v. State*, 232 So.2d 235 (Fla.App.1970). Uncontrolled discretion for failure to hear the defendant constitutes reversible error. *State v. Armijo,* supra.

The trial court failed to give defendant a fair hearing. It denied defendant the right to present evidence on the inadmissibility of the confession. The trial court also failed to make a determination of the issue of voluntariness of the confession. In *State v. LaCour*, 84 N.M. 665, 506 P.2d 1212 (Ct.App.1973), we granted a new trial. I favored a remand to determine the question of voluntariness. In *State v. Armijo*, supra, a new trial was granted. In *State v. Gurule*, 84 N.M. 142, 500 P.2d 427 (Ct.App.1972), we remanded with instructions to vacate the judgment, determine the question of voluntariness, and if the determination was not made in ninety days, the defendant was to be discharged.

The majority opinion disregards prior New Mexico law because Rule 18(c) was subsequently enacted.

The majority opinion relies on federal cases arising out of former Rule 41(e) of the Federal Rules of Criminal Procedure. The opinion states:

> 18 U.S.C.A. § 41(e) (1961) was very similar to Rule 18.

I cannot find a similarity. Section 41(e) only covered a person aggrieved by an unlawful search and seizure. It allowed a motion to return property unlawfully seized and to suppress the use of this property as evidence.

Each of the federal cases cited in the majority opinion pertains to unlawful search and seizure of property. None of

them involves the admission in evidence of a confession. The instant case is not based on unlawful search and seizure.

The procedure used in the trial court "did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial," and "did not adequately protect [Helker's] right to be free of a conviction based upon a coerced confession and therefore cannot withstand constitutional attack under the Due Process Clause of the Fourteenth Amendment." *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 908, 916, 1 A.L.R.3d 1205 (1964). *Jackson* has been followed or referred to in New Mexico at least twelve times. *State v. Lujan*, 87 N.M. 400, 534 P.2d 1112 (1975); *State v. Barnett*, supra; *State v. LaCour*, supra; *State v. Gurule*, supra; *State v. Paul*, 83 N.M. 619, 495 P. 2d 797 (Ct.App.1972); *State v. Cranford*, supra; *State v. Gruender*, 83 N.M. 327, 491 P.2d 1082 (Ct.App.1971); *State v. LeMarr*, 83 N.M. 18, 487 P.2d 1088 (1971); *State v. Burk*, 82 N.M. 466, 483 P.2d 940 (Ct.App.1971); *State v. Word*, 80 N.M. 377, 456 P.2d 210 (Ct.App.1969); *State v. Ortega*, supra; *Pece v. Cox*, 74 N.M. 591, 396 P.2d 422 (1964).

> 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.

Sims v. State of Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593, 598 (1967). *Sims* has been followed in New Mexico four times. *State v. Lujan*, supra; *State v. LaCour*, supra (Sutin, J., concurring); *City of Albuquerque v. Butt*, 83 N.M. 463, 493 P.2d 773 (Ct.App.1972); *State v. Gruender*, supra (Sutin, J., dissenting).

The majority opinion flouts the decision of the Supreme Court of the United States and the appellate courts of New Mexico.

Helker is 19 years of age. He received three *consecutive* sentences in the State Penitentiary: (1) 10 to 50 years for aggravated burglary, (2) 2 to 10 years for attempted rape, and (3) 2 to 10 years for sodomy. His life, as well as his liberty, are subject to the rack and the stake. We do not know what factors caused his departure from normal life. Was it his environment? His family? His schools? His church? His society? Now, absent help from society, in the depths of despair, no one but the public defender fights for his rights.

Time and space in a dissenting opinion do not allow for quotations from great judges. From the foundation of our country, our courts have protected life and liberty under the Constitution of the United States. Every person charged with a crime is entitled to a fair trial, free from reversible error.

The majority refuse to follow *State v. Elliott*, 88 N.M. 187, 539 P.2d 207 (Ct.App. 1975) where we declared the sodomy statute unconstitutional.

Today, one judge removed for another joined Judge Hendley in returning to the pre-*Elliott* case law. The majority have a right and duty to do so when justice, as they see it, demands the return. It is not as the *Elliott* dissent said, "a blatant abuse of judicial power."

The Supreme Court granted certiorari in *Elliott* and may follow in the footsteps of the Hendley dissent. It may reverse on other grounds and not determine the constitutional question. If it does not, perhaps it will do so in this case.

The legislature was wise enough to repeal the old sodomy statute and adopt a new one which meets all constitutional requirements. But Elliott and Helker will suffer punishment for a crime which did not exist in law, and which constitutional

problem the appellate courts of this State have studiously refused to determine.

Today, we are faced with what some people call "a waive of terror in the criminal field". It has grown slowly for two hundred years. It begins with adolescence. People cry aloud for a return to the feudalistic doctrine of "punishment to fit the crime", except when their own child is involved. Some courts and district attorneys pursue this course vehemently. By denying a person a fair trial, by chipping away segments of the Constitution, we begin a slow return to the good old days when men feared witches and burnt women. But judges today, who preach this doctrine in dissenting opinions, are severely criticized. So let it be.

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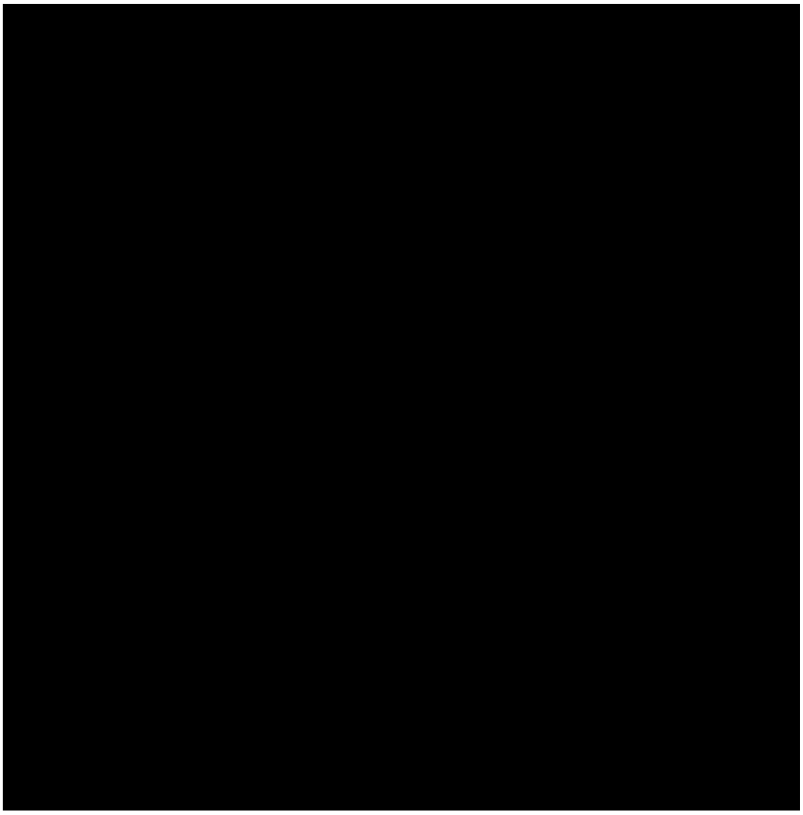

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