558 P.2d 613

Pierre J. OTT and Beverly J. Ott, his wife, Plaintiffs-Appellees,

v.

Conrad F. KELLER and Lillie A. Keller, his wife, Defendants-Appellants.

No. 2578.

Court of Appeals of New Mexico.

Dec. 14, 1976.

Thomas F. Hooker, Jr., Keith & Matthews, P. C., Albuquerque, for defendants-appellants.

Richard J. Grodner, Prelo & Grodner, Albuquerque, for plaintiffs-appellees.

OPINION

SUTIN, Judge.

Defendants appeal from a judgment based upon a claim of unlawful detainer and eviction brought by plaintiffs against defendants. We reverse.

A. *Findings of Fact and Conclusions of Law*

The trial court found:

On October 10, 1975, plaintiffs, as owners, and defendants, as purchasers, entered into a real estate contract for the purchase of plaintiffs' residence in Albuquerque, New Mexico. The pertinent parts of the contract are:

(1) The purchase price was $46,000.00. Defendants assumed and agreed to pay a mortgage held by the Albuquerque Federal Savings and Loan Association. Payments of $242.00 per month on the mortgage began on November 1, 1975.

(2) Defendants also agreed to pay plaintiffs' "equity" at the rate of $118.00 per month beginning on December 15, 1975.

(3) The Albuquerque National Bank was appointed escrow agent to collect the payments provided for in the contract, and to disburse $242.00 in payment of the mortgage and $118.00 to plaintiffs.

(4) On the matter of default, the contract provided:

> Should the Purchaser fail to make any of the said payments at the respective times herein specified, . . . *and continue in default for fifteen (15) days after written demand for such payments . . . has been mailed to the Purchaser . . .*, then the Owner may . . . terminate this contract and retain all sums theretofore paid hereunder as rental to that date for the use of said premises, and all rights of the Purchaser . . shall thereupon cease and terminate and *they shall thereafter be deemed a tenant holding over after the expiration of their term without permission.* [Emphasis added].

The court further found that defendants did not make the February 1, 1976 payment of $242.00 on the mortgage; that on February 4, 1976, plaintiffs' agent mailed a written demand to defendants to pay the $242.00; that the defendants did not make the payment on or before February 19, 1976; that on February 20, 1976, plaintiffs elected to terminate the contract and retain all sums theretofore paid under it as rental ($9,968.25) for the use of the premises, and further terminated all rights of the defendants in the premises; that since February 20, 1976, defendants were tenants holding over after the expiration of their term without permission and after the termination of their tenancy; that on February 20, 1976, a letter of eviction was hand-delivered to the defendants, and the defendants refused and failed to vacate the premises.

The court concluded in pertinent part that it had jurisdiction of the parties and the subject matter; that defendants breached the contract; that by failing to leave the premises, defendants committed the act of unlawful detainer; that plaintiffs were entitled to attorney fees of $250.00 and costs for bringing the action; and that plaintiffs were entitled to have the Sheriff

of Bernalillo County remove the defendants from the premises.

B. *The trial court lacked jurisdiction over the subject matter.*

The appeal concerns unlawful detainer. Sections 36–12–1 through 36–12–4, N.M. S.A.1953 (2nd Repl. Vol. 6). . . .

. . . . .

The action for unlawful detainer is purely statutory and is restricted in its operation to the situations specified in the statute. *Henderson v. Gibbany*, 76 N.M. 674, 417 P.2d 807 (1966). The relief available is possession of the premises and damages. Section 36–12–3, supra.

. . . . .

Kassel v. Anderson, 84 N.M. 697, 698, 507 P.2d 444, 445 (Ct.App.1973).

Unlawful detainer is a summary proceeding. An equitable owner under a real estate contract cannot be ousted from possession by a summary proceeding, and the question of title to land cannot be determined in an unlawful detainer action. *Reinhart v. Lindholm*, 84 N.M. 546, 505 P.2d 1222 (1972). The parties must litigate the question of title in a more suitable form of action. *McCracken v. Wright*, 159 Kan. 615, 157 P.2d 814 (1945).

Forcible entry or unlawful detainer settles nothing between the parties. It does not determine title to the property or the absolute right to possession. A judgment has only the effect of placing the parties in their original positions prior to the forcible entry or unlawful detainer. *Heron v. Ramsey*, 45 N.M. 491, 117 P.2d 247 (1941); *Heron v. Kelly*, 48 N.M. 123, 146 P.2d 851 (1944).

Section 36–12–1(2) provides that in unlawful detainer, the facts must show that:

> the defendant holds over after the termination, or contrary to the terms of, his lease or tenancy;

Plaintiffs contend that subsection (2) applies because the real estate contract recites that a purchaser in default "shall *thereafter* be deemed a tenant holding over after the expiration of their term without permission." [Emphasis added]. We disagree. A real estate contract is not a lease or tenancy. It does not involve a landlord-tenant relationship during the existence of the contract, and the contract cannot, after default, transform a vendor-vendee relationship into one of landlord-tenant.

The statute comprehends a landlord-tenant relationship, and an unlawful detainer action does not arise out of a vendor-vendee relationship, *Phoenix-Sunflower Industries, Inc. v. Hughes*, 105 Ariz. 334, 464 P.2d 617 (1970); *McCracken v. Wright*, supra, because the vendee in possession is not a tenant in any sense of the word, and a default does not make him a tenant. *Coe v. Bennett*, 39 Idaho 176, 226 P. 736 (1924); *Steffens v. Smith*, 477 P.2d 119 (Wyo.1970).

The trial court lacked jurisdiction over the subject matter. *Steffens v. Smith*, supra; *Phoenix-Sunflower Industries, Inc. v. Hughes*, supra. Lack of jurisdiction is fatal to the judgment. *State ex rel. Overton v. New Mexico State Tax Com'n*, 81 N.M. 28, 462 P.2d 613 (1969).

C. *The proceedings in unlawful detainer were inequitable to defendants.*

On February 26, 1976, plaintiffs filed their complaint. On March 1, 1976, plaintiffs requested a hearing on unlawful detainer; the estimated total time required was stated to be 15 minutes. The trial court set the hearing on March 8, 1976, at 1:15 p. m., twelve days after the complaint was filed.

On March 8, 1976, defendants filed an answer with seven affirmative defenses, *a counterclaim with eleven separate counts*, and a demand for jury trial. In the afternoon, the 15-minute summary hearing transformed into a full-blown trial on plaintiffs' claim of unlawful detainer only. Defendants were forced to offer evidence in the record over objections of the plaintiffs, which objections were sustained. At this time, defendants had paid the sum of $9,968.25 toward the total purchase price. At the close of the evidence, the trial court

terminated defendants' contract, evicted the defendants from their residence, forfeited all sums paid, and ordered defendants to pay plaintiffs' attorney fees and costs.

Defendants' counterclaim and demand for a jury trial, which were disregarded by the trial court, remain in issue before the Court.

First, unlawful detainer is a summary proceeding. When a summary proceeding, which on its face deprives an equitable owner of title to the property, causes a forfeiture of 25% of the purchase price, and an eviction of the defendants from the premises, and appears to be inequitable, the law and the facts should be viewed with care and caution through a spyglass. Forfeitures are not favored. *Melfi v. Goodman,* 73 N.M. 320, 388 P.2d 50 (1963). This litigation arose out of a claimed one-day default in payment of $242.00 on *an assumed mortgage,* and not on plaintiffs' "equity." It is seriously questioned whether this default triggers a default of the real estate contract. Furthermore, plaintiffs violated the terms of their contract by terminating the escrow account upon a claimed one-day default. The time that elapsed was unreasonably short. *Melfi v. Goodman,* supra. The remedy sought, on its face, was inequitable in the field of commercial contracts and practices thereunder.

Second, equity is defined in Black's Law Dictionary 634 (Rev. 4th ed. 1968) as follows:

> In its broadest and most general signification, this term denotes the spirit and the habit of fairness, justness, and right dealing which would regulate the intercourse of men with men,—the rule of doing to all others as we desire them to do to us; or, as it is expressed by Justinian, "to live honestly, to harm nobody, to render to every man his due." Inst. 1, 1, 3. It is therefore the synonym of natural right or justice. But in this sense its obligation is ethical rather than jural, and its discussion belongs to the sphere of morals. It is grounded in the precepts of the conscience, not in any sanction of positive law.

This precept should dominate all commercial transactions and practices.

Third, defendants were not delinquent in payment. On February 4, 1976, plaintiffs mailed a notice of default to defendants, by certified mail, return receipt requested, for failure to make the February 1, 1976 payment. Plaintiffs failed to prove that this letter was received by defendants. The envelope containing the notice of default was returned to the sender. No return receipt was placed of record, and defendants denied receipt of the letter. It is apparent that the trial court believed that a letter mailed is a letter received the following day; that the 15-day notice to pay, mailed on February 4, 1976, expired on February 19, 1976. Under prevailing postal delivery, we cannot accept per se the conclusiveness of this one-day delivery.

Nevertheless, we believe that the notice given did not make February 19, 1976 the final date upon which payment had to be made. The notice provided:

> If the above delinquency now due under the contract has not been paid within fifteen (15) days *from the effective date of this notice,* the Ott's will consider the contract terminated . . . .. [Emphasis added].

This notice did not make *the date the notice was mailed* effective as provided in the contract. The notice stated that the plaintiffs would consider the contract terminated, if payment was not made "within fifteen (15) days *from the effective date of this notice*". This language means from the date upon which the notice became operative and effective. See, *City of Plantation v. Mason,* 170 So.2d 441 (Fla.1964). The notice did not become effective and operative until it was received by the defendants. This is a just and equitable rule of construction.

If we assume that the notice mailed was received by defendants the following day, February 5, 1976, the date for payment of

$242.00 was fixed on February 20, 1976, and not February 19, 1976.

On the morning of February 20, 1976, plaintiffs withdrew the documents from the escrow agent. On the afternoon of February 20, 1976, defendants tendered payment to the escrowee, but the payment was refused. At 9:00 p.m. that night, defendants received a hand-delivered letter that the default had not been cured.

Payment having been made on time, defendants were not in default, did not hold over, and did not commit an act of unlawful detainer, if a landlord-tenant relationship existed.

Reversed. This cause is remanded to the district court to enter judgment that plaintiffs' complaint be dismissed with prejudice. Defendants shall recover all costs in the trial court and on appeal.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., specially concurring.

HERNANDEZ, Judge (Specially Concurring).

The pertinent parts of the real estate contract which forms the basis of this suit are the following:

"1. That the said Owner, in consideration of the covenants and agreements on the part of the said Purchaser, hereinafter contained, agrees to sell and convey unto the said Purchaser the following real estate situate, lying and being in the County of Bernalillo and State of New Mexico, to wit:

. . . . . .

"SUBJECT ALSO TO that certain real estate mortgage to Albuquerque Federal Savings and Loan Association recorded on September 11, 1972 in Book MD 9A, pages 476 through 478 of the records of Bernalillo County, New Mexico, Loan No. 3–51226–8 which mortgage the purchaser herein assumes and agrees to pay according to its terms.

. . . . . .

"3. In consideration of the premises, the said Purchaser agrees to buy said real estate and to pay said Owner therefor the sum of Forty six thousand dollars ($46,000) lawful money of the United States of America, which sum is to be paid as follows, to-wit: Seven thousand dollars ($7,000.00), cash in hand paid, the receipt of which is hereby acknowledged, and the balance of $39,000.00 shall be payable as follows, to-wit: $26,182.73 by assuming and paying the mortgage set out above in monthly payments, presently in the amount of 242.00 which payments include principal, interest, taxes and insurance beginning with the payment due on November 1, 1975, and $242.00, or more, if Trust Fund assessments are increased, on or before the first day of each succeeding month until fully paid. Payments include interest at the rate of 7¾ per annum. $12,817.27 balance of Owner's equity, which Purchaser will pay as follows: $118.00, or more, beginning on December 15, 1975 and $118.00, or more, on or before the fifteenth day of each succeeding month. Interest at the rate of 8½ per annum, is included in said monthly payments. In addition to the monthly instalments of $118.00, the Purchaser shall pay to the Owner an additional $2,000.00, or more, before January 1, 1976.

Escrow Agent hereinafter named shall collect the full amount of $360.00, or more, and disburse as ordered in Escrow Letter herein.

. . . . . .

"8. It is mutually agreed that time is the essence of this contract. Should the Purchaser fail to make any of the said payments at the respective times herein specified, or fail or refuse to repay any sums advanced by the Owner under the provisions of the foregoing paragraph, or fail or refuse to pay said taxes, assessments or other charges against said real estate and continue in default for fifteen (15) days after written demand for such payments of taxes, or payment of assessments or other charges against said real

estate, or repayment of sums advanced under provisions of the foregoing paragraph has been mailed to the Purchaser addressed to them at 3817 Mt. Rainier Dr., N.E. Albuquerque, N. M., or such other address as may be furnished in writing, then the Owner may, at his option, either declare the whole amount remaining unpaid to be then due, and proceed to enforce the payment of the same; or he may terminate this contract and retain all sums theretofore paid hereunder as rental to that date for the use of said premises, and all rights of the Purchaser in the premises herein described shall thereupon cease and terminate and they shall thereafter be deemed a tenant holding over after the expiration of their term without permission. An affidavit made by said Owner or his agent showing such default and forfeiture and recorded in the County Clerk's office shall be conclusive proof, in favor of any subsequent bonafide purchaser or encumbrancer for value, of such default and forfeiture; and the Purchaser hereby irrevocably authorizes the Owner or his agent to thus declare and record such default and forfeiture, and agrees to be bound by such declarations as their free act and deed.

. . . . .

"We also hereby appoint you Escrow Agent hereunder, and direct you as such Escrow Agent to collect the payments provided for in the above contract and place the money so collected to the credit of Owner, disburse $242.00, or more, in payment of mortgage set out herein to Albuquerque Federal Savings and Loan Assn., of Albuquerque, N.M., and the balance to be disbursed to Owner."

Starting with the proposition that the parties are presumed to have intended what the language of their contract clearly expresses, we look to the contract in this instance. See *Woodson v. Lee,* 73 N.M. 425, 389 P.2d 196 (1963). As can be seen from these excerpts purchasers were given credit toward the purchase price for the $7,000.00 cash paid and for the sum of $26,182.73 by assuming the Albuquerque Federal Savings and Loan Association mortgage. The remainder of the contract deals with the balance of the purchase price due the sellers, except the instructions to the escrow agent as to the disbursement of payments. The only payment due under the contract for the month of February, 1976, was due on the 15th in the amount of $118.00. Therefore sellers demand letter of February 3, 1976 was premature and of no effect. Granted that purchasers were in default on the mortgage payment due February 1, 1976, there is nothing in the contract giving the sellers the right to rescind for that reason. The payments referred to in paragraph 8 are the monthly payments of $118.00 due to the sellers. The fact that the mortgage payments were to be made through the escrow agent does not, in my opinion, make them payments due under the contract. The sellers could easily have provided in the contract that failure to make the mortgage payments on the due dates would give the sellers the right to rescind under the provisions of paragraph 8. They did not.

For these reasons I would reverse and remand with instructions to the trial court to vacate its judgment in favor of plaintiffs and reinstate this cause on its calendar for a hearing on defendants counterclaim.

558 P.2d 1149

STATE of New Mexico, Plaintiff-Appellee,

v.

Jacob B. ARMIJO, Defendant-Appellant.

No. 2531.

Court of Appeals of New Mexico.

Dec. 14, 1976.

Jan A. Hartke, Acting Chief Public Defender, Reginald J. Storment, Appellate Defender, William H. Lazar, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Paquin M. Terrazas, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Eleven of the sixteen counts of the indictment were submitted to the jury. Defendant was convicted on each count submitted. The eleven convictions divide into three categories: (a) Count 1—conspiracy with Lydia Blea and Diane Blea, from on or about December 31, 1974 through on or about February 19, 1975, to commit a felony by trafficking in heroin; (b) Counts 2, 5, 13 and 15—trafficking by distribution of heroin; and (c) Counts 3, 6, 10, 11, 12 and 16—trafficking by possession with intent to distribute heroin. See § 54–11–20, N.M.S.A.1953 (Repl.Vol. 8, pt. 2, Supp.1975). Defendant's appeal challenges the sufficiency of the evidence (1) as to the conspiracy and (2) as to the heroin.

Evidence of Conspiracy

Defendant claims the evidence is insufficient to show that he was a party to any agreement to traffic in heroin. This amounts to an attack on each of the convictions because defendant asserts that the ten trafficking counts were "submitted to the jury solely on a theory of derivative liability." By "derivative liability", defendant refers to the rule that: "A defendant may be convicted of a substantive offense which he did not himself commit if it is clear that the offense was committed in furtherance of a conspiracy of which the defendant was a member." *United States v. Trotter,* 529 F.2d 806 (3rd Cir. 1976); see *State v. Ochoa,* 41 N.M. 589, 72 P.2d 609 (1937).

Defendant's claim is overbroad. The instructions, particularly the instruction defining the material elements of the offenses charged, do not limit the distribution counts (category b) to a derivative liability theory. The consequence is that the four convictions in category (b) are not chal-

lenged on appeal. We assume that the derivative liability theory applies to the possession with intent to distribute counts (category c) as well as the conspiracy count (category a). Accordingly, the claim that the evidence of conspiracy is insufficient applies to seven of the eleven convictions. This does not mean, however, that evidence supporting the four distribution counts is not to be considered; the distribution evidence is clearly relevant to the conspiracy charge.

There is evidence of transactions between defendant and Diane Blea on December 31, 1974, and January 4, January 9, January 22, January 30, February 1, February 13 and February 19, 1975. Defendant characterizes these transactions as showing no more than "that Diane Blea appeared to have bought heroin from the defendant on several occasions." Conspiracy is defined in terms of a common design or mutually implied understanding. *State v. Deaton,* 74 N.M. 87, 390 P.2d 966 (1964); *State v. Ross,* 86 N.M. 212, 521 P.2d 1161 (Ct.App.1974). Defendant asserts: "The mere transacting of business between buyer and seller, even where the commodity being dealt in is contraband, should not be sufficient to establish the existence of a common design or purpose."

Defendant asserts that evidence of substantial business dealings between commonly owned enterprises was insufficient to show a common design between the enterprises, citing *Morris v. Dodge Country, Inc.,* 85 N.M. 491, 513 P.2d 1273 (Ct.App.1973). The substantial business dealings in evidence in *Morris,* supra, were of legitimate business transactions. These dealings did not support an inference that Leasing (the party sought to be charged as a conspirator) participated in any way in the one fraudulent transaction in that case and, therefore, did not support an inference of conspiracy. *Morris* is not applicable.

Defendant also relies on *United States v. Spanos,* 462 F.2d 1012 (9th Cir. 1972) and *United States v. Peoni,* 100 F.2d 401 (2nd Cir. 1938). In these two cases, the evidence of one completed transaction between A and B was insufficient to show that A was involved in a conspiracy involving B's distribution to C. That is not the situation in this case; here there is evidence of nine transactions on eight dates. Because of the number of transactions, neither *Spanos* nor *Peoni* is applicable.

In addition to the number of transactions, there is evidence that defendant's transactions with Diane were in $500 or $1,000 amounts; the price was $500 for one-half ounce; Diane would make a telephone call; a short time later defendant would appear; a transaction would occur; Diane would part with money and receive a baggie of a substance; all were cash transactions; Diane and Lydia were in the heroin selling business, usually selling in "caps". Their source of supply was defendant.

The size, frequency and manner of the transactions in this case were evidence sustaining defendant's conviction for conspiracy with Diane and Lydia to traffic in heroin. The jury could properly conclude that the heroin defendant supplied to Diane was for resale. *United States v. Steinberg,* 525 F.2d 1126 (2nd Cir. 1975); *United States v. Sin Nagh Fong,* 490 F.2d 527 (9th Cir. 1974); *United States v. Agueci,* 310 F.2d 817 (2nd Cir. 1962).

Evidence of Heroin

This issue goes to five of the six counts in category (c)—trafficking by possession with intent to distribute. After the transaction with defendant, Diane possessed the substance and she intended to distribute that which she and Lydia did not use. Agents for the State were unable to obtain any samples of the substance involved in these counts. We agree with defendant that there is no direct scientific evidence that the substance was heroin.

There is circumstantial evidence that the substance was heroin; the circumstantial evidence is substantial, in fact, almost overwhelming. In the four distribution counts (category b), there is no claim that the substance was not heroin. The substance in the other trafficking counts (category c) had the appearance and was

packaged in the same manner as in the category (b) counts. The price was the same. In the instances that Diane and Lydia used some of the substance, the substance was prepared for use by implements used for heroin injection. There is evidence from an experienced narcotics agent that in one instance Diane and Lydia were undergoing withdrawal symptoms, that after use of the substance these symptoms disappeared. There is also evidence that in at least one instance the "use" was an overdose. The manner of delivery of the substance for the category (c) counts was the same as the manner of delivery of the category (b) counts.

The essence of defendant's contention is that convictions involving narcotics should not be sustained on the basis of circumstantial evidence. We have held to the contrary. *State v. Burrell,* 89 N.M. 64, 547 P.2d 69 (Ct.App.1976).

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

558 P.2d 1151

STATE of New Mexico, Plaintiff-Appellee,

v.

Jacob B. ARMIJO, Defendant-Appellant.

No. 2532.

Court of Appeals of New Mexico.

Dec. 14, 1976.

Jan A. Hartke, Acting Chief Public Defender, Don Klein, Acting Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Raymond Hamilton, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The fourteen-count indictment charged defendant with various heroin offenses. He was convicted of three of the counts and apparently acquitted of two of the counts at a trial in January, 1976. The appeal of the three convictions, *State v. Armijo,* (Ct. App.) No. 2440, was dismissed by memorandum decision March 16, 1976. This appeal involves defendant's conviction of the remaining nine counts in April, 1976. The issues are: (1) sufficiency of the evidence, (2) evidence of acts and declarations of a co-conspirator, (3) aiding and abetting, and (4) double jeopardy.

Sufficiency of the Evidence

The heroin offenses involved in this appeal are based on the activities of Lincoln Blea. The offenses were trafficking, either by distribution of heroin or possession of heroin with intent to distribute. Section 54–11–20, N.M.S.A.1953 (Repl. Vol. 8, pt. 2, Supp.1975). Defendant's conviction of these offenses was based on a theory of derivative liability; that Lincoln Blea's offenses were committed in furtherance of a conspiracy of which defendant was a member. See *State v. Armijo,* 90 N.M. 10, 558 P.2d 1149 (Ct.App.) decided December 14, 1976.

Lincoln Blea's offenses occurred from March 18 through March 28, 1975. The State alleged that defendant and Lincoln Blea conspired to traffic in heroin between March 18 and April 9, 1975. Defendant recognizes that the State proved a conspiracy existed on April 9, 1975 but asserts the evidence is insufficient to show an existing conspiracy during the time covered by Lincoln Blea's offenses—March 18 through March 28. We disagree.

On March 9, 1975 a state agent telephoned "Jacob" at defendant's unlisted telephone number. The voice answering the telephone call was recognized by the agent to be the voice of defendant. The agent informed defendant that Diane Blea had been arrested for a parole violation and asked defendant if he could do anything to help her out. Defendant said he could not help Diane. The agent stated that he had been purchasing his supply of heroin from Diane and this source had been interrupted because Diane was in jail. See *State v. Armijo,* 89 N.M. 90, 558 P.2d 1149 (Ct. App.) supra. The agent asked defendant "if I could meet him and so I could purchase heroin from him. . . . He then told me that he didn't know me and I once again told him, I asked him, hadn't Diana [sic] Blea told him who I was, that I had been purchasing heroin from him through her and he said, yes, but I don't know you. I then told him to check with several people to verify that I was okay to sell heroin to and I named several people."

The agent gave defendant a list of names, including that of Lincoln Blea, and told defendant to check "that it was okay for him to sell heroin to me." Defendant said " 'I will do that,' " and then hung up. Defendant voiced no objections to what the agent wanted to do. Shortly after this telephone conversation, defendant's unlisted number was changed. The agent knew this before he met with Lincoln Blea.

The agent went to Lincoln Blea's house about 9:50 p. m. on March 18, 1975 where he observed Lincoln Blea cutting heroin and

selling 50 caps to "Willie". At 10:05 p. m. that night, the agent purchased heroin from Lincoln Blea. The agent also made purchases from Lincoln Blea, at his home, on March 19, 21 and 28, 1975. During the course of these transactions the agent importuned Lincoln Blea to introduce the agent to defendant. "[T]he only hesitation there, was whether or not Jacob could see us together at least twice before attempting introduction."

Subsequently, defendant was given opportunity to view the agent and a transaction was arranged for a $6,000 sale. This prearranged sale occurred on April 9, 1975; defendant supplied the heroin which Lincoln Blea sold to the agent.

In the agent's dealings at Lincoln Blea's house, the agent never saw any paraphernalia for using heroin and the indications from Lincoln Blea were that he was not a user.

Common design is the essence of a conspiracy. "A mutually implied understanding is sufficient so far as combination or confederacy is concerned, and the agreement is generally a matter of inference deduced from the facts and circumstances, and from the acts of the person accused done in pursuance of an apparent criminal purpose." *State v. Deaton,* 74 N.M. 87, 390 P.2d 966 (1964).

■ The circumstances of the telephone call, the dealings with Lincoln Blea thereafter, the absence of paraphernalia and indications of use on Lincoln Blea's part, Lincoln Blea's willingness to introduce the agent to defendant, the arrangements for defendant to view the agent and the April 9th transaction were substantial evidence of a conspiracy between defendant and Lincoln Blea to traffic in heroin during the March 18 to March 28 time period.

A second contention under this issue involves the distribution of 50 caps of heroin to "Willie". One of the defendants named in the indictment was Willie Baca who was alleged to be a co-conspirator. Since defendant's convictions are based on a theory of conspiracy, defendant asserts that his guilt requires a conclusion of mutual agency and accountability, and his guilt in connection with the 50-cap sale is necessarily predicated on a theory of distribution to himself. Defendant asserts this is not a crime. On this basis, defendant asserts there is no evidence to support conviction for the count involving the 50-cap sale.

We do not reach the merits of this contention. The evidence shows a sale of 50 caps to Willie, but there is nothing indicating that Willie was the defendant Willie Baca. In addition, there is nothing showing that Willie Baca was in fact a co-conspirator. The record does not support this second contention.

Evidence of Acts and Declarations of a Co-Conspirator

Defendant asserts that acts and declarations of Lincoln Blea concerning defendant were improperly admitted. Defendant states that "[a]dmission of acts of a co-conspirator, or his declarations, is permissible only upon proof of a prima facie case of conspiracy." He contends that admission of the facts and declarations of Lincoln Blea before prima facie evidence of a conspiracy was error.

The cases cited by defendant refer only to prima facie proof of the conspiracy before *statements* of a co-conspirator are admissible. *United States v. Olivia,* 497 F.2d 130 (5th Cir. 1974); *United States v. Spanos,* 462 F.2d 1012 (9th Cir. 1972). New Mexico decisions, however, refer to *acts* as well as statements of a co-conspirator. See *State v. Orfanakis,* 22 N.M. 107, 159 P. 674 (1916); *Territory v. Neatherlin,* 13 N.M. 491, 85 P. 1044 (1906); Compare, *State v. Farris,* 81 N.M. 589, 470 P.2d 561 (Ct.App. 1970). We do not seek to reconcile the decisions or determine the extent of the New Mexico rule. Rather, we assume the rule applies to acts and declarations of a co-conspirator.

■ Defendant's contention involves the order of proof. The trial court "has wide discretion in supervising the order of proof in a conspiracy case." *United States v. Turner,* 528 F.2d 143 (9th Cir. 1975); see *United States v. Calaway,* 524 F.2d 609 (9th

Cir. 1975), cert. denied, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 733 (1976). The issue is not, therefore, whether acts and declarations of Lincoln Blea were admitted *prior* to prima facie proof of a conspiracy. The issue is whether there was prima facie proof of a conspiracy apart from those acts and declarations.

The evidence required is evidence sufficient to make a prima facie case; evidence which would support a finding. *United States V. Calaway,* supra; *United States v. Olivia,* supra. Evidence making a prima facie case of conspiracy in this case was the telephone conversation followed by the agent's purchases of heroin from Lincoln Blea, the agent's requests to meet with defendant, the agent being exposed to defendant's view, the agent's arrangements for the $6,000 purchase, defendant's arrival at the prearranged place for the $6,000 transaction, the observation of the "bathroom" meeting of defendant and Lincoln Blea followed shortly thereafter by Blea selling $6,000 of heroin to the agent, and defendant having the marked money in his possession when arrested.

Aiding and Abetting

Defendant states that he objected to submission of evidence of conspiracy unless aiding and abetting were charged and there is no instruction on aiding and abetting. His claim is that unless aiding and abetting and conspiracy were jointly prosecuted at the trial or unless the prosecutor disproved aiding and abetting defendant could not be convicted of conspiracy. Defendant cites no authority in support of this contention; his view is that statutory provisions on conspiracy and aiding and abetting (§§ 40A–28–2 and 40A–1–14, N.M.S.A.1953 (2d Repl. Vol. 6)) preclude a finding of guilt on a theory of derivative liability.

Defendant did not raise this claim in the trial court; the only reference to aiding and abetting came in defendant's objection to admission of acts of Lincoln Blea because neither conspiracy nor aiding and abetting were charged. N.M.Crim. App. 308. On the merits, however, defendant, as a conspirator, can be guilty of the substantive offense on a theory of derivative liability, *State v. Armijo,* (Ct.App.) 558 P.2d 1149, supra; acts and declarations of co-conspirators may be admitted whether or not conspiracy is directly charged, *Territory v. Neatherlin,* supra; aiding and abetting and conspiracy are distinct and separate concepts, *State v. Ochoa,* 41 N.M. 589, 72 P.2d 609 (1937).

Double Jeopardy

One of the three counts of which defendant was convicted in January, 1976, was a count charging conspiracy. (See opening paragraph of this opinion.) The appeal was dismissed prior to the convictions now involved in this appeal.

Defendant recognizes that the conspiracy and the completed offenses are separate offenses and conviction of both does not amount to double jeopardy. *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946); see *State v. Tanton,* 88 N.M. 333, 540 P.2d 813 (1975).

Without citation of supporting authority, defendant claims that his conviction of the nine counts involved in this appeal amounted to double jeopardy because he had already been convicted of conspiracy and was serving his sentence for the conspiracy conviction prior to trial of the nine counts. He points out that the basis for guilt on the nine counts was as a co-conspirator. He states: "Thus, no act of the defendant other than that for which he was already being punished exists, upon which to ground liability."

Pinkerton v. United States, supra, answers defendant's contention:

> "The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. . . . A conviction for the conspiracy may be had though the substantive offense was completed. . .

And the plea of double jeopardy is no defense to a conviction for both offenses.

* * * * * *

"Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for that purpose. The act done was in execution of the enterprise. . . . If that [the required overt act] can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense."

Although defendant had been convicted and was being punished for his conspiracy at the time of his trial on the nine substantive counts involved in this appeal, he has not been placed in double jeopardy by being convicted and sentenced on the nine substantive counts.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

558 P.2d 1155

TIFFANY CONSTRUCTION CO., INC., Appellant,

v.

BUREAU OF REVENUE, Appellee.

No. 2683.

Court of Appeals of New Mexico.

Dec. 14, 1976.

Certiorari Denied Jan. 14, 1977.

Thomas L. Grisham, McCulloch, Grisham & Lawless, Albuquerque, for appellant.

Toney Anaya, Atty. Gen., Vernon O. Henning, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HENDLEY, Judge.

Taxpayer is an Arizona Corporation, headquartered in Phoenix, Arizona, involved in road building activities. The work performed, which involves the instant penalty assessment, was done on the Navajo Reservation within the boundaries of New Mexico. For all practical purposes this was the first road job taxpayer had done in New Mexico.

On appeal taxpayer's sole issue is whether it is subject to a penalty assessment. Section 72–13–82(A), N.M.S.A.1953 (Repl. Vol. 10, pt. 2, 1961, Supp.1975). That section states in part:

> "A. In the case of failure, due to negligence or disregard of rules and regulations, but without intent to defraud, to pay when due any amount of tax required to be paid or to file a return regardless of whether or not any tax is due, there shall be added to the amount two per cent [2%] per month or a fraction thereof from the date the tax was due or from the date the return was required to be filed . . . ."

The presumption of correctness section (§ 72–13–32(C), N.M.S.A.1953 (Repl. Vol. 10, pt. 2, 1961, Supp.1975)) also applies to the penalty section. See *Co-Con, Inc. v. Bureau of Revenue,* 87 N.M. 118, 529 P.2d 1239 (Ct.App.1974).

The Bureau by its decision and order held that the instant case was controlled by *G. M. Shupe, Inc. v. Bureau of Revenue,* 89 N.M. 265, 550 P.2d 277 (Ct.App.1976) because:

> ". . . The only evidence presented by the taxpayer here is that the taxpayer was not aware of its obligation to the State of New Mexico. Here there is no evidence that the taxpayer sought advice from legal or accounting sources, neither did the taxpayer seek information from the Bureau or the attorney general. . . ."

The basic essence of the taxpayer argument is that it was operating upon the ". . . belief that there were no such taxes due and that there were no taxes that they had to file for or register for in the State of New Mexico." Does this belief without further investigation constitute negligence so as to justify the penalty imposed? We hold the taxpayer must do more. See *Gathings v. Bureau of Revenue,* 87 N.M. 334, 533 P.2d 107 (Ct.App.1975).

Every person is charged with the reasonable duty to ascertain the possible tax consequences of his action. This can be done by consultation with one's legal advisor. Depending on the facts, failure to do so may constitute negligence. Section 72–13–82(A), supra. To hold otherwise would be to negate the meaning of the term negligence which is defined as the act of being negligent. Negligent is defined as: "2. indifferent, careless or offhand" (The Random House Dictionary, Unabridged Edition, 1969) or as a "lack of reasonable cause." *Gathings v. Bureau of Revenue,* supra.

Oral argument is unnecessary. Taxpayer's action or lack of action was negligence within the meaning of the act. The decision and order is in accordance with the law and supported by the record.

Affirmed.

IT IS SO ORDERED.

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

558 P.2d 1157

Alvin CHAPMAN (Cowling) and Mary Chapman, Plaintiffs-Appellants,

v.

FARMERS INSURANCE GROUP, Defendant-Appellee.

No. 2571.

Court of Appeals of New Mexico.

Dec. 14, 1976.

Certiorari Denied Jan. 14, 1977.

558 P.2d 1157

[redacted]

[redacted]

Alfred M. Carvajal, Albuquerque, for plaintiffs-appellants.

Lawrence H. Hill and C. LeRoy Hansen, Civerolo, Hansen & Wolf, Albuquerque, for defendant-appellee.

OPINION

SUTIN, Judge.

After obtaining a *default judgment* against Teresa Molina in a personal injury claim, *based upon service by publication,* plaintiffs brought this action against defendant, who was Molina's insurer, to recover the amount obtained in the default judgment. Defendant's motion to dismiss for failure to state a claim was sustained and plaintiffs' complaint was dismissed with prejudice. Plaintiffs appeal. We affirm.

A. *The default judgment was void.*

On March 5, 1973, plaintiffs filed a complaint against defendant Teresa Molina. It alleged that on November 11, 1970, this defendant negligently operated her vehicle and struck Alvin Chapman who was riding his bicycle, causing personal injuries and damage. On August 23, 1973, plaintiffs' trial attorney filed an affidavit that "due search and inquiry has been made as to the whereabouts of the Defendant, but efforts to do so have been unsuccessful, and said attorney requests that service by publication be granted."

Notice of suit was published in The El Independiente and the New Mexico Independent newspaper on August 31, September 7, 14 and 21, 1973.

On January 17, 1975, sixteen months later, plaintiffs' attorney filed an affidavit

that publication had been made and defendant had not entered her appearance and that plaintiffs were entitled to default judgment. On January 22, 1975, motion for default judgment was filed and on January 29, 1975, judgment was entered for plaintiffs.

On November 5, 1975, over nine months later, plaintiffs filed a complaint against Farmers Insurance Group, the insurer of Teresa Molina, to secure satisfaction of the default judgment.

The trial court granted plaintiffs a default judgment against Teresa Molina based upon service by publication under Rule 4(g) of the Rules of Civil Procedure [§ 21–1–1(4)(g), N.M.S.A.1953 (Repl. Vol. 4)].

This statute restricts notice by publication to actions in rem or quasi in rem. It does not relate to an action in personam. In the absence of personal service of summons within this State in an action in personam, the district court lacks jurisdiction to enter judgment. *State ex rel. Pavlo v. Scoggin,* 60 N.M. 111, 287 P.2d 998 (1955); *State ex rel. Truitt v. District Court of Ninth Judicial Dist., Curry County,* 44 N.M. 16, 96 P.2d 710, 126 A.L.R. 651 (1939). Personal service on nonresidents may be had under § 21–3–16, N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.). *Pope v. Lydick Roofing Company of Albuquerque,* 81 N.M. 661, 472 P.2d 375 (1970).

The trial court, lacking jurisdiction to enter judgment, the default judgment entered was void.

B. *Plaintiffs' claim for relief survives.*

This opinion, which holds the default judgment void, does not affect the validity of plaintiffs' complaint against defendant Molina. We note that the accident occurred on November 11, 1970. Plaintiffs' complaint against defendant Molina was filed on March 5, 1973, almost 2½ years after the accident. We can understand plaintiffs' failure, by due search and inquiry, to learn the whereabouts of defendant Molina. More than six years have now passed since the date of the accident. We do not know the facts and circumstances surrounding this delay. The record does not show that defendant Molina deliberately concealed herself to evade service of process. She had no reason to do so when protected with liability insurance. We were informed by plaintiffs' appellate attorney, during oral argument, that the whereabouts of defendant Molina is known. Plaintiffs must obtain personal service on defendant Molina to pursue this action further.

Plaintiffs' complaint against defendant Farmers was dismissed with prejudice. Defendant Farmers agrees with plaintiffs that the cause of action against defendant Farmers should be dismissed without prejudice. "A dismissal without prejudice does not relieve the insurer from further claims of plaintiff against the insurance company on its policy of insurance." *Caster v. Board of Education of Albuquerque,* 86 N.M. 779, 780, 527 P.2d 1217, 1218 (Ct.App.1974).

C. *Plaintiffs may not sue defendant Farmers directly.*

Plaintiffs' complaint against defendant Farmers was an action against defendant based upon the default judgment procured against defendant Molina in a previous action. Deletion of the default judgment from the complaint transforms this complaint into a direct action against defendant Farmers for recovery of damages caused by the negligence of defendant Molina. It has been uniformly held that, absent a contractual or statutory provision authorizing the action, an insurance carrier cannot be sued directly and cannot be joined as a party defendant. *Caster v. Board of Education of Albuquerque, supra; Campos v. Brown Construction Company,* 85 N.M. 684, 515 P.2d 1288 (Ct.App.1973); *Breeden v. Wilson,* 58 N.M. 517, 273 P.2d 376 (1954).

Plaintiffs believe the public policy of this State should be changed to conform to decisions of other states. A change in public

policy rests in the discretion of the Supreme Court.

Plaintiffs rely on Rules 17 and 20 of the Rules of Civil Procedure [§ 21–1–1(17), (20), N.M.S.A.1953 (Repl. Vol. 4)]. Rule 17(a) refers to real party in interest. Rule 20(a) refers to permissive joinder. In *Breeden v. Wilson,* supra, the Court said with reference to Rules 18, 19 and 20:

> Certainly, in their broad language, they seem to do so [allow joinder of claims and remedies]. However, under the view we have taken of this case, the question involved is not procedural, but one involving the substantive rights of the parties. The rules are procedural and do not control substantive rights. [58 N.M. at 525, 273 P.2d at 380].

Affirmed. This cause is remanded to the trial court to amend its judgment to read that plaintiffs' complaint be and hereby is dismissed "without" prejudice.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

559 P.2d 398

The CHAPMAN'S, INC. and Chapman Nursing and Convalescent Home, Inc., New Mexico Corporations, Plaintiffs-Appellants,

v.

Leo E. HUFFMAN, as Treasurer of Bernalillo County, New Mexico, and Edward M. Murphy, as Assessor of Bernalillo County, New Mexico, Defendants-Appellees.

No. 10274.

Supreme Court of New Mexico.

Nov. 10, 1975.

John P. Dwyer, Virgil L. Brown, Harry O. Morris, Albuquerque, for plaintiffs-appellants.

James L. Brandenburg, Dist. Atty., Joe C. Diaz, Vance Mauney, Special Asst. Dist. Attys., Albuquerque, for appellees.

STEPHENSON, Justice.

WHEREAS, the above entitled cause having been heretofore submitted for decision, the cause now being ready for final disposition and the Court being sufficiently advised, Mr. Justice Stephenson, Mr. Chief Justice McManus and Mr. Justice Oman concurring; and

WHEREAS, the Court being of the opinion that under the facts of this case the charitable use specified in Article VIII, Section 3 of the Constitution of New Mexico should be construed to mean use by the owner of the property rather than the use to which the property is put by the tenant;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the judgment of the District Court of the Second Judicial District in and for the County of Bernalillo, be and the same is hereby affirmed, and the cause is remanded to the aforesaid District Court.

McMANUS, C. J., and OMAN, J., concur.

559 P.2d 398

ROYAL INTERNATIONAL OPTICAL COMPANY, d/b/a Texas Optical, a Texas Corporation, Petitioner,

v.

TEXAS STATE OPTICAL COMPANY, a Texas Corporation, and Dr. N. J. Rogers, Individually, and as a partner of Texas State Optical Company, a/k/a TSO, Respondents.

No. 10813.

Supreme Court of New Mexico.

June 8, 1976.

DECISION

SOSA, Justice.

There being substantial evidence to support the judgment of the trial court, its

decision is affirmed. The Court of Appeals is reversed.

IT IS SO ORDERED.

OMAN, C. J., and McMANUS, STEPHENSON and MONTOYA, JJ., concur.

559 P.2d 399

In the Matter of David H. PEARLMAN, Attorney at Law.

No. 11035.

Supreme Court of New Mexico.

Aug. 4, 1976.

DISCIPLINARY PROCEEDING

OMAN, Chief Justice.

This matter coming on for consideration by the Court upon Recommendations and Submission of Record by the Disciplinary Board, and David H. Pearlman appearing in person before the Court; Mr. Chief Justice Oman, Mr. Justice McManus, Mr. Justice Montoya, Mr. Justice Sosa and Mr. Justice Easley sitting;

NOW, THEREFORE, IT IS ORDERED that the Recommendations of the Disciplinary Board be and the same are hereby adopted and approved by the Court; that David H. Pearlman be and he hereby is publicly censured by the Supreme Court by reason of his violation of Disciplinary Rule 7–102(A)(7) and 7–106(A).

559 P.2d 399

Milton M. CANON, Appellant,

v.

NEW MEXICO STATE BOARD OF EDUCATION, Appellee.

Nos. 11053 and 11054.

Supreme Court of New Mexico.

Aug. 4, 1976.

ORIGINAL PROCEEDINGS ON CERTIORARI

McMANUS, Justice.

DECISION

Two petitions for a writ of certiorari were filed in this cause. Writs of certiorari directed to the New Mexico Court of Appeals were granted.

A review of the transcript reflects that the New Mexico State Board of Education was correct in affirming the decision of the Board of Education of Deming, New Mexico. Such determination was supported by substantial evidence. § 77–8–17(J), N.M.S.A.1953 (Supp.1975); *Wickersham v. New Mexico State Board of Education*, 81 N.M. 188, 464 P.2d 918 (Ct.App.1970).

The decision of the Court of Appeals is reversed.

IT IS SO ORDERED.

OMAN, C. J., and MONTOYA, SOSA and EASLEY, JJ., concur.

559 P.2d 400

Gordon W. McCLURE, Plaintiff-Appellee,

v.

Mildred Lucille McCLURE, Defendant-Appellant.

No. 10767.

Supreme Court of New Mexico.

Aug. 13, 1976.

Rodey, Dickason, Sloan, Akin & Robb, Gene C. Walton, Albuquerque, for defendant-appellant.

Paul P. Shwartz, Jon T. Kwako, Albuquerque, for plaintiff-appellee.

OPINION

GENE E. FRANCHINI, District Judge.

The present proceeding arises out of a Motion filed by the Plaintiff, Gordon W. McClure, pursuant to Section 22-7-6, N.M. S.A.1953 (Supp.1975), to terminate any further obligation to pay alimony to the Defendant, Mildred Lucille McClure, and a Motion filed by said Defendant pursuant to the same statutory provision to increase Plaintiff's alimony obligation. The District Court for the Second Judicial District entered its Order reducing and terminating over a period of four (4) years Plaintiff's obligation to pay alimony to the Defendant.

The original decree was entered on March 4, 1970, at which time the Plaintiff was ordered to pay Defendant alimony in the sum of $350.00 per month as well as support for one minor son in the sum of $250.00 per month and the college education of his daughter in the sum of $3,840.00 per year.

On September 9, 1971, pursuant to a Motion filed by the Defendant, the Court increased the alimony to $400.00 per month. The daughter's support had terminated in June of 1971 as her education was completed and Plaintiff became obligated to pay for his son's college education in the approximate sum of $3,000.00 per year. By June of 1971, Plaintiff had married his second wife and Plaintiff acquired a stepdaughter who was then in high school. Defendant was then making $8,400.00 per year.

On October 10, 1974, the Plaintiff filed a Motion to terminate alimony and on November 12, 1974, Defendant filed a Motion for an increase. (At this time, Defendant was gainfully employed and had income from all sources of $17,439.82 per annum). Plaintiff's income had increased from $26,500.00 at the time of the divorce to $38,400.00 at the time of this hearing. He was still spending $3,000.00 to $4,000.00 per year for his son's education who is over 18 years of age and Plaintiff is providing a college education for his stepdaughter. The Defendant inherited $30,000.00 in 1968 and has invested and reinvested these funds in stocks and bonds over the last five (5) years. On April 20, 1975, the Trial Court conducted a hearing and pur-

suant thereto subsequently filed Findings of Fact and Conclusions of Law. The Court below ordered that the monthly alimony payments be decreased by $100.00 on the first day of each July, commencing with July 1, 1975, so that the alimony obligation would be completely terminated by July 1, 1978. Defendant appeals.

Defendant argues that there has not been such a change in circumstances as to warrant a termination of alimony even over a period of three (3) years. We disagree.

The Court's Finding of Fact number 10 states:

> "The Defendant, while gainfully employed, has an income sufficient to take care of her support and maintenance in a manner to which she has become accustomed, and is not in need of additional sums of alimony from the Plaintiff".

Findings of fact will not be disturbed on appeal if supported by substantial evidence. *Muckleroy v. Muckleroy,* 84 N.M. 14, 498 P.2d 1357 (1972).

The award or denial of alimony is discretionary with the trial Court and will be reversed only if that discretion has been abused. *Burnside v. Burnside,* 85 N.M. 517, 514 P.2d 36 (1973). We find no abuse of discretion.

In *Michelson v. Michelson,* 86 N.M. 107, 520 P.2d 263 (1974) this Court set down a number of circumstances to be considered by the Trial Court in this type of case. These were, "the needs of the wife, her age, health, and the means to support herself, the earning capacity and future earnings of the husband, the duration of the marriage, and the amount of property owned by the parties". To these we would add the element or circumstance of time. The Appellee here has paid alimony to a former spouse for over five (5) years. This circumstance of time, taken into consideration with the other circumstances is sufficient for the Trial Court to consider a change in the alimony provisions of the original decree. Alimony is a personal right and not a property right. *Burnside v. Burnside,* supra. As such, it should not continue without end if the circumstances have changed due to the passage of time, as they have here, and the recipient is able to support herself.

Appellant quotes extensively from *Lord v. Lord,* 37 N.M. 24, 16 P.2d 933 (1932) that a husband's remarriage and support of a stepchild are by themselves insufficient changes of circumstances to justify the modification of the award of alimony. These facts exist in the present case; however, they are combined with other facts which together and as a whole do show a sufficient change of circumstances to eventually terminate alimony. This is precisely what was done by the Trial Court. There is no error.

The Appellant's second point, i.e., error of the Trial Court in denying her Motion to increase alimony is without merit.

AFFIRMED:

IT IS SO ORDERED.

OMAN, C. J., and MONTOYA, J., concur.

559 P.2d 401

In the Matter of Stuart HINES, Attorney at Law.

No. 11068.

Supreme Court of New Mexico.

Aug. 25, 1976.

Disciplinary Proceeding

OMAN, Chief Justice.

This matter coming on for consideration by the Court upon Recommendations of the Disciplinary Board and submission of the

record, and the Court having considered said recommendations and record and having heard oral argument and now being sufficiently advised in the premises;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the Recommendations of the Disciplinary Board be and the same are hereby adopted and approved.

IT IS FURTHER ORDERED that STUART HINES be and he hereby is publicly censured for violation of Rule 1–102(A)(4) and Rule 5–101(B) of the Code of Professional Responsibility—Canons and Disciplinary Rules.

559 P.2d 402

STATE of New Mexico, Plaintiff-Appellee,

v.

Felipe Gardo VALENZUELA, Defendant-Appellant.

No. 10674.

Supreme Court of New Mexico.

Dec. 6, 1976.

Rehearing Denied Dec. 27, 1976.

[redacted]

[redacted]

[redacted]

Pickard & Singleton, Sarah Michael Singleton, Santa Fe, for appellant.

Toney Anaya, Atty. Gen., Raymond Hamilton, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

MONTOYA, Justice.

Felipe Gardo Valenzuela (defendant) was convicted following a jury trial in the District Court of Chaves County of murder in the first degree for the killing of his wife. Judgment and sentence of death were imposed; defendant's motion for a new trial was denied; and this appeal ensued.

The facts pertinent to the appeal are as follows: On March 27, 1975, defendant, an itinerant farm worker, picked up at a discount store in Artesia a revolver on which he had been making payments, and proceeded to his home in search of his wife. Following an argument with his wife, during the court of which defendant was overheard to say in Spanish that he was going to go to the penitentiary for a murder he was about to commit, defendant pulled the gun from his boot where it had been concealed and shot her. The victim died of the gunshot wounds almost immediately thereafter. The evidence also indicated that the marital relationship had become especially turbulent in the days preceding the incident, that defendant's wife had been taking tranquilizers for a nervous condition, and that defendant was of low normal intelligence.

Defendant advances twelve points in support of his arguments for reversal of the jury verdict. They are as follows:

"I. THE JURY SELECTION PROCEDURE AS IT RELATED TO THE DEATH QUALIFICATION OF THE JURY DEPRIVED APPELLANT OF HIS FEDERAL AND STATE CONSTITUTIONAL GUARANTEES TO DUE PROCESS OF LAW AND A FAIR AND IMPARTIAL JURY.

"II. ERRORS IN THE SELECTION OF THE JURY ARRAY AND THE JURY PANEL RESULTED IN AN ARRAY AND PANEL WHICH HAD AN UNDERREPRESENTATION OF SPANISH-SURNAMED PEOPLE AND AN OVERREPRESENTATION OF OLDER PEOPLE, DENYING THE DEFENDANT'S RIGHT TO A CROSS-SECTIONAL REPRESENTATIVE JURY GUARANTEED BY U.S. CONST., AMEND. VI AND XIV, AND N.M. CONST., ART. II, SEC. 14 and 18.

"III. THE METHOD OF SELECTION OF THE JURY VIOLATED N.M.STAT.ANN. § 19-1-3 (SUPP.1975), BECAUSE IT WAS NOT RANDOM AS ENVISIONED BY THE STATUTE.

"IV. FUNDAMENTAL ERROR OCCURRED BECAUSE THERE WAS NO JURY DETERMINATION OF COMPETENCY AND NO VALID WAIVER THEREOF.

"V. THE COURT ERRED IN NOT SUPPRESSING A STATEMENT GIVEN WITHOUT COMPLETE *MIRANDA* WARNINGS.

"VI. THE TRIAL COURT ERRED IN ADMITTING STATE'S EXHIBITS 1, 2, 3, AND 5, PHOTOGRAPHS OF THE DECEASED.

"VII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ALLOW DEFENSE COUNSEL TO REFER IN CLOSING ARGUMENT TO THE LANGUAGE OF THE INFORMATION.

"VIII. BECAUSE THE INFORMATION IN THIS CASE WAS FILED ON APRIL 10, 1975, THE TRIAL COURT'S DECISION TO GIVE ONLY U.J.L.—CRIMINAL AND TO REFUSE ANY INSTRUCTIONS NOT TAKEN FROM U.J.L.—CRIMINAL VIOLATED THE SUPREME COURT'S ORDER OF JUNE 24, 1975; N.M.CONST., ART. IV, SEC. 34, AND U.S.CONST., ART. I, SEC. 9, AND AMEND. 14.

"IX. IT WAS ERROR TO REFUSE TO INSTRUCT ON THE ISSUE OF INSANITY.

"X. THE TRIAL COURT ERRED IN GIVING, OVER DEFENSE OBJECTION, A COMBINED INSTRUCTION ON THE ISSUES OF INTOXICATION AND DIMINISHED RESPONSIBILITY.

"XI. THE TRIAL COURT ERRED IN FAILING TO QUASH THE INFORMATION BECAUSE N.M.STAT.ANN. § 40A-2-1 (1972) IS UNCONSTITUTIONAL.

"XII. IMPOSITION AND CARRYING OUT OF THE DEATH PENALTY IN THIS CASE, PURSUANT TO N.M. STAT.ANN. § 40A-29-2 (SUPP.1975), CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II §§ 13 AND 18 OF THE NEW MEXICO CONSTITUTION."

The issues raised in point XII regarding the imposition of the death penalty will be discussed first. This point has been answered by us in *State v. Rondeau*, N.M., 553 P.2d 688 (1976). In that case we held that the penalty to be imposed for a first degree felony was life imprisonment under the provisions of § 40A-29-2.2, N. M.S.A.1953 (2d Repl.Vol. 6, 1972), by reason of the recent decisions of the United States Supreme Court regarding capital punishment.

The defendant, in his first three points, contends that the trial court erred on the jury selection procedures relating to the qualification of jurors with respect to imposition of the death penalty, errors in the selection of the jury array, underrepresentation of Spanish-surnamed persons, overrepresentation of older people, and lastly that there was not a random selection of the prospective jurors as required by the statute. The first point relative to the qualification of jurors on the imposition of the death penalty need not be answered. That issue has been rendered moot in view of our decision in *State v. Rondeau*, supra, where the imposition of the death penalty for a first degree felony was struck down. The other issues raised as to jury selection procedures are without merit.

In point IV, defendant argues that fundamental error occurred because there was no jury determination of competency and no valid waiver thereof. A review of the evidence presented at the competency hearing indicates that the defendant was competent to stand trial. No evidence to the contrary was presented and accordingly the trial court correctly found that he was competent to stand trial, since no reasonable doubt could arise from the evidence submitted on this issue. Additionally, no request for jury determination of this issue was made. Defendant's argument that fundamental error resulted is of no merit in view of the state of the record.

Defendant next contends under point V that the court erred in not suppressing a statement given without complete Miranda warnings. The statement in question refers to oral statements made shortly after defendant's arrest and while being transported to the jail in the police vehicle. The argument centers around the question as to whether or not the so-called "spontaneous" statements were voluntarily given. The evidence in the record indicates that the defendant was advised of his rights. The trial court ruled that the statements made by the defendant were spontaneous and the motion to suppress was denied. We do not believe that the trial court erred in refusing to suppress the statements under the circumstances here present.

Another contention raised by defendant in point VI is that the trial court erred in admitting State's exhibits 1, 2, 3 and 5, photographs of the deceased taken at the time of the autopsy by one of the deputy sheriffs. State's exhibits 1, 2 and 3

are Polaroid color photos of the deceased and No. 5 is a picture of the deceased lying on a chair at the scene of the alleged crime. We have held that:

> "* * * Photographs which are calculated to arouse the prejudices and passions of the jury and which are not reasonably relevant to the issues of the case ought to be excluded."

State v. Upton, 60 N.M. 205, 209, 290 P.2d 440, 442 (1955). We have also held that photographs are properly admitted if they serve to corroborate other evidence, even though they may be cumulative. In *State v. Sedillo,* 76 N.M. 273, 277, 414 P.2d 500, 503 (1966), we said:

> "The question of admission of photographs into evidence rests largely within the discretion of the trial court, and ordinarily his decision on the question will not be disturbed. *State v. Johnson,* [57 N.M. 716, 263 P.2d 282 (1953)]; * * *."

The photographs in question here meet the "reasonably relevant" test. We do not agree that Rule 403 of the Rules of Evidence [§ 20-4-403, N.M.S.A.1953 (Supp. 1975)] adopted by this court makes the "reasonably relevant" test obsolete, or that the trial court abused its discretion in admitting the photographs.

The next argument advanced by defendant in point VII is that the trial court committed reversible error by refusing to allow counsel to refer in closing argument to the language of the information. Defendant claims that in so doing he was foreclosed from impressing upon the jury the nature of the crime of first degree murder by referring specifically to "malice," which definition was not contained in the court's instructions. The instructions given referred to a deliberate intention to take a life (N.M.U.J.I.Crim. 2.00 [2d Repl. Vol. 6, N.M.S.A.1953 (Supp.1975), at 295]), and certainly the ruling of the court did not foreclose or prohibit counsel from using the word "malice" or from arguing the lack of proof of such malice. This argument is without merit.

The next point advanced by defendant is that the filing of the information on April 10, 1975, precluded the use of the Uniform Jury Instructions—Criminal, supra, adopted by this court. U.J.I.Criminal were by terms of this court's order to be used in criminal cases filed in the district court after September 1, 1975. We find nothing in the order that precludes the use of such instructions prior to that date. The purpose of the order is to make their use mandatory in all cases filed after September 1, 1975. We agree that defendant's argument would be well taken if it could be shown that the adoption of N.M. U.J.I.Crim. changed the law. If the instructions requested by the defendant correctly stated the law, but were already covered by the court's own instructions, it was not error to refuse the tendered instructions. Neither can we say that it was error for the trial court to use N.M.U.J.I. Crim. before the effective date for their use, if the instructions used fairly and correctly stated the applicable law for the jury to follow in arriving at its verdict. Defendant's arguments do not convince us that the jury was not properly and correctly instructed.

Defendant in point X contends that the trial court erred in giving a combined instruction on the issues of intoxication and diminished responsibility. The defendant's objections to this instruction, as shown by the record, were directed solely to the impropriety of the use of N.M.U. J.I.Crim. Defendant made no objection at trial to the combination of the issues of intoxication and diminished responsibility and did not contend that either instruction was unsupported by the evidence. The trial court was not alerted to the now-claimed vice of the instruction, nor was the court's attention called to the use of the phrase "and/or." We are mindful of our previous disapproval of the use of such a phrase, which we have previously characterized as a "linguistic abomination." *State v. Smith,* 51 N.M. 328, 331, 184 P.2d

301, 303 (1947). However, defendant here failed timely to object to the instruction on the grounds now urged and therefore waived the error. Since the claimed error was not properly preserved, or even called to the court's attention, no further discussion is necessary.

In point XI defendant claims "the trial court erred in failing to quash the information because N.M.Stat.Ann. § 40A-2-1 (1972) is unconstitutional." His main attack is predicated on the argument that the statute makes impossible an ascertainable distinction between first and second degree murder, citing *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L. Ed.2d 346 (1972). We disagree with such an argument. The statute and our decisions clearly indicate that the element of deliberation is what distinguishes first degree murder from second degree murder under the information filed in this case. The trial court correctly instructed the jury on what constitutes a deliberate killing. The distinction between first and second degree murder has been clearly enunciated by the decisions of this court in interpreting §§ 40A-2-1 and 40A-2-2, N.M. S.A.1953 (2d Repl.Vol. 6, 1972). See *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975); *State v. Smith*, 26 N.M. 482, 194 P. 869 (1921). Therefore, we hold that the constitutional challenge made under this point is without merit.

The foregoing disposes of all the points raised by the defendant except the issue raised under point IX. Under this point it is claimed that it was error to refuse to instruct on the issue of insanity.

Defendant admits that no one of the expert witnesses testified in a way that would have established insanity as defined in *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954). Defendant asserts, however, that the testimony, if considered cumulatively, could at least have raised sufficient question on the issue to warrant a jury instruction on insanity. He concludes that the trial court, by refusing to instruct the jury on the law of insanity as it operates as a defense to a charge of criminal intent, deprived defendant of his constitutional rights to due process, proof of guilt beyond a reasonable doubt, and to a meaningful defense.

Defendant correctly states that the rule of law governing the disposition of this issue is embodied in *State v. Roy*, 40 N.M. 397, 404, 60 P.2d 646, 650 (1936), where this court declared:

> "When the defendant has put in evidence reasonably tending to show him insane, the problem is then to determine whether it is sufficient to take the case to the jury. This is a question for the court to determine. Therefore, when all the evidence is in, if there has been adduced competent evidence reasonably tending to support the fact of insanity urged by the defendant as a defensive issue in the case, it is the duty of the court to instruct on question of insanity. Otherwise, the court may properly refuse such instruction. [Citations omitted.]"

Obviously, proper application of this rule depends in turn upon the proper determination of what kind and quantum of evidence will "reasonably [tend] to support the fact of insanity." This rule is found in the landmark New Mexico case of *State v. White*, supra, where this court stated (58 N.M. at 330, 270 P.2d at 731):

> "For the purpose of clarifying the rule of law applicable to the defense of insanity in criminal cases in this jurisdiction, we state it to be as follows: '"The jury must be satisfied that, at the time of committing the act, the accused, *as a result of disease of the mind* * * * (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it."' [Citations omitted.]" (Emphasis added.)

We note that the first condition necessary for the establishment of insanity is a "disease of the mind" (or "mental disease," as N.M.U.J.I.Crim. 41.00 puts it). If this diseased mental state is not

proved, it matters not at all how much evidence is admitted to prove, cumulatively or otherwise, any of the alternative secondary conditions of insanity, e. g. inability to distinguish right from wrong or inability to control one's actions. While it is at least arguably true that the record before the court presents sufficient testimony to prove defendant's incapacity to prevent his commission of the act, if this lack of capacity is not proven to be the result of a disease of the mind, it is completely immaterial to prove insanity.

The element of a disease of the mind is the *sine qua non* of proof of insanity. That is an easy statement of the rule; stating precisely what constitutes such a disease is of course a far more difficult and complex problem, one which has been the subject of much clinical and scholarly debate. For our immediate purpose, however, it is sufficient to note and approve the discussion of the question found in *State v. White,* supra (58 N.M. at 330, 270 P.2d at 730):

> "* * * [T]he 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."

A "momentary insanity arising from the pressure of circumstances" is precisely what defendant and the experts testifying on his behalf were apparently attempting to establish in this case (and all that they would be able to establish in any event). For example, there is considerable expert testimony to the effect that, while defendant was not suffering from a "fixed mental disease" and could not in fact be termed either mentally ill or legally insane, he suffered from a "character disorder that leaves him susceptible to provocation." As this court said in *State v. White,* supra (58 N.M. at 330, 270 P.2d at 730–731):

> "* * *. Whether or not a defendant had the 'normal governing power of the will' is beside the point; the only question for determination is whether *disease* deprived the defendant of whatever will power he happened to have. * * *" (Emphasis added.)

No amount of evidence of a "personality with a low trigger point, a tolerance not as high, and a lack in education and sophistication thereby making him more susceptible to aggravation and provocation" will substitute for the "true disease of the mind" test required by our law as the initial premise in a case of insanity.

As we said in *State v. Roy,* supra (40 N.M. at 404–405, 60 P.2d at 650–651):

> "In the case of *Maulding v. Commonwealth,* 172 Ky. 370, 189 S.W. 251, 255, the defendant complained of the court's refusal to instruct on insanity. * * * The Court of Appeals of Kentucky sustained the trial court's refusal to instruct, and cited with approval from an earlier Kentucky case, which statement of the law we deem sound and applicable here: 'There is no law which will excuse or palliate a deliberate murder on the ground that the perpetrator of it is unlearned, passionate, ignorant, or even of weak mind, unless the weakness of mind amounts to such a defect of reason as to render him incapable of knowing the nature and quality of his act, or, if he does know it, that he does not know it is wrong to commit it. *It is no excuse for murder that the perpetrator has not power to control his actions when aroused or in a passion.* It is the duty of men who are not insane or idiotic to control their evil passions and violent tempers or brutal instincts, and if they do not do so, it is their own fault, and their moral and legal responsibility will not be destroyed or avoided by the existence of such passions, or by their conduct resulting from them.' *Bast v. Commonwealth,* 124 Ky. 747, 99 S.W. 978, 30 Ky.Law Rep. 967.
>
> "In the instant case, the defendant having failed to produce evidence rea-

sonably tending to establish the fact of insanity, he was not entitled to have the law on the subject declared by the court or to have the issue of insanity submitted to the jury." (Emphasis added.)

The circumstantial nature of defendant's alleged loss of control at the moment of killing his wife is further evidenced by the following exchange between Judge Snead and Dr. John McCarthy, a psychiatrist who testified for the defense at trial:

"THE COURT: All right. Would it be a fair characterization—and, again, if it is not a fair one, please speak, and if I am unfairly questioning, Mr. Campos, please speak. That, it is your view that his ability to reason to resist his emotional impulses, to formulate an intelligent plan or course of action, would be diminished by reason of intoxication, fatigue and the stress of his formidable relationship.

"THE WITNESS: Yes, sir.

"THE COURT: And, your conclusion, as I view it, from the history given, and again check me if I am improperly characterizing the matter, that it was an event which, as you view it, occurred under circumstances arousing a—under circumstances of provocation, such as to carry away his ability to coolly consider the consequences of his actions.

"THE WITNESS: Correct."

It is interesting to note that defendant's inability to control his actions was thus explained to be the result of "intoxication, fatigue, and stress." While these may well be facts tending to show (and thereby warranting instructions on) provocation and/or diminished responsibility, nevertheless, under the rubric of *State v. Roy,* supra, and *State v. White,* supra, such factors neither tend to prove nor warrant instructions on insanity since such temporary pressures of circumstance operative upon an "unlearned, passionate, ignorant" man of "weak mind" have specifically been held *not* to constitute the requisite defect of reason necessary to prove a diseased mind and, thereby, insanity. See *State v. Roy,* supra, quoting *Mauldin v. Commonwealth,* 172 Ky. 370, 189 S.W. 251 (1916).

Furthermore, the trial court did not just unilaterally refuse the defendant's tendered instruction. The record is replete with examples of the court's careful questioning of the experts and thoughtful consideration of the nature of the testimony. There is nothing in the record, nor does defendant allege anything, to indicate that the judge's refusal to instruct the jury on insanity was arbitrary or an abuse of discretion or unsupported by substantial evidence.

The problem of determining whether there is sufficient evidence of insanity to permit the jury to consider it as a factual question is, in the first instance, a question of law for the court. *State v. Roy,* supra; *State v. Gardner,* 85 N.M. 104, 509 P.2d 871 (1973), cert. denied, 414 U.S. 851, 94 S.Ct. 145, 38 L.Ed.2d 100 (1973). Since the record in this case is barren of any proof that a disease of the mind produced defendant's "rage reaction" at the time of the commission of the murder, the trial court properly decided that the evidence did not warrant the submission of the insanity issue to the jury.

In view of all of the foregoing, the verdict of the trial jury finding the defendant guilty of first degree murder is affirmed. However, in view of the disposition which we have made of point XII, which raised the issue of the death penalty imposed by the district court, the cause must be remanded for the imposition of a proper sentence. In accordance with the determination we made in *State v. Rondeau,* supra, we reverse only the judgment and sentence of the court imposing the death penalty. The cause is, therefore, remanded to the District Court of Chaves County for the purpose of sentencing the defendant to life imprisonment.

IT IS SO ORDERED.

OMAN, C. J. and SOSA, J., concur.

559 P.2d 410

In the Matter of John P. DUFFY, Attorney at Law.

No. 11155.

Supreme Court of New Mexico.

Dec. 8, 1976.

Disciplinary proceeding.

This matter coming on for consideration by the Court upon Recommendation of the Disciplinary Board, and the Court having considered said Recommendation and Brief of Chief Bar Counsel and after hearing oral argument on this matter, being now sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that the Recommendation of the Disciplinary Board be and the same is adopted and approved; that JOHN P. DUFFY, be and he hereby is publicly censured for violation of Rules 9–102(A), 9–102(B)(3) and 9–102(B)(4) of the Code of Professional Responsibility-Canons and Disciplinary Rules.

IT IS FURTHER ORDERED that all costs incurred by the Disciplinary Board in connection with this proceeding be assessed against the said John P. Duffy, said costs to be paid promptly.

Costs assessed pursuant to Cost Bill: $205.16

559 P.2d 410

FIRST NATIONAL BANK IN ALBUQUERQUE, Plaintiff-Appellee,

v.

CONTRENDS, INC., Leo Padilla, dba Albuquerque Electrical Company, et al., Defendants-Appellants.

No. 11010.

Supreme Court of New Mexico.

Jan. 24, 1977.

Rehearing Denied Feb. 4, 1977.

Stephen F. Lawless, Thomas L. Grisham, John Freeman, W. W. Atkinson, B. Thomas May, Turner W. Branch, William J. Sulli-

van, Michael M. Rueckhaus, Gary B. Ottinger, Martin B. Paskind, Richard E. Norton, William N. Henderson, Dickson & Dubois, Paul S. Wainwright, Albuquerque, for defendants-appellants.

Rodey, Dickason, Sloan, Akin & Robb, Rex Throckmorton, Albuquerque, for plaintiff-appellee.

OPINION

McMANUS, Justice.

On December 7, 1976 an opinion in the above cause was handed down by this Court. A motion for rehearing on behalf of the First National Bank in Albuquerque was filed on December 15, 1976. Said motion was granted by this Court. As a result, the opinion of December 7, 1976 is hereby withdrawn and held for naught.

This Court's former opinion, now withdrawn, was based generally upon the fact that the redemption period after foreclosure of the mortgage involved was nine months and that it had not been reduced to one month as authorized by statute. Copies of the bank's mortgage appear in two different places in the transcript. Whether by design or inadvertence, the top two lines, appearing on page three of the mortgage copies included in the transcript, had been cut off prior to the delivery of the transcript to the Clerk of the Supreme Court. A correct copy of the mortgage appears in the file of the Office of the District Court Clerk and in the mortgage records of Bernalillo County. These lines read as follows:

> If this mortgage is foreclosed, the redemption period after judicial sale shall be one month in lieu of nine.

Section 24–2–19.1, N.M.S.A.1953 (Supp. 1975) reads as follows:

> The parties to any such instrument may, by its terms, shorten the redemption period to not less than one [1] month, but the district court may in such cases, upon a sufficient showing before judgment that redemption will be effected, increase the period of redemption to not to exceed nine [9] months notwithstanding the terms of such instrument.

Therefore, since the redemption period under the mortgage was only one month and such period having expired, the judgment of the trial court in favor of the plaintiff-appellee, First National Bank in Albuquerque, will be affirmed.

Appellate review, with all of the documents before the Court, is difficult in itself. Attempting appellate review when documents are incomplete or missing is impossible. As a consequence of the problems that arose in this appeal, costs in the amount of Five Hundred ($500.00) Dollars will be assessed against defendants-appellants.

IT IS SO ORDERED.

EASLEY, J., and ROZIER E. SANCHEZ, District Judge, concur.

559 P.2d 411

LEONARD FARMS, a partnership, Plaintiff-Appellee and Cross-Appellant,

v.

CARLSBAD RIVERSIDE TERRACE APARTMENTS, INC., et al., Defendants-Appellees and Cross-Appellees,

v.

INVESTOR PROPERTIES, INC., Defendant-Appellant and Cross-Appellee,

v.

PIONEER NATIONAL TITLE INSURANCE COMPANY, Intervenor-Appellant and Cross-Appellee.

No. 10700.

Supreme Court of New Mexico.

Jan. 26, 1977.

Robertson & Reynolds, John W. Reynolds, Silver City, Martin, Martin & Lutz, R. Wilson Martin, Charles W. Cresswell, Las Cruces, for appellants.

Crouch, Parr & Herring, Walter R. Parr, Las Cruces, for appellees.

OPINION

McMANUS, Justice.

The background for the case before us appears in *Leonard Farms v. Carlsbad Riverside Ter. Apts. Inc.*, 86 N.M. 241, 522 P.2d 576 (1974). The sole issue on that appeal was whether or not the district court committed error in denying Leonard Farms' motion for an accounting because of lack of jurisdiction.

Leonard Farms (Leonard) made a mortgage payment to Kansas City Life, the senior mortgagee, on February 1, 1971, after Carlsbad defaulted in its payments. Leonard then brought a foreclosure action on its mortgage, and judgment was entered in its favor on November 12, 1971. Leonard subsequently purchased the Luna County property at the foreclosure sale on January 24, 1972. Investor Properties, Inc. (Investor), through a series of assignments, obtained the right of redemption and redeemed the property in May of 1972. Between the date of the foreclosure sale and the redemption by Investor, Leonard made another mortgage payment on February 1, 1972. After the mandate, the district court, sitting without a jury, heard the motion for an accounting. At the conclusion of this hearing the trial court held, "That the equitable lien should not be impressed on the Luna County property which was the land originally under foreclosure in this action." and "That an equitable lien should be impressed on the Grant County land which was the subject of the mortgage [redemption bond]." Further the court ordered that the defendant, Investor, was indebted to Leonard in the amount of $83,090.95, the total of both mortgage payments made by Leonard, plus interest of $23,433.27. The court also awarded plaintiff $8,000.00 in attorneys' fees. The court then imposed an equitable lien on the Grant County property to secure this sum. We reverse the trial court.

I. The first mortgage payment.

Leonard cannot recover the mortgage payment made prior to the foreclosure decree of November 12, 1971. In its complaint in the foreclosure case, Leonard asked that the land be sold, and that the proceeds of such sale be applied to the "amounts found to be due to the plaintiffs at the time of judgment and sale." Leonard did not request in its pleadings that the amount of the first mortgage payment be included in the judgment, nor was such amount included. A court may not grant judgment for relief which is neither requested by the pleadings nor within the theory on which the case was tried. *Federal National Mortgage Ass'n v. Rose Realty, Inc.*, 79 N.M. 281, 442 P.2d 593 (1968); *Holmes v. Faycus*, 85 N.M. 740, 516 P.2d 1123 (Ct.App.1973). Since the first mortgage payment had accrued prior to the decree of November 12, 1971, it was a necessary part of Leonard's claim in that action, if it expected to recover the same. A party may not split his demand and prosecute it piecemeal, or present a part of the grounds upon which such a cause of action is founded and leave the remainder to be presented in a subsequent suit if the first fails. *Fidelity & Deposit Co. of Maryland v. Hobbs*, 144 F.2d 5 (10th Cir. 1944). The effect of the judgment in the foreclosure action is to bar Leonard from resurrecting the claim for the first mortgage payment.

II. The second mortgage payment.

The trial court also held that Investor was liable for the second mortgage payment made by Leonard during the redemption period on February 2, 1972. We agree with this disposition. The trial court determined that this payment was not included in the redemption amount. In our previous decision we cited *Keel v. Vinyard*, 48 Idaho 49, 279 P. 420 (1929), for the proposition that although the redemption statute does not specifically allow recovery for the mortgage payments made during the redemption period, equity will permit the junior mortgagee to recover these expenses from the redemptioner. The court properly assessed this amount against Investor. This payment differs from the first mortgage payment because it was made subsequent to the decree in the foreclosure action. Thus, Leonard Farms could not have properly as-

serted a claim for this amount in the original action, and the redemption procedure was the appropriate place to assert such a claim.

III. The equitable lien against the Grant County property.

The trial court granted an equitable lien against the Grant County property to secure the judgment rendered against Investor. The order also stated that "such lien is superior to any claim of lien of Investor Properties, Inc. and all persons claiming by, through, and under Investor Properties, Inc., either as purchaser or lienholder and such persons are hereby barred and foreclosed from any right, title, or interest of any claim or demand of whatsoever nature." This was clearly improper in view of the previous orders issued by the trial court which released both the Luna County and Grant County property.

The trial court originally imposed a mortgage upon the Grant County property pursuant to a stipulation by the parties that the land would be pledged as security for a bond to release the Luna County property. This agreement was entered into before the court on May 1, 1972, and the trial court at that time ordered the Luna County land conveyed to Investor "without further liens or rights as to the parties to this suit as against the ultimate purchasers thereof." On May 18, 1973, the court issued an order releasing the Grant County property, and the clerk of the court released the mortgage that same day.

In our first encounter with this case we held that the trial court should have ordered an accounting and that it had jurisdiction to impose an equitable lien for any additional amounts owing. However, it was error for the trial court to impose an equitable lien on the Grant County land *after* the entry of the order of May 18, 1973 releasing the mortgage on the property. In *Keel v. Vinyard*, supra, it was held that a party who makes payments to protect his interest in land which is later redeemed is entitled to recover such payments through an equitable lien on *the redeemed property*. The Grant County land was not the subject of redemption, and the court lacked jurisdiction to impress an equitable lien on the property after the mortgage was released.

The record also shows that innocent third parties have acquired interests in both the Luna and Grant County land. Since no lis pendens notice of supersedeas bond was posted following the disposition by the trial court, the subsequent purchasers, mortgagees and lienholders are bona fide purchasers for value without notice of any defect and therefore, equity will not operate to divest or impair their title or interest. See generally *Sundie v. Harren*, 253 So.2d 857 (Fla.1971); *Ure v. Ure*, 223 Ill. 454, 79 N.E. 153 (1906); *Rose v. Cox*, 297 Ky. 458, 179 S.W.2d 871 (1944). Consequently, the appropriate remedy in this instance is simply a money judgment against Investor for the value of the mortgage payment made by Leonard during the redemption period and interest thereon.

IV. Attorneys' fees.

Appellants also object to the award of $8,000.00 in attorneys' fees. We have held that attorneys' fees are not to be awarded absent specific statutory authority or rule of court. *Lujan v. Merhege*, 86 N.M. 26, 519 P.2d 122 (1974). There is no statutory provision which permits the recovery of attorneys' fees in a proceeding on a motion for an accounting or in an equitable lien action. There was also no contract between Leonard and Investor which contemplated the payment of attorneys' fees, therefore, the award of attorneys' fees was improper. The trial court may have based this portion of the judgment on the contract between Kansas City Life and Carlsbad which does have a clause through which attorneys' fees may be awarded. Leonard had submitted its claim for the mortgage payments on a subrogation theory under which Leonard could assert its right to payment and attorneys' fees as a subrogee of Kansas City Life. Since we do not adopt that theory and do not agree that Leonard's claim is derived from the Kansas City Life

contract, we hold that Leonard may not recover the attorneys' fees.

IT IS SO ORDERED.

OMAN, C. J., and GERALD D. FOWLIE, District Judge, concur.

559 P.2d 415

Margie C. BAKER, now Margie C. Gooden, Plaintiff-Appellant,

v.

Carl D. BAKER, Defendant-Appellee.

Earl W. BAKER et al., Plaintiffs-Appellees,

v.

Margie GOODEN, formerly known as Margie C. Baker, aka Margie Corrine Baker, aka Margerie C. Baker, Defendant-Appellant Cross-Appellee,

v.

Carl D. BAKER, Involuntary-Plaintiff Cross-Complainant-Appellee Cross-Appellant,

v.

Earl W. BAKER et al., Cross-Defendants-Appellees.

Nos. 10951, 10952.

Supreme Court of New Mexico.

Jan. 27, 1977.

Beall & Crider, Charles J. Crider, Albuquerque, for plaintiff-appellant Margie Gooden.

Duhigg & Cronin, Bruce P. Moore, Albuquerque, for appellees.

Roberts & Roberts, Joseph A. Roberts, Santa Fe, for Carl D. Baker.

OPINION

SOSA, Justice.

Plaintiff-appellant Margie Gooden, formerly Margie Baker [hereinafter Margie or Margie Gooden], sought to modify her final decree of divorce to correct a clerical error in the description of property in cause number 65,089 [hereinafter Suit 1]. In cause number 5-75-2434 [hereinafter Suit 2], plaintiffs-appellees Earl Baker, Olin Baker, and Stella Pillman sought to quiet title against Margie Gooden in the property which was the subject matter of Suit 1; she counterclaimed. Carl Baker, Margie's former husband, was made involuntary-plaintiff in Suit 2, and he crossclaimed. Since the property involved in both suits appeared to be the same, these two suits were consolidated and tried to the trial court without a jury. The trial court granted judgment against Margie Gooden in both suits. She appeals. Carl Baker cross-appeals.

Margie Gooden married Carl Baker in 1941. On January 5, 1948, Edith L. Miller (also known as Edith L. Hill and Edith L. Baker), Earl Wayne Baker, Viola Baker, his wife, and Olin George Baker conveyed title by warranty deed to Carl Baker of lots 1 and 2 of the Hamilton Addition [hereinafter Hamilton Lots], City of Albuquerque, New Mexico, as his sole and separate property. On August 18, 1951, Carl and Margie Baker executed a general power of attorney in favor of Edith L. Hill, which Edith recorded in Bernalillo County on July 22, 1952. That same day Edith Hill executed a warranty deed, conveying the Hamilton Lots to herself. On December 31, 1956 the trial court entered the final decree of divorce of Carl and Margie. The decree awarded Margie one-half interest in the "Lot lettered 'H' of the Aaron J. Smith Subdivision" [hereinafter Smith Lot], but it was further described as "now under lease to that business known as 'Five Points Market,' with a barber shop adjacent thereto . . . ." This latter description is in actuality the description of the Hamilton Lots, which was the only real property owned by the parties at that time. On March 19, 1957, Margie signed a revocation of power of attorney and recorded it on April 18, 1957. On April 18, 1957, Margie Gooden filed a complaint against Edith Baker in federal court, seeking to invalidate Edith's conveyance to herself of the Hamilton Lots and also seeking payment of accrued rent which Edith had been collecting for the Bakers. On May 29, 1958, by quitclaim deed Carl Baker granted his interest in the Hamilton Lots to Edith Baker, his mother. On June 23, 1958, Margie Gooden moved to dismiss the case against Edith without prejudice, and the judge so ordered. Edith Baker continued to manage the Hamilton Lots until her death. Edith Baker died without a will on March 22, 1972. On November 20, 1974, the probate court distributed Edith's estate, including the Hamilton Lots, as follows: one-third each to Earl Baker and Carl Baker, and one-sixth each to Stella Pillman and Olin Baker.

Margie Gooden argues the following issues on appeal: the trial court erred in holding or finding that (1) Edith properly acquired title to the Hamilton Lots under the power of attorney, (2) the divorce decree gave Margie a one-half interest in the Smith Lot rather than the Hamilton Lots, (3) Margie was estopped from asserting any claim in the Hamilton Lots, and (4) Edith adversely possessed the Hamilton Lots. As the last issue is determinative of this appeal, we do not need to discuss the other issues. The trial court held that Edith had acquired the Hamilton Lots by adverse possession, since she had continuously and for more than ten years adversely possessed the property under color of title and paid taxes thereon.

Margie argues that (1) the deed by which Edith conveyed the Hamilton Lots to herself is insufficient for the purpose of color of title because it was void and it failed to describe the Hamilton Lots in sufficient detail, (2) the adverse possession was not done in good faith, and (3) the possession was not adverse but rather permissive.

First, Margie argues that the deed conveying the Hamilton Lots to Edith (the 1952 warranty deed) was void because Edith breached her fiduciary duty of disclosure to Margie and Carl under the power of attorney. *Kribbs v. Jackson*, 387 Pa. 611, 129 A.2d 490 (1957); Restatement (Second) of Agency § 381 (1958); 3 Am.Jur.2d Adverse Possession Agency § 200 (1962). Whether the deed was void or merely voidable because of the breach of the fiduciary duty of the agent (Edith) to disclose material actions to the principals (Carl and Margie) need not be decided here, for a void or a voidable deed may be sufficient for color of title. See *Romero v. Garcia*, 89 N.M. 1, 546 P.2d 66 (1976). In any event, there is a second deed under which Edith claims color of title—the 1958 quitclaim deed, which is neither void nor voidable.[1] Second, Margie argues the description in the 1952 warranty deed is insufficient since that deed refers to Lots 1 and 2 in the Hamilton Addition but fails to designate which block they are in.[2] The trial court properly permitted extrinsic evidence to determine the property in question. See *Hughes v. Meem*, 70 N.M. 122, 371 P.2d 235 (1962); 3 Am.Jur.2d Adverse Possession § 108 (1962). The trial court determined that the Hamilton Lots were in block 2 of the Hamilton Addition.

Margie argues that there was an absence of good faith, since Edith violated her fiduciary duty of disclosure, and thus Edith could not have adversely possessed the tracts. *Apodaca v. Hernandez*, 61 N.M. 449, 302 P.2d 177 (1956). While this may be true with respect to the 1952 warranty deed, it does not apply to the 1958 quitclaim deed. There is no showing of bad faith with respect to that deed, thus this element was satisfied.

Finally, Margie argues that Edith's use of the Hamilton Lots was permissive, not adverse, and thus Edith's adverse possession must fail. The evidence is conflicting and must be resolved by the fact finder. The trial court as fact finder found that there was adversity. There is substantial evidence to support its finding. The remaining elements of adverse possession were not disputed. Thus, the trial court properly found that Edith adversely possessed the Hamilton Lots.

The judgment of the trial court is affirmed.

EASLEY, J., and GERALD D. FOWLIE, District Judge, concur.

559 P.2d 417

In the Matter of the Forfeiture of ONE CESSNA AIRCRAFT, 206, 1974 MODEL, SERIAL NO. V-206-02337, NO. XB-HES, COLOR WHITE/GREEN.

STATE of New Mexico, Plaintiff-Appellee,

v.

CESSNA INTERNATIONAL FINANCE CORPORATION and Aviones Y Servicio, S.A., and Botello Velasquez, Defendants-Appellants.

No. 11026.

Supreme Court of New Mexico.

Jan. 28, 1977.

1. Cross-appellant Carl Baker challenged the validity of the quitclaim deed because it was not attested to by a notary public. See § 71-1-3, N.M.S.A.1953 (Supp.1975); *McBee v. O'Connell*, et al., 16 N.M. 469, 120 P.2d 734 (1911). The statute by its terms only prevents the recording of the deed and does not make it void. The general rule is that an unacknowledged deed is binding between the parties thereto, their heirs and representatives, and persons having actual notice of the instrument. See *Ebrite v. Brookhyser*, 219 Ark. 676, 244 S.W.2d 625 (1951); *Ballard v. Ballard*, 230 N.C. 629, 55 S.E.2d 316 (1949); *McQuatt v. McQuatt*, 320 Mass. 410, 69 N.E.2d 806 (1946); 1 Am.Jur.2d Acknowledgments § 4 (1962).

2. Although not raised by Margie, this problem also arose with the 1958 quitclaim deed and the 1948 warranty deed.

J. R. Crouch, Crouch, Parr & Valentine, Las Cruces, Michael G. Rosenberg, Rosenberg & Harris, Albuquerque, for defendants-appellants.

Toney Anaya, Atty. Gen., Mary Anne McCourt, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

McMANUS, Justice.

This case involves a seizure of an airplane which was found near Vaughn, New Mexico and which contained 580 pounds of marijuana. The pilot was never found or identified. The owners of the aircraft are reported to be two citizens of Mexico named Rigoberto Melchor and Guillermo Botello. Cessna International Finance Corporation (Cessna) and Aviones y Servicios (Aviones) claim a security interest in the airplane. The State of New Mexico seized the plane and asked for a foreclosure against all of the parties and a declaration that they are entitled to the plane free and clear of the interest of any party. At the conclusion of the district court trial, a judgment was rendered in favor of the plaintiff. We af-

firm as to appellant Botello and reverse as to the secured party.

Appellant Botello's major contention is that the forfeiture provisions under the Controlled Substances Act, § 54–11–33, et seq., N.M.S.A.1953 (Supp.1975) are unconstitutional because they violate procedural due process. Appellant also claims error on the basis that no probable cause existed to justify the search and subsequent seizure of the aircraft, and that an indispensable party was not joined.

It is our opinion that these claimed errors are without merit. The forfeiture provisions of the Controlled Substances Act are penal in nature and consequently no pre-seizure notice or hearing is constitutionally required. The statute provides for a hearing within thirty days of the seizure and this is sufficient to satisfy due process standards. See *State ex rel. Berger v. McCarthy*, 113 Ariz. 161, 548 P.2d 1158 (1976). There is also substantial evidence to support the trial court's finding of probable cause for the search and seizure; consequently we will not disturb this decision on appeal. At the hearing, appellant contended that the co-owner Rigoberto Melchor was an indispensable party; however, the evidence is inconclusive as to the nature of Melchor's interest and therefore the trial court was correct in ruling that Melchor was not an indispensable party to this proceeding.

Appellants Cessna and Aviones object to the forfeiture of their security interests in the subject aircraft. The complaint filed by the State herein reads in pertinent part as follows:

> 2. That the New Mexico State Police has made an investigation to determine the parties who may own, be in charge of or have a bona fide security interest in the above-listed conveyance, and has determined that such parties are as follows:
>
> Owner — Mr. Guillermo Botello
> 7th Street
> Colonia Alta Vista
> Hidalgo del Parral, Mexico
> State of Chihuahua
>
> Party with bona fide security interest
> Cessna Finance International Corporation
> P. O. Box 2078
> Wichita, Kansas

Cessna admitted in its answer, and introduced documentary and testamentary evidence of, its security interest. The State then contested the existence and validity of Cessna's interest. We have held that "material allegations of a complaint, admitted in the answer, need not be proved." *Home Plumbing and Contracting Company v. Pruitt*, 70 N.M. 182, 372 P.2d 378 (1962). The admission of the State precludes it from challenging this fact. See *Lujan v. Gonzales*, 84 N.M. 229, 501 P.2d 673, cert. denied, 84 N.M. 219, 501 P.2d 663 (1972). Section 54–11–33(G)(4), supra, provides that the forfeiture of a vehicle under the Controlled Substances Act shall be subject to the security interests of an innocent third party; therefore, the trial court erred in not recognizing Cessna's security interest.

Aviones also claims some type of security interest derived from a business transaction involving Cessna. The record below is unclear and the evidence is insufficient to permit a finding of a separate valid security interest of Aviones. We affirm this disposition and leave this issue to be resolved between Cessna and Aviones.

In the final analysis the judgment order of the trial court is affirmed as to Botello and Aviones and reversed as to Cessna.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

559 P.2d 420

Kenneth J. STOHR, Appellant,

v.

NEW MEXICO BUREAU OF REVENUE, Appellee.

No. 2591.

Court of Appeals of New Mexico.

Nov. 30, 1976.

Certiorari Denied Jan. 25, 1977.

William C. Erwin, Kastler, Erwin & Davidson, Raton, for appellant.

Toney Anaya, Atty. Gen., Vernon O. Henning, Bureau of Revenue, Legal Div., Santa Fe, for appellee.

OPINION

LOPEZ, Judge.

Stohr protested assessments for gross receipts taxes, penalty and interest. The protest of assessments for purchases of materials was denied by the bureau of revenue. The protest of assessments for wages was partially denied. Stohr appeals the decision and order of the commissioner of revenue

directly to this court. Section 72–13–39, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp. 1975). We affirm in part and reverse in part.

Stohr is a skilled union carpenter in Raton, New Mexico. He had been doing carpentry work for several years and, during the taxable period, performed carpentry work for over one hundred people. For convenience we will refer to these people as customers. He was paid by the hour. On a few jobs the customer would deduct Federal Insurance Contribution Act (F.I.C.A.) taxes. When customers did not deduct F.I.C.A. taxes, Stohr would file self-employment returns. Often, Stohr would purchase materials for a particular job; subsequently, he was reimbursed by the customer. The relevant findings of the commissioner are:

". . .

"4. During the taxable period the Taxpayer was engaged by over 100 persons . . . to perform carpentry work on buildings such as houses, garages and office buildings. This work included installing new window frames, room paneling, cabinets and garage doors.

"5. The Taxpayer was engaged by customers for a specific job e. g., install new paneling in a room. Generally, the Taxpayer determined when he would perform the job. Some jobs were performed in a few hours; others lasted considerably longer. The Taxpayer did not advertise himself as a contractor in any media; satisfied customers passed the word. In no case did the Taxpayer enter into written contracts with his customers.

"6. In most, but not all, cases the Taxpayer purchased in his own name the construction material necessary for the job and the Taxpayer paid the suppliers for the material although in some cases customers would pay the suppliers for materials purchased by the Taxpayer. In some cases customers themselves purchased the material in which case the customer paid the supplier. The Taxpayer apparently never delivered nontaxable transaction certificates to suppliers and all sales of material by suppliers were made with tax passed on to the purchaser.

"7. The Taxpayer was always paid for hours worked plus the Taxpayer's cost of material. The Taxpayer maintained a day book which reflected payments received, which included the labor element, (hours worked times the hourly rate) and the material purchased by the Taxpayer for the job. The tax assessment in question was based on the information in the day book.

"8. Several customers withheld federal income tax, state income tax and FICA (social security) taxes with respect to the payments attributable to the labor charges. The vast majority of customers did not withhold any taxes on payments made to the Taxpayer.

". . .

"12. During the taxable period the Taxpayer did not have a New Mexico contractors license. For the past eight years the Taxpayer has filed gross receipts tax returns with the Bureau but such returns showed no taxable receipts. The Taxpayer filed self employment tax returns (for social security purposes) with Internal Revenue Service where customers did not withhold FICA tax. The Bureau audit report indicates that the Taxpayer filed federal income tax returns, including federal Schedule 'C's', which indicated that the Taxpayer received amounts from a business or profession. The Taxpayer is not familiar with federal tax procedures and such returns were prepared by the Taxpayer's wife.

". . .

"14. It seems apparent that a person, such as the Taxpayer, could in some contractual relationships, be an employee within the meaning of § 72–16A–12.5, and in other arrangements the person could be an independent contractor. In this connection it appears the Bureau treated payments made to the Taxpayer by Northeastern Fair Association as wages, and not as taxable receipts, although the Taxpayer apparently per-

formed carpentry services for that customer. A customer, Paul Kastler, testified at the hearing about his relationship with the Taxpayer: that he told the Taxpayer when to perform the work; that he obtained liability insurance on the Taxpayer; that he withheld federal taxes on payments made to the Taxpayer; that he often directly purchased material; that on one occasion he terminated a project prior to completion; and that he exercised control over the Taxpayer.

"15. For purposes of the Federal Insurance Contributions Act (FICA), § 3121(d)(2) of the 1954 Internal Revenue Code (as amended) defines 'employee' to include 'any individual who, *under the usual common law rules* applicable in determining the employer-employee relationship has the status of an employee'. (Emphasis added) Where such a relationship exists, federal law imposes a tax on both employees (§ 3101 of the Internal Revenue Code) and employers (§ 3111 of the Internal Revenue Code). Where a customer accepts an economic burden by paying the portion of the employer's FICA tax, there is an inference that the customer does so because under the law, he is required to do so. While affirmative evidence of withholding FICA is not determinative, it is evidence to be considered. As indicated above, it is recognized that in some contractual relationships, the Taxpayer could be an employee. The Bureau audit report . . . lists the name of customers (including Mr. Kastler) who withheld FICA from payments made to the Taxpayer. It is concluded that at least those receipts . . are exempt under § 72–16A–12.5."

Wages

Stohr argues he was an "employee" and that compensation paid to him by customers were wages, therefore exempt under § 72–16A–12.5, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1975):

"Exempted from the gross receipts tax are the receipts of employees from wages, salaries, commissions or from any other form of remuneration for personal services."

Stohr relies on the Gross Receipts and Compensating Tax Act Regulations of the bureau which defines an employee as follows:

"G.R. REGULATION 12.5–1—EMPLOYEE DEFINED—

"In determining whether a person is an employee, the bureau will consider the following indicia:

"(1) is the person paid a wage or salary;

"(2) is the 'employer' required to withhold income tax from the person's wage or salary;

"(3) is F.I.C.A. tax required to be paid by the 'employer' and employee;

"(4) is the person covered by workmen's compensation insurance;

"(5) is the 'employer' required to make unemployment insurance contributions on the person;

"(6) does the person's 'employer' consider the person to be an employee;

"(7) does the person's 'employer' have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean 'mere suggestions').

"If all of the indicia mentioned above are present, the bureau will presume that the person is an employee. However, a person may be an employee even if one or more of the indicia are not present."

The issue is whether Stohr was an employee on the approximately "fifty to one hundred and fifty" jobs completed during the taxable period from January 1, 1972, to July 31, 1975. The commissioner found that on the majority of jobs Stohr was an independent contractor. The commissioner determined under finding number 15 that on those jobs where the customer deducted F.I.C.A. taxes, Stohr was an employee and his compensation was exempt as wages. On the jobs where no deductions were made, the commissioner determined that he was an independent contractor and liable for payment of gross receipt taxes. The commissioner based his decision on § 72–

16A–3 E and F, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1975).

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

"F. 'gross receipts' means the total amount of money or the value of other consideration, received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico. . ."

This Court must determine whether the findings of the commissioner were in accordance with law and supported by substantial evidence, or whether the findings were capricious and arbitrary. Section 72–13–39 D, supra. Stohr acknowledges the presumption that an assessment of gross receipts taxes is correct. Section 72–13–32 C, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp. 1975); *Mears v. Bureau of Revenue*, 87 N.M. 240, 531 P.2d 1213 (Ct.App.1975). In order for the taxpayer to be successful, he must clearly overcome this presumption. See *Archuleta v. O'Cheskey*, 84 N.M. 428, 504 P.2d 638 (Ct.App.1972). Moreover, where an exemption is claimed, the exemption is strictly construed in favor of the taxing authority. *Rock v. Commissioner*, 83 N.M. 478, 493 P.2d 963 (Ct.App.1972).

Of the seven indicia of employee status outlined in G.R. Regulation 12.5–1, supra, only three are present in this case. Although there is no dispute that Stohr was paid an hourly wage, there is conflicting evidence whether Stohr's "employers" considered him an employee. There is also a factual dispute whether the "employers" had the right to exercise control over the means of accomplishing a result. There is no dispute that in most of the jobs the "employer" did not withhold income tax, did not pay the employer's share of F.I.C.A. taxes, and did not make unemployment insurance contributions. Most of the time Stohr was not covered by workmen's compensation insurance.

On the jobs where the employer was sophisticated enough to make provisions for F.I.C.A. contributions, the employer was likely to withhold income tax, make unemployment insurance contributions, and provide workmen's compensation insurance. This was true of one principal witness, attorney Paul Kastler. On the jobs found taxable as gross receipts, Stohr paid both the employer's and employee's share of F.I.C.A. taxes, and filed federal tax returns showing income from a business or profession. Therefore, it is reasonable to include in gross receipts the jobs on which F.I.C.A. taxes were not paid.

We recognize that the bureau's regulation is not controlling, but it does provide a useful checklist. The dispositive findings are: (1) the taxpayer filed self-employment returns with the Internal Revenue Service for social security purposes where customers did not withhold F.I.C.A. taxes; (2) the taxpayer filed federal income tax returns which reported income from a business or profession; and, (3) the large number of "employers" indicates that the relationship with "customers" cannot be classified along traditional or conventional employer-employee lines. Cf. *Burton v. Crawford*, 89 N.M. 436, 553 P.2d 716 (Ct. App.1976). See also *Albuquerque Lumber Co. v. Bureau of Revenue*, 42 N.M. 58, 75 P.2d 334 (1938). The controlling factor, however, is that the taxpayer must treat transactions uniformly for all purposes within the tax laws. The taxpayer must not attempt to show one scheme for federal tax purposes, and a nontaxable event for purposes of state gross receipts tax. *Co-Con, Inc. v. Bureau of Revenue*, 87 N.M. 118, 529 P.2d 1239 (Ct.App.1974). See also *Mears v. Bureau of Revenue*, supra.

We believe that the bureau's findings were correct; they were supported by substantial evidence, were in accordance with law and not an abuse of discretion. *Duke v. Bureau of Revenue*, 87 N.M. 360, 533 P.2d 593 (Ct.App.1975).

Purchases of materials

Stohr argues he was acting as an agent for customers when he would order,

buy, or come into possession of materials which he would use for different jobs. We agree.

Section 72–16A–3 F, supra, states in pertinent part that:

" 'Gross receipts,' for the purposes of the business of buying, selling or promoting the purchase, sale or leasing, as factor, agent or broker, on a commission or fee basis, of any property, service, stock, bond or security, includes only the total commissions or fees derived from the business. . . ."

This means that the only amount properly includable in gross receipts is the commissions or fees derived. Stohr did not receive any commissions or fees, but acted merely as an agent for his customers. Stohr's purchases were erratic; sometimes the customer had the materials on hand, sometimes the customers purchased the materials, sometimes Stohr purchased the materials as a favor to the customer. It cannot be said that Stohr was in the business of buying and selling materials. He never advertised as such, and never sought any benefit from his purchases other than to expedite his work. Stohr always paid gross receipts tax to the supplier, and this tax was paid by the ultimate consumers, his customers. The purchases were merely incidental to his work as a carpenter. Cf. § 72–16A–12.16, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1975).

Although the taxpayer did not make a profit, profit is immaterial and not conclusive. *New Mexico Enterprises, Inc. v. Bureau of Revenue*, 86 N.M. 799, 528 P.2d 212 (Ct.App.1974). But see § 72–16A–3 B, supra, " 'buying' or 'selling' means any transfer of property for consideration or any performance of service for consideration. . . ."

We believe that the findings of the commissioner, with regard to materials, were not supported by substantial evidence.

Penalty

Stohr argues that a penalty was improperly assessed. We believe that he is not liable for penalty and interest pursuant to § 72–13–82, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1975):

"*Civil penalty for failure to pay tax or file a return.* A. In the case of failure, due to negligence or disregard of rules and regulations, but without intent to defraud, to pay when due any amount of tax required to be paid or to file a return regardless of whether or not any tax is due, there shall be added to the amount two per cent [2%] per month or a fraction thereof from the date the tax was due or from the date the return was required to be filed, not to exceed ten per cent [10%] thereof, or a minimum of five dollars ($5.00), whichever is greater, as penalty, but the five dollar ($5.00) minimum penalty shall not apply to taxes levied under the Income Tax Act [72–15A–1 to 72–15A–15].

"B. In the case of failure, with intent to defraud the state, to pay when due any amount of tax required to be paid, there shall be added to the amount fifty per cent [50%] thereof, or a minimum of twenty-five dollars ($25.00), whichever is greater, as penalty."

This section is divided into two parts: penalty for fraud and penalty for negligence. We do not believe that there is evidence of fraud nor do we believe that failure to pay comes under Section A, supra. Diligent protest by the taxpayer negates the possibility of negligence. The taxpayer did not disregard the rules and regulations because there was reasonable doubt as to the correctness of the taxes imposed by the commissioner. *Co-Con, Inc. v. Bureau of Revenue*, supra.

The decision of the commissioner is affirmed in part and reversed in part and remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

SUTIN and HERNANDEZ, JJ., concur.

559 P.2d 425

Eva WITHROW, Plaintiff-Appellant,

v.

M. C. WOOZENCRAFT, d/b/a Town House Motel, Defendant-Appellee.

No. 2589.

Court of Appeals of New Mexico.

Dec. 21, 1976.

Certiorari Denied Jan. 25, 1977.

Sumner Buell, Jasper & Buell, Santa Fe, for plaintiff-appellant.

J. Duke Thornton, K. Gill Shaffer, Shaffer, Butt, Jones & Thornton, Albuquerque, for defendant-appellee.

OPINION

LOPEZ, Judge.

The plaintiff filed suit for personal injuries which resulted when she slipped and

fell on defendant's premises. Summary judgment was entered in favor of the defendant. Plaintiff appeals. We reverse.

The issues presented are: (1) whether there are genuine issues of fact regarding the defendant's negligence; and (2) whether there are genuine issues of fact regarding the plaintiff's contributory negligence.

The plaintiff, accompanied by a companion, checked into the defendant's motel in Las Vegas, New Mexico, about 6:00 p. m. on July 30, 1976. Before going to the room, which happened to be number 16, the plaintiff advised an employee of the defendant that she and her companion would be departing at 5:00 a. m. the following day. The area in front of the room consisted of a concrete porch about eight feet wide and about three inches high. At a point slightly to the left of the door of the room was a concrete pad which extended from the porch into the parking lot. This concrete pad was about five feet wide and extended into the parking area about three feet.

On the following day, July 31, the plaintiff arose early and at 5:00 a. m. she was ready to load her car. It was still dark outside. The plaintiff and her companion tried to turn on the porch light which was adjacent to the motel room door. The light would not turn on because it was connected to a master timer switch that had been shut off at 4:30 a. m. The other lights in the motel parking lot were also on a master timer switch and had been turned off. Because it was too dark for the plaintiff to see outside, she opened the door of the room to allow the inside light to shine onto the porch. She picked up some luggage, went beyond the porch and onto the pad. As she reached the edge of the pad, unaware that it ended, she missed her footing, fell, and was injured.

Negligence of the Defendant

First, we must find whether the defendant owed a duty of care to the plaintiff. In *Proctor v. Waxler,* 84 N.M. 361, 503 P.2d 644 (1972), the Supreme Court of New Mexico considered the Restatement (Second) of Torts as persuasive authority entitled to great weight. It should be applied on a case by case basis. Paragraph 343 of the Restatement of Torts reads as follows:

"Dangerous Conditions Known to or Discoverable by Possessor.

"A possessor of land is subject to liability for physical harm caused to his invitee by a condition of the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger."

The evidence shows that the lights were turned off at 4:30 a. m. The defendant should have known that it was still dark outside, that the cement pad which extended from the sidewalk would not be easily seen by plaintiff and would create a dangerous condition. Defendant could easily have had better lighting until people who left early in the morning had enough daylight to see their way out of the parking lot.

The deposition of the defendant shows the following testimony:

"Q. . . . Any other person ever tripped or fallen?

"A. No, we've never had—oh, we've had some people fall, yes. This happens. I do it myself. I'll start to step off there sometimes and hang my foot. It's not because of the hazardous condition, it's just carelessness on my part.

"Q. Has anyone else ever fallen besides you?

"A. Yes, occasionally. I remember one gentleman that fell out there because he was visiting with another person and just walked off without looking, which he didn't competely [sic] fall, didn't hurt himself. He just, you know, just went down.

"Q. Okay. Who else, who else besides the older gentleman do you recall?

"A. We had a lady, that she was in room seventeen, approximately a year ago—give me some leeway on this.

"Q. Sure, sure.

"A. She fell in approximately the same general area, and she broke her hip.

"Q. Uh-huh.

"A. But it wasn't because she stepped off the walk or anything. She just fell.

"Q. Uh-huh.

"A. No reason for it. She wasn't—complained about it. We took her to the hospital. They X-rayed her. They brought her here to Santa Fe and she was in the hospital here for several days; matter of fact is they kept her here until she was well enough to go home. But it wasn't anything, she said, except that she just fell."

This testimony raises the issue of whether the dangerous condition was known to or discoverable by the defendant. Whether there is a breach of the duty to exercise reasonable care to protect invitees against danger is also an issue.

This case is here on summary judgment. We are guided by certain cardinal rules which are enumerated in *First National Bank v. Nor-Am Agricultural Products, Inc.,* 88 N.M. 74, 537 P.2d 682 (Ct.App.1975). *Nor-Am* stated five points applicable to summary judgment: (1) it is not to decide an issue of fact but rather to determine whether one exists; (2) it can be granted only where the record shows there is no genuine issue as to any material fact; (3) the party opposing the motion must be given the benefit of all reasonable doubts in determining whether an issue of fact exists; (4) it can be granted only where the moving party is entitled to judgment as a matter of law upon clear and undisputed facts; and (5) it must not be used as a substitute for trial.

Based upon the evidence and the law on summary judgment, we hold that in this case there are issues of fact regarding the negligence of the defendant. *Proctor v. Waxler,* supra; *Snodgrass v. Turner-Tourist Hotels,* 45 N.M. 50, 109 P.2d 775 (1941).

Contributory Negligence of the Plaintiff

The defendant argues that the plaintiff was contributorily negligent as a matter of law. This argument is based on a theory of stepping into the dark with knowledge of a dangerous condition. We do not believe that the facts in this case justify the applicability of the "step into the dark" cases. *Boyce v. Brewington,* 49 N.M. 107, 158 P.2d 124 (1945).

The instant case is analogous to *Mozert v. Noeding,* 76 N.M. 396, 415 P.2d 364 (1966), which distinguished the *Boyce* case. The plaintiff did not step blindly into the dark. When she opened the door to her motel room she noticed the darkness. When she discovered that the light outside the motel room would not turn on, she went inside and left the door open. She tried to allow enough light from her room to help her see outside. She proceeded cautiously, doing all she could to get light. See *Brown v. Hall,* 80 N.M. 556, 458 P.2d 808 (Ct.App. 1969).

It cannot be said that all reasonable persons would say that the plaintiff was contributorily negligent. Therefore, this is not a case where contributory negligence can be found as a matter of law. The facts create an issue of contributory negligence; this is for the jury, not the court, to resolve. *Anderson v. Welsh,* 86 N.M. 767, 527 P.2d 1079 (Ct.App.1974); *Proctor v. Waxler,* supra; *Snodgrass v. Turner-Tourist Hotels,* supra.

The judgment of the trial court is reversed and the case is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

SUTIN and HERNANDEZ, JJ., concur.

559 P.2d 839

Valerie A. FEVIG, as guardian of the persons and Estates of Mary Louise Fevig and Donna Jean Fevig, minors, Petitioner-Appellant,

v.

Valrie Marjorie FEVIG and Walter W. Fevig, Respondents-Appellees.

No. 11040.

Supreme Court of New Mexico.

Jan. 26, 1977.

Toulouse, Krehbiel & DeLayo, P.A., Leonard J. DeLayo, Jr., Albuquerque, for appellant.

R. Hugo C. Cotter, Albuquerque, for Valrie M. Fevig.

William P. Runnels, Albuquerque, for Walter W. Fevig.

OPINION

SOSA, Justice.

Petitioner-appellant Valerie A. Fevig, as guardian of the persons and estates of her minor sisters Mary Louise and Donna Jean Fevig, sought a decree from the trial court ordering their parents, Valrie M. Fevig and Walter Fevig, respondents-appellees, to contribute to the support and maintenance of the two minor children. The trial court found for the respondents. Petitioner appeals.

On April 17, 1970, the respondents were divorced. Valrie M. Fevig was awarded custody of Mary and Donna, but on October 23, 1970, custody of them was awarded to Walter Fevig. The children stayed with their father until late April or early May, 1975, when they moved out of their father's home and moved in with their older sister Valerie. On June 11, 1975, Valerie was appointed guardian of the persons and estates of Mary and Donna. Valerie filed for welfare assistance to enable her to support her two sisters, and she received $129 per month. On January 9, 1976, Valerie filed suit against respondents, alleging both had neglected to provide for their minor children, and requested an order of the court to compel contribution to their support.

The trial court held that (1) the minor children voluntarily left their home and thus relieved their parents from their support obligation, (2) the children were emancipated, and (3) the petitioner stood in loco parentis to the children. Thus the trial court concluded neither respondent owed a duty to support the two minor children.

Appellant first argues that the children are not emancipated based upon the facts presented. Appellees argue that since Mary and Donna left voluntarily and independently, they had emancipated themselves. The facts are mostly undisputed. Mary and Donna did not get along with their stepmother (Walter remarried). One day they had an argument with their father about keeping their room clean. Their father told them that if they could not keep their room clean, they could go to their mother. Mary Fevig testified to the exchange as follows:

> . . . and my father said, "Well, if you love your mother so much, why don't you go back with her?" And his wife said, "Why don't you pack up your bags right now," so we left.

Mary and Donna left with some of their clothes, but they went to their sister's home instead.

[redacted] Parents have a duty to support their children until they reach the age of majority or are otherwise emancipated. *Mason v. Mason*, 84 N.M. 720, 507 P.2d 781 (1973). In the case before us, neither child has reached the age of majority. Thus, in order to sever the parental duty of support, the children had to be emancipated. By voluntarily leaving their father's home after an argument, did Donna and Mary emancipate themselves? We think not.

[redacted] The power to emancipate a minor resides in that parent or those parents having the duty to support the child. *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965). An express emancipation of a minor takes place when the parent freely and voluntarily agrees with his child, who is able to care and provide for himself, that he may leave home, earn his own living, and do as he pleases with his earnings. *Rounds Bros. v. McDaniel*, 133 Ky. 669, 118 S.W. 956 (1909); cf. *Gillikin v. Burbage*, supra; *Merithew v. Ellis*, 116 Me. 468, 102 A. 301 (1917), 2 A.L.R. 1429 (1919). There is no evidence that Mary and Donna agreed that their parents were to be relieved of the responsibility of supporting them. Although she agreed to become their guardian, Valerie never agreed to furnish all the monetary support for her younger sisters. Walter Fevig, who earns approximately $1000 per month, testified at trial that he expected to furnish some support, and Valrie Fevig, who earns approximately $700 per month, stated she would be willing to furnish support for her daughters. Neither Donna nor Mary was able to care and provide for

herself, and neither one earned her own living. Thus, there is no express emancipation in this case. Emancipation of a minor may be partial and implied, however. See *Parker v. Parker*, 230 S.C. 28, 94 S.E.2d 12 (1956), 60 A.L.R.2d 1280 (1958). In *Fitzgerald v. Valdez*, 77 N.M. 769, 776, 427 P.2d 655, 659, (1967), we stated: "Once the family relationship is altered so that the child is no longer subject to parental care and discipline, the child is said to be emancipated. Emancipation as between parent and child is the severance of the parental relationship so far as legal rights and liabilities are concerned (citations omitted)." In that case the son had been emancipated as a matter of law upon reaching the age of majority (the fact that he lived with and was supported by his parents did not change his status of being emancipated). In the case before us the legal duty of the parents to support their minor children has not been severed because Mary and Donna are unable to support themselves. The parental right of discipline and care was severed and transferred to their guardian (Valerie), but Valerie did not agree to be the sole supporter of Mary and Donna. We hold there was a partial emancipation of Mary and Donna with respect to their parents' right to discipline and care for them. However, the parents' duty of support has not been extinguished.

Appellant argues that the trial court's conclusion that the appellee stood in loco parentis to her younger sisters, and thus the respondents had no duty to support Donna and Mary, was error. We agree. A person is said to stand in loco parentis when he puts himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formalities necessary to a legal adoption. *Commonwealth v. Smith*, 429 Pa. 561, 241 A.2d 531 (1968). However, the person must intend to assume toward the child the status of a parent. *State v. Superior Court for King County*, 37 Wash.2d 926, 226 P.2d 882 (1951); *Kransky v. Glen Alden Coal Co.*, 354 Pa. 425, 47 A.2d 645 (1946). The trial testimony shows that appellant did not intend to support her minor sisters, indeed she could not support her minor sisters without outside help, and that she expected her parents to contribute to the financial support of Donna and Mary.

The trial court is reversed with directions to determine reasonable support for Donna and Mary to be assessed against respondents-appellees.

EASLEY and PAYNE, JJ., concur.

559 P.2d 841

Ginger HODGE, Petitioner-Appellee,

v.

James P. HODGE, Respondent-Appellant.

No. 11027.

Supreme Court of New Mexico.

Feb. 8, 1977.

C. Gene Samberson, Heidel, Samberson, Gallini & Williams, Lovington, for appellant.

Bruce A. Larsen, Lovington, for appellee.

OPINION

McMANUS, Justice.

Appellant and appellee were married on December 19, 1970 and subsequently obtained a divorce. Appellant claims that the trial court erred in the division of the community property by determining that the residence of the parties was community property and not his sole and separate property. Although there is conflicting evidence in the record, there is substantial evidence to support the trial court's determination. We therefore affirm this portion of the judgment.

The trial court also made a division of the personal property belonging to the community. The court awarded all of the community property to petitioner and all of the community property to respondent. This is clearly error. There are other conflicting provisions in the judgment of the court, therefore, we remand this portion of the judgment to the court to reconsider the disposition of the personal property to comply with the evidence and to make a proper division of these items.

Each party shall bear his own costs, including attorney fees.

IT IS SO ORDERED.

SOSA, J., and RICHARD B. TRAUB, District Judge, concur.

559 P.2d 842

The PATTISON TRUST et al., Plaintiffs-Appellants,

v.

George BOSTIAN et al., Defendants-Appellees.

No. 2450.

Court of Appeals of New Mexico.

Dec. 14, 1976.

Certiorari Denied Jan. 25, 1977.

John A. Mitchell, Robert Dale Morrison, Mitchell, Mitchell, Alley & Morrison, Taos, for appellants.

Charles P. Reynolds, William E. Snead, Ortega, Snead, Dixon & Hanna, Albuquerque, for defendants-appellees.

OPINION

HERNANDEZ, Judge.

Plaintiffs sued defendants seeking damages for trespass and for cutting and removing timber from their real estate. Alternatively, plaintiffs sought damages for breach of contract for failing to observe good timbering practices. The trial court sitting without a jury decided in favor of defendants; plaintiffs appeal, alleging seven points of error.

Because of our decision as to plaintiffs' points I, III and IV and because of the disposition being made of the appeal, a rather limited statement of the facts will suffice to illustrate the basis of our opinion. Prior to September 1, 1970 the parties had entered into an oral agreement for the purchase and sale of timber located upon real property of plaintiffs near Twining, New Mexico. Shortly before that date the parties decided to put their agreement into writing. Plaintiff O. E. Pattison asked defendant George Bostian to prepare the document, which he did. The agreement was signed for the vendors by Buell Pattison, a trustee of the Pattison trust. There was no signature by O. E. Pattison or Luciester Pattison, who owned a fractional undivided interest in the subject property. The written agreement was to run from September 1, 1970, through September 1, 1973. Pursuant to this agreement defendants cut timber (weather permitting) from September 1, 1970 on. On or about June 12, 1972, plaintiffs' attorney wrote to defendants ordering them to stop cutting timber and stating that the agreement between them was null and void.

Plaintiffs' points I, III and IV will be considered together:

> "POINT I: The purported timber sale contract between the plaintiffs and the defendants involved matters within the provisions of the statute of frauds and was invalid and unenforceable.
>
> . . . . .
>
> "POINT III: Because of the invalidity of the purported timber sale contract, the defendants committed a trespass upon the real estate of the plaintiffs.
>
> "POINT IV: Plaintiffs, as a matter of law, were not estopped by their conduct."

Subsequent to the filing of this appeal, plaintiffs cashed several checks which defendants had tendered in full payment for timber they had cut from plaintiffs' land. The first of these checks was dated July 20, 1973, and the last September 7, 1973. Our review of the record indicates

that this was the last act in the consummation of the agreement. Consequently, the consummation of the agreement renders plaintiffs' points I, III and IV moot. As our Supreme Court pointed out in *Mapel v. Starriett et ux.*, 28 N.M. 1, 205 P. 726 (1922): "The statute of frauds applies only to executory, as distinguished from executed, contracts, and if a contract otherwise within the statute is completely performed, it is thereby taken out of its operation." To like effect see *Prude v. Lewis,* 78 N.M. 256, 430 P.2d 753 (1967). We would also point that "[t]he statute of fraud is intended to protect against fraud; it is not intended as an escape route for persons seeking to avoid obligations undertaken by or imposed upon them." *Keirsey v. Hirsch*, 58 N.M. 18, 265 P.2d 346 (1953).

Plaintiffs' second point of error is that the trial court failed to make findings of fact upon certain material issues. Plaintiffs contend that the trial court erred by not making findings as to the ownership of the land upon which the timber was located and upon the question of consent to cut timber during 1972 and 1973. The plaintiffs submitted several findings on these matters. In our opinion the trial court rejected such findings when it made the following findings: at no time did Mr. O. E. Pattison or any of the other members of the trust tell the defendants that any of the subject property was owned by O. E. Pattison and Luciester Pattison. That prior to signing the agreement, Mr. O. E. Pattison and representatives of the trust had gone over the property and pointed out the specific areas to be cut. That defendants, with the knowledge of Mr. O. E. Pattison, paid the trust in excess of $10,368.00 for timber cut from the subject property. That at all times defendants were acting in reliance upon the representations of Buell Pattison and O. E. Pattison that they had the authority to sell the timber which was being cut. A review of the record indicates substantial evidence to support these findings; that being so, plaintiffs' second point is without merit.

Plaintiffs' fifth point is that an act of God is an affirmative defense, and that defendants having failed to plead it specifically could not rely upon it. The answer to this point is factual: the defendants did not assert or rely upon an act of God as a defense.

Plaintiffs' sixth point is that the trial court failed to exercise its independent judgment and prepare its own decision. Plaintiffs in their argument refer to a letter from the trial court to the attorneys of the respective parties wherein the court stated that it found all issues in favor of the defendants and requested defendants' attorney to prepare the necessary findings and to prepare a final judgment based upon the decision of the court. Plaintiffs cite to § 21–1–1(52)(B)(a)(1), N.M.S.A.1953 (Repl. Vol. 4, 1970) which provides in part: "In such decision the court shall find the facts and give its conclusions of law pertinent to the case . . . ." Plaintiffs' point is well taken. Our Supreme Court in *Mora v. Martinez,* 80 N.M. 88, 451 P.2d 992 (1969) had this to say:

> "[W]e take note of the fact that, although our Rule 52 differs from the federal rule, nevertheless the reasons for both rules are the same, i.e., as an aid to the appellate court by placing before it the basis of the decision of the trial court; to require care on the part of the trial judge in his consideration and adjudication of the facts; and for the purposes of res judicata and estoppel by judgment. [Citations omitted.] We agree with the federal cases which, without exception, require adequate findings and insist on the exercise of an independent judgment on the part of the trial judge in making his own findings of fact rather than adopting those of one of the parties."

Having decided points I through V adversely to the contentions of the plaintiffs, we need not consider point VII, which alleges that there were manifest errors of law which were brought to the attention of the trial court and for which their motion for a new trial should have been granted.

This cause will be remanded to the trial court with instructions that proper findings of fact and conclusions of law be prepared and entered and that a judgment based thereon and consistent with this opinion be entered.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., dissented.

SUTIN, Judge (dissenting).

I dissent solely from that part of the opinion which remands this case to the district judge to prepare and enter proper findings of fact and enter a judgment based thereon consistent with the opinion. The judgment should be affirmed without remand.

A. *The trial court made proper findings of fact and conclusions of law.*

In *Mora v. Martinez*, 80 N.M. 88, 451 P.2d 992 (1969), and *Moore v. Moore*, 68 N.M. 207, 360 P.2d 394 (1961), the trial court did not prepare and enter a decision in a separate instrument as required by Rule 52(B)(a) of the Rules of Civil Procedure. The trial court, by a separate order, adopted the findings and conclusions requested by the successful party. To continue the appeal in both cases, the Supreme Court remanded with instructions to repair the damage and send it back to the Supreme Court.

Mora lay at rest because the parties settled their differences. *Moore* was affirmed in *Moore v. Moore*, 71 N.M. 495, 379 P.2d 784 (1963).

Mora is quoted as authority that a remand for proper findings of the court arises when findings fail to resolve the basic issues in dispute, and are insufficient to permit an appellate court to decide the case. *Michelson v. Michelson*, 86 N.M. 107, 520 P.2d 263 (1974); *State ex rel. State Highway Department v. Bruskas*, 85 N.M. 634, 515 P.2d 559 (1973). With this I agree.

In the instant case, by letter, the trial court announced that all issues were decided in favor of defendants, and asked defendants' attorney "to prepare the decision of the court making all appropriate, requisite and necessary findings of fact to sustain the judgment of the court, . . . prepare an order denying all requested findings and conclusions submitted by the parties . . . ." Plaintiffs did not object to this procedure.

Pursuant to this request, we assume defendants' attorney prepared the decision for the trial court and the order denying all requested findings and conclusions. The decision did not contain two of defendants' requested findings. Two weeks after the date of the letter, the decision and order was signed by the trial court and filed. By this decision, the trial court found the facts and gave its conclusions in a separate instrument as required by law. It is obvious that the trial court read the decision and approved its contents. I can find no criticism of the trial judge's request for assistance of the defendants' attorney even if proper objection had been made.

He was sufficiently harassed for three years. The trial judge made proper findings of fact.

B. *To remand for proper findings and judgment would be useless and would permit a second appeal.*

The transcript of the record on appeal consists of eight volumes. It contains rambling pleadings, and extensive depositions which consumed 508 pages of the transcript. The complaint was filed on November 8, 1972 and the trial commenced August 4, 1975, almost three years thereafter. More than four years have passed since the complaint was filed.

" . . . [C]ertainly if this court can remand the case for the entry of [a decision], it would be a useless thing to strike the present [decision] and remand the case to the trial court for the making of the same over again. Although we must insist upon compliance with the rule by the trial courts, certainly little would be accomplished, other than additional delay, in remanding the case for this purpose only. We do not feel that the interests of justice

require such a procedure . . . ." *Brown v. Hayes*, 69 N.M. 24, 27–28, 363 P.2d 632, 634 (1961).

Furthermore, to require the trial court to prepare and enter a new decision and enter judgment based thereon means that the trial court will have to add additional findings to its decision bearing on the issue of the consummation of the agreement. The consummation occurred subsequent to the filing of this appeal. It was raised by affidavit of defendant Bostian during the appeal, which affidavit showed that plaintiffs cashed checks of defendants which constituted total payment to plaintiffs for timber severed by defendants. Plaintiffs did not contest this matter.

If a new decision is required, evidence will be taken, additional findings will be made, and judgment will be entered thereon. Plaintiffs will then have the right to a second appeal. Plaintiffs had one fair trial, unreasonably delayed, and one fair appeal, even though adverse. Plaintiffs are not entitled to a second bite of the apple or a fourth strike in this ballgame.

559 P.2d 846

SPRINGER CORPORATION,
Plaintiff-Appellee,

v.

DALLAS & MAVIS FORWARDING COMPANY, INC., and Mack Trucks, Inc., Defendants-Cross Appellants,

and

Firestone Tire & Rubber Company, Defendant-Appellant.

No. 2541.

Court of Appeals of New Mexico.

Dec. 14, 1976.

Certiorari Quashed Feb. 3, 1977.

Ray H. Rodey, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendant-appellant Firestone.

Peter J. Adang, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendants-cross appellant Mack Trucks.

Leslie L. Rakestraw, Oldaker & Oldaker, Albuquerque, for appellee Springer.

Bill Chappell, Jr., Johnson, Paulantis & Lanphere, Albuquerque, for co-appellee and cross-appellant Dallas and Mavis.

OPINION

WOOD, Chief Judge.

The appeal involves the blowout of a new tire which had been driven approximately 40 miles. Springer (Springer Corporation) ordered a truck from Mack (Mack Trucks, Inc.). The truck was equipped with tires manufactured by Firestone (Firestone Tire & Rubber Company). Mack turned the completed truck over to Dallas (Dallas & Mavis Forwarding Company, Inc.) for delivery to Springer. The tire blew, and the truck wrecked, shortly after the delivery trip was underway. Springer recovered judgment against all defendants. Judgment was also entered in favor of certain cross-claiming defendants. The several appellants and cross-appellants raise a variety of issues. Two are dispositive: (1) evidence of a defect, and (2) common carrier liability.

Evidence of a Defect

Mack and Firestone were held liable to Springer on two theories—implied warranty and strict liability. Mack and Firestone were held liable to Dallas on its cross-claim on a theory of strict liability. Firestone was held liable to Mack on Mack's cross-claim, but with no theory of liability stated in the trial court's decision.

With the exception of Springer's judgment against Dallas, all the judgments in this case are based on an allegedly defective tire. Whether the legal theory is that of implied warranty or strict liability, the proponent (plaintiff or the cross-claimant) had the burden of proving a defect. *Markwell v. General Tire and Rubber Company*, 367 F.2d 748 (7th Cir. 1966); *State Farm Fire & Casualty Co. v. Miller Metal Co.*, 83 N.M. 516, 494 P.2d 178 (Ct.App.1971).

In addition to proof of a defect, there must be proof that the defect existed at a point in time sufficient to charge a particular defendant with the defect. *State Farm Fire & Casualty Co. v. Miller Metal Co.*, supra. The trial court's findings as to "point in time" are ambiguous as to Firestone. The trial court found the tire was defective when placed on the truck and the defect caused the blowout. Mack mounted the tire, but had the tire in its possession for five days before doing so. The trial court did not find that a defect existed in the tire at the time Firestone parted with it. However, one of the trial court's conclusions refers to the defective tire furnished by Firestone. Treating this conclusion as a finding, and construing the findings to support the judgment, the construed findings are to the effect that Firestone supplied a defective tire and the defect caused the blowout. *H. T. Coker Const. Co. v. Whitfield Transp., Inc.*, 85 N.M. 802, 518 P.2d 782 (Ct.App.1974).

Testimony concerning the blowout is that it was a line type rip on the outside of the sidewall. The rip extended some 40 to 50 percent along the circumference. There was a smaller break "lower down". In addition, there was a puncture hole in the tire which went clear through the tire. There was chafing around the area of the puncture hole. The witnesses agree that some of the long rip occurred at the time of the blowout. The evidence conflicts as to when the puncture hole occurred—before or after the blowout.

The tire was mounted by Mack. The truck was driven by a Dallas yard driver from Mack's plant to the Dallas yard, a

distance of 14 miles. The truck sat in Dallas' yard some 6 to 7 days before Dallas undertook to deliver the truck to Springer. The truck had been driven some 25 to 27 miles on the delivery trip when the blowout occurred. This distance had been traveled on paved roads. The driver testified that he had not run over anything and had not experienced any pulling which indicated a loss of pressure in the tire.

The truck was being driven within the speed limit on a clear flat road when the right front tire suddenly blew out. The truck veered to its right, crossed a ditch, went through a fence, a trailer park and another fence before coming to rest in another ditch.

The evidence is that when the tire was mounted by Mack, it was properly inflated and visually inspected for defects. None were found. The evidence is that before leaving the Dallas yard, the delivery driver visually inspected the tire for defects. Again, none were found. The delivery driver added approximately 5 pounds of pressure to the tires before starting on the trip. He brought the pressure up to 70 pounds, this being proper pressure for the tire under the existing loading conditions.

Springer states: "It is a logical inference from these facts that the tire was somehow defective, as a normal tire would not blow out under such conditions." Thus, the contention is that when a properly inflated new tire was being used on a truck properly driven on a paved road and a blowout occurred after approximately 40 miles of use, the fact finder could infer that the tire was defective. In our opinion, more was required.

There is no direct evidence of the alleged defect. The proof is circumstantial. A defect may be proved by circumstantial evidence. *Carter Farms Company v. Hoffman-Laroche, Inc.*, 83 N.M. 383, 492 P.2d 1000 (Ct.App.1971). The issue is whether the circumstantial evidence was sufficient.

"Circumstantial evidence consists of proof of facts or circumstances which give rise to a reasonable inference of the truth of the fact sought to be proved." U.J.I. Civil 17.6. An inference which will support a judgment cannot be supposition or conjecture, but must be a logical deduction from facts proven. *Gray v. E. J. Longyear Company*, 78 N.M. 161, 429 P.2d 359 (1967). In civil cases, where circumstantial evidence is relied on for recovery, the burden of proof is "to make out the more probable hypothesis." *Lopez v. Townsend*, 42 N.M. 601, 82 P.2d 921 (1938); see *Clower v. Grossman*, 55 N.M. 546, 237 P.2d 353 (1951); see the facts in *Carter Farms Company v. Hoffman-Laroche, Inc.*, supra. The evidence of a defect was insufficient under these rules.

Our reasons for this holding are:

1. After the delivery driver testified to the slit or rip in the sidewall, he was asked if that was the only damage he observed. His answer: "On the wheel. Truck tires have a split wheel. I never did find the rim, the thing that holds the tires together. It blowed out and nobody found it." There is no evidence as to the part this rim played, if any, in connection with the blowout.

2. It is undisputed that a puncture hole existed after the accident. Firestone's expert testified that the puncture hole caused the tire to be underinflated which in turn caused overflexing of the sidewalls and this caused the blowout. The trial court discarded this explanation, ruling that it was not credible. Yet, the fact of the puncture hole remains. Since the Firestone expert was not believed, the result is an absence of evidence as to the part, if any, played by the puncture hole in connection with the blowout.

We cannot hold that the more probable cause of the blowout was a defective tire absent some explanation concerning the rim and the puncture hole. Absent such an explanation, the circumstantial evidence does not permit an inference that the tire was defective. So holding, we do not reach the question as to the "point in time" the alleged defect existed.

Common Carrier Liability

Springer's judgment against Dallas was on the basis that Dallas was a common

carrier. The trial court so found, and this finding is not challenged. The contention under this issue involves one of the grounds by which a common carrier can avoid liability.

49 U.S.C.A. § 20(11) codified the common law rule concerning the liability of a common carrier. *Missouri P. R. Co. v. Elmore & Stahl,* 377 U.S. 134, 84 S.Ct. 1142, 12 L.Ed.2d 194 (1964) states:

> "[U]nder federal law, in an action to recover from a carrier for damage to a shipment, the shipper establishes his prima facie case when he shows delivery in good condition, arrival in damaged condition, and the amount of damages. Thereupon, the burden of proof is upon the carrier to show both that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability."

One of the causes relieving the carrier from liability is " 'the inherent vice or nature of the goods.' " *Missouri P. R. Co. v. Elmore & Stahl,* supra.

Dallas concedes that Springer made a prima facie case. It claims it met its burden of showing that damages to the truck resulted from the inherent vice or nature of the goods. It points out that damage to the truck resulted from the blowout. It asserts that it met its burden of proof because Firestone's expert testified that blowouts, such as the one in this case, were the result of the inherent nature of the tire.

This argument misconstrues the expert's testimony. The expert testified that, in his opinion, the puncture caused the tire to be underinflated, the underinflation caused pressure on the sidewalls and the result was the blowout. Thus, the basis for the blowout was underinflation of the tire, not the tire itself. This argument also overlooks the fact that the trial court ruled the expert's testimony was not to be credited. The trial court refused Dallas' request to find that the truck damages were caused by the inherent nature or vice of the goods supplied to Dallas. This request was properly refused; no evidence supports this theory other than the Firestone expert and he was not believed.

The trial court did not err in concluding that the truck damages were not of the type to relieve Dallas of its common carrier liability.

Oral argument is unnecessary. Springer's judgment against Dallas is affirmed. The other judgments are reversed. The cause is remanded for entry of a new judgment consistent with this opinion.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

559 P.2d 849

STATE of New Mexico, Plaintiff-Appellee,

v.

Lorraine SANCHEZ, Defendant-Appellant.

No. 2508.

Court of Appeals of New Mexico.

Dec. 22, 1976.

Certiorari Denied Jan. 27, 1977.

Jan Hartke, Chief Public Defender, Santa Fe, Reginald J. Storment, App. Defender, J. M. Scarborough, Espanola, Mary Jo Snyder, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Paquin M. Terrazas, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

ORDER

WOOD, Chief Judge.

Convicted of voluntary manslaughter, defendant was sentenced to serve a term of not less than seven nor more than fifteen years in the penitentiary. Defendant's notice of appeal was filed March 31, 1976.

The State moved to dismiss the appeal. A hearing on this motion was held December 22, 1976, at which counsel for the State and for the defendant appeared. The showing at this hearing was that defendant was committed to the penitentiary on March 30, 1976 and escaped from the penitentiary on September 10, 1976. Defendant's present whereabouts are unknown.

The question is whether "this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon . . . [her] pursuant to the conviction." *Molinaro v. New Jersey*, 396 U.S. 365, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970).

Should we rule on the merits of the appeal, our decision could not be carried out because defendant is not within the power nor under the control of this Court. There is no litigant before this Court "against whom the Court may enforce its decision." *Eisler v. United States*, 338 U.S. 189, 69 S.Ct. 1453, 93 L.Ed. 1897 (1949), Frankfurter, J., dissenting. If we should affirm, there is no indication defendant would surrender to New Mexico authorities; if we should reverse and defendant should seek consideration by New Mexico courts pursuant to any such reversal, defendant would in effect be dictating the terms under which she will subject herself to New Mexico authority. In this situation, defendant is not entitled to a determination of her claims, and the appeal should be dismissed. *Molinaro v. New Jersey, supra; Allen v. State of Georgia*, 166 U.S. 138, 17 S.Ct. 525, 41 L.Ed. 949 (1897); *United States v. Swigart*, 490 F.2d 914 (10th Cir. 1973); *Johnson v. Laird*, 432 F.2d 77 (9th Cir. 1970); *People v. Estep*, 413 Ill. 437, 109 N.E.2d 762 (1953), cert. denied, 345 U.S. 970, 73 S.Ct. 1112, 97 L.Ed. 1387 (1953), reh. denied, 346 U.S. 842, 74 S.Ct. 15, 98 L.Ed. 362 (1953). See *Estelle v. Dorrough*, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975).

In reaching this result we have not overlooked N.M.Const., Art. VI, § 2 which provides "that an aggrieved party shall have an absolute right to one appeal." She was accorded that right but, by her escape, defendant abandoned the appeal. *Allen v. State of Georgia,* supra.

The appeal is dismissed. The dismissal is effective upon entry of this Order.

HENDLEY, J., concurs.

HERNANDEZ, Judge (dissenting in part and concurring in part).

I agree that the appeal can be dismissed but am of the view that defendant should be given thirty days from the date of the filing of the State's motion in which to voluntarily submit to New Mexico authorities and if defendant does not submit, the appeal will be dismissed without further notice upon expiration of the thirty days.

559 P.2d 1190

Mary CAMPOS, Plaintiff-Appellee,

v.

Irene WARNER, Defendant-Appellant.

No. 10955.

Supreme Court of New Mexico.

Feb. 10, 1977.

Hunter L. Geer, Albuquerque, for defendant-appellant.

Houston, Housman, Freeman & Dawe, R. Thomas Dawe, Albuquerque, for plaintiff-appellee.

OPINION

EASLEY, Justice.

Defendant-Appellant, Irene Warner (Warner), sold real estate to Rentex, Inc. pursuant to a contract for deed. Rentex leased the property to Plaintiff-Appellee, Mary Campos (Campos). Rentex defaulted on its contract to buy. Warner cancelled the contract of sale and refused to honor the lease agreement between Rentex and Campos.

Campos sued Warner for damages for wrongful cancellation of the lease. The court awarded damages in the amount of $2,888.65. Warner appeals. We reverse the decision of the trial court.

Warner as the owner of the real estate and Rentex, the purchaser, entered into a standard printed-form real estate contract dated February 15, 1973. The contract contained a forfeiture clause in the event of failure to make the required payments. Rentex later leased its interest to Campos, but Warner had no knowledge of the leasing of the property at the time it occurred.

After Rentex defaulted on its payments under the contract with Warner, Warner took the required steps to terminate the interest of Rentex by filing an affidavit of forfeiture on July 17, 1976, and made it known to Campos that her lease would not be recognized.

Campos claimed that Warner was bound by the lease contract between Rentex and Campos. The trial court so found. Campos further claimed that Warner had ratified the lease agreement between Rentex and Campos by receiving money for rent after Warner had cancelled the real estate contract with Rentex. The trial court found that there was a ratification.

Warner points out that the contract by its plain terms was obligatory upon successors and assigns of Rentex and that it speci-

fied that legal title should remain in Warner until the contract was fully performed.

This is a case of first impression in New Mexico. However, this court has adopted a principle in cases dealing with the rights of judgment creditors of vendees under real estate contracts that is persuasive with reference to the issue at hand. In *Warren v. Rodgers,* 82 N.M. 78, 475 P.2d 775 (1970), this court considered whether a vendee under a real estate contract has an interest in real estate to which a judgment lien can attach. In that case the purchaser of the real estate defaulted on his contract and the seller declared a forfeiture and regained possession. This court stated (82 N.M. at 79, 80, 475 P.2d at 776, 777):

> The contract of sale never having been completed by the debtor-vendee, he had no vested legal interest in the real estate on which the lien could attach . . .
>
> A judgment creditor can claim no greater rights than a vendee might have asserted in offering to cure a default. The vendor had no contractual obligation with the judgment creditor and, therefore, was not bound to accept him in lieu of the vendee.

In accord is *Petrakis v. Krasnow,* 54 N.M. 39, 56, 213 P.2d 220, 230 (1949). Also see *Mutual Building & Loan Ass'n of Las Cruces v. Collins,* 85 N.M. 706, 516 P.2d 677 (1973) which overruled a portion of *Warren v. Rodgers,* supra, on a point that is not relevant to this case.

Although there is authority to the contrary, this court is persuaded that the better-reasoned view is represented by the leading case of *Schrunk v. Andres,* 221 Minn. 465, 22 N.W.2d 548 (1946), which considered facts which were in all material ways analogous to those in the instant case. The court ruled in favor of the defendant-owner, saying (22 N.W.2d at 551):

> It is clear that with the termination of the Mootz contract for deed plaintiff's interest in the premises, whatever it may have been, terminated. A lessor cannot create any greater interest in his lessee than he himself possesses, and the lessee takes subject to all claims of title enforceable against the lessor.

We hold that Rentex by leasing the property to Campos could not create any greater interest in Campos than it possessed and that Campos took the property subject to all claims of title enforceable against Rentex. We reverse the trial court on this issue.

To hold that an owner under these circumstances could not regain the possession of his property because of a subsequent lease could lead to ludicrous and perhaps even disastrous consequences. One hypothetical example: if a purchaser leased the property to a third party for ninety-nine years at a rental fee far below an amount that would be fair and reasonable, and then defaulted on his obligation to pay, it would be unjust to force the owner to submit to the lease.

Without burdening the record with a recitation of the evidence bearing on the question of ratification, the court has carefully studied the transcript and finds that there is no substantial evidence in the record to support the trial court's findings and conclusions that Warner ratified the lease agreement between Campos and Rentex.

The decision of the trial court is reversed, and the complaint of plaintiff-appellee is ordered dismissed.

McMANUS, J., and ROZIER E. SANCHEZ, D. J., concur.

559 P.2d 1192

Orth C. LACKEY and Mary R. Lackey, Plaintiffs-Appellants,

v.

MESA PETROLEUM COMPANY, Koch Oil Company, and the Permian Corporation, Defendants-Appellees.

No. 2408.

Court of Appeals of New Mexico.

Aug. 31, 1976.

Joseph E. Roehl, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for plaintiffs-appellants.

Harold L. Hensley, Jr., Paul J. Kelly, Jr., Hinkle, Bondurant, Cox & Eaton, Roswell, for defendants-appellees Mesa and Permian.

Thomas F. McKenna, Albuquerque, for defendant-appellee Koch.

OPINION

SUTIN, Judge.

Plaintiffs appeal from an adverse summary judgment granted all defendants, arising out of a claim for damages and an accounting from defendants based upon an oil and gas lease. We reverse.

A. *Interrogatories signed and verified by Mesa's attorney were not under oath and did not support its summary judgment.*

Rule 33 of the Rules of Civil Procedure provides in part:

> Any party may serve upon any adverse party written interrogatories to be answered by the party served or, *if the party served is a * * * private corporation * * *, by any officer or agent, who shall furnish such information as is available to the party. * * * The interrogatories shall be answered separately and fully in writing under oath.* The answers shall be signed by the person making them; * * *.

Plaintiff submitted extensive interrogatories to defendant Mesa Petroleum Company, a private corporation. Answers were signed and verified by an attorney of record in this case. The verification was made *on information and belief* "for the reason that the said Defendant does not have an officer or other agent available at this time for such purpose."

Answers to interrogatories, based solely on information and belief, are not sufficient to assist Mesa in its claim for summary judgment. These answers must be made *under oath. United States v. 58.16 Acres of Land, Etc., Clinton Cty., Ill.,* 66 F.R.D. 570 (D.Ill.1975).

An oath is an appeal by a person to God, to witness the truth of what he declares. *Youngstown Steel Door Co. v. Kosydar,* 33 Ohio App.2d 277, 294 N.E.2d 676 (1973); *In Re Rice,* 35 Ill.App.2d 79, 181 N.E.2d 742 (1962); *Asher v. Sizemore,* 261 S.W.2d 665 (Ky.1953); *Miller v. Palo Alto Board of Supervisors,* 248 Iowa 1132, 84 N.W.2d 38 (1957); 67 C.J.S. Oaths and Affirmations § 1 (1950); 58 Am.Jur.2d, Oath and Affirmation, § 1 (1971).

An attorney may answer interrogatories as an agent of a private corporation but verification must state that the attorney made answers to the interrogatories with *personal knowledge* that the answers were true and correct. *Jones v. Goldstein,* 41 F.R.D. 271 (D.Md.1966); *Antgoulatos v. Honduran S. S. Norlandia,* 139 F.Supp. 385 (D.Md.1956); *Nagler v. Admiral Corporation,* 167 F.Supp. 413 (D.N.Y.1958). In *Nagler,* the Court said verification on "knowledge, information and belief" leaves a party "with convenient avenues of evasion. It skillfully manages to avoid the requirement of distinguishing between matters stated on a party's own knowledge and matters stated on information and belief. It also per-

mits each [party] to avoid stating specifically under oath with respect to questions he claims to be unable to answer, that he does not have the information necessary to answer the question, and that the answers given reflect all the information available to him." [167 F.Supp. at 415].

Mesa relies on 4A Moore's Federal Practice § 33.07 (1975). This authority holds that an attorney may sign for a private corporation, but *Moore's* does not discuss the verification by the attorney. Section 33.26, p. 33–143, states:

> In 1946, the Rule was amended to make it clear that whatever officer or agent of the corporation is chosen to answer and verify interrogatories on behalf of a corporate party, he must " * * * funish [sic] such information as is available to the party." *Thus a corporation's answers must include facts and knowledge of its agents and any person under its control.* [Emphasis added].

Bailey v. New England Mut. Life Ins. Co., 1 F.R.D. 494 (D.Cal.1940) says:

> Rule 33 has a distinctive function separate and apart from the other rules, *in the discovery of truth reposing in the mind of the defendant, bearing upon the issue in preparation for trial.* It is peculiarly adopted to the use of parties in preparing for trial, in the interest of economy of time, for if admissions are made the fact is established, or if answers are adverse, and believed untrue, or the fact camouflaged in such a fashion as to becloud the truth, for use in cross-examination to clarify the answers, and uncover the truth. [Emphasis added] [1 F.R.D. at 495].

We hold that where an oath is required to verify answers to interrogatories by an officer or agent of a private corporation, the verification must state the truth of the answers. Mesa relies primarily upon its answers to plaintiffs' interrogatories to support summary judgment. Its answers on information and belief are ineffective. In their absence, genuine issues of material fact exist.

B. *The court's order sustaining objections by Mesa to interrogatories of plaintiffs under Rule 33 is erroneous.*

Plaintiffs submitted interrogatories to defendant Mesa on *January 20, 1975.* Mesa made objections to many of the interrogatories, but did not, pursuant to Rule 33, supra, "serve written objections thereto *together with a notice of hearing the objections at the earliest practicable time.*" [Emphasis added]. At least five days' notice should be given as provided by Rule 6(d) of the Rules of Civil Procedure. In this instance, the record shows that no notice was ever given and no hearing was ever held. On December 1, 1975, the day summary judgment was entered, the trial court entered an order that "Objections to Interrogatories previously filed by the Defendant, Mesa Petroleum Co., are well taken and therefore such interrogatories need not be answered." Mesa submits that its inadvertent failure to serve a notice of hearing at the earliest practicable time did not constitute a waiver of their objections.

Rule 33 should be strictly adhered to. However, where the objector informs the objectee that he will try to arrange an agreeable date for a hearing on the objections, a "just" determination requires that the objections not be waived. *Miller v. United States,* 192 F.Supp. 218 (D.Del.1961). This ruling constitutes a technical failure to comply with the terms of Rule 33, resulting in no prejudice and apparently little delay. But where the objectee informs the objector of his failure to comply with the rule, and the objector ignores the warning for a substantial period of time, objections are overruled. *Baldwin v. Liberty Mutual Fire Insurance Company,* 33 F.R.D. 311 (D.Del. 1963).

In the instant case, Mesa did not comply with the rule, and gave no notice to plaintiffs of an intention to comply. Over eleven months passed before the court, without a hearing, sustained the objections and on the same day entered summary judgment. Mesa's failure to comply with the rule, and plaintiffs' prejudice resulting therefrom, could require that Mesa's objec-

tions to plaintiffs' interrogatories be waived and overruled. We do not, however, declare that result. This matter rests within the discretion of the trial court after a hearing.

Mesa does not reach the essence of the rule—that a hearing is necessary because "The burden of persuasion is on the objecting party to show that the interrogatories should not be answered—that the information called for is privileged, not relevant, or in some other way not the proper subject of an interrogatory." 4A Moore's Federal Practice § 33.27, pp. 33–152, 153. We note that all objections made are insufficient. See, infra. If a hearing is held, it should be noted that the objections presently made should be overruled and proper objections should be made or answers given under oath.

Cardox Corp. v. Olin Mathieson Chemical Corp., 23 F.R.D. 27 (D.Ill.1958), says:

> Rule 33 establishes a method of making objections, including provisions for notice and hearing thereon, and an orderly procedure for the disposition of the same. Above all, the Rule contemplates that all objections will first be submitted to the court for its consideration and decision. * * * The best interests of parties litigant and of the court are served if all parties are held to strict account in their compliance with established and orderly procedures. [23 F.R.D. at 31].

■ In the instant case, the trial court proceeded to a ruling without a hearing. This failure to grant plaintiffs a hearing on objections to interrogatories was erroneous.

C. *The court's order sustaining objections by Koch to plaintiffs' interrogatories is erroneous.*

Plaintiffs submitted extensive interrogatories to defendant Koch Oil Company. After hearing, the trial court sustained objections to numerous interrogatories.

In support of Koch's motion in support of its defense that plaintiffs failed to state a claim for relief, Koch filed an affidavit of Frederick J. Hansen, house counsel for and assistant secretary of Koch Industries, Inc., parent of Koch Oil Company.

■ Plaintiffs' interrogatories were directed to this affidavit.

Defendant Koch's objections were stated as follows:

> 3. As to question No. 5(a), (b), (c), (d), (e), (k), they are oppressive, burdensome, ambiguous, not within the scope of the issue and not reasonably calculated to the discovery of admissible evidence; the affidavit was submitted only in connection with the Motion to Dismiss.
>
> * * * * * *
>
> 6. As to question No. 8, it is beyond the scope of the case and calls for an opinion and conclusion and Koch Oil Company is not a party to the lease, and is not proper discovery.
>
> 7. As to question No. 9(b), (c), (d), (e), (f) is beyond the scope of the case, calls for legal opinions and conclusions, is not calculated to proper discovery.
>
> 8. As to question No. 10, such is not a proper question under the Rules, calls for opinions and conclusions, and amounts to argumentation and is beyond the scope of the case as to this defendant.

These objections are not sufficient. Extensive authority is cited in support of the following statement made in 4A Moore's Federal Practice § 33.27, pp. 33–151, 152:

> General objections, such as the objection that the interrogatories will require the party to conduct research and compile data, or that they are unreasonably burdensome, oppressive, or vexatious, or that they seek information that is as easily available to the interrogating as to the interrogated party, or that they would cause annoyance, expense, and oppression to the objecting party without serving any purpose relevant to the action, or that they are duplicative of material already discovered through depositions, or that they are irrelevant and immaterial, or that they call for opinions and conclusions, are insufficient.

The trial court did not state its reasons for sustaining defendant Koch's objections

to the above numbered interrogatories. The ruling of the court, therefore, was erroneous; Koch is required to answer the above numbered interrogatories.

D. *Summary judgments granted are reversed.*

Plaintiffs sued defendants for: breach of contract and for payment due under an oil and gas lease; for an accounting of production, taxes, costs and moneys received to date, and for an injunction from further defaults in payments; and in tort for compensatory and punitive damages arising from the wrongful, negligent and malicious acts of the three defendant oil companies.

(1) *Defendant Mesa*

In the absence of answers to interrogatories, we are left with the answer of Mesa. Defendant Mesa answered in admissions and denials with two affirmative defenses: (1) the complaint failed to state a claim upon which relief can be granted, and (2) plaintiffs are estopped by the express terms of the oil and gas lease. Based upon the pleadings, Mesa is not entitled to summary judgment under Rule 56(c). The burden was on Mesa to establish a prima facie case showing there was no genuine issue of material fact. It failed to do so.

(2) *Defendant Koch*

Defendant Koch answered in admissions and denials with three affirmative defenses: (1) the complaint fails to state a claim upon which relief may be granted; (2) the complaint violates Rule 8, Rules of Civil Procedure; (3) Koch Oil Company is holding moneys for the presumed account of the plaintiffs because of the failure of the plaintiffs to first sign Koch's Division Order, a customary and established procedure in the oil and gas industry.

(a) *First Defense*

Koch filed an affidavit in support of its first defense, that of failure to state a claim, but its motion to dismiss was denied.

(b) *Third Defense*

In support of the third defense, Koch filed an affidavit by Hansen that plaintiffs' attorney was previously supplied with accountings of all production from the lease purchased by Koch and supplied the latest accounting through the month of August, 1975; Hansen averred that further accountings will be delivered to plaintiffs or their attorney, and all sums held in suspense and accruing to plaintiffs will be promptly remitted in due course of business.

In response, plaintiffs filed an affidavit that stated:

> 10. We have never received any accounting that we could understand of what was produced, when it was produced, who produced it, what was our prorata share, who we were to receive it from, why we were to receive it, what oil was being produced, what gas was being produced, what other products were being produced, who the products were being sold to, for what price, what reports were being made to the State or other governmental agencies, what taxes were due, what taxes were being paid, etc.
>
> 11. We have received a half a dozen or more forms from different sources that we have been asked to sign. Some of the forms merely have our name on them and a red "X" as the place to sign but no explanation as to why we should sign.

A genuine issue of fact exists, on the third affirmative defense, on the issue of an accounting.

(c) *Summary Judgment*

Based on the pleadings filed, genuine issues of material fact exist on the various claims of plaintiffs against Koch.

(3) *Defendant Permian*

For the reasons stated supra, genuine issues of material fact exist.

The summary judgments granted defendants are reversed.

E. *Motions for summary judgment were adequate under Rule 7(b)(1).*

Plaintiffs moved the trial court to strike and quash defendants' motions for summary judgment because defendants failed to comply with Rule 7(b)(1) of the Rules of Civil Procedure. Plaintiffs claim this was error. We disagree. This rule reads:

> *An application to the court for an order shall be by motion which,* unless made during a hearing or trial, shall be made in writing, *shall state with particularity the grounds therefor,* and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. [Emphasis added].

Summary judgment can be granted when "there is no genuine issue as to any material fact". Rule 56(c) of the Rules of Civil Procedure. A motion for summary judgment, based upon Rule 56, which states that there is no genuine issue as to any material fact, does "state with particularity the grounds therefor". *United States v. Krasnov,* 143 F.Supp. 184 (D.Pa.1956).

F. *Plaintiffs' complaint violates Rule 8(a) of the Rules of Civil Procedure.*

Plaintiffs' complaint violates Rule 8(a) of the Rules of Civil Procedure. It is suggested that an amended complaint be filed in accordance with Rule 15 of the Rules of Civil Procedure, and that it be in compliance with Rule 8(a).

Reversed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., dissenting.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

In my opinion all six of plaintiffs' points of error are without merit.

Rule 56(c), N.M.R.Civ.P. provides, in pertinent part, that:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any *material fact* and that the moving party is entitled to a judgment as a matter of law." [Emphasis mine]

Ballentine's Law Dictionary defines "fact" as:

> "A thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence. An actual happening in time or space or an event mental or physical. That which has taken place, not what might or might not have taken place."

"A material fact is one of such a nature as will affect the result or outcome of the case depending upon its resolution." *Rathbun v. W. T. Grant Company,* 300 Minn. 223, 219 N.W.2d 641 (1974). "[T]he law applicable to a given case determines what is a material fact. Only these facts are material which have some legal significance, that is, control in some way the legal relations of the parties." *Ahten v. Citizens Homestead Association,* 163 So.2d 403 (La.App.1964).

The material facts upon which the outcome of this case depends, as I see them, are the following: Plaintiffs, in paragraph 1 of their complaint, admit that on or about November 7, 1969 they entered into an oil and gas lease with Pubco Petroleum Corporation. Plaintiffs, in paragraph 3 of their complaint, acknowledge that Mesa Petroleum Company is the successor in interest to Pubco Petroleum Corporation. Plaintiffs, in paragraph 4 of their complaint, acknowleged having received a division order from the defendant, Koch Oil Company and attached a copy of it to their complaint. Exhibit "F" to plaintiffs' complaint is a letter from Koch Oil Company to the plaintiffs informing them that they were holding several thousand dollars of royalty payments pending receipt of an executed division order, and that upon receipt of that order a check would be sent to plaintiffs. Plaintiffs, in paragraph 6 of their complaint, acknowledge receipt of a division order from the defendant, Permian Corporation, and attached a copy of it to their complaint. The lease (Ex. A to plaintiffs' complaint)

recites, among other things, that: (1) It would remain in force for a term of five years and as long thereafter as oil and gas were produced; and (2) the royalties to be paid to plaintiffs were 3/16ths to be delivered at the wells or to the credit of the plaintiffs in the pipe line to which the wells might be connected. Plaintiffs, in answer to interrogatories propounded by the defendant, Koch Oil Company, stated that they had not made any arrangements for taking their share of the production in kind and that they had not made any arrangements or contracts to sell their share.

Mr. Frederick J. Hansen, house counsel and assistant secretary of Koch Industries, Inc., of which the defendant, Koch Oil Company was a division, stated the following in his affidavit: (1) that Koch Oil Company has been engaged in the business of purchasing crude oil and other liquid hydrocarbons in excess of 20 years; (2) that it engages in such business in 11 states, including New Mexico, and is "presently the largest single purchaser by volume of such hydrocarbons in the states of Oklahoma and Kansas"; (3) that Koch Oil Company consistently requires the execution of division orders before making payment; (4) that he personally was intimately familiar with Koch Oil Company hydrocarbon purchasing business for more than 10 years, and that he could not remember of the company ever disbursing money for such purchases without a signed division order; (5) that to the best of his knowledge the practice followed by Koch Oil Company was the common and customary practice followed throughout the oil industry; (6) that Koch Oil Company's form of division order contains only usual and customary terms commonly found in division orders from other purchasers.

The law applicable to this case, in my opinion, is the following: "An oil and gas lease is merely a contract between the parties and is to be tested by the same rules as any other contract." *Leonard v. Barnes,* 75 N.M. 331, 404 P.2d 292 (1965). Judge Phillips speaking for the court in *Wolfe v. Texas Co.,* 83 F.2d 425 (10th Cir. 1936), involving many of the issues in this case, stated:

> "Parties to a contract are presumed to know a well-defined trade usage generally adopted by those engaged in the business to which the contract relates.
>
> Persons, who enter into a contract in the ordinary course of business; unless the terms of the contract indicate a contrary intention, are presumed to have incorporated therein any applicable, existing general trade usage relating to such business.
>
> * * * * * *
>
> In the absence of an express provision in an oil and gas lease with respect to marketing the production, there is an implied duty on the part of the lessee to make diligent efforts to market the production in order that the lessor may realize on his royalty interest."

"A division order is an instrument required by the purchaser of oil and gas in order that it may have a record showing to whom and in what proportions the purchase price is to be paid." *Wagner v. Sunray Mid-Continent Oil Company,* 182 Kan. 81, 318 P.2d 1039 (1957). Section 20–4–103(a), N.M.S.A. 1953 (Repl. Vol. 4, Supp. 1975) provides: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Our Supreme Court in *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972) adopted the following from 3 Barron and Holtzoff, Federal Practice and Procedure, § 1234 at 124–126 (Revised by Wright 1958), as the test to be applied in evaluating a motion for summary judgment:

> "Though it has been said that summary judgment should not be granted if there is the 'slightest doubt' as to the facts, such statements are a rather misleading gloss on a rule which speaks in terms of 'genuine issue as to any material fact,' and would, if taken literally, mean that there could hardly ever be a summary judgment, for at least a slight doubt can be developed as to practically all things human. A better formulation would be that the party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine

issue exists. If there are such reasonable doubts, summary judgment should be denied. A substantial dispute as to a material fact forecloses summary judgment."

Looking now at some of plaintiffs' specific contentions. As to Mesa Petroleum Co., plaintiffs contend that Mesa's objections and answers to interrogatories are invalid and "are utterly of no force and effect whatsoever on the consideration of the motion for summary judgment." Assuming, but not deciding, that this contention is correct any consideration of either of these documents by the trial court would be harmless error because all of the material facts are contained in other documents, mostly in plaintiffs' complaint. Plaintiffs further contend that "there being not a single item, word or phrase properly of record for Mesa Petroleum Co. other than its answer" the trial court prematurely and therefore erroneously granted Mesa's motion for summary judgment. Rule 56(c), supra, does not limit the trial court's consideration solely to pleadings and other documents submitted by the movant. The trial court can consider all pleadings and other documents properly of record.

As to Koch Oil Co., plaintiffs contend that since Koch admitted that it was holding money belonging to plaintiffs that the trial court erred in entering a judgment as to Koch which recited that Koch: "have and recover judgment on all issues in this cause, dismissing this action with prejudice." Plaintiffs in their complaint prayed that defendants be required to make a proper accounting and to "show cause to justify their continued illegal actions" and for such other relief as might be proper under the circumstances. Koch in an affidavit by Mr. Frederick J. Hansen, its house counsel, in support of its motion for summary judgment gave an accounting through the month of August, 1975. Any claim that plaintiffs might have against Koch for such money was not foreclosed by this judgment.

Plaintiffs under Point of Error II, state that an oil and gas lease is a contract and that it is to be construed most strongly against the lessee. That such a lease contains implied covenants on the part of the lessee, i. e., to market the production, to develop the properties, to explore, to discover and to produce. They then state that: "it is the contention of plaintiffs that the oil and gas lease has been breached" but that the extent of the breach is unknown. Paragraphs 7 and 8 are equally unspecific as to who, when and how, any of the defendants breached any of these implied covenants. The most specific allegation is contained in paragraph 7, to-wit: "The Defendants and each of them have breached the implied duty of fair dealing with the plaintiffs." I would first point out that Koch Oil Co. and the Permian Corporation are not parties to the lease, and consequently, are not bound by any of its terms, express or implied. Mesa's answers to paragraphs 7 and 8 of plaintiffs' complaint were as follows:

"6. Answering Paragraph 7, Defendant admits that the oil and gas lease contains numerous and varied implied covenants and that this Defendant, as successor in interest and title to Pubco Petroleum Corporation, is the designated agent of the Plaintiffs for purposes of delivering the oil to pipeline purchasers for the Plaintiffs' credit, all of which has been done in accordance with law and the requirements of the oil and gas lease in question. Defendant denies the remaining allegations contained in said Paragraph 7.

"7. Answering Paragraph 8, Defendant denies any failure to comply with the express and implied provisions, conditions, covenants, duties or obligations which it assumed under the terms of the lease agreement in question and further denies that the Plaintiffs are entitled to any injunction or other relief by reason of the foregoing allegations."

These answers together with Mesa's letter of September 27, 1974, (Exhibit "H" to plaintiffs' complaint) to plaintiffs, the affidavit of Mr. Frederick J. Hansen, dated February 28, 1975, together with the lease (Exhibit "A" to plaintiffs' complaint), in my

opinion, established a prima facie showing on the part of Mesa that it was entitled to summary judgment. Once such a showing was made the burden was on the plaintiffs to come forward and demonstrate that a genuine issue of fact existed. *Goodman v. Brock,* supra. Plaintiffs filed two affidavits in response, one by their attorney, Mr. Joseph E. Roehl, four paragraphs of which merit discussion: (1) that Mesa's motion should be stricken for failure to comply with the provisions of Rule 7(b)(1), N.M.R. Civ.P.; (2) that the motion should be stricken because it was premature in that Mesa had not made "good, sufficient and proper answers" to certain enumerated interrogatories; (3) that since Mesa had denied the allegations of paragraph 18 of the complaint that this then raised a genuine issue for trial; (4) that plaintiffs would shortly file an amended complaint setting forth plaintiffs' theories and causes of action in individual counts. Rule 7(b)(1), supra, does not apply to motions for summary judgment because Rule 56 is sui generis. Furthermore, a motion for summary judgment does not require specification beyond the appropriate language of the statute. Mesa's answers to interrogatories were filed February 5, 1975, and Mr. Roehl's affidavit was filed November 12, 1975. During this period of nine months plaintiffs had an appropriate remedy under Rule 37(a), N.M. R.Civ.P. and did not avail themselves of it. Considering that the primary purpose of Rule 56 is to hasten the administration of justice and expedite litigation [*Agnew v. Libby,* 53 N.M. 56, 201 P.2d 775] raising such a defense at this late date was not timely. Paragraph 18 of plaintiffs' complaint states: "The ex parte action of the Defendants herein involved is totally invalid and not binding upon the plaintiffs." Plaintiffs are referring to the division orders sent to them by Koch and Permian. As plaintiffs in their brief-in-chief acknowledge, there is an implied covenant in oil and gas leases with respect to marketing the production. There is an implied duty on the part of a lessee to make diligent efforts to market the production. *Darr v. Eldridge,* 66 N.M. 260, 346 P.2d 1041 (1959). Therefore, when plaintiffs did not provide storage or arrange for the sale of their share of the royalty it became Mesa's duty to market it. Under the existing trade practice the purchasers of the oil have the right to withhold payment until a division order signed by plaintiffs had been furnished. *Wolfe v. Texas Co.,* supra. Hence, Mesa's denial of the allegations of paragraph 18 did not raise a material issue of fact for determination at trial. Plaintiffs' statement that they intended to file an amended complaint was not a valid ground for denying defendants' motions. A motion for summary judgment cannot be defeated by reason that the plaintiffs may have a good cause of action on a differently stated complaint. *Bright v. O'Neill,* 3 A.D.2d 728, 159 N.Y.S.2d 742 (1957). The affidavit of the plaintiff, Mary R. Lackey, did not, in my opinion, controvert any of the material facts.

"If upon consideration of all material undisputed facts, a basis is present to decide the issues as a matter of law, summary judgment is proper." *Worley v. United States Borax and Chemical Corp.,* 78 N.M. 112, 428 P.2d 651 (1967). Since all of the material facts were undisputed nothing remained for the trial court to do but to determine whether defendants were entitled to a judgment based on those facts. The trial court, in my opinion, correctly determined that they were entitled to a judgment. Granted that plaintiffs alleged many things in their long complaint, however, even assuming the correctness of all of them aside from those facts recited above, none were material to the outcome of this litigation.

559 P.2d 1201

Borden W. WILSON, Plaintiff-Appellee,

v.

LEONARD TIRE COMPANY, INC., and Jimmy Chavez, Defendants-Appellants.

No. 2539.

Court of Appeals of New Mexico.

Nov. 16, 1976.

Rehearing Denied Dec. 2, 1976.

Certiorari Denied Jan. 7, 1977.

James C. Ritchie, Bruce D. Hall, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for appellants.

Thomas F. McKenna, Albuquerque, for appellee.

OPINION

WOOD, Chief Judge.

The appeal is concerned with the use of medical reports of physicians not called to testify at the trial of this personal injury case. The reports contained the opinions of the nontestifying physicians; over defendants' objection, these opinions were admitted into evidence at the trial. The questions presented are whether the opinions were admissible: (1) as medical history; (2) under Evidence Rule 703 and Evidence Rule 705; (3) under Evidence Rule 803(24) or (4) as impeachment of a testifying physician. An additional question (5) is whether erroneous admission of the opinions was prejudicial error.

Plaintiff's car was struck from behind by defendants' vehicle. Plaintiff sued for personal injuries. Defendants admitted liability; the issue tried was that of damages. Plaintiff had a preexisting degenerative arthritic condition of the cervical and lumbar spine. An issue at trial was the extent the preexisting condition had been aggravated as a result of the accident. See *Morris v. Rogers,* 80 N.M. 389, 456 P.2d 863 (1969).

Medical History

In narrating plaintiff's medical history subsequent to the accident, Dr. Prescott was permitted to testify that plaintiff had been examined at a clinic in Oklahoma "and following an evaluation they recommended a hip transplant." Defendants' contention is that the recommendation was hearsay, not properly includable as a part of the medical history.

We do not decide whether the clinic's recommended treatment was admissible as a statement for purposes of medical diagnosis or treatment. See Evidence Rule 803(4); *Waldroop v. Driver-Miller Plumbing & Heating Corp.,* 61 N.M. 412, 301 P.2d 521 (1956). As a part of the same history, Dr. Prescott testified that the clinic's recommendation was reported to two other physicians who did *not* recommend the surgery. Dr. Prescott testified that he saw no indications for doing a hip replacement; that he was not impressed with the condition of the hip joint. There is evidence that plaintiff complained of hip pain. Dr. Prescott related this to the lumbar condition. The inference from Dr. Prescott's testimony is that there was no cause and affect relationship between the accident and the condition of the hip joint.

Any error in admitting the clinic's recommendation as a part of the medical history was harmless.

Evidence Rules 703 and 705

Evidence Rule 703 states that facts or data upon which an expert bases an opinion may be those made known to him at or before the hearing. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Defendants had Dr. Prescott identify various medical reports that Dr. Prescott reviewed in preparation for his trial testimony. Defendants cross-examined Dr. Prescott extensively as to asserted discrepancies between these reports and Dr. Prescott's trial testimony. This cross-examination went to the pre-accident condition of plaintiff's lumbar spine and the asserted absence of change in that condition subsequent to the accident. There is no claim that this cross-examination was improper.

Two of the reports identified by Dr. Prescott as having been utilized by him were the reports of Dr. Margo and Dr. Harvie. Defendants called Dr. Klebanoff and Dr. Stern as witnesses at trial. During the cross-examination of these two defense witnesses, the trial court permitted plaintiff to introduce medical opinions contained in the reports of Dr. Margo and Dr. Harvie. These opinions were to the effect that plaintiff's lumbar condition had been aggravated by the accident.

The opinions contained in the reports of Drs. Margo and Harvie could not have been properly admitted under Evidence Rule 703. That rule permits use of inadmissible facts and data reasonably relied on by the expert in forming an opinion. There is no evidence that Dr. Klebanoff or Dr. Stern relied on the reports of Dr. Margo or Dr. Harvie in forming their opinions. Even if the physicians had relied on hearsay in forming their opinions, that would not make the hearsay itself admissible. *United States v. Harper,* 450 F.2d 1032 (5th Cir.1971); *National Bank of Commerce v. City of New Bedford,* 175 Mass. 257, 56 N.E.2d 288 (1900); *City of Cheyenne v. Frangos,* 487 P.2d 804 (Wyo.1971); Compare *Herrera v. Springer Corporation,* 89 N.M. 45, 546 P.2d 1202 (Ct.App.1976).

Plaintiff contends the opinions in the reports of Dr. Margo and Dr. Harvie were properly admitted under Evidence Rule 705. That rule states that an expert may be required to disclose the facts or data underlying his opinion on cross-examination. Plaintiff asserts that under Evidence Rule 705, he could properly bring out that Dr. Klebanoff and Dr. Stern had *rejected* the opinions of Dr. Margo and Dr. Harvie.

Plaintiff's argument might be pertinent if Dr. Klebanoff and Dr. Stern had *considered* the reports of Dr. Margo and Dr. Harvie. There is nothing showing the reports were considered. Not having con-

sidered the reports, the defense witnesses could not have *rejected* the reports.

Neither Evidence Rule 703 nor Evidence Rule 705 authorized admission of the opinions in the reports of Dr. Margo and Dr. Harvie.

Evidence Rule 803(24)

The opinions in the reports of Dr. Margo and Dr. Harvie were offered to prove the truth of the claim that plaintiff's lumbar condition had been aggravated by the accident. These opinions were hearsay. Evidence Rule 801(c); *Waldroop v. Driver-Miller Plumbing & Heating Corp.,* supra.

Hearsay is not admissible except as provided by the Rules of Evidence, other rules adopted by the Supreme Court or by statute. Evidence Rule 802. Evidence Rule 803 lists 24 items not excluded by the hearsay rule. In denying defendants' motion for a new trial, the trial court ruled that the opinions of Dr. Margo and Dr. Harvie were admissible under the 24th item of Evidence Rule 803. The amendment to the 24th item, effective April 1, 1976, is not applicable. The wording of the 24th item applicable to this case is:

> "(24) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions [the prior 23 items] but having comparable circumstantial guarantees of trustworthiness."

The Advisory Committee's Note to the proposed Rules of Evidence for United States Courts states that item 24 provided "for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions."

How to get into evidence the opinion of an absent medical witness could hardly be considered an unanticipated situation. Our Rules of Civil Procedure, which went into effect in 1942, provide for discovery of testimony by depositions and interrogatories. See Compiler's Notes to § 21–1–1, N.M.S.A. 1953 (Repl. Vol. 4). The question of whether plaintiff's lumbar area had been aggravated by the accident was one of the issues being tried. The need for medical opinion concerning this aggravation could not have been unanticipated.

In addition, the transcript of this trial fails to show that the opinions of Dr. Margo and Dr. Harvie were of demonstrated trustworthiness. Our concern, at this point, is with the completeness of the hearsay opinion. See 4 Weinstein's Evidence, ¶ 800[01], Cross-Examination (1975). Neither the report of Dr. Margo nor the report of Dr. Harvie indicates that the physicians were aware of plaintiff's extensive medical history or diagnoses of plaintiff's pre-accident lumbar condition by various other physicians.

Weinstein, supra, ¶ 803(24)[01] states that admissibility under the amended and more restrictive Evidence Rule 803(24) depends on the peculiar strength or weakness of the particular evidence offered. Weinstein states: "Also significant are the *knowledge* and qualifications of the declarant." (Our emphasis.) The circumstances under which the opinion was rendered must be assessed. These considerations also apply to Evidence Rule 803(24) prior to its amendment.

Assessing the circumstances, the transcript does not show the knowledge that Dr. Margo or Dr. Harvie had before giving their opinions as to aggravation. Recognizing that admissibility under Evidence Rule 803(24) must be within the discretion of the trial court, we hold that discretion was abused because of the absence of a circumstantial guarantee of trustworthiness.

The trial court erred in admitting the opinions from the reports of Dr. Margo and Dr. Harvie for two reasons: (1) this was not an unanticipated situation and (2) under the facts of this case, there was no circumstantial guarantee of trustworthiness. The opinions having been improperly admitted, the reports containing those opinions were improperly admitted as exhibits.

Plaintiff contends we should not reach this result because of the use made by defendant of two medical reports in the cross-examination of Dr. Prescott. One of the reports was from Dr. Gray; this report went to plaintiff's pre-accident condition.

Dr. Prescott had not utilized this report in preparing his trial testimony. The second report was from Dr. Simpson. This report stated that plaintiff's preexisting lumbar condition " 'apparently was not re-exacerbated by this accident.' " Dr. Prescott had utilized Dr. Simpson's report in preparing his trial testimony.

Plaintiff contends the reports of Dr. Margo and Dr. Harvie have circumstantial guarantees of trustworthiness comparable to those of Dr. Gray and Dr. Simpson. We agree that Dr. Simpson's report is properly comparable with the reports of Dr. Margo and Dr. Harvie; this does not benefit plaintiff. The opinions of Dr. Margo and Dr. Harvie were not admissible; neither was Dr. Simpson's. Dr. Gray's report is not comparable. It goes to details of plaintiff's pre-accident condition; details largely corroborated by other exhibits not in question. Our answer to plaintiff's contention, however, is that plaintiff did not object to defendants' use of the reports of Dr. Gray and Dr. Simpson, and that there was no contention in the trial court that the opinions of Dr. Margo and Dr. Harvie were admissible because of the use made by defendants of the Gray and Simpson reports. See Evidence Rule 103; Rule of App.P., Civil 11.

Plaintiff also asserts the opinions of Dr. Margo and Dr. Harvie should be admissible because the opinions of those physicians had been made available to defendants prior to trial, because defendants had ample opportunity to depose Dr. Margo, and did depose Dr. Harvie prior to trial. We fail to understand the relevance of this argument. The question is the admissibility of evidence which plaintiff introduced, not whether defendants knew of or had opportunity to obtain certain evidence.

Impeachment of Testifying Physician

Plaintiff claims that the opinions of Dr. Margo and Dr. Harvie were properly admitted as impeachment of the physicians testifying for defendants. The asserted impeachment was a demonstration that the witnesses were biased. On the basis that the opinions were properly used for impeachment, plaintiff asserts that defendants could have obtained a limiting instruction under Evidence Rule 106 and having failed to request a limiting instruction, defendants may not complain about the admission of the opinions.

No claim was made at trial that the opinions were admissible to demonstrate bias on the part of the testifying physicians. Defendants objected to admission of the hearsay; the trial court overruled the objection and the opinions were read to the jury.

Apart from the fact that the impeachment contentions appear to be raised for the first time on appeal, the hearsay opinions did not demonstrate bias on the part of the testifying physicians. Nor was bias established by the fact that the testifying physicians disagreed with the hearsay opinions. In addition, plaintiff's questioning of the testifying physicians concerning the hearsay opinions shows that the opinions were interjected into the cross-examination for the purpose of placing inadmissible evidence of aggravation before the jury and not to impeach the testifying physicians. This was not proper cross-examination. *State v. Carter,* 21 N.M. 166, 153 P. 271 (1915). The hearsay opinions were not admissible under the guise of cross-examination for purposes of impeachment. See *Miller v. Kennedy,* 11 Wash.App. 272, 522 P.2d 852 (1974).

Prejudicial Error

Plaintiff asserts the error in admitting the hearsay opinions was not prejudicial. We disagree. If a showing of prejudice was required, such a showing was made. By use of hearsay, plaintiff presented two "aggravation" opinions to the jury to support Dr. Prescott's testimony. Dr. Prescott's opinion was severely challenged on cross-examination. The improper hearsay may have been sufficient to convince the jury of an aggravation in the lumbar area. *Brown v. General Insurance Company of America,* 70 N.M. 46, 369 P.2d 968 (1962); *Sayner v. Sholer,* 77 N.M. 579, 425 P.2d 743 (1967).

Oral argument is unnecessary. Reversed and remanded for a new trial.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

559 P.2d 1206

STATE of New Mexico, Plaintiff-Appellee,

v.

Ernest TURNER, Defendant-Appellant.

No. 2453.

Court of Appeals of New Mexico.

Nov. 30, 1976.

Certiorari denied Jan. 7, 1977.

Jan A. Hartke, Acting Chief Public Defender, Don Klein, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

James L. Brandenburg, Dist. Atty., Jeffrey M. Libit, Asst. Dist. Atty., Albuquerque, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of rape contrary to § 40A-9-2, N.M.S.A.1953 (2d Repl.Vol. 6, 1972) subsequently repealed, and aggravated burglary contrary to § 40A-16-4(C), N.M.S.A.1953 (2d Repl.Vol. 6, 1972) defendant appeals on the following grounds: (1) denial of transcript; (2) denial of motion in limine; (3) denial of motion for change of venue; (4) denial of motion for mistrial; (5) denial of funds for unrestricted polygraph examination; (6) denial of motion for a new trial based on inquiry of numerical division of jury; and (7) denial of motion for a directed verdict.

Denial of Transcript

Defendant's first trial ended in a mistrial. Subsequently, defendant moved

for production of a transcript of the first trial. The motion was denied on the grounds that there was an alternative method available, that is, the court reporter, who was the court reporter at the first trial, would have available the testimony of the first trial and if any conflict or apparent conflict existed the testimony would then be read. The record reveals this method was in fact used. The second trial was also conducted by the same trial judge and same attorneys approximately two and one-half months after the first trial.

In *State v. Romero*, 87 N.M. 279, 532 P.2d 208 (Ct.App.1975) this court adopted the spirit and rationale of *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971) relevant to a determination of need: (1) value, which we will assume in the instant case, and (2) availability of alternative devices that would fulfill the same function as a transcript. Given the record in the instant case we hold that the alternative available to defendant satisfied and fulfilled the same functions as a transcript.

Defendant asserts he did not take extensive trial notes during the first trial. *Britt*, supra, states that that suggestion has been repeatedly rejected. We see no reason for a departure from *Britt*, supra. Neither do we see our holding as a departure from the rule of construing liberally in favor of a defendant's right to equal protection of the law and effective cross-examination. *State v. Romero*, supra.

Denial of Motion in Limine

The prosecutrix testified that she had had intercourse only one other time prior to the rape. This occurred approximately thirty-six hours prior to the rape and was with a married man. Defense counsel agreed to waive any rights to know the identity and whereabouts of this boyfriend. It subsequently developed that of four pubic hairs combed from the prosecutrix, two were hers and the other two were neither from the defendant, defendant's wife or the boyfriend.

Based on these facts defendant claimed he had a right to know the identity and to cross-examine the boyfriend. Defendant bases this on the following claim:

> ". . . Should the 'boy friend' testify to lack of intercourse with anyone other than the prosecutrix for an extended time prior to the rape, the circle would be closed. The only possible source of the hairs, which were not defendant's, according to the testimony of Dr. Wengs, would have been the rapist. . . ."

Defendant's defense throughout the trial was that he was not the rapist. Thus, the issue was whether defendant was the rapist. The evidence of the two foreign pubic hairs was evidence most favorable to defendant. We fail to see how defendant could benefit in anyway by learning the identity of and cross-examination of the boyfriend. Even if such refusal was error, it was at best harmless error. Section 41–23–51, N.M.S.A.1953 (2d Repl.Vol. 6, 1972, Supp.1975). Cf. *State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct.App.1974).

Having held the error, if any, harmless we do not discuss the waiver issue.

Change of Venue

Defendant's motion for a change of venue was based upon his affidavit that he could not obtain a fair trial. Defendant rested his case on the affidavit.

The provisions of § 21–5–3(A)(2)(c), N.M.S.A.1953 (Repl.Vol. 4, 1970) are mandatory (*State v. Lunn*, 88 N.M. 64, 537 P.2d 672 (Ct.App.1975)) when the prescribed steps have been taken unless evidence is called for. Here, defendant was asked if he wished to produce testimony. Defendant stated he would stand on the affidavit. The motion was denied.

The mandatory provisions of § 21–5–3, supra, become discretionary once additional evidence is requested. Section 21–5–4, N.M.S.A.1953 (Repl.Vol. 4, 1970); *State v. Lunn*, supra. The trial court's denial of defendant's motion for a change of venue was not an abuse of discretion.

Denial of Motion for Mistrial

Defendant contends the prosecutor made an "expression of personal opinion" during rebuttal closing argument. The closing arguments were not recorded. There is no showing that defendant timely objected. Failure to timely object constitutes a waiver of alleged error. *State v. Vallejos*, 86 N.M. 39, 519 P.2d 135 (Ct.App. 1974).

Denial of Funds for Unrestricted Use of Polygraph Examination

An indigent must be provided with the same basic tools for an adequate defense or appeal when the tools are available to others for a price. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956). However, this is true only so long as the particular material requested is necessary and there are no other reasonable alternatives for obtaining the material. *Britt v. North Carolina*, supra. There is no denial of due process or equal protection if the indigent defendant does not show that the requested material or information is necessary in order to prepare an adequate defense. See *Jones v. Superintendent, Virginia State Farm*, 460 F.2d 150 (4th Cir. 1972); *Davis v. Coiner*, 356 F.Supp. 695 (D.C.W.Va.1973). Merely stating that the material is needed will not be sufficient. *United States v. Brown*, 143 U.S.App.D.C. 244, 443 F.2d 659 (1970). The emphasis is on *need* and not *kind* of material.

The Indigent Defense Act has incorporated the rule enunciated in the above cases by stating that an indigent is ". . . to be provided with the *necessary* services and facilities of representation, *including investigation* and other preparation. . . ." (Emphasis added) Section 41–22–3, N.M.S.A.1953 (2d Repl.Vol. 6, 1972). If there is no evidence to show that the requested material is necessary, then the trial court will not be permitted to authorize funds to obtain that material. *State v. Carrillo*, 88 N.M. 236, 539 P.2d 626 (Ct.App.1975); *State v. Frazier*, 85 N.M. 545, 514 P.2d 302 (Ct.App. 1973). Merely arguing that a defense will be hindered without certain material is not sufficient to show that the material is necessary.

Did the defendant in this case show that a polygraph examination was necessary? Our answer is in the negative. Counsel for the defendant stated that the defendant had been brought up on charges a few years ago and the defendant had been allowed to take a polygraph examination then. This statement is immaterial as to whether or not a polygraph would be necessary in this case. Counsel then stated that if his client had money, he could easily go out and hire a polygrapher. Counsel's argument simply does not show that a polygrapher would be necessary. Other reasons given by counsel were that the polygraph results would be impressive evidence to show that his client was telling the truth and that he could not prepare an adequate defense without such a test. Again, counsel is merely arguing that he needs the test and that favorable results would be helpful to the defendant's case but that in and of itself does not show the tests would be necessary.

This is not a situation where the polygraph results would be necessary because the defendant's case relied entirely on the defendant's credibility as in *State v. Dorsey*, 87 N.M. 323, 532 P.2d 912 (Ct.App. 1975). In *Dorsey*, supra, the defendant's defense in a trial for murder was based entirely on his statement that he acted in self-defense. In this case, the evidence against the defendant was circumstantial and the defendant introduced testimony to rebut that evidence. *Dorsey*, supra, should not be interpreted to mean that a case comes down to the defendant's credibility simply because the defendant pleads not guilty to the charges against him.

We conclude that the defendant did not show that a polygraph examination would have been necessary. As a result, the defendant was not entitled to funds to hire a polygrapher under either statutory or constitutional law. The issue of the conditional nature of the trial court's authorization

of funds to hire a polygrapher need not be reached since the defendant was never entitled to such authorization.

Inquiry as to Numerical Division of the Jury

"THE COURT: Without telling me which way the vote is, can you tell me numerically the split of the jury?

"THE FOREMAN: One to eleven."

The case was tried before *State v. Aragon*, 89 N.M. 91, 547 P.2d 574 (Ct.App. 1976) which disapproved of such an inquiry.

Defendant raised the issue only when he filed a motion for a new trial. Even if there was a timely objection which the record does not support, we cannot say that such inquiry was error as a matter of law. *State v. Nelson*, 63 N.M. 428, 321 P.2d 202 (1958) or *Pirch v. Firestone Tire & Rubber Co.*, 80 N.M. 323, 455 P.2d 189 (Ct.App.1969) are of no benefit to the defendant. The magnitude of error presented in those cases is simply not present in the instant case. *State v. Aragon*, supra.

Motion for a Directed Verdict

Here defendant claims that the evidence was such that the state's evidence disproved his guilt as a matter of law. Defendant asserts that the foreign hairs were not defendant's or his wife's and that this disproved his guilt. Defendant overlooks other circumstantial and direct evidence namely the matchbook cover found by the prosecutrix's bed with defendant's fingerprint; the blood type being the same as defendant's and different from either the boyfriend or the prosecutrix; the cut screen and window with defendant's latent prints thereon, which were no more than five days old (defendant had lived in the prosecutrix's apartment some months prior to the rape); the victim's wallet found near defendant's apartment.

The foregoing meets the substantial evidence test. *State v. Lucero*, 88 N.M. 441, 541 P.2d 430 (1975).

Affirmed.

IT IS SO ORDERED.

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

559 P.2d 1210

Johnny D. BARBIERI, Sr., Personal Representative and Administrator of the Estate of Johnny D. BARBIERI, Jr., Plaintiff-Appellant,

v.

Darwin JENNINGS, Zelda Jennings and James Jennings, Defendants-Appellees.

No. 2597.

Court of Appeals of New Mexico.

Nov. 30, 1976.

Rehearing denied Dec. 20, 1976.

Certiorari denied Jan. 17, 1977.

Charles G. Berry, Marchiondo & Berry, P. A., Albuquerque, for plaintiff-appellant.

James T. Roach, Klecan & Roach, P. A., Albuquerque, for defendants-appellees.

OPINION

WOOD, Chief Judge.

A car driven by Darwin Jennings collided with a car driven by Sister Louise, a nun.

Johnny D. Barbieri, Jr., a passenger in the Jennings' vehicle, died from injuries received in the accident. Plaintiff sued Jennings and Sister Louise for damages for wrongful death. Shortly before trial, the suit against Sister Louise was settled. The suit against Jennings was tried; the verdict was for Jennings. Plaintiff appeals, complaining of three instructions to the jury: (1) sudden emergency, (2) independent intervening cause, and (3) assumption that a driver will obey the law.

The accident happened on a straight stretch of a two-lane paved road. The lanes were divided by a painted center line. It was dark and it was raining. The evidence conflicts as to the intensity of the rain and conditions of visibility at the time of the accident.

The Jennings' vehicle was going north; Sister's vehicle was going south. The evidence conflicts as to whether the accident happened in the northbound or southbound lane of traffic.

Several theories of negligence were submitted to the jury. Included were claims that Jennings was negligent in not having his car under proper control, not keeping a proper lookout, driving too fast for existing conditions and driving on the wrong side of the road.

Sudden Emergency

The instruction on sudden emergency was U.J.I. Civil 13.14. Plaintiff's objection was that sudden emergency was not an issue in the case. The objection is ambiguous. On appeal, plaintiff argues an absence of evidence to justify the instruction. We assume the trial court understood the objection as going to the evidence and answer the appellate contention on the merits.

There is evidence that Sister's vehicle crossed into the lane of travel of the Jennings' vehicle and that the collision occurred in the Jennings' lane of travel. There is evidence that the crossing happened so quickly that Jennings had no time to react; that he had no time to apply brakes, swerve the car or reduce his speed. Plaintiff states: "Consequently, there was no conduct on his part after the emergency arose which should be judged under the sudden emergency doctrine."

Plaintiff also claims the sudden emergency instruction was inapplicable because of his theory that Jennings was negligent by driving too fast under existing conditions. The contention is that the sudden emergency doctrine does not apply to negligent acts originating prior to the emergency. Compare U.J.I. Civil 13.14 which defines the doctrine in terms of a person, "who, without negligence on his part," is confronted with a sudden danger.

Although not referred to by plaintiff, the argument concerning "no conduct" could be made in connection with evidence pertaining to Sister. There is evidence that while driving on her side of the road, she suddenly saw the lights of the Jennings' car and the collision immediately followed. The inference is that Sister did not have time to react when confronted with a sudden danger.

Under the evidence, in determining whether negligence on Jennings' part was the cause of the death, the jury necessarily had to determine whether any negligence on Sister's part was the proximate cause. The sudden emergency instruction, if applicable at all, was as applicable to Sister's conduct as to Jennings' conduct. This is our first answer to the preexisting negligence contention. A second answer is that the contention assumes preexisting negligence. Whether there was such negligence was a factual issue to be resolved by the jury. A *theory* of preexisting negligence was not a basis for not instructing on sudden emergency.

The claim that the sudden emergency doctrine is inapplicable when the evidence shows no reaction to the emergency, ignores the definition of the doctrine and New Mexico decisions.

The doctrine does not apply when there is ample time and space to avoid an accident because then there would be no emergency. *Seele v. Purcell,* 45 N.M. 176, 113 P.2d 320 (1941). The doctrine is defined

in terms of a person's duty of care when confronted with a sudden danger. If what a person does (or in this case, what Jennings and Sister did not do) is what a reasonably prudent person might have done under the same conditions, then the person has done all the law requires of that person in meeting the emergency. See U.J.I. Civil 13.14.

Otero v. Physicians & Surgeons Ambulance Serv., Inc., 65 N.M. 319, 336 P.2d 1070 (1959) involved injuries to a patient in the ambulance as a result of a collision between the ambulance and another vehicle. The decision found "no fault" with a sudden emergency instruction, stating:

> "The vehicles entered the intersection traveling from 20 to 30 miles per hour, with the ambulance having the right of way. The parties, thusly, were placed in imminent peril. *There was no time for reflection as to a better course to pursue. In this situation the instruction was proper.*" (Our Emphasis.)

The trial court did not err in instructing on sudden emergency.

Independent Intervening Cause

The independent intervening cause instruction was U.J.I. Civil 13.15. Plaintiff objected that the facts did not justify the instruction. "The only other cause in this case would be the concurrent negligence . . . of the driver of the other car, and the law is quite clear in this state that the concurrent negligence of another driver or another person is not an independent intervening cause."

Whether Sister was negligent, and if so, whether that negligence was a sole or concurrent cause were factual issues. U.J.I. Civil 12.10 on proximate cause, including the bracketed material, was given. This instruction informed the jury how to consider the concepts of independent intervening cause and concurring cause. Under the evidence, the instructions were proper. *Galvan v. City of Albuquerque,* 85 N.M. 42, 508 P.2d 1339 (Ct.App.1973); *Kelly v. Montoya,* 81 N.M. 591, 470 P.2d 563 (Ct.App. 1970).

Assumption That a Driver Will Obey the Law

The jury was instructed:

> "The driver of an automobile has the right to assume that the drivers of other automobiles will obey the law by not crossing the center line into the opposite lane of travel."

The instruction is legally incorrect because incomplete. It is incomplete in that it fails to state that the assumption does not apply if the driver "sees, or by the exercise of ordinary care and prudence should have seen, that the driver of the other motor vehicle will not obey the law, or is unable to turn to his right in time to avoid a collision." *Turrietta v. Wyche,* 54 N.M. 5, 212 P.2d 1041, 15 A.L.R.2d 407 (1949); *Aragon v. Speelman,* 83 N.M. 285, 491 P.2d 173 (Ct.App.1971).

The legal correctness of the instruction is not an issue in this appeal. Plaintiff, in the trial court, stated that the instruction, as given, was a correct statement of the law and continues that approach in the appeal.

In the trial court, plaintiff objected to the instruction "because there is no evidence whatsoever that one driver relied upon another driver to do something which they did not do, and that the reliance in any way contributed to the accident . . . ." Evidence that one driver relied on another driver to obey the law is not a prerequisite for giving the instruction. The right to assume obedience to the law is a right given by the law; the right exists and applies until there is a factual basis for inapplicability. *Turrietta v. Wyche,* supra.

The objection inferentially raised in the trial court and expressly argued on appeal is that Jennings should have anticipated that Sister's vehicle would not stay in its own lane. This argument is based on road and weather conditions. The contention is that because of the wet road and limited visibility, Jennings could not assume "that other drivers would be able to control their cars on such a dangerous and wet highway and would be able to remain on their side of the highway". Plaintiff makes a similar

argument in connection with the independent intervening cause instruction: "defendant should have foreseen the danger of another vehicle crossing into his lane of traffic."

Romero v. Turnell, 68 N.M. 362, 362 P.2d 515 (1961) involved a southbound Chevrolet that collided with a northbound truck which was moving a house on the highway. The truck had a police escort who tried to wave the Chevrolet over. In disregard of the warning, the Chevrolet continued south, passing other vehicles, to the point of collision. The opinion states:

> "The defendant's truck driver was not bound to anticipate the decedent's negligence in this situation until it reasonably should have been clear to him that the Chevrolet was not going to obey the law."

Similarly, Jennings was not required to anticipate that Sister's vehicle would drive into Jennings' lane of travel unless it reasonably should have been clear to him that Sister was not going to obey the law.

Whether disobedience of the law should have been reasonably clear to Jennings was a factual question. Plaintiff contends that the facts did not justify the instruction because of Jennings' speed of nearly 30 miles per hour in conditions of visibility so limited that Jennings first saw the other car when it was 50 feet away. The investigating officer testified that Jennings' speed of 25 to 30 miles per hour was a proper speed under the circumstances. Jennings testified that Sister's car was in its own lane of travel when he first saw it 50 feet away, that it was entirely in the southbound lane when 30 feet away and "maybe" 15 feet away when he first saw that it was coming over into Jennings' lane of travel. The foregoing evidence provided a factual basis for the instruction.

Erickson v. Perrett, Mont., 545 P.2d 1074 (1976), on which plaintiff relies, is not applicable. That decision refers to emergencies which should be anticipated or are foreseeable, apparently as a matter of law. Under *Romero v. Turnell,* supra, and *Turrietta v. Wyche,* supra, such are factual questions. On this record, the instruction did not amount to reversible error.

Oral argument is unnecessary. The judgment is affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

559 P.2d 1214

STATE of New Mexico, Plaintiff-Appellee,

v.

John E. GURULE, Defendant-Appellant.

No. 2626.

Court of Appeals of New Mexico.

Jan. 4, 1977.

Certiorari Denied Feb. 1, 1977.

Manny M. Aragon, Aragon, Martinez, Garcia & Gross, P.C., Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Suzanne Tanner, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was in charge of maintenance crews at the Bernalillo County Mental Health Center. There is evidence that defendant directed maintenance personnel to perform work for individuals, that this work was not work for the Mental Health Center, that time records of the Mental Health Center were approved by defendant which included this work. The result was maintenance personnel were paid with state funds for services not rendered to the State. Defendant appeals his conviction of violating § 40A–23–2, N.M.S.A.1953 (2d Repl. Vol. 6). Issues listed in the docketing statement, but not briefed, are deemed abandoned. *State v. Vogenthaler,* 89 N.M. 150, 548 P.2d 112 (Ct.App.1976). The four issues argued concern: (1) constitutionality of § 40A–23–2, supra; (2) notice of the crime charged; (3) duplicity in the indictment; and (4) comments on the evidence by the trial court.

Constitutionality of the Statute

Section 40A–23–2, supra, states:

"*Paying or receiving public money for services not rendered.*—Paying or receiving public money for services not rendered consists of knowingly making or receiving payment or causing payment to be made from public funds where such payment purports to be for wages, salary or remuneration for personal services which have not in fact been rendered.

"Nothing in this section shall be construed to prevent the payment of public funds where such payments are intended to cover lawful remuneration to public officers or public employees for vacation periods or absences from employment because of sickness, or for other lawfully authorized purposes.

"Whoever commits paying or receiving public money for services not rendered is guilty of a fourth degree felony."

Defendant contends the statute is unconstitutionally vague both as written and as applied. The vagueness claims are that fair warning was not given "of the exact conduct which is criminal." *State v. Marchiondo,* 85 N.M. 627, 515 P.2d 146 (Ct.App.1973).

The "as written" argument is directed to the exceptions in the second paragraph of the statute. Defendant asserts a person would not know whether a payment would be "lawful remuneration", particularly where the remuneration is "for other lawfully authorized purposes." The "as applied" argument is that whether a payment is for a lawfully authorized purpose depends upon administrative discretion. We disagree.

In determining whether a statute is unconstitutionally vague, we consider the statute as a whole. *State v. Najera,* 89 N.M. 522, 554 P.2d 983 (Ct.App.1976). As written, the statute gives fair warning against the expenditure of public funds for services not rendered. The statute excludes lawful payments for vacation time or sick leave or other lawfully authorized purposes. The reader is notified that expenditure of public funds for services not rendered is prohibited unless the expenditure has been lawfully authorized. There is no vagueness in the statute as written.

Application of the statute is not left to administrative discretion. Lawfulness of authorization is not determined by an administrative official; that determination will be made by a court. There is no missing standard as in *State v. Jaramillo,* 83 N.M. 800, 498 P.2d 687 (Ct.App.1972).

Defendant also contends the statute is unconstitutional because it has not been evenly applied. Such a contention provides no defense to the charges against defendant. *State v. Baldonado,* 79 N.M. 175, 441 P.2d 215 (Ct.App.1968).

Defendant seems to assert the statute has been unconstitutionally applied because, at trial, the evidence conflicted as to whether certain Mental Health Center employees were entitled to compensatory time.

This was a factual matter; it does not amount to a constitutional issue.

The constitutional claims are without merit.

Notice of the Crime Charged

The indictment reads:

"COUNT I: That between the 7th day of May, 1974, and the 30th day of October, 1975, in Bernalillo County, New Mexico, the above-named defendant did knowingly make or receive payment or cause payment to be made from public funds where such payment purported to be for wages, salary or remuneration for personal services which in fact had not been rendered, contrary to Section 40A–23–2, NMSA 1953, as amended."

The indictment is in the alternative; it charges that defendant "did knowingly make *or* receive payment *or* cause payment to be made from public funds". (Our emphasis.) The charge in the indictment follows the language of the statute. The indictment charges one crime committed in varying ways; the charge was not legally deficient. *State v. Ochoa,* 41 N.M. 589, 72 P.2d 609 (1937); *Territory v. Harrington,* 17 N.M. 62, 121 P. 613 (1912).

Defendant claims the alternative charge failed to give him notice of the crime charged in sufficient detail to enable him to prepare his defense. See *State v. Foster,* 87 N.M. 155, 530 P.2d 949 (Ct.App.1974). He also contends that the indictment fails to allege the essential facts as required by R.Crim.P. 5(d).

Defendant sought and obtained a statement of facts. R.Crim.P. 9. The statement of facts was to the effect that defendant caused payments of public funds to be made to six named individuals by submitting time sheets for payment of public funds to those individuals. Items of work not related to the individual's duties at the Mental Health Center were specified and the dates of this work were listed. The statement of facts gave defendant notice of the charges and the allegedly missing essential facts. See *State v. Mosley,* 75 N.M. 348, 404 P.2d 304 (1965); *State v. Lott,* 73 N.M. 280, 387 P.2d 855 (1963).

The indictment charges that the offense occurred between May 7, 1974 and October 30, 1975. The statement of facts refers to seventeen instances of non-Mental Health Center work performed by one or more of the six Mental Health Center employees during this period of time. Defendant asserts he could not properly prepare his defense because he was not informed as to which of the seventeen instances the State would attempt to prove. The contention is not accurate. The statement of facts informed defendant that the State was relying on each of the instances to prove the one offense charged in the indictment. See *State v. Ochoa,* supra. Defendant was informed of the crime charged in sufficient detail to enable him to prepare his defense. *State v. Foster,* supra.

Defendant asserts that notice was insufficient because of the multiplicity of instances relied on by the State. Defendant points out that it cannot be determined on what basis the jury reached its verdict of guilty. He claims he cannot "avail himself of his conviction as against further prosecution for the same offense." He also contends that the State failed to prove all of the instances relied on. *Crain v. United States,* 162 U.S. 625, 16 S.Ct. 952, 40 L.Ed. 1097 (1896) states:

"We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it."

Defendant also contends the indictment failed to give notice of the crime charged because, at trial, the State's proof

included incidents of non-Mental Health Center work which were not included within the statement of facts. This argument does not raise an issue as to the sufficiency of the indictment; rather, it goes to the admissibility of evidence at trial. Defendant does not claim on appeal that this evidence was inadmissible. See R.Crim.P. 7(c); Evidence Rule 404(b).

Duplicity in the Indictment

The indictment (quoted above) charged "payment" in the singular. The trial court granted the State's motion to charge the plural—"payments". Defendant asserts: "This amendment permitted the State to proceed with a duplicitous number of charges as is evident from the testimony and Statement of Facts . . . ." Defendant claims the indictment was bad for duplicity.

"Duplicity in criminal pleading is the joinder of two or more distinct and separate offenses in the same count." *State v. Peke,* 70 N.M. 108, 371 P.2d 226 (1962). Defendant asserts the amendment of "payment" to "payments" added additional offenses in violation of R.Crim.P. 7(a); that the State should have been required to elect which of the seventeen instances it chose to rely on, or in the alternative, to allege the transactions in seventeen separate counts.

Defendant's argument overlooks the fact that he was charged with but one offense. A pleading is not double because only one offense is charged rather than as many offenses as the evidence might sustain. *Korholz v. United States,* 269 F.2d 897 (10th Cir. 1959); see *Crain v. United States,* supra; *Territory v. Harrington,* supra. The indictment was not double because the statement of facts and subsequent proof related to a series of items, even though each might have been alleged as a separate violation. *Cohen v. United States,* 378 F.2d 751 (9th Cir. 1967).

Comments on the Evidence by the Trial Court

Defendant asserts that the trial court's comments on the evidence deprived him of a fair and impartial trial. Defendant relies on three items.

1. There was testimony concerning overtime pay and compensatory time. A juror stated that he did not understand the distinction between overtime and compensatory time. The judge explained the difference. Defendant claims this comment was prejudicial because the judge defined compensatory time as a matter of law rather than leaving it to the jury as a matter of fact. No such contention was raised in the trial court; this contention is raised for the first time on appeal. N.M.Crim.App. 308. In addition, the judge's comment was on the basis of the evidence presented and was a proper comment. *State v. Sedillo,* 76 N.M. 273, 414 P.2d 500 (1966).

Defendant also asserts that the judge's explanation "did not include applicability as regards the definition" stated by a witness later in the trial. This later witness did not define the term; rather, the witness testified that a certain class of employees was not entitled to compensatory time. Thus, the record does not support defendant's contention and, again, the contention made on appeal was not raised in the trial court. N.M.Crim.App. 308.

2. The trial court struck the testimony of a defense witness. Defendant asserts the witness' testimony was introduced for the purpose of challenging the credibility of a witness for the State and to show that defendant had made deliveries of furniture to the defense witness "as required by his job." The trial court struck the testimony as "irrelevant to the issues in this case." The ruling was correct; neither the testimony presented nor any tendered testimony established relevancy. See Evidence Rule 401. We do not understand defendant to claim that the trial court's ruling was incorrect.

Prior to striking the testimony, the judge made several remarks. One remark was to the effect that the court could not find any connection between the testimony and the case. Another was a question inquiring as to the relevancy of the testimony. Still another was that the witness had

not testified to anything of importance. These comments were not a comment upon the weight of the evidence; rather, they went to the legal basis for admission of the testimony. *State v. Carabajal,* 26 N.M. 384, 193 P. 406, 17 A.L.R. 1098 (1920). In themselves, the comments were not objectionable.

Defendant would have us consider the comments in relation to the manner in which the comments were made. "The writer does not have the ability to portray the looks of reproach bestowed by the judge and jury upon defendant's witness and defendant's counsel during the court's comments . . . ." We are unable to review this claim because neither the judge's tone of voice nor his manner when making the comments are included within the appellate record. *Territory v. O'Donnell,* 4 N.M. (Gild.) 196, 12 P. 743 (1887). Matters outside the record present no issue for review. *State v. Romero,* 87 N.M. 279, 532 P.2d 208 (Ct.App.1975).

3. Defendant complains of the remark: "The Court will determine whether or not it is a crime. If it is not a crime, the Court will not submit it to a jury." This remark is not improper when considered in context. The context was that the witness on the stand could not properly give an opinion as to whether defendant had been engaged in criminal activity; rather, it was for the court to determine whether there was sufficient evidence for submission of the charge to the jury for decision.

4. Defendant urges us to consider the three items in combination. We have done so. In addition, we have reviewed other comments of the court appearing in the record. The trial court dealt severely with defense counsel at times, but the prosecutor received like treatment. The record does not show undue interference by the judge and does not show impatience or such a severe attitude on the part of the judge that prevented proper presentation of the cause or the ascertainment of the truth. The record does not show defendant was denied a fair trial. See *In re Will of Callaway,* 84 N.M. 125, 500 P.2d 410 (1972).

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

559 P.2d 1220

STATE of New Mexico,
Plaintiff-Appellee,

v.

Phillip BOEGLIN, Defendant-Appellant.

No. 2662.

Court of Appeals of New Mexico.

Jan. 18, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, Santa Fe, for appellant.

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

OPINION

WOOD, Chief Judge.

A store was broken into, the glass in a showcase was smashed and five pistols taken. Defendant was apprehended within two to five minutes after the store's silent alarm was triggered. He has been convicted of aggravated burglary and five counts of larceny. Issues listed in his docketing statement, but not briefed, are deemed abandoned. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App.1976). Two issues are presented. They involve: (1) the order of exercising peremptory challenges, and (2) the number of larcenies committed.

Peremptory Challenges

Rule Crim.P. 39(b) states: "The State shall accept or make any peremptory challenge as to each juror before the defense is called upon to pass, accept or exercise a peremptory challenge as to the juror." See also § 19–1–14, N.M.S.A.1953 (Repl.Vol. 4).

Over defendant's objection, the trial court required the parties to exercise their peremptory challenges alternately. This violated the rule and is reversible error if defendant has been harmed by the error. Defendant asserts he was harmed because he exercised all of his peremptory challenges; he thus distinguishes *Territory v. Padilla*, 12 N.M. 1, 71 P. 1084 (1903) where all peremptory challenges were not exercised. Defendant refers us to *Territory v. Prather*, 18 N.M. 195, 135 P. 83 (1913) which holds that a jury must be selected in the required manner and a material departure from the required manner is grounds for reversal if a party has been deprived of a substantial right.

Defendant makes no claim that he has been harmed by use of the alternate method in exercising peremptory challenges. He does not claim that the jurors who tried the case were other than fair or impartial or that his peremptory challenges would have been exercised differently if the trial court had complied with the rule. See *State v. Sanchez*, 58 N.M. 77, 265 P.2d 684 (1954). The error did not amount to reversible error. *State v. Sluder*, 82 N.M. 755, 487 P.2d 183 (Ct.App.1971); *State v. Gonzales*, 82 N.M. 388, 482 P.2d 252 (Ct.App.1971).

Number of Larcenies

Defendant asserts that he could be sentenced for only one larceny under the "single larceny doctrine". The aspect of the doctrine involved in this case is the taking of two or more articles of property from the same owner at the same time and place. We are not concerned here with a theft from different owners, see *State v. Bolen*, 88 N.M. 647, 545 P.2d 1025 (Ct.App.1976), or with a series of thefts, see Annot., 53 A.L.R.3d 398 (1973).

The doctrine has existed for some time. *Lorton v. State*, 7 Mo. 55, 37 Am.Dec. 179 (1841) states that the "stealing of several

articles of property, at the same time and place, undoubtedly constitutes but one offense against the laws . . . ." See also *Hudson v. State*, 9 Tex.App. 151, 35 Am. Rep. 732 (1880). Although old, the doctrine has current applicability. 2 Anderson, Wharton's Criminal Law and Procedure, § 450 (1957); see Annot., 53 A.L.R.3d, supra; Annot., 37 A.L.R.3d 1407 (1971).

Why is the taking of several articles at one time and place "undoubtedly" but one offense? One justification is that there has been but one transaction, even when there are several takings or a certain time span is involved in removing the articles. *State v. Hall*, 111 Kan. 458, 207 P. 773 (1922); *State v. Mjelde*, 29 Mont. 490, 75 P. 87 (1904). As stated in *State v. Larson*, 85 Iowa 659, 52 N.W. 539 (1892):

> "While it is true that, if the taking were felonious, the larceny was completed with the taking of the first sack [of flaxseed] if no more had been taken, but, more being taken as a part of the same transaction, they all became the subject of the same larceny."

Another justification is that the taking of the several articles is with but one criminal intent. *State v. Allen*, 59 N.M. 139, 280 P.2d 298 (1955). Whether the explanation is in terms of one transaction or one criminal intent, the theory is the same—that only one criminal act has occurred. See 2 Anderson, Wharton's Criminal Law and Procedure, § 450, supra.

By defining the larceny in terms of one transaction or one criminal intent, a double jeopardy problem is avoided. An offense may not be split into many parts and made the subject of multiple prosecutions. *State v. Mullenax*, 124 W.Va. 243, 20 S.E.2d 901 (1942). Annot., 92 Am.St.Rep. 89 (1902) at page 117 states that a theft of one thousand dollars is one theft and not a thousand thefts, and the defendant can be prosecuted only once for the offense.

> "The instance above given, of the larceny of several articles at one time and place and by one act of theft, is one of frequent occurrence in the authorities. In such a case, by the great weight of authority, there is but one offense. The state may, if it sees fit, prosecute for the theft of all the articles at once, or it may select what it wishes and prosecute for the larceny of that part, but it cannot split the single larceny into as many charges as there were articles stolen and make of such charges the basis of successive prosecutions. The second and subsequent prosecutions are, then, for the 'same offense' as was the first . . . ."

This Court in *State v. Tanton*, 88 N.M. 5, 536 P.2d 269 (Ct.App.1975) considered the meaning of "same offense" in relation to the prohibition against double jeopardy. We considered the various approaches and held that we would look to the policies behind the prohibition against double jeopardy. The Court of Appeals opinion is referred to hereinafter as *Tanton 1*.

The Supreme Court reversed *Tanton 1*; *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975), hereinafter referred to as *Tanton 2*. The meaning of double jeopardy was limited in *Tanton 2* to identical offenses, or situations where collateral estoppel, the concept of lesser included offenses or the same evidence test applied. *Tanton 2* at page 336, 540 P.2d 813.

Defendant asserts he can be convicted of only one larceny in this case under the same evidence test. This test is whether the facts offered in support of one offense would sustain a conviction of the other offense. *Tanton 2*, supra.

The larcenies of which defendant has been convicted were charged in Counts II through VI of the information. Each count charged a theft on the same date from the same place. However, each count charged the theft of a different pistol. Defendant states: "The facts offered in support of Count II would have sustained a conviction of either Counts III, IV, V, or VI, *except* for the precise item stolen." The majority opinion took a similar approach in *State v. Maestas*, 87 N.M. 6, 528 P.2d 650 (Ct.App. 1974), where the difference between the two charges was in the controlled substance possessed. *Tanton 2*, supra, expressly overruled *State v. Maestas*, supra. Because

each of the larceny counts required proof of a different pistol, the same evidence test was not applicable.

Under *Tanton 2*, the multiple larceny convictions in this case are not barred by the prohibition against double jeopardy. Definition of the crime as one transaction in this case is not required to avoid a double jeopardy problem. See *State v. Bolen* supra.

Tanton 2 overruled *Tanton 1's* policy approach to double jeopardy by limiting the meaning of double jeopardy to specified concepts. *Tanton 2* did not, however, reject the use of policy in resolving questions of multiple prosecutions. Rather, it affirmed the use of judicial policy to prevent piecemeal prosecutions and stated that the policy approach was applicable to situations where the limited definition of double jeopardy in *Tanton 2* was inapplicable.

Apart from *State v. Bolen*, supra, three New Mexico decisions have considered the single larceny doctrine. *State v. Allen*, supra, discussed whether a single criminal intent applied to two takings of property. *State v. Klasner*, 19 N.M. 474, 145 P. 679 (1914) held that the wording of an indictment charging the theft of nineteen calves charged but one taking "at the same time and place" of the property of several owners.

State v. Romero, 33 N.M. 314, 267 P. 66 (1928) involved the embezzling of public money. Two charges were brought on the basis that defendant had two official capacities. *Romero* held there was but one transaction because "[t]he offense was the taking" and a second prosecution was barred under the double jeopardy clause. This approach is now prohibited by *Tanton 2*. However, in so holding, the *Romero* opinion states:

> "It would be as illogical and unjust to permit this offense to be split because of the separate funds from which the money was abstracted as to permit a larceny from the person to be split because a part was taken from one pocket and a part from another."

We view *Allen, Klasner* and particularly *Romero*, as approving a policy that a taking of two or more articles of property from the same owner at the same time and place shall be prosecuted as only one larceny. Such an approach accords with the policy approaches discussed in both *Tanton 1* and *Tanton 2*, supra.

We hold that under the facts of this case, only one larceny occurred. There being but one larceny, four of the larceny convictions must be set aside. *State v. Ross*, 86 N.M. 212, 521 P.2d 1161 (Ct.App. 1974). The aggravated burglary conviction and sentence are affirmed. The larceny conviction under Count II and the sentence under Count II are affirmed. The other four larceny convictions and sentences are reversed. The cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

560 P.2d 161

In the Matter of William Conrad DURDEN, Attorney at Law.

No. 11057.

Supreme Court of New Mexico.

Aug. 18, 1976.

DISCIPLINARY PROCEEDING

OMAN, Chief Justice.

This matter coming on for consideration by the Court upon Recommendations of the Disciplinary Board and Submission of Record, and the Court having considered said Recommendations and having heard oral argument and now being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED by the Court that the Decision of the Disciplinary Board be and the same is hereby adopted and approved; except, however, the suspension of William Conrad Durden will not be deferred, and the said William Conrad Durden be and he hereby is suspended for a period of thirty (30) days from the date hereof, and until the further order of this Court.

IT IS FURTHER ORDERED that the said William Conrad Durden be and he hereby is publicly reprimanded for violation of Code of Professional Responsibility DR 9–102(A) and (B), and Rule 11 of the Supreme Court Rules Governing Discipline.

IT IS FURTHER ORDERED that the office books and records of the said William Conrad Durden will be reviewed at unspecified intervals by a committee selected by the Disciplinary Board for this purpose, and the said William Conrad Durden is hereby directed to cooperate fully with said committee and to submit to it such books and records upon request, and after a period of one year, to submit a certified copy of an audit of his books and records, to be conducted at his own expense, to the reviewing committee.

IT IS FURTHER ORDERED that all costs in this matter shall be assessed against the said William Conrad Durden.

560 P.2d 161

In the Matter of William Conrad DURDEN, Attorney at Law.

No. 11057.

Supreme Court of New Mexico.

Oct. 21, 1976.

This matter coming on for consideration by the Court upon Application for Automatic Reinstatement and Consent of Disciplinary Board to Automatic Reinstatement, and the Court having considered said pleadings and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that Application for Automatic Reinstatement be and the same is hereby granted, and the said William Conrad Durden be and he hereby is reinstated to active membership in the New Mexico Bar.

IT IS FURTHER ORDERED that costs be and the same are hereby assessed against the said William Conrad Durden in the sum of $1,330.25, to be paid to the said Disciplinary Board.

560 P.2d 161

UNITED NUCLEAR CORPORATION, a Delaware Corporation, Plaintiff-Appellee,

v.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc., Defendant-Appellant.

No. 10943.

Supreme Court of New Mexico.

Oct. 15, 1976.

Harry L. Bigbee, Donnan Stephenson, Michael R. Comeau, W. Perry Pearce, Bigbee, Stephenson, Carpenter & Crout, Santa Fe, for plaintiff-appellee.

William Federici, Jeffrey R. Brannen, Thomas W. Olson, Montgomery, Federici, Andrews, Hannahs & Buell, Santa Fe, George T. Harris, Jr., Modrall, Sperling, Roehl, Harris & Sisk, John D. Robb, John P. Eastham, Richard C. Minzner, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendant-appellant.

OPINION

McMANUS, Justice.

On December 21, 1975, an action was brought in the District Court of Santa Fe County by United Nuclear Corporation (UNC), a Delaware corporation with its principal place of business in New York, against General Atomic Company (GAC), a California partnership with its principal place of business in San Diego, California. The two partners in GAC are Scallop Nuclear (Scallop), a Delaware corporation with its principal place of business in New York, and Gulf Oil Corporation (Gulf), a Pennsylvania corporation, with its principal place of business in Pennsylvania. UNC served GAC by serving the statutory agent of Gulf in New Mexico.

The suit in the lower court was to obtain a declaratory judgment setting aside or modifying certain contractual obligations to GAC which UNC has with respect to the supply and delivery of uranium. An amended complaint was filed on April 5, 1976, seeking to void an additional contract dated June 20, 1974, on grounds similar to those alleged in the original complaint.

GAC moved to dismiss the action on the grounds that the district court lacked personal jurisdiction over the defendant and that proper service of process had not been made. The district court denied the motion. Defendant sought and was granted an interlocutory appeal by the Court of Appeals. The appeal has been certified to the Supreme Court pursuant to § 16–7–14(C), N.M.S.A.1953.

Points relied upon by GAC in this appeal are as follows:

POINT I: No service of process was effected upon General Atomic.

POINT II: If service of process was not defective due process requires that General Atomic have contacts sufficient to satisfy the Long Arm Statute.

POINT [III]: GAC has not waived its objections to personal jurisdiction.

POINT [IV]: The defendant, General Atomic, a California partnership, has not transacted business within New Mexico and is therefore not subject to in personam jurisdiction in the New Mexico courts.

POINT [V]: General Atomic has not committed any tortious acts within New Mexico.

As to Point I, service of process in this cause was effected by serving the statutory agent of Gulf in New Mexico. Service on the statutory agent of a corporation is personal service. *Seaboard Coast Line Railroad Company v. Gillis,* 294 Ala. 726, 321 So.2d 202, 205–206 (1975). Gulf is and was a general agent of the partnership described above. Section 66–1–9, N.M.S.A. 1953, of the Uniform Partnership Act, provides in part as follows:

(1) Every partner is an agent of the partnership for the purposes of its business. * * *

It is argued that Gulf is not a party, under § 21–1–1(4)(*o*), N.M.S.A.1953, who may receive service of process on behalf of a partnership. Fed.R.Civ.P. 4(d)(3), which is identical insofar as pertinent to New Mexico's Rule 4(*o*), has been construed to mean that service of process on a general partner is effective service on the partner-

ship. *Porter v. Hardin,* 164 F.2d 401 (5th Cir. 1947).

A partner is a general agent of the partnership. The agency of a partner is the hallmark of that particular form of business or professional association.

Rule 4(*o*), supra, insofar as material, provides that:

> [Service shall be made.] Upon * * * a partnership * * * by delivering a copy of the summons and of the complaint to * * * [an] agent *authorized* * * * *by law to receive service of process* . . . *if the agent is one authorized by statute to receive service* and the statute so requires, by also mailing a copy to the defendant. (emphasis added).

Where the form of service is reasonably calculated to give the foreign defendant actual notice of the pending suit, the statute providing for such service is valid. *Speir v. Robert C. Herd & Co.,* 189 F.Supp. 432 (D.C.Md.1960). Every object of the rule is satisfied where the agent is of such rank and character so that communication to the defendant is reasonably certain. *Schering Corporation v. Cotlow,* 94 Ariz. 365, 385 P.2d 234, 17 A.L.R.3d 617 (1963).

We have seen that § 66–1–9, supra, of the Uniform Partnership Act, appoints Gulf an agent of the partnership. Another New Mexico statute which appoints a partner an agent to receive service of process is § 21–6–5, N.M.S.A.1953, which provides:

> 21–6–5. *Suits against partners—Joinder—Enforcement of judgment—Service of process.*—Suits may be brought by or against a partnership as such, or against all or either of the individual members thereof; and a judgment against the firm as such may be enforced against the partnership's property, or that of such members as have appeared or been served with summons; but a new action may be brought against the other members in the original cause of action. (*When the action is against the partnership as such, service of summons on one of the members, personally, shall be sufficient service on the firm.*) (emphasis added).

(Ch. 6, § 6, [1880] N.M. Laws)

Rule 91 of the Rules of Civil Procedure, § 21–1–1(91), states:

> Rule 91. *Adopting procedural statutes.* —1. All statutes relating to pleading, practice and procedure in judicial proceedings in any of the courts of New Mexico, existing upon the taking effect of the Act of the Eleventh Legislature, . . . and all statutes since enacted by any session of the legislature relating to said subjects, or any of them except as any of said statutes heretofore may have been or hereafter may be amended or vacated by order of this court, shall remain and be in effect and have full force and operation as rules of court. [Adopted February 29, 1960. Effective on and after April 1, 1960.]

Therefore, unless the court has adopted a conflicting rule, the prior procedural statute is still in effect and this court will avoid construing a Rule of Civil Procedure and statute in a manner which creates a conflict or inconsistency between the rule and the statute. See *State v. Peavler,* 87 N.M. 443, 535 P.2d 650 (Ct.App.), rev'd on other grounds, 88 N.M. 125, 537 P.2d 1387 (1975).

Rule 4(*o*), supra, and § 21–6–5, supra, are not inconsistent. They are complimentary. Section 21–6–5 appoints a partner an agent with authority to receive service of process. This is plainly contemplated by Rule 4(*o*) which speaks of an agent authorized by "law" or "by statute" (§ 21–6–5) to receive service of process.

Service of process upon Gulf, a general partner, is clearly effective service on the partnership GAC. This having been decided, the issue now becomes whether or not the district court could properly exercise in personam jurisdiction over the parties and the subject matter without violating state and federal due process standards. We must now determine whether the defendant has conducted its activities so that it would be fair and reasonable to subject it to the jurisdiction of the New Mexico courts.

In order to subject a defendant to jurisdiction in state court, the defendant

must have certain "minimum contacts" so that the exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice." *Internat. Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The Court therein stated that whether or not due process was satisfied depended upon the "quality and nature of the activity in relation to the fair and orderly administration of laws." Id. at 319, 66 S.Ct. at 160. The Court did not attempt to define what contacts were deemed sufficient but instead left the determination of what constitutes fair play and substantial justice to be decided on a case by case basis.

Following *International Shoe,* supra, the Supreme Court refined its position in *McGee v. International Life Ins. Co.,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), where the issuance of a single insurance policy was deemed a sufficient contact to permit California to exercise jurisdiction over a Texas defendant. This, however, did not mean that all limitations on a state's jurisdictional power were abolished and in *Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) the Court held that the defendant must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Id. at 253, 78 S.Ct. at 1240. The activity of the defendant in the forum state is not required to be directly related to the plaintiff's cause of action, *Perkins v. Benguet Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), as long as there are sufficient contacts.

■ Therefore, we must look to see whether GAC's activities grant to New Mexico the power to adjudicate the issues involved herein. The plaintiff *alleges* the following activities of GAC which would constitute the transaction of business and also satisfy the "minimum contacts" test of *International Shoe,* supra:

1. Gulf contracted with UNC for the production of uranium which it knew would be produced from UNC's mines in New Mexico. Deliveries are made from New Mexico. This contract was assigned to GAC and GAC seeks specific performance in the trial court.
2. GAC contracted with UNC for 3,000,000 pounds of uranium which it knew would be produced in New Mexico. The uranium was to be delivered f. o. b. UNC's mill in New Mexico.
3. GAC engages in the business of purchasing uranium from other producers in New Mexico.
4. GAC sought to obtain a security interest in UNC's Churchrock Mine in New Mexico.
5. GAC sought a veto power over UNC's right to make further sales from its Churchrock Mine.
6. GAC claims that a dedication of ore reserves from UNC's Churchrock Mine contained in a utility agreement inures to its benefit.
7. Gulf's purchase of the largest uranium ore body in the country and the actions of GAC are an attempt to monopolize and restrain trade in uranium in New Mexico.

Although any one of the foregoing allegations alone may not be sufficient to meet the minimum contacts requirement, looking at the substance of the alleged facts and the totality of the surrounding circumstances, if the plaintiff can prove these allegations, GAC's activities have such an impact on New Mexico that we can conclude GAC has availed itself of the protection and laws of New Mexico. We feel that under such circumstances this state would have a substantial interest in the resolution of this dispute and that it is not unfair to require GAC to defend this action in state court.

■ The court in *In-Flight Devices Corporation v. Van Dusen Air, Inc.* 466 F.2d 220 (6th Cir. 1972) thoroughly discussed the rationale behind exercising jurisdiction over a non-resident buyer. The court stated that a party should not be required to defend in a foreign forum where it had no reasonable expectation of being subject to that forum's law. The plaintiff cannot unilaterally require a defendant to appear in a forum unless the defendant has done some

purposeful act. In *Van Dusen*, supra, the purposeful act was the entering into a contract with an Ohio corporation to manufacture goods in Ohio. The court stated, "That the making (and breaking) of a contract with the Plaintiff would have substantial consequences with the State of Ohio is a reality of which the Defendant could not have been ignorant." Id. at 227. One of the most important factors that the Sixth Circuit considered was the involvement of the buyer in the activities of the plaintiff and in the contract negotiations. "To the extent the buyer vigorously negotiates, perhaps dictates, contract terms, inspects production facilities and otherwise departs from the passive buyer role it would seem that any unfairness which would normally be associated with the exercise of long-arm jurisdiction over him disappears." Id. at 233. Accord, *Whittaker Corporation v. United Aircraft Corporation,* 482 F.2d 1079 (1st Cir. 1973).

There are many parallels between the instant suit and the fact situation in Van Dusen. The plaintiff alleges that GAC used its superior financial position to force UNC to accept contract terms that were unfavorable to UNC. UNC also alleges that GAC took an active participation in UNC's business of mining the uranium, insofar as GAC tried to obtain a security interest in the mine and a veto power over UNC's sales of uranium. The cause of action here and in *Van Dusen* was based both in contract and in tort.

The *Van Dusen* case relied heavily on the earlier Sixth Circuit opinion in *Southern Machine Company v. Mohasco Industries, Inc.,* 401 F.2d 374 (6th Cir. 1968) in which the court held that where the defendant entered into a licensing agreement with the plaintiff which had a direct impact on the commerce in Tennessee and such impact was foreseeable, subjecting the defendant to an in personam action did not violate due process. The court stated:

> We are applying a constitutional standard defined in the broadest terms of "general fairness" to the defendant. Cf. *Perkins v. Benguet Mining Co.,* 342 U.S. 437, 445, 72 S.Ct. 413, 96 L.Ed. 485 (1952). For the purposes of that standard, business is transacted in a state when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state; and the defendant has purposefully availed himself of the opportunity of acting there if he should have reasonably foreseen that the transaction would have consequences in that state. * * * (footnotes omitted).

Id. at 382–383.

GAC clearly meets this standard. Although GAC has stated that UNC could have fulfilled its contract from any uranium mine in the country, it was obvious from the dealings of its predecessor corporation and its own dealings with UNC that the uranium would be produced in New Mexico from UNC's New Mexico mines. It is also clear that GAC knew or should have known that the sale of millions of tons of uranium involving billions of dollars would have a profound economic and ecological effect in this state. The fact that GAC is a California partnership and UNC is a Delaware corporation does not compel New Mexico to refrain from exercising its powers. Considering that the subject matter of the contract (e. g., uranium), the performance of the contract (e. g., the mining and shipping of the uranium), the breach of contract, and the tortious activity of GAC (e. g., restraint of trade) are all intimately concerned with New Mexico, these are the kinds of matters upon which jurisdiction may rest. Of course, proof of these allegations must be shown at a trial on the merits.

GAC relies on *Telephonic, Inc. v. Rosenblum,* 88 N.M. 532, 543 P.2d 825 (1975) and *Vacu-Maid, Inc. v. Covington,* 530 P.2d 137 (Okl.App.1974) for the proposition that an out-of-state buyer does not have the requisite contacts to be required to defend in this forum. GAC's reliance is misplaced because the present fact situation (assuming again that plaintiff's allegations are true) is so

different as to make those cases inapplicable.

In *Telephonic, Inc.,* supra, the only contacts the defendant had with New Mexico were some long distance calls and a contract which provided that the signing constituted "transacting business." Even though Rosenblum was also an out-of-state buyer of Telephonic's services, there was no product produced, manufactured, or shipped and no active participation by the defendant in the business affairs of Telephonic. Clearly the defendant did not have the requisite contacts.

We also agree with *Vacu-Maid,* supra, that in many instances an out-of-state buyer would not be subject to local jurisdiction because "the seller is the aggressor or initiator in the forum and by selling his product in the state he receives the benefit and protection of the forum state's laws, and * * * allowing jurisdiction over 'passive' buyers would tend to extinguish state lines and also to discourage out-of-state purchasers from dealing with resident sellers." Id. at 141. But the opinion continues, "There are, however, cases in which the nature of the transactions and the defendant's activities cause the court to find that jurisdiction over the foreign defendant would not offend 'traditional notions of fair play and substantial justice.' (citations omitted)." Id. at 141. In *Vacu-Maid,* the defendant agreed to promote and sell the plaintiff's product but the defendant was simply a passive purchaser. In the present case GAC cannot be characterized as such. Instead, we feel that the rationale set out above in *Southern Machine Company v. Mohasco Industries, Inc.,* supra, and *In-Flight Devices Corp. v. Van Dusen Air, Inc.,* supra, more appropriately applies in the present case.

We affirm the trial court. Accordingly, the balance of the points offered as error are not pertinent in resolving this interlocutory appeal. These points, if appropriate, would best be decided in a trial on the merits.

IT IS SO ORDERED.

MONTOYA, SOSA and EASLEY, JJ., concur.

OMAN, C. J., not participating.

560 P.2d 167

STATE of New Mexico, Petitioner,

v.

Anselmo LUJAN, Respondent.

No. 11218.

Supreme Court of New Mexico.

Feb. 14, 1977.

Toney Anaya, Atty. Gen., Suzanne Tanner, Asst. Atty. Gen., Santa Fe, for petitioner.

Jan A. Hartke, Acting Chief Public Defender, Reginald J. Storment, App. Defender, Santa Fe, for respondent.

OPINION

McMANUS, Justice.

Defendant pled guilty to the fourth degree felony of larceny of goods valued at more than $100.00 and less than $2,500.00 contrary to § 40A–16–1, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972). He also pled guilty to a supplemental information charging him with a previous felony conviction pursuant to § 40A–29–7, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972).

At sentencing, the defendant requested the trial court to suspend all or part of the sentence. The trial court ruled that the sentence was mandatory and that it had no discretion to suspend any of the sentence. The court then imposed a sentence of not less than two and one-half years and not more than ten years. On appeal the defendant asserted that the trial court erred when it ruled that it had no discretion. The Court of Appeals reversed the ruling of the trial court and remanded the case so the lower court could exercise its discretion in the sentencing. We granted certiorari and reverse the ruling of the Court of Appeals.

The habitual offender provisions, § 40A–29–5 et seq., N.M.S.A. 1953 (2d Repl.Vol. 6, 1972), were enacted "to inhibit repetition of criminal acts by individuals against the peace and dignity of the state. . . . [and] to protect society against habitual offenders." *State v. Gonzales*, 84 N.M. 275, 276, 502 P.2d 300, 301, cert. denied, 84 N.M. 271, 502 P.2d 296 (1972). The application of this act is mandatory. *State v. Martinez*, 89 N.M. 729, 557 P.2d 578 (Ct.App.1976).

Not only is the application mandatory but the language used in the statutes involved herein indicates that the provisions are also mandatory. The sentencing statute, § 40A–29–5, supra, states:

> . . . Any person who, after having been convicted within this state of a felony, . . . commits any felony within this state . . . *shall* be punished as follows:
>
> A. Upon conviction of such second felony, . . . such person *must* be sentenced to imprisonment . . . (emphasis added).

The general procedural section, § 40A–29–7, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972) is likewise expressed in the same terms, e. g., "the court *shall* sentence him to the punishment

as prescribed in section 29–5 [40A–29–5] governing habitual offenders . . . (emphasis added)." The words "shall" and "must" generally indicate that the provisions of a statute are mandatory and not discretionary. Section 1–2–2(I), N.M.S.A. 1953 (Repl.Vol.1970); 73 Am.Jur.2d Statutes § 22 (1974); Black's Law Dictionary 1541 (rev. 4th ed. 1968). We must assume that the Legislature intended such a result until the contrary is clearly shown. *State v. La Badie*, 87 N.M. 391, 534 P.2d 483 (Ct.App.1975).

The Court of Appeals held that unless a statute specifically prohibits the deferment or suspension of a sentence, the sentencing court must act in accordance with § 40A–29–15, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972). This section confers discretion on the trial court to defer or suspend a sentence "[u]pon entry of a judgment of conviction of any crime not constituting a capital or first degree felony . . ." Apparently the Court of Appeals misapprehended the nature of the habitual offenders provisions.

"Habitual criminality, however, is a status rather than an offense, so that allegations of prior convictions do not constitute a charge of a distinct crime, but only relate to the punishment . . ." *Lott v. Cox*, 75 N.M. 102, 104, 401 P.2d 93, 94 (1965); *State v. Knight*, 75 N.M. 197, 402 P.2d 380 (1965); *State v. Bonner*, 81 N.M. 471, 468 P.2d 636 (Ct.App.1970); *State v. Silva*, 78 N.M. 286, 430 P.2d 783 (Ct.App. 1967). Under § 40A–29–7, supra, the only issue to be determined in a proceeding for prosecuting habitual offenders is whether that person has, in fact, been convicted of the commission of a previous felony. An affirmative finding of such fact does not constitute the "conviction of any crime" within the purview of § 40A–29–15, and the sentencing judge has no discretion to exercise.

As we have noted above, the language of the habitual offenders statutes is mandatory. Therefore, the trial court is bound to sentence the defendant in accordance with the provisions of § 40A–29–5, supra.

We therefore affirm the ruling of the trial court.

IT IS SO ORDERED.

OMAN, C. J., and SOSA, EASLEY and PAYNE, JJ., concur.

560 P.2d 169

William B. CURTISS, Plaintiff-Appellee,

v.

AETNA LIFE INSURANCE COMPANY, Defendant-Appellant.

No. 2338.

Court of Appeals of New Mexico.

June 15, 1976.

Certiorari Denied July 15, 1976.

Rex D. Throckmorton, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendant-appellant.

Charlotte Mary Toulouse, Toulouse, Krehbiel & Cheney, P. A., Albuquerque, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Plaintiff recovered judgment on an oral contract of insurance for compensatory and punitive damages. Defendant appeals from a denial of its motion for judgment N.O.V. We affirm.

A. *Alleged material misrepresentations were questions of fact for the jury.*

Plaintiff made application with Aetna Life Insurance Company for an insurance policy which covered health insurance. In answer to one question: "Has any person to be covered had any Accident, Health or Life Insurance . . . declined . . .?" Plaintiff answered "No".

Whether this answer was a material misrepresentation depends upon the facts which surrounded plaintiff's prior application for health insurance with *Allstate Insurance Company.* Plaintiff's testimony was contradictory as to a conversation with an agent of Allstate. Plaintiff admitted that an agent *told him* that this application had been denied. However, the agent also *told him* that this application was being withdrawn, and that plaintiff did not have to reveal that fact. Plaintiff felt that he had withdrawn his application. As a matter of fact, plaintiff's application had been withdrawn. Allstate did not actually decline plaintiff's application. Plaintiff answered the question correctly. His answer was not a misrepresentation.

Contradictions in plaintiff's testimony only affect his credibility. We do not weigh the evidence. It is the duty of the jury to weigh the evidence, determine the credibility of the witness, the weight to be given to his testimony, and determine where the truth lies. *Tapia v. Panhandle Steel Erectors Company,* 78 N.M. 86, 428 P.2d 625 (1967).

The issue presented in this case requires contractual interpretation. The intent with which plaintiff acted is irrelevant. *Modisette v. Foundation Reserve Insurance Co.,* 77 N.M. 661, 427 P.2d 21 (1967). We believe the plaintiff's interpretation was reasonable.

The word "declined" in the question is ambiguous. It has many interpretations. See 2 Roget's International Thesaurus (3d ed. 1962) at 788. The well established test in New Mexico is that where terms used are ambiguous, the test is not what the insurer intended its words to mean, but rather what a reasonable person in the position of insured would understand them to mean. *Williams v. Herrera,* 83 N.M. 680, 496 P.2d 740 (Ct.App.1972). A reasonable person could understand that being asked to withdraw an application for health insurance was not the equivalent of having been "declined" insurance.

In answer to a second question: "Has any person to be covered ever been treated, during the past 5 years, for any sickness, disease or injury, or had any departures from good health not stated elsewhere in the application?" Plaintiff answered "No".

Plaintiff went to a doctor in Ohio for the express purpose of getting a physical examination. Plaintiff was told that his cholesterol was high and the doctor put him on a low fat diet. Plaintiff informed defendant of the name and address of the doctor. Furthermore, plaintiff did not consider high cholesterol a sickness, disease or injury.

In answer to both questions, whether plaintiff made a misrepresentation was a question of fact for the jury.

The jury believed that plaintiff did not misrepresent the fact that his insurance application with Allstate was "declined", nor that plaintiff had been treated for sickness, disease or injury. An appellate court should not place itself in the position of judge and jury below. We should follow the admonition in *Hooker v. Hancock,* 188 Va. 345, 49 S.E.2d 711 (1948):

> It must be kept in mind that plaintiff is fortified by a jury's verdict and the judgment of the trial court—thus he occupies the most favored position known to the law. [49 S.E.2d at 712].

B. *Plaintiff was entitled to punitive damages.*

The court gave an instruction on damages, the second paragraph of which is U.J.I. 14.25 and reads as follows:

> If you find that the conduct of defendant was willful *and* wanton and proximately caused damage to plaintiff, and if you further find that justice and the public good require it, you may award plain-

tiff, in addition to any compensatory damages to which you find plaintiff entitled, an amount by way of example or punishment, as punitive damages, which will serve to punish the defendant and to deter others from the commission of like offense. [Emphasis added].

Defendant objected to this portion of the instruction on two grounds: (1) punitive damages were not raised in the pleadings nor referred to in the pre-trial order, and (2) there was no evidence adduced at trial that would warrant the instruction. The first point was waived on this appeal.

Defendant now contends that plaintiff's pleadings did not contain any requests for punitive damages; that the pleadings were not amended when defendant objected to the instruction, and the issue of punitive damages was not tried with the implied or express consent of defendant as required by Rule 15(b) of the Rules of Civil Procedure. Defendant did not claim that the pre-trial order was controlling. This claim of error was waived.

(1) *Punitive damages was tried with the express consent of defendant under Rule 15(b).*

Count three of plaintiff's complaint alleged that plaintiff was damaged in the sum of $100,000.00 by reason of defendant's fraudulent and bad faith refusal to pay plaintiff's claim. Plaintiff did not use the words "punitive damages". In answer to one of defendant's interrogatories, plaintiff stated that one of the categories of damages sought was "punitive damages". Thereafter, defendant denied the allegations of count three of plaintiff's complaint. During defendant's cross-examination of plaintiff, plaintiff announced that his "complaint also alleges punitive damages." Defendant made no objection to this comment. During the trial of the case, defendant made no objection to any evidence which might bear on the issue of fraud or bad faith.

Fraud and bad faith are essential elements of punitive damages for breach of contract. *State Farm General Insurance Company v. Clifton*, 86 N.M. 757, 527 P.2d 798 (1974). Defendant was put on notice of the issue of punitive damages. The fact that an amendment to the complaint was not actually made to use the words "punitive damages" is unimportant. *Aguayo v. Village of Chama*, 79 N.M. 729, 449 P.2d 331 (1969).

Defendant expressly or impliedly consented to try the issue of punitive damages under Rule 15(b).

(2) *Evidence supported an award of punitive damages.*

U.J.I. 14.25 did not intend that, to obtain an award of punitive damages, a defendant must be "willful *and* wanton" in conduct toward a plaintiff. It should read "willful *or* wanton".

The court did instruct the jury that "willful *and* wanton" means "actual or deliberate intention to harm *or* which, *if not intentional*, shows an utter indifference to or conscious disregard for the rights of others." [Emphasis added]. Defendant did not object to this instruction. It is controlling.

The rule stated in *State Farm General Insurance Company v. Clifton*, supra, for breach of contract is:

> Punitive damages can be awarded in a breach of contract action in New Mexico, but there must be a showing of *malice or* of reckless or wanton disregard of plaintiff's rights. [Emphasis added] [86 N.M. at 759, 527 P.2d at 800].

"There is very little, if any, difference between 'willful' and 'malicious' conduct". An act characterized as " 'willfully' or 'maliciously' . . . denotes the intentioned doing of a harmful act without just cause or excuse or an intentional act done in utter disregard for the consequences, . . . *and does not necessarily mean actual malice or ill will*, ..." [Emphasis added]. *Potomac Insurance Company v. Torres*, 75 N.M. 129, 131–32, 401 P.2d 308, 309 (1965).

Aetna admits on appeal that the evidence established an oral contract of insurance

between the parties, the same as though an actual policy had been issued. The contract had been breached by refusal to pay.

In *Clifton*, supra, the court held that, in the absence of bad faith or fraud, it would be improper to assess punitive damages. "Bad faith" was defined as meaning "any frivolous or unfounded refusal to pay; it is not necessary that such refusal be fraudulent." [86 N.M. at 759, 527 P.2d at 800]. Aetna refused to pay because plaintiff was unable to take the physical examination, plaintiff then being in the hospital suffering a heart attack.

The record shows:

On July 19, 1972, plaintiff filled out an application for hospitalization insurance with Paul Lattin, agent of Aetna, and plaintiff paid $64.06 by check to Aetna, which was accepted. On August 4, 1972, Aetna's home office requested that the local office obtain a doctor's statement. On September 8, 1972, the home office again inquired about a doctor's statement. Eleven days later, on September 19, 1972, plaintiff was called for a correct address of the doctor. This application expired in sixty days and on September 27, 1972, plaintiff was required to fill out a second application for insurance. This delay was due to the fact that the application was left in the agent's desk drawer, the agent who had quit the firm. Aetna admitted this conduct was negligent. On October 13, 1972, plaintiff suffered a heart attack. The following Monday, his wife called the agent to remind him that an application had been filed in July and she wanted to know if he was insured and the agent assured her that he was and stated he was going to request a physical examination. She told the agent her husband was in the hospital. The agent said he would have to contact the home office and would let her know the following morning. He never did. On October 20, 1972, Aetna declined plaintiff's application because he was unable to take the physical examination and refused to pay plaintiff's medical expense.

This evidence falls within the meaning of the words "willful", "wanton" or "malicious" conduct. Defendant intentionally refused to pay without just cause or excuse because it declined plaintiff's application after plaintiff suffered a heart attack, knowing that plaintiff could not take a physical examination. The evidence was substantial in support of the instruction on punitive damages.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., dissents.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

The plaintiff knew that he had been rejected by the Allstate Insurance Company, yet in his application with defendant he denied this fact. His argument that he had not been denied insurance coverage because he had withdrawn his application, is sheer sophistry. Whether he acted fraudulently, negligently, or innocently, is not controlling. *Modisette v. Foundation Reserve Insurance Co.*, 77 N.M. 661, 427 P.2d 21 (1967). As to the materiality of this misrepresentation, Mr. Meyer, the defendant's general agent in Albuquerque, testified in part as follows:

"Q. Are you familiar with the underwriting policies of Aetna?

"A. Yes, I am.

"Q. Is it important from an underwriter's standpoint to know about prior insurance applications made by an applicant, and whether or not those applications have been denied?

"A. Yes, because it helps personal history on the individual.

"Q. And knowledge about prior applications is material in determining insurability?

"A. Yes, it is; sure is."

Terse as these answers were, nonetheless, they were not refuted. However, irrespective of these answers, I believe that the materiality of the answer to the question is self-evident because it relates directly to the plaintiff's insurability. The materiality

of an answer to such a question is determined by the probable and reasonable influence it would have on an insurer's decision whether or not to accept the risk, and if so, with what qualifications. *Rael v. American Estate Life Insurance Company,* 79 N.M. 379, 444 P.2d 290 (1968).

The trial court, in my opinion, erred in not granting the defendant's motion for judgment N.O.V., because in my opinion, there was neither evidence nor inference from which the jury could have arrived at its verdict. See *Tapia v. McKenzie,* 85 N.M. 567, 514 P.2d 618 (Ct.App.1973).

560 P.2d 174

Petition of FIRST NATIONAL BANK, Mrs. Helen Baures, John Marron, Tijeras Place Imp. Co., William C. Stein, Albert L. Matthew, Cale L. Karson, Jr., and Kay Karson, and Scanvest I Ltd., Appellants,

v.

BERNALILLO COUNTY VALUATION PROTEST BOARD, Appellee.

No. 2671.

Court of Appeals of New Mexico.

Jan. 18, 1977.

Bernard L. Robinson, Bernard L. Robinson, P. A., Joseph T. Sprague, Stribling, Sprague & Sprague, P. A., Albuquerque, for appellants.

Vance Mauney, Albuquerque, Toney Anaya, Atty. Gen., Santa Fe, John C. Cook, Asst. Atty. Gen., for appellee.

OPINION

SUTIN, Judge.

This is an appeal from orders entered by the Bernalillo County Valuation Protest Board. The protest was heard by only two members of the board and the order entered was signed by the chairman of the board. This was not in compliance with the law that a majority of the board attend the hearing. *Petition of Kinscherff,* 89 N.M. 669, 556 P.2d 355 (Ct.App.1976). The orders are void for lack of jurisdiction. We reverse.

This appeal demands additional guidelines for taxpayers and the board.

A. *The county assessor has an alternative method of valuation.*

The county assessor has a duty to follow a statutory method of valuation as provided in § 72–29–5(B), N.M.S.A.1953 (Repl. Vol. 10, pt. 2, 1975 Supp.). *San Pedro South Group v. Bernalillo County Valuation Protest Board,* 558 P.2d 53 (Ct.App. 1976).

In their protest and at the hearing, taxpayers relied on the "income method" in determining the valuation of their property for taxation purposes. The assessor had used the "cost methods of valuation." Both methods are set forth in the alternative in § 72–29–5(B). It provides that if market value cannot be determined due to the lack of comparable sales, "then its value shall be determined using an income method *or* cost methods of valuation." [Emphasis added].

"It is Taxpayers' position that the meaning of the quoted phrase is that 'an income method' will be used unless it also is inapplicable; then, if an income method cannot be used, 'cost methods' will be used. Taxpayers do not read the phrase to mean that *either* an income method *or* cost methods may be used at the Assessor's discretion. If that were the intent of the Legislature, the phrase would have been written in such manner." We disagree.

The word "or" as used in a statute is a matter of first impression in New Mexico.

In construing a statute, we must give the word "or" its ordinary meaning, *Mobile America, Inc. v. Sandoval County Commission,* 85 N.M. 794, 518 P.2d 774 (1974), unless a different intent is clearly indicated. *Winston v. New Mexico State Police Board,* 80 N.M. 310, 454 P.2d 967 (1969).

It is agreed that the legislature did give priority to the first method of valuation, a valuation determined by sales of comparable property. It did not do so with reference to the succeeding methods. If the legislature intended to give priority to the second method, the "income method," over the third method, the "cost method," for any reason, it would have phrased the statute in language similar to the priority established in the first method of valuation.

Ordinarily, the word "or" as used in a statute is given a disjunctive meaning unless the context and the main purpose of all the words demand otherwise. *Eastern Mass. St. Ry. Co. v. Massachusetts Bay T. Auth.,* 350 Mass. 340, 214 N.E.2d 889 (1966). "There is nothing to indicate that the word 'or' was used in the statute in other than its ordinary meaning, indicating an alternative such as 'either one or another.'" *United States Fidelity & Guar. Co. v. Security F. & I. Co.,* 248 S.C. 307, 149 S.E.2d 647, 650 (1966); *People v. Smith,* 44 Cal.2d 77, 279 P.2d 33 (1955); *Council Plaza Redevelopment Corp. v. Duffey,* 439 S.W.2d 526 (Mo. 1969); *State v. Sawtooth Men's Club,* 59 Idaho 616, 85 P.2d 695 (1938); *State v. Kress,* 105 N.J.Super. 514, 253 A.2d 481 (1969); *Wood v. Paulus,* 524 S.W.2d 749 (Tex.Civ.App.1975); *Central Standard Life Insurance Company v. Davis,* 10 Ill.App.2d 245, 134 N.E.2d 653 (1956).

The word "or" designates alternatives or separate categories. Its ordinary meaning should be followed unless it renders the statute doubtful or uncertain. It does not. The statutory language is clear and unambiguous.

In the instant case, the statute did not give taxpayers the right to determine the method of valuation. It gave the county

assessor the right to use *either* the "income method *or* cost methods of valuation." [Emphasis added].

B. *Taxpayer is entitled to a fair hearing.*

On cases appealed to this Court, we find that hearings are two-pronged affairs which constitute confusion confounded. Taxpayer usually proceeds pro se to prove the merits of his protest by a method of valuation that he chooses which is usually different from that used by the assessor. The assessor usually produces no evidence on the taxpayer's method and relies on his own method of valuation. This problem must be resolved.

The right to a fair hearing presupposes that the taxpayer has been informed, prior to the hearing, of the method of valuation used by the county assessor. Otherwise, he cannot be expected to intelligently protest an assessment made.

(1) *Taxpayer is entitled to notice from the assessor.*

Section 72–31–24(B)(3) provides that taxpayer's petition of protest filed with the county assessor shall:

> (3) state why the property owner believes the value . . . is incorrect and what he believes the correct value . . . to be; . . .

At the time the protest is filed, taxpayer does not know the method of valuation used by the assessor. No provision is made for notification of the assessor's method of valuation. As a result, taxpayer is unable to state why he believes the value is incorrect, or taxpayer states a method of valuation different from that used by the assessor. We believe the legislature should amend the "Property Tax Code," §§ 72–28–1, et seq., to give notice to the taxpayer of the method of valuation used by the assessor, and require the assessor to furnish taxpayer a copy of the appraisal made.

Nevertheless, taxpayer has the right to discover the method of valuation used. In *Matter of Protest of Miller,* 88 N.M. 492, 495, 542 P.2d 1182, 1185 (Ct.App.1975), we held that taxpayer has "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)]."

By this discovery process, taxpayer can obtain all information on the method of valuation used by the assessor.

(2) *As an alternative, taxpayer is entitled to assistance from the board.*

A protest board is a quasi-judicial body. It has a duty to see that a fair hearing is held. A taxpayer, with or without the assistance of counsel, is entitled to know the method of valuation used by the assessor, as well as the techniques of appraisal made to warrant the valuation. At the time taxpayer is given notice of a hearing on the merits, the board should give taxpayer notice that the method of valuation used, and the appraisal made, are available in its office for inspection. If it desires, it can send this information to taxpayer along with the notice of the hearing on the merits.

(3) *As another alternative, separate hearings can be held.*

A two step process is necessary: (1) the selection of a proper method of valuation and (2) a hearing before the board on the merits.

Where a dispute arises between the assessor's and the taxpayer's methods of valuation, the statute makes no provision for a solution of this dispute.

At a hearing before the board on the selection of a method of valuation, taxpayer shall present competent evidence to create an issue of fact and request the board to determine the proper method of valuation. When a proper method of valuation has been determined, a final hearing can later be held to decide the merits of the protest. If the assessor's method of valuation is not selected by the board, the assessor shall revalue the property based upon the method selected. If the method selected is contested on appeal, we can decide which

method was proper under the facts of the particular case.

C. *Accepted appraisal techniques shall be used by county assessor, and by taxpayer to overcome presumption of correctness of assessor's valuation.*

Section 72–29–5(B) provides:

In using any of the methods of valuation authorized by this subsection the valuation authority shall apply generally accepted appraisal techniques.

On the matter of the application of "generally accepted appraisal techniques" by the county assessor, he uses the current New Mexico State Manual. Section 72–28–7. We have no way of knowing whether this manual is a "generally accepted appraisal technique." If necessary, taxpayer has a duty to dispute this fact by expert testimony.

The value of property determined by the county assessor is presumed to be correct. Section 72–31–6. This presumption can be overcome by taxpayer showing that the assessor did not follow the statutory provisions of the Act or by presenting evidence tending to dispute the factual correctness of the valuation. *McConnell v. State ex rel. Bureau of Revenue*, 83 N.M. 386, 492 P.2d 1003 (Ct.App. 1971). Taxpayer can show that the assessor failed to determine valuation by any statutory method, *San Pedro South Group*, supra, or present evidence of value based on generally accepted appraisal techniques that tend to dispute the factual correctness of the method of valuation used by the board. *Peterson Prop., Etc. v. Valencia Cty. Val. Protests Bd.*, 89 N.M. 239, 549 P.2d 1074 (Ct.App.1976).

When a taxpayer overcomes the presumption of the correctness of the assessor's method of valuation, the burden shifts to the assessor to prove that his method of valuation utilized a "generally accepted appraisal technique." The board shall then determine the merits of the protest.

In the instant case, taxpayers did not overcome the presumption because they used, as evidence, the "income method" of valuation. At a new hearing on its protest, taxpayers have the burden of overcoming the presumption under the "cost methods of valuation" if that method is adopted by the board.

D. *The board's primary duty is to determine "market value" of property for purposes of taxation.*

"[T]he value of property for property taxation purposes shall be its market value . . . ." Section 72–29–5(B).

"In determining market value of property for assessment, '* * * market value has been defined as a price which a purchaser, willing but not obliged to buy, would pay an owner willing, but not obliged to sell, taking into consideration all uses to which the property is adapted and might in reason be applied.' " *Peterson Prop., Etc.*, supra [549 P.2d at 1078]; *Kaiser Steel Corp. v. Property Appraisal Dept.*, 83 N.M. 251, 490 P.2d 968 (Ct.App.1971).

Essential factors in determining market value are those set forth in "generally accepted appraisal techniques." Section 72–29–5(B). What is most important is that the appraisers, the assessor and the protest board exercise an honest judgment based upon the information they possess or are able to acquire. *New York ex rel. Brooklyn City R.R. Co. v. New York*, 199 U.S. 48, 25 S.Ct. 713, 50 L.Ed. 79 (1905); 72 Am.Jur.2d State and Local Taxation § 754 (1974). An "honest judgment" is not one that favors the state or the taxpayer. It should be a fair, reasonable, just and truthful judgment of valuation of property based upon the best information that can be obtained. It must not be influenced by the need for higher taxes to operate the government, or the apparent large value of property. Every county appraiser, assessor and board must promote honesty in judgment.

An appraiser is "A person appointed by competent authority to make an appraisement, to ascertain and state the true value of goods or real estate." Black's Law Dic-

tionary 129 (4th ed. 1968). An appraisal is a valuation or an estimation of value of property by *an impartial, disinterested person* of suitable qualifications. *Jacobs v. Schmidt*, 231 Mich. 200, 203 N.W. 845 (1925); *Application of Guaranty Trust Co. of New York*, 81 N.Y.S.2d 632 (1948); 6 C.J.S. Appraiser at p. 105 (1975).

By use of a competent appraiser who follows the generally accepted appraisal techniques, the assessor can best determine the "market value" of property for property taxation.

E. *For purposes of appeal, the board must prepare a decision and order.*

Section 72–31–27(B) provides that "Final action taken by the board on a petition shall be by written order signed by the chairman . . . ." The written order signed by the chairman is a uniform blank form of order. It states that:

> . . . after considering all the evidence presented at the Protest Hearing . . . ,
>
> ORDERS:
>
> ( ) That no change be made in the valuation records of the County Assessor . . . :
>
> ( ) That the valuation records . . be changed to reduce the . . . valuation . . .
>
> ( ) That the valuation records . . be changed to increase the . . . valuation . . . .
>
> ( ) OTHER:

Upon appeal, under § 72–31–28(D), this "court shall set aside a *decision and order* of the director or a county valuation protests board only if it is found to be:

> (1) arbitrary, capricious or an abuse of discretion;
>
> (2) not supported by substantial evidence in the record taken as a whole; or
>
> (3) otherwise not in accordance with law." [Emphasis added].

By inadvertence, the legislature omitted the requirement of a "decision" by the board under § 72–31–27. However, "The practical reasons for requiring *administrative findings* are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts, *irrespective of a statutory requirement.* The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdictions." [Emphasis added]. Davis, Administrative Law Treatise, § 16.05 at 444 (1958). "The necessity for a finding to sustain administrative action adjudicatory or quasi-judicial in character does not rest wholly upon a statutory requirement of a finding *but may exist even in the absence of specific legislative requirement.*" [Emphasis added]. 2 Am.Jur.2d Administrative Law § 447 at 258 (1962).

"It is generally required, either on constitutional grounds or under statutes so providing, *or even apart from statute*, that an administrative body or officer must make findings of fact on the issues presented to it in an adjudicatory proceeding. . . . [T]he action or determination is void unless it is supported by findings of the basis or quasi-jurisdictional facts conditioning its power." 73 C.J.S. Public Administrative Bodies And Procedure § 139, at p. 464 (1951).

The written order form signed by the chairman contains no information upon which the order is based. For purposes of judicial review, the order must, at least, indicate the reasoning of the board and the basis on which it acted. See *City of Roswell v. New Mexico Water Qual. Con. Com'n*, 84 N.M. 561, 505 P.2d 1237 (Ct.App. 1972).

When this Court does not know the reasoning or basis upon which the order was entered, we cannot determine whether the decision and order of the board should be set aside. Mr. Justice Cardozo's often quoted observation is apt:

> We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 511, 55 S.Ct. 462, 467, 79 L.Ed. 1023, 1032 (1935).

Reversed. Taxpayer is granted a new hearing. It may be based upon an amended protest. The hearing shall be held in compliance with the guidelines herein set forth.

HERNANDEZ and LOPEZ, JJ., concur.

HERNANDEZ, Judge (specially concurring).

Because of the manner in which many of the protest hearings have been conducted, I believe it is advisable to reiterate some of the well-established principles and rules governing administrative hearings for the future guidance of the various County Protest Boards.

Protest Boards are quasi-judicial bodies and even though the technical rules of evidence and the Rules of Civil Procedure do not apply at protest hearings (§ 72–31–27(A), N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1975)), there are various legal principles and rules which are binding upon them. They are bound, as are all courts, by the provisions of constitutional due process and by the fundamental rules of fairness. *State v. Mountain States Tel. & Tel. Co.,* 54 N.M. 315, 224 P.2d 155 (1950); *Transcontinental Bus System v. State Corp. Commission,* 56 N.M. 158, 241 P.2d 829 (1952); *Baca v. Chaffin,* 57 N.M. 17, 253 P.2d 309 (1953); *Ferguson-Steere Motor Co. v. State Corp. Com'n,* 63 N.M. 137, 314 P.2d 894 (1957); *McWood Corporation v. State Corporation Commission,* 78 N.M. 319, 431 P.2d 52 (1967). Procedural due process requires that a protesting taxpayer be given adequate notice of the time and place of the hearing (*Groendyke Transp., Inc. v. New Mexico State Corp. Com'n,* 79 N.M. 60, 439 P.2d 709 (1968)); that he be given the opportunity to be heard and to present evidence in his behalf; and that he be allowed a reasonable right of cross-examination and the right to be represented by counsel should he desire. Due process requires that the Board base its decision on evidence produced at the hearing by witnesses personally present or by authenticated documents, maps, etc., and that the evidence be incorporated in the record. *Transcontinental Bus System v. State Corp. Commission,* supra. That is, the Board may not base its order on facts outside the record about which the taxpayer had no knowledge and no opportunity to be heard in regard thereto. *Woody v. R.R. Co.,* 17 N.M. 686, 132 P. 250 (1913). Its orders must be supported by substantial evidence. *Baca v. Chaffin,* supra; *Ferguson-Steere Motor Co. v. State Corp. Com'n,* supra; and *McWood Corporation v. State Corporation Commission,* supra. Unsubstantiated hearsay does not constitute substantial evidence. *Ferguson-Steere Motor Co. v. State Corp. Com'n,* supra; *McWood Corporation v. State Corporation Commission,* supra.

The essence of a fair hearing is the right to be fully informed of what you are contending against. How else can a taxpayer be expected to protest an assessment intelligently if he doesn't know what it is based upon? *Woody v. R.R. Co.,* supra. This information should either be sent to the taxpayer or he should be informed where and when it is available for his inspection. A third alternative would be to hold a bifurcated hearing. At the first part the Board would be presented with the evidence of how the assessment was arrived at. At the second part the taxpayer would present his evidence and arguments. A protest hearing should not be viewed as an adversary proceeding with the Board arrayed against the taxpayer, even though the taxpayer has the burden of overcoming the presumption of correctness of the assessment (§ 72–31–6, N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1975)). The Board should readily make available all relevant information which it possesses about the taxpayer's property and the assessment.

I recognize that one of the main purposes of administrative law is to provide a more flexible and informal procedure than is possible before courts. However, informality must not be practiced to the point that a hearing becomes a summary proceeding, a mere formality preceding a predetermined result.

The orders of valuation protest boards must give some indication of their reasoning and of the basis upon which they were adopted in order for this court to be able to perform its reviewing function. *City of Roswell v. New Mexico Water Quality Control Com'n*, 84 N.M. 561, 505 P.2d 1237 (Ct.App.1972).

560 P.2d 181

STATE of New Mexico, Plaintiff-Appellee,

v.

Gary ESQUIBEL and Rick Kloeppel, Defendants-Appellants.

No. 2650.

Court of Appeals of New Mexico.

Jan. 18, 1977.

Certiorari Denied Feb. 16, 1977.

Charles G. Berry, Marchiondo & Berry, Albuquerque, for Esquibel.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, William H. Lazar, Asst. Appellate Defender, Santa Fe, for defendant Kloeppel.

Suzanne Tanner, Louis Druxman, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of possession of marijuana contrary to § 54–11–22(A)(1), N.M.S.A.1953 (Repl. Vol. 8, pt. 2, 1962, Supp.1975) defendants appeal. Defendant Kloeppel abandons certain issues raised in the docketing statement because they are not supported by the record. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App. 1976). Kloeppel's point for reversal is the failure of the trial court to grant his motion for a directed verdict. Esquibel raises three issues for reversal: (1) directed verdict; (2) entrapment as a matter of law; and, (3) sufficiency of the evidence to go to the grand jury. We affirm.

Directed Verdicts

Both defendants contend that the legislature has narrowed the meaning of marijuana. Section 54–11–2(O), N.M.S.A. 1953 (Repl. Vol. 8, 1962, Supp.1975) sets forth the definition of marijuana as "all parts of the plant Cannabis sativa L." We need not answer this contention. Although, there was conflicting testimony by the experts, there was evidence (all the tests

when taken as a whole) from which the jury could determine that the substance was "Cannabis sativa L." *State v. Mora,* 81 N.M. 631, 471 P.2d 201 (Ct.App. 1970).

Esquibel also asserts that the statute (§ 54–11–22(A)(2), N.M.S.A.1953 (Repl. Vol. 8, pt. 2, 1962, Supp.1975)) means that when THC was proved marijuana was excluded. Here the legislature separated marijuana (with a lesser penalty) from THC (as extracted from marijuana and more potent) by making its distribution subject to a greater penalty. Section 54–11–22(A)(2), supra.

Entrapment

Esquibel asserts entrapment as a matter of law. A review of the facts fails to disclose entrapment. *State v. Fiechter,* 89 N.M. 74, 547 P.2d 557 (1976) overruling *State v. Sainz,* 84 N.M. 259, 501 P.2d 1247 (Ct.App. 1972).

Sufficiency of the evidence before the Grand Jury

This court will not review the sufficiency of the evidence before the grand jury. *State v. McGill,* 89 N.M. 631, 556 P.2d 39 (Ct.App. 1976).

Affirmed.

IT IS SO ORDERED.

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

560 P.2d 540

I. E. SHAHAN, Wendal Owen and Owen & Associates, Inc., a New Mexico Corporation, Plaintiffs-Appellants and Cross-Appellees,

v.

Robert L. STRYKER, Wanda Hyatt, and Stryker Realty, Inc., Defendants-Appellees and Cross-Appellants.

No. 10906.

Supreme Court of New Mexico.

Sept. 24, 1976.

Campbell & Campbell, Thomas K. Campbell, Las Cruces, for appellants.

Adams & Foley, Quincy D. Adams, Albuquerque, for Hyatt.

Crouch, Herring & Valentine, James R. Crouch, Las Cruces, for Stryker.

DECISION

MONTOYA, Justice.

WHEREAS, the above entitled cause has been submitted for decision and the Court having considered all matters presented, Mr. Justice Montoya, Mr. Justice McManus and Mr. Justice Sosa concurring;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED by the Court that the judgment of the District Court of Dona Ana County, wherein this cause originated, be and the same is hereby affirmed. The trial court found that none of the defendants acted as agents for Barber's Supermarkets, Inc. in connection with the purchase of the land in question, that none of the plaintiffs were joint tortfeasors with any of the defendants with respect to the transactions involved, and concluded that plaintiffs were not entitled to indemnity or contribution from defendants or any of them.

A review of the record indicates that the decision of the trial court is supported by substantial evidence.

The trial court also decided that the counterclaim of the defendants for a real estate commission should be dismissed. It found that the agreement to pay a commission was an oral one and that there was no memorandum in writing signed by the plaintiffs regarding the payment thereof to the defendants, and that more than four years had elapsed from the time of the sale of the real estate to the time of filing the counterclaim. It concluded that the applicable statute of limitations barred the claim and that the alleged agreement was void.

The trial court is affirmed on its decision on the counterclaim.

McMANUS and SOSA, JJ., concur.

560 P.2d 541

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc., Petitioner,

v.

The Honorable Edwin L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico, Respondent.

No. 10870.

Supreme Court of New Mexico.

Feb. 21, 1977.

Rodey, Dickason, Sloan, Akin & Robb, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, Montgomery, Federici, Andrews, Hannahs & Buell, Santa Fe, Cravath, Swaine & Moore, New York City, Wilmer, Cutler & Pickering, Washington, D. C., for petitioner.

Bigbee, Stephenson, Carpenter & Crout, Santa Fe, for real party in interest.

OPINION

McMANUS, Justice.

General Atomic Company (GAC) applied to this Court for a writ of prohibition directed to the First Judicial District Court of New Mexico. That court had issued the following injunction:

> IT IS THEREFORE ORDERED that General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto. However, the case of *Gulf Oil Corporation v. United Nuclear Corporation,* Civil Cause No. 76–032–B, currently pending in the United States District Court for the District of New Mexico, is excepted from the operation of this preliminary injunction, as is the appeal currently pending before the Tenth Circuit Court of Appeals in *General Atomic Co. v. Duke Power Company, et al.,* No. 76–1152. The injunction herein against defendant shall bind Plaintiff to the same terms.

This Court granted an alternative writ on April 19, 1976 to consider the claims raised by GAC. After briefing and oral argument from counsel for GAC and United Nuclear Corporation (UNC) we quashed this writ as being improvidently granted on June 16, 1976. GAC then appealed this order to the United States Supreme Court. The United States Supreme Court, on December 28, 1976, issued its mandate with the following quoted directions to this Court:

> ON CONSIDERATION WHEREOF, it was ordered and adjudged on November 29, 1976, by this Court that the judgment of the Supreme Court of New Mexico in this cause be vacated, and that this cause be remanded to the Supreme Court of the State of New Mexico to consider whether the judgment is based on federal or state grounds, or both. See *California v. Krivda,* 409 U.S. 33 [93 S.Ct. 32, 34 L.Ed.2d 45] (1972).

Pursuant to the mandate of that Court, we set forth below the reasons for our actions in this matter.

UNC is in the business of mining and milling uranium. Approximately ten years ago UNC started manufacturing reload fuel and assemblies for nuclear reactors. It entered into a joint corporation, Gulf United Nuclear Fuels Corporation, with Gulf Oil Corporation (Gulf) in order to obtain additional capital. Gulf purchased UNC's interest in the joint corporation in 1973 and thereby acquired contracts to supply uranium to various power companies in the country. Gulf later entered into a partnership agreement with Scallop Nuclear, Inc. (Scallop) and formed the present General Atomic Company (GAC). Gulf assigned to GAC the utility supply agreements.

From 1967 to mid-1973 the market price of uranium was relatively stable at about $7.00 per pound and the utility supply contracts were based upon that figure. Since 1973 the market price of uranium has increased to approximately $40.00 per pound. The value of the uranium in dispute is considerable in the eyes of everyone concerned.

UNC stopped delivery of the uranium in 1975 and filed a declaratory judgment action on August 8, 1975 against GAC and its constituent partners seeking to avoid its obligation under the contract. Gulf removed the case to the United States District Court for the District of New Mexico; UNC took a voluntary nonsuit and filed again in state court naming only GAC as defendant.

UNC applied for a temporary restraining order on January 19, 1976 in the District Court of Santa Fe County, New Mexico, to prevent GAC from instituting any additional suits against UNC. This motion was denied. GAC filed a statutory interpleader in the United States District Court for the District of New Mexico on the same day naming UNC and four utility companies as defendants. On January 20, 1976 Gulf filed a suit in the same federal court against UNC on the same issue. (This suit was subsequently dismissed on a motion by UNC; the court declined to take jurisdiction because the issues could all be resolved in the state court proceeding.) Indiana & Michigan Electric Company (I & M) (one of the utility companies) filed suit in the United States District Court for the Southern District of New York against GAC and its partners on February 24, 1976. Duke Power Company (another utility) filed a demand on February 17, 1976 for arbitration proceedings against GAC on another uranium supply contract. On March 15, 1976 UNC again applied for a temporary restraining order and a preliminary injunction in the District Court of Santa Fe County, New Mexico after learning that GAC would try to bring UNC into the I & M suit and the Duke arbitration case and any other suit involving the utilities. After a hearing, the District Court granted the preliminary injunction restraining GAC, its partners, privies, agents, servants and employees from instituting any further legal action against UNC. The injunction was also applied to UNC. The District Court specifically excepted the federal action already proceeding[1] and the federal suit on appeal to the United States Court of Appeals for the Tenth Circuit.[2]

New Mexico Const. art. 6, § 3 grants to this Supreme Court the power to issue writs of mandamus, error, prohibition, habeas corpus and "all other writs necessary or proper for the complete exercise of its jurisdiction . . . ." Prohibition is an extraordinary remedy which is granted only in limited circumstances at the discretion of the Court and is properly invoked to prevent an inferior court from acting either without jurisdiction or in excess of its jurisdiction. *State ex rel. Harvey v. Medler,* District Judge, 19 N.M. 252, 142 P. 376 (1914); *Cal-M, Inc. v. McManus,* 73 N.M. 91, 385 P.2d 954 (1963); *State v. Tackett,* 68 N.M. 318, 361 P.2d 724 (1961); *State v. Carmody,* 53 N.M. 367, 208 P.2d 1073 (1949). This writ should be issued sparingly and only where irreparable harm, extraordinary hardship, costly delays, or unusual burdens of expense would result. *State v. Scarborough,* 75 N.M. 702, 410 P.2d 732 (1966); *Montoya v. McManus,* 68 N.M. 381, 362 P.2d 771 (1961). Prohibition, however, is not a substitute for an appeal nor can it be used merely to correct an erroneous decision of the district court. *Baca v. Burks,* 81 N.M. 376, 467 P.2d 392 (1970); *State v. Coors,* 52 N.M. 189, 194 P.2d 678 (1948). Therefore, in order to determine whether a writ of prohibition is appropriate, we must consider whether issuing the injunction was within the jurisdiction of the district court.

It is well settled that once a court has acquired jurisdiction over the parties and the subject matter, it may enjoin either party from instituting or proceeding with another action in the same state or in a sister state based upon the same facts and issues. *Cole v. Cunningham,* 133 U.S. 107, 10 S.Ct. 269, 33 L.Ed. 538 (1890). This principle rests upon the court's inherent equity power to prevent injustice. *Balti-*

1. *Gulf Oil Corporation v. United Nuclear Corporation* (D.N.M. No. 76 032-B).

2. *General Atomic Company v. Duke Power Company, et al.,* (D.N.M. No. 76 029 B); (10th Cir. No. 76-1152).

more & Ohio R. Co. v. Kepner, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28 (1941). Most courts are reluctant to resort to such measures in the interest of comity, because even though the injunction acts in personam it operates to interfere with the exercise of jurisdiction of the neighboring court. *James v. Grand Trunk Western Railroad Company,* 14 Ill.2d 356, 152 N.E.2d 858, cert. denied, 358 U.S. 915, 79 S.Ct. 288, 3 L.Ed.2d 239 (1958). For that reason an injunction will not issue to prevent mere inconvenience or hardship, but rather is to be used when serious and grave reasons are present. *Southern Pac. Co. v. Baum,* 39 N.M. 22, 38 P.2d 1106 (1934). The prevention of vexatious, harassing and oppressive suits has been generally recognized as an appropriate basis for invoking this remedy. *Allstate Insurance Company v. Hill,* 218 Ga. 430, 128 S.E.2d 321 (1962); *Boston & M. R. R. v. Whitehead,* 307 Mass. 106, 29 N.E.2d 916 (1940); *Poole v. Mississippi Publishers Corporation,* 208 Miss. 364, 44 So.2d 467 (1950); *John Hancock Mut. Life Ins. Co. v. Fiorilla,* 83 N.J. Super. 151, 199 A.2d 65 (1964).

As the injunction applies to the institution of suits in other state courts, it was clearly within the power of the district court to restrain the parties from so acting. The Court found that further litigation was contemplated by GAC, irreparable injury would occur, there was no adequate remedy at law, further proceedings would be vexatious, harassing and multiplicitous, and that the inconvenience and expense of further proceedings would be reduced by granting the preliminary injunction. These findings give ample support for the court's order.

The thrust of GAC's challenge however, goes mainly to that portion of the injunction which restrains it from instituting further suits in federal court. GAC relies on *Donovan v. City of Dallas,* 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964) for the proposition that a state court is absolutely prohibited from interfering with the right of a party to bring multiple actions designed to harass and oppress its opponent so long as the party resorts to the federal forum. As a matter of state law, we hold that, under these circumstances, a district court has inherent equity powers to order such a restraint. We do not think that Donovan is applicable where a party is currently proceeding in federal court and where any further federal action would be based upon the same issues and events for the purpose of harassment. We do not believe that Donovan removes all equity powers from the jurisdiction of state courts whenever a party resorts to a federal forum.

In *Donovan v. Dallas* the plaintiffs had instituted a state court proceeding challenging the issuance and selling of municipal bonds for the expansion of a municipal airport. The case was tried and judgment was rendered for the city and upheld on appeal. The plaintiffs then filed an action in federal court seeking the same relief. The city then obtained an injunction prohibiting the plaintiffs from continuing with the federal court action. Donovan and other plaintiffs appealed the dismissal of the federal suit and were convicted of contempt for violating the injunction. Upon review the United States Supreme Court stated the issue as follows:

> The question presented here is whether a state court can validly enjoin a person from prosecuting an action *in personam* in a district or appellate court of the United States which has jurisdiction both of the parties and of the subject matter. Supra at 408, 84 S.Ct. at 1580.

The Court then proceeded to answer this question in the negative. The bases for the decision were (1) the historical rule that state and federal courts would not interfere or try to restrain each other's proceedings, (2) that the petitioners had a right to bring such a suit in federal court and have that court decide the propriety of the state court's judgment and (3) that once jurisdiction has attached no other court may interfere with its exercise even though an in personam order was directed against the party.

The issue considered in Donovan is not present in the instant case and the rationale for that decision is inapplicable to the facts

before the district court. The injunction which was issued does not directly or indirectly affect any proceeding in the district court or appellate courts of the United States where jurisdiction has attached. Those suits which were pending in federal court were exempted from the terms of the injunction. The injunction is directed only towards the institution of future litigation wherein no federal or state court has yet to acquire jurisdiction.

GAC contends that this is a distinction without a difference but when the rationale behind the decision is applied to these facts we find that the district court did not run afoul of the dictates of Donovan. The injunction does not offend any interest of comity; the parties are not restrained from proceeding with the suits wherein the foreign court has exercised its jurisdiction. The district court carefully defined the parameters of the injunction to avoid such a conflict.

Donovan was also concerned with denying the petitioners access to the federal forum. Here no such right is being infringed. GAC has its case before two United States Courts—one district court and one appellate. GAC can raise any issue that is being litigated in the state court, and the federal court may hear all the questions on the merits; it is not limited to first considering whether the state decision is valid and the application of res judicata because no judgment has yet been rendered in the New Mexico district court. This right the Donovan Court tried to protect and the injunction here is not contrary to the Donovan holding.

The underlying issue before us is whether the district court may restrict the future acts of a party who is bringing vexatious and oppressive litigation in multiple jurisdictions for the purpose of harassment. Clearly, the party may be restrained from instituting future state actions; *University of Texas v. Morris,* 162 Tex. 60, 344 S.W.2d 426 (1961), and (before Donovan) some courts have held that the prohibition could encompass the federal courts too. *Baltimore & Ohio R. Co. v. Kepner, supra; Wheeler v. Vimalert Co.,* 235 App.Div. 643, 255 N.Y.S. 114 (S.Ct.1932); *Poole v. Mississippi Publishers Corporation, supra.* We feel that, in these circumstances where the considerations in Donovan are accommodated, the district court could properly issue such an injunction to include all forums whether state or federal.

Since we hold that the district court was acting within its jurisdiction in granting the injunction, this is not a proper case for the invocation of the remedy of prohibition, therefore, we will quash this writ as being improvidently granted.

IT IS SO ORDERED.

SOSA, EASLEY and PAYNE, JJ., concur.

560 P.2d 545

Mary Ann GARCIA, Plaintiff-Appellee,

v.

GENUINE PARTS COMPANY and Sentry Insurance Company, Defendants-Appellants.

No. 2547.

Court of Appeals of New Mexico.

Jan. 18, 1977.

Rehearing Denied Jan. 31, 1977.

Certiorari Denied Feb. 28, 1977.

James T. Roach, Klecan & Roach, P.A., Albuquerque, for defendants-appellants.

Arturo G. Ortega, Michael D. Bustamante, Ortega, Snead & Dixon, Albuquerque, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendants appeal the judgment in favor of plaintiff in this workmen's compensation case. The issues raised group into two categories: (1) proof of disability, and (2) basis for liability for medical expenses.

Plaintiff was accidentally injured while at work on December 31, 1973. She filed a complaint seeking workmen's compensation benefits in December, 1974. The case was tried in January, 1976. The transcript on appeal was filed in this Court on August 6, 1976; briefing was completed on November 29, 1976. See §§ 59–10–13.10(A) and 59–10–16.1, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1) concerning the advancement of workmen's compensation cases on court calendars.

There is evidence that a heavy box fell on a co-worker's foot; that upon lifting the box, plaintiff felt a sharp pain in her back that went down into her legs. This was immediately reported to plaintiff's manager who inquired whether plaintiff wished to continue working or wanted to go home. There is evidence that plaintiff continued working, but with increasing pain. During her luncheon time, on the day of the accident, plaintiff went to the emergency room of a hospital where she was told not to return to work for three days and to avoid heavy lifting on her return. Plaintiff was seen by Dr. Cornish on January 24 and February 28, 1974; Dr. Cornish diagnosed a muscle strain.

Plaintiff was seen by Dr. Hollinger on January 29 and February 11, 1974. Up until April, 1974 she was being seen by a chiropractor. She returned to Dr. Hollinger in August, 1974 with increased complaints and has remained under his care. This care

included a laminectomy in October, 1974 and a laminectomy and fusion in February, 1975. There is evidence that the fusion was a "non-union" and that an additional surgical procedure is necessary.

Proof of Disability

The trial court found that plaintiff was totally disabled at the time of trial and had been since the accident on December 31, 1973. Defendants raise three issues in connection with this finding.

Two of the issues are based on the testimony of defendants' medical witness, Dr. Parnall, who disagreed with Dr. Hollinger as to the need for Dr. Hollinger's surgical procedures. Defendants claim they cannot be held liable for aggravation of plaintiff's condition caused by unskillful medical treatment by a physician chosen by plaintiff. Defendants also claim an absence of substantial evidence to support an award of total disability in that any disability was caused by negligence of physicians chosen by plaintiff. Both contentions are directed to Dr. Hollinger's treatment; we assume, but do not decide, that Dr. Hollinger was selected by plaintiff.

These two issues are based on claims of unskillful medical treatment and negligence on the part of Dr. Hollinger. Evidentiary support for these claims is necessarily based on Dr. Parnall's testimony. Assuming, but not deciding, that Dr. Parnall's testimony provides such support, we have a conflict in the evidence; the medical experts were in disagreement.

Defendants recognize that this conflict exists. They contend we should not decide these two issues on the basis of substantial evidence. Although the trial court found that Dr. Hollinger's treatment was necessary, defendants would have us disregard this finding. In essence, defendants ask us to weigh the evidence, determine that Dr. Hollinger was not to be believed and hold that the facts are those inferable from Dr. Parnall's testimony.

We do not weigh the evidence on appeal; rather we view the evidence in the light most favorable to support the the findings of the trial court. *Duran v. New Jersey Zinc Company*, 83 N.M. 38, 487 P.2d 1343 (1971). There is substantial evidence that Dr. Hollinger's treatment was necessary and that plaintiff's disability resulted from the accident of December 31, 1973.

A third issue under this point is that there is no proof of disability between February 11, 1974 and August 23, 1974. During this period plaintiff was not seen by Dr. Hollinger. The evidence is that during this period of time, plaintiff visited a chiropractor and may have been treated in the emergency room of a hospital. The chiropractor did not testify; there is no medical evidence concerning emergency room treatment, if any. For this period of time Dr. Hollinger testified: "I would not really be able to state whether or not she could work."

Defendants state: "Dr. Hollinger admitted that there was no medical probability that . . . [plaintiff] was disabled" during the period in question. They assert that § 59–10–13.3(B), N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1) precludes an award of compensation for this period.

Defendants misconstrue Dr. Hollinger's testimony. The quoted testimony went only to an inability to testify as to working ability during the period in question; it did not go to whether disability did or did not exist during this period. Compare, *Mares v. City of Clovis*, 79 N.M. 759, 449 P.2d 667 (Ct.App.1968). Other testimony of Dr. Hollinger was to the effect that plaintiff was continuously disabled to some extent after the injury occurred. Dr. Parnall testified there was some interference with plaintiff's work due to the injury, but he could not say how long this "lame back" would have lasted if surgery had not been done. The first surgery was performed subsequent to the time period in question.

Section 59–10–13.3(B), supra, reads:

> "B. In all cases where the defendants deny that an alleged disability is a natural and direct result of the accident, the workman must establish that causal connection as a medical probability by expert medical testimony. No award of compen-

sation shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists."

This section requires the causal connection between the disability and the accident be established as a medical probability by expert medical testimony. Both Dr. Hollinger's and Dr. Parnall's testimony met this requirement. See *Gammon v. Ebasco Corporation,* 74 N.M. 789, 399 P.2d 279 (1965).

Neither physician testified as to the extent of plaintiff's disability during the period in question. Section 59–10–13.3(B), supra, does not require that the extent of the disability be established as a medical probability by expert medical testimony. "Disability" is defined in terms of ability to perform work and requires consideration of the claimant's age, education, training, physical capacity, mental capacity and work experience. Sections 59–10–12.18 and 12.-19, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1). By statutory definition, more than physical condition is involved in determining "disability". See *Goolsby v. Pucci Distributing Company,* 80 N.M. 59, 451 P.2d 308 (Ct.App. 1969).

Once causation is established by appropriate medical evidence, the absence of medical testimony as to the *extent of disability* does not bar a disability award. The extent of disability may be established by the plaintiff. See *Seay v. Lea County Sand and Gravel Company,* 60 N.M. 399, 292 P.2d 93 (1956). Plaintiff's testimony was substantial evidence supporting the award of total disability during the period in question.

Basis for Liability for Medical Expenses

The medical bills were substantial. The trial court found the bills were reasonable in amount and were incurred in the necessary treatment of plaintiff. It also found that additional medical and hospital care would be required in the future, and that plaintiff was entitled to be paid for reasonable future expenses. Defendants raise two issues in connection with these findings.

The first issue goes to the sufficiency of the evidence to support the findings. They concede that Dr. Hollinger testified that the bills were reasonable in amount and that the treatment reflected by the bills was necessary. Because the trial court adopted plaintiff's requested findings, defendants urge a "more stringent mode of review". Again, defendants are asking this Court to weigh the evidence, to disregard Dr. Hollinger's testimony and to accept Dr. Parnall's testimony. We are not fact finders, but a court of review. The trial court resolved the evidentiary conflicts. It is not our function to weigh the evidence, but to determine whether substantial evidence supports the challenged findings. *Duran v. New Jersey Zinc Company,* supra. The findings are supported by substantial evidence.

The second issue goes to the basis for holding defendant liable for the medical bills, and involves the meaning of § 59–10–19.1, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1). The pertinent portion of that section reads:

"A. After injury, and continuing as long as medical or surgical attention is reasonably necessary, the employer shall furnish all reasonable surgical, physical rehabilitation services, medical, osteopathic, chiropractic, dental, optometry and hospital services and medicine, not to exceed the sum of forty thousand dollars ($40,000), unless the workman refuses to allow them to be so furnished.

"B. 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 . . . ."

Language similar to that appearing in Paragraph A of § 59–10–19.1, supra, was interpreted in *Johnson v. Armstrong & Armstrong,* 41 N.M. 206, 66 P.2d 992 (1937). *Johnson* states that the language in Paragraph A:

"imports more than a mere passive willingness or duty to furnish medical and surgical aid when called upon. It allows the employer to select his own physicians and surgeons for the care of his injured employees, but imports that arrangements should be made in advance, or that some one should be at hand in authority to provide medical and surgical care in cases of emergency like the one here considered. *Case of Ripley*, 229 Mass. 302, 118 N.E. 638; *In re Panasuk (In re American, etc., Co.)*, 217 Mass. 589, 105 N.E. 368."

The two Massachusetts cases cited in *Johnson*, supra, elucidate. *In re Panasuk*, 217 Mass. 589, 105 N.E. 368 (1914) states that the obligation to provide medical services is imposed by the express words of the statute:

"This duty must be performed or reasonable efforts made to that end before the statutory obligation is satisfied. . . . The word 'furnish' in such connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief."

In re Ripley, 229 Mass. 302, 118 N.E. 638 (1918) affirmed the foregoing quotation from *Panasuk*, supra.

2 Larson's Workmen's Compensation Law, § 61.12, p. 10–453, states:

"[T]he first issue that sometimes comes into litigation is the question whether the initiative lies with the employee to apply for medical benefits, or with the employer to call attention to their availability and furnish them without being asked. It is usually held that, when the employee has furnished the employer with the facts of his injury, it is up to the employer to instruct the employee on what to do to obtain medical attention, and to inform him regarding the medical and surgical aid to be furnished."

See *Draney v. Industrial Accident Commission*, 95 Cal.App.2d 64, 212 P.2d 49 (1949); *Teague v. Graning Hardwood Manufacturing Co.*, 238 Miss. 48, 117 So.2d 342 (1960); Compare, *Gross v. Wichita Compressed Steel Company*, 187 Kan. 344, 356 P.2d 804 (1960).

The evidence is uncontradicted that defendants made no active effort to provide medical attention. When plaintiff reported the accident and her back and leg pain to her manager, the only inquiry was whether plaintiff wanted to continue working or go home. The manager never mentioned medical attention. Plaintiff went to the hospital emergency room on her own initiative. She went to see Dr. Cornish either on the recommendation of some one in the emergency room or because he had previously treated her for an unrelated illness; the evidence supports either view.

However, there is no issue in this appeal concerning the emergency room charge on the date of the accident or Dr. Cornish's bill. Defendants assert that they paid these bills. The trial court refused to so find, and properly under the record which is before us, because the deposition on which defendants rely has not been included in the record on appeal. However, we will assume that defendants did pay these bills.

Defendants claim they are not liable for the bills incurred in connection with Dr. Hollinger's treatment. These are the bills for which plaintiff recovered judgment. Defendants assert they are not liable for these bills under Paragraph B of § 59–10–19.1, supra. On the basis that they paid the emergency room charge and Dr. Cornish's bill, they assert that they were furnishing adequate medical attention and therefore are not liable to furnish additional medical services. They point out that plaintiff never requested them to provide additional medical services, never asserted that Dr. Cornish's services were inadequate, failed to keep an appointment with Dr. Cornish and on the day of the unkept appointment, went to Dr. Hollinger on her own initiative. They rely on cases where the employer was providing medical services. See, for example: *Dudley v. Ferguson Trucking Company*, 61 N.M. 166, 297 P.2d 313 (1956); *Provencio v. New Jersey Zinc Co.*, 86 N.M. 538,

525 P.2d 898 (Ct.App.1974) and cases cited in *Provencio.*

We have assumed that defendants paid the emergency room charge and Dr. Cornish's bill. Does this assumption require a conclusion that defendants were furnishing medical services to plaintiff? No. There is nothing in this record showing when the bills were paid; we note that Dr. Cornish's report to the insurance company was written more than ten months after the date of his examination. Plaintiff testified that she did not know who paid these bills; she never knew that defendants were willing to provide medical treatment; she selected the physicians that did in fact treat her. The facts here do not show that defendants undertook their obligations to pay plaintiff's medical expenses. See *Security Insurance Co. of Hartford v. Chapman*, 88 N.M. 292, 540 P.2d 222 (1975).

Defendants' position is that they had no obligation other than to respond to requests for medical attention. We have pointed out that "furnish" in Paragraph A of § 59–10–19.1, supra, requires more than a passive willingness to respond to a demand. Paragraph B of the statute requires an "offer to furnish" medical services to avoid liability for the services procured by plaintiff. "Furnish" in Paragraph B also requires more than a passive willingness to respond to a demand.

Before defendants can avoid liability under Paragraph B of § 59–10–19.1, supra, they must have provided medical services or they must have affirmatively offered the services. Assuming defendants did in fact pay two medical bills incurred by plaintiff on her own initiative, this assumption shows no more than a passive willingness to respond. See *McCoy v. Industrial Accident Commission,* 64 Cal.2d 82, 48 Cal.Rptr. 858, 410 P.2d 362 (1966). Not having offered medical services, § 59–10–19.1(B), supra, is not applicable. *Dudley v. Ferguson Trucking Company* and the rules discussed in *Provencio v. New Jersey Zinc Co.,* supra, are also inapplicable. Defendants are liable for the medical services which plaintiff procured.

Oral argument is unnecessary. The judgment is affirmed. Having considered the issues litigated on appeal and the time necessarily expended in responding to defendants' contentions, plaintiff is awarded $3,000.00 for the services of her attorneys in the appeal.

IT IS SO ORDERED.

HENDLEY and SUTIN, JJ., concur.

560 P.2d 550

STATE of New Mexico,
Plaintiff-Appellee,

v.

Jimmy J. GALVAN, Defendant-Appellant.

No. 2760.

Court of Appeals of New Mexico.

Feb. 8, 1977.

Paul M. Bohannon, Hinkle, Bondurant, Cox & Eaton, Roswell, for defendant-appellant.

Toney Anaya, Atty. Gen., Don D. Montoya, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge

This case involves an investigatory stop of an automobile. Defendant is charged with the burglary of and larceny from a dairy. Two officers stopped the vehicle

driven by defendant; after the stop defendant made incriminating statements, and the officers observed certain physical evidence. Defendant's motion to suppress this incriminating material was denied. We granted his application for an interlocutory appeal. We discuss: (1) investigatory stop, (2) the record to be reviewed, and (3) basis for the investigatory stop.

Investigatory Stop

A police officer may, in appropriate circumstances, approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest *State v. Hilliard*, 81 N.M. 407, 467 P.2d 733 (Ct.App. 1970); see *State v. Frazier*, 88 N.M. 103, 537 P.2d 711 (Ct.App. 1975).

What are appropriate circumstances? Officers must have a reasonable suspicion that the law has been or is being violated. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *United States v. McDevitt*, 508 F.2d 8 (10th Cir. 1974).

What is a reasonable suspicion? Officers must be "aware of specific articulable facts, together with rational inferences from those facts," and these facts and inferences must provide the basis for the suspicion. *United States v. Brignoni-Ponce*, supra. Unsupported intuition is insufficient. *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973). An inarticulate hunch is insufficient. *Brown v. State*, 481 S.W.2d 106 (Tex.Cr.App. 1972).

How is reasonable suspicion to be judged? The facts and inferences are to be judged by an objective standard: Would the facts available to the officer warrant the officer, as a person of reasonable caution, to believe the action taken was appropriate? *State v. Hilliard*, supra.

The Record to be Reviewed

The transcript before us is the transcript of the preliminary hearing. Inferring that there may be evidence not disclosed at the preliminary hearing, the State asserts: "It does not appear that the state specifically examined the officers on the facts and circumstances leading up to the investigatory stop, therefore, all the evidence which is before the court on the issue was brought out on cross examination at the preliminary hearing by defense counsel." The trial court's order recites that the motion to suppress "was submitted upon an agreed transcript of testimony at Preliminary Hearing." The trial court ruled on the basis of the "agreed" transcript. The claim that the State failed to present all its evidence will not be considered because raised for the first time on appeal. N.M. Crim.App. 308.

The two officers testified at the preliminary hearing. They were a deputy sheriff and a jailer. Defendant asks us to "weigh" the jailer's testimony and, in effect, to disregard it. We decline to do so. ". . . [I]t 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. Bidegain*, 88 N.M. 466, 541 P.2d 971 (1975).

We consider the testimony of both officers as that testimony appears in the "agreed" transcript.

Basis for the Investigatory Stop

The deputy and the jailer were patrolling East Grand Plains Road south of Roswell. This is a county road which connects with highways at each end. Although the record is not clear, apparently the dairy is reached from this county road.

The time was about 2:00 a. m. The officers noticed defendant's vehicle when it was approximately two miles away. The vehicle had its lights on; no improper driving was observed. Defendant's car turned off the county road onto a road that deadends in a field. The officers caught up with defendant's vehicle and stopped it. There is nothing in this record indicating the stop

was for the purpose of checking driver's licenses or registration papers. See *State v. Bidegain*, supra; *United States v. Jenkins*, 528 F.2d 713 (10th Cir. 1975).

The deputy testified that he was patrolling, shining his spotlight, when he saw defendant's car *approaching*. The deputy pulled off the road, stopped, and turned off his lights. The deputy "was going to wait for the vehicle to come by so I could see what it looked like, see what the license number was and maybe run a registration check on it. The vehicle turned off the roadway." The dead-end road was unmarked.

"Q. So when he turned down the road, am I correct in assuming that was the first time—that is what keyed you in to going after him and checking it out.

"A. That was not the first time that I became suspicious of him but that did cause me to turn on my lights and go down after him.

"Q. Now let's talk about the first time that you became suspicious. What caused you to be suspicious.

"A. The lateness of the hour, the fact that I have been a policeman for eight years—just intuition.

"Q. Just gut reaction more than anything.

"A. Something like that, yes sir."

According to the jailer, the patrol car and defendant's car may have been traveling in the same direction with the patrol car in front. The jailer testified that the only thing unusual was "as we moved they moved and as we slowed down and stopped they turned off."

On the basis of the testimony of the deputy and the jailer, the State asserts that a reasonable inference is that defendant saw the spotlight of the patrol car and took evasive action. We assume that if the facts support a reasonable suspicion that defendant was evading the patrol car, that the officers could make an investigatory stop. We do not agree that such an inference is a reasonable one in this case.

We have previously pointed out that a reasonable suspicion must be based on specific articulable facts and the rational inferences from those facts. This requirement eliminates the following portions of the evidence from consideration.

1. The "as we moved they moved" testimony does not support an inference of repetitive conduct on the part of defendant. This testimony of the jailer, read in context, states no more than what the deputy said—both cars were in motion, the patrol car stopped, and defendant turned off.

2. To the extent the deputy's suspicion was based on eight years experience, we have only a conclusion unsupported by any explanation as to the type of experience or how that experience provided a basis for action. Compare *State v. Santillanes*, 89 N.M. 727, 557 P.2d 576, (Ct.App.) decided November 23, 1976; *State v. Blea*, 88 N.M. 538, 543 P.2d 831 (Ct.App. 1975).

3. We have previously pointed out that unsupported intuition or an inarticulable hunch does not provide the basis for a reasonable suspicion.

What, then, is left? We have the following facts: (1) it was in the early morning hours; (2) the officers, intending to check the license number of defendant's car, pulled off the road, stopped and turned off the lights of the patrol car; (3) defendant's car turned off the county road onto an unmarked dead-end road; (4) the stopping of the patrol car and defendant's turn occurred at approximately the same time.

We agree with the State that it can be inferred there was no other traffic on the road and that the occupants of each car were aware of the other vehicle. There is nothing, however, supporting an inference that defendant knew the other car was a patrol car. Use of the spotlight adds nothing because of the common practice of "spotlighting" in non-urban areas. If the distance factor suggests anything, it is that defendant did not know the other vehicle was a patrol car when defendant turned onto the dead-end road. When the patrol car had traveled on the dead-end road a

"100 feet or so" it was "two or three city blocks behind the vehicle at the time." As soon as the red light of the patrol car was turned on, defendant pulled over.

Turning onto an unmarked dead-end road in the early morning hours at the same time as another vehicle stops and turns out its lights is neutral conduct. These actions of defendant did not provide the officers, as persons of reasonable caution, with a reasonable suspicion that the law had been or was being violated. See *United States v. Brignoni-Ponce*, supra; *United States v. McDevitt*, supra; *United States v. Mallides*, supra; *United States v. Carter*, 369 F.Supp. 26 (D.C.Mo. 1974); *Brown v. State*, supra.

The order denying the motion to suppress is reversed. The cause is remanded with instructions to grant the motion to suppress and exclude the suppressed evidence in further proceedings against defendant.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

560 P.2d 925

STATE of New Mexico,
Plaintiff-Appellee,

v.

Reggie David BELL,
Defendant-Appellant.

No. 10868.

Supreme Court of New Mexico.

March 1, 1977.

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Anthony E. Lucero, Jr., Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Louis Valencia, Anthony Tupler, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

EASLEY, Justice.

Defendant was convicted by a jury in the District Court of Bernalillo County of kidnapping in the first degree, criminal sexual penetration in the first degree, and aggravated battery. He was sentenced to two concurrent terms for life. He appeals.

On October 14, 1975, the defendant allegedly followed the victim, a seventeen-year-old female student at the University of New Mexico, through Albuquerque traffic to a fraternity house parking lot, where he assaulted and struck her and forced her onto the floor of his car and drove away.

The victim testified that she lost consciousness about this time, and that the next thing she remembers is waking in the emergency room of the Bernalillo County Medical Center some hours later.

Other than positive identification of the defendant as her assailant, she was able to offer little direct testimony in reference to the sexual assault. However, the evidence showed that she had been severely beaten about the face, that an eight-ounce rock and several handfuls of sand and pebbles had been packed into her vagina, and that 13,500 Sigma units of acid phosphatase, indicating recent sexual intercourse, were present in her vagina.

The victim testified that she had sexual intercourse with her boyfriend the evening preceding the incident, after which she showered and changed clothes. Rebuttal testimony established that only a few hundred units of acid phosphatase could reasonably be anticipated to be the remnants of that sexual encounter.

Nine points of error are raised by defendant:

1. Defendant claims that the trial court erred in instructing the jury that criminal sexual penetration is defined as "penetration . . . with any object" when the grand jury indictment did not so charge. This claim of error is completely without foundation. No such instruction was given. In fact, one submitted by the State containing the language objected to was refused by the court.

2. Defendant contends that it was error for the trial court to refuse to direct a verdict in his favor, claiming that the evidence was insufficient to support a conviction of first-degree criminal sexual penetration because the only evidence of sexual intercourse was circumstantial.

The traditional distinction between direct and circumstantial evidence, upon which defendant here relies, has been specifically disapproved by N.M.U.J.I.Crim. 40.00 and 40.01 [2d Repl.Vol. 6, N.M.S.A.1953 (Supp. 1975), at 316, 317], which were in effect at the time of defendant's trial. These instructions and use notes require that "no instruction . . . shall be given" either on the distinction between the two types of evidence or upon the test for the sufficiency of circumstantial evidence. The committee commentary reveals that the committee believed that defining the types of evidence had little practical value for the jury, and that nothing is added by instructing the jury on the sufficiency of circumstantial evidence once the court determines that the State has met the legal test for sufficiency of the evidence—which remains proof beyond a reasonable doubt.

By implication, of course, the only tests remaining, either for purposes of instructions or for raising error on appeal, are those of sufficiency of the evidence to support the charge and, on appeal, the substantiality of the evidence to support the verdict. Viewing the record as a whole, we think there is substantial evidence to warrant the case going to the jury, and the trial court did not err in denying defendant's motion. *State v. Ferguson*, 77 N.M. 441, 423 P.2d 872 (1967); *State v. Martin*, 53 N.M. 413, 209 P.2d 525 (1949); *State v. Wilkerson*, 83 N.M. 770, 497 P.2d 981 (Ct. App.1972).

3. Reversible error is claimed because the court denied a defense motion for a directed verdict. Defendant claimed that, because there was no medical testimony establishing permanent damage to the victim and no medical testimony that her injuries created a high probability of death, there was insufficient evidence to support a conviction for kidnapping in the first degree.

In order to support a conviction for kidnapping in the first degree, the evidence must prove, inter alia, that the defendant inflicted "great bodily harm" upon the victim. Section 40A–4–1(B), N.M.S.A.1953. Section 40A–1–13(A), N.M.S.A.1953 defines "great bodily harm" for purposes of the Criminal Code to be "injury to the person which creates a high probability of death; *or* which causes serious disfigurement; *or* which results in permanent *or* protracted loss or impairment of the function of any member or organ of the body." (Emphasis added.)

The disjunctive nature of the conditions of the statutory definition are obvious. The conditions are not cumulative; only one need be shown in order to establish "great bodily harm."

The medical testimony established that the victim was "at least temporarily seriously disfigured" and, before treatment, was in danger of permanent impairment of the function of the left eye. The plastic surgeon who examined and treated the victim following the incident testified that she had, in addition to multiple facial lacerations, hemorrhage in both eyes, paralysis of facial nerves, and a cheek bone so shattered that her left eye had dropped into her sinus. Elaborate plastic surgery was required to replace the eye and rebuild the bone. The bone was so fragmented that a plastic plate had to be inserted to hold the injured eye in place. This satisfied the statutory definition of great bodily harm, which does not require that the disfigurement be permanent.

Furthermore, the law does not require that "great bodily harm" be proved exclusively by medical testimony. The jury is entitled to rely upon rational inferences deducible from the evidence. *State v. La Boon*, 67 N.M. 466, 357 P.2d 54 (1960). The general description of the patient's appearance and condition upon arrival at the Bernalillo County Medical Center and other non-medical testimony, especially the photographs of the victim admitted into evidence, constitute substantial evidence justifying the denial of defendant's motion for a directed verdict. *State v. Ferguson, State v. Martin, State v. Wilkerson,* supra.

4. Defendant claims that the prior statement given to the police by the victim and received in evidence was inadmissible because offered for no other purpose than to corroborate her oral testimony.

The record reflects that the prior consistent statement of the victim was admissible under the exception to the hearsay rule provided in New Mexico Rule of Evidence 801(d) [§ 20–4–801(d)(1)(B), N.M.S.A.1953 (Supp.1975)].

That rule declares that a "statement is not hearsay if . . . [t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive."

Defendant on cross-examination declared that the victim had been "coached" in her oral testimony and implied that she was testifying from memory of the written statement. The statement was properly admitted to rebut this implicit charge of improper influence.

The admission or exclusion of evidence is a decision within the sound discretion of the trial court, whose judgment will be set aside only upon a showing of abuse of discretion. *United States v. Miller*, 460 F.2d 582 (10th Cir. 1972); *United States v. Wainwright*, 413 F.2d 796 (10th Cir. 1969), cert. denied, 396 U.S. 1009, 90 S.Ct. 566, 24 L.Ed.2d 501 (1970); *State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct.App.1974), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974). The court did not abuse its discretion here.

5. The trial court's exclusion of the testimony of a defense witness on the results of the defendant's polygraph examination is claimed as error.

The offered testimony would have shown that defendant registered a score of positive-three on the polygraph test. A score of positive-six was considered by the expert to be conclusively truthful, while a score of negative-seven was considered conclusively untruthful. A fair interpretation of the evidence shows nothing more than that a score of positive-three is inconclusive. Defendant employs the ingenious argument that because the test results were "inconclusive on the positive side," i. e., tending toward truthfulness, they were somehow probative evidence of truthfulness and that exclusion of this evidence was reversible error.

Defendant's expert would only say, "It's inconclusive. You've just got to have more positive indications of truthfulness, deception, to say." On cross-examination, the state asked the witness: "So you cannot say, as a basis or result of the test that you gave, that Mr. Bell was deceptive or that he was not deceptive?" Witness answered: "No I can't." There was no error in excluding the evidence.

Defendant claims that the offered evidence satisfied the requirements for admissibility of polygraph examinations set forth in *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975). These requirements are: (1) evidence of the qualifications of the operator, (2) testimony to establish the reliability of the testing procedure, and (3) the validity of the tests made on the subject.

It is true that the minimum standards thus set forth were satisfied by the polygraph test, since the State stipulated to the first two requirements and no objection was made to the third; but this is no way makes the evidence automatically subject to admission. There is always the question of relevance.

Admitting that all three of the requirements of Dorsey were met, the results of this test were inadmissible because they were irrelevant. They did not prove that defendant's truthfulness was more likely or less likely. See N.M.R.Evid. 401 [§ 20–4–401, N.M.S.A.1953 (Supp.1975)]. The results proved nothing and were properly excluded. N.M.R.Evid. 402 [§ 20–4–402, N.M.S.A.1953 (Supp.1975)].

6. The defendant challenges the admission of certain photographs of the victim, claiming that any probative value was outweighed by the danger of inflaming the passions of the jury, and that the photographs were unnecessarily cumulative of the other testimony.

The questions to be answered regarding admissibility of photographs of the victim in a criminal case are (1) whether the photographs are calculated to arouse the prejudices and passions of the jury and (2) whether they are reasonably relevant to the issues of the case. *State v. Upton,* 60 N.M. 205, 290 P.2d 440 (1955).

"Great bodily harm" was one element of the crimes charged which had to be proven by the State beyond a reasonable doubt. The extent and nature of the victim's wounds were material issues, to which the photographs were clearly relevant. *State v. Victorian,* 84 N.M. 491, 505 P.2d 436 (1973); *State v. Upton,* supra.

Admissibility being discretionary with the trial court, the case will be reversed on appeal only upon a showing of abuse of that discretion. *State v. Gardner,* 85 N.M. 104, 509 P.2d 871 (1973), cert. denied, 414 U.S. 851, 94 S.Ct. 145, 38 L.Ed.2d 100 (1973); *State v. Armstrong,* 61 N.M. 258, 298 P.2d 941 (1956).

Defendant has the burden of proof of abuse of that discretion. *State v. Victorian,* supra. No abuse is found.

7. A State's rebuttal witness was permitted to answer a certain hypothetical question relative to acid phosphatase testing and defendant claims error because the question was allegedly based on erroneous factors and the doctor's answer allegedly failed to take into account "all necessary and relevant factors."

Defense counsel offered testimony suggesting that it was impossible to determine from the evidence whether the acid phosphatase was residue from intercourse with the victim's boyfriend the night before the assault or residue from the defendant's criminal sexual penetration.

After the defense rested its case, the State introduced rebuttal testimony to the effect that the high level of acid phosphatase found "could not have come from intercourse the date previous to the sample."

A hypothetical question was propounded to the expert, directed toward an answer that the acid phosphatase found was the result of intercourse on the questioned day. Defense counsel objected, claiming that (1) the witness did not know what reagent was used in the test, (2) there was no evidence to support the witness' opinion as to the method of obtaining the count of acid phosphatase and (3) there was no testimony upon which the witness could base his opinion as to other possible contributing factors to the acid phosphatase count. However, the witness was permitted to answer.

Defendant argues that this "flaw" in the testimony invalidated the testimony and, moreover, amounts to reversible error under the rule of *Landers v. Atchison, Topeka & Santa Fe Railway Co.,* 68 N.M. 130, 359 P.2d 522 (1961). That case is distinguishable because the witness there based his opinion on an assumption which was later in the trial shown not to be true; and because it was shown that the false assumption was critical to the entire nature of the proof in the case. In *Landers* the hypothetical question and answer were properly found to be erroneously admitted.

Defendant offered no proof that the reagent used was not the proper one. Thus error was not substantiated. A careful analysis of the record in regard to this issue is persuasive that defendant's objection goes to the weight of the evidence rather than its admissibility. *Ruhe v. Abren,* 1 N.M. 247 (1857). The question was proper and the answer admissible.

8. Defendant next raises as fundamental error the failure of the trial court to instruct the jury that it must find that the victim was not defendant's spouse. Defendant did not object to this failure at trial nor did he submit a proper instruction. The issue is raised for the first time in this court.

The issue is of first impression here. The resolution of the question warrants very serious consideration because of the consequences of serving two life sentences by this defendant and because two other first-degree criminal sexual penetration cases are also pending before us.

The statute defines criminal sexual penetration to be the "unlawful . . . causing of a person, other than one's spouse, to engage in sexual intercourse . . . ." It is asserted that a finding by the jury that the victim was not defendant's spouse is essential to a conviction. Failure to instruct on an essential element of the crime charged is reversible error. *State v. Gunzelman,* 85 N.M. 295, 512 P.2d 55 (1973); *State v. Jones,* 85 N.M. 426, 512 P.2d 1262 (Ct.App.1973); *State v. Walsh,* 81 N.M. 65, 463 P.2d 41 (Ct.App.1969).

If proving that the victim was other than defendant's spouse is an essential element, the issue is properly in this court. If it is not, the defendant waived his rights by not perfecting his record, and cannot complain.

There are several critical facts operative under these peculiar circumstances that militate against a holding that the omission of the words "other than one's spouse" from the instruction on the elements of the crime requires reversal.

There was abundant, albeit circumstantial, evidence that the victim was not defendant's wife. The most cogent of this evidence is the victim's sworn statements that she had never seen defendant before he assaulted her and defendant's testimony that he had never seen the victim before she appeared in court. The last names of defendant and victim were different. Defendant did not raise "marital relationship" as a defense. He does not now claim to be married to the victim.

In short, it cannot be reasonably maintained that there was any doubt on this question. It simply was not factually at issue in this case.

The applicable rule of criminal procedure [§ 41–23–41, N.M.S.A.1953 (Supp.1975), hereinafter Rule 41] requires in subsection (a) that "[t]he court must instruct the jury upon all questions of law essential for a conviction of the crime or crimes submitted to the jury."

The "questions of law essential to a conviction" of rape, which was the common law precursor of the statutory offense of criminal sexual penetration, traditionally have been three: (a) carnal knowledge or intercourse, (b) force, and (c) commission of the act without the consent or against the will of the victim. 65 Am.Jur.2d Rape § 2 at 762 (1972); 75 C.J.S. Rape § 8 at 471 (1952); Black's Law Dictionary 1427 (4th rev. ed.).

It is clear that the jury must be properly instructed on the law relative to each of these three essential elements of the crime. It is not disputed by the defendant that the jury in this case *was* properly instructed in this regard.

The question of whether the victim was one "other than his spouse" is not to be considered in the same sense as the elements of carnal knowledge, force, and lack of consent; rather, it bears as an evidentiary matter upon the third element of lack of consent, since a wife is irrebuttably presumed to consent to sexual relations with her husband, even if forcible and without consent. A husband is legally incapable of raping his wife. See *Duggins v. State,* 76 Okla.Cr. 168, 135 P.2d 347 (1943); *Frazier v. State,* 48 Tex.Cr.R. 142, 86 S.W. 754 (1905). Defendant does not contend that there was any evidence—and there was none—from which the jury could have inferred that the victim was defendant's wife.

The basic weakness in defendant's argument is the assumption—unsupported by case law or statute or commentary of any

kind—that the definitional component of "other than one's spouse" is an essential element of criminal sexual penetration. This court has recently addressed the knotty semantic problem of the significance of designating certain components of a crime to be "elements." See *State v. Smith,* N.M., 558 P.2d 46 (1976), where this court declared that it was irrelevant whether provocation was termed an "element" of manslaughter so long as there was sufficient evidence of provocation in the record.

The prior statute covering the crime of rape, § 40A–9–2, N.M.S.A.1953, since repealed, specified that the crime consisted of a "*male* causing a *female* other than his *wife*" (emphasis added) to engage in sexual intercourse. No one has ever been in this court, or any other appellate court of which we are aware, contending that it was fundamental error for the court not specifically to instruct the jury that it must find that the defendant was a "male" and that the victim was a "female." Why would it not also be necessary under the reasoning of defendant that the court instruct the jury that it must find the Bernalillo County is really a county, that New Mexico is a state and that this is actually New Mexico?

In *Sharp v. State,* 188 Ind. 276, 123 N.E. 161 (1919) the Indiana Supreme Court considered a similar issue and stated, 188 Ind. at 279, 123 N.E. at 162:

> The rule which requires the state to prove the guilt of the defendant beyond a reasonable doubt applies only to the essential facts constituting the crime charged; but the rule does not apply to the proof of subsidiary facts which are not essential elements of the crime, but which, if shown to exist, have a tendency to prove or disprove one or more of the constituent elements of the crime.

There is authority for the proposition that when the statute creating the offense includes an exception, the prosecution need not negate the exception by either alleging or proving that the defendant does not come within it; rather, it is then for the defendant to prove that he comes within it as a matter of defense. *Jalbert v. State,* 200 Ind. 380, 165 N.E. 522 (1928) (holding, in a prosecution for interstate transportation of alcohol, that the state was not required to allege in indictment or sustain by evidence that the liquor was being transported for illegal purposes), which spawned the following cases: *Day v. State,* 251 Ind. 399, 241 N.E.2d 357 (1968) (not incumbent on state to allege or prove that possession of firearm was unauthorized); *Cartwright v. State,* 154 Ind.App. 328, 289 N.E.2d 763 (1972) (same re possession of narcotics); *Butler v. State,* 154 Ind.App. 361, 289 N.E.2d 772 (1972) (not incumbent on state in prosecution for unlawful possession of narcotics to prove all possible exceptions or, by affirmative evidence to negate every conceivable hypothesis by which defendant may have gained possession lawfully.)

The *Jalbert* rule was approved in *People v. Fowler,* 32 Cal.App.2d Supp. 737, 84 P.2d 326 (1938), where the California court admitted that possession of a chiropractor's license would afford a complete defense to the charged violation of the Medical Practice Act but declared that it did not follow that the complaint must negative defendant's possession of such a license. The California authority for so holding in *Fowler,* supra, is not dependent upon the Indiana rule but can be traced back as far as 1898, where the Supreme Court of California decided in *People v. Boo Doo Hong,* 122 Cal. 606, 55 P. 402 (1898) that, in a prosecution for illegally practicing medicine, the burden is on the accused to show that he had a license to practice as required by law, since it is a matter peculiarly within his own knowledge.

Consistent with both *Fowler,* supra, and *Boo Doo Hong,* supra, is *People v. Tilkin,* 34 Cal.App.2d Supp. 743, 90 P.2d 148 (1939), which held that the prosecution did not need to prove that the accused did not fall within an exception of the anti-picketing statute upon which the prosecution was founded, but that such proof fell to defendant as a matter of defense.

People v. Gelardi, 77 Cal.App.2d 467, 175 P.2d 855 (1946), likewise held that it was a matter of defense for the accused pharma-

cist to prove, if he could, that he sold the narcotic with a written prescription, but that the State was not required to negative the statutory exception relating to sales of narcotics made pursuant to a physician's written prescription. The court in *Gelardi,* supra, declared that if the accused person sells a narcotic "unlawfully," it follows that he does not hold a prescription for it. The analogy is clear: if a person causes another to have "unlawful" sexual intercourse, it follows that the person so caused is "other than the spouse of" the accused.

All of these cases espouse the principle that the rules of criminal pleading do not require the indictment to set forth the evidence or negate every possible theory of defense. See *Stokes v. United States,* 157 U.S. 187, 15 S.Ct. 617, 39 L.Ed. 667 (1895); 4 Wharton's Criminal Procedure, Indictment and Information § 264 (1957). Jury instructions are obviously analogous in form and intent to indictments: in fact, because the evidence must conform to the terms of the indictment as the instructions must conform to the evidence, the relationship between the sufficiency of the indictment and of the instruction is more than metaphoric. It is both direct and actual. Therefore, given this direct relationship between indictment and instruction, it shows that it was not incumbent on the State to prove that the victim was not the wife of the defendant in this case since the statutory definition of the crime creates by negative exclusion the exculpatory status of husband.

Even without this authority for the general proposition that it is not incumbent upon the prosecution in a criminal case to prove a negative status created by statutory exclusion, there is authority for the specific proposition that it is not incumbent upon the prosecution in a rape trial to allege or prove that the prosecutrix was not the wife of the accused.

At common law, it was never necessary to allege that the prosecutrix was not the wife of the accused, and whether or not such an averment is essential under the statute has been a point of conflict among jurisdictions. *Sharp v. State,* supra, 188 Ind. at 278, 123 N.E. at 161, 162 held that:

> It may be shown as a defense that the woman against whom the offense is alleged to have been committed is the wife of the person who is charged with committing the rape, but it is not necessary to negative this fact in the indictment. *Curtis v. State* (1909), 89 Ark. 394, 117 S.W. 521; *State v. Morrison* (1912), 46 Mont. 84, 125 P. 649; *State v. Williamson* (1900), 22 Utah 248, 62 P. 1022, 83 Am.St. 780; *State v. White* (1890), 44 Kan. 514, 25 P. 33.

Cases cited in *Sharp* for the opposite view are clearly distinguishable because they deal with statutory rape in which consent is not an element, which very materially affects the quality of the proof required for conviction.

In *Cutler v. State,* 15 Ariz. 343, 138 P. 1048 (1914) the facts in a statutory rape case were very similar to ours and the court held there was no error (15 Ariz. at 353, 138 P. at 1052):

> . . . It is absurd to say that a jury should be expected to adopt any other theory of the case than adopted by the state, the accused, and the court. The fact that the prosecutrix was not the wife of the accused never became a disputed fact in the course of the trial. . . .

The radical extension of the doctrine of *strictissimi juris* in favor of criminal defendants by higher courts of this country has led to some absurd results. To reverse this case under the circumstances pertaining here for the reason that the trial court omitted the words "other than his wife" from its instructions would be one of the more ludicrous results possible from the application of the doctrine.

It would be a perversion of justice, a classic demonstration of profoundly inequitable results that follow when the judiciary worships form and ignores substance.

Defendant's claim cleverly distorts and seeks to take advantage of an important policy of this court, that of recognizing the grave significance of proper jury instruc-

tions, especially in a first-degree case, and of entertaining arguments in this regard on appeal even when error was not preserved at trial. Holding the claimed error to be "fundamental" would be making a mockery of the jurisdictional-error rule, the reasons for its creation, and the judiciary that administers it.

Since the matter of "other than one's spouse" was, then, not one of the "questions of law essential for a conviction" upon which the court is required to instruct the jury, but rather a subsidiary fact, subsection (d) of Rule 41 comes into play. That paragraph provides in pertinent part that "[e]xcept as provided in paragraph (a) of this rule, for the preservation of error in the charge, objection to any instruction given must be sufficient to alert the mind of the court to the claimed vice therein, or, in case of failure to instruct on any issue, a correct written instruction must be tendered before the jury is instructed . . ."

Defense counsel did not raise objection to the allegedly fatal omission at trial and did not tender a proper instruction. Instead, defendant claims jurisdictional-error and that the issue may be raised for the first time on appeal. *State v. Gunzelman, State v. Walsh,* supra. We hold that the jurisdictional error rule, under the rubric of Rule 41(a), does not apply. Rather, Rule 41(d) requires that the error be preserved. This was not done and defendant cannot raise the issue here.

9. Defendant's final contention is that the judge erred in refusing to grant defendant's requested change of counsel. The extent of his complaint was that he felt his attorney did not believe him and that he did not want to represent him. This claim of error is manifestly without merit. *State v. Walker,* 202 Kan. 475, 477–478, 449 P.2d 515, 518 (1969) states:

> . . . An indigent defendant may not compel the court to appoint such counsel as defendant may choose. Such appointment lies within the sound discretion of the trial court . . . Likewise, whether the dissatisfaction of an indigent accused with his court-appointed counsel warrants discharge of that counsel and appointment of new counsel is for the trial court, in its discretion, to decide . . .

This rule was adopted in New Mexico by *State v. Salazar,* 81 N.M. 512, 469 P.2d 157 (Ct.App.1970), where the court emphasized that substitution of court-appointed counsel is within the discretion of the trial court.

There is no tenable showing of abuse of discretion here; no claim of inadequate representation or prejudice to the defense is made; it was clearly not error to deny defendant's request.

The decision of the district court is affirmed.

IT IS SO ORDERED.

McMANUS and SOSA, JJ., concur.

560 P.2d 934

SKYHOOK CORPORATION, d/b/a Baldwin Ward Manufacturing Company, Inc., Petitioner,

v.

John JASPER, as administrator of the Estate of and personal representative of Malvin Mack Brown, Deceased, Respondent.

No. 10843.

Supreme Court of New Mexico.

March 11, 1977.

Modrall, Sperling, Roehl, Harris & Sisk, Peter J. Adang, Albuquerque, for petitioner.

William H. Carpenter, Albuquerque, for respondent.

OPINION

OMAN, Chief Justice.

This cause is before us on a writ of certiorari directed to the New Mexico Court of Appeals, which reversed a judgment entered by the district court in favor of defendant (Skyhook) upon a directed verdict. *Jasper v. Skyhook Corporation,* 89 N.M. 98, 547 P.2d 1140 (Ct.App.1976). We reverse the Court of Appeals and affirm the judgment of the district court.

This is an action for claimed wrongful death brought by plaintiff (Jasper), as administrator of the estate and personal representative of Malvin Mack Brown, deceased, pursuant to §§ 22–20–1 & 3, N.M.

S.A. 1953. Decedent was employed by Electrical Products Signs, Inc. (Signs, Inc.) as an apprentice sign installer. On January 11, 1973, he was assisting a journeyman installer of signs (Pulis), also employed by Signs, Inc., to install a Phillips 66 sign at a service station near Springer, New Mexico.

A hole had been dug in the ground in which to place the heavy signpost, a metal pipe, in an upright position. Pulis and decedent were using a 100 foot telescoping crane rig to lift and place the signpost in the hole. This crane was manufactured by Skyhook and sold by it to Signs, Inc., in January 1968. A clearly visible written warning appeared on the boom. In this warning it was stated: "All equipment shall be so positioned, equipped or protected so no part shall be capable of coming within ten feet of high voltage lines."

Pulis was aware of and had read the warning, and the evidence is to the effect that decedent also had seen and was aware of the warning, since it was clearly visible and decedent had previously worked on and had operated the rig. Both Pulis and decedent knew of the presence of overhead high voltage lines, since they had been warned of the presence of these lines by the operator of the Phillips 66 station at which the sign was being installed. The station operator had warned them that they should operate the equipment ten feet from these high voltage lines.

Pulis and decedent positioned the crane so that, in the judgment of Pulis, the crane was ten or twelve feet from the power lines. However, no measurements were made to assure that the positioned distance of the crane from the power lines was sufficient to prevent any portion of the equipment from coming within ten feet of these lines, even though a tape measure was kept in the cab of the rig for the purpose of making these measurements. Pulis then hoisted the signpost with the crane and began swinging it toward the hole in which it was to be positioned. As he was swinging the signpost toward the hole, he heard decedent scream. Decedent, who was guiding the signpost by hand toward the hole, was electrocuted when the lift cable came in contact with the overhead power line. A "tag line" or "guide rope," which was not an effective conductor of electricity and which decedent could have used to guide the signpost to the hole, was available, but was not ordinarily used by the helper in setting a post. There were also other measures commonly known, and known at least to Pulis, which could have been taken to avert the electrocution of decedent.

Decedent had been warned by his father of the dangers in operating a crane too near high voltage lines. The rig had been used by Signs, Inc. for the purpose of erecting signs for a period of five years, and no such accident or incident had ever previously occurred.

Plaintiff sought recovery from Skyhook on the theory of strict tort liability for failing to equip its crane, at the time of its sale to Signs, Inc. in January 1968, with either an "insulated link" or a "proximity warning device." An insulated link is a device installed on a crane to isolate the lifting hook from the lifting line or cable, so that there is no electrical continuity between the crane boom or lifting cable and the load being lifted. In January 1968, no crane manufacturer installed insulated links as standard equipment, but they were available to a purchaser of a crane at an additional cost of $300 to $400, depending on the size of the link.

A proximity warning device is an alarm warning system activated by the electrostatic field of overhead power lines. The use of this device requires that the crane be positioned at the minimum distance desired from the power line and the device then set for operation. If properly set, it will warn the operator by sound and lights when the equipment encroaches on the minimum preset distance from the power line. At the time of the sale of the crane to Signs, Inc., no crane manufacturer offered this device as either standard or optional equipment, but it could be purchased for approximately $700.

In reversing the judgment of the district court entered pursuant to a directed ver-

dict, the Court of Appeals considered only the "facts (evidence) most favorable to plaintiff." *Jasper v. Skyhook Corporation,* supra. The standards to be followed by the trial court in ruling on a motion for a directed verdict, and the scope of review of the evidence on appeal from a judgment entered upon a directed verdict, are set forth in *Archuleta v. Pina,* 86 N.M. 94, 95, 519 P.2d 1175, 1176 (1974), wherein it is stated:

> "In ruling on a motion for a directed verdict, the trial court must view the evidence, together with all reasonable inferences deducible therefrom, in the light most favorable to the party resisting the motion, and must disregard all conflicts in the evidence unfavorable to the position of that party. (Citations omitted.)
>
> "* * *.
>
> "The appellate court, upon reviewing a judgment entered pursuant to a directed verdict, must also view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the party resisting the motion, and must disregard all conflicts in the evidence unfavorable to the position of that party. (Citations omitted.)"

Neither the trial court in ruling upon a motion for a directed verdict, nor an appellate court in reviewing the evidence on appeal from a judgment entered pursuant to a directed verdict, is authorized to consider only the evidence most favorable to the party opposing the motion. All the evidence must be reviewed, but, if there be conflicts or contradictions in the evidence, these conflicts must be resolved in favor of the party resisting the motion. Insofar as the properly admitted evidence is uncontroverted, it must be considered. However, if any uncontradicted evidence, including the reasonable inferences deducible therefrom, may reasonably be interpreted in different ways, then the interpretation most favorable to the resisting party must be accepted.

The pertinent facts of this case as set forth above are consistent with this scope of review.

In its opinion in this case, the Court of Appeals relied upon its opinion in *Deem v. Woodbine Manufacturing Company,* 89 N.M. 50, 546 P.2d 1207 (Ct.App.1976), for extending the concept of strict liability under Restatement (Second) of Torts § 402A (1965), hereafter cited as § 402A, to manufacturers of products who fail to equip their products with optional safety devices. However, by a unanimous decision of this court, the decision of the Court of Appeals in the *Deem* case was reversed, and its opinion disapproved with directions that it not be cited as precedent. *Woodbine Manufacturing Company v. Deem,* 89 N.M. 172, 548 P.2d 452; 89 N.M. 463, 553 P.2d 1270 (1976).

Since Skyhook was the seller, as well as the manufacturer of the crane involved in this case, we need only consider whether the evidence adduced at trial required the submission to the jury by the trial court of the issue of Skyhook's liability under § 402A. We have hereinabove recited the pertinent facts as established by the evidence. We need not and do not concern ourselves with the question of whether Skyhook, as the manufacturer of the crane, was responsible under Restatement (Second) of Torts § 398 (1965) for negligence in the plan or design of the crane because of its failure to supply the crane with either an insulated link or a proximity warning device. As stated above, plaintiff sought recovery under § 402A, and we have heretofore adopted as the law of New Mexico the concept of liability set forth therein. *Garrett v. Nissen Corporation,* 84 N.M. 16, 498 P.2d 1359 (1972); *Stang v. Hertz Corporation,* 83 N.M. 730, 497 P.2d 732 (1972).

Thus, the question to be resolved is whether the evidence created an issue of fact as to liability of Skyhook under § 402A, which should have been submitted to the jury. The pertinent portions of this section of the Restatement provide:

> "*Special Liability of Seller of Product for Physical Harm to User or Consumer.*
>
> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his

property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

"(a) the seller is engaged in the business of selling such a product, and

"(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."

There is no question about the sale of the rig by Skyhook to Signs, Inc; no question that Skyhook was engaged in the business of selling these rigs; no question that decedent was using the crane rig at the time of his death; and no question about any substantial change having been effected in the rig from the day of its sale to Signs, Inc. in January 1968 to January 11, 1973, the date of the unfortunate accident. Therefore the only issue under § 402A which must be determined is whether the crane was in a defective condition which made it unreasonably dangerous to the user.

First, we must decide whether the failure of a seller to include an optional safety device as a part of the product may be considered as a sale of the product in a "defective condition." It would serve no useful purpose to try to reconcile the authorities on this point. However, we are of the opinion that a failure to incorporate into a product a safety feature or device may constitute a defective condition of the product. Obviously, the test of whether or not such a failure constitutes a defect is whether the product, absent such feature or device, is unreasonably dangerous to the user or consumer or to his property.

If a condition of a product is unreasonably dangerous to a user or consumer or to his property, we see no reason why distinctions should be made as to the nature of the condition or defect. Although the Idaho Supreme Court was considering whether a distinction should be drawn between defective manufacture and defective design, the reasoning of that court is equally applicable to the liability of a seller under § 402A.

In *Rindlisbaker v. Wilson,* 95 Idaho 752, 759, 519 P.2d 421, 428 (1974), that court stated:

"Appellant urges that a distinction should be drawn between defective manufacture and defective design. However, we fail to see any logical reason to distinguish between the two. The risk to the user will be just as great with an *unreasonably dangerous* design defect as with a manufacturing defect." (Emphasis added.)

Applied to the case at hand, this raises the inquiry as to whether the crane rig was unreasonably dangerous. The fact that the accident did occur is not in itself sufficient, in the light of hindsight, to support a finding that the crane rig was unreasonably dangerous. Almost everything, if not everything, we use or consume can cause injury, or even death, if used excessively or improperly.

The crane rig had been used by Signs, Inc. for five years, had performed well, and no injury had resulted. Obviously, it was not unreasonably dangerous within the contemplation of the ordinary consumer or user of such a rig when used in the ordinary ways and for the ordinary purposes for which such a rig is used. See § 402A, comment i. Furthermore, even though Skyhook had knowledge that the rig might be used in areas where overhead high voltage lines were present, it placed on the boom a clearly visible written warning that "all equipment shall be so positioned, equipped or protected so that no part shall be capable of coming within ten feet of high voltage lines." There is no contention that this warning was inadequate, had it been heeded. Skyhook, as the seller, could reasonably assume that the warning would be read and heeded. And had it been heeded, the crane rig was not in a defective condition nor unreasonably dangerous. See § 402A, comment j.

The above reasons are sufficient in themselves to dispose of this case, but we have more here. Both Pulis and decedent had the presence of the high voltage lines called to their attention, both knew the dangers of high voltage electricity—as does every ordinary adult in this present day

society in New Mexico in which electricity is used so commonly for so many purposes—and together they positioned the crane rig away—but not far enough away—from these high voltage lines. There is no duty to warn of dangers actually known to the user of a product, regardless of whether the duty rests in negligence or on strict liability under § 402A. *Garrett v. Nissen Corporation,* supra.

Since there was no defect in the crane rig unreasonably dangerous to the decedent within the contemplation of the strict liability concept enunciated in § 402A, there was no culpable conduct on the part of Skyhook which could have proximately caused the accident and the resulting death. However, it is the obligation of a claimant under § 402A, in order to recover, to prove that a defective condition unreasonably dangerous proximately caused the physical harm to the user or consumer, or to his property. *Bradford v. Bendix-Westinghouse Auto. Air Brake Co.,* 33 Colo.App. 99, 517 P.2d 406 (1973); *Wenzell v. MTD Products, Inc.,* 32 Ill.App.3d 279, 336 N.E.2d 125 (1975); *Wilcheck v. Doonan Truck & Equipment, Inc.,* 220 Kan. 230, 552 P.2d 938 (1976); *Southwire Co. v. Beloit Eastern Corp.,* 370 F.Supp. 842 (E.D.Pa.1974).

In a case with a factual situation surprisingly similar to that in the present case and in which the § 402A claim of strict liability was predicated upon the absence of the same type of safety devices as those involved in the present claim, the Supreme Court of Minnesota, in its opinion holding as a matter of law that the defendant there involved was not liable under either strict liability or negligence, stated:

> "Here the manufacturer warned against using the product within 6 feet of any power lines. [This warning was contained in the Operator's Instruction Manual, whereas in the present case it was placed in a clearly visible position on the crane boom.] Additionally, Barton, the employer, and plaintiff, its employee, knew of the danger involved.
>
> "We hold that American Hoist did not owe the injured plaintiff any duty to install safety devices on its crane to guard against the risk of electrocution when the record demonstrated that risk was: (1) Obvious; (2) known by all of the employees involved; and (3) specifically warned against in American Hoist's operations manual. * * *"

Halvorson v. American Hoist & Derrick Co., Minn., 240 N.W.2d 303, 308 (1976).

As stated above, we take the same position in the present case as that taken by the Minnesota court in the *Halvorsen* case. Since we hold that there was no defective condition in the crane rig which was unreasonably dangerous to the decedent as a user thereof, we need not and do not consider the other issues raised in the appeal or in the petition for writ of certiorari.

The decision of the Court of Appeals is reversed and this cause is remanded to that court with directions to affirm the judgment of the district court.

IT IS SO ORDERED.

McMANUS, SOSA, EASLEY and PAYNE, JJ., concur.

560 P.2d 939

Lynn A. WEILAND, Sr., Individually and as father and next friend of Lynn A. Weiland, Jr., and Margaret Weiland, Plaintiffs-Appellants,

v.

Jose A. VIGIL and Esther L. Vigil, Defendants-Appellees.

No. 2590.

Court of Appeals of New Mexico.

Jan. 11, 1977.

Rehearing Denied Jan. 25, 1977.

Certiorari Denied Feb. 25, 1977.

Charles G. Berry, Marchiondo & Berry, Albuquerque, for plaintiffs-appellants.

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

OPINION

SUTIN, Judge.

Plaintiffs appeal from a judgment for defendants arising out of an automobile accident that occurred on Montgomery Boulevard in Albuquerque, New Mexico. We reverse.

This case is a matter of first impression in New Mexico.

A. *Facts.*

Plaintiffs, Lynn A. Weiland, Jr. and Margaret Weiland, and three other passengers were students at Eldorado High School and were being driven to school by Diane Keith (Diane). The Eldorado High School sits to the south of Montgomery Boulevard and east of Juan Tabo. It is separated from Montgomery Boulevard by a chain link fence and parking lot. The classes convened at 8:00 or 8:15 a. m.

There were two exit-entrances to the high school on Montgomery Boulevard, the second being to the east of the first. Twenty cars were backed up to the west in the curb lane from the first of these entrances.

The car driven by Diane was in the curb lane heading east on Montgomery Boulevard. Because of the traffic jam, she switched from the curb lane and drove in the lane nearest the median. She drove a distance of 428 feet, past the whole line of traffic, and to the point of collision with defendants' car, driven by defendant Esther Vigil (Esther), at the first entrance. Diane was headed east for the second entrance on Montgomery. Her speed was between 35 and 45 miles per hour. The collision occurred just prior to 7:55 a. m. when Esther exited from the entranceway.

The trial court instructed the jury:

> There was in force in the state at the time of the occurrence in question a certain statute which provided that:
>
> "Speed restrictions [*regulations*]. No person shall drive a vehicle on a highway at a speed greater than:
>
> 1. Fifteen (15) miles per hour on all highways when passing a school [dur-

ing school recess or] while children are going to or leaving school [*and when the school zone is properly posted*]. In any [*every*] event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements [*as may be established by the New Mexico highway department or the New Mexico state police department*] and the duty of all persons to use due care."

If you find from the evidence that this statute was violated you are instructed that such conduct constituted negligence as a matter of law. [Emphasis added].

B. *The school zone statute was not applicable.*

The statute was not applicable because a school zone was not established by state or local authorities.

The *emphasized, bracketed* language in the instruction given was a part of the statute but it was omitted from the instruction. The bracketed phrase "[during school recess or]" is not a part of the statute. Only a portion of the statute was used, as well as an addition to the statute. See § 64–18–1.1, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2).

"At all school crossings . . . *appropriate signs shall be provided* as prescribed by the state highway commission or local authorities . . . regulating traffic movement within the school zones." Section 64–18–35(C), N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2).

This is mandatory language. All parts of an Act relating to the same subject matter are to be construed together. *Kendrick v. Gackle Drilling Company,* 71 N.M. 113, 376 P.2d 176 (1962). Sections 64–18–1.1 and 64–18–35(C) are parts of an Act providing for a Code regulating traffic on highways. Laws 1953, ch. 139, and as amended.

In construing a statute, statutory words are presumed to be used in their ordinary and usual sense. *Bettini v. City of Las Cruces,* 82 N.M. 633, 485 P.2d 967 (1971). We must assume that the legislature chose the words advisedly to express its meaning unless the contrary clearly appears. *State v. La Badie,* 87 N.M. 391, 534 P.2d 483 (Ct.App.1975).

There was a school crossing at the first entrance-exitway from which Esther exited. By statute, the legislature declared that "appropriate signs *shall* be provided . . . regulating traffic movement within the school zones" . . . "*and* when the school zone is properly posted", the speed is reduced to 15 miles per hour. [Emphasis added]. Sections 64–18–35(C) and 64–18–1.1(A)(1), supra. Otherwise, the speed is restricted to that limit fixed by law, which, in this case, was 45 miles per hour.

Sergeant Jack Martin of the Albuquerque police force investigated the accident. He testified that the speed limit in the area of the accident was 45 miles per hour; *that no school zone sign was posted,* and, although caution should be used, that 45 miles per hour was a safe speed for a vehicle to travel on the inside lane to the left of the traffic tie-up.

Oliver Garcia, a witness, whose vehicle led the traffic tie-up at the first entrance, was asked if he stopped as he approached the entrance. He answered:

> I was going slow; I was doing about fifteen miles per hour. That is the speed limit in the school zone.

This witness did not testify that a school zone sign was posted. No evidence was presented that controverted the testimony of Sergeant Martin, and the record shows that during trial, defendants never relied on the school zone statute or a posted school zone sign.

Defendants claim that the plain meaning of the statute is that motorists passing schools are required to slow their vehicles down to 15 miles per hour whenever children are arriving at school; that the posting of a school zone sign is not a condition precedent to the imposition of the 15 mile

per hour speed limit. We disagree. The purpose of a school zone sign is to create a school zone, in the area of which speed must be reduced to 15 miles per hour. Without the school zone sign, the public is not notified of the precise distance from the school when the speed must be reduced.

The posting of a school zone sign is a condition precedent to the establishment of a school zone. If it were not a condition precedent, we should have to declare the language of the above statutes to be mere surplusage. This we cannot do. The legislature is presumed to have used no surplus words, *Cromer v. J. W. Jones Construction Company,* 79 N.M. 179, 441 P.2d 219 (Ct.App.1968), overruled on other grounds, *Schiller v. Southwest Air Rangers, Inc.,* 87 N.M. 476, 535 P.2d 1327 (1975), and where possible, effect must be given to every part of a statute. *State ex rel. Clinton Realty Company v. Scarborough,* 78 N.M. 132, 429 P.2d 330 (1967).

No school zone sign having been posted, we hold that a school zone was not created, the statute was not applicable, and the instruction given was erroneous.

C. *The instruction misled the jury.*

We must note that the statute was enacted primarily for the safety of children going to or leaving school. See, e. g., *People v. Worosz,* 69 Misc.2d 426, 330 N.Y.S.2d 196 (1972); *People v. Underwood,* 36 Misc.2d 498, 233 N.Y.S.2d 377 (1962); *Ross v. Reigelman,* 141 Pa.Super. 293, 14 A.2d 591 (1940); *Quillin v. Colquhoun,* 42 Idaho 522, 247 P. 740 (1926).

The terms "children" and "infant" are synonymous. Both refer to a child under the age of 21 years. However, today, children 18 years of age are considered to be adults. See, § 13–14–3, N.M.S.A.1953 (Repl.Vol. 3, pt. 1) of the Children's Code; § 3–21–2, N.M.S.A.1953 (Repl.Vol. 1, 1975 Supp.) (of the Federal Voting Rights Compliance Act); § 57–1–6, N.M.S.A.1953 (Repl. Vol. 8, pt. 2, 1975 Supp.) (pertaining to marriage); § 64–13–40(B), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2, 1975 Supp.) (pertaining to chauffeur license); *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970).

The statute would, therefore, apply to children who are under 18 years of age. The speed limit of 15 m. p. h. would apply "while children [under the age of 18 years] are going to, or leaving school, and when the school zone is properly posted." *Underwood,* supra, says:

> The law has recognized that such protection is necessary, because it is a matter of common knowledge that an infant not only lacks the adult knowledge of the probable consequences of his acts or omissions, but is wanting in capacity to make effective use of such knowledge as he has. [233 N.Y.S.2d at 380].

In the instant case, if it were a school zone, Diane had a duty to slow down to 15 miles per hour to protect the safety of the children in the car. If she failed to do so, she would be negligent as a matter of law as far as the children were concerned. However, her negligence could not be imputed to the plaintiffs because the court instructed the jury:

> Any negligence which you find on the part of the driver of the vehicle in which plaintiff was a passenger cannot be charge [sic] to plaintiff.

The school zone instruction misled the jury to believe that the plaintiffs must suffer the pangs of outrageous misfortune resulting from the negligence of Diane even though her negligence did not affect the conduct of the children. An instruction which is likely to confuse or mislead the jury is prejudicial error. *Embrey v. Galentin,* 76 N.M. 719, 418 P.2d 62 (1966); *Garcia v. Southern Pacific Company,* 79 N.M. 269, 442 P.2d 581 (1968); *Bolen v. Rio Rancho Estates, Inc.,* 81 N.M. 307, 466 P.2d 873 (Ct.App.1970).

D. *The trial court erred in disallowing evidence of impeachment of a witness.*

Plaintiffs called Oliver Garcia as a witness.

He was the driver of the vehicle moving east in the curb lane who stopped at the first entranceway on Montgomery Boulevard to permit Esther to exit from the school grounds. Esther intended to drive across the eastbound lanes to the westbound lanes of Montgomery and proceed west.

Esther and Garcia each testified that she had stopped before leaving the school grounds and did not prevent Garcia from moving forward in his lane of travel. Plaintiffs sought to impeach Garcia with prior inconsistent statements that defendants' vehicle had exited and stopped in the middle of his lane and prevented him from driving east. These purported statements were made (1) in a taped interview taken by an insurance agent, (2) to a paralegal employee of plaintiffs' attorney, (3) to Officer Martin at the scene of the accident, and (4) in a deposition taken in a companion case involving Diane.

The trial court denied admission of the impeachment testimony because it was immaterial, irrelevant and hearsay. We disagree.

The impeachment testimony would establish that defendant had stopped her car in such a manner as to impede Garcia from driving east on a heavily trafficked boulevard; that Esther had caused the traffic jam in the curb lane that obstructed the view of Diane and caused Diane to switch to another lane to proceed east to the second entrance to the school grounds; that when Garcia stopped his pickup truck, Esther, already in the eastbound curb lane, could have cleared the eastbound lanes and avoided the accident. The impeachment testimony was relevant and material to the issue of Esther's negligence. This impeachment testimony was admissible in evidence under rules governing this subject matter.

The impeachment testimony excluded by the trial court was offered by plaintiff in rebuttal.

First, "In the reception or exclusion of oral testimony much must be left to the discretion of the trial court". 88 C.J.S. Trial § 72 (1955). However, when a trial court exercised its discretion on untenable grounds, it established an abuse of discretion. *Grigsby v. City of Seattle,* 12 Wash.App. 453, 529 P.2d 1167 (1975). The exclusion of testimony because it is incompetent, irrelevant and immaterial is untenable. An objection to admissibility on these grounds is too general to warrant consideration by the trial court because it cannot intelligently rule on the objection, and opposing counsel cannot obviate the objection if possible. *Henderson v. Dreyfus,* 26 N.M. 541, 191 P. 442 (1919). See, *State v. Lewis,* 36 N.M. 218, 12 P.2d 849 (1932).

"It is wise to remember that the trend in American jurisprudence is toward the greater admissibility of evidence. We must not 'close any reasonable avenues to the truth in the investigation of questions of fact. In doubtful cases the doubt should be resolved in favor of its admissibility.' [Citations omitted]." *Pavlos v. Albuquerque National Bank,* 82 N.M. 759, 767–68, 487 P.2d 187, 195 (Ct.App.1971) (Sutin, J., dissenting).

Second, "It also is discretionary with the trial court to exclude rebuttal evidence which is properly part of the case-in-chief or merely cumulative thereof." *Phillips v. Smith,* 87 N.M. 19, 23, 528 P.2d 663, 667 (Ct.App.1974).

Third, impeachment testimony must be relevant to an issue in the case. *Empire Fire & Marine Insurance Company v. Lee,* 86 N.M. 739, 527 P.2d 502 (Ct.App. 1974).

Fourth, "Any relevant evidence having a tendency in reason to prove any material fact is admissible unless expressly excluded from evidence by the codified rules." *Williams v. Union Pacific Railroad Company,* 204 Kan. 772, 465 P.2d 975, 981 (1970).

Our Rules of Evidence do not exclude impeachment testimony.

"The credibility of a witness may be attacked by any party, including the party calling him." Rule 607 of the Rules of Evidence [§ 20–4–607, N.M.S.A.1953 (Repl.Vol. 4, 1975 Supp.)]. This impeach-

ment can be accomplished by extrinsic evidence of prior inconsistent statements as long as the witness is allowed to explain or deny the same, and the opposite party has an opportunity to examine the witness on the inconsistent statements. Rule 613(b) of the Rules of Evidence [§ 20–4–613(b), N.M.S.A.1953 (Repl.Vol. 4, 1975 Supp.)]. Extrinsic evidence is not collateral when the evidence is relevant and material to the issues in the case. *State v. Ross,* 88 N.M. 1, 536 P.2d 265 (Ct.App.1975).

"It is fundamental that a statement, written or oral of a witness as to a material matter inconsistent with his testimony at trial is admissible for impeachment purposes." *State v. Carlton,* 82 N.M. 537, 542, 484 P.2d 757, 762 (Ct.App.1971). Furthermore, for the purpose of impeachment, evidence is not barred because it is hearsay. A prior statement by a witness is not hearsay when the statement is inconsistent with his testimony. Rule 801(d)(1) of the Rules of Evidence [§ 20–4–801(d)(1), N.M.S.A. 1953 (Repl.Vol. 4, 1975 Supp.)].

The foundational prerequisites of Rule 613(b), supra, are: (1) that Garcia testify to relevant and material facts bearing upon the negligence of Esther; (2) that Garcia be shown the alleged contradictory remarks in a transcript of the tape or be allowed to listen to it; (3) that he admit having had the interview with the insurance agent; (4) that he is afforded an opportunity of explanation; and (5) defendants are afforded the opportunity of examining Garcia on the statements made in the tape. *N. L. R. B. v. Vangas, Inc.,* 517 F.2d 747 (9th Cir. 1975). For the method of procedure in the use of a tape recording for impeachment purposes, see *Slatinsky v. Bailey,* 330 F.2d 136 (8th Cir. 1964), where a similar event occurred. Under these foundational rules, the testimony of the paralegal employee, Officer Martin, and Garcia's testimony by deposition, were also admissible.

These foundational prerequisites were present in the record.

Successful impeachment of a witness is an important aspect of a trial because it allows a jury to judge the weight to be given to the testimony of the witness. The plaintiffs were denied this benefit which would have accrued if impeachment testimony were allowed in evidence.

The trial court abused its discretion and this was prejudicial error.

We have reviewed other points of error raised by plaintiffs. We do not find them of sufficient merit to warrant an opinion thereon.

Reversed. Plaintiffs are granted a new trial.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

560 P.2d 945

STATE of New Mexico,
Plaintiff-Appellee,

v.

Michael Marvin DAY,
Defendant-Appellant.

No. 2731.

Court of Appeals of New Mexico.

Jan. 25, 1977.

Rehearing Denied Feb. 4, 1977.

Certiorari Denied Feb. 28, 1977.

Charles Driscoll, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Paquin M. Terrazas, Anthony Tupler, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his convictions of aggravated burglary and second degree criminal sexual penetration. The dispositive issue involves instructions to the jury concerning the defense of insanity at the time of the offenses. We reverse because the instructions were contradictory and confusing.

During jury selection the trial court erroneously informed the prospective jurors that defendant had the burden of proving that he was insane. *State v. James*, 83 N.M. 263, 490 P.2d 1236 (Ct.App. 1971). Immediately prior to the reading of the jury instructions, the trial court corrected this information, stating:

> "'And when I stated that it was the burden of the defendant to establish his insanity, that was not correct. I was trying to explain the burden of proof. In the absence of any evidence, there is always a presumption of sanity . . . You will receive instructions on this . . . Once evidence of insanity is introduced and is received, then you are instructed on that. But the sanity of the defendant must be established by the state. They have the burden of proving that. And it must be established beyond a reasonable doubt. Now, that's what I should have said but I didn't say it very well. So I want to take this time to tell you that if anything I had said at that time bothered or disturbed you, you are to disregard it and listen to what I have

just told you here this morning and use this correction (and the statements that I have made) in the course of your deliberations if in fact you have any problems.' "

We are not concerned with the misstatement as to the burden of proof or with the point of time in the trial when the misstatement was corrected. Our concern is with the contents of the corrective statement and the relation of the contents to instructions given. The corrective statement told the jury: (1) to use the corrective statement during deliberations, (2) there is always a presumption of sanity, and (3) the State must establish the sanity of the defendant by proof beyond a reasonable doubt.

U.J.I.Crim. 41.00 is an instruction which defines sanity and which inferentially states that insanity must be proved beyond a reasonable doubt. The Committee Commentary to U.J.I.Crim. 41.00 states: "The instruction does not deal specifically with the problem of burden of proof."

Trial court instruction 7 tracks U.J.I. Crim. 41.00. The first sentence of instruction 7 states: "Evidence has been presented concerning the defendant's sanity."

Over defendant's objection, the trial court gave instruction 6, which reads:

"The defendant is presumed to be sane at the time of the commission of the criminal act, and the presumption of sanity remains unless and until competent evidence is introduced to show the defendant was not sane at the time of the commission of the criminal act alleged. Once the defendant introduces evidence which creates a reasonable doubt as to his sanity, the State must prove the defendant is sane beyond a reasonable doubt. However the State is not required to present any evidence on the issue, and it may instead simply rely on the presumption."

Other instructions told the jury that the State must prove beyond a reasonable doubt: (1) the elements of the offenses, (2) defendant's intent, and (3) defendant's guilt. The express references to the State's burden of proving sanity beyond a reasonable doubt are in the corrective statement and in instruction 6.

In accordance with U.J.I.Crim. 40.60, reasonable doubt was defined as "a doubt based upon reason and commonsense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life."

The confusion is demonstrated by the following items.

1. It is for the court to determine whether the evidence raises a question for the jury as to defendant's sanity. *State v. Wilson*, 85 N.M. 552, 514 P.2d 603 (1973). The first sentence of instruction 7 makes it clear that such a determination had been made. Yet instruction 6 leaves the impression that the jury is to determine whether there is an *issue* as to defendant's sanity.

2. The corrective statement informed the jury that the State must prove sanity beyond a reasonable doubt. Instruction 6 placed this burden on the State only after defendant introduced evidence creating a reasonable doubt as to his sanity.

3. *State v. Wilson*, supra, states that defendant "must offer evidence *tending to show* his insanity at the time in order to create a jury question upon this issue, unless a jury question on this issue is raised by evidence adduced by the state . . ." (Our emphasis.) The "tending to show" requirement is omitted from instruction 6. The first sentence of instruction 6 requires that the evidence "show" insanity. The second sentence of instruction 6 requires defendant to introduce evidence "which creates a reasonable doubt as to his sanity". The "tending to show" requirement of *State v. Wilson*, supra, is a lesser burden than creating a reasonable doubt as "reasonable doubt" is defined in U.J.I.Crim. 40.-60.

4. The corrective statement informed the jury that there is always a presumption of sanity. The first sentence of instruction 6 indicates the presumption disappeared when there was evidence "to show" defendant's insanity. With the contradictory

statements, when did the last sentence of instruction 6 apply? We are not concerned here with whether *State v. Lujan*, 87 N.M. 400, 534 P.2d 1112 (1975), cert. denied, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 400 (1975) contradicts *State v. Wilson*, supra, as to *how* the presumption of sanity is to be used; our concern is with confusion as to the applicability of the presumption.

In light of *State v. Wilson*, supra, we do not agree with defendant's claim that the presumption of sanity should not be mentioned in jury instructions. We do not consider defendant's claim that the word "competent" in instruction 6 was ambiguous because defendant did not object to the use of that word.

On the basis of the four items discussed above, we hold the instructions confused the jury and this confusion deprived defendant of a fair trial on the insanity issue. See *State v. Buhr*, 82 N.M. 371, 482 P.2d 74 (Ct.App. 1971). The State argues that defendant's objections to the instructions did not raise the "confusion" issue. We disagree. Defendant informed the trial court that the reference to presumption and the introduction of evidence concerning insanity in instruction 6 had resulted in confusion. Accordingly, the liberal approach of the Supreme Court in determining whether an objection was made need not be considered. See *Albertson v. State*, 89 N.M. 499, 554 P.2d 661 (1976).

The judgment and sentences are reversed. Defendant is to be given a new trial.

HENDLEY and HERNANDEZ, JJ., concur.

560 P.2d 948

STATE of New Mexico, Plaintiff-Appellee,

v.

Lewis W. CRAMER, Defendant-Appellant.

No. 2722.

Court of Appeals of New Mexico.

Jan. 25, 1977.

Rehearing Denied Feb. 3, 1977.

Certiorari Denied March 8, 1977.

Gerald Chakerian, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Dennis P. Murphy, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of embezzlement, defendant appeals. Section 40A–16–7, N.M.S.A.1953 (2d Repl.Vol. 6). The issues involve: (1) title to the property, and (2) conduct of a witness.

Title to the Property

The victim owned real property subject to a mortgage. There is evidence that the victim executed a second mortgage in favor of the defendant. Twenty-two days after the second mortgage, the victim executed a quitclaim deed in favor of defendant; a few hours later, on the same day, the victim executed still another mortgage in favor of Montgomery. Proceeds obtained in the Montgomery mortgage transaction were used to pay off the first mortgage. There is evidence that, subsequently, defendant sold the property and retained the proceeds. There is evidence that at all material times defendant was the victim's agent representing the victim's business interests.

Defendant moved for a directed verdict, relying on the quitclaim deed. His contention was that the deed placed title to the property in himself, and that he could not be guilty of embezzlement because he could not embezzle from himself.

State v. Prince, 52 N.M. 15, 189 P.2d 993 (1948) states that an essential element of embezzlement (under the statutes considered in that case) was "[t]hat the property belonged to some one other than the accused." This concept—that the property belong to some one other than the defendant— is implicit in our current statute, § 40A–16–7, supra. See U.J.I. Crim. 16.31; *State v. Moss,* 83 N.M. 42, 487 P.2d 1347 (Ct.App.1971).

The quitclaim deed, however, is not dispositive of the question of who owned the property. There is the question of the intent of the grantor; did the victim intend to pass title to the property? *Evans v. Evans,* 44 N.M. 223, 101 P.2d 179 (1940). "A deed will not be regarded as delivered while anything remains to be done by the parties who propose to deliver it. . . . Without an intent to pass title, no delivery occurs, even though there has been a manual delivery of the deed." *Nosker v. Western Farm Bureau Mutual Ins. Co.,* 81 N.M. 300, 466 P.2d 866 (1970). Intent is a question of fact. See *Coryell v. Kibbe,* 80 N.M. 507, 458 P.2d 582 (1969); *Waters v. Blocksom,* 57 N.M. 368, 258 P.2d 1135 (1953); *State v. Seefeldt,* 54 N.M. 24, 212 P.2d 1053 (1949).

In ruling on the motion for a directed verdict, the trial court was required to view the evidence in the light most favorable to the State. *State v. McKay,* 79 N.M. 797, 450 P.2d 435 (Ct.App.1969). Under this rule the motion was properly denied; the victim's testimony is to the effect that she never intended to pass title to the property to defendant.

Defendant requested an instruction which would have told the jury to find defendant not guilty if title to the property had passed to defendant. The requested instruction was refused; defendant asserts this was error. The contention is frivolous because the question of the victim's intent was submitted to the jury by other instructions given by the trial court. Refusal of a requested instruction is not error when the matter is adequately covered by the instructions given. *State v. Beal,* 86 N.M. 335, 524 P.2d 198 (Ct.App.1974).

Conduct of a Witness

An exhibit informs that the victim was a 66-year-old female suffering from senility. She was testifying at the time of a noon recess. As she was leaving the witness box, she missed a step and either fell, or started to fall. One or more jurors helped her to her feet. A juror asked if she was all right; she replied that other than a broken leg, she guessed so.

After the noon recess, defendant moved for a mistrial. The judge had not been in the courtroom when the incident occurred. The facts—the fall, juror help and the conversation—were elicited by the judge questioning counsel and the court reporter. Arguing the mistrial motion, defense counsel added that the prosecutor had escorted the victim into the courtroom. Defendant contended that a mistrial should be granted because the combination of the victim's age and senility, and the fact it was the victim that fell resulted in undue sympathy for the victim with resultant "possible" prejudice to defendant. Denying the motion, the trial court ruled that the "broken leg" comment had been made in jest, that the assistance rendered by the jurors was no more than the human nature of helping someone who fell and the situation was not the sort that would influence a juror's verdict.

At the close of the evidence, defendant renewed the mistrial motion, adding an additional claim—that one or more jurors had helped the victim leave the witness stand after she finished testifying. The court conducted no inquiry as to this claim, however, defendant never asked that an inquiry be made. The renewed motion was also denied.

Defendant contends the foregoing incidents—the fall and the subsequent assistance from the witness stand—"could be construed as an improper display of emotion, physical condition or other misconduct by a witness." It was not so construed by the trial court and there is nothing showing the trial court's view was incorrect.

Defendant also contends the incidents "could be interpreted as an unauthorized contact between the jurors and a witness." Assuming the incidents amounted to unauthorized contact, and assuming a presumption of prejudice resulted, the facts represented to the trial court were such that the trial court could properly rule no prejudice resulted. The trial court expressly so ruled when the motion was first made; such a ruling is implicit in the denial of the renewed motion. See *State v. Gutierrez,* 78 N.M. 529, 433 P.2d 508 (Ct.App.1967).

Additional issues were listed in the docketing statement, however, they have not been briefed and are deemed abandoned. *State v. Vogenthaler,* 89 N.M. 150, 548 P.2d 112 (Ct.App.1976).

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

560 P.2d 951

STATE of New Mexico,
Plaintiff-Appellee,

v.

Carl BELL, Defendant-Appellant.

No. 2610.

Court of Appeals of New Mexico.

Feb. 8, 1977.

Certiorari Denied March 10, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, App. Defender, Janet Clow, Asst. Public Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Suzanne Tanner, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The appeal involves two receiving stolen property convictions. One conviction was for receiving stolen property valued over $100.00 but not more than $2,500.00. The other conviction was for receiving a firearm valued less than $2,500.00. Section 40A–16–11, N.M.S.A.1953 (2d Repl. Vol. 6, Supp. 1975), Paragraphs E and G. The issues concern: (1) seizure of the stolen items, (2) the number of offenses, and (3) double jeopardy.

Seizure of Stolen Items

(a) The Pistol

The conviction for receiving a stolen firearm is based upon a pistol which officers discovered when searching a locked drawer of a gun cabinet. Defendant asserts his various trial court motions to suppress the pistol should have been granted because the pistol was seized during a warrantless search, and the State did not meet its burden of justifying the seizure in those circumstances.

If the pistol were seized during a warrantless search we would agree with defendant. The State did not show a basis for seizing the pistol during a warrantless search. See *State v. Ledbetter,* 88 N.M. 344, 540 P.2d 824 (Ct.App.1975); *State v. Gorsuch,* 87 N.M. 135, 529 P.2d 1256 (Ct. App.1974). However, the pistol was not discovered during a warrantless search.

Officers went to defendant's residence in Truth or Consequences to execute a warrant authorizing a search for property stolen from the residence of David Slade in Albuquerque. The affidavit on which this warrant was based had an attachment. The attachment was some 18 pages listing items stolen from the Slade residence. A common sense reading of the affidavit and warrant is that officers were authorized to search for all the property itemized. See *Andresen v. Maryland,* 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). More than a dozen weapons were included in the itemization of property stolen from Slade. The warrant authorized a search for these weapons.

There is nothing indicating that the officers were not searching pursuant to the (Slade property) warrant when the officers broke open the locked drawer and discovered the pistol. Specifically, the record does not show a bad faith search or a search beyond the scope of the (Slade property) warrant. See *State v. Alderete,* 88 N.M. 619, 544 P.2d 1184 (Ct.App.1976); *United States v. Tranquillo,* 330 F.Supp. 871 (D.C. Fla.1971).

The pistol seized was an Erma Wercke 380 automatic pistol. The closest description on the list of stolen weapons was a "32 automatic pistol". The evidence at trial was that the Erma Wercke pistol was stolen from someone other than Slade. No inquiry was made as to whether the officer reasonably believed that the Erma Wercke pistol was in fact the 32 automatic that was listed.

Defendant's claim throughout has been that the Erma Wercke pistol should have been suppressed as evidence because it was not an item listed in the affidavit for the

(Slade property) warrant. Such a claim is insufficient. There are situations where items not described in the affidavit and warrant may properly be seized. *State v. Alderete,* supra; *State v. Warner,* 83 N.M. 642, 495 P.2d 1089 (Ct.App.1972); 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). In *Andresen v. Maryland,* supra, the United States Supreme Court upheld the seizure of items not described in the warrant on the basis that the officers "reasonably could have believed" that the seized items could be used to show defendant's intent with respect to items seized pursuant to the warrant.

The trial court was not asked and it did not rule on the question of whether the Erma Wercke pistol was properly seized pursuant to the (Slade property) warrant. In this state of the record we cannot say that the trial court erred in refusing to suppress the Erma Wercke pistol. Compare *State v. Vallejos,* 89 N.M. 23, 546 P.2d 871 (Ct.App.1976).

(b) The Generator and Lantern

During the course of the search pursuant to the (Slade property) warrant, the officers viewed items of property which apparently could not be related to the property stolen from Slade. Some of the property so viewed was identified as having been stolen from a gun club. The officers obtained a second warrant and seized the gun club property. In addition, they seized a stuffed Javelina head stolen from Patterson. The evidence is that the sheriff remembered that the Javelina head had been stolen and that the Javelina head was seized on the basis that it was illegally possessed by defendant. *State v. Carlton,* 82 N.M. 537, 484 P.2d 757 (Ct.App.1971). No issue is raised on appeal concerning the seizure of the gun club or Patterson property.

In the course of executing the second (gun club property) warrant, officers seized additional items of property, among which were a generator and lantern. The trial evidence is that these two items belonged to and had been stolen from the United States Forest Service.

Defendant claims the generator and lantern should have been suppressed as evidence. We agree. There is nothing showing these two items were seized pursuant to a search authorized by either of the two warrants. In addition, there is nothing showing a basis for a warrantless seizure of these two items. Although the Forest Service burglary had been reported to the sheriff, the record does not show that the generator and lantern were seized because reasonably believed to be illegally possessed property. Rather, these two items were among two dozen items seized as "suspected" stolen items. The sheriff testified that if an item was "similar" to anything that had been reported as stolen, it was seized on the assumption that the item was stolen property. Seizure of the generator and lantern was improper because the evidence shows these two items were seized pursuant to a warrantless general search for "suspected" stolen property.

Although the generator and lantern should have been suppressed, the erroneous admission of these items as evidence does not aid the defendant. These items were admitted as part of the proof that defendant received stolen property in excess of $100.00 but less than $2,500.00. This charge was established by proof of the gun club and Patterson property; this proof consisted of eight exhibits not challenged in the appeal. The gun club and Patterson property proof was overwhelming; admission of the generator and lantern was harmless error. *State v. Self,* 88 N.M. 37, 536 P.2d 1093 (Ct.App.1975); *State v. Thurman,* 84 N.M. 5, 498 P.2d 697 (Ct.App.1972).

Number of Offenses

The evidence is to the effect that the stolen property (the pistol, the gun club property and the Patterson property) was in defendant's possession prior to execution of the first (Slade property) search warrant. Defendant contends that possession of numerous items of stolen property amounts to

only one crime. He states: "The statute does not make it a separate crime for possession of each item of stolen property but rather increases the penalty by the value of the stolen property possessed."

Defendant also asserts that when one possesses a stolen firearm, and also possesses other stolen goods, there is only one offense. The contention is that the offense of receiving stolen property is stated in Paragraph A of § 40A–16–11, supra, that Paragraphs E and G deal only with punishment, and that only one punishment could be imposed because only one offense was committed.

The contentions are based on a false premise. Section 40A–16–11, supra, provides that the offense is committed by either receiving, retaining, or disposing of stolen property. In this case we are concerned with "receiving"; the jury was instructed in terms of defendant "acquiring" the stolen property.

If defendant received the stolen pistol at a time different from the time that he received the gun club and Patterson property, then there were two offenses for which two sentences would be imposed even though at the time of discovery defendant possessed all the stolen property involved. This view is consistent with defendant's position in the trial court. He stated: "If you have the evidence to show that he received from John Smith on Tuesday and he received from Dave Gordon on Wednesday and someone other on Thursday those are separate crimes but those facts can't be revealed here."

Each separate "receiving" is a separate crime. See *State v. Tapia,* 89 N.M. 221, 549 P.2d 636 (Ct.App.1976). The evidence is that the pistol was stolen in 1974; the gun club and Patterson burglaries occurred in 1975. There is evidence to the effect that defendant received the pistol in 1974 and the other stolen property in 1975.

There is evidence of two crimes of receiving; defendant could be sentenced for each crime.

Double Jeopardy

In a separate case defendant was charged with violating § 40A–16–11, supra, on the basis that he received property stolen from Slade. After the jury was selected and sworn, the State moved that this charge be dismissed. The motion was granted; the charge was dismissed with prejudice.

Dismissal of the charge involving the Slade property occurred before defendant was tried on the two charges involved in this appeal. "Defendant contends that the dismissal with prejudice in Cause No. 3663 [the Slade property charge] is a double jeopardy bar to the charges in the instant case because all of the charges grew from the same evidence; there was only one possession."

We have previously pointed out that the offense of "receiving" is based on acquiring as opposed to possessing the stolen property. The two receiving charges in this case were not based on the same evidence as would have been involved in the case involving the Slade property. There was no double jeopardy. *State v. Tanton,* 88 N.M. 333, 540 P.2d 813 (1975).

The judgments and sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

561 P.2d 26

WESTERN ELECTRIC COMPANY, Appellant,

v.

NEW MEXICO BUREAU OF REVENUE, Appellee.

No. 2108.

Court of Appeals of New Mexico.

May 4, 1976.

Jeff Bingaman, Campbell & Bingaman, Santa Fe, for appellant.

Toney Anaya, Atty. Gen., Jan E. Unna, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

HERNANDEZ, Judge.

Taxpayer, Western Electric Company, appeals from a Decision and Order of the Commissioner of Revenue. The order affirmed assessment of a compensating tax on the transportation costs of materials purchased by Mountain States Telephone and Telegraph Company (Mountain Bell) from the taxpayer.

The taxpayer alleges three points of error, the first of which is dispositive of this appeal, to-wit: "The transportation charges here at issue would not be subject to gross receipts tax if they had been incurred in New Mexico and consequently cannot be held subject to the compensating tax." We agree.

Most of the pertinent facts are set forth in the Commissioner's Decision and Order:

"5. The taxpayer sells and Mountain Bell purchases telephone material and apparatus. Such purchases are subject to a blanket contract and related documents, which provide, among other things, that title to purchased property passes to the purchaser at point of shipment; that the taxpayer is to pay freight charges from point of origin to point of destination; and that the taxpayer will bill the purchaser for the freight charges paid by the taxpayer.

"6. All purchases in question here involve shipments of the property from points out of state to Mountain Bell locations located within New Mexico.

"7. All shipments of purchased property involved in this matter are handled substantially as follows: The taxpayer will determine the mode of shipment, viz: common carrier or United States mail; the taxpayer will pay freight charges—i. e., the mail costs or pay the common carrier; the taxpayer will bill Mountain Bell for the property sold; and the taxpayer will separately bill Mountain Bell for the freight charges."

The record also discloses that the price of the materials was f. o. b. the taxpayer's storerooms or factories. Further, the taxpayer normally selected the mode of shipment and the carrier, however, Mountain Bell had the option, as per the agreement, to designate these matters or to transport the materials in its own trucks. Materials purchased from the taxpayer's Phoenix facility were usually transported by an independent contractor with whom Mountain Bell had a ten year contract which terminates on March 1, 1981. Taxpayer billed Mountain Bell separately for all postage and freight charges from statements for materials sold.

Section 72–16A–2, N.M.S.A.1953 (Vol. 10, pt. 2, Supp.1975) provides:

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

Section 72–16A–4(A), supra, provides: "For the privilege of engaging in business, an excise tax equal to four percent [4%] of gross receipts is imposed on any person engaging in business in New Mexico."

Section 72–16A–7, supra, provides:

"A. For the privilege of using property in New Mexico, there is imposed on the person using property an excise tax equal to four per cent [4%] of the value, at the time of acquisition or of introduction into the state, whichever is later, or of conversion to use by the manufacturer of property that was: * * *. (2) acquired outside this state as the result of a transaction *that would have been subject to the gross receipts tax had it occurred within this state* * * *." [Emphasis Ours.]

The Commissioner, pursuant to the authority granted him by § 72–13–23, supra, issued G. R. Regulation 3(F):48, *Freight Charges* which provides:

"Transportation costs that are paid by the seller to the carrier are an element of the sales price of the property.

"Transportation costs that are paid to the carrier by the buyer are not an element of the sales price of the property * *."

The Bureau contends that "under G. R. Regulation 3(F):48 a seller must include transportation expenses in his gross receipts if he pays them and invoices the buyer for them." In support of this contention the Bureau cites *In Re Sales Tax Assessment No. 50030 v. Department of Revenue,* 522 P.2d 149 (S.Ct.Wyo.1974), [hereinafter *Mead*]; *Puna Sugar Company Limited,* Haw., 547 P.2d 2, decided March 8, 1976; *Colonial Pipeline Company v. Clayton,* 275 N.C. 215, 166 S.E.2d 671 (1969). In all of these cases, courts accepted the general proposition that transportation costs form part of the "price" of an item, and therefore a gross receipts tax can be imposed on these costs. The issue here is not, however, whether a gross receipts tax includes these costs; it is rather whether the taxpayer falls within the exemption created by G. R. Regulation 3(F):48. This regulation excludes transportation costs from the sales price of the property when paid to the carrier by the buyer.

Thus the issue in this case is the narrow one of determining who paid the transportation costs—the seller or the buyer.

The relationship between the taxpayer and Mountain Bell is shown by the following excerpts from their basic agreement:

ARTICLE I—SCOPE.

"1. *Manufacture and Purchase of Materials.*

The Electric Company [Taxpayer] will manufacture or purchase materials which the Telephone Company [Mountain Bell] may reasonably require for its business and which it may order from the Electric Company; provided, however, that nothing herein contained obligates the Telephone Company to purchase any materials from the Electric Company.

"2. *Delivery of Materials.*

The Electric Company will deliver said materials to the Telephone Company upon its written orders, in such quantities, in such manner, and at such times as the Telephone Company may reasonably designate.

"5. *Distributing Storerooms.*

The Electric Company will maintain distributing storerooms as at present established or at such points as from time to time may be agreed upon, for the distribution of materials to the Telephone Company.

"6. *Stocks of Materials.*

(a) The Electric Company will exercise due diligence in maintaining at all times, at its distributing storerooms, reasonable stocks of materials, except apparatus which must be specially assembled for each job (such as central office switchboards) and other materials which are customarily shipped direct, such as poles and directories.

* * * * * *

(b) The Electric Company will carry such special stocks of materials as the Telephone Company may authorize.

'Special stocks' means all stocks authorized by the Telephone Company other than or in excess of reasonable stocks.

"8. *Transportation Charges.*

The Electric Company as authorized by the Telephone Company and in so far as practicable will pay for the account of the Telephone Company such of the following transportation charges as under the Electric Company's prices and terms should be borne by the Telephone Company:

(a) On shipments of materials made hereunder to the Telephone Company.

(b) On shipments of materials returned from the Telephone Company to the Electric Company's distributing storeroom or other points designated by it.

(c) On shipments of Class 'B' returned materials from the Electric Company's distributing storerooms to its reclamation plants or other points of disposition designated by the Electric Company.

The Electric Company will adjust claims with carriers arising out of shipments hereunder.

"9. *Repairs to Materials.*

The Electric Company will maintain repair shops as at present established or at such points as from time to time may be agreed upon and will make such repairs to returned materials as the Telephone Company may reasonably require.

"10. *Other Services.*

The Electric Company will perform such other services as the Telephone Company may reasonably require from time to time."

ARTICLE II—PRICES AND TERMS.

"2. *Materials, Equipment Specification and Installations.*

The prices to be paid by the Telephone Company to the Electric Company for materials, equipment specifications and installations shall be those established from time to time by the Electric Company. *Such prices* in so far as practicable and any conditions affecting them not specifically provided for in this Article *shall be included in the Electric Company's published price lists.* Prices for materials shall include inspection provided for in paragraph 3 Article I of this Agreement. [Emphasis ours.]

"5. *Transportation Charges.*

The Telephone Company will reimburse the Electric Company for transportation charges paid by it as provided for in paragraph 8 Article I of this Agreement.

"8. *Payment.*

As of the first of every month the Electric Company will render monthly statements of account which shall be due and payable by the Telephone Company thirty days after date of such monthly statements. If payment is deferred, the account shall thereafter bear interest at a reasonable rate."

As can be seen, this is more than a sales contract; it is also an agency contract. An agent is defined as a person authorized by another to act on his behalf and under his control. The presence of an agency relationship must be determined from all the facts and circumstances of the case. See *Brown v. Cooley,* 56 N.M. 630, 247 P.2d 868 (1952). One of the aspects of agency present here is that the taxpayer is authorized to pay transportation charges not only on materials sold to Mountain Bell, but on those materials returned by Mountain Bell for credit or repair. This case is to be distinguished from the situation in *Mead* where the relationship of the equipment dealer and his customers was that of buyer and seller, and where the equipment dealer paid the freight charges and included them in the purchase price.

The Bureau concedes that its gross receipts regulations are controlling. G.R. Regulation 3(F):48, supra, specifically excludes from the sales price of the property transportation costs that are paid to the carrier by the buyer. The taxpayer argues, and we agree, that the buyer is in fact paying the transportation costs in this instance since Mountain Bell reimburses Western Electric for transportation costs.

Had the sale of these materials from the taxpayer to Mountain Bell taken place in New Mexico, this situation would clearly have come within the ambit of G.R. Regulation 8:2 and the gross receipts tax could not be levied on the freight charges; *a priori,* neither could the compensating tax. It is evident from the language of § 72–16A–2, supra, that the legislature intended to make our gross receipts tax and our compensating tax correlates: an exemption from the gross receipts tax must also be treated as an exemption from the compensating tax.

The Commissioner was in error in his decision and order for the reasons stated above and consequently the assessment is annulled.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., specially concurs.

SUTIN, Judge (specially concurring).

I concur in the result.

A. *Western Electric is not subject to the Gross Receipts Tax Act.*

The Commissioner decided that Western Electric, from out of state, sold property to Mountain Bell for use in this state. When this sale occurred, Western Electric was not liable for the gross receipts tax. Therefore, it had a duty to collect the compensating tax from Mountain Bell and pay over the tax collected to the Bureau. Western Electric paid the compensating tax on the purchase price of the property sold, but it did not pay the compensating tax on the freight charges, which freight charges were a part of the purchase price of the property sold. Western Electric paid the freight charges f. o. b., and billed Mountain Bell separately for the freight charged.

The Commissioner ordered Western Electric to pay the compensating tax on the freight charges which would have been due and owing from Mountain Bell as a compensating tax or due and owing from Western Electric as a gross receipts tax. I disagree.

An analysis of the Gross Receipts Tax Act convinces me that Western Electric is not subject to any tax. The two sections of the Act with which we are involved are §§ 72–16A–7(A), and 72–16A–10(A), N.M.S.A.1953 (Repl.Vol. 10, pt. 2, 1973 Supp.).

(1) *Section 72–16A–7(A) is a compensating tax and not applicable to Western Electric.*

Section 72–16A–7(A) is a compensating tax imposed for the privilege of using prop-

erty in New Mexico. The tax is imposed in two ways:

(1) "* * * on the person using property". Under this phrase, anyone who merely uses property in New Mexico cannot be subject to any tax. This phrase has meaning when read in connection with § 72–16A–10(A), infra.

(2) * * * *or of conversion to use by the manufacturer of property that was:*

(1) manufactured by the person using the property in the state;

(2) acquired outside this state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within the state; or

(3) acquired as the result of a transaction which was not initially subject to the compensating tax imposed by subsection A(2) of this section or the gross receipts tax but which transaction, because of the buyer's subsequent use of the property, should have been subject to the compensating tax imposed by subsection A(2) of this section or the gross receipts tax. (Emphasis added.)

What is meant by the phrase: "conversion to use by the manufacturer of property"? Its meaning is doubtful. "* * * [A]ll doubts as to the meaning and intent of a tax statute must be construed in favor of the taxpayer." *Field Enterprises Ed. Corp. v. Commissioner of Rev.*, 82 N.M. 24, 28, 474 P.2d 510, 514 (Ct.App.1970). To me, the words "conversion to use" means that after a product is manufactured and sold to a purchaser, and the purchaser uses the manufactured product, the manufacturer has converted this property to use. It has changed the function of the product from its original manufactured state to one of use.

Western Electric is the manufacturer. Western Electric must fall within one of the categories to be subject to a compensating tax. *First,* Western Electric did not manufacture property in New Mexico and then convert it to use. *Second,* Western Electric did not acquire property outside of this state, property that would have been subject to the gross receipts tax if the transaction had occurred in this state. *Third,* Mountain Bell's subsequent use of the property purchased from Western Electric could not be subject to tax unless Western Electric carried on an activity in this state to exploit New Mexico's markets as set forth in § 72–16A–10(A), supra.

Western Electric does not fall within the *first* and *second* categories. On the third category, the test is the applicability of § 72–16A–10(A).

(2) *Section 72–16A–10(A) is not applicable to Western Electric.*

Section 72–16A–10(A) provides:

Every person carrying on or causing to be carried on *any activity within this state attempting to exploit New Mexico's markets,* who sells property or sells property and service for use in this state and who is not subject to the gross receipts tax on receipts from these sales shall collect *the compensating tax* from the buyer and pay over the tax collected to the bureau. (Emphasis added.)

The word "activity" is defined. The relationship between Western Electric and Mountain Bell is contractual in nature. Although Western Electric is authorized to do business in New Mexico, the record does not disclose any activity in this state, nor does it show that Western Electric attempts to exploit New Mexico's markets. Although its sales to Mountain Bell are not subject to the gross receipts tax, Mountain Bell is not subject to a compensating tax. Therefore, Western Electric has no duty to collect a compensating tax.

Western Electric is not subject to taxation in this case.

B. *The Administrative Hearing was not fair and impartial.*

A review of the record discloses that the Commissioner admitted in evidence Bureau's Exhibit 3. This exhibit includes a letter from the Executive Secretary of the

Board of Tax Appeals of the State of Washington to the New Mexico legal division of the Bureau of Revenue. This letter enclosed: (1) A certified true copy of a final decision of the Board of Tax Appeals in the case of *Western Electric Company, Inc. v. State of Washington Department of Revenue* dated January 17, 1974. (2) A Stipulation of Facts. (3) A Supplemental Stipulation of Facts. (4) Eight exhibits. (5) A Determination of the Department of Revenue of the State of Washington "In the Matter of the Petition for Correction of Assessment of Western Electric Company, Inc." (6) A Standard Supply contract dated July 1, 1961 between Western Electric Company and Pacific Northwest Bell Telephone Company. (7) A Western Electric Company document called "Preface" which was a General Supplies Price List.

This exhibit covered 59 pages of the transcript. The Washington Opinion involved the applicability of Retail Sales Tax and Business and Occupation Tax by the State of Washington on transportation charges.

The Commissioner's attorney argued for admission that "the Western Electric Company raised the very same issues that they are raising in this protest in that matter and the Board of Tax Appeals ruled against them on that matter."

" '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." Section 20–4–401, N.M.S.A. 1953 (Repl.Vol. 4, 1975 Supp.).

Bureau's Exhibit 3 was not admissible. The Commissioner had a right to rely on this exhibit to arrive at his decision and order. It is not important to determine whether he did or did not. It is subject to inference that the Commissioner would rely on the evidence of his own attorney; that in case of doubt, he would favor the state and not the taxpayer, and that he would not be objective in nature. Every taxpayer is entitled to a fair and impartial hearing. Western Electric was denied one in this case.

The decision and order of the Commissioner was not in accordance with law.

561 P.2d 31

Prescilla ROMERO and Dolores Tarin, Plaintiffs-Appellants,

v.

Ralph P. MELBOURNE and Ralph Melbourne, Defendants-Appellees.

No. 2596.

Court of Appeals of New Mexico.

Feb. 8, 1977.

Certiorari Denied March 10, 1977.

Emmett C. Hart, Albuquerque, for plaintiffs-appellants.

William C. Madison, LeRoi Farlow, P. A., Albuquerque, for defendants-appellees.

OPINION

LOPEZ, Judge.

This case contains two plaintiffs, Prescilla Romero and Dolores Tarin, hereinafter referred to as Romero and Tarin. The case also contains two defendants, Ralph P. Melbourne and Ralph Melbourne, hereinafter referred to as Melbourne.

The plaintiffs appeal an adverse jury verdict in a damage action arising out of a car collision which occurred between plaintiffs and defendants in Valencia County. We affirm.

The plaintiffs present five points for reversal: (1) the trial court erred in submitting the issue of the contributory negligence of Romero; (2) the court erred in submitting the issue of the contributory

negligence of Tarin, the passenger in the automobile of Romero; (3) the court erred in denying plaintiffs' motion for a new trial because of improper closing arguments of defense counsel; (4) the court erred in failing to grant plaintiffs' motion for a cautionary instruction on the closing arguments of defense counsel; (5) the court erred in instructing the jury pursuant to U.J.I.Civ. 14.1 and 17.8, thereby duplicating and emphasizing the instructions.

Contributory Negligence of the Plaintiff Romero

The record reveals the plaintiff, Romero, was driving her automobile in which plaintiff, Tarin, was a passenger. Romero was driving in a westerly direction on Main Street in Los Lunas, New Mexico. Several cars were ahead of Romero; behind her came Melbourne's car. The cars ahead of Romero stopped suddenly and so did she. Romero did not collide with any of the cars in front of her; however, Melbourne's car hit plaintiffs' car from behind.

Other facts pertinent to the accident are in conflict. However, our problem is whether there is substantial evidence from which a reasonable inference can be drawn to conclude that Romero, who was driving, had stopped the automobile too suddenly or in a negligent manner. We must also determine whether there is substantial evidence from which a reasonable inference can be drawn to conclude that Tarin had failed in her duty as a passenger to exercise, under the circumstances, such care as an ordinarily prudent person would exercise. In considering this matter, we must view the evidence in the light most favorable to Melbourne who was the prevailing party below. *Gould v. Brown Construction Co.,* 75 N.M. 113, 401 P.2d 100 (1965); *Griego v. Marquez,* 89 N.M. 11, 546 P.2d 859 (Ct.App.1976).

The record indicates that, as she was driving, Romero was watching children ahead and in the roadway just before the collision. Romero admitted there was a lot of traffic and this was the usual situation at the particular time of day. The cars ahead of her stopped rather quickly; then, she stopped her car. The record does not indicate whether just prior to the accident Romero was looking at the cars ahead of her or looking behind at Melbourne's car.

Whether Romero stopped too suddenly is a question of fact for the jury. Whether Romero was watching the children in the roadway and not the cars in front is also a question of fact. Romero was able to avoid hitting the car in front but she got hit from behind by Melbourne's car which was traveling about half a car length behind. We believe the issue of Romero's negligence was properly submitted under the court's instructions No. 19 and No. 20 which are consistent with U.J.I.Civ. 13.1 and 13.12 respectively. The instructions read as follows:

> "19. When I use the expression 'contributory negligence', I mean negligence on the part of the plaintiffs that proximately contributed to cause the alleged damages of which plaintiffs complain.
>
> "20. In determining the issues of negligence and contributory negligence you are not to consider whether the plaintiffs were more or less negligent than the defendants. New Mexico law does not permit you to compare negligence.
>
> "The plaintiffs cannot recover if they were negligent and that negligence was a proximate cause of the accident and alleged injuries even though you believe that the defendants may have been more negligent."

If there is any evidence from which a legitimate inference can be drawn and upon which reasonable minds might differ, than the question of Romero's contributory negligence is for the jury. Indeed, it is reversible error not to have the jury instructed upon all correct legal theories of a case which are supported by evidence. *Stephens v. Dulaney,* 78 N.M. 53, 428 P.2d 27 (1967).

We have viewed the evidence in the light most favorable to Melbourne and we conclude that the instructions were justified. See *Gould v. Brown Construction Co.,* supra.

Contributory Negligence of the Plaintiff Tarin

Tarin contends there was error in submitting to the jury the issue of her negligence as a passenger. The trial court submitted the instructions on contributory negligence cited above and U.J.I.Civ. 9.5 which reads as follows:

"A passenger may be negligent. A passenger has a duty to use, for his own safety, such care as an ordinarily prudent person would exercise under the circumstances. A passenger may not sit idly by and permit himself to be driven carelessly to his injury where there are dangers which are known to him or which reasonably should be known to him.

"If you find that circumstances existed in this case immediately prior to the accident in question which would cause a passenger exercising ordinary care for his own safety to keep a lookout or warn the driver and that the plaintiff failed to so do then such failure is negligence."

Plaintiff Tarin traveled the accident route daily and was aware of the heavy traffic. We have also viewed the evidence most favorable to Melbourne with respect to Tarin and we are persuaded that the instruction was justified. See *Gould v. Brown Construction Co.,* supra; *Kindschi v. Williams,* 86 N.M. 458, 525 P.2d 385 (Ct. App.1974).

Improper Closing Arguments

The plaintiffs complain that the defense counsel made improper closing arguments to the jury. The arguments of defense counsel were not required to be reported verbatim by a court reporter at trial but were recorded on magnetic tape. Later, they were made available to the parties. Counsel's arguments were essentially a comment on the evidence. The cars were moving very slowly and stopping occasionally when they hit, and it was undisputed that very little damage occurred to plaintiffs' Volkswagen. No paint was chipped nor sheetmetal crimped on either car. The police officer who investigated the accident testified he saw no skid marks and he issued no citation. The only physical damage was a bent tailpipe on plaintiffs' car, yet chiropractic bills in excess of $4,000.00 were incurred. Plaintiffs gave the chiropractor a lien on a potential judgment to satisfy his charges, and the chiropractor had his office in the same building as plaintiffs' attorney. The defendants introduced expert medical testimony that plaintiffs had not suffered permanent physical injury. On these facts, defendants' counsel characterized the plaintiffs' cause of action as a "money-making" scheme which gave the law a bad name.

At the time the defense counsel was making the alleged improper and inflammatory arguments to the jury, no objection was made. This issue was brought to the attention of the court when the plaintiffs filed a motion for a new trial. We believe that under the authority of *Gonzales v. General Motors Corporation,* 89 N.M. 474, 553 P.2d 1281 (Ct.App.1976) and under *Higgins v. Hermes,* 89 N.M. 379, 552 P.2d 1227 (Ct.App.1976) the trial court was correct in denying the motion for a new trial because there was no timely objection to defense counsel's arguments.

Failure to Give Cautionary Instruction Relating to Closing Argument.

The plaintiffs made a motion after closing argument asking the court to give an additional instruction advising the jury to disregard the argument of defense counsel which implied the plaintiffs, the chiropractor, and the lawyer were involved in a "money-making scheme." The court denied this motion. The record shows the court gave an instruction to indicate that argument of counsel is not evidence. U.J.I.Civ. 17.7. We believe this instruction was sufficient to advise the jury of their duty to decide the case upon the evidence presented not upon argument of counsel. In essence, the instruction which was given presented the rule sought by the plaintiffs. *Apodaca v. Miller,* 79 N.M. 160, 441 P.2d 200 (1968); *Gould v. Brown Construction Co.,* supra.

Also, the conduct of the defense counsel was not such as would necessarily

prevent the jury from rendering a just verdict. The issue of whether counsel misconduct in statements to the jury should result in a new trial is left to the discretion of the trial court. See, e. g., *Lee v. People,* 170 Colo. 268, 460 P.2d 796 (1969); *Mayer v. Sampson,* 157 Colo. 278, 402 P.2d 185 (1965). We are not persuaded that the plaintiffs received an unfair trial, or that their rights were prejudiced, notwithstanding plaintiffs' alleged error of misconduct on the part of defense counsel. *Apodaca v. United States Fidelity and Guaranty Co.,* 78 N.M. 501, 433 P.2d 86 (1967). The trial court did not abuse its discretion.

Duplicate Instructions

The final assertion is that the court erred in instructing the jury pursuant to U.J.I.Civ. 14.1 and 17.8, thereby duplicating and emphasizing the instruction. The plaintiffs assert error, but give us no authority to support their contentions. The committee comment on the directions for use of U.J.I.Civ. 17.8 states:

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

We do not believe there is any merit to this alleged error; therefore, the trial court was correct in so instructing the jury. *Clinard v. Southern Pacific Company,* 82 N.M. 55, 475 P.2d 321 (1970).

Since we find no error, the judgment of the trial court is affirmed.

IT IS SO ORDERED.

SUTIN, J., concurs.

HERNANDEZ, J., specially concurs.

HERNANDEZ, Judge (specially concurring).

I concur in the result only. I think there was error in giving the contributory negligence instruction, but I consider it harmless:

> "[A] judgment will not be reversed by reason of an erroneous instruction, unless upon a consideration of the entire case, including the evidence, it shall appear that such error has resulted in a miscarriage of justice. The usual consequence is that there will be no cause for reversal unless the evidence indicates that without such error in the instructions the verdict probably would have been different from the verdict actually returned by the jury." *Shuey v. Asbury,* 5 Cal.2d 712, 55 P.2d 1160 (1936). Accord, *Commonwealth Life Insurance Company v. Gay,* 365 P.2d 149 (Okl.1961).

Although the negligence of the defendant in this case is admitted, the jury did not have to find the plaintiffs contributorily negligent to bring in a verdict for the defendant. There was evidence that the chiropractor who treated both plaintiffs had an interest in the case by virtue of an assignment made to him by the plaintiffs on the first day they went to him, giving him the right to the proceeds of any suit brought as a result of their injuries. The defendant's expert witness, Dr. Schultz, an orthopedic surgeon, testified that he could find no evidence of injury when he examined the plaintiffs fourteen months after the accident and that neither of them had any residual (permanent) injuries. He conceded that each of the plaintiffs might have had some degree of whiplash injury, but he said that he had only their subjective complaints as evidence that any such injuries had taken place. Both plaintiffs were still being treated by the chiropractor, Dr. James Lehmann, at the time of trial, about 20 months after the accident (Tarin had been in two further auto accidents since the one complained of here), and Dr. Schultz characterized Romero's treatment as "over treatment." Since there was a conflict in the evidence as to the degree of injury of the plaintiffs and since there was evidence that much of Dr. Lehmann's treatment may have been unnecessary and that Dr. Lehmann had a personal interest in prolonging the treatment, the jury had ample ground for deciding that the plaintiffs had suffered no compensable injuries as a result of the collision. It does not appear, therefore, that the inclusion of an erroneous instruction as to the contributory negligence of a

passenger has resulted in a miscarriage of justice. The error is harmless and does not require reversal.

As to the plaintiffs' claims of error with regard to improper closing arguments, failure to give a cautionary instruction relating to closing argument, and duplicate instructions, I concur in Judge Lopez' opinion.

561 P.2d 36

Manuel D. GRIEGO, Individually, and as Administrator of the Estate of Arthur Griego, Deceased, Plaintiff-Appellant,

v.

A. J. GRIECO and Cibola General Hospital, Defendants-Appellees.

No. 2582.

Court of Appeals of New Mexico.

Feb. 15, 1977.

Certiorari Denied March 15, 1977.

Lorenzo A. Chavez, Emmett C. Hart, Albuquerque, for plaintiff-appellant.

Bruce D. Hall, Rodey Dickason Sloan Akin & Robb, P. A., Albuquerque, for defendant-appellee A. J. Grieco.

Charles T. Hooker, Albuquerque, for defendant-appellee Cibola Gen. Hospital.

OPINION

SUTIN, Judge.

Plaintiff appeals a summary judgment granted defendants based upon two findings:

1. That the testimony of Dr. Thomas Wachtel is not competent to establish the applicable standard of care or breach thereof by the defendant, A. J. Grieco, or the defendant, Cibola General Hospital.

2. That there is no genuine issue of material fact and the defendant, A. J. Grieco and the defendant, Cibola General Hospital, are entitled to judgment as a matter of law in their favor . . . .

We reverse as to Grieco and affirm as to Cibola General Hospital.

A. *Dr. Thomas Wachtel was competent to testify.*

Plaintiff charged that defendant Grieco failed to properly diagnose, care for and treat plaintiff's decedent for peritonitis in Grants, New Mexico. Grieco took the deposition of Dr. Wachtel. After taking Dr. Wachtel's deposition, Grieco moved the court, *in advance of trial,* for an order of court excluding the testimony of Dr. Wachtel "insofar as said witness' testimony is offered to establish plaintiff's allegation that Defendant A. J. Grieco departed from accepted standards of skill and care in the treatment of Arthur Griego, Deceased."

The motion was sustained in conjunction with the granting of summary judgment on April 9, 1976.

Dr. Wachtel is a well qualified general surgeon—an expert in his field. On December 3, 1975, Dr. Wachtel was questioned as follows:

Q. . . . Do you know what G.P.'s [general practitioners], on an average, do in terms of treating a trauma patient in an emergency room in one of our smaller New Mexico communities? Do you know what procedures they go through; what type of history they take?

A. No.

Q. To what extent they admit for observation and don't admit for observation?

A. No, sir.

It is upon this testimony that Grieco contends Dr. Wachtel would be incompetent to

testify at trial as to the applicable standard of care.

It does not require mental agility to state that lack of knowledge on December 3, 1975 may be superceded by knowledge at the time of trial during the year 1977.

Grieco's motion was not filed in support of Grieco's motion for summary judgment. The motion was filed to protect Grieco at trial. At the time of trial, Dr. Wachtel could, by making inquiry, answer the above questions "yes." Grieco noted that Dr. Wachtel would be permitted at trial to testify on medical matters within his expertise, and that the ruling of the court was limited to this critical point: Is he competent to establish the standard of care required of Dr. Grieco? The time to determine the answer to this question is when Dr. Wachtel testifies at the time of trial.

The trial court erred in ruling that Dr. Wachtel was not competent to establish the applicable standard of care or breach thereof by Grieco.

B. *Plaintiff has appealed from the orders limiting discovery.*

Grieco contends that plaintiff has not appealed from the orders of the court relating to his oral interrogation.

On November 1, 1974, plaintiff took the deposition of Grieco, and after two hours of examination, plaintiff recessed because of numerous objections made to questions and instructions to Grieco by his attorney not to answer certain questions. Plaintiff moved the court to compel answers to permit a full and complete discovery. The motion was granted as to questions appearing on ten pages of the deposition.

On October 11, 1975, plaintiff was again limited. Plaintiff again filed a motion requesting an order and the motion was denied.

Plaintiff's notice of appeal states in pertinent part:

> . . . [P]laintiff . . . files herewith his Notice of Appeal . . . . This appeal is taken from that certain judgment granting Summary Judgment in favor of the defendants . . . and determining and ordering that the testimony of Dr. Thomas Wachtel was not competent . . ., which judgment was filed herein on the 9th day of April 1976.

Rule 4(b) of the Rules of Appellate Procedure in civil cases [§ 21–12–4(b), N.M.S.A. 1953 (Repl. Vol. 4, 1975 Supp.)] reads:

> The notice of appeal shall designate the party or parties taking the appeal, the judgment, order, decision or part thereof appealed from, and the court to which it is taken.

Grieco relies on *Mabrey v. Mobil Oil Corporation,* 84 N.M. 272, 502 P.2d 297 (Ct.App. 1972). In this case, we held that defendant's notice of appeal from a judgment entered in favor of plaintiff did not constitute notice of appeal from a summary judgment granted Sparger, a third-party defendant, after the summary judgment had become a final appealable order. This case does not support Grieco.

Orders entered on procedural motions that do not practically dispose of the case on the merits are not appealable. Section 21–12–3(a)(2), N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.). Plaintiff could not appeal from the orders limiting discovery. See generally, Annot., Appealability—Pretrial Examination, 37 A.L.R.2d 593, §§ 4 and 8 (1954); 4 C.J.S. Appeal & Error § 120 (1957, and 1976 Poc. Pt.); 4 Am.Jur.2d Appeal & Error § 79 (1962, and 1975 Supp.). The errors raised are properly before this Court on the appeal of the summary judgment.

C. *The trial court erred in limiting discovery during deposition of Grieco.*

Grieco was a defendant. He was subject to examination in aid of plaintiff's pending action. His deposition is important to plaintiff in opposition to defendant's motion for summary judgment.

The scope of the examination is set forth in Rule 26(b) of the Rules of Civil Procedure [§ 21–1–1(26)(b), N.M.S.A.1953 (Repl. Vol. 4)]:

> Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 30(d), supra, reads:

> At any time during the taking of the deposition, *on motion of any party or of the deponent* and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending . . . may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). . . . [Emphasis added]

No such motion was filed.

The attorney for Grieco continually objected in various ways to the form of the question with comments and at times directed Grieco not to answer. He led Grieco to answers of questions that Grieco did not understand. He objected after answers were given. He tried to clear the record by comments. He answered questions that were asked the witness. When the witness was asked to answer the question, the attorney said "If you can". He coached the witness. He did not allow opposing counsel to finish questions. Grieco asked his attorney: "Now, how do I answer that, Mr. Farlow?" "Mr. Farlow, isn't he asking the same question over and over, am I required to answer?" "Is that a proper form of question, Mr. Farlow?"

Plaintiff recessed the deposition after two hours of questioning because of the conduct of opposing counsel.

Upon motion of plaintiff, the trial court limited the examination of Grieco to the subject matter of questions that appeared on ten pages of the deposition and ordered that the examination shall not extend beyond those questions. We find no rule of law, and none has been presented, that allows a district court to limit the examination of a witness, absent a motion by the opposing party pursuant to Rule 30(b) and (d).

Salitan v. Carrillo, 69 N.M. 476, 368 P.2d 149 (1961) holds that under Rule 30(b) a party to be deposed may seek a protective order. For good cause shown, the court may in its discretion, enter any orders which justice requires to protect the party from annoyance, embarrassment or oppression. *Salitan* is not applicable because Grieco, in the instant case, did not seek any protection under Rule 30(b) or (d). On the other hand, plaintiff sought relief, not under Rule 30(b) or (d), and not to limit Grieco's testimony. Plaintiff's purpose was to examine Grieco upon all matters relevant to the subject matter. The trial court lacked discretionary authority to limit the examination.

Under Rule 26(b), plaintiff may examine deponent "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action". As to all issues made by the pleadings in this case, plaintiff had the right to examine Grieco fully and exhaustively. "Such a right is basically fundamental to our system of jurisprudence and no court has power to restrict or limit it." *Northwestern University v. Crisp,* 211 Ga. 636, 88 S.E.2d 26, 31 (1955). In fact, our rules do not forbid plaintiff to retake the deposition of Grieco. However, the use of repetitious depositions rests in the sound discretion of the trial court. *Turner v. Missouri-Kansas-Texas R. Co.,* 346 Mo. 28, 142 S.W.2d 455 (1940).

Prior to the taking of the deposition, the attorney for a deponent may ascertain, as a guide to his examination, what the deponent knows and the extent and limitation of his memory, but he does not have the right to go beyond proper objection. If necessary, he can seek relief from the court pursuant to Rule 30(b) and (d), supra.

During the taking of a deposition, the attorney for the deponent has the right to object to questions asked and state his reasons, without comment, to protect the rights of the deponent. But he should not continuously object to questions asked that are relevant to the issues in the case on insubstantial grounds, nor teach the deponent what he ought to know, nor suggest and dictate answers to the deponent, nor wrongfully interfere with the progress of the deposition. Under our rules authorizing the taking of depositions, it is equally necessary to ensure the due administration of justice and the proper protection of the rights of the parties. See *Pratt v. Battles,* 34 Vt. 391 (1861); *In Matter of Eldridge,* 82 N.Y. 161, 37 Am.R. 558 (1880); 26A C.J.S. Depositions § 67, at 392 (1956).

The trial court erred in limiting the examination of Grieco. Plaintiff has the right to proceed further in the examination of Grieco upon giving proper notice. This error may have some effect upon the summary judgment granted Grieco.

D. *A genuine issue of material fact exists as to Dr. Grieco.*

The important issue in this case is whether a genuine issue of material fact exists in the legal medical battle between plaintiff and Grieco. We believe there is.

The facts most favorable to plaintiff are:

On the evening of August 9, 1973 in Grants, New Mexico, Arthur Griego (decedent), 17 years of age, was injured while riding a motorcycle. He was taken to Cibola General Hospital and was first seen by Dr. Grieco about 10:30 p. m. that evening. Decedent suffered a fracture of the left wrist, and multiple lacerations and abrasions of the abdomen. There was a loss of superficial skin tissue over the middle part of the abdomen. This is called "blunt trauma," trauma caused by a blow to the abdomen. Traumatic injury to the abdomen is common.

Decedent had a very serious problem the moment he was injured. He was critically ill because the rupture of the hollow viscus had probably occurred. With each passing hour, the condition got worse; that is, the prognosis changed for the worse as the operative treatment was delayed. The earlier the operation for this suspected problem, the better it would have been for the decedent.

An x-ray of the abdomen is a routine order of a physician who suspects that a person has suffered an abdominal injury. If an upright x-ray is taken of a patient or one is taken on his side, it will disclose whether a large amount of free air is in the abdomen, evidence of a ruptured colon. If an examination of the abdomen discloses the rupture, the rupture must be treated operatively in the first twelve hours because peritonitis sets in. Bacteria from the area of the colon sets in motion.

Grieco examined decedent's blood pressure, blood count, heart, abdomen, eyes and rectum, and ordered x-rays taken. The specific kind of examinations made of the abdomen that night and the next day are not too clear. It is most important to watch very closely by examination the development of the injury to the abdomen. There are various methods of determining whether an intra-abdominal injury was present. X-rays were taken that night of the right shoulder, the chin, stomach, chest and left wrist. X-rays of the abdomen were not ordered because Grieco believed he had no suspicion that decedent had a ruptured hollow viscus, an intra-abdominal injury. This would, of course, depend on the method of examination of the decedent.

It does not appear from the record whether Grieco continued to lack suspicion on August 10 and 11, 1973 that decedent suffered an intra-abdominal injury. Nevertheless, no x-rays of the abdomen were ordered on the two days following the decedent's entry into the hospital.

On August 12, 1973, Grieco did order an x-ray of decedent's chest. It disclosed about a half inch of free air in the abdomen. The right side of the transverse colon had been completely ruptured. Peritonitis had set in. Grieco notified a surgeon in Albuquerque of the patient's condition and rushed the patient to an Albuquerque hospi-

tal for surgery. He was operated on four occasions and subsequently expired.

In support of his motion for summary judgment, Grieco, on *December 9, 1975,* filed an affidavit of Dr. G. R. Gutierrez of Grants, New Mexico, stating that Grieco followed the customary and standard procedures in Grants, New Mexico.

On *January 2, 1976,* the deposition of Dr. Gutierrez was taken. He testified that the fundamental techniques of diagnosis and treatment of an abdominal injury would be the same whether practiced in Albuquerque, Grants or New York. According to Dr. Gutierrez, when abdominal trauma is suspected, abdominal x-rays should be taken. He further testified that if an accident victim with scrapes and bruises on his abdomen were brought in for treatment, it would indicate some blunt trauma to the abdomen; that a physician would watch for intra-abdominal injuries; that one of the diagnostic procedures would be to take an x-ray of the abdominal region.

Dr. Gutierrez' testimony alone would create an issue of fact whether Grieco violated the applicable standard of care in Grants, New Mexico. True, it was inconsistent with his affidavit. However, where a conflict arises in statements made by a witness in an affidavit and deposition on a material fact, summary judgment is improper. *Rodriguez v. State,* 86 N.M. 535, 525 P.2d 895 (Ct.App.1974).

To meet the burden of establishing the facts set forth supra, plaintiff also presented the depositions of Drs. Grieco, Thomas Wachtel, and John P. O'Reilly, the surgeon who operated.

Dr. Wachtel testified that the diagnosis of abdominal injuries was taught in medical schools for many, many years, was of long standing, and the method of diagnosis did not vary from town to town in New Mexico. Dr. John P. O'Reilly testified that diagnostic tests and examinations would be the same in any community in New Mexico.

U.J.I. 8.1 sets forth the conceptual method by which a medical standard of care is established:

> In (treating) . . . (making a diagnosis of) the plaintiff, the doctor was under the duty to possess and apply the knowledge and to use the skill and care that was ordinarily used by reasonably well qualified doctors of the same field of medicine as that of the defendant practicing under similar circumstances, *giving due consideration to the locality involved.* A failure to do so would be a form of negligence that is called malpractice.
>
> The only way in which you may decide whether the defendant possessed and applied the knowledge and used the skill and care which the law required of him is from evidence presented in this trial by (physicians) (surgeons) . . . testifying as expert witnesses. . . . [Emphasis added]

The testimony of all of the doctors which establish the facts stated supra, shows that they did "give due consideration to the locality involved." The doctors were qualified to testify whether Grieco followed the standard of care and skill required of physicians in examining, diagnosing and treating a patient suffering from "blunt trauma" to the abdomen to determine whether an intra-abdominal injury was present. See *Goffe v. Pharmaseal Laboratories, Inc.,* No. 2480 (Ct.App.), decided December 7, 1976 (Sutin, J., concurring in part and dissenting in part), cert. granted January 7, 1977; *Gandara v. Wilson,* 85 N.M. 161, 509 P.2d 1356 (Ct.App.1973).

Grieco suggests consideration of *Murphy v. Dyer,* 409 F.2d 747 (10th Cir. 1969). This Federal court was bound by the rules of the State of Colorado. To determine whether an expert was qualified, it must be shown that the expert was familiar with standards of practice and techniques employed in Colorado Springs or similar communities. Defendant was a certified obstetrician and gynecologist. The expert witness was a renowned anesthesiologist. Although the expert testified that while the " 'standard practice in one community may *vary* to another community * * * ' 'the general principal [sic] of administering [a spinal an-

esthetic] are generally adhered to and fairly well established.' " [Emphasis added] [409 F.2d at 749]. The Court applied the Colorado locality doctrine and then stated:

> Likewise the plaintiff made no showing that the standards of administering a spinal anesthetic would be the same for a certified obstetrician as for a certified anesthesiologist. . . . [409 F.2d at 749]

This case does not support Grieco's contention. The standard varied from one community to another, and the expert did not prove the proper standard applicable to defendant.

A genuine issue of material fact exists on whether Grieco's failure to diagnose the intra-abdominal injury of decedent and failure to order x-rays of the abdomen to determine whether an intra-abdominal injury was present met the recognized standard of care required of a physician.

E. *No genuine issue of fact exists as to hospital.*

Plaintiff does not contend on appeal that a genuine issue of material fact exists as to Cibola General Hospital, and we find none.

Oral argument is unnecessary. Summary judgment in favor of Grieco is reversed. Summary judgment in favor of Cibola General Hospital is affirmed.

IT IS SO ORDERED.

WOOD, C. J., and HENDLEY, J., specially concurring.

WOOD, Chief Judge, and HENDLEY, Judge (specially concurring).

We agree with the result reached by Judge Sutin on all issues and join in Part E of his opinion. On other issues, we reach the result somewhat differently.

Locality Rule and Dr. Wachtel

The locality rule stated in U.J.I. Civil 8.1 states that in determining malpractice the fact finder is to give "due consideration to the locality involved." This instruction, in our opinion, differs from the standard stated in *Cervantes v. Forbis,* 73 N.M. 445, 389 P.2d 210 (1964)—departure from "the recognized standards of medical practice in the community".

The difference in the instruction approved by the Supreme Court and the definition in *Cervantes* was pointed out in *Gandara v. Wilson,* 85 N.M. 161, 509 P.2d 1356 (Ct.App.1973). The difference was discussed by Judge Sutin in his separate opinion in *Goffe v. Pharmaseal Laboratories, Inc.,* (Ct.App.) No. 2480, decided December 7, 1976, certiorari granted January 7, 1977.

We agree with the views stated by Judge Sutin in *Goffe*—that U.J.I. Civil 8.1 is the appropriate standard. We do not agree with Judge Sutin's comment in *Goffe* that U.J.I. Civil 8.1 was approved in *Williams v. Vandenhoven,* 82 N.M. 352, 482 P.2d 55 (1971). As we read *Williams,* there was no appellate issue in that case concerning the locality rule. The Supreme Court's latest decision on the locality rule followed *Cervantes* and did not discuss U.J.I. Civil 8.1. *Becker v. Hidalgo,* 89 N.M. 627, 556 P.2d 35 (1976).

Judge Sutin's opinion in this case follows U.J.I. Civil 8.1 rather than *Cervantes.* In our opinion, it makes no difference which locality rule is followed in deciding this case; under either rule there was an issue of fact. There is an issue of fact as to whether Dr. Grieco was late in considering whether there was a ruptured viscus. The question of lateness arises from the deposition testimony of several physicians as to fundamental diagnostic techniques. Accordingly, we do not consider nor join in the extensive factual references favorable to plaintiff in Part D of Judge Sutin's opinion. Because of the opinion as to fundamental techniques, applicable no matter where the doctor practices medicine, there was a factual issue under either locality rule.

With the other deposition testimony, it makes no difference whether Dr. Wachtel had personal knowledge concerning local practice. Fundamental techniques, applicable no matter where the doctor practices, would apply to the locality involved in this

lawsuit. We do not disagree with Part A of Judge Sutin's opinion; however, the ruling excluding Dr. Wachtel's testimony at trial was also erroneous for the reasons stated in this paragraph.

Limiting Discovery

We agree that the trial court erred in limiting the second deposition of Dr. Grieco to the subject matter of questions appearing on specified pages of the first deposition. Other pages of the first deposition show instances where Dr. Grieco's attorney intervened to avoid a question being answered.

Our deposition rules intend a liberal pretrial discovery to enable the parties to obtain the fullest possible knowledge of the facts before trial. See 4 Moore's Federal Practice (2nd ed.) ¶ 26.56. A trial court's decision to limit discovery will not be disturbed except for an abuse of discretion, however, the presumption is in favor of discovery. *Salitan v. Carrillo,* 69 N.M. 476, 368 P.2d 149 (1961). The conduct of Dr. Grieco's attorney during the taking of the first deposition thwarted the intent of the discovery rule and prevented plaintiff from obtaining knowledge of at least some of the facts. In this situation, it was an abuse of discretion to limit discovery in the second deposition to questions appearing on specified pages of the first deposition.

The remedy for this improper limitation is to allow plaintiff to depose Dr. Grieco again. While this result accords with the result of Judge Sutin, we do not join in Part C of Judge Sutin's opinion because it would hold that the trial court is powerless to limit discovery unless a party moves that a limitation be imposed. In appropriate circumstances the trial court may act sua sponte. See *Smith v. Walcott,* 85 N.M. 351, 512 P.2d 679 (1973); *Birdo v. Rodriguez,* 84 N.M. 207, 501 P.2d 195 (1972); *Miller v. City of Albuquerque,* 88 N.M. 324, 540 P.2d 254 (Ct.App.1975); *Beverly v. Conquistadores, Inc.,* 88 N.M. 119, 537 P.2d 1015 (Ct.App.1975).

Appeal of Orders Limiting Discovery

Part B of Judge Sutin's opinion discusses defendant Grieco's contention that the trial court orders limiting discovery were not appealed because not designated in the notice of appeal. Judge Sutin holds that the limiting orders are before this Court for review by the appeal from the summary judgment because the limiting orders were not appealable. This is subject to misinterpretation.

Defendant does not claim that rulings on procedural matters cannot be reviewed in an appeal from a summary judgment when an independent appeal cannot be taken on the basis of the procedural ruling. The claim is: "Assuming that the two orders complained of are appealable, they are before this Court only if included within the notice of appeal." Judge Sutin correctly holds that the orders were not appealable orders. The corollary is that not being appealable orders, the rulings may be reviewed in the appeal from the summary judgment.

561 P.2d 43

STATE of New Mexico, Plaintiff-Appellee,

v.

Frank PINA, Defendant-Appellant.

No. 2657.

Court of Appeals of New Mexico.

Feb. 22, 1977.

Peter B. Shoenfeld, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., John J. Duran, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

This appeal involves the Meat Inspection Act. Sections 54–8–6 to 54–8–21, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, Supp.1975). Defendant has been convicted by a jury of slaughtering without a proper inspection, selling uninspected meat. and failure to comply with regulations of the Livestock Board. Defendant represented himself at trial but has had the services of appointed counsel for the appeal. Nine issues are presented; five are grouped under point four. The points discussed are: (1) sufficiency of the evidence, (2) refusal to inspect, (3) validity of the regulations, (4) miscellaneous claims, and (5) the sentences.

Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence as to each of the convictions. In reviewing these contentions we consider the evidence, and permissible inferences therefrom, in the light most favorable to the verdict. *State v. Lucero,* 88 N.M. 441, 541 P.2d 430 (1975).

Applying the aforestated standard of review, there is evidence to the following effect.

In the fall of 1975, the Livestock Board had licensed slaughtering and selling operations at the physical location involved in the charges against defendant. The record is unclear as to the name of the slaughtering business; the selling operation was conducted under the name of Sweetmeat or Sweetmeat, Inc. In January, 1976, W. F. Hunt applied for two licenses—slaughterer and fresh meat dealer. The applications listed the name of each business as "Pursuit of Happiness" and listed the owner for each business as Hunt and Pina. Each license was issued in the names of these two men; subsequently, an inspector saw the licenses posted in the office of the businesses. These two licenses were described as having been transferred from prior licensees. After the licenses were issued to Hunt and Pina, "Pursuit of Happiness" conducted the slaughtering operation and "Sweetmeat" sold fresh meat under the "Pursuit of Happiness" license.

In the fall of 1975, an inspector had observed that slaughtering operations were being conducted in noncompliance with regulations of the Livestock Board. This noncompliance continued after the licenses were issued to Hunt and Pina. On February 10, 1976, a "Project and Progress Report" was signed by Pina under protest. This report specified corrective action that was to be taken by March 15, 1976. On March 15, 1976, the inspector observed that the corrective action had not been taken; the inspector informed someone at the slaughtering plant that there would be no more inspections until the corrections were made. The inspector called this a curtailment; the curtailment lasted for two or three days. The curtailment was in effect on March 16 and 17, 1976.

On March 16, 1976, unstamped mutton was observed in Sweetmeat's meat case. Entrails, heads and feet were observed in the slaughter plant; these items had not been present on March 15, 1976. On March 17, 1976, uninspected mutton was purchased from Sweetmeat.

Although the regulations were not introduced into evidence, a witness testified as to specific regulations that were violated. These regulations covered the items for corrective action in the "Project and Progress

Report". The items for corrective action involved a smooth finish for the walls and installing a door in the "offal" or "hide room," and repairing the drain which carried away blood in the "kill" room. There was evidence that the regulations involved were "sanitary" regulations.

There was substantial evidence that a sheep was slaughtered without inspection (Count I). Section 54–8–15(A), supra. There was substantial evidence that uninspected meat was sold (Count II). Section 54–8–15(B), supra. There was substantial evidence that regulations existed and that the regulations were violated (Count III). Section 54–8–13(J), supra, and § 47–2–19, N.M.S.A.1953 (Repl. Vol. 7, Supp.1975). There was substantial evidence that these violations occurred in the Pursuit of Happiness businesses licensed to Hunt and Pina to slaughter and sell fresh meat.

Defendant claims he cannot be held liable for the three crimes because there was no evidence that he was the owner of the two businesses. We fail to see the relevancy of ownership. The statutes involved, cited in the preceding paragraph, do not define the crimes in terms of ownership. No issue of ownership was included in the instructions and there was no objection by defendant to the instructions. If ownership has relevancy unperceived by this Court, the conflicting testimony given by W. F. Hunt raised a factual issue as to defendant's ownership.

Defendant claims (a) there was no evidence that he personally committed any of the crimes, (b) that he was found guilty on the basis that he was a licensee and he was not a licensee, and (c) even if he were a licensee, he cannot be liable for crimes committed by others.

We agree that there was an absence of evidence that defendant personally slaughtered the sheep on March 16th or that he sold the uninspected mutton on March 17th. We do not agree that there was an absence of evidence as to defendant's personal participation in the violation of the regulations.

Defendant signed the Project and Progress Report. Defendant's name was on the licenses and the licenses were posted on the premises. There was evidence that the prior operator turned the business over to Hunt and Pina, that Pina wanted to be named in the license applications in order to be involved in the management and operation. There was evidence that defendant gave orders concerning the operation of the businesses; an exhibit shows defendant informed the inspector as to when slaughtering was to occur (see § 54–8–10, supra); there was evidence that Pursuit of Happiness slaughtered for Sweetmeat.

There was substantial evidence that defendant was personally involved in the violation of the regulation, that defendant was a licensee and as licensee, defendant permitted the illegal slaughtering and selling to occur. Defendant was held liable for his own actions and not for actions of others.

The instruction setting forth the elements of the charge of violating regulations (Count III) states that defendant must have failed to comply with the regulations "by an unlawful and intentional *act*". Defendant asserts the evidence shows only non-action on his part. The briefs discussed when a non-act may be considered an act. We decline the invitation to discuss the semantics of "act". When the entire instruction is read, it clearly discusses a failure to comply with the regulations; the word "act" did not make the instruction confusing. There was evidence which supports the giving of this instruction.

Refusal to Inspect

The evidence was undisputed that upon ascertaining that the corrective action identified in the Project and Progress Report had not been taken by March 15, 1976, the inspector refused to continue with inspections until the corrections were made. Both ante-mortem and post-mortem inspections are required. Section 54–8–11, supra. Without the inspections, the Pursuit of Happiness licenses could not be legally op-

erated on a commercial basis. See § 54–8–16, supra.

The uninspected slaughtering on March 16 and the sale of uninspected meat on March 17th took place during the curtailment of inspections. Defendant asserts there was no authority for curtailment of inspections, that the only statutory authority was for suspension or revocation of meat inspection service after notice and hearing. Section 54–8–19, supra. Defendant claims the curtailment was an illegal suspension because there was no notice and no hearing. The State asserts that curtailment was something different from a suspension and that the Livestock Board and its inspectors have implied power to curtail inspections in carrying out the statutory mandate to assure that adulterated meat is not offered for sale. We do not decide whether the curtailment was legal, see § 54–8–8(B), supra, which provides that inspectors are to carry out the statutory inspections, but are also to enforce sanitary requirements.

Assuming, but not deciding, that the curtailment of inspections was unauthorized administrative action, what effect does such action have on the criminal prosecution? Defendant asserts that because of the unauthorized administrative action, Counts I and II should not have been submitted to the jury. This, in effect, is a claim that the unauthorized action barred prosecution for the criminal conduct. The decisions relied on do not support defendant.

Estep v. United States, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. 567 (1946) involved a failure to report for induction into the armed forces. *Estep* held that such a criminal prosecution could be defended on the basis that the local draft board had no jurisdiction to order the induction. Jurisdiction was used in the sense of "no basis in fact for the classification" which the local board gave to the defendant. The defense of no jurisdiction was authorized after the draft laws were reviewed and the United States Supreme Court determined there was no basis for judicial review of "no jurisdiction" orders prior to the criminal prosecution. See *Sicurella v. United States,* 348 U.S. 385, 75 S.Ct. 403, 99 L.Ed. 436 (1955) where the defense was utilized.

Estep, supra, does not bar a criminal prosecution because of unauthorized administration action. If *Estep* should be applicable to defendant's case, it does no more than authorize the criminal charges to be defended on the basis of the unauthorized action. Defendant utilized such a defense. Recognizing this, defendant shifts ground and asserts the trial court erred in not instructing the jury concerning the defense. No such instruction was requested; there was no error in failing to instruct on a defense when no instruction was requested. *State v. Lujan,* 87 N.M. 400, 534 P.2d 1112 (1975), cert. denied, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 400 (1975); *State v. Romero,* 87 N.M. 279, 532 P.2d 208 (Ct.App.1975).

In *Estep,* supra, a federal court interpreted a federal statute. When a state court interprets a state statute, there is no violation of due process if the state court holds that the wrongful administrative action is no defense to the criminal prosecution and requires the defendant to seek correction of the wrongful action in civil proceedings. *Poulos v. New Hampshire,* 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105, 30 A.L.R.2d 987 (1953).

Assuming the curtailment of inspections was unauthorized, defendant had the choice of complying with the curtailment and thus not slaughtering and selling contrary to the statute, or petitioning the district court to require the inspections to continue. He did neither. He proceeded to violate the law; his violation is not to be excused on the basis that an administrative official proceeded improperly. *Poulos v. New Hampshire,* supra, Note 13; *Humble Oil & Refining Co. v. United States,* 198 F.2d 753 (10th Cir. 1952), cert. denied, 344 U.S. 909, 73 S.Ct. 328, 97 L.Ed. 701 (1952). In so holding we have not overlooked *Benally v. Marcum,* 89 N.M. 463, 553 P.2d 1270 (1976). *Benally* holds that the State was divested of jurisdiction over the person of Benally because such jurisdiction was acquired by an illegal arrest. *Benally* is not applicable because there is no issue as to jurisdiction over the

person in this case. In addition, there is nothing showing that defendant's convictions are based on any illegal action by the inspector.

The claim that defendant should be excused from criminal conduct because of the State's failure to inspect is without merit.

Validity of Regulations

Defendant contends his Count III conviction should be reversed because the regulations on which this conviction is based were invalid. The claim is "The legislature has failed to provide to the livestock board any standards by which it is to be governed in the adoption of the regulations . . . ."

This contention involves unlawful delegation of legislative authority. "It is settled that a legislative body may not vest unbridled or arbitrary power in an administrative agency but must furnish a reasonably adequate standard to guide it." *City of Santa Fe v. Gamble-Skogmo, Inc.,* 73 N.M. 410, 389 P.2d 13 (1964).

To be "reasonably adequate," the standards need not be specific. Broad standards are permissible so long as they are capable of reasonable application and are sufficient to limit and define the agency's discretionary powers. *City of Santa Fe v. Gamble-Skogmo, Inc.,* supra; see *Mourning v. Family Publications Service, Inc.,* 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973).

A purpose of the Meat Inspection Act is "to assure the public that only pure, wholesome and unadulterated meat and meat food products are offered for sale." Section 54–8–8(A), supra. The Livestock Board is authorized to adopt rules and regulations "which shall conform as far as possible to the requirements of the rules governing meat inspection of the United States department of agriculture." Section 54–8–13, supra. The rules and regulations are to include "regulations relating to sanitation for all establishments licensed or subject to state inspection . . . ." Section 54–8–13(J), supra.

The legislative standards are adequate; there was no unconstitutional delegation of legislative authority and the sanitary regulations involved in this case are valid.

Miscellaneous Claims

This point lists and answers various contentions which require little discussion.

(a) Defendant claims the trial court erred in refusing to appoint a non-lawyer to represent him at trial. We do not reach the question of whether appointed counsel may be a non-lawyer. Defendant was not entitled to *any* appointed counsel because he refused to fill out, under oath, a certificate of indigency showing his income. There was no showing that he was a needy person. Sections 41–22–3 and 5, N.M.S.A.1953 (2d Repl. Vol. 6).

(b) Assuming that Livestock Board inspectors are required to be bonded, defendant asserts the bonds were void because not paid for in gold or silver coin as required by Art. I, § 10 of the Constitution of the United States. The contention is based on a patent misreading of a constitutional provision limiting the powers of states, but not Congress. See 31 U.S.C.A. § 463 (1976) and the cases annotated thereunder; *Chermack v. Bjornson,* 302 Minn. 213, 223 N.W.2d 659 (1974); *Leitch v. State, Department of Revenue,* 16 Or.App. 627, 519 P.2d 1045 (1974).

(c) Defendant asserts the district court complaint was "jurisdictionally" deficient because it did not set forth all the elements listed in R.Crim.P. 5(b). To the extent that the complaint, standing alone, could be considered defective, any such defect was cured by the Bill of Particulars filed by the State. *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). Even if the complaint were defective, such defect would not be jurisdictional in this case. See R.Crim.P. 7.

(d) Count I of the complaint charged the slaughter without inspection occurred "on or about" March 17, 1976.

The Bill of Particulars states the killing occurred "on" March 17, 1976. The proof at trial was that the slaughter occurred on March 16, 1976; Count I was submitted to the jury, without objection, on the basis of the March 16th date. Defendant asserts the Count I conviction must be reversed because of failure of proof. Defendant relies on *State v. Salazar,* 86 N.M. 172, 521 P.2d 134 (Ct.App.1974). *Salazar* is inapplicable to the facts of this case. R.Crim.P. 7(c) states that a variance between the complaint and evidence is not grounds for acquittal unless the variance prejudices substantial rights of defendant. There is nothing showing the variance prejudiced defendant's rights.

(e) Defendant asserts the prosecutor improperly commented on defendant's failure to testify. The prosecutor informed the jury that its decision should be based on the testimony given under oath and not upon arguments of counsel or comments of defendant from the podium. This was proper comment. The transcript shows that throughout the trial defendant made statements and arguments, and misstated the evidence, all in his role as counsel for himself.

The Sentences

Section 54–8–15, supra, declares slaughter without inspection and the sale of uninspected meat to be misdemeanors. Section 47–2–19, supra, declares the violation of a regulation of the Livestock Board to be a petty misdemeanor.

The trial court's sentencing authority for these offenses is § 40A–29–4, N.M.S.A.1953 (2d Repl. Vol. 6).

The fines and jail terms imposed for Counts I and II were within the trial court's sentencing authority and are valid. The jail term for Count III was within the trial court's sentencing authority and is valid. The fine of $200.00 for the Count III petty misdemeanor is unauthorized because $100.00 is the maximum authorized fine.

The convictions are affirmed. The sentences on all three counts are affirmed with the exception of the unauthorized fine under Count III. The cause is remanded with instructions to amend the judgment and sentence by imposing a fine under Count III consistent with § 40A–29–4, supra.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

561 P.2d 461

STATE of New Mexico,
Plaintiff-Appellee,

v.

Stanley Deon MELTON,
Defendant-Appellant.

No. 10805.

Supreme Court of New Mexico.

March 1, 1977.

[redacted]

[redacted]

[redacted]

ly 1:45 a.m., the morning of February 6, 1975. At about 3 a.m. a customer entered the store, saw no one, observed blood on the floor, and called the police. The police arrived at about 3:17 a.m. At about 4:44 a.m. the victim's seminude body was discovered in the Clovis Memorial Hospital parking lot.

The police arrested the defendant at 2304 Axtell, the vacant house of his brother. At the jail defendant's boots and socks, which had blood on them, were taken from him. Defendant's briefs had blood on the outside of the fly, and on the inside fly had semen and fibers similar to the victim's gold slacks she wore that night.

The autopsy showed that the victim's skull was fractured; there were bruises on her face, head, chest, hip, lower back, and leg. Her liver was lacerated. Death was caused by the injuries to her head and liver, both caused by severe blows. The victim had a large amount of acid phosphatase in her vagina and a small amount in her rectum.

The police investigation found blood stains on the floor in Allsup's as well as a pair of gold slacks, shoes, and a woman's pair of briefs. Investigation of the trailer house rented by the defendant revealed an Allsup's jacket outside. A green throw rug taken from the trailer had type A blood on it and hair similar to the victim's head and pubic hair. A blue shirt found in the trailer had fibers similar to those of the gold slacks. A Levi jacket and a white baby blanket were found in the shower of the trailer, the former having traces of blood, hair similar to the victim's head hair, and fibers similar to those of the gold slacks, and the latter having blood, weak signs of acid phosphatase, and hair similar to the victim's pubic hair on it.

A neighbor living approximately five yards from the trailer heard a car come into the driveway at about 3 a.m., and then he saw the trailer lights go on. He dozed off, awoke hearing water running, and then heard a car leave. When the police arrived, the water was running in the shower. When the police arrived at the 2304 Axtell residence, they saw defendant's pick-up truck with the motor still running. From the truck they recovered a section of the seat covers and a white glove; both had type A blood on them. The glove also had a hair similar to the victim's head hair on it. From inside the residence the police recovered a section of foam-rubber padding and a mattress cover with type A blood on them. Both the victim and the defendant had type A blood. A throw rug in the living room had hair similar to the victim's head hair on it, and a white towel in the fireplace of the den had hair similar to the victim's pubic hair on it.

Defendant first argues that the refusal of the trial court to issue a subpoena for Dr. Thompson was reversible error. Defendant had talked to Dr. Thompson (but was never examined or tested) while Dr. Thompson, a forensic psychologist, was a staff member at the New Mexico State Hospital. Apparently defendant's counsel never discovered this fact until Tuesday, the second day of trial. Whereupon he discussed the defendant's case with Dr. Thompson, who agreed to run the standard series of psychometric tests on defendant and to interview him, which occurred from 2 a.m. to 6 a.m. Wednesday morning. That morning counsel listened to Dr. Thompson's results and advised the district attorney of Dr. Thompson's findings shortly before 8:30 a.m. At the beginning of the trial that day, defense counsel requested the trial court to issue a subpoena for Dr. Thompson. The district attorney objected on the basis of unfair surprise and pointed out his prior cooperation with defendant in three previous psychiatric examinations. The trial court refused to grant the subpoena, but it told defense counsel he could "make a tender on that." Counsel replied that he would wait until Dr. Thompson's report was finished. On Thursday defense requested the trial court to reconsider its ruling. Defense also submitted Dr. Thompson's completed report as an exhibit to show the basis of the proferred testimony of Dr. Thompson, which the trial court allowed. The trial court still refused to grant the motion for a subpoena, but it did give defense an

opportunity to present later in the trial some authorities to substantiate his position. Thereafter no other request was made for the court to reconsider its ruling and no further argument or authority was presented to the trial court. The defense did not make an offer of proof of what Dr. Thompson would testify to in order to preserve error. N.M.R.Evid. 103(a)(2) [§ 20–4–103(a)(2), N.M.S.A. 1953 (Supp.1975)]. Thus this issue was not properly preserved for appeal. Finally, the defendant himself could have subpoenaed Dr. Thompson without court permission. N.M.R.Crim.P. 48 [§ 41–23–48, N.M.S.A. 1953 (Supp.1975)]; N.M.R.Civ.P. 45(e) [§ 21–1–1(45)(e), N.M.S.A. 1953]; N.M.R.Evid. 706(d) [§ 20–4–706(d), N.M.S.A. 1953 (Supp.1975)]. Had the trial court refused to allow Dr. Thompson to testify during the presentation of his case, the defendant would in that case have to have made an offer of proof to preserve error.

■ Defendant argues that the trial court erred in refusing to give his requested instruction[1] on expert testimony, where such testimony was crucial to his defense, citing to *People v. Ruiz*, 11 Cal.App.3d 852, 90 Cal.Rptr. 110 (1970). The trial court gave N.M.U.J.I.Crim. 40.50 [2d Repl. Vol. 6, N.M.S.A. 1953 (Supp.1975), at 324], which is identical to the last paragraph of defendant's requested instruction. In addition, the trial court gave N.M.U.J.I.Crim. 40.20 [2d Repl. Vol. 6, N.M.S.A. 1953 (Supp.1975), at 320]:

> You alone are the judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. In determining the credit to be given any witness, you should take into account his truthfulness or untruthfulness, his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have and the reasonableness of his testimony considered in the light of all the evidence in the case.

At trial defendant argued that his instruction was a correct statement of the law, that the N.M.U.J.I.Crim. were "about as clear as mud," and that they were not in effect then and thus not applicable to this case. We disagree. The New Mexico Uniform Jury Instructions intended to and did cover the very situation which occurred here. The use note to N.M.U.J.I.Crim. 40.-20 clearly states that the instruction may be given whenever an expert witness has testified or when a layman has been permitted to state an opinion. The trial court in its discretion could use or refuse to use it prior to the effective date of N.M.U.J.I.Crim. *State v. Valenzuela*, 90 N.M. 25, 559 P.2d 402 (1976).

■ Third, defendant argues that the aggravated sodomy and first-degree kidnapping charges should merge into the murder charge (of which he was found not guilty), and thus he requests a reversal of his sentence for aggravated sodomy and first-degree kidnapping and a remand for proper sentencing for sodomy and second-degree kidnapping. Defendant contends that the very circumstances for the conviction of *aggravated* sodomy and *first-degree* kidnapping were the circumstances leading to the death of the victim. The only evidence of great bodily harm, necessary for the highest degrees of sodomy and kidnapping, were the very injuries leading to the victim's death. When injury in fact causes

1. The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who, by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

You should consider each opinion received in evidence in this case and give it such weight as you think it deserves. If you should conclude that the reasons given in support of an opinion are not sound or that for any other reason an opinion is not correct, you may disregard the opinion entirely.

This is N.M.U.J.I.Civ. 15.1.

death, rather than merely raising its probability, great bodily harm has not occurred but rather death has, thus the aggravated element of the crime should merge into the charge of murder. Defendant submits that he could therefore only be convicted of the lesser felonies of sodomy and second-degree kidnapping.

From this somewhat confusing argument, we glean two different arguments. First, defendant believes there was little or no evidence that the sodomy and kidnapping took place under aggravating circumstances, and that the great bodily harm leading to the victim's death occurred subsequent to the kidnapping and sodomy. Thus, appellant contends he should have only been charged with sodomy, second-degree kidnapping, and murder, and, because of the jury's decision, convicted of only the first and second charge. The events of that night were for the jury to determine, and they rejected appellant's interpretation of the probable events. There was evidence to substantiate the jury's interpretation: a significant amount of blood was found at Allsup's and some more at the trailer and at the residence at 2304 Axtell. In light of these facts, appellant's hypothesis would only hold up under improbable circumstances, which in any event the jury rejected. Second, appellant appears to be arguing that the great-bodily-harm element of aggravated sodomy and first-degree kidnapping merges into the murder charge, leaving only sodomy, second-degree kidnapping, and murder. Although a novel argument, he fails to cite any cases for support of this proposition. We reject it. We find that the homicide resulting from the great bodily harm was sufficient evidence for the jury to find aggravated sodomy and first-degree kidnapping, and we hold that there is no merger.

Fourth, defendant argues the imposition of the death penalty was unconstitutional. We agree. *State v. Rondeau*, 89 N.M. 408, 553 P.2d 688 (1976). The proper penalty to be imposed is life imprisonment.

Fifth, defendant argues that since the trial court failed to instruct the jury that it must find that the victim was not defendant's wife in the rape (§ 40A–9–2, N.M.S.A. 1953) conviction, it was a jurisdictional error (failure to instruct on an essential element of the crime) which could be raised for the first time on appeal and which requires a new trial if the error occurred. *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973). This argument was rejected in *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977). In that case, as well as in this case, there was no evidence whatsoever that the victim was the spouse of the defendant.

The remaining arguments raised by defendant are without merit.

The trial court is affirmed with direction to proceed in a manner not inconsistent herewith.

OMAN, C. J., and McMANUS, J., concur.

561 P.2d 464

Danny Ray KENDALL, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 11254.

Supreme Court of New Mexico.

March 9, 1977.

561 P.2d 465

STATE of New Mexico, Petitioner,

v.

Frank BLOOM and Ralph Mikorey, Respondent.

No. 10876.

Supreme Court of New Mexico.

March 10, 1977.

Jan Alan Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, Santa Fe, for petitioner.

Toney Anaya, Atty. Gen., Santa Fe, for respondent.

OPINION

SOSA, Justice.

Defendant was convicted of fourteen felonies and one misdemeanor. The Court of Appeals affirmed in part and reversed in part. *Kendall v. State*, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977). We granted certiorari.

The only issue we entertain is the Court of Appeals' reversal of defendant's conviction of criminal sexual penetration because of the trial court's failure to instruct that the jury must find that the victim was other than defendant's spouse, and the resulting remand for new trial on the issue. The reversal was improper under the facts of the case. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977). The defendant was properly convicted of criminal sexual penetration, and his conviction is affirmed.

OMAN, C. J., and McMANUS, EASLEY and PAYNE, JJ., concur.

Toney Anaya, Atty. Gen., Ralph W. Muxlow II, Raymond Hamilton, Asst. Attys. Gen., Santa Fe, for petitioner.

Rosenberg & Harris, Albuquerque, for respondent.

OPINION

OMAN, Chief Justice.

This cause is before us on a writ of certiorari directed to the New Mexico Court of Appeals. That court affirmed the convictions of aggravated assault upon a police officer contrary to § 40A–22–21A(1), N.M.S.A.1953 (2d Repl.Vol. 6, 1972), escape from the custody of a peace officer contrary to § 40A–22–10, N.M.S.A.1953 (2d Repl.Vol. 6, 1972), and battery upon a peace officer contrary to § 40A–22–23, N.M.S.A.1953 (2d Repl.Vol. 6, 1972), but reversed the conviction of both defendants for possession of marijuana contrary to § 54–11–23(B)(3), N.M.S.A.1953 (Supp.1975). *State v. Bloom and Mikorey* (consolidated), opinion issued March 16, 1976, 90 N.M. 226, 561 P.2d 925 (Ct.App.1976). We granted certiorari to review only the reversal of the convictions for possession of marijuana. We reverse the Court of Appeals, insofar as it reversed these convictions, and remand the case to that court with directions to affirm the judgment of the trial court as to all convictions.

In the majority opinion of the Court of Appeals, by which the convictions for possession of marijuana were reversed, that court has detailed most of the pertinent evidence adduced at the hearing on the motion to suppress. This motion sought suppression upon the grounds that the stop, search, seizure and arrest were unlawful. The Court of Appeals upheld the legality of the arrest, so that question is not before us. What is before us is the question of the correctness of the holding by the majority of the Court of Appeals that the physical and testimonial evidence concerning the marijuana should have been suppressed by the trial court, because the stop and search of the vehicle and the seizure of the marijuana by the state police officer were illegal.

In addition to the evidence on this issue quoted in the majority opinion, we call attention to the dissenting opinion of Chief Judge Wood upon this issue. We agree with his dissent.

As to the purposes for the initial stop of the vehicle by the officer, there were contradictions in the officer's testimony. However, it is clear that there was evidence that the officer, with the assistance of another officer, was conducting a general roadblock for the purposes of checking driver's licenses and car registrations, and searching for stolen vehicles. The Court of Appeals concedes these are lawful purposes for stopping vehicles pursuant to statutory authority, and we agree. However, the majority of that court say they "have no doubt that the stopping of defendants' vehicle and requesting the driver's license and registration was merely an excuse to go beyond the sanctions permitted by the statute * * *." They claim by "so holding [they] are not avoiding the traditional standards of appellate review * * *" and that "there are certain cases were the traditional approach would be

closing one's eyes to the realities of the situation." With these statements we disagree.

The majority went beyond the permissible scope of appellate review by not limiting itself to a consideration of whether the evidence substantially supported the trial court's finding that the motion to suppress should be denied. Conflicts in evidence are to be resolved by the finder of the facts, in this case the trial court, and this includes conflicts in the testimony of a witness, as in the testimony of the police officer in this case. *State v. Landlee,* 85 N.M. 449, 513 P.2d 186 (Ct.App.1973); *State v. McKay,* 79 N.M. 797, 450 P.2d 435 (Ct. App.1969). The trial court, as the finder of the facts, resolved the conflicts against the defendants, and it was not within the province of the majority of the Court of Appeals to resolve the conflicts the other way, merely because it felt to follow this "traditional approach would be closing one's eyes to the realities of the situation." The realities of the factual situation were for the trial court to determine, and not for the Court of Appeals. The determination of the weight and effect of the evidence, including all reasonable inferences to be drawn from both the direct and circumstantial evidence, is a matter reserved for the determination of the trier of the facts. *State v. Vigil,* 87 N.M. 345, 533 P.2d 578 (1975).

With regard to the claimed search of the trunk of the vehicle, defendant Mikorey, in his testimony at the hearing on the motion to suppress, gave the following answers to the following questions posed by his attorney:

"Q Okay, now, there is some doubt in my mind, and I would like you to clarify this for me and for the Court. Prior to you opening the trunk of your car, and prior to Officer Williams making a statement to you concerning a search warrant, what were your—had you made up your mind at that point whether you were or were not going to open your trunk?

"A After he said that he could go down and get a search warrant, I figured, well, if he can get a warrant, he would be able to look in the trunk, anyway, so then I didn't have too much of a choice, so I just opened the trunk.

"Q Okay, now, before he made that statement about the search warrant, were you going to open the trunk?

"A Yeah, I was going to open the trunk. He said he just wanted to look in there.

"* * *.

"Q Okay. Why, then, did you open the trunk?

"A Because he said he wanted to look in the trunk."

It is true that he later testified that he had no intention of opening the trunk until the officer had stated that a search warrant could be secured. However, the conflict in the testimony of this defendant was also a matter for resolution by the trial court. Clearly this evidence, together with the evidence of the officer concerning his request to look into the trunk of the vehicle, could properly be construed as consent on this defendant's part to look into and make a search of the trunk. As stated in *State v. Bidegain,* 88 N.M. 466, 469–70, 541 P.2d 971, 974–75 (1975):

"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. (citations omitted). A search authorized by consent is an exception to the requirements of both a warrant and probable cause and is wholly valid. (Citations omitted.)

"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. (Citations omitted.) 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. (citations omitted.) 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. (citations omitted). 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." (Citations omitted.)

Mikorey opened the trunk. There was a definite odor of marijuana in the trunk which the officer smelled. The officer then asked Mikorey what he had in the suitcases and he answered that he had clothes. The officer asked him if he would open the top suitcase. He hesitated, said nothing and then opened it. This suitcase contained marijuana residue. Defendants were then placed under arrest for the possession of marijuana and the marijuana was seized.

When the evidence is viewed as it must be viewed by an appellate court, it supports the finding of the trial court that the stop, search and seizure were not unlawfully accomplished. Consequently, the majority of the Court of Appeals was in error in reversing the conviction of defendants for possession of marijuana, and this cause should be remanded to the Court of Appeals with directions to affirm these possession convictions.

IT IS SO ORDERED.

McMANUS and EASLEY, JJ., concur.

SOSA and PAYNE, JJ., dissent and agree with the opinion of the Court.

561 P.2d 468

Jesse L. GETZ, Plaintiff-Appellee,

v.

EQUITABLE LIFE ASSURANCE SOCIETY OF the UNITED STATES, Defendant-Appellant.

No. 10653.

Supreme Court of New Mexico.

March 11, 1977.

Rehearing Denied March 23, 1977.

Modrall, Sperling, Roehl, Harris & Sisk, Peter J. Adang, Judy A. Fry, Albuquerque, for defendant-appellant.

Klecan & Roach, Eugene E. Klecan, Albuquerque, for plaintiff-appellee.

OPINION

OMAN, Chief Justice.

This suit was brought by plaintiff (Getz) against defendant (Equitable) to recover long-term disability benefits for claimed total disability commencing September 28, 1973. The claim was made pursuant to the disability income provisions of a group life insurance policy issued to Sandia Corporation (Sandia) by Equitable. The district court found the issues in favor of Getz and entered judgment accordingly. Equitable has appealed. We reverse.

Getz was employed as a mechanical engineer by Sandia from 1956 until September 1973, when his employment was terminated. He had been notified in February 1973 that he would be one of about 800 employees whose employment would be terminated by Sandia. He thereupon applied to Sandia for disability retirement. This was denied, but his employment was extended until September 28, 1973, in order that he might qualify for partial retirement benefits. On September 23, 1974, he filed this suit in the district court and the judgment in his favor was entered on September 18, 1975.

There is no question about Getz being covered by the policy of Equitable. The question is simply whether or not he is qualified for total disability benefits thereunder. The provision of the policy, under which he must qualify for these benefits, states:

> "For the purpose of the Group Long Term Disability Income policy,
>
> "(a) an Employee shall be considered totally disabled if he is wholly and continuously unable
>
> "(i) during the first two years of any one period of disability, to perform any and every duty pertaining to his employment, and

"(ii) during the remainder of such period of disability, to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience."

In order for Getz to qualify for the benefits he seeks, the parties are agreed that he must have shown he was and will be wholly and continuously unable to perform the duties or work as provided in (a)(i) and (a)(ii), supra, during the periods of disability expressly set forth therein. The findings made by the district court, which have been challenged on this appeal and which we feel are pertinent to our decision, are:

"4. That while the Plaintiff was employed by Sandia Corporation and covered by the long-term disability policy, the Plaintiff became totally disabled within the meaning of the policy due to a coronary condition of arteriosclerosis resulting in a myocardial infarction. The coronary condition of ill being is permanent.

"5. That the plaintiff was required to ingest certain drugs, in particular valium and nitroglycerine to try to control the heart condition and resulting discomfort. The permanent heart condition, resulting discomfort, stress of work, and the side effects of the medication have made the Plaintiff wholly unable to do every task of his former employment and unable to be again employed.

"6. That during the first two years of the period of his disability, Jesse Getz was unable to perform any and every duty pertaining to his employment and during the remaining period of disability he is and will be unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training, or experience.

"* * *.

"8. That the Plaintiff, Jesse Getz, is totally disabled as defined in the policy and New Mexico cases and is unable to be employed without hazarding his life and health."

The evidence was that on or about October 1, 1970, Getz suffered a coronary thrombosis or myocardial infarction, and that he does have arteriosclerosis. A myocardial infarction causes some heart muscle damage, and, upon healing, leaves some scar tissue in the heart muscle. He was hospitalized on October 1, 1970, and remained in the hospital for about three weeks. After his discharge from the hospital he remained at home until December 7, 1970. He was largely resting and recuperating, but was permitted to engage in limited physical activity. On December 7, 1970, he returned to his work, but he was limited to four hours per day. In February 1971, he was returned to the performance of the full duties of his employment. In addition, he was on a program of physical exercise, including jogging. By the middle of 1971 he was jogging a mile or more, four or five days a week.

Valium is a sedative and antidepressant. Its purpose is to relieve anxiety. Getz took this sedative about three or four times a week after he returned to work. Nitroglycerine is a medication taken to relieve a temporary coronary insufficiency. He took this only occasionally as needed to relieve chest pains or discomfort coincident with angina, which is a temporary insufficiency of the full blood flow to some part of the heart muscle. Angina, or temporary coronary insufficiency, may be brought on by physical activity or by emotional or mental stress.

In its first point relied upon for reversal, Equitable contends that the district court erred in its interpretation of "total disability." This contention is predicated very largely upon oral statements made by the district court at the close of the presentation of the evidence by the parties. However, it clearly appears from its finding of fact No. 6, supra, that the district court interpreted total disability in accordance with the above-quoted policy provision. We have often held that an oral opinion, or oral statements, do not constitute a "decision," within the meaning of N.M.R.Civ.P. 52(B)(a)(1) [§ 21-1-1(52)(B)(a)(1), N.M.S.A.

1953 (Repl. Vol. 4, 1970)], and error may not be predicated thereon. *Specter v. Specter,* 85 N.M. 112, 509 P.2d 879 (1973); *Stone v. Stone,* 79 N.M. 351, 443 P.2d 741 (1968); *Fox v. Doak,* 78 N.M. 743, 438 P.2d 153 (1968); *Pack v. Read,* 77 N.M. 76, 419 P.2d 453 (1966).

As its second point relied upon for reversal, Equitable asserts that the district court erred in finding that during the first two years of Getz' claimed disability he was unable to perform any and every duty pertaining to his employment. We must concede that the evidence on this issue, as it appears in the transcript on appeal, is not free of conflicts, is far from conclusive, and would clearly support a contrary finding. However, we are of the opinion that it does support the finding when viewed as we must view it on appeal. It is not our function to weigh the evidence or its credibility, and we will not substitute our judgment for that of the trial court as to the facts established by the evidence, so long as the findings are supported by substantial evidence. *Lujan v. Merhege,* 86 N.M. 26, 519 P.2d 122 (1974); *Cantrell v. Lawyers Title Insurance Company,* 84 N.M. 584, 506 P.2d 90 (1973); *Tapia v. Panhandle Steel Erectors Company,* 78 N.M. 86, 428 P.2d 625 (1967).

For its third point relied upon for reversal, Equitable claims that there is no substantial evidence to support the other essential element of disability, to wit, that Getz is wholly and continuously unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience. We agree with Equitable.

In support of his position that he is wholly and continuously disabled to the extent required by this provision of the policy, Getz relies primarily upon his claim that all jobs for which he is fitted or may become reasonably fitted involve stress, and that after his retirement from Sandia he mailed to different employers approximately 100 job applications and did not secure employment.

The fact that there is stress in any job, or even in living, and the fact that he received no offer of a job in response to his applications, is no evidence of substance that he is wholly and continuously disabled from performing the duties of *any* occupation or performing *any* work for compensation or profit for which he *is* or *may become* reasonably fitted by education, training or experience. He jogs for about a mile four or five times a week, he gardens, he fishes and he boats, and there is no evidence that he is unable to perform any of the ordinary activities of a normally sedentary life, or perform the duties of many types of employment for which he is or may become fitted.

The physicians who had treated and examined him, and who testified at trial, classified him as Class I or Class II under the functional classification and either Class A or Class B under the therapeutic classification of the American Heart Association Classifications for heart patients. These classifications are:

"Class I. Patients with cardiac disease but without resulting limitations of physical activity. Ordinary physical activity does not cause undue fatigue, palpitation, dyspnea, or anginal pain.

"Class II. Patients with cardiac disease resulting in slight limitation of physical activity. They are comfortable at rest. Ordinary physical activity results in fatigue, palpitation, dyspnea, or anginal pain.

"Class A. Patients with cardiac disease whose physical activity need not be restricted in any way.

"Class B. Patients with cardiac disease whose ordinary physical activity need not be restricted, but who should be advised against severe or competitive efforts."

Both physicians who testified on behalf of Getz stated there were certain types of employment which he could perform. His treating physician named drafting and technical writing as two forms of employment in which he could engage. The other

doctor made the general statement that Getz could perform light and sedentary types of work. Work as a mechanical engineer was repeatedly referred to by witnesses as being sedentary. There is evidence that Getz' duties in engineering design did involve some stress, perhaps more than at least some other employments in the field of mechanical engineering. His employment also required occasional lifting of heavy equipment for which he would seek assistance, since his doctor advised he should not lift heavy objects. However, because his particular duties caused him some discomfort and distress three or four times a week and involved occasional physical activity which he could not perform alone, it does not follow that he is wholly and continuously disabled from performing the duties of any occupation or performing any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience. There was undisputed testimony from a vocational analyst concerning many types of employment which Getz could do, and his treating physician testified he would be better off psychologically if he did work.

Although it is not proper for us to disagree with a finding supported by substantial evidence, we can and must determine whether the evidence presented substantially supports a finding which has been properly attacked. *Tyner v. DiPaolo,* 76 N.M. 483, 416 P.2d 150 (1966). Findings not supported by substantial evidence, and which have been properly attacked, cannot be sustained on appeal, and a judgment dependent thereon must be reversed. *Cantrell v. Lawyers Title Insurance Company,* supra; *Forrest Currell Lumber Company v. Thomas,* 81 N.M. 161, 464 P.2d 891 (1970); *Herrell v. Piner,* 78 N.M. 664, 437 P.2d 125 (1968).

We have read the transcript on appeal in this case and are convinced that there is no substantial evidence to support the finding of the district court that Getz "is and will be unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience." Since this finding is essential to the judgment entered in favor of Getz, that judgment cannot stand.

The final point relied upon by Equitable relates to claimed errors in the computation of disability benefits. This point is of no significance and need not be considered by us, since the judgment is being reversed for the reason above stated.

The judgment of the district court is reversed, and this cause is remanded to that court with directions to enter judgment for Equitable.

IT IS SO ORDERED.

McMANUS and PAYNE, JJ., concur.

561 P.2d 472

William KILPATRICK, M.D., Plaintiff-Appellee,

v.

MOTORS INSURANCE CORPORATION, d/b/a CIM Insurance Corporation, Defendant-Appellant.

No. 10927.

Supreme Court of New Mexico.

March 14, 1977.

Sheehan & Sheehan, Timothy M. Sheehan, Albuquerque, for defendant-appellant.

Branch & Coleman, Turner W. Branch, Albuquerque, for plaintiff-appellee.

OPINION

EASLEY, Justice.

This suit for wrongful denial of insurance coverage was brought by Dr. William Kilpatrick (Kilpatrick) against Motors Insurance Corporation (Motors). The case was tried without a jury, a judgment was entered for Kilpatrick. Motors appeals, and we affirm the judgment of the district court.

On August 14, 1973, Kilpatrick cosigned a note with his son-in-law, Rivier Rodriquez, for the purchase of a 1972 Chevrolet Vega. On the same day, Motors issued an automobile insurance policy to Rodriquez which, among other things, covered the insured for theft. In November, 1974, Mr. Rodriquez told his father-in-law that he was an illegal alien and had been informed by the United States Immigration Service that he would have to leave the country. After returning from a trip just after Thanksgiving, Kilpatrick visited the Rodriquez family and discovered that they had moved from their apartment. However, the Vega was parked at the apartment. One week later, Kilpatrick returned to the apartment to find that the Rodriquezes were still absent and that the car was still parked at the apartment.

When Kilpatrick checked on the car five or six days later, the automobile was missing. He reported the Vega as stolen to the insurance company and filed a police report. Motors denied coverage, alleging that it had no insurance contract with Kilpatrick, that the car had not been shown to be stolen and that the terms of the insurance policy had not been followed.

The trial court found that the 1972 Chevrolet Vega was stolen, that at the time of the theft Kilpatrick had custody of the automobile, and that Kilpatrick timely filed a proof of loss with Motors in compliance with the insurance policy. It then concluded that Kilpatrick was entitled to coverage under the policy.

Motors argues on appeal that the trial court erred in concluding that: (1) the Vega was stolen; (2) Kilpatrick was an insured under the policy; and (3) Kilpatrick complied with the proof of loss provisions of the policy.

Motors argues that the word "theft" as used in an insurance policy should be interpreted in a strict legal sense to require that there be proof of intent to deprive the insured permanently of his car. This requirement would equate "theft" with the crime of larceny. See § 40A–16–1, N.M.S.A.1953.

■ However, in New Mexico the unauthorized taking of a motor vehicle is specifically prohibited by statute. § 64–9–4, N.M.S.A.1953 (Supp.1975). This statute has been expressly held not to require the intent found in larceny—an intent to deprive the owner of his property permanently. *State v. Eckles,* 79 N.M. 138, 441 P.2d 36 (1968). Section 64–9–4 was passed by the Legislature as one of several anti-theft provisions. See ch. 138, § 89, [1953] N.M. Laws 322. These provisions expanded the common law crime of larceny under which it was required that the State prove intent to deprive the owner of his property permanently.

■ New Mexico courts have not heretofore interpreted the word "theft" in an automobile insurance policy. In states with statutes that prohibit the unauthorized taking of a motor vehicle, there is a split of authority as to the interpretation of the word "theft." See Annot., 48 A.L.R.2d 8, §§ 11, 12 (1956). Our policy has been to construe language in contracts of insurance in a reasonable and ordinary manner. *Wesco Insurance Company v. Velasquez,* 88 N.M. 273, 540 P.2d 203 (1975); *King v. Travelers Insurance Company,* 84 N.M. 550, 505 P.2d 1226 (1973). In accordance with this policy we choose to follow a broad interpretation of the word "theft" in an insurance policy. We agree with the Supreme Court of Utah in *P. E. Ashton Company v. Joyner,* 17 Utah 2d 162, 165, 406 P.2d 306, 308 (1965) which recognized a similar anti-theft statute and then added:

> It would seem incongruous for this court to restrict the meaning of "theft" within an insurance policy, which should be liberally construed, to a situation where the taker had an intent to steal and to deprive the owner permanently of his possession, when our legislature has eliminated these elements in an anti-theft statute.

See also *James v. Phoenix Assur. Co.,* 75 Colo. 209, 225 P. 213 (1924); *National Fire Insurance Co. of Hartford v. Slayden,* 227 Miss. 285, 85 So.2d 916 (1956).

We interpret the word "theft" in an automobile insurance policy to mean the taking, without authority, of the property of another. *P. E. Ashton Company v. Joyner,* supra. Moreover, we refuse to set a higher standard for automobile insurance policyholders than that of the State in a prosecution for the unlawful taking of a motor vehicle.

■ The finding by the trial court that the automobile was stolen is supported by substantial evidence. Kilpatrick knew that his son-in-law and daughter were planning to leave the country. When he checked to see if they had in fact left, he found that their possessions had been removed with the exception of the automobile. He testified that he took custody of the automobile and that he intended to be responsible for it. Later the automobile disappeared, and

it was reasonable to conclude that the automobile was stolen.

Motors suspects that the Rodriquezes took the automobile, but this suspicion cannot be substantiated by the evidence. Under these circumstances the determination of whether or not a theft occurred rested with the trier of facts. See 11 R. Anderson, Couch on Insurance 2d § 42:283 (1963), and cases cited therein. The findings of the trial court are supported by substantial evidence and will not be disturbed. *Trujillo v. Glen Falls Insurance Company,* 88 N.M. 279, 540 P.2d 209 (1975); *Shirley v. Venaglia,* 86 N.M. 721, 527 P.2d 316 (1974).

The second contention by Motors is that Kilpatrick was not an insured under the policy. "Insured" is defined in the policy as the named insured, his spouse and "any person or organization maintaining, using or having custody of said automobile with the permission of the named insured and within the scope of such permission." Kilpatrick testified that after he realized that the Rodriquezes had left, he took custody of and assumed responsibility for the automobile. Although he did not have the key to the automobile, he periodically checked to see if it was still at the apartment.

Kilpatrick testified that he cosigned the note and made the down payment on the automobile. When the bank notified him early in December that a payment on the car had not been made, he responded by checking to see if the car was still at the apartment. These acts evidence a determination by Kilpatrick to be responsible for the automobile and to take custody of it when he learned that the Rodriquezes had left town.

The policy provides that the permission of the named insured must be obtained and the person having custody must act within the scope of that permission. Permission may be implied from the conduct of the insured, including lack of objection. *Gruger v. Western Cas. & Surety Co.,* 89 N.M. 562, 555 P.2d 683 (1976). See generally 7 Am.Jur.2d Automobile Insurance § 113 (1963); 12 R. Anderson, Couch on Insurance 2d § 45:352 (1964).

Kilpatrick took reasonable steps to at least safeguard the automobile until the possible return of his daughter and son-in-law. Kilpatrick also testified that Rodriquez knew that his father-in-law was responsible for payments on the car in the event of default. This evidence also suggests that Kilpatrick had the implied permission of Rodriquez to take custody of the automobile. There is substantial evidence to support the finding of the trial court that Kilpatrick had the permission of the named insured, Rivier Rodriquez. Moreover, Kilpatrick performed no act outside the scope of that permission. In conclusion, we hold that the finding of the trial court that Kilpatrick was an insured under the policy is supported by substantial evidence.

Motors' third contention is based upon the failure of Rivier Rodriquez to comply with the terms of the policy in the event of theft. This entire argument is based upon the assumption that Kilpatrick was not an insured under the policy. Since we have held that Kilpatrick is an insured, this argument by Motors is without merit. Kilpatrick immediately reported the theft to Motors, and the finding of the trial court that he substantially complied with the policy is supported by substantial evidence.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SOSA, J., and GERALD D. FOWLIE, District Judge, concur.

OMAN, Chief Justice, dissenting.

I feel compelled to dissent from the majority opinion in this case, because I cannot agree that the facts support a finding of custody in Kilpatrick with the permission of Rodriquez, the named insured.

The facts are that Kilpatrick did cosign a note with his son-in-law, Rodriquez, and this note was given as evidence of and to secure payment of at least a part of the purchase price of the automobile. Rodriquez left the automobile parked at the

apartment he and his wife occupied, and not with Kilpatrick. As shown by the majority opinion, Kilpatrick did not know that Rodriquez had left until he had visited the apartment. It was then he found the automobile parked there.

Kilpatrick did nothing to assert control over the vehicle. He had no key thereto and could not drive it away. He made no effort to otherwise remove the vehicle to his place or any other place for safekeeping, and he took no measures to exercise control over or to secure the safekeeping of the vehicle. He went back to the apartment about a week later and found the vehicle still sitting there. Again he did nothing to exercise control over or to secure the safekeeping of the vehicle. On his third visit, which was five or six days later, the vehicle had disappeared. It is true he testified he took custody of the automobile, but I can find no action on his part which would in any way so indicate. Surely the taking of custody of property under the circumstances here present requires more than the mere formation of an intent. There was not the slightest effort to exercise control over or to effect safekeeping of the vehicle.

Kilpatrick saw it sitting there and left it sitting there with nothing more, except his claimed intent to take custody.

Likewise, I cannot agree that Rodriquez gave permission to Kilpatrick to take custody. Rodriquez obviously took the key to the vehicle with him—or at least he did not offer or give it to Kilpatrick—and he left the vehicle at his apartment without knowledge on the part of Kilpatrick that he, Rodriquez, had left and was leaving the vehicle parked at the apartment. The majority rely upon implied consent. They do so on the ground that Rodriquez did not object. To what could he object? The most Kilpatrick had done was to see the vehicle parked at Rodriquez' apartment on two occasions and, according to him, had decided to take custody. There is nothing to even suggest that Rodriquez knew Kilpatrick had seen the vehicle so parked on the two occasions or had formed the intent to take custody. Even if Rodriquez had known, what was there to which he could object or which would even suggest the need for objection? The fact that Kilpatrick had cosigned the note, cannot, in my opinion, in any way be construed as implying permission on the part of Rodriquez for Kilpatrick to take custody of the automobile. Rodriquez did absolutely nothing from which his consent to give custody of the automobile to Kilpatrick could be implied.

The terms "custody" and "permission" must be given their ordinary meaning, because they are not ambiguous terms and are not used ambiguously in the policy of insurance. *King v. Travelers Insurance Company,* 84 N.M. 550, 505 P.2d 1226 (1973). For the plain and ordinary meaning of custody, see Webster's Third New International Dictionary 559 (3d ed. 1961). For the plain and ordinary meaning of permission, see Webster's Third New International Dictionary 1683 (3d ed. 1961).

Because I can find no custody, and certainly no custody with permission, I respectfully dissent from the majority opinion.

561 P.2d 476

Patricia G. CHINO, Plaintiff-Appellee,

v.

Mark R. CHINO, Defendant-Appellant.

No. 10768.

Supreme Court of New Mexico.

March 21, 1977.

Fettinger & Bloom, Kim J. Gottschalk, Alamogordo, for defendant-appellant.

Shipley, Durrett, Conway & Sandenaw, Wayne A. Jordan, Alamogordo, for plaintiff-appellee.

OPINION

PAYNE, Justice.

The district court of Otero County granted an order for the removal of the appellant from a home owned by his mother, the appellee. Appellant contests the court's jurisdiction of his person and of the subject matter.

The appellee, Patricia G. Chino, is an enrolled member of the Santa Clara Indian Pueblo but owns a home located within the Mescalero Apache Indian Reservation. The home had been acquired during her marriage to the appellant's father, a member of the Mescalero Apache Tribe. It was awarded to her in duplicate divorce proceedings in the Mescalero Apache Tribal Court and in the state district court in Otero County.

The appellant, Mark Chino, is an enrolled member of the Mescalero Apache Tribe. After his parents' divorce he moved into his mother's vacant home against her wishes. His mother brought suit in the district court in Otero County for forcible entry and wrongful detainer of her home.

The only issue with which we need concern ourselves on this appeal is whether state courts have jurisdiction over forcible entry and wrongful detainer actions involving fee patent lands lying within an Indian reservation.

Both federal and state courts have wrestled with jurisdictional problems between states and Indian tribes. These efforts to bring order to conflicting philosophies are made more difficult by increased interaction between Indians and non-Indians and by changing Indian policies enacted by Congress. See Canby, Civil Jurisdiction and the Indian Reservation, 1973 Utah L.Rev. 206; Kane, Jurisdiction over Indians and Indian Reservations, 6 Ariz.L.Rev. 237 (1965).

In 1832 Chief Justice Marshall first enunciated the principle that tribal jurisdiction was complete and that states were without jurisdiction unless some affirmative act of the federal government or the tribe operated to confer jurisdiction upon the state.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). Marshall's recognition of Indian tribal sovereignty was based upon the principle that tribal self-government is inherent. Using that criterion, the initial inquiry when questions of state authority over matters arising upon reservations were presented, was whether any affirmative act of the tribe or of the federal government allowed the state's intrusion into tribal affairs. The United States Supreme Court subsequently modified Justice Marshall's approach and allowed states to exercise their authority in some cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. *United States v. Candelaria,* 271 U.S. 432, 46 S.Ct. 561, 70 L.Ed. 1023 (1925).

In a civil suit against reservation Indians for goods sold them by a non-Indian operating a store on a reservation, the United States Supreme Court held that the state court lacked jurisdiction. *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). The court stated:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them (citations omitted).

This language has led to what has become known as the "infringement test." *State Securities, Inc. v. Anderson,* 84 N.M. 629, 506 P.2d 786 (1973), (dissenting opinion); Ransom and Gilstrap, Indians—Civil Jurisdiction in New Mexico—State, Federal and Tribal Courts, 1 N.M.L.Rev. 196 (1971). New Mexico has recognized and applied this test. *Sangre de Cristo Dev. Corp., Inc. v. City of Santa Fe,* 84 N.M. 343, 503 P.2d 323 (1972); *Montoya v. Bolack,* 70 N.M. 196, 372 P.2d 387 (1962).

Shortly after *Williams v. Lee,* supra, the United States Supreme Court decided *Kake Village v. Egan,* 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), which involved an attempt by the State of Alaska to regulate the fishing practices of non-treaty, non-reservation Alaskan Indians. In allowing the state to exercise jurisdiction the Supreme Court had to deal with Section 4 of the Alaskan Statehood Act.[1] Under that Act, Alaska had disclaimed all right and title to, and the United States had retained absolute jurisdiction and control over any lands or other properties held by the Indians. A similar disclaimer can be found in Section 2 of the New Mexico Enabling Act.[2]

Interpreting the disclaimer clause in *Kake Village,* supra, the United States Supreme Court came to the conclusion that absolute jurisdiction is not necessarily exclusive jurisdiction. This rationale was relied upon by this court in *State Securities, Inc. v. Anderson,* supra, to extend state jurisdiction, but recent decisions of the United States Supreme Court have narrowed its application. In *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 176, 93 S.Ct. 1257, 1264, 36 L.Ed.2d 129, 138 (1973), the court noted that the Indians in Kake Village were non-reservation Indians, and refused to extend the concept of concurrent federal and state jurisdiction to cases which arise in areas set aside by treaty for the exclusive use and control of Indians.

More recent cases shift the focus of analysis to the relevant treaties and statutes governing the tribes, and whether or not they would preempt state jurisdiction. *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 1634, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *McClanahan v. Arizona State Tax Comm'n,* supra; *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). Although these cases concern the power of the state to tax Indians and Indian related activities, they indicate a reluctance to extend state jurisdiction.

1. Pub.L. No. 85–508 July 7, 1958, 72 Stat. 339, amended by Act of June 25, 1959, Pub.L. No. 86–70, § 2A, 73 Stat. 141.

2. Repl. Vol. 1, 168, 170, N.M.S.A.1953; 36 Stat. 557 Ch. 310.

Applying the preemptive approach as used in *Moe, McClanahan* and *Mescalero,* supra, we must examine the treaties and statutes governing the Mescalero Indian tribe. The relevant treaty here is the Treaty of 1852 between the United States and the Apache Nation of Indians. 10 Stat. 979. Article I of that treaty states:

> Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

In addition, the New Mexico Enabling Act, supra, disclaimed jurisdiction over the Indians. The State of New Mexico has declined to assume jurisdiction over the Indian reservations within the state by failing to take affirmative steps under Public Law 280,[3] enacted by Congress in 1953, or under more recent congressional acts.[4] Thus the treaties and statutes applicable in this case preclude the state from exercising jurisdiction over property lying within the reservation boundaries.

In applying the "infringement test" the same conclusion is reached. In considering this test it is helpful to summarize certain criteria to determine whether or not the application of state law would infringe upon the self-government of the Indians. These are the following: (1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) what is the nature of the interest to be protected.

An action for forcible entry and unlawful detainer deals directly with the question of occupancy and ownership of land. When the land lies within a reservation, enforcement of the owner's rights to such property by the state court would infringe upon the governmental powers of the tribe, whether those owners are Indians or non-Indians. Civil jurisdiction of lands within the reservation remains with the tribe. *Kennerly v. District Court of Montana,* 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971). The fact that the land upon which plaintiff's house was located is fee patent land, presumably granted under the Indian Allotment Act,[5] is immaterial. *Moe v. Confederated Salish and Kootenai Tribes,* supra; *Seymour v. Superintendent,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). Even though the Mescalero tribal law makes no provision for a wrongful entry and detainer action, the state may not assume jurisdiction without congressional or tribal authorization. Indian customs and traditions may dictate different approaches than that which the state may use. For a state to move into areas where Indian law and procedure have not achieved the degree of certainty of state law and procedure would deny Indians the opportunity of developing their own system.

The decision of the trial court is reversed and the case is remanded with instructions to dismiss for lack of jurisdiction.

IT IS SO ORDERED.

OMAN, C. J., and SOSA, J., concur.

561 P.2d 479

NEW MEXICO EMPLOYMENT BUREAU, INC., a New Mexico Corporation, Plaintiff-Appellant,

v.

Thomas F. BRODERICK, Defendant-Appellee.

No. 11139.

Supreme Court of New Mexico.

March 21, 1977.

3. 28 U.S.C. § 1360 (1970).

4. 25 U.S.C. §§ 1321 and 1322 (1970).

5. 25 U.S.C. §§ 331–34 (1970).

Paul P. Shwartz, Jon T. Kwako, Albuquerque, for plaintiff-appellant.

James E. Womack, Albuquerque, for defendant-appellee.

OPINION

SOSA, Justice.

Plaintiff New Mexico Employment Bureau, Inc. (Bureau) brought an action against defendant Thomas Broderick (Broderick) for the collection of fees pursuant to a contract. The trial court found for the defendant. Plaintiff appeals.

On August 12, 1975, the Bureau and Broderick entered into a written contract whereby if the Bureau found or produced a lead to employment for Broderick and Broderick accepted that employment, Broderick would pay a service charge based upon a percentage of his gross yearly earnings. Broderick was referred to Harold K. Axness, a certified public accountant, who hired Broderick as an accountant on October 1, 1975. On October 27, 1975, Broderick became a general partner in a newly formed certified public accounting firm of Axness & Co., agreeing to pay Harold Axness approximately $37,500 for an undivided one-half interest in the partnership. On October 29, 1975, Broderick sent a letter to the Bureau, tendering $266.18 (20% of his gross earnings, $1087.40, plus 4% sales tax). The Bureau argued to the trial court that it had procured Broderick's employment, which was not terminated by forming the partnership, and thus it was entitled to the scheduled percentage of Broderick's income for the first twelve months of employment. The trial court rejected this argument and held that under the contract Broderick only owed the Bureau $266.18.

On appeal, the Bureau argues that it is entitled to a percentage of Broderick's income from the partnership. The contract had *inter alia* the following provisions:

A. PERMANENT EMPLOYMENT is 30 days or more (See terms above).

B. TEMPORARY EMPLOYMENT IS LESS THAN 30 DAYS. For temporary employment the Service Charge shall be 20% of the gross earned, either for any period of employment stated to be temporary in this contract, or for any period of employment terminating for any reason within thirty (30) days of the date of employment.

Broderick clearly was employed temporarily for twenty-seven days. The issue is whether Broderick, by forming a partnership with his former employer, is considered to be employed as defined by the contract or as defined by the Employment Agency Act

(Act), § 67–38–1 et seq., N.M.S.A.1953, and thus had to pay the Bureau part of his earnings from the partnership, or whether he had terminated his employment and thus was not liable for more than 20% of his earnings during the 27 days.

By becoming a partner in the partnership Broderick essentially has changed his status from employee to employer.[1] The Bureau argues that since it (1) directly procured Broderick's employment which later lead to the partnership and since (2) the nature of his employment has not changed (it still is accounting), although he may have changed his position or status in his employment field, it is entitled to a percentage of his share of the partnership earnings. The contract did not provide for this contingency and no part thereof can reasonably be interpreted to cover the facts of this case. The Act does not elucidate this matter either. We hold Broderick was no longer an employee and thus is not liable to the Bureau for additional payments.

The trial court is affirmed.

OMAN, C. J., and PAYNE, J., concur.

561 P.2d 481

STATE of New Mexico, ex rel. CITIZENS BANK, a New Mexico banking corporation, Petitioner,

v.

Hon. Gerald D. FOWLIE, District Judge of the Second Judicial District of the State of New Mexico, Respondent.

No. 11126.

Supreme Court of New Mexico.

March 22, 1977.

Olmsted & Cohen, Charles D. Olmsted, Santa Fe, for petitioner.

Thomas E. Horn, San Francisco, Cal., Threet, Threet, Glass, King & Maxwell, Martin E. Threet, Albuquerque, Bigbee, Stephenson, Carpenter & Crout, G. Stanley Crout, Paul D. Gerber, Santa Fe, for respondent.

DECISION

McMANUS, Justice.

This matter having come before the Court on writ of certiorari directed to the Court of Appeals; the Court having heard argument, examined the pleadings and briefs and being otherwise fully advised in the premises;

The decision of the Court having been that this Court will consider further only matters relating to the correction of the inadvertent, mathematical error contained in the opinion of the Court of Appeals dated July 6, 1976,

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Court of Appeals correct its original opinion in *Citizens Bank v. C & H Construction & Paving Co., Inc. et al.,* 89 N.M. 360, 552 P.2d 796 (1976) by ordering the substitution of the sum of $36,600 for the sum of $78,998.04 which appears in said opinion at 89 N.M. 368, 552 P.2d 804.

IT IS SO ORDERED.

SOSA and PAYNE, JJ., concur.

OMAN, C. J., and EASLEY, J., dissenting.

1. § 67–38–2(E), N.M.S.A.1953.

561 P.2d 482

STATE of New Mexico,
Plaintiff-Appellee,

v.

Leroy BAZAN, Defendant-Appellant.

No. 2599.

Court of Appeals of New Mexico.

Jan. 25, 1977.

Certiorari Granted then Quashed
March 17, 1977.

Farrell L. Lines, Lamb, Metzgar, Franklin & Lines, P. A., Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

There was a car chase with shooting. Involved were defendant, Madrid and Sheriff's Officer Foster. Defendant appeals his conviction of assault with intent to commit a violent felony. Section 40A–3–3, N.M.S. A.1953 (2d Repl. Vol. 6). The issues raised divide into two categories: (1) writing used to refresh memory, and (2) character evidence.

Writing Used to Refresh Memory

Because the incident in question involved the discharge of a firearm by Foster, the Internal Affairs Division of the Sheriff's Office conducted an investigation. As a part of that investigation, defendant was interviewed. The interview was tape recorded. A transcription was made of the tape; the transcription was included as a part of the Sheriff's Office file.

Officer Stockard conducted the investigation. When subpoenaed to testify, he attempted, unsuccessfully, to locate the tape of the interview with defendant. Prior to any testimony from Stockard, defendant moved to suppress the transcribed statement on various grounds. See *State v. Baca,* 82 N.M. 144, 477 P.2d 320 (Ct.App. 1970). We are not concerned with these grounds because the State did not attempt to introduce the transcription into evidence.

However, the State did inform Stockard that he could refer to the transcription to refresh his memory of the interview. Defendant claims the trial court erred in permitting Stockard to refresh his memory from the transcription. This contention involves past recollection recorded, present recollection revived and Evidence Rule 612.

3 Wigmore, Evidence (Chadbourn rev. 1970) discusses past recollection recorded at §§ 734–755. One of the requirements for use of a recorded recollection as evidence is a showing that the record was correct when made. See §§ 746–747. Wigmore (Chadbourn rev.), supra, discusses present recollection revived at §§ 758–765. Section 758 states:

> "It is worth while . . . to note that *none of the limiting rules just examined for past recorded recollection has any bearing on the present subject* [present recollection revived]. The confounding of the two has led to many misguided rulings." (Emphasis in Wigmore.)

Wigmore's distinction between the two rules has been consistent through the years. 1 Wigmore on Evidence, § 747 (1904) discusses the requirement of a showing that the past recollection recorded was accurate when made; §§ 758–764 discusses present recollection revived; § 758 states that *any* writing may be used to stimulate and revive a recollection.

McCormick on Evidence, § 9 (2nd Ed. 1972) agrees that the two rules are different, explaining that when a witness speaks from a memory that has been revived, the testimony is what the witness says and not the writing. However, when memory is not revived, the witness relies upon a writing. In this situation the reliability of the writing must be established. McCormick, supra, also agrees that the two rules have been confused, explaining the confusion by the practice of referring to both rules by the phrase "refreshing recollection".

Although a showing that the writing was correct when made is not a requirement of the rule concerning present recollection revived, McCormick, supra, considers there is

no harm in adding this requirement "if it is a safeguard needed in the search for truth." As to this, McCormick, supra, states:

> "[M]ost courts today when faced with the clear distinction between the two uses of the memoranda, will adhere to the 'classical' view that any memorandum or other object may be used as a stimulus to present memory, without restriction by rule as to authorship, guaranty of correctness, or time of making. On balance, it would seem that this liberality of practice is the wiser solution because there are other sufficient safeguards to protect against abuse."

New Mexico decisions have confounded the two rules. The question for this Court is whether we may adopt the "wiser solution" or whether under *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973) we must follow the New Mexico decisions. The question arises because there is no evidence that the transcription of the tape was correct when made. If such was required, the trial court erred in allowing Stockard to use the transcription to refresh his memory.

The confounding occurred in two decisions reported in Volume 15 of the New Mexico Reports: *Territory v. Harwood,* 15 N.M. 424, 110 P. 556, 29 L.R.A., (n.s.) 504 (1910) and *Palma & Ruppe v. Weinman & Barnett,* 15 N.M. 68, 103 P. 782, 24 L.R. A., (n.s.) 423 (1909).

An issue in *Harwood* was the age of a girl. A priest testified as to the age, however, he had no recollection of the girl's age or of her christening. His only knowledge of the girl's age was based on a memorandum made about the time of the christening. The priest did not testify that the memorandum was correct when made. This testimony raised an issue only as to past recollection recorded because there was no present memory.

Harwood discusses both present recollection revived as well as past recollection recorded and states:

> "Whether one or the other of the rules above outlined [concerning past recollection recorded] is followed or whether the memorandum is used simply to stimulate memory which thereupon becomes awakened thereby, it is an essential at the basis of the use of all memoranda that they shall be shown to have been correct when made."

State v. Apodaca, 42 N.M. 544, 82 P.2d 641 (1938) follows this quotation in a case involving past recollection recorded, citing *Harwood* as authority. Accordingly, *Apodaca* does not require separate consideration.

Harwood gives four citations in support of the above quotation. They are: Section 747 of the 1904 edition of Wigmore, supra; *Acklen's Executor v. Hickman,* 63 Ala. 494, 35 Am.Rep. 54 (1879); *Imhoff v. Richards,* 48 Neb. 590, 67 N.W. 483 (1896); *Nehrling v. Herold Co.,* 112 Wis. 558, 88 N.W. 614 (1902). All involve past recollection recorded; however, the Alabama and Wisconsin decisions do state that before a writing may be used to refresh one's memory, there must be a showing that the writing was correct when made. Thus, two of the authorities cited confuse the two rules; the other two authorities cited deal only with past recollection recorded.

In *Palma & Ruppe v. Weinman & Barnett,* supra, the witness read a list of items to the jury. The evidentiary question involved past recollection recorded. Yet, the opinion discusses the refreshing of a witness' memory and cites § 758 of the 1904 edition of Wigmore. This section deals with present recollection revived.

The New Mexico decisions involved past recollection recorded; as to this see Evidence Rule 803(5). The decisions did not involve present recollection revived. We do not consider that *Alexander v. Delgado,* supra, requires us to follow the dicta in *Territory v. Harwood,* supra, when that dicta is based on an obvious confusion of two evidentiary rules. Instead, we follow Wigmore, supra, and McCormick, supra. We hold that *Territory v. Harwood,* supra, does not apply to present recollection revived. Compare *Maestas v. Overton,* 87 N.M. 213, 531 P.2d 947 (1975). We also hold there was no error in allowing Stockard to

revive his memory by referring to the transcription without a showing that the transcription was correct when made.

This result is not affected by Evidence Rule 612, the applicable part of which reads:

"If a witness uses a writing to refresh his memory for the purpose of testifying, either—(1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."

3 Weinstein's Evidence, ¶ 612[01] (1975) explains:

"The Rule covers but a small portion of the law relating to the refreshing of recollections. A brief survey of some of the features of reviving memory is useful in understanding the rationale of the Rule, even though these aspects will continue to be governed by case law.

"1. No means of arousing recollection may be used until the witness has satisfied the trial judge that he lacks effective present recollection. . . .

"2. Anything may be used to revive a memory—'a song, a scent, a photograph, all allusion, even a past statement known to be false.' Thus, a 'writing' in Rule 612 includes sound recordings and pictures of all kinds. Compare Rule 1001. It does not matter whether a statement is written by the witness himself, was made contemporaneously with the event itself, or is a copy rather than an original. 'The only question is whether in fact it is genuinely calculated to revive the witness' recollection.' . . .

"3. The witness' recollection must be revived after he consults the particular writing or object offered as a stimulus so that his testimony relates to a present recollection. If his recollection is not revived, a memorandum may be read into evidence and admitted if it meets the test of recorded recollection set forth in Rule 803(5). . . .

* * * * * *

"Two safeguards have been adopted by the courts to temper the possibility of the witness putting before the court inaccurate, though perhaps unconscious, inventions which purport to be his present recollection. The first, which remains a matter of case law, is that the trial judge has considerable discretion at various points to reject the testimony either, as discussed before, by holding that the witness is not lacking in memory, or that the writing does not refresh his memory, or as in the case of leading questions (see Rule 611(c)) by declin[ing] to permit the use of the aid to memory, where he regards the danger of undue suggestion as outweighing the probable value.

"The second safeguard—*which is the subject of Rule 612*—is that an adverse party is entitled to have a writing used for refreshing recollection shown to him for use on cross-examination and exhibition to the jury at his request." (Our emphasis.)

The record shows that defendant had a copy of the transcription and cross-examined Stockard concerning its contents. Defendant did not offer any portion of the transcription into evidence. However, on redirect examination, the State had Stockard read into evidence two questions and answers from the transcription. Defendant claims this was error. We disagree.

The cross-examination brought out that defendant told Stockard that Madrid (a codefendant tried separately) had fired shots. The defense then asked Stockard to refer to the transcription and suggested that the transcription could be read to the effect that "zero" shots had been fired by Madrid. The two questions and answers read on redirect corrected the suggestion made by the defense.

■ Defendant having attempted to leave with the jury an incorrect impression as to the contents of the transcription, it was proper for the State on redirect to correct that impression by showing the true

content of the transcription on the particular subject. The State did no more than this. Reading of the two questions and answers on redirect was not error. *State v. Lumpkin,* 18 N.M. 480, 138 P. 208 (1914); *Wood v. Dwyer,* 85 N.M. 687, 515 P.2d 1291 (Ct.App.1973) and cases therein cited.

Character Evidence

Defendant desired to present evidence which went to the character of Foster. Defendant claims the trial court erred in two ways: (1) in excluding evidence that went to Foster's reputation for truth and veracity, and (2) in excluding evidence as to the character of the victim when such character was an essential element of the defense. These contentions involve the interrelationship of Evidence Rules 404, 405, and 608.

Evidence Rule 404 reads:

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

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

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

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

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

Evidence Rule 405 reads:

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

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

Evidence Rule 608 reads:

"*(a) Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, 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, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

"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 related only to credibility."

The relationship of these rules is explained in Advisory Committee's Notes to

Proposed Rules of Evidence for United States Courts.

The Advisory Committee's Note to Evidence Rule 404 explains that character questions arise in two different ways. 1. Where character is an element of the crime, claim, or defense there is no question as to relevancy. Character evidence of this type is *not* covered by Evidence Rule 404 and is admissible under Evidence Rule 402 which relates to the admission of relevant evidence. 2. Where character evidence is used to suggest that a person acted consistently with his character, the evidence is circumstantial and problems of relevancy exist. Evidence Rule 404 authorizes the admission of circumstantial character evidence in specified situations. Evidence Rule 404(a)(2) permits the defense to introduce evidence of a pertinent trait of character of Foster *as victim* of the crime for the purpose of showing that Foster acted in conformity with that character trait in defendant's case. Evidence Rule 404(a)(3) permits evidence of Foster's character *as a witness,* as provided in Evidence Rule 608.

The preceding paragraph discusses only the authority for admitting character evidence. In this paragraph we discuss the method of proof—the form the evidence must take to be admissible. Character evidence of the first type—where character is an element of the crime, claim, or defense—may be proved by evidence of reputation, opinion evidence, or by specific instances of conduct. Character evidence of the second type—circumstantial character—may be proved only by evidence of reputation or opinion evidence. The offering party (we are not concerned here with cross-examination) may not prove character of the second type by specific instances of conduct. Evidence Rules 404(b), 405(a), and 608, and Advisory Committee's Notes to those Rules; 2 Weinstein's Evidence, ¶ 405[01] (1975); see *De La O v. Bimbo's Restaurant, Inc.,* (Ct.App.), 89 N.M. 800, 558 P.2d 69, decided November 23, 1976.

A variety of contentions were raised in the trial court for the admissibility of the excluded character evidence. In ascertaining the contentions raised, we have reviewed the transcript of defendant's trial and also reviewed the transcript of Madrid's trial (a co-defendant tried separately) because contentions in Madrid's trial were incorporated into the arguments made in defendant's trial. These contentions may be found in the transcript of *State v. Madrid,* Ct.App. No. 2644. We need not consider the contentions in detail; general rules answer the appellate contentions.

Reputation or opinion evidence is admissible for both types of character evidence. To the extent defendant is asserting that reputation or opinion evidence was wrongfully excluded, there was no error because the offer of proof was deficient under Evidence Rule 103(a)(2). No questions were asked of a witness concerning any character trait of Foster. Defendant did claim that a certain witness could testify concerning Foster's reputation for aggressiveness and recklessness; however, this claim was a conclusion which failed to reveal the "substance" of the evidence either as to such character traits or Foster's reputation in connection with those traits. *De La O v. Bimbo's Restaurant, Inc.,* supra. The offer of proof as to reputation or opinion evidence being deficient, there was no error in exclusion of this evidence, whether the claim is based on Evidence Rules 404(a), 405(a), or 608.

Specific conduct is not admissible evidence to prove character of the second type. To the extent that defendant is asserting that specific conduct was admissible to prove character of the type authorized by Evidence Rule 404(a) there was no error. See Evidence Rules 404(b), 405(a), and 608.

Specific conduct is admissible to prove character of the first type. This first type of character is character which is an element of a crime, claim, or defense. Defendant did not claim self-defense nor would the evidence have supported such a claim, if made. Defendant contends that Foster's asserted traits of aggressiveness or recklessness were essential elements of the defense. This contention confuses the two

types of character evidence. We do not attempt to set forth a definition of "essential element" as that term is used in Evidence Rule 405(b). See 2 Weinstein, supra, ¶ 405[04] and ¶ 404[02]; 1 Weinstein's Evidence, ¶ 401[03] (1975). We do hold that absent any claim of self-defense, Foster's asserted character traits were not essential elements of the defense in this case, were not character of the first type and, thus, were not provable by specific acts of conduct. In this case, the asserted character traits were of the second or circumstantial type provable only by reputation or opinion evidence. To the extent defendant is claiming specific conduct was admissible under Evidence Rule 405(b), there was no error.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

561 P.2d 488

Carmen CATALANO, as natural parent and guardian ad litem for Delora English, an incompetent, Plaintiff-Appellant,

v.

James R. LEWIS and Horizon Corporation, Defendants-Appellees.

No. 2561.

Court of Appeals of New Mexico.

Feb. 8, 1977.

Rehearing Denied Feb. 21, 1977.

Certiorari Denied March 17, 1977.

David H. Pearlman, P.A., Albuquerque, for plaintiff-appellant.

James B. Collins, Keleher & McLeod, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

Plaintiff appeals a summary judgment granted defendants arising out of an intersection automobile accident that occurred in Albuquerque. We affirm.

This is just another intersection accident involving issues of negligence, contributory negligence and last clear chance. However, defendant James R. Lewis also claims that summary judgment was proper because of a release executed by him to plaintiff, Carmen Catalano, and Delora English, her daughter. This contention is a matter of public interest.

A. *The Release and Settlement of Claim executed by defendant Lewis was void.*

On April 4, 1973, a collision occurred between a 1970 Pinto operated by Delora English and a 1972 Ford Station Wagon operated by James R. Lewis.

On December 27, 1973, almost nine months later, Carmen Catalano and Delora English paid James R. Lewis $1,500.00 and Lewis executed a Release and Settlement of Claim.

The release was signed "James R. Lewis". Several lines below the signature appears the following:

"Louise Batt
My Commission expires 6–9–74"

Nevertheless, *on November 19, 1974,* Catalano filed her complaint against Lewis in the District Court of *Sandoval County* for damages in excess of $1,000,000.00 for injuries suffered by Delora.

On March 20, 1975, Lewis filed his complaint against English in the District Court of *Bernalillo County* as Cause No. 3–75–01372 for damages in the sum of $100,000.00. English filed a Motion for Summary Judgment based upon the Release and Settlement of Claim, supra. This motion was denied. In his brief filed in the case, Lewis contended then that the release was void under § 21–11–1(C), N.M.S.A.1953 (Repl.Vol. 4, 1975 Supp.), "as it was never notarized. Further, there is some question whether the release was notarized by a 'notary public *who has no interest adverse* to the injured person' (emphasis added) which would void the release itself."

We agree. Certainly, Lewis knew whether the release he signed was notarized by a notary public who had no interest adverse to himself.

Lewis jumped over the fence and now claims that this release was a complete settlement of all matters between the parties to the release under *Lugena v. Hanna,* 420 S.W.2d 335 (Mo.1967), and was an accord and satisfaction under *Harrison v. Lucero,* 86 N.M. 581, 525 P.2d 941 (Ct.App.1974).

We do not consider these contentions because the release was void.

Section 21–11–1(C), supra, provides:

> Any settlement agreement, any release of liability or any written statement shall be void unless it is acknowledged by the injured party before a notary public who has no interest adverse to the injured person.

We have held that non-compliance with this provision of the statute renders the settlement agreement and any release of liability invalid. *Mitschelen v. State Farm Mut. Auto. Ins. Co.,* 89 N.M. 586, 555 P.2d 707 (Ct.App.1976).

If summary judgment in the instant case was based upon the Release and Settlement of Claim, it was erroneous.

B. *Defendants were entitled to summary judgment on the issue of contributory negligence.*

To establish that no genuine issue of material fact exists, the defendants established the following facts.

At the place of the intersection collision, Coors Road, a four-lane highway, ran north and south. St. Joseph's Drive, a two-lane road, ran east, from the west end of Coors Road, to the University of Albuquerque. The posted speed limit on Coors Road was 50 m. p. h. The intersection was controlled by a traffic signal with an intermittent flashing amber light for north and southbound traffic. No turning lanes were provided for southbound traffic turning left onto St. Joseph's Drive. There were no adverse weather conditions.

Delora was driving south on Coors Road in the right-hand lane. As she approached the intersection with St. Joseph's Drive, a vehicle in front of her, also in the right-hand lane, was travelling at 50 m. p. h. A truck ahead of this vehicle was moving in the left-hand lane. Delora swiftly zig-zagged past these vehicles and made an illegal left turn from the right-hand lane on St. Joseph's Drive into the northbound lanes of Coors Road. At this moment, defendant Lewis, driving north on Coors Road, was at or close to the intersection. Delora's vehicle was right in front of him. Defendant applied his brakes and attempted to turn right to avoid the accident. In the matter of time, the collision occurred at the snap of the fingers. It does not require the citation of motor vehicle statutes and authority to establish that Delora was contributorially negligent as a matter of law.

Plaintiff sought to controvert this testimony by application of the last clear chance doctrine based upon affidavit opinion evidence of sight distance and time sequence. The opinion evidence did not explain how the opinion was arrived at, and it was not competent evidence. *Smith v. Klebanoff,* 84 N.M. 50, 499 P.2d 368 (Ct.App. 1972). Even if we considered this evidence, plaintiff was not entitled to the benefit of last clear chance. It implies time for appreciation and thought and time to act effectively. *Hartford Fire Insurance Company v. Horne,* 65 N.M. 440, 338 P.2d 1067 (1959). The defendant must have a clear chance, by the exercise of ordinary care, to avoid injury to the plaintiff. *Lucero v. Torres,* 67 N.M. 10, 350 P.2d 1028 (1960). Were we to apply the mathematical computations necessary, we hold, as a matter of law, that last clear chance was not applicable. *Montoya v. Williamson,* 79 N.M. 566, 446 P.2d 214 (1968); *Stranczek v. Burch,* 67 N.M. 237, 354 P.2d 531 (1960); *McCoy v. Gossett,* 79 N.M. 317, 442 P.2d 807 (Ct.App.1968).

Plaintiff could present no evidence to controvert defendants' strong position that Delora was contributorially negligent as a matter of law.

Summary judgment on the issue of contributory negligence is affirmed.

C. *Plaintiff's motion to remand for correction of the record is denied.*

On November 29, 1976, after all briefs had been filed, plaintiff filed a motion in this Court to remand to the district court to correct the record pursuant to Rule 8(f) of the Rules of Appellate Procedure [§ 21–12–8(f), N.M.S.A.1953 (Repl.Vol. 4, 1975 Supp.)].

Plaintiff sought certification and transmittal to this Court of the Lewis deposition taken on May 3, 1976 in the case of *Lewis v. English,* referred to supra.

First, we note that plaintiff filed her complaint on November 19, 1974. On October 2, 1975, defendants filed a motion for summary judgment with notice that a hearing would be held on November 10, 1975. Extensive briefs were filed in support of and opposed to the motion for summary judgment. On April 2, 1976, six months after the motion was filed, summary judgment was entered. Plaintiff did not seek "a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had" as provided by Rule 56(f) of the Rules of Civil Procedure [§ 21–1–1(56)(f), N.M.S.A.1953 (Rep.Vol. 4)].

A month after the summary judgment was entered, plaintiff took the deposition of Lewis in the Bernalillo County case. No explanation appears for plaintiff's failure to take Lewis' deposition prior to the entry of summary judgment. Plaintiff's motion came too late in the day to merit our consideration.

Second, plaintiff's motion did not fall within the meaning of Rule 8(f) of the Rules of Appellate Procedure. It reads:

> *Correction of the Record on Appeal. If anything material to either party is omitted by error or accident from the transcript of proceedings or from the record proper, or is misstated therein,* the parties by stipulation, or the district court either before or after the transcript on appeal is transmitted to the appellate court, or *the appellate court,* on proper suggestion or on its own initiative, *may direct that the omission or misstatement be corrected,* and, if necessary, that a supplemental record on appeal be certified and transmitted to the appellate court. [Emphasis added].

A deposition, not in existence at the time the transcript and record proper came to this Court, cannot be an omission "by error or accident."

Third, plaintiff did not request this Court to remand and direct the movant to file a motion with the trial court requesting an expression of opinion as to whether the trial court would entertain a motion under Rule 60(b)(6), Rules of Civil Procedure [§ 21–1–1(60)(b)(6), N.M.S.A.1953 (Repl.Vol. 4)], to consider defendant Lewis' deposition. See Opinion on Motion to Remand, *Terrel v. Duke City Lumber Company,* 86 N.M. 405, 436, 524 P.2d 1021 (Ct.App.1974), overruled in part on other grounds, *Duke City Lumber Company, Inc. v. Terrel,* 88 N.M. 299, 540 P.2d 229 (1975).

Fourth, defendant Lewis' deposition did not affect Delora's conduct on the issue of contributory negligence or last clear chance.

Plaintiff's motion to remand is denied.

D. *This opinion may or may not affect the issues in Lewis v. English.*

This opinion is based upon the transcript of proceedings filed in this case. If the evidence in the case of *Lewis v. English,* supra, is supplemented on the issues decided in this case, this opinion shall not control, otherwise it shall control. We believe there is sufficient evidence to establish a genuine issue of material fact on the negligence of Lewis.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ, J., specially concurring.

LOPEZ, J., concurs.

HERNANDEZ, Judge (Specially Concurring).

I concur in the result only on the basis of parts B and C of the opinion. Part B is dispositive, but equal weight should be given to the defenses of contributory negligence and last clear chance.

Contributory negligence: There is uncontroverted testimony to show that English was exceeding the speed limit and passing other cars in a reckless fashion, and that she turned left across four lanes of traffic from the right (outside) lane without keeping a proper lookout or yielding the right-of-way. She was therefore contributorially

negligent as a matter of law. Summary judgment in a negligence case is proper when an affirmative defense such as contributory negligence is proved as a matter of law:

> "Since certain affirmative defenses are often susceptible of categorical proof, . . . a summary adjudication of a claim based on negligence may appropriately be rendered for the defendant when such is the case and the defense is legally sufficient . . . ." 6 Moore's Federal Practice (2d ed. 1976) ¶ 56.17[42].

Even if an issue of material fact remains as to the negligence of defendant Lewis, therefore, summary judgment is proper because the contributory negligence of English bars the plaintiffs from recovery. See *Stoes Brothers, Inc. v. Freudenthal,* 81 N.M. 61, 463 P.2d 37 (Ct.App.1969); *Moss v. Acuff,* 57 N.M. 572, 260 P.2d 1108 (1953).

When a plaintiff has been contributorially negligent, he may not recover unless defendant had the last clear chance to avoid the accident. *Montoya v. Williamson,* 79 N.M. 566, 446 P.2d 214 (1968). The doctrine of last clear chance has four elements:

(a) That the plaintiff has been negligent;
(b) That as a result of his negligence, he is in a position of peril, from which he cannot escape by the exercise of ordinary care;
(c) That the defendant knows, or should have known, of plaintiff's peril; and
(d) That defendant then had a clear chance, by the exercise of ordinary care, to avoid the injury, and that he failed to do so.

Rice v. Gideon, 86 N.M. 560, 525 P.2d 920 (Ct.App.1974); cert. denied, 87 N.M. 299, 532 P.2d 888 (1975); *Lucero v. Torres,* 67 N.M. 10, 350 P.2d 1028 (1960). The fourth element was not proved here and the doctrine of last clear chance does not apply as a matter of law:

(1) Just before English made a left turn across the four-lane roadway, she was traveling in the right southbound lane and a van was next to her in the left (inner) southbound lane.
(2) Lewis was traveling in the right northbound lane at 50 miles per hour (the speed limit).
(3) Lewis was at or very near the intersection when he saw English's car turning in front of him.
(4) Lewis braked immediately on seeing English's car and attempted to pull to the right.
(5) Lewis traveled approximately 25 to 35 feet from the time of applying his brakes to the time of the impact.

These facts are sufficient to establish that Lewis had no chance to avoid the injury by the exercise of ordinary care. Plaintiffs' attempt to establish an issue of fact through the affidavit of an expert witness fails, both because the affidavit opinion evidence in not competent evidence and because the affidavit, even if admissible, does not show that Lewis had time for appreciation, thought, and effective action. Compare the facts above with those in *McCoy v. Gossett,* 79 N.M. 317, 442 P.2d 807 (Ct.App. 1968), where this court found that the fourth element of last clear chance was not proved even though the defendant in *McCoy* was going slower than Lewis and saw the plaintiff's car when it was farther away from him than English's car was when Lewis first saw it turning. For a summary judgment case involving issues of contributory negligence and last clear chance, see *Horne v. Seaboard Coast Line Railroad Company,* 301 F.Supp. 561 (D.S.C.1969).

In the absence of material issues of fact as to contributory negligence and last clear chance, summary judgment was properly granted.

561 P.2d 493

A. W. (Buck) MOORHEAD, Plaintiff-Appellee,

v.

GRAY RANCH COMPANY, d/b/a Pruett-Ray Cattle Company, d/b/a Victorio Land and Cattle Company and Industrial Indemnity Company, Defendants-Appellants.

No. 2646.

Court of Appeals of New Mexico.

Feb. 8, 1977.

Rehearing Denied Feb. 21, 1977.

Certiorari Denied March 17, 1977.

Gary Jeffreys, Hughes & Jeffreys, Deming, for appellants.

Frederick H. Sherman, Sherman & Sherman, Deming, for appellee.

OPINION

LOPEZ, Judge.

The defendants appeal a workmen's compensation judgment awarded to the plaintiff (hereinafter referred to as Moorhead)

for total and permanent disability at the rate of $75.00 per week for 500 weeks commencing January 14, 1975. We affirm.

For reversal, the defendants present several points which may be summarized by the following four issues: (1) causation; (2) total disability; (3) notice; and (4) rate of compensation.

Causation

The plaintiff was employed by the defendants as a cowboy. On or about September 4, 1973, he was riding a horse which fell on him. The defendants challenged the court's findings of fact regarding causation. These findings are Nos. 3, 5 and 7:

"3. On September 4, 1973, while herding stray cows for Gray Ranch, a cow ran under Moorhead's horse, dumping the horse and Moorhead, causing the horse to roll on top of Moorhead and thereby causing a disabling injury to Moorhead.

". . .

"5. Moorhead returned to his work and performed his duties at a decreased pace and performed lighter duties as a cook in round up.

". . .

"7. Moorhead suffered an injury in the course of his employment from several days of hard riding up to January 13, 1975, and which aggravated the pre-existing arthritic condition of Moorhead's knees, causing him to be totally and permanently disabled."

Other pertinent findings of fact by the court are Nos. 2, 9 and 12:

"2. Moorhead commenced work for the Gray Ranch on December 1, 1970, and worked steadily for Gray Ranch as a ranchhand up until January 13, 1975 [the date the court found Moorhead to be disabled totally].

". . .

"9. Each of Moorhead's knees are totally and permanently disabled and Moorhead is totally and permanently disabled from performing as a ranch employee or from any job requiring any strength, agility, or significant use of his legs.

". . .

"12. Medical bills for the treatment of Moorhead's knees up to and including the report of January, 1975, have been paid by Industrial Indemnity Company [the workmen's compensation insurance carrier for Gray Ranch]."

Defendants allege that plaintiff failed to prove as a medical probability that the plaintiff's disability was caused by the accident of September 4, 1973. Defendants alleged that plaintiff failed to comply with § 59–10–13.3 B, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1, 1974), which reads as follows:

"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."

The defendants requested certain findings of fact, but before we consider these requested findings, we must review the findings of the trial court. If there is substantial evidence to support the findings, they shall not be disturbed. *Duran v. New Jersey Zinc Co.,* 83 N.M. 38, 487 P.2d 1343 (1971); *Gammon v. Ebasco Corporation,* 74 N.M. 789, 399 P.2d 279 (1965); *Lyon v. Catron County Comm'rs,* 81 N.M. 120, 464 P.2d 410 (Ct.App.1969). In reviewing a workmen's compensation case, it is a cardinal rule of appellate procedure that we will consider the evidence, and the inferences that may be drawn reasonably therefrom, in the light most favorable to support the findings. *Quintana v. East Las Vegas Municipal School Dist.,* 82 N.M. 462, 483 P.2d 936 (Ct.App.1971). Substantial evidence is evidence which a reasonable mind accepts as adequate to support a conclusion. *Tapia v. Panhandle Steel Erectors Co.,* 78 N.M. 86, 428 P.2d 625 (1967).

The defendants agree that Dr. Breck and Dr. Luckett gave somewhat conflicting testimony as to the causation of plaintiff's disability. The defendants state that Dr. Luckett's testimony cannot connect the accident with the disability, and that Dr.

Breck's opinion of causal connection is based upon mere speculation and should be disregarded. Dr. Hossley examined Moorhead on September 5, 1973, the day after Moorhead was thrown from the horse. Dr. Hossley testified, by deposition, that he probably told Moorhead to go see Dr. Breck, an orthopedic specialist.

Briefly, Dr. Breck testified, by deposition, that in his opinion Moorhead's knee troubles had developed gradually over a period of quite a few years. In his opinion, the accident of September 4, 1973, substantially aggravated Moorhead's previous condition, the accident being the precipitating or final cause of Moorhead's total disability which occurred on or around January 13, 1975. Dr. Breck testified that Moorhead was suffering from severe to moderate degenerative, traumatic arthritis when the doctor first saw him. Nonetheless, the doctor permitted Moorhead to continue at his job as long as it was not too strenuous. The doctor was surprised that Moorhead could work at all after his September 4, 1973 accident. The doctor knew that Moorhead's knees were headed for trouble and they might eventually need a total knee-joint replacement; nonetheless, the doctor chose to pursue a conservative treatment, permitting Moorhead to work as long as he could because any operations at that time would have prevented Moorhead from working at all. However, on January 17, 1975, it became evident to Dr. Breck that the knees had sustained severe damage and he pronounced Moorhead totally disabled. In Dr. Breck's opinion the injury was related to Moorhead's work as a cowboy. This testimony effectively refutes defendants' contention that plaintiff's disabilities were the result of his own injurious practices.

Dr. Luckett, an expert witness for the defense, testified that it was abundantly clear both of Moorhead's knees had received a lot of injury over his lifetime. Dr. Luckett testified to the severity of the damage which Moorhead's knees had sustained, but insisted that it was impossible for anyone to determine how much of the damage was attributable to one specific accident. Dr. Luckett did agree that it was reasonable to assume the accident of September 4, 1973, could produce a good deal of aggravation.

In a letter, introduced into evidence, from Dr. Luckett to Mr. Gary Jeffreys, defendants' attorney, Dr. Luckett wrote:

> "In summary we have a 59 year old cowboy [Moorhead] who in a rather typical ranch accident had a horse run over a cow and fall rolling multiple times and crushing and twisting the rider's legs, the left more than the right.
>
> ". . .
>
> "Physical examination certainly confirms the presence of two very severely deteriorated knees. . . . The right knee is one of the most severely deteriorated knees that I have examined in my entire [orthopedic] career and though the left knee presents evidence of significant severe deterioration and damage, it cannot in my opinion at this time be compared to the right. . . ."
>
> ". . .
>
> "There is absolutely no question about the fact that the man's two knees are so severely damaged as to effectively prevent him from being of any use as a ranch employee. His only possibility of gainful employment would be in some sedentary job not requiring strength, agility, or significant use of the legs. Obviously a great many of the changes in both knees must have antedated by some degree the accident with which . . . we are concerned, specifically, the one of the 4th September 1973."

Dr. Luckett went on to say that it was virtually impossible to separate the percentage of Moorhead's injury which could be attributed to the accident of September 4, 1973. The doctor concluded: "Obviously . . . both knees had some preexisting damage and equally obviously both of them are now nonfunctional in his former occupation."

Dr. Luckett's opinion, based upon a reasonable medical probability, was that the onset of Moorhead's disabling arthritic condition was sometime in 1974. He came to this opinion because there were no prior

complaints or seeking of medical treatment for the knees prior to 1974.

We believe it is not our duty to weigh the testimony of these doctors. That is the duty of the trier of fact. One of the cases cited by defendant is *Montano v. Saavedra,* 70 N.M. 332, 373 P.2d 824 (1962), in which the Supreme Court said:

> "True enough, there was testimony of the medical expert from which the trial court might have found otherwise. Nevertheless, it was for the trial court, as the fact finder, to evaluate all the evidence and determine where the truth lay."

According to defendants, the opinion of the doctors is nonprobative, as far as medical probability, in establishing causal connection. There is testimony on record that before 1973, plaintiff had other accidents. There is also testimony to indicate that these accidents or falls were slight. The defendants also argue that accidents which plaintiff may have had after 1973 were the ones which caused the disability. In particular, there was testimony that hard riding activities in January of 1975 were a contributing factor which aggravated a preexisting condition, causing Moorhead to become totally disabled. There was testimony from Dr. Breck that the accident in 1973 aggravated the preexisting knee condition. Moorhead continued to perform light work, but during the month of January of 1975, due to hard riding, his injury was aggravated to the point of total disability. There is substantial evidence to establish a causal connection between the accidental injury and the resulting disability, even though the injury is attributable in part to a preexisting condition. See *Reynolds v. Ruidoso Racing Assoc., Inc.,* 69 N.M. 248, 365 P.2d 671 (1961); *Webb v. New Mexico Publishing Co.,* 47 N.M. 279, 141 P.2d 333 (1943). See also, *Shannon v. Sandia Corp.,* 79 N.M. 634, 447 P.2d 514 (1968).

Total Disability

The trial court's conclusion that the plaintiff is totally and permanently disabled is supported by substantial evidence.

Notice

The defendants do not deny that the plaintiff had an accident on September 4, 1973, but they deny notice of injury to the knees was given in 1973. The defendants state they received no notice of an accident relating to a knee injury as required by § 59–10–13.4, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1, 1974):

> "*Notice to employer.*—A. Any workman claiming to be entitled to compensation from any employer shall give notice in writing to his employer of the accident and of the injury within thirty [30] days after their occurrence . . . ."

We believe that the defendants would ask this Court to require the plaintiff to give notice of an injury to the knee which the plaintiff didn't know had resulted after the accident in 1973. The record reveals that notice was given as to total and permanent disability in January of 1975. Under *Beckwith v. Cactus Drilling Corp.,* 84 N.M. 565, 505 P.2d 1241 (Ct.App.1972) it was not necessary for the plaintiff to give notice of an injury to the knee or knees after the 1973 accident. All the plaintiff was required to do was give notice of the accident. Notice was given because the defendants had actual knowledge of the 1973 accident. In *Beckwith* the Court of Appeals said:

> ". . . Yet, the Legislature, by the change enacted in 1959, eliminated the requirement of actual knowledge of injury. If this change defeats the purpose of notice requirements, it is a matter for legislative consideration."

We believe that under *Beckwith,* as long as there was actual knowledge of the accident, this complies with the notice requirement. The record shows notice was also given of total disability in 1975.

The record shows there were oral conversations notifying the foreman that the defendant had sustained an injury. See § 59–10–13.4 B, supra. For this reason Moorhead was put on light work. For two years, when Moorhead rode a horse, his injury was aggravated.

After Moorhead visited Dr. Breck in 1975, the doctor wrote the foreman and the insurance company to notify them of Moorhead's disability. The trial court concluded:

> "2. Proper notice was given Gray Ranch of the accident of September 4, 1973, and proper notice was given of the accident which aggravated Moorhead's pre-existing condition and which caused permanent disability on January 13, 1975."

This conclusion is supported by substantial evidence.

Rate of Compensation

Defendants argue that the rate of compensation should be based on the statute at the time of the accident and not at the time of the disability. We disagree.

In a recent case handed down by this Court, *De La Torre v. Kennecott Corp.*, 89 N.M. 683, 556 P.2d 839 (Ct.App.1976), it was held that the date of disability is critical and the law effective at that time controls. But see *Davis v. Meadors-Cherry Co.*, 65 N.M. 21, 331 P.2d 523 (1958). Therefore, *De La Torre* is authority for the proposition that the rate of compensation should be based upon the applicable law on the date of disability. In this case, total disability commenced in January of 1975 and the rate of compensation should be based upon the statutory rate in effect at that time.

Judgment of the trial court is affirmed. Plaintiff is awarded $1,750.00 for the services of his attorney on appeal.

IT IS SO ORDERED.

SUTIN, J., specially concurring.

HERNANDEZ, J., concurs.

SUTIN, Judge (specially concurring).

I concur in the result.

Before an appeal is taken, a party and his attorney must strongly believe that the claimed error is plain, obvious, sharp, unmistakable, apparent and manifest. Emotional resurgence that arises at the loss of a case below should not impel a party or his attorney to appeal. When this occurs without manifest error, memorandum opinions flow from this Court as swiftly as the Mississippi River.

This admonition must be observed to warrant consideration of reversal on appeal. The primary duty of an appellate court is to affirm judgments below even though judgments are rendered for wrong reasons.

The forty page brief of defendants and the thirty-seven page answer brief of plaintiff are beyond the number allowed by the appellate rule. They show great time and conscientious effort pointlessly because the argument was not based on the simple issues in this case.

I recognize that this admonition is of little value. An unnecessary appeal is a common practice that cannot be solved. To meet this challenge requires wisdom, experience and common sense. "Common sense is very uncommon." I shall repeat this admonition as often as I believe it necessary to educate some members of the profession that "justice on appeal" deserves common sense, not mere rivalry. Carrington, Meador and Rosenberg in Justice on Appeal, at 91, say:

> As we have seen, hopeless appeals can clog the judicial system and cause an erosion of the process which results in less adequate justice for those appellants who do have substantial questions to raise. Hopeless cases tend to produce unreadable briefs, soporific arguments, and impatient decisions. They are demoralizing to counsel and to judges. While it is perfectly true that they require less time and energy for disposition, this fact itself represents a basic cheapening of the process. Every care must be taken to observe all of the imperatives of appellate justice in dealing with every case having any plausible merit, but this goal can scarcely be achieved without taking some care to manage the tide of hopeless cases.

The trial court found:

> 7. Moorhead suffered an injury in the course of his employment from several days of hard riding up to *January 13, 1975*, and which aggravated the pre-exist-

ing arthritic condition of Moorhead's knees, causing him to be totally and permanently disabled.

8. On *January 17, 1975*, Moorhead was examined by Dr. Breck, who in a letter to defendant, Industrial Indemnity Company, on *January 21, 1975*, described the condition of Moorhead's knees, found Moorhead totally and permanently disabled, and notified that Defendant that Moorhead's disability was related to his employment with Gray Ranch.

The court concluded:

2. Proper notice was given Gray Ranch . . . of the accident which aggravated Moorhead's pre-existing condition and which caused permanent disability on *January 13, 1975.*

* * * * * *

4. Moorhead is totally and permanently disabled by reason of an injury in *January, 1975* . . . . [Emphasis added]

Defendants did not challenge finding No. 8. Defendants were given due notice of the accident and injury. Written notice to defendants' insurance carrier by Dr. Breck was sufficient compliance with § 59–10–13.4, N.M.S.A.1953 (Repl. Vol. 9, pt. 1); *Anaya v. Big Three Industries, Inc.*, 86 N.M. 168, 521 P.2d 130 (Ct.App.1974).

There was substantial evidence to support the findings. All testimony and evidence of events that occurred prior to the accident of January 13, 1975 are superfluous.

561 P.2d 925

In the Matter of William S. MARTIN, Jr., Attorney at Law.

No. 11290.

Supreme Court of New Mexico.

Feb. 28, 1977.

JUDGMENT AND ORDER

OMAN, Chief Justice.

This cause having come on before the Court, upon the report and recommendation of the Disciplinary Board and the Findings of Fact of Hearing Committee A of the Southern Disciplinary District;

And the Court having considered the same and the record of this proceeding, and being fully advised.

The Court finds that William S. Martin, Jr., an attorney of this Court, has been guilty of unprofessional conduct in that he has been convicted in the District Court of the Sixth Judicial District (Grant County) of eight counts of false statement and eighteen counts of attempted tax evasion, all in relation to his legal obligations under the New Mexico Gross Receipts Tax Laws.

And the Court concludes that the Respondent should be disciplined.

NOW, THEREFORE IT IS ORDERED that Respondent William S. Martin, Jr., be and he hereby is suspended from the practice of law in all Courts in the State of New Mexico for a period of thirteen months, effective July 30, 1976.

And it appearing to the Court that Respondent was temporarily suspended *pendente lite* from the practice of law on July 30, 1976, under the provisions of Rule 12 of the Rules Governing Discipline (now Rule 13), and has been continuously barred from the practice under that order until this date;

IT IS FURTHER ORDERED that, if Respondent shall forthwith file an undertaking to comply with the terms of probation hereinafter set forth, the effect of his suspension shall be lifted and deferred from March 1, 1977, until the expiration thereof on AUG. 31, 1977 (both inclusive) PROVIDED that during said entire period, the Respondent strictly and conscientiously obeys all of the laws of the United States and the State of New Mexico, the provisions of the Code of Professional Responsibility and Canons of Ethics, and Rule 12 of the Rules Governing Discipline; and thereafter files his Affidavit of Compliance and Petition For Automatic Reinstatement, at the conclusion of said period as provided in Rule 19B.

AND IT IS FURTHER ORDERED that Respondent pay the costs of this proceeding to be assessed.

561 P.2d 925

STATE of New Mexico, Plaintiff-Appellee,

v.

Frank BLOOM and Ralph Mikorey, Defendants-Appellants.

Nos. 2121; 2122.

Court of Appeals of New Mexico.

March 16, 1976.

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

Dahl L. Harris, Rosenberg & Harris, Albuquerque, for defendants-appellants.

OPINION

HENDLEY, Judge.

Bloom was convicted of possession of marijuana contrary to § 54–11–23(B)(3), N.M.S.A.1953 (Repl. Vol. 8, pt. 2, 1962, Supp.1975), aggravated assault upon a police officer contrary to § 40A–22–21(1), N.M.S.A.1953 (2d Repl. Vol. 6, 1972) and escape from the custody of a peace officer contrary to § 40A–22–10, N.M.S.A.1953 (2d Repl. Vol. 6, 1972). Mikorey was convicted of the same count of possession of marijuana and escape from custody charges, and also of battery upon a peace officer contrary to § 40A–22–23, N.M.S.A.1953 (2d Repl. Vol. 6, 1972). Both defendants appeal asserting: (1) the trial court erred in refusing to suppress the marijuana seized because the seizure was a result of an illegal stop, arrest and seizure; (2) the police officer was not in the lawful discharge of his duties when he arrested the defendant; and (3) the marijuana conviction should be reversed for failure of the state to disclose pursuant to Rule 27 of the R.Cr.P.

Motion to Suppress

Defendants' motion to suppress was on the grounds that the "stop, search, seizure, and arrest was made without the necessary probable cause." The following testimony is taken from the motion to suppress hearing and is taken solely from Patrolman Williams' testimony. We set forth the testimony as reported as any attempted summary would be unfair. At approximately 3:00 p.m. on January 27, 1975 Patrolman

Williams, New Mexico State Police was conducting a road block checking driver's licenses and registration certificates.

Direct examination of Williams by the state.

"Q Okay, now, would you tell us what you were set up or instructed, or what you were actually doing out there in making the checks, how you conducted the checks, and so on. You stated you were looking for driver's license, stolen cars, marijuana, all of it, but what were you actually doing then in looking for these things, the next car that came?

"A That's what I was looking for.

"Q Okay. All right, lets take the next car that you said you checked. What did you do with reference to that car?

"A Driver's license-registration, like I said. I don't remember what car it was or who it was or—I don't even think I searched it, but I might have. I don't know, I mean searching, open the trunk and look in it, I don't call that searching.

"Q Okay, have you ever opened anyone's trunk and looked in their trunk without asking their consent?

"A No, sir.

"Q Or at least whether it's a valid search or not, that you felt there was reason to make such a search?

"A No, sir.

" . . .

"A I would have no reason to search it if I didn't think I had a valid reason.

" . . .

"Q Then with reference to that car that you had checked out, go ahead and tell us again, chronologically, the way you remember it happening, up to the time the vehicle in which the defendant, Mikorey, was driving came by.

" . . .

"A Well, I just flagged them down and checked their driver's license. Mikorey, he was driving. I asked him for driver's license and registration and he handed me a driver's license and a rental contract.

"Q All right, at that point was there any conversation about it being a rental car?

"A No, sir, I could see that with the contract.

"Q All right.

"A I told him to pull over to the side, then I had some more traffic backed up, I think, and I waved them on by, probably checked one more, two more cars, I don't know, you know, driver's license, registration.

" . . .

"Q Okay, and as you approached the window this time, do you recall what was said by you and by the defendant?

"A Yeah, I asked Mr. Mikorey, I asked him what he had in the trunk.

"Q Okay, why did you ask him that?

"A Why? Cause I suspected him of hauling marijuana.

"Q Why at that point?

"A Well, I could, I thought I could smell it. I didn't know for sure if I could smell it or not. I smelled what appeared to be marijuana, but I didn't know.

"Q Did you observe anything about the automobile?

"A Well, yes, it was heavily loaded, had a bunch of big paintings and stuff in the back seat, you know, which could have fit in the trunk.

"Q Okay, and you asked him then what he did have in the automobile?

"A Yes, I asked him, I said, what he had in the trunk of the car.

"Q And he answered, to the best of your recollection, by what?

"A Luggage, clothes.

"Q And what did you do then?

"A I said, 'Do you mind if I take a look?' [in the trunk]

"Q And how did he respond?

"A He said, 'No.' So he got out of the car, walked around to the trunk, started to open it, and I told him, I said, 'You realize you don't have to open the trunk.' And he wanted to know why I wanted to look in

there, and I told him that we was looking for marijuana, and I said, 'We could go to town and get a search warrant,' whatever he—it would probably be better for him if we did.

"Q If you did what?

"A Went to town and got a search warrant.

" . . .

"Q All right, did you, up to that point, had you made any—well, had the defendant asked what would happen if he did not—had you made any statements as to what would happen if he did not let you look in the trunk, anything of this nature?

"A No, he never denied me that I couldn't look in the trunk.

" . . .

"Q Okay, so the trunk then was opened. Who opened it?

"A Mikorey.

"Q And what happened once the trunk was opened?

"A Okay, I asked him what he had in the suitcases and he said, 'Clothes,' and I said, 'What do you have in the gold suitcase?' which was setting on top, and he said, 'Nothing.' I said, 'Would you open it?' He opened, he pulled it out of the car first and set it on the ground.

"Q Okay, was—did he make any statement when you said, 'Would you open it?' did he make any statement or—

"A No, he didn't.

"Q —shake his head?

"A He didn't want to open it, but he didn't make any statements or anything. He hesitated, and so he picked it back up and set it in the trunk of the car, and I said, 'Are you going to open that for me?' And he said, 'Okay.' So he opened it and there was some marijuana residue in there.

"Q All right, anything else in the trunk other than the marijuana, or substance you believed to be marijuana?

"A Yes, sir, I think there was two more suitcases, I believe, and a green, I don't remember what color it was, I think it was green trunk, footlocker.

"Q Okay, but was the gold suitcase, was it empty other than the residue that you have described?

"A Yes, sir.

"Q And approximately how much residue—when you, when we talk of residue, how much are you talking about? How much did you see in that gold suitcase?

"A Not very much, you know, just a little bit on the bottom.

"Q All right, not very much. Can you—

"A Well, like—

"Q —be a handfull?

"A Like a baggie full, or something.

"Q As much—

"A I don't know if it was that much.

"Q Approximately a baggie if it was put together?

"A Yes, sir.

"Q All right, upon the trunk being opened, did you receive any other essential sensation, anything come to your attention upon the trunk being opened?

"A Sure. I could smell the marijuana from the trunk.

"Q Okay.

"A I knew it wasn't that what I smelled in that suitcase, I knew it wasn't that.

" . . .

"Q Okay, so when you, in the trunk, what I refer to as the Mikorey automobile, there was an odor, a definite odor that you recognized.

"A Yes, when the trunk was opened."

Cross-examination of Williams by defendants.

"Q Okay, now, at the time that you stopped the Mikorey vehicle, did you have any reasonable cause to believe that that vehicle was unsafe or not equipped as required by law?

"A No, I knew it was hauling marijuana, or something, there was something wrong with it.

"Q Okay, did you have any reason to believe that its equipment was not in proper adjustment or repair?

"A No, I'm not a mechanic.

"Q Okay, did you have any reason to believe that the driver did not have a valid license or registration?

"A That's why I asked him, to see if he did have.

"Q I see. Did you have any reason to believe that the automobile was stolen?

"A No, I knew it was a rent car, a rental car. I suspected it, being a rental car.

"Q Then why did you stop it?

"A Why did I stop him?

"Q Yeah.

"A Because I figured he was hauling marijuana.

"Q This is before you, before you even approached the car?

"A Yeah.

"Q Now, you said that you do not search all the cars unless you have reason to, right?

"A Right.

"Q And that day did you search some of the other cars?

"A Yes, sir.

"Q I see. What were the reasons that you searched those other cars?

"A Like one I thought was a stolen vehicle, which I had run it through on the computer, but it come back that it wasn't stolen, but like California, they don't enter their vehicles until 24 hours after they have been missing and they can be further than here in 24 hours and not ever be entered in the computer, and I check them, see if their spare tire and stuff are in there. You know, usually, somebody steals a car, they got no money, so they take the spare tire out and jacks and sell them.

"Q Well, did you have any reason to believe that any of the cars that you searched were, in fact, stolen?

"A Yeah, I just said I did.

"Q Okay, what led you to believe that they might have been stolen?

"A By the way the people act, by the car they are driving. You take a 'skroag' driving a Lincoln Continental, a ten thousand dollar car and he don't even have shoes to put on, something wrong.

"Q A what? What did you call—

"A Hippie, skroag, whatever.

". . .

"Q (Continuing by Mr. Rosenberg.) Did you encounter any vehicles like that that day?

"A Oh, yeah, I encounter a lot of them.

"Q Did you stop them and search them?

"A Oh, some of them I did. I can tell whether they are hauling dope, usually.

"Q So, then the reason that you signalled to Mr. Mikorey to stop at that roadblock is because you suspected he was hauling dope?

"A Uh huh.

"Q And what was it about that car, its appearance as it approached you that led you to believe it was hauling dope?

"A Rent car. Nearly every car we pick up hauling marijuana is a lease vehicle.

"Q I see. Do you every encounter any leased vehicles that don't have marijuana?

"A No, I haven't.

"Q Or do you just stop the lease cars that have marijuana and let the lease cars that don't have marijuana go by?

"A Well, yeah. Why would I want to stop the ones that didn't have marijuana?

"Q What was it about this car that led you to believe that it was a lease car before you stopped it?

"A I can tell a lease car.

"Q What is it about a car that—

"A Well, all of them has got a little sticker in the window, and some of them has got them up behind the mirror or on the bumper.

"Q I see. And where did this car have its sticker?

"A I think it was on the left or right side of the windshield up at the top.

"Q And what did it say?

"A It's just got numbers on it.

"Q And that's what led you to believe that it was a rent car?

"A Uh huh.

"Q And that it was hauling marijuana.

"A Yes, sir. That, and then the two people in the car.

"Q What was it about the two people in the car?

"A They just looked like dope haulers.

"Q Okay, what do dope haulers look like?

"A Just like that.

". . .

"Q Would you tell the Court, would you describe to the Court what their appearance was on the day in question that led you to believe that they were dope haulers.

"A I just told you.

"Q What was it?

"A Well, they just look like dope haulers.

"Q Okay.

"A I got my own way of telling.

"THE COURT: How would I know what to look for if I were looking for a dope hauler, Mr. Williams?

"THE WITNESS: Well, your Honor, you would have to go through the State Police school and be out on the highway and know, you can tell these people. I mean, you have to do it with experience, you just, you couldn't just jump out there say that guy, I think, is hauling dope.

"THE COURT: Go ahead.

"Q (continuing by Mr. Rosenberg) When in your State Police school did they tell you how to identify dope haulers?

"A No, like I said, it comes with experience.

"Q I see. Was it their age?

"A No, I didn't know how old they was.

"Q Okay, was it their length of hair?

"A No.

"Q Was it the clothes they were wearing?

"A No. It was by the way they acted. Like I said, I got my own way of telling which you wouldn't have.

"Q Okay.

"A You know, I can't explain it to you.

"Q So you, you knew before that car even came to a stop, you felt in your own mind it was hauling—

"A No.

"Q —dope?

"A I had a good idea it was when I found out it was a rent car, lease car.

"Q And there was something about the people in the car that you can't really describe to us that you knew?

"A Sure.

"Q Okay.

"A Nervous.

"Q Who was nervous?

"A Mikorey.

"Q He was nervous?

"A I never did talk to Bloom at the initial contact.

"Q What would you have done if Mikorey hadn't let you look in his trunk?

"A What would I have done?

"Q Yeah.

"A I would have probably brought him to town and obtained a search warrant.

"Q Did you tell him that?

"A No, he never did tell me I couldn't look in there.

"Q Okay. What purpose were you there originally on the highway, for what purpose were you there originally on the highway?

". . .

"A Like I said, we was checking for stolen cars, driver's license, registration checks, equipment checks, marijuana.

"Q Just—

"A Pills, we pick up a lot of pills.

"Q I see. Just more or less anything you could find?

"A Anything that's illegal.

"Q That you could find.

"A Yeah. We usually find it, you know, if it's illegal.

"Q In other words, that was the purpose that you established this roadblock.

"A Yes, sir.

". . .

"Q Now, after Mr. Mikorey gave you his driver's license and registration, was there anything about those that appeared to be in violation of any law or statute, Motor Vehicle Code?

"A No, except Mr. Mikorey said the lease contract had a due date on it and it didn't, it was an indefinite contract."

Re-direct examination.

"Q Okay, is this a factor in your conclusion that this, as you stated, figured he was hauling marijuana? Is the rental car existence, is that a, a factor?

"A Yes, sir, because they rent these cars. That's the way, this way we can't confiscate them.

"Q All right, based on your experience, then, that's a very common occasion for marijuana to be hauled in rental cars.

"A Yes, sir, that's in, anybody picks up marijuana, most of the arrests are made out of rental vehicles.

"Q Okay, now, you mentioned in your direct examination the fact that the car was heavily loaded in the rear. Is that a factor?

"A Well, it was loaded, it wasn't heavily loaded. I mean it wasn't setting down on the ground, but I could tell there was something in the trunk, either that or he had real bad shocks, one of the two.

"Q Okay, and you have also mentioned seeing clothes and pictures and this type thing in the back seat. Is that one of the factors that you might put together with the others to justify some seeking out or further—

"A Well, I figured, you know, them pictures, they could have put them in the trunk. There had to be something in the trunk, where the pictures wouldn't go. I wouldn't think they would haul them in the back seat.

"Q In other words, if they have marijuana in the trunk, they would have to put their clothes and other objects in the back seat?

"A Yes, sir.

"Q So all these combinations are factors, is that correct?

"A Yes, sir.

"Q Plus, you stated the way they acted when they see a police officer is—am I quoting you right there, is that a factor?

"A Yes, sir, they get nervous.

"Q Okay, do you find that a normal tourist, say, upon being stopped by police officer gets nervous? Are you talking about something different, or can you elaborate a little?

"A No. Like I said, lot of them don't get nervous if you stop them and give them a ticket, they don't get real nervous. May get a little mad, but they don't get nervous."

Defendants' motion to suppress was based on the fact ". . . [t]hat said stop, search, seizure and arrest was made without the necessary probable cause to support the actions of Officer Williams." The trial court denied the motion to suppress and ". . . found that the arrest, search and seizure occurring on January 27, 1975, was not an unreasonable search and seizure as defined by the Constitution of the United States."

Subsequently, defendants filed a motion asking the trial court to reconsider its ruling on defendants' motion to suppress together with a trial brief which reemphasized the fact that Patrolman Williams was ". . . selectively stopping vehicles based on past experience when he saw 'scrods', 'hippies', 'longhairs' and rental cars, etc. . . ." The motion to reconsider was also denied.

The Stop

We first consider the basic authority of Officer Williams to conduct a driver's license and vehicle registration check. The two following statutory sections are pertinent. Section 64–3–11, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972) states in part:

". . . Every such registration evidence or duplicates thereof certified by the division shall be exhibited upon demand of any police officer."

Section 64–13–49, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972) states:

". . . *License to be carried and exhibited on demand.*—Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same upon demand of a justice of the peace, a peace officer, or a field deputy or inspector of the division. However, no person charged with violating this section shall be convicted if he produces in court an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest."

Compare the cases of *United States v. Cupps*, 503 F.2d 277 (6th Cir. 1974); *Morgan v. Town of Heidelberg*, 246 Miss. 481, 150 So.2d 512 (1963); *Murphy v. State*, 194 Tenn. 698, 254 S.W.2d 979 (1953); *Cox v. State*, 181 Tenn. 344, 181 S.W.2d 338 (1944) and *State v. Severance*, 108 N.H. 404, 237 A.2d 683 (1968) and cases cited therein regarding statutes similar to New Mexico.

No New Mexico cases have dealt directly with §§ 64–3–11, supra, 64–13–49, supra. See *State v. Lewis*, 80 N.M. 274, 454 P.2d 360 (Ct.App.1969); *State v. Slicker*, 79 N.M. 677, 448 P.2d 478 (Ct.App.1968). See also *United States v. Fallon*, 457 F.2d 15 (10th Cir. 1972). However, in *United States v. Jenkins*, 528 F.2d 713 (10th Cir. 1975) the court stated:

"In stopping Jenkins' vehicle the patrolman was acting pursuant to 64–3–11 and 64–13–49, New Mexico Statutes Annotated. 64–3–11 provides that every owner of a vehicle shall exhibit his vehicle registration papers 'upon demand of any police officer.' 64–13–49 provides that every driver shall display his driver's license 'upon demand of a justice of the peace, a peace officer, or a field deputy or inspector of the division.' However, even though the patrolman in the instant case may well have been acting in accord with New Mexico law, his actions must still comport with the requirements of the Fourth Amendment to the United States Constitution. . . ."

We further note that there is support for the statutory authority granted by footnote 8, in *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) wherein the court stated in part:

". . . Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, and similar matters."

Compare also *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) where the court held, with regard to inspecting records and a storeroom of a federally licensed gun dealer, that where regulatory inspections further urge federal interests and the possibilities of abuse and threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant wherein specifically authorized by statute.

We believe that the same rationale applies to the above quoted statutes. Here there is an urgent state interest involved. The New Mexico State Police Report for 1974, page 63, states that there is a motor vehicle theft in New Mexico every two hours and thirty-six minutes. It further states at page 9 that there was a total of 39,471 traffic accidents in New Mexico of which 10,463 were investigated by the State Police. The checking of drivers licenses will tend to protect the public in that it can keep many unsafe drivers off the highways. *City of Miami v. Arnovitz*, 44 So.2d 784 (Fla.1959).

In view of the foregoing, we hold that the above quoted statutes grant the police the unquestioned good faith right to detain motor vehicles for the purposes specified therein. Compare *Commonwealth v. Swanger*, 300 A.2d 66 (Pa.1973) affirmed on reargument, 453 Pa. 107, 307 A.2d 875 (1973).

However, the actions of the police must be in conformity with the constitutional requirements of the Fourth Amendment. See *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *United States v. Jenkins*, supra. When the detention permitted by the statute becomes a mere subterfuge or excuse for some other purpose which would not be lawful the actions then become unreasonable and fail to meet the constitutional requirement. *Murphy v. State*, supra; *Morgan v. Town of Heidelberg*, supra; *Coston v. Mississippi*, 252 Miss. 257, 172 So.2d 764 (1965). *Compare City of Miami v. Arnovitz*, supra.

In reviewing the record of the motion to suppress we have no doubt that the stopping of defendants' vehicle and requesting the driver's license and registration was merely an excuse to go beyond the sanctions permitted by the statute as viewed from the constitutional mandate. One cannot do by indirection that which is directly prohibited. We are unwilling to sanction such conduct. The detention, under the record of this case, was a mere subterfuge and cannot be condoned. The motion to suppress should have been granted.

In so holding we are not avoiding the traditional standards of appellate review. *State v. Bidegain*, 88 N.M. 466, 541 P.2d 971 (1975). However, there are certain cases where the traditional approach would be closing one's eyes to the realities of the situation. We feel the present record presents such a case.

The cold sterile record on appeal speaks with clarity and certainty as to the realities of the reason for the detention. Any other approach by us would be ". . . [a]phlegmatic detachment of such magnitude . . . [which] boggles the mind." *Mares v. State*, 83 N.M. 225, 490 P.2d 667 (1971) reversing *State v. Mares*, 82 N.M. 682, 486 P.2d 618 (Ct.App.1971).

Lawful Arrest

After Patrolman Williams discovered the marijuana he placed Mikorey under arrest and attempted to handcuff him. Bloom then got out of the car and came toward Williams and said: "What's going on?" Officer Williams told Bloom that he too was under arrest for possession of marijuana over eight ounces. As Officer Williams reached over to grab defendant Bloom's hand, Bloom jerked away. It was at this time that Bloom jerked Officer Williams' pistol out of his holster. Officer Williams grabbed for the pistol and Mikorey pushed the officer from behind and knocked him off his balance. Bloom then stepped back about four or five feet and told Officer Williams that he was going to kill him. Bloom then told Mikorey to get Officer Williams' radio mike and car keys. Mikorey then walked over to the police car, and pulled out the mike and took the car keys. Defendants Mikorey and Bloom then jumped into their car and drove off. The defendants were rearrested at a later time.

There may be cases where ". . . in the lawful discharge of his duties . ." there is a distinct question apart from the validity of the arrest. *State v. Frazier*, 88 N.M. 103, 537 P.2d 711 (Ct.App.1975). In the instant case whether the arrest was valid depends on whether the officer was ". . . in the lawful discharge of his duties . . . ."

We first decide the meaning of "lawful discharge of his duties." The powers and duties of the state police are prescribed by statute. Section 39–2–17(a), N.M.S.A.1953 (2d Repl. Vol. 6, 1972) states:

> ". . . They shall be conservators of the peace within the state of New Mexico, with full power to apprehend, arrest and bring before the proper court *all law violators* within the state of New Mexico." (Emphasis Ours)

Possession of marijuana is a violation of the law. Section 54–11–23(B)(3), supra.

Although we have held that the marijuana must be suppressed, because the search and seizure was the fruit of the illegal detention, we nonetheless hold that the arrests by the officer, after smelling and seeing the marijuana, was in the "lawful discharge of his duties."

To hold otherwise would place the officer in the position of not being able to seize

obvious known contraband even though he was not lawfully in the area of the contraband. The remedy for the seizure is suppression. That, however, does not negate a lawful arrest under the facts of this case. The arrest was legal. But the convictions following such arrest would be based on nonadmissible evidence (the marijuana seized). Those convictions must be reversed.

Escape from Custody of a Police Officer

Section 40A–22–10, N.M.S.A.1953 (2d Repl. Vol. 6, 1972) states in part:

> ". . . Escape from custody of a peace officer consists of any person who shall have been placed under lawful arrest for the commission or alleged commission of any felony, unlawfully escaping or attempting to escape from the custody or control of any peace officer."

The issue here necessarily turns upon the question of ". . . who shall have been placed under a lawful arrest . . . ." As we have heretofore held the arrests were lawful. Thus, the defendants' convictions of escape from custody are affirmed. *State v. Lopez*, 79 N.M. 235, 441 P.2d 764 (1968); *State v. Martinez*, 79 N.M. 232, 441 P.2d 761 (1968).

Having held the seizure illegal we do not reach defendants' third issue relating to disclosure.

Accordingly, the convictions of both defendants of possession of marijuana are reversed. The conviction of aggravated assault upon a peace officer by defendant Bloom and battery upon a police officer by defendant Mikorey, and of escape from custody of a police officer are affirmed.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

WOOD, C. J., dissenting in part and concurring in part.

WOOD, Chief Judge (dissenting in part and concurring in part).

The majority hold that the officer illegally stopped and detained defendants. I disagree. The officer's testimony is contradictory. As to the initial stop, the officer testified defendants' car was stopped because the officer figured defendants were hauling marijuana. The officer also testified that he was manning a general roadblock, checking driver's licenses, car registrations, checking for stolen cars, anything illegal. The evidence is clear that other vehicles were being stopped and checked. A Marine AWOL had been apprehended and was in the officer's car when defendants' car was stopped.

As to having defendants pull off the road and wait, again the evidence is in conflict. The officer indicated this was done because defendants looked like dope haulers and the officer "figured" marijuana was being hauled. On the other hand, the officer testified he was suspicious that marijuana was being hauled because the car was a lease car, the way the car was loaded, the nervous way the defendants acted and because the officer thought he smelled marijuana, although he was not sure.

As to the opening of the trunk, the evidence is again contradictory. The officer's testimony that Mikorey consented is not directly contradicted. However, the context of the officer's testimony would permit the inference that consent was under a threat to get a search warrant.

Conflicts in the testimony of the officer were to be resolved by the fact finder. *State v. Landlee*, 85 N.M. 449, 513 P.2d 186 (Ct.App.1973). Our function, on appellate review, is to view the evidence in the light most favorable to the trial court's decision and determine whether the evidence substantially supports the trial court's decision. *State v. Bidegain*, 88 N.M. 466, 541 P.2d 971 (1975). Under this standard, the trial court's denial of the motion to suppress should be affirmed. Accordingly, I would affirm the marijuana convictions.

I concur in the affirmance of the other convictions. Even under the majority view that the stop and detention was illegal, I agree that the officer was in the lawful discharge of his duties at the time of the

assault and battery on him by the defendants. The officer was clearly performing his lawful duties in arresting defendants for possession of contraband which the officer had seen and smelled. *State v. Frazier*, 88 N.M. 103, 537 P.2d 711 (Ct.App.1975) is not to the contrary.

561 P.2d 935

STATE of New Mexico, Plaintiff-Appellee,

v.

Danny Ray KENDALL, Defendant-Appellant.

No. 2608.

Court of Appeals of New Mexico.

Jan. 4, 1977.

Toney Anaya, Atty. Gen., Suzanne Tanner, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

WOOD, Chief Judge.

Convicted of fourteen felonies and one misdemeanor, defendant appeals. Statutory references are to N.M.S.A.1953 (2d Repl. Vol. 6 and the 1975 Supp.) unless otherwise noted. The fifteen crimes were: (1) four kidnappings which were second degree crimes (Counts I, II, XII and XIII), § 40A–4–1, supra; (2) three armed robberies which were second degree crimes (Counts III, IV and XV), § 40A–16–2, supra; (3) two aggravated batteries which were third degree crimes (Counts V and VI), § 40A–3–5, supra; (4) two aggravated assaults which were fourth degree crimes (Counts VII and XI), § 40A–3–2, supra; (5) two aggravated burglaries which were second degree crimes (Counts VIII and IX), § 40A–16–4, supra; (6) one criminal sexual penetration, a second degree crime (Count X), § 40A–9–21(B), supra; and (7) one attempt to unlawfully take a motor vehicle, a misdemeanor (Count XIV), § 40A–28–1, supra, § 64–9–4, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2, Supp. 1975) and § 64–10–8, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2).

The issues involve: (1) self-incrimination; (2) contentions not supported by the record; (3) instruction on intent; (4) elements of criminal sexual penetration; (5) instruction on use of a firearm; and (6) the sentences imposed.

Self-Incrimination

The privilege against self-incrimination is the privilege of not being a witness against oneself. Constitution of the United States, Amend. V; Constitution of New Mexico, Art. II, § 15. See *State v. Zamora*, 84 N.M. 245, 501 P.2d 689 (Ct.App.1972); *State v. Watson*, 82 N.M. 769, 487 P.2d 197 (Ct.App.1971).

The trial court ordered a psychiatric examination of defendant to determine his mental condition. This court-ordered examination did not violate the privilege against self-incrimination *United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976); *State v. Phillips*, 245 Or. 466, 422 P.2d 670 (1967); Annot., 32 A.L.R.2d 434 at 444; 8 Wigmore, Evidence, § 2265 (McNaughton rev. 1961).

Defendant claims that he had a right not to answer questions asked during this examination, see *Shepard v. Bowe*, 250 Or. 288, 442 P.2d 238 (1968), that he was not adequately advised of this right, that he made communications to the examiner which were incriminatory and these communications were testified to at trial. The answer is factual; no incriminating statements made by defendant in connection with the psychiatric examination were testified to at the trial.

Contentions Not Supported by the Record

The following two contentions are not supported by the record.

1. Count XIII charged the kidnapping of Martha with the intent to hold her to service against her will. Section 40A–4–1(A)(3), supra. Defendant contends the evidence was not sufficient to show such an intent. There was evidence that defendant bound and gagged Martha and her mother, raped the mother and stated that Martha and her mother were to take defendant out of state, to Oklahoma. The evidence of intent was sufficient.

2. During cross-examination of the psychiatrist called by the State on rebuttal, the State objected to a defense question. The objection was sustained. The defense stated it wanted "to make an offer of proof on the question that I asked". The trial court stated that defendant could make the tender after the jury was excused for the night. Defendant did not object to this procedure. See *State v. Snow*, 84 N.M. 399, 503 P.2d 1177 (Ct.App.1972). After the jury was excused, the question was repeated and the witness answered. Thereafter defense counsel stated "we would like to make an offer of proof with regard to other questions to which objections were sustained." The trial court ruled it was

"too late now." Defendant claims this ruling of the trial court denied him the right to put on a defense, to confront witnesses and to have effective assistance of counsel, because it precluded a "complete offer of proof."

We assume defendant's belated request to offer proof goes to the psychiatrist and not other witnesses, otherwise the contention is meaningless. With the exception of the one question and answer referred to above, at the time objections were sustained, defendant did not ask to make an offer of proof. See Evidence Rule 103(a)(2). Defendant's contention goes to unidentified "other questions" and with no theory of admissibility stated as to the unidentified questions. See *State v. Quintana*, 87 N.M. 414, 534 P.2d 1126 (Ct.App.1975), cert. denied, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975); *State v. Santillanes*, 86 N.M. 627, 526 P.2d 424 (Ct.App.1974). We cannot say the trial court erred in not permitting defendant to put on a general offer of proof going to an unidentified subject matter.

Instruction on Intent

There are two contentions concerning intent instructions.

1. Several of the counts charged specific intent crimes. U.J.I.Crim. 41.11 is an instruction on inability of a defendant to form a specific intent because of the use of alcohol or drugs or because he suffered from a mental disease or disorder. The evidence justified such an instruction in this case as to each of the specific intent crimes charged.

Defendant requested a separate intent instruction for each specific intent crime charged. These requested instructions were refused.

The trial court did instruct on specific intent. It gave a separate instruction stating the elements for each of the counts charging kidnapping (four of them). It then gave the equivalent of U.J.I.Crim. 41.-11, making that one instruction applicable to the specific intent involved in the four kidnapping charges and identifying those charges in the intent instruction. This procedure was followed as to the other specific intent crimes; that is, the jury was instructed as to each count of a particular crime and these instructions were followed by one instruction as to the specific intent required for that particular crime.

In addition, the trial court instructed on the basis of U.J.I.Crim. 41.11 concerning alcohol, drugs and mental disease or disorder. This instruction was applied to the specific intent crimes by naming them in the instruction.

Defendant claims these instructions were error for two reasons. First, he asserts the procedure followed violated the Use Note to U.J.I.Crim. 41.11 which states: "[T]he instruction should follow the elements instruction for the crime or crimes with the intent element." The asserted violation is in not giving a separate intent instruction as to each kidnapping count (for example), but in giving one intent instruction applicable to all of the kidnapping counts. Second, he asserts that he was prejudiced because the method followed by the trial court in instructing on specific intent was confusing.

Defendant's contentions border on the frivolous. There were no objections to the specific intent instructions given. R.Crim.P. 41; N.M.Crim.App. 308. The application of a specific intent instruction to several counts involving the same specific intent crime was not a substantial modification of U.J.I.Crim. 41.11. See U.J.I.Crim. General Use Note. The procedure followed by the trial court tended to simplify the instructions and avoid confusion.

2. Voluntary intoxication from use of alcohol or drugs is not a defense to the question of whether a defendant had a general criminal intent. *State v. Roybal*, 66 N.M. 416, 349 P.2d 332 (1960); *State v. Scarborough*, 55 N.M. 201, 230 P.2d 235 (1951); *State v. Crespin*, 86 N.M. 689, 526 P.2d 1282 (Ct.App.1974); see *State v. Tapia*, 81 N.M. 274, 466 P.2d 551 (1970).

Defendant requested instructions which would have directed the jury to con-

sider the effect of intoxication on defendant's ability to form a general criminal intent. He claims refusal of these requests was error.

Defendant's argument is that—(1) since voluntary intoxication is not a defense to the existence of a general criminal intent, a general criminal intent is always presumed from the doing of the prohibited act; (2) conclusive presumptions are unconstitutional; (3) general criminal intent is conclusively presumed in New Mexico from the doing of a prohibited act, and (4) the refusal of the requested instructions denied defendant the right to put on a defense. The argument is patently meritless.

The existence or nonexistence of general criminal intent is a question of fact for the jury. *State v. Roybal*, supra. The general intent instruction submitted the issue to the jury as a question of fact. U.J.I.Crim. 1.50. No presumption was involved in the instruction given. As to conclusive presumptions in New Mexico, see Evidence Rule 303; *State v. Matamoros*, 89 N.M. 125, 547 P.2d 1167 (Ct.App.1976); *State v. Jones*, 88 N.M. 110, 537 P.2d 1006 (Ct.App.1975).

Elements of Criminal Sexual Penetration

Defendant was convicted of criminal sexual penetration in the second degree (Count X). Section 40A–9–21, supra. The statute defines the crime in terms of sexual penetration with a person "other than one's spouse". This is an essential element of the crime as defined by the Legislature; this element was not included in the instructions of the trial court. Compare, *State v. Jimenez*, 89 N.M. 652, 556 P.2d 60 (Ct.App.), decided September 28, 1976.

The State says omission of this element was not error because, at the beginning of the trial, the court read the indictment to the jurors and this element was included in the indictment. The record shows the indictment was read to prospective jurors, however, we do not concern ourselves with this factual variation.

The trial court instructed the jury in accordance with U.J.I.Crim. 50.00. This instruction states: "The law governing this case is contained in these instructions . . . ." The indictment was not contained within the instructions given. Even if it had been, instructing the jury by reference to the indictment is improper. *State v. McKnight*, 21 N.M. 14, 153 P. 76 (1915); *Territory v. Baca*, 11 N.M. 559, 71 P. 460 (1903); Compare, *Haynes v. Hockenhull*, 74 N.M. 329, 393 P.2d 444 (1964).

The State contends omission of an element of the crime was harmless error because the evidence is undisputed that the victim was not the defendant's spouse. R.Crim.P. 41 requires the court to instruct upon all questions of law necessary for guidance in returning a verdict. "A jury must be instructed on the essential elements of the crime charged." *State v. Puga*, 85 N.M. 204, 510 P.2d 1075, 1078 (Ct.App.1973). When the jury is not instructed on the essential elements of the crime, it has not been instructed on the law applicable to the crime charged. See *Territory v. Baca*, supra. Such an error is fundamental because the error is jurisdictional and thus not harmless. See *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973); *State v. Walsh*, 81 N.M. 65, 463 P.2d 41 (Ct.App.1969).

Instruction on Use of a Firearm

Section 40A–29–3.1(A)(1), supra, provides that when a separate finding of fact by the court or jury shows that a firearm was used in the commission of a felony, other than a capital felony, the minimum and maximum terms of imprisonment shall be increased by five years. See *State v. Wilkins*, 88 N.M. 116, 537 P.2d 1012 (Ct.App.1975). A special verdict of the jury found that a firearm was used in the commission of twelve of the fifteen counts.

The trial court submitted the question of use of a firearm to the jury by instructions in accordance with U.J.I. Crim. 50.13, as U.J.I.Crim. 50.13 was worded at the time this case was tried. As then worded, U.J.I. Crim. 50.13 did not instruct the jury that the State must prove beyond a reasonable doubt that the defendant committed the

crimes by use of a firearm. An amendment to U.J.I.Crim. 50.13, effective October 1, 1976, now informs the jury as to the State's burden of proof.

Defendant claims that enhanced sentences pursuant to § 40A–29–3.1, supra, should not have been imposed "because the jury did not find beyond a reasonable doubt that defendant used a firearm".

Proof beyond a reasonable doubt "is the traditional burden which our system of criminal justice deems essential." *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 1891, 44 L.Ed.2d 508 (1975). "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Although the decisions apply the "beyond a reasonable doubt" standard to factual determinations of guilt, the standard also applies to the factual determination that a firearm was used because that fact is a predicate for enhancing defendant's sentence.

The State contends that the jury was instructed that the proof of use of a firearm must be beyond a reasonable doubt. It points out that the instructions submitting the issue of guilt included U.J.I.Crim. 40.60 which informed the jury as to the State's burden of proof. The State points out that one general instruction on reasonable doubt is sufficient. *State v. Burrus*, 38 N.M. 462, 35 P.2d 285 (1934); *State v. Roybal*, 33 N.M. 187, 262 P. 929 (1928). These decisions do not provide an answer in this case because of the procedure that was followed. The trial court submitted three issues to the jury—guilty, not guilty and not guilty by reason of insanity. The burden of proof instruction was given in connection with the submission of these issues. The burden of proof instruction, by its wording, was applied to a determination of guilt; no reference was made to use of a firearm. After the guilty verdicts were returned, instructions were given submitting the "use of a firearm" issue to the jury. No burden of proof instruction was given as to this issue. With this procedure, we cannot say that the jury was instructed on the burden of proof concerning use of a firearm.

Although defendant submitted fifty-seven requests for instructions, he did not request an instruction on the burden of proof as to use of a firearm. In addition, defendant did not object to the instructions given. Defendant first raised an issue concerning the burden of proof instruction subsequent to the trial and verdicts. Specifically, defendant did not raise the issue in a timely manner as provided by R.Crim.P. 41(d).

State v. Henderson, 81 N.M. 270, 466 P.2d 116, 118 (Ct.App.1970) states that "[i]t is error to fail to instruct the jury on this *presumption of innocence*, if defendant requests an instruction thereon." *State v. Jones*, supra, held that constitutional error in instructions concerning presumptions did not amount to reversible error when the issue had not been timely raised.

R.Crim.P. 41(d), *State v. Henderson*, supra, and *State v. Jones*, supra, are to the effect that the failure to instruct on the burden of proof as to use of a firearm was not reversible error under New Mexico law because the issue was not timely raised.

Defendant ignores New Mexico law; he claims the error was a violation of federal due process and amounted to jurisdictional error which can be raised at any time. The two decisions relied on do not support defendant. *In re Winship*, supra, holds that proof beyond a reasonable doubt is a constitutional requirement, but does not discuss the procedural problem of when the issue must be raised. *Mullaney v. Wilbur*, supra, affirms that proof beyond a reasonable doubt is required "when the issue is properly presented." The concurring opinion in *Mullaney* points out that no objection had been made to the trial court instruction in that case. A footnote to the concurring opinion attaches significance to the absence of an "objection or exception which might prevent the error from ever occurring."

Davis v. United States, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973) involved a

post-conviction attack on the grand jury that returned the indictment. The petitioner, a black, claimed that the trial court had acquiesced in the systematic exclusion of qualified blacks as jurymen. In affirming the trial court's denial of post-conviction relief, *Davis*, supra, applied a federal procedural rule to the effect that the claim was waived if not raised by pretrial motion and held no cause had been shown relieving petitioner from the waiver.

In this case, not only was no issue timely raised concerning the absence of a burden of proof instruction in connection with use of a firearm, the record suggests that defendant acquiesced in the procedure followed. After the instructions were settled in chambers, court was convened "for the purpose of putting the objections to the instructions on the record." The court stated: "[B]oth sides have stipulated that the appropriate time in this case to submit instructions in reference to the firearm would be after the jury returned a verdict because if they find Defendant not guilty or not guilty by reason of insanity, there is no need to do that. I am proposing that if they convict the Defendant, *we will give them the instruction on the enhancement, on the firearm statute*, and let them make their finding . . . ." (Our emphasis.) Defense counsel then thanked the court.

In addition, this is not a case where relevant evidence is lacking on a crucial element of the offense. See *Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974). The evidence is substantial, in fact almost uncontradicted, that a firearm was used as to each of the counts on which the jury returned an affirmative verdict.

Summarizing: The cases relied on by defendant do not support his contention; the concurring opinion in *Mullaney v. Wilbur*, supra, suggests defendant should have objected to the absence of an instruction; *Davis v. United States*, supra, applied federal procedural rules to bar a constitutional claim not timely raised; defendant did not complain of the absence of an instruction and the record suggests defendant acquiesced in submitting only "use" instructions after a guilty verdict was returned. Accordingly, we hold there was no violation of federal due process because the jury was not instructed that the firearm use must be proved beyond a reasonable doubt.

The Sentences Imposed

Defendant claims he has been improperly sentenced; his attack is directed to the enhanced sentence for use of a firearm. We do not agree with defendant's view of the firearm enhancement statute. To reach this result, we are required to interpret the judgment because, as entered, the judgment is ambiguous. The judgment is ambiguous because it does not specify what sentence was imposed for a particular count. The following discussion involves: (1) the trial court's sentencing authority; (2) the meaning of the firearm enhancement statute; and (3) the proper sentence in this case.

(1) The trial court's authority to suspend or defer sentence is not involved in this case. Section 40A–29–15, supra. What is involved is the trial court's authority in imposing sentence. Its authority was to sentence defendant to the minimum and maximum provided by law for the particular offense involved. *State v. Romero*, 73 N.M. 109, 385 P.2d 967 (1963); *State v. Hovey*, 87 N.M. 398, 534 P.2d 777 (Ct.App. 1975). Section 40A–29–3, supra, states a minimum and maximum sentence according to the degree of felony involved. In this case we have second, third and fourth degree felonies. The minimum and maximum sentences, stated in § 40A–29–3, supra, are: For second degree—not less than ten nor more than fifty years; for third degree—not less than two nor more than ten years; for fourth degree—not less than one nor more than five years.

Section 40A–29–3.1, supra, provides for an enhanced sentence when a firearm was used in the commission of a felony. For felonies other than a capital felony, both the minimum and maximum terms of imprisonment are to be increased by five

years. The enhancement provisions are mandatory. *State v. Barreras*, 88 N.M. 52, 536 P.2d 1108 (Ct.App.1975). Thus, when § 40A–29–3.1, supra, is applicable, the sentences to be imposed are: For second degree—not less than fifteen nor more than fifty-five years; for third degree—not less than seven nor more than fifteen years; for fourth degree—not less than six nor more than ten years.

The trial court has authority to order that a sentence be served concurrently or consecutively. *Deats v. State*, 84 N.M. 405, 503 P.2d 1183 (Ct.App.1972). Section 40A–29–3.1, supra, made no change in this authority.

(2) The jury found that a firearm was used in twelve of the fifteen counts. The trial court enhanced defendant's sentence on some, but not all of the counts where a firearm was used. Because of the wording of the judgment, we cannot be certain of the counts where the sentence was enhanced. Defendant claims that he "used" a firearm only once, rather than twelve times; he asserts that only one count could properly be enhanced under § 40A–29–3.1, supra. He relies on *People v. Johnson*, 38 Cal.App.3d 1, 112 Cal.Rptr. 834 (1974) and *State v. Ellis*, 88 N.M. 90, 537 P.2d 698 (Ct.App.1975).

People v. Johnson, supra, held that under California's firearm enhancement statute, there could be only one enhancement for use of a firearm although defendant had committed three crimes. In the opinion of the California court, "defendant indulged in a single 'use' in the course of the liquor store holdup" where he committed three crimes. We disagree with this reasoning. *If the statute punishes for "use" of a firearm in committing a felony, the punishment is to be applied for each felony committed by using a firearm.*

Two other reasons were stated in *People v. Johnson*, supra, as justification for limiting the firearm enhancement to only one of the three crimes committed. One reason was a statute prohibiting multiple sentences based upon a single criminal transaction. New Mexico has no such statute and has rejected the "single transaction" concept. See *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975). A second reason was that the California statute was based on a theory of deterrence because the enhanced penalty increased with successive convictions. New Mexico's statute is worded differently; enhancement is required for "any felony" where a firearm was used, other than a capital felony. *People v. Johnson*, supra, is not applicable.

State v. Ellis, supra, involved the meaning of "second or subsequent felony" in the firearm enhancement statute as it existed prior to its amendment by Laws 1975, ch. 138. The amendment made substantial changes in the statute. The amended statute applies in this case. As amended, § 40A–29–3.1, supra, reads:

> "A. When a separate finding of fact by the court or jury shows that a firearm was used in the commission of:
>
> "(1) any felony except a capital felony, the minimum and maximum terms of imprisonment prescribed by the Criminal Code shall each be increased by five [5] years; and
>
> "(2) for any crime constituting a felony other than a capital felony, the court shall not suspend the first one [1] year of any sentence imposed.
>
> "B. For second and subsequent felonies other than a capital felony in which a firearm is used, the minimum and maximum terms of imprisonment prescribed by the Criminal Code shall be increased by five [5] years and the court shall not suspend or defer all or any part of the sentence nor shall parole be considered unless the minimum sentence has been served.
>
> "C. If the case is tried by a jury and if a prima facie case has been established showing that a firearm was used in the commission of the offense, the court shall submit the issue to the jury by special interrogatory."

The statute involved in *State v. Ellis*, supra, did not apply to "any felony". The present statute does not distinguish be-

tween "any felony" and "second and subsequent felonies" when it provides that minimum and maximum sentences are to be increased by five years. The distinction between "any felony" and "second and subsequent felonies" in the present statute involves suspended and deferred sentences and parole. *State v. Ellis*, supra, would be applicable to such a situation, but that situation is not involved in this case. Because the statute has been amended, *State v. Ellis*, supra, is not authority for holding that only one firearm enhancement may be imposed in this case.

Excepting capital felonies, § 40A–29–3.1, supra, provides for a five-year enhancement of minimum and maximum sentences for "any felony" and for "second and subsequent felonies". If, under *State v. Ellis*, supra, eleven of the twelve crimes committed by use of a firearm should be construed not to be second or subsequent felonies, they nevertheless are "any felonies"; the enhancement provisions are applicable to each count where a firearm was used.

(3) Defendant was sentenced to a term of not less than seventy and not more than two hundred seventy years computed as follows:

"*Counts I & III* to run concurrently with each other for a total of 15 to 55 years but consecutively to all other counts.

"*Counts II & IV* to run concurrently with each other for a total of 15 to 55 years but consecutively to all other counts.

"*Counts V thru VIII* to run concurrently with each other for a total of 15 to 55 years but consecutively to all other counts.

"*Counts IX & XI thru XV* to run concurrently with each other for a total of 15 to 55 years but consecutively to all other counts.

"*Count X* 10 to 50 years to run consecutively to all other counts."

Counts I and III were second degree felonies; a firearm was used in each felony. We interpret the trial court's disposition of Counts I and III as separate sentences of not less than 15 nor more than 55 years, to be served concurrently, but consecutive to other sentences. So interpreted, the sentences on these counts are legally correct.

Counts II and IV were also second degree felonies; a firearm was used in each felony. Applying the same reasoning used as to Counts I and III, the sentences for Counts II and IV, of not less than 15 nor more than 55 years, to be served concurrently, but consecutive to other sentences, are legally correct.

Count V was a third degree felony; a firearm was used. Count VI was a third degree felony; a firearm was used. Count VII was a fourth degree felony; a firearm was used. Count VIII was a second degree felony; a firearm was used. The total sentences for these four counts would have been not less than 35 nor more than 95 years; however, the trial court could properly order that the sentences on Counts V, VI and VII be served concurrently with Count VIII. So interpreting the judgment, the sentence of not less than 15 nor more than 55 years on these four counts is legally incorrect. Concurrent sentences of not less than 15 nor more than 55 years for each of Counts V, VI and VII exceed the sentence authorized by law for third and fourth degree felonies. *State v. Lucero*, 48 N.M. 294, 150 P.2d 119 (1944). If we do not interpret the judgment as imposing concurrent sentences on Counts V, VI and VII, then no sentence has been imposed on these counts. The sentence on Count VIII is legally correct.

Count IX was a second degree felony; a firearm was used. Count XI was a fourth degree felony; a firearm was *not* used. Count XII was a second degree felony; a firearm was used. Count XIII was a second degree felony; a firearm was used. Count XIV was a misdemeanor; even though a firearm was *not* used, § 40A–29–3.1, supra, is not applicable. Count XV was a second degree felony; a firearm was used. The sentences on these six counts would

have totalled not less than sixty-one nor more than two hundred twenty-five years, plus a sentence for a definite term of less than one year for the misdemeanor. Section 40A–29–4(A), supra. However, the trial court could properly order that the sentences on Counts IX, XI, XII, XIII and XIV be served concurrently with Count XV. So interpreting the judgment, the sentence of not less than 15 nor more than 55 years, on these six counts, to be served consecutively to the sentences on other counts, is legally incorrect as to Counts XI and XIV because a 15 to 55 year sentence is not authorized for a fourth degree felony or a misdemeanor. *State v. Lucero*, supra. The sentences on Counts IX, XII, XIII and XV are legally correct.

The sentence on Count X, where a firearm was not used, is to be set aside for failure to instruct on an essential element of the crime.

The conviction and sentences on Counts I, II, III, IV, VIII, IX, XII, XIII and XV are legally correct and are affirmed. The total of these sentences, under the trial court's grouping of concurrent and consecutive sentences amounts to not less than 60 nor more than 220 years.

The convictions on Counts V, VI, VII, XI and XIV are affirmed. The sentences as to these five counts are legally incorrect and are set aside. The trial court is instructed to impose a legally correct sentence as to these counts.

The conviction on Count X is reversed and a new trial is ordered as to that count.

The case is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

561 P.2d 945

CITY OF FARMINGTON,
Plaintiff-Appellee,

v.

Franklin D. SANDOVAL,
Defendant-Appellant.

No. 2816.

Court of Appeals of New Mexico.

March 1, 1977.

Louis Denetsosie, Window Rock, Ariz., for defendant-appellant.

Jay Burnham, Asst. City Atty., Farmington, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The municipal court convicted defendant of violating two Farmington ordinances. He appealed to the district court. After an evidentiary hearing, defendant was again convicted of the ordinance violations. Defendant now appeals the district court judgment. He claims: (1) the evidence was insufficient for conviction, and (2) the district court improperly imposed a sentence greater than the sentence imposed by the municipal court. Because the second claim has not been previously decided by New Mexico appellate courts, Farmington's motion for summary affirmance is denied.

The Evidence Claim

Defendant's brief makes no effort to review the evidence. The brief states: "Defendant will, without briefing the matter, have the Court of Appeals decide whether or not there was sufficient evidence to support conviction based on the record."

We need not decide whether the civil or criminal appellate rules apply to this case. Civil Appellate Rule 9(d) states:

> "A contention that a . . . finding of fact is not supported by substantial evidence will not ordinarily be entertained unless the party so contending shall have stated in his initial brief the substance of all evidence bearing upon the proposition, with proper references to the transcript."

Criminal Appellate Rule 501(a)(3) requires "a short résumé of all facts relevant to the issues presented for review, with appropriate references to the record proper and transcript of proceedings." Whichever of the quoted rules apply, defendant violated the rule.

The consequence of the rule violation is that we will not review the evidence; rather, we accept the findings of the trial court. *Perez v. Gallegos,* 87 N.M. 161, 530 P.2d 1155 (1974); *Lacy v. Holiday Management Company,* 85 N.M. 460, 513 P.2d 394 (1973); *General Services Corp. v. Board of Com'rs,* 75 N.M. 550, 408 P.2d 51 (1965); *Irwin v. Lamar,* 74 N.M. 811, 399 P.2d 400 (1964).

The trial court found that 1) defendant operated a motor vehicle while under the influence of intoxicating liquor and 2) defendant failed to give immediate notice of an accident. The trial court also found that these two actions were violations of specific ordinances which were in full force and effect. These are the facts before this Court.

The Sentence Claim

The municipal court sentence for the driving under the influence offense was a $150.00 fine and a thirty-day jail sentence. Twenty days of the sentence was suspended on condition that the fine be paid in sixty days. The sentence for failure to give notice was a $100.00 fine.

The district court sentence for the driving under the influence offense was a fine of $150.00 and a twenty-day jail sentence. The sentence for failure to give notice was a $100.00 fine.

The difference between the sentences was the jail term. Because the district court did not suspend any of the jail term it imposed, the effect was an increase in the amount of jail time required to be served. This was an increase in the sentence. See *State v. Soria,* 82 N.M. 509, 484 P.2d 351 (Ct.App.1971).

Defendant's claim is that he "[could] not . . . be subjected to greater punishment" in appealing his municipal court conviction to the district court.

Section 38–1–11, N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1975) states:

> "If the judgment of the municipal court in the action is affirmed or rendered

against the defendant on appeal, the district court shall enter judgment imposing the same, *a greater* or a lesser penalty as that imposed in the municipal court in the action." (Emphasis added.)

The statute authorizes the greater penalty imposed in this case. The question is whether the statute is constitutional.

In *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the defendant had been convicted and sentenced to prison; the conviction was reversed and upon retrial defendant was again convicted. The sentence imposed after retrial was greater than the original sentence. *Pearce,* supra, holds that the greater sentence was neither a violation of double jeopardy nor a denial of equal protection of the law. *Colten v. Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) reaffirmed the *Pearce* holding that a greater penalty on reconviction did not amount to double jeopardy. See also *Chaffin v. Stynchcombe,* 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973).

Defendant would have us disregard *Pearce, Colten* and *Chaffin,* supra, and apply California decisions holding that the greater sentence amounts to double jeopardy. See *People v. Henderson,* 60 Cal.2d 482, 35 Cal.Rptr. 77, 386 P.2d 677 (1963); *Application of Ferguson,* 233 Cal.App.2d 79, 43 Cal.Rptr. 325 (1965). For the reasons stated in *Pearce,* supra, we hold a greater sentence on retrial is not a violation of double jeopardy.

North Carolina v. Pearce, supra, also discussed whether a greater sentence on retrial would be contrary to due process. The concern was with vindictiveness against a defendant for having successfully attacked his first conviction. To avoid both vindictiveness and the apprehension of vindictiveness (see *Michigan v. Payne,* 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973)), *Pearce* outlined certain requirements which must be met to insure that the greater sentence does not violate due process. Discussion of these requirements is unnecessary in this case because our factual situation differs from *Pearce,* supra.

Pearce, supra, involved a retrial in the same court after reversal of the original conviction. This case involves an "appeal" from the municipal court to the district court. Although characterized as an "appeal", the district court proceeding is a trial do novo. Section 38–1–13, N.M.S.A.1953 (2d Repl.Vol. 6); see N.M.Const., Art. VI, § 27. A trial de novo is a trial "anew", as if no trial whatever had been had in the municipal court. Section 21–10–1, N.M.S.A. 1953 (Repl.Vol. 4). If the district court were in any way bound by the proceedings in the municipal court "it would not be a trial de novo, or a trial anew." *Southern Union Gas Company v. Taylor,* 82 N.M. 670, 486 P.2d 606, 607 (1971).

The de novo trial in the district court is a trial in a court different from the court which imposed the original sentence. The district court is not doing over what it thought it had already done correctly; it is not even reviewing the correctness of the proceedings in the municipal court. The district court trial is as if no trial had been held in the municipal court. Because of these distinctions, *Colten v. Kentucky,* supra, held the possibility of vindictiveness did not inhere in the de novo trial in that case and there was no violation of due process. See *Chaffin v. Stynchcombe,* supra; Compare *Blackledge v. Perry,* 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).

The "appeal" in this case from the municipal court to the district court, where the trial was de novo, is similar to the "appeal" and de novo trial in *Colten v. Kentucky,* supra. *Colten* is applicable to this case. We hold that the greater sentence imposed by the district court after a trial de novo did not deprive defendant of due process.

Defendant suggests that a greater sentence should be prohibited because the possibility of a greater sentence has a "chilling effect" on the exercise of his right to appeal. There are two answers to this claim: 1. There was no "chilling effect" on defendant; he took an appeal to the district court. 2. Requiring defendant to choose between accepting the risk of a

greater sentence or foregoing his "appeal" is not constitutionally impermissible under the facts of this case; the choice is defendant's. See discussion in *Chaffin v. Stynchcombe,* supra.

Defendant contends that we should not follow the United States Supreme Court decisions cited in this opinion. Defendant urges us to impose a "more strict" constitutional standard. He advances no reason why we should do so. The hazard of a greater sentence upon trial de novo is not fundamentally unfair.

The judgment and sentences of the district court are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

561 P.2d 948

STATE of New Mexico, Plaintiff-Appellee,

v.

John DOE, Defendant-Appellant.

No. 2804.

Court of Appeals of New Mexico.

March 1, 1977.

Barbara Nobel Farber, Sante Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Suzanne Tanner, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The child appeals from an order of the Children's Court which revoked probation and committed the child to the Boys School at Springer. We discuss two jurisdictional problems: (1) validity of the order placing the child on probation, and (2) effect of the order revoking the probation. The jurisdictional issues involved the power or authority of the Children's Court to decide the particular matter presented. *Heckathorn v. Heckathorn,* 77 N.M. 369, 423 P.2d 410 (1967). Statutory citations are to the Children's Code, §§ 13–14–1 through 13–14–45, N.M.S.A. 1953 (Repl. Vol. 3, pt. 1).

Validity of the Probation Order

The petition charged that the child had committed two delinquent acts which would

be crimes if committed by an adult. The petition also charged that the child was in need of supervision, care or rehabilitation. *In Re Doe, III,* 87 N.M. 170, 531 P.2d 218 (Ct.App.1975).

After a hearing, the Children's Court found that the child had committed the delinquent acts. Section 13–14–3(N), supra. The Children's Court did *not* find that the child was in need of care or rehabilitation. Section 13–14–28(E), supra, requires such a finding. See also § 13–14–28(H), supra.

The Children's Court ordered a sixty-day diagnostic evaluation. Diagnostic evaluations are authorized for "a child adjudicated as a delinquent child". Section 13–14–29(D), supra. Delinquent child is defined as a child "who has committed a delinquent act and is in need of care or rehabilitation". Section 13–14–3(*O*), supra. Although the child committed delinquent acts, there was no finding that the child was in need of care or rehabilitation, or a finding that the child was a delinquent child. See *Doe v. State,* 88 N.M. 627, 545 P.2d 93 (Ct.App.1976). The Children's Court lacked authority to order the diagnostic evaluation. However, it is unnecessary to consider the effect of the unauthorized diagnostic evaluation.

After receiving the diagnostic evaluation, the Children's Court placed the child on probation. This order was also entered without a finding that the child was in need of care or rehabilitation. Section 13–14–31(B)(3), supra, authorizes probation for a child "found to be delinquent". Under § 13–14–3(*O*), supra, a child is not delinquent unless in need of care or rehabilitation. There being no finding that the child was in need of care or rehabilitation, the order placing the child on probation was unauthorized.

The deficiency in the proceedings against the child was the failure to recognize that there are two aspects to the determination that a child is a delinquent child—the act, and the need for care or rehabilitation. Section 13–14–28(E), supra; Compare Rule 38 of the Children's Court Rules and the Committee Commentary to Rule 38. The Children's Court failed to consider one of these aspects. The result was that it had no authority to order the probation. The order placing the child on probation was void because the order was entered without authority. *Heckathorn v. Heckathorn,* supra.

Effect of the Revocation Order

The petition to revoke probation alleged the child had violated certain terms and conditions of his probation. The child admitted the violation. In the order revoking probation and committing the child to the Boys School, there is a finding, for the first time, that the child is in need of care and rehabilitation. The revocation order contains a finding that "the child has committed the offense as charged in the Petition To Revoke Probation, a delinquent act, that he is by reason thereof a delinquent child and is in need of care, supervision and rehabilitation."

Generally, proceedings to revoke probation are governed by the procedure applicable to proceedings on a delinquency petition. Section 13–14–40, supra. The order revoking probation contains the requisite findings.

Does the order revoking probation validate the void order which placed the child on probation? Section 13–14–40, supra, states:

> "A child on probation incident to an adjudication . . . as a delinquent child . . . who violates a term of the probation . . . may be proceeded against in a probation . . . revocation proceeding."

The child was not placed on probation as an incident of an adjudication that he was a delinquent child, because there was no determination that he was in need of care or rehabilitation. Section 13–14–40, supra, contemplates a valid probation order; it cannot be construed as validating a void order of probation.

The order placing the child on probation being void, the situation is as if no probation order had been entered. See *Heckathorn v. Heckathorn*, supra. There being no probation order, the order revoking probation was without legal effect. See *Heckathorn v. Heckathorn,* supra; *Eaton v. Cooke,* 74 N.M. 301, 393 P.2d 329 (1964); *Elwess v. Elwess,* 73 N.M. 400, 389 P.2d 7 (1964).

The order revoking probation and committing the child to the Boys School is reversed. The cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

561 P.2d 1345

Thomas W. KRUPIAK and Maria Estella Krupiak, his wife, Individually, and Krupiak Construction & Development Co., Inc., Petitioners,

v.

George A. PAYTON and Joan Payton, his wife, Perry C. Chase and Patricia A. Chase, his wife, Daniel Archuleta and Martha Archuleta, his wife, Frank E. Larkins, a single man, Gerald Emerson and Reyna Emerson, his wife, Respondents.

No. 11215.

Supreme Court of New Mexico.

March 31, 1977.

Edward J. Apodaca, Albuquerque, for petitioners.

Robert C. Resta, Rodey, Dickason, Sloan, Akin & Robb, John P. Salazar, Albuquerque, amicus curiae Albuquerque Home Builders Assn.

OPINION

PAYNE, Justice.

In February 1972, the defendant Krupiak, a home builder, purchased certain lots fronting a paved access road and bordered on the back by an unpaved street. He was given a discount from the purchase price to offset any special assessments or other charges which "have been or may be levied against said lots." Homes were constructed on these lots which were sold to the plaintiffs through a real estate agency. These sales occurred in 1973. In 1975 the City of Albuquerque levied a special assessment against the lots for the purpose of improving and paving San Antonio Drive, the street which abutted the lots to the rear. The plaintiffs filed suit alleging that Krupiak, with the intent to deceive them, had violated a duty to disclose the possibility of the special assessment. The district court

granted summary judgment in favor of Krupiak. That decision was reversed by the Court of Appeals. Certiorari was granted and we now uphold the decision of the district court.

Even when given the strongest possible weight, the plaintiff's petition and affidavits do not show the existence of any genuine issue of fact. The most that can be supported by the record is that Krupiak knew of the "possibility" of an assessment at the time plaintiffs purchased their homes.

The plaintiff's petition was sufficient to raise the issue of fraud. *Steadman v. Turner*, 84 N.M. 738, 507 P.2d 799 (Ct. App.1973). Actionable fraud is found if a party to a transaction knows of material facts, has a duty to disclose, and remains silent. A duty to disclose may arise if there is knowledge that the other party to a contemplated transaction is acting under a mistaken belief. A duty to disclose may also arise if one has superior knowledge that is not within the reach of the other party or could not have been discovered by the exercise of reasonable diligence. *Everett v. Gilliland*, 47 N.M. 269, 141 P.2d 326 (1943); *H. B. Cartwright v. U. S. B. & T. Co.*, 23 N.M. 82, 131, 167 P. 436, 453 (1917); W. Prosser, Law of Torts, § 106, at 695–696 (4th ed. 1971).

There is no evidence that the defendant had any direct contact or acquaintance with any of the plaintiffs prior to the lawsuit. There was no fiduciary or confidential relationship existing between the parties. There was no reliance upon any affirmative statements, words or acts by the defendant distracting the plaintiffs from making their own independent investigation as to the status of the property.

The record does not reflect that the builder had superior knowledge of any possible future special assessment. He knew that there was an unpaved street to the rear of the lots, but the homeowners also knew the status of the unpaved street. The homeowners had visually inspected their lots and had or could have obtained all the knowledge that the builder had pertaining to a possible assessment. The builder had no duty to disclose his discount transaction nor to pass along the benefit of that transaction to plaintiffs when the discount was based upon the mere "possibility" of a special assessment. We hold that a builder cannot be held to a burden of disclosing unknown contingencies.

The special assessments made by the city in this case were presumably based upon benefits which would accrue to the abutting property under §§ 14–32–1 and 14–32–4, N.M.S.A. 1953. These benefits had not accrued at the time the plaintiffs purchased their homes. If plaintiffs contend they are not benefited to the extent of any assessments made, their remedy would have been against the city. Section 14–32–6, N.M.S.A. 1953.

The decision of the Court of Appeals is reversed and the matter is remanded for action consistent with this opinion.

IT IS SO ORDERED.

OMAN, C. J., and McMANUS, SOSA and EASLEY, JJ., concur.

[redacted]

561 P.2d 1349

STATE of New Mexico,
Plaintiff-Appellee,

v.

David SCOTT, Defendant-Appellant.

No. 2748.

Court of Appeals of New Mexico.

March 1, 1977.

Writ of certiorari denied March 30, 1977.

Jan Hartke, Chief Public Defender, Reginald J. Storment, App. Defender, William H. Lazar, Asst. App. Defender, Santa Fe, for defendant-appellant.

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

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of second degree murder. Issues listed in the docketing statement which have not been argued in the briefs are deemed abandoned. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App.1976). The two points argued concern the instructions stating the elements of the crimes of second degree murder and voluntary manslaughter. The points are: (1) the instructions are erroneous in failing to refer to malice as a distinction between second degree murder and voluntary manslaughter; and (2) the instruction on voluntary manslaughter is erroneous because it permitted the jury to

"find the defendant guilty of voluntary manslaughter if it had a reasonable doubt whether he acted as a result of sufficient provocation." Because of the procedural posture of this case, we do not discuss the merits of either point. Rather, we discuss: (1) applicability of the Supreme Court order adopting the challenged instructions; and (2) whether the voluntary manslaughter instruction is reviewable.

Applicability of the Supreme Court Order

The instructions given are U.J.I. Crim. 2.10 (second degree murder) and U.J.I. Crim. 2.20 (voluntary manslaughter). Neither instruction refers to malice. Both by objections to these instructions and by requested instructions which were refused, defendant contended the jury must be instructed that second degree murder was a killing with malice and that voluntary manslaughter was a killing without malice. Compare § 40A–2–1 with § 40A–2–3, N.M. S.A.1953 (2d Repl. Vol. 6). The prosecutor agreed with defendant's contention. See, however, *State v. Hamilton*, 89 N.M. 746, 557 P.2d 1095 (1976).

The General Use Note to U.J.I. Crim. states: "When a Uniform Instruction is provided for the elements of a crime . . . the Uniform Instruction must be used without substantive modification or substitution." The Committee Commentary to U.J.I. Crim. 2.00 and 2.10 makes it clear that the failure to refer to malice in the homicide instructions was deliberate and not an inadvertent omission.

The order of the Supreme Court entered in connection with U.J.I. Crim. adopts the instructions and Use Notes and directs that the instructions be used in criminal cases filed in district courts after September 1, 1975.

In refusing to insert a reference to malice in the instructions given, the trial court pointed out that it was giving instructions approved by the Supreme Court and that it was bound by the Supreme Court order.

Defendant would have this Court disregard the Supreme Court order, citing *State v. Castrillo* (Ct.App.), No. 2499, decided December 21, 1976. In *Castrillo*, two members of this Court failed to follow the Supreme Court order in connection with an instruction approved by the Supreme Court. *Castrillo* is pending in the Supreme Court on a writ of certiorari issued February 1, 1977.

This Court is to follow precedents of the Supreme Court; it is not free to abolish instructions approved by the Supreme Court. *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973); see *State v. Sedillo*, 86 N.M. 382, 524 P.2d 998 (Ct.App.1974), cert. denied, 419 U.S. 1072, 95 S.Ct. 662, 42 L.Ed.2d 669 (1974). Compare the approach to U.J.I. Crim. instructions in *State v. Smith*, 89 N.M. 777, 558 P.2d 46 (Ct.App. 1976), overruled on other grounds in *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976).

This Court is bound by the Supreme Court order approving the challenged instructions; we have no authority to set the instructions aside. In so holding, we recognize that in appropriate situations we may consider whether the Supreme Court precedent is applicable. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct.App.), decided January 25, 1977; *State v. Boeglin*, 90 N.M. 93, 559 P.2d 1220 (Ct.App.), decided January 18, 1977; *Rodgers v. Ferguson*, 89 N.M. 688, 556 P.2d 844 (Ct.App.1976); *State v. Dorsey*, 87 N.M. 323, 532 P.2d 912 (Ct.App. 1975), aff'd, 88 N.M. 184, 539 P.2d 204 (1975). In this case there is no question that the instructions of the Supreme Court are applicable.

The instructions being applicable and this Court being bound to follow the Supreme Court order, we decline to review the merits of the "malice" argument.

Whether Voluntary Manslaughter Instruction is Reviewable

Defendant's challenge to the legal correctness of the voluntary manslaughter instruction is a challenge to the first paragraph of U.J.I. Crim. 2.20. See point 2 in the opening paragraph of this opinion. The only challenge to U.J.I. Crim. 2.20 in the

trial court was the omission of any reference to malice. The appellate argument directed to the legal correctness of the first paragraph of U.J.I. Crim. 2.20 was not raised in the trial court. See *Smith v. State*, supra.

Defendant claims U.J.I. Crim. 2.20 is unconstitutional because it is an incorrect statement of the "reasonable doubt" standard. He then asserts that the jury was instructed it did not have to apply the reasonable doubt standard and this amounts to jurisdictional error. The contention fails to consider the instructions as a whole; the jury was told that the burden "is always on the State to prove guilt beyond a reasonable doubt." Defendant's claim is not a claim of jurisdictional error; the claim goes only to the legal correctness of the instruction. See the discussion in *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct.App.), decided January 4, 1977, certiorari granted February 9, 1977. This claim is not before us for review because it is raised for the first time on appeal. N.M.Crim.App. 308.

Even if the claim is properly before us for review, the attack on U.J.I. Crim. 2.20 is an attack on the legal correctness of an instruction approved by the Supreme Court. We have already pointed out that we are bound to follow the Supreme Court order as to use of approved instructions.

Another answer is that defendant was convicted of second degree murder; he was not convicted of voluntary manslaughter. Two instructions of the trial court told the jury they were first to determine whether defendant was guilty of second degree murder; that guilt of voluntary manslaughter was to be considered *only* if it was determined that defendant was not guilty of second degree murder. See U.J.I. Crim. 2.40. In light of instructions as to the procedure to be followed, any error in the voluntary manslaughter instruction was harmless. *State v. Hamilton*, supra.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

561 P.2d 1351

AL ZUNI TRADERS, Plaintiff-Appellant,

v.

BUREAU OF REVENUE, Defendant-Appellee.

No. 2707.

Court of Appeals of New Mexico.

March 8, 1977.

William C. Marchiondo, Marchiondo & Berry, P. A., Albuquerque, for plaintiff-appellant.

Toney Anaya, Atty. Gen., Santa Fe, Richard M. Kopel, Special Asst. Atty. Gen., for defendant-appellee.

OPINION

SUTIN, Judge.

Taxpayer appeals, pursuant to § 72–13–39, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, 1975 Supp.), a Decision and Order of the Commissioner of Revenue which assessed a gross receipts tax for sales made to out-of-state purchasers, and for intrastate sales from whom taxpayer did not obtain nontaxable transaction certificates pursuant to § 72–16A–14.2, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, 1975 Supp.). We affirm.

Taxpayer contends that the Commissioner deprived taxpayer of its constitutional rights to equal protection and due process under Article II, Section 18 of the New Mexico Constitution; that the tax imposed violated the interstate commerce clause of the United States Constitution, Article I, Section 8; that the Decision and Order was not supported by substantial evidence, and that the Decision and Order was arbitrary, capricious and unlawful. We disagree.

A. *Taxpayer may appear at hearing without an attorney.*

The hearing officer was aware that taxpayer, through Ralph Khalaf, had appeared at the original hearing with counsel, but nevertheless permitted a second partner to appear and represent himself at the second hearing without the aid and assistance of counsel.

Taxpayer's attorney on appeal was not an attorney in the hearing below. We cannot understand taxpayer's struggle to reverse a case wherein its partner stated that he would rather handle the matter himself than have his attorney present. "I don't need no lawyer", he said. After the hearing officer called this matter to taxpayer's attention, taxpayer voluntarily and willingly waived his right to counsel. The hearing officer was not required to assume the duties of counsel for taxpayer at the second hearing. *McConnell v. State ex rel. Bureau of Revenue,* 83 N.M. 386, 492 P.2d 1003 (Ct.App.1971).

Taxpayer replies that *McConnell* is inapplicable because taxpayer was not advised of his rights at the second hearing. Taxpayer has forgotten that his rights were amply protected at the first hearing. The second hearing was a continuation of the first, and the only issue that survived was taxpayer's duty to secure additional proof that its sales were nontaxable transactions. Taxpayer tried but failed. Taxpayer was granted a full and fair hearing. It had no right to condemn the Commissioner for "whipping the Indian jewelry industry into line."

B. *There was no violation of the interstate commerce clause.*

Taxpayer claims that the "Gross Receipts" Tax Act, insofar as it applies to certain interstate transactions of the taxpayer, is unconstitutional. The argument made does not reach a constitutional question. Taxpayer says that the Commissioner is attempting to collect gross receipts tax on its sales made in interstate commerce. In fact, the Commissioner's auditor permit-

ted deduction pursuant to § 72–16A–14.10, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, 1975 Supp.), on interstate commerce, for all sales for which the taxpayer had evidence for delivery out of state. Taxpayer was given more than sixty days' additional time to obtain evidence. See § 72–16A–13. The hearing officer was liberal in construing evidence in favor of taxpayer. In fact, taxpayer testified that his accountant agreed with the auditor's report and the result of the audit was correct. Taxpayer admitted its defeat.

Taxpayer also decries the fact that prior to the first audit of its books, the Commissioner had not sent any notice to taxpayer, or other taxpayers in the same industry, of the type of proof necessary to avoid taxation. Under the "Gross Receipts" Tax Act, this contention is pure nonsense.

Taxpayer's contention has no merit.

C. *The Decision and Order was supported by substantial evidence; it was not arbitrary, capricious or unlawful.*

Taxpayer seeks to burden the Commissioner with proof that its sales were not interstate. The burden, however, rests squarely on the taxpayer to prove entitlement to an exemption.

Where substantial evidence supports the findings of the Commissioner, as it does in this case, "The moment you lose, you're done for." Taxpayer's claims of its ignorance of the law, its unnecessary condemnation of the Commissioner, its irrelevant claims of error, do not assist the taxpayer on appeal. The taxpayer who bravely dares to challenge the record in this manner must risk a fall. Benjamin Disraeli once said, "Candor is the brightest gem of criticism." An Arabian proverb reads, "Examine what is said, not him who speaks."

Appeals of this nature should be avoided.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

561 P.2d 1353

STATE of New Mexico, Plaintiff-Appellee,

v.

Jessie SANDOVAL, Defendant-Appellant.

No. 2737.

Court of Appeals of New Mexico.

March 8, 1977.

Writ of Certiorari Denied March 31, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, App. Defender, William H. Lazar, Asst. App. Defender, Santa Fe, for defendant-appellant.

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

OPINION

WOOD, Chief Judge.

Defendant was convicted of armed robbery, § 40A–16–2, N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1975) and aggravated battery, § 40A–3–5, N.M.S.A.1953 (2d Repl.Vol. 6). Consecutive sentences were imposed. Defendant claims that, under the evidence, both charges should not have been submitted to the jury. Defendant also claims that it was error to impose consecutive sentences. The claims assert that defendant has been subjected to either prohibited multiple prosecutions or multiple punishment. We discuss three concepts: (1) included offenses, (2) same evidence, and (3) merger. Other issues listed in the docketing statement have not been briefed; they are deemed abandoned. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App.1976).

Section 40A–16–2 reads:

"Robbery consists of the theft of anything of value from the person of another

or from the immediate control of another, by use or threatened use of force or violence.

"Whoever commits robbery is guilty of a third degree felony.

"Whoever commits robbery while armed with a deadly weapon is, for the first offense, guilty of a second degree felony and, for second and subsequent offenses, is guilty of a first degree felony."

The pertinent part of § 40A-3-5 reads:

"A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.

* * * * * *

"C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony."

In the docketing statement, defendant contends the aggravated battery "is a lesser included offense under the facts of this case and should have merged" with the armed robbery charge. In arguing for a directed verdict in the trial court, defendant asserted the same evidence applied to the two offenses and claimed that the offenses had merged. These contentions involve either double jeopardy or concepts related to double jeopardy. *Tanton I* (*State v. Tanton*, 88 N.M. 5, 536 P.2d 269 (Ct.App.1975)), overruled in part in *Tanton II* (*State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975)). The above contentions, however, confuse the concepts of included offenses, same evidence, and merger.

Included Offenses

"A conviction or acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense." *Tanton II*, supra. "For the lesser offense to be 'necessarily included', the greater offense cannot be committed without also committing the lesser. . . . In determining whether an offense is necessarily included, we look to the offense charged in the indictment." *State v. Medina*, 87 N.M. 394, 534 P.2d 486 (Ct.App.1975).

The concept of lesser included offenses is not involved in this case because a comparison of the statutory definitions shows that either offense can be committed without committing the other offense.

Same Evidence

There is evidence that defendant shot the victim while robbing her of her purse. Defendant relies on this evidence, asserting: "[T]he evidence showed that the aggravated battery which the defendant committed upon Mrs. Baca was the force which the State was required to prove in order to obtain a conviction for the charge of armed robbery." There is also evidence permitting the inference that the shooting occurred after the purse had been taken. However, our discussion is based on defendant's view of the evidence—that defendant got the purse by shooting the victim.

Defendant asserts: "The force or violence used constituting an element of the crime of robbery, it cannot itself be charged as a separate offense consistent with the principles of double jeopardy." This is incorrect.

Tanton II, supra, states the "same evidence" test is whether the facts offered in support of one offense would sustain a conviction of the other offense. *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) was cited with approval in *Tanton II*. *Tanton II*, supra, quotes only the first sentence of the definition in *Owens v. Abram*, supra. *Owens*, supra, continues: "If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing." Compare *Woods v. State*, 84 N.M. 248, 501 P.2d 692 (Ct.App.1972).

Taking the purse was a fact required to be proved under the armed robbery charge; the taking was not required to be proved under the aggravated battery charge. Application of force was a fact required to be proved under the aggravated battery charge; threatened use of force would be acceptable proof under the armed robbery charge. As stated in *State v. Ranne*, 80 N.M. 188, 453 P.2d 209 (Ct.App.1969): "The elements of the two crimes are not the same."

In emphasizing that he obtained the purse by force (shooting the victim), defendant is really arguing that there was only one criminal transaction. The "same transaction" test was disapproved in *Tanton II*, supra. "Certainly, a person may by one act violate more than one statute or commit more than one offense." *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).

The evidence shows that in shooting the victim to get her purse, defendant committed aggravated battery as well as armed robbery. Because the facts required to be proved for the two offenses differ, the "same evidence" test does not apply.

Merger

The New Mexico decisions have discussed "included offenses" and "same evidence" in the context of subsequent prosecutions. "Merger" is the name applied to the concept of multiple punishment when multiple charges are brought in a single trial. *Tanton I*, supra. Merger is an aspect of double jeopardy; it is concerned with whether more than one offense has occurred. See 1 Wharton's Criminal Law & Procedure, § 33 (1957). The concept is applied to prevent a person from being punished twice for the same offense. *State v. McAfee*, 78 N.M. 108, 428 P.2d 647 (1967).

The test of whether one criminal offense has merged in another is not "whether two criminal acts are successive steps in the same transaction [the rejected same transaction test, *Tanton II*, supra] but whether one offense necessarily involves the other." *State v. Martinez*, 77 N.M. 745, 427 P.2d 260 (1967); *State v. Dosier*, 88 N.M. 32, 536 P.2d 1088 (Ct.App.1975); *Tanton I*, supra.

As defined, the merger concept has aspects of the included offense concept. See *Tanton II*, supra, which cites "merger" decisions in discussing the included offense concept. In determining whether one offense "necessarily involves" another offense so that merger applies, the decisions have looked to the definitions of the crimes to see whether the elements are the same. *State v. McAfee*, supra; *State v. Ranne*, supra; *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct.App.1969). This approach is similar to the approach used in determining whether an offense is an included offense—to be necessarily included, the greater offense cannot be committed without also committing the lesser. *State v. Medina*, supra. In determining whether an offense is "included" we look to the offense charged. *State v. Medina*, supra. Both under the elements test and the included offense approach, the offense of aggravated battery did not merge with the armed robbery.

As defined, the merger concept also has aspects of the same evidence test. This is so because "merger" and the "same evidence" test are both concerned with whether more than one offense has been committed. Thus, the facts were examined in *State v. Blackwell*, 76 N.M. 445, 415 P.2d 563 (1966) and *State v. Quintana*, 69 N.M. 51, 364 P.2d 120 (1961). Compare *State v. Dosier*, supra. Defendant relies on the facts in contending the aggravated battery merged with the armed robbery. There was no merger because, as pointed out in discussing the same evidence test, the same evidence test is not applicable to the facts of this case.

The judgment and consecutive sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

562 P.2d 497

NAVAJO FREIGHT LINES, INC. and Robert A. Whedon, Petitioners,

v.

Ruth Ann English BALDONADO, Respondent.

No. 11268.

Supreme Court of New Mexico.

April 6, 1977.

Coors, Singer & Broullire, Henry V. Coors IV, Albuquerque, for petitioners.

Rodey, Dickason, Sloan, Akin & Robb, Charles B. Larrabee, Albuquerque, Glascock, McKim & Head, Gallup, for respondent.

OPINION

McMANUS, Chief Justice.

This is an appeal from a dismissal of a third-party complaint which was based upon the New Mexico guest statute, § 64–24–1, N.M.S.A. 1953 (2d Repl.Vol. 9, Pt. 2, 1972) and also upon the grounds of improper joinder of parties pursuant to Rule 14(a) and Rule 18(a), N.M.R.Civ.P. [§ 21–1–1(14)(a) and (18)(a), N.M.S.A. 1953 (Repl. Vol. 4, (1970)]. The Court of Appeals affirmed. We granted certiorari and reverse the Court of Appeals and the district court.

The plaintiff, Robert Baldonado, was injured on October 30, 1974 in an automobile and truck accident in Gallup, New Mexico. The automobile was driven by Ruth English and Baldonado was a passenger. The truck was owned by Navajo Freight Lines and operated by Robert Whedon.

Baldonado sued Navajo and Whedon for his injuries, and Navajo and Whedon filed a third-party complaint against English for contribution and property damage. Whedon sued English for personal injuries. The third-party complaint was based upon the theory that since the New Mexico guest statute was no longer applicable, English was liable to Baldonado for his injuries, or alternatively, that English and Navajo

and/or Whedon were jointly liable. Thereafter English filed a motion to dismiss, asserting that the New Mexico guest statute was effective at the time of the accident and therefore Baldonado, as a non-paying passenger, had no right of action against English, his host, for his injuries. If the guest statute was applicable, then Navajo and Whedon could not have joined English as a third-party defendant in this action because English would not be liable to the original plaintiff, Baldonado. The trial court held that the guest statute did apply, and therefore, English could not be held liable for Baldonado's injuries. The trial court then dismissed the third-party complaint against English.

At the time of the accident there was in effect a statute, § 64–24–1, N.M.S.A. 1953 (2d Repl.Vol. 9, Pt. 2, 1972), which barred a guest from recovering damages from a host:

> 64–24–1. Guests in motor vehicles—Right of action for damages for injury, death or loss. —No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.[1]

However, on September 23, 1975 this Court declared the guest statute unconstitutional on the grounds that it created an unreasonable classification and therefore was a denial of equal protection under U.S. Const. amend. XIV and N.M.Const. art. 2, § 18, as amended. *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975).

On November 17, 1975 Baldonado sued Navajo and Whedon; the third-party complaint against English was filed on December 29, 1975. The issue before the Court is whether the *McGeehan* decision should be applied to the Baldonado suit where the accident occurred before the decision but the action was not commenced until after the decision was rendered. *McGeehan* was given a modified prospectivity:

> 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.
>
> 88 N.M. at 314, 540 P.2d at 244.

Clearly, this suit was not "the case at bar" and neither was it a "similar pending action" since the complaint had not been filed prior to September 23, 1975. Section 21–1–1(3), N.M.S.A. 1953 (Repl.Vol. 4, 1970); *Brown v. Board of Education*, 81 N.M. 460, 468 P.2d 431 (Ct.App.1970). Therefore, we must determine if this is a case which arose in the future.

There are practical and policy considerations involved in applying a new decision which overrules an established precedent. In *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975) we overruled the doctrine of sovereign immunity but (after rehearing) gave the decision a prospective effect only because of the hardship retroactive application would cause in subjecting the state and local governments to liability when they had relied on the previous immunity doctrines. Other courts have handled the prospective-retroactive effect differently in sovereign immunity abolition cases.

The same is true in the cases wherein other courts have struck down the guest statutes. Each court has considered the application of its decision and each court has given effect to the decision in a different manner. See, *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974), which deci-

1. The portion of the statute relating to "operators" is void. *Gallegos v. Wallace*, 74 N.M. 760, 398 P.2d 982 (1965).

sion also used a modified-prospectivity rule; *Laakonen v. Eighth Judicial District Court*, 91 Nev. 506, 538 P.2d 574 (1975) and *Batesel v. Schultz*, 91 Nev. 553, 540 P.2d 100 (1975), which decision rendered the statute null and void and therefore, the decision operated retroactively; *Johnson v. Hassett*, 217 N.W.2d 771 (N.D.1974), which decision applied to case at bar and then only prospectively; *Primes v. Tyler*, 43 Ohio St.2d 195, 331 N.E.2d 723 (1975), no discussion of applicability of decision. See generally, Prospective or Retroactive Operation of Overruling Decision, 10 A.L.R.3d 1371 (1966).

The Kansas Supreme Court, in its decision which overruled the Kansas guest statute, did not provide for either a prospective or retroactive application. *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974). Thereafter it faced the issue in *Vaughn v. Murray*, 214 Kan. 456, 521 P.2d 262 (1974). In *Vaughn v. Murray*, the court carefully considered and discussed the effect of the *Henry v. Bauder* decision and applied that decision " . . . to all similar cases pending in the courts of this state [on the date of the *Henry v. Bauder* decision], and to cases filed thereafter regardless of when the causes of action accrued . . ." 214 Kan. at 467, 521 P.2d at 271. Although the Kansas court in *Vaughn v. Murray* dealt more explicitly with the point at which modified prospectivity would apply—i.e. when a case was filed rather than when the cause of action arose—than this court did in the *McGeehan* decision, nevertheless the intended result was the same.

Appellee English asks us to construe "all cases which may arise in the future" to mean "all causes of action which accrue in the future;" a "cause of action," meaning those acts which would give rise to a claim for injuries or damages, e.g. the accident which gives rise to a tort claim. Appellants, on the other hand, contend that this language means "all cases filed after the decision." This is the correct interpretation. We hold that in *McGeehan*, "cases which arise in the future" means civil actions in which the complaint is filed after September 23, 1975 and which are not barred by the applicable statute of limitation.

Since such confusion has resulted from the provision "cases which may arise in the future," we also feel compelled to explain the term "modified prospectivity." Although *McGeehan* applies to cases filed after the decision, we do not mean *McGeehan* to operate totally retroactively. Here again, we agree with the outcome in *Vaughn v. Murray*, supra, (although that court termed the application a "retroactive effect") and hold that *McGeehan* should not operate on cases in which a final judgment was rendered prior to September 23, 1975, where the same is free from reversible error under the law then applicable. If a case is reversed on appeal and a remand is necessary, then *McGeehan* will govern any subsequent proceeding.

■ Having found that *McGeehan* is applicable, we hold that Navajo and Whedon's claims for property damage and personal injury were properly joined.

Rule 14(a), N.M.R.Civ.P. [§ 21–1–1(14)(a), N.M.S.A. 1953 (Repl.Vol. 4, (1970)] states:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim* against him. . . . (Emphasis added.)

and Rule 18(a), N.M.R.Civ.P. [§ 21–1–1(18)(a), N.M.S.A. 1953 (Repl.Vol. 4, (1970)] states:

> The plaintiff in his complaint or in a reply setting forth a counterclaim and the *defendant in an answer* setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. . . . There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied. (Emphasis added.)

Since the claims of Navajo and Whedon arise out of the same transaction, and the liability of Navajo, Whedon and English are dependent upon the same operative facts, the joinder was proper.

The decision of the Court of Appeals is reversed. The cause is remanded to the district court for proceedings consistent with this opinion.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

SOSA, J., respectfully dissents, and agrees with the Court of Appeals' opinion herein.

562 P.2d 829

STATE of New Mexico ex rel. PROPERTY APPRAISAL DEPARTMENT, Plaintiff-Appellee,

v.

SIERRA LIFE INSURANCE COMPANY, Peter Chalamidas and Elizabeth Chalamidas, Defendants-Appellants,

and

Western Skies Corporation and American Title Insurance Company, Intervenors-Appellants.

Nos. 10393, 11004, 10957 and 10966.

Supreme Court of New Mexico.

March 30, 1977.

Rehearing Denied April 15, 1977.

Standley, Quinn & Patterson, Fred M. Standley, Santa Fe, for Sierra Life.

Robert J. Maguire, Earl E. Hartley, Albuquerque, for Chalamidas.

Keleher & McLeod, John B. Tittmann, Charles A. Pharris, Albuquerque, for intervenors.

Toney Anaya, Atty. Gen., John C. Cook, Asst. Atty. Gen., Property Tax Dept., Santa Fe, for plaintiff-appellee.

Vance A. Mauney, Joe C. Diaz, Albuquerque, for County Assessor & Treasurer.

OPINION

PAYNE, Justice.

This appeal involves the determination of the property tax liability of the appellants, Chalamidas and the Sierra Life Insurance Company, for the years 1971–1973.

The property that is subject to taxation in this proceeding is a 17.684 acre tract of land known as the Western Skies property. In 1967, 5.56 acres of the property was erroneously assessed to a Mr. W. T. Kelly. Mr. Kelly never owned any interest in the property and informed both the County Treasurer and the County Assessor of the error. The Assessor corrected the error but the County Treasurer's office failed to correct its records and failed to show payment of the 1967 taxes. On August 16, 1971, the Treasurer executed and delivered to the State of New Mexico a tax deed for the erroneously assessed 5.56 acres. This error was compounded when the entire 17.684 acres of the Western Skies property appeared on the official 1971 tax roll of Bernalillo County as property of the State of New Mexico. On June 14th of the same year Sierra, the first of the appellants to own the property, sold it to Chalamidas.

During 1972 and through June 16, 1973, the property continued to be carried on the official tax rolls as the property of the State of New Mexico. The property was not declared and no taxes were assessed or paid. Early in 1973, a title search was conducted as part of a proposed sale of the property and the errors were discovered. These discrepancies were brought to the attention of the State Attorney General by the appellants, and on June 21, 1973, the State deeded the 5.56 acre tract to Chalamidas.

The complaint in this action was filed on September 7, 1973, by the Property Appraisal Department which was represented by the Attorney General. It sought to collect any delinquent taxes and correct assessment errors pursuant to § 72–7–26 [1] and § 72–7–27 [2] N.M.S.A.1953. A stipulated judgment was entered the same day ordering the appellants to pay delinquent taxes in the amount of $530.60. The judgment further decreed that the State of New Mexico had no interest in the subject property and that the ad valorem taxes on the property were current through June 21, 1973, except for the $530.60. There was no appeal from this judgment.

Approximately fourteen months later the district court reopened the case on its own motion. The Property Appraisal Department (this time represented by a court-designated attorney and a deputy attorney general) was allowed to file a motion to vacate and set aside the judgment that had been previously entered. This motion was

1. Ch. 154, § 1, [1957] N.M. Laws 240 (Repealed as of January 1, 1975).

2. Ch. 6, § 2, [1929 (S. S.)] N.M. Laws 14 (Repealed as of January 1, 1975).

made under N.M.R.Civ.P. 60(b)(4) and (6),[3] asserting that the judgment was void and that justice required relief. The district court set the judgment aside on two grounds: (1) lack of indispensable parties (the County Assessor and the County Treasurer), and (2) lack of jurisdiction by the district court to cancel or forgive ad valorem taxes. On October 1, 1975 the court entered its order joining as parties plaintiff the Bernalillo County Assessor and the Bernalillo County Treasurer. Western Skies Corporation, which had purchased the property from Chalamidas in 1974, and the American Title Insurance Company, which had issued a title policy acting in reliance on the earlier judgment, were allowed to intervene. At the trial on the merits, Chalamidas and Sierra were found liable for payment of taxes in the amounts of $139,023.26 and $79,217.50 respectively. Appellants assert that the original decree entered on September 7, 1973, was valid and that the trial court erred in setting it aside.

Under the statutes as they existed in 1973, the State Tax Commission (now known as the Property Appraisal Department) had authority to: (A) "* * * exercise general supervision over the administration of the assessment and tax laws of the state, over boards of equalization and all officers having power of levy and assessment, * * *." § 72–6–12(1), N.M.S.A. 1953[4], (B) "Advise and assist the attorney general and the district attorneys in the commencement and prosecution of actions and proceedings in respect to the assessment of property and the collection of taxes * * *.", § 72–6–12(3), N.M.S.A.1953[5], (C) file a petition in the district court for the county in which erroneous assessments have been made, "* * * praying for a correction thereof * * *.", § 72–7–27, N.M.S.A.1953, and (D) file petitions in district court seeking to void any double assessments or to make corrections where "* * property has been erroneously described or assessed, * * *." § 72–7–28, N.M.S.A. 1953[6].

Nowhere do the statutes provide that the County Assessor or the County Treasurer must be made parties to effect the corrections of errors and assessments, or in assessing property that has been omitted from the tax rolls, or in collecting back taxes that might have accrued through errors or inadvertence in the assessment or taxing procedures. To the contrary, the State Tax Commission had full authority to take the necessary steps in representing the State of New Mexico as well as any county authorities that would be affected. The Assessor and the Treasurer were not, therefore, indispensable parties to the relief sought in the original lawsuit brought by the Property Appraisal Department through the Attorney General of the State of New Mexico.

The statutes of the State of New Mexico as they existed in 1973 gave the district court the power to: (A) "* * * order the correction of errors or inequalities in any assessment, or levy appearing upon any tax roll, * * *." § 72–7–26, N.M.S.A. 1953, (B) make orders canceling erroneous assessments and canceling any tax liens or tax sale certificates that may have been issued against property and "* * * authorize and empower the treasurer to reassess the property correctly * * *." § 72–7–28, N.M.S.A.1953, and (C) "* * * order the state tax commission to reassess the property so erroneously assessed * * *." § 72–7–27, N.M.S.A.1953.

Taxes were not forgiven nor cancelled by the court in the original order entered in this matter. Because of the errors there had been no assessments made nor taxes charged to the property. The original decree of the district court was not to cancel or forgive taxes, but to correct assessment errors, order reassessment and to enforce the payment of delinquent taxes in the amount of $530.60.

3. § 21–1–1(60)(b)(4) and (6), N.M.S.A.1953.

4. Ch. 208, § 6, [1947] N.M. Laws 467 (Repealed as of January 1, 1975).

5. Id.

6. Ch. 125, § 2, [1935] N.M. Laws 307 (Repealed as of January 1, 1975).

The evidentiary presentation at the rehearing, after the original order had been set aside, indicated that the subject property should have been assessed at a higher rate and should have been subject to a much higher ad valorem taxation than $530.60. In the original proceedings the Property Appraisal Department had been represented by the Attorney General, who entered into the negotiations with the property owners and Bernalillo County. The original judgment was stipulated and agreed to at that time. The Attorney General had the authority to compromise the claims and enter into the settlement in behalf of the Property Appraisal Department. Section 17–1–15, N.M.S.A.1953, reads as follows:

> The attorney general * * * when any civil proceedings may be pending in * * * the district court, in which the state or any county may be a party, * * shall have power to compromise or settle said suit or proceedings, or grant a release or enter satisfaction in whole or in part, of any claim or judgment in the name of the state or county, or dismiss the same, or take any other steps or proceedings therein which to him may appear proper and right; and all such civil suits and proceedings shall be entirely under the management and control of the said attorney general * * * and all compromises, releases and satisfactions heretofore made or entered into by said officers are hereby confirmed and ratified.

This court has also held that when acting in accordance with his statutory responsibilities, the Attorney General's acts must be affirmed. *Lyle v. Luna,* 65 N.M. 429, 338 P.2d 1060 (1959), *State v. State Inv. Co., et al.,* 30 N.M. 491, 239 P. 741 (1925). Absent a showing of fraud or misdealing, it is not for the courts to second-guess the Attorney General in the exercise of his authority in compromising this matter. *State v. State Inv. Co. et al.,* supra. No fraud or misdealing was proved.

The district court correctly held that a property owner has an affirmative duty to declare his property pursuant to § 72–2–1 [7] and § 72–2–10.1 [8], N.M.S.A., and that appellants had failed in that duty. The failure of the property owner to declare the property as required by statute, however, could have been raised by the Property Appraisal Department at the original proceeding. The Property Appraisal Department was a party and the named plaintiff in the original proceeding. Any omissions or failures of the Property Appraisal Department to assert claims in the original proceedings are not now grounds for setting aside the judgment. *Miller v. Miller,* 83 N.M. 230, 490 P.2d 672 (1971), *Ealy v. McGahen,* 37 N.M. 246, 21 P.2d 84 (1933).

After the original proceeding the appellees delayed in trying to remedy or rectify the inconsistencies they now claim in that proceeding. A delay in excess of sixteen months, from the time the original decree was entered until the motion to vacate was filed, is a delay beyond the time that is reasonable for setting aside the judgment in this case.

We reverse the decision of the trial court and remand the case with instructions to reinstate the original judgment entered herein.

IT IS SO ORDERED.

EASLEY, J., and RICHARD B. TRAUB, District Judge, sitting by designation, concur.

7. Ch. 107, § 2, [1933] N.M. Laws 205 (Repealed as of January 1, 1975).

8. Ch. 328, § 1, [1959] N.M. Laws 1012 (Repealed as of January 1, 1975).

562 P.2d 833

Patrick M. HAYDEN, Plaintiff-Appellant,

v.

Reverend Charles LEE, Kenneth Benally, Samuel Harrison, Phillip Foutz and Jack Cline, Members of the School Board for Central Consolidated Schools, Independent District No. 22, Defendants-Appellees.

No. 10790.

Supreme Court of New Mexico.

April 11, 1977.

Jones, Gallegos, Snead & Wertheim, Jerry Wertheim, Steven L. Tucker, Santa Fe, for plaintiff-appellant.

Caton & Hynes, Byron Caton, Farmington, for defendants-appellees.

OPINION

SOSA, Justice.

Plaintiff Patrick Hayden [Hayden] brought suit against defendant members of the Central Consolidated Schools, Independent District No. 22 School Board [Board] to obtain damages and equitable relief for violation of his civil rights. The trial court found for the defendants. Plaintiff appeals.

Hayden, who had become tenured as an instructor, was later employed as an elementary school principal in Shiprock, New Mexico, by the Central Consolidated School, Independent School District No. 22 for several years up to and including the 1971–1972 school year. On February 12, 1972, the Board refused to renew Hayden's contract as principal for the 1972–1973 school year, but it did offer him a position as an instructor. Hayden received notice of this action on February 17, 1972. He accepted the teaching position in the school district on May 8, 1972.

During this period Rule 2–B of the New Mexico State Department of Education was in effect, and it stated in part:

> REGULATIONS OF THE STATE BOARD OF EDUCATION FOR THE TERMINATION OF *NON–TENURE TEACHERS* AT THE END OF THE SCHOOL YEAR FOR UNSATISFACTORY WORK PERFORMANCE
>
> . . . . .
>
> (1) Three (3) conferences shall be held with *non-tenure personnel* prior to service of notice of termination upon them for unsatisfactory work performance at the end of the school year (emphasis added).

Hayden argued at trial, and now upon appeal, that he was entitled to the protection of the procedures prescribed by Rule 2–B, including the conferences and written records thereof prior to being terminated for

unsatisfactory work performance. The trial court found that (1) Hayden came within the classification of certified non-tenure personnel, (2) that the reason Hayden was not rehired as principal was for unsatisfactory work performance, and (3) that Rule 2–B was not applicable to Hayden, and, therefore, the three conferences required by Rule 2–B were not held. However, the trial court held that Rule 2–B did not apply to Hayden because Hayden ". . . was not discharged during the term of an existing contract but was terminated at the expiration of the contract," and thus he ". . . was not entitled to the protections of Rule 2–B . . . ."

The issue is whether Rule 2–B applies to administrators such as Hayden. We hold that it does not. First, the title of Rule 2–B refers to "non-tenure teachers." Second, in paragraph (1) of Rule 2–B, "non-tenure personnel" can only apply to instructors, since administrators are neither tenured nor non-tenured. Third, the authorizing statute only refers to terminated instructors. Section 77–8–18, N.M.S.A.1953.[1] The discharged personnel section of the statute is not applicable here. Since Rule 2–B is not applicable to Hayden as administrator, he was properly terminated. Cf. *Black v. Board of Ed. of Jemez Mountain Sch. D. No. 53*, 87 N.M. 45, 529 P.2d 271 (1974); *Quintana v. State Board of Education*, 81 N.M. 671, 472 P.2d 385 (Ct.App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

The trial court is affirmed.

EASLEY and PAYNE, JJ., concur.

[redacted]

562 P.2d 834

Robert ARCHULETA, Plaintiff-Appellant,

v.

Carl KOPP, Defendant-Appellee.

No. 2611.

Court of Appeals of New Mexico.

Feb. 1, 1977.

Rehearing Denied Feb. 14, 1977.

Certiorari Quashed April 12, 1977.

[redacted]

1. *Supervision and correction procedures.*—The state board shall, by regulations, prescribe procedures to be followed by a local school board in supervising and correcting unsatisfactory work performance of certified school instructors with tenure rights before notice of termination is served upon them and of certified school personnel before notice of discharge is served upon them. These regulations shall provide that written records shall be kept on all action taken by a local school board to improve any person's unsatisfactory work performance and all improvements made in the person's work performance. These written records shall be introduced as evidence at any hearing for the person conducted by the local school board.

William E. Snead, Ortega, Snead & Dixon, Albuquerque, for plaintiff-appellant.

Jacob Carian, Robert W. Casey, Albuquerque, for defendant-appellee.

OPINION

LOPEZ, Judge.

Plaintiff, Robert Archuleta, originally sued in magistrate court for damages resulting from the use of a defective fireplace in a house which was purchased from the defendant. Archuleta tried the case *pro se* and won. On trial *de novo* in district court, judgment went against Archuleta. The plaintiff now appeals the adverse judgment entered by the district court sitting without a jury. We reverse and remand.

The issue is whether the defendant is liable under a theory of innocent misrepresentation, which is also known as constructive fraud.

The trial court made eighteen findings of fact which we shall summarize. The house in question was listed for sale in the multiple listing service of the Albuquerque Board of Realty and offered to the public. This listing included a picture and description of the premises. Next to a description on the printed listing form which read "WB/FP," the word "Den" was typed. Next to "remarks," the words "Large den with stone FP" were typed. The defendant and his agents made no representations other than the aforementioned listing. Nonetheless the court concluded the plaintiff had not relied on defendant's representation that there was a functioning woodburning fireplace in the house, but purchased "as is." In fact the fireplace was a fire hazard

and was totally inoperative, unuseable and defective because the chimney was not of a sufficient height, there was no smoke shelf, no damper, the flue liner was too small in proportion to the opening of the fireplace, and the firebox was not made of the proper materials. The court went on to conclude as a matter of law that the plaintiff failed to establish proof of fraudulent, intentional misrepresentation or negligent misrepresentation.

Plaintiff also submitted proposed findings, which fairly stated the issue of innocent misrepresentation. The evidence is undisputed that the plaintiff is blind. When he purchased the house, the plaintiff examined the fireplace by sense of touch. As a result of the defects in the fireplace, when plaintiff lit a fire therein the house sustained smoke damage in the amount of $988.00. In order to correct the defects, it is necessary that the fireplace be reconstructed entirely at a cost of $1,258.00.

First, defendant contends that the plaintiff failed to challenge finding No. 18 which reads:

> "That pursuant to paragraph 2 of the purchase agreement, Plaintiff represented that he examined said premises and purchased same 'as is' and not because of any representations by the sellers or agents."

The defendant makes this point because he says that under any theory of misrepresentation there must be justifiable reliance by the plaintiff. Plaintiff's brief did challenge finding No. 17 which reads:

> "That the Plaintiff at no time relied upon any representations of the Defendant Kopp or his agents as to the fireplace in purchasing the house."

We do not believe that 17 and 18 are so inconsistent as to conclude that there was no proper challenge to the court's finding of no reliance upon the defendant's representations. The representations were material because they affected the value or desirability of the property. Moreover, plaintiff's requested findings in pertinent part stated:

> "13. Plaintiff purchased the house in question relying upon the representation that the house contained a wood-burning fireplace;
>
> "14. The representation that the house contained a wood-burning fireplace implied that the fireplace was in working order and was an operable wood-burning fireplace. Plaintiff's reliance upon the representation made in the multiple listing service that the house contained a wood-burning fireplace was a reasonable reliance under the circumstances;"

The district court's finding that plaintiff's purchase was not made in reliance upon defendant's false representation is not supported by substantial evidence. No evidence was introduced to contradict plaintiff's testimony that he did rely because he was in the market for a three bedroom house with a woodburning fireplace. Plaintiff did not purchase the house "as is." Plaintiff was induced to purchase the house by representations that it was otherwise. An "as is" clause cannot preclude recovery where the seller actively misrepresents the condition of the property. *Lingsch v. Savage,* 213 Cal.App.2d 729, 29 Cal.Rptr. 201, 8 A.L.R.3d 537 (1963). See also *Maxey v. Quintana,* 84 N.M. 38, 499 P.2d 356 (Ct.App.1972); Prosser, *Strict Liability to the Consumer,* 18 Hast.L.J. 9, 46 (1966).

We believe that there was a duty on the part of the defendant to disclose the condition of the fireplace to the realtors or to the plaintiffs. Two previous tenants of the house testified that they notified the defendant of the utterly worthless condition of the fireplace, but the defendant remembered nothing about these conversations. The defendant did testify that he knew the fireplace had been added to the house after its original construction. In sum, we read conflicting evidence in the record with respect to the actual knowledge by the defendant of the condition of the fireplace. We follow *Everett v. Gilliland,* 47 N.M. 269, 141 P.2d 326 (1943). That case says:

> "[I]f one party to a contract . . . has superior knowledge, or knowledge which is not within the fair and reasona-

ble reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak, and his silence constitutes fraud, especially when the other party relies upon him to communicate to him the true state of facts to enable him to judge . . . the expediency of the bargain."

Everett also says:

"Generally speaking, however, in the conduct of various transactions between persons involving business dealings, commercial negotiations, or other relationships relating to property, contracts, and miscellaneous rights, there are times and occasions when the law imposes upon a party a duty to speak rather than to remain silent in respect to certain facts within his knowledge and thus to disclose information, in order that the party with whom he is dealing may be placed on an equal footing with him."

See *Payton v. Krupiak*, (Ct.App.) No. 2537, decided December 7, 1976.

Even if there was no duty to speak, or if the defendant knew nothing, about the condition of the fireplace, the case for misrepresentation is much stronger when there is an actual representation. When the defendant speaks, liability arises in such a case because there is a duty, if one speaks at all, to give reliable information. "Once the duty to render accurate information is recognized, it seems obvious that an action for innocent misrepresentation is best suited to this situation." Green, *The Communicative Torts*, 54 Tex.L.Rev. 1, 21 (1975).

On appeal, the plaintiff asserts the district court should have concluded, or had no choice but to conclude as a matter of law, that there was liability on the part of the defendant based upon a theory of innocent misrepresentation or constructive fraud. We agree.

The defendant contends that there is no such thing as innocent misrepresentation or constructive fraud in the State of New Mexico. This clearly is not the law. *Snell v. Cornehl*, 81 N.M. 248, 466 P.2d 94 (1970) and *Barber's Super Markets, Inc. v. Stryker*, 84 N.M. 181, 500 P.2d 1304 (Ct. App.1972), stand for the proposition that constructive fraud is a breach of a legal or equitable duty, irrespective of the moral guilt of the fraud-feasor. It is not necessary to prove dishonesty of purpose nor intent to deceive to maintain a cause of action for constructive fraud. This has been the law in New Mexico since 1853, when the New Mexico Supreme Court, stated:

". . . acts contrary to public policy, to sound morals, to the provisions of a statute, etc., *however honest the intention with which they may have been performed*, are deemed *constructive frauds*, or *frauds in law*, and are absolutely void." *Leitensdorfer v. Webb*, 1 N.M. (Gild.) 34, 53 (1853), affirmed 61 U.S. (20 How.) 176, 15 L.Ed. 891 (1858).

Judge Sutin, in *Barber's Super Markets*, elaborated on constructive fraud:

"Generally speaking, constructive fraud is a breach of a legal or equitable duty which the law declares fraudulent because of its tendency to deceive others." 84 N.M. at 186, 500 P.2d at 1309.

There is no doubt that the listing with the Albuquerque Board of Realty tended to deceive the public in general and the plaintiff in particular.

The district court considered the facts under the theory of intentional fraud, see *Prudential Insurance Co. v. Anaya*, 78 N.M. 101, 428 P.2d 640 (1967), and under the theory of negligent misrepresentation, see *Maxey v. Quintana*, supra, and *Neff v. Bud Lewis Company*, 89 N.M. 145, 548 P.2d 107, (Ct.App.), decided March 18, 1976. We are not convinced that there is substantial evidence to support these findings, but we will resolve any conflict in their favor.

The court did not consider whether liability existed under the theory of innocent misrepresentation or constructive fraud. We believe that under *Barber's Super Markets* and *Snell* the court should have concluded as a matter of law that liability on the part of the defendant existed.

Therefore we reverse the judgment of the district court and order it to enter a new judgment finding liability upon innocent misrepresentation or constructive fraud. The case is to be retried to determine damages and costs only. See *Aragon v. Boyd*, 80 N.M. 14, 450 P.2d 614 (1969).

IT IS SO ORDERED.

SUTIN and HERNANDEZ, JJ., specially concur.

SUTIN, Judge (specially concurring).

I concur in the result.

Plaintiff sued defendant in the magistrate court for "BREACH OF CONTRACT (faulty fireplace—plaintiff bought home with the idea that the fireplace was in working condition)." Defendant denied there was a breach of contract.

On December 29, 1973, plaintiff purchased a home from defendant under a printed real estate contract. Paragraph 2 provides:

> Purchaser(s) declare that they are buying said property upon their own examination and judgment *and not by reason of any representation made to Purchaser(s) by the Seller(s)*, or agent for Seller(s), as to its *condition*, size, location, value, future value, income therefrom or as to its production. *Purchaser(s) further accept property in "as is" condition including, but not limited to, roof, plumbing, electrical and all mechanical equipment.* [Emphasis added]

In the magistrate court, it appears that defendant, represented by attorneys, filed a memorandum brief on the "as is" provision of the contract.

Plaintiff recovered judgment and costs in the sum of $1,264.00. Defendant appealed to the district court. In the district court, plaintiff was represented by attorneys.

A. *Defendant made no representations.*

The fireplace was defective and caused damage to plaintiff's home. However, the trial court found that defendant did not make any representations regarding the fireplace. There was substantial evidence to support this finding. Furthermore, the "as is" provision of the contract waived any prior representation as well as any reliance thereon. *Montague v. Bank for Savings in City of New York*, 181 Misc. 863, 43 N.Y.S.2d 321 (1943); *Redner v. City of New York*, 53 Misc.2d 148, 278 N.Y.S.2d 51 (1967).

In *Montague*, the judge said:

> If the plaintiff's construction is to receive judicial recognition no vendor can ever protect himself against a false and fraudulent claim respecting a purported prior representation concerning the condition of the premises which are the subject of the sale and one can readily visualize the opening of a fertile field for the perpetration of fraud. [43 N.Y.S.2d at 326].

This concept of justice throws out of consideration any purported prior representation of defendant concerning the condition of the home purchased by plaintiff.

State v. Jones, 44 N.M. 623, 628, 107 P.2d 324, 327 (1940) quoted the following:

> "Isaac was blind, and there is an old adage that justice is blind. But justice is only blind in so far as it does not make any distinction between litigants, be they of high or low degree, rich or poor, Jew or Gentile. Justice cannot distinguish one from the other. However, in detecting fraud and deception justice should have the vision to discover them in their true nature no matter how well the design to deceive."

I agree. Courts would be blind indeed if they could not see an attempt by a purchaser of real estate to seek by deception, relief from an "as is" provision based on prior representations of defendant concerning the condition of the property.

B. *The "as is" provision did not bar plaintiff's claim for relief.*

Plaintiff is a blind young man who was a student at the University of New Mexico. Alice Enyart was the real estate saleslady acting on behalf of the broker with whom defendant listed the property for sale. On

cross-examination, plaintiff testified that Alice read the contract to him in its entirety. This included paragraph 2 which contains the "as is" provision.

Q. You, therefore, understood that you were buying the property as is?

A. No, not as is, well as is per se.

Defendant did not ask plaintiff what he meant by his answer. To me, it means that plaintiff did *not* understand that he was buying the property "as is," as those words are commonly understood when taken alone. Neither did defendant produce Alice to controvert the testimony of plaintiff. The court found:

> 18. That pursuant to paragraph 2 of the purchase agreement, Plaintiff represented that he examined said premises and purchased same "as is" and not because of any representations by the sellers or agents.

Plaintiff did represent that he examined the premises, but the examination of the fireplace by a blind person who had no knowledge of the hidden defects was a useless gesture. Plaintiff did not purchase the property because of any representations by defendant or Alice. But, in my opinion, he did *not* purchase the property "as is," as those words are defined in cases which involve real property.

"Common-sense justice is, of course, the most desirable objective inherent in the application of any legal concept; and where the application of a legal concept so clearly results in injustice, it is incumbent upon the courts to examine the concept and its applicability most carefully." *DeNike v. Mowery*, 69 Wash.2d 357, 366, 418 P.2d 1010, 1017 (1966).

The "as is" provision in a real estate contract, *involving the purchase of a home*, seems to be a matter of first impression in the United States. *Lingsch v. Savage*, 213 Cal.App.2d 729, 29 Cal.Rptr. 201, 8 A.L.R.3d 537 (1963) involved an action against a real estate broker. In the course of its opinion, the court discussed an "as is" provision in a real estate contract. The court said:

> We are of the opinion that, generally speaking, *such a provision means that the buyer takes the property in the condition visible to or observable by him.* [Emphasis added] [29 Cal.Rptr. at 209].

Under this interpretation, as applicable to the purchase of a home, the "as is" provision in the real estate contract did not affect plaintiff's claim for damages for a defective fireplace.

Redner, supra, says:

> The purpose of the "as is" clause is to negate the existence any representations by the seller as to the particular condition, fitness and type of construction of the premises sold. *It merely means that the purchaser must take that for which he bargained, reasonable use, wear, tear and natural deterioration excepted.* (*Montague v. Bank for Sav.*, 181 Misc. 863, 43 N.Y.S.2d 321.) [278 N.Y.S.2d at 54].

Under this interpretation, plaintiff is protected.

Montague, supra, involved an action to rescind a contract for the purchase and sale of a building because it was not fireproof. The contract provided that the plaintiff purchased the building, " 'as is' and would accept it in its present condition". The judge who wrote the opinion stated that there was no basis for recision because the "as is" provision "waived, if it did not entirely destroy, any prior representation as to the condition of the building, and, as well, any prior reliance thereon." [43 N.Y. S.2d at 325]. But the judge found that the plaintiff read and understood the terms of the contract, voiced no objection to the "as is" provision, and knew that the building was not fireproof.

The California and New York interpretation of the "as is" provision in a real estate contract is fair under principles of justice that prevail in business transactions. One who sells real estate should not profit by insertion of an "as is" clause to protect himself from hidden defects that cause damage to the purchaser.

"A very wise judge and preceptor gave this advice: 'If you are in doubt, take a short cut to justice.' " *Russell v. Thielen*, 82 So.2d 143, 146 (Fla.1955).

I shall follow this advice. Plaintiff, a blind young man, listened to a woman read a long, involved real estate contract. There was no discussion as to its contents. A fireplace was not mentioned nor discussed. It was not observable to him. He could not determine whether it was defective without expert advice. He did not clearly understand the meaning of the "as is" provision. The purpose of the provision is to protect the defendant "against a false and fraudulent claim respecting a purported prior representation concerning the condition of the premises . . . ." [43 N.Y.S.2d at 326]. Plaintiff does not seek to perpetrate a fraud on defendant. He accepted the property in an "as is" condition, reasonable use, wear, tear and natural deterioration excepted.

The "as is" provision of the real estate contract did not bar plaintiff's claim for relief.

HERNANDEZ, Judge (specially concurring).

In my opinion the listing made by the defendant that there was a wood burning fireplace in the den when there was not constituted constructive fraud. Constructive fraud is the breach of a legal or equitable duty which the law declares fraudulent because of its tendency to deceive others. It may consist of not speaking when one has a duty to speak as well as saying that which is false. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud. *Scudder v. Hart*, 45 N.M. 76, 110 P.2d 536 (1941); *Barber's Super Markets, Inc. v. Stryker*, 84 N.M. 181, 500 P.2d 1304 (Ct.App.1972), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972). That is, ignorance is not a defense; a party is bound to know whereof he speaks or remain silent. This could also be classified as negligent misrepresentation. See *Maxey v. Quintana*, 84 N.M. 38, 499 P.2d 356 (Ct. App.1972), cert. denied, *Jack Daily Realty, Inc. v. Maxey*, 84 N.M. 37, 499 P.2d 355 (1972).

The decisive findings made by the trial court were Nos. 6 and 10:

"6. Said listing included a picture of the premises and also a description of the premises, among which was the following description printed on the listing form, to-wit: 'WB/FP' after which the word 'Den' was typed (Finding 6, Id).

"10. The fireplace was defective in that the chimney was not of sufficient height, there was no smoke shelf, there was no damper, and the firebox was not made of proper materials (Finding 11, Id)."

These two findings render findings 11, 12, 13, and part of 14 immaterial:

"11. The Defendant Kopp had no more expertise in the condition of the fireplace or the construction and function of the fireplace than the plaintiff, his wife, or his representative (Finding 13, Tr. 66, Challenged Point I).

"12. Defendant Kopp had no knowledge or information of the defects in the fireplace until after the sale to the plaintiff (Finding 14, Tr. 66, Challenged Point I).

"13. The plaintiff or his wife at no time prior to signing the purchase agreement or closing had any conversation with the Defendant Kopp (Finding 15, Tr. 67, Challenged Point I).

"14. At no time did the Defendant Kopp or his agents make any representations to the plaintiff or his wife or agents regarding the fireplace . . . ."

Finding 15 is plainly not warranted by any reasonable view of the evidence:

"15. The plaintiff at no time relied upon any representations of the Defendant Kopp or his agents as to the fireplace in purchasing the home (Finding 17, Tr. 67, Challenged Point I)."

We are not bound by the conclusions or inferences that a trial court draws from the facts.

Finding No. 18 made by the trial court reads as follows:

"18. That pursuant to paragraph 2 of the purchase agreement, plaintiff represented that he examined said premises and purchased same 'as is' and not be-

cause of any representations by the sellers or agents."

Although purportedly a finding of fact, this constitutes a conclusion of law, in my opinion. The construction and meaning of a written contract is a question of law to be determined by the court. *Neher v. Viviani*, 15 N.M. 460, 110 P. 695 (1910). The trial court obviously construed this part of the contract to mean that the plaintiff was purchasing the property in the condition shown and that he was trusting to his own examination. To adopt such an interpretation in circumstances such as these would be to allow sellers to perpetrate all sorts of fraud and constructive fraud on unsuspecting buyers. A more reasonable interpretation under these circumstances and one with which I am in complete agreement, was given in *Lingsch v. Savage*, 213 Cal. App.2d 729, 29 Cal.Rptr. 201, 8 A.L.R.3d 537 (1963): "such a provision means that the buyer takes the property in the condition visible to or observable by him." The major defects in the construction of the fireplace would not have been visible to plaintiff even if he could see.

562 P.2d 841

STATE of New Mexico, Plaintiff-Appellee,

v.

James Benny BACA, Defendant-Appellant.

No. 2756.

Court of Appeals of New Mexico.

March 22, 1977.

Lynn Pickard, Pickard & Singleton, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Dennis P. Murphy, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant, on a plea of guilty, was given a one to five year suspended sentence on April 11, 1974 on the following conditions: (1) that he not violate any law or ordinance during the period of his probation; (2) that he enroll in and "* * * complete treatment to the satisfaction of the Surgeon General of the United States pursuant to the requirements of Title III, Narcotic Addict Rehabilitation Act of 1966 * * *." [See 42 U.S.C.A. 3401, et seq.]; (3) that if he leaves the program before treatment is

completed the sentence would be imposed. Defendant did not appeal this judgment and sentence. Defendant completed the treatment part of the program, and was discharged.

Subsequently, after notice and hearing, the trial court on June 17, 1975 revoked defendant's suspension on the grounds of a criminal conviction and sentenced defendant. Defendant did not appeal this revocation and sentencing.

On September 23, 1976 the trial court entered an order which reflected that at the June 17, 1975 hearing the state had been requested, but failed to prepare, an order for the purpose of correcting the April 11, 1974 order to include a provision for setting a term of probation pursuant to § 40A–29–17, N.M.S.A. 1953. The trial court then ordered that the April 11, 1974 sentence be corrected to provide for a three year probation period and that the order be entered "Nunc Pro Tunc June 17, 1975." It is this order that is appealed. We affirm.

Defendant contends that the April 11, 1974 sentence was a "* * * valid and definite sentence which suspended a term of imprisonment on condition * * *" and that the trial court "* * * was thereby rendered without jurisdiction to come back later, add a three year term of probation and subsequently revoke the probation so added." Defendant asserts that "[d]efendant was not specifically placed on probation. * * *" For the purposes of this opinion we assume but do not decide jurisdiction to entertain the appeal.

The April 11, 1974 order suspending the sentence provided in part:

> "1. That the defendant, Bennie Baca not violate any law of the United States, the State of New Mexico, or any State in the United States or the ordinances of any municipality thereof *during the period of his probation.*" (Emphasis ours)

However, the term of probation was not specified. Section 40A–29–17, N.M.S.A. 1953 (2d Repl. Vol. 6, 1972) states:

> "* * * *Placing defendant on probation.*—When a person has been convicted of a crime for which a sentence of imprisonment is authorized, and when the district court has deferred or suspended sentence, it shall order the defendant to be placed on probation for all or some portion of the period of deferment or suspension if the defendant is in need of supervision, guidance or direction that is feasible for the probation service to furnish; Provided, however, the total period of probation shall not exceed five [5] years."

What is the legal consequence of paragraph one of the court's order of April 11, 1974 which states "* * * during the period of his probation * * *" in light of § 40A–29–17, supra, which states that "* * * the total period of probation shall not exceed five [5] years"?

Defendant recognizes this issue and cites us to authority for the differing propositions that when no period is stated probation is for the maximum period set by statute (see *State v. Simpson,* 25 N.C.App. 176, 212 S.E.2d 566 (1975)) or when no period is stated, the probation is invalid and void (see *Laurie v. State,* 29 Md.App. 609, 349 A.2d 276 (1976)). But as defendant states neither of the cases state why either rule announced is selected or preferred.

Defendant argues that it appears from the orders and from the hearings, that "* * * everyone concerned intended that defendant's only sentence was to be that he should complete the drug program." We disagree because to so interpret the order would result in the omission of that part stating "* * * during the term of his probation." Defendant's argument would lead us to ascertain the trial court's intent. This we need not do. The answer is that when the trial court ordered "* * during the period of his probation * *" the statute mandated the full term for the reasons hereinafter stated.

We agree with the results reached in *State v. Simpson,* supra. We do so for specific reasons. Suspension or deferment of a sentence is not a matter of right but is an act of clemency. *State v. Serrano,* 76 N.M. 655, 417 P.2d 795 (1966). The broad

general purposes to be served by probation are education and rehabilitation. Probation assumes that the best interests of the public and the offender will be served. The conditions of probation are directed to that end. Probation assumes the offender can be rehabilitated without serving the suspended jail sentence. It is not meant to be painless. It has an inherent sting and the restrictions on the probationer's freedom are realistically punitive. *In Re Buehrer,* 50 N.J. 501, 236 A.2d 592 (1967).

Once the trial court determines that a defendant is a proper candidate for probation, it is limited by statute to the maximum period of five years. Given the foregoing we hold that when a defendant is placed on probation, without a fixed period being specified, then that period of probation is the maximum. We feel this is in accord with the purposes to be served by probation.

Accordingly, the trial court did not add to defendant's sentence as in *State v. Soria,* 82 N.M. 509, 484 P.2d 351 (Ct.App.1971). Instead it shortened defendant's probation. This is not prohibited. The trial court had jurisdiction to reduce the term of probation.

Affirmed.

IT IS SO ORDERED.

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

562 P.2d 843

David MARTINEZ, Plaintiff-Appellant,

v.

DRIVER MECHENBIER, INC., and Sentry Insurance Company, its insuror, Defendants-Appellees.

No. 2742.

Court of Appeals of New Mexico.

March 22, 1977.

Thomas E. Jones, Albuquerque, for plaintiff-appellant.

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

OPINION

SUTIN, Judge.

A hearing was held to determine whether plaintiff was entitled to workmen's compensation benefits arising out of defendants' claim that plaintiff falsified his employment application.

The trial court found that plaintiff knowingly and willfully made false representations as to his physical condition; that the employer relied upon the false representations, a substantial factor in hiring plaintiff; that a causal connection existed between the false representations and the injury claimed.

The trial court concluded that plaintiff was not entitled to workmen's compensation benefits and entered judgment that plaintiff's complaint be dismissed with prejudice. We affirm.

The findings were supported by substantial evidence.

This appeal is not meritorious because plaintiff did not comply with Rule 9(d), Rules of Appellate Procedure [§ 21–12–9(d), N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.)]. In pertinent part, it reads:

> The brief must set forth an attack on any finding in accordance with these rules or such finding shall be conclusive.

Plaintiff failed to attack any findings in his brief which were challenged. This is insufficient to raise an issue on appeal. *Perez v. Gallegos,* 87 N.M. 161, 530 P.2d 1155 (1974). However, denial of recovery of workmen's compensation benefits arising out of a falsified employment application is a matter of first impression. We must determine the factors essential to bar recovery in order to decide whether the trial court's findings meet the test.

The only case in New Mexico that approaches the problem is *Gray v. J. P. (Bum) Gibbins, Inc.,* 75 N.M. 584, 408 P.2d 506 (1965). Here, defendants contend that plaintiff's employment was fraudulently procured. The trial court found that (1) plaintiff did *not* knowingly or willfully make a false representation as to his physical condition, and (2) the employer did *not* rely upon the questionnaire as a condition of plaintiff's employment. Upon these findings, workmen's compensation benefits were awarded. The case was affirmed on appeal.

To bar recovery, three essential factors must be present: "(1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury." 1A Larson, Workmen's Compensation Law, § 47.53 (1973); *Federal Copper & Aluminum Company v. Dickey,* 493 S.W.2d 463 (Tenn.1973); *Cooper v. McDevitt & Street Company,* 260 S.C. 463, 196 S.E.2d 833 (1973); *City of Homestead, Dade County v. Watkins,* 285 So.2d 394 (Fla.1973); *Air Mod Corporation v. Newton,* 9 Storey 148, 59 Del. 148, 215 A.2d 434 (1965).

The trial court found each of these factors present.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

562 P.2d 1138

Robert BALDONADO, Plaintiff,

v.

NAVAJO FREIGHT LINES, INC., a New Mexico Corporation, and Robert A. Whedon, Defendants.

NAVAJO FREIGHT LINES, INC., and Robert A. Whedon, Third-Party Plaintiffs-Appellants,

v.

Ruth Ann English BALDONADO, Third-Party Defendant-Appellee.

No. 2553.

Court of Appeals of New Mexico.

Jan. 18, 1977.

John A. Myers, Coors, Singer & Broullire, Albuquerque, for appellants.

Charles B. Larrabee, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for appellee.

OPINION

SUTIN, Judge.

This appeal involves only the dismissal of a third-party complaint for two reasons: (1) The third-party complaint against the third-party defendant for contribution was barred by the New Mexico "guest statute" [§ 64–24–1, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 2)], and (2) the third-party complaint against third-party defendant for property damage and personal injury was not proper under Rules 14(a) and 18(a) of the Rules of Civil Procedure [§ 21–1–1(14)(a), 18(a), N.M.S.A. 1953 (Repl.Vol. 4)]. We affirm.

On October 30, 1974, an automobile-truck accident occurred in Gallup, New Mexico. The automobile was driven by Ruth Ann English. Robert Baldonado was a guest in this car. The truck was owned by Navajo Freight Lines and it was operated by Robert A. Whedon.

Baldonado sued Navajo and Whedon for personal injuries. Navajo and Whedon filed a third-party complaint against English. Navajo sued for contribution and property damage. Whedon sued for personal injuries.

The English motion to dismiss was granted.

A. *Navajo's claim for contribution was barred by the New Mexico "guest statute."*

Section 64–24–1, supra, reads:

> No person transported by the owner or operator of a motor vehicle as his guest . . . shall have a cause of action for damages against such owner or operator for injury . . . .

Under this statute, Baldonado had no claim for damages against English. English was immune from such suit. Therefore, the Joint Tortfeasors Act [§ 24–1–11, et seq., N.M.S.A. 1953 (Vol. 5)] protected English from a third-party complaint for contribution. *Rodgers v. Galindo,* 68 N.M. 215, 360 P.2d 400 (1961), overruled on other grounds, *Maestas v. Overton,* 87 N.M. 213, 531 P.2d 947 (1975).

Navajo and Whedon claim that this concept was abolished because the "guest statute" was declared unconstitutional on *September 23, 1975. McGeehan v. Bunch,* 88 N.M. 308, 540 P.2d 238 (1975). The Court said:

> 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 ac-*

tions and all cases which may arise in the future. [Emphasis added] [88 N.M. at 314, 540 P.2d at 244].

"*Purely prospective*" application means that the overruling decision shall *not* apply to the parties *in the case at bar.* A "*modified prospective*" application means a qualified application: (1) that the *McGeehan* decision shall apply to the case at bar, (2) all similar *pending actions,* and (3) *all cases which may arise in the future.*

We must determine if the case at bar is a "pending action" or a case which "may arise in the future." It is neither.

(1) This is not a "*pending action.*"

"A civil action is commenced by filing a complaint with the court." Section 21–1–1(3), N.M.S.A. 1953 (Repl.Vol. 4). "An action is to be regarded as pending from the time of its commencement until its final termination." 1 C.J.S. Actions § 142 (1936). Navajo's third-party complaint was not pending in court at the time of the *McGeehan* decision. *Brown v. Board of Education,* 81 N.M. 460, 468 P.2d 431 (Ct.App. 1970).

(2) *This is not a case that "may arise in the future."*

We are confronted with the meaning of the word "case," and the words "arise in the future." "The word 'case' in a legal sense, means 'suit.'" *State v. Reed,* 62 N.M. 147, 151, 306 P.2d 640, 642 (1957). The word "suit" is more general than the word "action" because it applies to equitable, criminal and legal proceedings. *In Re Sloan,* 5 N.M. 590, 25 P. 930 (1891).

Under Rule 3 of the Rules of Civil Procedure, supra, the words "civil action" are broad and used interchangeably with the words "civil case." See *Echols v. N. C. Ribble Company,* 85 N.M. 240, 511 P.2d 566 (Ct.App.1973).

A "cause of action" is not easily defined, but for purposes of this case, it means those facts which give rise to a right of action. 1 C.J.S. Actions § 8(c) (1936); 1 Am.Jur.2d Actions § 1 (1962). A cause of action accrues or arises when "there is an existing right to sue forthwith". *Reich v. Van Dyke,* 107 F.2d 682, 683 (3rd Cir. 1939). "Thus a cause of action arises when it springs up, originates, comes into being, becomes operative, presents itself." *Bergin v. Temple,* 111 Mont. 539, 111 P.2d 286, 289, 133 A.L.R. 1115 (1941).

What is meant by a case "which may arise in the future?" It does *not* mean a case "which may be filed in the future," or "which may be commenced in the future." If this were the intent of the court, it would have so stated. In *Vaughn v. Murray,* 214 Kan. 456, 521 P.2d 262 (1974), the court was confronted with *Henry v. Bauder,* 213 Kan. 751, 518 P.2d 362 (1974), pending in its court, which declared the Kansas "guest statute" unconstitutional without any provision for modified prospectivity. *Vaughn* concluded that *Henry* "be given retroactive application to all similar cases pending in the courts of [Kansas] on January 26, 1974, *and to cases filed thereafter regardless of when the causes of action accrued* . . ." [Emphasis added] [521 P.2d at 271]. If the emphasized language had appeared in *McGeehan,* English would not have the benefit of the "guest statute."

"A cause of action or *suit* arises, according to the universal rule in courts of both law and equity, *when and as soon as the party has a right to apply to the proper tribunal for relief* . . . ." [Emphasis added]. *Washington Sec. Co. v. State,* 9 Wash.2d 197, 114 P.2d 965, 967, 135 A.L.R. 1330 (1941).

In the instant case, the accident occurred on *October 30, 1974.* Navajo's causes of action arose at that time. Navajo's "case" arose at that time out of its right of action because a civil action could have commenced at that time. This date was long *before* the *McGeehan* opinion. Modified prospectivity therein granted English the benefit of the "guest statute."

The trial court properly barred the first count of Navajo's third-party complaint for contribution.

B. *Navajo's and Whedon's claims for property damage and personal in-*

jury were not proper under Rules 14(a) and 18(a).

Counts II and III of the third-party complaint were, respectively, independent claims of property damage to Navajo's truck and personal injuries to Whedon arising out of the same accident.

English moved to dismiss counts II and III on the ground that they did not state a claim for relief under Rule 14(a) of the Rules of Civil Procedure. The trial court sustained the motion to dismiss. We agree.

Rule 14(a) provides in part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him.* [Emphasis added].

This emphasized language does not include an *independent* action by Navajo and Whedon against a third party.

Rule 18(a) provides in part:

> . . . [T]he defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims . . . as he may have against an opposing party.

"Rules of Civil Procedure 14(a) and 18(a) limit third-party complaints to cases where there is a secondary liability against the third-party defendant arising out of the plaintiff's claim against the original defendant." *Hancock v. Berger,* 77 N.M. 321, 325, 422 P.2d 359, 362 (1967). Navajo's and Whedon's third-party claims against English are not based on plaintiff's claim against Navajo and Whedon, and counts II and III are improperly joined.

In Navajo's reply brief, it states:

> NAVAJO concedes that their Third Party Claims for property damage and personal injury depend upon the validity of their claim for contribution from ENGLISH and that if this Court finds that the Guest Statute applies to this case, then these claims are improperly joined.

We agree.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

LOPEZ, J., dissents.

LOPEZ, Judge (dissenting).

I dissent.

The plaintiff, Robert Baldonado, brought an action for personal injuries and property damage based on the negligence of the defendants, Navajo Freight Lines, Inc., and Robert A. Whedon. The defendants; then filed a third-party complaint against Ruth Ann English Baldonado. This third-party complaint, which sought contribution from a joint tortfeasor, was dismissed. The defendants appeal and I would reverse.

For reversal, the defendants present two points: (1) that the claim for contribution is not barred by the New Mexico guest statute; (2) that the claims for property damage and personal injuries were properly joined under Rule 18(a), N.M.R.Civ.P. [§ 21-1-1(18)(a), N.M.S.A.1953 (Repl. Vol. 4, 1970)].

Facts

Defendants' third-party complaint against Ruth Ann English Baldonado was contained in the answer to plaintiff's complaint. For clarity, we will refer to the third-party defendant as English. The third-party complaint reads as follows:

"COUNT ONE

> "2. The Third-Party Claimants have been sued in this cause by ROBERT BALDONADO . . . for injuries allegedly incurred as a result of an accident on the 30th day of October, 1974 . . . .
>
> "3. The accident alleged in the Complaint . . . was caused by Third-Party Defendant's negligent operation of her automobile.
>
> "4. If the Plaintiff, ROBERT BALDONADO, should recover anything under this Complaint against the Defendants and Third-Party Claimants, they should

have judgment over against the Third-Party Defendant for contribution.

* * * * * *

"COUNT TWO

"For its action against the Third-Party Defendant, Third-Party Claimant, NAVAJO FREIGHT LINES, INC., states:

"2. . . . the Third-Party Defendant negligently operated her vehicle causing it to collide with Defendant, NAVAJO FREIGHT LINES, INC.'s, vehicle.

"3. As a result of the collision described above, the Third-Party Claimant, NAVAJO FREIGHT LINES, INC., incurred the following items of damage:

"Repairs to its truck	$ 880.97
"Loss of use of its truck for eight days at $75.00 per day	$ 600.00
"Driver delay expense	$ 116.64
"TOTAL DAMAGE	$1,597.61

* * * * * *

"COUNT THREE

"For his claim against the Third-Party Defendant, Third-Party Claimant, ROBERT A. WHEDON, states:

"2. . . . the Third-Party Defendant negligently operated her vehicle causing it to collide with defendant, NAVAJO FREIGHT LINES, INC.'s vehicle which Third-Party Claimant, ROBERT A. WHEDON, was then operating.

"3. As a result of Third-Party Defendant's negligent operation of her vehicle, Third-Party Claimant, ROBERT A. WHEDON, sustained personal injuries.

"4. In the aforesaid collision, Third-Party Claimant, ROBERT A. WHEDON, sustained injuries necessitating medical treatment and expenses in the amount of $250.00 and suffered general damages in the additional sum of $2,500.00."

English did not file a responsive answer but filed a motion to dismiss, asserting that the New Mexico guest statute barred Baldonado's right to recovery for the negligent operation of the vehicle in which Baldonado was a passenger. Consequently, English asserted that the defendants' right to contribution from her was also barred. The motion to dismiss further asserted an improper joinder of claims. The court entered an order and judgment which accepted English's assertions.

On September 23, 1975, the Supreme Court of New Mexico decided *McGeehan v. Bunch,* 88 N.M. 308, 540 P.2d 238 (1975). *McGeehan* found that unreasonable classifications created by the New Mexico guest statute were an unconstitutional denial of equal protection.

The New Mexico guest statute at the time of the *McGeehan* case was § 64–24–1, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972) which reads:

> "Guests in motor vehicles—Right of action for damages for injury, death or loss.—No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or reckless disregard of the rights of others."

On November 17, 1975 Baldonado sued Navajo and Whedon. The defendants' third-party complaint was filed December 29, 1975.

Point I

Navajo's claim for contribution is not barred by the New Mexico guest statute.

The significant wording of *McGeehan* is:

> "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 third-party plaintiffs, Navajo and Whedon, argue that *McGeehan* applies to the *McGeehan* case itself, all cases pending at that time, and all cases filed after the decision. This gives the word "case" its ordinary meaning. I agree.

English argues that *McGeehan* applies only to causes of action which accrued after the decision. In other words, that it applies only to the *McGeehan* case and "causes of action" which arose afterwards. I disagree. If the court meant *McGeehan* to apply only to causes of action arising after the overruling decision, it would have used such wording.

I must also determine what the Supreme Court meant by "modified prospectivity." If the court had held that the overruling decision was to be given no retroactive effect, not even to the parties of the overruling case, such a holding would have left it quite clear that the overruling decision had no application to prior events where no litigation had commenced before the time of the overruling decision. If the court had held that the overruling decision was to be given such extensive retroactive effect as to authorize the overturning of prior final judgments, it would have been implicit that if no litigation in connection with prior events was pending, nonetheless the principles established in the overruling case would operate on such events.

But where, as in the *McGeehan* case, the court has held that the overruling decision will be applied retroactively to the parties to the overruling decision, and to other cases pending at the time the overruling case was decided, it is unclear to what extent the overruling decision should apply to prior events which were not the subject of litigation until after the overruling case was decided. When a court's decision is unclear, the application of a newly announced rule of law has engendered no little confusion and much commentary. See e. g., Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal,* 61 Va.L. Rev. 1557 (1975); Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling"* or *"Sunbursting,"* 51 Marq.L.Rev. 254 (1967–68).

The parties agree that the New Mexico Supreme Court has the power to deem a statute unconstitutional, applicable retrospectively or prospectively. *Great Northern Ry. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

This is a case of first impression in New Mexico and for guidance I look to other states. The Kansas Supreme Court declared the Kansas guest statute unconstitutional in *Henry v. Bauder,* 213 Kan. 751, 518 P.2d 362 (1974). In *Vaughn v. Murray,* 214 Kan. 456, 521 P.2d 262 (1974), the court considered the retroactive effect of the overruling decision. The court noted that the cases fall into four categories: (1) *purely prospective,* where the law declared will not apply even to the parties to the overruling case; (2) *limited retroactive,* where the law declared will govern the rights of the parties to the overruling case and apply prospectively in all other cases; (3) *general retroactive,* governing the rights of the parties to the overruling case and to all pending and future cases, unless further litigation is barred by the statute of limitations or jurisdictional rules of appellate procedure; and (4) *retroactive,* governing the rights of the parties to the overruling case, other cases pending when the overruling case was decided and all future cases, but limited so the new law will not govern the rights of the parties to cases terminated by a judgment or verdict before the overruling decision was announced. I find the reasoning of the Kansas Supreme Court compelling, and conclude that, by "modified prospectivity," the New Mexico Supreme Court meant categories (3) and (4) above.

English cites *Hicks v. State,* 88 N.M. 588, 544 P.2d 1153 (1975). That case was modified to apply purely prospectively; i. e., only to torts arising subsequent to the decision. The general rule is that unless there are special circumstances (such as reliance) which require the denial of retroactive application, an overruling decision will be given retroactive as well as prospective application. Currier, *Time and Change in Judge-Made Law: Prospective Overruling,* 51 Va.L.Rev. 201, 205 (1965); Note, *Limitation of Judicial Decisions to Prospective Operation,* 46 Iowa L.Rev. 600, 617 (1961). Although the traditional policy is in favor of giving unlimited retroactive effect to an

overruling decision, it is now recognized that a court has the power to go to the opposite extreme and overrule a case purely prospectively. *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); *State v. Jones,* 44 N.M. 623, 107 P.2d 324 (1940).

But *Hicks* is not relevant to this case. As stated by Currier in his excellent article, supra, the fault concept of tort liability has generally left little room for reliance. He states:

> "The history of Anglo-American tort law has been largely that of retroactive judicial expansion of tort liability, without concern for the tortfeasor's reliance, ever since the action on the case was first recognized—retroactively—by the fiat of the judges. . . . More important, the courts need not go as far to protect such reliance in this area as in the property field, because here reliance, such as it is, is at best only one-sided, and to protect it requires denial of equality to tort claimants. . . ." 51 Va.L.Rev. at 244 [Citation omitted].

Pure prospectivity has been especially appropriate in cases such as *Hicks,* where sovereign immunity was overruled, because of the high degree of reliance. The agencies losing immunity would have no opportunity to obtain insurance. *Molitor v. Kaneland Community Unit Dist.,* 18 Ill.2d 11, 163 N.E.2d 89 (1959); see also *Spanel v. Mounds View School Dist.,* 264 Minn. 279, 118 N.W.2d 795 (1962). In *Hicks,* stability and the right to rely on existing law seem to have controlled. See also *Gelpcke v. City of Dubuque,* 68 U.S. (1 Wall.) 175, 17 L.Ed. 520 (1863) (affecting property rights).

English also relies on two other cases. In *Thompson v. Hagan,* 96 Idaho 19, 523 P.2d 1365 (1974) the Supreme Court of Idaho refers to "modified prospectivity" as meaning that the newly announced law applies to the case which they decided and also "to all actions arising in the future." *Johnson v. Hassett,* 217 N.W.2d 771 (N.D.1974) states:

> "The decision in this case will govern this case and otherwise will be prospective only, applying to claims for relief accruing on and subsequent to the date of this opinion . . . ."

Because the wording of these cases is different from the wording in *McGeehan,* these cases are distinguishable.

I believe the Supreme Court of New Mexico intended *McGeehan* to apply to that case itself, to cases pending at that time of the decision, and cases or lawsuits filed subsequent to the ruling. This case was filed subsequent to the ruling of *McGeehan*; therefore the ruling applies to it. There is no reliance, as in *Hicks,* which would justify purely prospective application.

I hold that the court erred in determining that *McGeehan* did not apply to the instant case. The defense of the guest statute is not applicable and the defendants can implead English as a third-party defendant.

Point II

Navajo's and Whedon's claims for property damage and personal injury were properly joined under Rule 18(a), supra. In deciding this issue I must determine whether two rules are applicable. First, Rule 14(a) N.M.R.Civ.P., [§ 21–1–1(14)(a), N.M.S.A. 1953 (Repl. Vol. 4, 1970)]:

> "*Rule 14. Third-Party practice.*
>
> "(a) *When defendant may bring in third-party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than ten [10] days after he serves his original answer. . . ."

Also, I must decide whether Rule 18(a) is applicable:

> "*Rule 18. Joinder of claims and remedies.*
>
> "(a) *Joinder of claims.* The plaintiff in his complaint or in a reply setting forth a counterclaim and *the defendant in an an-*

swer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. . . . There may be a like joinder of . . . third-party claims if the requirements of Rule . . 14 respectively are satisfied." [Emphasis added].

Based on my decision that Count I of the third-party complaint stated a claim for contribution, I believe the court erred in dismissing Counts II and III of the third-party complaint. Under Rules 14(a) and 18(a) the defendants had a right to join English as a third-party defendant for these additional claims.

In 1966 the federal rules were amended to correct a split of authority. Some courts had read the rules restrictively. Although New Mexico did not amend its Rule 18, I read the rule in the permissive manner which permits joinder. Walden, Civil Procedure in New Mexico § 6c(3). This conclusion is necessary to effectuate the purpose of the rules of civil procedure; namely, to prevent multiple and circuitous actions, and prevent the possibility of inconsistent results. See e. g., *Prager v. Prager,* 80 N.M. 773, 461 P.2d 906 (1969).

The case of *Hancock v. Berger,* 77 N.M. 321, 422 P.2d 359 (1967) is not applicable. Therein, the Court held that joinder of an unrelated or independent claim was not void if objection to joinder came at the conclusion of the case. It did not consider whether additional, related claims can be joined in a third-party complaint once the third-party defendant has been properly impleaded under Rule 14(a). The claim which was to be joined in *Hancock* was unrelated to the plaintiff's action against the third-party plaintiff. In the instant case all the claims arise out of the same operative facts which gave rise to the original action; therefore, the claims are not unrelated and joinder is proper.

The district court having erred, I would reverse the summary judgment and would remand this case for proceedings consistent with my opinion.

562 P.2d 1145

STATE of New Mexico, Plaintiff-Appellee,

v.

John C. BAKER and Murphy Patrick Ford, Defendants-Appellants.

No. 2810.

Court of Appeals of New Mexico.

March 29, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, Douglas A. Barr, Asst. Appellate Defender, Santa Fe, for defendants-appellants.

Toney Anaya, Atty. Gen., Ernesto J. Romero, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

What is the proper sentence to be imposed upon an habitual offender convicted in one trial of multiple felonies after a prior felony conviction?

Defendants were convicted of false imprisonment, robbery and unlawful taking of a motor vehicle. Each offense was a felony. See § 40A-4-3, N.M.S.A. 1953 (2d Repl. Vol. 6), § 40A-16-2, N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1975) and § 64-9-4, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, Supp.1975). Each defendant had a prior felony conviction in New Mexico. The trial court enhanced each of the three convictions as a second felony. Defendants challenge the propriety of the enhanced sentences. The proper sentence issue has two parts: (1) whether each of the subsequent convictions could be enhanced and (2) manner of serving the sentences.

Section 40A-29-5, N.M.S.A.1953 (2d Repl. Vol. 6) states:

> "Any person who, after having been convicted within this state of a felony . . . commits any felony within this state not otherwise punishable by death or life imprisonment, shall be punished as follows:
>
> "A. Upon conviction of such second felony, if the subsequent felony is such

that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than half the longest term, nor more than twice the longest term prescribed upon a first conviction."

Enhancement of Each of the Subsequent Convictions

Defendants claim that it would be illogical to treat each of the three subsequent convictions as second felonies because two of the last three convictions are their third and fourth felony convictions. They do not assert, however, that the sentences for two of the last three convictions should be enhanced as third and fourth felony convictions. See Paragraphs B and C of § 40A–29–5, supra. Their contention is that their second, third and fourth felony convictions should be treated as one conviction for purposes of an enhanced sentence.

New Mexico decisions have considered multiple convictions in relation to an enhanced sentence under § 40A–29–5, supra. Where multiple convictions occur, and there are no prior felony convictions, none of the sentences are enhanced; rather the regular sentence is imposed for each of the convictions. In this situation there have been no *prior* convictions as required by § 40A–29–5, supra. *State v. Ellis*, 88 N.M. 90, 537 P.2d 698 (Ct.App.1975); see *French v. Cox*, 74 N.M. 593, 396 P.2d 423 (1964). Where there has been one prior conviction and a defendant is convicted of two subsequent felonies at one trial, the second felony conviction may not be utilized to enhance the sentence for the third felony. The reason is that under § 40A–29–5, supra, the second felony conviction is not a *prior* conviction. *State v. Martinez*, 89 N.M. 729, 557 P.2d 578 (Ct.App.1976). These decisions do not aid defendants because there is no issue as to prior convictions; there is only one prior conviction for each of the defendants.

There were five felony convictions charged in *State v. Sanchez*, 87 N.M. 256, 531 P.2d 1229 (Ct.App.1975). Defendant was convicted of the middle three felonies at the same time. *Sanchez* states that if the middle three felonies were for unrelated crimes, each could be counted as a separate conviction in habitual offender proceedings. If, however, the multiple convictions arose out of a unified course of events, the multiple convictions counted as one conviction in the habitual offender proceedings. In *Sanchez*, the middle three felonies were counted as one in the trial court; the enhanced sentence for defendant's fifth felony conviction was on the basis of a third felony under § 40A–29–5, supra. *Sanchez* is not applicable because it involved *prior* multiple convictions; this case involves subsequent multiple convictions.

The New Mexico decisions to which reference has been made do not provide the answer to the issue in this case; they do, however, answer the "logic" contention of defendants. Because the enhanced sentence provisions of § 40A–29–5, supra, require *prior* convictions, the number of convictions which may be utilized under § 40A–29–5, supra, will not necessarily equate with the total number of a defendant's felony convictions.

Defendants point out that § 40A–29–5(A), supra, is worded in the singular—conviction of a second felony. They contend that the absence of the plural means there can be only one second felony. This argument is meritless. Section 1–2–2(B), N.M.S.A.1953 (Repl. Vol. 1) provides that the singular may be extended to several things. The opening paragraph to § 1–2–2, supra, states that such a rule of construction "shall be observed" unless inconsistent with manifest legislative intent. Section 40A–29–5, supra, does not indicate a legislative intent that "conviction" may not be extended to cover "convictions".

We are aware that penal statutes are to be construed strictly and in favor of the defendant. *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1948). However, there is no basis for construction when the language is unambiguous; in this situation the Legis-

lature must be understood as meaning what it expressly declared. *State v. Shop Rite Foods, Inc.*, 74 N.M. 55, 390 P.2d 437 (1964); *State v. Ortiz*, 78 N.M. 507, 433 P.2d 92 (Ct.App.1967).

In some jurisdictions, the habitual offender statute has specific provisions for the treatment of multiple convictions. See *State v. McCall*, 14 N.J. 538, 103 A.2d 376 (1954). With the wording of New Mexico's statute such provisions are not needed. Section 40A–29–5, supra, states that anyone, after having been convicted of a felony in New Mexico "commits *any* felony within this state . . . shall be punished" (emphasis ours) as therein provided. "Any felony" is an inclusive term; it does not distinguish between multiple felony convictions and single felony convictions. See *State v. Kendall* (Ct.App.) 90 N.M. 236, 561 P.2d 935, decided January 4, 1977, overruled on other grounds, *Kendall v. State*, 90 N.M. 191, 561 P.2d 464, Sup.Ct., decided March 9, 1977. With this statutory language, the trial court properly enhanced each of the three subsequent felony convictions as second felony convictions. See *Hodges v. Mayo*, 65 So.2d 750 (Fla.1953); *State v. Sortor*, 10 Or.App. 316, 499 P.2d 1370 (1972); *Melby v. State*, 70 Wis.2d 368, 234 N.W.2d 634 (1975).

Manner of Serving the Enhanced Sentences

The regular statutory sentences were imposed for each of the three subsequent convictions. Ford's sentence for false imprisonment was suspended and he was placed on probation for that offense. Ford's sentences for robbery and for unlawfully taking a motor vehicle were to be served consecutively, but concurrently to a prison term Ford was then serving. Baker's sentences for false imprisonment and robbery were to be served consecutively; his sentence for unlawfully taking a motor vehicle was to be served concurrently. These sentences were to be served consecutively to a prison term Baker was then serving. The sentences referred to in this paragraph were imposed in September, 1976.

Thereafter supplemental proceedings were held in which it was determined that defendants were habitual offenders. Enhanced sentences for second felonies were imposed for each of the three subsequent felonies. Ford's sentences for robbery and for unlawfully taking a motor vehicle were to be served consecutively; his sentence for false imprisonment was to be served concurrently; the three sentences were to be served consecutively to the prison term Ford was then serving. Baker's sentences were to be served in the same manner. The enhanced sentences were imposed on November 30, 1976 and filed on December 3, 1976.

A comparison shows that, as to each defendant, the manner of serving the sentences was changed.

Ford's sentence for false imprisonment was changed from a suspended sentence to a sentence to be served concurrently with sentences for the other two offenses. Inasmuch as the trial court has no authority to suspend the enhanced sentence, the change from a suspended sentence to a sentence to be served was proper. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167, decided February 14, 1977.

Two changes occurred in Baker's sentences. Baker's false imprisonment sentence was changed so that it was to be served concurrently rather than consecutively; his sentence for unlawfully taking a motor vehicle was changed so that it was to be served consecutively rather than concurrently. Were these changes proper? They were.

Regular sentences were imposed upon defendants prior to the time their status as habitual offenders was determined. In this situation the regular sentences are to be vacated and the enhanced sentences are to be imposed. *Lott v. Cox*, 75 N.M. 102, 401 P.2d 93 (1965); *State v. Martinez*, supra. The record does not show that the regular sentences, those imposed in September, 1976, have been vacated.

The enhanced sentences are new sentences. *Lott v. Cox*, supra. At the time

of imposing the enhanced sentences, the situation was as if no sentence for the subsequent felonies had been imposed. See *State v. Bonner*, 81 N.M. 471, 468 P.2d 636 (Ct.App.1970). In imposing the new enhanced sentences, the trial court's arrangement of the manner in which the new enhanced sentences were to be served was not limited by the arrangement for serving the regular sentences which should have been vacated.

No issue having been raised as to whether concurrent sentences are permissible for enhanced sentences, we express no opinion on the question. We note, however, that § 40A–29–5, supra, says nothing about the manner of serving the enhanced sentences. See *Deats v. State*, 84 N.M. 405, 503 P.2d 1183 (Ct.App.1972); *Hodges v. Mayo*, supra; *Melby v. State*, supra.

Defendants' enhanced sentences are affirmed. The cause is remanded for entry of an order vacating the September, 1976 sentences.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

562 P.2d 1149

STATE of New Mexico, Plaintiff-Appellee,

v.

Donald LARAN, Defendant-Appellant.

No. 2847.

Court of Appeals of New Mexico.

April 1, 1977.

Donaldo A. Martinez, Las Vegas, for defendant-appellant.

Toney Anaya, Atty. Gen., Dennis P. Murphy, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

ORDER

WOOD, Chief Justice.

Defendant obtained an extension of time to file his docketing statement on February 10, 1977. The docketing statement was filed on that date. On February 11, 1977 the appeal was assigned to the limited calendar.

On March 11, 1977 the State moved to dismiss the appeal, or in the alternative to summarily affirm relying on N.M.Crim. App. 404(b) and 403(a). The motion asserted that defendant had not complied with N.M.Crim.App. 209(a) and (b). These rules pertain to a conference for the purpose of designating the proceedings to be included in the transcript and making satisfactory arrangements for payment of the reporter's transcript. The motion was accompanied by a memorandum of authority. A certificate on both documents recites that a copy was mailed to opposing counsel. Defendant has not responded to the motion.

On March 24, 1977 this Court directed defense counsel to show cause why the appeal should not be dismissed for failure to comply with the Rules of Appellate Procedure for Criminal Cases. Hearing on this

order was scheduled for April 1, 1977 at 9:00 A. M. A copy of this order was sent to counsel. There was no appearance for defendant at this hearing.

At trial defendant was represented by private counsel. The docketing statement recites that defendant "will file a motion for free process to meet the cost of the production of the transcript. He is indigent and has no means with which to meet that cost." There is nothing showing that defendant has sought an order for free process.

The showing before this Court is that N.M.Crim.App. 209 has been violated and that no steps have been taken for the preparation of a transcript for use in the appeal. Under N.M.Crim.App. 209 the transcript was due to be filed on April 1, 1977.

In light of the foregoing, the appeal is dismissed for noncompliance with N.M. Crim.App. 209.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

563 P.2d 91

A. A. OWEN and Rubye N. Owen, his wife, Petitioners,

v.

BURN CONSTRUCTION COMPANY, Respondent.

No. 11134.

Supreme Court of New Mexico.

April 18, 1977.

Rehearing Denied May 4, 1977.

Martin, Martin & Lutz, James T. Martin, Jr., Michael L. Winchester, Las Cruces, for petitioners.

Edward E. Triviz, Keith S. Burn, Las Cruces, for respondent.

OPINION

EASLEY, Justice.

Plaintiffs A. A. Owen and his wife, Rubye, (Owen), owners of a restaurant building in Las Cruces, sued Burn Construction Company, Inc. (Burn) in damages for the negligent destruction of the building. The jury returned a verdict of $3500.00 in favor of Owen. Both parties filed motions for judgment notwithstanding the verdict and both motions were denied by the trial court. Both parties appealed to the Court of Appeals and that court reversed the trial court, directing that judgment be entered in favor of defendant notwithstanding the verdict. Owen petitioned for certiorari. We reverse the Court of Appeals and the trial court.

Burn held a contract with Las Cruces Urban Renewal Agency (Agency) to demolish a two-story hotel building immediately adjacent to Owen's restaurant building. While the work was in progress part of the second story of the hotel toppled onto Owen's structure, completely destroying its usefulness. The Agency agreed to complete the demolition of the Owen building and to remove the debris. Part of the agreement was that the action of the Agency in clearing Owen's lot would not prejudice Owen's right to seek damages against Burn for the destruction of the building.

Two months after the hotel collapsed on the Owen structure and after the debris had been removed, the Agency filed suit to condemn the vacant lot. The Agency and Owen stipulated to the entry of judgment whereby Owen would receive $59,072.00 for the vacant lot. The judgment signed by the court specifically set forth that the settlement was based on the value of the lot at the time the condemnation action was filed, i. e. without the building, and that the settlement would in no way affect any claim which Owen might have against Burn for the prior damage to the building.

Owen later filed this case against Burn to recover $26,000.00 in damages for the total destruction of the building. It was undisputed that the damage to the building was the fault of Burn. The evidence was also uncontested that the value of Owen's building at the time the damage occurred was $26,000.00.

On the theory that Owen had already been fully compensated by the Agency for both the lot and the building, Burn induced the trial court to take judicial notice of the entire file in the prior condemnation action. Over Owen's objections and in derogation of the express terms of the judgment entered pursuant to the stipulation of the parties, testimony and written opinions of the court-appointed appraisers were admitted into evidence to attempt to prove that the $59,072.00 appraised value included both the building and the land.

The jury returned a verdict for Owen in the inexplicable amount of $3500.00. Both parties moved for judgment n. o. v., which motions were denied; judgment was entered; both parties appealed.

The Court of Appeals held that the trial court should have entered judgment n. o. v. in favor of Burn, and remanded with instructions to set aside the $3500.00 judg-

ment for Owen and to enter judgment for Burn. This court granted Owen's petition for writ of certiorari.

Owen makes three contentions: (1) the judgment in the condemnation matter was clear and unambiguous; therefore, it was error for the trial court to permit evidence which varied and contradicted the judgment and it was error for the court to refuse an instruction that the building had not been paid for in the condemnation case; (2) the admission of written appraisals made by persons who were not called as witnesses and were not subject to cross-examination was violative of N.M.R.Evid. 802 [§ 20–4–802, N.M.S.A.1953 (Supp.1975)]; and (3) the Court of Appeals' direction of a verdict for Burn was improper because the record shows that Owen was entitled to that relief.

(1) Owen first contends that the two lower courts were in error in deciding that evidence of the condemnation suit and the appraisals made in conjunction therewith were admissible in this cause for the purpose of proving that Owen had already been paid for his building.

The consent judgment entered by stipulation of the Agency and Owen was in no way ambiguous. It provided:

> The compensation is based upon the value of the premises . . . on the date of the commencement of this action, and such award is not intended to affect any claim which the defendants may have against any person, firm or corporation who may have damaged said premises prior to the commencement of this proceeding, and the stipulation on file herein and this judgment shall not constitute a settlement or release of any claim which the defendants may have by reason of damage that may have occurred to the condemned premises prior to the commencement of this action; . . .

The written stipulation that was filed was even more explicit as to the parties' intent that the $59,072.00 be considered payment for the vacant lot.

However, the trial court permitted testimony and written opinions from the appraisers that their evaluations in the condemnation suit included both the land and the building. The Court of Appeals held that the consent judgment was binding on the Agency and Owen but was not binding on Burn, that since the appraisers considered the value of the land and the building in arriving at their evaluations that Owen had already been justly compensated, that assessment of damages is the exclusive function of the jury and that "duplication of damages is not proper." We disagree that these principles of law are dispositive of the case.

It is true, as pointed out by the Court of Appeals, that a stipulated judgment is not considered to be a judicial determination; "rather it is a contract between the parties," *State v. Clark*, 79 N.M. 29, 439 P.2d 547 (1968); but this legal principle is not controlling and does not diminish the legitimacy of the claim or preclude the relief prayed for by Owen.

The rules to be followed in arriving at the meaning of judgments and decrees are not dissimilar to those relating to other written documents. Where the decree is clear and unambiguous, neither pleadings, findings nor matters dehors the record may be used to change or even to construe its meaning. *Chavez v. Chavez*, 82 N.M. 624, 485 P.2d 735 (1971).

Considering this consent judgment as a mere contract between Owen and the Agency affords no comfort to Burn. "It is well settled in New Mexico that where the language of a contract is clear and unambiguous, the intent of the parties must be ascertained from the language and terms of the agreement." *Hondo Oil & Gas Co. v. Pan American Petroleum Corp.*, 73 N.M. 241, 245, 387 P.2d 342, 345 (1963). In accord, *Brown v. American Bank of Commerce*, 79 N.M. 222, 441 P.2d 751 (1968). It is not the province of the court to amend or alter the contract by construction and the court must interpret and enforce the contract which the parties made for themselves. *Rubenstein v. Weil*, 75 N.M. 562, 408 P.2d 140 (1965); *Boylin v. United West-*

ern Minerals Company, 72 N.M. 242, 382 P.2d 717 (1963); *Davis v. Merrick*, 66 N.M. 226, 345 P.2d 1042 (1959).

The case of *Vaca v. Whitaker*, 86 N.M. 79, 519 P.2d 315 (Ct.App.1974) involved a malpractice suit in which there had been a prior judgment entered and satisfied and a new claim later filed for additional damages against a second party. The opinion states (86 N.M. at 83–84, 519 P.2d at 319–20):

> . . . This involves an examination of the pertinent portions of the record in the prior case. The fact of "prior satisfaction" is to be determined from the record, and not from oral testimony.[1]
>
> [1] When the record in the prior action is silent or ambiguous, so that the record does not show the injuries for which recovery was obtained, we recognized that oral testimony may be introduced. The oral testimony may properly be introduced only to explain the prior record; the oral testimony may not go beyond that record.

See also *Lemon v. Morrison-Knudsen Co.*, 58 N.M. 830, 277 P.2d 542 (1954); 2 Black on Judgments §§ 624–625 (2d ed. 1902).

The Court of Appeals in *Vaca*, supra, ruled that medical expenses incurred subsequent to the judgment in the prior case were not included among the issues litigated and the subsequent claim was not barred by satisfaction of the prior judgment. *Seven Rivers Farm, Inc. v. Reynolds*, 84 N.M. 789, 508 P.2d 1276 (1973); *Hollingsworth v. Hicks*, 57 N.M. 336, 258 P.2d 724 (1953); *Dunham v. Stitzberg*, 53 N.M. 81, 201 P.2d 1000 (1948); *Westbrook v. Lea General Hospital*, 85 N.M. 191, 510 P.2d 515 (Ct. App.), cert. denied, 85 N.M. 228, 511 P.2d 554 (1973).

Lemon, supra, holds that where the question is determinable by inspection of the record alone, without the aid of extrinsic evidence, it is then a matter of law and is for the court. See *Metzger v. Ellis*, 65 N.M. 347, 337 P.2d 609 (1959); *In re McMillan's Estate*, 38 N.M. 347, 33 P.2d 369 (1934).

In this case the words cannot be misconstrued; they spell out clearly that the parties intended that Owen should have the right to preserve this action against Burn for damages. There can be no legitimate claim of ambiguity; therefore, there was no need for the court to resort to evidence extrinsic to the agreement.

We are confronted with the specious reasoning of Burn, which corporation was not a party to the suit, that we should go behind the judgment and the specific stipulation signed by the parties and adopt unsworn testimony to emasculate these solemn documents. Who would know what was bought and sold and at what price better than the buyer and seller; and how much better can the bargain be sealed than by a lucid stipulation and judgment?

We hold that it was error to admit the evidence dehors the record to vary the terms of the judgment in condemnation; and, as a necessary corollary, we hold that it was error for the court to refuse Owen's instruction that he had not received compensation for his building in the first suit.

(2) Owen claims that the trial court was in error in admitting into evidence written appraisals of the property in question without the appraisers being present for cross-examination. The trial court held that the evidence was admissible under N.M.R.Evid. 803(6), [§ 20–4–803(6), N.M.S.A.1953 (Supp.1975)] as an exception to the hearsay rule because it was a record of a regularly-conducted activity. The rule provides that a report setting forth an opinion in the course of a regularly-conducted activity, "as shown by the testimony of the custodian or other qualified witness," is admissible even though the declarant is not available.

The evidence shows that the written appraisals were prepared for use in the condemnation proceedings, i. e., for purposes of litigation. The Agency did not prepare them but engaged outside parties, whom they did not supervise, to make the appraisals. The Agency would not vouch for the accuracy of the reports and did not know what factors were considered by the appraisers. The evaluation of one of the appraisers was based on the erroneous assumption that the building was forty years

old rather than ten years old. There was no opportunity for Owen to cross-examine, the appraisers not being present at the trial.

Owen claims that the circumstances under which the appraisals were prepared and presented provide none of the circumstantial guarantees of trustworthiness which are normally required to justify an exception to the hearsay rule. We agree.

N.M.R.Evid. 801(c), [§ 20–4–801(c), N.M. S.A.1953 (Supp.1975)] defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Unless the written appraisals fall within the protection of the exception asserted by Burn, the evidence is patently hearsay, since the plain object of offering the evidence was to prove the truth of the assertions in the written opinions that both the building and the land were included in the evaluation.

In *Lahr v. Lahr*, 82 N.M. 223, 478 P.2d 551 (1970) this court held that a husband's opinion as to the value of community real estate was admissible in evidence; however, the court ruled that the accountant employed by the husband could not testify by deposition regarding statements by the husband to the accountant as to the husband's opinion regarding the value of community realty. The court stated (82 N.M. at 225, 478 P.2d at 553):

> . . . Even if these values are those of the defendant as well as of the appraiser, the accountant's deposition testimony remains hearsay because it is the testimony of a witness as to out-of-court statements of a declarant who was not a witness as to that specific subject matter. *Chiordi v. Jernigan*, 46 N.M. 396, 129 P.2d 640 (1942).

In *Chiordi* this court explained the basis of its exclusion of certain testimony as hearsay by stating (46 N.M. at 402, 129 P.2d at 644):

> . . . That it is not subject to the tests which ordinarily can be applied to ascertain its truthfulness by cross-examination of the declarant; and because not given under the sanctity of an oath, and because the declarant is not subject to the penalties of perjury.

First Sav. Bk. & Tst. Co., Alb. v. Elgin et al., 29 N.M. 595, 225 P. 582 (1924). See also *Davis v. Davis*, 83 N.M. 787, 498 P.2d 674 (1972); *Caranta v. Pioneer Home Improvements, Inc.*, 81 N.M. 393, 467 P.2d 719 (1970).

The prejudice inherent in the admission of such hearsay evidence is readily apparent. It is even questionable, although we need not decide, that the evidence qualifies as a "record of a regularly conducted activity." See *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), affirming *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942); McCormick, Evidence § 308 (2d ed. 1972).

Therefore, even if Burn had the legal right to challenge the efficacy of the judgment in question, the entire evidentiary basis of his challenge was inadmissible hearsay. The trial court and the Court of Appeals were in error in holding otherwise.

(3) Owen's third issue on appeal is that the two lower courts were in error in failing to hold that Owen's motion for judgment n. o. v. should have been granted, and was in error in giving the same relief to Burn. We agree. The issues as to Burn are heretofore set forth. There is no rational basis to support the $3500.00 verdict awarded by the jury. Furthermore, as to Burn's liability and the amount of $26,000.00 as the damages suffered by Owen there are no issues of material fact disclosed by the record.

In a case such as this where the evidence on an issue of fact is undisputed, and the inferences to be drawn therefrom are plain and not open to doubt by reasonable men, the issue is no longer one of fact to be submitted to the jury, but becomes a question of law. *Griego v. Roybal*, 81 N.M. 202, 465 P.2d 85 (1970); *Loucks v. Albuquerque National Bank*, 76 N.M. 735, 418 P.2d 191 (1966); *Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68 (Ct.App.1972). If reasonable minds cannot differ, then a di-

rected verdict is not only proper but the court has a duty to direct a verdict. N.M.R. Civ.P. 56(c) [§ 21–1–56(c), N.M.S.A.1953 (Repl.Vol. 4, 1970)]; *Goldenberg v. Village of Capitan*, 53 N.M. 137, 203 P.2d 370 (1948).

We have no hesitancy in holding that reasonable minds could not differ as to the liability of Burn or as to the amount of damages, since there literally is no evidence disputing either of these factual issues. The same holding pertains to the wholly-unsubstantiated award of damages in the verdict of the jury.

It necessarily follows that we dismiss the cross-appeal of Burn, reverse the Court of Appeals and the trial court on issues above indicated, affirm the Court of Appeals' decision ordering that the award to Owen of $3500.00 be set aside, and direct that judgment be entered, notwithstanding the verdict, awarding Owen $26,000.00 in damages plus his costs.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA and PAYNE, JJ., concur.

563 P.2d 96

Harry LINAM, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 11343.

Supreme Court of New Mexico.

April 25, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, William H. Lazar, Asst. Appellate Defender, Santa Fe, for petitioner.

Toney Anaya, Atty. Gen., Santa Fe, for respondent.

OPINION

SOSA, Justice.

Defendant Harry Linam was indicted and convicted by a jury of two counts of forgery. He appealed. The Court of Appeals dismissed for failure to comply with N.M.R. Crim.App. 209(e) [§ 41–23A–209(e), N.M.S.A. 1953 (Supp.1975)]. We granted certiorari.

After judgment and sentencing, defendant filed his notice of appeal on September 10, 1976. Defendant filed a docketing statement on September 20, designating two issues on appeal. On September 24 the Court of Appeals assigned the case to summary calendar and proposed summary re-

versal. The State filed a memorandum in opposition to the proposed summary reversal on October 8, whereupon the case was reassigned to the limited calendar on October 15. The brief-in-chief was due on November 8. Defendant moved for and was granted an extension of time in which to file the brief-in-chief until November 19.

On November 10 defendant's counsel informed the Court of Appeals that the tapes on file were incomplete and that a typed transcript of certain parts of the pretrial proceedings would have to be ordered. The Court of Appeals reassigned the case to the limited calendar and tolled the briefing time pending receipt of the typed transcript. After receipt of the limited calendar designation, the trial attorney filed a designation of the necessary parts of the proceedings in the district court on November 24 pursuant to Rule 209(a). However, the designation erroneously named a judge who had not heard the case, so that the judge's court reporter was unable to and did not prepare the transcript. Pursuant to Rule 209(c) counsel had thirty days to file the transcript, or until December 23. In early January, 1977, appellate counsel contacted the judge's court reporter, discovered the error, and contacted the trial attorney. The trial attorney in turn contacted the proper court reporter. The transcript was then prepared and filed in the district court on February 23. Neither attorney filed for an extension of time for the transmission of the transcript, pursuant to Rule 209(e), supra.

On February 24 the defendant's counsel filed a motion in the Court of Appeals to allow the late filing of the transcript. The motion was set for hearing March 3. At the hearing that motion to allow the late filing was denied. At the same time the Court of Appeals dismissed the appeal for failure to comply with Rule 209(e).

In his petition for certiorari, defendant argues that (1) other, lesser sanctions as opposed to the extreme of dismissing the appeal would be more appropriate here, citing *Vigil v. State,* 89 N.M. 601, 555 P.2d 901 (1976), and (2) the Court of Appeals violated N.M.R.Crim.App. 404(a) [§ 41–23A–404(a), N.M.S.A. 1953 (Supp.1975)] by failing to give notice of dismissal to the defendant, and (3) the New Mexico Constitution guarantees each defendant one appeal as a matter of right. N.M.Const. art. 6, § 2. As the first issue is dispositive of this appeal, we do not reach the others. We agree with defendant that dismissal of this appeal is too extreme in this case. Cf. N.M.R.Crim. App. 102 [§ 41–23A–102, N.M.S.A. 1953 (Supp.1975)]. First, as in *Vigil v. State,* supra, the technical violations of procedural rules were perpetrated by the defendant's attorney, not the defendant. The dismissal only affects the defendant. Second, we can see no prejudice to the State in permitting this appeal, especially since the State itself moved to have the case taken from the summary reversal calendar. The probable incarceration of the defendant without an appellate court having considered the issues raised on appeal outweighs any prejudice to the State. However, as in *Vigil v. State,* supra, we do not believe that this breach of the rules should go unnoticed.

This cause is remanded to the Court of Appeals with instructions to reinstate the appeal on the docket and to consider the imposition of appropriate sanctions.

McMANUS, C. J., and EASLEY and PAYNE, JJ., concur.

563 P.2d 97

Leonard OLGUIN, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 11288.

Supreme Court of New Mexico.

April 25, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, Santa Fe, for petitioner.

Toney Anaya, Atty. Gen., Santa Fe, for respondent.

OPINION

PAYNE, Justice.

The defendant Olguin was convicted of the crimes of battery and possession of a deadly weapon by a prisoner. Notice of appeal from the judgment was timely filed, but a docketing statement, which is required by N.M.R.Crim.App. 205(a)[1], was not timely filed. Defendant's appointed counsel was called several times by the clerk of the Court of Appeals in an attempt to correct the problem. These attempts resulted in statements by counsel that he was "incredibly busy" and would send a motion to extend the time for filing the docketing statement. This was never done. Counsel finally tendered a docketing statement on the day set for the hearing of an order to show cause why the appeal should not be dismissed pursuant to N.M.R.Crim. App. 404(a)[2]. The Court of Appeals heard the argument of counsel as to why he had not complied with the rules in behalf of his

1. Section 41–23A–205(a), N.M.S.A.1953 (Supp. 1975).

2. Section 41–23A–404(a), N.M.S.A.1953 (Supp. 1975).

client. It concluded that no sanctions should be imposed upon the attorney, but refused to accept the docketing statement for late filing and dismissed the appeal pursuant to N.M.R.Crim.App. 102 [3]. Certiorari was granted to review the dismissal.

The defendant Olguin seeks relief by relying upon the New Mexico Constitution, art. VI, § 2. That section provides "that an aggrieved party shall have an absolute right to one appeal." This does not mean that a party can disregard time limits provided for in the rules of appellate procedure. The right of appeal is provided for in the Constitution while the means for exercising that right are properly controlled by rules of procedure. *State v. Garlick,* 80 N.M. 352, 456 P.2d 185 (1969). The defendant's constitutional right to appeal was not abridged by the dismissal for failure to follow procedural rules.

There are adequate grounds to support defendant's petition for relief within the rules of procedure. Inherent within Rule 102 is the necessary latitude and flexibility to allow stern enforcement without depriving a party of his appeal. This rule provides as follows:

> For failure to comply with these rules or any order of court, the appellate court may, on motion or on its own initiative, take such action as it deems appropriate, including but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of costs or, *in extreme cases,* dismissal or affirmance. (Emphasis added.)

New Mexico Criminal Appellate Rule 404(a), supra, provides as follows:

> When an appellant fails to comply with these rules, the appellate court shall notify the appellant that upon the expiration of ten [10] days from the date thereof the appeal will be dismissed unless prior to that date appellant shows cause why the appeal should not be dismissed.

Rules 102 and 404 are enforcement rules designed to give the courts sufficient power to insure that appellants comply with other procedural rules. Previous opinions of this court have recognized that appeals could be dismissed for failure to follow appellate procedures that are outlined. *Vigil v. State,* 89 N.M. 601, 555 P.2d 901 (1976); *State v. Garlick,* supra; *Jaritas Live Stock Co. v. Spriggs,* 42 N.M. 14, 74 P.2d 722 (1937).

Procedural rules of courts must be carefully followed to provide for orderly disposition of cases. However, this court has consistently followed a policy of construing rules liberally, "to the end that causes on appeal may be determined on the merits where it can be done without impeding or confusing administration or perpetrating injustice." *Jaritas Live Stock Co. v. Spriggs,* supra at 16, 74 P.2d at 722.

Rule 102 provides that only in extreme cases is the appeal to be dismissed. In *Vigil v. State,* supra, we declined to define the parameters of what constitutes an "extreme case." This must be determined on a case by case basis and no party or counsel can assume that procedural rules can be disregarded without the possibility that his case will be dismissed. The court should consider other sanctions against counsel or a party prior to applying the extreme sanction of dismissal.

In the case at bar, the appellate court did consider sanctions against counsel but did not feel compelled to impose them. It is inconsistent to impose the most severe sanction of dismissal against the defendant while failing to impose any sanction against heedless counsel upon whom the defendant relied.

We therefore reverse the dismissal of the appeal and remand the matter to the Court of Appeals with instructions to allow the filing of a docketing statement and to reinstate the matter for its determination upon the merits.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA and EASLEY, JJ., concur.

3. Section 41–23A–102, N.M.S.A.1953 (Supp. 1975).

563 P.2d 100

STATE of New Mexico,
Plaintiff-Appellee,

v.

Ralph HERRERA, Defendant-Appellant.

No. 2679.

Court of Appeals of New Mexico.

March 15, 1977.

Writ of Certiorari Denied April 20, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, Santa Fe, for defendant-appellant.

Ralph W. Muxlow, II, Asst. Atty. Gen., for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of trafficking in heroin. His appeal raises issues as to: (1) sufficiency of the evidence and (2) judicial misconduct. Other issues listed in the docketing statement have not been briefed. They are deemed abandoned. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct. App.1976).

Sufficiency of the Evidence

This issue is before us even though no motion for a directed verdict was made at the close of the evidence. *State v. Lard*, 86 N.M. 71, 519 P.2d 307 (Ct.App.1974).

Searching for heroin pursuant to a search warrant, officers searched the house and curtilage of defendant. See *State v. Aragon*, 89 N.M. 91, 547 P.2d 574 (Ct.App.1976). Under a boat trailer, in a "freshly dug earth spot", a vial was found which contained heroin. Defendant and his wife were arrested; subsequently, the wife pled guilty to possession of heroin.

Defendant claims the evidence is insufficient to show that he possessed the heroin that was found. Since he was not in physical possession of the heroin when it was found by the officers, defendant must have constructively possessed the heroin. By constructive possession, we mean knowledge of the presence of the heroin and control over it. *State v. Montoya*, 85 N.M. 126, 509 P.2d 893 (Ct.App.1973).

Defendant was not in exclusive possession of the premises; his wife resided with him. Because defendant was not in exclusive possession, an inference of constructive possession cannot be drawn unless there are incriminating statements or circumstances tending to support the inference. *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct.App.1974); *State v. Baca*, 87 N.M. 12, 528 P.2d 656 (Ct.App.1974). Such additional evidence is present in this case.

Inside the house officers found numerous "tinfoils" approximately one and one-half inches square. The tinfoil was unused. There is evidence that "caps" are usually wrapped in tinfoil of this size. On the way to the police station, the wife remarked that " 'You got everything that *we* had, that's all that *we* had' ". (Our emphasis.) Defendant told his wife to keep her mouth shut. This evidence sustains the inference that defendant constructively possessed the heroin that was found.

Defendant claims the evidence was insufficient to show trafficking because the evidence is insufficient to show that he intended to distribute the heroin. Section 54–11–20 N.M.S.A.1953 (Repl. Vol. 8, pt. 2, Supp. 1975).

There is evidence that the heroin weighed 3.3 grams and was 16 percent pure. There is evidence that the usual purity of street heroin is 3 to 5 percent and that street heroin is packaged in weights of 20 to 40 milligrams. Reduction of the heroin which was found to street purity, packaged for street sale, would result in at least 264 caps of heroin. There is evidence that heroin is generally packaged for resale on the street in small tinfoil packets, called caps. There is evidence that the search failed to disclose paraphernalia indicating use of the heroin on the premises. This evidence, together with the large number of tinfoil squares, permits the inference that defendant intended to distribute the heroin. See *State v. Bowers*, supra.

The evidence is sufficient to sustain the conviction.

Judicial Misconduct

(a) Remarks Concerning Witnesses

The defense called Tartaglia as a witness. Tartaglia, an employee of an Albuquerque drug rehabilitation program, testified as to street usage and practices in connection with heroin. On cross-examination, the State asked Tartaglia whether defendant or defendant's wife was a member of "your program". Defense counsel, stating no reasons, objected and moved for a mistrial.

Tartaglia stated that under federal law he could not give information "on any of the clients on the program" without permission of the client.

Defense counsel then interrupted, stating that Tartaglia's testimony was not the law. Defense counsel proceeded to make a speech about federal law and regulations. In the speech, defense counsel stated that the director of the program, Richard Gomez, was "out in the hall", and would have information about the program and what could not be revealed under federal law. The trial court remarked: "You shouldn't be calling people like that as a witness."

Defendant again moved for a mistrial, stating no grounds. On appeal, defendant asserts the "unnecessary remarks concerning the calling of witness Tartaglia" amounted to judicial misconduct. This is incorrect. The context shows the trial court's remark referred to Gomez and not Tartaglia.

In cross-examining Tartaglia, the State asked a series of questions concerning Tartaglia's unwillingness to testify in cases involving heroin users because such testimony would cause people on a methadone maintenance program to distrust Tartaglia. Defense counsel objected "to this line of questioning" as irrelevant and hypothetical. The trial court remarked: "If you don't want your witnesses cross-examined, don't call them. Objection overruled." Defense counsel objected to the remarks and moved for a mistrial. Defendant asserts this remark also amounted to judicial misconduct.

Neither of the remarks was a display of bias against or in favor of a party. *State v. Sedillo*, 76 N.M. 273, 414 P.2d 500 (1966); *State v. Mireles*, 84 N.M. 146, 500 P.2d 431 (Ct.App.1972); *State v. Clark*, 83 N.M. 484, 493 P.2d 969 (Ct.App.1971). Neither of the remarks amount to an undue interference by the trial court or show such a severe attitude that proper presentation of the case was prevented. *In Re Will of Callaway*, 84 N.M. 125, 500 P.2d 410 (1972).

The remarks do indicate impatience on the part of the trial court. However, when considered in context, we cannot say that the remarks deprived defendant of a fair trial. *State v. Gurule*, 90 N.M. 87, 559 P.2d 1214 (Ct.App. decided January 4, 1977).

(b) Interruption of Closing Argument

In cross-examining an officer, the defense brought out that the officer told the grand jury that he seized approximately an ounce of heroin. The trial evidence shows that the weight was 3.3 grams or less than one-seventh of an ounce. The officer explained the discrepancy on the basis that he had not weighed the heroin prior to his grand jury testimony.

During closing argument by the defense, the following occurred:

> "The big thing about this case, something called a Grand Jury. You can't bring somebody in here unless he has been indicted by a Grand Jury, you've got to have that much testimony presented to the Grand Jury and this man Ortiz, with seven years' experience went before that Grand Jury, six or seven weeks after he dug this stuff up out of the ground, and told them that he dug up an ounce, which is ten times as much as this is in that bottle, and because he told them he dug up an ounce, they indicted this man with possession to - - -
>
> "THE COURT: Counsel, that is not a proper statement, not a proper argument as to what happened at the Grand Jury and why the Grand Jury did something. That is not material, and you know that is not why the Grand Jury did it and refrain from any further comments along that line."

Defendant moved for a mistrial because of the interruption by the trial court. He claims his "argument to the jury was entirely proper, yet the outburst left the jury with the impression that defense counsel was guilty of some gross, intentional misconduct." The argument was improper; it argued the evidentiary basis for the grand jury indictment. The evidentiary basis for the grand jury indictment is not a matter for judicial review. *State v. Ergenbright*, 84 N.M. 662, 506 P.2d 1209 (1973);

State v. Elam, 86 N.M. 595, 526 P.2d 189 (Ct.App.1974). The evidentiary basis for the indictment is also not a matter for argument to the trial jury because it is irrelevant to the question of guilt or innocence. It is the trial court's "duty to see that no improper statements are made likely to influence the jury in their verdict, and that the cause is tried upon the sworn testimony of the witnesses." *State v. Cummings*, 57 N.M. 36, 253 P.2d 321 (1953).

The trial court could properly interrupt counsel's argument and require that the argument stay within matters pertinent to the trial. See *State v. Pace*, 80 N.M. 364, 456 P.2d 197 (1969). The interruption did not amount to judicial misconduct nor deny defendant a fair trial.

Defendant asserts that the "outburst by the court and the denial of defendant's mistrial motion were reversible error because it deprived defendant of his right to comment on the credibility of witnesses against him—the right to put on a complete defense." This contention is fiction. Nothing was said about commenting on the discrepancy between the officer's grand jury and trial testimony. The exchange between the trial court and defense counsel, out of the presence of the jury, went only to "why the Grand Jury did something."

(c) Cumulative Error

Defendant claims that the combination of the trial court's remarks during the testimony of Tartaglia and the interruption of defense counsel's closing argument amounted to cumulative error. There being no error, there was no cumulative error. *State v. Mireles*, supra.

(d) Trial Court's Manner

We have previously quoted defendant's brief referring to the interruption of closing argument as an "outburst". The brief also characterizes the trial court's remarks during the interruption as a "tirade". The brief states that the trial court's remarks during the testimony of Tartaglia were shouted in an extremely loud and angry voice. Transcript references in support of these characterizations are to defendant's motion for a new trial. The docketing statement characterizes the trial court as "bellowing."

The transcript is typewritten. As stated in *In Re Will of Callaway*, supra: "[A] cold, bare transcript sometimes does not reflect the total atmosphere of a trial." The transcript here does not show the alleged mannerisms of the trial court. We cannot determine either whether the trial court indulged in the asserted mannerisms or whether counsel have made improper charges against the trial court. *State v. Gurule*, supra. We do note that, to date, claims based on trial court mannerisms have not been raised in appeals where the trial proceedings were taped.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

563 P.2d 103

Joe S. GALLAGHER, Plaintiff-Appellee,

v.

ALBUQUERQUE METROPOLITAN ARROYO FLOOD CONTROL AUTHORITY, Defendant-Appellant.

No. 2808.

Court of Appeals of New Mexico.

March 15, 1977.

Writ of Certiorari Denied April 20, 1977.

Joseph M. Fine and Stanley P. Zuris, Albuquerque, for defendant-appellant.

Roy A. Jacobson, Jr., Zeikus & Reichert, P.A., Albuquerque, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The issue is whether defendant AMAFCA (Albuquerque Metropolitan Arroyo Flood Control Authority) has "sovereign immunity" from liability for its torts. Sections 75–36–1 through 75–36–103, N.M.S.A.1953 (Repl.Vol. 11, pt. 2). AMAFCA is authorized and directed "to acquire, equip, maintain and operate a flood control system . . . ." Section 75–36–19, supra. This includes "necessary or desirable, related or appurtenant, facilities . . . ." Section 75–36–4(K), supra. In this case an AMAFCA service road is involved.

For the purpose of this appeal, it is a fact that "AMAFCA placed a steel cable across its service road to prevent public travel thereon . . . ." Plaintiff, riding his trail bike along the service road, ran into the cable and was injured. His complaint alleged that AMAFCA was negligent in causing the cable to be strung across the road. Defendant moved for summary judgment, claiming it could not be held liable because of sovereign immunity. The trial court denied the motion; we granted AMAFCA's application for an interlocutory appeal.

1. *Applicable Law*

(a) The accident occurred in June, 1974. *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975) held that in tort actions, common law sovereign immunity could no longer be interposed as a defense by the State or any of its political subdivisions. However, *Hicks* does not apply if the tort occurred prior to July 1, 1976. *Hicks*, supra, is not applicable to this case.

(b) The Public Officers and Employees Liability Act modifies common law sovereign immunity. Sections 5–13–1 through 5–13–17, N.M.S.A.1953 (Repl.Vol. 2, pt. 1, Supp.1975). This act does not apply to claims arising before the effective date of the act. Section 5–13–16, supra. The act does not apply to this case because its effective date was July 1, 1975. See Laws 1975, ch. 334, § 17.

(c) Sections 5–6–18 through 5–6–21, N.M.S.A.1953 (Repl.Vol. 2, pt. 1) were in effect at the time of the accident. See Laws 1975, ch. 334, § 18. Neither party claims this law is applicable in this lawsuit.

(d) Common law sovereign immunity, as it existed in New Mexico prior to the decision in *Hicks v. State*, supra, is applicable to plaintiff's claim.

2. *AMAFCA's Status*

AMAFCA is established by statute. Sections 75–36–4(C) and 75–36–5, supra. It is "a body corporate and politic, a quasi-municipal corporation, and a political subdivi-

sion of the state." Thus, AMAFCA has two roles—that of political subdivision and that of a quasi-municipality.

3. *State Instrumentality*

The role of a body politic, a political subdivision of the State, is the role of an instrumentality of state government. *Albuquerque Met. Arroyo Flood Con. A. v. Swinburne,* 74 N.M. 487, 394 P.2d 998 (1964). As a state instrumentality, AMAFCA would be immune from tort liability. *Sangre De Cristo Dev. Corp., Inc. v. City of Santa Fe,* 84 N.M. 343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S.Ct. 1900, 36 L.Ed.2d 400 (1972); *Vigil v. Penitentiary of New Mexico,* 52 N.M. 224, 195 P.2d 1014 (1948); see *State v. Burks,* 75 N.M. 19, 399 P.2d 920 (1965). There is nothing in the record indicating that AMAFCA was acting as a state instrumentality; AMAFCA does not claim that its participation in the steel cable incident was in the role of a state instrumentality. The immunity of a state instrumentality is not involved in this case.

4. *Quasi-Municipality*

(a) AMAFCA does claim immunity on the basis that its role was that of a quasi-municipality. It asserts that there is a distinction between municipal corporations and quasi-municipal corporations. It relies on a "general rule" that quasi-municipal corporations are not liable for torts unless so provided by statute. This contention relies on the label "quasi-municipal" and disregards what the quasi-municipal corporation does.

(b) Where the duties are "ordinarily wholly governmental" the quasi-municipal corporation has been accorded immunity. 18 McQuillin, Municipal Corporations, § 53.-05 (3rd Ed.Rev.1963). In such a case the immunity would exist by virtue of the "governmental" activity, regardless of whether the label was municipal, quasi-municipal or state instrumentality. The discussion in McQuillin, supra, § 53.05, as to immunity for quasi-municipal corporations indicates a lack of uniformity in the decisions. McQuillin, supra, § 53.05a, states that "liability has been imposed where the tort was connected with an undertaking . . . which was in the nature of a proprietary activity."

(c) Immunity for municipalities in New Mexico has depended on whether the function involved was governmental or proprietary. See *Sangre De Cristo Dev. Corp., Inc. v. City of Santa Fe,* supra. This distinction has also been applied to county activities, *Elliott v. Lea County,* 58 N.M. 147, 267 P.2d 131 (1954); see *Sangre De Cristo Dev. Corp., Inc.,* supra. McQuillin, supra, § 53.05, considers counties to be quasi-municipal corporations.

(d) No reason has been advanced as to why the immunity of a flood control authority should be considered in a manner different from the immunity of a municipality or a county.

(e) The fact that AMAFCA has the label of "quasi-municipality" does not determine whether it is immune from liability for its torts. Whether AMAFCA has immunity depends on whether its activity was governmental or proprietary.

5. *Flood Control System as Governmental or Proprietary*

(a) AMAFCA contends that the governmental versus proprietary analysis should be limited to "the placing of a steel cable across an AMAFCA service road in order to prevent public travel thereon." It asserts that consideration of its general purpose—flood control—would be absurd. It argues that if storm sewer drainage is proprietary, all of its acts would be proprietary notwithstanding the statute establishing "AMAFCA as an organization performing both governmental and proprietary acts."

(b) AMAFCA's contention is an overstatement; it does not necessarily follow that all of its activities would be proprietary if flood control activities are held to be proprietary. Consider, as examples only, AMAFCA's authority to levy ad valorem taxes, condemn property for public use, and establish facilities across or along pub-

lic rights of way. Section 75–36–22, supra, paragraphs (J), (L), and (P). However, we are not concerned here with categorizing all of AMAFCA's activities.

(c) Whether AMAFACA's flood control activities are governmental or proprietary is an appropriate consideration in this case. Categorization of the activity or function involved is an approach followed in New Mexico decisions. *Murphy v. City of Carlsbad,* 66 N.M. 376, 348 P.2d 492 (1960) did not limit its consideration to the carrousel within the amusement area of the public park; the question was whether "the establishment and maintenance of a municipal park is a proprietary function . . ." *McWhorter v. Board of Education,* 63 N.M. 421, 320 P.2d 1025 (1958) did not limit its consideration to the replacement of broken window panes in the school building; consideration was given to the function of a school district. *Barker v. City of Santa Fe,* 47 N.M. 85, 136 P.2d 480 (1943) did not limit its consideration to the conditions of the sewage disposal plant; the question was whether the operation and maintenance of a sewage disposal plant was a proprietary function.

(d) No claim is made that the service road was not a part of AMAFCA's flood control system. AMAFCA asserts that the maintenance of a flood control system is a governmental activity. It relies on the four tests stated in *Barker v. City of Santa Fe,* supra, and approved in *Murphy v. City of Carlsbad,* supra. The third test of governmental activity is: "When the municipality [here the quasi-municipality] acts for the public benefit generally, as distinguished from acting for its immediate benefit and its private good." AMAFCA does not meet this test; it operates and maintains a flood control system "for the benefit of the authority and the inhabitants thereof". Section 75–36–19, supra. As stated in *Albuquerque Met. Arroyo Flood Con. A. v. Swinburne,* supra: ". . . it cannot seriously be doubted that the Act does not have a uniform operation throughout the State and is a special law enacted by the legislature for the express purpose of acquiring and operating a flood control system to benefit the property within the boundaries expressly specified in the Act." Compare *Barker v. City of Santa Fe,* supra. AMAFCA's maintenance of its flood control system, which includes its activities in connection with the service road, was not a governmental activity. The activity was proprietary; AMAFCA could not interpose the defense of sovereign immunity to avoid liability for negligent acts in connection with the activity.

(e) Our holding that AMAFCA's flood control activities are proprietary is supported by *Barker v. City of Santa Fe,* supra, which held the maintenance of a sewage disposal plant was a proprietary activity. AMAFCA would distinguish *Barker,* supra, on the basis that its flood control activities involve storm drainage rather than sewage disposal. We see no merit to this asserted distinction; *Barker* cites favorably a decision which held that construction of storm sewers was a proprietary activity. Our holding is also supported by the statement in *State v. Town of Grants,* 66 N.M. 355, 348 P.2d 274 (1960) that "the operation by a municipality of sewer and water facilities is in a proprietary capacity." See also: *Taylor v. Roosevelt Irr. Dist.,* 71 Ariz. 254, 226 P.2d 154 (1950); *Chandler v. Drainage Dist. No. 2,* 68 Idaho 42, 187 P.2d 971 (1947); *Dilley v. City of Houston,* 148 Tex. 191, 222 S.W.2d 992 (1949); *Associated Enter., Inc. v. Toltec Watershed Imp. Dist.,* 490 P.2d 1069 (Wyo.1971); *Sigurdson v. City of Seattle,* 48 Wash.2d 155, 292 P.2d 214 (1956).

6. *The Cable Incident as Governmental or Proprietary*

If the governmental versus proprietary analysis is limited to the cable incident, as AMAFCA contends, the result is the same. Placing the steel cable across the service road to prevent public travel on the road is more than the governmental activity of regulating the use of the road through traffic control devices. See *Hammell v. City of Albuquerque,* 63 N.M. 374, 320 P.2d 384 (1958). What is involved is the placing of an obstruction in the service

road. A municipality is liable for the negligent failure to keep its streets in a reasonably safe condition. *Hammell v. City of Albuquerque*, supra; *Johnson v. City of Santa Fe*, 35 N.M. 77, 290 P. 793 (1930). Liability exists because maintenance and repair of municipal streets are proprietary functions. McQuillin, supra, §§ 53.39, 53.41. As to counties, compare *Dairyland Ins. Co., Inc. v. Board of County Com'rs*, 88 N.M. 180, 538 P.2d 1202 (Ct.App.1975). AMAFCA's placing of the cable across the road was a proprietary activity.

The order denying the motion for summary judgment is affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

563 P.2d 108

STATE of New Mexico,
Plaintiff-Appellee,

v.

Edward F. KRAUL, Defendant-Appellant.

No. 2754.

Court of Appeals of New Mexico.

March 22, 1977.

Writ of Certiorari Denied April 20, 1977.

Sarah M. Singleton, Pickard & Singleton, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Paquin M. Terrazas, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of battery upon a peace officer, defendant appeals. The battery took place during an altercation involving defendant, his mother, his grandmother and a Santa Fe police officer. The appeal presents issues concerning instructions given and refused. There was no evidentiary problem with any of the issues. There was evidence supporting the giving of the instructions given and there was evidence supporting the giving of instructions which were refused. We discuss: (1) battery upon a peace officer as an offense included in aggravated battery upon a peace officer; (2) battery as an offense included in battery upon a peace officer; (3) refused instruction on investigative stop; and (4) refused instruction on self-defense.

Peace Officer Battery as Included Within Peace Officer Aggravated Battery

Section 40A–22–24, N.M.S.A.1953 (2d Repl. Vol. 6) defines aggravated battery upon a peace officer. It reads:

"A. Aggravated battery upon a peace officer consists of the unlawful touching or application of force to the person of a peace officer with intent to injure that peace officer while he is in the lawful discharge of his duties.

"B. Whoever commits aggravated battery upon a peace officer, inflicting an injury to the peace officer which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a fourth degree felony.

"C. Whoever commits aggravated battery upon a peace officer, inflicting great bodily harm, or does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, is guilty of a third degree felony."

Section 40A–22–23, N.M.S.A.1953 (2d Repl. Vol. 6) defines battery upon a peace officer. It reads:

"A. Battery upon a peace officer is the unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner.

"B. Whoever commits battery upon a peace officer is guilty of a fourth degree felony."

The indictment charged defendant with violating § 40A–22–24(A), supra, by committing the offense in a manner whereby great bodily harm could be inflicted. Section 40A–22–24(C), supra. At the close of the evidence, the trial court ruled there was insufficient evidence to submit Paragraph C, great bodily harm, to the jury. The trial court instructed on aggravated battery not likely to cause great bodily harm, which is Paragraph B. The trial court also instructed on § 40A–22–23, supra. The jury having convicted defendant of violating § 40A–22–23, supra, we are not concerned with the instruction on § 40A–22–24(B), supra.

Defendant claims that peace officer battery, § 40A–22–23, supra, was not charged in the indictment; that not having been given notice of this charge his conviction must be reversed and he should be discharged. He relies on *State v. Trivitt*, 89 N.M. 162, 548 P.2d 442 (1976) and *State v. Crump*, 82 N.M. 487, 484 P.2d 329 (1971). Both *Trivitt* and *Crump* involved notice to defendant of a narrowly drawn charge and the limitations resulting from the narrow charge. Neither decision is applicable if peace officer battery is an offense included within peace officer aggravated battery. See *State v. Trivitt*, supra.

For an offense to be included within another offense, the offense must be "necessarily included in the offense charged". R.Crim.P. 44(d). Accordingly, we look to the offense charged in the indictment. *State v. Medina*, 87 N.M. 394, 534 P.2d 486 (Ct.App.1975). For an offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. *State v. Medina*, supra; see *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App. decided March 8, 1977).

Paragraph A of § 40A–22–24, supra, defines the crime of aggravated battery upon a peace officer. Paragraphs B and C of § 40A–22–24, supra, go to the method by which the crime is committed. See *State v. Chavez*, 82 N.M. 569, 484 P.2d 1279 (Ct.App. 1971).

Whether battery upon a peace officer is included within aggravated battery upon a peace officer is determined by comparing § 40A–22–23, supra, with § 40A–22–24(A), supra. Contrary to defendant's contention, *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975) did not change this approach.

Comparing the two offenses, the significant difference is that the aggravated battery must be "with intent to injure" while battery must be "done in a rude, insolent or angry manner." Considering a similar distinction in non-peace officer statutes, we held that battery was included within the offense of aggravated battery. *State v. Duran*, 80 N.M. 406, 456 P.2d 880 (Ct.App.1969).

Defendant suggests that *Duran* was incorrectly decided. He states: "If one batters a peace officer with an intent to injure him it is aggravated battery on a peace officer no matter how courteously, calmly or unenraged one was. One simply does not need to be rude or angry to have an intent to injure." The contention is that one can commit aggravated battery (intent to injure) without also committing battery (rude, insolent or angry manner) and, therefore, battery is not an included offense.

Defendant's contention reduces to an exercise in semantics. One cannot commit battery with an intent to injure without also proceeding in a rude, insolent or angry manner. See the various definitions of "rude", "insolent" and "angry" in Webster's Third New International Dictionary (1966). The meaning of "rude" includes offensive in manner or action; the use of force. The meaning of "insolent" includes insult; contemptuous or brutal in behavior. The

meaning of "angry" includes various forms of displeasure.

Battery upon a peace officer is a charge included within the charge of aggravated battery upon a peace officer. The battery upon a peace officer instruction was proper; his conviction is for an offense included within the charge of which he had notice.

Battery as Included Within Peace Officer Battery

The trial court refused defendant's request to instruct on simple battery as an included offense. Section 40A–3–4, N.M.S.A.1953 (2d Repl. Vol. 6) reads:

> "Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.
>
> "Whoever commits battery is guilty of a petty misdemeanor."

One distinction between simple battery and aggravated battery upon a peace officer is the "rude, insolent or angry" versus "intent to injure" distinction previously discussed.

Another distinction is that simple battery is "to the person of another" while aggravated battery upon a peace officer is "to the person of a peace officer . . . while he is in the lawful discharge of his duties." Both offenses involve persons. One cannot batter a peace officer while in the lawful discharge of his duties without battering the person of another. There being evidence that the police officer was not in the lawful discharge of his duties in connection with the altercation, the trial court erred in refusing to instruct on simple battery. *State v. Duran*, supra.

Refusal to Instruct on an Investigatory Stop

The jury was instructed that to commit battery upon a peace officer, there must be proof that the officer was in the lawful discharge of his duties. See *State v. Bloom*, 90 N.M. 226, 561 P.2d 925 (Ct.App. decided March 16, 1976), reversed on other grounds, 90 N.M. 192, 561 P.2d 465, Sup.Ct., decided March 10, 1977. There was no instruction defining lawful discharge of duties. No such instruction was requested although the lawfulness of the officer's actions was a severely disputed factual question. See *State v. Dosier*, 88 N.M. 32, 536 P.2d 1088 (Ct.App.1975); *State v. Bell*, 84 N.M. 133, 500 P.2d 418 (Ct.App.1972).

Both parties submitted a requested instruction on when a police officer may approach a person to investigate possible criminal behavior. See *State v. Galvan*, 90 N.M. 129, 560 P.2d 550 (Ct.App. decided February 8, 1977). Both requests were refused.

Defendant asserts the trial court erred in refusing his requested instruction. He states: "When, as in the case at bar, there is a factual question as to what happened, it is necessary to inform the jury when the police have a legal right to detain a person. This is necessary to ensure that the jury's determination of whether the officer was lawfully discharging his duties is based on a legal standard."

The purpose of an instruction is to enlighten the jury. An instruction which is confusing, rather than enlightening, is properly refused. *State v. Selgado*, 76 N.M. 187, 413 P.2d 469 (1966). In the case of a failure to instruct, a correct written instruction must be tendered. *State v. Dutchover*, 85 N.M. 72, 509 P.2d 264 (Ct.App.1973).

There was no error in refusing the requested instruction on an officer's right to detain a person. The requested instruction was incomplete and, therefore, it was not a correct instruction. The requested instruction was incomplete because it focused only on the officer's initial approach to defendant and disregarded the officer's attempt to arrest after defendant allegedly hit the officer. In light of the evidence, the requested instruction would have confused the jury on the issue of lawful discharge of duties. See *State v. Bloom*, supra.

Refused Instruction on Self-Defense

The trial court instructed the jury on the right to resist an unlawful arrest. *State v.*

Calhoun, 23 N.M. 681, 170 P. 750 (1917). No issue is raised concerning this instruction. See Comment, 7 Nat. Res. J. 119 (1967), *Criminal Law—Arrest—The Right to Resist Unlawful Arrest.*

Defendant also requested an instruction on self-defense in a non-homicide situation. See U.J.I. Crim. 41.51. The trial court refused the requested instruction. Defendant asserts this was error.

There are two parts to this issue: (1) there being no question that there was evidence supporting a self-defense instruction, was defendant entitled to such an instruction; and (2) if entitled to an instruction, was the requested instruction a proper instruction?

State v. Heisler, 58 N.M. 446, 272 P.2d 660 (1954) states on unqualified right to a self-defense instruction in a criminal case when there is evidence which supports the instruction. *Heisler* involved private individuals. Self-defense instructions have been involved in cases where self-defense was asserted as a defense in a matter involving an attack on a police officer. *State v. Selgado*, supra; *State v. Middleton*, 26 N.M. 353, 192 P. 483 (1920); *State v. Calhoun*, supra; *Brobst v. El Paso & Southwestern Co.*, 19 N.M. 609, 145 P. 258 (1914). From these decisions we infer that the giving of a self-defense instruction is not error. Our question is the opposite—is it error to refuse a self-defense instruction when an instruction has been given on the right to resist an unlawful arrest? Compare *State v. Smith*, 88 N.M. 541, 543 P.2d 834 (Ct.App. 1975).

The right of self-defense is not barred simply because the other person in the affray is a police officer. There are, however, limitations on this right. 1 Wharton's Criminal Law and Procedure (Anderson 1957) § 216 states:

> "The rule of self-defense applies to the case of an officer attempting to make an arrest, who abuses his authority and transcends the bounds thereof by the use of unnecessary force and violence, as well as to the case of a private individual who unlawfully uses such force and violence.
>
> "As against an officer using necessary force to overcome resistance to an arrest, or using proper force to prevent an escape, the person sought to be arrested has no right to act in self-defense. When a man puts himself in a state of resistance and openly defies the officers of the law, he is not allowed to take advantage of his own wrong, if his life is thereby endangered, and set up the excuse of self-defense."

Gray v. State, 463 P.2d 897 (Alaska 1970) states:

> "The overwhelming weight of authority indicates that a person subjected to an unlawful arrest may use reasonable force to defend himself. In the case of *Miller v. State*, 462 P.2d 421 (Alaska 1969), we modified this rule by holding that there was no right to resist a peaceful arrest, even though the arrest was unlawful. The *Miller* case did not deal, however, with the circumstances of the present case, where it has been claimed that the arrest was unlawful because Officer Strong used unprivileged force to effect the arrest. An officer in making an arrest is privileged by statute to use only that force which is necessary to restrain the arrested person. To the use of necessary force the arrested person cannot claim the privilege of self-defense. If more than necessary force is used, then the officer commits an unprivileged assault on the arrested person. To an arresting officer's unprivileged use of force, the arrested person must have the right to use reasonable force to defend himself."

Criticizing the right to resist an unlawful arrest, Comment, 7 Nat. Res. J., supra, at 126 states: "When an officer attempting to make an arrest abuses his authority and uses unnecessary force or violence, the right to self-defense arises, whether or not the arrest was otherwise lawful." See *State v. Mulvihill*, 57 N.J. 151, 270 A.2d 277 (1970).

One does have a right to defend oneself from a police officer. This right exists whether the attempted arrest is law-

ful or unlawful. This right, however, is limited. One may defend oneself against excessive use of force by the officer. One does not have the right to self-defense when the officer is using necessary force to effect an arrest. See *Brobst v. El Paso & Southwestern Co.*, supra; compare *State v. Calhoun*, supra.

The right of self-defense against a police officer is a concept different from the right to resist an unlawful arrest. Self-defense is for the purpose of protecting a person's bodily integrity and health. *State v. Mulvihill*, supra. The purpose of resistance to an unlawful arrest is to prevent the arrest. Comment, 7 Nat. Res. J., supra. In jurisdictions where the right to resist an unlawful arrest has been abolished, the right of self-defense against excessive force by a police officer continues to exist. *Gray v. State*, supra: *State v. Mulvihill*, supra.

We hold that defendant did have a limited right of self-defense against the police officer, that he was entitled to an instruction on that limited right. The instruction concerning resistance to an unlawful arrest did not cover defendant's right to self-defense; the unlawful arrest instruction went only to the arrest; it did not cover the right to defend against excessive force whether or not the arrest was unlawful.

Although defendant was entitled to an instruction on his limited right to self-defense, refusal of the requested instruction was not error. The requested instruction did not limit defendant's right of self-defense to situations where the officer used excessive force; the requested instruction would have given defendant an unlimited right of self-defense.

The requested instruction was properly refused because it was an incorrect statement of the law. *State v. Dutchover*, supra.

For failure to instruct on simple battery as an offense included with the charge of aggravated battery upon a peace officer, the conviction is reversed. The cause is remanded with instructions to grant defendant a new trial.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

563 P.2d 113

STATE of New Mexico, Plaintiff-Appellee,

v.

Leo ORTIZ, Defendant-Appellant.

No. 2778.

Court of Appeals of New Mexico.

April 5, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Donald D. Montoya, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of embezzlement contrary to § 40A–16–7, N.M.S.A.1953 (2d Repl. Vol. 6, 1972) defendant appeals asserting the trial court erred in: (1) not dismissing the indictment because it charged in the disjunctive and therefore did not give defendant sufficient notice; and, (2) not directing a verdict because of insufficient evidence. Issues listed in the docketing statement and not briefed on appeal are deemed abandoned. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App.1976).

On April 30, 1976 two agents of the Drug Enforcement Administration, through an informant known to one of the agents, arranged to meet with defendant. Defendant indicated he could buy one-half ounce of heroin for them for $500.00. One agent testified that defendant did not ask the usual questions that 99% of the go-betweens ask before they will arrange a buy. Defendant showed no reluctance to act as the go-between.

They then drove to a trailer park in Albuquerque. Defendant had them stop the car about one and one-half blocks from the trailer park. There had been previous purchases arranged at this same trailer park. Defendant would not allow the agents to go with him to meet his source. Defendant stated that his source would not deal if someone was watching. The agents reluctantly gave defendant $500.00. Defendant walked into the trailer park and out of sight of the agents. Both defendant and the $500.00 disappeared and did not return. Defendant was subsequently charged by indictment and arrested.

The Indictment

The indictment charged as follows:

"That on or about the 30th of April, 1976, in Bernalillo County, New Mexico, the above-named defendant did attempt to commit a felony, to wit: Trafficking in a Controlled Substance, to wit: Heroin, a Schedule I Narcotic Drug, in that he did an overt act in furtherance of and with intent to commit Trafficking in a Controlled Substance, to wit: Heroin, a Schedule I Narcotic Drug, and tending but failing to effect the commission thereof, contrary to Sections 40A–28–1, 54–11–20, 54–11–2, 54–11–6, 54–11–7, NMSA 1953, as amended, OR IN THE ALTERNATIVE;

"That on or about the 30th day of April, 1976, in Bernalillo County, New Mexico, the above-named defendant did intentionally misappropriate or take a thing of value, to wit: approximately $500 in United States Currency, belonging to the United States Government, by means of fraudulent conduct, practices or representations, said thing of value having a value exceeding $100 but not more than $2500, contrary to Section 40A–16–6, NMSA 1953, as amended, OR IN THE ALTERNATIVE;

"That on or about the 30th day of April, 1976, in Bernalillo County, New Mexico, the above-named defendant did embezzle or convert to his own use, a thing of value, to wit: approximately $500 in United States Currency, with which he had been entrusted, with fraudulent intent to deprive the United States Government, the owner thereof, said thing of value having a value exceeding $100 but not more than $2500, contrary to Section 40A–16–7, NMSA 1953, as amended."

Defendant's first motion to dismiss the indictment was predicated on three grounds: (1) failure to inform defendant of the nature and cause of the accusation; (2) lack of specificity so as to enable defendant to plead the judgment as a bar to a subsequent prosecution; (3) lack of facts for trial court to decide whether the facts would be sufficient to support a conviction. The trial court denied the motion.

Defendant's second motion to dismiss the indictment was predicated on three grounds: (1) neither the indictment nor the statement of facts [furnished after the hearing on the first motion] sufficiently apprised defendant of the nature and cause of the accusation against him; (2) being tried on the indictment would deprive the defendant of a fair trial; (3) the indictment was returned in violation of § 41–5–10, N.M.S.A.1953 (2d Repl. Vol. 6, 1972). The trial court also denied this motion. The trial court stated that it would not require an election of counts at that time but would do so if necessary at the end of the state's case.

Defendant's argument is that "[i]n obtaining an indictment on these three charges, then in proceeding to trial on all three, the prosecutor is in effect saying, 'I think there is evidence to support all three charges, but rather than risk an election and go on the one I believe best supported by the evidence, we will let the jury pick. . . .'"

Our answer is that the trial court did direct a verdict against the state as to the alternative charge, attempted trafficking in heroin. Thus, we need only decide the alternative charges of embezzlement or fraud. A person may by one act violate more than one statute or commit more than one offense. *State v. Tijerina*, 86 N.M. 31,

519 P.2d 127 (1973). Also, a statute may be violated in several ways by different acts. See *State v. Tapia*, 89 N.M. 221, 549 P.2d 636 (Ct.App.1976). Further, the concept of double jeopardy is not involved since the charges were in the alternative. *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975). Nor are the concepts of included offenses, same evidence or merger. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct.App.) decided March 15, 1977. We see nothing unfair in the charging of the defendant in the alternative. When alternative charging is to the effect of a crime being committed in various ways and the various ways are pursuant to a statute the charge is not legally deficient. *State v. Gurule*, 90 N.M. 87, 559 P.2d 1214 (Ct.App.) decided January 18, 1977; *State v. Ochoa*, 41 N.M. 589, 72 P.2d 609 (1937). We fail to see how the alternative charging in the instant case would be any different than the alternative charge situation which occurred in *State v. Gurule*, supra, particularly since the charges arose out of the same events and carried the same penalties. See generally Wharton's Criminal Procedure, Torcia, 12th Ed. 1975, Vol. 2, § 294. Here defendant was furnished with a most detailed statement of fact which not only included the complete district attorney's file and police reports but the citation of authorities the state was relying on in support of each of the alternative charges.

Sufficiency of the Evidence

We examine the evidence to determine whether it was sufficient to go to the jury under the counts of fraud or embezzlement. An essential element of each count is intent. Intent is seldom provable by direct testimony. See *State v. Elam*, 86 N.M. 595, 526 P.2d 189 (Ct.App.1974). It must be proved by the reasonable inferences shown by the evidence and the surrounding circumstances. If there are reasonable inferences and sufficient circumstances then the issue of intent becomes a question of fact for the jury. It is only where there is no reasonable inferences or sufficient surrounding circumstances that we can say, as a matter of law, that a motion for a directed verdict should have been granted or that a charge should not have been presented to the jury.

Here there was sufficient evidence, reasonable inferences and surrounding circumstances for the alternative counts to be presented to the jury to decide whether the crime was fraud or embezzlement. Specifically, it was for the jury to decide whether defendant obtained the $500.00 by fraud in violation of § 40A–16–6, N.M.S.A. 1953 (2d Repl. Vol. 6, 1972) or converted to his own use the money with which he had been entrusted. Section 40A–16–7, N.M.S.A.1953 (2d Repl. Vol. 6, 1972). See *State v. Seefeldt*, 54 N.M. 24, 212 P.2d 1053 (1948). In addition, although the evidence and inferences were conflicting, the evidence is sufficient to show that defendant intended to convert the money after it was entrusted to him. Accordingly, we do not reach the question of whether an intent to convert, which existed prior to the entrustment, is sufficient intent for embezzlement. See *State v. Konviser*, 57 N.M. 418, 259 P.2d 785 (1953).

Affirmed.

IT IS SO ORDERED.

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

563 P.2d 586

Margaret PLATT, Plaintiff-Appellant,

v.

Anselmo MARTINEZ, Defendant-Appellee.

No. 11090.

Supreme Court of New Mexico.

April 6, 1977.

Rehearing Denied May 3, 1977.

Burton F. Broxterman, Albuquerque, for plaintiff-appellant.

N. Tito Quintana, Albuquerque, for defendant-appellee.

OPINION

PAYNE, Justice.

This is a boundary dispute. Plaintiff, Margaret Platt, brought suit alleging that the defendant, Anselmo Martinez, had encroached upon her lands by building fences that incorporated portions of her property within his. Martinez counterclaimed asking that title to the disputed land be quieted in him on the alternative grounds of either adverse possession or acquiescence. The trial court found for Martinez. We reverse.

In 1961 the plaintiff and her husband, since deceased, purchased a tract of land described as apportionate parts of a particular section. The defendant, Martinez, also held lands in the same section. His lands abutt the Platt property and were described as apportionate parts of the same section. The legal descriptions of the two tracts of land contained in the respective deeds do not conflict and create no over-lap. Martinez had purchased his land in 1955 and had been familiar with it from his boyhood. In 1964 the defendant procured a survey in which the surveyor followed some stone markers and some old fence posts in setting the boundaries. These corresponded to Martinez' understanding of the boundary and to the location of old fences of which only vestiges remained. Based upon that survey, Martinez built a new fence, which incorporates a portion of the Platt property within his.

The terrain where the fence was built, as viewed from the plaintiff's side, is brushy and somewhat uneven. In fact, the fence cannot be seen from plaintiff's side without a specific effort to do so and without "crawling through the brush." On the defendant's side there is a meadow and the new fence included all of the meadow within the defendant's property. The fence is easily seen from his side. After the fence line was erected, but before its discovery by plaintiff, she went onto the property at various times but made no specific effort to walk the boundaries or to explore her property. She was never aware that a fence had been built that encroached upon her land.

The two theories upon which defendant claims title to the disputed land are adverse possession and acquiescence. The requirements of adverse possession are established in New Mexico by statute. Section 23–1–22, N.M.S.A.1953 (Supp.1975). We do not have to consider the application of adverse possession in this case beyond stating that there was no evidence of the payment of taxes on the disputed tract by the defendant. This is a specific requirement of our statute and the lack of that evidence defeats defendant's claim for title whether or not any other elements of adverse possession are present. Defendant paid taxes only on the property covered by his deed.

The theory of acquiescence upon which Martinez also relies has been treated in numerous New Mexico cases. *Sachs v. Board of Trustees of the Town of Cebolleta Land Grant,* 89 N.M. 712, 557 P.2d 209 (1976); *McBride v. Allison,* 78 N.M. 84, 428 P.2d 623 (1967); *Thomas v. Pigman,* 77 N.M. 521, 424 P.2d 799 (1967); *Woodburn v. Grimes,* 58 N.M. 717, 275 P.2d 850 (1954); and *Retherford v. Daniell,* 88 N.M. 214, 539 P.2d 234 (Ct.App.1975). These cases have firmly recognized acquiescence as a principle for settling boundary disputes in New Mexico. As stated in the *Sachs* case:

> . . . It is well established in the law of this State and generally that if adjoining landowners occupy their respective tracts up to a clear and certain line (such as a fence), which they mutually recognize and accept as the dividing line between their properties for a long period of time, neither may thereafter claim that the boundary thus recognized is not the true boundary.

89 N.M. at 717, 557 P.2d at 214.

There is no question in this case that the defendant occupied the land up to the fence line and that he recognized the fence line as the boundary. However, there are questions as to whether there was a mutuality of recognition of the fence line, and the degree of knowledge the plaintiff must have to support acquiescence. The trial court in its findings of fact stated:

> 12. Plaintiff knew, or should have known, of the fence line after she purchased the property in 1961 and also of the new fence constructed by the defendant in 1964.

It is undisputed that the fence was in existence for at least ten years. Nothing in the record, however, supports that portion of the finding that plaintiff "knew" of the fence line. The finding is incorrect to that extent. The issue to be determined is whether acquiescence can be found where a

party does not know of the existence of the fence or the boundary but "should have known."

In the *Sachs* decision this court referred to the "plain meaning of the words" in interpreting acquiescence, and stated that:

> . . . According to Webster's New International Dictionary of the English Language (2d ed. 1960), to "acquiesce" in something is to accept or comply tacitly or passively, without implying assent or agreement; "acquiescence" is distinguished from avowed consent on the one hand, and, on the other, from opposition or open discontent. . . .
>
> 89 N.M. at 719, 557 P.2d at 216.

This definition implies that a party must be aware of a condition to acquiesce in that condition. The *Sachs* case also quoted *Lane v. Walker,* 29 Utah 2d 119, 120, 505 P.2d 1199, 1200 (1973) as follows:

> Plaintiffs urge that there is no evidence to indulge a fiction that there was a fence mutually 'intended' to be a boundary. To this we say that the test to establish the boundary by 'acquiescence' necessarily need not be based on mutual 'intent.' 'Intent' is not synonymous with 'acquiescence' in these cases. 'Acquiescence' is more nearly synonymous with 'indolence,' or 'consent by silence,' —or a knowledge that a fence or other monuments appears to be a boundary,—but that no one did anything about it for 48 years. No one in this case did much except by invective, across the very fence that made irritants out of erstwhile neighbors, for 48 years,—until suddenly the appreciation of property values transmuted yesteryear's minimal values into objects d'art of inestimable value in the real estate market.

Again, even though the court specifically rejects the necessity of "mutual intent", it does require some knowledge as a base from which "consent by silence" will spring. The knowledge required is not that of an ultimate mental conclusion, i. e. that a fence is or is not on the true property line, however, there must at least be a knowledge that the fence is in existence.

Each case must be viewed upon its own facts. In this instance, even though the plaintiff had been on the property numerous times gathering wood, picnicking and enjoying the property, she was never aware of the existence of the fence. The particular terrain and the heavy brush involved obscured her view of the fenced boundary. There are many situations where a property owner could unknowingly be subject to the loss of lands by neighbors mistakenly relocating fences and thus expanding their holdings. This could occur because of absentee ownership, incapacity or even, as in this case, terrain which precludes reasonable ascertainment of fences and boundary lines. We cannot extend the doctrine of acquiescence to that extent in New Mexico.

We therefore reverse and remand the cause to the district court for further proceedings necessary to conform to this decision.

IT IS SO ORDERED.

SOSA and EASLEY, JJ., concur.

563 P.2d 588

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Petitioner-Appellant and Cross-Appellee,

v.

NEW MEXICO STATE CORPORATION COMMISSION, Columbus Ferguson, Chairman, Floyd Cross, Member, Charles Rudolph, Member, Respondents-Appellees and Cross-Appellees,

and

New Mexico Retail Association, Intervenor-Appellee and Cross-Appellant.

No. 10983.

Supreme Court of New Mexico.

April 20, 1977.

Rehearing Denied May 11, 1977.

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Campbell & Bingaman, Santa Fe, Pauline J. Nelson, Albuquerque, for petitioner-appellant and cross-appellee.

Toney Anaya, Atty. Gen., William C. Primm, Asst. Atty. Gen., Santa Fe, for Corporation Commission.

Montgomery, Federici, Andrews & Hannahs, Frank Andrews, III, Santa Fe, for intervenor-appellee and cross-appellant.

OPINION

EASLEY, Justice.

This cause was removed from the New Mexico State Corporation Commission (Commission) after a rate increase applied for by Mountain States Telephone & Telegraph Company (Mountain Bell or the Company) had been denied by the Commission. We reverse the Commission and remand with instructions.

In April, 1975, Mountain Bell filed an application with the Commission for a determination of its revenue requirements and for permission to file a schedule of proposed rates to obtain additional revenue. The parties stipulated that the hearings would be conducted in two phases, the first to be concerned with the adequacy of Mountain Bell's rate of return, the second to be for the determination of a schedule of rates.

On July 9, 1975, the Commission entered its order that Mountain Bell was entitled to an 11.7% rate of return on its average book equity, which translated into a finding that Mountain Bell was entitled to earn an additional $12,900,000 in revenue annually.

On July 14, 1975, Mountain Bell filed proposed rates designed to raise this additional revenue. The New Mexico Retail Association (Association) intervened to oppose the rates. By order dated January 12, 1976, the Commission refused to approve the proposed rates on the basis that Mountain Bell had not sustained its constitutional burden of proof that the rates were fair and reasonable. Mountain Bell was advised by order of the Commission that a new application would be required, along with the requisite notice and a second full hearing.

On February 3, 1976, Mountain Bell petitioned the Commission for an even-percentage increase in rates for all services to provide the required revenue, or, in the alternative, for the Commission to fix reasonable rates. On February 11, 1976, the Commission denied this petition for a supplemental order. The cause was then removed by Mountain Bell to this court. The Association is before this court on cross removal.[1] On July 13, 1976, this court ordered the rates proposed to and rejected by the Commission to be fixed under bond.

The issues raised by Mountain Bell are: (1) whether, once the Commission had determined that Mountain Bell was entitled to an 11.7% rate of return it had a constitutional duty to fix the rates to provide the revenue; (2) whether, under the New Mexico Constitution, the Commission had only six months within which to fix some schedule of rates rather than just to deny the proposed rate schedule; (3) whether the Commission's denial of a motion to allow its new rates to go into effect under bond during the six months' period constituted confiscation of Mountain Bell's property in violation of the United States and New Mexico Constitutions; (4) whether the Commission erred in holding that Mountain Bell had failed to meet its burden of proof; and (5) finally, whether the Commission should be directed on remand to consider the most recent data in establishing the rate base period for an 11.7% return and should be directed to fix a permanent schedule of rates from January 14, 1976.

The Commission and the Association contested each of the utility's contentions.

This court's scope of review is set forth in N.M.Const. art. 11, § 7 where it is provided that:

1. See N.M.Const. art. 11, §§ 7, 8.

> . . . the said Court shall have the power and it shall be its duty to decide such cases on their merits, . . .

This section was last considered in *State Corporation Com'n v. Mountain States Tel. & Tel. Co.,* 58 N.M. 260, 270 P.2d 685 (1954) (hereinafter Mountain States 1954) where the court relied upon *Seward v. D. & R. G.,* 17 N.M. 557, 131 P. 980 (1913) in which the court stated (17 N.M. at 583, 584, 131 P. at 989):

> Our constitution . . . requires this court to pass upon the merits of the case, without indulging in any presumptions. This being true, it is our duty to take the order made by the commission and test its reasonableness and lawfulness by the evidence adduced upon the hearing. This court forms its own independent judgment, as to each requirement of the order, upon the evidence, . . .

This court, however, in *Mountain States 1954,* supra, held that we are not a rate-making body, that we do not have the power or authority to determine what a fair actual rate is and that we can only determine whether an order of the Commission is just and reasonable and to be enforced, or the contrary.

1. Mountain Bell argues that after the Commission found that Mountain Bell was suffering a revenue deficiency and determined a rate of return to which it was entitled, the Commission had a duty under the constitution and under its own rules to fix the schedule of rates sought to be implemented by Mountain Bell or to substitute a schedule of rates that the Commission found to be fair.

Mountain Bell has a legitimate concern that unless this court rules that the Commission has a positive duty to fix rates when it has disapproved those filed by the utility, the Commission could intermittently turn down proposed rates each six months, causing severe and irreparable injury to Mountain Bell from the loss of revenue. It is contended that the Commission could continue to deny entire rate structures unless Mountain Bell proved with mathematical precision to the satisfaction of the Commission the reasonableness of each of its four thousand separate rates for services and equipment.

On the other hand, the Commission and intervenors understandably contend that if this court holds that the Commission has a positive duty to fix rates, the utility could file a schedule of rates unsupported by sufficient data to substantiate the reasonableness thereof and thus place the burden back on the Commission to assemble the evidence necessary to support the reasonableness of the rates.

There is validity to the apprehensions of both sides. The problem becomes one of arriving at a solution that will prevent the occurrence of either of the postulated radical extremes.

In defining the duties of the Commission with regard to establishing telephone rates, the framers of the Constitution would have had difficulty finding language that was more clear, concise and forceful. N.M.Const. art. 11, § 7 states in part:

> The commission *shall have power and be charged with the duty* of *fixing, determining, supervising, regulating* and *controlling* all charges and rates of . . . telephone . . . companies . . . within the state . . . . The commission shall have power to change or alter such rates, to change, alter or amend its orders, rules, regulations or determinations, and to enforce the same in the manner prescribed herein; . . . and it shall have power, upon a hearing, to determine and decide any question given to it herein, . . . (Emphasis added.)

The words "shall . . . be charged with the duty" indicate that the provision is mandatory rather than discretionary. See § 1–2–2(I), N.M.S.A.1953 (Repl. Vol. 1, 1970); *State v. Lujan,* 90 N.M. 103, 560 P.2d 167 (1977); *Application of Sedillo,* 66 N.M. 267, 347 P.2d 162 (1959).

According to Webster's Third International Dictionary (1971), to "fix" is "to give a final or permanent form to": make definite and settled: to "determine" is "to fix conclusively or authoritatively . . . to

settle a question or controversy . . . to settle or decide by choice of alternatives;" "control" is the "power or authority to guide or manage: directing or restraining domination."

The statutes serve to implement the broad grant of constitutional authority to the Commission, giving it the power to prescribe its own rules, inspect a company's records, require reports under oath, initiate petitions for grievances and mediate them, grant time for assembling evidence, adjourn or continue hearings, investigate and take testimony, compel production of documents, invoke the aid of the courts, and take depositions. Sections 69–7–1 through 69–7–10, N.M.S.A.1953.

The Corporation Commission's rules further define the duties and authority of the Commission. Mountain Bell contends that it is entitled to rely on the duty imposed by § 8 of the Corporation Commission Rules, Docket No. 346 (1952) to establish that the Commission has a positive duty to fix rates:

> If, after any such hearing, the *Commission finds* any such rate or *rates* to be unlawful or *unreasonable,* or both, or any part thereof, and the Commission *having determined* the *reasonable* or lawful rate or *rates* to be charged by such person subject to these rules herein, and *shall fix the same* by Order, *or order* such company to fix such reasonable and lawful rates *in accord* with the *findings* of the Commission . . . .. (Emphasis added.)

Mountain Bell claims the Commission established a precedent upon which it could rely as to the Commission's interpretation of its authority and responsibility as set forth in the Mountain States' order of 1973 in which the Commission did not limit itself to considering only rates for which Mountain Bell had requested changes. The Commission explained its action as follows:

> . . . we direct increases in certain rates not requested by the applicant. Since the applicant has presented an "open filing" to the commission, it is our view that *we have authority to adjust and change any rate,* even though not requested to do so by the applicant, if such adjustment and change is fairly indicated by all circumstances. (Emphasis added.)

Mountain States Teleph. & Teleg. Co., 2 P.U.R. 4th 332, 359 (N.M. State Corp. Com'n 1973).

It is difficult to conceive of a more clear and all-inclusive grant of power to a governmental agency. The Commission has a duty to be a prime mover in the procedure to see that the public interest is protected by establishing reasonable rates and that the utility is fairly treated so as to avoid confiscation of its property. Considering this broad mandate it could hardly be envisioned that the Commissioners would sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a "thumbs-up or thumbs-down" judgment after the dust of battle settles in the arena.

That this Commission may misapprehend its constitutional duties is demonstrated by the fact that it did not call a single witness and did not introduce a single exhibit in relation to the issues before us. Only one witness was called by the Commission in the first phase of the hearings and only five pages of exhibits were introduced. However, there was rigorous cross-examination of Mountain Bell's and the Association's witnesses by the Commission, and material evidence by way of testimony and exhibits was introduced by the Association with support from the Commission. Historically, the Commission has had insufficient funds to perform fully in this area, although the State has a solemn obligation to provide adequate monetary support so that it may fulfill its constitutional duty. The magnitude of the problem calls for serious consideration by New Mexico lawmakers.

There are no New Mexico cases that precisely address the question as to the circumstances under which it is mandatory that the Commission act to fix rates when proposed rates have been rejected. Although the fact situation in the case is not fully analogous to ours, the reasoning of Justice Cardozo in the United States Supreme Court case of *Dayton P. & L. Co. v.*

Comm'n, 292 U.S. 290, 54 S.Ct. 647, 78 L.Ed. 1267 (1934) is persuasive. The Commission in that case had rejected the utility's rates in their entirety because it disagreed in part with the Company's schedule. Justice Cardozo said (292 U.S. at 294, 54 S.Ct. at 650):

> At the threshold there is a controversy as to the scope of the problem before us for solution. The appellee [*Commission*] argues that the only question for the *Commission was one as to the reasonableness of the new schedule, in the very form proposed:* let the rates be excessive by ever so little, the schedule it is said, was to be rejected altogether, and no other could be substituted. In opposition the appellant [*Company*] *urges* that this is too narrow a construction of the function and powers of the Commission under the applicable statute: *if the proposed schedule was too high and the earlier one too low, there was a duty to fix a rate between, and thereby make the compensation adequate. We accept this broader view in the absence of a ruling to the contrary by the courts of the state.* (Emphasis added.)

The Commission and Association argue that the last sentence of Justice Cardozo's statement as set forth above precludes our consideration of this case as authority for the view expressed for the reason that the Supreme Court in this state expressly ruled "to the contrary" in the case of *Mountain States 1954,* supra. They misconstrue the holding in that case.

The New Mexico Supreme Court was construing the scope of review of the *Supreme Court* as opposed to the scope of the inquiry before the *Commission,* as here, where we are deciding the issue within the narrow confines of the authority delegated to the Commission by N.M.Const. art. 11, § 7. The court called specific attention to this distinction and stated (58 N.M. at 270, 270 P.2d at 691):

> We do not decide finally the scope of the question before the commission because decision of that question is not required for disposition of this case.

The Commission has an ongoing, affirmative duty to establish rules and regulations, issue orders, examine records, conduct investigations, grant continuances and do all other things necessary to insure that the public has fair telephone rates and that the utility is fairly treated. Its role is not a passive one. *State v. Montana-Dakota Utilities Co.,* 89 N.W.2d 94 (N.D.1958); *Bennett v. Mountain States Telephone & Tel. Co.,* 121 Colo. 325, 215 P.2d 714 (1950); *Illinois Bell Telephone Co. v. Commerce Commission,* 304 Ill. 357, 136 N.E. 676 (1922).

As the Superior Court of Pennsylvania declared in *Pennsylvania Power & Light Co. v. Public Service Com'n,* 128 Pa.Super. 195, 217, 218, 193 A. 427, 437 (1937):

> If . . . it is found that the rates are too high, *the commission must then necessarily either indicate a proper charge or furnish a basis which will enable the utility to file a proper tariff. Otherwise there would be no end to the controversy.* . . .
>
> We are all of the opinion that *we cannot perform the duty imposed* on us . . . *until the commission has completed its task by determining what, in its opinion,* are fair charges or proper tariffs. . . . (Emphasis added.)

See also *School Dist. No. 47 at Lakewood Sanitation Dist.,* 68 P.U.R. (N.S.) 385 (Colo. Pub.U.Com'n, 1947); *Milltown Mutual Telephone Co.,* 56 P.U.R. (N.S.) 125 (Wisc.Publ. Serv.Com'n, 1944); *Peoples Natural Gas Co. v. Pennsylvania Pub. U. Com'n,* 141 Pa.Super. 5, 14 A.2d 133 (1940); *Lewis & Dunn,* 8 P.U.R. (N.S.) 285 (Me.Pub.U.Com'n, 1934).

How do these general legal principles apply to the relevant facts in the case at hand?

The record reveals an unusual set of circumstances. The dominant issue concerning Mountain Bell was settled when the Commission ruled that the Company was entitled to $12,900,000 per year in additional revenue. This was the most critical part of the decision-making process; from there it simply became a question of how the increased revenue load was to be apportioned among the customers of Mountain Bell.

The evidence shows that traditionally and logically there is a great measure of public policy that enters into the apportionment of rates. It is incumbent upon the Commission to make public policy decisions and to change proposed rates that do not comport therewith.

The eighteen days of hearings and subsequent proceedings produced a monumental record of over seven thousand pages of testimony, exhibits and briefs, all of which have been reviewed by this court. The Company officials testified that they had presented to the Commission "all" of the evidence available to Mountain Bell bearing upon the fairness and reasonableness of the rates proposed and that they had supplied to the Commission all documents or information requested by the Commission. There was no complaint by the Commission as to failure on the part of Mountain Bell to supply any information or documents that were known to be available to the Company. There was no indication that the Commission desired additional proof. Mountain Bell made no request for time within which to furnish additional evidence.

It is obvious from the testimony that the complicated cost data that would have been required to meet the criticisms of the Association and the Commission would entail studies that would take a considerable amount of time to make or for which there were no known or tested procedures.

So, at the end of the hearings, the parties were at an impasse. The Commission, by its order, found "an absence of reliable cost information and a failure to prove that the proposed rates and charges are just and reasonable. . . . We are convinced that the absence of reliable cost and revenue data exists in the evidence offered to support each and every proposed rate or charge in every service category." The posture of Mountain Bell at that point was that it had supplied the Commission with every scrap of relevant evidence that could be obtained. The Commission denied the proposed increases as to all rates.

It is inherent in the Commission's constitutional mandate that it has the authority to refuse to fix telephone rates when it does not have substantial evidence from which fair rates can be reasonably calculated or determined. Under such circumstances the Commission has a duty to deny the rates. The Commission's findings and conclusions show that the members were exercising their prerogative, as they saw it, of denying the rates for the reason that there was no substantial evidence upon which they could act.

Thus, the Commission having fulfilled what it considered to be its duty, it devolves upon this court to examine the case "on the merits" as charged in the Constitution, look at the entire record and decide whether the decision of the Commission is just and reasonable and "should be enforced, or the contrary." *Mountain States 1954,* supra.

We cannot hold that under all situations, without regard for the state of the evidence, the Commission has a duty to formulate rates. We cannot say as a matter of law that the rates submitted should have been approved. We do, however, hold that there was substantial evidence before the Commission that the rates were reasonable, or substantial evidence was present from which the Commission could have promulgated reasonable rates consistent with the Commission's discretion on public policy issues involved with regard to apportionment. Upon remand the Commission shall proceed to fix rates, having these legal principles in mind.

2. Mountain Bell claims that the New Mexico Constitution sets a maximum limit of six months within which the Commission must establish new rates. N.M.Const. art. 11, § 8 states that:

> . . . The Commission shall hear and decide applications . . . with reasonable promptness. If within six [6] months after having filed such an application the commission has not entered an order disposing of the matter, the company . . . may put the proposed change into effect.

We hold that the constitutional provision above cited is plain and definite

and free from ambiguity. The section plainly states that the Commission must act "with reasonable promptness." The six months' provision does not make it mandatory upon the Commission to act within six months but simply says that if the Commission does not act the utility may put the proposed rates into effect. The plain and ordinary sense of the words used make the clause free from ambiguity and thus not susceptible to construction. *Flaska v. State,* 51 N.M. 13, 177 P.2d 174 (1946).

3. Mountain Bell contends that failure of the Commission to allow its basic exchange rates to go into effect under bond after its petition so requesting was filed on August 11, 1975, amounted to an unconstitutional confiscation of the Company's property.

Mountain Bell argues that the finding of the Commission that the utility was suffering a serious revenue deficiency triggered the Commission's constitutional duty to act to prevent confiscation of the Company's property because of inadequate rates. It is alleged that when rates are established at so low a level that operating costs cannot be recovered, the Commission is taking the Company's property without just compensation.

It is a well-established principle that private property may not be taken for public use without just compensation. U.S. Const. amends. V and XIV; N.M.Const. art. 2, § 20. Obviously, a fair rate of return is one that is compensable. The failure of a regulatory commission to provide for rates that will provide a reasonable rate of return therefore constituted a violation of due process. *West v. C. & P. Tel. Co.,* 295 U.S. 662, 55 S.Ct. 894, 79 L.Ed. 1640 (1935); *Northwestern Bell Telephone Co.,* 69 S.D. 36, 6 N.W.2d 165, 46 P.U.R. (N.S.) 293 (1942).

The authority granted to the Commission is so broad that little room is left for construction. In *San Juan C. & C. Co. v. S. F., S. J. & N. Ry. Co.,* 35 N.M. 512, 516–517, 2 P.2d 305, 307 (1931) this court discussed the extent of the Commission's authority:

> If the commission were a creature of the Legislature, we should construe its powers with some strictness. Such powers as the Legislature had not conferred or delegated, it would be deemed to have reserved. Even so, the language of the grant is here so all-inclusive that good reason for limiting it has not occurred to us.
>
> But this is not a legislative grant. It is a delegation of power and duty by the Constitution. *The power to fix rates is an attribute of sovereignty.* The people, in framing their fundamental law, considered where they would place it. It is legislative in its nature, and, if the people had not spoken, rate making would have devolved upon the Legislature as one of its natural and inherent concerns. But they did speak. It is clear to us that they intended the corporation commission to have all the power and the Legislature to have none of it. . . .
>
> *We consider the rate-making power of the commission to be plenary,* except as restricted by those principles of constitutional law which would have limited its exercise if it had been intrusted to the Legislature. (Emphasis added.)

See also *Meana v. Morrison,* 28 Ill.App.3d 849, 329 N.E.2d 535 (1975); *In re Promulgation of Rules of Practice,* 132 N.J.Super. 45, 332 A.2d 209 (1974); *State v. Mountain States Tel. & Tel. Co.,* 54 N.M. 315, 224 P.2d 155 (1950).

Mountain Bell's proof showed that in 1973 the Commission allowed the Company a minimum rate of return on common equity of 11.7%, but this return was never realized. In 1973, the actual rate was 8.87%, in 1974, 8.13% and in the first quarter of 1975, 6.41%. The Commission's order of July 9, 1975, in this hearing authorized a rate of return of 11.7% which necessarily meant that the Company was losing over a million dollars each month from what had been established by the Commission to be a fair rate of return.

It takes no intricate process of reasoning or calculation to arrive at the conclusion that, at the point when it became obvious

that the decision of the Commission would be delayed and the Company would suffer irreparable loss of revenue in the interim, failure to increase the rates was an unconstitutional confiscation of the Company's property without due process of law.

Many states have either constitutional provisions or statutes, or both, which specifically authorize the regulatory body charged with the responsibility of fixing rates to institute interim rates in cases of emergency, or where the decision on permanent rates would be likely to take such a length of time that it would work a hardship on the utility. Other states that do not have constitutional provisions or statutes granting this power have held that their commissions have the implied right to exercise the authority under proper circumstances.

The conditions under which the courts have felt that this authority has been properly exercised have been generally the same, whether the authority is given by law or is impliedly within the power of the regulatory agency. Generally, the rationale for the existence of the relief has been held to be the same in each of the categories of cases that have found their way into the books. It is logical and reasonable that presence or absence of a law permitting the relief should not be controlling.

Cases from our neighboring state of Arizona have addressed this problem. In *Arizona Corp. Com'n v. Mountain States Tel. & Tel. Co.,* 71 Ariz. 404, 228 P.2d 749 (1951) the Arizona Commission had refused interim rates while permanent rates were being litigated. The court called attention to the fact that nine months had elapsed in which the Commission had not put into effect a schedule of rates that would not be confiscatory, "evidencing a callous disregard of their duty, to the company's financial detriment." The court further found that, although there was no specific authority in the constitution or statutes for the Arizona Supreme Court to fix temporary rates, the proper remedy was for that court to allow the company to fix and collect a temporary rate on giving proper security.

Under similar circumstances, the Florida Supreme Court found that, when the telephone company alleged that its rate of return was below that approved by the commission as the minimum rate, it made out a prima facie case requiring the commission to approve an interim rate increase so long as the increase would not bring the rate of return above the previously-approved minimum. The court declared that "any rate of return below the authorized minimum must, of necessity, be unfair, unjust, unreasonable and insufficient." *Southern Bell Telephone & Telegraph Co. v. Bevis,* 279 So.2d 285, 286 (Fla.1973). See also: *Coplay Cement Mfg. Co. v. Public Service Commission,* 271 Pa. 58, 114 A. 649 (1921); *S. Central Bell v. Tennessee Pub. Serv. Comm.,* 10 P.U.R. 4th 72 (Tenn.Chanc.Ct.1975).

In *Pacific Teleph. & Teleg. Co.,* 78 P.U.R. (N.S.) 491, 493 (Cal.Pub.U.Com'n 1949), the commission stated:

> It is an elementary rule of law that the power to grant a particular relief carries with it all the incidental, necessary, and reasonable authority to grant that which is less. It is apparent that the authority delegated to this Commission by the Public Utilities Act to award rate relief to a public utility carries with it the incidental and implied power to grant interim rate relief, if the facts warrant such summary relief. . . .

The Commission in this case had already determined that Mountain Bell was losing over one million dollars per month considering what had been determined to be its fair rate of return. In compliance with the Commission's desires, Mountain Bell had presented great volumes of cost-of-service evidence regarding the basic exchange rates.

In its petition of August 11, 1975, for interim rates, the Company did not request that new rates be set on all its services. It asked that the proposed basic exchange rates which had been "cost justified . . by evidence showing that exchange rates are not sufficient to cover the direct cost of exchange service" be placed into effect under bond. The granting of the motion

would not have permitted the Company to earn the full rate of return that the Commission had found was needed but would have reduced the losses to some degree.

The Commission refused to grant interim rates stating that the rate structure should be established as a whole and that the Commission had not heard cross-examination on the proposed rates. It was further claimed that the granting of interim rates might have the effect of encouraging incomplete presentations by Mountain Bell in the future. These arguments are not persuasive.

We hold that the Commission, when it had found that the rates of Mountain Bell were not fair and reasonable and when it became obvious that it would be a considerable length of time before permanent rates could be fixed, had a constitutional duty to fix interim rates that would minimize the confiscation of Mountain Bell's property. The fourteenth amendment to the United States Constitution and article 2, § 20 of the New Mexico Constitution prohibiting public confiscation of private property without just compensation made it the imperative duty of the commission to provide adequately for temporary rates.

The authority to grant the rates under bond, as a lawful and necessary adjunct to the effectual exercise of the power to fix interim rates, is given by implication of law. *Wimberly v. New Mexico State Police Board,* 83 N.M. 757, 497 P.2d 968 (1972).

4. The Commission contends that Mountain Bell failed to meet its burden of proof.

The New Mexico Constitution provides that the utility company has the burden of proof to show that the proposed rates are "just and reasonable," and that the Commission is to give "due consideration" to "earnings, investment and expenditure as a whole within the state" in their promulgation. N.M.Const. art. 11, §§ 7, 8.

The Commission in its decision and order No. 274(c) in this case dated January 12, 1976, denied all requested changes and stated that ". . . *the* acceptable form of proof is cost data." (Emphasis added.) It further found that there was an absence of reliable cost data to support each and every proposed rate.

Mountain Bell objects to the decision of the Commission because it considered only cost data in determining whether the utility had met its burden of proof and claims that this constitutes a holding that only cost data may be considered in determining whether the rates are just and reasonable.

The above decision of January 12 and the entire record reflect that the Commission was determined to develop cost-of-service data for each of the services rendered by Mountain Bell. Heavy reliance was placed upon the order of the Commission of 1973 in the Mountain Bell rate case. *Mountain States Teleph. & Teleg. Co.,* 2 P.U.R. 4th 332, 356–359 (N.M.State Corp. Com'n 1973).

In that order the Commission analyzed the traditional methods of determining rates for a particular telephone service. It recognized that the circumstances involving common plant and equipment "make it extremely difficult" to allocate costs by type and quantity of service and that the cost allocations are largely dependent upon "informed judgment;" but observed that this method might not be as arbitrary as the traditional "value of service pricing theory," employed in part by Mountain Bell in this case. The order provided (2 P.U.R. 4th at 359):

> Nevertheless, it is our declared intention to move toward this principle of pricing insofar as it proves possible and feasible and to require the applicant, in the future, to present definitive cost justification for its proposed new rates, together with cost justification for services for which new rates are not requested, where all such services are supplied through use of common plant, equipment, and personnel. . . . [O]ur intention is to grant those rate increases justified by the applicant on the basis of cost, to deny those which were not, to eliminate differentials which appeared to have no rational justification . . .

The Commission claims that this order was adequate notice to Mountain Bell that cost-of-service evidence would be required as to all services. Mountain Bell contends that the order of 1973 fails to notify the Company as to the form and nature of the cost data it would require, and that when the Commission in this case adopted cost-of-service evidence as the single factor for consideration, it denied Mountain Bell due process of law as guaranteed by the United States and the New Mexico constitutions.

This point calls for discussion of the historical background regarding techniques used in developing telephone rates over a period of many years.

Witnesses testified that for seventy to eighty years prior to 1969, there was a generally consistent policy throughout the United States whereby regulatory commissions established telephone rates by looking at costs and revenues on a statewide basis. The regulatory bodies did not require that the costs of operating the various exchanges throughout a state or the costs of providing each individual service be broken down and itemized. In fact, the Uniform Accounting System made mandatory by rule of the Federal Communications Commission for all utilities that operate in interstate commerce does not even now require the keeping of accounts in such a manner that this type of information can be readily ascertained.

The testimony was to the effect that greater reliance has been placed upon the presentation of cost-of-service data since the year 1969 when an anti-trust suit was filed against AT&T in which it was alleged that the rates being charged for residence and business phones were subsidizing the departments that sold equipment and services in competition with other firms. It became necessary for the company to itemize the costs of these competitive services for use in avoiding anti-trusts actions. As this information became available, the regulatory commissions began requiring additional cost studies for other services. The New Mexico Commission's order of 1973 reflected this trend.

Mountain Bell showed that since 1970 it has made great strides in devising methods of producing cost data for many services. According to Mountain Bell's witnesses, a full-time staff of twenty persons with the help of hundreds of other Bell employees with probably thousands of years of collective experience assembled as much cost information as could be made available to the Commission.

The complexity of telephone rate-making is compounded by the fact that common plants and equipment and personnel are employed to furnish virtually all the separate types of telephone service. Allocation of the costs of construction and maintenance of a single telephone pole among the four thousand different services that the Company renders exemplifies the problem.

In the area of interstate telephone service, the FCC and various state regulatory systems have developed certain "arbitrary" methods of allocating the revenues and expenses as between interstate and intrastate operations. These are called "separation procedures." These methods have not been generally used to allocate costs among various intrastate services. Other methods have been devised to attempt to assure that there is reasonable justification for the rate that is charged for each service.

In New Mexico the Commission has adopted an approach which combines "value of service" and "cost of service." In some types of services the cost is reasonably determinable. In others the data has not been available from which reasonably accurate costs could be developed. Even where precise costs are determined, as well as where the costs of service are only estimated, the Commission has consistently ignored the cost data in apportioning the rates and has fixed the rates so that residential customers, small exchange users and rural customers are subsidized by charging much higher rates for other services. Witnesses of Mountain Bell testified that residential customers were paying only approximately sixty percent of the actual estimated cost of providing the service under the present

rates. Determining the level of subsidies, if any, is a Commission function.

This deviation from charging the customer on the basis of "cost of service" has been justified by the Commission on the grounds of "public policy" and on the theory that some subscribers receive more value from having a telephone. The businessman's telephone makes a profit for him. The fact that there are residential phones is of value to businesses, since the more residential connections there are the more commercial value is received. In smaller exchanges fewer people can be called, thus less value is received. This type of reasoning has supported the utilization of "value of service pricing" as an important factor in rate-making.

The development of "cost-of-service" data has other complex ramifications. The goal has not been reached by simply looking back at Mountain Bell's books and determining what is revealed therein about past costs. This is just the starting point. As is common, a future test year was established, in our case the year 1975, for which there are no available cost figures since the rate case was filed in April of that year. All the various revenues and costs of past years must be analyzed and projected to estimate costs and revenues that may be expected to accrue in the test year. Then one must estimate what each of the proposed new rates will add to the revenues, the projected decrease in service because of the increased rate, the decrease in the cost of the service because of the decrease in persons using the service, the effect of inflation, the market considerations on competitive items, the cost of money, and a multiplicity of other factors.

The end result of the machinations is not a determination of the actual cost of any given service. Use of the term "cost of service" is an over-simplification. At best, the result represents an educated guess as to what the costs may be in the test year. It cannot be dignified by being considered a factual determination. It is tenuous expert opinion, or informed-judgment evidence, based upon extremely complex and elusive information.

It is clear from this record and from the nature of this complex business that there is no way of learning precisely what it will cost to render any particular service. *King v. Pacific Teleph. & Teleg. Co.*, 16 P.U.R. (N.S.) 348 (Oregon Pub. U. Com'nr 1936). Relating each customer's rate to the actual cost of the service rendered to him, even if such cost were susceptible of ascertainment, would be highly impractical for it would lead to a multitude of varying rates. It is for these reasons that telephone rates must be developed on a trial-and-error basis with due consideration to the relative value of each service, as well as cost data. *Morris v. New Jersey Bell Teleph. Co.*, 6 P.U.R. (N.S.) 258 (N.J. Bd. of Pub. U. Com'nrs 1934). Under some circumstances value of service may be entitled to more weight than an estimate of cost-of-service, which necessarily involves many allocations on a more or less arbitrary basis. *Wisconsin Telephone Co.*, 22 P.U.R. (N.S.) 220 (Wisc. Pub. Serv. Com'n 1937).

The Commission was not bound to the use of any single formula or combination of formulae in determining rates. The rate-making function involves the making of pragmatic adjustments. It is the result reached, not the method employed, which is controlling. *Power Comm'n v. Hope Gas. Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944); *Power Comm'n v. Pipeline Co.*, 315 U.S. 575, 62 S.Ct. 736, 86 L.Ed. 1037 (1942).

In *Mountain States 1954*, supra, Justice Seymour analyzed the various formulae used in rate cases in the past to determine the revenue requirements of utilities and stated (58 N.M. at 272, 273, 270 P. 2d at 693):

> This Court can see no reason why it should adopt as the law of this state any single formula which has been evolved out of this history of litigation . . . Obviously, no single formula can be achieved which will successfully meet the varying needs of different economic levels.

The same can be said with regard to development of rate schedules. The Commission has a constitutional mandate to consider the Company's earnings, investments and expenditures as a whole within the state in promulgating rates. The Commission is not confined solely to the cost-of-service formula, nor can it impose this single criterion on Mountain Bell under the circumstances here.

In *Chesapeake & Potomac Telep. Co.*, 90 P.U.R.3d 314, 316 (D.C. Pub. Serv. Com'n 1972) the commission said:

> . . . it has long been recognized that *costs are not the sole* criterion to be used in the fixing of the rates to be charged for particular utility services. To the contrary, such factors as history and value of service also play an important role in the determining of such rates. (Emphasis added.)

Other courts have approved various types of evidence that merit consideration, such as cost of service, value of service, existence of competition, characteristics of the commodity, anticipated volume of use, economic status of the industry served, comparison with other rates in other geographic areas, size of exchanges, permissible calling distances, subscriber density, usage, calling characteristics, specific and relative rate levels, station availability, and relative exchange earnings. *Westinghouse Electric Corporation v. United States*, 388 F.Supp. 1309 (W.D.Pa.1975); *Scranton Steam Heat Co. v. Pennsylvania Pub. U. Com'n*, 194 Pa.Super. 143, 167 A.2d 693 (1960); *General Teleph. Co. of California*, 25 P.U.R.3d 129 (Cal. Pub. U. Com'n 1958). Extreme nicety in the allocation is not required, but only reasonable measures are necessary. *Iowa-Illinois Gas & Electric Co. v. City of Fort Dodge*, 248 Iowa 1201, 85 N.W.2d 28 (1957); *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930).

If the Commission did not consider cost-of-service evidence as the sole criterion in this case, it is evident that it gave overwhelming credence to the formula in appraising the evidence submitted. The task facing the Commission at this point was to allocate the $12,900,000 increase among the various customers of Mountain Bell. With this in mind we hold that there is substantial evidence in the record to support the reasonableness of the proposed rates by standards that have been used by the Commission for many years past. There was a great deal of evidence presented (allegedly all that could reasonably be obtained) by Mountain Bell in the nature of cost-of-service data as requested by the Commission. Although there was contrary evidence submitted by the Association as to some rates, the court finds that there is substantial evidence in the record from which the Commission should have fixed rates after it disagreed with the manner in which apportionment was handled in the proposed rate schedule.

We hold that it was error under these circumstances for the Commission, having refused to accept the rates filed by the Company, to decline to fix rates which would be just and reasonable.

In light of the Commission's views on problems of allocation, Mountain Bell contends that, even if a cost-of-service formula may be required by the Commission, the Company was not given adequate notice as to the nearly-exclusive extent to which the doctrine would be applied and was not apprised of the nature of the evidence that the Commission would demand. The complaint is a legitimate one.

The 1973 order is far from clear. It says that the Commission has an intention "to move toward this principle of pricing." It does not say the formula has been definitely adopted. The order says that the Commission will move toward this principle "as it proves possible and feasible." There are no standards from which it can be determined what is possible or feasible. These matters are to be required "in the future," but no reference is made to a specific deadline. The applicant will be required to present "definitive cost justification," with no enunciation of the means by which the costs are to be justified. The order is vague and ambiguous on the vital point at issue.

The Association's expert found it essential and recommended to the Commission that special hearings should be held in the future to promulgate guidelines as to the types of cost evidence that are to be required and the methods to be employed in their development. Other regulatory bodies have used this procedure or plan to do so.

For an order of the Commission to be valid, binding and enforceable, it must be reasonably definite in its terms and requirements. *Seward v. D.R.G.R. Company*, 17 N.M. 557, 131 P. 980 (1913).

It is one of the cardinal principles of constitutional law that a statute (or, by logical extension, an administrative order)

> . . . which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). See also *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); *Williams v. Board of Dir. of Endicott Sch. Dist. 308*, 10 Wash.App. 579, 519 P.2d 15 (1974); *Lone Star Gas Co. v. Kelly*, 140 Tex. 15, 165 S.W.2d 446 (1942). According to this test, it becomes apparent that the lack of specificity in the 1973 order combined with the great weight placed by the Commission on the cost-of-service formula constituted a deprivation of Mountain Bell's property without due process of law.

5. In its final point Mountain Bell asserts that it is entitled to have the Commission instructed that the most recent economic data available must be considered and urges that the Commission be ordered to promulgate permanent rates that will provide the Company with the level of revenue to which it was entitled as of January 14, 1976.

This court has previously criticized the Commission for failure to use the "latest available actual figures" and asserted that the determination of rates "depends upon the economic facts relevant at the time of decision." *Mountain States 1954*, supra, 58 N.M. at 276–278, 270 P.2d at 696. The court further stated in that case that it was error to use a past historical test year, as would be the case here if the year 1975 were employed as the test year at this time.

Quite obviously the most recent figures would be the most reliable in determining adequate utility rates. This case has been in progress since April of 1975, a period of almost twenty-four months. It would be unreasonable to ignore the actual experience during that period of time in arriving at new rates.

Common sense requires that the latest available economic information should be utilized in order to insure that the projected figures bear a meaningful relation to future as well as past and present fiscal realities. See *General Telephone Co. v. Michigan Public Serv. Com'n*, 341 Mich. 620, 67 N.W.2d 882 (1954); *Tampa Electric Co.*, 92 P.U.R.3d 398 (Fla. Pub. Serv. Com'n 1971).

We hold that the Commission shall take into consideration the most recent figures available after this matter comes under its jurisdiction again.

Mountain Bell also argues that the Company's revenue deficiency should be remedied by this court ordering the Commission to make the rates retroactive to January 14, 1976. On August 11, 1976, our court ordered that the rates applied for be made effective. Thus, the loss of revenue about which Mountain Bell is complaining occurred over a period of approximately six months.

The contention is that this represents the cut-off date of the six-months' limitation contained in the stipulation of the parties, and based on the constitutional provision, and the date on which Mountain Bell claims that it was mandatory for the Commission to fix rates. We have already ruled that the six-months' clause does not make it mandatory that rates be fixed within the prescribed period, without regard for the state of the evidence.

This is an issue of first impression in New Mexico. However, this court has held that rate-making is legislative in its nature, *San Juan C. & C. Co. v. S.F., S.J. & N. Ry. Co.*, supra, and it is axiomatic that legislative action operates prospectively, not retroactively. Retroactive remedies, which are in the nature of reparations rather than rate-making, are peculiarly judicial in character, and as such are beyond the authority of the Commission to grant. See *Pacific Telephone & Tel. Co. v. Public Utilities Com'*, 62 Cal.2d 634, 44 Cal.Rptr. 1, 401 P.2d 353 (1965); *Southern Pac. Co. v. Railroad Commission*, 194 Cal. 734, 231 P. 28 (1924).

Moreover,

> [t]here is no better established rule with regard to the prescription of rates for a public utility than the one that holds that rate fixing may not be accomplished retroactively, unless some specific statutory or constitutional authority permits. Past deficits may not be made up by excessive charges in the future nor may past profits be reduced by disallowances to future operating expense.

Pacific Teleph. & Teleg. Co., 80 P.U.R. (N.S.) 355, 369 (Calif. Pub. U. Com'n 1949). In accord are *Williams v. Washington Metropolitan Area Transit Com'n*, 134 U.S.App. D.C. 342, 415 F.2d 922 (1968), cert. denied, 393 U.S. 1081, 89 S.Ct. 860, 21 L.Ed.2d 773 (1949); *Michigan Bell Tel. Co. v. Michigan Pub. Serv. Com'n*, 315 Mich. 533, 24 N.W.2d 200 (1946). See also *T.W.A. v. Civil Aeronautics Board*, 336 U.S. 601, 69 S.Ct. 756, 93 L.Ed. 912 (1949); *Public Utilities Comm'n v. Gas Co.*, 317 U.S. 456, 63 S.Ct. 369, 87 L.Ed. 396 (1943); *United States v. N.Y. Central*, 279 U.S. 73, 49 S.Ct. 260, 73 L.Ed. 619 (1929).

Accordingly, since, first, the Commission's authority is legislative and therefore limited generally to prospective regulation and, second, neither the applicable constitutional provisions nor the pertinent statutes, previously discussed at length, provide the requisite specific permission to make rates retroactive, the rates fixed by the Commission will apply prospectively only.

In its cross-appeal the Association claims that the Commission committed error in refusing to reduce the PBX and Centrex trunk rate differentials from 1.75 to 1.50 times the single business line rate. The Association contends that there is substantial evidence in the record in support of this reduction in the rates that were already in effect prior to this hearing. Mountain Bell made application for a differential of 1.875, which was also refused in Order No. 3274(c).

As previously enunciated in this opinion, this court does not promulgate rates. *Mountain States 1954*, supra. Our function is to determine whether rates fixed by the Commission are just and reasonable. Until the Commission acts to fix rates in these two categories, we cannot exercise that function. Furthermore, there is substantial evidence in the record to support the Commission's denial of the requested relief. We affirm that denial.

The Supreme Court's order of the 13th day of July, 1976, fixed interim rates to be in force under bond for one year beginning on July 14, 1976. Since this court finds that there is substantial evidence in the record to show that these rates are just and reasonable, there is no necessity that a bond be provided. The new rates that are now in force shall continue until further order of the Commission or further order of this court. No bond shall be required.

This cause is remanded to the Commission for action not inconsistent herewith.

IT IS SO ORDERED.

McMANUS, C. J., SOSA and PAYNE, JJ., and WILLIAM F. RIORDAN, District Judge, concur.

563 P.2d 605

STATE of New Mexico,
Plaintiff-Appellee,

v.

Anthony LUCERO, Defendant-Appellant.

No. 2714.

Court of Appeals of New Mexico.

Feb. 22, 1977.

Certiorari Quashed April 15, 1977.

Mary C. Walters, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., John J. Duran, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant's bribery convictions were affirmed by this Court in a memorandum opinion. *State v. Lucero,* (Ct.App.) No. 1810, decided May 11, 1976. Subsequently, defendant moved for a new trial. The trial court denied the motion; defendant appeals. We discuss: (1) the motion, (2) denial of the motion, and (3) matters outside the record.

The Motion

Rule 60(b) of the Rules of Civil Procedure abolishes the common law writ of coram nobis but authorizes relief from a "final judgment, order, or proceeding" on six specified grounds. Ground (2) involves newly discovered evidence; ground (4) involves a void judgment; and ground (6) involves "any other reason justifying relief".

Defendant's motion sought a new trial "under the provisions of Rule 60(b)(2) and 60(b)(6) (*State v. Romero,* 76 N.M. 449, 415 P.2d 837 [1966]; *State v. Raburn,* 76 N.M. 681, 417 P.2d 813 [1966]) . . . ."

Although Rule 60(b) is a *civil* rule, *State v. Romero, supra,* held that where a prisoner had served his sentence and had been released, this civil rule could be utilized to seek relief from a criminal judgment claimed to be void. This result was based on an intent to retain all substantive rights protected by the old writ of coram nobis. See *State v. Raburn, supra; Roessler v. State,* 79 N.M. 787, 450 P.2d 196 (Ct.App. 1969), cert. denied, 395 U.S. 967, 89 S.Ct. 2115, 23 L.Ed.2d 754 (1969).

Defendant's motion did not seek relief on the basis that the judgment was void (ground (4)). Rather, it sought relief on the basis of newly discovered evidence and "other reasons" (grounds (2) and (6)). New Mexico decisions have not authorized relief in a *criminal case* under grounds (2) and (6) of Civil Rule 60(b).

The State moved to dismiss the appeal on the basis that Civil Rule 60(b) did not authorize a new trial in a criminal case. This Court denied the motion. The denial was not on the basis that grounds (2) and (6) of Civil Rule 60(b) authorized a new trial in a criminal case; we did not consider this question. We denied the State's motion to dismiss because Rule 45 of the Rules of Criminal Procedure is authority for the trial court to grant new trials in criminal cases. Defendant's motion was properly before the trial court under the criminal rule; the State's claim that the trial court had no jurisdiction because of lack of authority to consider the motion is without merit.

Denial of the Motion

Defendant asserts the motion for a new trial was "based upon information contained in the affidavits of Richard Martinez and Robert A. Nickerson, which affidavits were attached to the motion." This is incorrect. No affidavits were attached to the

motion; the Martinez affidavit was filed later; no Nickerson affidavit was filed or tendered in support of the motion. Items before the trial court at the motion hearing were the Martinez affidavit and testimony of witnesses adduced at the hearing.

Defendant sought a new trial on the grounds of newly discovered evidence. To obtain a new trial on this ground, there must be a showing that there is in fact such evidence; movant must inform the court as to this evidence or satisfactorily explain why it is not presented to the court. *State v. Klasner,* 19 N.M. 474, 145 P. 679 (1914); see *State v. Gomez,* 75 N.M. 545, 408 P.2d 48 (1965). This requirement was not met for two of the three claims of defendant.

One of the claims was that a State's witness, contrary to the trial court's admonition, had discussed her testimony with other witnesses during the course of the trial. The evidence of this at the motion hearing was entirely speculative. Another claim was that the State, contrary to the trial court's orders for discovery, withheld certain "logs" from the defendant. Testimony at the new trial hearing was that these "logs" were records of the Construction Industries Commission which "normally" showed the names of persons taking examinations and the date of the examinations. However, the testimony was that these logs had been returned to the commission some six weeks in advance of the new trial hearing. The "logs" were not offered as evidence at the new trial hearing; there is no showing that they had been subpoenaed; the record shows no effort to have the logs present in court. Defendant neither informed the court as to the evidence nor explained why it was not presented.

Defendant did show the existence of the evidence on the third claim—testimony of Martinez concerning the date of certain license applications. Even when the evidence is shown to exist, the requirements stated in *State v. Fuentes,* 67 N.M. 31, 351 P.2d 209 (1960) must be met in order to obtain a new trial on the basis of newly discovered evidence. See also *State v. Gomez, supra.*

One of the requirements is that the newly discovered evidence "[m]ust be such as by reasonable diligence on the part of the defendant could not have been secured at the former trial." This requirement was not met concerning the Martinez testimony. The record shows that Martinez had been charged with an offense similar to the charges against defendant, that for a time the same attorney represented both Martinez and defendant, that after the attorney ceased to represent Martinez, this attorney suggested to Martinez that he be present when a deposition was taken, and that Martinez was present during defendant's trial. An amended statement of facts filed by the State prior to trial states that defendant received a bribe "by and through" Martinez. A holding that the Martinez testimony could not have been secured for defendant's trial would have been incredible; the record is overwhelming that the testimony could have been secured.

Defendant also claims that he should have been granted a new trial because his prior trial was unfair. This contention has two aspects.

One aspect is that the multiplicity of counts and the evidence introduced in connection with those counts, deprived him of a fair trial. The record does not support the contention—four of the eight counts were dismissed; the jury acquitted on two counts and convicted on two counts. See *State v. Sero,* 82 N.M. 17, 474 P.2d 503 (Ct.App. 1970). Defendant's claim that retrial on two counts would be simpler and less complicated does not establish that his prior trial was unfair.

The other aspect is that the State's withholding of the "logs" denied defendant a fair trial. We do not reach the merits of whether the "logs" were improperly withheld. Assuming, but not deciding, that they were, the "logs" were never presented to the trial court so that it could determine whether they were "material" or whether the withholding "prejudiced" the defense. See the review undertaken in *State v. Rondeau,* 89 N.M. 408, 553 P.2d 688 (1976) and

Chacon v. State, 88 N.M. 198, 539 P.2d 218 (Ct.App. 1975).

There was no error in denying the motion for a new trial on the grounds asserted by defendant.

Matters Outside the Record

Attached to the docketing statements were two affidavits. The affidavits were by Robert A. Nickerson and Anthony E. Lucero, Jr.; they are dated October 1, 1976.

Defendant asks this Court to consider these affidavits in deciding whether the trial court erred in denying the motion for a new trial. The hearing on the motion for a new trial was held September 15, 1976, and the order denying the motion was entered September 21, 1976. Thus, defendant asks us to hold that the trial court erred on the basis of affidavits which not only were not brought to the trial court's attention, but did not exist at the time of the motion hearing.

No rule authorizes exhibits to docketing statements. Exhibits to briefs neither identified nor tendered as exhibits to the trial court will not be considered. See *State v. Rogers,* (Ct.App.) No. 2652, decided February 15, 1977, and cases therein cited. The same approach is applicable to the affidavits attached to the docketing statement. The affidavits have not been considered.

The order denying the motion for a new trial is affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

563 P.2d 608

Maxine MARTINEZ, Appellant,

v.

HEALTH AND SOCIAL SERVICES DEPARTMENT of the State of New Mexico, and Fernando C de Baca, Executive Director, Appellee.

No. 2763.

Court of Appeals of New Mexico.

March 8, 1977.

Rehearing Denied March 21, 1977.

Certiorari Quashed May 3, 1977.

James A. Burke, Northern New Mexico Legal Services, Inc., Santa Fe, for appellant.

Toney Anaya, Atty. Gen., Robert P. McNeill, Gen. Counsel, Health and Social Services Dept., James G. Huber, Sp. Asst. Atty. Gen., Health and Social Services Dept., Santa Fe, for appellee.

OPINION

LOPEZ, Judge.

Mrs. Martinez appeals an adverse decision of the director of H.S.S.D. (Health and Social Services Department) terminating A.F.D.C. benefits (Aid to Families with Dependent Children) for her three children from a previous marriage. We reverse and remand.

On appeal Mrs. Martinez presents three points: the dispositive point relates to the substantiality of the evidence regarding H.S.S.D. Regulation No. 221.832. The other two points are constitutional issues relative to this section. We feel that we can decide this case without addressing the constitutional issues presented. We do so because we follow the principle of the Supreme Court of New Mexico that a court will not decide constitutional questions unless necessary to a disposition of the case. *Property Tax Department v. Molycorp, Inc.*, 89 N.M. 603, 555 P.2d 903 (1976). See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1940); *Huey v. Lente*, 85 N.M. 597, 514 P.2d 1093 (1973).

Mrs. Martinez lives with her husband, and a mutual child of this marriage, and three minor children from her previous marriage. The three children from her previous marriage form the A.F.D.C. assistance unit whose benefits are in dispute; she does not work and has no other source of income. Mrs. Martinez' present husband is the stepfather of the three minor children but he has not adopted them. The uncontroverted evidence in the record indicates that Mrs. Martinez' present husband has not taken any responsibility to provide for the support of the three children, nor does he give Mrs. Martinez one-half of his income with which she could support the children from the previous marriage.

The decision of the county, affirmed by the director, is based on H.S.S.D. Regulation 221.832 which attributed income available to Mrs. Martinez in the amount of $277.53. The need of the assistance unit, based upon agency budgetary standards, was $187.00; hence, no deficit remained. Mr. Martinez has a gross monthly income of $960.28. One-half of this amount was considered available to Mrs. Martinez. After division of income, and appropriate deductions, $303.22 was considered available to the budget group which Mrs. Martinez represents. The county recomputed the amount available at the hearing. At that time the county concluded that $277.53 was available to the budget group.

The issue on appeal is whether the director's decision was erroneous as not supported by substantial evidence or not in accordance with law. Section 13–18–4 F(1)(2)(3), N.M.S.A.1953 (Repl.Vol. 3, pt. 1, 1976), provides:

"F. The court shall set aside a decision and order of the director only if found to be:

"(1) arbitrary, capricious or an abuse of discretion;

"(2) not supported by substantial evidence in the record as a whole;

"(3) otherwise not in accordance with law."

H.S.S.D. Regulation No. 221.832 B.1.(a) reads as follows:

"a. *Division of Income between Spouses*—In keeping with the State's community property law, one half (½) the community property income of spouses is considered available to each spouse when they live together. The separate income of a spouse is considered available only to that spouse. '*Separate inome* [sic]' is income (1) that is derived from property acquired before marriage and not since converted to community property or (2) *that is kept separate by one spouse and is not used to meet common expenses or debts of both spouses.* All income is considered as community property income unless the client can demonstrate to the worker's satisfaction that it is separate income." [Emphasis added]

This regulation was issued on April 15, 1976 by H.S.S.D.

The evidence in the record shows that Mr. Martinez does not give Mrs. Martinez one penny of his income toward the support of the three children of her previous marriage.

The regulation does not state an irrebuttable presumption that the income of Mr. Martinez should be legally available to support those three children. The regulation only says that if it is "available," it shall be considered in determining benefits. This case presents evidence that the disputed income was separate property under subsection (2) of the regulation. It is undisputed that the income was kept by one spouse and not used to meet common expenses or debts of both spouses. The department is bound by its own regulations. *Pellman v. Heim*, 87 N.M. 410, 534 P.2d 1122 (Ct.App. 1975).

The record, we conclude, supports the following contention: there is no substantial evidence to support the finding of the director that any part of the community property was "available" to Mrs. Martinez. Mrs. Martinez overcame the presumption that her husband's income was available to her for the benefit of the assistance unit. Because H.S.S.D. offered no evidence in rebuttal, the finding that Mr. Martinez' income was available is not supported by substantial evidence. Section 13–18–4 F(2), supra; *San Pedro So. Group v. Bernalillo Cty. Val. Pr. Bd.*, 89 N.M. 784, 558 P.2d 53 (Ct. App.1976). See also *Tapia v. Panhandle Steel Erectors Co.*, 78 N.M. 86, 428 P.2d 625 (1967). The income at issue is community property or income for general purposes, but it is separate income for A.F.D.C. purposes. See generally *Huerta v. Health and Social Services Department*, 86 N.M. 480, 525 P.2d 407 (Ct.App.1974).

The case is reversed and remanded to the director to reinstate A.F.D.C. benefits to Mrs. Martinez retroactively and to proceed in a manner consistent with this opinion.

IT IS SO ORDERED.

SUTEN and HERNANDEZ, JJ., concur.

563 P.2d 610

Eddie P. VALLES, Petitioner-Appellant,

v.

STATE of New Mexico, Respondent-Appellee.

No. 2734.

Court of Appeals of New Mexico.

March 29, 1977.

Certiorari denied May 4, 1977.

Charles Driscoll, Albuquerque, for petitioner-appellant.

Toney Anaya, Atty. Gen., John Duran, Asst. Atty. Gen., Santa Fe, for respondent-appellee.

OPINION

HERNANDEZ, Judge.

The defendant's motion for post-conviction relief, brought pursuant to Section 21–1–1(93), N.M.S.A. 1953 (Repl. Vol. 4, 1970), subsequently superseded by Section 41–23–1 et seq., N.M.S.A. 1953 (2d Repl. Vol. 6, Supp. 1975), raises the question of whether

the following rule laid down in *State v. Sparks,* 85 N.M. 429, 512 P.2d 1265 (Ct.App. 1973) should be accorded retroactive application:

> "[O]nce the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness' grand jury testimony relating to the crime for which defendant is charged."

The prior rule, promulgated in *State v. Tackett,* 78 N.M. 450, 432 P.2d 415 (1967), 20 A.L.R.3d 1 (1968), cert. denied 390 U.S. 1026, 88 S.Ct. 1414, 20 L.Ed.2d 283 (1968), was that the transcript of the testimony of witnesses before a grand jury need not be supplied to defendants in the absence of a showing of a particularized need for such transcript.

In May, 1971, the defendant was convicted of three counts of armed robbery. Three of the witnesses who testified before the grand jury also testified against the defendant at trial. On the first day of trial one of these three witnesses, Dale Blythe, was examined. At the start of the second day of the trial the defendant made a motion for production of the transcript of the grand jury minutes for purposes of cross-examination. The motion was denied. Defendant appealed, alleging as his first point of error that the trial court had erred in denying his motion for production of the transcript of the grand jury minutes. We affirmed his conviction, *State v. Valles,* 83 N.M. 541, 494 P.2d 619 (Ct.App. 1972). His first point of error in that appeal was denied on the ground that defendant did not show a particularized need as required by *Tackett,* supra.

Section 21–1–1(93), supra, provides in part:

> "A prisoner in custody under sentence of a court established by the laws of New Mexico claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution of the United States, or of the Constitution or laws of New Mexico . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."

The trial court denied defendant's Rule 93 motion on the grounds that the demand for the transcript of the grand jury minutes had been considered on appeal and that the denial was correct under the then-prevailing rule and that the new rule should not be retroactively applied.

Before considering the question of retrospectivity, we must consider whether this is a proper case for post-conviction consideration under Rule 93. This rule was adopted from the federal judicial code, 28 U.S.C. § 2255; interpretations of that section, although not binding upon us, are nonetheless persuasive.

> ". . . § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus. . . . '[T]he sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum.' . . . 'As a remedy, it is intended to be as broad as habeas corpus.'
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> . . . . .
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> "This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. . . . [T]he appropriate inquiry . . . [is] whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" *Davis v. United States,* 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974).
>
> ". . . [T]he availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake." *Kaufman v. United States,* 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969).

Article II, § 7 of the Constitution of New Mexico provides: "The privilege of the writ of habeas corpus shall never be suspended, unless, in case of rebellion or inva-

sion, the public safety requires it." And, Article II, § 14 provides in part: "In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; *to be confronted with the witnesses against him* . . ." [Emphasis added]. As we stated in *State v. Sparks,* supra:

> "The right of cross-examination is [implicit in] the constitutional right to be confronted with the witnesses against one.
>
> . . . . .
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> "'. . . The State has no interest in denying the accused access to all evidence that can throw light on issues in the case, and, in particular, the state should have no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits.'
>
> . . . . .
>
> "If otherwise, an accused is denied the right to confront the witnesses against him."

And as we further stated in *State v. Romero,* 87 N.M. 279, 532 P.2d 208 (Ct.App. 1975):

> "It has long been recognized that a transcript of prior testimony is a most useful tool in mounting an attack upon the credibility of witnesses. [citation omitted] The refusal to give a copy of the grand jury testimony of witnesses who would also testify at trial on the same subject matter has been held to deny a defendant the right of effective cross-examination."

Clearly the question of a denial of the constitutional right of confrontation is cognizable under a Rule 93 proceeding.

[redacted] As to the question of the trial court's denying defendant's motion on the ground that the issue of the denial of the grand jury minutes had been considered on the prior appeal, the trial court was in error. The purpose of Rule 93 was to allow a collateral review as to the validity of a conviction. *State v. Ramirez,* 78 N.M. 418, 432 P.2d 262 (1967). The defendant's conviction may have been valid by the constitutional standards in effect when it took place, but not valid when measured by the higher standard of *Sparks.* To accept the trial court's reasoning in this instance would be contrary to the very purpose of Rule 93. Rule 93 was not intended to allow collateral review of claimed error which has already been raised and decided on direct appeal. Only in cases such as in the instant case where there has been a change in the law governing the error is a Rule 93 review proper.

We turn then to the question of the retrospectivity of the rule in *Sparks.* Because of the paucity of New Mexico cases on this subject we look to the decisions of the federal courts for guidance. Prior to *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1964), all opinions of the Supreme Court of the United States giving a new and broader interpretation of the Bill of Rights in criminal cases were given retrospective effect. The following position, however, was adopted in *Linkletter:*

> "At common law there was no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.' . . . The judge rather than being the creator of the law was but its discoverer.
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> . . . . .
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> "Implicit in such an approach is the admission when a case is overruled that the earlier decision was wrongly decided.
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> . . . . .
>
> "However, some legal philosophers continued to insist that such a rule was out of tune with actuality largely because judicial repeal ofttime did 'work hardship to those who [had] trusted its existence.' . . . Chief Justice Hughes in *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940) . . . reasoned that the actual existence of the law prior to the determination of unconstitutionality 'is

an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.'

. . . . .

"Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective.

. . . . .

"While the cases discussed above deal with invalidity of statutes or the effect of a decision overturning long established common-law rules there seems to be no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation require such an application.

. . . . .

"Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

In *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) the Supreme Court further amplified the test to be applied in deciding whether a given opinion should be given retroactive application:

"The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

The Supreme Court in *Adams v. Illinois,* 405 U.S. 278, 92 S.Ct. 916, 31 L.Ed.2d 202 (1972), had before it the question of whether *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970), should be given retroactive application. The holding in *Coleman* was that a preliminary hearing was a critical stage of the criminal process at which the accused was constitutionally entitled to the assistance of counsel. The Supreme Court held that *Coleman* should not be given retroactive application. The Court did state the following, however:

"We have given complete retroactive effect to the new rule, regardless of good-faith reliance by law enforcement authorities or the degree of impact on the administration of justice, where the 'major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials. . . .'"

Most of the rules of evidence and procedure governing the conduct of criminal trials were designed to enhance the truth-finding process, to the end that we do not convict an innocent person. However, as we indicated in *Sparks* and *Romero,* supra, the right of confrontation is not a mere rule of evidence or procedure but a constitutional right of primary importance in the truth-finding process, because we have yet to devise a more effective method of eliciting the truth than effective cross-examination. The function and importance of this constitutional right and the concomitant right of cross-examination mandates retroactivity, regardless of previous reliance on the old rule or the possible impact on the administration of justice.

Whether there is or is not anything in the grand jury minutes that might be of aid to the defendant in cross-examination should not be determined by a court. As was stated in *Dennis v. United States,* 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966): "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

The judgment is vacated and the case remanded with instructions to grant the defendant a new trial.

IT IS SO ORDERED.

SUTIN, J., specially concurs.

HENDLEY, J., dissents.

SUTIN, Judge (specially concurring).

I concur in the result.

Defendant moved that the judgment and sentence of the trial court affirmed in *State v. Valles*, 83 N.M. 541, 494 P.2d 619 (Ct.App. 1972) be vacated and set aside pursuant to Rule 93 of the Rules of Civil Procedure, and that defendant be granted a new trial. The basis of the motion was that defendant was denied his constitutional right to confront and cross-examine three grand jury witnesses who testified against him at trial. Evidence of what occurred at the trial was presented.

A hearing was held. The trial court found:

> 8. At the jury trial . . . the first witness for the prosecution, Dale Eugene Blythe, finished his testimony and was excused from the stand on a Friday afternoon. When the trial resumed on Monday, the attorney for the Defendant Valles requested the Grand Jury minutes in their entirety for all witnesses testifying at the Grand Jury, and in support of his request, stated that he needed the minutes so that he might use them for cross examination of all state witnesses. The request was denied by the trial judge, the Honorable Harry E. Stowers, Jr.

The court concluded:

> 2. . . . . Once an issue has been raised and litigated by a Defendant upon direct appeal and decided adversely to him, it cannot be raised again in post-conviction proceedings.
>
> . . . . . .
>
> 4. The ruling of the trial judge . . was correct, and in accordance with the rule prevailing at that time that a defendant was not entitled to the Grand Jury minutes absent a showing of particularized need.
>
> 5. The ruling was also correct for the additional reason that the demand for Grand Jury minutes was not timely, Defendant hving [sic] waited until the time of trial to make such demand, after the first State witness had left the stand and had been excused.
>
> 6. Decisions subsequent to the date of Defendant's trial have judicially created a new procedural right of a defendant to have access to Grand Jury minutes of a state witness at trial following his direct testimony. There is no authority for making such a rule retroactive.
>
> 7. . . . [E]ven if Defendant were entitled to raise the issue of retroactivity, application . . . does not call for making the right of access to Grand Jury transcripts retroactive.
>
> 8. . . . . None of the requisities [sic] for post-conviction relief are present here, and the State is entitled to a dismissal with prejudice.

A. *The trial court's conclusions were erroneous.*

(1) *Conclusion of Law No. 2 is erroneous.* That the error litigated cannot be relitigated is correct. *State v. Williams*, 78 N.M. 431, 432 P.2d 396 (1967). *State v. Garcia*, 80 N.M. 21, 23, 450 P.2d 621, 623 (1969) inadvertently stated that the error cannot be relitigated "even though the errors relate to constitutional rights." No authority is cited and none can be found. We mistakenly followed this rule. *State v. Gilihan*, 86 N.M. 439, 524 P.2d 1335 (1974); *State v. Jones*, 84 N.M. 500, 505 P.2d 445 (Ct.App. 1972). Rule 93 and Rule 93(b) of the Rules of Civil Procedure [§ 21–1–1(93) and 93(b), N.M.S.A.1953 (Repl.Vol. 4)] specifically allows the trial court to grant a new trial if the court finds that there has been a denial or infringement of constitutional rights of the prisoner. Defendant's claim for relief is based on constitutional grounds.

(2) *Conclusions of Law Nos. 4 and 5 are erroneous.* The rule of "particularized need" arises when the grand jury testimony is requested "in advance of trial." *State v. Tackett*, 78 N.M. 450, 432 P.2d 415 (1967); *State v. Vigil*, 85 N.M. 735, 516 P.2d 1118 (1973). The proper time to make a demand for grand jury testimony during trial is when the grand jury witness testifies at

trial and the defendant wants to cross-examine. *State v. Morgan*, 67 N.M. 287, 354 P.2d 1002 (1960).

(3) *Conclusions of Law Nos. 6 and 7 are erroneous.* Retroactivity of later decisions creating a new method of procedure to obtain relief, and the right to grand jury testimony, is irrelevant. The rights that defendant had were in effect prior to *State v. Valles, supra.* Retroactivity was not applicable.

Valles' trial was held in 1971, and the appeal was decided in 1972. Article II, Section 14 of the New Mexico Constitution grants to defendant the right "to be confronted with the witnesses against him". One of the purposes of confrontation is to secure the right of cross-examination. *Mascarenas v. State*, 80 N.M. 537, 458 P.2d 789 (1969); *State v. James*, 76 N.M. 376, 415 P.2d 350 (1966); *State v. Halsey*, 34 N.M. 223, 279 P. 945 (1929).

State v. Morgan, supra, held that a defendant was entitled during trial to grand jury testimony of witnesses who testified at trial.

Prior to Valles' conviction and affirmance on appeal, Valles had the right to grand jury testimony for purposes of cross-examination. The denial of grand jury testimony was a violation of Valles' constitutional rights.

B. *State v. Valles was decided erroneously.*

State v. Valles, supra, was erroneously decided on two grounds. This Court held that Valles was not entitled to grand jury testimony because (1) "nothing in the record shows the grand jury minutes were used at the trial." (2) There was no particularized need. The Court said that "Defendant is required to bring himself within the disclosure situations of the *Morgan* and *Tackett* cases." Judicial history of this subject discloses that the Court was wrong.

State v. Morgan, supra, marks the beginning of the doctrine of utilization by defendant of grand jury testimony during the trial of a case. Here, "At the trial, two of the witnesses for the state, having previously testified before the grand jury, were examined by the district attorney, *who used the transcript of their grand jury testimony as a basis for his questions.* Counsel for Morgan requested the right to inspect the transcript as to the testimony of these two witnesses, but such request was refused. . . . *It must be conceded that the defendant did not know what the grand jury testimony of the other witnesses was*, and that the principal purpose in making the request was the hope of developing impeaching, or at least contradictory, testimony." [Emphasis added.] [67 N.M. at 289, 354 P.2d at 1003].

The Court said:

> It is most difficult to understand how a defendant, who has never had access to testimony before a grand jury, can show a particularized need for such testimony, for it can only be after seeing the same that it can be determined whether there is a conflict. *If the defendant has a right at all to see the grand jury testimony of a witness who is in the process of testifying at the trial, he should certainly have the right to make his own determination whether the prior testimony was conflicting or impeachable.* . . .
>
> *It would appear that the rule adopted by the New York courts is a sound one.* The practice appears to be that if the district attorney uses the grand jury testimony during the trial, the defendant will be granted inspection. [Citations omitted.] That jurisdiction also holds that the extent of inspection will be determined by the court according to the circumstances of each case, *and that the defendant will be allowed to examine only the testimony of the witness that he wishes to cross-examine.* [Citations omitted.] [Emphasis added.] [67 N.M. at 291, 354 P.2d at 1005].

Reduced to its simplicity, the court "determined that where the prosecutor used grand jury testimony at the trial, the defendant should be permitted to examine the grand jury testimony of that witness for the purpose of cross examination." *State v. Tackett, supra. Tackett* held that grand

jury testimony could not be obtained "*in advance of trial.*" *Tackett* is not applicable. *Morgan* pointed out that we have no rule of procedure comparable to Federal Rule of Criminal Procedure 6(c) that has been judicially declared to include "a particularized need." *Mascarenas v. State, supra.*

The first deviation from the *Morgan* rule occurred in *State v. Valles, supra,* where conviction of the defendant on this appeal was affirmed. One basis of the decision was that "nothing in the record shows the grand jury minutes were used at the trial." This reason was erroneous. In *Morgan,* the fact was that the district attorney "used the transcript of their grand jury testimony as a basis for his questions." This does not mean that the district attorney in *Valles,* who kept the transcript in his office safe, was entitled to proceed in court to question the grand jury witness, thumb his nose at the defendant, and march to victory before the jury. All that was necessary under *Morgan* was that the district attorney use "grand jury testimony at trial." "Grand jury testimony at trial" means a witness who testified before the grand jury and then testified at trial.

State v. Baca, 85 N.M. 55, 508 P.2d 1352 (Ct.App.1973) followed *Valles,* supra. I concurred. My error, like that of many appellate judges, flows from a failure to study the history of this rule of law.

"[O]nce the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness' grand jury testimony relating to the crime for which defendant is charged." *State v. Sparks,* 85 N.M. 429, 431, 512 P.2d 1265, 1267 (Ct.App. 1973), approved in *State v. Felter,* 85 N.M. 619, 515 P.2d 138 (1973); *State v. Vigil,* 87 N.M. 345, 533 P.2d 578 (1975).

Another reason given was that *Tackett, supra,* called for "a particularized need." That reason may be true when a defendant demands grand jury testimony "in advance of trial," not during trial. "There can be no valid reason for requiring the defendant to show a particularized need for the grand jury testimony of a witness who has already appeared and testified publicly in the criminal trial." *State v. Vigil,* 85 N.M. 735, 516 P.2d 1118 (1973). This reason given in *State v. Valles, supra,* was erroneous. See also, *State v. Sparks, supra,* as discussed in *State v. Felter, supra.*

The interest of a state in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). "Justice" is a term that varies from judge to judge, dependent upon his experience in the courtroom. A judge with knowledge and experience knows, (1) that, perhaps, the testimony of the witness at trial may have concealed information given by the witness to the grand jury or the testimony at trial is contradictory and impeachable.

(2) That the art of cross-examination for impeachment purposes is invaluable in a search for the truth. It is a cornerstone in the trial of a case. A cornerstone is a large stone laid at the base of a building to strengthen the two walls forming a right angle. In figurative use, it unites the jury and the trial to assure the fair administration of justice in the courts. The jury should have the assurance that the doors that may lead to the truth have been unlocked. It is not necessary for a defendant to demonstrate actual prejudice when the right of cross-examination is denied. In *State v. Romero,* 87 N.M. 279, 282, 532 P.2d 208 (Ct.App.1975), the following was quoted.

As pointed out in *Dennis v. United States,* 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966):

> "[It is not] realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

In *Alford v. United States*, 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931), the Court said:

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. [Citations omitted.] It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. [Citations omitted.] *To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.* [Citations omitted.]

. . . . .

(3) That "The right of cross-examination is a part of the constitutional right to be confronted with the witnesses against one." *State v. Sparks, supra*, 85 N.M. at 430, 512 P.2d at 1266.

(4) That disclosure, rather than suppression of relevant matters, ordinarily promotes the proper administration of criminal justice. Rarely is the prosecution justified to have exclusive access to a storehouse of relevant facts.

(5) "[O]nce the witness has testified publicly at the criminal trial, any privilege that he had with respect to his testimony on the same subject before the grand jury is lost." *State v. Morgan, supra*, 67 N.M. at 290, 354 P.2d at 1004.

(6) That the determination of what may be useful to the defense can only be made by the attorney for the defendant.

As to the grand jury testimony of Dale Eugene Blythe, the first witness, it is true that the request for his grand jury testimony was not made until the witness had left the stand on a Friday. The following Monday, the defendant made demand that the grand jury minutes be available so that proper examination of all witnesses could be made. The court denied the motion because it was untimely made. Thereafter five grand jury witnesses listed in the indictment testified at trial.

Technically, defendant was not entitled to the grand jury testimony of the grand jury witnesses prior to their call to the stand. A defendant is not entitled to all of the grand jury minutes. He is limited to the witness' testimony as to the specific offense. If the witnesses had not been called, their grand jury testimony would properly be locked in the safe of the district attorney. But it is clear that defendant meant to demand the grand jury testimony of witnesses who would testify at trial as they were called to the stand. Defendant's demand was timely filed.

HENDLEY, Judge (dissenting).

For dissent purposes I assume but do not decide that the rule of *State v. Vigil*, 85 N.M. 735, 516 P.2d 1118 (1973) is retroactive.

Appellate counsel accidently found the Grand Jury transcript. The only discrepancy complained of is Mr. Martinez' testimony before the Grand Jury and at Trial.

Grand Jury Testimony

"Q. Did you see a weapon of any kind?

"A. Yes, I did.

"Q. What did you see?

"A. *A .38 automatic.*

"Q. Was this in his hand?

"A. It was in his right hand." (Emphasis ours)

Trial Testimony

"Q. Could you describe the gun he had?

"A. It was—what it looked like to me was *a .32 Beretta automatic.*

"Q. Do you know guns?

"A. Well, I just recently got out of the service."

(Emphasis ours)

When viewing the receiving end of a pistol the barrel size may vary. To some it may seem the size of a large open pit. A .38 and a .32 have a different diameter of approximately ⅛ of an inch. Automatics generally have a similarity in design. The issue at trial was the identity of defendant. Defendant had several alibi witnesses. The state had four eye witnesses. It was undisputed that the robber had a gun.

Defendant attempts to elevate the discrepancy, which is at best harmless error, when he states:

"The conflict in the testimony of Martinez is clear—and bothersome. It is material. It goes to credibility. It raises a question either about the *perceptive capacity* of the witness Martinez or his *veracity* or both. Therefore, it raises a serious question about the reliability of the *identity* testimony of witness Martinez."

Section 41–23–51, N.M.S.A.1953 (2d Repl. Vol. 6, 1972) states that unless ". . . such action appears to the court inconsistent with substantial justice . . ." it is harmless error. I would hold the error harmless. *State v. Baros*, 87 N.M. 49, 529 P.2d 275 (Ct.App.1974); *State v. Benavidez*, 87 N.M. 223, 531 P.2d 957 (Ct.App.1975); *State v. Turner*, 90 N.M. 79, 559 P.2d 1206 (Ct.App.1976). Substantial justice was done and defendant received a fair trial.

Accordingly, I dissent.

563 P.2d 1150

NEW MEXICO STATE HIGHWAY DEPARTMENT, Petitioner,

v.

Knox VAN DYKE, Administrator of the Estate of Anita Van Dyke, Deceased, and Knox Van Dyke as parent and next friend of Richard Van Dyke, a minor, Respondents.

Knox VAN DYKE, Administrator of the Estate of Anita Van Dyke, Deceased, and Knox Van Dyke as parent and next friend of Richard Van Dyke, a minor, and Knox Van Dyke, Individually, Petitioner,

v.

NEW MEXICO STATE HIGHWAY DEPARTMENT, and the Millers Mutual Fire Insurance Company of Texas, Respondents.

Nos. 11046, 11050.

Supreme Court of New Mexico.

April 6, 1977.

Rehearing Denied May 17, 1977.

Toney Anaya, Atty. Gen., James V. Noble, Asst. Atty. Gen., Richard L. Russell, Chief Counsel, N.M. State Highway Dept., Santa Fe, Rodey, Dickason, Sloan, Akin & Robb, P.A., James C. Ritchie, Albuquerque, for N.M. State Highway Dept.

S. S. Koch, W. B. Kelly, White, Koch, Kelly & McCarthy, Santa Fe, for Knox Van Dyke.

Modrall, Sperling, Roehl, Harris & Sisk, Allen C. Dewey, Jr., Albuquerque, for The Millers Mut. Fire Ins. Co. of Tex.

OPINION

McMANUS, Chief Justice.

On July 21, 1971 petitioner-respondent Van Dyke (hereafter plaintiff), with his wife and son, was driving from Albuquerque toward Santa Fe on Highway 85. After passing the crest of La Bajada Hill the Van Dyke vehicle struck the rear of a truck carrying concrete blocks. The collision caused the death of Mrs. Van Dyke with injuries to Mr. Van Dyke and their son. A suit was filed for injuries received by Van Dyke and his son, and the death of his wife. The jury rendered a judgment in favor of all three plaintiffs. The New Mexico State Highway Department (Highway Department) appealed the denial of its motion for a directed verdict to the Court of Appeals. The Millers Mutual Fire Insurance Company of Texas (Millers) was allowed to intervene in the proceedings before the Court of Appeals. In its opinion concerning this case the Court of Appeals stated as follows:

> We reverse the judgment with respect to the plaintiff Knox Van Dyke in his individual capacity and as administrator of the estate of Anita Van Dyke and remand for a new trial. The judgment for Richard Van Dyke is affirmed. The order of the trial court regarding insurance coverage between Millers and the Highway Department is reversed for a new trial. It is the further order of this court that the trial court determine the issue of insurance coverage before any action is taken on affirmance of Richard Van Dyke's judgment and of the new trial for Knox Van Dyke in his individual capacity and as administrator of the estate of Anita Van Dyke.

The Van Dykes and the Highway Department both petitioned for a writ of certiorari to the Court of Appeals. We granted certiorari and consolidated both petitions. We reverse the Court of Appeals.

There were several points alleged as error in the petitions. The first point concerns the allegations of negligence on the part of the Highway Department.

Plaintiff alleges as the basis of the Highway Department's liability that it was negligent in designing the highway with "stopping-sight" distances and shoulders less than standard; and that it posted an excessive speed limit for the highway. Plaintiff's theory of the case, as submitted to the jury in instruction No. 1, reduced the claim to posting an excessive speed limit and having inadequate shoulders.

The highway in question was constructed in 1931 and has not been materially altered since then. There was no evidence that it did not conform to new-highway construc-

tion standards, existing at that time. Subsequent to 1931, various changes were effected to meet new driving conditions. An annual rating system for older highways was developed and each road was periodically checked to determine whether it met the newer standards.

In 1971 the legal speed limit was 70 m. p. h. but the Highway Department had the power to lower the speed limit if an investigation revealed that the legal speed was greater or less than was reasonable or safe for the road conditions. Section 64–18–2.-1(A), N.M.S.A.1953 (2d Repl. Vol. 9, Pt. 2, 1972). The annual ratings for Highway 85 for several previous years showed that it was rated adequate for 70 m. p. h. traffic, although, by the new construction standards of 1971, there were some deficiencies. There was no allegation that this rating system was negligent or improper.

The alleged defect was that the "stopping-sight" distances for a 70 m. p. h. highway did not conform to either the 1954 or 1971 criterion for new-highway construction. The "stopping-sight" distance is that distance required for a motorist, after perceiving an obstruction in the road ahead, to take appropriate action to avoid it. The 1971 standards called for a 600 feet stopping-sight distance for a car traveling 70 m. p. h., measured from a point three feet nine inches from the pavement (e. g. approximate eye-level of a driver) to a point six inches above the pavement (supposedly where an object would by lying). The stopping-sight distance at the portion of the highway where the accident took place did not meet this standard.

However, under the present circumstances it is clear that plaintiff had an adequate stopping-sight distance because the object which was obstructing his progress was not six inches from the pavement, but was a truck measuring eight feet two inches in height. The facts are undisputed. Plaintiff had the opportunity to see the truck, or a part of it, well in excess of the recommended stopping distance of 600 feet, and well in excess of the distance required to react and stop or safely change lanes. It is the duty of a motorist to do more than merely look, "it is his duty to see and be cognizant of what is in plain view or obviously apparent, and he is chargeable with seeing what he should have seen, but not with what he could not have seen in the exercise of ordinary care." *Ortega v. Koury,* 55 N.M. 142, 145, 227 P.2d 941, 943 (1951). Accord, *Horrocks v. Rounds,* 70 N.M. 73, 370 P.2d 799 (1962); *Martinez v. City of Albuquerque,* 84 N.M. 189, 500 P.2d 1312 (Ct.App.1972). Plaintiff offered no evidence to justify his failure to perceive the truck and take adequate measures to avoid it. See *Selgado v. Commercial Warehouse Company,* 86 N.M. 633, 526 P.2d 430 (Ct.App.1974).

Beside the stopping-sight distance, plaintiff also alleged that the highway was defective because the shoulder of the road was inadequate. Although the shoulders at that point in the road did not conform to the 1971 standard, there was no evidence that the shoulders contributed to the accident. Neither the truck nor Van Dyke's car came into contact with the shoulder (but a disabled camper was parked there). A recent New Jersey case held that the absence of shoulders could not be the basis of liability where the road was reasonably safe and there was no federal or state law requiring shoulders. *Hughes v. County of Burlington,* 99 N.J.Super. 405, 240 A.2d 177 (1968). However, where improperly constructed or maintained shoulders contribute to, or are causally related to accidents, the state's negligence may result in liability. *Russell v. State,* 268 App.Div. 585, 52 N.Y. S.2d 629 (S.Ct.1944) (case remanded for a determination of causation). See generally 45 A.L.R.3d 875 (1972). Since the shoulders did not contribute to or cause the accident, any defect therein is irrelevant, which only leaves the matter of the 70 m. p. h. speed limit.

Despite the failure of the highway to conform to the standard stopping-sight distance, it is still necessary for the plaintiff to show that the failure to meet those standards proximately caused the accident. *Pack v. Read,* 77 N.M. 76, 419 P.2d 453

(1966); *Hartford Fire Insurance Company v. Horne,* 65 N.M. 440, 338 P.2d 1067 (1959); *Archuleta v. Johnston,* 83 N.M. 380, 492 P.2d 997 (Ct.App.), cert. denied, 83 N.M. 379, 492 P.2d 996 (1971). Where several factors may have caused an accident, the plaintiff cannot recover unless he proves that his injuries were sustained by a cause for which the defendant is responsible. *Stuart-Bullock v. State,* 38 A.D.2d 626, 326 N.Y.S.2d 909 (S.Ct.1971). *Bouldin v. Sategna,* 71 N.M. 329, 332–333, 378 P.2d 370, 372 (1963) sets out the applicable test to use:

> In *Thompson v. Anderman,* 59 N.M. 400, 285 P.2d 507, we stated that, "The proximate cause of an injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred."

If the cause of the accident was the fact that plaintiff was traveling at 70 m. p. h. and the "blind spot" at the crest of the hill prohibited him from seeing the truck, liability may have been established. However, the record shows that it was Van Dyke's failure to keep a proper lookout which was the proximate cause of the accident. The evidence showed that the truck was visible from over 600 feet and that plaintiff had an adequate opportunity to take evasive measures. When the negligence of the driver produces the injury, the state is not responsible for unrelated road conditions. *Ikene v. Maruo,* 54 Haw. 548, 511 P.2d 1087 (1973); *Martin v. State Highway Commission,* 213 Kan. 877, 518 P.2d 437 (1974); *Litts v. Pierce County,* 9 Wash.App. 843, 515 P.2d 526 (1973).

Negligence and causal connection are generally questions of fact for the jury, but it is equally well established that where the evidence is undisputed and reasonable minds cannot differ, the question is one of law to be resolved by the judge. *Montoya v. Williamson,* 79 N.M. 566, 446 P.2d 214 (1968); *Bouldin v. Sategna,* supra. Cf. *Archuleta v. Johnston,* supra.

The truck was visible to plaintiff for an adequate time and distance before the collision. The plaintiff failed to perceive it until too late to avoid the collision. Since the plaintiff is required by law to perceive what is visible, the proximate cause of the accident was nothing other than plaintiff's failure to see, and not any negligence of the Highway Department.

Following our discussion above, we are of the opinion that there was no negligence on the part of the New Mexico State Highway Department, and that the sole proximate cause of the accident was the negligence of the driver Knox Van Dyke. As a result of this disposition we do not need to reach the rest of the issues presented.

The judgment in favor of all three plaintiffs is reversed and the cause is remanded to the District Court of Santa Fe County with directions to grant the Highway Department's motion for a directed verdict.

IT IS SO ORDERED.

SOSA, EASLEY and PAYNE, JJ., concur.

563 P.2d 1153

STATE of New Mexico, Plaintiff-Appellee,

v.

George NOBLE, Defendant-Appellant.

No. 10878.

Supreme Court of New Mexico.

April 19, 1977.

Rehearing Granted Feb. 18, 1977.

Jan A. Hartke, Chief Public Defender, Don Klein, Appellate Defender, Reginald J. Storment, Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Paquin M. Terrazas, Robert E. Robles, Don D. Montoya, J. Michael Francke, Asst. Attys. Gen., Santa Fe, on rehearing, for plaintiff-appellee.

OPINION

MUSGROVE, District Judge, Sitting by Designation.

The motion for rehearing is granted. The former opinion is withdrawn and the following opinion is substituted.

Defendant was convicted of first-degree murder following jury trial in the District Court of Grant County, and was sentenced to death. He appeals.

The following are the essential facts of the case. In the early hours of May 29, 1975, the defendant followed his ex-wife to her home after having seen her with another man in a local bar. The defendant had told a friend he was going up there to "* * * do a number on both of them." Some neighbors were awakened by screams coming from the victim's house. The victim's sister, who lived next door, called the police. A seven-year-old girl, daughter of the defendant and victim, was awakened by the noise, got up, and went into the living room, saw blood gurgling out of her mother and her father standing nearby with a knife in his hand. When the police arrived, they found the defendant inside the house and the victim on the floor fatally wounded. Her throat had been cut, and she also had received several stab wounds in her throat and several head wounds. The defendant was arrested and charged with murder.

The defendant raises six points on his appeal. First, defendant claims that New Mexico's death penalty is unconstitutional and that the case must be remanded for resentencing. We agree. The penalty to be imposed in this case is life imprisonment. *State v. Rondeau,* 89 N.M. 408, 553 P.2d 688 (1976).

Second, defendant claims fundamental error occurred because there was no jury determination of competency and no valid waiver thereof. Prior to the preliminary hearing in magistrate court, counsel for defendant filed a motion in District Court, requesting an examination to determine his mental competency as provided by Rule 35(c), N.M.R.Crim.P. 35(c) [§ 41–23–35(c), N.M.S.A.1953 (Supp.1975)]. The motion was granted staying the magistrate court proceedings and ordering a psychiatric examination. Following the examination, a hearing was held at which the examining doctor testified that the defendant understood the nature and gravity of the proceedings against him, was capable of assisting in his own defense and was competent to stand trial. At the conclusion of the hearing the Court found that the defendant was mentally competent to stand trial and that there was no reasonable doubt as to his mental competency to stand trial.

Rule 35(b), N.M.R.Crim.P. 35(b) [§ 41–23–35(b), N.M.S.A.1953 (Supp.1975)] provides

that when it appears that there is a question as to the mental competency of a defendant to stand trial, any further proceedings shall be suspended until the court without a jury determines that issue, i. e. whether there is a reasonable doubt as to the defendant's present mental capacity to stand trial.

The Court decides the issue in one of three ways. First, the Court may decide that there is no reasonable doubt that the defendant is incompetent to stand trial, in which case further proceedings shall be conducted concerning the question of involuntary hospitalization. Second, the Court may decide there is a reasonable doubt as to defendant's competency to stand trial. In this event, the defendant has a right to have the question submitted to and answered by the same jury which is selected for and tries the case on its merits. This special interrogatory should be submitted to the jury at the time the case is submitted to it for its verdict. Third, the Court may decide that there is no reasonable doubt as to the defendant's competency to stand trial, in which case there is no question for a jury to decide. Such a determination is only subject to review for abuse of discretion. *State v. Lujan,* 87 N.M. 400, 534 P.2d 1112 (1975); *State v. Upton,* 60 N.M. 205, 290 P.2d 440 (1955); *State v. Chavez,* 88 N.M. 451, 541 P.2d 631 (Ct.App.1975); *Hoffman v. State,* 79 N.M. 186, 441 P.2d 226 (Ct.App.1968). In the present case there was no conflict in the testimony presented at the hearing concerning the defendant's competency to stand trial. No further pursuit of that question was made by defendant. We conclude that the trial court did not abuse its discretion.

Third, defendant claims that the trial court erred in admitting photographs of the body of the deceased. One of the photographs shows the victim as she was found by the police in her house. The other photographs show the wounds inflicted on the victim. Defendant contends that the photographs were so inflammatory, prejudicial and irrelevant that they should have been excluded. We disagree. The photographs were used to illustrate, clarify and corroborate the testimony of witnesses concerning the scene of the crime, wounds of the victim and identity of the deceased. Defendant's counsel concedes that the admission of photographs into evidence is a discretionary matter with the trial court, subject only to a review for an abuse of that discretion. Defendant has the burden to show such abuse. He has failed to meet that burden in this case. *State v. Victorian,* 84 N.M. 491, 505 P.2d 436 (1973); *State v. Upton, supra; State v. Holden,* 85 N.M. 397, 512 P.2d 970 (Ct.App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

Fourth, defendant claims that the trial court erred in allowing testimony of Dawn Noble, the seven-year-old daughter of defendant and victim, because she was not a competent witness and because the prejudicial effect of her testifying outweighed the probative value of her testimony. Prior to the young girl's testimony, an extensive examination out of the presence of the jury was made by the defense counsel, the prosecutor and the judge concerning the girl's understanding of her obligation to tell the truth. The record of that examination clearly demonstrates that she understood her duty to tell the truth. The guidelines for determining whether a child is competent to testify were set out in *State v. Manlove,* 79 N.M. 189, 192, 441 P.2d 229, 232 (Ct.App.), cert. denied, 79 N.M. 159, 441 P.2d 57 (1968).

> In each instance the capacity of a child of tender years is to be investigated, and the trial court must determine from inquiries the child's capacities of observation, recollection and communication, and also the child's appreciation or consciousness of a duty to speak the truth. It then lies within the sound discretion of the trial court to determine, from the child's intelligence and consciousness of a duty to be truthful, whether or not the child is competent to testify as a witness.

Here the trial court followed the guidelines. We are of the opinion the court properly determined that the young girl was a competent witness. Counsel argues that N.M.

R.Evid. 603 [§ 20–4–603, N.M.S.A.1953 (Supp.1975)] requires more than that announced in *Manlove*. We disagree. Counsel claims that even if the child was a competent witness, the prejudicial effect of her testimony outweighed any probative value, and cites N.M.R.Evid. 403 [§ 20–4–403, N.M.S.A.1953 (Supp.1975)]. Our review of the testimony leads us to the opposite conclusion. The evidence presented by the testimony was relevant, the essential part was noncumulative, and it had considerable probative value. The trial court was correct in denying the motion to exclude the testimony.

Fifth, defendant claims that the trial court erred in refusing to direct a verdict of not guilty by reason of insanity. There was a disputed factual question presented by the testimony concerning the sanity of defendant at the time of the crime. Dr. Hernandez, called by the defense, was of the opinion that defendant was suffering from a mental disease, designated as a convulsive disorder of the *petit mal* type, and that this type of mental disease could cause defendant not to know what he was doing, not to understand the consequences of the act, and not to be able to prevent himself from doing it. Dr. Shelton, called by the State, was of the opinion that defendant did not have a mental disorder and that defendant knew the nature and quality of his act. Dr. Shelton did not detect any epilepsy.

Counsel recognizes that the rule in New Mexico is that expert testimony on the issue of insanity is not binding of the factfinder and that the jury may believe or disbelieve expert testimony as it chooses. *State v. Victorian, supra; State v. Moore,* 42 N.M. 135, 76 P.2d 19 (1938); *State v. James,* 85 N.M. 230, 511 P.2d 556 (Ct.App.), cert. denied, 85 N.M. 228, 511 P.2d 554 (1973). The evidence presented a question of fact which was properly submitted to the jury to decide.

Sixth, defendant claims that it was error for the trial court to instruct the jury with N.M.U.J.I.Crim. 2.00 [2nd Repl. Vol. 6, N.M.S.A.1953 (Supp.1975), at 295] in advance of the effective date because the instruction changed the elements of the crime of first-degree murder. The trial court instructed the jury with N.M.U.J.I. Crim. 2.00, supra. Defendant argues that the instruction (1) omits the element that the killing must be unlawful, (2) contravenes the definition of express malice set forth by the legislature in § 40A–2–2, N.M. S.A.1953 by allowing an inference of intent from the facts and circumstances of the case, and (3) sets an unreasonably vague definition for the very important concept of "deliberation." Instruction 2.00 does not change the necessary elements to be proven for a conviction of first-degree murder.[1] "Unlawful: means not authorized by law. *State v. Chenault,* 20 N.M. 181, 147 P. 283 (1915). "Unlawful" is equivalent to "without excuse or justification." *Territory v. Gonzales,* 14 N.M. 31, 89 P. 250 (1907). Section 40A–2–9, N.M.S.A. (1953) states: "Whenever any person is prosecuted for a homicide, and upon his trial the killing shall be found to have been excusable or justifiable, the jury shall find such person not guilty and he shall be discharged." For those circumstances where a killing is excusable or justified, see §§ 40A–2–6 through 8, N.M.S.A.1953. Every killing of a person by another is presumed to be unlawful, and only when it can be shown to be excusable or justifiable will it be held otherwise. When the evidence permits, excuse or justification may be raised as a defense and decided by the factfinder. Initially, the absence of excuse or justification is not an element of homicide to be proven by the prosecution. In the present case no such issue was presented, no instruction was requested, nor would the evidence have permitted it.

Defendant argues that in the past the jury had to be instructed that a necessary element of first-degree murder was express malice and that § 40A–2–2(A), supra, re-

1. This issue has already been addressed by this court. See *State v. Valenzuela,* 90 N.M. 25, 559 P.2d 402 (1976).

quires that express malice be "* * * manifested by external circumstances capable of proof." He further argues that N.M. U.J.I.Crim. 2.00 equates express malice with deliberate intention to take away life, which it does, but that the jury is permitted to infer a deliberate intention to take a life from "* * * all of the facts and circumstances of the killing." He concludes that "* * * all of the facts and circumstances of the killing" is so different from "* * * manifested by external circumstances capable of proof" that it somehow changes the law. We cannot indulge in such specious semantics.

This court, in discussing express malice and first-degree murder, stated in *State v. Hamilton,* 89 N.M. 746, 751, 557 P.2d 1095, 1100 (1976):

> This problem should be resolved by the new Uniform Jury Instructions for Criminal Cases, which became effective September 1, 1975. The new instruction on first degree murder, N.M.U.J.I.Crim. 2.00, does not use the phrase "malice aforethought, either express or implied," but instead discusses "deliberate intention to take away the life of" the victim. We are confident that the confusion raised by the terms "express" and "implied" malice will now be eliminated. See generally Institute of Public Law and Services, Committee Commentary to N.M.U.J.I. Crim. 2.00, New Mexico Uniform Jury Instructions Criminal Approved Committee Commentaries (1975).

We can only say what was there anticipated is now a reality.

Defendant claims the guidelines in the instruction for consideration of deliberate intention are too vague. We disagree. The language is clear, unambiguous and remarkably free of "legalese."

Defendant claims error in the trial court's use of N.M.U.J.I.Crim. 41.00 [2nd Repl. Vol. 6, N.M.S.A.1953 (Supp.1975), at 326] before its effective date, because it does not deal specifically with the issue of burden of proof of sanity. This contention is without merit. See *State v. Wilson,* 85 N.M. 552, 514 P.2d 603 (1973). Defendant did not offer an instruction or object to the one given. Objections to instructions cannot be raised for the first time on appeal where defendant neither objected to the instructions at trial nor tendered any written request. *State v. Rodriquez,* 81 N.M. 503, 469 P.2d 148 (1970).

The defendant's conviction is hereby affirmed. The cause is remanded only for the purpose of sentencing the defendant to life imprisonment.

McMANUS, C. J., and EASLEY and PAYNE, JJ., concur.

SOSA, J., dissenting only on the basis that the question of defendant's competence and the issue of his guilt or innocence should not both be submitted to the same jury.

563 P.2d 1158

Robert BUDAGHER, Sheriff of Sandoval County, Trustee for and on behalf of H. E. Leonard, Winona Leonard, and Leonard Motor Company, beneficiaries, and H. E. Leonard, Winona Leonard and Leonard Motor Company, Individually, Plaintiffs-Appellees,

v.

SUNNYLAND ENTERPRISES, INC., John E. Kinscherff, and County of Sandoval, Defendants-Appellants.

No. 11075.

Supreme Court of New Mexico.

May 9, 1977.

Poole, Tinnin & Martin, Douglas Seegmiller, Albuquerque, for appellants.

Gallagher & Walker, Peter Gallagher, Albuquerque, for appellees.

OPINION

McMANUS, Chief Justice.

Plaintiffs-appellees sought personal judgments and the foreclosure of a deed of trust against defendants-appellants John E. Kinscherff and Sunnyland Enterprises, Inc. Defendant Kinscherff appeals from the addition of $45,399.23 for attorney's fees and $454.64 for costs to the $453,022.25 found due and owing.

On June 29, 1973, plaintiffs H. E. Leonard, Winona Leonard, and Leonard Motor Company sold certain real estate in Sandoval County to Sunnyland Enterprises, Inc. (Sunnyland). Plaintiffs received a real estate mortgage note, a deed of trust, and $57,871.32 as down payment. Sunnyland conveyed its interest in the land to Kinscherff that same day; Kinscherff did not assume personal liability for payment of any obligations secured by the land. Sunnyland defaulted on the payment of the note on November 3, 1975. The trial court found $453,992.25 to be due and owing, and it added $45,399.23 in attorney's fees (ten per cent) and $454.64 in costs.

First, defendant argues that the attorney's fees were excessive and unreasonable. The real estate mortgage note provides that upon default the entire amount will be due and payable, "* * * with ten per cent (10%) additional on amount unpaid should this note be placed in the hands of an attorney for collection." Defendant filed a motion declaring that ten per cent was excessive and that he should be able to introduce evidence of reasonable attorney's fees. The trial court denied the motion.

This Court has never explicitly held that a contract provision which awards excessive attorney fees may be subject to reduction by the trial court upon proof of the unreasonableness of the amount. We long ago held that such contract provisions were valid and enforceable in *Bank of Dallas v. Tuttle,* 5 N.M. 427, 23 P. 241 (1890). After stating the above rules, that case proceeded to qualify the holding:

> [I]t does not follow, and this court does not hold, that the courts will not interfere to prevent oppression and collusion, where the facts are brought before the court in the proper manner. The courts have held void many of the provisions for attorney's fees in notes and contracts, where they are uncertain, excessive, or oppressive. Even where a fixed sum has been agreed upon by the parties, the courts have interfered to afford relief, where the amount was clearly exorbitant or oppressive, and the facts were shown to the court. In this case, services of the attorney were rendered. It is not shown that the amount contracted for was excessive . . . . [W]e must presume that the amount fixed was the reasonable value of the services rendered, until the contrary appears.

5 N.M. at 434, 23 P. at 243.

The federal court in *First Savings Bank & Trust Co. v. Stuppi,* 2 F.2d 822, 824 (8th Cir. 1924) construed the Bank of Dallas decision to hold "that such a provision means that the fee shall be reasonable in value not exceeding the amount stipulated." Although this was not the specific holding in *Bank of Dallas,* we feel that this is the

correct statement of law and we now so decide. It is clearly within the equitable power of the court to consider and reduce an excessive fee. See generally, 59 C.J.S. Mortgages § 812d(2) (1949); 55 Am.Jur.2d Mortgages § 627 (1971); 17 A.L.R.2d 288 (1951). If the trial court determines that the contract amount is reasonable, it may order such amount paid; however, when the reasonableness is challenged, it is incumbent upon the court to determine the value of the services rendered.

Plaintiffs argue that such contractual agreements must be enforced as written. We have never held such because in cases subsequent to *Bank of Dallas,* the reasonableness of the fee was not contested. See *Yates v. Ferguson,* 81 N.M. 613, 471 P.2d 183 (1970); *Shortle v. McCloskey,* 39 N.M. 273, 46 P.2d 50 (1935); *Sandell v. Norment,* 19 N.M. 549, 145 P. 259 (1914); *Howey v. Gessler,* 16 N.M. 319, 117 P. 734 (1911); *Armijo v. Henry,* 14 N.M. 181, 89 P. 305 (1907).

The majority of courts have also held that where the mortgage provides for either a stipulated fee or percentage, the court should, in its equitable discretion, only allow such sums as may be reasonable. *Jones v. First Nat. Bank of Ft. Collins,* 74 Colo. 140, 219 P. 780 (1923); *Jardine v. Hawkes,* 44 Idaho 237, 256 P. 97 (1927); *Foulke v. Hatfield Fair Grounds Bazaar, Inc.,* 196 Pa.Super. 155, 173 A.2d 703 (1961); *Matheson v. Rogers,* 84 S.C. 458, 65 S.E. 1054 (1909); *Dermott v. Carter,* 151 Va. 81, 144 S.E. 602 (1928); *Graves v. Burch,* 26 Wyo. 192, 181 P. 354 (1919). Since such a clause is generally considered an indemnification provision, the payee is only entitled to a reasonable fee for the legal services rendered.

We hold that the trial court abused its discretion in refusing to consider evidence concerning the reasonableness of the fees awarded in connection with the judgment. We also find that the trial court did not abuse its discretion in awarding costs for copies of the depositions. We reverse the trial court's denial of the motion to consider evidence on the question of attorney fees and remand for a disposition in accordance with this decision.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

SOSA, J., respectfully dissents.

SOSA, Justice.

I respectfully dissent.

Although on philosophical grounds I tend to agree with the result reached by the majority, I cannot agree to that result in light of general contractual law. Both parties here were capable of entering into a contract or note and were able to understand the provisions they agreed upon. They could have easily provided for reasonable attorney's fees rather than a flat fee. Courts should not rewrite clear and unambiguous clauses in a contract or note merely because one party later dislikes the financial consequences of what he agrees to in that contract or note. Thus, I do not agree that the clause in the note must be interpreted to say "a reasonable amount, up to but not more than ten percent."

563 P.2d 1160

Julio P. MARCHIONDO and Charles Petritsis, d/b/a Copper Penny Lounge, Petitioners,

v.

James T. ROPER, Administrator of the Estate of Geraldine Joyce Roper, Deceased, Respondent.

No. 11291.

Supreme Court of New Mexico.

May 10, 1977.

Shaffer, Butt, Jones, Thornton & Dines, K. Gill Shaffer, Stephen M. Williams, Albuquerque, for petitioners.

Kastler, Erwin & Davidson, Paul A. Kastler, Raton, for respondent.

OPINION

SOSA, Justice.

Plaintiff James Roper, as administrator of the estate of his deceased wife Geraldine Roper, sought to recover damages from defendants for the negligent sale of intoxicating liquor to Jennie Sandoval, who in an inebriated condition left their tavern in her automobile and later struck and killed Mrs. Roper. The trial court granted defendants' motion to dismiss for failure to state a cause of action. The Court of Appeals reversed. We granted certiorari.

On October 12, 1973, Geraldine Roper was struck and killed in Raton, New Mexico, by an automobile driven by Jennie Sandoval. Jennie Sandoval had arrived at the Copper Penny Lounge at approximately 12:00 o'clock noon and drank until approximately 4:30 that afternoon, whereupon she left in an extremely intoxicated condition. On the way back to her home, Jennie Sandoval struck Mrs. Roper who was walking along South Second Street. A blood examination taken of Jennie Sandoval about one and a half hours after the accident indicated that she had 0.35% of alcohol by weight in her blood. Plaintiff alleged in the complaint that the defendants knew that Jennie Sandoval was a habitual drunkard and that she was extremely intoxicated at the time she left the Copper Penny Lounge.

The decision of the Court of Appeals overrules our previous decision, *Hall v. Budagher*, 76 N.M. 591, 417 P.2d 71 (1966), and thereby establishes a cause of action in New Mexico for third parties damaged by the negligent sale of intoxicating liquor by tavernkeepers to inebriated customers (i. e. dram shop legislation). In *Hall v. Budagher*, we stated:

> Whether legislation in the nature of the so-called dram-shop or civil damage statutes should be included as a part of our liquor control acts is within the province of the legislature and we should not through judicial action establish the equivalent of such legislation.

76 N.M. at 595, 417 P.2d at 74.

The fact is that the Legislature then and now has not yet addressed itself to the existence of liability of the tavernkeeper to third parties, either affirmatively or negatively. Section 46–10–13, N.M.S.A.1953.[1] An examination of the common law today, however, indicates that civil liability is imposed judicially under negligence concepts in many states,[2] although almost as many

1. SALE TO DRUNKARDS AND LUNATICS.— It shall be a violation of this act for any person to sell, serve, give or deliver any alcoholic liquors to, or to procure or aid in the procuration of any alcoholic liquors for any habitual drunkard or person of unsound mind knowing that the person buying, receiving, or receiving service of such alcoholic liquors is an habitual drunkard or lunatic.

2. *Waynick v. Chicago's Last Department Store*, 269 F.2d 322 (7th Cir. 1959), cert. denied, 362 U.S. 903, 80 S.Ct. 611, 4 L.Ed.2d 554 (1960); Vance v. United States, 355 F.Supp. 756 (D.C.

jurisdictions have refused to impose civil liability through the common law.[3] Being certain that our Legislature must be aware of the many problems of alcohol abuse and will deal with the problem presented here, we are hesitant to act at this time and hope that it will address this serious issue in the near future, either for or against extending tavernkeepers' liability to third parties. We do not, however, feel that it would be improper for this Court to address this issue in the future if the Legislature chooses not to act.

The trial court is affirmed.

McMANUS, C. J., and EASLEY and PAYNE, JJ., concur.

FEDERICI, J., not participating.

Alaska 1973); *Vesely v. Sager*, 5 Cal.3d 153, 95 Cal.Rptr. 623, 486 P.2d 151 (1971); *Davis v. Shiappacossee*, 155 So.2d 365 (Fla.1963); *Colligan v. Cousar*, 38 Ill.App.2d 392, 187 N.E.2d 292 (1963); *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Pike v. George*, 434 S.W.2d 626 (Ky.1968); *Pence v. Ketchum*, 326 So.2d 831 (La.1976); *Adamian v. Three Suns, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1968); *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1, 75 A.L.R.2d 821 (1959); *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550 (1964); cf. *Mason v. Roberts*, 35 Ohio App.2d 29, 300 N.E.2d 211 (1971) [imposed civil liability even if no blacklisting under the dram shop act occurred in certain instances]. See generally 64 A.L.R.3d 922 (1975); 64 A.L.R.3d 882 (1975); 64 A.L.R.3d 849 (1975); 75 A.L.R.2d 833 (1961); 70 A.L.R.2d 628 (1960); 54 A.L.R.2d 1152 (1957); Keenan, "Liquor Law Liability in California," 14 Santa Clara Lawyer 46 (1973).

3. *Thompson v. Bryson*, 19 Ariz.App. 134, 505 P.2d 572 (1973) [no proximate cause as a matter of law in this case, no negligence per se]; *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965) [legislative function, no common law or statutory cause of action]; *Hull v. Rund*, 150 Colo. 425, 374 P.2d 351 (1962) [no cause of action]; *Moore v. Bunk*, 154 Conn. 644, 228 A.2d 510 (1967) [no proximate cause]; *Meade v. Freeman*, 93 Idaho 389, 462 P.2d 54 (1969) [no proximate cause, legislative function]; *State v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951) [no cause of action, no proximate cause, legislative function]; *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976) [no cause of action, legislative function, no common law negligence, no negligence per se]; *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969) [legislative function, judicial restraint, not negligence per se]; *Hall v. Budagher*, 76 N.M. 591, 417 P.2d 71 (1966) [no proximate cause, legislative function]; *Garcia v. Hargrove*, 46 Wis.2d 724, 176 N.W.2d 566 (1970) [refused to extend to purchasers on public policy grounds Wisconsin's dram shop act not applicable to case)]; *Parsons v. Jow*, 480 P.2d 396 (Wyo.1971) [no proximate cause, a legislative function, no cause of action either by statute or at common law].

563 P.2d 1162

John Dee READ, Plaintiff-Appellant,

v.

WESTERN FARM BUREAU MUTUAL INSURANCE COMPANY and Dwight M. Mazzone, individually and as agent for Western Farm Bureau Mutual Insurance Company, Defendants-Appellees.

No. 2785.

Court of Appeals of New Mexico.

April 12, 1977.

Phil Krehbiel, Toulouse, Krehbiel & DeLayo, P.A., Albuquerque, for plaintiff-appellant.

Frank H. Allen, Jr., Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendant-appellee Western Farm Bureau Mut. Ins. Co.

OPINION

SUTIN, Judge.

Plaintiff sought reformation of a general farm liability insurance policy issued by Western Farm Bureau Mutual Insurance Company (Western Farm) to include therein family medical insurance coverage. In addition, plaintiff sought damages based on negligence, breach of contract and fraudulent misrepresentation. Summary judgment was granted Western Farm and plaintiff appeals. We reverse.

A. *On the claim for reformation, a genuine issue of material fact exists.*

Plaintiff contends, on his claim for reformation of the Western Farm insurance poli-

cy, that the doctrine of reasonable expectation applies as stated in *Pribble v. Aetna Life Insurance Company*, 84 N.M. 211, 501 P.2d 255 (1972). Western Farm contends that plaintiff had no reasonable expectation because a check of the face sheet would alert any layman that he did not have medical coverage. It is Western Farm's position that the policy in question, particularly the face sheet, is clear, plain and without ambiguity; and, therefore, plaintiff is chargeable with knowledge of its terms.

The question for decision is:

Is there a genuine issue of material fact on whether the insurance policy issued by Western Farm was clear, plain and without ambiguity?

On April 24, 1974, Dwight M. Mazzone (Mazzone), a sales agent for Western Farm, discussed various insurance coverages with plaintiff. Plaintiff asked for a liability insurance policy that included family medical coverage, and specifically told Mazzone that plaintiff wanted coverage that would pay medical expenses for accidental injury to himself and members of his family.

Mazzone assured plaintiff that the policy purchased would contain family medical coverage without limitation as to the amounts of benefits payable thereunder. Plaintiff relied on Mazzone, purchased the insurance and paid the premium.

Plaintiff received the insurance policy by mail. Plaintiff examined the policy and noted paragraph III of section one, which was "COVERAGE D—MEDICAL PAYMENTS (Premises and Employees)". This paragraph provided for medical payments "to or for each person who sustains bodily injury caused by accident; while such person is: 1. on the insured premises with your permission". Plaintiff believed that this described the type of insurance requested, and plaintiff assumed that the policy had been issued in accordance with Mazzone's assurance.

Paragraph IV of section one was "COVERAGE E—Medical Payments (Named Insured and Family)". From the affidavit and depositions of plaintiff and his wife, we have no knowledge whether plaintiff read this paragraph.

On the face sheet of the policy, plaintiff noticed the word "NIL" typed several times under all coverages specified, except "General Farm Liability." The premium for this coverage was $37.20. Under "5. FAMILY MEDICAL PAYMENTS—E. LIMITS E—PREM." appeared the word "NIL".

Plaintiff was 19 years of age with a high school education. He swore that he could not find a definition of "NIL" in the policy. He had no idea what it meant and no one had explained it to him.

After plaintiff suffered an accidental injury, Western Farm denied liability.

The word "nil" is a contraction of "nihil", and "nihil" means "nothing".

We have discovered only two cases that discuss the use of the word "nil" in an insurance policy. *Treadwell v. Pacific Indemnity Company*, 154 C.A.2d 853, 317 P.2d 123 (1957); *Alamo Cas. Co. v. Richardson*, 235 S.W.2d 726 (Tex.Civ.App.1950).

In *Treadwell*, the insured argued that the typewritten word "nil" should apply to limits of liability, rather than to coverage. The Court said:

> In more technical approach, the word "nil," a contraction of nihil, means "nothing" (Webster's New International Dictionary, 2d ed.). To state that "The liability of this Company shall not exceed nothing" is by no means to say that the liability is unlimited. *We are aware that it is hardly realistic to apply standards of good English usage to the language of an insurance policy. Policy jargon is at least as painful to the purist as the language of judicial opinions. Nonetheless, we are convinced that the word "nil" in its context here cannot be given the meaning urged by appellant.* [Emphasis added.] [317 P.2d at 124]

In *Alamo Cas. Co.*, cited in *Treadwell*, the Court held that the word "nil" as used in a clause of the policy which read " $ Nil On automobiles being driven over road to point of destination selected by the insured as the place of storage of such automobiles",

would be construed to mean that the policy did not insure against such loss, and not as meaning that no limitation as to amount was imposed on liability for such loss. The Court said:

> (A) The test of the constructions proposed by the parties is the intention expressed in the policy, and the only evidence of this intention now before us is the language of the policy. *The parties did not pray for equitable relief, and they did not attempt to prove that language in the policy had a meaning different from the meaning which would ordinarily be attributed to it.* [Emphasis added.] [235 S.W.2d at 729]

We gather from the above cases that in an equitable action, if the insured attempts to prove that the word "nil" is of doubtful meaning, an ambiguity may exist in the insurance policy.

In the instant case, the claim for reformation of the insurance policy was an equitable proceeding. *Buck v. Mountain States Investment Corporation*, 76 N.M. 261, 414 P.2d 491 (1966).

The question that presents itself is whether the use by Western Farm of "NIL", the meaning of which plaintiff did not understand, renders the policy vague and ambiguous.

"Language is ambiguous when its meaning is doubtful or when it has a double meaning." *Foundation Reserve Insurance Co. v. McCarthy*, 77 N.M. 118, 120, 419 P.2d 963 (1966). In an insurance policy, language used is a means of communication, and a word used in an insurance policy is often a "bone of contention". This is a metaphor taken from two dogs fighting for a bone. Decade after decade, with regularity, the insured and the insurer fight for a bone, which includes the meaning of a word, a phrase or a provision of the insurance policy.

In each case where a "bone of contention" exists over a word in an insurance policy, that word has different meanings to the insured and insurer, because " 'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.' " Quoted in *Jernigan v. New Amsterdam Casualty Company*, 69 N.M. 336, 343, 367 P.2d 519, 524 (1961); *Harp v. Gourley*, 68 N.M. 162, 171–72, 359 P.2d 942 (1961). In each case, we take the word or phrase and construe it liberally to protect the insured. *Mountain St. M. C. Co. v. Northeastern N. M. Fair Ass'n*, 84 N.M. 779, 508 P.2d 588 (1973) (practicing); *King v. Travelers Insurance Company*, 84 N.M. 550, 505 P.2d 1226 (1973) (accidental); *Foundation Reserve Insurance Co.*, supra (struck; by); *Ivy Nelson Grain Co. v. Commercial U. Ins. Co. of N. Y.*, 80 N.M. 224, 453 P.2d 587 (1969) (all only while contained in or attached to such buildings or structures); *Fowler v. First National Life Insurance Co. of America*, 71 N.M. 364, 378 P.2d 605 (1963) (driving or riding).

The reason is that the insurer prepares the policy. Its sales agent, generally, is schooled in the art of salesmanship. The insured most often is a layman, the average man or woman on the street, who is not a college graduate or a student of insurance law. These insureds are persons who do not seek legal advice to determine whether insurance coverage has been afforded when the coverage and the premium paid are modest. They cannot, ordinarily, read and understand the complex, complicated and intricate provisions of an insurance policy in words of fine print that ambles along the way. They rely on the representations of the sales agent.

These facts are also the reasons why a word, a phrase, or a provision in a contract of insurance is not what the insurer intended the language to mean, but what a reasonable person in the position of the insured would have understood them to mean, and any ambiguity will be construed liberally in favor of the insured. *Ivy Nelson Grain Co. v. Commercial U. Ins. Co. of N. Y.*, supra. The trial court below and this Court understand the meaning of the odd contracted Latin word "NIL" as used in the policy, and we know that coverage of medi-

cal payments, limited to premises and employees, does not cover medical payments for the named insured and family, but we must not impose this knowledge on the public. When we say that a word will be given its ordinary meaning, we do not include "odd" words, peculiar words, contracted words, Latin words, or words that are not a part of speech or writing. We mean words ordinarily used in the common speech of men and women. Black's Law Dictionary 1195 (Rev. 4th ed. 1968) defines NIHIL:

> Lat. Nothing. Often contracted to "nil." The word standing alone is the name of an abbreviated form of return to a writ made by a sheriff or constable, the fuller form of which would be "nihil est" or "nihil habet," according to circumstances.

We must recognize the admonition of Justice Moise sixteen years ago when he said that ". . . the better rule is to not require of an insured something we know as a practical matter is not ordinarily done, namely, that he read and understand the terms of his policy. . . . To hold otherwise puts every insured at the mercy of the company in its fine print, and sets an unrealistic standard of conduct. I venture the opinion that before long the court will be faced with trying to distinguish later arising cases on their facts . . . ." *Porter v. Butte Farmers Mutual Insurance Company*, 68 N.M. 175, 186, 360 P.2d 372, 379 (1961) (Justice Moise, dissenting).

A later case, *Pribble*, supra, said:

> We will not simply mechanically charge Mr. Pribble with the duty of reading and understanding the policy and certificate and then bar him from recovery by a literal application of its terms and provisions. Rather, based on the facts before us, *we hold that Mr. Pribble, himself . . . was only bound to make such examination of such documents as would be reasonable for him to do under the circumstances; that he will only be held to that which he would be thereby alerted; and if the language is such that a laymen [sic] would not understand its full impact were he to attempt to plow through it, the documents will yield the maximum protection consistent with their language and the reasonable expectation of Mr. Pribble.* [Emphasis added.] [84 N.M. at 216, 501 P.2d at 260]

From an examination of the policy, plaintiff mistakenly believed that he was covered for medical expenses incurred in an accidental injury due to the representations of Mazzone. The word "NIL" did not communicate to plaintiff that medical expense coverage was omitted. A word that an insured cannot understand is a word of doubtful meaning and ambiguous, and if an insured accepts the policy under these facts and circumstances, a genuine issue of material fact exists whether the insured's conduct was that of a reasonable person, such as an ordinary lay person.

From the admonition given in earlier years, from the liberal construction given to words and phrases in insurance contracts for the benefit of the insured, and from the relaxation of the rule that an insured must read, know and understand the contents of a policy before he accepts it, we have adopted a realistic doctrine. An insurance company has a duty to make policy provisions and words therein, especially those related to coverage, plain, clear and prominent to laymen. Otherwise, if the language is such that a layman would not understand its full impact, the insurance contract will be interpreted to yield the maximum protection consistent with its language and the reasonable expectation of the insured. Furthermore, on summary judgment, we must view the matters presented in the most favorable aspect they will bear in support of the right to trial on the issues. *Jacobson v. State Farm Mutual Automobile Ins. Co.*, 81 N.M. 600, 471 P.2d 170 (1970).

By following the precepts that govern this case, we cannot say as a matter of law that the word "NIL" is plain, clear and unambiguous to plaintiff. It is a question of fact so that a genuine issue of material fact exists in the claim for reformation of the policy.

B. *On the claim for damages, a genuine issue of material fact exists.*

On the issue of damages, plaintiff's position on appeal is that a genuine issue of material fact exists whether Mazzone had authority to make representations that would be binding upon Western Farm. In *Pribble*, supra, it was held that actual or apparent authority was usually an issue of fact.

Western Farm claims that *Pribble* had nothing to do with the issues in the case at bar. This is one way to confess the validity of plaintiff's contention. *Pribble* was directly in point.

The trial court denied Mazzone's motion for summary judgment. This means that genuine issues of material fact exist with respect to Mazzone's negligence and fraud. Western Farm did not challenge these findings by cross-appeal. Neither did Western Farm establish that Mazzone, as its agent, was not acting within the scope and authority of that agency. Accordingly, genuine issues of material fact are present on the liability of Western Farm for the claimed misdeeds of Mazzone. *Pribble,* supra; Appleman, 22 Insurance Law and Practice § 12854 (1947, and 1976 Supp.).

C. *Plaintiff is relieved of payment of costs and expenses charged by the court.*

Mazzone disqualified the judge of the Fourth Judicial District and the judge of the First Judicial District was appointed to hear this case. The appointment required the judge to travel to Las Vegas for trial.

On March 19, 1976, Western Farm filed a motion for summary judgment. This motion was set for hearing on April 9, 1976. On April 9, 1976, in open court, Western Farm filed an amended answer. The record is silent on what occurred but summary judgment was not entered. No further notice of hearing was given.

The case came on for jury trial in Las Vegas four months later, on August 9, 1976. During oral argument plaintiff's attorney claimed that he received a telephone call from the court two days before trial saying that the motion for summary judgment had been overruled and to appear for trial. Western Farm claimed that the office received a call to appear for trial. All parties appeared for trial.

A conference of attorneys was held in the court's chambers. The court granted Western Farm's motion for summary judgment and denied Mazzone's motion for summary judgment. Plaintiff did not want to proceed on his claim against Mazzone and requested a continuance pending an appeal of the summary judgment. The court orally granted plaintiff a continuance on condition that plaintiff pay the costs of the jury, and the expenses of the court and the court reporter incident to vacating the trial setting. Under protest and objection, plaintiff agreed to pay the costs and expenses incurred.

Section 16–3–10, N.M.S.A. 1953 (Repl.Vol. 4) reads:

> District judges and district court employees shall be allowed per diem and shall be reimbursed for their necessary travel expenses incurred while absent from their principal offices upon official business . . . . These expenses shall be paid from the funds of the district court of the judicial district for which the business is transacted.

The expenses incurred by the district judge and his court reporter "shall be paid from the funds of the district court" of the Fourth Judicial District.

"Costs are a creature of statutes and may not be imposed in the absence of clear legislative authorization." *Reck v. Robert E. McKee General Contractors,* 59 N.M. 492, 503, 287 P.2d 61 (1955). We find no statute or rule of court that imposes upon litigants in a civil case the burden of paying per diem and travel expenses incurred by a district judge and his court reporter. In the absence of a statute or rule of court, such expenses cannot be properly taxed as costs. *State ex rel. Stanley v. Lujan,* 43 N.M. 348, 93 P.2d 1002 (1939).

In 1963, in a criminal case, following conviction of defendant for driving a

motor vehicle while under the influence of intoxicating liquor, the expense incurred by a nonresident judge was properly taxed as costs because it had a direct relation to the case being tried. *City of Portales v. Bell*, 72 N.M. 80, 380 P.2d 826 (1963). However, the statute relating to the reimbursement of such expenses was repealed and in 1968 the present § 16–3–10, supra, was adopted. Payment by the Fourth Judicial District is mandatory. *City of Portales* is not applicable.

The expenses of the district judge and his court reporter were not properly taxed as costs.

With reference to the taxation of jury fees as costs, § 21–1–1(38)(h), N.M.S.A. 1953 (Repl.Vol. 4, 1975 Supp.) reads:

> *Costs.* In civil cases the fees of a jury of six [6] shall be taxed as a part of the costs of the case against the party losing the case. The fees of a jury of twelve [12] shall be paid by the party demanding the same and no part thereof may be taxed as costs.

Under this rule of court, we can find no basis for taxing costs against the plaintiff because no jury was selected to try the case.

In the instant case, a jury panel was in attendance at court. Persons summoned for jury service shall be compensated for their time in travel and attendance. Section 19–1–15, N.M.S.A. 1953 (Repl.Vol. 4). No provision is made for the taxation of these costs. Section 21–1–1(54)(d), N.M.S.A. 1953 (Repl.Vol. 4) reads in part:

> *Costs.* Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course *to the prevailing party* unless the court otherwise directs. . . . [Emphasis added.]

"To the prevailing party" means the party who wins the lawsuit. The taxation of costs must await the final determination of the case. The costs of jury attendance in court were not properly taxed against plaintiff.

In the instant case, costs and expenses incurred were conditioned on the grant of a continuance to the plaintiff.

"The granting or denying of continuances is a matter within the sound discretion of the trial court, and such actions will be reviewed only where palpable abuse of discretion is demonstrated." *Schmider v. Sapir*, 82 N.M. 355, 358, 482 P.2d 58, 61 (1971). We believe there was a palpable abuse of discretion in denying the continuance, and by conditioning the continuance on plaintiff's payment of costs and expenses.

Plaintiff was ready for trial and plaintiff did not seek a continuance merely for vexation or delay. He was caught by surprise the morning of trial.

We construe the motion provisions of our Rules of Procedure in that way which will effect the simplification of litigation. We seek to avoid technical road blocks in order to provide a speedy determination of litigation upon its merits. *Maxey v. Quintana*, 84 N.M. 38, 499 P.2d 356 (Ct. App.1972). "We do not condone the practice of attorneys permitting motions to rest in peace. The disposition of motions is an important aspect of civil procedure and some reasonable time and place for hearing and disposition should be established by district courts. Section 21–1–1(78), N.M.S.A. 1953 (Repl.Vol. 4)." *Atol v. Schifani*, 83 N.M. 316, 319, 491 P.2d 533, 536 (Ct.App. 1971).

Plaintiff had a valid reason for a continuance. He did not want to try an agent and principal separately in the event summary judgment was reversed. Western Farm says the trial court gave plaintiff his choice: Go to trial or pay the costs and expenses incurred. Plaintiff made his choice, so make him abide by it. Western Farm adopts the operatic maxim: "Let the punishment fit the crime." To punish plaintiff for a crime not committed by him is not a doctrine acceptable in appellate courts. It does not comport with reason and fairness.

Plaintiff is relieved of the payment of costs and expenses incurred by the presence

of the jury, the court and its reporter the morning of trial.

Reversed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

563 P.2d 1170

STATE of New Mexico, Plaintiff-Appellee,

v.

John KING, Defendant-Appellant.

No. 2803.

Court of Appeals of New Mexico.

April 19, 1977.

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

Toney Anaya, Atty. Gen., John J. Duran, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of second degree murder, with firearm enhancement, defendant appeals. The nine issues raised by defendant group into four categories. They are: (1) the charge; (2) the instructions; (3) the evidence; and (4) the prosecutor's closing argument.

The Charge

The indictment was in four counts. Count 1 charged murder contrary to §§ 40A–2–1, 40A–2–2 and 40A–2–3, N.M.S.A.1953 (2d Repl.Vol. 6). These references are to statutes pertaining to first degree murder, second degree murder, express malice, implied malice, voluntary manslaughter and involuntary manslaughter.

Count 2 is the same as Count 1 with the addition the murder was with a firearm, contrary to § 40A–29–3.1, N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1975). Count 3 charged voluntary manslaughter with a firearm. Count 4 charged involuntary manslaughter with a firearm.

In addition, there is a general notation on the indictment that defendant was charged with first degree murder, second degree murder with a firearm, voluntary manslaughter with a firearm and involuntary manslaughter with a firearm. The failure to refer to a firearm in the first degree murder charge was correct because first degree murder is defined as a capital felony and the firearm enhancement provision does not apply to capital felonies. See § 40A–2–1 and § 40A–29–3.1, supra.

Defendant did not challenge the sufficiency of the indictment prior to trial; he did not claim the indictment did not give him sufficient notice of the charges against him so that he could prepare his defense.

At trial, after the close of the evidence, the trial court struck Counts 2, 3, and 4 as surplusage on the basis that second degree murder, voluntary manslaughter and involuntary manslaughter were included in Count 1. The specific statutory references in Count 1 show that the trial court was correct.

Defendant contends that after Counts 2, 3, and 4 were stricken, Count 1 did not charge a crime. He claims specific section numbers were not referred to; quite clearly there was such a reference. See *State v. Nixon*, 89 N.M. 129, 548 P.2d 91 (Ct.App.1976). He also claims that essential facts were missing. Count 1 charged defendant with the murder of Lynn Allen in Bernalillo County on a specified date in violation of specific statutes. No essential facts were missing; there was no violation of R.Crim.P. 5(d). *State v. Cutnose*, 87 N.M. 307, 532 P.2d 896 (Ct.App.1974); *State v. Vigil*, 85 N.M. 328, 512 P.2d 88 (Ct.App. 1973); see *State v. Hamilton*, 89 N.M. 746, 557 P.2d 1095 (1976).

Defendant asserts the indictment was duplicitous in that it charged violation of statutes which defined mutually exclusive crimes. Duplicity is the joinder of two or more distinct and separate offenses in the same count. *State v. Gurule*, N.M., 559 P.2d 1214 (Ct.App.1977).

A charge of murder in violation of statutes pertaining to first and second degree murder and voluntary and involuntary manslaughter is not a charge of mutually exclusive crimes. Neither is it a charge of distinct and separate offenses. Compare the charge in *State v. Hicks*, 89 N.M. 568, 555 P.2d 689 (1976). Rather the charge is an open charge of murder, a form of charging approved in *State v. Roy*, 40 N.M. 397, 60 P.2d 646 (1936), 110 A.L.R. 1 (1937). Under such an open charge, the jury is to be instructed on the degrees of the unlawful killing for which there is evidence. *Torres v. State*, 39 N.M. 191, 43 P.2d 929 (1935); *State v. Reed*, 39 N.M. 44, 39 P.2d 1005 (1934), 102 A.L.R. 995 (1936); *State v. Burrus*, 38 N.M. 462, 35 P.2d 285 (1934). *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976), on which defendant relies, does not announce a different rule. *Smith* did not involve pleadings; *Smith* held there was no evidence for the submission of voluntary manslaughter to the jury.

Defendant claims that after Counts 2, 3 and 4 were stricken, the indictment left the prosecutor free to proceed upon any theory it chose. Defendant seems to be arguing that he did not have notice "of what he must be prepared to meet". The indictment charged murder. *State v. Roy, supra*, states:

> "No citizen of even less than average intelligence can fail to understand the significance of a charge of murder preferred against him. In its usual acceptation it means the taking of a human life unlawfully."

Defendant was given notice that he must defend against a charge of unlawfully taking a human life.

Defendant contends that the striking of Counts 2, 3, and 4 was prejudicial—"the Court was changing the charges to suit its own notions of what the grand jury wanted to do." The contention is frivolous. Defendant faced the same charges both before and after the counts were stricken. Because the stricken counts were surplusage there was no prejudice.

Defendant objected to submitting the question of use of a firearm to the jury. The charge of killing with a firearm was contained in the counts which were stricken. Since Count 1 did not charge a killing with a firearm, defendant complains that submitting the question to the jury was contrary to *State v. Blea*, 84 N.M. 595, 506 P.2d 339 (Ct.App.1973). "*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 . . . ." *State v. Barreras*, 88 N.M. 52, 536 P.2d 1108 (Ct.App.1975).

Prior to the striking of Counts 2, 3 and 4, defendant was given such notice. When defendant objected to submitting the question to the jury, the trial court stated that it had not intended to strike the charge that the killing was with a firearm. Defendant claims he was prejudiced by the trial court's reinstatement of the firearm charge which had previously been stricken. We disagree. No additional or different offense was charged by the reinstatement. See *State v. Padilla*, 86 N.M. 282, 523 P.2d 17 (Ct.App. 1974). There was no prejudice because the taking of evidence had been concluded before Counts 2, 3, and 4 were originally stricken; any defense to the firearm charge had been presented in defending against the firearm charge in Counts 2, 3, and 4.

Instructions

The trial court did not read the indictment to the jury. Defendant asserts this was fundamental error; unless the "jury knows what crimes are charged in an indictment, they simply cannot be certain they are convicting the Defendant of the right crime." The contention is frivolous. The trial court is to instruct the jury upon questions of law necessary for guidance in returning a verdict. R.Crim.P. 41. In accordance with U.J.I.Crim. 50.00, the law governing the case was contained in the instructions given. It would have been improper to instruct the jury by reference to the indictment. *State v. Kendall*, (N.M.Ct. App.) 561 P.2d 935, decided January 4, 1977, and cases therein cited, overruled on other grounds, *Kendall v. State*, N.M., 561 P.2d 464, decided March 9, 1977. The instructions informed the jury of the charges they were to consider.

Defendant asserts the instruction on first degree murder injected a false issue into the case because the indictment did not charge first degree murder. This claim is also frivolous; Count 1 charged first degree murder.

Defendant contends U.J.I.Crim. 2.10 is erroneous; *State v. Scott*, (N.M.Ct.App.) 561 P.2d 1349, decided March 1, 1977 points out why this Court has no authority to review such a claim.

Defendant claims the trial court erred in refusing to instruct on involuntary manslaughter. He asserts the evidence indicates that he "was engaged in the commission of a lawful act which might produce death, (self- defense) in an unlawful manner or without due caution and circumspection." We do not reach the question of whether defendant was acting in self-defense at the time of the killing. *State v. Pruett*, 27 N.M. 576, 203 P. 840 (1921), 21 A.L.R. 579 (1922) states that the involuntary manslaughter statute, § 40A–2–3(B), supra:

> "excludes all cases of intentional killing, and include only unintentional killings by acts unlawful, but not felonious, or lawful, but done in an unlawful manner, or without due caution and circumspection. In other words, the killing must be unintentional to constitute involuntary manslaughter, and, if it is intentional and not justifiable, it belongs in some one of the classes of unlawful homicide of a higher degree than involuntary manslaughter."

See 1 Wharton's Criminal Law and Procedure (Anderson), § 289 (1957); compare U.J.I.Crim. 2.30 and 2.31. The evidence is that the killing was intentional. Defendant, who was the initial aggressor, and the victim were struggling for the gun. Defendant retrieved the gun, placed it at the back of the victim's head and pulled the trigger.

There is another reason why there was no error in refusing to instruct on involuntary manslaughter. First and second degree

murder and voluntary manslaughter were submitted to the jury. Following U.J.I. Crim. 2.40, the jury was told to first determine whether defendant was guilty of first degree murder. Only after disagreement on first degree murder was second degree murder to be considered. Only after disagreement on second degree murder was voluntary manslaughter to be considered. Defendant was convicted of second degree murder; the jury never reached the question of voluntary manslaughter. In light of the instructions on the procedure to be followed, failure to instruct on involuntary manslaughter was not error. *State v. Scott, supra.*

Evidence

[redacted] Defendant contends that, "at best," the State's case is one of manslaughter and not second degree murder. Defendant asserts the State failed to prove the absence of provocation and failed to prove that defendant did not act in self-defense. We disagree. The evidence on provocation sufficient to reduce the killing from murder to voluntary manslaughter and the evidence of self-defense was conflicting. With this conflict, the questions were factual ones to be resolved by the jury. The trial court properly submitted the issues of second degree murder, voluntary manslaughter and self-defense to the jury.

During direct examination of the victim's mother, the State brought out that a child of the victim told the victim's mother (the child's grandmother) that defendant had killed " 'my momma' ". Defendant did not object to this testimony. Subsequently, the State attempted to elicit testimony that the child told the grandmother that defendant had hit the child. Defendant objected that the question was leading. The objection was sustained and the jury was admonished to disregard the grandmother's answer.

Thereafter, out of the presence of the jury, the State tendered evidence to show that the child's comment was admissible as an excited utterance. The trial court ruled that the showing was insufficient and that the grandmother could not testify about statements made by the child. Compare *State v. Lunn*, 82 N.M. 526, 484 P.2d 368 (Ct.App.1971). After this ruling by the trial court, defendant claimed that the State had failed in its duty of continuing disclosure and moved for a mistrial. The motion for mistrial was denied.

When proceedings resumed in the presence of the jury, the State attempted to evade the trial court's ruling by an artfully worded question; however, the defense objection was sustained. Defendant again moved for a mistrial, arguing that even though the question was not answered, the State had left the inference that defendant beat the child. "I don't think he can get a fair trial from this point on."

We are not concerned with the continuing duty of disclosure. The trial court refused to admit the evidence. Certainly the defendant was not prejudiced by the exclusion of the testimony. R.Crim.P. 30; *State v. Wilkins*, 88 N.M. 116, 537 P.2d 1012 (Ct. App.1975); see *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct.App.1975).

Defendant claims that the prosecutor asked the questions in a bad faith effort to introduce evidence that the prosecutor knew was inadmissible. Defendant's argument is based on *State v. Rowell*, 77 N.M. 124, 419 P.2d 966 (1966). *Rowell* held the prosecutor's question to the mother about a prior conviction of the daughter was asked in bad faith, had "no possible place in the trial" and was prejudicial even though the question was not answered. That is not the situation here. Whether the child had injuries was relevant, and the trial court so ruled. The trial court excluded testimony that defendant had caused the injuries because the testimony, as tendered, was not admissible.

We cannot say that the questions asked of the grandmother were asked in bad faith as a matter of law. See *State v. Garcia*, 80 N.M. 247, 453 P.2d 767 (Ct.App.1969). In our view, the prompt sustaining of the objection and the admonition to disregard the answer cured any prejudicial effect from testimony inadmissible because hearsay.

State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968). Further, the prosecutor's attempt to evade the trial court's exclusionary ruling did not deprive defendant of a fair trial because objection to the question was promptly sustained and the question was never answered. *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct.App.1969).

A motion for mistrial is addressed to the trial court's discretion and is reviewable for an abuse of discretion. State v. Padilla, 86 N.M. 282, 523 P.2d 17 (Ct.App. 1974). In the circumstances of this case, we cannot say there was an abuse of discretion in denying defendant's motions.

Closing Argument

R.Crim.P. 40 provides that the State opens the closing argument, the defense then argues and the "state may make rebuttal argument only." Defendant claims the State asserted its theory of the case for the first time during its rebuttal argument and that defendant was prejudiced because unable to respond to the new theory. The claim is frivolous. The rebuttal argument, even when taken out of context as defendant does, is fairly within the evidence and consistent with the State's theory of first degree murder presented throughout the trial, including its opening argument.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

563 P.2d 1175

STATE of New Mexico, Plaintiff-Appellee,

v.

Dorsey Lee ROBERTSON, Defendant-Appellant.

No. 2729.

Court of Appeals of New Mexico.

April 26, 1977.

Certiorari Denied May 6, 1977.

William A. L'Esperance, Santa Fe, for defendant-appellant.

Andrea R. Buzzard, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of larceny over $2,500.00, defendant appeals. Section 40A–16–1, N.M.S.A.1953 (2d Repl. Vol. 6). The issues on appeal involve: (1) continuance; (2) sufficiency of the evidence; and (3) a refused instruction.

Continuance

Immediately before the trial began defendant orally moved that the trial setting be vacated so as to enable defendant to have a polygraph examination. No evidence was offered in support of the motion. The hearing on the motion consisted entirely of representations of counsel. The trial court denied the motion. Its reason for doing so was that the examiner chosen by defendant had stated that any examination results would not be meaningful because of pain suffered by defendant as a result of alleged injuries suffered in an automobile accident. The trial court also pointed out that defendant had had prior opportunities to obtain the examination. The reasoning of the trial court is supported by representations of counsel. On this showing, we cannot say the trial court abused its discretion in denying the requested continuance. *State v. Blea*, 88 N.M. 538, 543 P.2d 831 (Ct.App.1975).

The showing referred to in the preceding paragraph appears in a supplemental transcript which was filed without the permission of this Court. N.M.Crim.App. 209(g). The supplemental transcript is not entitled to consideration. Once the supplemental transcript is excluded, there is nothing to show either that a continuance was sought, or that timely efforts were made to obtain a polygraph examination, or that the trial court abused its discretion.

Sufficiency of the Evidence

Larceny, as defined in § 40A–16–1, supra, requires an unlawful taking and an intent to permanently deprive the owner of his property. *State v. Rhea*, 86 N.M. 291, 523 P.2d 26 (Ct.App.1974); *State v. Puga*, 85 N.M. 204, 510 P.2d 1075 (Ct.App.1973). Defendant claims there is no evidence of an unlawful taking and no evidence of the requisite intent. We disagree.

There is evidence that defendant, an employee of the corporate owner of the property, took the property from the business where it had been repaired, sold the property to a third person and retained the proceeds of the sale. There is evidence that defendant had no authority either to obtain possession of the property or to sell it. This is evidence of an unlawful taking with the requisite intent. The fact that there was conflicting evidence does not aid the defendant. We review the evidence in the light most favorable to support the verdict.

State v. Santillanes, 86 N.M. 627, 526 P.2d 424 (Ct.App.1974).

Refused Instruction

Defendant requested an instruction which read:

> "If you find that the defendant Dorsey Lee Robertson was an employee of Permian Servicing Company, Inc., and as such had the right to have the possession of the equipment in question, then even though you find that the defendant Dorsey Lee Robertson sold said equipment without authority you are to find him not guilty as charged in this Information."

Defendant claims the trial court erred in refusing this requested instruction. He asserts that the instructions given by the trial court failed to instruct on defendant's right to possess the equipment; that this "right to possess" involves both the element of possession and the element of intent; that both of these elements are covered in the refused instruction which represented defendant's theory of the case. We need not discuss the validity of these contentions. It is not error to refuse a requested instruction which is an incorrect statement of the law. *State v. Dutchover*, 85 N.M. 72, 509 P.2d 264 (Ct.App.1973). The requested instruction is an incorrect statement of the law.

The requested instruction is to the effect that a right to possess property which was wrongfully sold prevents the wrongful conduct from amounting to larceny. In arguing that view is correct, defendant does not distinguish between possession and the right of possession. It is not necessary in this case to consider the failure to make such a distinction. We assume, but do not decide, that a right of possession equates with possession. The requested instruction is erroneous under the facts of this case because it fails to consider the nature of any possessory rights.

The property involved is oil field equipment; it is undisputed that the equipment was owned by defendant's employer; that it had been left with a business to be repaired; that after the repairs were effected, the equipment remained on the premises of the repair business subject to directions of the employer. Although the repair business had actual custody of the equipment, the employer had constructive possession of the equipment. *State v. Rhea*, supra.

Defendant's job was that of a mechanic and welder. There is evidence that he had authority to obtain parts and service from the repair business. There is also evidence (disputed, of course) that defendant had authority to remove the equipment involved in this case from its location at the repair business. According to defendant, he had been authorized to sell the equipment by one of the four stockholders in the employer corporation. This evidence, if believed, shows nothing more than that defendant had authority to take the equipment in carrying out his employment.

If defendant physically removed the equipment from the repair business in carrying out his employment, what was the nature of his "possession"? 2 Wharton's Criminal Law and Procedure (Anderson) § 468 (1957) states:

> "Since the physical control exercised by an employee over property entrusted to him by his employer is merely custody and not possession, an employee takes the property from his employer's possession, and thereby commits a trespass, when he converts it. He is accordingly guilty of larceny, without regard to whether he entertained such intent at the time he acquired custody, or not."

Under the evidence, defendant's physical control over the equipment was no more than custody of the equipment on behalf of the employer. Although defendant had custody, possession of the equipment remained in the employer. When defendant wrongfully sold the equipment, there was an unlawful taking of the equipment from the employer's possession. *United States v. Pruitt*, 446 F.2d 513 (6th Cir. 1971); *Home Ins. Co. of New York v. Trammell*, 230 Ala. 278, 160 So. 897 (1935); *Edwards v. State*,

244 Ark. 1145, 429 S.W.2d 92 (1968); *Mullis v. Wainwright*, 234 So.2d 371 (Fla.App. 1970); *Connor v. State*, 6 Md.App. 261, 250 A.2d 915 (1969); *Mahfouz v. State*, 303 So.2d 461 (Miss.1974); *State v. Leicht*, 124 N.J.Super. 127, 305 A.2d 78 (1973); *State v. Tilley*, 239 N.C. 245, 79 S.E.2d 473 (1954); *State v. Harris*, 246 Or. 617, 427 P.2d 107 (1967).

The requested instruction was incorrect because it failed to recognize that defendant's physical control of the equipment was no more than custody on behalf of an employer who retained possession.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and SUTIN, JJ., concur.

90 N.M. 386

Violet M. KIGHT, Plaintiff-Appellant,

v.

Henry P. BUTSCHER and Janice Lee Butscher, a minor, Defendants-Appellees.

No. 2604.

Court of Appeals of New Mexico.

April 5, 1977.

Rehearing Denied April 18, 1977.

Certiorari Denied May 11, 1977.

Charles G. Berry, Marchiondo & Berry, P. A., Albuquerque, for plaintiff-appellant.

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

OPINION

HERNANDEZ, Judge.

This appeal arises out of a rear end collision which occurred in Albuquerque on Menaul Boulevard near the intersection with Louisiana Boulevard. The trial was before a jury and the defendants were granted judgment upon the verdict.

Immediately preceding the collision, the plaintiff had made a left-hand turn from Louisiana Boulevard east onto Menaul Boulevard, a major thoroughfare with three moving lanes in each direction separated by a median divider. The defendant, Janice Butscher, driving a vehicle owned by her father, Henry Butscher, was directly behind the plaintiff before commencing the turn and after completing it. The plaintiff was in the center lane after completing the turn. Ms. Butscher followed directly behind the plaintiff. The collision occurred approximately 40 feet east of the intersection. A garbage truck directly in front of plaintiff came to a stop, indicating with its turn signal an intention to turn right. The plaintiff stopped, but Ms. Butscher was unable to stop and her vehicle struck plaintiff's vehicle in the rear.

Plaintiff's first point of error is divided in three parts. Part 1–A, which is dispositive of this appeal, has two parts: the first is that the trial court erred in denying plaintiff's motion for a directed verdict on the issue of contributory negligence. The determination of this question must be made in light of the following rule:

> "Ordinarily, contributory negligence is a question of fact for the trier of facts and not one of law. [Citations omitted] The question of contributory negligence properly becomes one of law only when reasonable minds cannot differ on the question and readily reach the conclusion that plaintiff's conduct falls below the standard to which he should have conformed for his own protection and that plaintiff's negligent conduct proximately contributed with that of defendant in causing the injury." *Stewart v. Barnes,* 80 N.M. 102, 451 P.2d 1006 (Ct.App.1969).

The trial court, by giving the following part of its instruction No. 2 and part of instruction No. 17, limited the issue of contributory negligence to the manner in which plaintiff completed the turn from Louisiana Boulevard onto Menaul Boulevard:

> "No. 2. The defendants deny the plaintiff's claims and assert the following affirmative defense: That the plaintiff was contributorily negligent in that she made an improper turn by failing to enter the proper lane of traffic on Menaul."
>
> "No. 17. There was [sic] in force in the state at the time of the occurrence in question certain statutes which provided that: '3. At any intersection where traffic is restricted to one (1) direction or [sic] one (1) or more of the roadways, the driver of a vehicle intending to turn left at any such intersection shall approach the intersection in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle and after entering the intersection the left turn shall be made so as to leave the intersection, as nearly as practicable, in the left-hand lane lawfully available to traffic moving in such direction upon the roadway being entered. If you find from the evidence that any of the parties conducted themselves in violation of one or more of these statutes, you are instructed that such conduct constituted negligence as a matter of law."

This part of instruction No. 17 repeats § 64–18–21(D), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2).

We note at the outset that the accident did not occur in the intersection but approximately 40 feet east of it. An intersection is defined as that area occupied by two streets where they cross one another; that is, it is the space common to both streets. In seeking to determine what § 64–18–21(D), supra, was intended to accomplish, we must keep in mind that this section applies to signalized intersections as well as to intersections having no stop signs and to those having two or four. It also applies to streets having one or more lanes or roadways in each direction.

Supposing the intersection of two streets, X which runs east and west and Y which runs north and south, each street having two moving lanes in each direction and a four-way stop; the statute was intended to avoid a collision between a vehicle making a left hand turn to the north from the westerly portion of X onto Y and a vehicle simultaneously making a right turn to the north from the easterly portion of X onto Y; and also to avoid a collision between a vehicle making a left turn to the north from the easterly portion of X onto Y and a vehicle proceeding north in the right-hand lane of Y across the same intersection. Various other situations can be imagined, but it is obvious that the statute was not intended to avoid a collision between two vehicles such as in this situation, where both are making a left turn, one following the other. Furthermore, assuming that plaintiff had violated § 64–18–21(D), supra, by turning into the center lane rather than the left lane, this action did not contribute to the collision which subsequently occurred. The plaintiff had completed her turn and the accident occurred 40 feet beyond the intersection. This section was not applicable in this situation.

Janice Butscher testified that the plaintiff was traveling between 10 and 15 miles per hour in front of her and that she was traveling approximately 10 miles per hour. She further testified that she saw the garbage truck in front of plaintiff and that when she saw the brake lights of plaintiff's vehicle come on, plaintiff's vehicle was still moving. She described the manner in which plaintiff stopped as sudden. Section 64–18–17(A) provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." That is, the driver of a following vehicle must control his speed and distance from the vehicle ahead so as to avoid colliding with it if the lead vehicle should make a sudden stop. *Apato v. Be Mac Transport Company,* 7 Ill.App.3d 1099, 288 N.E.2d 683 (1972); *Copeland v. Greyhound Corporation,* 337 F.2d 822 (5th Cir. 1964).

Applying this rule to the instant situation, the plaintiff's principal duty was to keep a lookout ahead and this she fulfilled. She did not collide with the garbage truck in front of her even though it made an unexpected stop, (unexpected in that a vehicle intending to make a right turn should make it from the right lane). There was no evidence that plaintiff was guilty of negligence proximately contributing to the accident and the trial court erred in not granting her motion for a directed verdict on this issue of contributory negligence.

The second part of plaintiff's point I–A was that the trial court erred by giving instructions 2, 8, 12, 15, and 17, which pertained to plaintiff's duty of care. The pertinent parts of these instructions are as follows:

"No. 2. The defendants deny the plaintiff's claims and assert the following affirmative defense: That the plaintiff was contributorily negligent in that she made an improper turn by failing to enter the proper lane of traffic on Menaul.

"No. 8. It was the duty of the plaintiff, before and at the time of the occurrence to use ordinary care for her own safety.

"No. 12. When I use the expression 'contributory negligence,' I mean negligence on the part of the plaintiff that proximately contributed to cause the alleged damages of which plaintiff complains.

"No. 15. In determining the issues of negligence and contributory negligence, you are not to consider whether the plaintiff was more or less negligent than the defendant. New Mexico law does not permit you to compare negligence.

"The plaintiff cannot recover if he was negligent and that negligence was a proximate cause of the accident and alleged injuries, even though you believe that the defendant may have been more negligent."

The pertinent part of instruction No. 17 is set out above.

It is our opinion that these instructions were erroneous. As we just stated, there was no evidence adduced showing any negligence on the part of the plaintiff; consequently the issue of contributory negligence should not have been submitted to the jury. See *State v. Atchison, Topeka and Santa Fe Railway Co.,* 76 N.M. 587, 417 P.2d 68 (1966).

We believe it necessary for the guidance of the trial court on the re-trial of this case to comment upon some of plaintiff's other points of error.

Plaintiff's point I–C is without merit because the matter was adequately covered by the trial court's instruction No. 17, paragraphs one and two. *Flanary v. Transport Trucking Stop,* 78 N.M. 797, 438 P.2d 637 (Ct.App.1968). Point II–A is likewise without merit because there was no evidence of a pre-existing condition that was aggravated by the collision of June 1, 1970. Plaintiff's point II–B is well taken: this instruction was repetitious of instruction No. 20 and unduly emphasized the burden of proving damages. *Terry v. Biswell,* 66 N.M. 201, 345 P.2d 217 (1959). As to that part of plaintiff's point III concerning the trial court's refusal to admit plaintiff's exhibit 25 (a tabulation of the time that she lost from work and the hourly rate of pay she would have received), there was no abuse of discretion. However, the trial court did err in refusing to instruct the jury as to the loss of past earnings and the present cash value of earnings reasonably certain to be lost in the future. See N.M.U.J.I.Civ. 14.7.

The judgment of the trial court is reversed and the cause remanded for a new trial.

LOPEZ, J., concurs.

SUTIN, Judge (dissenting).

I dissent.

This is a common, little, rear end vehicle bump case where both parties were making a left-hand turn, driving at 10 m. p. h. Almost three years later, plaintiff sued defendant for $137,500.00. The jury believed that both parties were negligent and rendered a verdict for the defendant. Plaintiff appeals. This appeal should be affirmed. Jury verdicts and judgments below should not be reversed unless we discover prejudicial error that constitutes a miscarriage of justice.

A. *Plaintiff was not entitled to a directed verdict on the issue of contributory negligence.*

At the close of the evidence, plaintiff moved for a directed verdict as to the issue of contributory negligence. The motion was properly denied. Authority is unnecessary to establish that the moving party must rely on the evidence most favorable to the defendant, not the plaintiff. To support a directed verdict, it is common practice for appellants to recite the evidence most favorable to themselves. We have no method of preventing this skittish approach to the problem.

Immediately before the collision, plaintiff made a left-hand turn from Louisiana Boulevard, slowly proceeding east to the *middle* lane of Menaul Boulevard. She claims that "due to traffic blocking the innermost, or *left hand* lane, of Menaul Boulevard, [she] was forced to proceed into the *middle* lane of Menaul Boulevard proceeding east." [Emphasis added.] The evidence discloses that the traffic was not stopped in the left-hand lane on Menaul, which was the proper lane for her to complete her turning movement. Traffic was stopped in the middle lane due to the presence of a garbage truck which had come to a stop in that lane. In the left-hand lane, a car was moving slowly and had its blinkers on to turn left. So plaintiff changed her mind and decided to enter the middle lane, then suddenly stopped and was bumped in the rear. At one point in her cross-examination, she was impeached by previous deposition testimony wherein she swore she had "no idea" why she pulled behind the garbage truck in the middle lane. She also testified that she "just went into the middle lane." Plaintiff was not forced "into the middle lane." Whether plaintiff's conduct violated § 64–18–21(D), N.M.S.A.1953 (2d Repl.Vol. 9, pt.

2), entitled "Required position and method of turning at intersections", and whether her sudden stop was a careless act, were questions of fact for the jury to determine.

Plaintiff was not entitled to a directed verdict.

B. *Instructions on contributory negligence were not erroneous.*

Plaintiff claims error in giving Instructions No. 2 (stated as an affirmative defense); No. 8, which is U.J.I. 12.3; No. 12, which is U.J.I. 13.1; No. 15, which is U.J.I. 13.12; and No. 17, which is U.J.I. 11.1; that these instructions on contributory negligence were erroneous. I disagree.

Instructions No. 2, 8, 12 and 15 are correct. It is only necessary to discuss Instruction No. 17, which is U.J.I. 11.1.

(1) *U.J.I. 11.1 was not erroneous.*

Instruction No. 17, U.J.I. 11.1, is an instruction on violation of a statute. The problem that arises here is, should U.J.I. 11.2, which provides for excusable or justifiable violation thereof, be substituted for U.J.I. 11.1?

After stating the statutes involved, the instruction concluded as follows:

> If you find from the evidence that any of the parties conducted themselves in violation of one or more of these statutes, you are instrsucted [sic] that such conduct constituted negligence as a matter of law.

The language omitted from U.J.I. 11.2 reads:

> . . . unless you further find that such violation was excusable or justifiable.
>
> To legally justify or excuse a violation the violator must sustain the burden of showing that he did that which might reasonably be expected of a person of ordinary prudence acting under similar circumstances who desired to comply with the law.

Plaintiff objected to Instruction No. 17, U.J.I. 11.1, and tendered an instruction pursuant to U.J.I. 11.2.

The only issue to determine is whether the omission of the provision "that such violation was excusable or justifiable" is prejudicial error. I believe not.

"Prejudicial error" has not been defined in New Mexico. It means "error which substantially affects the rights and obligations of appellant as to result in a miscarriage of justice, *Kyne v. Eustice,* 215 Cal. App.2d 627, 30 Cal.Rptr. 391 (1963), and the burden is on appellant to establish such prejudice." *Gutierrez v. Gutierrez,* 20 Ariz. App. 388, 513 P.2d 677, 678 (1973). See *Specter v. Specter,* 85 N.M. 112, 509 P.2d 879 (1973). This rule applies to instructions given the jury. *Jewell v. Seidenberg,* 82 N.M. 120, 477 P.2d 296 (1970).

Plaintiff did not meet the burden of showing prejudicial error.

First, U.J.I. 11.2, Directions for Use, states:

> This instruction should not be given unless the court holds as a matter of law that there is sufficient evidence of excuse or justification for the issue to go to the jury. Absent such evidence the "per se" rule applies and is covered by instruction UJI 11.1.

The court did not hold as a matter of law that there was sufficient evidence to submit the "excusable or justifiable" clause to the jury. Plaintiff was not entitled to U.J.I. 11.2.

Second, in the instant case, three statutory violations were stated in the instruction: (1) § 64-18-17 (following too closely); (2) § 64-18-21(D) (method of turning at intersection); and (3) § 64-22-3.1 (careless driving), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2). Plaintiff's objection was limited to § 64-18-21(D). No claim was made that the evidence supported the "excusable or justifiable" clause which made it applicable to the other two statutes, and plaintiff's requested instruction did not limit the clause to § 64-18-21(D).

Third, "What is sauce for the goose is sauce for the gander." The same principle applies in both cases; what is fitting for the defendant should be fitting for the plain-

tiff. Defendant was slowly following plaintiff in making the left-hand turn at the intersection. Both were charged with statutory violations submitted to the jury. Plaintiff contends that if the jury believed plaintiff may have committed a "technical" violation of the statute, there was ample justification for her driving in the wrong lane. Defendant would also have the benefit which plaintiff claims. Plaintiff was no more harmed, if at all, than the defendant. It did not constitute prejudicial error.

The foregoing instructions were properly given by the court.

C. *Denial of plaintiff's requested instruction on violation of speed regulations was not prejudicial error.*

Plaintiff tendered an instruction on violation of four statutes by defendant, one of which was § 64–18–1.1(C), pertaining to speed regulations. At the time of the accident, § 64–18–1.1(A) set speed limits from 15 m. p. h. in school zones to 70 m. p. h. on all highways. Plaintiff and defendant were travelling at the rate of 10 m. p. h. Neither party was exceeding the speed limit. This does not close the inquiry.

Subsection (C) provides:

> In every event, speed shall be so controlled as may be necessary:
>
> (1) To avoid colliding with any . . . vehicle . . . on . . . the highway; and
>
> (2) To comply with . . . the duty of all persons to use due care.

This subsection means that vehicles may only be operated at such speed as shall be consistent at all times with safety and the proper use of the roads to avoid a collision. *Langenegger v. McNally,* 50 N.M. 96, 171 P.2d 316 (1946). If the trial court had considered speed as an essential ingredient of negligence, it would have included subsection (C) in Instruction No. 17, supra.

In *Lopez v. Maes,* 81 N.M. 693, 472 P.2d 658 (Ct.App.1970), the same requested instruction was denied. Plaintiff in the instant case and in *Lopez* relied on *Langenegger,* supra. *Lopez* held that the language in *Langenegger* did not compel the giving of the instruction. The Court said:

> There is no evidence that either defendant was violating the maximum speed limit of 45 miles per hour, and there is no evidence that either was driving at a speed inconsistent with the exercise of due care and the proper use of the highway. Excessive speed under the prevailing conditions is not inferable from the mere fact that the accident happened. [81 N.M. at 700, 472 P.2d at 665]

This language is applicable to the instant case. To have given U.J.I. 11.2 would have been reversible error. *Embrey v. Galentin,* 76 N.M. 719, 418 P.2d 62 (1966).

Plaintiff's requested instruction was properly denied.

Other claimed errors relating to damages are irrelevant.

564 P.2d 194

Leo L. PERALTA, Plaintiff-Appellee,

v.

Phillip U. MARTINEZ, Coursen B. Conklin, and Irvine G. Jordan, Defendants-Appellants.

No. 2786.

Court of Appeals of New Mexico.

April 12, 1977.

Certiorari Denied May 4, 1977.

Ranne B. Miller, Robert H. Clark, Keleher & McLeod, Albuquerque, for defendants-appellant.

John W. Pope, Cowper, Bailey & Pope, Belen, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

This is a medical malpractice case. The appeal, which involves only plaintiff and Dr. Martinez, is concerned with the statute of limitation. The dispositive issue is when plaintiff's cause of action against Dr. Martinez accrued.

On February 15, 1971 Dr. Martinez operated on plaintiff. Allegedly, Dr. Martinez left a cottonoid in plaintiff's body at the time of this surgery. The cottonoid was discovered in surgery performed April 17, 1973. Plaintiff sued Dr. Martinez for malpractice; the complaint was filed January 8, 1976. Claiming the statute of limitation had run, Dr. Martinez moved for summary judgment. The motion was denied; we granted Dr. Martinez' motion for an interlocutory appeal.

The limitation period for bringing an action for "injury to the person" is three years. Section 23–1–8, N.M.S.A.1953. The three-year period begins to run from the time the cause of action accrues. Section 23–1–1, N.M.S.A.1953. *Roybal v. White*, 72 N.M. 285, 383 P.2d 250 (1963) states that an action for personal injuries for malpractice accrues at the time of the wrongful act causing the injury. *Roybal* was followed by this Court in *Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68 (Ct.App.1972).

If *Roybal* is correct, the three-year limitation period would have expired on February 15, 1974. Dr. Martinez relies on *Roybal*. Plaintiff seeks to avoid the applicability of *Roybal*, arguing: (1) the limitation period did not begin to run until the cottonoid was removed; (2) the limitation period was tolled by alleged fraudulent concealment on Dr. Martinez' part, see *Hardin v. Farris*, 87 N.M. 143, 530 P.2d 407 (Ct.App.1974); and (3) although rejected in *Roybal*, supra, the limitation period should not begin to run until the malpractice is "discovered". We do not reach these contentions; in our opinion, the *Roybal* holding is not a correct statement of when the limitation period begins to run. Our opinion is based on the following six reasons.

1. The statute does not state that the limitation period runs from the time of the wrongful act. Compare § 58–33–13, N.M.S.A.1953 (Interim Supp.1976) which provides that the limitation period runs from the

date of the act of malpractice. Section 58–33–13, supra, is not applicable to this case. Laws 1976, ch. 2, § 32. The applicable statute is § 23–1–8, supra, which provides that the limitation period runs from the "injury".

2. The reason that the limitation period runs from the injury rather than from the wrongful act, is that there is no cause of action for malpractice until there has been a resulting injury. *Spurlin v. Paul Brown Agency, Inc.*, 80 N.M. 306, 454 P.2d 963 (1969). A wrong without damage or damage without wrong does not amount to a cause of action. *Jensen v. Allen*, 63 N.M. 407, 320 P.2d 1016 (1958); see *Chisholm v. Scott*, 86 N.M. 707, 526 P.2d 1300 (Ct.App. 1974).

3. In personal injury actions not involving malpractice, the limitation period stated in § 23–1–8, supra, has been held to run from "the time of the injury not the time of the negligent act." *New Mexico Electric Service Co. v. Montanez*, 89 N.M. 278, 551 P.2d 634 (1976); see also *Chavez v. Kitsch*, 70 N.M. 439, 374 P.2d 497 (1962).

4. The distinction between the time of the injury and the time of the wrongful act has been applied in damage actions not involving personal injury. *Spurlin v. Paul Brown Agency, Inc.*, supra; *Chisholm v. Scott*, supra.

5. In holding that an action for personal injury from malpractice runs from the time of the wrongful act, *Roybal* cites only *Kilkenny v. Kenney*, 68 N.M. 266, 361 P.2d 149 (1961) as authority. *Roybal* states:

> "New Mexico, following the majority, has held that a cause of action for personal injuries for malpractice accrues at the time of the wrongful act causing the injury. *Kilkenny v. Kenney*, supra."

Kilkenny v. Kenney, supra, does not support the holding in *Roybal*; *Kilkenny* applied the "time of injury" rule. One of the claims in *Kilkenny* was by the husband for personal injury to his wife for malpractice. The claim was for damages for the period between the time of the injury to his wife and the subsequent death of his wife. *Kilkenny* states:

> ". . . for such an action as brought by the appellant here, as husband, the same should have been filed within three years from the date of the injury."

6. The holding in *Kilkenny* cannot be disregarded as an unfortunate choice of words. A subsequent decision shows that the *Kilkenny* holding was deliberate and intended. *Chavez v. Kitsch* states:

> "We recently held in the case of *Kilkenny v. Kenney*, 68 N.M. 266, 361 P.2d 149, that in an action brought by a husband as administrator and for himself and as next friend of his children, for damages arising out of injury and death of his wife, that § 23–1–8, supra, applied, and that the action should have been filed within three years from the date of the injury."

The holding in *Roybal* is inconsistent with the statute and with other New Mexico decisions. However, *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973) reminded this Court that we are to follow precedents of the Supreme Court. Are we bound to apply *Roybal*? We think not for two reasons: (1) Supreme Court decisions conflict as to when the limitation period begins to run in malpractice actions—*Roybal* conflicts with *Kilkenny*, yet *Roybal* relies on *Kilkenny* as authority; and (2) *Roybal* is a departure from the consistent approach in non-malpractice decisions which hold the limitation period runs from the date of the injury.

We hold that the limitation period began to run against plaintiff from the time of his injury and not from the time of the malpractice. Is this a distinction with a difference? Yes.

In *Layton v. Allen*, 246 A.2d 794 (Del. 1968) a hemostat was left in plaintiff's body during surgery in 1958; plaintiff first experienced pain in 1965. *Wilkinson v. Harrington*, 104 R.I. 224, 243 A.2d 745 (1968) states:

> "In this age of enlightened medicine and highly sophisticated curative treatment it is very likely that the maturation of injury resulting from negligent treatment would not evidence itself for well after

the . . . [time] provided for in the statute of limitations."

Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959) states:

"The plaintiff . . . could hardly have launched his lawsuit on the day Dr. Morgan performed the operation because, at that time, no injury was yet inflicted. The injury became a reality when the sponge began to break down healthful tissue within the body of the plaintiff."

Whether the injury occurs at the time of the malpractice or subsequently, the limitation period begins to run from the time of the injury.

How is the time of the injury to be determined? *Ayers v. Morgan*, supra, states:

"The injury is done when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable."

Layton v. Allen states:

". . . when an inherently unknowable injury, such as is here involved, has been suffered . . . and the harmful effect thereof develops gradually over a period of time, the injury is 'sustained' . . . when the harmful effect first manifests itself and becomes physically ascertainable."

This is not the "discovery" rule. In *Layton*, supra, the limitation period did not run from "discovery" of the hemostat in 1966, the limitation period was held to run from 1965 "when the plaintiff first experienced pain caused by the unknown foreign object."

■ We hold the limitation period begins to run from the time the injury manifests itself in a physically objective manner *and* is ascertainable.

■ The complaint alleges that the injuries suffered by plaintiff because of the cottonoid were inherently unknowable to plaintiff. Affidavits submitted in support of Dr. Martinez' summary judgment motion are to the effect that: (1) plaintiff's continuing complaints of pain following the 1971 surgery were consistent with a herniated disc at the L5–S1 level (not the level operated on in 1971), and (2) "the only way the presence of the cottonoid could be discovered would be during surgery as, in fact, it was on April 17, 1973." This was not a showing that the injury manifested itself and was ascertainable prior to April 8, 1973 (three years prior to filing the complaint). Rather, Dr. Martinez' showing was that the limitation period did not begin to run until April 17, 1973. The complaint was filed within the limitation period.

Oral argument is unnecessary. The order denying summary judgment on the basis that the limitation period had not run is affirmed.

IT IS SO ORDERED.

HENDLEY, J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (specially concurring).

Peralta sued defendant doctors for medical malpractice arising out of discovery of a cottonoid left at the site of prior surgery.

Peralta's amended complaint alleged claims for relief in three counts:

(1) Defendants negligently failed to complete the operation of February 15, 1971, by leaving a cottonoid at the site of surgery which remained in Peralta's body until April 17, 1973, when Peralta first became aware of it. Peralta's failure to learn of defendants' negligence and consequential injuries until April 17, 1973, resulted from his confidence in defendants and his belief that the operation had been completed with no foreign object left in his body.

(2) Defendants' failure to discover the cottonoid constituted continuing negligence by defendants, the last act or omission of which occurred on April 17, 1973.

(3) Breach of contract based on fraudulent concealment.

Dr. Martinez, by way of answer, set up the affirmative defense of the statute of limitations that plaintiff's claim based on allegations of negligence or other wrongful conduct occurring prior to January 8, 1973, was barred by the applicable statute of limitations.

The trial court properly ruled that the contractual obligation of defendants merged in the tort action on the issue of limitations because ". . . the statute of limitations for injuries to the person applies, even though the cause of action stated is ex contractu in its nature." *Chavez v. Kitsch*, 70 N.M. 439, 444, 374 P.2d 497, 500 (1962). We so held in medical malpractice actions. *Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68 (Ct.App.1972).

Dr. Martinez' motion for summary judgment was *denied* upon one ground: Peralta's claim for relief was *not* barred by the applicable three-year limitation statute. Section 23–1–8, N.M.S.A.1953 (Vol. 5). Pursuant to § 21–10–3, N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.), we granted Dr. Martinez' motion to appeal the interlocutory order.

Doctors Conklin and Jordan remain as parties defendant in the action but are not parties on this appeal.

On *February 15, 1971*, Drs. Martinez and Jordan performed a spinal fusion on Peralta's back. A cottonoid was left at the surgical site. Ordinarily, plaintiff's claim for relief would have expired on *February 15, 1974*. The complaint was filed *January 8, 1976*.

Our duty is to determine whether plaintiff's claim accrued as a matter of law prior to *January 8, 1973*.

A. *Findings of Fact*

The trial court found:

1) That Plaintiff's claim as against this Defendant is not barred by the applicable statute of limitations, NMSA § 23–1–8 (1953), as a matter of law because:

a) There is a factual issue of whether *from the time of discovery, on April 17, 1973, of a foreign body at the site of prior surgery the said defendant fraudulently concealed from the Plaintiff the fact the said cottonoid was a cause of disability experienced by the Plaintiff* from February, 1971, through the time of subsequent surgery on April 17, 1973.

b) The applicable statute of limitations, NMSA § 23–1–8 (1953), does not begin to run in medical malpractice actions, wherein it is alleged that a foreign body was allowed to remain in a surgical site, *until the surgical procedure is completed by removal of the foreign body.* Therefore, the said statute of limitations did not begin to run in the present case until April 17, 1973. [Emphasis added.]

A cottonoid is a small sponge approximately 6/10″ × 1/10″ in size.

On appeal, Dr. Martinez challenged both findings.

The burden is on Dr. Martinez to prove that the cause of action accrued more than the statutory time before the commencement of the action. *Insurance Company of North America v. Knight*, 8 Ill.App.3d 871, 291 N.E.2d 40 (1972); *Van de Wiele v. Koch*, 256 Or. 349, 472 P.2d 803 (1970); *Holland Furnace Company v. Willis*, 120 Ga.App. 733, 172 S.E.2d 149 (1969); 54 C.J.S. Limitations of Actions § 386 (1948).

On motion for summary judgment, Dr. Martinez must establish, as a matter of law, that the cause of action accrued *prior* to January 8, 1973. To support the trial court's order, we may closely scrutinize the papers supporting the movant. *United States v. Western Electric Co.*, 337 F.2d 568 (9th Cir. 1964). This was a trial by affidavits.

B. *Facts Presented by Dr. Martinez*

Dr. Martinez, a neurosurgeon, first saw Peralta in January, 1971, at which time Peralta complained of low back difficulties and gave a history of a job related injury in September, 1969, with subsequent treatment, including a lumbosacral fusion in February, 1970, and a fusion at the L–4 level in August, 1970. In January, 1971, Peralta's complaints were consistent with a possible herniated disc at the L–4,5 level.

On February 15, 1971, Dr. Jordan, an orthopedic surgeon, and Dr. Martinez performed a lumbar laminotomy with removal of the L–4,5 disc and repair of the fusion. No significant complications were noted and Peralta was discharged from the hospital on February 24, 1971.

On March 23, May 4 and November 10, 1971, Peralta was re-examined. He continued to experience low back problems and on November 16, 1971, a myelogram study was performed at the hospital. The films indicated a defect at the L5–S1 level consistent with a herniated disc at that level. This finding was consistent with Peralta's complaints at that time. It was the opinion of Dr. Martinez and his associate that surgical procedure should be performed with the expectation that Peralta's discomfort would be relieved. Mr. Peralta declined.

On September 25, 1972, Peralta was examined again. Additional surgery had been and was indicated, but Peralta was reluctant to accept another operation.

In April, 1973, Dr. Conklin, an orthopedic surgeon, had Peralta admitted into the hospital and Peralta was seen by Dr. Martinez. On April 17, 1973, Dr. Conklin and Dr. Martinez performed an exploratory operation and removed the cottonoid from the area where the last surgery was performed in February, 1971.

C. *Dr. Martinez' facts do not establish basis for bar of claim*

Section 23–1–1, N.M.S.A.1953 (Vol. 5) reads:

> The following suits or actions may be brought within the time hereinafter limited, respectively, *after their causes accrue*, and not afterwards, *except when otherwise specially provided.* [Emphasis added.]

Section 23–1–8 provides in pertinent part:

> . . . *for an injury to the person* . . . ., within three [3] years. [Emphasis added.]

Effective February 27, 1976, the Medical Malpractice Act was adopted. This is the first exception to the accrual statute. Section 58–33–13, N.M.S.A. (1976 Interim Supp.) reads in pertinent part:

> No claim for malpractice arising out of *an act of malpractice* . . . may be brought . . . unless filed within three [3] years after the date that *the act of malpractice occurred* . . . . [Emphasis added.]

This statute was not in effect at the time Peralta's claim was filed. It does not have retroactive force. However, it is significant to note the difference between "an injury to the person" and "an act of malpractice."

In the instant case, "an act of malpractice" occurred on February 15, 1971, when a cottonoid was left at the surgical site. But, when did Peralta suffer "an injury to the person"? No injury was inflicted on February 15, 1971, because the mere presence of a small sponge in the spinal column did not cause "an injury to the person," nor pain and suffering, nor disability.

Dr. Martinez established that during the year 1971, Peralta experienced low back problems and underwent surgery; that low back problems continued which could have been caused by the defect at the L5–S1 level that was consistent with a herniated disc at that level. No evidence was presented that Peralta's low back problems were caused by the cottonoid. We cannot assume, for purposes of summary judgment, that, prior to January 8, 1973, Peralta suffered an injury to the person caused by the cottonoid; that the cottonoid caused a personal injury by breaking down healthful tissue within Peralta's body, or caused Peralta's first experience of pain. A genuine issue of material fact exists on whether Peralta suffered an injury to the person prior to January 8, 1973.

There are four accrual dates from which the statute of limitations commences to run: three years from (1) an injury to the person, (2) the last treatment, (3) the act of malpractice, and (4) in fraudulent concealment, three years from the time that the right of action is discovered by Peralta, or, by the exercise of ordinary diligence, could have been discovered.

(1) *The statute commences to run from the date of the patient's injury.*

In tort claims, there is no cause of action for negligence until there has been a result-

ing injury, and the statute of limitations does not begin to run until the injury occurs. *Spurlin v. Paul Brown Agency, Inc.*, 80 N.M. 306, 454 P.2d 963 (1969); *Chisholm v. Scott*, 86 N.M. 707, 526 P.2d 1300 (Ct. App.1974). This rule also applies in medical malpractice. *Kilkenny v. Kenney*, 68 N.M. 266, 361 P.2d 149 (1961); *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959); *Layton v. Allen*, 246 A.2d 794 (Del.1968), quoted in *Gaston v. Hartzell*, 89 N.M. 217, 549 P.2d 632 (Ct.App.1976); *Peterson v. Roloff*, 57 Wis.2d 1, 203 N.W.2d 699 (1973), dissenting opinion; *Ragan v. Steen*, 229 Pa.Super. 515, 331 A.2d 724 (1974); *Wilkinson v. Harrington*, 104 R.I. 224, 243 A.2d 745 (1968).

Kilkenny v. Kenney, supra, was an action for wrongful death by way of medical malpractice. On *December 12, 1955*, due to the negligence of Dr. Kenney, Kilkenny suffered a diabetic coma, or insulin shock, resulting in total incompetence and from which she died December 2, 1958. The complaint was filed *November 12, 1959, more than three years after the date of the injury.* The Court said:

> In view of this language, we hold that § 23–1–8, supra, is the applicable statute, and that for such an action as brought . . . , *the same should have been filed within three years of the date of the injury.* [68 N.M. at 270, 361 P.2d at 151] [Emphasis added.]

The negligent act and the injury occurred simultaneously. Yet the Court chose "the date of the injury" as the accrual date.

In every tort action, there are at least three essential elements, (1) the negligent act or breach of duty, (2) the causation, and (3) an injury. Until the injury occurs, no harm is done and there is nothing to be compensated. In a tort claim, "injury" means some harm recoverable in money damages. "'Wrong without damage, or damage without wrong does not constitute a cause of action.'" *Jensen v. Allen*, 63 N.M. 407, 409, 320 P.2d 1016, 1017 (1958). When such harm occurs, a cause of action accrues. In *Kilkenny*, as in many malpractice cases, although the injury and the negligent act occurred simultaneously, the cause of action accrued on the date of the injury and not the negligent act.

Since injury is necessary to establish a cause of action, the question becomes, what is an injury and when does an injury occur in a medical malpractice case? The answer is that the injury does not occur until it manifests itself in some recognizable harm to the victim.

Ayers was also a "sponge" case. The Court said:

> The plaintiff in the case at bar could hardly have launched his lawsuit on the day Dr. Morgan performed the operation because, at that time, no injury was yet inflicted. *The injury became a reality when the sponge began to break down healthful tissue within the body of the plaintiff.* [154 A.2d at 790] [Emphasis added.]

In *Layton*, a metallic hemostat was left in the patient's body. The Court said:

> Upon the bases of reason and justice, we hold that when an inherently unknowable injury, such as is here involved, has been suffered by one blamelessly ignorant of the act or omission and injury complained of, and the harmful effect thereof develops gradually over a period of time, *the injury is "sustained" under § 8118 when the harmful effect first manifests itself and becomes physically ascertainable.* Translated in the terms of this case, *we hold that the limitations period commenced to run when the plaintiff first experienced pain caused by the unknown foreign object.* Since that event occurred in 1965 and this action was filed in 1966, the action is timely. [246 A.2d at 798] [Emphasis added.]

In *Wilkinson*, the Court said:

> To construe the statute narrowly so as to preclude a person from obtaining a remedy simply because the wrong of which he was the victim did not manifest itself for at least two years from the time of the negligent conduct, is clearly inconsistent with the concept of fundamental justice. To require a man to seek a remedy before he knows of his rights, is palpably unjust. [243 A.2d at 753]

The limitation statute must be read in the light of reason and common sense, and in a manner that the legislature intended. Section 23–1–8 was enacted in 1880, almost 100 years ago. It related the time of accrual to "an injury to the person." This time of accrual was applicable to every tort claim involving "an injury to the person." It never excluded medical malpractice until 1976 when the claim was barred three years after the act of malpractice occurred. To construe § 23–1–8 otherwise produces a result that is absurd, unreasonable and harsh. Prior to 1976, the legislature did not intend, in a malpractice case, to require a patient, without knowledge of the negligence of a surgeon nor the existence of an injury, to open up his body like a door and look in to ascertain what occurred. Neither did the legislature intend that a patient be deprived of his remedy before he knew of his rights. Generally, public policy speaks in favor of tolling the statute of limitations. *Gaston*, supra. In keeping with this policy we adopted the maxim that no doctor may obtain advantage of his own wrong. *Hardin v. Farris*, 87 N.M. 143, 530 P.2d 407 (Ct.App.1974).

In medical malpractice "an injury to the person" occurs when the foreign body breaks down healthful tissue within the body of the patient, or when the patient first experiences pain caused by the unknown foreign object. The cause of action accrues when the fact of injury is reasonably ascertainable. A genuine issue of material fact exists on whether Peralta suffered an injury to the person prior to January 8, 1973.

(2) *The statute does not commence to run until the last treatment of the patient.*

This rule of law was recognized in *Roybal v. White*, 72 N.M. 285, 383 P.2d 250 (1963). The Court said:

> There is no allegation in the instant case of continued treatment by the doctor. Those cases [cited by plaintiff] fixing accrual of the cause of action *at the time of the last treatment* are not in point under the facts here present. [72 N.M. at 287, 383 P.2d at 252] [Emphasis added.]

Roybal did not accept nor reject this exception.

The "termination of treatment" exception has flourished for three-quarters of a century beginning with the "sponge" case of *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902), 93 Am.St.Rep. 639 (1903). *Gillette* has been cited with approval in many states of the union until the Supreme Court of Ohio, like many other courts, swept aside all exceptions to the rule and declared in effect the modern rule that ". . . the negligent leaving of a metallic forceps and a nonabsorbent sponge inside a patient's body during surgery will toll the running of the statute of limitation upon that cause of action until such time as the patient discovers, or by the exercise of reasonable diligence should have discovered, the negligent act." *Melnyk v. Cleveland Clinic*, 32 Ohio St.2d 198, 61 Ohio Ops.2d 430, 290 N.E.2d 916 (1972), 70 A.L.R.3d 1 (1976); See Annot., 80 A.L.R.2d 368, 379 (1961), Later Case Service, p. 111 (1968), Later Case Service and Supplemental Cases issued April, 1976, p. 73.

The citation of cumulative authority is burdensome. We cite only the cases set forth in *Roybal*, each of which relied on *Gillette*. *Huysman v. Kirsch*, 6 Cal.2d 302, 57 P.2d 908 (1936); *Hotelling v. Walther*, 169 Or. 559, 130 P.2d 944 (1942), 144 A.L.R. 205 (1943); *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934). In *Roybal*, the surgeon-patient relationship terminated nine and one-half years before exploratory surgery discovered and removed the sponge.

The "termination of treatment" rule flows from the theory that the operation was not completed until the sponge is removed as alleged in Peralta's complaint; that the negligence of the surgeon in failing to remove a foreign substance after it had served its purpose, is a continuing tort, one that continues during the physician-patient relationship, and the limitation period does not begin to run until the date of removal of the foreign substance by the

physician who has continued to treat the patient through "the last treatment."

In *Mantz v. Follingstad*, supra, we said:

> The statute of limitations was not tolled *during* the period of medical treatment. [Emphasis added.] [84 N.M. at 477, 505 P.2d at 72]

Roybal was cited. This sentence did not mean "the last treatment" as stated in *Roybal*. No period of medical treatment was involved in *Mantz*. Whether it tolls the statute of limitations depends upon whether the treatment continues until "the last treatment" when the foreign substance is discovered.

Whether the doctor-patient relationship continued to "the last treatment" is an issue of fact. *Frazor v. Osborne*, 57 Tenn. App. 10, 414 S.W.2d 118 (1966).

Under "the last treatment" rule, a genuine issue of material fact exists whether the limitation period commenced to run prior to January 8, 1973.

The facts presented by Dr. Martinez did not bar plaintiff's claim as a matter of law.

(3) *The act of malpractice accrual date is not followed.*

Dr. Martinez relies on *Roybal v. White*, supra. Roybal's complaint alleged "that defendant negligently left a sponge in plaintiff's abdominal cavity [on January 14, 1952] which resulted in the necessity of further surgery on July 24, 1961", nine and one-half years later. Based on this allegation, plaintiff's complaint was dismissed by the trial court and affirmed on appeal. The Court said:

> New Mexico, following the majority, has held that a cause of action for personal injuries for malpractice accrues at the time of the wrongful act causing the injury. *Kilkenny v. Kenney*, supra. [72 N.M. at 287, 383 P.2d at 252]

Kilkenny did not hold that the cause of action for personal injuries accrued at the time of *the wrongful act causing* the injury. It held that the cause of action accrued from the date that the injury occurred. *The "wrongful act" or "negligent act" is causation, not injury.*

Roybal states a rule that the period of limitations commences to run from the date of the negligent act. It seems absurd that in a tort action, the only defendant granted the benefit of the "wrongful act" theory as the accrual date, is the physician and surgeon. Every other defendant is bound by the "personal injury" theory as the accrual date as provided by statute. From the time the limitations Act was adopted, the legislature did not see fit to mention the "physician-patient" relationship until the recently adopted Medical Malpractice Act, supra. *Roybal* has judicially amended the statute of limitations to read that in a medical malpractice action *only*, the limitation period begins to run from the date of the "wrongful act." In all other tort actions, it runs from the date of the injury. This power rests solely in the legislature.

We are not bound by *Roybal* when the law provides other accrual dates for the commencement of the limitation period.

(4) *In fraudulent concealment, the statute begins to run from the time Peralta's right of action is disclosed, or in the exercise of ordinary diligence could have been discovered.*

Dr. Martinez claims that there was no factual or legal basis for the trial court's finding 1(a) supra on fraudulent concealment. It is unfortunate that courts have created a fiction or semi-myth called "fraudulent concealment" in medical malpractice when there is no fraud whatsoever. We have unfortunate consequences flowing from the careless use of this phrase. In medical malpractice, mere silence constitutes "fraudulent concealment." Upon this fiction, we test Dr. Martinez' claims.

(a) *There was a legal basis.*

Dr. Martinez claims that Peralta's first amended complaint did not "explicitly allege that the statute of limitations . . . should be tolled" because of fraudulent concealment; that the complaint did not allege, (1) that Peralta did not know he had

a cause of action on April 17, 1973; (2) that Dr. Martinez prevented Peralta from obtaining knowledge of a cause of action or a right of action; and (3) that Dr. Martinez tried to hide the fact that the cottonoid had been found in Peralta's body.

Our duty is to view Peralta's complaint in the most favorable aspect it will bear in opposition to Dr. Martinez' motion. *Institute for Essential Housing, Inc. v. Keith*, 76 N.M. 492, 416 P.2d 157 (1966).

Peralta's complaint contained three counts. It alleged in pertinent part that Dr. Martinez negligently left the cottonoid in Peralta's body; that with knowledge of the unsatisfactory results, and with knowledge or notice of their failure to complete the February, 1971, operation, he continued to treat Peralta until April 17, 1973, when the cottonoid was discovered and removed; that this was the first time Peralta became aware of the cottonoid in his body and his injury; that Dr. Martinez knew or should have known that Peralta's body could not put him on notice of the negligence and injuries; that Peralta placed full confidence in Dr. Martinez and relied on his knowledge. "Accordingly, the limitation of action provisions of Section 23–1–8, N.M.S.A. 1953 *are tolled in accordance with law and Section 23–1–7*, N.M.S.A. (1953), *and Plaintiff's right of action accrued not before but on or about April 17, 1973.*" [Emphasis added.]

By reference to § 23-1-7, from which fraudulent concealment arose, *Roybal*, supra, the complaint alleged that the statute of limitations was tolled by reason of fraudulent concealment.

Hardin v. Farris, supra, stated the rule as follows:

> We therefore conclude that where a party against whom a cause of action accrues *prevents the one entitled to bring the cause from obtaining knowledge thereof by fraudulent concealment* [Citation omitted], *or where the cause is known to the injuring party, but is of such character as to conceal itself from the injured party* [Citation omitted], the statutory limitation on the time for bringing the action will not begin to run *until the right of action is discovered, or, by the exercise of ordinary diligence, could have been discovered.*
>
> . . . . .
>
> . . . [M]ere silence constitutes fraudulent concealment. [Emphasis added.] [87 N.M. at 146, 530 P.2d at 410.]

Peralta's complaint stated a claim for relief on the theory of fraudulent concealment.

(b) *There was a factual issue.*

The only evidence presented by Dr. Martinez on the claim of fraudulent concealment consisted of a lack of knowledge of the presence of the cottonoid at the surgery site and that the only way it could have been discovered, and, was in fact discovered, was by the April 17, 1973, surgical exploration. This evidence is insufficient to bar a claim for fraudulent concealment. Dr. Martinez did not disclose anything to Peralta.

There are two concepts that destroy the claim of Dr. Martinez: (1) the surgeon-patient relationship, and (2) the meaning of fraudulent concealment.

(1) The relationship of surgeon-patient is one of trust and confidence and it imposes on the surgeon the duty to speak. *Hardin v. Farris*, supra. In all dealings with a patient, the surgeon must use the utmost good faith or he is guilty of fraud. *Batty v. Arizona State Dental Board*, 57 Ariz. 239, 112 P.2d 870 (1941). He must reveal to the patient that which, in his best interests, it is important that he should know. *Cannell v. Medical and Surgical Clinic, S.C.*, 21 Ill. App.3d 383, 315 N.E.2d 278 (1974); *Emmett v. Eastern Dispensary and Casualty Hospital*, 130 U.S.App.D.C. 50, 396 F.2d 931 (1967). This includes a full and fair disclosure of all facts which materially affect the patient's rights and interests. A patient has a right to know the cause of his disability. Withholding information, in a sense, amounts to a misrepresentation. *Wohlgemuth v. Meyer*, 139 Cal.App.2d 326, 293 P.2d 816 (1956); *Stafford v. Shultz*, 42 Cal.2d 767, 270 P.2d 1 (1954).

(2) Reduced to its essentials, fraudulent concealment is nothing more than a riposte to a limitation of action defense because statutes of limitation are shields to protect the unwary surgeon from the prosecution of musty claims dredged up by tardy patients. However, where a surgeon has misled a patient by concealment in order to induce the patient to believe that a cause of action does not, in fact, exist, the surgeon seeks to use the statute of limitations as a sword. The statute of limitations cannot be converted into an instrument of fraud. This use is forbidden by law. "Fraud vitiates anything. Courts will not uphold fraud, or presume the Legislature intended to do so by allowing one in a confidential relationship to conceal an injury done another until the statute of limitations has run. The language of the statute should be so plain that there is no question as to its meaning if the Legislature intends to give a wrongdoer the advantage and benefit of his fraudulent concealment of an injury done another. Equity had its origin in granting relief from frauds when the old common law courts were too rigid in their reasoning to grant relief from grave injustices. We feel our interpretation of the statute of limitations in this case should be in accordance with the principles of equity." *Guy v. Schuldt*, 236 Ind. 101, 138 N.E.2d 891, 896 (1956). Ordinarily, a surgeon is estopped from relying on the statute because his prior negligent act indicates both a timely knowledge of liability and an intent to avoid liability by subterfuge.

A surgeon's failure to remove a sponge after closing the incision is negligence as a matter of law. *Thompson v. Barnard*, 142 S.W.2d 238 (Tex.Civ.App.1940), aff'd 138 Tex. 277, 158 S.W.2d 486 (1942). When this occurs, the suppression of something which the party is bound to disclose is fraudulent concealment. *Magee v. Manhattan Life Ins. Co.*, 92 U.S. 93, 23 L.Ed. 699 (1876). The failure of a surgeon to disclose acts of malpractice constitutes a fraudulent concealment which tolls the statute of limitation. *Sheets v. Burman*, 322 F.2d 277 (5th Cir. 1963). Where a fiduciary relationship exists, and a duty to disclose follows, the patient does not have to prove affirmative acts of concealment on the part of the surgeon to deliberately conceal the act of malpractice or the right of action. Mere silence constitutes fraudulent concealment *Hardin v. Farris*, supra; *Higbee v. Walsh*, 229 Iowa 408, 294 N.W. 597 (1940).

We have uniformly held that when the law imposes a duty upon a party to speak rather than to remain silent in respect to certain facts within his knowledge, he must disclose the information in order that the party with whom he is dealing may be placed on an equal footing. *Everett v. Gilliland*, 47 N.M. 269, 141 P.2d 326 (1943); *Barber's Super Markets, Inc. v. Stryker*, 84 N.M. 181, 500 P.2d 1304 (Ct.App.1972).

On April 17, 1973, when the cottonoid was discovered and removed, Dr. Martinez knew then he had committed an act of negligence in prior surgery. He knew then that the cottonoid was the cause of Paralta's disability. He knew then that Peralta had a right of action. He was silent.

We recognize how difficult it is for a surgeon to disclose the negligent act. Sponge cases, like the instant case, have occurred throughout the twentieth century. When that foreign substance does harm to a patient, equity comes along in a judicial sense to notify the surgeon that if he does not confess his error, he cannot hide behind the statute of limitations. He is responsible for the delay in the filing of a claim for relief, and the patient, the ordinary human being, cannot be charged with filing a stale claim.

The failure of Dr. Martinez to disclose his act of malpractice to Peralta established fraudulent concealment. The limitation period began to run, not from the date of the wrongful act, but from the time that Peralta discovered, or, in the exercise of reasonable diligence, could have discovered his right of action.

D. *The trial court did not err when it accepted and considered Peralta's affidavit*

Dr. Martinez claims that Peralta's affidavit should not have been accepted and con-

sidered by the trial court. As heretofore determined, Peralta's affidavit was not essential to a determination of the claim of fraudulent concealment.

The issues raised by this claim of error is a matter of first impression. Because an answer can assist in the progress of the law on summary judgment, it is deemed to be essential to the administration of the procedural rules surrounding Rule 56 of the Rules of Civil Procedure that governs summary judgment.

In his affidavit, Peralta stated:

> At no time during the Defendants' treatment of Affiant did any of the Defendants suggest, relate or otherwise inform Affiant that the cottonoid was the cause of Affiant's pains, particularly those pains radiating down his legs. *It is the belief of Affiant* that Defendants had said knowledge, as shown by [letters of Dr. Mora] with copies sent to Defendants. *It is the belief of Affiant* that Defendants failed to notify Affiant of this medical opinion in order to allow the statute of limitations to lapse, therefore, denying the Affiant the opportunity to seek redress, and at no time was Affiant aware of the cottonoid substances *before April 17, 1973.* That Defendants had knowledge of Dr. Mora's medical opinion on or about September 10, 1973, as illustrated by [Dr. Mora's letter] attached to this Affidavit. [Emphasis added.]

Dr. Federico Mora, a neurosurgeon, wrote two letters. They were dated March 26, 1973, and September 10, 1973. Unsigned copies were sent to Dr. Conklin, a co-defendant.

At the hearing on the motion for summary judgment, no record was made. The parties "agreed that Dr. Martinez' counsel had properly objected to the timeliness and the admissibility of plaintiff's affidavit at the summary judgment hearing before the trial court." The specific grounds upon which the objections were made, and the specific portions of the affidavit to which objection was made, do not appear of record. The motion for summary judgment was heard on September 24, 1976. The order denying summary judgment was filed November 23, 1976. For two months, no action was taken to preserve for review the claimed error raised on appeal.

Rule 56(e) of the Rules of Civil Procedure [§ 21–1–1(56)(e), N.M.S.A.1953 (Repl. Vol. 4)] provides in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers . . . referred to in an affidavit shall be attached thereto or served therewith.

The affidavit was admissible because it was subscribed and sworn to and it did set forth some facts as would be admissible in evidence at trial if no objection was made to inadmissible evidence. "Inadmissible affidavits are no different from inadmissible evidence. They may be stricken in the discretion of the trial judge, but will support a judgment if he elects to consider them and no objection is made." *United States v. Dibble*, 429 F.2d 598, 603 (9th Cir. 1970) (concurring opinion, Wright, J.). During the trial of a case, an objection to an admission into evidence which does not specify the particular ground on which the evidence is objectionable, will be treated on appeal as if no objection to such evidence has been made. *Ash v. H. G. Reiter Company*, 78 N.M. 194, 429 P.2d 653 (1967). We find no objection made to the admissibility of Peralta's affidavit.

When an affidavit is filed, the opposing party has alternative methods of attacking inadmissible matters, (1) by filing a motion to strike, pointing out specifically just what language or statements or exhibits the party wants to have stricken, or (2) by making an objection. *Associated Press v. Cook*, 513 F.2d 1300 (10th Cir. 1975); *Auto Drive-Away Company of Hialeah, Inc. v. I.C.C.*, 360 F.2d 446 (5th Cir. 1966); *Ernst Seidelman Corporation v. Mollison*, 10 F.R.D. 426 (D.Ohio 1950); *Klingman v. National Indemnity Company*, 317 F.2d 850 (7th Cir.

1963); *McSpadden v. Mullins*, 456 F.2d 428 (8th Cir. 1972); *Wimberly v. Clark Controller Company*, 364 F.2d 225 (6th Cir. 1966); *Monroe v. Board of Education of Town of Wolcott, Conn.*, 65 F.R.D. 641 (D.Conn. 1975); *United States v. Dibble*, supra; *Newton v. Misner*, 423 P.2d 648 (Wyo.1967); *Noblett v. General Electric Credit Corporation*, 400 F.2d 442 (10th Cir. 1968); 6, Pt. 2, Moore's Federal Practice § 56.22[1] (1976).

Absent a motion to strike or to otherwise object to the affidavits, any formal defects contained in the affidavits are deemed waived. This includes those requirements of Rule 56(e) such as lack of personal knowledge, inadmissibility of facts set forth and competency of the affiant to testify. *Associated Press*, supra; *United States v. Dibble*, supra; *Noblett*, supra; *Auto Drive-Away*, supra.

The reason that objection must be made to specific portions of the affidavit in the trial court is based on the rule that a moving party should not expect the court to go through the opposing affidavit "with a fine-tooth comb" and pick out the "certain portions" which a party, from his point of view, feels should be stricken. *Ernst Seidelman Corporation*, supra. The trial court rules upon each of the objections made by the moving party. *Monroe*, supra.

On appeal, for the first time, we learn the objections which Dr. Martinez has to Peralta's affidavit. They are, (1) lack of personal knowledge, (2) the admissibility of Dr. Mora's letters, and (3) the timeliness of the filing of Peralta's affidavit. The first two objections have been disposed. The third objection, being a matter of first impression, will be discussed.

(1) *The acceptance of an affidavit filed a day late was not an abuse of discretion.*

Peralta's affidavit was filed at the time of the hearing on the motion for summary judgment. Dr. Martinez objected to the timeliness of the filing. Rule 56(c) of the Rules of Civil Procedure provides that "The adverse party *prior to the day of hearing* may serve opposing affidavits." [Emphasis added.]

The admission of affidavits filed at the time of hearing on motion for summary judgment rests within the discretion of the trial court. *Beaufort Concrete Co. v. Atlantic States Construction Co.*, 352 F.2d 460 (5th Cir. 1965), cert. denied 384 U.S. 1004, 86 S.Ct. 1908, 16 L.Ed.2d 1018 (1966) (Justice Black, dissenting). In *Beaufort*, the trial court *denied* admission of affidavits. The Court of Appeals held that the trial court did not abuse its discretion. In the instant case, we hold that the *admission* of Peralta's affidavit was *not* an abuse of discretion. The reasoning can be found in the dissenting opinion of Justice Black. He said:

> . . . Surely a judge should not have discretion to enter final judgment at will every time a slight lapse occurs which may delay for half a day or so the service of one of a multitude of papers that must be served during the trial and appeal of a lawsuit.
>
> The summary judgment entered below indicates, in my opinion, a failure to appreciate that "The basic purpose of the Federal Rules is to administer justice through fair trial, not through summary dismissals as necessary as they may be on occasion." [384 U.S. at 1005, 86 S.Ct. at 1909, 16 L.Ed.2d at 1019]

We have uniformly held that "An abuse of discretion is said to occur when the court exceeds the bounds of reason, all the circumstances before it being considered." *Independent Steel & Wire Co. v. New Mexico Cent. R. Co.*, 25 N.M. 160, 165–66, 178 P. 842, 844 (1918). The refusal to deprive Peralta of his day in court because he failed to file the affidavit "prior to the day of hearing" did not constitute an abuse of discretion.

564 P.2d 207

STATE of New Mexico,
Plaintiff-Appellee,

v.

John DOE, I and John Doe, II,
Defendants-Appellants.

No. 2860.

Court of Appeals of New Mexico.

May 10, 1977.

Jan A. Hartke, Chief Public Defender, William H. Lazar, Asst. Appellate Defender, Santa Fe, for defendants-appellants.

Toney Anaya, Atty. Gen., Paquin M. Terrazas, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The dispositive issue in this Children's Court case involves § 13–14–25(J), N.M.S.A. 1953 (Repl. Vol. 3, pt. 1) which reads:

> "In a proceeding on a petition, a party is entitled to the opportunity to introduce evidence and otherwise be heard on the party's own behalf and to confront and cross-examine witnesses testifying against the party, and to admit or deny the allegations against the party in a petition."

The children admitted one of the delinquent acts alleged in the petition. The Children's Court then held a hearing on whether the children were in need of care or rehabilitation. See § 13–14–28(E), N.M.S.A.1953 (Repl. Vol. 3, pt. 1).

Testimony at the hearing was to the effect that child I had been stopped for speeding by an unidentified person who informed child I "that the next time I come down the street he was going to make me wear a brick around my neck . . . ." Child I reported this to his brother, child II. The

two of them got a shotgun, returned to the neighborhood and fired the shotgun through a window of the house. The room into which the shotgun was fired was occupied at the time by two of the residents of the house.

This testimony sustains the finding that the children were in need of care or rehabilitation. The complaint on appeal concerning this testimony is that the testimony was not given under oath. There was no objection in the Children's Court concerning the admission of unsworn testimony. The children may not raise the issue on appeal. *State v. Madrigal,* 85 N.M. 496, 513 P.2d 1278 (Ct.App.1973).

At the hearing directed to whether the children were in need of care or rehabilitation, the Children's Court had before it the report of probation service. At that hearing, information was presented to the court concerning the work and marital status of one child and concerning the school record of the other child. In addition, the probation officer recommended a diagnostic commitment. See Children's Court Rule 37.

The following then occurred. Mr. Fitzpatrick is the attorney for the children:

"THE COURT: I'm sorry but with a crime like this, I don't care what their school records are like or what their past records are like, I have no choice except to send them up to Springer on a full commitment, both of them.

"MR. FITZPATRICK: Well, Judge—

"THE COURT: That is the order of the Court.

"MR. FITZPATRICK: I think, Your Honor—

"THE COURT: I have ruled.

"MR. FITZPATRICK: Well, let me—could I point out one factor? I don't know if I should point out that . . . has a wife that isn't working, with an infant—

"THE COURT: He should have thought of that.

"(Mother of boys starts to weep very loudly.)

"MR. FITZPATRICK: Now, I would think that, Judge—

"(Mother continues to weep very loudly drowning out Mr. Fitzpatrick.)

"MR. FITZPATRICK: (continuing) Judge, could I ask the Court to reconsider or to consider the recommendation of the Diagnostic Center on a 40-day commitment?

"THE COURT: No.

"MR. FITZPATRICK: I don't know if it was pointed out, I think for the younger child, this is his first referral and—

"THE COURT: I am sorry, Mr. Fitzpatrick, I have ruled.

"(END OR HEARING)"

The brief for the children states:

"The refusal of the judge of the Children's Court to allow the appellants' attorney to present evidence on the issues of their need for care and rehabilitation and the disposition to be made before he summarily sentenced them to full commitments at Springer is the sole error urged for reversal on appeal."

We do not agree that the Children's Court refused to allow the presentation of evidence, either on the question of whether the children were in need of care or rehabilitation or the question of the appropriate disposition. The Children's Court was never informed that the children desired to present additional evidence. See Evidence Rule 103. Thus, no issue is presented under § 13–14–28(G), N.M.S.A.1953 (Repl. Vol. 3, pt. 1).

What the record does show is that the Children's Court made a dispositional ruling without giving the attorney for the children an opportunity to be heard. When the attorney nevertheless sought to speak on behalf of the children, the Children's Court interrupted and effectively denied the children the opportunity to be heard. Section 13–14–25(J), *supra.*

The findings in the judgments that each of the children committed a delinquent act, and each is in need of care or rehabilitation are affirmed. Because the opportunity to be heard was denied, the portions of the

judgments committing each of the children to the Department of Corrections at Springer are vacated. After affording the children an opportunity to be heard, a new dispositional judgment is to be entered. See *Territory v. Herrera,* 11 N.M. 129, 66 P. 523 (1901); *State v. Torres,* 81 N.M. 521, 469 P.2d 166 (Ct.App.1970).

IT IS SO ORDERED.

HENDLEY, J., concurs.

HERNANDEZ, J., dissents in part, concurs in part.

HERNANDEZ, Judge, (dissents in part, concurs in part).

I respectfully dissent from that part of the majority opinion that holds: "that the Children's Court made a dispositional ruling without giving the attorney for the children an opportunity to be heard," citing Section 13–14–25(J), *supra.* That section governs "a proceeding on a petition." The appropriate section governing dispositional hearings, in my opinion, is § 13–14–28(G), N.M.S.A. 1953 (Repl. Vol. 3, pt. 1) which provides:

> "In that part of the hearings held under the Children's Code on dispositional issues all relevant and material evidence helpful in determining the questions presented, including oral and written reports, *may* be received by the court and may be relied upon to the extent of its probative value even though not competent had it been offered during the part of the hearings on adjudicatory issues and the issue of need for care and rehabilitation." (Emphasis mine.)

Nonetheless, the record shows that the probation officer testified about the children's father and mother (their occupation, church attendance, etc.), and then gave his recommendation to the court as to how the matter should be disposed of. The children's attorney, without interruption or hindrance from the court, questioned them concerning the incident which gave rise to the petition. His examination also brought out that the elder of the two, seventeen years old, was married and had an infant child, about four months old, and that he was employed as a cook. That the younger one, sixteen years old, attended school regularly, had had no disciplinary problems and was living with his parents. The father testified that he had made arrangements to make reimbursement for the damage done by his sons. The part of the colloquy between the court and the children's attorney quoted by the majority came after all of the facts recited above had been elicited. It is my opinion that the children and their attorney were given a fair hearing and that the court did not abuse its discretion in refusing to hear more.

564 P.2d 612

John L. HUNING and Fred D. Huning, as Trustees of the Huning Land Trust, Plaintiffs-Appellees,

v.

Dale POTTS, aka Glen Dale Potts, and Terezia Potts, his wife, Defendants-Appellants.

No. 11012.

Supreme Court of New Mexico.

May 16, 1977.

Rehearing Denied June 1, 1977.

Ashby, Rose & Sholer, Philip R. Ashby, Hugh R. Horne, Albuquerque, for defendants-appellants.

Keleher & McLeod, Russell Moore, James B. Collins, M. Ralph Brown, Albuquerque, for plaintiffs-appellees.

OPINION

SNEAD, District Judge.

This is an appeal from a judgment in favor of plaintiffs-appellees, John L. Huning and Fred D. Huning, Jr., as trustees of the Huning Land Trust [hereinafter Huning], and against Dale Potts and Terezia Potts, his wife [hereinafter Potts]. We reverse.

Huning brought an action in trespass, and obtained a judgment enjoining Potts from entering onto or crossing the lands owned or controlled by Huning, and further enjoining Potts from interference with the grazing rights of Huning on its own lands, and from interfering with prescriptive

grazing rights over other lands, including those tracts owned by Potts. The property concerned is a part of the San Clemente Grant and is within a substantially enclosed tract known as the Cerro pasture, encompassing some twenty to twenty-five sections.

Old Spanish Grants, Inc. acquired the tract in issue in 1929 and divided it into 10 acre lots. A plat of the land, reflecting lot designations and road rights-of-way between lots was filed with the county clerk of Valencia County on June 1, 1931. Thereafter, Old Spanish Grants, Inc. sold a number of the lots to individual owners. Each of the deeds was a grant of fee simple title "subject to restrictions and reservations of record and subject to rights of way for road purposes and railroad rights of way." Each of the deeds made reference to the plat filed with the county clerk. Each deed contained, as a part of the printed deed form, the following language:

> The grantor hereby covenants and agrees to pay the taxes on the foregoing described land . . . from the date hereof until 1933, provided the grantee does not improve the land by irrigation or the discovery of oil or any other means whereby the present status of the land as fit for grazing only is altered and its value increased, and the grantor is allowed use of said land for grazing.

The deed form with the language quoted was used on deeds issued both before and after 1933. In 1944, Huning acquired all of the remaining interest of Old Spanish Grants, Inc.

Of the tracts sold by Old Spanish Grants, Inc. between 1931 and 1944, some are still held under the original deeds; many others have been sold for taxes over the years. Of the tracts sold for taxes, many have been acquired by Huning while others have been acquired by various owners, including Potts.

During 1974 Potts acquired from the State of New Mexico some sixty-nine lots and fractional interests in lots within the area platted by Old Spanish Grants, Inc. and subsequently conveyed some of the lands so acquired to other owners. That same year Potts cut the fence adjacent to a point at which State Highway No. 6 crosses the platted area, and began blading out various access roads to the tracts which he had purchased. The roads in some instances appear to follow easement lines of the old plat; in other instances they do not. The roadways bladed out by Potts traverse lots now owned by Huning as well as lots owned by others.

The trial court found that all of the property in dispute had been used since the early 1930's for grazing by the Hunings; that such usage had been open, adverse and under claim of right since 1944; that Huning thereby obtained a prescriptive right to grazing which was prior in time to the tax deeds, and which was not extinguished by the tax deeds; that Potts had knowledge of the use made of the land prior to purchase and purchased without knowledge as to whether there was an access to the lands. The court concluded that Defendant Potts had no right of access to the lands acquired by him and no right to interfere with the prior right of Huning to use the land exclusively for grazing and permanently enjoined Potts from entering upon any of Huning's land.

Huning claims a perpetual grazing right under two theories: (1) express reservation in the deed and (2) by prescription. We hold that whatever type of right Huning had has been extinguished by the tax sale by the state.

Section 72–8–5, N.M.S.A., 1953 [1] applicable to this case, states:

> *Title vested by Tax Sale—Easements—Possession—State As Purchaser.*—The tax sale shall vest in the state of New Mexico and its grantees and assigns, as the case may be, subject to the right of redemption as provided in this act, the right to a complete title to the property

1. Repealed by Ch. 258, § 156 [1973] N.M.Laws 1154, and Ch. 92, § 34 [1974] N.M.Laws 347. The trial court relied upon § 72–31–70 (B), N.M.S.A., 1953 (Supp.1975), effective January 1, 1975, to find no extinguishment of the grazing profit.

sold, subject, however, to the easements of any telephone, telegram, transmission, or pipeline company or any irrigation or drainage ditch or road to which such land may be subject; Provided, that the state and its grantees and assigns shall not be entitled to the possession of said property until the period of redemption has expired and a deed has been executed therefor.

By the terms of the statute, the grazing profit was extinguished by the tax sale. Potts received a fee simple estate from the state (subject to the statutorily-enumerated reserved easements). See *Jackson v. Hartley*, 90 N.M. 428, 564 P.2d 992 (1977) and cases cited therein.

Huning relies on *Alamogordo Improvement Co. v. Hennessee*, 40 N.M. 162, 56 P.2d 1127 (1936), to support the thesis that a dominant easement is not extinguished by tax sale. The holding in the *Hennessee* case was modified in *Alamogordo Improvement Co. v. Prendergast*, 43 N.M. 245, 91 P.2d 428 (1939), holding that an easement which was an "encumbrance" upon the land and which bestowed no reciprocal benefit upon the servient estate was cut off by a tax sale, under the statute in effect at that time.[2] A dominant estate such as is present in this case, which usurps the entire beneficial ownership of the surface to the exclusion of the fee owner, is clearly an encumbrance without reciprocal benefit.

Potts contends that he has a right to access to his landlocked property under any of three theories: (1) the 1931 plat created a public easement, (2) the road easements in the deeds incorporating the 1931 plat created private easements, and (3) an implied easement of necessity.

Huning contended on appeal that Potts is precluded from raising a "private easement" claim on appeal because he failed to raise the argument at trial. The record reveals that Potts requested the District Court to conclude that the deeds, in conjunction with the plat, gave the purchasers from Old Spanish Grants, Inc. "mutual easements" for road purposes. Potts also properly challenged contrary conclusions on appeal. New Mexico law requires no more. See Supreme Court Rule 20 [§ 21–2–1 (20), N.M.S.A.1953, Repl.Vol. 4 (1970)]; *Barnett v. Cal M, Inc.*, 79 N.M. 553, 445 P.2d 974 (1968).

The contention as to "private easement" is dispositive. It is well-settled in New Mexico that if land is purchased under an agreement and representation that it will abut upon a street, existing or to exist by the terms of the deed, and the grantor owns the land to be so used, the grantor and his heirs are estopped to deny the existence of the street and the purchaser acquires a right of way over the land in question. *Nickson v. Garry*, 51 N.M. 100, 179 P.2d 524 (1947). This rule was broadened in *Cree Meadows, Inc. (NSL) v. Palmer*, 68 N.M. 479, 363 P.2d 1007 (1961), where this court stated that private rights to the use of land delineated in a subdivision plat exist independently of any public right that might exist by reason of a dedication, and that it is unimportant whether this rule is based on a theory of implied grant, implied covenant, or estoppel. This rule was approved and elaborated in *Ute Park Summer Homes Ass'n v. Maxwell Land Gr. Co.*, 77 N.M. 730, 735, 427 P.2d 249, 253 (1967), where we emphasized that:

> [i]t is the use made of the plat in inducing the purchasers, which gives rise to the legally enforceable right in the individual purchasers, and such is not dependent upon a dedication to public use . . .

See also *Sedillo Title Guaranty, Inc. v. Wagner*, 80 N.M. 429, 457 P.2d 361 (1969). We hold that the plat filed of record on June 1, 1931, together with the express reservations in the deeds, created private easements of way so as to give Potts access to the lots in question.

The judgment of the trial court is reversed and it is ordered that judgment be entered in favor of Potts dissolving the injunction against him, and awarding him

2. Ch. 102, § 27, [1925] N.M.Laws 170.

access to his property in accordance with the easement reservations in the deeds from Old Spanish Grants, Inc. to that property as further detailed in the recorded plat referred to in the deeds. Potts shall be awarded his costs.

IT IS SO ORDERED.

SOSA and EASLEY, JJ., concur.

564 P.2d 615

MIMBRES VALLEY IRRIGATION CO., Plaintiff-Appellee,

v.

Tony SALOPEK et al., Defendants-Appellees,

v.

DEPARTMENT OF AGRICULTURE FOREST SERVICE, Defendant-Appellant,

State of New Mexico, Plaintiff-in-Intervention-Appellee.

No. 11094.

Supreme Court of New Mexico.

May 23, 1977.

Victor Ortega, U. S. Atty., James B. Grant, Asst. U. S. Atty., Albuquerque, Peter R. Steenland, Jr., Land & Natural Resources Div., Dept. of Justice, Washington, D. C., for defendant-appellant.

Toney Anaya, Atty. Gen., Paul L. Bloom, Richard A. Simms, Asst. Attys. Gen., Santa Fe, for State of New Mexico, intervenor.

J. Wayne Woodbury, Ben Shantz, Silver City, for appellees.

OPINION

PAYNE, Justice.

This suit was filed in 1966 as a private action to enjoin alleged illegal diversions of the Rio Mimbres which flows through the Gila National Forest in southwest New Mexico. In 1970 the State of New Mexico, on the relation of the State Engineer and pursuant to § 75–4–4, N.M.S.A.1953 (Repl. Vol. 11, Pt. 2, 1968), filed a complaint-in-intervention seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. The complaint-in-intervention named as defendants all parties claiming any interest in and use of the waters of the Rio Mimbres. The State's motion to intervene was granted and the suit proceeded as a general statutory adjudication of all the water rights on the stream system.

Among the named defendants in the complaint-in-intervention was the United States of America, joined pursuant to 43 U.S.C. § 666 (1970). The United States claimed reserved water rights for minimum

instream flows and for recreational purposes within the Gila National Forest. The matter was referred by the trial court to a special master to determine the rights of the parties. The master entered findings of fact and conclusions of law which supported the United States' claim to 6.0 cubic feet per second of water in the Gila National Forest for minimum instream flows and recreational purposes. The State of New Mexico, pursuant to N.M.R.Civ.P. 53(e)(2)[1], objected to the master's report. The district court reversed, holding that the United States had not reserved water rights in the Gila National Forest for its claimed purposes. We affirm the decision of the district court.

The "reservation" doctrine, as it applies to federal enclaves, was initially recognized in *Winters, v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). The issue decided therein was whether the United States, at the time of the creation of the Fort Belknap Indian Reservation in Montana, had impliedly reserved a water right for future use of the Indians upon those lands. The United States Supreme Court upheld the power of the federal government to reserve the waters and exempt them from appropriation under state laws.

The exact meaning of the principle articulated in the *Winters* case has been subject to inconclusive debate through the years. It was further clarified, however, in *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), a case that also involved waters flowing through the Gila National Forest. The United States Supreme Court reaffirmed the viability of the *Winters* doctrine, and for the first time extended the reservation doctrine to other non-Indian federal enclaves. Although it refused to discuss the non-Indian related claims, the Court said:

> 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 the future requirements of the 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.

More recently the Supreme Court has given additional guidance on the application of the principle of reserved water rights. In *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976), the Court stated:

> [W]hen the Federal Government reserves land, by implication it reserves the water rights sufficient to accomplish the purposes of the reservation.
>
> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created. . . . (Citations omitted.)
>
> 426 U.S. at 139, 96 S.Ct. at 2070.
>
> The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. . . . (Citation omitted.)
>
> Id. at 141, 96 S.Ct. at 2071.

The *Cappaert* decision restricts the application of the reservation doctrine to the limited purposes for which the reservation was created.

The final decree entered in *Arizona v. California*[2] concludes that the United States had reserved water rights in "quantities reasonably necessary to fulfill the

1. Section 21-1-1(53)(e)(2), N.M.S.A.1953 (Repl.Vol. 4, 1970).

2. 376 U.S. 340, 350, 84 S.Ct. 755, 11 L.Ed.2d 757 (1964). Decree carrying into effect the United States Supreme Court's prior opinion of June 3, 1963, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542.

purposes of the Gila National Forest." Applying the *Cappaert* Rule, we must now determine for what purpose the Gila National Forest was originally established and whether those purposes necessarily require an implied reservation of water.

The Gila National Forest was established by separate presidential proclamations dated March 2, 1899, July 2, 1905, February 6, 1907, June 18, 1908 and May 9, 1910. In subsequent years portions of other national forests were transferred to the Gila National Forest so that it now comprises about 2,787,093 acres of land in southwestern New Mexico. Approximately 92,622 acres of privately owned land is encompassed by the forest. The legislative act under which the establishment of national forests was authorized is the Creative Act of March 3, 1891. 16 U.S.C. § 471 (1970). It reads as follows:

> The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

The statute did not set forth the purposes for which the forests were withdrawn nor did it set up the means of administration of the forests. Further congressional action to remedy this situation resulted in the passage of the Organic Act of 1897. 16 U.S.C. § 475 (1970); see Bassman, "The 1897 Organic Act: A Historical Perspective," 7 Nat.Res.Law. 503 (1974). The pertinent provision of that Act reads as follows:

> § 475. *Purposes For Which National Forests May Be Established And Administered.*
>
> . . . No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.

The United States asserts that additional recreational purposes were envisioned when the act was passed. It likewise argues that minimum instream flows are necessary for aesthetic, environmental, recreational and "fish" purposes. We do not disagree with the objective of preserving the aesthetic and environmentally pleasing qualities of the forests and we appreciate the availability of the forests for recreational purposes. We cannot agree, however, that these objectives come within the original intent of Congress when creating national forests. The United States would equate these other "uses" of the forest as part of the original "purposes" for which it was established, and argues that the "uses" and "purposes" of the forest are one and the same. Congress has provided that the Secretary of Agriculture is authorized "to regulate . . . occupancy and use and to preserve the forests thereon from destruction . . . 16 U.S.C. § 551 (1970). We are urged to recognize this section of the Code as support for the proposition that the words "occupancy and use" contemplate more than the limited purposes set out in the Organic Act. We cannot take such liberty with the expressions of Congress. There is little doubt that if secondary uses such as grazing, mining or recreation conflict with the primary purposes of assuring watershed protection or timber preservation, those secondary uses would not be permitted to continue. *United States v. Grimaud*, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911); *Light v. United States*, 220 U.S. 523, 31 S.Ct. 485, 55 L.Ed. 570 (1911); *United States v. Hunt*, 19 F.2d 634 (N.D.Ariz.1927); *Honchok v. Hardin*, 326

F.Supp. 988 (D.Md.1971). The fact that Congress has opened the national forests for the many diversified uses which are now allowed does not expand the purposes for which they were originally created.

If there remains any question concerning the applicability of the "reservation" doctrine for the uses now claimed by the United States, it is dispelled by the Multiple-Use Sustained-Yield Act of 1960. 16 U.S.C. § 528 (1970). This act includes the following proviso:

> It is the policy of the Congress that national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title.

The United States argues that this enactment by Congress clarifies and is further support for its position that these additional purposes have always been considered as integral parts of the whole purpose of the Creative and Organic Acts. A similar argument was made in *West Virginia Div. of Izaak Walton L. of Am., Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975), wherein the Court stated:

> In effect, appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds. First of all, it is at odds with the well established rule that repeal of a statute by implication is not favored and, as recently stated by the Court in *Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974):
>
> > "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."
>
> In addition to the foregoing principle, Section 1 of the Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language:
>
> > "The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. § 475)."
>
> Appellants' argument in this respect also elides the fact that in and out of Congress there has not been unanimous agreement with respect to the interpretation and application of the Multiple-Use Act. Over a decade after its passage controversy over its meaning and intent, as well as the management practices of the Forest Service, . . . has continued unabated.
>
> . . . . .
>
> [F]rom our review of the material at hand we are satisfied that in enacting this legislation Congress did not intent [sic] to jettison or repeal the Organic Act of 1897. We are equally satisfied that this act did not constitute a ratification of the relatively new policy of the Forest Service . . .
>
> 522 F.2d at 953–54.

The Multiple-Use Sustained-Yield Act can just as easily be interpreted to exclude the additional purposes as part of the original intent of the Organic Act. The fact that Congress declared them to be "supplemental to" the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act. The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897.

We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated.

We are aware of the advancing environmental and aesthetic concerns related to the use of our natural resources. Had the congressional enactments and their interpretations by the Supreme Court given us leeway so as to interpret more broadly the intent of the Creative and Organic Acts we may have been persuaded to decide differently. However, the intent of Congress is clear and we must follow it.

An additional matter raised in this appeal is whether the water rights used by permittees of the United States Forest Service should be adjudicated to the permittee under the state law of prior appropriation or outright to the United States. The prior discussion in this opinion reveals that the United States does not have reserved water rights in the forests for these permitted uses. It necessarily follows that water rights must be perfected and held by the permittee in accordance with state law.

We affirm the trial court.

IT IS SO ORDERED.

SOSA and EASLEY, JJ., concur.

564 P.2d 619

Dwaine BENDORF, Plaintiff-Appellant,

v.

VOLKSWAGENWERK AKTIENGESELISCHAFT, Defendant-Appellee.

No. 2648.

Court of Appeals of New Mexico.

April 5, 1977.

Certiorari Denied May 11, 1977.

Lorenzo A. Chavez, James H. Foley, Albuquerque, for plaintiff-appellant.

Eugene E. Klecan, James T. Roach, Klecan & Roach, Albuquerque, for defendant-appellee.

OPINION

HENDLEY, Judge.

Plaintiff appeals an adverse verdict after retrial. See *Bendorf v. Volkswagenwerk Aktiengeselischaft,* 88 N.M. 355, 540 P.2d 835 (Ct.App.1975) (*Bendorf I*). Plaintiff

claims the accident was caused by a defective seat track mechanism made by defendant. Defendant claims the seat track mechanism was not defective and even if defective it was plaintiff's wrongful driving which caused the accident or plaintiff assumed the risk of the defect because he knew of the defect. The facts are basically set forth in *Bendorf I.*

Plaintiff's points for reversal on appeal are: (1) the jury was erroneously instructed that ordinary contributory negligence is a complete defense; (2) the jury was erroneously instructed on ordinary contributory negligence; (3) the trial court's conduct deprived plaintiff of his day in court; (4) the trial court erred in refusing to allow defendant's expert witness to be examined as to his compensation; (5) the trial court erred in admitting testimony of how the seat track mechanism operated after the accident; and (6) the trial court erred in refusing to admit prior consistent statements of plaintiff.

Contributory Negligence

Before reaching plaintiff's two arguments concerning the jury instructions we feel it advisable to briefly discuss our decision in *Bendorf I.* In that case we said that: "* * * 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. * * *" *Bendorf I.* The jury was also instructed that contributory negligence is "* * * negligence on the part of plaintiff that proximately contributed to cause his damages." *Bendorf I.* We stated that the affirmative defense of assumption of the risk and misuse were not involved in the case and that "* * * defendant's defense should only have prevailed if plaintiff's negligent driving had caused the accident. * * *" *Bendorf I.* The error, therefore, was that the instruction required a verdict for the defendant if the jury believed that plaintiff's wrongful driving and the defective seat were concurring causes of the accident. Our decision implicitly adopted the view that "* * * if a product is defective, if the plaintiff is unaware of that defect, and if that defect is the proximate cause of the plaintiff's [accident], then the fact the plaintiff's negligent conduct may have concurred with the defect to cause * * * [the accident] should have no bearing on the validity of the initial policies calling for the application of strict liability. * * *" *Bachner v. Pearson,* 479 P.2d 319 (Alaska 1970). Accord, *Findlay v. Copeland Lumber Company,* 265 Or. 300, 509 P.2d 28 (1973). The result being that the jury should not have been required to find for the defendant unless they found that plaintiff's wrongful driving was the *sole* proximate cause of the accident. See *Fields v. Volkswagen of America, Inc.,* 555 P.2d 48 (Okl.1976).

In the present appeal, the trial court's instruction No. 1 read 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 interferring 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 moved, causing Plaintiff to lose control of his car, run a red light and collide with another car, which resulted in injuries which have left him paralyzed.

"The Plaintiff has the burden of proving that he sustained damages and that one or more of the claimed acts was a proximate cause thereof.

"A. The Defendant denies all the Plaintiff's claims and asserts that the accident was not caused by a defect in the seat assembly of his automobile, if any such defect existed, but was caused by one or more of the following acts of wrongful driving conduct on the part of the Plaintiff:

"1. That the Plaintiff failed to keep a proper lookout for the traffic signals and approaching vehicles and that said failure was the proximate cause of the alleged accident and resulting injuries.

"2. That the Plaintiff failed to yield the right of way at the intersection to the Mustang driven by Mr. Torrez and that said failure was the proximate cause of the alleged accident and resulting injuries.

"3. That the Plaintiff failed to stop in obedience to the traffic signals which were operating at the intersection and that said failure was the proximate cause of the alleged accident and resulting injuries.

"4. That the Plaintiff failed to keep his car under proper control as he approached the intersection when he knew there were traffic signals in operation and that said failure was the proximate cause of the alleged accident and resulting injuries.

"5. That the Plaintiff failed to exercise ordinary care for his own safety and that such failure was the proximate cause of the alleged accident and resulting injuries.

"B. That Defendant further asserts the following affirmative defense:

"1. That Plaintiff was contributorily negligent in that Plaintiff discovered any defect of which he complains but nevertheless unreasonably used the product and assumed the risk while he knew of the defect and danger and that such contributory negligence by the Plaintiff was a proximate cause of the alleged accident and resulting injuries.

"The Defendant has the burden of proving the affirmative defense and that said defense was a proximate cause of the alleged accident and resulting injuries.

"If Defendant's assertions of wrongful driving conduct by Plaintiff as stated above in A–1, 2, 3, 4 or 5 did occur, but were proximately caused by a defect in the product, that is, the seat assembly of the VW, then the said alleged acts of wrongful driving conduct would not be *the proximate cause* of the accident and therefore would not bar a recovery. (Emphasis ours).

"If you find that Plaintiff has proved those claims required of him, including proximate causation, 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 the Plaintiff has not been proved, including proximate causation, or that any one of Defendant's assertions of wrongful driving has been proved, and that such was the proximate cause of the accident, or, if you find that Defendant's affirmative defense has been proved and that such was a proximate cause of the accident, then your verdict should be for the Defendant."

The jury here was not specifically instructed as in *Bendorf I*, that plaintiff's wrongful driving was contributory negligence, an affirmative defense. Plaintiff objected to the above quoted instruction stating that "* * * it instructs the jury that if the plaintiff's behavior was the proximate cause, they cannot recover. * * *" The jury was also given several instructions on plaintiff's duty to use ordinary care. Plaintiff claims these instructions erroneously injected the issue of contributory negligence into the case.

Assuming, without deciding, that plaintiff is correct in his assertions we find that reversal of this case is not required. The jury was told in instruction No. 1 that if plaintiff's wrongful driving was *the proximate cause* of the accident then their verdict should be for the defendant. The definition of proximate cause given to the jury states: "[t]he proximate cause * * * need not be the only cause, nor the last nor

the nearest cause. It is sufficient if it occurs with some other cause * * *" No other instruction on proximate cause was given. It is clear that by applying the proximate cause instruction given to instruction No. 1 the jury would have been required to find for the defendant even if they found that plaintiff's wrongful driving and the defective seat were concurring causes of the accident.

However, instruction No. 1 was not erroneous. The proximate cause instruction was erroneous because it allowed the jury to elevate plaintiff's wrongful driving to contributory negligence as an affirmative defense and clearly was an inappropriate instruction in this case. *Bendorf I.*

The proximate cause instruction was not only unobjected to by the plaintiff but it had been requested by the plaintiff. It thus became the law of the case. *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct.App.1973); rev. on other grounds, 86 N.M. 141, 520 P.2d 869 (1974); *Griego v. Conwell*, 54 N.M. 287, 222 P.2d 606 (1950); *Marchant v. McDonald*, 37 N.M. 171, 20 P.2d 276 (1933). Plaintiff cannot now complain of the contributory negligence aspect of this case when he requested the erroneous instruction which was given to the jury. *Territory v. Yarberry*, 2 N.M. 391 (Gild. 1883); See *Cochran v. Gordon*, 77 N.M. 358, 423 P.2d 43 (1967); *Platero v. Jones*, 83 N.M. 261, 490 P.2d 1234 (Ct.App.1971).

Trial Court's Conduct

Plaintiff contends that certain comments by the trial court were so prejudicial that he was denied a fair and impartial trial. The passages cited by the plaintiff do show that some rather severe comments were directed towards plaintiff's counsel. As to the propriety of the trial court's conduct our Supreme Court stated in *In re Will of Callaway*, 84 N.M. 125, 500 P.2d 410 (1972) the following guidelines:

> "The tenor of the Judicial Canons of Ethics indicates that a judge may properly intervene in the trial of a case to promote expedition and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience or participation in the examination of witnesses or a severe attitude on his part toward witnesses or counsel may tend to prevent the proper presentation of the cause or the ascertainment of the truth therein. * * *"

The question is whether the conduct of the trial court was so prejudicial to plaintiff's case as to require a new trial. It is obvious that " . . . a cold bare transcript sometimes does not reflect the total atmosphere of a trial." *Callaway*, supra. We, therefore, cannot substantiate plaintiff's claim of "reproachful looks" coming from the trial court. See *State v. Gurule*, (Ct.App.) 90 N.M. 87, 559 P.2d 1214, decided January 4, 1977. The record does indicate that critical remarks by the trial court were directed to defense counsel as well as plaintiff's counsel. After examining the record of proceedings prior to the trial court's remarks it is apparent that many of the remarks were entirely justified. The jury was also instructed by the trial court not to let the court's remarks influence their decision. We hold that the conduct of the trial court, when considered in context, was not so prejudicial so as to require a new trial.

Compensation of Expert Witness

On cross-examination plaintiff's counsel questioned one of the defendant's expert witnesses as to the amount of compensation he had received from the defendant. The witness responded by saying he charged "$95.00 an hour." When the witness was asked if this meant that in 1974 he received $180,000.00 the trial court sustained defendant's objection that the answer would be immaterial. Plaintiff claims this was reversible error.

It is proper to question a witness as to his payment for testifying as an expert and a trial court's refusal to allow such questioning may constitute reversible error. *State v. Clarkson*, 58 N.M. 56, 265 P.2d 670 (1954). However, the decision to admit or exclude evidence rests within the sound dis-

cretion of the trial court and the trial court's decision will not be overturned absent an abuse of discretion. *State v. Bell,* 90 N.M. 134, 560 P.2d 925, decided March 1, 1977. The record does not disclose an abuse of discretion. Further, even assuming error, it was harmless. *Scott v. Brown,* 76 N.M. 501, 416 P.2d 516 (1966). Plaintiff was afforded the opportunity of soliciting testimony from the expert that he was a paid witness.

Seat Track Mechanism

A reasonable inference is a conclusion arrived at by a process of reasoning. This conclusion must be a rational and logical deduction from facts admitted and established by the evidence, when those facts are viewed in the light of common experience. *Williamson v. Piggly Wiggly Shop Rite Foods, Inc.,* 80 N.M. 591, 458 P.2d 843 (Ct.App.1969).

Over plaintiff's objections of relevancy and materiality the trial court allowed the introduction of defendant's testimony concerning how the Volkswagen seat track mechanism operated subsequent to the accident. The testimony showed that subsequent users of the seat track had no problems with the seat track slipping or otherwise malfunctioning. There is no indication from the testimony that the seat track mechanism was altered after the accident.

This testimony gave rise to a reasonable inference that the seat track mechanism was working properly before the accident. *Ferran v. Jacquez,* 68 N.M. 367, 362 P.2d 519 (1961). The trial court properly admitted the testimony. It was relevant and material on the claim of a defective seat track mechanism.

Prior Consistent Statements

Plaintiff's trial testimony was that he had run the red light because the defective seat had caused him to lose control of the car.

In his opening statement defense counsel stated that the evidence would show that immediately after the accident plaintiff had stated to two people that he had missed the red light because he had been reaching over towards his child who had fallen off the seat. The evidence adduced at trial indicated that plaintiff had made the alleged statements. Plaintiff had no recollection of the incident and did not deny making the statements.

Plaintiff was refused permission to introduce testimony of two witnesses who would have testified that two or three hours after the accident and again two months after the accident plaintiff had made statements similar to his trial testimony as indicated above. The trial court ruled the statements were inadmissible hearsay. Plaintiff contends the statements are not hearsay and should have been admitted under Rules of Evidence 801(d)(1)(B) which states in part:

> "A statement is not hearsay if * * * [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive * * *."

As with the two previous points, the decision to admit or exclude evidence pursuant to Rule 801(d)(1)(B), supra, is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Bell,* supra.

We hold that the trial court properly exercised its discretion. In so holding we note: (1) the use of the prior inconsistent statement did not necessarily imply that plaintiff's trial testimony was recently fabricated or was made from an improper influence or motive. *Coltrane v. United States,* 135 U.S.App.D.C. 295, 418 F.2d 1131 (1969); *Hanger v. United States,* 398 F.2d 91 (8th Cir. 1968); 4 Wigmore, Evidence, § 1126 (1972); McCormick, Evidence, § 49 (1972); (2) plaintiff is obviously an interested party in this case and allegedly made the prior consistent statements after the accident and at a time when a motive was present for the plaintiff to deny any wrong

doing. *United States v. Greene*, 497 F.2d 1068 (7th Cir. 1974); *United States v. Dorfman*, 470 F.2d 246 (2d Cir. 1972); see *Applebaum v. American Export Isbrandtsen Lines*, 472 F.2d 56 (2d Cir. 1972); and (3) the prior consistent statements were made after the prior inconsistent statement. *Felice v. Long Island Railroad Company*, 426 F.2d 192 (2d Cir. 1970); *Ayres v. Keith*, 355 S.W.2d 914 (Mo.1962); McCormick, supra; see *Applebaum v. American Export Isbrandtsen Lines*, supra.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

I dissent.

Plaintiff appeals an adverse judgment a second time arising out of a products liability case heretofore reversed. *Bendorf v. Volkswagenwerk Aktiengeselischaft*, 88 N.M. 355, 540 P.2d 835 (Ct.App.1975) (*Bendorf I*). We should reverse this case again.

A. *Failure to instruct on sole proximate cause was reversible error.*

This case was tried on the single theory of strict liability in tort based on a defective product. We are confronted a second time with instructions given to the jury. In *Bendorf I*, we decided the following proposition:

> 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. * * * 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. [Emphasis by Court] [88 N.M. at 360, 540 P.2d at 840.]

Under this theory, plaintiff's misconduct as a misuse of the vehicle must be the sole proximate cause of the accident. Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okl.1976). Contra, *General Motors Corporation v. Walden*, 406 F.2d 606 (10th Cir. 1969). The Federal court misconstrued Arizona law stated in *O. S. Stapley Company v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968), upon which it relied. The jury was not so instructed. This was reversible error.

B. *Instructions on plaintiff's duties were erroneous.*

The court instructed the jury that on February 17, 1969, plaintiff drove a 1964 Volkswagen in a northerly direction on San Mateo, N.E., Albuquerque, New Mexico. As he drove across Highway I–40, traffic conditions made it necessary for him to apply the brakes and as he did so, the seat moved, causing him to lose control of the car, run a red light and collide with another car, which resulted in injuries that left him paralyzed.

The court also instructed the jury:

> 6. It is the duty of every operator of a vehicle using the public highway to exercise ordinary care at all times to avoid an accident.
>
> 7. It is the duty of every operator of a vehicle using the public highway to exercise ordinary care at all times to keep a proper lookout and to maintain proper control of his vehicle so as to avoid placing himself or others in danger and so as to avoid an accident.
>
> 8. 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.
>
> 9. It was the duty of the Plaintiff, before and at the time of the occurrence, to use ordinary care for his own safety.

These instructions are U.J.I. 9.1, 9.2, 9.3, and 12.3, respectively. They repeat and repeat claims of contributory negligence set forth in Instruction No. 1, infra. They were not applicable in this case. The failure of plaintiff to exercise ordinary care

was not a denial of the causal allegations that established a prima facie case for plaintiff, that a defect in the automobile was the proximate cause of the accident.

In *Bendorf I*, supra, the court instructed the jury that plaintiff was contributorially negligent if plaintiff failed to keep a proper lookout, and failed to keep his car under proper control. We held that, absent proximate cause of the accident, the instruction was erroneous.

Instructions No. 7 and 8, on proper lookout and proper control, are elements of contributory negligence of plaintiff, *Martinez v. City of Albuquerque*, 84 N.M. 189, 500 P.2d 1312 (Ct.App.1972), or to determine negligence of the defendant. *Sandoval v. Cortez*, 88 N.M. 170, 538 P.2d 1192 (Ct.App.1975). Negligent conduct of defendant is irrelevant because defendant was not operating a vehicle.

Instruction No. 9 stated that plaintiff had a duty to exercise ordinary care for his own safety. This is an instruction that "will not be used and is not proper unless there is an issue of contributory negligence to go to the jury." U.J.I. 12.3, Directions for Use; *Paddock v. Schuelke*, 81 N.M. 759, 473 P.2d 373 (Ct.App.1970).

Instruction No. 6, on the duty of plaintiff to exercise ordinary care to avoid an accident, also falls within the category of contributory negligence.

In *Bendorf I*, supra, we held that conventional contributory negligence was not a defense when the doctrine of strict liability applied.

Instructions No. 6, 7, 8, and 9, together with Instruction No. 1, infra, strongly pounded in the minds of the jury that plaintiff had a duty to exercise ordinary care, even though this conduct was unrelated to plaintiff's claim that the defective seat was the proximate cause of the accident. These instructions were prejudicially erroneous.

C. *The court's instruction on one of defendant's defenses was erroneous.*

Instruction No. 1 clearly stated that "The Plaintiff has the burden of proving * * *." It included a statement of defendant's defenses and instructed the jury in part as follows:

A. The Defendant denies all the Plaintiff's claims and asserts that the accident was not caused by a defect in the seat assembly of his automobile, if any such defect existed, but was caused by one or more of the following acts of wrongful driving conduct on the part of the Plaintiff:

1. That the Plaintiff failed to keep a proper lookout for the traffic signals and approaching vehicles and that said failure was the proximate cause of the alleged accident and resulting injuries.

2. That the Plaintiff failed to yield the right of way at the intersection to the Mustang driven by Mr. Torrez and that said failure was the proximate cause of the alleged accident and resulting injuries.

3. That the Plaintiff failed to stop in obedience to the traffic signals which were operating at the intersection and that said failure was the proximate cause of the alleged accident and resulting injuries.

4. That the Plaintiff failed to keep his car under proper control as he approached the intersection when he knew there were traffic signals in operation and that said failure was the proximate cause of the alleged accident and resulting injuries.

5. That the Plaintiff failed to exercise ordinary care for his own safety and that said failure was the proximate cause of the alleged accident and resulting injuries.

The instruction concluded in part as follows:

*If * * * you find * * * that any one of Defendant's assertions of wrongful driving have been proved, and that such was the proximate cause of the accident, * * * then your verdict should be for the Defendant.* [Emphasis added.]

Plaintiff says:

No place is the jury instructed as to what party had the burden of persuasion as to the occurrence or non-occurrence of any one of the five alleged acts of wrongful driving.

I agree.

This instruction directed the jury's attention to the fact that defendant relied upon *five acts of wrongful driving* as the proximate cause of the accident; that the verdict should be for defendant if "defendant's assertions of wrongful driving have been proved"—by whom, plaintiff or defendant? It did not instruct the jury that the burden of persuasion rested on defendant to prove these facts.

Instruction No. 1 also stated the defense of contributory negligence in the form of assumption of risk as follows:

B. That Defendant further asserts the following affirmative defense:

1. That Plaintiff was contributorily negligent in that Plaintiff discovered any defect of which he complains but nevertheless unreasonably used the product and assumed the risk while he knew of the defect and danger and that such contributory negligence by the Plaintiff was a proximate cause of the alleged accident and resulting injuries.

The Defendant has the burden of proving the affirmative defense and that said defense was a proximate cause of the alleged accident and resulting injuries. [Emphasis added.]

Here, the instruction did place the burden of persuasion on the defendant, limited to this particular affirmative defense.

I note that defendant submitted a requested instruction in which wrongful driving was stated as an affirmative defense. The trial court modified the instruction without objection. The modification changed the position of this affirmative defense in the instruction. It was placed in an area where burden of persuasion was omitted. The claim of five acts of wrongful driving was a denial of plaintiff's claim that the defective seat caused plaintiff to lose control of his car. It was a denial that the defective seat was the proximate cause of the collision. But as a matter of proof, it is an affirmative matter. *Kirkland v. General Motors Corporation,* 521 P.2d 1353 (Okl. 1974). It was an affirmative declaration that plaintiff's wrongful driving was the proximate cause of the accident. This claim falls within the phrase "other matter constituting an . . . affirmative defense" as set forth in Rule 8(c) of the Rules of Civil Procedure [§ 21–1–1(8)(c), N.M.S.A. 1953 (Repl. Vol. 4, 1975 Supp.)].

The burden of persuasion rested on defendant to prove its affirmative defense that plaintiff's wrongful driving was the (sole) proximate cause of the accident. U.J.I. 3.1, 3.6; *Wallace v. Wanek,* 81 N.M. 478, 468 P.2d 879 (Ct.App.1970); *J. A. Silversmith, Inc. v. Marchiondo,* 75 N.M. 290, 404 P.2d 122 (1965).

Regardless of whether wrongful driving was an affirmative defense, the burden of persuasion rested on defendant to prove the claims stated in the defense of wrongful driving.

Rule 51,1(a) of our Rules of Civil Procedure provides that "The court shall instruct the jury regarding the law applicable to the facts in the cause unless such instructions be waived by the parties." Section 21–1–1(51), 1(a) N.M.S.A.1953 (Repl. Vol. 4). This rule is mandatory. It means that fundamental law applicable to the facts shall be given by instructions whether requested or not. *City of Albuquerque v. Ackerman,* 82 N.M. 360, 482 P.2d 63 (1971); *Gerrard v. Harvey & Newman Drilling Company,* 59 N.M. 262, 282 P.2d 1105 (1955).

The law on burden of persuasion is fundamental in character. It is important and indispensable in the administration of justice because it affects a substantial right of the plaintiff. Defendant's burden must be clearly stated so that the burden does not shift to plaintiff. This rule of law should be carefully guarded and rigidly enforced by the court. *King v. Bass,* 273 N.C. 353, 160 S.E.2d 97 (1968); *Hess v. Mumma,* 136 Pa.Super. 58, 7 A.2d 72 (1939); See, *Akers v. Cowan,* 26 Cal.App.2d 694, 80 P.2d 143 (1938).

From a reading of this long, involved instruction, the jury could have believed that plaintiff had the burden of proving that his wrongful driving was *not* a proximate cause of the accident.

Instruction No. 1, as set forth *supra,* was prejudicially erroneous.

D. *Undue emphasis was placed on plaintiff's wrongful driving.*

Instruction No. 1 stated defendant's wrongful driving in negligent context five times. Instructions 6, 7, 8, and 9 emphasized plaintiff's duties in the operation of his vehicle in negligent context. Plaintiff, attacked from every fortress of the defendant, was left defenseless in the minds of the jury. It cloaked the defendant with legal immunity. A trial court should not single out any particular or individual factual aspect of litigation for instructions since there is danger that the jury may unduly attach significance to it. The vice in undue emphasis puts the court in the position of making an argument to the jury. It misleads the jury into thinking that because the court has specifically mentioned certain facts, they are of undue importance or that the court believed them to be true. Instructions should not focus the jury's attention on particular items of evidence that are made unduly prominent and overemphasized.

Medler v. Henry, 44 N.M. 275, 288, 101 P.2d 398 (1940) issued a warning with the following quotation:

> In 14 R.C.L. p. 780, Sec. 48, it is stated: "It is a dangerous practice to call special attention to an isolated fact and thus, by making it prominent, lead the jury to the opinion that it is of greater significance and weight than other unmentioned facts in the case which may be of no less importance, for the jury will feel bound to regard the fact, thus isolated for their consideration, as the controlling if not the only important fact in the cause which should govern them in making up their verdict. Therefore it is a general rule that an instruction should not single out particular facts and thereby give undue prominence to them, as such practice tends to mislead the jury."

Repeated references to the jury of the conduct of the plaintiff may well have caused the jury to render its verdict, not on the defect as the proximate cause of the accident, nor as assumption of risk by plaintiff, but upon some conventional contributory negligence of plaintiff in the operation of his vehicle. It also focused the jury's attention on improper driving to the detriment of plaintiff. This is prejudicially erroneous. *Harlan v. Curbo,* 250 Ark. 610, 466 S.W.2d 459 (1971); *Rodriquez v. Lompoc Truck Company,* 227 Cal.App.2d 769, 39 Cal.Rptr. 117 (1964); *Dufour v. Henry J. Kaiser Co.,* 215 Cal.App.2d 26, 29 Cal.Rptr. 871 (1963); *Smith v. Shankman,* 208 Cal. App.2d 177, 25 Cal.Rptr. 195 (1962); *Gerard v. Kenegson,* 151 So.2d 26 (Fla.App.1963); *Clarke v. Hubbell,* 249 Iowa 306, 86 N.W.2d 905 (1957); *Croushorn Equipment Company v. Moore,* 441 S.W.2d 111 (Ky.1969); 75 Am.Jur.2d Trial § 643 (1974); 88 C.J.S. Trial § 340 (1955).

E. *The trial court's conduct of the trial deprived appellant of his "day in court."*

"The tenor of the Judicial Canons of Ethics indicates that a judge may properly intervene in the trial of a case to promote expedition and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience or participation in the examination of witnesses or a severe attitude on his part toward witnesses or counsel may tend to prevent the proper presentation of the cause, or the ascertainment of the truth therein." *In Re Will of Callaway,* 84 N.M. 125, 128, 500 P.2d 410, 414 (1972).

By way of caution, I point to Rules 105 and 605 of the Rules of Evidence [§§ 20–4–105, 605, N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.)].

Rule 105 reads:

> The judge shall not comment to the jury upon the evidence or the credibility of the witnesses.

Rule 605 reads:

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Plaintiff's last witness, to conclude his case in chief, was William Ernest Baker, a Professor of Mechanical Engineering at the University of New Mexico, who had received a doctorate in Engineering Mechanics. Plaintiff presented Exhibit No. 7 to the witness, a segment of the floor pan from a Volkswagen Beetle with the lower frame of the seat on the seat tracks. *This was an exhibit of defendant in the previous trial. It was a seat from a Volkswagen automobile.* The witness was asked to examine it carefully, take the carriage apart and look it over. A harangue began before the jury—plaintiff questioning, defendant objecting and making argument thereon, and the court directing the procedure. The court questioned the witness and then commented:

If this is not the seat runner, and this witness says so, manufactured by the Volkswagen Corporation, *then it has no place in this lawsuit.*

* * * * * *

Whether they were furnished to you by the defendant or not, *this witness says it is not the seat manufactured by Volkswagen,* and whether furnished by the defendant or not, *then it is not admissible in evidence as a design made by the defendant,* Volkswagen Corporation, *no matter where it came from.*

MR. CHAVEZ: May we have a recess until 8:00 o'clock in the morning?

THE COURT: No, we still have some time.

MR. CHAVEZ: If the Court please, I don't wish to argue, but *I don't think the witness testified that this was not a seat manufactured or furnished by Volkswagen.* * * * [Emphasis added]

The arguments continued thereafter in the presence of the jury until the court concluded:

The first thing, we're going to have to recess now, because the Court intended to go to 5:30, *and we have wasted just about an hour and fifteen minutes this afternoon. The Court is not going to put up with that tomorrow.* If you are not ready to explain the alterations made, this exhibit is not going to be admitted in evidence. *The Court has already ruled on that, and the Court is not about to change his mind. We cannot use an exhibit that is an authentic exhibit,* and any alteration without proper explanation is not authentic, *unless you can show that the defendant authorized the alterations to comply with some design of theirs* that existed in the automobile that was involved in this accident.

* * * The Court will want to see counsel here at 8:00 o'clock tomorrow morning, in chambers, and be ready at that time to give the Court a full explanation of the alteration of the exhibit.

The Court will now recess. Ladies and gentlemen, it was the Court's intention to take testimony until 5:30 today, hoping that we could conclude this case this week. We have a holiday coming on Monday, and the Court did not want that to interrupt this trial. The Court still thinks we can finish it this week, *but we have wasted some time here,* and the Court wishes to apologize to the jury for the loss of this time. *Ordinarily counsel are prepared with their exhibits, and this is a most unusual case, where a witness comes in and testifies that he has altered an exhibit. This is unusual, it is improper, to say the least.* * * * [Emphasis added]

The next day, the court continued to pursue plaintiff's attorney and the plaintiff's case until the following occurred:

MR. CHAVEZ: We are going to further object. This is highly prejudicial to the plaintiff's case.

THE COURT: *All evidence introduced on the other side is prejudicial to the other side.*

MR. CHAVEZ: *For the record, if Your Honor please, the court's comments are being prejudicial to my client.*

THE COURT: *Yes. You may sit down,* and you may proceed to prove the

foundation of the film. [Emphasis added]

Other colloquy and comments continued thereafter in the presence of the jury. In passing, we point only to the following:

> THE COURT: * * * *The Court has instructed the jury not to take into consideration anything you say,* just what he says:
>
> * * * * * *
>
> THE COURT: You are going to have to talk louder than that, *if you are talking down to the floor.* I think you do better if you stay behind the lectern. [Emphasis added]

During the trial of stubbornly contested cases, the patience of judges and opposing attorney are heavily strained, especially when the same case is tried a second time. Judges are human beings. "Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities." *Bridges v. California,* 314 U.S. 252, 289, 62 S.Ct. 190, 86 L.Ed. 192, 206 (1941) (Justice Frankfurter, dissenting). Arguments that arise during the examination and cross-examination of witnesses can arouse the emotions of a judge. However, we suggest that the better elements of one's nature should control the proceedings.

The reproof of attorneys and adverse comments of a party's case, if necessary during trial, should be made in the absence of the jury. The average juror looks with profound respect to the presiding judge and the juror's opinion can be affected by the unfavorable attitude of the judge toward one of the attorneys during the trial of a case. In most cases, the jury "tries" the lawyer rather than the client. The lawyer gradually absorbs the client's cause to such an extent that unconsciously in the minds of the jury it becomes the lawyer's cause. Neither a cautionary instruction nor any other action by the trial court can cure the error. To do so may do more harm than good. It may emphasize the jury's awareness of the lawyer's conduct.

A presiding judge should conduct a trial in a fair and impartial manner and refrain from making unnecessary comments during the course of trial which may tend toward a prejudicial result to a litigant. *Etzel v. Rosenbloom,* 83 Cal.App.2d 758, 189 P.2d 848 (1948); *City of Miami v. Williams,* 40 So.2d 205 (Fla.1949). To this end, it is wise to caution the jury that the judge's comments are not binding and the jury should not be guided by them. *Williams v. Philadelphia Transportation Company,* 415 Pa. 370, 203 A.2d 665 (1964).

I quote with approval from *Turner v. Modern Beauty Supply Co.,* 152 Fla. 3, 10 So.2d 488, 492 (1942), the admonition that should prevail in every jury trial:

> * * * [A] suitor, as a matter of law, is entitled to have his cause considered with the cold neutrality of an impartial judge and an unbiased or an unprejudiced jury correctly and adequately instructed by the trial court upon all the law applicable to the controversy. Likewise this neutrality and impartiality of the court and jury under our judicial system, like the sword of Damocles, should remain suspended over each participant therein and be extended to each incident of the trial and proceedings from the impaneling and swearing of the jury until the entry of the order by the trial court on the motion for a new trial to the end that the law and right only shall prevail in our temples of justice.

Although I read from a cold record, I believe that the remarks and comments of the district judge were harmful to the plaintiff. *In Re Will of Callaway, supra; Ginnis v. Mapes Hotel Corporation,* 86 Nev. 408, 470 P.2d 135 (1970), 42 A.L.R.3d 769 (1972); *Lee v. Artis,* 205 Va. 343, 136 S.E.2d 868 (1964).

I do not question the learning, integrity, impartiality, long experience and good judgment of the district judge. However, this complicated case has twice been tried with him presiding, and perhaps this fact may have affected his conduct. The American Bar Association, Standards of Judicial Administration, stated, in § 3.36(c), p. 60,

Directions Upon Remand of Standards Relating to Appellate Courts:

> The court may in appropriate circumstances order that a retrial be assigned to a different trial judge.

This matter is one of first impression and one of public interest.

In *King v. Superior Court In & For County of Maricopa,* 108 Ariz. 492, 502 P.2d 529, 530 (1972), 60 A.L.R.3d 172 (1974), the Supreme Court amended its rule on change of judge which reads as follows:

> When an action is remanded by an appellate court and the opinion or order requires a new trial on one or more issues, then all rights to change of judge are renewed and no event connected with the first trial shall constitute a waiver.

The Court said:

> In the case of an appeal, reversal and a remand for a new trial, it is always possible that the trial judge may subconsciously resent the lawyer or defendant who got the judgment reversed. The mere possibility of such a thought in the back of a trial judge's mind means that a new judge should be found.

The amended rule appears to be an innovation in the rules for change of judge in order for a party on reversal to seek a fair and impartial trial the second time around. See, *People v. Winters,* 171 Cal.App.2d Supp. 876, 342 P.2d 538 (1959); *City of Columbus v. Molt,* 34 Ohio App.2d 146, 296 N.E.2d 564 (1973); *United States v. Crovedi,* 467 F.2d 1032 (7th Cir. 1972); *People v. Jackson,* 391 Mich. 323, 217 N.W.2d 22 (1974); Disqualification of Original Trial Judge to Sit on Retrial After Reversal or Mistrial, 60 A.L.R.3d 176 (1974).

Upon a second trial of a case, the trial judge should be subject to formal disqualification at the instance of the losing party.

F. *Cross-examination of expert witness on compensation rests in discretion of the court.*

Derwin Severy, a research engineer dealing with automotive, track engineering problems, testified for defendant as an expert witness. On cross-examination, the following occurred:

> Q. Let me ask you, Mr. Severy, for how many years have you performed services like this for Volkswagen?
>
> A. Since 1971 is the first time, sir.
>
> Q. All right. And your compensation for the services in this case amount to how much?
>
> A. The same as I charge before, ninety-five dollars an hour.
>
> Q. Ninety-five dollars an hour? Let's take 1974 for service like that. Your compensation would have been from Volkswagen, about a hundred and eighty thousand dollars?
>
> MR. KLECAN: Your Honor, I don't think that is material, what he got from Volkswagen in 1974.
>
> THE COURT: Objection sustained.
>
> MR. CHAVEZ: Well, we would like to tender the compensation from Volkswagen to this witness, '73, '74, and '72, '75, so the jury can evaluate bias or absence of bias.
>
> MR. KLECAN: Objection.
>
> THE COURT: You have made the tender and the Court is refusing. You made the tender. The Court is rejecting the evidence.

An expert witness may be cross-examined as to payment for testifying as an expert. *State v. Clarkson,* 58 N.M. 56, 265 P.2d 670 (1954). "The amount of an expert's fees, whether stipulated in advance of a trial or determinable in the future, has a direct and vital bearing upon his credibility, his interest, bias, or partisanship, and the rule * * * should be liberally applied." *Reed v. Philadelphia Transp. Co.,* 171 Pa.Super. 60, 90 A.2d 371, 373 (1952), 33 A.L.R.2d 1166, 1169 (1954); 31 Am.Jur.2d Expert and Opinion Evidence, § 50 (1967). However, "the scope and extent of the cross-examination rests in the sound discretion of the trial court." *Mezzanotte Construction Company v. Gibons,* 219 Md. 178, 148 A.2d 399, 401 (1959); *Hostert v. Iowa State Highway Commission,* 250 Iowa 253,

93 N.W.2d 773 (1958); *State v. Howington,* 268 Ala. 574, 109 So.2d 676 (1959).

Plaintiff was allowed to show that the expert witness received $95.00 per hour for services rendered in this case. This was sufficient to apprise the jury of the interest, bias or partisanship of the witness.

The important question is: Did the trial court abuse its discretion in disallowing proof of payment for services rendered defendant for four years prior to 1976? The answer is "No." It is prejudicial error to allow in evidence the amount of compensation paid for general services to defendant. *Zamsky v. Public Parking Authority of Pittsburgh,* 378 Pa. 38, 105 A.2d 335 (1954).

If plaintiff wanted to determine the amount of compensation paid to the expert witness for services rendered in this case, he had a duty to question the witness of the number of hours spent on behalf of defendant. The jury was not impressed with plaintiff waving before them the sum of $180,000.00 as compensation for services rendered defendant. The trial court properly rejected the tender of this evidence.

564 P.2d 992

John H. JACKSON, Jr. and Norma S. Jackson, Plaintiffs-Appellees,

v.

Earl E. HARTLEY and Mary Hartley, Defendants-Appellants.

No. 10980.

Supreme Court of New Mexico.

April 18, 1977.

Earl E. Hartley, Albuquerque, for defendants-appellants.

Lawrence H. Prentice, Los Lunas, for plaintiffs-appellees.

OPINION

EASLEY, Justice.

On motion of defendants, rehearing was granted. We withdraw the prior decision, and substitute the following.

Until now this case has been poorly pleaded, ineptly tried and badly judged on all issues at all levels, including this one.

Plaintiffs, John H. Jackson, Jr. and Norma S. Jackson (Jackson) filed a quiet-title suit against defendants, Earl H. Hartley

and Mary Hartley (Hartley) and others, including the Property Appraisal Department of the State of New Mexico, seeking to establish title to three lots in Grants, New Mexico. The trial court found for Jackson and Hartley appealed. We reverse the decision of the trial court.

Jackson filed a complaint in conventional form, alleging facts to support a quiet-title suit and including Hartley among those who were allegedly asserting an interest adverse to Jackson. Hartley's answer stated that he had fee-simple title to the property after having acquired title by deed from the State of New Mexico in 1970. Hartley also counterclaimed, stating that plaintiffs had entered into possession of the premises unlawfully, and prayed for an order of ejectment and for damages.

The Property Appraisal Department (Department), moved to dismiss the complaint on jurisdictional grounds as to itself, and moved that Jackson be ordered to file an amended complaint setting forth the purported interest of the Department in the premises. The court issued the requested order in response to the motion and later dismissed the complaint as to the Department when Jackson failed to comply.

The record is skimpy. The parties stipulated to the introduction into evidence of an abstract of title involving the three lots. Jackson called an abstractor as a witness, and elicited from him the fact that Zuni Enterprises, Inc. (Zuni), Hartley's predecessor in title, had had no deed in its name on the records of Valencia County. This is the totality of the legally-admissible evidence at the trial.

The abstract showed that Jackson acquired title to the three lots by deed from the First National Bank in Albuquerque (Bank), which Bank had been designated as trustee in two separate deeds, one from Jack M. Stagner and Virginia Stagner, and one from Jack B. Aldridge and Ina D. Aldridge, both deeds having been recorded in 1961. The beneficiaries of the trust were not named in either of the deeds.

The abstract shows that Hartley's claim is based upon repurchase of the property from the State of New Mexico after the Valencia County treasurer had deeded it to the State on January 20, 1964, because of delinquent taxes for the year 1960. Hartley had obtained a quitclaim deed dated April 10, 1970, from "Zuni Enterprises, Inc." and had recorded it on April 16, 1970.

The abstract reflects that the property was assessed to "Zuni Enterprises" in 1959 and shows that the taxes were paid. Through the years 1960 and 1963 the property was assessed in the name of "Zuni Enterprises" and the tax roll was marked "Repurchased from State 4//70." From 1964 through 1969, the tax roll showed the property in the name of "State of New Mexico . . . Zuni Enterprises" with the roll being marked in the same manner as set forth above regarding the repurchase from the State. From 1970 through 1973 the assessment rolls showed the property to be owned by Earl E. Hartley and indicated that the taxes had been paid in each of those years.

Hartley's deed from Zuni was signed by Jack M. Stagner as Vice President, Stagner being one of the individuals who deeded the property to the Bank as trustee. The name "Zuni Enterprises" appears at another place in the abstract in a notice of suit pending in a street-improvement case filed by the City of Grants against Zuni Enterprises, "a partnership," which partnership included Jack M. Stagner and Virginia L. Stagner, his wife, along with three other couples. The record shows no deed to Zuni as a partnership or as a corporation.

After the abbreviated trial, the court notified the parties by letter that it had decided that the plaintiffs should prevail and that a proper form of judgment should be submitted.

Jackson neglected for a matter of months to submit requested findings and conclusions and a form of judgment. Hartley called the court's attention to the delinquency by letter and submitted a requested judgment and findings and conclusions in his favor, which the trial court adopted and signed. The order was entered, but on motion of Jackson the trial court later vacated

the judgment, stating that it had been inadvertently signed. The court thereafter proceeded to make findings and conclusions in favor of Jackson.

The court found that, in 1960, when the taxes were not paid, the property was assessed in the name of Zuni, but that the Aldridges and the Stagners were the equitable owners, that the two couples deeded the lots to the Bank as trustee in 1961, and that in 1974 the Bank deeded the property to Jackson.

The court concluded that the deed from Zuni to Hartley was void and that the deed from the Department to Hartley was also void because it was obtained from the State as the result of "constructive fraud." It was further concluded that the title to the real estate was vested in the State, subject to the right of Jackson to repurchase under §§ 72–8–31 and 72–8–32, N.M.S.A.1953, as amended.

The final decree (1) adjudged the title to be in the State subject to the right of Jackson to repurchase, (2) barred Hartley from claiming any interest in the land, (3) held Hartley's deeds from Zuni and the State to be void, and (4) ordered Jackson to reimburse the amount paid by Hartley on back taxes in the event the State did not return his money.

The six issues raised by Hartley will be treated in the same order as listed in his brief-in-chief.

1. Hartley contended that he was entitled to have the judgment entered in his favor on February 9, 1976, stand as the final judgment, and that the trial court abused its discretion in vacating that judgment and entering one on behalf of Jackson. We hold that the record does not show an abuse of discretion in this regard, and we affirm the court's decision.

2. It was claimed by Hartley that the trial court erred in concluding that the Zuni deed was void, that the record showed Zuni to have an equitable title in the subject property, and that Zuni had a statutory right to repurchase, which right had been properly assigned to Hartley. It is not necessary or proper for the disposition of this case to settle the question of the validity of Hartley's title. We decline to do so.

3. It was contended by Hartley that there were insufficient facts upon which the trial court could legally have concluded that Zuni never existed and that its deed to Hartley was void. We agree, but the issue is not material to our decision herein.

4. Fraud was not pleaded but was raised over Hartley's claim of surprise in Jackson's opening statement· Hartley alleges error because of the court's legal conclusion that the facts and circumstances indicate as a matter of law that constructive fraud was committed in obtaining the deed from the State of New Mexico. We hold that there is no substantial evidence in the record sufficient to support the conclusion of the trial court that constructive fraud existed in this transaction and we hold there is certainly no grounds to justify a conclusion that constructive fraud existed as a matter of law even under the lenient guidelines set forth in the New Mexico case law. *Snell v. Cornehl*, 81 N.M. 248, 466 P.2d 94 (1970); *In re Trigg*, 46 N.M. 96, 121 P.2d 152 (1942); *Barber's Super Markets, Inc. v. Stryker*, 84 N.M. 181, 500 P.2d 1304 (Ct.App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972).

5. The claim is made by Hartley that when the Bank failed to exercise its right to redeem or to repurchase the property prior to the time that Hartley obtained a conveyance, the Bank's subsequent deed to Jackson was null and void. This point is the crux of the dispute between the parties. If the Bank had no right to repurchase the property, then Jackson received nothing by the deed from the Bank in 1974 and has no legitimate right to relief in this cause.

The undisputed facts are that (1) the taxes for the year 1960 were not paid; (2) by tax deed dated January 20, 1964, the Valencia County treasurer conveyed the lots to the State of New Mexico for delinquent taxes for the year 1960; (3) neither Jackson nor anyone in his chain of title made application to the Department to repurchase the property up to April 30, 1970, or since; (4) after Hartley made an applica-

tion to repurchase, the Department deeded the lots to him on April 30, 1970; (5) it was not until January 9, 1974, that Jackson received a deed from the Bank, as trustee.

The right to repurchase property deeded to the State for delinquent taxes is controlled by § 72–8–31, N.M.S.A.1953, which provides that the State shall not convey the acquired property for a period of one year to any person other than one who is entitled to repurchase. It is further provided that the right to repurchase shall continue after the expiration of one year from the date the tax deed to the State has been recorded and until the property acquired is sold at public auction or at private sale.

Jackson attempts to show that Hartley's deed from the Department is void and of no effect and that he would thus be entitled to repurchase the property for the reason that it has not been legally sold. However, Jackson must contend with § 72–8–20, N.M.S.A.1953, which specifies that in all suits involving property held under a deed from the State where the property was acquired from a county treasurer, the party claiming adverse title is required to prove, in order to defeat the title,

> . . . either that the said property was not subject to taxation . . . or that the taxes had been paid before sale by the treasurer to the state, or that the property had been redeemed from the sale according to the provisions of this act, and that such redemption was made or had for the use and benefit of the persons having the right of redemption . . . but no person shall be permitted to question the title acquired by deed from the state without first showing that he, or the person under whom he claims title to the property, had title thereto at the time of sale by the county treasurer; . . . Provided . . . such owner may prove fraud committed by the officer selling . . . or in the purchaser, to defeat the same, and, if fraud is established, such title shall be void.

Another statute that is very material to the resolution of the issues here is § 72–8–21, N.M.S.A.1953, in which it is stated:

> Any actions to test the validity of any proceedings . . . relating to the assessment and collection of delinquent taxes, or proceedings whereby it is sought to avoid any sale under the provision of this act, or irregularity or neglect of any kind of officer having any duty to perform under the provisions hereof, *shall be commenced within two (2) years from the date of the sale* by the county treasurer to the state, and not afterwards. (Emphasis added.)

Jackson's predecessors were bound by this statute to take action to test the validity of the sale to the State by January 20, 1966. They did not do so.

The deed from the Valencia County treasurer of January 20, 1964, stripped the Bank, Zuni, and all other legal and equitable owners of all interest in the lots in question and conveyed a fee-simple title to the State of New Mexico, subject only to the statutory preferential right to repurchase. *Marquez v. Marquez*, 85 N.M. 470, 513 P.2d 713 (1973); *State v. Thomson*, 79 N.M. 748, 449 P.2d 656 (1969); *Hargrove v. Lucas*, 56 N.M. 323, 243 P.2d 623 (1952); *De Baca v. Perea*, 52 N.M. 418, 200 P.2d 715 (1948); *Alamogordo Improvement Co. v. Hennessee*, 40 N.M. 162, 56 P.2d 1127 (1936).

There are few principles of law in New Mexico that are more firmly established than the one enunciated in *De Baca*, supra, that the former owner's preferential right of repurchase is conditioned on his making application therefor in strict compliance with the statutory provisions and before anyone else has applied. The court in *De Baca* stated (52 N.M. at 420, 200 P.2d at 716):

> In addition to the right to redeem the property before the issuance of a tax deed to the State, the law gives the former owner, or one claiming under him, the first and prior right to repurchase the property from the State after the issuance of a tax deed to it by the county treasurer by complying with the provisions of Section 76–740, 1941 Compilation. This is purely statutory and, if claimed,

> must be exercised in the manner and within the time provided by statute or the right is lost. To protect, preserve and enjoy the preferential right to repurchase the land from the State on the most favorable terms authorized by the Act, the former owner, or one claiming under him, must comply with its provisions. He must make application to repurchase and claim the preferential right therein given him before any other application has been made for the repurchase of the land. . . . [T]his does not mean that such owner, or one claiming under him, may delay making his application and offer to repurchase and claim his preferential right until after another has made his for such sale, and then make the offer, assert the right and demand the benefits of a statute with which he has not complied.

In accord are *Armijo v. Via Development Corporation*, 81 N.M. 262, 466 P.2d 108 (1970); *Greene v. Esquibel*, 58 N.M. 429, 272 P.2d 330 (1954); *Belmore v. State Tax Commission*, 56 N.M. 436, 245 P.2d 149 (1952); *Lawson v. McKinney*, 54 N.M. 179, 217 P.2d 258 (1950); and *Turner v. Sanchez*, 50 N.M. 15, 168 P.2d 96 (1946).

It is fundamental that Jackson must recover upon the strength of his own title or not at all. *Morris v. Ross*, 58 N.M. 379, 271 P.2d 823 (1954); *Eager v. Belmore*, 53 N.M. 299, 207 P.2d 519 (1949); *N. M. Realty Co. v. Security I. & D. Co.*, 27 N.M. 664, 204 P. 984 (1921); *Union Land and Grazing Co. v. Arce*, 21 N.M. 115, 152 P. 1143 (1915). In *New Mexico Realty*, supra, this court as early as 1921 stated that the above principle "is settled beyond further controversy." Jackson's main effort has been directed toward proving the invalidity of Hartley's title. Such proof is immaterial since Jackson has the burden first to establish his own right to the property.

The statutory right to repurchase is not to be considered a vested property right in any event under the New Mexico cases. *State v. Thomson*, supra; *Yates v. Hawkins*, 46 N.M. 249, 126 P.2d 476 (1942); *Hood v. Bond*, 42 N.M. 295, 77 P.2d 180 (1938).

This being a quiet-title suit, the interest claimed by Jackson must be an interest in the title. *Rock Island Oil and Refining Company v. Simmons*, 73 N.M. 142, 386 P.2d 239 (1963); *Holthoff v. Freudenthal*, 22 N.M. 377, 162 P. 173 (1916). The variation between the relief prayed for by Jackson and the disposition of the issues made by the trial judge must be noted. Jackson sued to quiet the title in himself. The judgment showed that title was found to be in the State. The relief given Jackson was the right to repurchase under §§ 72–8–31 and 72–8–32, N.M.S.A.1953. Jackson had long since lost that right.

Considering all conceivable theories, it is eminently clear that Jackson has no right whatsoever to the property in question for the reason that neither he nor his predecessors in title took any action to repurchase the lots within the statutory period. Any right that he or his predecessors had was extinguished as of January 20, 1966, which was two years after the Valencia County treasurer issued a tax deed to the State of New Mexico covering the three lots, since Jackson filed no application to repurchase in advance of the one filed by Hartley, did not contest Hartley's deed from the State within the statutory time, and there was no fraud shown which would justify cancellation of the sale to Hartley. Jackson is a stranger to the title and is entitled to no relief.

6. Hartley contends that he is entitled to a decree vesting title in him in fee simple to the lots in question. We hold that he has no right to such relief. His pleadings did not request such relief, but only asked for a decree in ejectment and for damages. There was no proof at all supporting either one of these claimed rights. In any event, since the two claims are not related to the title to the premises, and the suit to quiet title is a statutory proceeding, the counterclaim was not within the purview of the quiet-title statute, § 22–14–1, N.M.S.A.1953. *Lanehart v. Rabb*, 63 N.M. 359, 320 P.2d 374 (1957); *Clark v. Primus*, 62 N.M. 259, 308 P.2d 584 (1957); *Security*

Investment & Development Co. v. Capital City Bank, 22 N.M. 469, 164 P. 829 (1917). Furthermore, the issues in the counterclaim were not preserved by proper requests for findings and conclusions and were not properly raised on appeal; thus, they will be considered by this court as having been abandoned by Hartley.

The complaint of Jackson and the counterclaim of Hartley shall be dismissed.

IT IS SO ORDERED.

McMANUS, SOSA and PAYNE, JJ., concur.

564 P.2d 997

Elsie FERNANDEZ, Plaintiff-Appellant,

v.

LLOYD McKEE MOTORS, INC., a New Mexico Corporation, and Ernest H. Bisaillon, Defendants-Appellees.

No. 2719.

Court of Appeals of New Mexico.

May 3, 1977.

Leonard J. DeLayo, Jr., Toulouse, Krehbiel & DeLayo, P. A., Albuquerque, for plaintiff-appellant.

J. E. Casados, Gallagher, Casados & Patten, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

The issue to determine is whether Ernest H. Bisaillon (Ernest) was acting within the scope and authority of his employment at the time of an accident in which plaintiff was injured. Summary judgment was granted Lloyd McKee Motors, Inc. (Lloyd McKee) and plaintiff appeals. We affirm.

On a Saturday, the day of the accident, Ernest was out trying to make sales for Lloyd McKee. He travelled in a Lloyd McKee van to Mountainair, Socorro, Truth or Consequences, and then he intended to head on back home. However, he stopped in Socorro at a bar to have a sandwich and a few drinks. He remained for two or three hours and had six or seven drinks of Vodka, water and lime twist. It was pretty late when he left Socorro, hours after he ate the sandwich. He went from Socorro directly to his residence in Albuquerque to get some money for a meal. Then he got back into the van, began driving to a place to eat, and had no customers to call on. He

travelled west on Central Avenue and the accident occurred. Thereafter Ernest pled guilty to driving while intoxicated. Prior to the date of the accident, Ernest never used the van for personal reasons. He used it only for trying to make sales or deliver parts. He had no authority to use the van for personal reasons and no authority to drive the van after he had been drinking alcoholic beverages.

Plaintiff relies on facts unrelated to the master-servant relationship at the time of the accident, such as Ernest, (1) had a general area to cover, (2) made trips on Saturdays, (3) had full use of the vehicle, (4) had been trying to make sales, (5) stopped for a meal, (6) his supervisor knew he was trying to pick up customers, (7) he had no fixed hours of work, (8) he had forgotten to get a receipt for reimbursement, and (9) he was reimbursed weekly for gas. From these facts, plaintiff seeks to create a cobweb that ends in "acting within the scope and authority of employment and with the consent of the employer."

Alfred the Great, King of Wessex, successfully resisted the Danish invaders after watching the spider weave its cobweb to an end. Plaintiff's evidence falls short of the finished cobweb to successfully seek relief in this case. Ernest had no authority to drive the van to and from meals in a state of intoxication. His deviation aimed at reaching some specific personal objective. He was not using the van with knowledge and consent of the master, and it was not used within the scope of employment to facilitate the master's business. *Morris v. Cartwright,* 57 N.M. 328, 258 P.2d 719 (1953); *Miller v. Hoefgen,* 51 N.M. 319, 183 P.2d 850 (1947).

Appeals of this nature should be avoided.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

564 P.2d 998

STATE of New Mexico,
Plaintiff-Appellee,

v.

Eloisa CRESPIN, Defendant-Appellant.

No. 2823.

Court of Appeals of New Mexico.

May 3, 1977.

Jan A. Hartke, Chief Public Defender, Santa Fe, William H. Lazar, Asst. Appellate Defender, Santa Fe, Alice Hector, Dist. Public Defender, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Dennis Murphy, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant pled guilty to two fourth degree felonies. The sentences were suspended and defendant was placed on probation. Her appeal asserts that the length of her probation is greater than the maximum time authorized by statute. We agree.

After orally imposing sentence, the trial court stated: "I will suspend imposition of sentence on each of these charges and put you on probation for a period of three years on each count. That's a total of six years probation." These remarks by the trial court differ somewhat from the written sentence which was imposed. Because these remarks do not amount to a final judgment, we do not consider them further. *State v. Hatley*, 72 N.M. 377, 384 P.2d 252 (1963); *State v. Morris*, 69 N.M. 89, 364 P.2d 348 (1961); *State v. Atencio*, 85 N.M. 484, 513 P.2d 1266 (Ct.App.1973).

The final judgment entered by the trial court sentenced defendant to a penitentiary term of not less than one nor more than five years for each count. The judgment states: "Execution of sentence is suspended and Defendant is ordered to be placed on probation for Six (6) Years . . . ."

The State views this judgment as imposing consecutive sentences with probation for a period of three years on each count. On the basis of this view, the State argues that under § 40A-29-17, N.M.S.A.1953 (2d Repl.Vol. 6) the total probation period of five years applies to each crime and that consecutive sentences of probation are authorized. Defendant contends that under § 40A-29-17, supra, consecutive terms of probation exceeding five years are not authorized. See *Fox v. United States*, 354 F.2d 752 (10th Cir. 1965); Compare, however, *United States v. Lancer*, 508 F.2d 719 (3rd Cir. 1975). We do not answer these contentions because they are based on a mistaken view of the judgment.

The final judgment of the trial court does not state whether the sentences were to be served concurrently or consecutively. Absent such a statement, the sentences are to be served concurrently. *State v. Padilla*, 85 N.M. 140, 509 P.2d 1335 (1973); *Swope v. Cooksie*, 59 N.M. 429, 285 P.2d 793 (1955); *Deats v. State*, 84 N.M. 405, 503 P.2d 1183 (Ct.App.1972).

The final judgment suspends "execution of sentence" without indicating whether the suspension applied to one or both sentences. In the absence of express limitation, the suspension applied to both sentences. Section 40A-29-16, N.M.S.A. 1953 (2d Repl.Vol. 6).

The six years probation period stated in the final judgment is not divided between the two sentences. We have a six-year probation period applicable to two fourth degree felony sentences being served concurrently.

The maximum sentence for a fourth degree felony is a penitentiary term of five years. Section 40A-29-3, N.M.S.A.1953 (2d Repl.Vol. 6). Probation cannot "exceed

that of the maximum sentence prescribed by law for the commission of the crime for which he was convicted . . . ." Section 40A–29–18(E), N.M.S.A.1953 (2d Repl. Vol. 6). See also § 40A–29–19(B), N.M.S.A. 1953 (2d Repl.Vol. 6).

The maximum probation term for each of defendant's fourth degree felonies is five years. *State v. Baca*, 90 N.M. 280, 562 P.2d 841 (Ct.App.) decided March 22, 1977. The six-year probation imposed by the trial court is unauthorized. The probation period must be corrected to state an authorized period of probation. Once a corrected probation period is imposed, defendant will not serve more than the five-year total stated in § 40A–29–17, supra, because the sentences are being served concurrently.

With the exception of the probation period, the judgment and sentences are affirmed. The probation period of six years is reversed. The cause is remanded with instructions to enter a corrected sentence imposing a probation period not to exceed five years.

IT IS SO ORDERED.

HENDLEY and SUTIN, JJ., concur.

564 P.2d 1000

STATE of New Mexico, Plaintiff-Appellee,

v.

Dee WILBURN, Defendant-Appellant.

No. 2863.

Court of Appeals of New Mexico.

May 3, 1977.

John Paul Gallegos, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Ernesto J. Romero, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of fraud in violation of § 40A–16–6, N.M.S.A. 1953 (2d Repl. Vol. 6), defendant appeals. The dispositive issue involves an amendment to the indictment at the close of the State's case-in-chief, and the refusal of the trial court to grant defendant's motion for a continuance after the amendment was granted.

The indictment charged defendant with intentionally misappropriating money in an amount over $2,500.00 by means of fraudu-

lent conduct. The indictment charged that the offense occurred on or about May 10, 1976.

The evidence introduced during the State's case covered the gamut of the dealings between defendant and the car dealership involved. This evidence is to the effect that defendant rented a Ford Maverick upon a promise to pay, that defendant did not pay and continued to use the Maverick through false representations. The evidence also went into the dealings for a lease of a Ford Granada, a draft which took an inordinately long time to go through banking channels before being returned unpaid, and a check on which payment was stopped. The amount of defendant's indebtedness to the car dealership was also litigated. This evidence came in without objection from either party, and there is no claim that any evidence was improperly admitted.

At the close of the State's case, defendant moved for a directed verdict. One of the grounds asserted by defendant was that there was no evidence that any money had been misappropriated. The State contended that the car dealer had suffered a loss of profit in dealing with defendant and lost profits amounted to a misappropriation of money. When the trial court inquired concerning certain items of evidence, the State stated that if the trial court was inclined to grant defendant's motion then the State desired to amend the indictment to conform to the evidence.

After argument of counsel and over defendant's objection, the trial court granted the State's motion to amend. As amended, the charge against defendant was that he intentionally misappropriated the use of the Ford Maverick between May 13 and July 21, 1976 and that the value of this use was over $100.00 but less than $2,500.00. Defendant then moved for a continuance which the trial court denied.

The amended indictment changed the thing misappropriated from money to use of a car, changed the date of the offense, and changed the value of the item misappropriated. Defendant asserts that with these changes a different offense was charged in violation of R.Crim.P. 7(a). We do not answer this contention because after granting this amendment, the trial court erred in denying defendant's motion for a continuance.

R.Crim.P. 7(c) states in part:

> "The court may at any time allow the indictment or information to be amended in respect to any variance to conform to the evidence. If the court finds that the defendant has been prejudiced by an amendment, the court may postpone the trial or grant such other relief as may be proper under the circumstances."

In seeking a continuance, defendant asserted that the amendment prejudiced him because his defense had been directed to the charge of misappropriation of money. Defendant claimed he was not prepared to defend against the amended charge, that to conduct such a defense other evidence would be needed. Defendant specifically mentioned telephone bills to substantiate when he made certain telephone calls to the car dealership and a witness that overheard defendant's end of one of the telephone conversations. See *State v. Lunn*, 80 N.M. 383, 456 P.2d 216 (Ct.App.1969).

The granting of a continuance is within the trial court's discretion; the trial court's ruling on a motion for a continuance is reviewable only for an abuse of discretion. Discretion was abused in this case. Prior to trial, defendant had no notice that he must defend against a charge of misappropriating the use of a car. While evidence of such a misappropriation came in without objection, see *State v. McKay*, 79 N.M. 797, 450 P.2d 435 (Ct.App.1969), nevertheless, defendant was not charged with nor defending against the misappropriation of use of the car when the evidence was admitted. Once the indictment was amended, defendant's uncontradicted showing is that relevant evidence was available to defend against the amended charge. The trial court was informed as to the substance of this evidence. Compare *State v. Jara-*

millo, 88 N.M. 60, 537 P.2d 55 (Ct.App.1975); *State v. Brewster*, 86 N.M. 462, 525 P.2d 389 (Ct.App.1974). In these circumstances, failure to grant the continuance denied defendant the opportunity to defend against the amended charge.

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

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

564 P.2d 1321

STATE of New Mexico,
Plaintiff-Appellee,

v.

Franklin HARRISON, Jr.,
Defendant-Appellant.

No. 10726.

Supreme Court of New Mexico.

May 19, 1977.

Rehearing Denied June 8, 1977.

Pickard & Singleton, Santa Fe, for defendant-appellant.

Theodore E. Lauer, Santa Fe, for amicus curiae.

Toney Anaya, Atty. Gen., Albert V. Gonzales, Don Montoya, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Justice.

Defendant Franklin Harrison, Jr. was indicted for felony murder, kidnapping and rape. The jury convicted him of false imprisonment and felony murder. Defendant was sentenced to one to five years and to death. Defendant appeals from the felony murder conviction and the death sentence.

The facts pertinent to this appeal are as follows: Defendant and Emmett Cunejo, co-indictee, were driving about in the vicinity of Gallup, New Mexico on May 2, 1975. They had two rifles, a handgun, and ammunition with them to go prairie dog hunting. After having done some shooting and target practicing, at about six in the evening they came upon the victim, Susan Brown, who was walking alongside the highway. They decided to stop and to give her a ride. What happened after this event varies in the statements, deposition, and testimony given. Either Mrs. Brown ran away, was caught and tripped by the defendant, was struck in the mouth, and was dragged back to the car, or she resigned herself to going along with them but tripped and fell to the ground, causing her lips and mouth to bleed. The medical examiner testified that Mrs. Brown had sustained a hard blow to the mouth. They then drove to a remote area known as the Hog's Back near Gallup. Having been told to "take a walk," Cunejo left the defendant and Mrs. Brown in the car and practiced shooting with one of the rifles far from the car.

Cunejo returned after some time, picked up a beer and more ammunition, left, returned, got in the back seat, noticed the handgun, and picked it up. He pulled the trigger a few times, thinking the gun was unloaded. A shot went off and Mrs. Brown, who was in the front seat with defendant, slumped in the defendant's lap, the bullet having gone through her head, probably killing her instantly. Defendant and Cunejo panicked. They spent the next few days trying to dispose of the cadaver, getting drunk, and destroying evidence. During a transfer of the cadaver to another place, they ran what appeared to be a road block and hit a car in the process, whereupon they threw the cadaver out of the car. They were arrested shortly thereafter.

On May 10 Emmett Cunejo gave his statement to the police concerning the events of May 2. On May 12 he gave another, differing statement. On August 9 Emmett Cunejo was deposed and he related still another version of the May 2 events. At that deposition Cunejo stated he was coerced and tricked into giving his May 10 and May 12 statements. On October 29 a second deposition was taken of Mr. Cunejo, where he again claimed he was coerced and tricked. While incarcerated, Emmett Cunejo sent a letter to the defendant, which was intercepted. It related another but basically similar to the depositions' version of the events.

Prior to trial, defendant moved for a polygraph examination and requested the State to pay for it. The motion was granted. Defendant failed the polygraph test.

At trial, Emmett Cunejo, who had pled guilty to kidnapping and second-degree murder, testified on behalf of the State. The State then proceeded to impeach his testimony by using his prior statements and the letter, thereby presenting its version of the circumstances leading to Mrs. Brown's death. The State's version was that the defendant sought to force the woman into the car by intimidation (a rifle was sticking out of the car), tripped and punched her when she ran away, that later the defendant had sexual relations with Mrs. Brown against her will, and that finally Cunejo and the defendant killed her to silence her. The medical evidence presented was to the effect that a gunshot wound had caused Mrs. Brown's death, that the other injuries were caused by the cadaver being thrown out of the car, with the exception of some facial injuries which were apparently caused by a forcible blow, that there was no evidence of forcible sexual intercourse, and that the acid phosphatase found in the vagina was consistent with sexual relations three days prior to her death. Mrs. Brown's husband testified that he had intercourse with his wife three days before her death.

Defendant Harrison took the stand and testified to essentially the same story Cunejo had told. The trial court then allowed the State to impeach his testimony on the basis of the failed polygraph examination. At the close of the trial, defendant submitted on his own a jury instruction on

false imprisonment. The jury returned a verdict of guilty as to felony murder and false imprisonment, but it found the defendant not guilty of rape and kidnapping.

On appeal defendant argues that the felony of false imprisonment cannot be used for a conviction of felony murder and that the testimony of the polygrapher was improperly admitted as evidence.

The English common law origin of felony murder can be traced back to an early, relatively simple idea: any homicide committed during the perpetration or the attempted perpetration of a felony constituted felony murder, and death was the punishment. Since death also was the punishment for most felonies, it did not matter whether the defendant was put to death for committing the felony or for the homicide. Section 40A–2–1, N.M.S.A.1953 defines murder as: "[T]he unlawful killing of one human being by another with malice aforethought, either express or implied, by any of the means with which death may be caused." Section 40A–2–1(A)(3) defines felony murder: "Murder in the first degree consists of all murder perpetrated: . . . (3) in the commission of or attempt to commit any felony; . . . ." Despite the broad wording of the statute, felony murder has evolved to the point that today various limitations have been placed on it. Depending on the jurisdiction, those limitations, both statutory and judicial, include the following: (1) there must be a causal relationship between the felony and the homicide, (2) the felony must be independent of or collateral to the homicide, and (3) the felony must be inherently or foreseeably dangerous to human life. See Annot., 50 A.L.R.3d 397 (1973); Annot., 40 A.L.R.3d 1341 (1971); Crum, "Causal Relations and the Felony-Murder Rule," 1952 Wash.U. L.Q. 191; Arent, "The Felony Murder Doctrine and its Application under the New York Statutes," 20 Cornell L.Q. 288 (1935).

The appellant argues that there was no causation in this case. He argues there was no causal connection between the false imprisonment and the homicide, thus felony murder does not apply. The traditional test of felony murder is that the homicide must be so clearly connected to the felony as to fall within the *res gestae* thereof. See *State v. Flowers,* 83 N.M. 113, 489 P.2d 178 (1971); *Nelson v. Cox,* 66 N.M. 397, 349 P.2d 118 (1960); *State v. Nelson,* 65 N.M. 403, 338 P.2d 301 (1959), cert. denied, 361 U.S. 877, 80 S.Ct. 142, 4 L.Ed.2d 115 (1959). It was further elucidated in *State v. Adams,* 339 Mo. 926, 933, 98 S.W.2d 632, 637 (1936):

> It is held in many jurisdictions, including Missouri, that when the homicide is within the *res gestae* of the initial crime and is an emanation thereof, it is committed in the *perpetration* of that crime in the statutory sense. Thus it has been often ruled that the statute applies where the initial crime and the homicide were parts of one continuous transaction, and were closely connected in point of time, place and causal relation . . . .

Professor Crum has pointed out some of the problems with the *res gestae* rule:

> On the surface, and at first reading, this would appear to be a fairly clear and explicit statement of an easy rule to follow. But consider for a moment what the court is actually saying: if the death occurred during the course of a criminal transaction, it is murder. The death occurred during the course of criminal transaction if it was closely related in point of time and place *and if there was a causal relation.*
>
> Such a statement, it is submitted, does not solve the problem. It does not aid analysis to say that a connection between a felony and a homicide exists if the homicide fell within the *res gestae* of the crime, and that the homicide fell within the *res gestae* of the crime if a connection between the homicide and the crime existed. The essential nature of the connection is not defined by such logic. 1952 Wash.U.L.Q. at 196.

Clearly a more exact definition of causation is required. We define it as follows: causation must be physical; causation consists of those acts of defendant or

his accomplice initiating and leading to the homicide without an independent force intervening,[1] even though defendant's or his accomplice's acts are unintentional or accidental. Causation in the final analysis primarily deals with the *actus reus* of the crime.

Our felony murder statute conclusively presumes that any homicide occurring during any felony is first-degree murder. But the *mens rea* of first-degree murder requires malice aforethought or a greatly dangerous act without regard to human life. To presume conclusively that one who commits *any* felony has the requisite *mens rea* to commit first-degree murder is a legal fiction we no longer can support. In felony murder cases where the felony is a first-degree felony such a presumption is appropriate, but not where the felony is of a lesser degree. This presumption is inappropriate today for lesser-degree felonies where moral, social, and penal considerations dictate that criminal liability should be imposed according to moral culpability. Thus, we now adopt an additional test, the natural and probable consequences test, first announced in *Regina v. Serne,* 16 Cox C.C. 311 (1887), and which has today evolved into what is called the inherently or foreseeably dangerous to human life test. Of the lesser-degree felonies only those known to have a high probability of death may be utilized for a conviction of first-degree murder. Assuming the *actus reus* condition is met, the *mens rea* of one who is committing a felony which is inherently or foreseeably dangerous to human life is sufficient to justify convicting a defendant of felony murder and sentencing him to death or life imprisonment.

Today the courts apply this test in two differing manners: (1) the felony is examined in the abstract to determine whether it is inherently dangerous to human life, *People v. Satchell,* 6 Cal.3d 28, 489 P.2d 1361, 98 Cal.Rptr. 33, 489 P.2d 1361 (1971), 50 A.L.R.3d 383 (1973); *People v. Williams,* 63 Cal.2d 452, 47 Cal.Rptr. 7, 406 P.2d 647 (1965), or (2) both the nature of the felony and the circumstances surrounding its commission may be considered to determine whether it was inherently dangerous to human life. *State v. Thompson,* 280 N.C. 202, 185 S.E.2d 666 (1972); *Jenkins v. State,* 230 A.2d 262 (Del.Sup.1967). We adopt the latter test. Professor Perkins stated in R. Perkins, Criminal Law 34 (1957):

> One who is perpetrating a felony which seems not of itself to involve any element of human risk, may resort to a dangerous method of committing it, or may make use of dangerous force to deter others from interfering. If the dangerous force thus used results in death, the crime is murder just as much as if the danger was inherent in the very nature of the felony itself.

In the final analysis this is for the jury to decide in each case, subject to review by the appellate courts.

In summary, in a felony murder charge, involving a collateral lesser-degree felony, that felony must be inherently dangerous or committed under circumstances that are inherently dangerous. In cases where the collateral felony is a first-degree felony, the *res gestae* test shall be used. In view of this decision, N.M.U.J.I. Crim. 2.04 [2d Repl. Vol. 6, N.M.S.A.1953 (Supp.1975), at 297] will have to be altered to conform herewith.

Second, appellant raises the issue that an indigent who requests to take a polygraph test at public expense should have the right to decide unilaterally whether the results may be used as evidence. Appellant sought a polygraph examination and the trial court approved it. Afterwards the defense counsel informed the State that the examination had been conducted and

1. A policeman who shoots at an escaping robber but misses and kills an innocent bystander would be considered a dependent, intervening force, and the robber would be criminally liable for felony murder under this test. Lightning striking and killing the bystander would be an independent, intervening force.

that the results thereof would not be disclosed to the State. Thereupon the State moved for disclosure pursuant to N.M.R. Crim.P. 28 [§ 41–23–28, N.M.S.A.1953 (Supp.1975)] and gave notice that it would call the polygraph examiner, Mr. Galbreth, as a witness for the State. Appellant objected and the trial court ruled that the examiner could not be called during the State's case in chief. The trial court later ruled that if appellant testified in his own behalf, it would then consider whether the state could call the examiner. After the appellant testified on his own behalf, the trial court ruled that the State could examine Mr. Galbreth over the objection of the defense counsel.

Appellant and amicus curiae, the New Mexico Criminal Defense Lawyers Association, argue that a defendant should have control of the use of the results of the polygraph examination under the theories of (1) privileged communications between attorney and client, (2) attorney work product, and (3) denial of due process and the equal protection of the laws. We dispose of the question before us on the following grounds. We feel that the rationale of *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) applies in the instant case. There, the United States Supreme Court held that a statement inadmissible against a defendant in the prosecution's case in chief because of lack of the procedural safeguards required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack the credibility of defendant's trial testimony. That court stated:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. See *United States v. Knox,* 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275 (1969); cf. *Dennis v. United States,* 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.
>
> The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

401 U.S. at 225–226, 91 S.Ct. at 646.

If the other prerequisites of polygraph examinations are satisfied, we hold that the statements made to the polygrapher and the results as to the truthfulness of those statements may be used for impeachment purposes. We uphold the limitation set by the trial court in this case: the results of a polygraph test may be used to impeach a defendant who takes the stand.

Defendant's conviction of felony murder is hereby set aside with directions to the trial court to order a new trial consistent with this opinion.

EASLEY and PAYNE, JJ., concur.

McMANUS, C. J., and FEDERICI, J., dissent.

564 P.2d 1326

The CITY OF SANTA FE, a Municipal Corporation organized under the laws of the State of New Mexico, Plaintiff-Appellee,

v.

Jose Benito VELARDE et al., Defendants-Appellants.

The CITY OF SANTA FE, a Municipal Corporation organized under the laws of the State of New Mexico, Plaintiff-Appellee,

v.

Ray Victor ARMIJO et al., and Jose Benito Velarde, Defendants-Appellants.

Nos. 11084 and 11091.

Supreme Court of New Mexico.

May 23, 1977.

Rehearing Denied June 8, 1977.

William W. Gilbert, Santa Fe, for defendants-appellants.

Bob D. Barberousse, City Atty., Harry S. Connelly, Jr., Sp. Asst. City Atty., Santa Fe, for plaintiff-appellee.

OPINION

MAURICE SANCHEZ, District Judge.

In November, 1973, the City of Santa Fe (City), in its corporate and proprietary capacities, brought suit in the district court of Santa Fe County to quiet title to certain property. The complaint named Jose Benito Velarde (Velarde) and several others as party defendants.

Velarde answered, pleading laches, limitations concerning lands granted by the United States, adverse possession for a period of ten years under color of title with payment of taxes and a general denial. Following Velarde's answer, the City moved for summary judgment against him upon the alternative grounds "that Santa Fe County Cause No. 46215 is res judicata upon all issues in this case or that Santa Fe County Cause No. 46215 collaterally estops the Defendant Jose Benito Velarde from defending this action."

Cause No. 46215 on the docket of the Santa Fe County District Court (first case) was an action previously filed by Velarde and his wife, claiming to be the owners in fee simple and in actual possession of certain described lands, which lands for all practical purposes are the same as the land involved in the suits to quiet title which are the subject matter of this appeal. It appears that in the first case Velarde had sought a quitclaim deed to the lands in question from the City of Santa Fe under a patent issued by the United States of America to the City on February 16, 1901, pursuant to the act of Congress approved on April 9, 1900, entitled "an Act to settle the Title to Real Estate in the City of Santa Fe, New Mexico." Under the Act, the City was granted the land "in Trust for the benefit of all persons claiming title to their individual holdings of real estate . . . by actual possession or under color of title for the period of ten years prior to the passage" of the legislation and further ordered "to execute proper deeds of quitclaim to the persons entitled thereto." Velarde's application for such a deed apparently having been previously turned down without a hearing, he alleged in the first case among other things that the Act and the city ordinance implementing it did not provide for an adequate opportunity to be heard, were subject to unequal enforcement, and thus should be declared unconstitutional. The suit further alleged that the City had a conflict of interest with respect to appellant inasmuch as the land was being claimed by the City both in its proprietary and fiduciary capacities, and that the Mayor, Clerk, and other City agents had refused appellant's application for a quitclaim deed without properly processing it. The City filed a motion to dismiss challenging (1) the court's jurisdiction, (2) plaintiffs' capacity to sue, (3) the sufficiency of the claim stated as a subject for relief, (4) the lack of an (unnamed) indispensable party, and (5) the claim that plaintiffs were taking fatally inconsistent positions in the same case. The district court entered an order dismissing the complaint with prejudice unless Velarde, within twenty days, amended his complaint to seek mandamus or quiet title or both. The order specifically recited that by stipulation of the parties "the Complaint on file herein does not assert on behalf of plaintiffs a Quiet Title action against the Defendant. . . ." Velarde did not avail himself of the leave to amend and the first case stood dismissed.

This appeal is taken from the district court's order granting the City's motion for summary judgment on the grounds of res judicata and collateral estoppel predicated upon the order dismissing the first case with prejudice. The cases are docketed as Nos. 11084 and 11091 on the docket of this court and the legal issues in both cases being identical in all respects, the court has considered them together.

The doctrines of res judicata and collateral estoppel by judgment involve different and distinct principles. Res judicata in its proper application operates where there are identical parties, causes of action,

subject matter, and capacities in the two cases; collateral estoppel by judgment arises where the causes of action are different but some ultimate facts or issues may necessarily have been decided in the previous case. Stated another way, where the causes of action in the cases are identical in all respects, the first judgment is a conclusive bar upon the parties and their privies as to every issue which either was or properly could have been litigated in the previous case. But absent the identity of causes of action, the parties are precluded from relitigating only those ultimate issues and facts shown to have been actually and necessarily determined in the previous litigation. *Atencio v. Vigil*, 86 N.M. 181, 521 P.2d 646 (1974); *Miller v. Miller*, 83 N.M. 230, 490 P.2d 672 (1971); *Curtis Manufacturing Company v. Barela*, 76 N.M. 392, 415 P.2d 361 (1966); *Terry v. Pipkin*, 66 N.M. 4, 340 P.2d 840 (1959); *Williams v. Miller*, 58 N.M. 472, 272 P.2d 676 (1954); *McCarthy v. Kay*, 52 N.M. 5, 189 P.2d 450 (1947); *Paulos v. Janetakos*, 46 N.M. 390, 129 P.2d 636 (1942); *Flint v. Kimbrough*, 45 N.M. 342, 115 P.2d 84.

In *Paulos*, supra, we reviewed the many cases on the subject and then said:

> As this action and the equity suit have identical parties, but are brought upon different claims or demands, the judgment in the latter operates as an estoppel only as to the questions, points, or matters of fact in issue in that case which were essential to a decision, and upon the determination of which the judgment was rendered. (Citations omitted.)
>
> 46 N.M. at 393, 129 P.2d at 637.

The City argues that the "causes", "rights asserted by appellant", and "issues" in the previous and the present case are "the same" and in support of its argument points to the following facts none of which are disputed: (1) the first and second cases involve some or all of the same land; (2) appellant was plaintiff in the first case and defendant in the present case; (3) appellant had counsel in both cases; (4) in the first case appellant was given the opportunity to amend his pleadings seeking mandamus or quiet title and chose not to do so; (5) appellant had a right to appeal the dismissal of the first case and did not do so, and (6) the dismissal of the first case was "with prejudice."

Admittedly, all of the propositions asserted are true. None of these propositions, however, or any combination thereof meet the test for the application of the doctrines of res judicata or collateral estoppel by judgment under the rules enunciated in *Paulos v. Janetakos*, supra, and the other cases cited.

In our view, the fact that Velarde was given the opportunity to amend his pleadings so as to change his cause of action is not the same as to say that the causes of action were identical. The rule that a prior final decision determines not only what was in issue but also what might have been put in issue contemplates existing identical causes of action and not what the causes of action might have been after theoretical amendments to the pleadings which in fact were never made. The case of *Gilman v. Osborn*, 78 N.M. 498, 433 P.2d 83 (1967), cited by the City, involved identical causes of action and, therefore, is not in point.

The causes are reversed and remanded to the trial court with instructions to overrule the motion for summary judgment and to proceed accordingly.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

564 P.2d 1329

STATE of New Mexico, Plaintiff-Appellee,

v.

Jackie SLAYTON, Defendant-Appellant.

No. 2775.

Court of Appeals of New Mexico.

May 10, 1977.

Leon Taylor, Albuquerque, Lynn Pickard, Sarah M. Singleton, Pickard & Singleton, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Donald D. Montoya, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of second degree murder. We summarily reversed the conviction by memorandum decision in *State v. Slayton,* (Ct.App.) No. 2584, decided July 20, 1976. We reversed because the showing before this Court was that an arrangement between counsel for defendant and the prosecutor prevented the defendant from having a meaningful trial. See *State v. Romero,* 86 N.M. 244, 522 P.2d 579 (1974).

After the reversal by this Court, defendant was given a new trial. A witness who testified at the first trial died prior to the new trial. At the new trial, over defendant's objection, the State introduced the testimony given at the first trial by the deceased witness. Defendant has again been convicted of second degree murder. We again reverse. In doing so we consider only one of the issues presented by defendant. That issue, which is dispositive, is the fairness of using the testimony of a deceased witness given at a trial conducted by counsel pursuant to an arrangement between counsel which deprived the trial of meaning.

Having reviewed (a) the proceedings at the first trial, (b) the showing before this Court in connection with the appeal from the first conviction, and (c) the showing made at the evidentiary hearing prior to the new trial which sought to suppress the deceased witness's prior testimony, we

agree with the defendant. " . . . [T]he role the State played in depriving defendant of a fair trial at the first trial bars admission" of the testimony of the deceased witness. See *State v. Halsey,* 34 N.M. 223, 279 P. 945 (1929); *State v. Plant,* 86 N.M. 2, 518 P.2d 961 (Ct.App.1973).

What was the role played by the State?

The showing to this Court in the first appeal was that Solsbery, the defense attorney, had represented defendant's father in civil matters for at least fifteen years. After the killing, the father contacted Solsbery, who in turn contacted District Attorney Cathey and informed Cathey that defendant was undergoing psychiatric evaluation at a hospital in Dallas, Texas.

On April 17, 1976, Solsbery and Cathey took the deposition of the psychiatrist. After the deposition, Cathey agreed with Solsbery that defendant was insane. Cathey supplied Solsbery with a form of judgment used in another case in which the defendant was found not guilty by reason of insanity at the time of commission of the offense. Cathey advised Solsbery that Cathey was agreeable to entry of a similar judgment in defendant's case.

Solsbery and the father had discussed employing an attorney experienced in criminal law. After the April 17th agreement nothing was done about such a lawyer. In light of the agreement it was not necessary.

Three times subsequent to April 17, 1976, Cathey assured Solsbery that a judgment of insanity would be entered. 1. In early May, 1976 Cathey advised Solsbery by telephone that Cathey had discussed the case with Judge Snead and Judge Snead was agreeable to a judgment along the lines Solsbery and Cathey had discussed. (We interject that the record does not show Judge Snead agreed to anything; our concern is with Cathey's representation that Judge Snead had agreed to an insanity judgment.) 2. On May 13 or 14, 1976 after an informal pretrial conference before Judge Snead, Cathey told Solsbery not to worry, that Judge Snead would sign the proposed judgment. 3. On May 20, 1976 Cathey advised Solsbery that because of political commitments, Cathey would not appear for the hearing scheduled on May 21, 1976. Solsbery was advised that Assistant District Attorney Stagner would appear. However, " 'the name of the game is still the same' ".

Various exhibits supported the credibility of the above information which was presented to this Court by affidavit. One exhibit was the form of judgment supplied by Cathey, another was the form of judgment that Solsbery prepared, still another was an "outline" of the procedure Solsbery was to follow on May 21, 1976. Because of Solsbery's lack of recent experience in the criminal law, Solsbery obtained the assistance of attorney Fleming in preparing the outline. The outline listed various rights that were to be waived. The outline was shown to Stagner prior to the hearing. Stagner advised that arraignment could not be waived; Solsbery crossed off of the outline the notation to waive arraignment.

The first trial was on May 21, 1976. Judge Snead rejected the insanity defense and found defendant guilty. Defendant moved for a new trial, relying on the matters discussed above. Asserting that an agreed judgment was to be entered, defendant claimed he had been denied a fair trial because the agreement had not been kept. Although Cathey filed a written "consent" to a new trial, the motion was denied.

On the basis of the foregoing, this Court proposed summary reversal. The State filed a memorandum opposing summary reversal, contending we should not reverse before examining the record of proceedings before the trial court. However, the State did *not* contest the accuracy of any of the factual representations made to this Court. Accordingly, we summarily reversed. After the reversal, Judge Snead granted a new trial and recused himself.

Judge Reese was the judge for the new trial. Defendant moved to suppress use, at the new trial, of the testimony given by the deceased witness at the first trial. An evidentiary hearing was held; both Solsbery and Cathey testified.

Solsbery's testimony is entirely consistent with his affidavit to this Court. The evidentiary hearing developed additional information. The deposition of the deceased witness was taken on April 19, 1976. Solsbery neither prepared for the deposition nor cross-examined the witness. He did not do so because of the agreement with Cathey. The form of judgment which Solsbery prepared contained a provision that defendant would remain out of the state for a year. According to Solsbery, Cathey stated the provision "would take some of the heat off of him." Solsbery testified that after April 17, 1976 he engaged in no trial preparation and interviewed no witnesses. When Solsbery went to court on May 21, 1976, he went with the understanding that the only issue to be tried was defendant's sanity at the time of commission of the offense. Consistent with that understanding the only defense evidence at trial was the father's testimony and the deposition of the psychiatrist. Both went to the insanity defense.

Cathey's testimony varies somewhat from that of Solsbery. Cathey would not characterize his understanding with Solsbery as an agreement that a judgment of insanity would be entered. Cathey admitted that he thought Judge Snead would find defendant insane and admitted he would not have opposed such a judgment. Cathey agreed that he handed over the form of judgment which Solsbery used, but disagreed as to the reason he supplied the form. Cathey affirmed that after contacting Judge Snead in early May, 1976, he had the impression that Judge Snead would find defendant not guilty by reason of insanity but admitted that Judge Snead never made such a statement. Cathey failed to answer when asked whether, in early May, 1976, he advised Solsbery that Judge Snead would sign the proposed judgment. Cathey could not remember whether he assured Solsbery after the pretrial conference that Judge Snead would sign the proposed judgment. Cathey could not remember what he told Solsbery on May 20, 1976.

Cathey agreed that he was not to put on any expert testimony at the trial on May 21, 1976 and in fact did not. Cathey could not remember whether Solsbery told him that Solsbery would only prepare on the insanity issue. Cathey admitted he was shocked when Judge Snead rejected the insanity defense and found defendant guilty.

Although Cathey and Solsbery disagree as to an "agreed" judgment, the showing was uncontradicted that both counsel proceeded on the basis that a judgment of insanity would be entered and that counsel cooperated in the preparation of the judgment. It is uncontradicted that Solsbery did nothing toward preparing a defense. Cathey did not contradict Solsbery's testimony that after April 17, 1976 Cathey assured Solsbery three times that an insanity judgment would be entered.

Does the record of the trial on May 21, 1976 cast a different light on the dealings between Solsbery and Cathey? No. The State called ten witnesses; Solsbery did not cross-examine six of them. Cross-examination of one witness went only to the type of pickup truck in which a shell was found. Cross-examination of another witness brought out that on the evening prior to the killing the defendant was "irrational". Cross-examination of still another witness brought out that defendant and the deceased had a fight during the evening before the killing and the deceased got the best of the fight.

The most extensive cross-examination was of the deceased witness. This examination touches on a variety of topics—defendant's drinking, his fight with the deceased, defendant's temper, the State's grant of immunity to this witness, the witness's memory problems. Although various topics were touched on, none were developed. The cross-examination at best was cursory and consistent with Solsbery's asserted role-playing prior to a judgment finding defendant insane at the time of the offense.

N.M.Const., Art. II, § 18 states that no person shall be deprived of liberty without due process of law. Use of the deceased witness's first trial testimony at the new

trial violated this constitutional provision. The violation is established by the uncontradicted showing that at the first trial counsel proceeded under an arrangement which considered only the question of defendant's sanity, an arrangement that gave no consideration to defendant's guilt or innocence. To use the deceased witness's testimony concerning guilt would be fundamentally unfair because under the arrangement between counsel there was to be no meaningful inquiry concerning guilt. Such fundamental unfairness violates due process.

The conviction and sentence are reversed. The cause is remanded for a new trial. At this new trial, neither the deposition of the deceased witness nor the deceased's testimony is to be admitted as evidence.

IT IS SO ORDERED

HENDLEY, J., concurs.

SUTIN, J., specially concurs.

SUTIN, Judge (specially concurring).

I concur in the result.

Judge Wood's opinion reads like a Sherlock Holmes detective story in which an alleged murderer gets relief from a second degree murder conviction. The opinion is not based upon the claims of error raised by defendant on this appeal. Its conclusion arises out of righteous indignation, a strong feeling that results from a review of the mechanical formula that led to the conviction of defendant in the first and second trials. My feelings are also strong for reversal. My reasons differ.

"The process of judging, so the psychologists tell us, seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. A convenient analogy is the technique of the author of a detective story." Frank, Law and the Modern Mind, p. 100 (1936).

Those of us who have had long experience in the courtroom and ascend to the appellate court view the record below with a laser beam to detect the fairness or unfairness of a criminal trial. We perceive with the retina, not with a dictionary. We should not flyspeck in our examination of what goes on before and during trial. However, in our effort to see that the rights of persons accused of crime are protected, we should not overlook the fact that the people also have interests that should be protected. We must weigh in the balance the correlative rights of the defendant and the public.

This detective story began on January 21, 1976, in Roswell, New Mexico, when defendant allegedly shot and killed the deceased. For emergency reasons, A. D. Solsbery, an oil and gas lawyer, was employed to represent defendant prior to a criminal information being filed. The district attorney knew that Solsbery was not learned in criminal law and was not able to represent defendant in a criminal trial.

On April 1, 1976, the district attorney prepared a criminal information that accused defendant of first degree murder. The information was filed April 13, 1976. The district attorney accompanied Solsbery to Dallas, Texas, to take the deposition of Dr. Kindred, defendant's attending psychiatrist. It was taken on April 17, 1976. Thereafter, the district attorney and Solsbery agreed that defendant was not guilty by reason of insanity and a formal order was prepared to submit to the trial court.

On May 21, 1976, a hearing was held before the trial court. For some petty reason, the district attorney did not appear. He sent his assistant. The sole issue in the case was intended to be the mental competence of defendant, together with an order approved by the district attorney, that defendant was not guilty by reason of insanity. The district attorney told Solsbery he had conferred with the trial court on this matter. However, the district attorney failed to notify the trial court of this agreed arrangement.

Defendant was arraigned and pled not guilty, and not guilty by reason of insanity. A preliminary hearing and trial by jury were waived. Solsbery advised the court of defendant's evidence on the issue of insanity, and said " . . . in this connection, your honor, we would waive any hearing which would be necessary to determine the Defendant's sanity to understand the nature of these proceedings." The court said: "All right. I take it then, there is no issue for the Court, concerning his present capacity to stand trial."

Lo and behold! The court called the case for trial on first degree murder! Solsbery was not prepared to meet the challenge of a trial.

The State called as a witness Mike Hutchinson, 23 years of age.

At this "trial," Hutchinson testified that he had known defendant some seven or eight years before the alleged crime and had worked with him in the same employment. On the day of the alleged crime, he was with defendant in a bar and witnessed an arm wrestling match between defendant and the deceased. Defendant and Mike left the bar in defendant's pickup. Defendant got a shotgun and some shells, went back to the bar and waited for the deceased. Deceased left the bar, got into his car and drove to the south part of Roswell and stopped. Defendant and Hutchinson followed the deceased and when the deceased got out of his car, defendant shot him three times. This was the only direct evidence against defendant.

How strange that, at an agreed arrangement for a hearing before the court on defendant's mental competency, testimony of first degree murder was presented and defendant was convicted of second degree murder!

Hutchinson's testimony did not bear upon defendant's mental competency at the time of the alleged offense. However, the district attorney sought a conviction of defendant for first degree murder by any means at an agreed arrangement for an order of not guilty by reason of insanity. This was fundamental injustice and we recognized it. Not only did the district attorney fail in his duties as a representative of the public, but he knew that defendant was without adequate representation at a trial for first degree murder.

Defendant appealed to this Court. Defendant claimed fundamental error because (1) defendant was deprived of a fair, meaningful trial; (2) that the trial court did not make a valid determination of defendant's competency to stand trial; (3) that defendant did not make an intelligent and express waiver of jury trial; (4) that defendant's counsel was rendered ineffective by the negotiations and representations made; (5) that the trial court's decision on defendant's sanity was not supported by substantial evidence.

We proposed summary reversal. The State submitted a memorandum in opposition to summary reversal of no value and in a three-sentence Memorandum; we reversed. The trial judge recused himself and the second trial took place before a new judge and a jury.

Unfortunately, we did not meet the challenge of the first appeal. We did not write an opinion in which we could have determined the admissibility of Hutchinson's testimony on retrial. *In hasty decisions,* we often overlook matters of substance and create insuperable barriers to fairness and justice. We are often reversed by the Supreme Court. If we had met the challenge, defendant's second appeal might have been avoided.

On August 22, 1976, Hutchinson committed suicide. At the second trial, Hutchinson's prior testimony was used, over objections, to convict defendant of second degree murder. If this testimony were not used, defendant's conviction would have depended on circumstantial evidence. By denying the use of Hutchinson's prior testimony, we do not set the defendant free. We do place an additional burden on the district attorney to establish defendant's guilt beyond a reasonable doubt. The defense relies on an alibi that defendant was at home at the time of the alleged crime.

On this appeal, defendant raised two points.

(1) That the admission at the second trial of Hutchinson's testimony violated hearsay rules and the right of confrontation. This point is questionable.

(2) The conduct of the district attorney at the second trial deprived defendant of a fair trial. This point is superfluous.

At the second trial, defendant did not raise an issue that constitutional due process was violated. We must search for our own concepts of the law to determine the admissibility of Hutchinson's testimony.

Alfred the Great, King of Wessex, successfully resisted the Danish invaders after watching the spider weave its cobweb to an end. Judge Wood's opinion, like a spider, wove a cobweb to an end in the second trial by resorting to the mechanics of the first trial. Does it successfully resist the demands of the State and the public? Yes, but for reasons stated without authority to support it.

"Courts of review are dedicated to the protection of the constitution and devoted to the principle that 'Justice, Justice shalt thou pursue.' This court has the inherent power to prevent, fundamental injustice." *Saiz v. City of Albuquerque,* 82 N.M. 746, 749, 487 P.2d 174, 177 (Ct.App.1971) (Sutin, J., dissenting), overruled in *Galvan v. City of Albuquerque,* 87 N.M. 235, 531 P.2d 1208 (1975). "Ordinarily this court is content to examine the points here relied upon for reversal, if properly preserved at the trial, sustaining or overruling them. That is all appellants are entitled to as of right. But that does not limit the inherent power of this court to prevent fundamental injustice." *Gonzales v. Rivera,* 37 N.M. 562, 568–69, 25 P.2d 802, 805 (1933).

Fundamental injustice depends upon what the court believes its concept of justice to be. Justice does not mean "hang in haste and try at leisure". It means to be fair, to do the right thing, to shoot straight with the defendant; to give the Devil his due; to see justice done. "The time has come once again to remind each district attorney that he has a duty, not to seek conviction alone by any means. He has a duty to give the defendant a fair trial. Trial judges have the same duty." *State v. Quintana,* 86 N.M. 666, 673, 526 P.2d 808, 815 (Ct.App.1974) (Sutin, J., concurring in part and dissenting in part).

It is upon this basis that we must determine the admissibility of Hutchinson's testimony. We must recognize the general rule that former testimony of a witness is admissible where the witness testified at the former trial, was *fully examined and cross-examined,* and then died. Defendant was actually confronted with the witness in the first trial and cannot complain. *Mattox v. United States,* 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *State v. Tijerina,* 84 N.M. 432, 504 P.2d 642 (Ct.App.1972), opinion of Hernandez, J., adopted by the Supreme Court in *State v. Tijerina,* 86 N.M. 31, 519 P.2d 127 (1973); *State v. Moore,* 40 N.M. 344, 59 P.2d 902 (1936); *State v. Jackson,* 30 N.M. 309, 233 P. 49 (1925). We have gone so far as to hold that where objections were not made to the admissibility of the evidence in the former trial, the defendant is precluded from further objections as to its admissibility. *State v. White,* 61 N.M. 109, 295 P.2d 1019 (1956).

If we were to follow these rules of law, Hutchinson's testimony was admissible and we should affirm the conviction below.

Defendant seeks to avoid these rules of law by reference to Rule 804(b)(1) [§ 20–4–804(b)(1), N.M.S.A.1953 (Repl.Vol. 4, amended in Interim Supp.1976)]. This rule provides that where a witness is unavailable, his former testimony is admissible as an exception to the hearsay rule:

> . . . [I]f the party against whom the testimony is now offered . . . had an opportunity *and similar motive* to develop the testimony by . . . *cross . . . examination.* (Emphasis added)

Under this rule defendant's motive to develop testimony by cross-examination in the first trial must be similar to that motive in the second trial.

Defendant says "To be sure in the case at bar, the cause of action was the same in both cases." With this admission, the issues in both cases were the same. The motive would ordinarily be the same. But, defendant at the first trial sought only to substantiate his plea of not guilty by reason of insanity. Perhaps he had no motive to cross-examine the substance and credibility of Hutchinson's testimony. Perhaps the issues were not the same under the erroneous belief that insanity was the only issue and that a finding of insanity was assured defendant. There may be some merit to defendant's contention. But even if the contention is correct, defendant's attorney, an oil and gas lawyer, under the circumstances of this case, had no motive in cross-examination at the first trial.

In order to deny the admissibility of Hutchinson's testimony at the second trial, we must find some constitutional bases upon which to declare fundamental error or, a miscarriage of justice, or we must find that the trial court abused its discretion.

A hearing on defendant's motion to suppress Hutchinson's testimony was held before the second trial at which Solsbery and the district attorney testified. The trial court should have learned that defendant and his attorney were misled by the district attorney at the former trial; that it was a simulated trial; that defendant's attorney was not prepared to assist defendant; and that the defendant did not have adequate assistance of counsel. This is obvious. Preliminary examination and jury trial were waived by defendant. Hutchinson was not fully cross-examined. Objections were not made to Hutchinson's testimony, nor motions made to strike his testimony. Defendant and his attorney did not prepare for trial for first degree murder, and they were not, in effect, prepared. They were led to the precipice of a lofty mountain blindfolded, and the district attorney allowed defendant to step off to years of imprisonment, and allowed his attorney to have a conniption. The proceedings were so abhorrent that we granted a summary reversal after the first trial. The trial court, however, denied defendant's motion to suppress the testimony of Hutchinson.

Based upon the oral arguments made and briefs filed, I can recognize the reasons that led the trial court to deny defendant's motion. Generally speaking, former testimony of a deceased witness is admissible in a subsequent trial, so that hearsay rules and right of confrontation did not affect the thinking of the court.

In my opinion, defendant appeared without counsel at the first trial. Inexperienced attorneys in criminal trial practice are not *effective* legal defense counsel. Oil and gas attorneys are not *effective* criminal lawyers. Negligence trial attorneys are not *effective* tax attorneys. Commercial attorneys are not *effective* trial counsel.

The people of New Mexico adopted our Constitution. The people gave to defendants certain constitutional rights called the "Bill of Rights." A repetition of this "Bill of Rights" is unnecessary. The people of our country adopted a Constitution of the United States that contains amendments as the "Bill of Rights." The Constitution guarantees to persons accused of crime the right to jury trial with the assistance of competent counsel for his defense. These are safeguards against the corrupt or overzealous prosecutor, and against a biased or eccentric judge. *The assistance of competent counsel is a requisite to the very existence of a fair trial, Argersinger v. Hamlin, Sheriff,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), and "defendants facing felony charges are entitled to the *effective* assistance of *competent* counsel." (Emphasis added.) *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

On grounds of constitutional protection granted by the people, fundamental error occurred, and when coupled with an abuse of discretion, Hutchinson's testimony was inadmissible in the second trial. It was a miscarriage of justice.

564 P.2d 1336

WHITFIELD TANK LINES, INC., Herman Pedroncelli and Transport Indemnity Company, Plaintiffs-Appellees,

v.

NAVAJO FREIGHT LINES, INC., and Robert White, Defendants-Appellants.

No. 2688.

Court of Appeals of New Mexico.

May 10, 1977.

Certiorari Denied June 8, 1977.

Henry G. Coors, IV, Robert N. Singer, Coors, Singer & Broullire, Albuquerque, for defendants-appellants.

Thomas S. Watrous, Civerolo, Hansen & Wolf, P. A., Scott McCarty, Marchiondo & Berry, Albuquerque, for plaintiffs-appellees.

OPINION

LOPEZ, Judge.

The action involved in this appeal was begun in the district court of Taos County by the following parties: plaintiff Whitfield Tank Lines, Inc. (Whitfield) to recover property damages resulting from the alleged negligence of the defendants, Navajo Freight Lines, Inc. (Navajo) and driver, Robert White (White); Transport Indemnity Company (Transport) sued to recover workmen's compensation benefits paid to plaintiff's insured driver, Herman Pedroncelli (Pedroncelli was the driver of the truck owned by Whitfield); plaintiff Pedroncelli sued for personal injuries resulting from the alleged negligence of the defendants, Navajo, and Navajo's driver, White; Navajo counterclaimed against Whitfield and Pedroncelli for property damages.

Before trial the parties agreed to sever Transport as a party, allowing Transport to recover from a verdict rendered for Pedroncelli. The case was tried by a jury which awarded Whitfield the sum of $18,795.70,

and Pedroncelli the sum of $74,400.00. Navajo and White moved for a remittitur, which the court granted, and an amended judgment was entered for Pedroncelli in the amount of $65,000.00. Navajo and White appeal the verdict and judgment Pedroncelli cross-appeals the remittitur. We reverse the judgment and remittitur.

Navajo presents six points for reversal: (1) the trial court erred by giving instructions on negligence per se relating to two statutes, §§ 64–18–8 and 64–18–9, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 2, 1972), both of which had to do with the fact that Navajo's vehicle ended up on the wrong side of the road; (2) the court erred by refusing Navajo's instruction relating to Whitfield's violation of a federal regulation; (3) the court erred by refusing Navajo's instruction relating to Whitfield's violation of § 64–18–1.1 C, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 2, 1972); (4) the court erred by refusing Navajo's instruction regarding the duty of Pedroncelli to drive at a speed consistent with his ability to stop within the range of his headlights; (5) the court erred by denying Navajo the opportunity to present evidence regarding the surrounding circumstances and qualifications of Navajo's accident investigator, who had filed an accident report with the Department of Transportation; and (6) the court erred by permitting a state police officer to explain the meaning of his statement which supposedly gave an opinion on the issue of liability.

Pedroncelli's cross-appeal presents one point: The court erred by denying Pedroncelli's motion to amend the pleadings and by ordering a remittitur.

This case can be resolved by Navajo's first point. Because this case is to be remanded for a new trial, we shall discuss the other points argued by Navajo and the point advanced by Pedroncelli on cross-appeal.

Facts

About 6:00 a. m. on January 18, 1973, on U. S. 285, a two-lane highway, a collision occurred between the Whitfield vehicle, driven by Pedroncelli, consisting of the tractor and a propane tanker, and a vehicle owned by Navajo, driven by White, consisting of a tractor and two trailers. The weather was inclement and snowing heavily. The Navajo vehicle was proceeding south and the Whitfield vehicle north. The Navajo vehicle entered a snowdrift and jackknifed, sliding into the northbound lane in the path of the Whitfield vehicle. Whitfield's vehicle attempted to stop, skidded on ice in the roadway, remained in the proper lane of traffic, but collided with Navajo's truck.

The Court Improperly Submitted Instructions on Negligence Per Se

The defendants contend that the court committed reversible error by submitting instructions nos. 18 and 19, which were as follows:

"18. There was in force in the state at the time of the occurrence in question a certain statute which provided that:

'Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, and where practicable, entirely to the right of the center thereof.'

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

"19. There was in force in the state at the time of the occurrence in question a certain statute which provided that:

'Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one [1] line of traffic in each direction each driver shall give to the other at least one-half of the main-traveled portion of the roadway as nearly as possible.'

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

Instruction no. 18 related to § 64–18–8, supra, and instruction no. 19 related to § 64–18–9, supra.

"64–18–8. Drive on right side of roadway—Exceptions.—(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, and where practicable, entirely to the right of the center thereof, except . . . [None of the exceptions are applicable].

". . . (b) Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except . . . [None of the exceptions are applicable].

"64–18–9. Passing vehicles proceeding in opposite directions.—Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one [1] line of traffic in each direction each driver shall give to the other at least one-half of the main-traveled portion of the roadway as nearly as possible."

These instructions were requested by Whitfield and relate to the statutory requirement of driving on the right side of the road. The instructions were given in conformity with N.M.U.J.I. Civ. 11.1. Navajo objected asking that the instructions be modified to conform to N.M.U.J.I. Civ. 11.2 which contains a provision allowing justification or excuse of a statutory violation. The following language distinguishes N.M.U.J.I. Civ. 11.2 from N.M.U.J.I. Civ. 11.1:

". . . unless you further find that such violation was excusable or justifiable.

"To legally justify or excuse a violation the violator must sustain the burden of showing that he did that which might reasonably be expected of a person of ordinary prudence acting under similar circumstances who desires to comply with the law."

As we previously stated, N.M.U.J.I. Civ. 11.1, which is also called the "per se" rule, does not contain this excuse or justification language. The instructions for use of N.M.U.J.I. Civ. 11.2, state:

"This instruction should not be given unless the court holds as a matter of law that there is sufficient evidence of excuse or justification for the issue to go to the jury. Absent such evidence the 'per se' rule applies and is covered by instruction UJI 11.1."

Navajo contends that under the law and under the facts in this case, instructions 18 and 19 should have been modified to conform to N.M.U.J.I. Civ. 11.2. See *Stephens v. Dulaney*, 78 N.M. 53, 428 P.2d 27 (1967); *Hayes v. Hagemeier*, 75 N.M. 70, 400 P.2d 945 (1963). The facts which would justify or excuse violation of the aforementioned statutes can be summarized as follows:

The wind was blowing and snow had drifted across the roadway from west to east. It was dark and visibility was not good. The snowdrift at the scene of the accident was 450 feet long and the Navajo truck had traveled into the drift from north to south for 250 feet before the truck suddenly jackknifed. The easterly edge of the drift at its greatest depth and the center of the drift was only eight to ten inches deep. The westerly edge of the snowdrift gradually increased from south to north until it got to a maximum depth of three and one-half feet, then gradually declined again to the north end of the drift. Gradual changes in elevation of the snow are not perceptible until a drift is entered, consequently, the depth of the snowdrift would not have been apparent to the driver. The accumulation of snow was not even apparent to the Whitfield vehicle approaching from the south.

The Navajo truck had encountered other drifts along the road prior to coming upon the drift which caused the truck to jackknife, but the Navajo truck had no difficulty driving through previous drifts. The drift which caused the truck to jackknife appeared to the Navajo driver to be identi-

cal to other drifts which he had successfully negotiated. The Navajo truck would reduce speed to about 35 miles per hour before entering a drift.

The Navajo driver, White, tried to stay in his lane but when the vehicle jackknifed suddenly and without warning the vehicle got away from him. The snowdrift caused the Navajo vehicle to jackknife. Brakes should not be applied in a snow bank and the Navajo driver did not apply his brakes. Under the circumstances an expert driver would have tried to drive through a snowdrift similar to the one which caused the truck to jackknife but there would have been no warning under such conditions that a jackknife was about to occur. If a vehicle unexpectedly encountered a depth of snow under these conditions, not even an expert could have avoided a jackknife.

It is the law in the State of New Mexico that a party is entitled to an instruction on a theory of the case if pled and supported by the evidence. *Reed v. Styron*, 69 N.M. 262, 365 P.2d 912 (1961); *Terry v. Biswell*, 66 N.M. 201, 345 P.2d 217 (1959).

Whitfield counters with the proposition that the "per se" instruction was appropriate. *Pavlos v. Albuquerque National Bank*, 82 N.M. 759, 487 P.2d 187 (Ct.App.1971); *Paddock v. Schuelke*, 81 N.M. 759, 473 P.2d 373 (Ct.App.1970). See also *Archibeque v. Homrich*, 88 N.M. 527, 543 P.2d 820 (1975).

However, in the *Pavlos, Paddock* and *Archibeque* cases there was no evidence to excuse the vehicle responsible for the accident from being on the wrong side of the road.

We believe the statutes under which instructions nos. 18 and 19 were given were applicable; however, we believe the court committed reversible error in not amending the instructions to conform to N.M.U.J.I. Civ. 11.2. The court should have submitted the instructions with the excuse or justification provision because there was evidence that Navajo's presence in the wrong lane might have been caused by snow, wind and forces beyond anyone's control. These facts could very well have excused a violation of a statute, or at least make the violation a jury question. Reasonable minds could differ as to whether Navajo can be excused from the statutory requirement of driving on the right side of the road; therefore, Navajo was entitled to the requested instructions because a party is entitled to an instruction on a particular theory of the case if supported by the evidence. *Stephens v. Dulaney, supra.*

Furthermore, the court gave instruction no. 17 which reads as follows:

> "17. There was in force in the state at the time of the occurrence in question a certain statute which provided that:
>
> 'Whenever any roadway has been divided into two or more clearly marked lanes for traffic, the following rule shall apply: A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.'
>
> "If you find from the evidence that the defendant conducted himself in violation of this statute you are instructed that such conduct constituted negligence as a matter of law, unless you further find that such violation was excusable or justifiable.
>
> "To legally justify or excuse a violation the violator must sustain the burden of showing that he did that which might reasonably be expected of a person of ordinary prudence acting under similar circumstances who desired to comply with the law."

Instruction no. 17 conforms to the requirements of N.M.U.J.I. Civ. 11.2 because the instruction has the provision for excuse or justification of a violation of the statute. Instruction no. 15 contains similar terminology.

We cannot understand how the trial court could have given instructions nos. 15 and 17 to comply with N.M.U.J.I. Civ. 11.2 and then give instructions nos. 18 and 19 and not comply with N.M.U.J.I. Civ. 11.2. All of these instructions relate to the fact that Navajo's vehicle was in the wrong

lane. It is evident that the jury was confused when given two instructions (nos. 15 and 17) which contained the excuse or justification provision, and two instructions (nos. 18 and 19) which dealt with the same subject matter but did not contain the excuse or justification provision. Further contradictory language was added by instruction no. 11. This is N.M.U.J.I. Civ. 13.4. The confusion of the jury is manifest. There were three separate communications from the foreman of the jury to the judge, the final one stated:

> "Instruction no. 11 allows 'His duty is to exercise only the care that a reasonably prudent person would exercise in the same situation,'
>
> "Instruction no. 17 appears to allow such leeway with its quoted statute.
>
> "Instructions no. 18 and 19 point out no such leeway in regards to their quoted statutes and could be interpreted that *by definition* the person is negligent if the vehicle is on the wrong side of the center of the road.
>
> "Is there any conflict between instruction no. 11 and instruction 18 and 19?
>
> "i e in 11 '* * * he has done all that the law requires of him'
>
> "/s/ V. Belindo
> Foreman"

It is not error to give instructions supported by substantial evidence, unless prejudicial. *Terry v. Biswell*, supra. It is error to give instructions which unduly emphasize or are repetitious, especially if they are contradictory. See *State v. Atchison, Topeka and Santa Fe Ry. Co.*, 76 N.M. 587, 417 P.2d 68 (1966).

Refusal of an Instruction on Violation of a Federal Regulation

Federal regulation, 49 C.F.R. § 392.-14 (1976) provides that "[e]xtreme caution in the operation of a motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. Speed shall be reduced when such conditions exist." The evidence shows that Pedroncelli was hauling propane gas and there was a lot of snow. We believe that the facts could justify this instruction; however, failure to do so does not in and of itself constitute reversible error. The error, however, shall be corrected on retrial.

Refusal of Instruction Concerning Speed

Navajo asserts that the court should have given instruction no. 22 under the format provided by N.M.U.J.I. Civ. 11.2. This instruction related to § 64–18–1.1 C, *supra*, in effect at the time of the accident which provides:

> "In every event, speed shall be so controlled as may be necessary:
>
> "(1) To avoid colliding with any person, vehicle or other conveyance on, or entering the highway; and
>
> "(2) To comply with legal requirements as may be established by the New Mexico highway department or the New Mexico state police department, and the duty of all persons to use due care."

This instruction was refused. We believe that under *Stephens v. Dulaney, supra, Lucero v. Torres*, 67 N.M. 10, 350 P.2d 1028 (1960), and *Flanary v. Transport Trucking Stop*, 78 N.M. 797, 438 P.2d 637 (Ct.App.1968), the court should have given this instruction. But failure to do so constitutes reversible error.

Refusal of Another Instruction Concerning Stopping Distance

Navajo requested an instruction which stated Pedroncelli's duty to drive at a speed consistent with the ability to stop within the range of the tractor trailer's headlights. The court refused the instruction.

Navajo submitted two instructions relevant to this point. Instruction no. 4, which presented the issue of negligence per se, and instruction no. 9, which presented the factual issue of negligence. The question of negligence per se was decided by the New Mexico Supreme Court in *Manufacturers & Wholesalers Indem. Exch. v. Valdez*, 75 N.M. 363, 404 P.2d 562 (1965). Therein the Supreme Court stated:

"The rule that a defendant is negligent per se if he cannot stop within the range of his vision has not been laid down in this jurisdiction, notwithstanding the appellant's position to the contrary."

The factual issue of driving beyond the "range of vision" is often appropriate for jury determination. As stated by the Supreme Court in the *Manufacturers* case: "We have held that the issue of negligence is such a situation is a question for the trier of the facts." The Supreme Court went on to say:

"It is to be noted that even in jurisdictions which follow the ['range of vision'] rule, *the rule has been held to have no application in cases of emergencies creating unexpected hazards.*" [Emphasis added]

The case *sub judice* presents a classic example of an emergency creating an unexpected hazard. The defendant was not contributorially negligent by outrunning the range of vision of his headlights, thereby resulting in a collision with a stationary object. The defendant's truck jackknifed and came toward the plaintiff. This shortened the plaintiff's response time. The trial court did not abuse its discretion by denying the requested instructions.

Opportunity to Impeach D.O.T. Report

A report was made by Navajo's Director of Safety and Personnel after the accident and was submitted to the federal government. The report states that the accident was "preventable" and White was laid off for a couple of weeks without pay. We assume this action was a reprimand. The report was submitted as evidence by stipulation. Navajo wanted to impeach the director who, at the time of trial, either had quit or had been fired. Navajo wanted to impeach the director's credibility. Since the report was submitted by stipulation, however, we believe that the court properly sustained Whitfield's objection.

Error in Permitting Alleged Opinion Evidence

Navajo's argument under this point concerns testimony by a state police officer. The pertinent testimony is as follows:

"Q. Did you say anything to him, or did he say anything to you?

"A. I don't remember what exactly was said, but I made the comment that that [a piece of equipment taken from the Navajo truck] would be partially down payment on the new truck.

"Q. What did you mean by that?"

At this point counsel for Navajo objected. The trial court overruled Navajo's objection. The witness answered as follows:

"Q. Go ahead, Officer. Who did you make that statement to?

"A. Well, I don't know if I directed it to anybody in particular. They were all standing around there, the safety representative for both companies, and I don't —the wrecker driver, I don't know who else was standing there.

"Q. You took that gladhand, [the equipment in question] or that gladhand was taken off the Navajo truck, is that correct?

"A. Yes, sir.

"Q. Did you mean the Navajo truck would have this as a down payment for the Whitfield truck?

"A. Yes, sir."

Navajo's argument is based on the premise that the testimony was an opinion by the state police officer, an opinion on liability. We hold that there was no harm done to either party by the statements. Also, the expression of opinion was admissible under N.M.R.Evid. 704 [§ 20–4–704, N.M.S.A. 1953 (Supp.1975)].

Pedroncelli's Cross-Appeal

Pedroncelli's cross-appeal asserts that the trial court erred by denying several attempts to amend the pleadings and by ordering a remittitur in the amount of $9,400.00. Pedroncelli's original complaint asked for $50,000.00 medical damages and $15,000.00 for lost wages and earning capacity. The jury came in with a verdict of $74,400.00.

We believe that there was testimony, given to the jury without objection, from which the jury could have concluded that a verdict in the sum of $74,400.00 was reasonable. The trial court found:

"3. The jury was not influenced by passion, prejudice, or sympathy, and was not mistaken as to the measure of damages. *Both the amount claimed and the verdict are reasonable and supported by the evidence. The verdict is excessive only because it exceeds the prayer.*" [Emphasis added]

No objection or challenge was made to this finding.

We believe that the court could not remit $9,400.00 simply because the verdict exceeded the prayer by that amount. We fail to see anything in the record which would justify a remittitur. It is the policy of the law to freely allow amended pleadings when justice requires. *Constructors, Ltd. v. Garcia*, 86 N.M. 117, 520 P.2d 273 (1974); N.M.R.Civ.P. 15(a) [§ 21–1–1(15)(a), N.M.S.A. 1953 (Repl.Vol. 4, 1970)]. The defendants have made no showing whatsoever of actual prejudice which would justify a denial of plaintiff's motion to amend the complaint to conform to the evidence. *Silva v. Noble*, 85 N.M. 677, 515 P.2d 1281 (1973); N.M.R.Civ.P. 15(b) [§ 21–1–1(15)(b), N.M.S.A. 1953 (Repl.Vol. 4, 1970)]. To deny plaintiff the opportunity to amend the complaint on the sole ground that the recovery exceeded the *ad damnum* is an abuse of discretion. *Cf. Kirby Cattle Co. v. Shriners Hospitals for Crippled Children*, 88 N.M. 605, 544 P.2d 1170 (Ct.App. 1975).

"The prayer does not limit the amount of recoverable damages. . . . In brief, it is the duty of the court to grant relief to which a party is entitled irrespective of the prayer for relief in the pleadings." Moore's Federal Practice § 54.62 (1971); N.M.R.Civ.P. 54(c) [§ 21–1–1(54)(c), N.M.S.A. 1953 (Repl.Vol. 4, 1970)]. See also *LuVaul v. Holmes*, 63 N.M. 193, 315 P.2d 837 (1957).

The judgment of the trial court is reversed. Navajo and White are granted a new trial.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, J., concurring in part and dissenting in part.

SUTIN, Judge (concurring in part and dissenting in part).

We are involved with a simple highway truck accident that occurred in Taos County, New Mexico, on January 18, 1973, caused by a snowdrift on the highway. However, there was a complaint with three plaintiffs and a counterclaim with two defendants in which opposing parties sought property damage and personal injuries.

Before and during trial, opposing attorneys assaulted and battered each other for days with furious arguments, accusations, differences of opinion, the use and nonuse of witnesses, the lack of time granted defendants to present their case, and many similar oral tongue fights. The attorneys fought with their gloves off, with no holds barred and without any courtesies of debate. No punches were pulled. An old saw found in many languages says: "He that fights for his life and runs away may live to fight another day."

In the trial of a lawsuit, where neither party runs away, both parties may live to fight another day.

Many fouls were committed in this fight.

When instructions are submitted to the jury, it is a simple task for the trial court to submit U.J.I. instructions pertinent to the facts presented. Before submitting the instructions, the court is made aware of errors by objections made. It should know that attorneys often overstep their bounds in the submission of requested instructions, and then use them as a sledgehammer in the fight. Time, patience and study are essential ingredients for the determination of proper instructions. *When requested instructions are refused, reasons for refusing instructions should be stated in the record.* Hurrying or rushing into submission of the instructions to the jury as a time sequence

for the conclusion of the trial can lead to reversible error. This means the loss of a year or more in time, a loss of expenses and attorney fees paid, and often a loss of a witness or two.

Let us take a look at the confusion in this case. It illustrates the importance of giving instructions which are simple in language, clear to the average mind, and free from any appearance of doubt in their meaning. Instructions are taken to the jury room. Jurors today read the instructions carefully because they are bound by them. When they do not understand the language or are perplexed by the various instructions given, confusion arises. When this occurs, we must reverse.

The foreman of the jury, during deliberations, submitted three memoranda to the court, questions to be answered:

(1) "Do the last two paragraphs of instruction 17 apply to instructions 18 and 19[?]

ANSWER: "No.

"Under instruction 11, if a person has done all that requires of him, can he still be guilty of violating a statute[?]

ANSWER: "Yes.

(2) "Referring to Instruction *#11*, if guilty *of violation of either Inst. #17, 18 or 19* ("Statutes") can he be found not guilty of negligence under #11[?]

ANSWER: "The determination of negligence is the duty of the jury.

(3) "Instruction No. 11 allows "His duty is to exercise only the care that a reasonably prudent person would exercise in the same situation.

"Instruction No. 17 appears to allow such leeway with its quoted statute.

"Instructions No. 18 & 19 point out no such leeway in regards to their quoted statutes & could be interpreted that *by definition* the person is negligent if the vehicle is on the wrong side of the center of the road.

"Is there any conflict between instruction No. 11 & instructions 18 & 19?

i.e. in 11 '. . . he has done all that the law requires of him'

ANSWER: "You are to consider the instructions as a whole."

In addition to this confusion, the court gave instruction No. 15, requested by plaintiff Whitfield. It was *not* an U.J.I. instruction. It reads:

> If you find from the evidence presented in this case that the Navajo Freight Lines, Inc. tractor-trailer was on the wrong side of the road at the instant of the collision, and if you find that Navajo Freight Lines, Inc. and Robert White *cannot excuse or justify their presence on the wrong side of the road,* then you are instructed that said conduct constitutes negligence on the part of Defendants Navajo Freight Lines, Inc. and Robert White. [Emphasis added.]

This instruction added fuel to the fire.

Plaintiffs did win the verdict of the jury, but the plaintiffs created confusion confounded. It ended in a 10–2 verdict of the jury for the plaintiffs. This is not the way to win a fight.

Defendants' requested instruction, refused by the court, reads:

> There was in force at the time of the accident in question a certain federal regulation which provided that:
>
> "Extreme caution in the operation of a motor vehicle shall be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust or smoke adversely affect visibility or traction. Speed shall be reduced when such conditions exist."
>
> If you find from the evidence that the Plaintiff conducted himself in violation of this federal regulation you are instructed that such conduct constituted negligence as a matter of law, unless you further find that such violation was excusable or justifiable.
>
> To legally justify or excuse a violation the violator must sustain the burden of showing that he did that which might reasonably be expected of a person of ordinary prudence acting under similar

circumstances who desired to comply with the law.

This instruction related to a federal regulation governing interstate carriers. 49 C.F.R. § 397.2.

Whitfield was an interstate carrier hauling hazardous and flammable propane. Pedroncelli testified that he took an I.C.C. examination, that he was hauling propane, and that he was on a run from Albuquerque to Alamosa, Colorado. Without recitation of the facts, there was sufficient evidence to submit the instruction to the jury. Plaintiffs do not assert that the evidence is not sufficient to bind Whitfield to the federal regulations.

Motor carrier regulations stand in the shoes of state statutes, the violation of which constitutes negligence per se. *Taylor v. Pennsylvania Railroad Company*, 246 F.Supp. 604 (D.Del.1965) followed in *Sammons v. Ridgeway*, 293 A.2d 547 (Del.Sup. 1972). See *Tri-State Casualty Ins. Co. v. Loper*, 204 F.2d 557 (10th Cir. 1953).

Plaintiffs cannot complain that this instruction applied only to plaintiffs and not defendants—that it was not bilateral. This type of instruction may be applicable to defendants if the facts support it. If so, plaintiffs have the duty of tendering a similar instruction or request the trial court to make it applicable to both parties.

I disagree with Judge Lopez' opinion that this is harmless error. The failure to give this instruction is reversible error.

Defendants' requested instruction No. 22 was an instruction based on § 64–18–1.1(c), N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 2). I disagree with Judge Lopez' opinion that this was harmless error. The failure to give this instruction was reversible error.

Defendants' requested instructions Nos. 4 and 9, regarding the duty of an operator of a motor vehicle to drive at such a rate of speed so as to stop in time within the range of his vision to avoid a collision, were not U.J.I. instructions and were properly refused. Section 21–1–1(51)(c)(e), N.M.S.A. 1953 (Repl.Vol. 4).

Pedroncelli's cross-appeal is moot. He can now amend his complaint to recite a larger amount of damages claimed.

564 P.2d 1345

STATE of New Mexico, Plaintiff-Appellee,

v.

James GRIEGO, Defendant-Appellant.

No. 2873.

Court of Appeals of New Mexico.

May 17, 1977.

Certiorari Denied June 8, 1977.

N. Tito Quintana, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Paquin M. Terrazas, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of embezzling merchandise samples furnished by his employer. The jury determined the value of the merchandise was over $100 but not more than $2500. Sec. 40A–16–7, N.M. S.A.1953 (2d Repl. Vol. 6). Defendant's claim that the State failed to prove market value, see U.J.I.Crim. 16.01, is frivolous. There is substantial evidence of market value. Defendant's claim that the trial court erred in excluding an exhibit is without merit. The trial court excluded the exhibit after the prosecution objected that no foundation had been laid to show the relevancy of the exhibit. Defendant argues the question of relevancy on appeal; however, he made no attempt to demonstrate relevancy to the trial court. The transcript of the trial proceedings does not show the trial court abused its discretion in excluding the exhibit. *State v. Bell*, N.M., 560 P.2d 925 (1977). The remaining issue involves two instructions of the trial court.

The trial court gave the authorized instruction stating the elements of embezzlement. In addition, at the prosecution's request, the jury was instructed on "intent to deprive" and the meaning of "entrusted". Both phrases are used in the authorized instruction, U.J.I.Crim. 16.31. On appeal defendant argues that the instruction on entrustment is unintelligible. No such contention was made to the trial court, it will not be considered. N.M.Crim.App. 308, *State v. Justus*, 65 N.M. 195, 334 P.2d 1104 (1959).

Defendant's objections in the trial court to the additional instructions were: 1. They unduly emphasized certain elements of embezzlement, and 2. They should not be given because they are not included in the Uniform Jury Instructions authorized by the Supreme Court for use in criminal cases.

The additional instructions did not unduly emphasize certain elements of the crime. See *State v. Lindwood*, 79 N.M. 439, 444 P.2d 766 (Ct.App.1968). There was no undue emphasis because the instructions did no more than explain the meaning of "intent to deprive" and "entrusted". See *State v. Gonzales*, 86 N.M. 556, 525 P.2d 916 (Ct.App.1974); *State v. Bell*, 84 N.M. 133, 500 P.2d 418 (Ct.App.1972).

It was not necessary to give the additional instructions; if they had been refused it would not have been error. Committee Commentary to U.J.I.Crim. 16.31; *State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct.App. 1971). However, they were given; the question is whether the giving of these unnecessary instructions was error.

We hold there was no error. The additional instructions are not among those

prohibited, the additional instructions did not alter an approved instruction, the additional instructions do not conflict with an approved instruction; the additional instructions went to definitions not covered by the approved instruction. See General Use Note to U.J.I.Crim. In these circumstances, defendant may properly be required to show how he was prejudiced by the unnecessary additional instructions. No prejudice has been shown.

The Judgment and Sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concurring.

565 P.2d 337

Mary Ann BOONE, Petitioner-Appellant,

v.

Danny L. BOONE, Respondent-Appellee.

No. 11088.

Supreme Court of New Mexico.

June 6, 1977.

Harry L. Patton, Clovis, for petitioner-appellant.

Dan B. Buzzard, Clovis, for respondent-appellee.

OPINION

MAURICE SANCHEZ, District Judge.

This is an appeal from an order entered by the District Court of Roosevelt County, New Mexico, changing the custody of two minor children from their mother Mary Ann, petitioner-appellant, to their father Danny, respondent-appellee.

Mary Ann and Danny were divorced on December 18, 1975. The divorce decree awarded custody of Kimberly DiAnn Boone, age 6 years, and Darion Timothy Boone, age 4 years, to Mary Ann. On June 3, 1976, Danny filed a motion alleging that "circumstances and conditions have changed substantially since the entry of the judgment and decree herein in that the minor children are not being properly cared for and it would be to their best interest if their care, custody, and control were given to respondent." The court granted the motion and changed the custody of the children to Danny by order entered July 23, 1976. After a hearing, both parties requested findings of fact and conclusions of law. The court adopted the findings of fact and conclusions of law requested by Danny and denied those submitted by Mary Ann.

The dispositive findings of fact as found by the trial court, and all of which are challenged by the respondent, are the following:

9. That the relationship between Mary Ann Boone and Ben Corsey has caused the daughter embarrassment at school and has caused the children to be deceptive, and they try to cover up the facts of the relationship of their mother and Ben Corsey.

11. That such relationship is immoral and creates a poor situation for the raising of the children. Although Mary Ann Boone has said that the children never knew she was sleeping with Ben Corsey, the relationship between them is a bad influence on the children.

12. That such conditions create an improper atmosphere in which to raise children, whether Ben Corsey be white or black; and the fact he is black does not excuse the relationship.

13. That Mary Ann Boone has shown great instability in her attitude toward the moral training of the children by the way she has lived with Ben Corsey.

14. That with the respondent the children would have better moral training, and have a better opportunity to be trained and educated, and to develop a stable life.

18. That the children would be better reared with members of their own race.

Mary Ann contends that the trial court abused its discretion when it modified its decree and changed custody of the children when there is no substantial evidence of material change in circumstances which would justify such a change.

The rule is firmly established in this jurisdiction that the findings of fact of the trial court, when supported by substantial evidence, cannot be disturbed on appeal. *Wilson v. Employment Security Commission,* 74 N.M. 3, 389 P.2d 855 (1963). It is also well established that on appeal all disputed questions of fact must be resolved in favor of the successful party, and all reasonable inferences indulged in support of the judgment. *Blancett v. Homestake-Sapin Partners,* 73 N.M. 47, 385 P.2d 568 (1963); *Totah Drilling Co. v. Abraham,* 64 N.M. 380, 328 P.2d 1083 (1958). However, the evidence must be of such substance as will establish facts from which reasonable inferences may be drawn. *Tapia v. Panhandle Steel Erectors Company,* 78 N.M. 86, 428 P.2d 625 (1967).

We have uniformly held that in determining custody of children in a proceeding of this type, the best interests and welfare of the children should be the controlling and paramount inquiry of the court. *Terry v. Terry,* 82 N.M. 113, 476 P.2d 772 (1970); *Merrill v. Merrill,* 82 N.M. 458, 483 P.2d 932 (1971); *Martinez v. Martinez,* 49 N.M. 405, 165 P.2d 125 (1946). In proceedings to change the provisions for custody of minor children, the burden is on the moving party to convince the court that a material change in circumstances has occurred to justify a modification of the original decree. There is a presumption in favor of the reasonableness of the original judgment and decree. *Merrill v. Merrill,* supra; *Kerley v. Kerley,* 69 N.M. 291, 366 P.2d 141 (1961).

Bearing in mind the foregoing principles, we have searched the record and failed to find any evidence of a substantial

nature to support the findings set forth above. A careful examination of the record does not reveal any material change of circumstances which would indicate the necessity or the justice of modifying the custody provisions contained in the divorce decree. We shall make no attempt to detail all of the evidence in this case, suffice it to say there is nothing in the record which materially reflects upon the morality, the character, or the integrity of the petitioner in this case or which indicates that the children are not receiving proper maternal care. It is true that Mary Ann has been seeing Ben Corsey, a black man, and at the time of the hearing in the lower court was engaged to him, and at the time of the argument before this court was married to him.

The court found, as noted above, that the relationship between Mary Ann and Ben was immoral, a bad influence on the children, and an improper atmosphere to raise minor children. It found that Mary Ann had shown instability in her attitude toward the moral training of her children "by the way she has lived with Ben Corsey," that the children would have better moral training with their father, that the children would be happier if placed in the home of Mary Ann's brother Chester Harth, and, finally, that the children will be "better reared with members of their own race."

The record is barren of any evidence to support any of these findings. We recognize that the trial court is vested with broad discretion in awarding the custody of minor children, but we cannot ignore the complete lack of evidence to support the court's findings in this case. The record, in fact, discloses clear and convincing evidence that Mary Ann and Ben have been circumspect in their relationship and at no time have acted in a way harmful to the children's welfare. The evidence is also clear and convincing that the children are in better mental and physical health than they were at the time of the dissolution of the marriage of their parents. The record shows that Ben spends much time with the children and has achieved a good and friendly relationship with them. The evidence is undisputed that the children are well-fed, clean and well-dressed, and are not in any way neglected by their mother. On the other hand, Danny is single, resides alone, and is a truck driver who spends many long hours away from home. The father's plan is to place the children in a foster home, the residence of Mary Ann's brother, Chester Harth, where the children will be deprived of the consistent personal attention of either parent.

It is clear to this court that racial considerations weighed heavily upon the trial court in ordering a change of custody in this case. We hold that racial considerations alone cannot properly determine what is in the best interests of children, or what is most consonant with their welfare or physical and mental well being. We agree with the holding in the case of *In Re H.*, 37 Ohio Misc. 123, 66 Ohio Op.2d 178, 181, 305 N.E.2d 815, 818 (1973).

> It was not until 1967, that the United States Supreme Court struck down criminal anti-miscegenation laws. *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010. In doing so the Court used the following language: "The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination. Under our Constitution, the freedom to marry or not to marry, a person of another race resides with the individual and cannot be infringed by the State." *If the Court in the case at Bar would hold that Carol by her interracial marriage had forfeited the custody of her child we would indeed be infringing upon the right to marry a person of another race.* (Emphasis added.)

It follows from what has been said that the trial court abused its judicial discretion since its decision does not find support in the evidence, and the order changing custody of the minor children without the necessary evidentiary support should therefore be reversed.

This cause is reversed and remanded to the trial court with instructions to enter a new order setting aside the modification order entered on July 23, 1976, thus restor-

ing the parties to their original status under the final judgment and decree of divorce entered on December 18, 1975. A reasonable attorney's fee in the amount of $1,200.00 is allowed appellant herein to be taxed as costs against the appellee.

IT IS SO ORDERED.

SOSA and EASLEY, JJ., concur.

565 P.2d 340

D. G. EIFERLE and Anna Eiferle, Plaintiffs-Appellants,

v.

Milton A. TOPPINO, Defendant-Appellee.

No. 11146.

Supreme Court of New Mexico.

June 14, 1977.

Gallagher & Walker, Peter E. Gallagher, Albuquerque, for plaintiffs-appellants.

Threet, Threet, Glass, King & Maxwell, R. Michael Hooe, Albuquerque, for defendant-appellee.

OPINION

FEDERICI, Justice.

Plaintiffs Eiferle brought this action in the District Court of Bernalillo County, seeking a declaratory judgment as to the rights of the parties under a real estate contract entered into by them with Defendant Toppino. The court heard the case on the merits, entered findings of fact and conclusions of law based upon a stipulation of facts, and dismissed plaintiffs' complaint with prejudice. This appeal followed and we reverse.

Plaintiffs as purchasers and defendant as vendor entered into a real estate contract on February 17, 1970, for the purchase and sale of a residence in Albuquerque. The contract was a standard Valliant Form Real Estate Contract which provided for payment of $23,500.00 to be paid as follows: $3,000.00 down, with plaintiffs to assume a mortgage of $17,259.93 to Prudential Insurance Company, payable to Prudential on the first day of each month in payments of $135.45. The contract also provided for the payment by plaintiffs of defendant's equity balance in the house in the amount of $3,204.07, payable in monthly installments of $30.00 or more per month to a designated escrow agent.

The contract provided in Paragraph 8 that in the event of default on the part of the purchaser, the vendor could either declare the whole unpaid amount to be due, or terminate the contract and retain all sums paid as rental. In Paragraph 2 the contract

provided that if defendant mailed a written demand letter pursuant to the termination provision of Paragraph 8, the purchaser, in addition to the payment of other sums due, would pay $25.00 to cover the costs, expenses and fees of such action.

On March 1, 1975, plaintiffs sent a check to Prudential as payment on the mortgage, and also sent to the escrow agent the defendant's portion of the monthly payment. On March 20, 1975, Prudential wrote a letter to plaintiffs, returning their check for the reason that the bank had refused to honor it, and threatening to begin foreclosure proceedings. However, in the same letter, it offered plaintiffs an opportunity to pay all existing delinquencies by sending to it the sum of $573.89, no later than March 31, 1975. Prudential sent a copy of this letter to defendant. On March 25, 1975, plaintiffs purchased a cashier's check payable to Prudential in the amount of $573.89, which was mailed to Prudential and, upon receipt, applied to the mortgage balance on or before April 1, 1975. On March 28, 1975, defendant's attorney sent a demand letter to plaintiffs because of the deficiency in the mortgage payment owing Prudential. This letter was received by plaintiffs on March 29, 1975. The escrow agent refused to accept the payment owing to defendant unless the plaintiffs also paid the $25.00 which the contract required to cover costs, fees and expenses of the demand letter. On June 1, 1975, the defendant caused the papers in escrow to be withdrawn, filed an affidavit of default and forfeiture, and also filed a special warranty deed, the effect of which was to convey title to the property back to the defendant.

Since the filing of the complaint plaintiffs have made some, but not all, of the payments to Prudential.

The question presented on this appeal is whether the trial court was correct in concluding that under the particular facts in this case and under the terms of the real estate contract, the defendant could terminate the contract, reconvey to himself the title to the property, and retain all payments made by plaintiffs as rental.

We are of the opinion that the trial court erred in its ruling.

The rule is well settled in New Mexico that the type of real estate contract involved here is an enforceable one and upon default by a purchaser, the vendors are entitled to terminate the contract, regain possession of the property and retain the payments made as rental. *Davies v. Boyd,* 73 N.M. 85, 385 P.2d 950 (1963); *Bishop v. Beecher,* 67 N.M. 339, 355 P.2d 277 (1960).

However, in those cases, the court also held that there are exceptions to this rule. In *Bishop v. Beecher,* supra, the court said:

> Under the circumstances, we will not rewrite the contract into which the parties freely entered. Appellants failed to comply with their agreement, and, *absent unfairness which shocks the conscience of the court,* the appellees are entitled to enforce the contract as written. (Emphasis added.)

67 N.M. at 343, 355 P.2d at 280.

In *Davies v. Boyd,* supra, Justice Moise, in his specially concurring opinion, stated that notwithstanding the fact that a contract such as the one involved here was enforceable, in certain situations the contract and acts of the parties would be construed if at all possible, so as to avoid a forfeiture.

It also appears that the letter written by Prudential gave plaintiffs until March 31, 1975 to correct the alleged default. Consequently, the letter of default written by defendant to plaintiffs on March 28, 1975, was premature and of no effect. Cf. *Ott v. Keller,* 90 N.M. 1, 558 P.2d 613 (Ct.App. 1976) (specially concurring opinion of Judge Hernandez).

Bearing in mind the specific facts in this case and in particular the fact that Prudential had given plaintiffs an opportunity to meet the payments, which the plaintiffs accomplished, we feel that to permit the defendant to cancel the agreement, regain title to the property, and retain all payments made, would result in an "unfairness which shocks the conscience of the court."

The trial court is reversed and the cause is remanded for the purpose of a hearing on the amount of principal and interest due to defendant and Prudential by plaintiffs. The trial court shall further set a reasonable time within which the plaintiffs shall pay the amount of the judgment to the defendant.

Each of the parties shall bear its own costs and attorneys fees on this appeal.

IT IS SO ORDERED.

McMANUS, C. J., and EASLEY, J., concur.

565 P.2d 342

Gilbert MITCHELL, Petitioner,

v.

C & H TRANSPORTATION CO., INC., a corporation, et al., Respondents.

No. 11346.

Supreme Court of New Mexico.

June 16, 1977.

Matias A. Zamora, Elliot L. Weinreb, Santa Fe, for petitioner.

Civerolo, Hansen & Wolf, William P. Gralow, Albuquerque, Montgomery, Federici, Andrews & Hannahs, Thomas W. Olson, Santa Fe, Modrall, Sperling, Roehl, Harris & Sisk, Joseph E. Roehl, Albuquerque, for respondents.

OPINION

EASLEY, Justice.

Plaintiff-Petitioner Gilbert Mitchell (Mitchell) brought a personal injury action against defendants-respondents Plateau, Inc. (Plateau) and Frank Duran and Anita Duran (Duran), along with others who are not parties to this appeal. Summary judgment in favor of Plateau and Duran was granted by the trial court and the decision was sustained by the Court of Appeals. We granted certiorari and now reverse the decisions of the two lower courts.

An accident occurred north of Las Vegas, New Mexico, on U.S. Highway 85 near property owned by Jose Gallegos, west of the highway, when a truck and lowboy trailer became stuck on the driveway over the state right-of-way as the driver was re-entering the highway. A truck stop to the north operated by Duran, and a cafe to the south, operated by Jimmy Gallegos, could both be reached by two driveways which cross the state right-of-way at the north and south ends of the Gallegos property.

Jose Gallegos had leased the entire acreage to McNulty who "assigned" the lease to Plateau, reserving the land on which the cafe was situated, which cafe McNulty was to operate. If McNulty closed the cafe, Plateau had the right under the sublease to operate it. Plateau agreed to keep the premises in good condition. Plateau's sublease to Duran included all the land without mentioning the cafe. Duran was to keep the "driveways in good order and repair and in a . . . safe . . . condition," and was to comply with all state regulations. There was also a clause providing that Duran would indemnify Plateau against any claims for damages arising out of Duran's use of the premises.

Plateau was not obligated under the sublease to make repairs, but reserved the right to go on the premises at any time to examine and inspect the property and to make repairs, additions and alterations "as it [Plateau] may deem desirable."

The State Highway Department had in effect at the time a regulation for the pur-

pose of "traffic control" providing that the "maintenance of driveways shall be the responsibility of the owner of the adjacent property." The same regulation specified that the maximum gradient of a driveway from the edge of the highway shoulder onto commercial property was to be from five to eight percent.

Duran testified in his deposition that he had in fact maintained the "driveways," but later equivocated on this point. On being asked a question about the maintenance, he stated: "I know Plateau is supposed to maintain them," but stated that he, Duran, actually maintained "them."

At about 5:30 on the morning of August 5, 1974, while it was still dark, defendant Gerrald C. Desormeaux (Desormeaux) who was an employee of defendant C & H Transportation Company, Inc. (C & H) was pulling out of the south driveway onto the highway to proceed north, after having stopped at the cafe for coffee and a hamburger. As he turned out of the driveway onto the highway the lowboy trailer which he was pulling with a truck-tractor became securely "hung-up" on the convex surface of the driveway with the tractor stalled in the traveled portion of the highway. Desormeaux put out flares and tried in other ways to warn the persons traveling on the highway but was unsuccessful in warning Mitchell who was riding as a passenger in a vehicle which crashed into the truck. Mitchell suffered injuries as a result of the collision.

The factual questions and the legal issues in this case were thoroughly scrambled in the briefs of the parties on appeal. The two lower courts based their decisions approving summary judgment in favor of Plateau and Duran on the determination that neither of them owned, controlled or occupied the property.

The principal question is whether there is a genuine issue of material fact as to the existence of a duty on the part of one or both of these defendants and, if there is such a duty, as to the negligence of one or both which proximately caused Mitchell's injuries.

Highway Department Driveway Regulation

Mitchell filed a copy of the New Mexico Highway Department's driveway regulation in his efforts to defeat the motion for summary judgment. Although Duran raised a question of the admissability of the regulation based on the document not having been submitted in affidavit form, he did not preserve his record for purposes of appeal on that point and did not raise at all the question of the materiality of the evidence in relation to the application of the regulation to this particular highway. This point is unavailable to Duran since the record was not perfected for appeal. N.M.R. Civ.App. 11 [§ 21–12–11, N.M.S.A.1953 (Supp.1975)].

The regulation deals specifically with driveways that are "on the right-of-way of public highways . . . from the edge of the highway driving surface to the right-of-way line to serve any business."

The pertinent language in the rule reads:

> On public highways already constructed, the construction and maintenance of driveways shall be the responsibility of the owner of the adjacent property.

The regulation states that the purpose of controlling the driveways is to "control traffic" for the "safety of the traveling public." It is our duty to construe the regulation to establish the legitimate end sought by the State Highway Commission when it enacted the rule. *Burroughs v. Board of Cty. Com'rs, Cty. of Bernalillo*, 88 N.M. 303, 540 P.2d 233 (1975); *State ex rel. Sanchez v. Reese*, 79 N.M. 624, 447 P.2d 504 (1968).

■ Both Plateau and Duran had a vital interest in the safety of the people using the driveways to reach the premises leased to them and had a sufficient ownership interest to come within the terms of the rule. The lessee who is present on the premises cannot escape the obligation imposed merely by saying that he is not the "owner." The regulation itself recognizes that as to applications for new driveways a lessee would be considered the real party in

interest and permitted to file the necessary requests.

The adoption of the regulation by the Highway Commission constituted a legislative act under the doctrine set forth in *Wylie Bros. C. C. v. Albuqerque-Bernalillo C.A.C.B.,* 80 N.M. 633, 459 P.2d 159 (Ct.App. 1969). A legislative rule is valid and as binding upon a court as a statute if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable. 1 K. Davis, Administrative Law Treatise, § 5.03 at 299 (1958); *Nat. Broadcasting Co. v. U. S.,* 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943). There being no challenge to any of these required elements, the rule in question here is binding upon this court. *Regents of New Mexico v. Albuquerque Broadcasting Co.,* 158 F.2d 900 (10th Cir. 1947); *Goldenberg v. Village of Capitan,* 55 N.M. 122, 227 P.2d 630 (1951); *Brininstool v. New Mexico State Board of Education,* 81 N.M. 319, 466 P.2d 885 (Ct.App.1970).

Plateau and Duran argue that responsibility is placed solely on the "owner" under the terms of the regulation and that, since both of them were lessees rather than owners, the duty to maintain the driveway did not fall upon them. We disagree. Such an interpretation would effectively frustrate the purpose behind the regulation. Both lessees had obligations under the subleases signed by them to keep the premises in good condition. The lessee in possession certainly would be a logical person upon whom the primary liability should fall for failure to carry out the mandate of the regulation.

The duty of Plateau to maintain the premises under the circumstances here is somewhat different from that of Duran.

Although Plateau placed upon Duran the duty to maintain the premises and to indemnify Plateau for any loss because of negligence in doing so, it retained the right to go on the premises to make whatever repairs or changes that it considered necessary. The duty of Duran to maintain the driveway is unquestioned.

The general rule seems well settled that where a landlord fully parts with the possession of the premises and retains no control or right of control over them, and does not thereafter assume control, he is under no duty to inspect their condition while a tenant remains in possession, and is not chargeable with liability for defects not made by him or under his direction or for a failure to make repairs. *City of Dalton v. Anderson,* 72 Ga.App. 109, 33 S.E.2d 115 (1945). However, there has developed a sound body of law in many jurisdictions where the question has been raised of the landlord's continuing liability after the leasing of the premises, where he has reserved the right to enter to make repairs, even in cases where he has not convenanted to make any repairs. *City of Dalton v. Anderson,* supra, and authorities cited therein.

A later Georgia case, *Levy v. Logan,* 99 Ga.App. 253, 108 S.E.2d 307 (1959) held that a landlord who retained a right to enter and inspect the premises for purposes of repair was liable to third parties for injuries resulting from defects which ordinary care in making such an inspection would have revealed, regardless of whether, as between the parties to the lease, the landlord is relieved from obligation of making such inspection or repairs or both. The same situation exists in the case at hand. Plateau, who sought to protect itself by placing the liability for the repairs on Duran and to cause him to indemnify Plateau for any damages as a result of negligence, is still not relieved of its responsibility to Mitchell. It has been asserted in numerous cases that a reservation of a right to enter to make repairs extends the duty of the landlord to the traveling public, who may be off the premises, to maintain the premises in a safe condition. *Johnson v. Prange-Geussenhainer Co.,* 240 Wis. 363, 2 N.W.2d 723 (1942). It follows that a landlord who reserves a privilege which bears directly upon his relation to the passerby has not surrendered or divested himself of the duty of care. The reason for relieving the owner of the obligation fails when he retains the right to enter and repair even though he may not choose to exercise the right. *Shee-*

han v. 535 North Water Street, 268 Wis. 325, 67 N.W.2d 273 (1954). See also *Appel v. Muller,* 262 N.Y. 278, 186 N.E. 785 (1933); *Wilson v. Jaybro Realty & Development Co.,* 266 App.Div. 668, 40 N.Y.S.2d 186 (1943); *Tauraso v. Texas Co.,* 192 Misc. 147, 79 N.Y.2d 812 (1948).

We approve the reasoning in *McDonald v. Frontier Lanes, Inc.,* 1 Ill.App.3d 345, 272 N.E.2d 369 (1971) in which case a patron of a bowling alley sustained a fall in a twelve-inch-deep hole resulting from the gas company's installation of a gas line to the defendant's bowling alley at defendant's request, the hole being on a city-owned parkway. The court held that the rule that an occupant or owner of premises owes to an invitee a duty to use ordinary care to have the premises in a reasonably safe condition includes the duty to provide an invitee with reasonably safe means of ingress and egress, both within the confines of the premises owned or controlled by the inviter, and, "within limitations dictated by the facts of the case, beyond the precise boundaries of such premises."

Since this case will be remanded for trial, we now consider other issues raised by the parties in the event that they may later become material.

Obligations Under The Lease Assignments

The intent of the parties to a contract must be ascertained from the language and the terms of the agreement. *Owen v. Burn Construction Co.,* N.M., 563 P.2d 91 (1977).

Plateau contracted with McNulty to keep the premises in good condition, and Plateau reserved the right to make repairs when it subleased to Duran.

The sublease between Plateau and Duran states in part:

> Lessee further covenants . . . that he will keep said *premises* . . . together with *adjoining* sidewalks, areas, alleys, and entrance driveways in good order and repair and in a . . . safe and healthful condition . . . that he will comply with all . . . state . . . rules, regulations and ordinances with regard to use and condition of the leased premises . . .. (Emphasis added.)

Plateau and Duran claim that they had no duty under their subleases to maintain the driveways where they cross the state right-of-way, and that if they had any such duty it was only to maintain the driveway to the north which is adjacent to the truck stop. They assert that Jimmy Gallegos, the operator of the cafe, had the duty to maintain the driveway to the south where the accident occurred. The two lower courts held that Plateau and Duran had no control over the state's right-of-way and were not liable to Mitchell. We cannot read the documents and the law to sustain this position.

Both subleases describe all of the land in question except that the McNulty-Plateau document excludes the portion on which the cafe is situated. The only reasonable interpretation of the language is that only the land on which the *cafe building* is located is exempt.

Duran's sublease states that he is to keep the "premises" in a safe condition but also specifies that "adjoining" areas including "entrance driveways" shall be kept in a safe condition. This clearly refers to areas other than the "premises" leased. The reference to "alleys" in the above-quoted sentence also indicates that the sublease contemplates that not only the leased premises but also areas covered by easements shall be maintained in a non-negligent manner so that injury will not occur to patrons. The only "entrance driveways" that could possibly be the subject of the lease provision are the two that cross the right-of-way to connect the highway to the private property. The use of the term "driveways" (plural) defies the argument that only one driveway was involved.

The sublease of McNulty to Plateau and Plateau to Duran both provided for rent to be paid on the basis of the amount of gasoline sold. It makes sense that all parties would intend that the entrances to the business would be kept in such condition that

there would be no impediment to the patrons gaining access to the pumps and returning to the highway. Obviously, Plateau considered the cafe to be a satellite business to the service station and an asset to that business since it reserved the right in the assignment from McNulty to operate the cafe in the event that McNulty closed it.

A fair appraisal of the documents leads inexorably to the conclusion that both Plateau and Duran had a duty to keep the driveways in a safe condition.

Now the question arises as to whether these defendants, having this duty to maintain, owed a legal duty to Mitchell when the car in which he was riding ran into the C & H truck. The rear end of the trailer was caught on the driveway because of defendants' alleged negligence in permitting the sides of the driveway to erode to a lower elevation than the central portion. Aside from any duty imposed by valid rules and regulations of the state, a lessee, who has contracted to maintain property in a safe condition, has a duty to the traveling public to exercise reasonable care in maintaining property adjacent to a public road or street. *Copeland v. Larson,* 46 Wis.2d 337, 174 N.W.2d 745 (1970); *City of Dalton v. Anderson,* supra; *Johnson v. Prange-Geussenhainer,* supra; and other cases cited above; Cf. *Lommori v. Milner Hotels,* 63 N.M. 342, 319 P.2d 949 (1957).

There being no legal theory under which defendants were entitled to prevail as a matter of law, the burden was on Duran and Plateau to show the absence of a genuine issue of fact. *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972). Mitchell is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists. If there are substantial disputes as to material fact this forecloses summary judgment. *Skarda v. Skarda,* 87 N.M. 497, 536 P.2d 257 (1975); *Goodman v. Brock,* supra; *First Nat. Bk., Albuquerque v. Nor-Am Agr. Prod., Inc.,* 88 N.M. 74, 537 P.2d 682 (1975), cert. denied, 88 N.M. 74, 537 P.2d 682.

Mitchell claims that Duran's testimony was inconsistent in that he made the statement that he maintained the "driveways" and then later testified that he maintained the northern driveway and that the operator of the cafe maintained the southern driveway, where the accident occurred. Where there is a conflict regarding a question of material fact, summary judgment is improper. N.M.R.Civ.P. 56(c) [§ 21–1–1(56)(c), N.M.S.A.1953 (Repl. Vol. 4, 1970)].

Furthermore, the photographs introduced as exhibits show that the actual gradient on the driveway at the point where the trailer became lodged drops sharply in elevation, which drop-off could in fact cause a trailer to become snared as did the trailer here. The degree of gradient as indicated by the photographs is far greater than the drop in elevation of five to eight percent that was prescribed in the highway department's regulation. This discrepancy between the actual and the prescribed gradients is sufficient to raise a genuine issue as to a material fact regarding the negligence of Duran in failing to keep the driveway safe. The very fact that the trailer and truck were unable to make the turn without becoming stuck on the driveway presents such an issue which should have precluded summary judgment.

Plateau's Liability

Duran's statement that "I know Plateau is supposed to maintain" the driveways adequately raises an issue of material fact regarding the liability of Plateau in negligence for breach of a duty to keep the driveway in question safe for travelers.

We hold that it was error to grant summary judgment. We reverse and remand for further proceedings.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA and PAYNE, JJ., concur.

565 P.2d 348

Marilyn R. CLARK, Individually, and as widow and next friend of Allen B. Clark, Plaintiff-Appellee,

v.

ELECTRONIC CITY, a/k/a Electronics City, and John Capo, Defendants-Appellants.

No. 2758.

Court of Appeals of New Mexico.

May 3, 1977.

Rehearing denied May 13, 1977.

As Amended May 17, 1977.

Certiorari Denied June 8, 1977.

David W. King, Threet, Threet, Glass, King & Maxwell, Albuquerque, for defendants-appellants John Capo.

William J. Cooksey, Dickson & DuBois, P. A., Albuquerque, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant appeals a judgment awarding plaintiff workmen's compensation benefits arising out of the death of her husband while he was operating an automobile in the course of his employment. Two claims for reversal are raised. (A) The workmen's compensation statute did not apply to defendant. (B) Plaintiff's decedent, Allen B. Clark, made a major deviation and abandoned his employer's business. We affirm.

A. *The Workmen's Compensation Act applied to defendant.*

The defendant, John Capo, solely owned and operated three businesses, as sole proprietorships, known as Electronic City of Albuquerque, New Mexico, the Adult Bookstore of Santa Fe, New Mexico, and the Adult Bookstore of Albuquerque, New Mexico. He did not carry workmen's compensation insurance. On March 1, 1974, the date of decedent's death Capo cumulatively employed a total of four or more employees in the above mentioned three sole proprietorships. Section 59–10–2, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1) defines employers who come within the Act. It reads in pertinent part:

> . . . *[E]very private person . . engaged in carrying on for the purpose of business, trade or gain within this state, and which employs four [4] or more workmen, . . . shall become liable to, and shall pay* . . . compensation in the manner and amount, at the times herein required. [Emphasis added.]

Section 59–10–4(A) reads in pertinent part:

> Every employer of four [4] or more workmen shall be subject to the provisions of the Workmen's Compensation Act [59–10–1 to 59–10–37].

An " 'employer' includes any person . . . *engaged in or carrying on for the* purpose of business, or trade or gain any of the occupations or pursuits to which the Workmen's Compensation Act is applicable . . . ." Section 59–10–12.8.

A " 'workman' means any person who has entered into the employment of . . . an employer . . . ." Section 59–10–12.9.

The issue is whether we should translate "business, trade or gain" into "*each* business, trade or gain," so that if Electronic City employed less than four employees, it would not be subject to the Workmen's Compensation Act. This issue is a matter of first impression.

Traditional rules of construction of the Workmen's Compensation Act militate against defendant's position. The fundamental basis for the adoption of the Act was the protection of the workmen, not the employer. The Act is remedial in nature and a liberal view of the language has always been exercised. This philosophy, expressed by Justice Bratton over half a century ago, has remained the cornerstone which unites the Act with an employee who is injured or who has died as a result of an incident of his employment. *Gonzales v. Chino Copper Co.*, 29 N.M. 228, 222 P. 903 (1924). We assist the employer when we believe the language upon which the employee relies is contrary to the clear legislative intent, and contrary to sound reason and policy, *Martin v. White Pine Lumber Co.*, 34 N.M. 483, 284 P. 115 (1930), or where an unreasonable or strained construction is necessary. *McBee v. Hale*, 56 N.M. 53, 239 P.2d 737 (1952).

After *Gonzales*, supra, our courts have devised liberal interpretations of language in the Act so that workmen and their families will be compensated for accidental injuries or death that normally flow from employment. For examples: (1) Although injuries received going to and from work were not compensable, and the subject was a no man's land, two methods of interpreta-

tion and construction of the statute were made to afford the workman compensation. *Cuellar v. American Employers' Ins. Co. of Boston, Mass.*, 36 N.M. 141, 9 P.2d 685 (1932). (2) Although loss of an eye constituted an injury to a specific body member, three methods of interpretation and construction of the statute were made to afford the workman additional compensation for facial disfigurement. *Elkins v. Lallier*, 38 N.M. 316, 32 P.2d 759 (1934).

A citation of numerous additional cases in the past forty years is unnecessary. To add the word "each" to § 59–10–2, supra, is a function of the legislature, not the courts. The broad phrase, "*engaged in carrying on for the purpose of* business, trade or gain", encompasses various businesses engaged in for gain. A workman is any person who has entered into the employment of the employer. Each workman, whether employed in one business or another, is an employee of the employer under § 59–10–12.9. *Harmon v. Rainey*, 306 S.W.2d 469 (Mo.1957). This principle follows even though a statute reads "in the same business." *La Croix v. Frechette*, 50 R.I. 90, 145 A. 314 (1929). See *Foster v. Cooper*, 143 Fla. 493, 197 So. 117 (1940).

Defendant relies on *Threet v. Cox*, 189 Tenn. 477, 226 S.W.2d 86 (1949) and *Buck & Simmons Auto & Electric Sup. Co. v. Kesterson*, 194 Tenn. 115, 250 S.W.2d 39 (1952). *Threet*

> held without discussion of the point that entirely independent businesses are not to be added together—in this instance a sawmill and a small coal mining operation. This is a highly questionable assumption, both as a matter of statutory language and as a matter of giving effect to the purpose of the exemption. . . Subsequently, without discussion, [*Buck & Simmons*] produced a quite different result by adding together the employees in an electrical supply business and a house-transporting business. This makes better sense in relation to the purpose of the numerical-minimum exemption, since it is generally agreed that the purpose is a matter of avoiding administrative inconvenience to very small employers. Therefore, if an employer is in business on a large enough scale to hire an aggregate of the number of employees specified, he can be expected to undertake the administrative and insurance burdens of compensation coverage whether the employees are all in one business or not. 1A Larson's Workmen's Compensation Law § 52.33, p. 9–102 (1973).

Considering the purpose and the scope of the entire Act, we hold that every private person engaged in several separate businesses in New Mexico is covered by the Workmen's Compensation Act if four or more employees are cumulatively employed at the time of the injury or death of a workman.

B. *Plaintiff's decedent did not make a major deviation and did not abandon his employer's business.*

The trial court found that decedent was a route salesman for defendant and was furnished transportation for the performance of his duties, and was paid for gas, lodging and other travel expenses, to and from Albuquerque. The majority of defendant's customers for the southern route were located in the towns of Bayard, Silver City, and Truth or Consequences. At the time of his death, he was still learning the route on which he was killed in a one-vehicle automobile accident. On at least one prior occasion, he had performed his route in the identical manner he was following at the time he was killed, by going through the towns of Socorro and Deming on the second day of his route.

On March 1, 1974, decedent suffered an accidental injury that proximately resulted in his death. He died approximately 15 miles north of Truth or Consequences. He was returning to Albuquerque and was concurrently serving the interest of his employer. He was carrying materials such as cash receipts, customer order invoices, travel vouchers, and inventory belonging to defendant which he was to have returned to defendant's place of business before his route was completed, along with the van

that belonged to defendant. Decedent had no fixed hours of employment, either while in the performance of his duties or while completing his route. He was killed on the most direct route between Deming and Albuquerque. By returning to Albuquerque, he was accomplishing some necessary item of employment for the defendant, even though he may have been returning early.

Decedent left Deming; New Mexico, sometime after 1:20 p. m., heading to Albuquerque while in ill health. He made no further stops after leaving Deming and was fatally injured in a single-vehicle accident at 6:00 p. m.

All of the above findings were unchallenged. Defendant challenged other findings and the failure of the trial court to make defendant's requested findings. We do not find it necessary to rule upon these claims of error.

Section 59–10–13.3(A) provides:

> 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; . . . .

The trial court found that decedent suffered an accidental injury arising out of, and in the course of his employment, and that the accident was reasonably incident to the decedent's employment.

Defendant claims that decedent made a major deviation from his route and abandoned his employment at the time of his death.

Decedent had been suffering from several chronic illnesses for several years. He was concerned about his health and went to the Veterans Hospital on Wednesday, February 27, 1974, two days before his death, and was referred to the alcoholic treatment center. He talked with defendant and told him "that he had been to the hospital that morning and was having problems, and that he should turn himself into the hospital." Defendant suggested that perhaps he should not make the trip and decedent said: "No, John, I want to make this last trip for you, and then I am going to turn myself into the hospital."

On Thursday morning, February 28, 1974, decedent, on the southern route, made calls on customers in Truth or Consequences, Bayard, and Silver City, arriving in Lordsburg that night. He stayed all night in Lordsburg, made business calls there on Friday morning, March 1, 1974, and drove to Deming that day where he made some calls. From Deming, decedent called his mother about 1:20 p. m. and advised her that he was returning home so he could enter the hospital the following morning. Decedent left Deming sometime after 1:20 p. m. while in ill health. He was injured on the most direct route to Albuquerque and later died.

Decedent's return to Albuquerque was not aimed at reaching some specific personal objective alone. There was a "dual purpose"—(1) to enter a hospital, and (2) to accomplish some necessary item of employment as shown by the trial court's findings of fact.

The "dual purpose" rule originated with *Marks' Dependents v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929). Justice Cardozo established a rule that has swept the country, including New Mexico.

> The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. [167 N.E. at 183].

The "dual purpose" doctrine has been adopted in New Mexico. *Brown v. Arapahoe Drilling Company*, 70 N.M. 99, 370 P.2d 816 (1962); *McKinney v. Dorlac*, 48 N.M. 149, 146 P.2d 867 (1944).

Defendant's contention seems to be that at the time decedent met his death, he did not follow an assigned route; that if he had, he would have been somewhere between Carrizozo and Corona at the time of the accident. This plea falls on deaf ears. Whether he had his accident at either place, he was within the scope of his employment. An employee who leaves his assigned route

but who remains within the scope of his "dual purpose" doctrine has not abandoned his employment. Justice Moise held thusly in *Frederick v. Younger Van Lines*, 74 N.M. 320, 393 P.2d 438 (1964).

Defendant relies on *Carter v. Burn Construction Company, Inc.*, 85 N.M. 27, 508 P.2d 1324 (Ct.App.1973), as controlling. Here, decedent, on his way home from work, stopped at a lounge where he spent four and one-half hours drinking beer, playing pool and conversing with friends. He received a telephone call, left the lounge and resumed his homeward journey when he was fatally injured. The Court concluded:

> However, if in the course of a business trip an employee makes a major deviation, major because of its duration in time or because of its nature, or both, it can be said that as a matter of law he has abandoned his employment. Then, regardless if he returns to the route of the business trip, this does not in and of itself return him to the scope of employment and an injury occurring after this does not arise out of or in the course of his employment. [85 N.M. at 30, 508 P.2d at 1327].

Such facts are absent in the instant case. There was no deviation nor abandonment of decedent's employment at the time of his death.

Plaintiff is awarded attorney fees of $1,500.00 on this appeal.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

565 P.2d 352

STATE of New Mexico, Plaintiff-Appellee,

v.

Orlando PADILLA, Sr., Defendant-Appellant.

No. 2839.

Court of Appeals of New Mexico.

May 17, 1977.

Certiorari Denied June 9, 1977.

Terry M. Word, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Dennis Murphy, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant was charged with two counts of first degree murder, one count of attempted murder or in the alternative, assault with intent to commit murder or mayhem or aggravated battery—all with a firearm. Convicted of one count of voluntary manslaughter and one count of aggravated battery he appeals asserting the trial court erred in: (1) failing to give former U.J.I. Criminal 2.11 which defines "intent to kill or do great bodily harm"; (2) refusing to give his requested self-defense instructions; (3) allowing the admission of certain out-of-court statements; and, (4) committing cumulative error.

We affirm.

This case arose out of a shooting incident. Certain facts are not in dispute. Defendant was managing the LULAC Club. Robert, James and Roger Montoya came into the club and began playing pool. One or more of the Montoyas became involved in a fight with another person in the club. Defendant tried to break up the fight and was struck with a pool cue by one or more of the Montoyas. While the fight continued and became larger defendant went to where he kept his gun and fired into the ceiling in an effort to stop the fight. Robert Montoya then pulled out a gun whereupon defendant stated he did not want any trouble but only wanted the fighting to end. Subsequently all the Montoyas backed out of the building. Shortly thereafter, two or more of the Montoyas started to return and confronted defendant at or near the door of the club. Shots were fired which resulted in the death of Robert and James Montoya and the injury of Roger Montoya.

Failure to Give Instruction

The jury was instructed on voluntary manslaughter which stated in part:

> "The defendant had an intent to kill or do great bodily harm . . . ." [Subsequently amended October 1, 1976]

The Use Note states that U.J.I. Criminal Instruction 2.11 [subsequently amended to U.J.I. Criminal 1.21] must be given. Instruction 2.11 defined intent to kill or do great bodily harm. Instruction 2.11 was not given and defendant did not request that it be given.

Defendant now contends that the failure to give Instruction 2.11 amounts to jurisdictional error because it omitted an

essential element of voluntary manslaughter. *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973). We cannot see how a failure to give a definition instruction can be elevated to a failure to instruct on an essential element. *State v. Gunzelman*, supra, and *State v. Fuentes*, 85 N.M. 274, 511 P.2d 760 (Ct.App.1973) state that instructions in the language of the statute are sufficient. Further, a failure to instruct the jury on a definition or amplification of the elements of a crime is not error. *State v. Gonzales*, 86 N.M. 556, 525 P.2d 916 (Ct.App.1974); *State v. Puga*, 85 N.M. 204, 510 P.2d 1075 (Ct.App.1973); *State v. Bell*, 84 N.M. 133, 500 P.2d 418 (Ct.App.1972).

Defendant further contends that since the Use Note states the instruction must be given and since we are bound to follow the Supreme Court Order adopting the U.J.I. Criminal Instructions and Use Notes (*State v. Scott*, (Ct.App.) 90 N.M. 256, 561 P.2d 1349, decided March 1, 1977), the failure to give the instruction was jurisdictional error. While error may have occurred had defendant requested Instruction 2.11, an issue we need not decide, we decline to hold that the Use Note elevated Instruction 2.11 to the status of an element of the crime of voluntary manslaughter.

Failure to give the unrequested definitional instruction was not jurisdictional error.

Self-defense Instructions

Defendant's requested instruction No. 2 was taken from U.J.I. Criminal Instruction No. 41.43 (subsequently changed to 41.61). It stated:

> "Self-defense is not available to a person who starts a fight or agrees to fight, unless he tries to stop the fight and lets the other person know he no longer wants to fight or unless he had to defend himself against unreasonable force without being able to stop the fight."

Defendant contends the trial court erred in not giving the instruction because without it the jury might have believed that if defendant started or agreed to the fight with the Montoyas he would not be entitled to the right of self-defense.

We disagree with defendant's contention. The jury was given instructions on defendant's right to self-defense that corresponds to U.J.I. Criminal 41.41. Defendant's requested instruction would have injected a false issue in the case since there was no evidence to support the giving of the instruction. *State v. Waller*, 80 N.M. 380, 456 P.2d 213 (Ct.App.1969). The fight was at an end when the Montoyas left the building. The fact that they subsequently returned started a new series of events. It was during this series of events that the shooting occurred. The trial court properly refused the requested instruction.

Defendant also requested an instruction on self-defense that corresponds to U.J.I. Criminal 41.41. Part of that instruction stated:

> " . . . There was an appearance of immediate danger of death or great bodily harm to the defendant as a result of [the victim's] [assault] with a deadly weapon, to wit: a cue stick or a gun. . . . "

The trial court accepted the defendant's requested instruction except that it deleted the words " . . . to wit: a cue stick or a gun. . . . " Defendant contends that the deletion constituted error because his requested instruction "properly represented the law and the facts of the case."

Defendant relies in part on *State v. Martinez*, 30 N.M. 178, 230 P. 379 (1924). *Martinez*, supra, also dealt with the question of a trial court's refusal of the defendant's requested instruction and the adequacy of the instructions actually given. The Supreme Court stated:

> " . . . While the testimony may have authorized the court to submit the charge as given, certainly the defendant had a right to have submitted to the jury her theory of the case, . . . , and to have the facts relative thereto stated with sufficient clearness in the charge to distinctly present this phase of her defense to the jury. . . . "

While the language of *Martinez*, supra, may support the defendant's contention we find that *Martinez*, supra, is not controlling.

Defendant's requested instruction differs from the instruction given in that the former comments on the evidence given at trial. U.J.I. Criminal implicitly adopts a policy against using instructions which comment on the evidence. The General Use Note to U.J.I. Criminal states that when an issue arises that is not covered by U.J.I. Criminal " . . . the court may give an instruction which is . . . free from hypothesized facts and otherwise similar in style to these instructions." Comments on the evidence is a matter that should be left for argument. See Committee Commentary to U.J.I. Criminal 40.00 and 40.02. Compare the expressed policies stated in the civil area. Rule of Civ.Proc. 51(1); see also *Garcia v. Barber's Super Markets, Inc.*, 81 N.M. 92, 463 P.2d 516 (Ct.App.1969).

To the extent that *Martinez*, supra, may be in conflict with U.J.I. Criminal we hold that the Order of the Supreme Court adopting U.J.I. Criminal has implicitly overruled *Martinez*, supra. Other authorities relied on by the defendant are not persuasive. The instruction given by the trial court was detailed enough to put the alleged acts of the Montoyas in context with the evidence. See *State v. Beal*, 86 N.M. 335, 524 P.2d 198 (Ct.App.1974).

Out-of-court Statements

Detective Richardson, a witness for the state was allowed to testify about certain statements made to him by a Leon Padilla. Leon Padilla was not called to testify at trial. Defendant objected at trial and claimed the admission of these out-of-court statements violated the Rules of Evidence relating to hearsay. On appeal, defendant claims the use of these statements violated the hearsay rule and denied his constitutional right to confrontation. The latter contention will not be considered because it was not brought to the attention of the trial court. *State v. Bolen*, 88 N.M. 647, 545 P.2d 1025 (Ct.App.1976).

Defendant's hearsay contentions, even if correct, do not constitute error on the part of the trial court. The state asserts it was using the statements for a purpose other than for the truth of the matter asserted. The state's purported use would take the statement out of the hearsay rule. Evidence Rule 801(c). It is not error to admit evidence inadmissible for one purpose but admissible for another purpose. *Boulden v. Britton*, 86 N.M. 775, 527 P.2d 1087 (Ct.App.1974), rev. on other grounds, 87 N.M. 474, 535 P.2d 1325 (1975); *Moore v. Mazon Estate*, 24 N.M. 666, 175 P. 714 (1918).

Defendant also contends that the purported use of the statements by the state was not relevant to any issue in the case. The defendant's arguments concerning relevancy are raised for the first time on appeal and will not be considered. *State v. Duran*, 83 N.M. 700, 496 P.2d 1096 (Ct. App.1972).

Cumulative Error

Defendant contends that the alleged errors above plus six other additional alleged errors amount to cumulative error requiring reversal. *State v. Gutierrez*, 78 N.M. 529, 433 P.2d 508 (Ct.App.1967). After reviewing the other six additional alleged errors we find that none of them constituted error. There being no error in any of the points raised by defendant there is no cumulative error. *State v. McCallum*,, 87 N.M. 459, 535 P.2d 1085 (Ct.App.1975).

Other issues raised in the docketing statement and not argued on appeal are deemed waived. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App.1976).

The judgment and sentence of the trial court is affirmed.

IT IS SO ORDERED.

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

565 P.2d 655

STATE of New Mexico ex rel. STATE HIGHWAY DEPARTMENT OF NEW MEXICO, Petitioner-Appellee,

v.

Dudley C. SHAW et al., Exxon Corporation and Texaco, Inc., Defendants-Appellants.

No. 11143.

Supreme Court of New Mexico.

May 26, 1977.

As Amended on Denial of Rehearing June 30, 1977.

Hinkle, Bondurant, Cox & Eaton, Harold Hensley, Jr., Paul M. Bohannon, Roswell, for Exxon.

Rowley & Bowen, Stephen W. Bowen, John W. Anderson, Tucumcari, for Texaco.

Toney Anaya, Atty. Gen., V. Henry Rothschild, III, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

PAYNE, Justice.

In 1962 it became a matter of general knowledge that a by-pass, which would be a part of Interstate Highway 40, would be built in the Tucumcari, New Mexico area. Based upon this information, Texaco and Exxon, in separate transactions, acquired "floating options" to purchase tracts of property in the vicinity of the highway. The floating options gave the defendants the right to select a specific location within a general tract of land at such time as the exact location of the highway and its right-of-way became fixed by the State Highway Department. By 1969 the Highway Department began to acquire the property that would be necessary to construct the by-pass. During the year 1972 and continuing through April 24, 1973, the defendants maintained continuous contact with the Highway Department so that they would know when to exercise their options. Throughout 1972 and 1973 there were numerous conversations between representatives of Texaco and Exxon and officials in both the Design and Right-of-way Divisions of the Highway Department. The defendants were told that there would be no further taking of land by the State. In December, 1972, Texaco applied for and was granted a driveway permit based upon the

right-of-way maps as they then existed. On April 24, 1973, a representative of Exxon wrote the design engineer of the Highway Department desiring to know whether there would be any further taking by the State from the property Exxon wanted to purchase. The State replied by letter stating that it had acquired all the necessary property. As a result of the verbal assurances, the granting of the driveway permit, the letter and the right-of-way maps, defendants exercised their options in July of 1973 paying $85,000.00 each for their respective tracts of land. On May 6, 1974, the Highway Department issued a "final" right-of-way map which generally was in agreement with prior maps that had been used by the department. However, in July, 1974, the Highway Department amended its right-of-way map to show an additional thirteen-foot right-of-way taking from the front of the Exxon property. In December of 1974, another amendment was made taking a thirteen-foot right-of-way from the front of Texaco's property. Finally in March, 1975, another taking appeared on the right-of-way map showing for the first time a fifty-foot by one hundred seventeen-foot (50′ x 117′) drainage easement that bisects the Exxon property.

Condemnation proceedings were brought by the State against the defendants. Prior to trial, the parties stipulated that the district court would determine whether the evidence of value of the Texaco and Exxon tracts admissible at the trial should be the enhanced value due to the proximity of the freeway or the values of the land prior to enhancement. The trial court ruled that evidence of enhancement would not be admissible. We granted this interlocutory appeal and reverse the trial court.

The general rule of whether enhancement may be considered as an element of value is explained in 4 J. Sackman, Nichols' Law of Eminent Domain § 12.3151, at 12–293 (rev. 3d ed. 1976):

> The general rule is that any enhancement in value which is brought about in anticipation and by reason of a proposed improvement is to be excluded in determining the market value of such land, . . .

In *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943), the Supreme Court of the United States stated:

> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement. 317 U.S. at 376–377, 63 S.Ct. at 281.

The Court then stated an exception which has become the controlling rule of law:

> The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating a probable increase in value due to the Government's activities. Id. at 377, 63 S.Ct. at 281.

This rule has been followed by federal and state courts. *United States v. 2,353.28 Acres of Land, etc., State of Fla.*, 414 F.2d 965 (5th Cir. 1969); *United States v. 172.80 Acres of Land, etc.*, 350 F.2d 957 (3rd Cir. 1965); *Merced Irrigation District v. Wool-*

stenhulme, 4 Cal.3d 478, 93 Cal.Rptr. 833, 483 P.2d 1 (1971); *State, Department of Highways v. Colby,* 321 So.2d 878 (La.App. 1975).

The trial court determined that the lands being condemned were within the scope of the highway project at the time the State was first committed to it. The record reflects that the Department's design maps differed from its right-of-way maps[1] as to what lands would ultimately have to be acquired. The Department admitted to a mistake when it failed to transfer the extra right-of-way takings from its design specification plan to the right-of-way map. It is apparent from the record that the additional thirteen-foot takings that affect both Texaco and Exxon were contemplated in the original design specifications that were drawn up for the Department. The record also shows that the drainage easement that affected Exxon's property was on the 1970 construction plans. Texaco and Exxon take the position that since these additional takings were not added to the right-of-way maps until after the "final" map of May 6, 1974, they were not within the original scope of the highway project. We do not agree. The scope of a project is determined by a showing of what the State Highway Department intended. Although intent is subjective, the scope of a project as it related to the land necessary to complete the project can be determined by examining the objective acts of the department. The design and construction plans, although subject to possible diverse interpretation, are the primary tools in determining whether the land to be condemned was probably within the scope of the project involved. These plans support the finding of the trial court.

The defendants further assert that the principle of equitable estoppel precludes the State from denying their recovery of the enhanced value of their land. The events upon which the defendants base this claim are not in dispute. Exxon and Texaco executed options to purchase their property in July of 1973. They did this after considerable effort to determine the extent of the State's taking. They received repeated assurances from the Highway Department upon which they relied. The additional takings of which defendants complain were subsequently announced in 1974 and 1975.

In *State ex rel. State Highway Department v. Yurcic,* 85 N.M. 220, 511 P.2d 546 (1973), we discussed the application of the principle of estoppel as it would be applied against the State Highway Department. We said:

> " 'The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.' " 85 N.M. at 223, 511 P.2d at 549.

The trial court set forth three reasons for not applying the principle of estoppel: (1) there was no false representation or concealment on the part of the Highway Department, (2) the defendants should not have relied on the April 24, 1973, letter from Mr. Bob Humble; and (3) the defendants had reason to know and means of discovering the probable extent of the project.

1. A right-of-way map is prepared by the Right-of-Way Division and shows the property that will have to be acquired by the State in order to construct the highway. This map is developed from the design specifications that are set forth on the maps provided by the Design Division of the Department.

The first reason cannot be used to defeat the defendants' claim of estoppel. The trial court failed to apply that part of the Yurcic test which triggers an estoppel claim when the "conduct . . . is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert . . . ." It is clear that the Department is now adopting a position that is contrary to its representations to the defendants in 1973. Representations that are contrary to the essential facts to be relied upon, even though made innocently or by mistake, will support the application of the estoppel doctrine.

It must be assumed that Mr. Bob Humble was authorized to speak for the State Department. The letter he sent was pursuant to an inquiry referred to him by the supervising engineer of the Design Division. The letter was sent out over the signature block of L. G. Boles, the State Highway Engineer. Mr. Humble was thus authorized to speak for the Design Division and the Highway Department must be held responsible for the representations he made.

The trial court found that the defendants had "reasons to know and means of discovering the probable extent of the project." We have searched the record for evidence that might support this conclusion but have been unsuccessful. The testimony of all the witnesses, including the Highway Department personnel, was that no one knew the additional takings would be made until July, 1974, one year after defendants made their purchase. Although the design plans were available which showed that the additional property was probably within the scope of the project, these plans were never made available to the defendants.

We find that the defendants claim of estoppel against the State should prevail. The defendants, in good faith, relied upon the Department's maps and verbal assurances and paid the consideration of $85,000 each for their property. The State now wishes to condemn the property at values far less than what the defendants paid, based on the argument that the defendants should have searched out and understood the design plans. It is estopped from doing so. The enhancement of value due to the construction of the highway project may be used as evidence by the defendants in determining damages for the property that the Department now wishes to acquire. The ruling of the trial court is reversed and the case is remanded to the district court for further proceedings.

IT IS SO ORDERED.

SOSA, J., and FRED T. HENSLEY, District Judge, sitting by designation, concur.

565 P.2d 658

STATE of New Mexico, Petitioner,

v.

Alfred A. HARTLEY, Respondent.

No. 11321.

Supreme Court of New Mexico.

June 7, 1977.

OPINION

EASLEY, Justice.

Defendant was convicted, following jury trial in the District Court of Roosevelt County, of criminal sexual penetration in the first degree and murder in the second degree. The Court of Appeals reversed the convictions and remanded for a new trial. The State petitioned for writ of certiorari, which we granted. We reverse the Court of Appeals.

The only issue before us is whether the Court of Appeals erred in holding, contrary to the trial court, that the evidence was sufficient to warrant an instruction on the issue of defendant's insanity at the time the crime was committed.

The defendant's expert witness, a psychologist, testified at some length after having examined the defendant for approximately four hours in the Chaves County jail. The testimony was equivocal.

The most that can be said is that it characterized the defendant to be "extremely depressed, very agitated," "prone to . . . destructive behavior, if you hypothesize that something occurred to . . . set him off," having a "mental disorder," showing indications of a "schizoid personality," acting under an "irresistible impulse," "prone to act impulsively which may hinder his ability to prevent" his actions.

The psychologist would not give an opinion on whether the defendant at the time of the offenses understood the consequences of his acts, whether he had the mental capacity to form the intention to commit the crimes, whether he was capable of knowing the difference between right and wrong, whether he was capable of preventing himself from committing the acts, or whether his mind was diseased.

Under our law the defendant is presumed to have been sane at the time of the alleged crimes, which casts upon him the necessity of going forward with the evidence tending to show that he was insane. *State v. Roy*, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936). This presumption of sanity

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Toney Anaya, Atty. Gen., Suzanne Tanner, Asst. Atty. Gen., Santa Fe, for petitioner.

Reginald J. Storment, Appellate Defender, Santa Fe, for respondent.

continues to operate through the trial. *State v. Wilson*, 85 N.M. 552, 514 P.2d 603 (1973).

The court in *State v. Roy, supra*, a landmark case on many issues raised here, stated [40 N.M. at 404, 60 P.2d at 650]:

> When the defendant has put in evidence reasonably tending to show him insane, the problem is then to determine whether it is sufficient to take the case to the jury. This is a question for the court to determine. Therefore, when all the evidence is in, if there has been adduced competent *evidence reasonably tending to support* the fact of *insanity* urged by the defendant as a defensive issue in the case, it is the duty of the court to instruct on the question of insanity. Otherwise, the court may properly refuse such instruction. (Emphasis added.)

See also *State v. Wilson, supra.*

■ In reviewing a judgment of conviction an appellate court is required to view the evidence as a whole in the light most favorable to the State, resolving conflicts and indulging all permissible inferences in favor of the verdict. *State v. Crouch*, 75 N.M. 533, 407 P.2d 671 (1965); *State v. Tapia*, 79 N.M. 344, 443 P.2d 514 (Ct.App. 1968). The State charges that the Court of Appeals made its own independent determination of the sufficiency of the evidence to warrant submission of an insanity instruction. That court held that the testimony of the psychologist "tended" to show that the criminal acts charged were committed as a result of a "disease of the mind."

This calls for an assessment of what constitutes "competent evidence reasonably tending to support the fact of insanity" in New Mexico.

For many decades our court applied the rule from the M'Naghten case, 10 Clark & F. 200, 8 Eng.Rep. 718 (1843) which espoused what is known as the "right-and-wrong test." In order to support a verdict of insanity under the M'Naghten test, the jury must be satisfied that the defendant (1) did not know the nature and quality of the act or (2) did not know that it was wrong.

This rule prevailed in New Mexico until 1954 when this court in *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954) made a careful analysis of the authorities and made a limited extension of the M'Naghten rule, adding a third ingredient. The court held that if the accused, (3) as a result of disease of the mind "was incapable of preventing himself from committing" the crime, he could be adjudged insane and thereby relieved of legal responsibility for what would otherwise be a criminal act.

The court very carefully delineated the extent to which it would expand the rule [58 N.M. at 329, 270 P.2d at 730]:

> The only further rule of law as to the defense of insanity which this Court is willing to adopt is as follows: Assuming defendant's knowledge of the nature and quality of his act and his knowledge that the act is wrong, if, by reason of disease of the mind, defendant has been deprived of or lost the power of his will which would enable him to prevent himself from doing the act, then he cannot be found guilty.

The decision ruled out excitement or impulsive action and stated further [58 N.M. at 330, 270 P.2d at 730]:

> 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.

The court ruled out any consideration of "ordinary" or "reasonable" willpower, stating that whether or not the defendant has "normal" governing power of the will is beside the point, that the only question for determination is whether *disease* deprived the defendant of whatever willpower he happened to have.

We uphold the decisions in *State v. Roy*, and in *State v. White, supra*, in which former case we said [40 N.M. at 405, 60 P.2d at 651]:

> It is no excuse for murder that the perpetrator has not power to control his actions when aroused or in a passion. It is the duty of men who are not insane or idiotic to control their evil passions and violent tempers or brutal instincts, and if they do not do so, it is their own fault, and their moral and legal responsibility will not be destroyed or avoided by the existence of such passions, or by their conduct resulting from them. (Citations omitted.)

This theory was further amplified in *State v. Moore*, 42 N.M. 135, 158–59, 76 P.2d 19, 32–33 (1938):

> Insanity, to excuse crime, must be such as dethrones reason and renders the subject incapable of discerning right from wrong, or of understanding or appreciating the extent, nature, consequences, or effect of his wrongful act. . . . A mere uncontrollable impulse of the mind, coexisting with possession of his reasoning powers, will not warrant an acquittal on the ground of insanity; . . . Where the defendant has sufficient mental capacity to distinguish between right and wrong, mere passion or frenzy produced by anger, jealousy, or other passions will not excuse. There may, indeed, be insane impulses which are so far uncontrollable that there is no criminal liability therefor, but they must be shown to be the result of a diseased mind.
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> . . . 'An irresistible impulse,' as recognized by some courts as a defense to a charge of crime, and as popularly understood, has been well defined to be an impulse produced by and growing out of some mental disease affecting the volition, as distinguished from the perceptive powers, so that the person afflicted, while able to understand the nature and consequence of the act charged against him, and to perceive that it is wrong, is unable, because of such mental disease, to resist the impulse to do it. This class of mental infirmity or 'insanity' is to be distinguished from emotional or moral insanity, insane delusion, morbid impulse, passion, or overwhelming emotion not growing out of or connected with a disease of the mind. (Citations omitted.)

Accord, *State v. Valenzuela*, 90 N.M. 25, 559 P.2d 402 (1976); *State v. Wilson, supra; State v. Gardner*, 85 N.M. 104, 509 P.2d 871 (1973); *State v. Chambers*, 84 N.M. 309, 502 P.2d 999 (1972).

In *Valenzuela, supra*, recently decided, this court reiterated the rule that the first condition necessary for the establishment of insanity is a "disease of the mind." Even though an accused proves his incapacity to prevent his commission of a crime, it is of no avail to him unless it is shown that this incapacity was the result of a disease of the mind. All proof regarding "mental disorder," schizoid personality, destructive behavior, agitation, depression, impulsive behavior, irresistible impulse or the accused's inability to control his actions is immaterial to prove insanity here unless predicated upon the presence of a disease of the mind. *State v. Valenzuela, supra.*

State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct.App.1975) ruled an "impulsive act" to be insufficient to raise a factual issue on the question of insanity. *State v. Smith*, 80 N.M. 126, 452 P.2d 195 (Ct.App.1969) rules out a "mental or personality defect" as well as the fact that the accused was "inclined to violent emotional eruptions" and that "when in a rage he is unable to control himself", holding these insufficient to establish the defense of insanity.

The evidence in this case that defendant had a mental disorder, was inclined to be depressed, agitated, prone to act impulsively, capable of destructive behavior if something triggered his actions, and that these traits *might* hinder his ability to prevent the commission of the alleged crimes, does not meet the test of reasonably tending to show that defendant had a diseased mind. The trial court's action in refusing an instruction on insanity was not error.

The Court of Appeals is reversed, the convictions of first-degree criminal sexual penetration and second-degree murder are reinstated pursuant to the jury verdict, and the cause remanded for sentencing.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, PAYNE and FEDERICI, JJ., concur.

565 P.2d 662

In the Matter of the ESTATE of Leonard Joseph ENGBROCK and Mary Engbrock, his wife, Deceased.

Kayle ADAMS and Sandra Adams, husband and wife, Martin Wallace and Christine Wallace, husband and wife, Carl Williams and Joyce Williams, husband and wife, A & A Concrete, Inc., an Arizona Corporation, Objectors-Appellants,

v.

Eugene ENGBROCK, Administrator, Appellee.

No. 11335.

Supreme Court of New Mexico.

June 20, 1977.

Robert S. Skinner, Raton, for appellants.

Kastler, Erwin & Davidson, William C. Erwin, Raton, for appellee.

OPINION

SOSA, Justice.

Appellants the Adams, the Wallaces, the Williams, and A & A Concrete, Inc., tort claimants to the estates of the decedents, Leonard and Mary Engbrock, appeal from the district court's dismissal of their challenge to the closing of the estate by the probate court. On May 4, 1976, the decedents were killed in an automobile accident near Globe, Arizona. Three Arizona residents, Kayle Adams, Martin Wallace, and Carl Williams were injured in the accident. On May 10 probate was commenced on the decedents' estates in the Colfax County probate court. Notice of appointment of the administrator of their estates was published beginning May 13, 1976. On September 28 the administrator, Eugene Engbrock, filed his final account and report in the probate court, and notice of hearing thereon was published in the Raton Daily Range, beginning September 30 and running the requisite number of times. On October 1 the administrator of the estates was personally served process of a suit based on tort commenced in the United States District Court for the District of Arizona. In the probate matter appellants were not served with notice of the hearing of the final account

except by publication in the newspaper. On November 18 the probate court entered its final decree, approved the final accounting, and discharged the administrator. Shortly thereafter the appellants learned of the entry of the final decree. On December 7 they filed a motion for appeal to the district court pursuant to § 31–12–12, N.M.S.A. 1953. At the same time they filed objections to the final account and report, setting out generally the failure to give them notice of the hearing on the final account. An order granting appeal was entered December 7 and the matter was docketed in the district court. The administrator filed a motion to dismiss the appeal, and after a hearing on January 25, 1977, the district court entered an order dismissing the appeal.

The question for determination is the sufficiency of constructive notice by publication to known tort claimants.

Appellants argue (1) that they were entitled to notice by personal service of the pendency of the hearing on the final account in probate court and (2) that the probate court lacked jurisdiction to enter its final decree pursuant to the repeal of §§ 31–12–1 to –20, N.M.S.A. 1953 by 1975 N.M. Laws, ch. 257, art. IX at 1345. Appellee Engbrock argues (1) that appellants failed to file timely objections to the final account and report, thus they did not become persons aggrieved by the probate court's decision, citing *Dunn v. Lindsey,* 68 N.M. 288, 361 P.2d 328 (1961) [hereinafter *Dunn*] and *In Re Estate of Torres,* 84 N.M. 753, 508 P.2d 23 (1973) [hereinafter *Torres*]; (2) that § 31–12–7, N.M.S.A. 1953 does not require personal service upon potential tort claimants and that constructive notice by general publication is sufficient; (3) that appellants failed to diligently pursue their remedies by waiting 85 days before objecting to the final report (from the date of filing the federal suit to December 7), and, finally, (4) that the probate court had jurisdiction.

An examination of *Dunn* and *Torres* is in order. In *Torres* the administratrix appealed the decision denying a motion to reopen the estate for the appointment of a person to accept service of process for a wrongful death action. The estate had been closed, the property distributed, the administratrix and her bondsman discharged, and the proceeding had been fully concluded thirteen months prior to the motion to reopen. We held that since there was nothing to put the administratrix on notice of an impending tort claim against the estate, and since she had no reason or excuse not to expeditiously close the estate, the court and the administratrix properly concluded probate. In *Dunn* the appellee tort claimant served the executor-appellant with a copy of the suit, and shortly thereafter the executor filed his final account without mentioning the pending tort action. The court closed the estate. We held that a tort claimant is an interested person in an estate, has standing, and is entitled to appeal the decision of the court. The closing of the estate in *Dunn* should have been stayed pending determination of the tort action.

As in *Dunn,* the administrator in this case was served with notice of a tort claim against the estate. The problem is whether failure to object to the final accounting bars tort claimants pursuant to § 31–12–11, N.M.S.A. 1953 (Supp. 1975), if the tort claimants receive only constructive notice by general publication of the hearing for a final account and report, despite the fact that the administrator knows of the tort claimants and their addresses. *Torres* is obviously distinguishable since no notice was given there. However, in discussing *Dunn v. Lindsey* in *Torres,* we discussed the very problem raised here. 84 N.M. at 753, 508 P.2d at 25. The implication of that discussion is that failure to file objections to the final accounting pursuant to § 31–12–11, supra, could bar the tort claim. We hold otherwise. We feel that personal service should have been afforded the appellants here of the date for hearing of the final account and report. First, the tort claimants, their attorneys, and their addresses were made available to the administrator. Second, the administrator knew or should have known that out-of-state tort

claimants have at best a very small chance of receiving notice through general publication, especially if the only publication was made in the Raton Daily Range, a local paper of limited circulation. Thus, we hold that with respect to *known* creditors, tort claimants, and other interested persons, constructive notice in a general publication of the hearing of the final account and report is insufficient to meet minimum due process requirements.

The duty of an administrator or an executor, or the personal representative (as he is now called), is to preserve the assets of an estate for those legally entitled to that estate as determined by court decree.

The jurisdictional issue is without merit. The trial court is reversed with directions to reopen the estate for the purpose of holding another hearing on the final account and report. Each party shall bear his own costs.

EASLEY, J., and RUEBEN E. NIEVES, District Judge, concur.

565 P.2d 664

John W. RAMMING, J. T. McGuckin and G. R. McNary, Plaintiffs-Appellees,

v.

Bonnie BELL, aka Bonnie Evans Bell, Defendant-Appellant,

and

Jeremy Chisholm, Garnishee.

No. 11214.

Supreme Court of New Mexico.

June 20, 1977.

Mitchell, Mitchell, Alley & Morrison, James B. Alley, Jr., Santa Fe, for appellant.

William H. Carpenter, Albuquerque, for Ramming.

Adams & Foley, Quincy D. Adams, Albuquerque, for McGuckin & McNary.

White, Koch, Kelly & McCarthy, Santa Fe, for garnishee.

OPINION

McMANUS, Chief Justice.

A judgment on a promissory note was entered against appellant Bonnie Evans Bell. Appellant claimed that she was no longer obligated on the note because Ramming (the original holder) released Bell when he became aware of the property settlement pursuant to the divorce between Bell and her husband (who was a co-maker). The property settlement provided that Alfred Bell would assume all of the debts and obligations of the community. The trial court rejected the theory of a release when it adopted the plaintiff's requested findings of fact and conclusions of law. Since the release was oral in nature, the only evidence was the testimony of the parties to the note. We affirm the judgment of the trial court.

The case of *State ex rel. Thorton v. Heselden Const. Co.,* 80 N.M. 121, 452 P.2d 190 (1969) disposes of this issue. In that case a subcontractor tried to prove that there was an oral agreement to release him from liability for non-completion of the contract. The trial court rejected his theory and the Supreme Court upheld that decision, stating:

> We do not believe there was any necessity for the court to find as requested by the plaintiff. As a matter of fact, the court refused to make such a finding upon plaintiff's request. It is settled beyond argument in this jurisdiction that failure to find an issue on which a party has the burden of proof constitutes a finding to the contrary. (Citations omitted.) There is no merit in plaintiff's contention.

80 N.M. at 122–123, 452 P.2d at 191.

This is an identical situation. The defendant Bell had the burden of proving the affirmative defense of the release and the trial court rejected that theory. It is not up to this Court to substitute its opinion of the evidence. There is sufficient ambiguity in the facts to support the rejection of the theory of a release. Therefore, the opinion of the trial court should be affirmed.

IT IS SO ORDERED.

PAYNE, J., and REUBEN E. NIEVES, District Judge, concur.

565 P.2d 1013

STATE of New Mexico, ex rel. STATE HIGHWAY DEPARTMENT of New Mexico, Petitioner-Appellant,

v.

Dorothea A. BRANCHAU et al., Defendant-Appellee.

No. 11201.

Supreme Court of New Mexico.

June 22, 1977.

Toney Anaya, Atty. Gen., Richard Russell, Henry Rothschild, State Highway Dept. Asst. Attys. Gen., Santa Fe, for appellant.

Jones, Gallegos, Snead & Wertheim, J. E. Gallegos, Steven L. Tucker, Santa Fe, for appellee.

OPINION

McMANUS, Chief Justice.

The State of New Mexico brought an eminent domain action in the District Court of Quay County seeking to acquire some of Branchau's property. The jury returned a verdict in the sum of $21,800 and the State appealed. We reverse.

The State's basic contention was that the trial court erred in permitting Nathan Bell, an expert witness called on behalf of Branchau, to testify even though he was not listed in the pretrial order. The State objected immediately after opening argument when Bell's name was revealed and later when Bell was called to testify. The State also objected to the trial court's denial of its requested motion to question the jury on voir dire concerning any business or personal relationships between Bell and the jurors.

The pretrial order provided that the State and Branchau were to exchange appraisal reports and the names of all of the witnesses on October 5, 1976. Trial was scheduled to start October 12, 1976. Appellee contends that since Bell did not give a value statement it was unnecessary to name him according to the pretrial order and that she informed the State that she would call a "land value witness" and the State did not object when the witness' identity was not disclosed.

N.M.R.Civ.P. 16 [§ 21–1–1(16), N.M.S.A. 1953 (Repl. Vol. 4, 1970)] concerning pretrial procedures provides:

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

The pretrial order determines the issues and becomes the law of the case. *Johnson v. Citizens Casualty Company of New York*, 63 N.M. 460, 321 P.2d 640 (1958). As set forth in the rule, the test for modification is the prevention of manifest injustice which determination is within the discretion of the trial court. *Herrera v. Springer Corporation*, 89 N.M. 45, 546 P.2d 1202, cert. denied, 89 N.M. 206, 549 P.2d 284 (1976). Such decision is reviewable for an abuse of that discretion. *Transwestern Pipe Line Company v. Yandell*, 69 N.M. 448, 367 P.2d 938 (1961).

The Court of Appeals in a similar situation held that the trial court did not abuse its discretion in permitting a witness to testify whose identity was not revealed at the time set forth in the pretrial order. In *Tobeck v. United Nuclear-Homestake Partners*, 85 N.M. 431, 512 P.2d 1267 (Ct.App. 1973), the pretrial order stated that the parties would exchange the names of the witnesses thirty (30) days before trial. However, seventeen (17) days before the trial the defendants notified the plaintiff that they were calling an additional expert witness. Since the witness was using the same data, no new issues were developed, and there was a substantial period of time between the disclosure and trial, the Court of Appeals held that this was not error.

The facts here are substantially different than in the *Tobeck* case and therefore a different conclusion is merited. The names of the witnesses were scheduled to be exchanged seven (7) days before trial. Because of the type of case involved, this would have been adequate time to make objections or to pursue discovery. Here the State was unaware of the additional witness until after trial started. The State had no time to object to or discover the contents of Bell's testimony. It was entitled to rely upon the information it received pursuant to the pretrial order and there was no reason for it to anticipate that in the midst of the trial an unexpected "expert" would appear. Although Branchau offered to make Bell available after the trial recessed in the evening, this was not an adequate protection. Consequently, a problem arose later when it was discovered that Bell was acquainted with the majority of the jurors (a not uncommon situation in a small town).

There is also no indication that "manifest injustice" would have occurred to Branchau without this evidence. Branchau conceded that Bell's testimony was cumulative and general. There was no showing that this was newly discovered or critically important evidence. However, we are not prepared to say that this was harmless error because there is no way of knowing what impact this additional, albeit general, testimony had on the jury's decision.

The justification behind Rule 16, supra, is to prevent surprise and to get away from the "sporting" theory of justice. *Tobeck v. United Nuclear-Homestake Partners*, supra. Clearly, the State was taken by surprise and therefore was unprepared properly to challenge Bell's testimony. There was no apparent necessity to permit Bell to testify over the objections of the State during the course of the trial without adequate notification.

We therefore hold under these circumstances, that the trial court abused its discretion in permitting Bell to testify when Branchau failed to follow the pretrial order. Because of this disposition, we need not consider the issue of prohibiting the State from examining the jurors concerning their relationship with Bell.

The judgment is reversed and the case is remanded to the District Court of Quay County to grant the State a new trial in accordance with this opinion.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

565 P.2d 1015

Charles DAVIS and Rudy A. Ortiz, Petitioners,

v.

Richard TRAUB, District Judge, Division XI, Second Judicial District, State of New Mexico, Respondent.

No. 11434.

Supreme Court of New Mexico.

June 27, 1977.

Marchiondo & Berry, William C. Marchiondo, David L. Norvell, Albuquerque, for petitioners.

Toney Anaya, Atty. Gen., Steven G. Farber, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

PER CURIAM.

Petitioners Davis and Ortiz were indicted before the Bernalillo County Grand Jury on February 25, 1977 for bribery and conspiracy. In the course of the grand jury proceedings, petitioners became aware that certain allegedly unauthorized persons were present during the grand jury investigation. A motion to quash the indictment was denied by respondent and petitioners sought to invoke the extraordinary remedy of prohibition. We granted an alternative writ and after a hearing we made the writ permanent and directed the respondent to quash the indictment.

During the presentation of testimony before the grand jury, the prosecuting assistant attorney general was present along with an investigator for the attorney general's office who acted as bailiff. This was at the direction of the attorney general, not at the direction of the court. The investigator, Patrick O'Hearn, had assisted in collecting information concerning the charges and had personally interviewed some of the witnesses who testified before the grand jury while he was present in the grand jury room. There was also an incident in which two witnesses appeared concurrently before the jury although no substantive testimony was given at that time. Petitioners contend that these irregularities were sufficient to taint the indictment because the possibility of outside influence occurring is deemed prejudicial.

The Supreme Court has the power to issue writs of prohibition by virtue of N.M.Const. art. 6 § 3. This writ is properly evoked when an inferior court is exceeding its jurisdiction or acting outside its jurisdiction. *General Atomic Co. v. Felter,* 90 N.M. 120, 560 P.2d 541 (1977). However, under some exceptional circumstances, this Court will grant such a writ where irreparable harm, extraordinary hardship, costly delays or unusual burdens of expense would result. *State v. Scarborough,* 75 N.M. 702, 410 P.2d 732 (1966). This issue to be resolved here involves important historical rights which have been adopted from ancient common law to protect the rights of an accused. The Montana Supreme Court in *State v. District Court of First Judicial Dist.,* 124 Mont. 249, 256, 220 P.2d 1035, 1039 (1950) considered the propriety of issuing a writ of prohibition under similar circumstances and concluded:

> [T]he issues are of such vital importance as to affect not only the indictments in the instant case but all the proceedings of the grand jury. Not only the rights of the relator but the validity of other indictments are involved. If all the defendants indicted by the grand jury are required to go to trial with these issues undecided serious miscarriages of justice may occur and expensive and needless jury trials take place causing useless expense to the taxpayers and subjecting the relator and other accused to fruitless and unnecessary trials.

This Court has never ruled on this issue but the district court did not feel compelled to follow the pronouncement of *State v. Hill,* 88 N.M. 216, 539 P.2d 236 (Ct.App.1975). This Court now specifically adopts that rule of law and we join the federal courts and numerous other state courts and hold that the presence of an unauthorized person before the grand jury requires dismissal of the indictment without the necessity of showing prejudice. The purpose behind such a rule is not only to

protect the secrecy of the proceedings but more importantly to prevent the possibility of undue influence on the witnesses and jurors. *United States v. Isaacs,* 347 F.Supp. 743 (N.D.Ill.1972).

Some states by statute have mandated the dismissal of an indictment when a person not specifically authorized by law appears before a grand jury. See *People v. Minet,* 296 N.Y. 315, 73 N.E.2d 529 (1947). Although some states without such statutes consider it a mere irregularity and require prejudice be shown, i. e. *State v. Canatella,* 96 N.H. 202, 72 A.2d 507 (1957), we feel that the view most consistent with our notions of justice is that prejudice can and should be presumed. See generally 4 A.L.R.2d 392 (1949). *State v. District Court of First Judicial District,* supra, and *State v. Revere,* 232 La. 184, 94 So.2d 25 (1957) trace the historical development of our grand jury system. The grand jury has evolved to where it now functions as a guardian of the citizens' right to be free from government harassment unless good cause is shown for attempting a prosecution. The grand jury is not, and should not be, the tool of the prosecuting authority to manipulate at will. Our statutes specify certain procedures and authorize specific persons to aid the grand jury's investigation of criminal activity. We will not permit anyone to circumvent the letter or the spirit of those laws.

The attorney general contends that O'Hearn was an "authorized person" and his presence in the grand jury room was not improper. The State argues that inasmuch as Judge Sanchez appointed O'Hearn a grand jury aide pursuant to § 41–5–7 N.M.S.A.1953 (2 Repl.Vol. 6, 1972) this was sufficient authorization for him to be present. This claim has no merit because grand jury aides are not authorized by statute to be present in the grand jury room unless they fall within the categories specified in § 41–5–4, supra, as district attorneys, interpreters, court reporters, etc. Section 41–5–7, supra, alone does not authorize such presence. Judge Sanchez testified that he did not intend the aides to be in the room during the taking of testimony. The attorney general presented to Judge Sanchez a list of many people to be approved to assist in the presentation of evidence to the grand jury. Only a portion of these individuals were attorneys. The list included secretaries, investigators and administrators from the attorney general's office. The attorney general then argued that any or all of these named individuals would be entitled to be in front of the grand jury during the taking of testimony. This argument, if carried to its logical extension, would open the doors of the grand jury to such extent that the proceedings would neither be private nor fair.

Alternatively, the State claims since O'Hearn was a member of the attorney general's staff that § 41–5–4, N.M.S.A.1953 (2 Repl.Vol. 6, 1972) permitted him to be present in the room. That statute reads:

> 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. Inspections or grand jury views of places under inquiry may be made when directed by the foreman wherever deemed necessary within the county, but no oral testimony or other evidence may be received except during formal private sessions. (Emphasis added.)

In oral argument, the attorney general made the assertion that any member of the staff could properly be present during the grand jury hearings. This is clearly an erroneous interpretation and ignores the meaning of the words "persons *required* or *entitled* to assist the grand jury * * *" Such persons are enumerated in the statute. Staff in this context refers to the *legal* staff of the district attorney or the attorney general's office, e. g. assistant district attorneys or assistant attorneys general. This does not mean that a secretary, runner, investigator or non-legal personnel is free to roam in and out of the grand jury room while testimony is being given. This would violate the sanctity and secrecy of the entire system.

The attorney general also stated that since the court did not appoint a bailiff that O'Hearn could, as a grand jury aide, function in that capacity. We have no quarrel with this contention; however, there was no necessity for the investigator to be present in the jury room. He could have waited outside the door and called in the witnesses from there. There was no need for him to be in the room when his presence could have had a coercive or oppressive effect on some of the witnesses. In *State v. Revere,* supra, an investigator operated a recording machine while the witness testified and that court held that this was a substantial violation of the defendant's rights.

An incident also occurred during the investigation wherein two witnesses appeared before the grand jury simultaneously. When Cecil Irwin was called to testify he requested permission for Frank Diaz to be present "for the experience." The assistant attorney general consented but later asked Diaz to leave. Even though no substantive testimony was given at that time, under the per se prejudice rule this would also taint the indictment. See *State v. Bower,* 191 Iowa 713, 183 N.W. 322 (1921); *Com. v. Harris,* 231 Mass. 584, 121 N.E. 409. Section 41–5–4, supra, also refers to "the witness" in the singular. This action clearly violated the terms of the statute and we are distressed at the slipshod procedure which resulted in this situation.

The charge was also made that this Court should not overturn an indictment on a "mere technicality." It is precisely those mere technicalities that give meaning and vitality to our precious constitutional rights. The Louisiana Supreme Court in *State v. Revere,* 232 La. at 203, 94 So.2d at 32, also recognized this proposition.

> The important point that is frequently overlooked in similar instances is that the mere presence of an unauthorized person in the grand jury room is violative of a substantial right of the citizen and cannot, if we are to preserve the safeguards of our heritage in grand jury proceedings, be abridged through the subterfuge of shifting to that citizen the burden of proving such an invasion of his substantial right was prejudicial. "The contention," the highest court of Massachusetts points out, "that the burden is upon the defendant to show he was injured by action of the grand jury is unsound, because in the nature of things it would be impossible to prove the fact if true before the jury trial and because the wrong complained of is the violation of a substantial right guaranteed by the Bill of Rights, and is not a mere failure of the grand jury to observe technical requirements and formalities." *Commonwealth v. Harris,* 231 Mass. 584, 121 N.E. 409, 410.

To require a showing of prejudice could create situations where the testimony of grand jurors would be necessary. Certainly a prosecuting attorney, such as in this case, would not admit prejudicial actions either of himself or his assistants. Who else could testify to show if any prejudice existed? The record of the proceeding would not reflect the full import of the situation, i. e. the raised eyebrows, the tone of voice, the questioning glance etc. Since judges are not permitted to be present to monitor the hearings, the testimony of the jurors would be the only source of information and we cannot permit the integrity of the process to be breached by post-indictment interrogations. There is a uniform policy among all states that grand jury proceedings must be secret and insulated from all outside influences. It is our duty to see that the rights of every citizen are protected, even those accused of an infamous crime.

Therefore, the writ of prohibition will issue to prevent this matter from proceeding to trial on the present indictment and respondent is directed to order the indictment quashed and the charges dismissed.

IT IS SO ORDERED.

McMANUS, C. J., and EASLEY and PAYNE, JJ., concur.

565 P.2d 1019

SOUTHWEST DISTRIBUTING COMPANY, a New Mexico corporation, Petitioner-Appellee,

v.

OLYMPIA BREWING COMPANY, a Foreign Corporation, Respondent-Appellant.

No. 10802.

Supreme Court of New Mexico.

June 27, 1977.

Keleher & McLeod, John B. Tittmann, Albuquerque, for respondent-appellant.

Knight, Sullivan, Villella, Skarsgard & Michael, Albuquerque, for petitioner-appellee.

Campbell & Bingaman, Santa Fe, for amicus curiae, Distilled Spirits Council of the United States.

Olmsted & Cohen, Charles D. Olmsted, Santa Fe, Fordyce & Mayne, Frederick M. Switzer III, St. Louis, Mo., for amicus curiae, Wine & Spirits Wholesalers of America, Inc.

OPINION

McMANUS, Chief Justice.

Petitioner-appellee Southwest Distributing (hereinafter Southwest) sought a mandatory injunction against respondent-appellant Olympia Brewing Company (Olympia), seeking to require Olympia to supply and sell Hamm's beer to Southwest for resale throughout New Mexico. The trial court temporarily restrained and enjoined Olympia from terminating the supply of Hamm's beer to Southwest, and on December 8, 1975 it permanently enjoined Olympia therefrom. Olympia appeals and we reverse.

A distributor of beer, wine, liquor, institutional grocery and sanitary supplies, Southwest has been a distributor of Hamm's beer in New Mexico since 1947, and the exclusive distributor since 1951. The distributorship agreement between Southwest and the Theodore Hamm Company (Hamm) was oral, did not provide for any fixed termination date, did not specify the quantity to be purchased or sold, or stipulate any other terms. Southwest's distributorship of Hamm's beer continued under the changes in ownership in the Theodore Hamm Company occurring in 1965 and in 1973.

On February 20, 1975, Olympia purchased certain of Hamm's assets, including its St. Paul brewery and the Hamm trademark. In a letter dated February 28, 1975, Olympia advised former Hamm distributors, including Southwest, that it would ship Hamm's beer to them on an "order to order" basis, pending Olympia's evaluation of how those Hamm distributors would fit in the Olympia distribution network. On April 11, 1975, the Alcohol Beverages Franchise Act, § 46–9–16 through –20, N.M.S.A. 1953 (Supp.1975), went into effect. In a letter dated April 12, 1975, Olympia notified Southwest that Olympia could better serve

the New Mexico market through another distributor and would no longer accept orders from Southwest. Olympia's last shipment to Southwest was delivered prior to April 11, 1975 and no subsequent shipments were made after that date, whereupon Southwest sought to enjoin Olympia from terminating the supply of Hamm's beer to Southwest.

The trial court enjoined Olympia from terminating Southwest's distributorship on the bases that (1) Southwest had a vested property right in the distributorship; (2) Olympia purchased the assets of Hamm with an encumbrance thereon for the distributorship agreements; (3) the contractual agreement between Hamm and Southwest could not be terminated by Olympia without good cause; and (4) the Alcohol Beverages Franchise Act applied to the Olympia-Southwest transaction and that Olympia had violated the Act. The trial court erred in reaching these conclusions.

I. Vested Property Right

Southwest claimed, and the district court found, that Southwest had a vested "property right" in Hamm's beer and the beer distributorship. Southwest relied on *Equitable Building and Loan Ass'n v. Davidson,* 85 N.M. 621, 515 P.2d 140 (1973); *Muckleroy v. Muckleroy,* 84 N.M. 14, 498 P.2d 1357 (1972); and *People v. Wisch,* 58 Misc.2d 766, 296 N.Y.S.2d 882 (S.Ct.1969) for this proposition; however, these cases are inapplicable.

Equitable Building and Loan Ass'n v. Davidson, supra, held that a branch office of a savings and loan could be considered a "property right;" however, that case dealt with a public franchise granted by the state to an association. The reasoning is inappropriate where an agreement between private parties is concerned. *Muckleroy v. Muckleroy,* supra, also dealt with a type of "public franchise." The issue in *Muckleroy* was whether a medical license was "property;" here again the "franchise" in question was a right given by the state to a citizen and therefore is inapplicable to the case at bar. *Muckleroy* states:

> Broadly defined, property includes every interest a person may have in a thing that can be the subject of ownership, including the right to enjoy, use, freely possess and transfer that interest. (Citations omitted.)
>
> 84 N.M. at 15, 498 P.2d at 1358.

The case then held that although a medical license was a property right, it could not be considered "community property" because it was not subject to joint ownership. The point in *Muckleroy* was that an object of ownership may be property for one purpose but not for another. *People v. Wisch,* supra, is consistent with the *Muckleroy* decision because the court therein held that a milk route that had pecuniary value could be considered "property" which could be the object of an extortion.

Here the purported "property right" was the right to distribute Hamm beer. This was a right obtained under an oral agreement between two parties and therefore, a right obtained by a contract. It does not possess the characteristics of a property right because there was no evidence that Southwest could have sold or transferred its interest in the distributorship agreement to another person or corporation and forced Hamm to deal with the transferee. Southwest had the right to order beer from Hamm and to use the Hamm trademarks in selling Hamm products but Southwest had no right to "enjoy, use, freely possess and transfer" the distributorship as a piece of its own property. The only interest Southwest possessed was an oral contract agreement with Hamm.

II. The Encumbrance on Hamm's Assets

The district court found as a conclusion of law:

> The assets of Theodore Hamm Brewing Company were sold to Respondent with an encumbrance on the assets of said Company as a matter of law and Respondent assumed those assets together with the encumbrance thereon as a matter of law, regardless of the terms of the purchase agreement.

Although there was no express agreement, Olympia may have impliedly assumed this contract through the purchase agreement with Hamm. Therefore, the 64-page purchase agreement must be scrutinized to see if it would support this conclusion.

Olympia agreed to purchase "all of the assets of Hamm utilized by Hamm in connection with the manufacture, sale and distribution of the Hamm's . . . brands of beer . . . and all other items of tangible personal property . . ." This clause was entitled "Acquired Assets" and is followed by four and one-half pages of enumerated items including (h), "Those agreements, undertakings, instruments, executory contracts . . . necessary or desirable for Olympia to use the Acquired Assets to conduct business . . . *all* of which are described on Exhibit A-h . ." (Emphasis added.) Exhibit A-h referred to Collective Bargaining Agreements, advertising contracts, utility and licensing agreements. There was no reference to any distributorship contract. Section 4 related to liabilities and Olympia agreed to "assume, perform, and satisfy the following (*and no other*) liabilities and obligations of Hamm . . ." (Emphasis added.) Again, no distributorship agreement was referred to. Under section 7(c)(i) Hamm represented, warranted and agreed that, "Except for the encumbrances [which were specified] . . Hamm has good and marketable title to all the Acquired Assets free and clear of all mortgages, liens and encumbrances, of every kind and character . . ." Not only did Olympia not assume the distributorship, as a part of the Acquired Assets, but Hamm warranted that those assets would not be subject to any encumbrance.

Southwest also relied on a letter dated April 16, 1975 wherein the Board of Directors of Theodore Hamm Company expressed regret at Olympia's actions in terminating some wholesalers. The directors said, "We believed that by selling to Olympia and Pabst we had substantially accomplished the purpose of Theodore Hamm Company—to assure a supply of *Hamm's* beer for the wholesaler organization, to preserve jobs, and to keep the brands alive." (Emphasis added.) However, the directors did not contend that there was an agreement or a contract which obligated Olympia to comply with those terms. Despite the language in the purchase agreement the district court held that as a matter of law the assets were encumbered.

Based upon the findings of fact and the record, there was no support for this conclusion of law. In American jurisdictions it is well settled that a corporation which purchases the assets of another corporation does not automatically acquire the liabilities or obligations of the transferor corporation except (1) where there is an agreement to assume those obligations; (2) where the transfer results in a consolidation or merger; (3) where there is a continuation of the transferor corporation; or (4) where the transfer is for the purpose of fraudulently avoiding liability. *Forest Laboratories, Inc. v. Pillsbury Company,* 452 F.2d 621 (7th Cir. 1971); *Pankey v. Hot Springs Nat. Bank,* 46 N.M. 10, 119 P.2d 636 (1941); 15 W. Fletcher, Cyclopedia of the Law of Private Corporations § 7122 (Rev. perm. ed. 1973). A manufacturer or seller may stop doing business, or refuse to do business with any person or corporation unless such refusal would result in, or is designed to promote, unlawful activity. *United States v. Colgate & Co.,* 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969). None of the exceptions to the general rule are found in the present case.

A case which is strikingly similar to the present situation is *Oak Distributing Co. v. Miller Brewing Company,* 370 F.Supp. 889 (S.D.Mich.1973) wherein the plaintiffs alleged that their distributorships were wrongfully terminated when Miller purchased Meister Brau, Inc. with whom the plaintiffs had had their original distribution agreement. The plaintiffs alleged that Meister Brau had given them assurances "that Meister Brau, Inc. and any corporation acquiring trademarks from it would continue to supply beer products to plain-

tiffs. (No time limit was alleged and no written contract is alleged.)" Supra at 902–903. After Miller assumed control it sent letters to the distributors offering to do business on an order-to-order basis and the plaintiffs had acquiesced by replying to Miller. The court in *Oak Distributing* refused to hold that Miller had impliedly assumed these distributorships when Miller acquired Meister Brau stating:

> It is clear that, with respect to a "distributorship", the plaintiffs had nothing to lose. Insofar as Meister Brau sold the rights to market the products in question, plaintiffs may have had an action against Meister Brau. They certainly had no rights against Miller (*supra,* p. 903). Consequently, there could have been no duress on the part of Miller, which was merely affording plaintiffs an opportunity to market products which they otherwise would not have had.
>
> Supra at 907–908.

We agree and find that there was no legal encumbrance upon the assets other than those upon which the parties agreed.

III. Termination of the Contractual Agreement

The district court also concluded:

> That there is a contractual agreement between Petitioner [Southwest] and Theodore Hamm Brewing Company as to the present and future distribution of Hamms Beer by Petitioner which cannot be taken from it by the unilateral actions of Respondent [Olympia] without a showing by Respondent of good faith on its part and a further showing of good cause by Respondent.

This decision was consistent with Southwest's position that since it has sold Hamm beer for 28 years it cannot be terminated no matter what changes occur within the Hamm Company, unless Hamm stops making beer. This contention cannot be supported either factually or legally. A third party (here Olympia) cannot be held liable for the termination of a contract to which it is not a party, particularly after it has timely disclaimed any assumption. On February 28, 1975 Olympia sent a letter to all the distributors prior to its assuming control of Hamm indicating that it was not taking over the Hamm distribution system and that it planned to "ship the Hamm's brands to you on an order-to-order basis until the evaluation is complete." Olympia clearly indicated that it had not assumed these agreements.

The district court in its findings of fact determined (1) that all distributorship agreements between Southwest and the owners of Hamm were oral; (2) none of the agreements was for a fixed or terminable period of time; and (3) there was no oral or written agreement between Southwest and Olympia giving Southwest the exclusive wholesale distributorship. We accept the findings of the district court. *Gonzales v. Garcia,* 89 N.M. 337, 552 P.2d 468 (1976).

Since we have concluded that Olympia did not assume the oral distributorship agreement between Hamm and Southwest by virtue of its acquisition of Hamm's assets, we must determine what relationship between Southwest and Olympia was terminated and if the termination was proper. The district court found that no agreement, either oral or written, existed between Southwest and Olympia; therefore, no contract was formed. *Trujillo v. Glen Falls Insurance Company,* 88 N.M. 279, 540 P.2d 209 (1975). The letter of February 28, 1975 which offered to do business with Southwest on an order-to-order basis could possibly be construed as a distributorship contract, but by trade custom these transactions are generally considered individual contracts of sale. See *Jay-El Beverages, Inc. v. Miller Brewing Company,* 461 F.2d 658 (3d Cir. 1972).

Assuming (without finding any basis in the record) that such a distributorship agreement existed, there was no showing that the termination was unreasonable or that good faith or good cause was necessary. The agreement between Hamm and Southwest was oral and therefore no explicit terms are readily apparent. It seems obvious from the testimony of Mr. Bachechi, Southwest's president, that the termi-

nation of the agreement was never discussed. Mr. Bachechi referred to a "moral understanding" and "ethical behavior" but neither Hamm nor Southwest presented any evidence on whether there was an agreement on the method of termination. The district court also found as a fact that none of the agreements were for any fixed or terminable period of time. Therefore, the next question is whether Olympia's manner of termination was reasonable.

Some courts have held that even though no duration was agreed upon, an exclusive distributorship will extend for a reasonable time or until the dealer has recouped his investment. *Alpha Distrib. Co. of Cal., Inc. v. Jack Daniel Distillery,* 454 F.2d 442 (9th Cir. 1972); *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.,* 395 F.2d 388 (8th Cir. 1968). Other courts have required reasonable notice of termination. *Des Moines Blue Ribbon Distrib. v. Drewrys Ltd., U.S.A.,* 256 Iowa 899, 129 N.W.2d 731 (1964) (90-day notice reasonable). Some courts have also held that where there is no evidence of an agreement for termination that either party may terminate without cause and without notice. In *Scanlan v. Anheuser-Busch, Inc.,* 388 F.2d 918 (9th Cir.) cert. denied, 391 U.S. 916, 88 S.Ct. 1810, 20 L.Ed.2d 654 (1968), the appellant contended that the distributorship was terminable only for cause. The ninth circuit reversed finding that the evidence showed that the appellee dealt with the distributor only on an order-to-order basis and the agreement was terminable at will. See also *Jay-El Beverages, Inc. v. Miller Brewing Company,* supra. *Robert Porter & Sons, Inc. v. National Distillers Prod. Co.,* 324 F.2d 202 (10th Cir. 1963) involved a factually similar suit wherein the distributor alleged that the appellant wrongfully terminated their 25-year oral distributorship agreement. The appellate court held that the agreement was not a contract and could be terminated at will; therefore, the ninety-day termination notice was not improper.

In the instant case, there was no evidence of a termination provision. From the record it seems clear that the agreement was terminable at will by either party. Southwest had ample opportunity to recoup its initial and subsequent investments and the record shows that Southwest's investments reaped many years of profit. The termination may have been abrupt but Southwest has no legal remedy because it had no right to demand a continuation of the relationship.

IV. Application of Alcohol Beverages Franchise Act

It was this unfortunate state of affairs, resulting mainly from the custom in the liquor business to deal informally and orally, which lead the Legislature to pass the Alcohol Beverages Franchise Act, § 46–9–16 through –20 N.M.S.A. 1953 (Supp.1975). This Act prohibits the above type of activity and imposes the requirement that a "termination, cancellation or failure to renew [must be] done in good faith and for good cause." Section 46–9–17. The district court held that the Franchise Act applied to the relationship between Olympia and Southwest. This was error.

Olympia initially advised Southwest on February 28, 1975 that it was reviewing the distributorships. On April 11, 1975 the Legislature passed the Franchise Act with an emergency clause making it effective immediately; on April 12, 1975 Olympia terminated the distributorship. The relationship between Olympia and Southwest (either as a continuation of the Hamm-Southwest agreement, or on the basis of the order-to-order relationship established by the February 28 letter) would fall within the terms of the Act if the Act applied because § 46–9–16 defines franchise as:

> C. . . . a contract or agreement, either expressed or implied, either written or oral, between a supplier and wholesaler, wherein:
>
> (1) a commercial relationship of definite duration, or continuing indefinite duration, is involved; and
>
> (2) the wholesaler is granted the right to offer, sell and distribute within this state or any designated area thereof such of the supplier's brands of packaged distilled

spirits, malt beverages and wines as may be agreed upon;

Olympia contends that to apply the Franchise Act retroactively to relationships existing before the passage of the Act would unconstitutionally impair the obligation of contracts. If the distributorship was a continuation of the Hamm-Southwest agreement, termination was at the will of either party and Olympia properly terminated. If the relationship was order to order, then Olympia terminated before the Franchise Act applied to the Olympia and Southwest transactions.

Since the statute makes a substantive change in the rights and obligations of the parties and is remedial in nature, the general rule is that it is presumed to operate prospectively only. *Clark v. Ruidoso-Hondo Valley Hospital,* 72 N.M. 9, 380 P.2d 168 (1963); *Board of Education of City of Las Vegas v. Boarman,* 52 N.M. 382, 199 P.2d 998 (1948); *State v. Padilla,* 78 N.M. 702, 437 P.2d 163 (Ct.App.1968); 2 Sutherland, Statutes and Statutory Construction § 41.04 (Rev. ed. 1973). Although the Act was to take effect immediately, there was no indication that the Legislature intended it to apply retroactively.

In *Superior Motors, Inc. v. Winnebago Industries, Inc.,* 359 F.Supp. 773 (D.S.C. 1973) the federal district court faced an identical problem. It refused to reach the constitutional issue of the validity of newly-enacted franchise termination statute but instead decided that the legislation could not apply to an existing contract, stating:

> [I]t is manifestly clear that this statute, if applied to the instant contract between the parties, would impose significant new duties and conditions and take away previously existing rights. As such, the legislation as applied to this contract would unconstitutionally impair its obligations. The rights of these parties then must be determined without reference to the new legislation.
>
> Supra at 779.

This resulted despite the fact that the termination occurred after the legislation became effective. Cf. *33 Flavors of Florida, Inc. v. Larsen,* 308 So.2d 591 (Fla.App.1975) where the contract was consummated after the legislation was enacted, but the prohibited activity occurred prior; the court held that this was not a retroactive application of the new law nor was the application impairing a contractual obligation.

This does not mean that the Franchise Act does not apply to those order-to-order agreements which were in effect prior to April 11, 1975. If a manufacturer was shipping on an order-to-order basis and it shipped an order after April 11, 1975 (which Olympia did not do here) the Franchise Act would apply. If there was a written contract effective before April 11, 1975 then the termination provisions in the contract would control, but any subsequent amendment, renewal or new contract would be subject to the Franchise Act.

Having decided that the Franchise Act does not apply, we will not consider at this time the issue of the unconstitutionality of this Act.

Therefore, we reverse the decision and remand this case to the district court to dissolve the injunction and grant judgment in favor of appellant.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

SOSA, J., respectfully dissents.

FEDERICI, J., not participating.

SOSA, Justice, dissenting.

I respectfully dissent.

I find merit in the last ground proffered by the trial court in granting the injunction: the distributorship could not be taken from Southwest without Olympia showing good faith and good cause, or more specifically, Olympia violated § 46–9–17, N.M.S.A. 1953 (Supp.1975) of the Alcohol Beverages Franchise Act.

The Theodore Hamm Company's oral contract with Southwest clearly fell within the terms of the Alcohol Beverages Franchise Act. The question is whether Olympia falls within the terms of the Act. I feel that

Olympia, by purchasing Hamm's assets and continuing to supply Hamm's beer on an order-to-order basis, falls within the terms of the Act.

Having found that the Act applies to the relationship between Olympia and Southwest, I now deal with Olympia's arguments that the Act is unconstitutional in that it impairs the obligation of contracts, and violates the due process and equal protection clauses of the New Mexico and United States Constitutions. U.S.Const. art. I, § 10, U.S.Const. amend. XIV; § 1; N.M. Const. art. II, § 19; N.M.Const. art. II, § 18.

Olympia argues that to apply the Act to franchises existing before its enactment would be an impairment of its contractual relationship with Southwest, that is, a new clause would be added to the existing relationship: Olympia could not terminate supplies of Hamm beer to Southwest except for good cause. Olympia cites to various cases holding that the application of such an act to franchise agreements entered into before passage of the act is violative of the impairment of contracts clause. *United States Brewers' Association v. State*, 192 Neb. 328, 220 N.W.2d 544 (1974); *Globe Liquor Co. v. Four Roses Distillers Company*, 281 A.2d 19 (Del.1971), cert. denied, 404 U.S. 873, 92 S.Ct. 103, 30 L.Ed.2d 117; Cf. *Superior Motors, Inc. v. Winnebago Industries, Inc.*, 359 F.Supp. 773 (D.S.Car.1973); Annot., 67 A.L.R.3d 1299. Southwest, on the other hand, argues that the impairment of contracts clause, when balanced against the state's police power to protect the public health, safety, and welfare of its citizens by controlling the distribution of alcoholic beverages pursuant to the broad powers invested in the states by U.S.Const. amend. XXI, see *Seagram & Sons v. Hostetter*, 384 U.S. 35, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966), must give way. Cf. *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972); *Ruiz v. Economics Laboratory, Inc.*, 274 F.Supp. 14 (D.C.P.R.1967). I agree.

From its early absolute character, see *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 4 L.Ed. 529 (1819), *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), the impairment of contracts clause has been weakened in light of state police powers and has yielded to the right of a state to legislate to protect vital interests of the people. *Home Bldg. & L. Assn. v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); cf. *W. B. Worthen Co. v. Thomas*, 292 U.S. 426, 54 S.Ct. 816, 78 L.Ed. 1344 (1934). One such vital state interest is control of alcoholic beverages. U.S.Const. amend. XXI; *Seagram & Sons v. Hostetter, supra; California v. LaRue, supra.* The test then becomes whether the legislation reasonably protects those interests of a state when balanced against the contractual rights arising between parties. *W. B. Worthen Co. v. Thomas, supra; Home Bldg. & L. Assn. v. Blaisdell, supra.* An examination of the Act is therefore necessary. Section 46–9–17 was added as an additional method of control to the existing three-tier system of controlling the distribution of alcoholic beverages in New Mexico. § 46–5–1 et seq., N.M.S.A. 1953; § 46–9–1 et seq., N.M.S.A. 1953. This three-tier system [1] separates and regulates the sale of alcoholic beverages on the supply, wholesale, and retail levels. Section 46–9–17 seeks to regulate business practices between alcoholic beverage wholesalers and suppliers,[2] in particular it seeks to prevent tied houses and similar means of control by suppliers over wholesalers and, indirectly, over retailers. These direct and indirect means of control are not imaginary. See *Adolph Coors Company v. F.T.C.*, 497 F.2d 1178 (10th Cir. 1974), cert. denied, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975). I would hold that the Act is a reasonable exercise of the state's power to regulate the sale and distribution of alcoholic beverages

1. For a more detailed study of the three-tier system of control of alcoholic beverages, see F. Switzer, The Three-Tier System of Distribution in the Wine and Spirits Industry (1975).

2. Chapter 325 [1975] N.M. Laws 1878 states in its title: "An Act Regulating Business Practices Between Alcoholic Beverage Wholesalers And Suppliers; Defining Unlawful Acts; Providing for Civil Actions and Penalties; Declaring An Emergency."

and does not unconstitutionally impair the obligation of contracts clause. Thus I would affirm the decision of the trial court.

565 P.2d 1027

ALBUQUERQUE HILTON INN, Petitioner,

v.

Mary HALEY, Respondent.

No. 11292.

Supreme Court of New Mexico.

June 29, 1977.

Shaffer, Butt, Jones, Thornton & Dines, Stephen M. Williams, Albuquerque, for petitioner.

Toulouse, Krehbiel & DeLayo, Leonard J. DeLayo, Jr., Albuquerque, for respondent.

OPINION

EASLEY, Justice.

This case arose as a civil action for damages in the District Court of Bernalillo County. The trial court, finding § 49–6–1, N.M.S.A.1953 (Repl. Vol. 7, 1966) applicable, granted the motion of defendant-appellee-petitioner (hereinafter Hilton) for partial summary judgment against plaintiff-appellant-respondent (hereinafter Haley). The Court of Appeals reversed and remanded for trial with each of the panel writing a separate opinion basing the inapplicability of § 49–6–1, supra, on different grounds.

We granted Hilton's petition for writ of certiorari, and now reverse the Court of Appeals.

The facts pertinent to disposition are as follows. On September 18, 1974, the plaintiff, Mrs. Haley, arrived in Albuquerque on a Texas International Airlines (TIA) flight. The airline informed her that her luggage had been inadvertently transferred to Los Angeles. Mrs. Haley told TIA that she was staying at the Hilton. The next morning, her retrieved luggage was delivered to the Hilton; a receipt was signed by the desk clerk, the luggage placed on the bell stand and a bellhop called to carry the bags to Mrs. Haley's room. By the time the bellhop arrived, the luggage had disappeared. It has never been found. Mrs. Haley made repeated inquiries at the desk as to the whereabouts of her luggage and was repeatedly informed that it had not yet been delivered. When she finally contacted TIA, she was shown the receipt indicating delivery to the hotel.

Mrs. Haley sued the Hilton for compensatory ($5,000.00) and punitive ($25,000.00) damages, basing her complaint on Hilton's alleged wrongful refusal to return her luggage or compensate her for its loss (Count I) and also for its refusal to assist her as promised in her attempts to locate her luggage (Count II). Nowhere in the complaint do allegations of theft or negligence appear, nowhere does the claim for relief purport to be based on or limited by the hotelkeeper's liability statute, § 49–6–1, supra. Hilton moved for partial summary judgment as to any liability beyond the $1,000.00 maximum allowed by that statute. Mrs. Haley's motion in opposition to Hilton's motion claimed that the statute did not apply (1) because it pertained only to loss of property "brought by . . . guests into the hotel" and she had not so brought the missing luggage, and (2) because it worked a deprivation of property without due process of law. The trial court granted Hilton's motion, declared that the hotelkeeper's statute applied to limit liability, awarded Mrs. Haley judgment against Hilton for $1,000.00 accordingly, and granted judgment for Hilton as to any liability in excess of that amount.

Mrs. Haley appealed the judgment, arguing the same grounds set forth in her motion in opposition to summary judgment at trial. The Court of Appeals reversed, agreeing with appellant that the statute did not apply and that there were genuine issues of material fact requiring trial.

We decline to adopt the reasoning of the Court of Appeals (Lopez, J.) that the statute only applies to property brought physically into the hotel by the guest or his agent. Furthermore, neither the other theories advanced by the other specially-concurring members of the panel nor the constitutional arguments presented to the two lower courts are properly before us on certiorari. Nor is consideration of these points necessary since we agree with the trial court that the statute does apply and reverse the Court of Appeals accordingly.

The statute in question provides in pertinent part that the liability of hotelkeepers for loss of guests' property is not to exceed the sum of $1,000.00. It is beyond question that the statute is in derogation of the common law rule, which provided sternly that the innkeeper was answerable as an insurer (regardless of absence of negligence) for loss of the goods, money, and baggage of his guest, except for the acts of God, the public enemy or the guest himself. As this court stated long ago [*Horner v. Harvey*, 3 N.M. (Gild.) 307, 309, 5 P. 329, 329–330 (1885)]:

> The liability of innkeepers is strict, and justly so . . . . The law of civilized countries benignantly protects men away from home, and from those resources with which the denizen or citizen can guard himself from wrong, and protect his property from loss or injury. When the traveler comes to an inn and is accepted, he instantly becomes a guest. The innkeeper when he accepts him and his goods becomes his insurer, and the innkeeper must answer in damages for the loss or injury of all goods, money, and baggage of his guest, brought within his inn and delivered into his charge and custody . . . .

Accord, *Landrum v. Harvey*, 28 N.M. 243, 210 P. 104 (1922).

As a general rule, statutes in derogation of the common law are to be strictly construed. *State v. Chavez*, 70 N.M. 289, 373 P.2d 533 (1962); *El Paso Cat. Loan Co. v. Hunt et al.*, 30 N.M. 157, 228 P. 888 (1924). However, this statute was obviously enacted to ameliorate the effect of the harsh common law rule, and as a remedial statute in derogation of the common law a different rule applies. *In re Gossett's Estate*, 46 N.M. 344, 351, 129 P.2d 56, 60 (1942) sets forth that rule:

> Where a statute is both remedial and in derogation of the common law it is usual to construe strictly the question of whether it does modify the common law, but its application should be liberally construed. *Archer v. Equitable Loan Assurance Society*, 218 N.Y. 18, 112 N.E. 433; *Ex Parte Dexter*, 93 Vt. 304, 107 A. 134; *Chicago, B. & Q. R. Ry. Co. v. Dunn*, 52 Ill. 260, 4 Am.Rep. 606; *Wolf v. Keagy*, Del., 3 W.W.Harr. 362, 136 A. 520; *Stem v. Nashville Interurban Ry.*, 142 Tenn. 494, 221 S.W. 192; *Robinson v. Harmon*, 157 Mich. 276, 122 N.W. 106.
>
> "There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy." 1 Cooley's Blackstone, p. 86.

Applying this rule, it becomes clear that the liberal construction of the statute, the construction which the Legislature obviously intended and which would "suppress the mischief and advance the remedy," should be applied here. This entails looking through the form of the pleadings to the substance of the action and applying the statute to limit defendant's liability.

Under circumstances similar to those involved here the Supreme Court of Hawaii held that an analogous statute applied to limit the defendant hotel's liability for the loss of a guest's mink coat to the $50.00 statutory amount, ruling that [*Minneapolis Fire & Marine Ins. Co. v. Matson Nav. Co.*, 44 Haw. 59, 67, 352 P.2d 335, 340 (1960)]:

> The rule of strict construction does not require or permit a statute "to be construed so strictly as to defeat the obvious intention of the legislature" (*Johnson v. Southern Pacific Co.*, 196 U.S. 1, 18, 25 S.Ct. 158, 49 L.Ed. 363) and even where strict construction is called for, the words of the statute are to be given their ordinary meaning. *Mann v. Mau*, 38 Haw. 421, 426; *Kamanu v. E. E. Black, Ltd.*, 41 Haw. 442, 459. "Although a rule of strict construction is applied to a statute in derogation of the common law, it should nevertheless be construed sensibly and in harmony with the purpose of the statute, so as to advance and render effective such purpose and the intention of the legislature. The strict construction should not be pushed to the extent of nullifying the beneficial purpose of the statute, or lessening the scope plainly intended to be given thereto." 50 Am.Jur., Statutes, § 404, pp. 428–9.

The trial court did not err in awarding summary judgment on the basis of the statute.

The decision of the Court of Appeals is reversed, and the summary judgment of the trial court is affirmed.

McMANUS, Jr., C. J., and FEDERICI, J., concur.

SOSA and PAYNE, JJ., dissenting.

SOSA, Judge, dissenting.

I respectfully dissent.

Although I agree with the majority's interpretation of § 49–6–1, N.M.S.A.1953 (Repl. Vol. 7, 1966), I would not apply that statute under these circumstances. In my opinion a constructive bailment arose when Albuquerque Hilton Inn accepted custody of the plaintiff's luggage, transported by an independent carrier at Texas International Airlines' request. Plaintiff was a paying

guest, thus the bailment was one for hire. See *Shamrock Hilton Hotel v. Caranas*, 488 S.W.2d 151 (Tex.Civ.App.1972); cf. *Kula v. Karat, Inc.*, 531 P.2d 1353 (Nev.1975). Thus I concur with the court of appeals and I would reverse the judgment of the trial court with direction to reinstate the case for trial.

PAYNE, J., concurs in this dissent.

565 P.2d 1030

AMERICAN TANK AND STEEL CORPORATION and Employers National Insurance Company, Petitioners,

v.

Johnnie Lee THOMPSON, Respondent.

No. 11152.

Supreme Court of New Mexico.

June 30, 1977.

Tansey, Rosebrough, Roberts & Gerding, Charles Tansey, Farmington, for petitioners.

Hynes, Eastburn & Hale, Benjamin S. Eastburn, Farmington, for respondent.

OPINION

PAYNE, Justice.

In 1973, while engaged in the course of his employment, Johnnie Lee Thompson, a code welder, sustained an accidental injury to his right thumb, right index finger and the webbing between the thumb and finger. In an action brought under the New Mexico Workmen's Compensation Act,[1] the trial court found that no other part of Thompson's body was physically impaired as a natural and direct result of the accident. It further found that Thompson is able to use some, but not all of the tools necessary to perform the usual tasks of a welder. The trial court specifically found as follows:

> 7. Because of his inability to use all of the necessary tools, the plaintiff is wholly unable to perform the usual tasks in the work he was performing at the time of

1. §§ 59-10-1 to 59-10-37, N.M.S.A.1953 (2d Repl. Vol. 9, Pt. 1, 1974).

his injury and for the same reason is wholly unable to perform the usual tasks in any work for which he is fitted by reason of age, education, training, general physical and mental capacity and previous work experience.

The trial court concluded that the plaintiff was entitled to total disability rather than the limited benefits under the scheduled injury section [2] of the Workmen's Compensation Act. The Court of Appeals affirmed the decision of the trial court.

The question presented for review on certiorari is whether a workman is entitled to compensation benefits for total permanent disability where disability arose from injuries to a specific body member scheduled in § 59–10–18.4, *supra*, or whether the scheduled injury section is exclusive.

The employer and the insurance carrier argue that the decisions rendered by the Court of Appeals in this case and in an earlier case, *Witcher v. Capitan Drilling Company*, 84 N.M. 369, 503 P.2d 652 (Ct. App.1972), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973), are in conflict with prior decisions of this Court: See *Montoya v. Sanchez*, 79 N.M. 564, 446 P.2d 212 (1968); *Quintana v. Trotz Construction Company*, 79 N.M. 109, 440 P.2d 301 (1968); *Yanez v. Skousen Construction Company*, 78 N.M. 756, 438 P.2d 166 (1968); *Webb v. Hamilton*, 78 N.M. 647, 436 P.2d 507 (1968); *Baker v. Shufflebarger & Associates, Inc.*, 78 N.M. 642, 436 P.2d 502 (1968); *Casados v. Montgomery Ward & Co.*, 78 N.M. 392, 432 P.2d 103 (1967); *Jensen v. United Perlite Corporation*, 76 N.M. 384, 415 P.2d 356 (1966); *Salome v. Eidal Manufacturing Company*, 75 N.M. 354, 404 P.2d 308 (1965); *Sisneros v. Breese Industries, Inc.*, 73 N.M. 101, 385 P.2d 960 (1963); *Boggs v. D & L Construction Company*, 71 N.M. 502, 379 P.2d 788 (1963). To the extent that they conflict with Witcher we specifically overrule the previous decisions of this court.

This court first enunciated the exclusivity of the scheduled injury section in *Boggs v. D & L Construction Company, supra*. This position has not always received the total support of this court. See *Salome v. Eidal Manufacturing Company, supra*, (Moise, J., concurring opinion). The strict application of the scheduled injury section created inequities in the remedy provided to injured workmen who were totally disabled and unable to return to gainful employment because of injuries to a scheduled body member. An analysis of the cases arising after the *Boggs* decision demonstrates a tendency to relate scheduled injuries to other parts of the body or to psychological problems in an apparent effort to circumvent the *Boggs* holding and reach a just result. *Quintana v. Trotz Construction Company, supra*; *Yanez v. Skousen Construction Company, supra*; *Webb v. Hamilton, supra*; *Jensen v. United Perlite Corporation, supra*; *Salome v. Eidal Manufacturing Company, supra*. These cases frequently resulted in less than precise directives for lawyers and litigants. Such legal and judicial gyrations can be easily resolved by adherence to the legislative directives within the Act. *Security Insurance Co. of Hartford v. Chapman*, 88 N.M. 292, 540 P.2d 222 (1975); *Mascarenas v. Kennedy*, 74 N.M. 665, 397 P.2d 312 (1964); *Montell v. Orndorff*, 67 N.M. 156, 353 P.2d 680 (1960).

The pertinent provision of the Workmen's Compensation Act defining total disability states:

> 59–10–12.18. 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.

The section of the Workmen's Compensation Act dealing with injuries to specific body members states:

2. § 59–10–18.4, N.M.S.A.1953 (2d Repl. Vol. 9, Pt. 1, 1974).

59–10–18.4. Compensation Benefits—Injury to Specific Body Members.—A. For disability resulting from an accidental injury to specific body members including the loss or loss of use thereof, the workman shall receive the weekly maximum and minimum compensation for disability as provided in section 59–10–18.2 NMSA 1953, . . .

. . . . . .

B. For a partial loss of use of one of the body members or physical functions listed in subsection A of this section, the workman shall receive compensation computed on the basis of the degree of such partial loss of use, payable for the number of weeks applicable to total loss or loss of use of that body member of physical function.

To allow the scheduled injuries section to be exclusive of the total disability section is to ignore both the plain meaning of § 59–10–12.18, *supra*, and the overall purpose of the Workmen's Compensation Act.

A summary of the exclusivity of scheduled allowances is found in 2 Larson's Workmen's Compensation Law, § 58.20 at 10–212–214 (1976), where it states:

> Although it is difficult to speak in terms of a majority rule on this point, because of significant differences in statutory background, it can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction that one might now, with equal justification, say that the field is dominated by the view that schedule allowances should not be deemed exclusive, whether the issue is treatment of a smaller member as a percentage loss of a larger, or treatment of any scheduled loss as a partial or total disability of the body as a whole. (Footnotes omitted.)

The facts in this case can equally justify an award of total and permanent disability under § 59–10–18.2 (2d Repl. Vol. 9, Pt. 1, 1974), or an award for a scheduled injury under § 59–10–18.4, *supra*. Under the latter, Thompson could receive no more than $65.00 per week for 125 weeks notwithstanding the fact that he is totally disabled within the terms of § 59–10–12.18, *supra*.[3] Under the former, he would be entitled to $65.00 per week for up to 500 weeks.

If one suffers a scheduled injury which causes a physical impairment but does not create disability, § 59–10–18.4, *supra*, will apply. When the impairment amounts to a disability, §§ 59–10–18.2 and 59–10–18.3, *supra*, are properly invoked.

The trial court in the present case found that the injury and physical impairment were limited to plaintiff's right hand. No other part of plaintiff's body was physically impaired. The trial court also found total disability as a result of the plaintiff's injuries and his subsequent inability to perform the only work for which he was qualified. The degree of disability is a question of fact to be determined by the fact finder. *Roybal v. County of Santa Fe*, 79 N.M. 99, 440 P.2d 291 (1968); *Adams v. Loffland Brothers Drilling Company*, 82 N.M. 72, 475 P.2d 466 (Ct.App.1970). We have reviewed the record and have concluded that there is substantial evidence to support the court's findings of fact and conclusions of law. *Gallegos v. Duke City Lumber Co., Inc.*, 87 N.M. 404, 534 P.2d 1116 (Ct.App.1975); *Maes v. John C. Cornell, Inc.*, 86 N.M. 393, 524 P.2d 1009 (Ct.App.1974).

We therefore affirm both the trial court and the Court of Appeals and assess additional attorney's fees against American Tank and Steel Corporation and Employers National Insurance Company in the amount of $1,500.00.

IT IS SO ORDERED.

SOSA and EASLEY, JJ., concur.

McMANUS, C. J., dissenting.

FEDERICI, J., not participating.

3. Defendants argued at trial that plaintiff was only entitled to recover 45% partial permanent disability to the right hand for an amount of $29.25 per week for 125 weeks.

565 P.2d 1033

SAFECO INSURANCE COMPANY OF AMERICA, INC., Plaintiff-Appellant,

v.

Bernard J. McKENNA and Richard E. McKenna, Defendants-Appellees,

and

Robert Ortiz, Intervenor-Appellee.

No. 11102.

Supreme Court of New Mexico.

July 1, 1977.

Rehearing Denied Aug. 2, 1977.

Gallagher, Casados & Patten, David R. Gallagher, Albuquerque, Shaffer, Butt, Jones & Thornton, J. Duke Thornton, Albuquerque, for plaintiff-appellant.

Bradford H. Zeikus, Albuquerque, for defendants-appellees.

Thomas D. Schall, Albuquerque, for intervenor-appellee.

OPINION

EASLEY, Justice.

Bernard McKenna (McKenna) had a homeowner's insurance policy with Safeco Insurance Company of America (Safeco). McKenna's son, Richard, was a minor and a member of his father's household. Robert Ortiz (Ortiz) filed a civil action in assault and battery for damages sustained in a fight with Richard, alleging intentional misconduct by Richard and also the negligence of McKenna in failing to exercise discipline and control over Richard, allegedly of known vicious proclivities. Both McKenna and Richard were made defendants.

Safeco sought a declaratory judgment in the District Court of Bernalillo County as to its liability and collateral obligation to defend McKenna and Richard. That court declared that, under the terms of the public liability provisions of the policy, Richard was "an insured," but that he was not "the insured" mentioned by the exclusionary clause of the policy pertaining to intentional torts, and accordingly concluded that Safeco was obligated to defend both McKenna and Richard and pay all damages awarded. The court also awarded $3,000.00 in attorney's fees to McKenna and Richard for defending the declaratory judgment action.

Safeco appealed the decision of the trial court, challenging both the award of attorney's fees and its obligation to defend Richard or pay any judgment against him, claiming error in the trial court's determination that the exclusionary clause did not apply to Richard. Safeco does not contest its obligation to defend or indemnify McKenna.

With regard to the issues before us the cases from other jurisdictions reflect that the terms of homeowners' liability policies are materially the same throughout the country. Pertinent portions of the Safeco policy are set forth in which the company agreed:

> *To Pay* on behalf of *the insured* all sums which the *insured* shall become obligated to pay . . . To Pay, if requested by the *named insured* . . . the reasonable expense of necessary medical, surgical and dental services, [etc.] . . . *Defend* any suit against *the insured* . . . *Pay* . . . all costs taxed against *the insured* . . . *Pay* expenses incurred by *the insured* . . . *Reimburse the insured* for all reasonable expenses . . .
>
> c. *Definitions* 1. *"Insured"* the *unqualified* word "insured" includes (a) the *named insured* and if residents of the household, *his* spouse, and *relatives* . . (b) with respect to animals and watercraft owned by *an insured,* any person or organization legally responsible therefor and (c) with respect to farm tractors and trailers and self-propelled or motor or animal drawn farm implements, any employee of *an insured* while engaged in the employment of *the insured* and (d) in the event of the death of the *named insured* within the policy period unless the policy is cancelled, (1) the *named insured's* legal representative as the named insured but only with respect to the premises of the original *named insured* and those of his spouse, and (2) while a resident of said premises, any person who was *an insured* prior to the death.

2. *Exclusions* This Section does not apply: . . . c. to injury, sickness, disease, death or destruction caused intentionally by or at the direction of *the insured;* (Emphasis added.)

Only one page of the printed policy was placed in evidence, but there were many more instances on that page where the term "the insured" was employed to include both the named insured and the additional insureds. The policy provided that the "unqualified word 'insured' " meant the named insured and the additional insureds. However, the only times in the policy where the term "insured" was preceded by a definitive qualifying word was when the term "*named* insured" was used.

It is unquestioned that Richard intentionally inflicted injuries upon Ortiz and that Richard was an additional insured under the policy. The parties recognize that the controversy turns upon the legal construction of the exclusionary clause. The sole question is whether this intentional-tort exclusion was limited to McKenna, the "named insured," or applied as well to Richard, one of the additional insureds.

The McKennas argue that the exclusion does not apply to Richard and that the company is bound to defend him and pay any damages for the reason that he is not "the insured" mentioned in the exclusionary clause, that term being synonymous with "named insured," i. e., McKenna. Safeco maintains that the exclusionary clause applies to the intentional conduct of Richard as it would apply to like actions of McKenna, and that the phrase "the insured" is to be interpreted to mean the additional insureds as well as McKenna.

This court has held that exclusionary definitions in an insurance contract are to be enforced so long as their meanings are clear and they do not conflict with the statutory law. *Willey v. Farmers Insurance Group,* 86 N.M. 325, 523 P.2d 1351 (1974). However, the specific question involved here has not heretofore arisen on appeal in our courts. We recognize that there is a minority view to the contrary but nevertheless adopt the reasoning and holdings in *National Union Fire Insurance Company v. Bourn,* 441 S.W.2d 592 (Tex.Civ. App.1969) and *Kipp v. Hurdle,* 307 So.2d 125 (La.App.1974).

In *Bourn,* four young men deliberately and in concert intentionally committed an assault. The court held that, under an insurance policy clause with nearly the identical language as is under review here, the policy provision clearly and effectively excluded coverage for such intentional acts of an additional insured and held that the clause was valid.

In *Kipp,* the facts showed that Mrs. Hurdle, while driving by the Crocodile Inn looking for her husband, came upon his parked vehicle. She entered the lounge "in a rage and barefooted." Mr. Hurdle was dancing with Mrs. Kipp and Mrs. Hurdle "walked over to the rear of her husband, grabbed his arm, spun him around and slapped his face." Then she "grabbed the plaintiff by the hair of the head and shoved her to the floor." Mrs. Kipp was injured and sued Mr. and Mrs. Hurdle.

The clause in the homeowner's policy at issue in *Kipp* was materially the same as the one in our case. The court stated [307 So.2d at 129]:

> We are unable to agree with the trial court that there exists any ambiguity whatever in this policy. The policy plainly, simply and unequivocally states that it does not cover personal liability arising from a bodily injury either expected or intended by the insured. There is complete clarity in defining the person designated as the insured. Mrs. Hurdle, as the spouse living in the household of the named insured is an "insured" within the terms of the policy.

The trial court in the instant case erroneously characterized the clause which defined the additional insureds as the "omnibus clause." In *Kipp,* the court explained the difference between the two types of policy [307 So.2d at 129]:

> It is clear that this policy, by its terms, does not cover vicarious liability as such. There is no "omnibus clause" and there

are no "omnibus insureds" under the policy issued to Hurdle. These terms are used in discussing liability arising ordinarily from the use of a motor vehicle with the permission of the named insured, or vicarious liability imposed on some other person or organization because of fault of the named insured or a driver operating the vehicle with permission of named insured. Such has no application to the type policy consideration herein.

The parties to an insurance contract may validly agree to extend or limit insurance liability risks as they see fit. *Pendergraft v. Commercial Standard Fire & Marine Co.,* 342 F.2d 427 (10th Cir. 1965). It has been held that a provision in a policy excluding coverage for intentional injuries is designed to prevent indemnifying one against loss from his own wrongful acts. *Pendergraft; Arenson v. National Automobile & Casualty Ins. Co.,* 45 Cal.2d 81, 286 P.2d 816 (1955). The rule is expressed in 11 Couch on Insurance 2d § 44:272 (1963) as follows:

> By express policy limitation or judicial construction, it is held that a public liability policy only protects against liability on the ground of negligence; that is, the insured is not protected from the consequences of his own wilful and intentional wrongs, nor against the wilful and intentional wrongs of his agent, committed with the intent to inflict injury . . .

Other jurisdictions have held that the additional insureds are excluded from claiming indemnity from the insurers by similar exclusionary clauses. *Oakes v. State Farm Fire & Casualty Company,* 137 N.J.Super. 365, 349 A.2d 102 (1975); see also *Pawtucket Mutual Insurance Company v. Lebrecht,* 104 N.H. 465, 190 A.2d 420, 423 (1963). In *Pawtucket,* the fact situation and the policy terms were practically identical with those in the instant case. However, the minor son who inflicted the injuries was not a party to the suit. The court held that under those circumstances the father and mother would be covered under the policy against liability for the intentional injury committed not by them but by their minor son who was insured as an additional party but stated that the son "would be excluded from coverage as the insured under exclusion clause 'c'." That court in considering the terms used in the policy stated [104 N.H. at 468, 190 A.2d at 422–423]:

> It is reasonable to assume that when the company used the definite expression "the Insured" in certain provisions of the policy and the more indefinite or general expression "any Insured" or "an Insured" in other provisions, it intended to cover differing situations which might come within the terms of the policy. (Citations omitted.) We are of the opinion that the provisions excluding from liability coverage injuries intentionally caused by "the Insured" was meant to refer to a definite, specific insured, namely the insured who is involved in the occurrence which caused the injury and who is seeking coverage under the policy.

In our case, unlike *Pawtucket,* the minor son was made a party defendant and is seeking coverage under the policy.

In *Walker v. Lumbermens Mutual Casualty Company,* 491 S.W.2d 696 (Tex.Civ. App.1973) the court faced a situation similar to that present in *Arenson* where the father of the minor who committed the tortious act was suing his insurance company for indemnity without joining his son as a party. The court disagreed that *Arenson* was in conflict with *National Union Fire Company v. Bourn,* supra, stating that in *Bourn* the court had correctly held that an *additional* insured who intentionally caused damage was precluded from recovering by the exclusion clause, stating [491 S.W.2d at 699]:

> The important distinction between *Bourn* and *Arenson,* is that in *Bourn* claim was made through an insured who committed an intentional wrong. Exclusion No. 5 was applicable. In *Arenson,* and in the instant case claim was made by an insured who is legally responsible for property damage he did not intentionally commit.

In *Walker,* the court held that the exclusionary clause did not apply to the father who was not the party who intentionally committed the tortious act. That case is distinguishable from ours.

Under New Mexico law the obligation of a liability insuror is contractual and is to be determined by the terms of the policy. *Willey v. Farmers Insurance Group, supra; Jones v. Harper,* 75 N.M. 557, 408 P.2d 56 (1965); *Wolff v. General Casualty Company of America,* 68 N.M. 292, 361 P.2d 330 (1961). The clauses in the policy must be construed as intended to be a complete and harmonious instrument designed to accomplish a reasonable end. *Erwin v. United Benefit Life Insurance Company,* 70 N.M. 138, 371 P.2d 791 (1962).

Unambiguous insurance contracts must be construed in their usual and ordinary sense unless the language of the policy requires something different. *Wesco Insurance Company v. Velasquez,* 88 N.M. 273, 540 P.2d 203 (1975); *Couey v. National Benefit Life Insurance Company,* 77 N.M. 512, 424 P.2d 793 (1967); *Harris v. Quinones,* 507 F.2d 533 (10th Cir. 1974).

If an ambiguity is found in the language of an insurance contract, then it should be construed liberally in favor of the insured. *Erwin v. United Beneficial Life Insurance Company,* supra. However, the rule requiring construction of insurance contracts favorably to an insured applies only where the language in the policy is ambiguous. *Foundation Reserve Insurance Co. v. McCarthy,* 77 N.M. 118, 419 P.2d 963 (1966). Resort will not be made to a strained construction for the purpose of creating an ambiguity when no ambiguity in fact exists. *Cain v. National Old Line Insurance Company,* 85 N.M. 697, 516 P.2d 668 (1973); *Miller v. Mutual Benefit Health and Acc. Ass'n of Omaha,* 76 N.M. 455, 415 P.2d 841, 19 A.L.R. 3d 1421 (1966).

The term "the insured" was used in numerous places in the Safeco policy to include not only the "named insured" but the additional insureds as well. There is nothing unreasonable or illogical about reading the words "the insured" in the exclusionary clause to mean that none of the insureds that commits an intentional tort can claim indemnity from Safeco or is entitled to representation by the insurer when sued. Construing the words in their usual and ordinary sense the words are complete and harmonious and appear to be designed to accomplish a reasonable end. Holding that the term "the insured" in the exclusionary clause actually means "named insured" would constitute a strained construction and create an ambiguity when no ambiguity in fact exists.

We hold that the language in the policy is clear and unambiguous and that Richard should be denied indemnity against Safeco for damages and attorney's fees. We reverse the district court on the issues of liability and attorney's fees and order judgment entered for Safeco.

IT IS SO ORDERED.

McMANUS, C. J., and PHILLIP D. BAIAMONTE, District Judge, concur.

565 P.2d 1037

STATE of New Mexico,
Plaintiff-Appellee,

v.

Henry Lee ROLAND,
Defendant-Appellant.

No. 2789.

Court of Appeals of New Mexico.

April 19, 1977.

Certiorari Denied May 24, 1977.

Jan A. Hartke, Chief Public Defender; Reginald J. Storment, Appellate Defender, William H. Lazar, Asst. Appellate Defender, Santa Fe, for appellant.

Toney Anaya, Atty. Gen., Dennis P. Murphy, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

In 1973 defendant was convicted of larceny. In 1976 defendant was convicted of armed robbery committed by use of a firearm. This Court affirmed the armed robbery conviction by memorandum in *State v. Roland,* (Ct.App.) No. 2656, decided November 2, 1976. This appeal involves proceedings against defendant as an habitual offender. Section 40A–29–5, N.M.S.A. 1953 (2d Repl. Vol. 6). Two issues have been briefed: (1) the validity of the prior larceny conviction, and (2) the propriety of enhancing defendant's sentence for armed robbery. Issues listed in the docketing statement, but not briefed, have been abandoned. *State v. Vogenthaler,* 89 N.M. 150, 548 P.2d 112 (Ct.App.1976).

Prior Conviction

Defendant sought dismissal of the habitual offender charge on the basis that his prior conviction for larceny was invalid as a matter of law. He claims the trial court erred in denying this motion.

Defendant pled guilty to larceny; his larceny conviction is based on that plea. He claims the plea was invalid because of the procedure followed by the trial court in accepting the guilty plea. He argues two grounds.

First, defendant claims R.Crim.P. 21(e) was violated in that the trial court failed to advise defendant that if he pled guilty "there will not be a further trial of any kind". This provision was not in effect

at the time of defendant's guilty plea, having been added by an amendment effective October 1, 1974. See annotation to § 41–23–21, N.M.S.A. 1953 (2d Repl. Vol. 6, Supp. 1975).

Second, the transcript of the proceedings at the time of the guilty plea shows that defendant was not advised that his guilty plea waived the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. Because of a lack of specific reference to these rights, defendant contends his guilty plea was invalid under *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). We stated our understanding of *Boykin* in *State v. Martinez,* 89 N.M. 729, 557 P.2d 578 (Ct.App. 1976):

> "The reference to three enumerated constitutional rights demonstrates the gravity of the trial court's responsibility in accepting a guilty plea. *Boykin* did not impose a procedural requirement that the three constitutional rights be enumerated before a guilty plea would be valid."

Defendant does not claim that his plea of guilty to larceny was involuntary. The transcript of the proceedings indicates that the plea was in fact voluntary. See *State v. Martinez,* supra.

The trial court did not err in refusing to hold the guilty plea invalid as a matter of law.

Enhanced Sentence for Armed Robbery

The current, and second, felony conviction is defendant's first conviction for armed robbery; it is a second degree felony. Section 40A–16–2, N.M.S.A. 1953 (2d Repl. Vol. 6, Supp. 1975). Because the offense was committed by use of a firearm, his sentence was increased. Defendant does not claim that his original penitentiary sentence of not less than fifteen nor more than fifty-five years was improper. See § 40A–29–3(B), N.M.S.A. 1953 (2d Repl. Vol. 6) and § 40A–29–3.1(A)(1), N.M.S.A. 1953 (2d Repl. Vol. 6, Supp. 1975).

Defendant complains of the enhanced sentence imposed upon him as an habitual offender. The enhanced sentence is for not less than twenty-seven and one-half years and not more than one hundred ten years in the penitentiary. Defendant contends: (1) any enhancement as an habitual offender is not authorized; and (2) if authorized, the enhancement was figured incorrectly.

(1) Habitual Offender Enhancement for Armed Robbery

Section 40A–16–2, supra, provides that second or subsequent armed robbery convictions are first degree felonies. Defendant asserts this is a specific enhancement provision for armed robbery and, because of this specific provision, the general enhancement provisions for habitual offenders are not applicable. *State v. Sanchez,* 87 N.M. 256, 531 P.2d 1229 (Ct.App. 1975) pointed out that a similar argument was inappropriate when the facts showed only one armed robbery conviction. Defendant asserts that *State v. Sanchez,* supra, should be overruled, and that his contention is controlled by *State v. Lujan,* 76 N.M. 111, 412 P.2d 405 (1966). We disagree.

In *State v. Lujan,* supra, the habitual offender statute was used to enhance a sentence for violation of the applicable narcotic drug law. *Lujan* held that the penalty provisions of the two laws conflicted and that the legislative intent was that narcotic violations were to be punished only under the specific narcotic drug law. With this legislative intent, the general habitual offender statute did not apply.

Lujan, supra, discusses two decisional grounds—the inapplicability of a general statute which conflicts with a specific statute and legislative intent. Both concepts have been recognized in subsequent decisions. *State v. Alderete,* 88 N.M. 150, 538 P.2d 422 (Ct.App. 1975); *State v. Lard,* 86 N.M. 71, 519 P.2d 307 (Ct.App. 1974). The result in *Lujan* does not control this case because the issue here is the applicability of the habitual offender statute to an armed robbery conviction and not to a narcotic conviction; a different statute is involved. We agree, however, that the approach taken in *Lujan* is appropriate. Is there a con-

flict between the habitual offender statute and the armed robbery statute? What was the legislative intent?

Both the armed robbery statute and the habitual offender statute were enacted as a part of the Criminal Code. Laws 1963, ch. 303. The original enactment of § 40A–16–2, supra, contained no enhancement provisions for armed robbery. Thus, as originally enacted, the penalty for armed robbery did not conflict with the habitual offender statute.

Section 40A–16–2, supra, was amended by Laws 1973, ch. 178, § 1. This amendment provided that second or subsequent armed robberies were first degree felonies. This was an enhanced penalty because the penalty for a first degree felony is life imprisonment, § 40A–29–3(A), supra; a penalty greater than the penalty for a second degree felony.

Even with the increased penalty for second or subsequent armed robberies, there is no conflict with the habitual offender statute. Defendant's armed robbery conviction is his second felony conviction. The pertinent portion of § 40A–29–5, supra, reads:

> "Any person who, after having been convicted within this state of a felony, or who has been convicted under the laws of any other state government or country, of a crime or crimes which if committed within this state would be a felony, commits any felony within this state not otherwise punishable by death or life imprisonment, shall be punished as follows:
>
> "A. Upon conviction of such second felony, if the subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than half the longest term, nor more than twice the longest term prescribed upon a first conviction."

Under the first paragraph of the above quotation, the statute applies to a current felony "not otherwise punishable by death or life imprisonment". Second or subsequent armed robberies are punishable by life imprisonment. Section 40A–29–5, supra, does not apply to second and subsequent armed robberies. See *French v. Cox,* 74 N.M. 593, 396 P.2d 423 (1964).

Under Paragraph A of the above quotation the statute applies to a current felony, if upon first conviction, the felony is punishable by a term "less than his natural life". A first conviction for armed robbery is punishable by a ten-to-fifty-year prison sentence. The statute applies to a first armed robbery conviction.

There is no conflict between § 40A–16–2, supra, and § 40A–29–5, supra, because: (a) Enhancement of the sentence for the first armed robbery occurs under § 40A–29–5, supra; there is no enhancement under § 40A–16–2, supra, for the first armed robbery. (b) Enhancement of the sentence for second or subsequent armed robberies occurs under § 40A–16–2, supra; there is no enhancement under § 40A–29–5, supra, for second or subsequent armed robberies.

Legislative intent is to be determined primarily from the language used in the statute. *State v. McHorse,* 85 N.M. 753, 517 P.2d 75 (Ct.App. 1973). *State v. Lujan,* 90 N.M. 103, 560 P.2d 167 (1977) considered the wording of § 40A–29–5, supra, and held that the Legislature intended the habitual offender statute to be mandatory. With this mandatory language, § 40A–29–5, supra, applies to first convictions for armed robbery.

(2) Figuring the Enhanced Penalty

Defendant contends that the enhanced sentence for an habitual offender should be based on the conviction for armed robbery; that the enhanced sentence cannot be based on the increased penalty for use of a firearm. This argument emphasizes the words "felony" and "conviction" in the above-quoted statute. Under this approach, defendant asserts his enhanced sentence should be a twenty-five-to-one hundred-year sentence rather than the twenty-seven and one-half-to-one hundred ten-year sentence imposed.

Instead of emphasizing selected words, we consider the statute as a whole. The statute says that the enhanced sentence must be "for a term not less than half the longest term, nor more than twice the longest term prescribed upon a first conviction." The term prescribed for his armed robbery conviction was fifteen to fifty-five years because the crime was committed by use of a firearm. The enhanced sentence of twenty-seven and one-half to one hundred ten years was the proper sentence.

We note that the original sentence of fifteen to fifty-five years has never been vacated. The cause is remanded solely for the purpose of vacating the original sentence. See *State v. Baker,* 90 N.M. 291, 562 P.2d 1145 (Ct.App.) filed March 29, 1977.

The judgment and the enhanced sentence entered November 19, 1976 are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

565 P.2d 1041

STATE of New Mexico, Plaintiff-Appellee,

v.

William S. MARTIN, Jr., Defendant-Appellant.

No. 2653.

Court of Appeals of New Mexico.

May 3, 1977.

Certiorari Denied May 25, 1977.

Lynn Pickard, Pickard & Singleton, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Paquin M. Terrazas, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of eighteen counts of attempt to evade or defeat any tax pursuant to § 72–13–85, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, 1961, Supp.1975) and eight counts of willfully making a false return with intent to evade or defeat payment of the tax pursuant to § 72–13–86, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, 1961, Supp.1975) defendant appeals. The points for reversal

related to: (1) sufficiency of the evidence; (2) jury instruction given; (3) jury instruction refused; and, (4) offer of proof. Issues raised in the docketing statement but not argued on appeal are deemed waived. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App.1976). We affirm.

Sufficiency of the Evidence

We view the evidence together with all reasonable inferences flowing therefrom in the light most favorable to support the verdict. *State v. Bidegain*, 88 N.M. 466, 541 P.2d 971 (1975); *State v. Bloom*, 90 N.M. 192, 561 P.2d 465, decided March 10, 1977. The record discloses the following.

The taxes and returns involved related to defendant's gross receipts taxes. Defendant is a lawyer and engaged in selling legal services. See § 72–16A–3(F), (K), N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, 1961, Supp.1975). Defendant's internal accounting procedures were at best sloppy. There was no orderly or regular procedure to keep track of income. " . . . His records are admittedly not adequate . . . ." This was not the first time defendant had trouble with his taxes and returns. Previously the Bureau of Revenue had assisted him in straightening out his reporting and taxes. This straightening out was only temporary—he then missed several reporting periods. He would not utilize any records to prepare returns but would "guestimate." Subsequently the matter was turned over to a Special Agent for criminal investigation. The indictments followed.

Under this point defendant makes a three prong attack: (a) that the evidence, taken as a whole, does not show the requisite criminal intent pursuant to §§ 72–13–85 and 86, supra; (b) that the amounts of taxes due were not substantial or material amounts; and (c) that the convictions on the first four counts of tax evasion "were improper as a matter of law due to the fact that defendant was assessed on these counts."

(a) *Intent*

Defendant candidly concedes that under the traditional standard of appellate review in criminal cases, the evidence "could be found to have supported the verdicts." We agree. *State v. Bidegain*, supra. However, defendant urges us to require a higher standard of proof in terms of criminal intent in tax fraud causes, that since this is the first case of its kind it should even be higher and " . . . rather a gut feeling that upon the evidence adduced below, all reasonable people must have a reasonable doubt as to whether defendant really willfully intended to cheat the government out of taxes due it."

Defendant's arguments regarding legislative intent and similarity of Federal provisions relating to quantum of proof required for the requisite criminal intent are not persuasive. First, the presumption is that the legislature intended that statutes enacted would be effective and productive of the most good. *Alvarez v. Board of Trustees of La Union Townsite*, 62 N.M. 319, 309 P.2d 989 (1957). Secondly, tax statutes normally are such that the taxpayer has the obligation of self-declaration of any incident which has a tax consequence. See § 72–14–1, et seq.; § 72–15A–1, et seq.; § 72–15B–1, et seq.; § 72–16A–1, et seq.; § 72–18–1, et seq.; § 72–27–1, et seq., N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp.1975) as examples. The reasons for this are apparent—that the taxpayer will faithfully perform his obligation and that to do otherwise would increase the administrative burdens of the tax collection agencies. Thirdly, the legislature is presumed to have enacted the statutes with knowledge of legislative and judicial pronouncements. *Bettini v. City of Las Cruces*, 82 N.M. 633, 485 P.2d 967 (1971). With the foregoing in mind, the legislature could have provided for a stricter degree of proof for such cases. However, since it did not and since it was presumed to know the burden of proof required in normal criminal cases (See *Sandoval v. Rodriquez*, 77 N.M. 160, 420 P.2d 308 (1966)) we feel obliged to follow the traditional standard of appellate review.

Viewing the evidence as we must we hold that it is substantial to support the verdicts. The absence of procedures and the lack of method of doing business shows a conscious pattern of reckless disregard of any obligation to comply with the law and consequently a reasonable inference of intent not to pay or correctly report proper taxes and income.

(b) *Substantial Amounts*

Throughout the trial court's instructions it referred to substantial amounts. Substantial was defined in the instructions as "considerable in amount, value, or the like and also means large, as a substantial gain." Since these instructions were not objected to and were requested by the state they become the law of the case. *State v. Rayos*, 77 N.M. 204, 420 P.2d 314 (1967); *State v. Gutierrez*, 75 N.M. 580, 408 P.2d 503 (1965); *Griego v. Conwell*, 54 N.M. 287, 222 P.2d 606 (1950). We note in passing that §§ 72–13–85 and 86, supra, do not refer to substantial amounts but instead refer to "any tax." See *State v. Grijalva*, 85 N.M. 127, 509 P.2d 894 (Ct.App.1973). We further note that the power to define crimes is a legislative function. *State v. Allen*, 77 N.M. 433, 423 P.2d 867 (1967).

Defendant argues that since the " . . total sum of the additional tax liability proved against the defendant was $1,200.00 spread over a twenty-four month period, or approximately $50.00 per month . . . " and since he was convicted of twenty-six felony counts the average amount would be somewhat less than $50.00. Defendant further argues that in some months the tax due was less than $10.00 and would certainly not meet the substantial amount requirement. We disagree.

Defendant asks us to rule as a matter of law that certain of the amounts due were not substantial. This we need not consider in light of the instructions.

The trial court's instruction No. 11 stated in part that: " . . . there did exist in New Mexico gross receipts tax for each of those months in an amount substantially in addition to what the defendant paid or in addition to the amount reported by him . . . the defendant willfully attempted to evade or defeat the substantial amount of New Mexico gross receipts tax due . . . ." Instruction No. 12 stated in part: " . . . a substantial amount of his taxes . . . that such obligation substantially exceeded the amount which may have been reported by him . . . ."

Reading the instructions as a whole, as we must (*State v. Rushing*, 85 N.M. 540, 514 P.2d 297 (1973)) we hold that the above quoted instructions defined "substantial amount" as it related to the difference of that paid or reported by the defendant and actual amount due or unreported. By this standard we cannot say as a matter of law that the amounts were not substantial.

(c) *Four Counts of Tax Evasion Conviction*

Defendant's argument here concerns the first four counts of the tax evasion conviction. Defendant had been assessed and paid the Bureau in the sum of $20.00 on each count. Defendant's argument relates to the presumption of correction of the Bureau, § 72–13–32(C), supra, and that the state should now be estopped from imposing criminal liability against defendant when the situation was created by the state. Compare *United States v. Bureau of Revenue*, 87 N.M. 164, 531 P.2d 212 (Ct.App.1975). The state asserts the issue was not raised in the docketing statement. It was raised in the docketing statement. However, nowhere does defendant refer us to the appropriate transcript reference of how the issue was preserved for appellate review. N.M.Crim.App. Rule 205(a)(4). This does not meet the requirements of N.M.Crim.App. Rule 501(a)(3). Accordingly, we will not search the record to see if the issue was preserved. *City of Farmington v. Sandoval*, (Ct.App.) 90 N.M. 246, 561 P.2d 945, decided March 1, 1977; *Wilson v. Albuquerque Board of Realtors*, 82 N.M. 717, 487 P.2d 145 (Ct.App.1971).

Instruction Given

Defendant contends that the giving of N.M.U.J.I.Crim. 1.50 in a tax fraud case is per se reversible error. Defendant recognizes that the issue was not raised in the trial court, that the challenged instruction has been made mandatory by our Supreme Court in every criminal case except for crimes not requiring criminal intent, and first and second degree murder and voluntary manslaughter. See Use Note to No. 1.50, supra. However, defendant feels compelled to raise the issue, because under the law, the instruction is so clearly wrong and that we may so hold notwithstanding *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973).

Our answer is two-fold. First, the error was not preserved for review. N.M.Crim. App. Rule 308. Second, the instruction is made mandatory by Supreme Court Order Misc. 8000, dated June 24, 1975. *Alexander v. Delgado,* supra.

Instruction Refused

Defendant in his post-trial motion, submitted affidavits of two jurors. We need not detail the contents of the affidavits. Suffice it to say, the affidavits attempted to impeach the verdict on the grounds that the jury only thought defendant would be required to pay the amounts due on his taxes. Defendant attempts to use the affidavits to support his argument that the trial court should have given his requested instruction which stated that each count charged was a felony.

Defendant recognizes that he must overcome the rule that juries should not be instructed as to penalties, (*State v. Brigance*, 31 N.M. 436, 246 P. 897 (1926)) and that affidavits of jurors may not be used to impeach their verdicts. Evidence Rule 606(b) being § 20–4–606(b), N.M.S.A. 1953 (Repl. Vol. 4, 1970, Supp.1975).

We need not detail our reasons. Those reasons are set forth in *Brigance,* supra, and the Committee Comments of Evidence Rule 606(b). The refusal to give the requested instruction was not error.

Offer of Proof

In his opening statement defense counsel began to discuss that the defendant was being prosecuted because he was a candidate for district attorney. The state's (presentation to the grand jury and prosecution was being handled by the attorney general's office) objection to the opening statement was sustained. Defendant then tendered the balance of his opening statement as to what he would present at trial outside the presence of the jury. It was to the effect of why and how " . . . a prosecution of this type concerning rather insignificant amounts came to the attention of the authorities in the first place . . a prosecution that has got to cost . . . a minimum of twenty-five thousand dollars, and we are talking about $1,577.71 . . [t]here being no recorded cases of prosecution under those Statutes, indicates a singling out of one particular individual for prosecution . . . . It just happens I am the opponent of E. C. Serna, who is the incumbent District Attorney and candidate for District Attorney and who had knowledge that I was going to run against him . . . ." The defense also attempted to show that the district attorney was instrumental in getting the trial set.

The trial court ruled that the items tendered by defendant were not relevant to the issues at trial and further, that the trial was set but not at the district attorney's request. We agree that the tender was not relevant.

Rule of Evidence 401 states:

> " '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.*" (Emphasis ours)

The Advisory Committee Note states:

> "Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence . . . .

" . . .

"Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand . . . .

"The standard of probability under the rule is 'more . . . probable than it would be without the evidence.' Any more stringent requirement is unworkable and unrealistic . . . ."

Accordingly under the foregoing tests of relevancy the trial court properly ruled the offer of proof inadmissible. It had nothing to do with the issues to be tried. It was irrelevant evidence. Rule of Evidence 402. The issues to be tried were defendant's failure to pay and report taxes due.

Affirmed.

IT IS SO ORDERED.

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

565 P.2d 1046

Bill A. MARTINEZ, Plaintiff-Appellant,

v.

Marilyn K. SCHMICK, Defendant-Appellee.

No. 2741.

Court of Appeals of New Mexico.

May 10, 1977.

Rehearing denied May 23, 1977.

Writ of Certiorari Denied June 16, 1977.

Robert K. Patten, Gallagher, Casados & Patten, Albuquerque, for plaintiff-appellant.

James T. Roach, Klecan & Roach, P. A., Albuquerque, for defendant-appellee.

OPINION

HERNANDEZ, Judge.

Plaintiff appeals from an adverse judgment entered on a jury verdict in a negligence action arising out of an automobile accident.

The accident occurred on September 5, 1974, at about 2:00 p. m. at the intersection of Coors Road and Blake Road in the southwest quadrant of Albuquerque. The plaintiff was traveling south on Coors Road at a speed of 45 miles per hour. The defendant, who had been traveling north on Coors Road, made a left turn at the intersection intending to go west on Blake Road. During the turn and at the moment of impact she was traveling at 5 miles per hour. Coors Road at this intersection consists of two lanes in each direction, each 12 feet wide. The accident occurred in the right-hand lane of the southbound lanes, that is, the lane nearest the shoulder of the road. The view north and south from the intersection on Coors was unobstructed for a distance of 100 yards or more. The plaintiff's vehicle had left 30 feet of skid marks. Plaintiff did not see defendant's vehicle un-

til it was close in front of him making a left turn across his lanes of travel; defendant never saw plaintiff's vehicle before impact.

Plaintiff's first point of error is that the trial court erred in refusing to give his requested instruction on "sudden emergency," N.M. U.J.I. Civ. 13.14:

> "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."

It is our opinion that the trial court erred, because the facts of this case require the application of the sudden emergency doctrine. A party is entitled to have the jury instructed upon his theory of the case if it is supported by substantial evidence. *Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68 (Ct.App.1972).

The trial court gave defendant's requested instruction on contributory negligence, but refused plaintiff's requested instruction on sudden emergency. Plaintiff claims as his first point of error that refusal of the emergency instruction was error because there was substantial evidence on the issue of sudden emergency and proper objection was made when the instruction was refused. Defendant contends (1) that plaintiff's failure to object to the contributory negligence instruction bars him from claiming on appeal that it was error for the trial court to refuse the sudden emergency instruction, and (2) that there was insufficient evidence to support the giving of the instruction on sudden emergency. We consider these contentions in order.

Defendant does not adequately explain the reasoning behind her first contention, but we understand her to mean that instructions on contributory negligence and sudden emergency are mutually inconsistent when applied to the same party. The sudden emergency instruction, supra, begins with the phrases, "A person who, *without negligence on his part*, is suddenly and unexpectedly confronted with peril . . . ." [Emphasis added.] Under defendant's reasoning, plaintiff ought to have objected to the contributory negligence instruction in order to be able to claim that he had not contributed by his negligence to creating the sudden emergency.

It is a question of first impression in New Mexico whether instructions on contributory negligence and sudden emergency are mutually inconsistent when applied to the same party, so that a party offering the emergency instruction is required to object to an instruction on negligence or contributory negligence which might apply to him.

The sudden emergency doctrine is merely the application of the "reasonable person" standard to a situation in which a reasonable person cannot be expected to act with forethought or deliberation. It is a condition precedent to applying the doctrine that the party relying on it must not have contributed by his negligence to creating the emergency. 2 Restatement (Second) of Torts § 296 and comments *b* and *d* (1965); W. Prosser, The Law of Torts § 33 (4th ed. 1971). As we stated in a recent opinion, the fact that the party relying on the doctrine *may* have contributed by his negligence to causing the emergency does not preclude giving the sudden emergency instruction. It is ordinarily a question of fact for the jury whether the negligence of the party contributed to causing the emergency. If the jury finds such negligence, it does not apply the emergency doctrine; if it finds no

such negligence, it goes on to apply the emergency doctrine. *Barbieri v. Jennings*, 90 N.M. 83, 559 P.2d 1210 (Ct.App.1976); *Britton v. Jackson*, 226 Or. 136, 359 P.2d 429 (1961). In order for the jury to follow the proper sequence, it would be desirable to precede the sudden emergency instruction by an instruction such as "If you find that the plaintiff was contributorily negligent and that his negligence contributed to causing the emergency situation, you must disregard the instruction on sudden emergency."

Assuming that there was evidence to support giving both a contributory negligence instruction and a sudden emergency instruction, was plaintiff required to object to the contributory negligence instruction in order to be entitled to the sudden emergency instruction? We hold that he was not so required. Failure to object did not constitute an admission on plaintiff's part that he was contributorily negligent; it constituted only a recognition by plaintiff that there was an issue of fact as to contributory negligence which it was necessary for the jury to decide before it could apply the sudden emergency instruction.

The parties are in conflict as to whether there was substantial evidence to support giving a sudden emergency instruction. Even viewing the evidence in the light most favorable to the prevailing party, as we must on appeal, we must conclude that there was sufficient evidence on the issue of sudden emergency to go to the jury. Plaintiff testified that he was watching the road ahead of him and that defendant's car suddenly appeared making a left turn across the lanes of traffic close in front of him. He was able to apply his brakes and he thought he tried to change lanes, but he was unable to avoid a collision. For the evidence necessary to support a sudden emergency instruction, see *Barbieri v. Jennings*, supra; Annot., 80 A.L.R.2d 5, § 4 (1961).

Defendant relies on *Horrocks v. Rounds*, 70 N.M. 73, 370 P.2d 799 (1962), but that case is distinguishable because the court determined as a matter of law that defendant (the party relying on the sudden emergency doctrine) contributed by his negligence to causing the accident. Defendant also cites *Frei v. Brownlee*, 56 N.M. 677, 248 P.2d 671 (1952), but in that case our Supreme Court held that it was proper for the issue of sudden emergency to go to the jury under an instruction that emphasized that the party relying on the doctrine must be free from negligence in causing the emergency. Finally, defendant cites *Bellere v. Madsen*, 114 So.2d 619, 80 A.L.R.2d 1 (Fla. 1959); there, the implication of the holding is that the trial court should have found the defendant negligent as a matter of law, and that he was therefore not entitled to an instruction of sudden emergency.

Plaintiff's second point of error is that the trial court erred in denying his motion for a new trial. Plaintiff's motion was not denied by the trial court but by operation of law because a ruling had not been entered within 30 days of the filing of the motion. Nonetheless, this does not preclude our considering the matter. *Montgomery Ward v. Larragoite*, 81 N.M. 383, 467 P.2d 399, 42 A.L.R.3d 859 (1970). The ground for plaintiff's motion was "that no substantial evidence supports the verdict returned by the jury." The granting or denial of a motion for a new trial rests within the sound discretion of the trial court and its ruling will not be disturbed in the absence of a clear abuse of that discretion. *State ex rel. State Highway Dept. v. Robinson*, 84 N.M. 628, 506 P.2d 785 (1973). In view of the plaintiff's own testimony, this point borders on the spurious. The trial court did not abuse its discretion.

In light of our disposition of plaintiff's point one, the judgment is reversed and a new trial is granted.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

I dissent.

Plaintiff raises two questions on appeal:

(1) The court erred in refusing plaintiff's requested jury instruction on sudden emergency, and (2) the court erred in denying the plaintiff's motion for a new trial.

A. *Trial court's failure to state reasons for refusal was not reversible error.*

Plaintiff requested that the court give U.J.I. 13.14 on sudden emergency. The trial court refused. The defendant objected because "there has been evidence showing that the Plaintiff might have been or was at some time operating under an emergency situation; that it goes to the issue of his contributory negligence, if any, and that failure to give such an instruction is prejudicial and deprives the Plaintiff of the theory of his case." At the close of objections stated by plaintiff and defendant, the court said:

> Okay, gentlemen, thank you. We'll be in recess until one-thirty. At that time we'll instruct the jury, and then you can make your closing arguments.

For reasons unknown, the trial court did not comment on its refusal to give the instruction. Plaintiff relies on *Chapin v. Rogers*, 80 N.M. 684, 459 P.2d 846 (Ct.App. 1969) for reversal. Here the court held that ". . . [A] U.J.I. instruction must be used, unless the court finds it to be erroneous or otherwise improper, and states into the record the reasons for not using it. A failure to comply with the Order of the New Mexico Supreme Court in this regard constitutes reversible error." [80 N.M. at 686–87, 459 P.2d at 848]. Plaintiff's attorney should have known that this rule was modified.

On June 29, 1970, rehearing denied October 15, 1970, the Supreme Court followed *Chapin* in *Clinard v. Southern Pacific Company*, 82 N.M. 55, 60, 475 P.2d 321, 326 (1970) and said:

> U.J.I. 17.8, specifically requested by the railroad, *should have been given* and the failure of the trial court to explain why it was not, and to follow the clear, mandatory requirements of Rule 51(1)(c), supra, constitutes reversible error in this case. [Emphasis added]

On November 16, 1970, one month later, the Supreme Court said in *Jewell v. Seidenberg*, 82 N.M. 120, 124, 477 P.2d 296, 300 (1970) (Justice Compton, dissenting):

> We agree with the holding of our Court of Appeals in *Chapin v. Rogers*, supra, that U.J.I. requirements are mandatory, but if any statement therein would seem to make a failure to comply with them reversible error, *regardless of a showing of prejudice*, it must be modified. [Emphasis added.]

No reference was made to *Clinard*.

We have interpreted *Jewell* and *Clinard* to mean that *it is error* when the trial court fails to state in the record the reasons for not using a U.J.I. instruction. However, it is *not reversible error* unless the plaintiff can show that he was prejudiced by the failure to give the requested instruction, and that substantial rights of his have been harmed. *Anderson v. Welsh*, 86 N.M. 767, 527 P.2d 1079 (Ct.App.1974).

In *Chapin* and *Clinard*, substantive U.J.I. instructions were requested and refused and the case reversed as a matter of law. In *Jewell*, a cautionary U.J.I. instruction was requested and refused, but the case was not reversed because defendant did not establish prejudicial error.

The time has come for the present Supreme Court to review the cases and determine what result shall follow the failure of the trial court to state into the record the reasons for refusing to give a U.J.I. instruction. Judge Oman, later Chief Justice of the Supreme Court, wrote *Chapin*, and it was concurred in by two members of this Court. Chief Justice Compton dissented in *Jewell* because it chipped away at the use of U.J.I. instructions.

In my opinion, the trial judge should lay his cards on the table when objections to instructions are made, when the facts are fresh in mind, and the application and meaning of the instruction is clear. "We must speak by the card, or equivocation will undo us." Shakespeare: Hamlet V. 1. When a trial court lays his cards on the table during the entire trial of the case, it

assists the attorneys who tried the case, and it assists the appellate courts on review.

In my opinion, when the trial court fails, by inadvertence or oversight, to state its reasons in the record, the lawyer has a duty to request the court to state the reasons to preserve the error on review. When the reasons are given, the lawyer has the right to respond in order to try and avoid reversible error.

When an appellate court puts the burden on a party whose U.J.I. instruction has been refused, to establish prejudice and substantial harm, the appellate court can affirm or reverse in good conscience. But doubt, speculation and uncertainty arises because we have no knowledge of what effect the instruction might have had on the verdict of the jury. If we believe it has no effect, we call it harmless error. If we believe it does have an effect, we call it prejudicial error.

To solve this problem, to avoid doubt and uncertainty, to avoid reversible error, the *Chapin* rule should prevail provided, upon the failure of the trial court to state the reasons in the record, the party requesting the instruction remind the trial court to state his reasons in the record.

B. *The sudden emergency instruction was not applicable.*

(1) *Facts Favorable To Plaintiff*

The automobile accident occurred September 5, 1974, at approximately 2:00 p. m. on a clear, dry afternoon in the right-hand, southbound lane of Coors Road. Coors Road consisted of four lanes, two northbound and two southbound, with each lane about twelve feet wide. Blake Street runs east and west. Immediately prior to the collision, plaintiff, 22 years of age, was proceeding south on Coors Road at between 40 and 45 miles per hour. He was looking straight ahead, paying attention to the oncoming traffic. He was just driving along, "and all of a sudden this car turns right in front of me." The car was proceeding west across Coors Road into Blake Street. Plaintiff had no idea how fast the car was going. He did not see defendant's car except a moment before the collision. He saw the vehicle at the "beginning of the intersection." He said, "I just saw it there and smashed into it."

Was plaintiff entitled to the sudden emergency instruction?

U.J.I. 13.14, Sudden Emergency, reads:

> 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.

The court also instructed the jury on contributory negligence, the duty to use ordinary care, keep a proper lookout, not merely look, but to actually see what is in plain sight or obviously apparent, and speed.

U.J.I. 13.1, Contributory Negligence, reads:

> When I use the expression "contributory negligence", I mean negligence on the part of the plaintiff that proximately contributed to cause the alleged damages of which plaintiff complains.

A claim of "sudden emergency" is simply a denial of negligence. *Lawrence v. Deemy*, 204 Kan. 299, 461 P.2d 770 (1969). "Sudden emergency" is not the primary issue. The primary issue is plaintiff's contributory negligence. "Sudden emergency" is a secondary phase raised by the plaintiff to protect himself in his claim for relief. It

is "a formula whereby a jury may determine that acts which would constitute negligence under normal circumstances do or do not constitute negligence in the face of sudden peril." *State of New Mexico ex rel. State Highway Commission of New Mexico v. Davis*, 64 N.M. 399, 405, 329 P.2d 422, 426 (1958).

The essential elements of the sudden emergency doctrine are: (1) A sudden and unexpected peril must have actually existed, or apparently existed from the standpoint of the one asserting the doctrine. The sudden peril must *not* have been reasonably anticipated. (2) The sudden peril must *not* have arisen from the actor's own negligent conduct. This means that the sudden peril "is not brought about, in whole or in part, by the negligence of the party seeking to invoke the doctrine." *Zook v. Baier*, 9 Wash.App. 708, 514 P.2d 923, 929 (1973). (3) *The actor must have been faced with deciding between two or more courses of action in order to make a choice.* (4) There must not have existed time for reflective judgment upon which course to follow. (5) Once the sudden peril is perceived, the actor must exercise such care as a reasonably prudent person would have exercised under the same circumstances. See Wise, The Sudden Emergency Doctrine As Applied in South Carolina, 20 S.C.L.Rev. 408 (1968).

The sudden emergency doctrine applies to the choice an actor makes after he is confronted with sudden peril through no fault of his own.

Plaintiff's testimony standing alone established that he was not negligent as a matter of law. The "sudden emergency" doctrine never came into play. He did not have a choice to make of any course of action to take to avoid hitting the car after he was confronted with the sudden emergency. When there is no choice of action, the sudden emergency doctrine is not applicable. Where factors of non-negligence, sudden danger, unpremeditated choice, and action based thereon are absent, the doctrine of sudden emergency is inapplicable. *Davis v. Calhoun*, 128 Ga.App. 104, 195 S.E.2d 759 (1973); *Zook v. Baier*, supra.

The failure of the trial court to give plaintiff's requested instruction on sudden emergency was not erroneous.

C. *Plaintiff was not entitled to a new trial.*

Plaintiff claims there was an absence of substantial evidence to support the verdict of the jury. I disagree. There was sufficient evidence of negligence and contributory negligence to submit this case to the jury.

Defendant was driving north on Coors Road in the inside lane, slowed down, made a left turn signal and turned left, or west across the southbound lanes toward Blake Road. She drove at five miles per hour. She looked north and saw no approaching vehicle. There was sight distance of 300 feet south, the direction from which plaintiff was driving. The collision occurred in the right-hand lane near the shoulder of the roadway. She drove in front of plaintiff's car and was hit. This is sufficient evidence of defendant's negligence.

Plaintiff, driving south, did not see defendant's vehicle approaching from the north. He did not know where defendant's car came from, did not know where it was going, did not know why it was there, did not see defendant's car turning, and did not know whether defendant's car was moving or stopped. Plaintiff recalls being in the left southbound lane as soon as he got on Coors Road, but he does not remember which lane he was in from there to the point of collision. Immediately before the collision, and at all material times before the collision, he was clearly in the right-hand southbound lane. He marked a position on a photograph that put him in the outside lane a considerable distance from the point of collision. His tires left skid marks 30 feet long, entirely straight and completely within the right-hand southbound lane. The speed limit was 50 miles per hour. As soon as he saw the car, he "possibly tried to avoid it, go to the right". He could not remember if he changed lanes, and there is no evidence of his distance

from the point of collision when he first saw the car. He did not know whether he applied his brakes, but he thought he swerved to the right to avoid hitting defendant's car. He said he did not remember hitting the other vehicle. This is sufficient evidence upon which to submit the issue of contributory negligence to the jury.

Furthermore, plaintiff was not entitled to the benefit of a motion for a new trial. He did not move for a directed verdict at the close of the evidence. He cannot raise the issue of the sufficiency of the evidence on a motion for a new trial. *Nally v. Texas-Arizona Motor Freight, Inc.*, 69 N.M. 491, 368 P.2d 806 (1962).

The judgment of the trial court should be affirmed.

565 P.2d 1053

STATE of New Mexico, Plaintiff-Appellee,

v.

John DOE, a child, Defendant-Appellant.

No. 2918.

Court of Appeals of New Mexico.

May 24, 1977.

Donald C. Schutte, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Ernesto J. Romero, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

This appeal from a judgment of the Children's Court concerns the probation of a delinquent child. We discuss: 1. Amendment of the petition to revoke probation. 2. The terms of probation, and 3. Double jeopardy.

The original petition charged the child with assault and criminal damage to property. On *June 8, 1976,* the child was found to have committed the delinquent acts charged, and was found to be a delinquent child and in need of care or rehabilitation. The child was placed on probation from June 1, 1976 through June 1, 1977, and ordered to "execute forwith and abide by all conditions of the Juvenile Probation Agreement within the Second Judicial District, Bernalillo County, New Mexico."

In September 1976, a petition to revoke probation was filed which charged that the child had committed assault. The child admitted the charge. A judgment of *November 4, 1976,* found that the child was delinquent and in need of care or rehabilitation. This judgment authorized the child to "relocate to Las Vegas, Nevada" to live with relatives until the child's mother joined him there. The judgment also provides:

> "Ordered that said Child be continued on probation for a period of one (1) year, effective September 16, 1976, until September 16, 1977, which probation is to be transferred through the Interstate Compact Services to Las Vegas, Nevada. Terms and conditions of said Child's probation shall be negotiated with Probation Services in Las Vegas, Nevada."

If the child went to Nevada, he wasn't there very long. A petition to revoke probation, filed *January 21, 1977,* charged that the child committed aggravated burglary in Bernalillo County on *November 26, 1976.* An amended petition was filed *February 23, 1977.* A judgment of March 3, 1977, found that the child committed the delinquent act of aggravated burglary and made the other necessary findings. The judgment committed the child to the Department of Corrections at Springer for a full term commitment.

Amendment of the petition to revoke.

The amended petition of February 1977 amended the January 1977 petition; the amended petition was filed on the day set for hearing the January 1977 petition. We have assumed that the child had no advance notice that the amended petition would be filed. The amended petition was heard on February 23, 1977, and is the basis for the March 1977 judgment.

The child contends the amended petition of February 1977, charged a different offense than the petition of January 1977. See Children's Court Rule 4(e). This is incorrect; both charged that the child committed aggravated burglary in Bernalillo County, on November 26, 1976.

The child contends the amended petition substantially changed the allegations against the child. He points out that the January 1977 petition charged a violation of the November 1976 probation while the February 1977 amended petition charged a violation of the probation of June 1976.

Children's Court Rule 4(d) states:

" . . . No pleading shall be deemed invalid, nor shall the inquiry, hearing, judgment or other proceeding thereon be stayed, arrested or in any manner affected because of any defect, error, omission, imperfection or inconsistency therein which does not prejudice the substantial rights of the respondent on the merits. The court may at any time prior to an adjudication on the merits cause the pleadings to be amended to cure errors, defects, omissions, imperfections or variances if substantial rights of the respondent are not prejudiced. Upon ordering such an amendment of a petition or other pleading, the court shall grant a continuance to any party whose ability to present his case has been affected by the amendment."

There are two variations.

(a) Both the January 1977 petition and the February 1977 petition had attached thereto the probation agreement signed by the child in June 1976. This was the probation agreement entered in conformity to the June 8, 1976 order. The January 1977 petition referred to probation of November 1976; the amended petition changed this reference to June 1976. The misreference to probation in November 1976 is not significant because the June probation agreement was attached.

(b) The January 1977 petition did not refer to a specific probation term alleged to have been violated; the February 1977 petition identifies a specific probation violation. However, the specific probation violation in the January petition is obvious because aggravated burglary was charged. The probation violation in both the January and February petitions was a failure to comply with State law.

These two variations did not amount to a substantial change and there is nothing showing the child's ability to present his case was affected by the amended petition. Children's Court Rule 4(d) was not violated; there was no error in allowing the amended petition to be filed on February 23, 1977.

Defendant argues that the June and November probations were significantly different. This is incorrect; the contention will be discussed in the following point.

Terms of Probation.

The June 1976 probation agreement contains specific terms and conditions. As previously pointed out, one provision required the child to comply with State laws. This provision was violated when the child committed aggravated burglary.

The child asserts the November probation order altered the June probation agreement when it provided that the terms and conditions of probation were to be negotiated with probation services in Nevada. The child contends this provision was a substantial change in the terms and conditions of his probation.

The child also claims that no probation agreement was entered in Nevada. Absent such an agreement, the child contends there were no terms and conditions for him to violate and his aggravated burglary was not a violation of probation. A logical consequence of this argument is that the aggravated burglary should have been handled as an original petition rather than as a probation violation.

Neither argument recognizes what the court ordered in this case. The November order states that the child was to "be continued on probation." What probation was to be continued? The probation agreement of June 1976. The November 1976 order states that probation "is to be transferred" to Nevada. Section 13–16–1, Art. 7, N.M.S.A.1953 (Repl. Vol. 3, pt. 1). There is nothing indicating such transfer ever took place.

Until such time as the child's probation was transferred to Nevada and a new pro-

bation agreement entered there, the June 1976 probation agreement was in effect. There had been no change in the child's June probation agreement, because the change authorized by the court never occurred. Because the change never occurred, the child was subject to the provision in the June agreement that he was not to violate State law.

Double Jeopardy.

The judgment of March 1977 revoked the probation granted June 1976 and ordered the child's commitment. The child claims this placed him in double jeopardy. His theory is that his probation had been revoked in November 1976, and a second revocation amounts to double punishment for the same offense, which is double jeopardy. *State v. McAfee,* 78 N.M. 108, 428 P.2d 647 (1967). We have previously pointed out that probation was not revoked in November 1976; rather it was continued. The only revocation occurred in March 1977. To the extent the child's contention is based on two revocations, it has no factual basis.

The June 1976 probation was from June 1, 1976, through June 1, 1977.. The November 1976 order continued the child's probation for a period from September 16, 1976, until September 16, 1977. This was a change in the length of the child's probation. The child asserts this increase in the length of probation and the subsequent commitment amounts to prohibited double punishment.

The State asserts the double jeopardy question is not before us because it was raised neither in the Children's Court nor in the docketing statement. See *Matter of Doe,* 89 N.M. 83, 547 P.2d 566 (Ct. App.1976); *State v. Alderete,* 88 N.M. 619, 544 P.2d 1184 (1976). Ordinarily, we would agree with the State. However, § 40A–1–10, N.M.S.A.1953 (2nd Repl. Vol. 6), states that the defense of double jeopardy may not be waived and may be raised at any stage of a criminal prosecution. We assume that § 40A–1–10, supra, applies to Children's Court proceedings involving a delinquent child. See N.M. Crim.App. 101. This assumption, however, raises the question of whether § 40A–1–10, supra, is unconstitutional, in that it is a legislative attempt to regulate court procedure. See *Matter of Doe,* 88 N.M. 644, 545 P.2d 1022 (Ct.App.1976); Compare *Ammerman v. Hubbard Broadcasting, Inc.,* 89 N.M. 307, 551 P.2d 1354 (1976). We need not resolve this problem. The double jeopardy question based on multiple probation revocation proceedings affects the interest of the State at large. On that basis, it is properly before us for review. *State v. Pacheco,* 85 N.M. 778, 517 P.2d 1304 (Ct.App.1973); See N.M. Crim.App. 308.

The double jeopardy concept involved is double punishment for the same offense. *State v. McAfee,* supra; compare *State v. Tanton,* 88 N.M. 333, 540 P.2d 813 (1975). The November 1976 extension of probation was not for the assault and criminal damage to property involved in the original petition; rather, the extension was because of an assault committed in September 1976. The March 1977 commitment was for the aggravated burglary committed in November 1976. The child twice violated the terms of his probation. The facts show the violations were separate matters; there has not been double punishment for the same offense. Double jeopardy has not been violated.

The judgment and commitment are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

565 P.2d 1057

STATE of New Mexico,
Plaintiff-Appellee,

v.

William M. SHAW, Defendant-Appellant.

No. 2855.

Court of Appeals of New Mexico.

May 24, 1977.

Kathryn Jones Lauer, Sante Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Ernesto J. Romero, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of armed robbery. Section 40A–16–2, N.M.S.A. 1953 (2d Repl.Vol. 6, Supp.1975). We reverse because of two capricious rulings of the trial court involving: (1) polygraph examination and, (2) tender of evidence. The State presents a casuistic defense for each of the rulings.

Polygraph Examination

The results of polygraph examinations are admissible evidence in New Mexico if a proper foundation is laid and the results are relevant at trial. *State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977); *State v. Dorsey,* 87 N.M. 323, 532 P.2d 912 (Ct.App. 1975), aff'd, 88 N.M. 184, 539 P.2d 204 (1975).

Prior to trial defendant moved that the trial court authorize the expenditure of funds to pay for a polygraph examination. The order denying the motion states that at the motion hearing no evidence was taken and no argument was heard. This order does not reflect what transpired before the trial court. The transcript shows the following occurred.

"THE COURT: How about the expert witness fees?

"MS. HECTOR: They agree to that. That is for a polygraph expert in this particular case.

"THE COURT: Whose [sic] going to pay for it?

"MS. HECTOR: Out of the court fund.

"THE COURT: No, there is no money from our court fund.

"MS. HECTOR: Well, there is a letter in our office from Larry Coughenour to the District Judges and listed under expert witness fees are polygraph funds, and I have had them paid by the court before.

"THE COURT: Well, at this point your motion for a polygraph is denied. It's not admissible evidence, and I am not going to spend money to have tests run for evidence that is not admissible in court. It's as simple as that, polygraph tests are not admissible evidence.

"MS. HECTOR: That is denied?

"THE COURT: That is denied. If that's what your expert witness fee is for, that is denied.

"MS. HECTOR: Yes, Your Honor.

* * * * * *

"MS. HECTOR: Yes, sir. So the record is clear, that is irregardless of whether the defendant is indigent or not?

"THE COURT: What's that?

"MS. HECTOR: On the polygraph; that has nothing to do with whether the defendant is indigent?

"THE COURT: What is the purpose of the polygraph test? Do you intend to offer it in evidence at trial?

"MS. HECTOR: Yes, sir.

"THE COURT: It's not admissible.

"MS. HECTOR: I believe it is admissible if the person is qualified.

"THE COURT: Not in this court it's not admissible, Ms. Hector, at this time.

"MS. HECTOR: Yes, sir; okay.

"THE COURT: So, whether they're indigent or not, unless the evidence or the expert is to be used at the time of trial and is admissible, I won't order it. I won't order a polygraph test. . . ."

The State defends the trial court ruling as follows:

1. The trial court conducted an evidentiary hearing.

2. The trial court did not refuse to hear testimony in support of the motion.

3. The defendant offered no evidence to show the necessity for a polygraph examination.

None of the State's contentions are based on the transcript. The trial court ruled as a matter of law that the results of a polygraph examination were "not admissible evidence." This ruling came before defendant had the opportunity to present evidence or demonstrate necessity for the examination. The "not admissible" ruling was repeated several times. The trial court made it clear that his ruling would not be changed by the fact of defendant's indigency. Neither *State v. Turner,* 90 N.M. 79, 559 P.2d 1206 (Ct.App.1976) nor *State v. Carrillo,* 88 N.M. 236, 539 P.2d 626 (Ct.App. 1975) are applicable. Coming at the time it did, the trial court's ruling was error.

Tender of Evidence

During his direct examination, defendant testified that he had gone to visit Steve Maes on the evening of the crime, but that

Steve was not at home. Defendant also testified that he could not remember the day of the week the crime took place because four months had elapsed.

Cross-examining, the prosecutor asked defendant if Steve Maes was still in town. Defendant replied: "Yes he is. I believe he is. I been—I been in jail four months." The prosecutor then asked defendant if he'd like to get out of jail; defendant replied in the affirmative.

On redirect, defense counsel asked defendant why he had been in jail for four months. The prosecutor's objection, on grounds of relevancy, was sustained. In the absence of the jury, the trial court cautioned counsel that although defendant volunteered the information that he had been in jail, it was improper to go into the matter further.

Defense counsel asked to tender proof to show the relevancy of the question concerning defendant being in jail. The trial court refused to permit the tender, stating that none was needed because the reason defendant was in jail was not relevant. Defendant claims the trial court erred in not permitting a tender of proof.

Evidence Rule 103(a)(2) provides that error may not be predicated upon a ruling excluding evidence unless a substantial right of the party is affected and "the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked."

This is not a case where no tender was made. See *State v. Carrillo,* supra. The trial court refused to permit defendant's tender. Yet, one of the grounds for predicating error on the exclusion of evidence is a tender which makes the substance of the evidence known to the trial court. Evidence Rule 103.

Why is a tender of proof required? One reason is to advise the trial court of the nature of the evidence so that the trial court can intelligently consider it. Compare *State v. Hogervorst* (Ct.App.), No. 2750, decided May 17, 1977.

Another reason is to have the excluded evidence in the record for purposes of appellate review. ". . . [I]f a trial court can arbitrarily deny to counsel the right to dictate into the record their offer of proof, he can prevent any consideration upon appeal as to the correctness of his own ruling as to the exclusion of certain evidence. It is obvious that this cannot be the law." *Bexterimueller v. Busken,* 376 S.W.2d 621 (Mo.App.1964).

The right to offer proof is almost absolute. The offer, of course, must be timely. *State v. Kendall,* 90 N.M. 236, 561 P.2d 935 (Ct.App.1977), rev'd on other grounds, 90 N.M. 191, 561 P.2d 464 (1977). And, the trial court has discretion to restrict repetitious proof. *Jones v. Clark,* 418 P.2d 792 (Wyo.1966); *People v. Camel,* 10 Ill.App.3d 1022, 295 N.E.2d 270 (1973). See *Commonwealth v. Barnett,* 354 N.E.2d 879 (Mass.1976); *Barci v. Intalco Aluminum Corporation,* 11 Wash.App. 342, 522 P.2d 1159 (1974).

The tender of proof was neither untimely nor repetitious. The State claims there was no error in not permitting the tender. Its arguments, and our answers, follow.

1. Defendant waived the error because he never moved to strike the testimony complained of and did not ask for a cautionary instruction. See *State v. Sandoval,* 88 N.M. 267, 539 P.2d 1029 (Ct.App.1975). Defendant is not complaining of evidence *received*; his grievance is that the trial court *excluded* evidence without permitting a tender of proof. Defendant asked the trial court to be permitted to try to demonstrate the relevancy of the question concerning jail time. Since the tender wasn't permitted, we cannot determine whether the jail time question, if answered, was either subject to being stricken or that a cautionary instruction would have been appropriate. In these circumstances, there was no waiver.

2. Defendant is really complaining because the trial court sustained the prosecutor's relevancy objection. We disagree. Defendant is complaining of not being per-

mitted to tender evidence in an effort to demonstrate relevancy.

3. No tender was necessary because the substance of the evidence is apparent from the question asked, and the trial court's remarks. Evidence Rule 103. The question asked defendant to explain why he had been in jail four months. The answer is not indicated by the question. The trial court remarked that it would be improper to go into the matter. This remark does not indicate either that the trial court knew what the answer would be or that the trial court knew the substance of the evidence that defendant desired to tender. The substance of the evidence is not apparent from the trial proceedings.

4. The trial court correctly ruled that the reason defendant had been in jail was irrelevant. How can we know that when the trial court would not give the defendant the opportunity to try to demonstrate relevancy? Four months in jail might or might not have been relevant to the prosecutor's question concerning the availability of Steve Maes as a witness. We don't know, nor could the trial court know without permitting the defendant to tender his proof.

The trial court erred in not allowing defendant to tender proof as to relevancy of the question concerning jail time.

The judgment and sentence are reversed. The cause is remanded for a new trial.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

566 P.2d 93

VANN TOOL COMPANY, a New Mexico Corporation, Plaintiff-Appellee,

v.

Michael P. GRACE, II and Corrine Grace, his wife, Defendants-Appellants.

No. 11216.

Supreme Court of New Mexico.

July 6, 1977.

Lamb, Metzgar, Franklin & Lines, Richard Mantlo, Albuquerque, for defendants-appellants.

Losee & Carson, Chad D. Dickerson, Artesia, for plaintiff-appellee.

OPINION

PAYNE, Justice.

Vann Tool Company brought suit upon a contract against the Graces, who are nonresidents of New Mexico. Service of process was obtained by posting the summons at an address in Phoenix, Arizona. The defendants failed to appear and default judgment was entered in favor of Vann Tool. Subsequently the defendants entered an appearance and moved to set aside the judgment. They asserted that they were not "personally" served as required by § 21–3–16, N.M.S.A.1953 (Supp.1975), more commonly known as the "long-arm statute," and that the address where the summons was posted was not their usual place of abode. The court denied the defendants' motions.

The initial question presented is whether or not substituted service of process under the long-arm statute is sufficient to give the court jurisdiction over the defendants. The proper method for obtaining jurisdic-

tion in this instance was by complying with the provisions of § 21–3–16, supra. Subparagraph B of that statute reads:

> Service of process may be made upon any person subject to the jurisdiction of the courts of this state under this section by *personally serving the summons upon the defendant* outside this state and such service has the same force and effect as though service had been personally made within this state. (Emphasis added.)

Defendants assert that the statute requires the summons to be placed "in hand" to be personally served. Plaintiffs argue that the use of the phrase "personally serving the summons" merely differentiates between service which would give *in personam* jurisdiction and constructive service which would give *in rem* jurisdiction.

The New Mexico long-arm statute was patterned after a similar Illinois statute. Decisions of the Illinois courts in construing the statute are helpful in defining its scope. *Melfi v. Goodman*, 69 N.M. 488, 368 P.2d 582 (1962). Illinois has held that the long-arm statute reflects the legislative intention to exert jurisdiction over non-resident defendants to the limits permitted by the due process clause. *Ziegler v. Houghton-Mifflin Co.*, 80 Ill.App.2d 210, 224 N.E.2d 12 (1967); *Koplin v. Thomas, Haab & Botts*, 73 Ill. App.2d 242, 219 N.E.2d 646 (1966). Defendants make no argument that out-of-state substituted service by posting exceeds constitutional due process requirements.

Although substituted service is not explicitly provided for in New Mexico's long-arm statute, we are of the opinion that the legislature's purpose in adopting the statute was to permit service of process on out-of-state persons in the same manner as process may be served upon residents of the state. The procedure for service of process in New Mexico is outlined in N.M.R.Civ.P. 4 [§ 21–1–1(4), N.M.S.A.1953]. The same procedure will be applied to actions which are brought under § 21–3–16, supra.

The remaining issue is whether the substituted service by posting was left at "the usual place of abode" of the defendants. Service of process was shown by a return executed by a deputy sheriff of Maricopa County, Arizona. The return stated:

> [T]hat he served the within summons on the 10th day of June, 1976 * * * by posting a copy of said summons on front door of residence, at 1141 E. Bethany Home Road, Phoenix, Arizona * * *.

N.M.R.Civ.P. 4(e)(1), supra, allows substituted service by delivering a copy to a person of sufficient age residing at "the usual place of abode" of the defendant. If no such person be found willing to accept a copy, then service shall be made by posting on the defendant's premises.

Defendants presented testimony that they had not lived at the address indicated in the return of service since December of 1975. Defendants did not disclaim ownership of the home nor did they deny that they were residents of Phoenix, Arizona. Their children had remained at the Phoenix address until about two (2) months prior to the date of service, but no member of the family lived there on June 10, 1976.

Plaintiffs introduced documents showing that defendants had answered a suit filed against them wherein summons had been posted at the same address on May 6, 1976. A document was introduced showing that defendants answered another lawsuit on April 26, 1976, admitting that they were residents of Phoenix, Arizona. A third document showed that defendants admitted residence in Maricopa County, Arizona. These documents were the only evidence presented by the plaintiffs. The trial court found that:

> 1. Process was served upon the defendants, Michael P. Grace, II and Corrine Grace, his wife, on June 10, 1976, by posting copies of the Summons and Complaint herein on the front door of a residence at 1141 East Bethany Home Road, Phoenix, Arizona.
>
> 2. The residence set forth above was the usual place of abode of the defendants, Michael P. Grace, II and Corrine Grace, his wife, on June 10, 1976.

There is no testimony or evidence that 1141 East Bethany Home Road was the

usual place of abode of the defendants on June 10, 1976. Even if the defendants' evidence is completely discounted, nothing remains in the record to support the court's finding. Had the return of service indicated that the questioned address was defendants' "usual place of abode", the burden would have been upon defendants to persuade the court to the contrary. Under those circumstances the trial court could have disbelieved defendants' evidence and we would have been bound to sustain the finding. This was not the case.

This court recently answered the question of what constitutes the usual place of abode in connection with service under § 21–1–1(4)(e)(1) in *Household Finance Corporation v. McDevitt*, 84 N.M. 465, 466, 505 P.2d 60, 61 (1973), by citing *Williamson v. Taylor*, 96 W.Va. 246, 122 S.E. 530 (1924):

> Under the statute 'the usual place of abode' means the customary place of abode at the very moment the writ is left posted; hence, where the writ is left posted at a former place of abode, but from which defendant had, in good faith, removed, and taken up his place of abode elsewhere, service so had is ineffective and invalid.

Even when we view the evidence in the light most favorable to the plaintiff, the finding by the district court that the address where posting was made was the usual place of abode of the defendants on June 10, 1976 is not supported by substantial evidence.

We reverse the trial court and remand the case with instructions to set aside the judgment for lack of jurisdiction over the defendants.

IT IS SO ORDERED.

McMANUS, C. J., and EASLEY, J., concur.

566 P.2d 95

FIRST NATIONAL BANK OF LORDSBURG, Plaintiff-Appellee,

v.

RETIREMENT RANCHES, INC., Defendant-Appellant.

No. 11166.

Supreme Court of New Mexico.

July 7, 1977.

E. Ray Phelps, Roswell, Quinn & Quinn, Clovis, for defendant-appellant.

Martin, Martin & Lutz, William L. Lutz, Las Cruces, for plaintiff-appellee.

OPINION

REUBEN E. NIEVES, District Judge.

Defendant-appellant, Retirement Ranches, Inc., appeals from a judgment rendered in favor of First National Bank of Lordsburg, Plaintiff-appellee on a guarantee agreement. The parties will be referred to as defendant and plaintiff, respectively.

Plaintiff bank loaned money to Retirement Ranch of Lordsburg, Inc., (a related corporation of defendant Retirement Ranches, Inc.) on a promissory note and accepted from the defendant a continuing guaranty for repayment. Authority for this guaranty was duly given by defendant's board of directors. The directors further authorized the pledging of a certificate of deposit in the amount of $12,500 as additional security for the loan made by plaintiff to Retirement Ranch of Lordsburg, Inc. Retirement Ranch of Lordsburg, Inc., failed as a business, and defendant was called upon by plaintiff to honor its commitment under the guaranty. Subsequently, defendant authorized the application of the proceeds from the certificate of deposit toward payment on the loan and this was accomplished. Thereafter, defendant failed to honor its guaranty and legal action was instituted by the plaintiff. Defendant urged that the guaranty was unenforceable in that defendant did not possess authority to enter into this guaranty, nor to pledge the funds represented by the certificate of deposit. Defendant also counterclaimed to recover the monies pledged as security. The matter was tried to the court without a jury. Judgment was entered for the plaintiff on its complaint and defendant's counterclaim was denied. We affirm.

Defendant, in urging reversal of the trial court's judgment, advances four (4) points for our consideration:

(1) defendant was a nonprofit corporation, and Retirement Ranch of Lordsburg, Inc., was an ordinary business corporation;

(2) the continuing guaranty executed by the defendant was ultra vires;

(3) defendant was not estopped to rely on the defense of ultra vires; and

(4) plaintiff took the funds pledged as security for the guaranty with notice that they were trust funds being diverted from an express trust purpose, and the same should be restored to the defendant.

In reference to the points raised by defendant, the trial court found: (a) as to Point (1): defendant was a New Mexico corporation, but made no finding concerning the nature of the corporation whose debt was guaranteed, i. e., Retirement Ranch of Lordsburg, Inc.; (b) as to Point (2): the guaranty of the loan by defendant was in furtherance of defendant's plan to establish a nursing home, and the execution of the guaranty was within its corporate powers, and therefore, was not ultra vires; (c) as to Point (3): even if the execution of the guaranty were an ultra vires act, the defendant was estopped to plead such as a defense; (d) as to Point (4): the pledge and the assignment of the funds placed as security were not contrary to any restrictions on the use of the funds by the donor to the defendant, and even if the pledge of the funds was contrary to the restrictions on its use, the defendant is estopped to raise those restrictions and waived any right to rely on them.

It is contended by the plaintiff, and was advanced in the trial court, that the obligation of the defendant was created by the execution of the guaranty; that defendant knew the purposes thereof and acquiesced therein; that the guaranty was authorized by the defendant's Board of Directors; and that its acts were in furtherance of defendant's business under the powers granted by its charter. There is substantial evidence to support this view of the facts. *State v. Williams*, 57 N.M. 588, 261 P.2d 131 (1953).

We first proceed to examine defendant's contention under its Point 2 as to whether or not the act of entering into the guaranty obligation was ultra vires. The defendant was chartered under the provisions of §§ 51–14–20—51–14–40, N.M.S.A. 1953, prior to said sections being repealed in 1976 by Ch. 217, § 98 N.M. Law 1975. Section

51--14–30, supra, gave the following general powers, among others, to a non-profit corporation unless otherwise restricted by its articles of incorporation:

(e) . . . encumber, convey or dispose of real and personal property;

(f) enter into obligations or contracts . . . expedient to the purposes stated in its articles of incorporation;

* * * * * *

(h) to receive, hold and administer trust funds and endowments for the uses and purposes of said corporation;

Article III (A), (J) and (N) of defendant's Articles of Incorporation authorized it to "equip, maintain, service and operate houses for the aging, hospitals," et cetera, and gave it general powers to so operate, and that the "enumeration of powers" should not be held "to limit or restrict in any manner powers of the corporation."

In this instance, defendant Retirement Ranches, Inc., by its charter and the appropriate statutes under which it was incorporated, had the authority to enter into obligations or contracts, encumber or dispose of personal property, and hold and administer trust funds, all in furtherance of its purposes for existence, to-wit: "equip, maintain, service and operate houses for the aging, hospitals," et cetera.

The funds that were pledged as a guaranty by the defendant originated as a bequest from an estate of a decedent to a religious institution, a church. This church, in turn, authorized the transfer of these funds to the defendant to be used by the defendant for the establishment or maintenance of a retirement home at Lordsburg, New Mexico, in accordance with the provisions of Section Eleven of the Will of the decedent.

The question of whether the execution of a guaranty by the officers of a non-profit corporation is an ultra vires act, is a case of first impression in New Mexico. However, the case of *Ingram v. Texas Christian University,* 196 S.W. 608 (Tex.Civ.App.1917), which has a similar factual situation, provides this Court with some direction. There, an action was brought by Ingram against Texas Christian University to recover rents on a building. The University denied liability, contending that it did not authorize the rental contract and further, if it did so attempt to execute the contract, such was ultra vires. The trial court rendered judgment for the defendant university, concluding that the execution of the lease was an effort on the part of the university to lend its credit to and guarantee the debts of the University Hospital Association. As such, the defendant's act was ultra vires and created no legal obligation on its part to comply with the terms of the lease. Upon appeal, the Court of Civil Appeals reversed the trial court and at 196 S.W. at 611 quoted with approval the following language found in *Live Stock Co. v. West Texas B. & T. Co.,* 111 S.W. 417 (Tex.Civ.App.1908):

> Ordinarily, a contract of suretyship is foreign to the object for which corporations are created; but there are exceptions to this rule, one of which is that, though not expressly authorized, the corporation may become a surety when it is necessary to enable it to accomplish the object for which it was created, or whenever the particular transaction is reasonably necessary or proper in the conduct of its business.

It is generally recognized that:

> An express grant of power to a corporation carries with it all the powers which may be implied from, or are incidental or auxiliary to, the powers expressly conferred, and permits the corporation to do everything convenient, suitable or necessary to enable it fully to perform the powers designated in its charter and the business for which it was organized.

6 W. Fletcher, Cyclopedia of the Law of Private Corporations § 2486 (Rev. perm. ed. 1968).

We therefore hold that the entering into an obligation agreement by the defendant with the plaintiff, guaranteeing the loan made by plaintiff to Retirement Ranch of Lordsburg, Inc., the creation of which was in furtherance of defendant's corporate purpose of existence, was not ultra vires.

Our holding that the guaranty executed was not ultra vires is dispositive of the other issues urged by defendant on this appeal. The judgment of the trial court is affirmed in all respects. Costs are assessed against the defendant-appellant, Retirement Ranches, Inc.

McMANUS, C. J., and PAYNE, J., concur.

566 P.2d 98

Kenneth ARNOLD, Plaintiff-Appellee,

v.

FORD MOTOR COMPANY, Ford Motor Credit Company and Wayne Lovelady's Frontier Ford, Inc., Defendants-Appellants.

No. 11185.

Supreme Court of New Mexico.

July 7, 1977.

Rodey, Dickason, Sloan, Akin & Robb, Gene C. Walton, Albuquerque, for Ford Motor Co. and Ford Motor Credit Co.

Threet, Threet, Glass, King & Maxwell, J. Jerome Maxwell, Albuquerque, for Wayne Lovelady's Frontier Ford.

Kanter & Carmody, John Carmody, Jr., Albuquerque, for plaintiff-appellee.

OPINION

PAYNE, Justice.

Kenneth Arnold brought suit against Wayne Lovelady's Frontier Ford, Ford Motor Company and Ford Motor Credit Company to recover damages for breach of warranty in the sale of a new 1972 Ford Ranger pickup. Ford Motor Credit Company counterclaimed for the balance due on the purchase price of the vehicle. The trial court denied the counterclaim of the credit company, awarded Arnold damages against defendants Ford Motor Company and Wayne Lovelady's Frontier Ford, and directed Arnold to deliver the vehicle to defendants upon satisfaction of the judgment.

It was uncontested at trial that Frontier Ford and Ford Motor extended an express warranty to the plaintiff which warranted the pickup for a period of twelve months or 12,000 miles. The warranty provided that the "selling Dealer will repair or replace any part that is found to be defective in factory materials or workmanship." Arnold had the burden of proving four essential elements. Those elements were: (1) the existence of a defect in the operation of the vehicle, (2) that the defect resulted from factory material or workmanship, (3) that the plaintiff presented the vehicle to the automobile dealer with a request that the defect be repaired, and (4) that the dealer failed or refused to repair or replace the defective parts. *Hass v. Buick Motor Division of General Motors Corp.*, 20 Ill. App.2d 448, 156 N.E.2d 263 (1959); *Lilley v. Manning Motor Co.*, 262 N.C. 468, 137 S.E.2d 847 (1964).

The dispute in this case centers around the requirement that the defect resulted from factory material or workmanship and the proof necessary to establish this element. The trial court failed to make a specific finding that there was a defect in factory material or workmanship, but did find as follows:

> 7. The vehicle . . . was defective in the following respects:
>
> (a) the engine would die when the gears were engaged and the driver attempted to cause the vehicle to begin moving.
>
> (b) the engine would die upon turning corners.
>
> (c) the engine would die unexpectedly and on numerous occasions when being driven straight ahead at various speeds.
>
> (d) the engine would overheat when the air conditioning was in use.
>
> (e) the engine would exhaust black smoke.

The court concluded that there was a breach of the express warranty based upon that finding.

Plaintiff did not offer the testimony of any expert witness that the defects in the car were a result of factory material or workmanship. There is substantial testimony, however, to support the fact that the defects in the vehicle existed from the time Arnold drove the vehicle from the lot after it had been newly purchased. We must give a liberal construction to the trial court's findings of fact in determining whether these findings would sustain a judgment. *Jones v. Friedman*, 57 N.M. 361, 258 P.2d 1131 (1953). The failure of the court to use the specific words that the defect resulted from factory materials or workmanship does not change the clear meaning of the court's findings of fact and conclusions of law.

It is not clear what process the trial court used in determining damages. The parties are in agreement that the applicable measure of damages for breach of warranty in this case is outlined in § 50A–2–714(2), N.M.S.A. 1953 (Repl. Vol. 8, Pt. 1, 1962). That provision provides that damages for breach of warranty are to be measured by the difference between the value of the vehicle as accepted and the value of the vehicle as it was warranted. The proper measure of damages was not used and on remand § 50A–2–714(2), supra, should be applied.

The third issue presented in this case is raised by the Ford Motor Credit Corporation with regards to its counterclaim which was denied by the trial court. The trial court concluded that defendant Ford Motor Credit Company took the assignment of Arnold's retail installment contract subject to the express warranties of defendants Ford Motor Company and Frontier Ford.

The relationship between account debtors and assignees of contracts is governed by the terms of § 50A–9–318, N.M.S.A.1953 (Repl. Vol. 8, Pt. 1, 1962). Under the terms of that section, the rights of the assignee, Ford Motor Credit Company, are subject to all the terms of the contract between Frontier Ford and Arnold. This includes any defenses arising therefrom. See also *Associates Loan Company v. Walker*, 76 N.M. 520, 416 P.2d 529 (1966). Pursuant to the terms of § 50A–9–206, N.M.S.A. 1953 (Supp. 1975), however, if Arnold had agreed not to assert any claims or defenses against the assignee, Ford Motor Credit Company would be entitled to fully recover on its counterclaim. The contract entered into between Arnold and Frontier Ford contains an agreement which requires the buyer to "settle directly with the original Seller all claims concerning the Property or its use or operation." The language of the contract does not restrict Arnold from asserting defenses against Ford Motor Credit Company. The defense of breach of warranty was available to Arnold. The extent and nature of Arnold's defense, however, needs further clarification.

The trial court treated Arnold's breach of warranty defense as a complete bar to Ford Motor Credit Company's counterclaim. The defense of breach of warranty, however, can only be used by Arnold as a setoff against the amount owing under the installment contract. Arnold had not rejected or properly revoked acceptance of the vehicle under the Uniform Commercial Code. The guidelines for determining whether a buyer has accepted, rejected or revoked acceptance of any particular goods are found in §§ 50A–2–602, 50A–2–606, 50A–2–607 and 50A–2–608, N.M.S.A. 1953 (Repl. Vol. 8, Pt. 1, 1962). At the time of trial Arnold had driven the vehicle approximately 49,000 miles. He had not rejected or revoked acceptance of the vehicle. Since he had accepted the vehicle his only remedy was under § 50A–2–717, N.M.S.A. 1953 (Repl. Vol. 8, Pt. 1, 1962). This section allows the buyer to deduct the damages for breach of warranty from the portion of the purchase price still due under the contract. Arnold should therefore retain the vehicle and pay Ford Motor Credit Corporation any balance owing on the contract after deducting his damages as measured by § 50A–2–714(2), supra. If Arnold's damages exceed the amount owing on the installment contract, judgment should be entered against the defendants for the additional amount.

This case is remanded to the trial court for a proper determination of damages and for such other proceedings that are necessary to conform to this opinion.

IT IS SO ORDERED.

McMANUS, C. J., and REUBEN E. NIEVES, District Judge, concur.

566 P.2d 101

Calvin ELLER and Dennis Richardson, Petitioners,

v.

STATE of New Mexico, Respondent.

No. 11445.

Supreme Court of New Mexico.

July 8, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, William H. Lazar, Asst. Appellate Defender, Santa Fe, for petitioners.

Toney Anaya, Atty. Gen., Santa Fe, for respondent.

OPINION

FEDERICI, Justice.

Defendants were charged with and pled guilty to multiple counts of issuing worthless checks in violation of § 40–49–4 & 5(B), N.M.S.A. 1953 (2d Repl. Vol. 6, 1972), and one count of conspiracy in violation of § 40A–28–2, N.M.S.A. 1953 (2d Repl. Vol. 6, 1972).

A plea and disposition agreement had been entered into by Defendant Eller and the prosecutor providing that the State would recommend a suspended sentence. Defendant Richardson had not entered into such an agreement at the time he pled guilty, but did sign a plea and disposition agreement prior to sentencing.

Both defendants pled guilty and were advised of the consequences of their pleas. The trial court was informed of the prosecutor's recommendations, but refused to follow the recommendation for a suspended sentence, and instead sentenced the defendants to terms in the penitentiary.

Defendants moved to withdraw their guilty pleas, which motion was denied. Defendants appealed to the Court of Appeals from the denial of the motion. The Court of Appeals' calendar assignment proposed summary affirmance under N.M. R. Crim. App. 207(d) [§ 41–23A–207(d), N.M.S.A. 1953 (Supp.1975)], and defendants then filed a memorandum opposing summary affirmance.

The Court of Appeals affirmed the trial court proceedings and sentences on the grounds that (1) the procedural issues which defendants claim the trial court should have followed upon rejection of the prosecutor's recommendation were not raised in the trial court; (2) those same procedural issues were not raised in the docketing statement; and (3) the memorandum abandoned the issues which were raised in the docketing statement. We granted certiorari and now reverse the Court of Appeals.

The result we have reached is dictated by the state of the record in this case and by very recent decisions of this court in *Olguin v. State*, 90 N.M. 303, 563 P.2d 97 (1977); *Linam v. State*, 90 N.M. 302, 563 P.2d 96 (1977); *Vigil v. State*, 89 N.M. 601, 555 P.2d 901 (1976).

With reference to the alleged failure of defendants to raise the proper procedural issues upon the trial court's rejection of the prosecutor's recommendations, the record shows that the defendants moved to withdraw their guilty pleas, based upon the trial court's refusal to follow the suspension of sentences recommended by the prosecutor. After requested findings of fact and conclusions of law had been submitted by the defendants and the prosecutor, the motions were denied by the trial court. Defendants' requested conclusion of law No. 6 specifically raised the issue that the trial court did not reject the agreement. The filing of the motion and requested findings and conclusions, and the ruling of the trial court, were sufficient to alert the trial court of the defendants' position and to raise the issues involved.

With reference to the docketing statement, the Court of Appeals held that under N.M. R. Crim.App. 205 [§ 41–23A–205, N.M.S.A. 1953 (Supp.1975)], the procedural issues were not raised. N.M. R. Crim. App. 205, *supra*, requires a "concise statement" of the case containing the facts material to a consideration of the issues presented and the presentation of the issues on appeal "but without unnecessary detail." Defendants' docketing statement set forth the pertinent proceedings and material facts and specifically raised the issues that (a) upon accepting the plea bargain the trial court was bound to impose a sentence consistent with the agreement, and (b) once a court is aware that a guilty plea is based upon a prosecutor's recommendation, it must impose a sentence consistent with that recommendation. Further, the statement of material facts in defendants' docketing statement reads:

> On April 11, 1977, Defendants filed a written Motion to Withdraw the Plea of Guilty, based upon the Judge's acceptance of the Plea and Disposition Agreement, and his failure to follow the recommendations of the District Attorney.

The Motion was heard on oral argument on April 11, 1977, and the Court denied the Motion. * * *

The requested findings of fact and conclusions of law submitted by the defendants and by the prosecution, and the court's findings of fact and conclusions of law, are attached to the docketing statement as exhibits. A reading of the entire docketing statement, together with the attached exhibits, is sufficient to raise the procedural issues on appeal.

Finally, the Court of Appeals' opinion states that the memorandum submitted by defendants opposing summary affirmance abandons the issues raised in the docketing statement. We do not feel that the statements in defendants' memorandum should control the contents of the docketing statement.

The basic issue revealed from a reading of the record in this case, is whether the trial court erred in refusing to permit the defendants to withdraw their pleas of guilty after the judge failed to follow the recommendations of the district attorney. This issue was sufficiently contained in the docketing statement although not necessarily in the appropriate place or perhaps not even in the proper form. N.M. R. Crim. App. 102 [§ 41–23A–102, N.M.S.A. 1953 (Supp.1975)], provides that the appellate court may take such action as it deems appropriate, including citation of counsel or a party for contempt, refusal to consider the offending parties' contentions, assessment of costs, or, in *extreme* cases, dismissal or affirmance. We do not consider the violations involved so extreme as to warrant summary affirmance. *Olguin v. State, supra; Linam v. State, supra; Vigil v. State, supra.* The imposition of appropriate sanctions, if any, is to be determined by the Court of Appeals.

We do not pass upon the merits of defendants' appeal. The cause is remanded to the Court of Appeals with instructions to reinstate the appeal on the docket of that court and to proceed accordingly.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, EASLEY and PAYNE, JJ., concur.

566 P.2d 103

STATE of New Mexico, Plaintiff-Appellee,

v.

Linda Schad HALL, Defendant-Appellant.

No. 2933.

Court of Appeals of New Mexico.

May 31, 1977.

Rehearing Denied June 10, 1977.

Bruce Lowenhaupt, Las Cruces, Joseph (Sib) Abraham, Jr., Charles Louis Roberts, El Paso, Tex., for defendant-appellant.

Toney Anaya, Atty. Gen., John J. Duran, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The question in this interlocutory appeal is whether officers had a sufficient basis for making an investigatory stop of defendant's vehicle. This question is to be answered by applying the test stated in *State v. Galvan*, 90 N.M. 129, 560 P.2d 550 (Ct.App. 1977). The test is whether the officers had a reasonable suspicion that the law had been or was being violated. The suspicion must be based on specific articulable facts and the reasonable inferences therefrom; the facts and inferences are to be judged by an objective standard. On the basis of the facts known to the officers, would a person of reasonable caution believe the investigatory stop was appropriate? We hold there was a basis for the investigatory stop.

Two men attempted to rent a car at the Holiday Inn in Las Cruces. They were unsuccessful because of insufficient identification. They left the Holiday Inn in a cab and went to the Travelodge. At the Travelodge they entered Room 103. About five minutes later, three persons emerged from the room, entered the cab and were taken to the airport. Enroute to the airport one of the men asked "if you think the stuff will be all right until we get back."

A Cadillac was parked in front of Room 103. It was registered to Etheleen Schad of El Paso, Texas. Registration for Room 103 was in the name of Mr. and Mrs. Linda Schad Hall of Fort Worth, Texas.

Defendant left Room 103 and placed some items in the Cadillac. She inquired at the Travelodge office for directions to Denny's Restaurant. She did not go to the restaurant. She left Las Cruces and drove east toward Alamogordo; she was stopped near the turnoff to White Sands Missile Range.

The Cadillac was heavily loaded. It would weave erratically when lane changing or stopping for traffic lights in Las Cruces. On the highway it would weave across the center line and also onto the highway shoulder. When the car hit a bump, it was as if there was uncontrolled motion. The size of the vehicle, its load in the back, its rate of speed and the weaving were consistent, in the officers' experience, with cars hauling marijuana. See *State v. Santillanes*, 89 N.M. 727, 557 P.2d 576 (Ct. App. 1976).

Defendant had been in the motel room visited by men concerned with the safety of their "stuff". The motel registration used an address different than the address on the car registration. Defendant left town in a heavily loaded car after asking for directions to a restaurant. The car, its loaded condition and the way it handled while being driven was consistent with cars hauling marijuana. With these facts, and the inferences therefrom, the trial court could properly conclude that the officers, as men of reasonable caution, acted appropriately in making an investigative stop. *State v. Bloom*, 90 N.M. 192, 561 P.2d 465 (1977).

Once the car was stopped, the officers smelled a strong odor of raw marijuana. They searched the car and recovered over 800 pounds of marijuana. Defendant does not claim that after being stopped the officers lacked probable cause to search.

The order denying defendant's motion to suppress is affirmed.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

HENDLEY, J., dissenting.

HENDLEY, Judge (dissenting).

I dissent.

The majority holds that the facts and the inferences therefrom permitted the trial court to conclude that the officers, as men of reasonable caution, acted appropriately in making the stop. I cannot so conclude. The behavior and the happenings were not inconsistent with innocent behavior. The happenings were consistent with innocent behavior.

The officers may have had a "suspicion" or a "hunch" but they certainly could not conclude, as reasonable men of caution, that the law had been or was being violated. See *State v. Galvan*, 90 N.M. 129, 560 P.2d 550 (Ct.App. 1977) and cases cited therein.

Accordingly, I dissent. The motion to suppress should have been granted.

566 P.2d 105

The TRAVELERS INSURANCE CO., an Insurance Corporation, Plaintiff-Appellee,

v.

Isabelle P. MONTOYA, Defendant-Appellant,

Telesfor F. Padilla, Jr., Alex Padilla, Theresa Pohl, Stella Garcia and Barbara Sanchez, Defendants.

No. 2833.

Court of Appeals of New Mexico.

June 7, 1977.

Jacob Carian, Carian, Casey & Carian, Albuquerque, for appellant.

Richard C. Civerolo, Civerolo, Hansen & Wolf, Albuquerque, for defendants.

Charles B. Larrabee, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for appellee.

OPINION

WOOD, Chief Judge.

The appeal involves the propriety of dismissing a counterclaim against the stakeholder in an interpleader action brought under Civil Procedure Rule 22.

Telesfor F. Padilla had life insurance under a group policy issued by plaintiff. In the fall of 1975 Padilla changed the beneficiary of the life insurance to his daughter, Isabelle P. Montoya. Padilla died in June, 1976. Plaintiff was put on notice of conflicting claims to the insurance proceeds. Plaintiff filed an interpleader action naming Padilla's children as defendants. Plaintiff also paid the life insurance proceeds into the registry of the trial court. Although the briefs discuss whether interpleader was proper under the facts alleged in the pleadings, there is no issue as to the propriety of the interpleader action. The trial court's order authorizing the action has not been challenged in the appeal.

The pleadings show two claimants to the life insurance proceeds—daughter Montoya and the other children. Each claimant has cross-claimed against the other claimant; this appeal does not involve the cross-claims.

Montoya filed a counterclaim against plaintiff. The counterclaim alleged that plaintiff's failure to pay the life insurance proceeds to her was wilful, wanton and in bad faith. In addition to the life insurance proceeds, Montoya sought compensatory damage for loss of use of the money and punitive damages.

New Mexico recognizes a tort claim for unreasonable delay, in bad faith, in making payments pursuant to the insurance contract. See *State Farm General Insurance Company v. Clifton*, 86 N.M. 757, 527 P.2d 798 (1974); *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct.App.1976). Thus, Montoya's counterclaim against plaintiff seeks a recovery in tort in addition to the life insurance proceeds. With such a recovery being sought, cases dismissing counterclaims, on the basis that only the stake of the interpleader was involved, do not apply. See *Metropolitan Life Insurance Company v. Jackson*, 178 F.Supp. 361 (D.C. Penn.1959); *Old Colony Insurance Company v. Lampert*, 129 F.Supp. 545 (D.C.New Jersey 1955).

Plaintiff moved to dismiss Montoya's counterclaim "on the ground that said counterclaim fails to state a claim upon which relief can be granted." The motion was granted, the counterclaim was dismissed, Montoya appealed.

Plaintiff's motion to dismiss was authorized by Civil Procedure Rule 12(b)(6). The motion, however, is properly granted only if it appears that Montoya could not recover under any state of facts provable under her counterclaim. *Villegas v. American Smelting & Refining Co.*, 89 N.M. 387, 552 P.2d 1235 (Ct.App.1976) and cases therein cited. Since New Mexico recognizes the tort claim asserted by Montoya, the order of dismissal cannot be sustained on the basis that the counterclaim failed to state a claim upon which relief could be granted.

Plaintiff's position is "that the court had no jurisdiction to entertain a counterclaim in this interpleader action and that defendant . . . Montoya had no right to file one." This position is based on the view that plaintiff, as stakeholder with adverse claimants to the insurance proceeds, is not an opposing party against whom a counterclaim can be filed. Plaintiff points out that the rule concerning compulsory counterclaims, Civil Procedure 13(a), requires an "opposing party". To support its claim that it is not an opposing party, plaintiff cites three decisions of the Tenth Circuit. They are: *Knoll v. Socony Mobil Oil Company*, 369 F.2d 425 (10th Cir. 1966); *Erie Bank v. United States District Court for Dist. of Colo.*, 362 F.2d 539 (10th Cir. 1966); *First National Bank in Dodge City v. Johnson County National Bank and Trust Co.*, 331 F.2d 325 (10th Cir. 1964).

The Tenth Circuit decisions on which plaintiff relies were partially overruled in *Liberty National Bank and Trust Co. of Oklahoma City v. Acme Tool Division of*

Rucker Co., et al., 540 F.2d 1375 (10th Cir. 1976). This decision points out that the Tenth Circuit rule as to counterclaims stands alone; this decision overruled the above-named Tenth Circuit decisions to the extent that they deny the interposing of a compulsory counterclaim in an interpleader action.

As to the plaintiff's claim that it is not an opposing party, 7 Wright and Miller, Federal Practice and Procedure (1972), § 1715, page 448 states: ". . . inasmuch as the stakeholder's discharge will bar the claimant from asserting any rights against him related to the deposited fund or property, as a practical matter there really is an antagonistic relationship between them."

The applicable rule, in our opinion, is stated in 3A Moore's Federal Practice (1974), ¶ 22.15 at pages 3129–3130, as follows:

> "The interpleader court may properly be employed as a forum to resolve not only the basic title contest between claimants, but also other disputes between the claimants, or between a claimant and the stakeholder. Thus, an allegation by one or more claimants that the stakeholder plaintiff is subject to an independent liability may be raised as a counterclaim under Rule 13; indeed, in the typical case such a counterclaim is compulsory. . . . The stakeholder-plaintiff, having initiated the interpleader action, and subjected itself thereby to the personal jurisdiction of the court, cannot complain if a claimant's answer seeks to interpose a counterclaim for relief in excess of or different from the subject matter of the interpleader dispute."

Plaintiff asserts that even under the above rule Montoya cannot recover on her counterclaim because there was no bad faith on plaintiff's part in failing to pay the insurance proceeds to Montoya. The correctness of this contention is not before us because it depends on the facts. The facts have not been reached because plaintiff obtained a dismissal of the counterclaim on the basis of the pleadings.

Oral argument is unnecessary. The trial court erred in dismissing Montoya's counterclaim on the pleadings. Its order of dismissal is reversed. The cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

566 P.2d 107

Bessie CASAUS, Plaintiff-Appellant,

v.

LEVI STRAUSS & CO., Employer, and Insurance Company of North America, Insurer, Defendants-Appellees.

No. 2767.

Court of Appeals of New Mexico.

June 7, 1977.

Writ of Certiorari Denied June 30, 1977.

John Hogan Stewart, P. A. and Leof T. Strand, Albuquerque, for plaintiff-appellant.

Bryan L. Query, Steve Williams, Shaffer, Butt, Jones, Thornton & Dines, P. C. Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

Plaintiff appeals a workmen's compensation judgment that awarded her compensation for total temporary disability for a period of 19 months ending November 1, 1975, but did not award her any compensation for any disability thereafter. We reverse.

A. *Plaintiff was entitled to 25% partial disability after November 1, 1975.*

The trial court found that plaintiff was totally disabled from June 4, 1974, until November 1, 1975; that plaintiff did not have any disability subsequent to November 1, 1975, which would prevent her from returning to work for her employer or for some other employer.

The test is whether plaintiff, after November 1, 1975, was partially unable to

perform any work for which she was fitted. Section 59–10–12.9, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1); *Medina v. Zia Company,* 88 N.M. 615, 544 P.2d 1180 (Ct.App.1975).

Plaintiff worked as an inspector for 15 days. This work involved standing for eight hours, picking up pants, bending and pushing. She suffered an accidental injury on March 25, 1974. She had a high school education and had worked as an egg candler, office clerk or assistant bookkeeper and a live-in housekeeper. As an egg candler she had to stand and lift egg cartons, containing 40 dozen eggs, for eight hours a day. As an office clerk or assistant bookkeeper, she had to sit for eight hours a day. As a live-in housekeeper, she did all of the cooking and cleaning for a widower and his three children which involved bending, standing and lifting.

On August 28, 1974, a surgeon removed a coccygeal joint, the end of the vertical column beyond the sacrum, the last bone on the spine. It is referred to as the "tailbone." On November 25, 1975, subsequent to termination of her total temporary disability, she suddenly got worse with pain in the coccygeal-rectal area, and medication was renewed. The last time the surgeon saw her was February 9, 1976. At that time she complained that "her neck was very tight and tense for three or four days, and that she was somewhat dizzy." She could not stand or sit for more than a few hours without changing her position, and she could not return to work where she had to stand all day long.

The surgeon stated that in his opinion, based upon reasonable medical probability, the accident she suffered during her employment was the cause of her impairment of function and disability at the time of trial on April 15, 1976. It was his opinion that she was unable to work in employment that required standing or sitting all day long; she would probably be able to work if she could change positions, part-time standing, part-time sitting, frequently changing her position every few hours. She was still suffering pain.

In the surgeon's opinion, plaintiff was totally disabled until November, 1975. From that date forward she had 15% partial impairment of function to the lower body and 25% partial disability. Plaintiff has not worked from March 25, 1974. There was substantial evidence to support the surgeon's opinion.

Unfortunately, the trial court did not state any reason why the surgeon's testimony on partial disability was disregarded. It is impossible to guess what the judge did experience in trying this case and what his reactions were to the evidence. It appears that the trial court's beliefs were based on an emotional observation of subjective factors, and not objective data. Appellate courts are often similarly affected by desires and aims that push and pull them without regard to the objective situation.

Defendant relies on the testimony of three doctors who examined plaintiff in 1974. One doctor examined her on April 8, 1974. A second doctor examined her on May 31, 1974, and the third doctor last examined her on June 28, 1974. From their testimony, the court could have found that she did not suffer a work related injury. Defendant, however, did not cross appeal on this issue. The trial court chose not to accept this testimony. It chose the testimony of plaintiff's surgeon. We cannot see how the testimony of defendants' doctors can serve as a foundation for a decision that the plaintiff was not disabled. Not one of the doctors had seen plaintiff in the 17 months preceding November 1, 1975.

"In the instant case, where causal connection has been denied and must be established by medical testimony as a medical probability, and where medical opinion based on the facts has been expressed and is uncontradicted, the evidence is conclusive upon the court as trier of the facts." *Ross v. Sayers Well Servicing Company,* 76 N.M. 321, 326, 414 P.2d 679, 683 (1966); *Lyon v. Catron County Commissioners,* 81 N.M. 120, 464 P.2d 410 (Ct.App.1969). This means that the uncontradicted evidence is conclusive as to the establishment, as a medical probability, of *the causal connection* between the accident and the disability as

expressly required by § 59–10–13.3, N.M.S. A.1953 (2d Repl. Vol. 9, pt. 1). *Lucero v. Los Alamos Constructors, Inc.,* 79 N.M. 789, 450 P.2d 198 (Ct.App.1969). The causal connection was established in the instant case.

Opinion testimony of a medical expert can also be considered as substantial evidence upon which a finding of total or partial disability can be made. *Roybal v. County of Santa Fe,* 79 N.M. 99, 440 P.2d 291 (1968). However, a percentage opinion may be disregarded by the trial court if there is other competent evidence to the contrary. This is of necessity true when more than one medical expert testifies. *Lucero,* supra; *Seal v. Blackburn Tank Truck Service,* 64 N.M. 282, 327 P.2d 797 (1958). Neither is the medical opinion conclusive if there is lay opinion testimony to the contrary on the determination of a fact in issue. *State v. Lujan,* 87 N.M. 400, 534 P.2d 1112 (1975); *State v. Smith,* 80 N.M. 126, 452 P.2d 195 (Ct.App.1969); see Rule 701 of the Rules of Evidence [§ 20–4–701, N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.)].

We can find neither expert nor non-expert testimony in the record to conflict with the percentage opinion of plaintiff's surgeon on partial disability. The percentage opinion stands uncontradicted as competent evidence. It cannot be disregarded by the trial court. We have a well established rule that where facts are not in dispute and but one reasonable inference can be drawn therefrom, this Court can independently draw its own conclusion and overrule contrary conclusions of the trial court. *Lyon v. Catron County Commissioners,* supra. We do so in this case.

The plaintiff is entitled to 25% partial disability compensation payments from November 1, 1975, as provided by law.

B. *Plaintiff was entitled to payment of minor medical expense.*

The trial court excluded plaintiff's offered exhibits 7 and 8 in the sum of $72.68. These were charges of the New Mexico Medical Foundation and Bernalillo County Medical Center incurred by plaintiff on March 25, 1974, when plaintiff went to the emergency room of the Medical Center. The reasonableness of the bills was not questioned.

Plaintiff's surgeon testified that these charges were "necessary, usual and customary." The trial court requested authority for admission of this evidence. Later, after authorities were presented, the trial court denied admission of the exhibits because "The doctor said that he didn't even know." We cannot find such testimony on the part of plaintiff's doctor.

For the benefit of court and counsel generally, we emphasize Rules of Evidence 702, 703, and 704 [§§ 20–7–702, 703, 704, N.M.S. A.1953 (Repl. Vol. 4, 1975 Supp.)]. These rules pertain to expert testimony, basis of opinion testimony and opinion on ultimate issue. These rules should convince a trial court that testimony such as that of Dr. Altman is sufficient to warrant the admission of the evidence in this case.

Medical bills are admissible in evidence when it is "shown that the services for which the bills were rendered were reasonably necessary as a result of plaintiff's accident." *Williams v. City of Gallup,* 77 N.M. 286, 293, 421 P.2d 804, 809 (1966).

In *Williams,* the *treating doctor* did not testify that a medical center bill and the bill of a doctor on its staff were reasonably necessary as a result of the accident. We do not know whether this rule applies to a *non-treating* doctor who first examines the patient several months later. We believe the same rule should apply to the *non-treating doctor.*

A non-treating doctor is a medical expert. His knowledge of the facts which led a patient from an accidental injury into a hospital is sufficient upon which to render an opinion that the services rendered were reasonably necessary. In fact, under Rule 705 of the Rules of Evidence, "[t]he expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on

cross-examination." Section 20–4–705, N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.). Even when the plaintiff is available as a witness, "[s]tatements made for purposes of medical diagnosis or treatment" are admissible as an exception to the hearsay rule. Section 20–4–803(4), N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.).

The surgeon's opinion that the bills were "necessary, usual and customary" was sufficient to allow the exhibits in evidence.

Plaintiff is entitled to payment of $72.68.

C. *Attorney fee granted plaintiff in trial court was not an abuse of discretion.*

The trial court awarded plaintiff an attorney fee of $800.00, plus a tax of $34.00. Plaintiff contends this was not a reasonable attorney fee. "It is recognized that the fixing of attorney fees in compensation cases is a matter resting in the sound discretion of the trial court." *Waymire v. Signal Oil Field Service, Inc.,* 77 N.M. 297, 302, 422 P.2d 34, 38 (1966). Some eleven years ago the Supreme Court in *Waymire* believed that a fee of $1,000.00 was an abuse of discretion and raised the fee to $1,500.00. Although not stated by the Supreme Court, it had to believe that the trial court, all the circumstances before it being considered, exceeded the bounds of reason. *Independent, Etc. Co. v. N. M. C. R. Co.,* 25 N.M. 160, 178 P. 842 (1918).

Plaintiff requested an attorney fee of $2,000.00. The defendant requested an attorney fee of $800.00, plus tax, for plaintiff. The trial court adopted the request of defendant.

Section 59–10–13.10(A), N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1) provides:

> When a workmen's compensation claim is at issue, *the judge of the district court shall advance the cause on the court's calendar and dispose of the case as promptly as possible.* The trial shall be conducted in a summary manner as far as possible. [Emphasis added.]

This statute is mandatory. Section 1–2–2(I), N.M.S.A.1953 (Repl. Vol. 1). Fifty-three years ago in *Gonzales v. Chino Copper Co.,* 29 N.M. 228, 232, 222 P. 903, 905 (1924), Justice Bratton wrote:

> It may well be kept in mind that the theory upon which the Workmen's Compensation Acts of the several states were adopted was to substitute a more humanitarian and economical system of compensation for injured workmen or their dependents in case of their death; *to provide a speedy and inexpensive method by which such compensation might be made* to such employees or those dependent upon them and which is more in harmony with modern methods of industry than the common-law liability for torts, *which usually involved long, tedious and expensive litigation* * * *. [Emphasis added.]

In *Codling v. Aztec Well Servicing Co.,* 89 N.M. 213, 549 P.2d 628, 630 (Ct.App.1976), we said:

> Within the policy considerations of the Workmen's Compensation Act the interests of the claimant and the public are paramount. To prevent the claimant from being on the welfare rolls is a part of the legislative scheme.

■ The policy of the law is for a speedy trial of the issues of liability and to this end claims for compensation should be advanced on the docket for trial. Long delays in the final decisions of the case result in injurious consequences to the injured employee. *Stovall v. General Shoe Corporation,* 204 Tenn. 358, 321 S.W.2d 559 (1959).

We believe that the statute and the purposes for which it was adopted are not only applicable to the district judge but apply equally to officers of the court who have a solemn duty to assist in a speedy trial. We compliment the court and reproach plaintiff's attorney who caused this delay, as shown by the record.

■ In the instant case, plaintiff's complaint was filed August 12, 1974. Defendants' answer was filed September 5, 1974. After motion of defendants for an order to take depositions, the parties were noticed to trial on the court's calendar on workmen's

compensation cases for January 23, 1975. The plaintiff subpoenaed her surgeon as a witness for trial. Defendants gave notice of depositions of plaintiff's surgeon and plaintiff on January 13, 1975, and January 17, 1975. The plaintiff and defendants moved the court to vacate the trial setting because discovery was incomplete; that it would require 45 days. The trial court vacated the hearing for 45 days. On January 20, 1975, plaintiff gave notice that the cause had been reset for hearing on the merits on March 24, 1975. On March 17, 1975, plaintiff moved the court to vacate the March 24 setting because her attorney was undergoing extensive dental work and was unable to prepare for trial. The trial court vacated the March 24 setting. On December 17, 1975, nine months later, *another attorney* appeared for plaintiff and requested a trial setting. The court set the request for hearing on February 19, 1976. On January 9, 1976, plaintiff gave notice of hearing on the merits on February 25, 1976. On February 12, 1976, the parties requested the court to vacate the setting of February 25th for reasons stated. The trial court vacated the setting. On February 12, 1976, plaintiff requested a hearing on the merits, and the court set the hearing for April 15, 1976. Depositions were taken during March and April, 1976, before the trial. Trial was had on April 15, 1976. Judgment was entered September 23, 1976. Two years and one month passed from the time of filing the complaint to the date of judgment.

The trial judge is complimented on his devotion to the advancement of the cause on his calendar as required by statute. The unconscionable delay in the trial of this case must be placed on the first attorney for plaintiff who caused the delay. Plaintiff cannot complain of the award of $800.00 as attorney fees. The trial court, under the circumstances of this case, did not abuse its discretion in the amount awarded as attorney fees.

D. *Defendants' motion to dismiss appeal is denied.*

Defendants moved this Court to dismiss plaintiff's appeal because plaintiff failed to file the transcript of record within the time allowed. Defendants overlooked an order of the trial court extending the time for filing the transcript on appeal. The transcript was filed in time. The motion to dismiss is denied.

This cause is reversed and remanded to the district court; that an amended judgment be entered below to include the following:

(1) It is further ordered, adjudged and decreed that from and after November 1, 1975, plaintiff recover judgment against defendants the sum of $_____ per week [the amount to be computed and entered] for partial disability to the extent of 25%, together with all medical and hospital expenses thereafter incurred as a result of the compensable injury, until the further order of this Court.

(2) That the sum to be recovered for medical expenses be increased by $72.68 for a total of $2,138.18.

The plaintiff is entitled to attorney fees for services on this appeal in the sum of $1,750.00.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., dissenting in part, concurring in part.

HERNANDEZ, Judge (dissenting in part, concurring in part).

I respectfully dissent from parts "A" and "B" of the majority opinion and concur with part "C".

The majority in their discussion in part "A" state: "In the surgeon's [Dr. Altman] opinion, plaintiff was totally disabled until November, 1975. From that date forward she had 15% partial impairment of function to the lower body and 25% partial disability. Plaintiff has not worked from March 25, 1974. There was substantial evidence to support the surgeon's opinion." They go on to state: "We can find neither expert nor non-expert testimony in the record to conflict with the percentage opinion of plain-

tiff's surgeon on partial disability. The percentage opinion stands uncontradicted as competent evidence. It cannot be disregarded by the trial court."

It is my opinion that the majority misconceive the issue to be decided. The issue, as I see it, is whether there is substantial evidence to support the following findings made by the trial court:

"That plaintiff did not have any disability subsequent to November 1, 1975, as a result of said accident, which would prevent her from returning to work at Levi Strauss & Co. in work for which she was qualified and could perform, whether at Levi Strauss & Co. or for some other employer."

"That plaintiff was not wholly or partially unable after November 1, 1975 to perform any work for which she was at that time fitted or qualified."

The following, in my opinion, is substantial evidence in support of these findings: Dr. Sidney Schultz, an orthopedic surgeon, who first examined plaintiff about one month after her injury, testified in part as follows:

"She showed some limitation of low back motion, questionable muscle spasm and no signs of any nerve root pressure in her low back. * * * this lady's manifestation throughout the examination, I felt, were exaggerated * * * she complained of soreness or pressure, regardless of where she was touched. * * *"

Dr. Schultz sent plaintiff to Dr. Seelinger for an electromyogram test which was performed on May 1, 1974. As to the results of that test, Dr. Schultz testified:

"I believe that nervousness is her major problem, all the tests were normal * * *. As of the 15th [May], pain localized to coccyx now; nothing else hurts. * * * pain in the tailbone is a very common neurotic complaint in females. * * * I saw her on June 28th, and she was still complaining bitterly of pain in the tailbone * * *. I cannot find anything to account for this woman's complaints, clinically. I X-rayed her sacrum and coccyx and the X-rays were normal * * *."

Dr. Schultz reading from a letter dated August 27, 1974, which he had written as to whether plaintiff could return to work stated the following:

"* * * when she was last seen on June 28, 1974, she still complained bitterly of pain in the tailbone. I can find no orthopedic reason for her persistent complaints. She was worked up by Dr. Sager * * * and he could find no pathology that could account for her complaints * * * since I have not seen this woman for the past two months, I am unaware of her present condition, however, from a strict orthopedic standpoint, I can see no reason why she would not be able to return to work."

Dr. Edward M. Sager, a family physician, who first examined plaintiff on March 29, 1974, testified in part as follows:

"* * * she exhibited some tenderness in her mid lumbar area and the lower area of her back * * *."

Plaintiff was admitted to the hospital on April 1, 1974, and discharged on April 12, 1974. Dr. Sager referring to his discharge summary testified that:

"She was treated with bed rest, traction, an analgesic, physical therapy, lumbar sacral X-rays were noted as negative * * patient's physical findings initially were somewhat bizarre, neurologically * * the day that I admitted her to the hospital, she was complaining of pain and exerting (sic) symptomatology entirely on the right, now, at this point it is also involving the left, and yet on the third [of May], my note indicates that she has improved, it was at this time that I elected to have her seen and evaluated by Dr. Peter Stern."

Dr. Sager when asked "When you first saw Miss Casaus, Doctor, did she complain of any pain in her tailbone or coccyx area?" answered no. Dr. Sager saw plaintiff again on May 31, 1974, after she had been evaluated by Dr. Schultz. As to this visit, Dr. Sager testified: ". . . she states that she is feeling pressure on the coccyx . . . ."

Dr. Sager when asked: "Assuming that Miss Casaus sustained an injury so severe, as a result of this accident, that it required a coccygectomy. What is your opinion as to whether it is unusual for a person to first complain of pain in the coccyx two months after an injury of this type?" Dr. Sager answered: "I would say that this would be extremely remote, it would be impossible." As to the results of a pelvic-rectal examination that Dr. Sager made of plaintiff he testified:

> "* * * I doubt that coccygodynia exists, which is a pathological problem with the coccyx, but, the patient states that she has rectal fullness and pain. There was a rectal examination which physically and essentially is within normal limits * * *."

Dr. Sager when asked: "What is your opinion as to the frequency of a wobbly coccyx or a coccyx which requires that it be removed related to a lifting type injury?" Answered: "They really don't relate, because in lifting, you are using the muscles, the low back and thoracic, upper back, the coccyx is really a rudimentary left over tail type structure, it just sits there and, unless you fall and land on it, it would be rather an uncommon injury and even at that, it would take a fall on an elevated or blunt type object, because it is rather well-cushioned because of the gluteal area, the behind."

Dr. Peter D. Stern, an orthopedic surgeon, who examined plaintiff on April 8, 1974, testified as follows from his notes prepared at that time:

> "This 36-year old patient states that she has a severely injured back. She states that she has pain radiating to both her lower extremities, but she has more pain in the right lower extremity. * * * On examination there are multiple inconsistencies * * * which is to say that none of the tests were consistent with the other tests that were done to confirm the presence or absence of sciatic nerve injury or low back injury. * * * Based on the inconsistencies and the psychiatric stretch tests [and other tests] * * * I concluded that this patient was either malingering about her low back problem or pain, or had emotional problems with relation to this injury, and I could find little anatomic basis to substantiate her claims of low back pain with radiation into the lower extremities."

The plaintiff did not complain of any pain in the coccyx area to Dr. Stern. When asked, in his experience, "What percentage of coccyx injuries occur with a lifting type of injury?" Dr. Stern answered, "Very few. The vast majority are from a direct fall on the tailbone such as when a prankster pulls out a chair and a person sits on the floor. This is the vast majority, if not all of the cases that I have seen involving tailbone injury."

Dr. Stern when asked: "Assuming that in June, 1974, Bessie Casaus no longer complained of any back pain to her treating physician, Dr. Sidney Schultz, and based upon the fact that during your examination on April 8, 1974, her complaints were solely attributable to the back; do you have an opinion as to whether she, in June of 1974, had any type of physical or functional impairment?" Answered: "If she had no complaints referable to her low back, and no other complaints, I would suppose that she would be able to return to work."

Granted that neither Dr. Schultz, Dr. Sager or Dr. Stern uttered the specific words "the plaintiff has no disability arising out of the incident in question." However, in my opinion, the import of their testimony is unmistakable: the plaintiff has no disability partial or otherwise. It is readily apparent that the plaintiff is a hypochondriac.

As to part "B" the trial court in my opinion properly denied the admission of exhibits 7 and 8 into evidence. Dr. Altman had no personal knowledge of the matter and a proper foundation for a hypothetical question was not established.

566 P.2d 115

STATE of New Mexico, Plaintiff-Appellee,

v.

Michael BRIONEZ, Defendant-Appellant.

In the Matter of Anthony E. LUCERO, Jr.

No. 3048.

Court of Appeals of New Mexico.

June 9, 1977.

Anthony E. Lucero, Jr., Albuquerque, for defendant-appellant.

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

ORDER

WOOD, Chief Judge.

We discuss: (1) extension of time for filing docketing statement; (2) filing of docketing statement; and (3) disposition of the contempt citation.

On June 1, 1977 this Court directed Attorney Lucero to show cause why he should not be held in contempt of court for failure to perfect the appeal in accordance with the Criminal Appellate Rules.

At the time the show cause order was entered, and up to the hearing held June 8, 1977, the appellant had filed *no documents* with the Court of Appeals. This Court had reviewed the district court file prior to issuance of the show cause order. This file revealed that the notice of appeal was filed on May 3, 1977; that a motion for extension of time to file the docketing statement was filed in the district court on May 13, 1977; that the district court granted this motion on May 13th and extended the time for filing the docketing statement until May 23, 1977; and that a copy of a docketing statement was filed in the district court on May 24, 1977.

At the hearing, Lucero's position was:

1. The Criminal Appellate Rules do not state who may extend the time for filing a docketing statement.

2. He had through May 26, 1977 to file a docketing statement in light of the extension granted by the district court and N.M. Crim.App. 302(b).

3. He mailed a docketing statement to this Court on May 23, 1977 together with the docketing fee. See N.M.Crim.App. 205(c).

The contention that a docketing statement was mailed to this Court on May 23, 1977 is supported by a copy of a letter of transmittal dated May 23, 1977. This copy was presented to this Court at the time of the hearing. The contention is also supported by a certificate of mailing which appears on the docketing statement in the district court. This showing is uncontradicted.

Extension of Time for Filing Docketing Statement

Under the appellate rules applicable to criminal cases prior to the adoption of the Criminal Appellate Rules, the appellate courts took little part in the perfection of the appeal. Consistent therewith, after notice of appeal was filed, the district court retained jurisdiction for purposes of perfecting the appeal. *State v. White,* 71 N.M. 342, 378 P.2d 379 (1962); see *State v. Clemons,* 83 N.M. 674, 496 P.2d 167 (Ct.App. 1972); *State v. Maples,* 82 N.M. 36, 474 P.2d 718 (Ct.App.1970).

The Criminal Appellate Rules, adopted by the Supreme Court in 1975, specify what the district court and the appellate court are to do in perfecting the appeal.

The notice of appeal is filed in the district court and the district court is authorized to extend the time for filing the notice of appeal. N.M.Crim.App. 201 and 202. An application for an interlocutory appeal, by permission, is filed in the appellate court. N.M.Crim.App. 203. Docketing statements are filed in the appellate court which utilizes this statement in assigning the case to a calendar. N.M.Crim.App. 205 and 207. The conference for designating the transcript of proceedings is conducted by the district court; that court resolves objections to the transcript and is authorized to grant one extension of time for transmitting the transcript to the appellate court. N.M. Crim.App. 209. Motions for a supplemental docketing statement or a supplementary transcript of proceedings are to be filed in the appellate court. N.M.Crim.App. 209(g). If the docketing statement has not been filed, the district court may dismiss the appeal on motion of appellant. N.M.Crim. App. 405.

With few exceptions, see N.M.Crim. App. 404(b), the rules are silent as to where a motion should be filed when the motion involves a stage in the appellate process involving action by the appellate court. Thus, the rules do not specifically state that a motion to extend the time for filing a brief, to extend the length of a brief, or for summary disposition should be filed in the appellate court. Similarly the rules do not specifically state that a motion for extension of time to file the docketing statement is to be filed in the appellate court. The import of N.M.Crim.App. 402, however, is that motions involving appellate court responsibility in perfecting the appeal are to be filed in the appellate court. The purpose of the Criminal Appellate Rules is to place the responsibility for appellate delays with the appellate court.

Consistent with the purpose of the rules and the responsibility of the appellate court in the calendaring process, we hold that the district court had no authority to extend the time for filing the docketing statement. The extension in this case was unauthorized.

Filing of Documents

N.M.Crim.App. 205 states that the docketing statement is to be filed in the appellate court within 10 days after the notice of appeal is filed. Lucero contends that N.M.Crim.App. 302(b) extends the 10-day period by 3 days and that a docketing statement due to be filed in the appellate

court by May 23, 1977 would be timely if it reaches the appellate court by May 26, 1977. We disagree.

N.M.Crim.App. 302(b) reads:

"(b) *Additional Time After Service by Mail.* Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period."

N.M.Crim.App. 302(b) is not applicable; no paper has been served on appellant, by mail or otherwise.

N.M.Crim.App. 301 is the applicable rule. It provides that a paper to be filed with the appellate court is to be filed with the clerk except in those instances where filing with a judge is appropriate. "Filing by mail is not complete until actual receipt." N.M. Crim.App. 205 states the docketing statement is to be filed within 10 days of the notice of appeal.

The docketing statement must be filed within the time specified by the rule; additional filing time due to use of the mail is not authorized.

Disposition of the Contempt Citation

The uncontradicted showing is that Lucero mailed a docketing statement to this Court on May 23, 1977. In doing so he was relying on an extension of time granted by the district court. These circumstances show cause why Lucero should not be held in contempt.

IT IS ORDERED as follows:

1. Our order directing Lucero to show cause why he should not be held in contempt is quashed.

2. Upon the Clerk of this Court receiving the docketing fee, the appeal will be docketed in this Court. Lucero is to pay this fee forthwith.

3. Once the appeal is docketed, the docketing statement filed in the district court file will be considered as having been filed with this Court as of the date the filing fee is paid to the Clerk.

HENDLEY and HERNANDEZ, JJ., concur.

566 P.2d 117

STATE of New Mexico, Plaintiff-Appellee,

v.

John DOE, Defendant-Appellant.

No. 2876.

Court of Appeals of New Mexico.

June 14, 1977.

[redacted]

[redacted]

[redacted]

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, App. Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Suzanne Tanner, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

This Children's Court appeal involves the timeliness of the hearing on the petition. Other issues listed in the docketing statement were not briefed and, therefore, were abandoned. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App.1976). The issue of timeliness involves: (1) the statute, (2) Children's Court rule, and (3) whether the statute or the rule is controlling.

The child was committed to the Boy's School at Springer in February, 1976. According to the briefs, he was paroled by the school. A petition to revoke this parole was filed November 24, 1976. This petition alleged that the child had committed armed robbery and aggravated assault on November 22, 1976. The Children's Court found that the child committed the acts charged, that he was a delinquent child in need of care and rehabilitation. It revoked the child's parole and transferred the child to the Boy's School. The timeliness of the hearing leading to parole revocation is the issue on appeal.

Statute

Children's Court procedures for original petitions alleging delinquency apply to petitions for revocation of parole. Section 13–14–40, N.M.S.A.1953 (Repl.Vol. 3, pt. 1). A hearing on a petition alleging delinquency must be begun within stated time limits. Section 13–14–26, N.M.S.A. 1953 (Repl.Vol. 3, pt. 1).

Under § 13–14–26(A), supra, a hearing on a petition alleging delinquency must be begun:

> "(1) fifteen [15] days from the date the petition is filed when a child in custody is denied unconditional release at his detention hearing;
>
> "(2) forty-five [45] days from the date the petition is filed when a child once in custody for the offense charged in the petition or an offense based upon the same conduct is released at or before his detention hearing . . . ."

The child asserts that the above-quoted subparagraph (1) applies to his case. He points out that he was released to his parents at the detention hearing held on November 24, 1976, but this release was on specified conditions. Because his release was not unconditional, he claims the 15-day time limitation applied. Because the hearing was not begun within 15 days of November 24, 1976, he asserts he is entitled to a dismissal of the petition with prejudice. We disagree.

The record shows that the child was detained in jail from 8:45 a. m. on November 22, 1976. He was released at his detention hearing. Having been "once in custody for the offense charged in the petition" and having been released at his detention hearing, the above-quoted subparagraph (2) applied. The time for beginning a hearing on the petition to revoke was 45 days from November 24, 1976.

The 45th day would have fallen on January 8, 1977. Since this was a Saturday, the child asserts that a hearing on the petition to revoke should have begun not later than January 10, 1977. On the basis that no hearing had begun within the 45-day period, the child contends his motion to dismiss should have been granted. Again, we disagree.

A petition to revoke the child's release, filed on January 3, 1977, alleged the child had violated the conditions of his release. A hearing on this petition was held on January 5, 1977. At this hearing, the Children's Court ordered the child held in jail.

At the hearing held January 5, 1977, the Children's Court continued the hearing on the petition to revoke until January 21, 1977 because of the absence of certain witnesses. On January 20, 1977 the Children's Court again continued the hearing because a jury trial, at which the judge was presiding, would not be completed within the scheduled time.

The Children's Court denied the motion to dismiss the petition on the basis that the continuances had been granted for good cause and only for so long as necessary. Section 13–14–26(C), supra.

Both the absence of witnesses and the judge being occupied with a jury trial were good cause for the continuances. However, there are no formal orders granting the continuances; rather, the continuances, and the reasons for them, appear in the judge's remarks in ruling on the motion to dismiss. The child asserts this was "slipshod procedure" which failed to consider the interest of the public in prompt disposition of Children's Court cases. Section 13–14–26(C), supra. Regardless of the child's characterization, this record shows that continuances were granted for good cause and only for so long as necessary. See *Doe v. State,* 88 N.M. 644, 545 P.2d 1022 (Ct.App. 1976).

The hearing on the petition to revoke parole was begun within the time limits of the continuances authorized by § 13–14–26(C), supra. The trial court did not err in denying the motion to dismiss.

Children's Court Rule

The State did not respond to the child's contentions concerning the statute. Its position is that the hearing on the petition to revoke was timely under the Children's Court rules adopted by the Supreme Court.

Children's Court Rule 34(a) states:

"(a) *Time Limits.* Adjudicatory hearings on petitions shall be commenced:

"(1) Within 90 days from the date the petition is served on the respondent if the respondent is not in detention; or

"(2) Within 30 days from the date the petition is served on the respondent if the respondent is in detention."

The Committee Commentary to this rule states:

"Rule 34 supersedes § 13–14–26 NMSA 1953 Comp. Not only is the statutory term changed, but the time limits for commencement of the hearing are expanded. In terms of the time limit, the rule makes no distinction between a respondent who has been in detention and was released and one who had never been in detention."

The record does not show the date the petition to revoke parole was served on the child; we assume it was served on the filing date—November 24, 1976. Whether the 30- or 90-day period applied depended on whether the child was or was not in detention.

In this case the child was in detention before the petition was filed, but was released after a detention hearing held November 24, 1976. Since the child was in detention but was then released, consistent with the Committee Commentary, we hold that the 90-day provision of the rule applied. The hearing resulting in revocation of probation was held prior to the expiration of the 90 days.

Was the applicability of the 90-day provision changed by the fact that the child's release was revoked on January 5, 1977? No. Since the time periods in the rule run from the date of service, the 30-day period would have run prior to the date the release was revoked. Such an after-the-fact control over the applicable time period is not contemplated by the rule. The child's release was revoked for violation of the conditions of release. See § 13–14–24(G), N.M.S.A.1953 (Repl.Vol. 3, pt. 1). This did not change the applicable time period which became fixed (either 90 or 30

days) by the presence or absence of detention of the child after the detention hearing. See § 13–14–24, supra.

The hearing on the petition to revoke was timely under Children's Court Rule 34.

Whether the Statute or the Rule is Controlling

Neither the statute nor the rule was violated in this case. Nevertheless, the statute and the rule state different time requirements as to when the hearing must be begun. There can be at least two conflicts between the statute and the rule: (1) a hearing not begun within the statutory time (with no continuances) but begun within the rule time, and (2) a hearing not begun within the rule time (with no continuances pursuant to the rule) but begun within the statute because of continuances granted by the Children's Court.

In case of conflict, which controls?

Section 13–14–4(C), N.M.S.A.1953 (Repl. Vol. 3, pt. 1) states that the Supreme Court shall adopt rules of procedure *not in conflict* with the Children's Code governing proceedings in the Children's Court. The time provisions of Children's Court Rule 34 conflict with § 13–14–26, supra; this rule is not authorized by § 13–14–4(C), supra.

Time limitations are procedural. *State ex rel. Delgado v. Stanley,* 83 N.M. 626, 495 P.2d 1073 (1972); *Southwest Underwriters v. Montoya,* 80 N.M. 107, 452 P.2d 176 (1969); *State v. Arnold,* 51 N.M. 311, 183 P.2d 845 (1947). Under the New Mexico Constitution, the Supreme Court has inherent power to regulate all procedure affecting the judicial branch of government. The power to regulate such procedure is vested exclusively in the Supreme Court. In case of a conflict between the statute and a procedural rule adopted by the Supreme Court, the rule controls. *Ammerman v. Hubbard Broadcasting, Inc.,* 89 N.M. 307, 551 P.2d 1354 (1976); *State ex rel. Anaya v. McBride,* 88 N.M. 244, 539 P.2d 1006 (1975); *State v. Roy,* 40 N.M. 397, 60 P.2d 646 (1936), 110 A.L.R. 1 (1937).

The order of the Children's Court revoking parole and transferring the child to the Boy's School at Springer is affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

566 P.2d 121

STATE of New Mexico, Plaintiff-Appellant,

v.

John DOE, a child, and John Doe, a child, Defendants-Appellees.

Nos. 2941 and 2942.

Court of Appeals of New Mexico.

June 14, 1977.

Rehearing denied June 10, 1977.

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

Richard Jay Grodner, Prelo & Grodner, P. A., Albuquerque, for defendants-appellees.

OPINION

WOOD, Chief Judge.

These consolidated appeals involve delinquent children committed to the Boy's School at Springer, New Mexico, after an unchallenged finding that they were mentally ill. The appeals were taken by the Secretary of Corrections and the Superintendent of the Boy's School. We discuss: (1) the party appellant, (2) the issues on appeal, (3) commitment of mentally ill delinquents, (4) treatment of the children, and (5) release of the children.

The first two issues are procedural; the last three issues are substantive. The substantive issues arise because of the effort of the Children's Court to provide an appropriate disposition for the mentally ill delinquents. Two decisions are background for the substantive issues. *Carter v. Montoya*, 75 N.M. 730, 410 P.2d 951 (1966) held that under the old juvenile law, the juvenile court could not order the Los Lunas Hospital and Training School to admit a mentally retarded juvenile. *Matter of Doe*, 88 N.M. 632, 545 P.2d 491 (Ct.App.1976) held that § 13–14–32(B), N.M.S.A.1953 (Repl.Vol. 3, pt. 1) limits the authority of the Children's Court to transfer a child in need of psychiatric treatment to a state agency. The transfer of the child to the custody of the Health and Social Services Department was limited to the thirty-day time period and for the purposes stated in § 13–14–32(B), supra.

Both of the children involved in these consolidated appeals admitted the delinquent acts charged in the petition and both admitted to being a delinquent child. The Children's Court found that each child was in need of supervision, care or rehabilitation. Both children were committed to the Department of Corrections at Springer. Insofar as they may be isolated from the matters in the following paragraph, no challenge is made to the propriety of the matters identified in this paragraph. See § 13–14–31(B)(2), N.M.S.A.1953 (Repl.Vol. 3, pt. 1).

An unchallenged finding as to each child reads: "That said Child is a mentally ill Child and there are no facilities in New Mexico able to provide care for him in a psychiatric milieu." The judgment as to

each child provides that the child be provided psychiatric care while in the custody of the Department of Corrections. The judgment in No. 2942 also orders that the Department of Hospitals and Institutions become involved in providing psychiatric care to the child in that case. In No. 2941, the judgment orders that the child not be released from the Boy's School without prior approval of the Children's Court. In No. 2942, the judgment orders the child to come before the Children's Court before being released or granted parole. The matters referred to in this paragraph are the basis for the substantive issues in this appeal.

Party Appellant

Section 13–14–36(A), N.M.S.A.1953 (Repl.Vol. 3, pt. 1) states that any *party* may appeal the Children's Court judgment. Children's Court Rule 9(a) states that in proceedings in petitions alleging delinquency, the parties are the respondent and the State, unless otherwise ordered by the court. In this case, up through entry of the judgment, the parties were the State and the children.

After entry of judgment, in each case, the Department of Corrections sought, and the Children's Court granted, an extension of time for filing notices of appeal. The notices of appeal were filed within the time authorized for extensions by the trial court. N.M.Crim.App. 202(c).

The notices of appeal were filed by the Secretary of Corrections and the Superintendent of the Boy's School. The reference to these two positions means the Department of Corrections. See §§ 42–9–3 and 42–9–9, N.M.S.A.1953 (2d Repl.Vol. 6, Supp. 1975). We hold the notice of appeal was filed by the Department of Corrections.

We are not required to determine whether the State, a party at the time judgment was entered, is a party different from the Department of Corrections. Children's Court Rule 9(d)(1) permits intervention, with leave of court, by the custodian of the child. The judgments placed the children in the custody of the Department of Corrections. Assuming the State and the Department of Corrections are separate parties, intervention occurred when the Children's Court granted the Department of Corrections an extension of time in which to file the notice of appeal.

We hold that the Department of Corrections is the party appellant.

Issues on Appeal

N.M.Crim.App. 205(a) requires the docketing statement to list the issues presented by the appeal, "including a statement of how they arose in the trial court . . . ." The docketing statement for each child states that the substantive issues presented in the appeal "did not arise in the Children's Court", but that the issues could be raised on appeal. The docketing statements do not say on what basis they can be raised on appeal.

N.M.Crim.App. 308 states exceptions to the requirement that for an issue to be reviewed, the issue must have been raised in the trial court. One exception is a question of general public interest. The questions here affect the interest of the State at large. We consider them properly before us for review. Compare *State v. John Doe* (Ct.App.) 90 N.M. 536, 565 P.2d 1053, decided May 24, 1977.

Commitment of Mentally Ill Delinquents

The Children's Court found each child was mentally ill. These findings are unchallenged. No contention is made that the question of mental illness was not before the court or that the findings of mental illness were procedurally deficient. See § 13–14–37(A), N.M.S.A.1953 (Repl.Vol. 3, pt. 1).

The Department of Corrections contends that the findings of mental illness are surplusage and can be disregarded. No authority is cited in support of this claim. We do not understand how the findings can be treated as surplusage since the judgments direct the Department to provide psychiatric care and the findings of mental illness are the factual basis for this direction.

The Department of Corrections also asserts that the Children's Court exceeded its jurisdiction in committing the children to the Department. This argument is based on the view that § 13–14–31, supra, and § 13–14–32, N.M.S.A.1953 (Repl.Vol. 3, pt. 1) "provide for the mutually exclusive disposition of children." Section 13–14–31(B)(2), supra, authorizes the transfer of the legal custody of a child found to be delinquent to an agency responsible for the care and rehabilitation of delinquent children. Section 13–14–32, supra, states what the Children's Court "may" do in a situation where there is a question of mental illness.

Section 13–14–32, supra, states:

"A. If in a hearing at any stage of a proceeding on a petition under the Children's Code [13–14–1 to 13–14–45] the evidence indicates that the child is mentally retarded or mentally ill, the court may:

"(1) order the child detained if appropriate under the criteria established under the Children's Code; and

"(2) initiate proceedings for the commitment of the child as a mentally ill or mentally retarded minor.

"B. 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.

"C. If a child is committed as a mentally retarded or mentally ill child under this section, the petition shall be dismissed."

We do not agree that the two statutes are mutually exclusive. The word "may" in § 13–14–32, supra, is "permissive or directory". Section 1–2–2, N.M.S.A.1953 (Repl. Vol. 1, Supp.1975). When the court proceeds under § 13–14–32, supra, its authority as to what it may do is limited as stated in that section. *Matter of Doe,* supra. Thus, if a child is committed as mentally ill, the Children's Court petition is to be dismissed. Section 13–14–32(C), supra. However, the Children's Code does not make § 13–14–32, supra, the exclusive method of handling a mentally ill child who is also a delinquent child.

Section 13–14–2(D), N.M.S.A.1953 (Repl. Vol. 3, pt. 1) states a legislative purpose of providing "appropriate and distinct dispositional options for treatment and rehabilitation" of delinquent children. In these appeals, the delinquent children are in need of care and rehabilitation, and the Boy's School is an appropriate facility to provide care and rehabilitation. However, the children are mentally ill and the unchallenged findings are that there are no New Mexico facilities able to care for them in a "psychiatric milieu". Thus, the Children's Court fashioned "an appropriate and distinct" dispositional option; it ordered that psychiatric care be provided while at the Boy's School. Section 13–14–32, supra, does not prohibit such a disposition; § 13–14–2(D), supra, authorizes this disposition.

The Children's Court did not err in committing mentally ill, delinquent children to the Boy's School and in ordering that psychiatric care be provided.

Treatment of the Children

The judgments order that psychiatric care be provided to the children while they are in the custody of the Boy's School. We have held this was a permissible disposition. We add that this is treatment ordered by the court, the cost of which is to be paid from court funds. Section 13–14–38, N.M.S.A.1953 (Repl.Vol. 3, pt. 1); *Matter of Doe,* supra.

The judgment in No. 2942 ordered D.H.I. (Department of Hospitals and Institutions)

"to become involved in providing psychiatric care" while the child is in the custody of the Department of Corrections. We doubt that this provision has any legal effect upon D.H.I. Custody has not been transferred to D.H.I. *Matter of Doe,* supra. There is nothing before us indicating that D.H.I. was involved in any "matters in issue" in this case. See *Bell v. Odil,* 60 N.M. 404, 292 P.2d 96 (1956). However, we need not decide the legal effect upon D.H.I. of the portion of the judgment stating that D.H.I. was "to become involved."

D.H.I. was not a party to the proceedings before the Children's Court and is not a party to this appeal. D.H.I. is not complaining of the "become involved" provision. It is the Department of Corrections that is complaining of this provision; it does not pertain to the Department of Corrections. Since the "become involved" provision does not affect the Department of Corrections, its complaint about this provision will not be considered. *Edwards v. Fitzhugh,* 18 N.M. 424, 137 P. 582 (1913); see *Yoakum v. Western Casualty and Surety Company,* 75 N.M. 529, 407 P.2d 367 (1965).

Release of the Children

The judgment in No. 2941 provides that the child is not to be released without prior approval of the Children's Court. The judgment in No. 2942 provides that the child is to come before the Court before being released or granted parole. The Department of Corrections asserts the Children's Court had no authority to enter either of these provisions. We agree.

The authority of the Children's Court over the children terminated when it transferred these delinquent children to the Boy's School for care and rehabilitation. Sections 13–14–12(C) and 13–14–35(A), N.M.S.A.1953 (Repl.Vol. 3, pt. 1); *In Re Doe,* 85 N.M. 691, 516 P.2d 201 (Ct.App. 1973). Under these circumstances, the Boy's School "has the exclusive power to parole or release the child". Section 13–14–35(A)(1), supra.

The provisions in the judgments involving the Children's Court in the release or parole of the children (second paragraph 2 of the judgment in No. 2941; second paragraph 5 of the judgment in No. 2942) are reversed. In other respects, the judgments of the Children's Court are affirmed. Both cases are remanded to the Children's Court for entry of corrected judgments consistent with this opinion.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HENDLEY, J., specially concurs.

HENDLEY, Judge (specially concurring).

I fully concur in the majority opinion and add the following since it is not properly a part of the opinion.

This is not the first time we have seen the Children's Court Judges attempt to fashion remedies which will meet the needs of the child. We can understand and appreciate their concern and frustration when confronted with these types of problems. In these instances the statute becomes a shackle rather than an instrument of correction. Legislative attention is needed.

566 P.2d 426

STATE of New Mexico,
Plaintiff-Appellant,

v.

Lupe GARCIA, Defendant-Appellee.

No. 2822.

Court of Appeals of New Mexico.

May 17, 1977.

Rehearing Denied May 31, 1977.

Writ of Certiorari Denied June 23, 1977.

Toney Anaya, Atty. Gen., Ernesto J. Romero, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Jack Smith, Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

This appeal by the State involves the legal sufficiency of an affidavit for a search warrant. The trial court granted defendant's motion to suppress the evidence seized in the search pursuant to the warrant. It did so on the basis that the information recited in the affidavit was stale and therefore did not supply probable cause for issuance of the warrant. We discuss: (1) reliability of information supplied to the judge issuing the warrant, (2) staleness of the information in the affidavit, and (3) reliability of the informants.

Reliability of the Information Supplied to the Judge

The appeal was originally assigned to the "Legal" calendar on the basis that "staleness" would be determined by the affidavit contained in the district court file. Defendant moved for reassignment of the case to the "Limited" calendar, claiming that the staleness issue had been determined on the basis of evidence presented at the suppression hearing. After hearing argument on the motion to reassign, there was a question as to whether the trial court had tried the truthfulness of the affidavit. Our concern was based on *State v. Baca*, 84 N.M. 513, 505 P.2d 856 (Ct.App.1973). Accordingly, we granted the motion and reassigned the case to the "Limited" calendar. See N.M.Crim.App. 207(b) and (c).

In *Baca*, supra, defendant contended that he had a right to challenge the truthfulness of the allegations in the affidavit. *Baca* points out that the decisions in other states are in conflict as to when such attacks are permissible. *Baca* states:

> "Although we incline to the view that an attack is permissible if the claim is that the allegations are perjurious, we do not decide the question of when attacks should be allowed. Whenever other jurisdictions have allowed an attack, it has been directed to the truthfulness of the affiant's allegations. In this case, defendant did not attack the truthfulness of the statements made by the officers who signed the affidavit; the attack was on the truthfulness of the information received from an informer."

The transcript of the suppression hearing shows that there was no attack on the truth of the affiant's allegations. Accordingly, the question of when such attacks should be allowed is not an issue in this case.

Staleness of the Information in the Affidavit

The affidavit sought a warrant to search a described premises, and the defendant, for heroin and paraphernalia used in connection with heroin. The affidavit sets forth information that the affiant officer received from three informants. The affidavit recites that informant I "has personally purchased heroin from the above subject at above premises the latest being approximately one month ago."

Defendant relies upon this one-month delay to support his contention of no probable cause because of stale information. The significance of this time factor depends on whether there was an isolated transaction or a continuing series of events. *United States v. Johnson*, 461 F.2d 285 (10th Cir. 1972); *United States v. Harris*, 482 F.2d 1115 (3rd Cir. 1973). See footnote 9 in *Andreson v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); footnote 2 in *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). As stated in *State v. Austria*, 524 P.2d 290, 294 (Haw.1974):

"If there is a reasonable basis in the affidavit for the conclusion that the criminal activity alleged by the informer is of a continuing, ongoing nature, the passage of time between the informer's last observations of that activity and the issuance of the warrant is less significant than when no such showing is made in the affidavit."

The affidavit contains a reasonable basis for concluding that defendant was engaged in criminal activity of a continuing, ongoing nature. The affidavit recites:

1. Informant I last observed heroin sales by defendant at the described premises between August 10 and September 10, 1976.
2. Informant I had been at the described premises on numerous occasions, and on those prior occasions defendant had heroin for sale. Also, that informant I had seen heroin on the premises on numerous occasions.
3. All three informants, independently of one another, state that defendant uses heroin and needs heroin daily to supply his habit. These statements were based either on the informant's personal observations or admissions by defendant.

The foregoing shows a continuing activity in connection with heroin up to the date of the affidavit, which was September 10, 1976.

Affidavits are to be read with common sense. *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723, supra; *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct.App.1974). The above information was sufficient for the judge who issued the search warrant to conclude there was a probability of criminal conduct. *State v. Bowers*, supra. The affidavit does not show stale information.

Reliability of the Informants

Defendant asserts that one cannot base probable cause on the continuing conduct recited in the affidavit. He asserts that the continuing conduct supplied by the informants cannot be considered because the reliability of the informers is not shown. Once the continuing conduct is eliminated, defendant asserts the only information left to support probable cause is a one-month-old purchase by one informer. We disagree.

Although *Hudson v. State*, 89 N.M. 759, 557 P.2d 1108 (1976) does not refer to *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723, supra, it does follow the approach used in *Harris*. That approach is to determine whether there was a substantial basis for believing there is a factual basis for the information furnished. In this case the question is whether there is a substantial basis for believing the information received from the informants was based on fact rather than rumor or speculation.

Here, we have informant I's purchase of heroin (See *State v. Archuleta*, 85 N.M. 146, 509 P.2d 1341 (Ct.App.1973)), his past observations of heroin on the premises and his observations of sales from the premises during the month prior to issuance of the search warrant. We also have all three informants stating, either on the basis of personal observations or admissions from the defendant, that defendant is a daily heroin user. The affiant also states that the informants have provided information in the past which led to the arrest of several persons for possession and trafficking in heroin. See *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723, supra. The judge who signed the warrant could conclude from the foregoing that the informants were reliable.

Defendant complains of other statements in the affidavit. We need not consider them. The statements in the affidavit discussed in this opinion show a substantial basis for believing the informants.

The trial court erred in granting the motion to suppress on the basis that the information in the affidavit was stale. The order granting the motion is reversed. The cause is remanded with instructions to deny the motion to suppress.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

566 P.2d 828

STATE of New Mexico,
Plaintiff-Appellee,

v.

Paul Bik HOGERVORST, Jr.,
Defendant-Appellant.

No. 2750.

Court of Appeals of New Mexico.

May 17, 1977.

Rehearing Denied May 31, 1977.

Writ of Certiorari Denied June 24, 1977.

Thomas L. Grisham, McCulloch, Grisham & Lawless, P. A., Albuquerque, for defendant-appellant.

John J. Duran, Paquin M. Terrazas, Asst. Attys. Gen., Toney Anaya, Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

In 1974 defendant was convicted of bribery of a public official. His crime was the payment of money to the district attorney with the intent to influence the district attorney in carrying out his duties. Section 40A–24–1(D), N.M.S.A.1953 (2d Repl.Vol. 6). In 1975 we reversed and directed a new trial. *State v. Hogervorst*, 87 N.M. 458, 535 P.2d 1084 (Ct.App.1975). Upon retrial in 1976, defendant was again convicted. This appeal involves the 1976 conviction. Issues listed in the docketing statement, but not briefed, are deemed abandoned. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App.1976). His brief raises issues concerning: (1) the indictment; (2) double

jeopardy; (3) right to counsel; (4) entrapment; (5) intercepted communications; (6) the prosecutor as a defense witness; (7) evidence of prior wrongful acts; (8) defense cross-examination; (9) prosecutor misconduct; and (10) instructions. We affirm.

Indictment

Defendant moved to quash the indictment, contending that "members of the Grand Jury returning the indictment . . . were witnesses against the Defendant."

The indictment charging bribery was filed September 7, 1973. The same grand jury had returned indictments charging defendant with two public nuisance offenses in violation of § 40A–8–1, N.M.S.A.1953 (2d Repl.Vol. 6). One public nuisance charge concerned the operations of the Galaxy Book Store. The other public nuisance charge concerned the showing of the movie, "Deep Throat". The two public nuisance indictments were filed August 10, 1973. In addition, on August 10, 1973, defendant was directed to show cause to the district court why he should not be held in contempt for his failure to obey a subpoena. See § 41–5–12, N.M.S.A.1953 (2d Repl.Vol. 6), the 1975 amendment not being applicable. The subpoena had directed defendant to bring the film "Deep Throat" before the grand jury.

Section 41–5–3(C), N.M.S.A.1953 (2d Repl.Vol. 6) authorizes a challenge to the validity of the grand jury on the basis that "a member of the grand jury returning the indictment was a witness against the person indicted."

Defendant contends the grand jurors were witnesses against him because the grand jury had returned two indictments against him prior to returning the bribery indictment, and had "witnessed" the actions of defendant which led to the contempt citation. Defendant asserts that a grand jury involved in these prior events could not be unbiased or impartial in considering the bribery charge and had become witnesses against defendant's character and conduct. On this basis, defendant asserts the trial court erred in refusing to quash the indictment.

Defendant's argument perverts the meaning of "witness" as used in the grand jury statutes. These statutes refer to the oath for a witness, the testimony of witnesses, the power to compel the attendance of witnesses. Sections 41–5–6, 41–5–11, 41–5–12, N.M.S.A.1953 (2d Repl.Vol. 6). As used in these statutes, including § 41–5–3(C), supra, witness means a person called to give evidence regarding matters under inquiry by the grand jury. See Webster's Third New International Dictionary (1966); Black's Law Dictionary (1951). The effect of § 41–5–3(C), supra, is to prohibit a grand juror from testifying before the grand jury of which he or she is a member. The trial court correctly denied the motion to quash the indictment.

Double Jeopardy

After reversal by this Court and the granting of a new trial, defendant moved for dismissal of the indictment on the ground that retrial would violate the constitutional provision against double jeopardy.

State v. Sneed, 78 N.M. 615, 435 P.2d 768 (1967) states:

> "The constitutional protection against double jeopardy does not prevent a second trial for the same offense when the defendant himself, by an appeal, has invoked the action which resulted in the second trial."

Defendant asserts this rule does not apply to his case. He relies on a statement in *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). That statement is that the double jeopardy clause bars retrials where bad faith conduct by the prosecutor threatens the harassment of defendant by successive prosecutions so as to afford the prosecution a more favorable opportunity to convict.

We reversed defendant's first bribery conviction "because of the failure to correct false evidence concerning the bribery of Las Cruces officials." *State v. Hogervorst*, supra. Defendant asserts that it is evident from our ruling "that the prosecution's willful and deliberate actions in eliciting testi-

mony that was known to be false constitutes the same type of bad faith conduct that the Double Jeopardy Clause is designed to protect against . . . ." We disagree.

> In *State v. Hogervorst*, supra, we stated: "It may be questioned whether the prosecutor knowingly or deliberately solicited this [false] evidence because some of the testimony may fairly be read as nonresponsive to the questions asked."

We did not hold that the prosecutor in the first trial willfully or deliberately elicited false testimony, and did not hold that the prosecutor was guilty of bad faith conduct. The reversal was for failure to correct false evidence. Defendant does not, in this appeal, attempt to demonstrate bad faith conduct by the prosecutor in the first trial; he relies entirely on statements in our opinion in *State v. Hogervorst*, supra. The result is a failure to show bad faith conduct on the part of the prosecutor.

In addition, *State v. Hogervorst* states: "There is substantial evidence that defendant paid $2,000 to District Attorney Williams in an effort to have the District Attorney drop the prosecution" of the August 10, 1973 indictments and the contempt citation. There is no showing that the retrial afforded the prosecution a more favorable opportunity to convict.

United States v. Dinitz, supra, is not applicable; the trial court did not err in refusing to dismiss the indictment on grounds of double jeopardy.

Right to Counsel

The public nuisance indictments were filed August 10, 1973. A civil suit seeking to close down defendant's "business" activities was filed on August 21, 1973. The bribery indictment charged that the offense was committed on August 24, 1973.

Between August 10th and August 24, 1973, investigators from the district attorney's office met with defendant in a continuing investigation of defendant. During these meetings, defendant made statements which were used against him in the bribery prosecution. And, defendant met with the district attorney on August 24, 1973, the meeting where he produced the bribery money.

Defendant had retained counsel in connection with the public nuisance indictments and in connection with the civil suit. The district attorney knew that defendant was represented by counsel. Yet, defendant did not have counsel present during the meetings with the investigators or the district attorney, nor was he advised of his right to counsel.

Defendant asserts that damaging admissions were intentionally solicited by representatives of the State subsequent to the public nuisance indictments, that these admissions were obtained at a time when he was entitled to the assistance of counsel, that the admissions were obtained in violation of his right to counsel and, because of this violation, the admissions should have been suppressed.

Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) held that defendant's statements obtained surreptitiously by federal agents, after indictment and in the absence of defendant's counsel, could not be admitted against defendant in the trial of the charge for which he had been indicted. *United States v. Anderson*, 523 F.2d 1192 (5th Cir. 1975) is to the same effect. Both decisions deal with evidence surreptitiously obtained by the government subsequent to indictment in the absence of the defendant's counsel. Both are distinguishable on the facts. We are not concerned here with evidence obtained by the State subsequent to the public nuisance indictments which was used at trial of the public nuisance charges. The evidence obtained by the State in this case was used at the trial of the separate bribery charge.

We are uncertain as to the meaning to be given to *People v. Vella*, 21 N.Y.2d 249, 287 N.Y.S.2d 369, 234 N.E.2d 422 (1967). The facts given are sparse and no reasoning is given for the conclusion reached. We recognize that *Vella* may be viewed as supporting defendant's contention. We disagree with such a view.

The issue here involves the right to counsel. It is clear that the right to counsel exists after judicial proceedings have been initiated against an accused, whether by way of formal charge, preliminary hearing, indictment, information or arraignment. *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). No judicial proceedings had been initiated against defendant in connection with the bribery charge at the time of the meetings between defendant and representatives of the State. *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973) states the right to counsel is determined by an "examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." Here there was no adversary; all that was involved was an investigation.

Defendant's contention is similar to that raised in *State v. Anaya*, 81 N.M. 52, 462 P.2d 637 (Ct.App.1969) which involved two unlawful sales of heroin purchased by an informer while being observed by a police officer. Anaya contended that once an investigation reaches an accusatory stage, the defendant must be advised of his right to remain silent and the right to counsel. Anaya claimed the accusatory stage was reached once the police began a concerted effort to obtain incriminating evidence against him. Anaya claimed the accusatory stage had been reached in his case once the informer set up the heroin purchase and, at that point, he was entitled to be advised of his rights. We disagreed, pointing out that the adversary system had not begun to work against Anaya at the time he sold the heroin. See also *State v. Maes*, 81 N.M. 550, 469 P.2d 529 (Ct.App.1970).

The representatives of the State were investigating fresh criminal activity. Defendant "cannot, by virtue of his status as an accused person, immunize himself from the consequences of further criminal acts simply because they were committed in the presence and with the cooperation of Government agents . . . ." *Gascar v. United States*, 356 F.2d 101 (9th Cir. 1965).

There was no violation of the right to counsel because defendant had no right to counsel while committing the crime of bribery. *Gascar v. United States*, supra.

Entrapment

Related to the right to counsel claim is defendant's contention that the trial court should not have submitted the issue of entrapment to the jury, but should have ruled there was entrapment as a matter of law. The focal issue in entrapment is the intent or predisposition of the defendant to commit the crime. In determining whether entrapment has occurred, a line must be drawn between a trap for the unwary innocent and a trap for the unwary criminal. *State v. Fiechter*, 89 N.M. 74, 547 P.2d 557 (1976).

There is evidence that defendant suggested the bribe to one of the district attorney's investigators. There is evidence that defendant assured the district attorney that paying the money was defendant's idea. With this evidence, defendant cannot be characterized as an unwary innocent. The trial court did not err in submitting the issue of entrapment to the jury and in refusing to hold entrapment existed as a matter of law.

Intercepted Communications

There was eavesdropping on two of defendant's meetings with representatives of the State. The conversation between defendant and investigator Autrey on August 23, 1973 was transmitted by a device concealed on Autrey and overheard by a person in a car parked nearby. The conversation between defendant and the district attorney on August 24, 1973 was transmitted by a device concealed on the district attorney and overheard by Autrey, who was sitting in a car parked nearby. Statements made by defendant in these "overheard" conversations were admitted into evidence over defendant's objection. Defendant claims his statements should have been suppressed. His suppression claim is based on two grounds—a statute and the constitutional prohibition against unlawful searches.

The statutory claim is based on §§ 40A–12–1 through 40A–12–1.10, N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1975). These provisions pertain to interference with communications. They authorize interference with communications under court order. There was no court order in this case. Section 40A–12–1.7, supra, states that the contents of an intercepted communication is not to be received in evidence unless the parties are provided with a copy of the court's authorization order ten days prior to the trial. From this, defendant argues that no intercepted communication is admissible as evidence unless there is a court order authorizing the interception. Defendant reads the statute too broadly.

Section 40A–12–1, supra, defines the petty misdemeanor of "interference with communications". The definition of nearest applicability in this case is § 40A–12–1(C), supra, which states: "reading, hearing, interrupting, taking or copying any message, communication or report intended for another by telegraph or telephone without his consent." Section 40A–12–1, supra, goes on to state that the interference which has been made criminal, will not be criminal if the interference is authorized by court order.

By its terms, § 40A–12–1(C), supra, pertains to telephone conversations or telegraph messages. Neither are involved in this case; the overheard communication here was a face-to-face conversation transmitted to a listener by a device concealed on one of the participants in the conversation. This overhearing is not made criminal by § 40A–12–1, supra; the court order method of avoiding criminal conduct is not applicable. Because the court order method is not applicable, the provisions in § 40A–12–1.7, supra, regulating admissibility of court order authorized evidence is also not applicable.

The unlawful search issue involves defendant's expectation of privacy which the Fourth Amendment to the United States Constitution protects in the absence of a search warrant. *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971), reh. denied, 402 U.S. 990, 91 S.Ct. 1643, 29 L.Ed.2d 156 (1971), points out that a police agent who conceals his police connections may write down his conversations with a defendant and testify concerning them without violating the Fourth Amendment. The plurality opinion in *White*, supra, holds that for constitutional purposes no different result is required if, instead of reporting and transcribing his conversations, the agent either: (a) simultaneously records the conversations with electronic equipment carried on his person, or (b) carries equipment which transmits the conversations either to recording equipment located elsewhere or to agents monitoring the transmission. There was no unlawful search.

The trial court did not err in admitting testimony concerning the overheard conversations.

Prosecutor as a Defense Witness

The prosecutor is not District Attorney Williams; he removed himself from the case because he would necessarily be a witness for the prosecution. District Attorney Brandenburg was the prosecutor; he conducted both trials on behalf of the State. Defendant claims the trial court denied him his constitutional right to call witnesses when it refused the defense request to call Brandenburg as a witness in the second trial. See N.M.Const., Art. II, § 14.

Our mandate reversing the first conviction and awarding a new trial was filed in the district court May 27, 1975. The district court file shows the case was set for trial numerous times in 1975, and in the spring and summer of 1976. Each setting was vacated. On July 21, 1976 notice was given that the case was set for trial on September 14, 1976. The trial did begin on September 14, 1976.

On August 11, 1976 defendant filed a motion requesting that Brandenburg be removed as prosecutor because the defense intended to call Brandenburg as a defense witness. This motion was heard on August 30, 1976 and denied as untimely. See

R.Crim.P. 33(f). At the time this motion was filed, more than a year had elapsed since the first trial setting after remand. The trial court did not err in overruling the motion.

On September 10, 1976 Brandenburg was served with a subpoena to testify as a witness. When the case was called for trial on September 14, 1976, defendant objected to Brandenburg prosecuting the case, stating that he had subpoenaed Brandenburg and planned to call him as a witness. Although the subpoena does not state that Brandenburg was to testify on behalf of the defense, no issue was raised concerning a defective subpoena. Instead, the trial court inquired as to the nature of the testimony which the defense desired to elicit from Brandenburg. After hearing defendant's response, the trial court denied the motion on the basis that the testimony would be irrelevant.

After the case-in-chief for the prosecution was concluded and the testimony of the first defense witness had been concluded, the defense informed the trial court that it intended to call Brandenburg as a witness and wished to go over with the court, outside of the jury's presence, the questions to be asked. This was done. The trial court again concluded that the questions were irrelevant and refused to permit the defense to call Brandenburg as a witness.

The trial court did not err in proceeding as it did or in not permitting defendant to call Brandenburg as a witness. There was no violation of defendant's constitutional right to call witnesses on his behalf. In so holding, we express no view as to whether the trial court could have properly denied the last two motions, as it did the first motion, on the basis that they were not timely. That issue is not presented.

Brandenburg's position as the prosecutor did not immunize him from being called as a witness. See *Beall v. Territory,* 1 N.M. (Gild.) 507 (1871), reversed on other grounds, 83 U.S. 535, 16 Wall. 535, 21 L.Ed. 292 (1873). Nevertheless, a trial court has discretion respecting the examination of witnesses and, in appropriate circumstances, may refuse to allow a witness to take the stand. Courts are reluctant to allow attorneys to be called as witnesses in trials in which they are advocates. When a trial court refuses to allow a prosecutor to be called as a witness for the defense, the appellate issue is whether the trial court abused its discretion. *Gajewski v. United States,* 321 F.2d 261 (8th Cir. 1963). See *United States v. Phillips,* 519 F.2d 48 (5th Cir. 1975); *Hayes v. United States,* 329 F.2d 209 (8th Cir. 1964); Annot., 54 A.L.R.3d 100 at 158.

In determining whether to allow the defense to call Brandenburg as a witness, the trial court properly required the defense to indicate in advance the testimony he desired to elicit from Brandenburg. *Gajewski v. United States, supra; State v. Stiltner,* 61 Wash.2d 102, 377 P.2d 252 (1962), cert. denied, 380 U.S. 924, 85 S.Ct. 928, 13 L.Ed.2d 810, (1965). See Evidence Rule 103.

Defendant informed the trial court that he intended to ask Brandenburg the following questions:

1. "[I]sn't it true that the last trial of this case was reversed because of knowing use of false evidence by the prosecution[?]"
2. "Did you discuss with prosecution witnesses prior to the last trial their testimony?"
3. "Whether Mr. Brandenberg [sic] advised the witnesses to testify as they did at the trial, or whether it was their own idea[?]"
4. "Isn't it true that you failed to correct the false testimony at the last trial?"

Defendant asserts that these questions would tend to impeach the credibility of the State's witnesses, tended to show a lack of criminal intent on the part of defendant, and also went to the defense of entrapment. They do not. All of the questions are directed to the conduct of Brandenburg as prosecutor. None of the questions tended to make the existence of a fact, that was of consequence to the determination of the

bribery charge, more probable or less probable than it would be without the questions being asked. Evidence Rule 401. Brandenburg's testimony concerning Brandenburg's conduct would not have impeached State witnesses, would not have shown a lack of criminal intent on defendant's part, or tended to establish entrapment.

The trial court did not abuse its discretion in refusing to permit the defense to call Brandenburg as a witness.

Evidence of Prior Wrongful Acts

The public nuisance indictments were admitted as exhibits, as was the contempt citation. In addition, evidence was admitted, over defendant's objection, that the district attorney was investigating defendant's adult bookstore and adult theater. Defendant objected to these references, claiming they were prejudicial. Defendant recognizes that this evidence was admissible under Evidence Rule 404(b) to show his motive in offering money to the district attorney.

The claim on appeal is that the probative value of the above evidence was substantially outweighed by the danger of unfair prejudice and should have been excluded under Evidence Rule 403.

No claim concerning Evidence Rule 403, or that the prejudicial effect of the evidence outweighed its probative value, was raised in the trial court. Thus, the claim is not properly before us for review. N.M. Crim.App. 308; *State v. Smith,* 89 N.M. 777, 558 P.2d 46 (Ct.App.1976), overruled on other grounds, 89 N.M. 770, 558 P.2d 39 (1976). See also *State v. Baca,* 89 N.M. 204, 549 P.2d 282 (1976).

Defendant's claim that the evidence was prejudicial did not alert the trial court to a question concerning Evidence Rule 403. The fact that competent evidence may tend to prejudice defendant is not grounds for exclusion of that evidence. See *State v. Waller,* 80 N.M. 380, 456 P.2d 213 (Ct.App.1969). The question is whether the probative value of the evidence was outweighed by its prejudicial effect. That question was never raised in the trial court.

On the merits, the references to adult bookstore and to adult theater were not so cumulative that we can say, as a matter of law, that the prejudicial effect outweighed the probative value of the evidence.

Other claims under this point ignore what happened at trial. Defendant asserts he was accused of contempt of court; the transcript shows the reference was to the contempt citation. Defendant contends that he was accused of "vice" and "organized crime". These references were made in a long, unresponsive answer to a question asked by the defendant. Defendant asked that the answer be stricken because not responsive. The trial court granted the motion and instructed the jury to disregard the answer. These contentions simply do not pertain to Evidence Rule 403.

Defense Cross-Examination

Defendant asserts the trial court limited his right to cross-examine witnesses. The claim is frivolous. The transcript does not show that defendant was limited either in the time spent in cross-examination or in questioning concerning matters relevant to the case.

Defendant's contention of a limited cross-examination is not developed in his brief. He contents himself with transcript references which he claims shows an improper limitation. An examination of those references shows these "limitations" were to the form of the questions asked, to matters involving legal conclusions, to matters not within the knowledge of the witness, to irrelevant questions, and to the characterization of one witness by another. One of defendant's transcript references is to an objection by the prosecutor which was overruled. These matters concerning the propriety of the questions asked were within the trial court's discretionary control. See *State v. Marquez,* 87 N.M. 57, 529 P.2d 283 (Ct.App.1974); *State v. Mireles,* 84 N.M. 146, 500 P.2d 431 (Ct.App.1972). No abuse of discretion is shown and there is nothing indicating an improper limitation of cross-examination.

Defendant also claims the trial court refused to allow defendant to cross-examine a witness concerning testimony given at defendant's first trial. Again, the claim is frivolous. The transcript references on which defendant relies go to objections which were sustained because of the form of the question asked or because the question was irrelevant. These references do not show that defendant was kept from cross-examining a witness concerning prior testimony.

Prosecutor Misconduct

Defendant contends that prosecutor Brandenburg was allowed to cross-examine a witness recklessly with the purpose of eliciting hearsay testimony, of violating the attorney-client privilege, of introducing totally irrelevant evidence, and of denying defendant a fair trial. The witness was a polygraph examiner called by the defense.

The transcript references on which defendant relies do not support the contention made. What the references show are questions emphasizing the information made available to the examiner in preparing for and conducting the examination. The examiner established the relevancy of the questions when he testified that a thorough knowledge of the background and issues aided him in conducting the examination. Information sought by the prosecutor's questions was the facts before the examiner which he could have considered in arriving at his opinion. *State v. Turner,* 81 N.M. 450, 468 P.2d 421 (Ct.App.1970). This information was not elicited for its truth, and was not hearsay. Evidence Rule 801(c).

The attorney-client privilege claim is based on the showing that the information made available to the examiner was supplied either by defendant or defendant's attorney. Assuming (but not deciding) that the information was a confidential communication when made, and within the privilege established by Evidence Rule 503, the privilege was waived when the examiner was called to the witness stand by defendant and testified to an opinion which utilized the information supplied. See *Evidence Rules* 511, 703 and 705.

The prosecutor's cross-examination of defendant's polygraph examiner cannot be characterized as reckless; there was no misconduct in the prosecutor's cross-examination.

Instructions

(a) At the close of the State's case, the prosecutor requested that the trial court instruct the jury that certain tapes had been excluded from evidence because of their poor quality. The argument of the attorneys and the questions by the trial court indicate that *after* the trial court had excluded the tapes, the defendant would object to testimony on the basis that the tapes were the best evidence of the matter being presented. In light of these tactics by defendant, the prosecutor requested the instruction to correct any impression that the prosecution was trying to withhold the tapes from the jury.

The trial court instructed the jury:

> "Ladies and gentlemen, reference has been made to some tapes, and the Court instructs you that the Court has ruled that those tapes can not be put in evidence and played to you because of the poor quality of the tapes and the technical difficulties with them. They frankly—they are just not clear enough that you could really get very much out of them."

Defendant asserts the instruction prejudiced him "in that it created, in the minds of the jurors, the inference that the Defendant was solely responsible for the withholding of the tapes, i. e., that he was trying to 'hide' something." The contention is frivolous. All the instruction states is that the tapes were excluded because of their poor quality. Nothing in the wording of the instruction provides a basis for inferring that either of the parties tried to withhold the tapes.

Defendant also claims the instruction was erroneous because it was not predicated on evidence supporting some theory of the case. This contention is also frivo-

lous. Various explanatory instructions are authorized for use. See *U.J.I. Crim.* 1.00 through 1.07, 50.00 through 50.07, 50.20. The trial court can properly instruct or admonish the jury concerning an evidentiary matter in an effort to avoid prejudice. See *State v. Ferguson,* 77 N.M. 441, 423 P.2d 872 (1967); *State v. McFerran,* 80 N.M. 622, 459 P.2d 148 (Ct.App.1969).

(b) The trial court refused various instructions requested by defendant which went to the credibility of certain witnesses. The trial court gave the general credibility instruction—U.J.I. Crim. 40.20. No other instruction was required. *State v. Smith,* 88 N.M. 541, 543 P.2d 834 (Ct.App.1975).

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

566 P.2d 838

Dennis MARTINEZ, Plaintiff-Appellant,

v.

EARTH RESOURCES COMPANY, Employer, and United States Fidelity and Guaranty Company, Insurer, Defendants-Appellees.

No. 2815.

Court of Appeals of New Mexico.

June 20, 1977.

Matias L. Chacon, Espanola, Bruce P. Moore, Duhigg & Cronin, Albuquerque, for plaintiff-appellant.

William K. Stratvert and Robert H. Clark, Keleher & McLeod, Albuquerque, for defendants-appellees.

OPINION

HERNANDEZ, Judge.

This is the second time that this Workmen's Compensation case has been before us, *Martinez v. Earth Resources Co.*, 87 N.M. 278, 532 P.2d 207 (Ct.App.1975). However, it is not necessary to refer to the prior appeal with the exception of the following part of the judgment which was affirmed:

> "That as a natural and direct result of said accident proximately caused within the scope of plaintiff's employment said plaintiff has been totally disabled since the date of the accident on December 25, 1972 and will be totally disabled for a period of six months from the date of trial January 4, 1974 which will be July 4, 1974 *at which time the Plaintiff may bring the matter before the Court for a determination of his disability status as provided by law.*" [Emphasis ours.]

On April 26, 1976, plaintiff filed a petition requesting a hearing to determine his disability status and alleging that he was disabled. In support of his petition he attached a letter dated March 9, 1976, by the doctor who had treated him at the time of the original injury indicating a continuing disability and a "distant" possibility of surgery. The defendants filed a motion to dismiss for lack of jurisdiction, upon what grounds we do not know, since a copy of the motion does not appear in the record. However, at the hearing on the motion defendants argued that plaintiff's motion was barred by Section 59–10–13.6(A), N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 1, 1974) which provides in part:

> "If an employer or his insurer fails or refuses to pay a workman any installment of compensation to which the workman is entitled * * *, after notice has been given * * *, it is the duty of the workman * * * to file a claim therefor * * * not later than one [1] year. * * * [I]f the workman fails to file a claim * * * within the time required * * *, his right to the recovery of compensation and the bringing of any legal proceeding for the recovery of compensation are forever barred."

We would note parenthetically that defendants' contention that the statute of limitations is jurisdictional is erroneous. The statute of limitations is a privilege which defendant may interpose or which he may waive or be estopped by his conduct from asserting. *Greve v. Gibraltar Enterprises*, 85 F.Supp. 410 (D. N.M. 1949). "Jurisdiction of the subject matter cannot be conferred by consent of the parties, much less waived by them." *State ex rel. Overton v. New Mexico State Tax Com'n.*, 81 N.M. 28, 462 P.2d 613 (1970); *Martinez v. Research Park*, 75 N.M. 672, 410 P.2d 200 (1965).

The trial court in granting defendant's motion stated the following as its reasons for doing so:

> "It was the intention of the Court in going back and interpreting Paragraph 6 of the Final Judgment that was entered in this case, the Court found that the petitioner was disabled for a period of six months beyond the date of the trial, and gave to the Petitioner an opportunity to come before the Court at the expiration of that period of time in the event that he felt, based upon medical testimony, that that time should be expanded.
>
> "The Court feels that the authority in this case is governed by Section 25 of the Workmen's Compensation law and not the general statute of limitations within the statute itself. I believe that the peti-

tioner has exceeded the time that was given to him for purposes of making that determination, and *it was not the Court's intent to give to the Petitioner an unlimited time in which to make the determination that he did need an expansion or enlargement of the time.*" [Emphasis ours.]

The plaintiff alleges four points of error. However, we need consider only two of the questions raised in order to resolve this appeal: Whether plaintiff's petition was barred by § 59–10–13.6(A) supra; and whether the trial court had the authority to place a time limitation on plaintiff's right to petition to re-open the original judgment to determine if his disability had increased or become aggravated.

Section 59–10–25(A), N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 1, 1974) provides in pertinent part:

"The district court in which any workman has been awarded compensation . . . may, upon the application of the . . workman . . ., fix a time and place for hearing upon 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. Hearings may not be held more frequently than at six-month intervals . . . ."

As can be seen, there is no time limit in the section within which applications specified must be filed. Our Supreme Court in *Norvell v. Barnsdall Oil Co.*, 41 N.M. 421, 70 P.2d 150 (1937), which involved an application for decrease or termination, answered the question of whether there was unlimited time in which to file applications and whether § 59–10–13.6(A), supra, fixing the time limit within which to file the original claim for compensation, applied to applications to reopen:

"[An] application to decrease or terminate compensation under a prior award not being an original proceeding is not affected by the provision of the act fixing the time within which original proceedings for compensation must be instituted and is not affected by the Code provision applicable to modification of judgments generally, and in the absence of controlling statute or rule may be presented at any time within the period for which compensation is allowable . . . ."

The maximum duration of benefits at the time of plaintiff's accident on December 25, 1972, was 500 weeks. Therefore, his application filed on April 26, 1976, was timely.

The trial court was obviously under the impression that § 59–10–25, supra, gave it the authority to place a time limitation on when plaintiff could file an application to reopen. The trial court was mistaken; there is no such provision in this section or in the Workmen's Compensation Act. Did the trial court, as a court of general jurisdiction, nonetheless have inherent authority to impose such a limitation? The answer is no. "[T]he Workmen's Compensation Act of New Mexico is sui generis and creates rights, remedies and procedures which are exclusive." *Security Insurance Co. of Hartford v. Chapman*, 88 N.M. 292, 540 P.2d 222 (1975). The legislature having granted the substantive right to reopen the original judgment and having established the procedure for enforcement thereof, the courts cannot nullify or change such a right or the procedure. "We are not authorized judicially to eliminate rights conferred by the legislature." *Gonzales v. Sharp & Fellows Contracting Co.*, 51 N.M. 121, 179 P.2d 762 (1947).

For the guidance of the trial court upon the rehearing of this matter we think it is necessary to comment further on jurisdiction. Section 59–10–13.7, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 1, 1974) provides in part that: "Claims to recover compensation benefits shall be filed in district court and shall be in the nature of a civil complaint wherein the workman shall be designated 'plaintiff' and his employer and the insurer shall be designated 'defendants.'" This section satisfies the question of the trial court's jurisdiction over the subject matter. The defendants subjected themselves to the jur-

isdiction of the trial court when they entered a general appearance in the original action.

We reverse and remand for further proceedings not inconsistent with this opinion. Should it be determined that plaintiff's disability continued beyond July 4, 1974 and should plaintiff be awarded further compensation beyond what he has already received, then in awarding attorney's fees the trial court should take into consideration the services of plaintiff's attorneys in this appeal.

Appellant is to be allowed $1,250.00 for the services of his attorneys.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (specially concurring).

I concur in the result and believe that additional relief should be granted plaintiff.

Ofttimes, when a trial judge decides a case, he makes law—sometimes good, sometimes bad. A new case, being what it is, often leads a court to legislate, whether it wants to or not. This is especially true when lawyers obfuscate the proceedings and the issues and the trial judge exercises his discretion in arriving at a decision.

A. *The Record On Appeal*

The record shows the following dates and events:

(1) On *March 19, 1974*, "Final Judgment" was entered in which the trial court found plaintiff totally disabled and awarded compensation therefor; *that plaintiff would be totally disabled for a period of six months ending July 4, 1974*, and ordered payments to be made by defendants until that date, and then arbitrarily ordered, "*at which time the plaintiff may bring the matter before the Court for a determination of his disability status as provided by law.*" [Emphasis added.]

Section 59–10–16(A) provides for inclusion in a judgment "an order upon the defendants for the payment to the workman, at regular intervals *during the continuance of his disability*". [Emphasis added.] There is no provision by statute that the trial court can summarily fix a time for plaintiff to bring the matter before the court. Section 59–10–25(A) provides that *upon application by a workman*, the district court may fix a time and place for hearing, "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." [Emphasis added.]

(2) On *April 4, 1975*, after the judgment was affirmed and a mandate filed, the trial court entered judgment on the mandate, and at the same time, plaintiff executed and filed a satisfaction of judgment which showed a full and complete satisfaction of the "Final Judgment" entered on March 19, 1974.

(3) On *April 26, 1976*, more than one year after satisfaction of the judgment, plaintiff moved "the Court that *the Defendant be ordered to reinstate his workmen's compensation as of July 4, 1974*". [Emphasis added.] The issue to be decided was whether plaintiff's total disability continued after July 4, 1974.

(4) At some *unspecified time*, defendants' attorney states he filed a motion "to dismiss for lack of jurisdiction." The attorneys in these proceedings were not concerned with the fact that the motion to dismiss, if written, does not appear in the transcript of the record, and if oral, the circumstances under which it was made, is not shown. Neither do we know upon what basis the motion was made. This lack of concern by lawyers is a return to adolescence in the practice of the law. It may not be of significance to some appellate judges, but it is to me. This reference to adolescence not only applies in this case but is a common occurrence, and it does not arouse my sympathy.

(5) On *July 30, 1976*, argument was held on defendants' motion to dismiss for lack of jurisdiction. Jurisdiction is the power to hear and decide. Defendants' argument was based upon the application of § 59–10–13.6, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 1).

This statute bars a claim for workmen's compensation if the claim is not filed within one year "after the failure or refusal . . . to pay compensation."

(6) On *August 26, 1976*, the court entered its final order from which this appeal was taken. Defendant did not raise any issue of waiver in the trial court. Nevertheless, the trial court found "*that plaintiff by his delay in filing such Petition has waived any rights to bring this matter before the court* and the court further finding *that the Motion is well taken*;" the court ordered plaintiff's petition dismissed with prejudice. [Emphasis added.] *It desires clarification by this Court on its decision and judgment.*

Two issues are presented on this appeal: (1) Did the trial court lack jurisdiction to hear and decide this matter, and (2) did plaintiff waive his rights to bring this matter before the court?

B. *The trial court did not lack jurisdiction.*

We are confronted with one serious problem. Does a trial court have the power to terminate the end of total disability in a "Final Judgment" and grant the plaintiff a discretionary right for *six months* in which to determine his disability status "as provided by law"? We say "No." This is a matter of first impression.

When a complaint and answer are filed in a workmen's compensation case, the trial court determines whether a workman is disabled. If the workman is disabled at the time of trial, the court must enter judgment against defendants "for the amount then due, and shall also contain an order upon the defendants for the payment to the workman, at regular intervals during the continuance of his disability, the further amounts he is entitled to receive." Section 59–10–16(A). This kind of judgment is mandatory.

This is not a "Final Judgment". We all know that "[t]here is no longer any question in this jurisdiction but that a judgment such as here involved is not final until the full statutory period of 550 weeks has elapsed." *Churchill v. City of Albuquerque*, 66 N.M. 325, 327, 347 P.2d 752, 753 (1959). During this period of time, the trial court has continuing jurisdiction to determine the disability status of the workman. *Segura v. Jack Adams Contractor*, 64 N.M. 413, 329 P.2d 432 (1958); *LaRue v. Johnson*, 47 N.M. 260, 141 P.2d 321 (1943). This determination is made when the employer or the workman calls this matter of disability to the attention of the court. Section 59–10–25(A). The plaintiff did call this matter to the attention of the court, and the trial court had jurisdiction to determine plaintiff's disability subsequent to July 4, 1974. The defendants' motion directed to lack of jurisdiction did not seek a termination of plaintiff's disability. This issue was not before the court. The trial court proceeded contrary to the explicit provisions of the Workmen's Compensation Act and the court's provision for termination of total disability is null and void.

Defendants contend that the one-year statute of limitations contained in § 59–10–13.6 is applicable, warranting dismissal of plaintiff's petition. They say:

> Claimant's delay of over a year between the time of final Satisfaction of Judgment (April 4, 1975) and the filing of the petition for reinstatement of benefits (April 26, 1976) was in excess of this one year period, thereby mandating dismissal of the petition.

It is a common occurrence for trial courts and attorneys to pole vault to dismissal without a pole, or to dance around the law without a partner to sustain a "lack of jurisdiction." Those are two of the reasons we are flooded with appeals. Section 59–10–13.6 applies to the initial claim for compensation. It does not apply to reopening procedures.

Defendants argue that the same considerations which led the legislature to enact this statute are as applicable to reopening procedures as the filing of the initial claims, i. e., to allow the employer to protect himself by prompt investigation and treatment of the injury, to prevent fraud, and to protect litigants from stale claims. This pro-

tection is given defendants by § 59–10–25(A).

The trial court did not lack jurisdiction. The trial court erred in sustaining defendants' motion to dismiss.

C. *Plaintiff did not waive his rights.*

The trial court found that plaintiff waived his rights to bring this matter to the attention of the trial court within six months as provided in the "Final Judgment". Inasmuch as this portion of the "Final Judgment" is null and void, plaintiff did not waive his rights. One purpose of the Workmen's Compensation Act is to protect the workman after judgment is entered during the time that he is disabled. The employer is liable until such time as the workman, for some consideration, releases the employer of all liability, or the parties enter into a stipulation for a lump-sum judgment that is fully paid and satisfied. *Durham v. Gulf Interstate Engineering Company*, 74 N.M. 277, 393 P.2d 15 (1964). Neither event occurred.

The satisfaction of judgment executed by the plaintiff in "full and complete satisfaction of the final Judgment entered in this cause on March 19, 1974," means exactly what it says. He was paid compensation and attorney fees for total disability through July 4, 1974. He did not satisfy all future compensation to which he was entitled thereafter.

Plaintiff did not waive his right to bring this matter before the court.

D. *Plaintiff is entitled to payment of compensation until disability is terminated.*

Plaintiff was entitled to compensation for disability after the "Final Judgment" was entered on March 19, 1974. These payments must be made at regular intervals during the continuance of his disability, "subject to its termination should the court subsequently adjudge that the disability had ceased." *LaRue*, supra, 47 N.M. at 268, 141 P.2d at 326. Plaintiff sought to "reinstate" the disability payments after July 4, 1974. The defendants did not seek to diminish or terminate plaintiff's disability. Until they do, plaintiff is entitled to a continuation of total disability payments from and after July 4, 1974. Plaintiff's motion should be granted.

This cause should be reversed. In addition thereto, I believe that plaintiff's motion that the court order defendants to make the payments from and after July 4, 1974, should be sustained and plaintiff should be paid compensation until the defendants desire to contest plaintiff's disability. Plaintiff is entitled to attorney fees on this appeal in the sum of $2,000.00.

566 P.2d 843

STATE of New Mexico, Plaintiff-Appellee,

v.

Frederico MARTINEZ, Defendant-Appellant.

No. 2894.

Court of Appeals of New Mexico.

June 21, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, App. Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., John J. Duran, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

WOOD, Chief Judge.

Defendant's conviction and his enhanced sentence as an habitual offender were affirmed by this Court in memorandum opinions. *State v. Martinez*, (Ct.App.) No. 2720, decided December 14, 1976 and (Ct.App.) No. 2794, decided January 4, 1977. This appeal involves the denial of his motion for a new trial. We discuss: (1) time for filing the motion, (2) request for polygraph examination, (3) juror as a witness, and (4) sealing defendant's affidavit.

Time for Filing the Motion

The verdict of guilty was filed August 26, 1976. Judgment and sentence were filed September 27, 1976. The motion for a new trial was filed November 24, 1976; a second, but identical motion for a new trial was filed February 3, 1977.

Rule of Criminal Procedure 45(c) reads:

> "(c) *Time for Making Motion for New Trial.* A motion for new trial based on the ground of newly discovered evidence may be made only before final judgment, or within two years thereafter, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial based on any other grounds shall be made within ten days after verdict or finding of guilty or within such further time as the court may fix during the ten-day period."

The motion for new trial was not filed within ten days of the verdict. The briefs discuss whether the motion was timely because based on the ground of newly discovered evidence.

The motion for a new trial asserted that a juror gave false answers on voir dire regarding her acquaintance with defendant. Such bore on the qualifications of the person to serve as a juror and involves the question of whether defendant was tried by an impartial jury. Such an issue may be raised upon discovering the fact of disqualification after trial. *Mares v. State*, 83 N.M. 225, 490 P.2d 667 (1971); see *State v. Maes*, 81 N.M. 550, 469 P.2d 529 (Ct.App. 1970). Accordingly, we are not concerned with fitting the motion in this case within the time requirements of Rule of Criminal Procedure 45(c).

We note that the motion was not filed until almost three months after the verdict. Defendant did not inform the trial court of when he became aware of the information on which he relies; the only statement is that his awareness came "after the trial was over." The promptness of defendant's action after becoming aware of the information may bear on defendant's credibility at the rehearing to be held in this matter.

Request for Polygraph Examination

Defendant, an indigent, moved that the expenditure of public funds be authorized for a polygraph examination. Defendant was the subject to be examined. The trial court denied the motion.

Defendant sought the examination to support the credibility of defendant's affidavit. To avoid this public expenditure, the State offered to stipulate that defendant "might be" telling the truth in his affidavit.

It is unnecessary to decide whether the trial court erred in denying the motion for funds which is involved in this appeal inasmuch as a rehearing is to be held in connection with the motion for a new trial. Should the matter arise in connection with the rehearing, we point out that defendant must show the necessity for such an examination. See *State v. Turner*, 90 N.M. 79, 559 P.2d 1206 (Ct.App. 1976) and *State v. Carrillo*, 88 N.M. 236, 539 P.2d 626 (Ct.App. 1975), on the question of necessity.

Juror as a Witness

At the hearing on the motion for expenditure of public funds, the trial court considered the merits of the motion for a new trial, although notice had not been given that the merits would be considered.

The defendant objected, contending that he was not prepared to proceed on the merits because he desired to present the testimony of the juror concerning the juror's acquaintanceship with the defendant. The trial court ruled that it would not permit such testimony; that such testimony was excluded under Evidence Rule 606(b). It then denied the motion for a new trial on the merits. This was error.

Evidence Rule 606(b) bears the heading "Inquiry Into Validity of Verdict or Indictment." It deals with the general subject of when a juror may impeach a verdict. See *Biebelle v. Norero*, 85 N.M. 182, 510 P.2d 506 (1973). The issue here does not involve impeaching the verdict, but with the qualifications of one of the jury members to serve as a juror. To question a juror concerning the truthfulness of her answers given on voir dire is a subject separate from the question of impeaching the jury verdict. *Clark v. United States*, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993 (1932); 3 Weinstein's Evidence, ¶ 606[04] (1976). See *People v. Castaldia*, 51 Cal.2d 569, 335 P.2d 104 (1959).

In light of the showing made in defendant's affidavit, the trial court erred in ruling that it would not permit defendant to question the juror concerning the truthfulness of her answers on voir dire. Because defendant has not been permitted to present this testimony, the order denying the motion for a new trial must be reversed.

Sealing of Defendant's Affidavit

Defendant's affidavit, supporting his motion for a new trial, details an alleged relationship between defendant and the juror. Considering that the details alleged were scandalous, the trial court ordered that the affidavit be sealed. Defendant asserts this was error. We do not decide the question; compare Civil Procedure Rule 12(f). Because there is to be a rehearing, any error in sealing the affidavit was harmless.

We recognize that, at rehearing, the issue may again be presented. The record of the voir dire shows that the juror failed to respond when asked if she knew the defendant. The issue at the rehearing will involve the truthfulness of that response. This inquiry will also involve the truthfulness of the allegations made against the juror in defendant's affidavit. Since defendant's allegations are in fact scandalous, we suggest that defendant not be permitted to rely on his affidavit, but be called to testify in person. This suggestion is made to insure cross-examination, under oath, so that the trial court may be in a better position to determine the truth of the matter, and decide whether there should be a new trial. See *United States v. Robbins*, 500 F.2d 650 (5th Cir. 1974); *Brown v. United States*, 356 F.2d 230 (10th Cir. 1966). Whether the sealing of the affidavit should be continued will depend on the procedure at the rehearing.

The order denying the motion for a new trial is reversed; the cause is remanded for an evidentiary hearing on the motion for a new trial.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

566 P.2d 846

Emmett A. ALEXANDER, Plaintiff-Appellee,

v.

Richard COOK, d/b/a Espanola Transit-Mix Company, Defendant-Appellant.

No. 2931.

Court of Appeals of New Mexico.

June 28, 1977.

M. J. Rodriguez, Jones, Gallegos, Snead & Wertheim, P. A., Santa Fe, for defendant-appellant.

J. Ronald Boyd, Sanchez & Boyd, Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Plaintiff and defendant, according to the briefs, are non-Indians engaged in business activity on Pueblo land. Plaintiff seeks damages from defendant for interference with plaintiff's business activity. The issues in this interlocutory appeal are: (1) subject matter jurisdiction, and (2) whether the United States is an indispensable party.

The complaint alleges that plaintiff has a permit to remove sand and gravel from specified acreage belonging to the Pueblo of San Ildefonso. This is Indian land. *Sangre de Cristo Dev. Corp., Inc. v. City of Santa Fe*, 84 N.M. 343, 503 P.2d 323 (1972), cert. denied, 411 U.S. 938, 93 S.Ct. 1900, 36 L.Ed.2d 400 (1973). The permit is included in the appellate record; it is an exclusive use permit to remove sand and gravel from specified acreage. The permit was executed by the Governor of the Pueblo and approved by the Superintendent of the United Pueblos Agency.

The complaint alleges that defendant came onto the acreage specified in plaintiff's permit and removed sand and gravel from that acreage. The complaint also alleges that defendant's plant, adjacent to plaintiff's acreage, has flooded a portion of plaintiff's acreage with waste and that defendant has blocked ingress and egress in connection with plaintiff's acreage. Plaintiff seeks compensatory and punitive damages from defendant.

Defendant moved to dismiss the complaint. The motion asserts a lack of subject matter jurisdiction in New Mexico courts and that the United States is an indispensable party which has not been joined. The trial court denied the motion to dismiss. We granted defendant's application for an interlocutory appeal.

Subject Matter Jurisdiction

We start with the proposition that the Indian land is a part of New Mexico and that New Mexico law, both civil and criminal, is in force on the Indian land unless rendered inapplicable by higher authority. See *Surplus Trading Co. v. Cook*, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091 (1930). Paraphrasing *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), this appeal involves a reconciliation of the plenary power of New Mexico over residents within its borders with the fact that the activities involved in this lawsuit occurred on Indian land. What is involved is the "exertions of state sovereignty over non-Indians who un-

dertake activity on Indian reservations." *McClanahan, supra.*

Absent a specific prohibition, a state court has subject matter jurisdiction over crimes committed on an Indian reservation by non-Indians against non-Indians. *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *New York ex rel. Ray v. Martin,* 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946); *Draper v. United States,* 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419 (1896); see *State v. Warner,* 71 N.M. 418, 379 P.2d 66 (1963). Unless prohibited by higher authority, a state may tax the property of non-Indians which is located on Indian land. *Thomas v. Gay,* 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898); *Utah & Northern R. Co. v. Fisher,* 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542 (1885). See *Prince v. Board of Ed. of Cent. Con. Ind. Sch. D. No. 22,* 88 N.M. 548, 543 P.2d 1176 (1975).

Starting with the proposition that New Mexico has plenary power to adjudicate a dispute between non-Indians, the question is whether that power has been so restricted that the New Mexico District Court is without authority to act. Defendant contends the authority to act has been restricted in three ways: (a) preemption, (b) infringement on the rights of reservation Indians, (c) a New Mexico decision.

(a) Preemption

Defendant points out that various federal statutes and court decisions are to the effect that state courts have no authority to adjudicate the ownership of Indian land, the right to possession of Indian land or any interest in Indian land. He points out that the preemption doctrine has been held to apply to the leasing of Indian land. *Sangre de Cristo Dev. Corp., Inc. v. City of Santa Fe, supra.* We need not review the authority cited by defendant. Rather, we accept the proposition that New Mexico courts lack authority to adjudicate interests in Indian land. See *Chino v. Chino,* 90 N.M. 476, 561 P.2d 476 (1977).

Defendant also points out that plaintiff has some sort of interest in Indian land. We also accept that proposition. In doing so, we make no effort to define the nature of that interest. The briefs refer to a "lease"; however, the instrument from which plaintiff's interest arises is an exclusive use "permit". Neither party has briefed the nature of this "permit" interest. Compare: Lease—*State v. District Court of Ninth Judicial Dist., Curry County,* 44 N.M. 16, 96 P.2d 710 (1939), 126 A.L.R. 651 (1940); permit—*State v. Mauney,* 76 N.M. 36, 411 P.2d 1009 (1966); license—*New Mexico Sheriffs & Police Ass'n v. Bureau of Rev.,* 85 N.M. 565, 514 P.2d 616 (1973). Whatever the nature of plaintiff's "permit" interest, damage to that interest is protected by the courts. See *Harris v. Keehn,* 25 N.M. 447, 184 P. 527 (1919), 7 A.L.R. 1099 (1920).

Is plaintiff's interest in Indian land being adjudicated in this lawsuit? No.

The appellate record consists of a complaint, a letter exhibit attached to the complaint, plaintiff's permit, and defendant's motion to dismiss. These documents do not show a dispute between plaintiff and any Indian or Indian agency. They do show a dispute between non-Indians. Defendant's brief affirms that plaintiff holds a permit approved by the Bureau of Indian Affairs, United States Department of the Interior.

In an effort to demonstrate that an interest in Indian land would be adjudicated, defendant relies on a sentence in the letter exhibit to characterize this lawsuit as a boundary dispute. To arrive at this characterization, defendant takes the sentence out of context.

The letter is from the Superintendent to defendant. It states that it is "very apparent" that defendant's operations "are being conducted in the area permitted to E.A. Alexander." It states that defendant's south boundary cannot be changed because of plaintiff's permit. It suggests that defendant's south boundary be delineated to prevent future encroachment by defendant outside defendant's permitted area. It closes with the offer to resurvey the boundary if such is needed. This letter does not show a boundary dispute; rather, it supports a "very apparent" encroachment by defend-

ant on plaintiff's acreage and an offer to help defendant stop this encroachment by resurveying, if a resurvey is needed.

There is nothing before us showing that plaintiff's damage claims involve the adjudication of an interest in Indian land. Accordingly, there is no factual basis for holding state court jurisdiction has been preempted on the basis that an interest in Indian land would be adjudicated.

(b) Infringement

The infringement test, stated in *Williams v. Lee, supra,* is whether state action infringed on the right of reservation Indians to make their own laws and be ruled by them. Concerning this test, *McClanahan v. Arizona State Tax Commission, supra,* states:

> "It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. * * * In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected."

How would the exercise of New Mexico jurisdiction in this case affect Indian interests in self-government? See *United States v. Antelope,* 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977).

One Indian interest, according to defendant, is the resolution of disputes that arise within the reservation. The dispute, however, is between non-Indians. The resolution of that dispute by a New Mexico court does not infringe on Indian government any more than state court jurisdiction over crimes between non-Indians that arise on Indian land. State court jurisdiction over such crimes has been approved. *Williams v. Lee, supra.* As to a suit for damages, see *Paiz v. Hughes,* 76 N.M. 562, 417 P.2d 51 (1966).

Another Indian interest, according to defendant, is the interest of the Pueblo government in protecting Indian land. Defendant asserts that a lawsuit involving Indian land necessarily involves the affairs of the Pueblo. He relies on *United States v. Blackfeet Tribal Court,* 244 F.Supp. 474 (D.C.Mont.1965) and *Hot Oil Service, Inc. v. Hall,* 366 F.2d 295 (9th Cir. 1966). Both decisions involved non-Indian plaintiffs who asserted interests in Indian leases. Both decisions state that the leasehold interests necessarily involved the internal affairs of the Indian tribe. The distinguishing factor, however, is that both decisions involved an attempt to enforce an interest in Indian land against an Indian defendant. Our case involves a claim for damages from a non-Indian defendant.

Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) involved an Indian vendor of cigarettes on Indian land. *Moe* approved the requirement that the Indian seller collect Montana's cigarette tax validly imposed on non-Indians. "We see nothing in this burden which frustrates tribal self-government * * *." Similarly, we do not see how New Mexico's resolution of a damage suit involving non-Indians would interfere with tribal self-government even though the damage claims arise out of business activities on Indian land.

(c) A New Mexico Decision

The New Mexico decision involves both of the concepts previously discussed—preemption and infringement. Implicit in defendant's brief is the contention that regardless of whether federal decisions require a holding of no subject matter jurisdiction, the decision in *Chino v. Chino, supra,* reaches that result. If that is true, we must apply it. *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973).

Chino involved a suit between Indians for possession of a home located within an Indian reservation. In holding that New Mexico courts lacked subject matter jurisdiction, the New Mexico Supreme Court stated that the applicable treaties and statutes precluded "the state from exercising jurisdiction over property lying within the reservation boundaries." It also held:

"When the land lies within a reservation, enforcement of the owner's rights to such property by the state court would infringe upon the governmental powers of the tribe, whether those owners are Indians or non-Indians. Civil jurisdiction of lands within the reservation remains with the tribe."

On the facts, *Chino* is distinguishable. Defendant disregards the facts of *Chino* and relies on the above quotations.

We doubt that the New Mexico Supreme Court intended the first quotation to apply to suits between non-Indians without regard to the property involved. Our doubts are based on the following: (1) The disclaimer over right and title to Indian land found in N.M.Const., Art. XXI, § 2, and in the Enabling Act for New Mexico, § 2, paragraph Second, is a disclaimer of proprietary interest, but is not a disclaimer of governmental interest. *Sangre de Cristo Dev. Corp., Inc. v. City of Santa Fe, supra; Montoya v. Bolack,* 70 N.M. 196, 372 P.2d 387 (1962). (2) Powers not reserved to Indians for their exclusive jurisdiction includes "taxation of property belonging to non-Indians on the reservation, *Utah & Northern Railway v. Fisher,* 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542 (1885)." *State Securities, Inc. v. Anderson,* 84 N.M. 629, 506 P.2d 786 (1973). (3) The holding in *Prince v. Board of Ed. of Cent. Con. Ind. Sch. D. No. 22, supra,* is that non-Indian property located within a reservation can be taxed by New Mexico. These decisions indicate that non-Indian property located within an Indian reservation is subject to the jurisdiction of New Mexico courts.

The second quotation states that state courts have no jurisdiction to enforce a non-Indian owner's rights in land located within a reservation because such would be an infringement upon the governmental powers of the tribe. This statement must be considered in light of the *Chino* three-point analysis of the infringement test. The three points are: 1. Whether the parties are non-Indian, 2. whether the cause of action arose on the reservation, and 3. the nature of the interest to be protected. Here the parties are non-Indians, the cause of action did arise on the reservation, see, however, *Paiz v. Hughes, supra,* and the interest to be protected is a non-Indian interest. In these circumstances we doubt that our Supreme Court intended the second quotation to apply to the facts of this case.

Because the parties are non-Indians and because the interest to be protected is non-Indian, we hold that the *Chino* quotations are not controlling. However, there is another distinction. This case does not deal directly with the occupancy and ownership of land, as did *Chino.* This case involves interference with plaintiff's right to remove sand and gravel. Enforcement of that right, as between non-Indians, is not barred by *Chino.*

The trial court did not err in refusing to dismiss for lack of subject matter jurisdiction.

Indispensable Party

Defendant contends the United States is an indispensable party because it holds title to the land in trust for the Pueblo. Because the United States is a trustee, defendant asserts that "it follows that the United States is an indispensable party in an action involving boundary lines within that land." We assume that the United States is a trustee; we have held that the record before us does not show that the suit involves a boundary dispute.

Defendant also asserts this suit is a proceeding against property in which the United States has an interest. This is incorrect. Plaintiff is seeking to be compensated for the damage to his property interest: no claim has been made that directly involves the interest of the United States.

Defendant asserts that the interests of the United States "may be affected" and therefore it is an indispensable party. He

fails to demonstrate how the interest of the United States will be necessarily affected. Complete and final justice can be affected between the parties without affecting the rights of the United States. *American General Companies v. Jaramillo,* 88 N.M. 182, 538 P.2d 1204 (Ct.App.1975). The United States is not an indispensable party to this litigation. The trial court did not err in refusing to dismiss on that basis.

Oral argument is unnecessary. The order denying the motion to dismiss is affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

566 P.2d 1142

STATE of New Mexico, Petitioner,

v.

David Wadajo ROGERS, Respondent.

No. 11322.

Supreme Court of New Mexico.

July 7, 1977.

Toney Anaya, Atty. Gen., Ernesto J. Romero, Asst. Atty. Gen., Santa Fe, for petitioner.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, Santa Fe, for respondent.

OPINION

FEDERICI, Justice.

On January 15, 1976, a branch of the First National Bank in Albuquerque was robbed of approximately $68,250.00. Dur-

ing the course of the robbery, two employees of the bank were required, at gunpoint and against their will, to return inside the bank after they had left the bank building for the day, and to telephone for the combination of the bank lock. Defendant Rogers was indicted and tried in the United States District Court for the District of New Mexico for violating certain provisions of 18 U.S.C. § 2113 (1970), relating to bank robbery. The jury found defendant not guilty of the federal charges. Subsequent to the federal court trial, the defendant was indicted, tried and convicted in the Bernalillo County District Court of New Mexico on two charges: (1) Receiving stolen property by disposing of it [§ 40A–16–11, N.M.S.A. 1953 (Supp.1975)]; and (2) Kidnapping [§ 40A–4–1, N.M.S.A.1953 (Supp.1975)].

Defendant has appealed his conviction from the state district court. The Court of Appeals affirmed the conviction of the crime of receiving stolen property, but reversed the conviction for kidnapping, holding that the acquittal on the federal charges barred the subsequent state prosecution for kidnapping on the grounds of judicial policy. *State v. Rogers,* 90 N.M. 673, 568 P.2d 199 (Ct.App.1977). We granted certiorari.

Defendant has claimed throughout these proceedings that the state prosecution for kidnapping and receiving stolen property amounts to double jeopardy in view of his acquittal on the federal charges of bank robbery. Defendant throughout has also contended that the New Mexico prosecutions were barred by the doctrine of collateral estoppel.

The only issue we consider here is whether defendant's acquittal of the federal charges relating to bank robbery bars the prosecution by the State of New Mexico of the kidnapping charge. We agree with the Court of Appeals in its affirmance of the state court conviction of the charge of receiving stolen property. We reverse the Court of Appeals in its ruling that the acquittal on the federal charges relating to bank robbery barred the subsequent state prosecution for kidnapping.

Defendant first argues that because he was acquitted in federal district court, the state prosecution violated the provisions of the United States and New Mexico Constitutions against double jeopardy. U.S. Const. amends. V, XIV; N.M.Const. art. II, § 15. Defendant's contention with regard to the double jeopardy provision of the United States Constitution, made applicable to the states in *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), is without merit. The United States Supreme Court has consistently held that the federal constitution does not prohibit the prosecution of a defendant in both state and federal courts for criminal charges arising out of an alleged criminal activity. E. g., *Bartkus v. Illinois,* 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); *Abbate v. United States,* 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959); *United States v. Lanza,* 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314 (1922); *Moore v. Illinois,* 55 U.S. (14 How.) 13, 14 L.Ed. 306 (1852); *Fox v. Ohio,* 46 U.S. (5 How.) 410, 12 L.Ed. 213 (1847). These cases rely upon the concept of separate sovereignties and hold that each government can determine what shall be an offense against its peace and dignity, thereby permitting each sovereign to prosecute regardless of what the other has done. Although there has been an erosion of some of the principles announced in *Bartkus v. Illinois,* supra, the United States Supreme Court has never reconsidered its position on the "dual sovereignty" doctrine, and in fact has refused opportunities to do so. *Martin v. Rose,* 481 F.2d 658 (6th Cir.), cert. denied, 414 U.S. 876, 94 S.Ct. 86, 38 L.Ed.2d 121 (1973), and cases cited therein.

We must now determine whether our N.M.Const. art. II, § 15 is subject to the dual sovereignty doctrine relied upon in *Bartkus v. Illinois,* supra, and *Abbate v. United States,* supra. This is a matter of first impression in New Mexico.

It is our conclusion that the dual sovereignty doctrine is applicable under the double jeopardy provision of the New Mexico Constitution. There is little to distinguish the language of our constitutional

prohibition against double jeopardy from that found in the federal constitution. N.M.Const. art. II, § 15, states: "nor shall any person be twice put in jeopardy for the same offense," while U.S.Const. amend. V, states: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Since the two provisions are so similar in nature, we are of the opinion that they should be construed and interpreted in the same manner. *Hall v. Commonwealth,* 197 Ky. 179, 246 S.W. 441 (1923); *State v. Hite,* 3 Wash.App. 9, 472 P.2d 600 (1970).

Furthermore, other states which have been presented with the issue of whether a defendant may be charged in state courts following a conviction or acquittal in federal court tend overwhelmingly to uphold the validity of consecutive prosecutions by separate sovereigns. Many states recognizing the dual sovereignty doctrine do so on the basis of an interpretation of double jeopardy provisions in both the state and federal constitutions. *Nance v. State,* 123 Ga.App. 410, 181 S.E.2d 295 (1971); *Hall v. Commonwealth,* supra; *State v. Castonguay,* 240 A.2d 747 (Me. 1968); *Bankston v. State,* 236 So.2d 757 (Miss.1970); *State v. Turley,* 518 S.W.2d 207 (Mo.App.1974), cert. denied, 421 U.S. 966, 95 S.Ct. 1956, 44 L.Ed.2d 454 (1975); *State v. Pope,* 190 Neb. 689, 211 N.W.2d 923 (1973); *State v. Cooper,* 54 N.J. 330, 255 A.2d 232 (1969), cert. denied, 396 U.S. 1021, 90 S.Ct. 593, 24 L.Ed.2d 514 (1970); *Breedlove v. State,* 470 S.W.2d 880 (Tex.Cr.App.1971), cert. denied, 405 U.S. 1074, 92 S.Ct. 1512, 31 L.Ed.2d 808 (1972). Others rely on the federal constitution or merely cite *Bartkus* for the principle of dual sovereignty. *State v. Duncan,* 221 Ark. 681, 255 S.W.2d 430 (1953); *State v. Tiche,* 33 Conn.Sup. 51, 360 A.2d 135 (1976); *Richardson v. State,* Ind. App., 323 N.E.2d 291 (1975); *Bell v. State,* 22 Md.App. 496, 323 A.2d 677 (1974), cert. denied, 421 U.S. 1003, 95 S.Ct. 2405, 44 L.Ed.2d 672 (1975); *Crane v. State,* 555 P.2d 845 (Nev.1976); *State v. Fletcher,* 26 Ohio St.2d 221, 271 N.E.2d 567 (1971), cert. denied, 404 U.S. 1024, 92 S.Ct. 699, 30 L.Ed.2d 675 (1972); *Beard v. State,* Tenn.App., 485 S.W.2d 882 (1972); *State ex rel. Cullen v. Ceci,* 45 Wis.2d 432, 173 N.W.2d 175 (1970). Insofar as we can determine, only one state has held to the contrary. *People v. Cooper,* 398 Mich. 450, 247 N.W.2d 866 (1976). The law is well established in both federal and state courts that where the same act is prohibited by the laws of the separate jurisdictions, a prior acquittal or conviction by one sovereign does not necessarily operate as a bar to a subsequent prosecution for the same act or transaction by the other sovereign.

Finally, we are of the opinion that if there is to be a change in the dual sovereignty doctrine, public policy would dictate that such a change should be initiated by the Legislature. Numerous states have now enacted statutes which bar prosecution of a defendant on a charge for which he has previously been acquitted or convicted under the laws of the federal government or another state. See, e. g., Ariz.Rev.Stat. § 13–146 (1956); Cal.Penal Code § 656 (West 1970); Colo.Rev.Stat. § 18–1–303 (1974); Ill.Rev.Stat. ch. 38, § 3–4(c) (1974); Ind.Code § 35–41–4–5 (Supp.1976); Kan. Stat. § 21–3108(3) (1974); N.Y. [Crim.Proc.] Law § 139 (Consol.) (Cum.Supp.1967); N.D. Cent.Code § 29–03–13 (Repl. Vol. 5A, 1974); Okla.Stat. tit. 22, § 130 (1969); 18 Pa.Cons. Stat.Ann. § 111 (Purdon 1973); S.D. Compiled Laws Ann. §§ 22–5–8, 23–2–13 (1967). New Mexico's statute on double jeopardy does not provide such a bar. Section 40A–1–10, N.M.S.A.1953 (2d Repl. Vol. 6, 1972). In fact, the only specific statutory bar to consecutive federal-state prosecutions in New Mexico is found in our Controlled Substances Act. Section 54–11–27, N.M.S.A. 1953 (Supp.1975).

We are also of the opinion that defendant's contentions regarding double jeopardy have been set to rest in *State v. Tanton,* 88 N.M. 333, 540 P.2d 813 (1975), even though that case involved successive prosecutions in municipal and state district courts, and not consecutive prosecutions initiated by separate sovereigns. In *Tanton,* this court rejected the "same transaction"

test and approved instead the "same evidence" test which is stated as "whether the facts offered in support of one offense, would sustain a conviction of the other." Clearly, in the case at bar, the facts offered in support of the convictions of receiving stolen property and kidnapping are different from those facts offered in an attempt to convict defendant on the federal charges of bank robbery.

For the above reasons, and based on the record before us, we do not feel compelled on the basis of "judicial policy" to depart from a rule which has been adhered to for many years by both state and federal courts. We find no error in the conviction of defendant in the state courts of New Mexico for receiving stolen property by disposing of it and for kidnapping following his acquittal in the United States District Court on charges of bank robbery.

Defendant's claim that the New Mexico prosecution for kidnapping was barred by the doctrine of collateral estoppel was rejected by the Court of Appeals on the basis that there was no identity of parties. We reject defendant's argument for the same reason.

In *State v. Tijerina,* 86 N.M. 31, 33, 519 P.2d 127, 129 (1973), we stated that collateral estoppel [quoting from *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970)]:

> * * * means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated *between the same parties* in any future lawsuit. (Emphasis added.)

Thus, the application of collateral estoppel requires an identity of parties in the prior and subsequent litigation. In this case, the federal government is neither the same as nor in privity with the State of New Mexico. *United States v. Johnson,* 516 F.2d 209 (8th Cir.), cert. denied, 423 U.S. 859, 96 S.Ct. 112, 46 L.Ed.2d 85 (1975); *In re Hutul,* 54 Ill.2d 209, 296 N.E.2d 332 (1973); *Commonwealth v. Studebaker,* 240 Pa.Super. 37, 362 A.2d 336 (1976). Cf. *Maroney v. United States Fidelity and Guaranty Co.,* 81 N.M. 111, 464 P.2d 401 (1970).

For the reasons stated, we affirm the decision of the Court of Appeals with respect to the conviction of receiving stolen property by disposing of it, and reverse the decision of the Court of Appeals in its reversal of the conviction for kidnapping. This case is remanded with instructions to proceed in a manner consistent herewith.

IT IS SO ORDERED.

McMANUS, C. J., EASLEY, J., and SANTIAGO E. CAMPOS, District Judge, concur.

SOSA, J., dissenting.

SOSA, Justice, dissenting.

I respectfully dissent.

I agree with the analysis of the Court of Appeals and the majority with respect to the receiving conviction. The only issue I consider here is whether the defendant's acquittal of the federal charges bars the kidnapping prosecution by the state. The Court of Appeals upheld such a bar for the kidnapping charge on the grounds of judicial policy. I would reach the same result but for different reasons.

Defendant claims that the state prosecution for kidnapping after the acquittal of the federal charge of robbery amounts to double jeopardy. In *State v. Tanton,* 88 N.M. 333, 540 P.2d 813 (1975) we adopted the same evidence test in analyzing double jeopardy problems. We continue to uphold that test. In the case before us it is obvious that the evidence to convict someone of robbery is not the same as that required to convict him of kidnapping. Thus, assuming we were to adopt the policy that only one sovereign may prosecute the defendant for the same crime, the same evidence test in this case would not bar the state from prosecuting the defendant for kidnapping; rather, it would only bar the state from prosecuting the defendant for robbery.

However, the factual circumstances surrounding this case necessitate further analysis. The state stipulated that ". . .

to clarify and simplify the issues, . . . there was no rational basis for the federal jury's verdict other than the defendant was not present at the bank."[1] The state is bound by its stipulation. Since it stipulated to the fact that the federal jury could only have reached its verdict by finding that the defendant was not present at the bank, *a fortiori* the state must agree that the federal jury concluded that the defendant could not have kidnapped the two women outside of the bank also. In a civil case collateral estoppel would bar a redetermination of such a material fact by a second jury. In a criminal case similarly a redetermination of such a material fact is normally precluded. Cf. *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Thus, in this case collateral estoppel would have barred the kidnapping charge based upon the state's stipulation and the federal jury's acquittal of robbery, assuming we only allow one prosecution by either the state or the federal government.

Thus, I now reach the central issue: may both the federal and state government prosecute and punish a defendant for the same crime? Should the concept of single prosecutions (or single determinations of material facts) be circumvented by the concept that each sovereignty may prosecute such crimes or determine such facts merely because it is a sovereign? The United States Supreme Court has held that the federal Constitution does not bar such double prosecutions. *Bartkus v. Illinois,* 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959); *Abbate v. United States,* 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959). I, however, am unable to approve of such duplicate prosecutions in view of our double jeopardy clause, N.M.Const. art. II, § 15, and my feelings about basic fairness. To make a defendant face the manifold resources of two sovereigns and be tried twice for the very same crime is tantamount to vexatious prosecution. I agree with the spirit of Black's dissent in *Bartkus v. Illinois,* 359 U.S. at 154–55, 79 S.Ct. 676. I would hold that the stipulation and the acquittal by the federal jury under the concept of collateral estoppel[2] would bar the kidnapping charge and conviction.

For the foregoing reasons I dissent from the majority's continued adherence to the concept of dual sovereignty.

566 P.2d 1146

STATE of New Mexico, Petitioner,

v.

Lalo CASTRILLO, Respondent.

No. 11239.

Supreme Court of New Mexico.

July 8, 1977.

1. Another obvious, rational basis for the federal jury's acquittal is that the prosecutor failed to convince the jury beyond a reasonable doubt as to each element of the federal crime of bank robbery.

2. Technically, collateral estoppel requires litigation between the same parties. Here the parties were not the same (first the federal government versus the defendant; second, the state versus the defendant). However, the state and federal government should be treated as the same vis-a-vis a defendant with respect to prosecutions of the same crime.

Toney Anaya, Atty. Gen., Don Montoya, Asst. Atty. Gen., Santa Fe, for petitioner.

Pickard & Singleton, Lynn Pickard, Santa Fe, for respondent.

OPINION

PAYNE, Justice.

The defendant was tried to a jury on a charge of murder in the first degree. Lesser included offenses of second-degree murder and voluntary manslaughter were also submitted for the jury's consideration. At the conclusion of the trial and after deliberation by the jury, the foreman announced that the jurors were deadlocked and unable to reach a verdict. The defendant was tried a second time and found guilty of murder in the second degree. He appealed from that judgment and the Court of Appeals reversed the conviction, holding that the defendant had twice been put in jeopardy and should therefore be discharged. We granted certiorari not only to review that issue but because the Court of Appeals treated additional issues and gave an advisory opinion on matters that were outside the scope of appellate review.

Prior to the second trial, defendant moved to dismiss the charges against him on the grounds of double jeopardy, claiming that the first jury had unanimously voted for acquittal on the charges of first and second-degree murder. An affidavit of the foreman of the jury was offered to support the defendant's contention. The trial court denied the motion, relying upon *Biebelle v. Norero,* 85 N.M. 182, 510 P.2d 506 (1973) and *State v. Brooks,* 59 N.M. 130, 279 P.2d 1048 (1955).

Defendant argues that where a mistrial has been declared without a conviction or acquittal there is no verdict and that Rule 606(b) [1] of the Rules of Evidence allows the introduction of the affidavit as evidence. We do not agree.

New Mexico has consistently held that it is improper to allow juror affidavits or other evidence tending to impeach, impugn or vitiate the jury's decisions. *Biebelle v. Norero,* supra. The affidavit of the foreman of the jury was properly disregarded by the trial court.

In *State v. Brooks,* supra, the jury had deliberated on a murder charge for a period of time and concluded that it was unable to reach a verdict. The defendant then requested that the court poll the jurors as to conviction or acquittal on the included offenses of a murder charge. The trial court refused the request and on appeal this court held:

> While the parties to either criminal or civil cases have a right to poll the jury to ascertain whether the verdict rendered is the verdict of the individual juror, a request to have the jury polled before the

1. Section 20-4-606(b), N.M.S.A.1953 (Supp. 1975).

> verdict is rendered is premature and should be denied. (Citations omitted.) 59 N.M. at 133, 279 P.2d at 1050.

The holding in *Brooks* will no longer be applicable in New Mexico. Henceforth, when a jury announces its inability to reach a verdict in cases involving included offenses, the trial court will be required to submit verdict forms to the jury to determine if it has unanimously voted for acquittal on any of the included offenses. The jury may then be polled with regard to any verdict thus returned.

Within the framework of the Uniform Criminal Jury Instructions a jury may reach one of three different results as to each included offense. It may unanimously find a defendant guilty of a greater offense, it may unanimously vote to acquit on the greater offense, or it may fail to reach agreement. If the vote is not unanimous or if the vote is unanimous for acquittal, it must then move to a consideration of the lesser offenses. N.M.U.J.I.Crim. 50.01 and 50.12 [2d Repl.Vol. 6, N.M.S.A.1953 (Supp. 1975), at 335, 338]. Either an acquittal or a conviction of a lesser included offense bars further prosecution for the greater offense. *State v. Tanton,* 88 N.M. 333, 540 P.2d 813 (1975); *State v. Goodson,* 54 N.M. 184, 217 P.2d 262 (1950); *State v. Medina,* 87 N.M. 394, 534 P.2d 486 (Ct.App.1975).

If charges are presented to a jury as separate or alternative counts rather than included offenses, Rule 44(c) of the Rules of Criminal Procedure [§ 41–23–44(c), N.M.S.A.1953 (Supp.1975)] allows retrial only for counts upon which the jury cannot agree. The rule states.

> If there are two [2] or more counts, the jury may at any time during its deliberations return a verdict or verdicts with respect to a count or counts upon which it has agreed. If the jury cannot agree with respect to all counts, the defendants may be tried again upon the counts on which the jury could not agree.

Retrial is thus precluded for counts upon which the jury reached unanimous agreement and returned a verdict. *Ex parte Williams,* 58 N.M. 37, 265 P.2d 359 (1954). The same result should also obtain if a jury has voted unanimously for acquittal on any of several included offenses. The procedure, however, must be different when charges are presented as lesser-included offenses rather than separate counts. A trial court should not accept an announcement as to the jury vote on any included offense until the jury has carried its deliberations as far as possible. Jeopardy should then attach to those offenses upon which the jury has unanimously agreed to acquit, even if it is unable to reach a final verdict as to any lesser included offenses.

We are aware that our holding in this case is not only contrary to *State v. Brooks,* supra, but is also a departure from the approach taken in other jurisdictions. *Walters v. State,* 255 Ark. 904, 503 S.W.2d 895, cert. denied, 419 U.S. 833, 95 S.Ct. 59, 42 L.Ed.2d 59 (1974); *People v. Griffin,* 66 Cal.2d 459, 58 Cal.Rptr. 107, 426 P.2d 507 (1967); *People v. Doolittle,* 23 Cal.App.3d 14, 99 Cal.Rptr. 810 (1972); *People v. Hall,* 25 Ill.App.3d 992, 324 N.E.2d 50 (1975); *State v. Hutter,* 145 Neb. 798, 18 N.W.2d 203 (1945). In *People v. Griffin,* supra, a recent case that is frequently relied upon, the Supreme Court of California said:

> We first consider defendant's contention that his third trial placed him twice in jeopardy of first degree murder. . . . The jury at the second trial was discharged after failing to reach a unanimous verdict, and a mistrial was declared. * * * After the jury was discharged, the foreman disclosed in open court that the jurors had stood 10 for acquittal and 2 for guilty of second degree murder. * * * Defendant contends that this fact establishes an implied acquittal of first degree murder.
>
> This contention must be rejected. . . . We may not infer from the foreman's statement that the jury had unanimously agreed to acquit of first degree murder. There is no reliable basis in fact for such an implication, for the jurors had not completed their deliberations and those voting for second degree murder may have been temporarily compromising in an effort to reach unanimity.

66 Cal.2d at 464, 58 Cal.Rptr. at 109–10, 426 P.2d at 509–10.

The California Court raised the question of when a jury vote can be considered final and opted to deny recognition to any jury action not returned in a final verdict. It recognized that as a practical matter juries may not follow an undeviating procedure of voting on included offenses starting with the greater and moving to the lesser. It did not want to preclude a jury from reconsidering a previous vote on any issue.

We agree that the approach taken by a jury in reaching a decision should not be called into question. We agree with the policy that discourages, and in most instances prohibits, any inquiry or intrusion into the jury room. We do not feel, however, that allowing inquiry as to the jury vote on greater-included offenses would violate that policy.

The reluctance of courts to allow consideration of a jury's determination on any included offenses until the jury has reached a final verdict on the total package of charges is based upon additional factors. One factor is the interest of the State in retrying a defendant on the total case rather than a limited portion. If prosecutors are unsuccessful in a first trial, they hope to use that experience as a dress rehearsal for a better presentation of evidence in the second trial. It could also be argued that fairness is a two-edged sword that requires an aborted trial to be retried from the first with neither side given an advantage. The doctrine of double jeopardy, however, recognizes that the State has the burden of proof, and once a defendant has been put in jeopardy the State cannot retry that issue.

The historical development of the trial of homicide cases is another basis for the failure of some states to accept the approach we now adopt. Under the early common law there were no degrees of murder or manslaughter. In dividing these crimes into degrees, legislatures recognized that homicide could not be so easily categorized. Some are less aggravated and merit less punishment, while others must be treated more severely. In *State v. Hutter,* supra, the Nebraska Court, following the historical approach said:

> The unlawful killing constitutes the principal fact and the condition of the mind or attendant circumstances determine the degree or grade of the offense, and when the greater of the degrees has been committed, the lesser degrees have also been committed, they being necessarily involved as a constituent part of the higher crime. * * *
>
> * * * [W]hen the jury disagrees there is no verdict determining the primary element of the crime, whether or not there was an unlawful killing. Until there has been a final determination of the crime charged, there is no verdict which can be pleaded as a prior conviction or acquittal.

145 Neb. at 804–05, 18 N.W.2d at 208.

The fallacy of this logic if applied to New Mexico, is that even if the fact of homicide is conceded, the statutory scheme of homicide prohibits convictions on the greater offenses unless additional elements are also present. § 40A–2–1, N.M.S.A.1953 (2d Repl.Vol. 6, 1972). A jury that has unanimously concluded that there is a failure of proof on any necessary element is bound to acquit.

The theories behind the arguments that are contrary to our present approach have not remained inviolate. In order to protect the right to appeal, a defendant convicted of a lesser offense overturned on appeal may not be retried for any greater offense. A defendant would not always pursue valid grounds for appeal after conviction of a lesser charge if he knew he would face the possibility of a trial on greater charges after reversal. *Green v. United States,* 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). We hold that the purpose and policies supporting the double jeopardy restrictions are equally as valid. That rationale is ably set forth by the Court of Appeals in *State v. De Baca,* 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

A mistrial not moved for or consented to by the defendant must be based upon a manifest necessity or jeopardy attaches preventing retrial. *Green v. United States,* supra. The power to declare a mistrial must be exercised with the greatest caution, under urgent circumstances, and for very plain and obvious reasons. *United States v. Perez,* 22 U.S. (9 Wheat.) 579; 6 L.Ed. 165 (1824). There is no plain and obvious reason to declare a mistrial as to any included offense upon which the jury has reached a unanimous agreement of acquittal.

In the present case the declaration of the mistrial came after the following exchange between the trial court and the foreman of the jury:

THE COURT: Mr. Fenner, you wish to speak to the Court?

MR. FENNER: Yes, sir, your honor, we are deadlocked.

THE COURT: All right, sir. You have been at your work just about eleven or twelve hours, since we have submitted the case to you, including the times you have had for meals. Do you think to this point, Mr. Fenner, there is no real purpose in continuing with deliberations in the case?

MR. FENNER: Yes, sir. By polling the Jury in the Jury Room, they are of the opinion that there would be no—

THE COURT: No chance?

MR. FENNER: No chance, no change to be expected, no sir.

THE COURT: All right, thank you. I suspect it is always a little disappointing to the Jury not to be able to resolve on the Jury in a case, after the time and efforts that you have invested in it. We, of course, like to have a verdict, if possible to do so. We don't undertake to resort to any sort of coercion amongst the Jury to bring that about. I am going to declare a mis-trial in the case, and discharge the Jury. I would like to know, Mr. Fenner, questions which I don't ask except when I am breaking the Jury out, because before that time, I don't consider it any of my business. What is your numerical stand? What is your division?

MR. FENNER: Nine to three.

THE COURT: Nine to three. Are you at a level of acquittal on voting?

MR. FENNER: Yes, sir, we have a level of acquittal.

THE COURT: In other words, how do you stand, how many for acquittal, to your nine to three?

MR. FENNER: Nine.

THE COURT: Nine for acquittal and three for some degree of conviction?

MR. FENNER: Yes, sir.

A manifest necessity for the declaration of a mistrial is shown since the jury could not agree to at least one of the included offenses within the murder charge. The record is silent upon which, if any, of the specific included offenses the jury had agreed and upon which the jury had reached an impasse. The record is clear, however, that the jury did not acquit the defendant on all offenses. The holding in *State v. Spillmon,* 89 N.M. 406, 553 P.2d 686 (1976), dictates a dismissal upon double jeopardy grounds as to such offenses on which the record is unclear. In that case, this court held:

> Since the record does not disclose a "manifest necessity" for the discharge of the jury and a final termination of the trial, we follow the suggestion of the United States Supreme Court in *Downum v. United States,* 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963), and resolve any doubt in favor of the liberty of the citizen. We hold that under the facts in this case jeopardy has attached and the defendants may not be tried again on the murder charge.

89 N.M. at 408, 553 P.2d at 688.

The principle set forth in *Spillmon,* supra, is applicable under the circumstances of this case since the record is not clear as to which of the included offenses the jury was considering at the time of its discharge. Without inquiry by the trial court into the jury's deliberations on the greater, included offenses, no necessity is manifest to declare a mistrial as to those offenses and thus jeop-

ardy has attached. Jeopardy did not attach to the offense of voluntary manslaughter which was the least of the included offenses. Had the jury reached a unanimous decision on that offense it could not have been in the posture it announced to the court.

The Court of Appeals erred in concluding that jeopardy had attached to all of the included offenses. Jeopardy had not attached to the charge of voluntary manslaughter. The conviction of the defendant of second-degree murder is reversed and the case is remanded for retrial on the charge of voluntary manslaughter.

IT IS SO ORDERED

McMANUS, C. J., and SOSA and EASLEY, JJ., concur.

566 P.2d 1152

In the Matter of Jose Cruz CASTELLANO, Jr., Attorney at Law.

No. 11458.

Supreme Court of New Mexico.

July 13, 1977.

McMANUS, Justice.

This matter came on for hearing before the court on the report and recommendations of the Disciplinary Board. The Board was represented by William W. Gilbert, Esquire, Chief Disciplinary Counsel, and Respondent appeared pro se. After hearing the arguments of counsel and considering the record in the cause, and being fully advised:

The court finds that the Respondent, Jose Cruz Castellano, Jr., was guilty of unprofessional conduct in the making of certain public statements to press and radio outlined in the Findings of Fact of the Hearing Committee that heard this matter as approved by the Disciplinary Board; and concludes that discipline should be imposed as recommended by the Hearing Committee.

NOW THEREFORE IT IS ORDERED that the Respondent be, and hereby is, publicly censured in open court for his conduct; that he be, and he hereby is, ordered and required to apologize in writing to First Judicial District Judges Campos, Felter and Donnelly and to Toney Anaya, Attorney General of the State of New Mexico, and file a copy thereof in the records of this cause; and that he be, and hereby is, required promptly to pay to the Clerk of this Court for credit to the Disciplinary Board of the Supreme Court of New Mexico General Fund, the costs of prosecuting these proceedings which are hereby assessed at $763.90.

566 P.2d 1152

STATE of New Mexico, Plaintiff-Appellee,

v.

Mike Paul ARMIJO, Defendant-Appellant.

No. 2937.

Court of Appeals of New Mexico.

June 28, 1977.

Theodore E. Lauer, Lauer & Lauer, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Suzanne Tanner, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his convictions of kidnapping and CSP II (Criminal sexual penetration in the second degree). We reverse each conviction, discussing: (1) false imprisonment as a lesser offense included within

the kidnapping charge, and (2) amendment of the CSP II charge after the evidence was closed.

False Imprisonment as a Lesser Included Offense Within the Kidnapping Charge

The indictment charged kidnapping by holding the victim to service against the victim's will. Section 40A–4–1(A), N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1975) reads:

"A. Kidnaping is the unlawful taking, restraining or confining of a person, by force or deception, with intent that the victim:

"(1) be held for ransom;

"(2) as a hostage, confined against his will; or

"(3) be held to service against the victim's will."

Although this statute was amended in 1973, the definition of kidnapping by "holding to service" is the same as that set forth in *State v. Clark,* 80 N.M. 340, 455 P.2d 844 (1969).

Section 40A–4–3, N.M.S.A.1953 (2d Repl. Vol. 6) defines false imprisonment. It reads:

"False imprisonment consists of intentionally confining or restraining another person without his consent and with knowledge that he has no lawful authority to do so.

"Whoever commits false imprisonment is guilty of a fourth degree felony."

Defendant requested that the jury be instructed on false imprisonment as a lesser included offense within the kidnapping charge. The request was refused.

■ For false imprisonment to be a lesser offense included within kidnapping by holding to service, the false imprisonment must be necessarily included in the kidnapping charge. *State v. Medina,* 87 N.M. 394, 534 P.2d 486 (Ct.App.1975). For a lesser offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. *State v. Sandoval,* 90 N.M. 260, 561 P.2d 1353 (Ct. App.1977). Whether an offense is a necessarily included lesser offense is determined by looking to the offense charged in the indictment. *State v. Sandoval,* supra.

The State asserts that kidnapping by holding to service can be committed without committing false imprisonment. It contends that false imprisonment requires that a victim be confined against his will and such is not a requirement of kidnapping by holding to service. It relies on *State v. Clark,* supra.

State v. Clark, supra, states:

". . . [I]t is not necessary that he be confined against his will when the purpose of the taking, restraining or confining is that the victim be held to service against his will. Merely to confine or restrain against a person's will without the requisite intention is not kidnapping. . . . This is false imprisonment under § 40A–4–3, supra, when done with knowledge of an absence of authority."

The above quotation, taken in context, appears in a discussion of the three methods of kidnapping defined in the then applicable statute. Two of the three methods required that the victim be confined against his will; the third method—by holding to service—did not require a confining against the victim's will. That is what was meant in the first sentence of the above quotation.

■ Kidnapping by holding to service is not defined in terms of "confined against his will"; it is defined in terms of a taking, restraining or confining by force or deception. Section 40A–4–1(A), supra. False imprisonment is not defined in terms of "confined against his will"; it is defined in terms of confining or restraining the victim without his consent. Section 40A–4–3, supra. When one is confined by force or deception, one is confined without consent. The confining or restraining necessary for kidnapping by holding to service cannot be committed without also committing the confining or restraining necessary for false imprisonment.

Kidnapping by holding to service requires an "unlawful" taking, restraining or confining. Section 40A–4–1(A), supra. False imprisonment requires that the person doing

the confining or restraining know that he has no "lawful" authority to do so. One cannot commit the "unlawful" action required for kidnapping by holding to service without also committing the confining or restraining with knowledge of no "lawful" authority that is false imprisonment.

We hold, on the basis of the statutory language, that false imprisonment is a lesser offense necessarily included in kidnapping by holding to service. The distinction between these two offenses is whether the defendant intended to hold the victim to service against the victim's will. *State v. Clark,* supra.

If there is some evidence tending to establish the lesser offense, defendant is entitled to an instruction on the lesser offense. *State v. Wingate,* 87 N.M. 397, 534 P.2d 776 (Ct.App.1975). The State asserts that under the evidence in this case, the only justifiable verdicts were conviction of kidnapping or acquittal. See *State v. Vigil,* 86 N.M. 388, 524 P.2d 1004 (Ct.App.1974), cert. denied, 420 U.S. 955, 95 S.Ct. 1339, 43 L.Ed.2d 432 (1975). The correctness of this contention depends on whether there is evidence tending to show an absence of intent to hold the victim to service against his will.

Defendant's version of the events of the night in question was that no crime occurred; that defendant went with the victim to the victim's home because the victim had not repaid money allegedly borrowed from defendant, and subsequently scuffled with the victim in a restaurant because of a threat made by the victim. The jury could, and did, reject defendant's testimony that no force or deception was involved in the relationship between defendant and the victim. Still, the jury could have determined, from defendant's testimony, that the force or deception by defendant was without the intent to hold the victim to service against his will. While defendant's version of the facts may seem incredible, nevertheless it was evidence tending to show an absence of the requisite intent.

The trial court erred in refusing the requested instruction on false imprisonment as a lesser offense included within the kidnapping charge. See *State v. Wingate,* supra.

Amendment to the CSP Charge After the Evidence Was Closed

Section 40A–9–21(B), N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1975) states five methods of committing CSP II. Three of the methods are pertinent to this issue. Section 40A–9–21(B), supra, reads:

> "B. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:
>
> * * * * * *
>
> "(2) by the use of force or coercion which results in personal injury to the victim;
>
> * * * * * *
>
> "(4) in the commission of any other felony; or
>
> "(5) when the perpetrator is armed with a deadly weapon."

Another statute pertinent to this issue is the applicable definition of "personal injury". Section 40A–9–20(C), N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1975) states:

> "C. 'personal injury' means bodily injury to a lesser degree than great bodily harm and includes, but is not limited to, disfigurement, mental anguish, chronic or recurrent pain, pregnancy or disease or injury to a sexual or reproductive organ[.]"

The indictment charged defendant with CSP II by engaging in anal intercourse while armed with a deadly weapon, in violation of § 40A–9–21(B)(5), supra. This specific charge limited the State to establishing the facts supporting the one method of CSP II charged in the indictment. *State v. Trivitt,* 89 N.M. 162, 548 P.2d 442 (1976); *State v. Crump,* 82 N.M. 487, 484 P.2d 329 (1971).

After the evidence was concluded and the instructions were being settled, the State requested, and the trial court proposed to instruct on three methods of CSP II—(a) force or coercion resulting in personal inju-

ry, (b) in the commission of any other felony, and (c) while armed with a deadly weapon. See subparagraphs B(2), B(4) and B(5) quoted above.

Defendant objected that the proposed instruction went beyond the issues in the case. The State agreed. The State then proposed that the indictment be amended to include the two additional methods for committing CSP II which were covered in the proposed instruction. The amendment was granted over defendant's objection, and the jury was instructed on three methods of committing CSP II.

One of defendant's objections was that the amendment was untimely. This objection was properly overruled. Under Rule of Criminal Procedure 7(c), the court may allow the indictment to be amended "at any time" to conform to the evidence.

Defendant also objected that he was prejudiced by the amendment. The State's response was that evidence supporting the two additional methods came in without objection from defendant. On appeal, defendant correctly points out that this evidence was admissible in connection with the kidnapping charge and, thus, any objection to this evidence would have been useless. We do not consider this argument further because it was not presented to the trial court.

Before the trial court, defendant contended that he had not been charged with CSP II by force or coercion resulting in personal injury and had not prepared to defend such a charge. This contention is also argued on appeal.

Rule of Criminal Procedure 7(c) states: "If the court finds that the defendant has been prejudiced by an amendment, the court may postpone the trial or grant such other relief as may be proper under the circumstances." Rule of Criminal Procedure 7(d) states that no appeal, based on the evidentiary variance (because of which an amendment was granted) "shall be sustained unless it is affirmatively shown that the defendant was in fact prejudiced thereby in his defense on the merits."

The State asserts that prejudice has not been affirmatively shown. It points out that there has been no change in the offense charged. That is true, but the amendment enlarged the indictment to charge the offense had been committed by three methods rather than one. See *State v. Wilburn,* (Ct.App.) 90 N.M. ——, 564 P.2d 1000, decided May 3, 1977. The State contends that defendant's "sole defense was that he had committed none of the acts charged" and such a defense was as applicable to the two additional methods as to the one method charged prior to the amendment. The State seems to be saying that the defense would not have been different if the defense had been given notice of the two additional methods charged by the amendment. This is no more than speculation on the State's part.

Prejudice affirmatively appears in this record. The amendment added a charge of CSP II by force or coercion which results in personal injury to the victim. Section 40A–9–21(B)(2), supra. "Personal injury" is defined in the statute. Section 40A–9–20(C), supra. While evidence of personal injury was relevant to "force or coercion" of the kidnapping charge, personal injury or the extent thereof was not a matter directly in issue on any of the charges on which defendant was tried, including the two charges of which he was acquitted. At trial, defendant had no reason to defend against "personal injury" as defined in § 40A–9–20(C). To permit the jury to convict on the basis of action resulting in personal injury, by adding this charge after the evidence was concluded in a trial where personal injury was not in issue, is prejudice.

The State asserts that amendment should not be held to be error because defendant did not request a continuance. A continuance to obtain additional evidence could not have resolved the question of prejudice. To counter the prejudice resulting from injecting personal injury into the case after the evidence was concluded, defendant would

have needed to cross-examine all witnesses who testified concerning the victim's condition both during the events in question and after they were concluded.

The record in this case shows the jury was permitted to convict defendant of CSP II by a method that had not been tried. This error requires reversal of this conviction. See *State v. Villa,* 85 N.M. 537, 514 P.2d 56 (Ct.App.1973).

The judgment and sentences are reversed. The cause is remanded for a new trial on the indictment as amended.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

567 P.2d 62

Kathleen J. THOMPSON, Plaintiff-Appellant,

v.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA and Robert K. Foster, Defendants-Appellees.

No. 2765.

Court of Appeals of New Mexico.

June 28, 1977.

Thomas J. Dunn, Nordhaus, Moses & Dunn, Albuquerque, for appellant.

William A. Sloan and Kenneth R. Brandt, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for appellee Occidental.

Ruth Milne Schifani and Joseph E. Roehl, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for appellee Foster.

OPINION

HERNANDEZ, Judge.

Plaintiff sued the defendant, Occidental Life Insurance Company of California, Inc.

(Occidental) to recover a part of an insurance premium paid on a policy of life insurance owned by her on the life of her deceased husband. Plaintiff's claim against the defendant, Robert K. Foster (Foster) was that he (the agent who sold the policy) negligently failed to advise her that it was Occidental's position that the policy did not provide for a refund of any part of the premium should the insured die prior to the end of the premium period.

Defendants' motions for summary judgment were granted and plaintiff appeals both judgments, alleging two points of error.

The pertinent facts are these: Occidental issued the subject life insurance policy on February 11, 1960, in the face amount of $130,000.00. The insured was the husband of the plaintiff and she was the owner. The paragraph relating to premiums provided:

> "Premiums are payable in advance from the policy date during the life of the Insured. If a part of the premium ceases to be payable under the provisions of an attached rider, the premium shall then be reduced accordingly. The mode of premium payment may be changed on any policy anniversary to any other mode for which a premium is shown in the policy data. All premiums are payable at the Home Office of the Company or to an authorized agent or cashier of the Company, but only in exchange for an official receipt signed by the President or Secretary and counter signed by the person receiving the payment. If any premium remains unpaid after the grace period, this policy shall terminate subject to the non-forfeiture provisions."

The mode of payment of the premiums of the policy was changed three times after its issuance, in 1964 and 1970 and on February 11, 1974. On the latter date the mode of payment was changed from monthly to annual payments and the premium of $6,014.70 was paid. Plaintiff's husband died on May 9, 1974.

Plaintiff contends that the trial court erred in granting Occidental's motion for summary judgment because there is an ambiguity in the paragraph of the policy relative to premiums and that consequently there was an issue of fact as to its interpretation. We do not agree. An insurance policy is a contract and is generally governed by the law of contracts, and the rights and duties of the parties are to be determined by its terms. *Vargas v. Pacific National Life Assurance Company*, 79 N.M. 152, 441 P.2d 50 (1968). Should there exist an ambiguity in any of its terms a liberal construction favorable to the insured is to be adopted. *Vargas*, supra. However, the determination as to whether an ambiguity exists is one of law to be made by the court. *Vargas*. Plaintiff argues that the paragraph relating to premiums "does not state that the unearned premium will be refunded nor does the provision state that the unearned premium will not be refunded." We find no ambiguity in the provisions of this paragraph. What the plaintiff would have us do, under the guise of construction, is to read into it terms it does not contain. It is not within the province of the courts to write a new contract for the parties. Absent any ambiguity, our duty is confined to interpreting the contract which they made for themselves. *Davies v. Boyd*, 73 N.M. 85, 385 P.2d 950 (1963).

As to the question of whether the plaintiff was entitled to a refund of a part of the premium paid, the rule is that:

> "In the absence of statutory or contract provision to the contrary, if a legal risk has once attached or commenced, there can be no apportionment or return afterward of the premium, so far as that particular risk is concerned. And diminution in its duration has no effect to decrease the amount stipulated as the premium or price for renewing the risk, for it is sufficient to preclude a return that the insurer has been liable for any period, however short." 6 Couch Cyclopedia of Insurance Law § 34:9 (2d ed., R. Anderson, 1961). See *Sil-Turn Co. v. London Guaranty & Acc. Co.*, 153 Misc. 805, 276 N.Y.S. 412 (1934).

There being no statutory or contract provision for a refund in this instance, the plaintiff was not entitled to one. The trial court did not err in granting Occidental's motion for summary judgment.

Plaintiff contends that the trial court erred in granting the defendant Foster's motion for summary judgment because he had negligently misrepresented to plaintiff Occidental's position that they would not refund any part of the premium after her husband's death. Plaintiff argues that Foster had a duty to advise her "that if she paid the premium on an annual basis that Occidental would not refund any portion of the premium after her husband's death." Plaintiff in answer to an interrogatory concerning Foster's negligent failure to advise her about the question of refunds stated: "Specifically in February 1972, I consulted with Mr. Foster relative to changing from monthly to annual payments, asking him the amount of discount, if any, for such change." She went on to say that Mr. Foster was well aware of the precarious state of her husband's health and that he was 70 years of age. She concluded by saying, "Mr. Foster must have realized this was an inadvisable change and should have so advised me." In an affidavit filed in support of his motion for summary judgment, after setting forth the times that the mode of payment of premiums was changed by plaintiff, Foster stated "[n]one of said changes were made at the suggestion nor insistence of the affiant."

"In the absence of special circumstances, an agent of the insurer is clearly not the agent of the insured." *Volker v. Connecticut Fire Ins. Co.*, 22 N.J.Super. 314, 91 A.2d 883, 889 (1952). Section 58–5–28, N.M.S.A.1953 (Repl. Vol. 8, pt. 2) provides in part:

> "Any person licensed as an agent to represent an insurance company shall, in any controversy between the insured or his beneficiary and the company, be held to be the agent of the company issuing the insurance solicited or applied for, anything in the application or the policy to the contrary notwithstanding . . . ."

Our Supreme Court has held:

> "[A]n applicant for insurance who accepts a policy, the provisions of which are plain, clear and free from all ambiguity, is chargeable with knowledge of its terms and legal effect. It is the duty of the assured to read and know the contents of the policy before he accepts it, and where he fails or neglects to do so, he is estopped from denying knowledge of its terms and conditions, unless he alleges and proves that he was induced not to read the same by some trick or fraud of the other party." *Porter v. Butte Farmers Mutual Insurance Company*, 68 N.M. 175, 360 P.2d 372, 375 (1961).

Plaintiff cites us to several cases, none of which is applicable in that they involved instances of misrepresentation. Plaintiff cites no authority in support of her contention that Foster negligently failed to advise her that it was Occidental's position that the policy did not provide for a refund of any part of the premium. Foster was not plaintiff's agent. There are circumstances where an insurance agent will be considered the agent of the insured but this is not one of them. See *Inland Empire Ins. Co. v. Bair*, 246 F.2d 505 (10th Cir. 1957). We know of no authority which holds that in circumstances such as this an insurance agent owes a duty to advise the insured. Quite the contrary, there is authority that: "Interpreting contracts of insurance is not within the scope of authority of a soliciting agent . . . ." *Union Life Ins. Co. v. Burk*, 169 F.2d 235 (10th Cir. 1948). The record reveals that the plaintiff is possessed of considerable business experience and clearly the estoppel provided for in *Porter*, supra, does apply in this instance. The trial court correctly granted Foster's motion for summary judgment.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J. (concurring in part, dissenting in part).

SUTIN, Judge (concurring in part and dissenting in part).

I dissent as to Occidental and concur as to Foster.

Judges and lawyers often read insurance policies with antagonistic eyes, especially where an ordinary policyholder and the family are involved, and benefits are denied. This view arises from a history of insurance policies carefully prepared by an insurance company and for an insurance company for the protection of an insurance company. "The deceptive practices of many insurers, the evils resulting from the complex, confused, and misleading provisions inserted in various policies issued by different insurers covering the same kinds of risks prompted State legislatures to act." 1 Richards on Insurance § 12 (5th ed. by Freedman, 1952). It required the legislature and judicial decisions to modify this contract to protect the rights of an insured and his family. The insurance company always stood as strong and firm as the "Rock of Gibraltar." The insured stood by the rock as a weak and limp piece of plastic clay in contrast. The legislature and the courts have not yet met the entire challenge of the insurance contract vis-a-vis the family.

There yet remain two areas which have been covered in some respects by the judiciary and not the legislature: (1) the duty of the insured to read and understand the complex, complicated and intricate provisions of an insurance policy, the language of which ambles along the way in pedantic insurance methodology, and (2) the application of the doctrine of "reasonable expectations."

In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540, 64 S.Ct. 1162, 1167, 88 L.Ed. 1440, 1450 (1944), Justice Black said over 30 years ago:

> Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

The salesmanship of the insurance agent convinces average persons that insurance is a necessity in every family. What the ordinary policyholder does not know and is not taught are the provisions of the policy, the rights and duties that flow from these provisions, and the law that protects the insurer and not the insured. The insured does not seek legal advice to determine what constitutes insurance coverage and what rights are determined when a fortuitous event occurs.

The insurance contract is a one-way street. It does not fall within the category of ordinary contracts that travel along a two-way street. Ordinary contracts are prepared by attorneys. These contracts are analyzed and discussed, amended and modified before they are signed by the parties to protect each of the rights of the parties and impose reciprocal duties. Judge Learned Hand succinctly described the difference in *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 602 (2d Cir. 1947):

> . . . [T]he canon contra proferentem [against the party who proffers or puts forward a thing] is more rigorously applied in insurance than in other contracts, in recognition of the difference between the parties in their acquaintance with the subject matter.

The insurance contract is carefully prepared by the insurance company with over two centuries of experience. The insured is a neophyte. He does not have the intellectual equipment to meet the challenge. Under these circumstances, the law, if it is to meet the needs of the family in the last quarter of the 20th century, must adapt itself to those needs. The law must cease to embody a philosophy opposed to change. It must become avowedly pragmatic. The first step in the administration of justice is the recognition that man is not made for the law, but that law is made for the man. Frank, Law and the Modern Mind at 252 (1936).

It has long been recognized that psychological factors, biases and prejudices, economic and social factors, and the unconscious state of mind of judges all play an essential role in the determination of change in the law. These factors have influenced my judgment. And it is wise that change comes slowly with the passage of time.

Our Supreme Court has followed the philosophy of change in the last few years. It abolished sovereign immunity. *Hicks v. State,* 88 N.M. 588, 544 P.2d 1153 (1975). It declared the "guest statute" unconstitutional. *McGeehan v. Bunch,* 88 N.M. 308, 540 P.2d 238 (1975). It adopted the "reasonable expectations" doctrine in insurance law. *Pribble v. Aetna Life Insurance Company,* 84 N.M. 211, 501 P.2d 255 (1972). It abolished the defense of "unavoidable accident," *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973), and "assumption of risk" as a defense in tort law, *Williamson v. Smith,* 83 N.M. 336, 491 P.2d 1147 (1971), and it adopted the doctrine of strict tort liability. *Stang v. Hertz Corporation,* 83 N.M. 730, 497 P.2d 732 (1972).

In New Mexico, we have always interpreted insurance contracts with great liberality to protect the insured. *Read v. Western Farm Bur. Mut. Ins. Co.,* 90 N.M. 369, 563 P.2d 1162 (Ct.App.1977). We no longer require every insured to read and understand the terms of the contract. We have adopted the doctrine of "reasonable expectations." *Pribble,* supra; *Read,* supra.

To arrive at a decision in this case, I leave the pathways by which opposing attorneys have sought a solution to the problem in this case.

Is a beneficiary of an ordinary life insurance policy, under which an annual premium has been paid by the insured, entitled to a pro rata refund of a portion of the premium paid, when, thereafter, the insured dies during the year?

This is a new and novel question in New Mexico.

Plaintiff was the owner and beneficiary of defendant Occidental's life insurance policy, which policy insured the life of her husband. On February 11, 1974, plaintiff paid the annual premium in the amount of $6,209.70 and on May 9, 1974, her husband died. Defendant paid the amount admittedly owing, but it refused to refund approximately three-fourths of the premium paid, $4,657.26, which amount represents a pro rata refund. Defendants were well aware of the precarious state of her husband's health. They knew that the Thompsons had sold their business due to Mr. Thompson's prolonged illness of several years. If plaintiff had been aware of Occidental's undisclosed rule that the advanced payment would penalize her, that no refund would be made, she would not have changed from a monthly to an annual premium, and would not have paid such a large amount in advance. Plaintiff had consulted with defendant Foster, Occidental's agent, relative to changing from monthly to annual payments to determine the amount of discount, if any, for such a change. Under the monthly payment plan, the policy provided:

> Any unpaid premiums or instalments required to complete the premium payments for the policy year in which death occurs, will be deducted in any settlement hereunder.

In the annual premium policy in question no such provision was contained therein. Plaintiff's husband died at around the age of 70 years. When she requested the refund she was advised by defendant Foster that she had saved $78.00 a year which would take about 60 years to result in a saving of $4,657.26, the pro rata amount she believed was due her.

We are not involved with any ambiguity in the language of the policy. It was silent on the right of an insured to a refund. We cannot say that the "Payment of Premiums" provision is doubtful or uncertain, speculative or open to question. We are confronted with the old proverb that "Good words are silver, silence is golden." An insurer believes that the premium language in its policy is silver, and its silence on refund is golden. I am unable mentally to apply this proverb favorably in insurance contracts in view of the status of the parties. The insurer has a duty to speak or disclose. Otherwise, it is bound by the doctrine of "reasonable expectations" of the insured.

Wilbur M. Bolton, Associate Actuary of Occidental, by affidavit, stated:

The practice of refunding premiums for some part or all of the period beyond the date of death varies with different insurance companies. Some companies do make such refunds either because the insurance contract requires it or because through action by the Company's Board of Directors an apportionment of the company's surplus funds has been made to provide such refunds to the beneficiaries of those insureds whose death occurs after the date on which this action by the Board of Directors becomes effective. *Other companies, including Occidental Life Insurance Company of California, do not make such refunds nor provide for such refunds by the insurance contract. In the absence of such a contractual requirement, no such action to appropriate the company's surplus funds has been made by the Board of Directors.*

* * * * * *

. . . In practice, therefore, a company which refunds premium paid beyond the date or month of death, will charge a higher rate for life insurance than another company which does not refund premiums . . . .. *In the absence of a state law and regulation requiring that such benefits be provided by all life companies, it is proper for a life insurance company to follow a practice of refunding premiums beyond death and charging a higher rate therefor or a practice of not refunding such premiums and charging a lower rate as is the practice of Occidental Life Insurance Company.* [Emphasis added.]

Mr. Bolton's statement is fair and clear. It is a simple explanation of the rules under which an insurance company determines the payment or non-payment of premium refunds. My quarrel with Occidental is also fair and clear.

Occidental relies on the old established rule stated in 6 Couch on Insurance 2d § 34:9 (1961):

In the absence of statutory or contract provision to the contrary, if a legal risk has once attached or commenced, there can be no apportionment or return afterward of the premium, so far as that particular risk is concerned.

This rule of law is also stated in 44 C.J.S. Insurance § 406 (1945); 43 Am.Jur.2d, Insurance, § 629 (1969). To my knowledge, no case involves an action to recover a refund after the insured has died, and very few of the cases involve an ordinary life insurance policy with an ordinary family beneficiary, and all of them precede the doctrine of "reasonable expectations."

Occidental also relies upon the doctrine that where an insured dies on the due date of the premium, the insurer can deduct the amount of the annual premium for the ensuing year. *Long v. Pilot Life Insurance Company,* 250 N.C. 590, 108 S.E.2d 840 (1959); *Callahan v. John Hancock Mutual Life Insurance Co.,* 331 Mass. 552, 120 N.E.2d 640 (1954), 45 A.L.R.2d 1262 (1956), and cases cited in the annotation.

In these cases, the policy provides that the amount of insurance due would be paid on the death of the insured "less any unpaid balance or premium for the uncompleted policy year." The irrelevance of this rule is obvious. The difference between an "unpaid" premium with a policy provision for deduction and a "paid" premium with silence in the policy as to a refund is the difference between black and white. Occidental seeks to beat the plaintiff black and blue. It raises the "black flag," one that used to be hoisted over a prison immediately after an execution. To me, no execution of plaintiff has occurred.

The ordinary beneficiary, the plaintiff in this case, has no knowledge of this rule of law. My quarrel with Occidental arises out of the answer to this question: Why did Occidental refrain from stating in bold face type in its policy: "OCCIDENTAL DOES NOT MAKE REFUNDS OF INSURANCE PREMIUMS UNDER THIS POLICY."? or "Why does your agent refrain from notifying the insured that no refunds of premiums will be made under the terms of this policy?" or "Why do you keep this rule of law a secret from your insured?"

An insured relies upon the language of the policy or the language of the agent.

The insured never sees his policy until after he has paid his premium and the contract is formed and presented to him. The policy is then placed in a drawer to await death with hope and confidence that his family will be protected and no controversy will arise. No longer is the insured a witness.

Under these circumstances, it is normal and rational for judges to return to the ancient maxims by which justice is determined. Heretofore, it has not been done. We ascertain justice by natural reason or ethical insight, independent of the formulated body of law. We call it "equity," and we say that "Equity delights to do justice and that not by halves," or "Equity looks upon that as done which ought to have been done," or "Equity suffers not a right without a remedy." I simply call all of these maxims a search for "fair play" in the social and business relationships of our society.

The doctrine of "reasonable expectations" is an equitable approach to a solution of this controversy. By this doctrine we mean that the insured is the "Rock of Gibraltar;" that the insurance policy will yield the maximum of protection to, and the reasonable expectation of, the insured; that the insurer will not be permitted to take an unconscionable advantage.

Thus far, we have related the doctrine to ambiguities in the language of the policy. *Read, supra; Pribble, supra.* This doctrine has been extended beyond the ambiguity problem.

The basis for this extended version of the doctrine is to fulfill the insured's objectively reasonable expectation even though the policy excludes coverage for the particular loss sustained. Milstein, Contracts—Insurance Law—Theories of Unconscionability, etc., 64 Georgetown L.J. 987 (1976); Keeton, Insurance Law Rights at Variance with Policy Provisions, 83 Harvard L.Rev. 961 (1970). Professor Keeton states the rule as follows:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. [at p. 967.]

This is the direction in which insurance law appears to be moving and Professor Keeton submits that it is also "a principle that insurance law ought to embrace."

In *Corgatelli v. Globe Life & Accident Insurance Co.,* 96 Idaho 616, 533 P.2d 737 (1975), Idaho adopted the "doctrine of reasonable expectations." Under the insurance policy, payment was allowed "For Complete Dislocation of: . . . Collar Bone". A collar bone cannot be dislocated, but the court allowed recovery for dislocation of the shoulder joint. The court said:

> The doctrine of reasonable expectations is peculiarly applicable to contracts where as here it is drawn in such a fashion that one hand steals away what the other seemingly confers. A close analysis of the literal meaning of the words in the provision in question solves none of the problems since the literal language is at odds with the reasonable expectations an insured would obtain from the contract. [533 P.2d at 741–42.]

In *Paramount Prop. Co. v. Transamerica Title Ins. Co.,* 1 Cal.3d 562, 83 Cal.Rptr. 394, 463 P.2d 746 (1970), a "Payment of Loss" provision provided that "'. . . [p]ayment in full by any person . . . of a mortgage covered by this policy shall terminate all liability of the [title] Company to the insured owner of the indebtedness secured by such mortgage, * * *" Even though "payment" was allegedly made under duress, and the payor sought recovery in court, the court held that the "payment" did not terminate coverage of the policy. Why? Because "[n]o language preceded this last sentence [*supra*] to warn the policyholder that it did not involve payment of loss but *non*-payment of loss." [83 Cal. Rptr. at 396, 463 P.2d at 748.] The court said:

> If "full payment" is interpreted to apply to a payment which does not eliminate the insured's risk, then the provision irrationally ties the termination of the policy to an arbitrary and fortuitous occurrence. We do not think such an interpretation is

in accord with the reasonable expectations of the parties. [83 Cal.Rptr. at 398, 463 P.2d at 750.]

In New Jersey, a homeowner's policy was held to include workmen's compensation insurance even though many pages later, it was specifically excluded. Reasonable expectation means that an insurance company is bound by the impression that the average insured would gain from such inspection of the policy as he would be likely to make. *Caldwell v. Aetna Casualty and Surety Company,* 107 N.J.Super. 456, 258 A.2d 900 (1969), 41 A.L.R.3d 1300 (1972); *Gerhardt v. Continental Ins. Cos.,* 48 N.J. 291, 225 A.2d 328 (1966).

Public policy and "fair play" dictate that we read into the policy in bold face type:

The objectively reasonable expectations that you have regarding the terms of this policy will be honored.

A question of fact exists whether plaintiff had reasonable expectations that a pro rata refund of the premium paid would be made.

Occidental argues that plaintiff's claim is barred by an accord and satisfaction. This is an affirmative defense. Section 21–1–1(8)(c), N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.). It was not pleaded as an affirmative defense or raised as an issue in the trial court. Issues not properly raised in the trial court and on which a ruling of the trial court was not properly invoked will not be considered on appeal. *In Re Will of Skarda,* 88 N.M. 130, 537 P.2d 1392 (1975). Neither can it be raised for the first time on appeal. *Western Cas. and Sur. Co. v. City of Santa Fe,* 84 N.M. 409, 504 P.2d 17 (1972).

Plaintiff sued Foster as a duly authorized agent of Occidental acting within the scope of his authority and employment; that as an authorized agent, in handling the account of plaintiff, he "should have advised said customer of the company's application and interpretation of the policy provisions, and his negligent failure to so advise Plaintiff of facts which he knew or should have known Plaintiff would rely upon, and upon which Plaintiff did rely, caused Plaintiff damages in the amount of $4,657.26. . . . Plaintiff is entitled to damages based on the negligent misrepresentations of the Defendant Robert K. Foster . . . .'"

Plaintiff seeks to pole vault to damages without a pole. An action for negligent misrepresentations is an action upon which relief can be granted. It is a tort determined by the general principles of the law of negligence. To sustain the action, the breach of a legal duty must occur. *Maxey v. Quintana,* 84 N.M. 38, 499 P.2d 356 (Ct. App.1972).

First, plaintiff says:

"Foster had a duty to advise Thompson that if she paid the premium on an annual basis that Occidental would not refund any portion of the premium after her husband's death."

Did Foster have a duty to advise? Plaintiff relies on *Barber's Super Markets, Inc. v. Stryker,* 84 N.M. 181, 500 P.2d 1304 (Ct. App.1972). This case involved a fiduciary relationship between a purchaser and a broker. A licensed insurance agent is an agent of the company issuing the insurance solicited. Section 58–5–28, N.M.S.A.1953 (Repl. Vol. 8, pt. 2). No fiduciary relationship existed between Foster and plaintiff.

Thus far, no authority can be found, and none has been cited, that upon inquiry by an insured with reference to a change in premium payments, an insurance agent has a legal duty to advise an insured of the company's application and interpretation of the policy's provisions on the pro rata refund of an annual premium. We have consistently held that whether a duty exists, the breach of which gives rise to liability for negligence, is a pure question of law for determination by the court. *Southern Union Gas Co. v. Briner Rust Proofing Co.,* 65 N.M. 32, 331 P.2d 531 (1958).

Upon what legal basis did Foster have a duty to advise?

A "legal duty" is defined in 28 C.J.S. "Duty" at 597 (1941) as follows:

The term implies the existence of some relation of duty, public or private, special or general, either by contract or as an implication of public policy; and has been defined as an obligation arising from contract of the parties or the operation of law; that which the law requires to be done or forborne to a determinate person or to the public at large, and is correlative to a right vested in such determinate person or in the public.

It has also been said that a legal duty implies the existence of some legal relation. *Early v. Houser & Houser,* 28 Ga.App. 24, 109 S.E. 914 (1921).

There was no fiduciary, contractual or legal relationship between Foster and plaintiff. Foster did not seek to induce plaintiff to change from a monthly to an annual premium to be paid on the policy. For inducements and representations thereon, see *Winslow v. Burns,* 47 N.M. 29, 132 P.2d 1048 (1943). I can find nothing that the law requires to be done or forborne by Foster. Foster had no duty to advise plaintiff.

Second, Foster did not make a negligent misrepresentation. *Winslow, supra,* quoted two definitions of a representation:

"While in its strict sense, a 'representation' is an assertion or statement of some fact, it may also include an implied representation by conduct that a fact exists, including both express and implied statements, so that whatever word, action, or conduct conveys a real impression that a fact exists is embraced in the term. *Ricks v. State,* 8 Ga.App. 449, 69 S.E. 576, 577."

. . . . .

"The term 'representation' is used for convenience as including both express and implied statements. It is not necessary that there should be an express statement. Whatever word, action, or conduct conveys a clear impression as of a fact is embraced in the term. Indeed, the term 'representation' includes silence in certain cases; for silence, where one is bound to speak, is ordinarily equivalent to an admission of fact. *Foster v. McAlester,* 3 Ind.T. 307, 58 S.W. 679, 684." [47 N.M. at 34, 132 P.2d at 1050.]

A misrepresentation is a false representation. To establish a misrepresentation, plaintiff would have to establish that Foster said to plaintiff, or by some word, action or conduct, conveyed to plaintiff the fact that the insurance policy allowed a pro rata refund of an annual premium, which representation would be false. Foster had no duty to speak and was silent on the subject of any refund. To say nothing cannot be transformed into a false representation.

Plaintiff's argument centers among those cases which establish a rule that if a misrepresentation has been made by the insurer or the insured, or by a party to a contract, and such misrepresentation is material to the contract, then it makes no difference whether the party acted fraudulently, negligently, or innocently. *Modisette v. Foundation Reserve Insurance Co.,* 77 N.M. 661, 427 P.2d 21 (1967); *Tsosie v. Foundation Reserve Insurance Company,* 77 N.M. 671, 427 P.2d 29 (1967); *Horger v. Mutual of Omaha Insurance Company,* 83 N.M. 596, 495 P.2d 376 (1972); *Ham v. Hart,* 58 N.M. 550, 273 P.2d 748 (1954), overruled in part by *Hockett v. Winks,* 82 N.M. 597, 485 P.2d 353 (1971); *Prudential Insurance Company of America v. Anaya,* 78 N.M. 101, 428 P.2d 640 (1967).

Plaintiff cannot pole vault to these cases without first making an argument that Foster made a negligent misrepresentation that induced her to change from a monthly to an annual premium. No such argument was made because no such evidence appears in the record. There is no genuine issue as to any material fact.

I conclude that the summary judgment in favor of Occidental should be reversed, and the summary judgment in favor of Foster should be affirmed.

567 P.2d 478

T. Edsil RUNYAN et al., Petitioners-Appellants,

v.

Carlos L. JARAMILLO et al., Respondents-Appellees.

No. 11276.

Supreme Court of New Mexico.

Aug. 10, 1977.

Jack T. Whorton, Alamogordo, for petitioners-appellants.

Toney Anaya, Atty. Gen., Albert V. Gonzales, Asst. Atty. Gen., Santa Fe, for Jaramillo.

S. Thomas Overstreet, Alamogordo, for Lewvanco, Inc.

OPINION

FEDERICI, Justice.

On February 3, 1975, appellee Lewvanco, Inc. applied for a non-quota rural liquor dispensing license in accordance with §§ 46–5–1 to 28, N.M.S.A. 1953 (Supp.1975). The license was to be located in Weed, New Mexico. Appellant Runyan, the owner of a bar in Mayhill, which is situated 10.2 road miles and 5.99 miles "as the crow flies" from Weed, and the individually named and institutional appellants protested the issuance of a dispenser's license to Lewvanco at a liquor board hearing held in Alamogordo on July 14, 1975. Appellee Jaramillo, Chief of the Division of Liquor Control, denied Lewvanco's application on July 15, 1975. Lewvanco did not appeal this decision under the procedure provided by § 46–5–16(F), N.M.S.A. 1953 (Supp.1975).

On August 27, 1975, Lewvanco reapplied for a rural dispenser's license and again posted the notice on the premises for the statutory length of time. A public hearing was set for December 22, 1975, and a hearing was held, at which no protestants appeared. On December 30, 1975, a rural dispenser's license was issued to Lewvanco.

Appellants appealed the issuance of this license to the district court pursuant to § 46–5–16(F), supra. Petitions appealing the director's action were filed in the District Courts of Otero and Santa Fe Counties. The Otero County District Court dismissed the cause of action for improper venue. This dismissal was appealed to this court, which affirmed the order of dismissal of the district court in a memorandum decision. *Runyan v. Jaramillo*, No. 10,883 (S.Ct. N.M. June 30, 1976).

In the District Court of Santa Fe County, the appellants' cause of action was also dismissed in an amended order of dismissal entered on January 24, 1977. In that order, the court (1) granted appellee Jaramillo's motion to dismiss for improper venue, (2) granted appellee Lewvanco's motion for summary judgment, (3) granted Lewvanco's amended motion to dismiss for lack of jurisdiction, lack of standing, and failure to state a claim for which relief could be granted, and (4) denied appellants' motion for summary judgment. It is from this order of the District Court of Santa Fe

County that Runyan and the other individually named and institutional appellants have appealed.

The first issue we consider is whether venue properly lies in Santa Fe County. We note that on appeal, appellee Jaramillo has abandoned the position he took in district court on the issue of venue, and now urges that venue does lie in the District Court of Santa Fe County. We hold that venue properly lies in Santa Fe County.

Section 21–5–1(G), N.M.S.A. 1953 (Repl. Vol. 4, 1970) provides:

> G. Suits against any state officers as such shall be brought in the court of the county wherein their offices are located, at the capitol [capital] and not elsewhere.

In *Pollack v. Montoya*, 55 N.M. 390, 234 P.2d 336 (1951), we applied this statutory provision to the office of Chief of Division of Liquor Control.

There is another statute which is applicable in this case on the question of venue. Section 46–5–16(F), supra, provides in part:

> F. Any person, firm or corporation aggrieved by any decision made by the chief of division as to the issuance or refusal to issue any additional license may appeal to the district court of jurisdiction by filing a petition therefor in the court within thirty [30] days from the date of the decision of the chief of division, . . .

This particular statute was amended in 1973 to substitute the language "district court of jurisdiction" for "district court of Santa Fe."

There is some ambiguity created by the two statutes and we therefore resort to a rule of statutory construction which imposes a duty on the court to consider all existing statutes relating to the same subject so that, if possible, all of the acts will be operative.

In *City Commission of Albuquerque v. State*, 75 N.M. 438, 444, 405 P.2d 924, 928 (1965), we held:

> In interpreting a statute this court may presume that the legislature was informed as to existing law, and that the legislature did not intend to enact a law inconsistent with any existing law or not in accord with common sense or sound reasoning. (Citations omitted.) *This court has the duty to construe acts so that all of the acts of the legislature will be operative.* (Emphasis added.)

Since § 21–5–1(G), supra, was in existence at the time the Legislature enacted § 46–5–16(F), supra, we must assume that the Legislature was aware of the prior statute and that the enactment of the later statute was intended to complement the earlier provision and not conflict with it. Applying this rule, we find that the "district court of jurisdiction" found in § 46–5–16(F), supra, means the District Court of Santa Fe County.

We next consider whether summary judgment in favor of Lewvanco was properly granted by the district court.

It appears that the motion for summary judgment filed by Lewvanco was based upon an affidavit by Mr. Ralph Telles, who was the hearing officer at the second hearing on the application for a dispenser's license. In his affidavit, Mr. Telles stated, among other things, that Lewvanco had fulfilled all of the statutory requirements for the issuance of the license.

The basic question is whether there were genuine issues of material fact presented to the trial court. Where such issues of material fact exist, a summary judgment cannot be granted under N.M.R. Civ.P. 56(c) [§ 21–1–1(56)(c), N.M.S.A. 1953 (Repl.Vol. 4, 1970)]. *Skarda v. Skarda*, 87 N.M. 497, 536 P.2d 257 (1975); *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972). A reading of the transcript reveals that there are several issues of material fact presented, including whether the distance between Runyan's bar in Mayhill and Lewvanco's site in Weed complies with the requirements of the statute and Department of Alcohol Beverages Control regulations, and whether the hearing officer complied with § 46–5–16(F), supra.

Therefore, we are of the opinion that summary judgment in favor of Lew-

vanco was not proper since the transcript reflects that there are genuine issues of material fact as shown by the pleadings, affidavits and evidence presented in the case.

Appellants claim that the district court erred in granting Lewvanco's motion to dismiss for lack of jurisdiction, lack of standing, and failure to state a claim for which relief could be granted.

With reference to the question of jurisdiction, we hold that the Santa Fe County District Court has jurisdiction over both the parties and the subject matter under § 46–5–16(F), supra.

To determine whether the appellants have standing to sue in the present case, we must decide whether they are "person[s], firm[s] or corporation[s] aggrieved" by a decision of the director who may appeal to the district court under § 46–5–16(F), supra.

In *Padilla v. Franklin*, 70 N.M. 243, 372 P.2d 820 (1962), this court considered the issue of who was an "aggrieved person" and entitled to review on appeal pursuant to § 46–5–16(F), supra. In that case, the review was sought by a person whose own application for a liquor license had been denied and who alleged that the Chief of Division of Liquor Control acted in excess of his jurisdiction in granting additional liquor licenses to parties other than the applicant. We held that under the facts in that case the appellant was not an aggrieved person under the statute, and stated:

> We conclude that the facts alleged by appellant give him no standing whatever to a review here of the actions of the chief. He asserts no rights other than as a member of the general public. Such is not contemplated by the statute. A person aggrieved must be a person having a direct interest, pecuniary or otherwise, one different from the public as a whole. (Citations omitted). 70 N.M. at 244, 372 P.2d at 821.

It is apparent from the standards set by this court in *Padilla v. Franklin*, supra, that the individual and institutional appellants in the case at bar, except Runyan, have not set forth nor shown a direct or pecuniary interest in the matter in controversy to make them "aggrieved persons" and to entitle them to relief under § 46–5–16(F), supra. The interests of these individual and institutional appellants in the public health, safety and morals of a community are no different than the interests of the public as a whole, and this has been held by our court not to be a "direct interest" sufficient to give them standing under § 46–5–16(F), supra. *Padilla v. Franklin,* supra. Cf. *Eastham v. Public Employee's Retirement Ass'n Bd.*, 89 N.M. 399, 553 P.2d 679 (1976); *De Vargas Savings & L. Ass'n of Santa Fe v. Campbell,* 87 N.M. 469, 535 P.2d 1320 (1975); *Asplund v. Hannett*, 31 N.M. 641, 249 P. 1074 (1926).

Appellant Runyan, on the other hand, is the present owner of a liquor license which he claims is within the ten-mile limit which could prevent the issuance of a new license to Lewvanco. The granting of a liquor license to Lewvanco has a pecuniary effect on Runyan's business, and he therefore has a direct interest as distinguished from the public as a whole.

We hold that Appellant Runyan is an aggrieved person and may appeal, but that the other individual and institutional appellants are not aggrieved persons within the meaning of the statute and have no standing in court by way of a right to appeal the decision of the Chief of Division of Liquor Control.

In considering a motion to dismiss for failure to state a claim for which relief can be granted under N.M.R.Civ.P. 12(b)(6), supra, all facts well pleaded must be accepted as true, and the motion may be granted only when it appears the plaintiff cannot be entitled to relief under any state of facts provable under the claim. *Jones v. International Union of Operating Engineers*, 72 N.M. 322, 383 P.2d 571 (1963). In the present case, assuming as we must that the facts pleaded are true, appellant may be entitled to relief under §§ 46–5–1 to 28, supra. Moreover, N.M.R.Civ.P. 12(b), supra, also provides that if matters outside

the pleadings are presented to the court under such a motion, as occurred in the instant case, it shall be treated as one for summary judgment. As we stated above, the granting of Lewvanco's motion for summary judgment was improper, as was the granting of the motion for failure to state a claim for which relief can be granted was error.

In their final point, appellants contend the trial court erred in denying their motion for summary judgment. This motion was supported by an affidavit of Mr. Quinton E. Daniel, a registered professional engineer, in which he stated, among other things, that the computed distance between the Mayhill Bar and Lewvanco's bar in Weed is 5.99 miles in a straight line. In view of our holding that genuine issues of material fact exist, we hold that the district court's denial of appellants' motion for summary judgment was proper.

The case is remanded to the district court for further proceedings in accordance with this opinion.

IT IS SO ORDERED.

SOSA and PAYNE, JJ., concur.

567 P.2d 482

Earsley BARNETT, Petitioner-Appellee,

v.

Clyde MALLEY et al., Respondents-Appellants.

No. 11109.

Supreme Court of New Mexico.

Aug. 15, 1977.

Toney Anaya, Atty. Gen., Ralph W. Muxlow II, Asst. Atty. Gen., Department of Corrections, Santa Fe, for respondents-appellants.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, William H. Lazar, Asst. Appellate Defender, Santa Fe, for petitioner-appellee.

OPINION

PHIL BAIAMONTE, District Judge.

This is a habeas corpus action filed in the District Court of Santa Fe County. The cause was heard on July 13, 1976, before the Honorable Thomas A. Donnelly, District Judge. The decision of the Court was that petitioner be released from incarceration subject to existing parole conditions. Respondents appeal. We affirm.

Petitioner was a parolee from the Penitentiary of New Mexico and was charged with violating the conditions of his parole. A preliminary probable cause parole revocation hearing was held in Roswell, New Mexico, with Hearing Officer T. C. Batho presiding. Mr. Batho determined that petitioner was entitled to counsel and petitioner was represented at this hearing by a public defender. Following the hearing, Mr. Batho determined that there was no probable cause to find that petitioner had violated the conditions of his parole. The hearing officer concluded that to be guilty of the offense of possession of marijuana, the possessor must be the owner of the marijuana that is possessed. This was an error of law.

Thereafter, Batho's supervisor, Mr. Santos Quintana, Field Services Director of the Department of Corrections, determined that Mr. Batho had made a mistake in applying the law to the facts found in the first hearing, and Mr. Quintana ordered a second hearing to be conducted before Hearing Officer Ward Lockhart. Mr. Lockhart conducted a second hearing, and determined that petitioner was not entitled to counsel; he further found that there was probable cause to believe that petitioner had violated the conditions of his parole.

We hold that the Field Services Division Director acted within his statutory and inherent authority in ordering a new preliminary hearing when the initial hearing officer's finding of no probable cause was based on an erroneous legal conclusion. This decision should not be interpreted as allowing the director to order a rehearing when he is merely dissatisfied with the result of the initial hearing. Only upon a clear misapplication of the law or for other strong and compelling reasons should this authority be exercised.

We next consider the question of petitioner's right to counsel at the second hearing. This issue was decided in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) wherein the Court states:

> We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.
>
> It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements. The facts and circumstances in preliminary and final hearings are susceptible of almost infinite variation, and a considerable discretion must be allowed the responsible agency in making the decision. 411 U.S. at 790, 93 S.Ct. at 1763.

We follow the reasoning and holding in *Gagnon v. Scarpelli*, supra. We hold that the state authority charged with the responsibility for administering the probation and parole system has discretion to determine the need for counsel on a case-by-case

basis. However, if the determination is made to supply counsel to indigent parolees, then counsel must be made available and given the opportunity to participate in any subsequent rehearings.

In the instant case it was determined at the first hearing that the petitioner was entitled to counsel; at the second hearing it was determined that the petitioner was not entitled to counsel. This was error and the trial court so found.

The result of the trial court is affirmed based upon the failure to provide counsel at the second hearing.

IT IS SO ORDERED.

SOSA and PAYNE, JJ., concur.

567 P.2d 487

Dorothy WILLIAMS, Plaintiff-Appellant,

v.

Bill (William) COBB, Defendant-Appellee.

No. 2723.

Court of Appeals of New Mexico.

May 24, 1977.

Benjamin M. Sherman, Sherman & Sherman, Deming, for plaintiff-appellant.

Edward E. Triviz, Las Cruces, for defendant-appellee.

OPINION

LOPEZ, Judge.

The plaintiff filed suit for damages and personal injury resulting from a collision at an intersection in Deming, New Mexico. The jury returned a verdict for the defendant and the trial court entered judgment accordingly. The plaintiff appeals. We reverse.

The plaintiff asserts reversible error with regard to several instructions which were given, and some which were refused, relating to the following issues: (1) contributory negligence; (2) sudden emergency; (3) independent intervening cause; and (4) the

assumption permitted to a motorist traveling on a thoroughfare.

The record establishes the following: the collision between the plaintiff's and the defendant's cars occurred at the intersection of Spruce Street, a thoroughfare running east and west, and Iron Street, an intersecting street running north and south. There was a stop sign which was turned sideways on the northwest corner of the intersection; the sign was supposed to face north to stop traffic traveling south on the intersecting street, Iron Street. Just prior to the collision, the plaintiff was driving in an easterly direction at a speed of between 22 to 25 miles per hour. The plaintiff, a long time resident of Deming, was familiar with the street and knew that she was on the designated right-of-way. The defendant was driving his automobile in a southerly direction on Iron Street at a speed of 25 miles per hour. The defendant was unfamiliar with the community. The defendant did not see the stop sign because it was turned sideways so that only its edge was visible. Neither plaintiff nor defendant stopped at the intersection. The record reveals that the view at the intersection was partially obstructed, both cars entered the intersection at approximately the same time, neither at excessive speed, and the accident happened too quickly for either party to avoid the collision.

The question presented by this case appears to be one of first impression in New Mexico. The question is well summarized in 74 A.L.R.2d 242, 243 (1960), which annotates many similar cases. Therein, the question was stated as this:

> "What effect, if any, does a missing, displaced, or obliterated stop sign, or a malfunctioning traffic signal, have upon the liability of a motorist for a collision at the intersection of an arterial highway, boulevard, or through street with an unfavored servient or secondary street or road?"

For clarity we will refer to Spruce Street, which is the thoroughfare, arterial highway or boulevard, as a "through" street, i. e., having no stop signs or traffic signals at the particular intersection. We will refer to the unfavored servient or secondary street as the "intersecting" street. We will address the appellant's last point first.

Assumption Permitted to a Motorist on a Through Street

The contention is that the court erred by failing to instruct the jury as to the assumption permitted to one traveling on a through street. The plaintiff tendered two instructions:

> "If you find that Dorothy Williams was traveling on a through street and did not see whether a driver approaching the intersection with the through street did or would not stop for the through street, you must find that Dorothy Williams was not contributorily [sic] negligent. But if you find that Dorothy Williams was aware that the driver approaching the through street intersection was not going to stop at the "stop" sign before entering the intersection, you must find that Dorothy Williams had a duty to take steps to avert a collision and to take precautions commensurate with the dangers reasonably to be anticipated under the circumstances.
>
> "3 Blashfield, Automobile Law and Practice Sec. 114.102 p 229"
>
> "You are instructed that an automobile driver, with knowledge of location of stop signs, has a right to rely, when crossing intersection, upon the assumption that anyone approaching will observe same, and will not undertake to cross against them and need not anticipate that a driver will enter the intersection in violation of a stop sign.
>
> "*Mayfield v. Crowdus,* 38 N.M. 471 (1934) 3–4 Huddley's [sic] Encyclopedia of Automobile Law (9th ed) sec. 154, 1 Blashfield's Cyclopedia of Automobile Law Sec 24 (1932) p. 68, 2 Blashfield, Cyclopedia of Automobile Law and Practices Sect. [sic] 1028 at P. 305 & 306"

There exists a general rule of law applicable to this case. In a factual context quite similar to the case at bar, the Louisiana Court of Appeal for the Fourth Circuit

considered the general rule. In the case of *Ory v. Travelers Insurance Co.,* 235 So.2d 212 (La.App.1970) the court said:

". . . It [the Louisiana Court of Appeal for the Third Circuit in *Fontenot v. Hudak,* 153 So.2d 120 (La.App.1963)] observed that *had the stop sign been standing, clearly plaintiff would have been entitled to recovery,* citing *Martin v. Barros,* 142 So.2d 171 (La.App.3d Cir. 1962); and *Hernandez v. State Farm Mutual Ins. Co.,* 128 So.2d 833 (La.App.3d Cir. 1961). The court then went on to say:

'The general rule of law in a case where a stop sign has been misplaced, improperly removed, destroyed or obliterated is set out in 74 A.L.R.2d at pages 245 and 246, and reads as follows:

"Where the boulevard, through street, or arterial highway has been properly designated and appropriate signs have been erected, it ordinarily has been held that *the preferred status of the highway is not lost merely because a stop sign is misplaced, improperly removed, destroyed, or obliterated.*

. . .

"*The rule that a motorist driving on an arterial or preferred road protected by stop signs is entitled to assume that the driver of a vehicle on an intersecting servient street will obey the law and stop or yield the right of way has been held not rendered inapplicable because a stop sign which ordinarily should face the motorist on the side street has been misplaced, destroyed or improperly removed.* But the right to rely on the assumption may be lost where the driver on the arterial road is not himself exercising due care while approaching or crossing the intersection, and motorist [sic] upon arterial highways will be held liable, of course, for collisions resulting from their failure to exercise due care toward traffic on the intersecting road."'" [Emphasis added]

Several cases have taken exception to the general rule, one of which is relied on by defendant. *Schmit v. Jansen,* 247 Wis. 648, 20 N.W.2d 542, 162 A.L.R. 925 (1945). But the *Schmit* case is distinguishable. In *Schmit* the court found evidence that each party used the same degree of caution and the accident occurred as each party, using reasonable care, relied on presumed rights-of-way. The defendant in *Schmit* had the general right-of-way. In the instant case the plaintiff was not only on the through street, but she also had the general right-of-way. We proceed to explain this distinction.

We note that there exist two distinct rights-of-way on the highways of New Mexico. The first is often referred to as the general rule or statutory right-of-way. This is exemplified by § 64–18–27, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 2, 1972) which states:

"*Vehicle approaching or entering intersection.*—(a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.

"(b) When two [2] vehicles enter an intersection from different highways at approximately the same time *the driver of the vehicle on the left shall yield the right of way to the vehicle on the right.*

"(c) The right of way rules declared in paragraphs (a) and (b) are modified at through highways and otherwise as hereinafter stated in this article [64–18–27 to 64–18–31]." [Emphasis added].

For clarity we will refer to this as the general right-of-way.

The general right-of-way applies only when neither street at an intersection is a through street. *Bunton v. Hull,* 51 N.M. 5, 177 P.2d 168 (1947). The general right-of-way can be modified as provided by § 64–18–27(c), supra. The modified right-of-way is often referred to as a modified, designated, controlled, or preferential right-of-way. A stop sign creates one such right-of-way, as stated in § 64–18–29, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2, 1972):

"*Vehicles entering stop or yield intersection.—A. Preferential right of way at an intersection may be indicated by*

stop signs or yield signs as authorized in the Motor Vehicle Code.

"B. Except when directed to proceed by a police officer or traffic-control signal, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop as required by section 64–18–44C and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on the highway as to constitute an immediate hazard during the time when the driver is moving across or within the intersection." [Emphasis added]

For clarity we will refer to this as the preferential right-of-way.

Several cases follow the *Schmit* case. *Schmit* considers an intersection where the stop sign has been destroyed, obliterated, or rendered useless, as an uncontrolled intersection. The analysis then looks to the general right-of-way to determine if an unavoidable accident has occurred. See, e. g., *Austinson v. Kilpatrick,* 105 N.W.2d 258 (N.D.1960); *Hammon v. Brazda,* 173 Neb. 1, 112 N.W.2d 272 (1961).

Fortunately, this Court does not need to choose between two apparently conflicting points of view because the plaintiff in the instant case had both the preferential and general rights-of-way.

Although we believe that the better view is that the preferred status of a through street is not lost merely because a stop sign is misplaced, improperly removed, destroyed, or obliterated, *Jenkins v. City of Alexandria,* 324 So.2d 924 (La.App.1976), cert. denied, La., 328 So.2d 105 (1976), the facts of this case present a clear solution because the defendant entered the intersection with no apparent right-of-way. The facts are analogous to the case of *Cangiamilla v. Brindell-Bruno, Inc.,* 210 So.2d 534 (La.App.1968), cert. denied, 252 La. 839, 214 So.2d 162 (1968). Therein the court held that the motorist on the intersecting street was negligent in failing to maintain a proper lookout. Regardless whether the intersecting motorist knew or should have known of the stop sign, he entered the intersection *with no apparent right-of-way* and collided with a vehicle that under normal circumstances would have had both the preferential right-of-way if proper controls had been in place as well as the general right-of-way. See *Funderburk v. Temple,* 268 So.2d 689 (La.App.1972), cert. denied, La., 270 So.2d 875 (1973). We adopt this reasoning; it is compelling and dispositive.

The requested instructions did not provide the plaintiff with an absolute right-of-way. The instructions impose a duty on the driver along the through street to keep a proper lookout. See, e. g., *Dillman v. Allstate Insurance Company,* 265 So.2d 322 (La.App.1972). But in this case the plaintiff did everything possible to avoid the collision even though she had the right-of-way. The plaintiff testified that if she had been aware of the defendant's car entering the intersection, she would not have proceeded. If the plaintiff did all she could to avoid the accident, she had a right to proceed through the intersection; therefore, the requested instruction stated the correct rule of law and should have been given.

In essence, the instructions state the rule of *Barbieri v. Jennings,* 90 N.M. 83, 559 P.2d 1210 (Ct.App.1976). The driver of an automobile has a right to assume that the drivers of other automobiles will obey the law. *Bunton v. Hull,* supra. We believe that the plaintiff was entitled to the two instructions because there was evidence to support the proposed theories. *Sandoval v. Cortez,* 88 N.M. 170, 538 P.2d 1192 (Ct.App. 1975).

Plaintiff's Contributory Negligence

The plaintiff objects to the trial court giving part of instruction no. 2, an affirmative defense, which reads as follows:

". . . 1. The plaintiff was contributorily [sic] negligent and cannot recover in that:

". . .

"d. In the exercise of reasonable care and caution plaintiff should have observed that the stop sign was so situated as to be ineffective to the defendant as a

motorist and, therefore, not have relied on a right of way."

Plaintiff argues that there is no evidence to justify the giving of this instruction. Plaintiff argues that the instruction is a misstatement of the law because it requires a driver on a through street to examine the stop signs along intersecting streets to see if the signs are in their proper place.

In this case, although the plaintiff knew the existence of a stop sign, there was no evidence that plaintiff knew the sign was turned sideways. A party is entitled to have the jury instructed on all legal theories of the case which are supported by substantial evidence. *Sandoval v. Cortez,* supra. This portion of the instruction was erroneously given because it is not supported either by evidence or by law.

We believe that to require the driver on a through street to know the condition of the stop signs along intersecting streets is a misstatement of the law. The correct rule of law, that the person on the through street can justifiably rely on others to stop (or obey the law), has already been discussed under the first part of this opinion. See *Barbieri v. Jennings,* supra; *Bunton v. Hull,* supra; *Mayfield v. Crowdus,* 38 N.M. 471, 35 P.2d 291 (1934); 3 A.L.R.3d 180, 255 (1965).

Plaintiff also objects to the portion of N.M.U.J.I. Civ. 3.1, given in instruction no. 2:

"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 any one of the defendant's affirmative defenses have been proved), then your verdict should be for the defendant."

Appellant's argument is without merit. The Supreme Court by order adopted this instruction; therefore, we are bound to follow the Supreme Court's order on the use of these approved instructions. This Court is not free to abolish the instruction. *State v. Scott,* 90 N.M. 256, 561 P.2d 1349 (Ct.App.) decided March 1, 1977.

Sudden Emergency

The court gave N.M.U.J.I. Civ. 13.14 regarding sudden emergency.

The plaintiff does not object to the instruction as being an incorrect statement of the law; the plaintiff argues that the evidence did not justify the giving of the instruction.

Assuming, arguendo, that there was an emergency, according to *Seele v. Purcell,* 45 N.M. 176, 113 P.2d 320 (1941), the Supreme Court, quoting from 42 C.J. Motor Vehicles § 592 (1927) stated:

"Where the automobilist created the emergency, or brought about the perilous situation, through his own negligence, he cannot avoid liability for an injury on the ground that his acts were done in the stress of emergency."

Even if we were to agree that there was an emergency, there was evidence the emergency was caused by the defendant's negligence; therefore, he cannot take advantage of a sudden emergency instruction. 80 A.L.R.2d 5, 16 (1961). Any emergency was a natural and direct result of the defendant's failure to stop before entering the intersection. The defendant was not "without negligence on his part." We believe that the sudden emergency instruction should not have been given because it served to confuse the jury by injecting a false issue. *Embrey v. Galentin,* 76 N.M. 719, 418 P.2d 62 (1966).

Independent Intervening Cause

At the request of the defendant, the trial court gave instruction no. 20:

"A negligent act or omission cannot be said to be a proximate cause of an injury if, between the time of the negligent act or omission and the time of the injury in question there occurs an 'independent intervening cause' of such injury.

"An 'independent intervening cause' is an act or omission which interrupts the natural sequence of events following from the first act or omission, turns aside its course, prevents the fulfillment of the natural and probable result of the original act or omission, and produces a differ-

ent result that could not have been reasonably foreseen to have been a result of the original act or omission."

This instruction is N.M.U.J.I. Civ. 13.15.

The plaintiff argues that there was no evidence to justify the instruction. The defendant asserts that the sign which had been turned sideways was an independent intervening cause.

We have looked at the record and it shows that, prior to the collision, the defendant did not see the stop sign because he was looking to the left, away from the sign. Whether or not the sign was misplaced is immaterial because the defendant did not look in the direction of the stop sign.

Thompson v. Anderman, 59 N.M. 400, 285 P.2d 507 (1955) states that before an instruction on independent intervening cause is given, there must be an intervening act which breaks the natural sequence of the negligent conduct of one of the parties, so the unforeseeable intervening act stands as the efficient cause of the injury and damage. The defendant has failed, however, to present evidence that any act broke the natural sequence of events, caused the accident, and thereby insulated the negligence of the original tortfeasor. Failure to keep a lookout and running the stop sign produced a foreseeable result, *Lopez v. Southern Pacific Company,* 499 F.2d 767 (10th Cir. 1974), and was the proximate cause of the accident. *Sellman v. Haddock,* 66 N.M. 206, 345 P.2d 416 (1959). See also *Vallot v. Touchet,* 337 So.2d 687 (La.App.1976); *Mondello v. State Dept. of Highways,* 338 So.2d 730 (La.App.1976), cert. denied, La., 340 So.2d 991 (1977).

We believe that the submission of the instruction created a false issue which misled and confused because the jury may have found the defendant negligent, but could have considered the condition of the stop sign to excuse or justify the negligence. See *Embrey v. Galentin,* supra. It was reversible error to give this instruction. See *Kelly v. Montoya,* 81 N.M. 591, 470 P.2d 563 (Ct.App.1970).

The jury verdict and the judgment are reversed and the cause is remanded to the district court for a new trial to proceed in accordance with this opinion.

IT IS SO ORDERED.

SUTIN and HERNANDEZ, JJ., specially concurring.

SUTIN, Judge (specially concurring).

I concur in the result.

Judge Lopez' opinion holds that the refusal of plaintiff's requested instructions on "assumption" is reversible error. I disagree. The opinion holds that the trial court's instructions on the affirmative defense of contributory negligence, sudden emergency and independent intervening cause are reversible error. I agree.

The opinion also contains statements, citation of authorities and discussions with which I disagree. But to specify each disagreement would add fuel to the fire.

To me, it is a sad day in the field of negligence law to note that attorneys submit non-U.J.I. instructions to bolster a claim for relief or an affirmative defense, submit U.J.I. instructions that are clearly inapplicable, and weave theories of law that lead juries astray. To invite reversible error is foolish and puerile. To plead for "harmless error" is a plea to sustain a verdict of the jury without the unknowable fact of its impact on the jury. The use of the doctrine of "harmless error" in the submission of erroneous instructions to the jury means that the appellate judges are returning their own verdict, preceded by, but independent of, the jury's verdict. This appellate verdict is founded upon a knowledge of the learning of jurors and their discussion of the erroneous instructions given. Appellate judges are able to and do disregard improper matters, but it is impossible to know that the jury did.

Experience has taught me that jurors are a cross section of people in the community with average intelligence, sincere in their devotion to this service. Instructions are read and analyzed, discussed and debated. Each instruction given does bear upon the verdict of the jury. For these reasons, we

have adopted U.J.I. to try and avoid reversible error. Jurors heed the legal instructions given by a judge, the expert, and accord to him appropriate respect for his superior legal wisdom.

Attorneys who participate in negligence trials should read, study and know the impact of non-U.J.I. instructions and improper U.J.I. instructions submitted to a jury. To win the battle on instructions and lose the war does not comport with a fair trial.

This appeal is based on error in the court giving three instructions, and its failure to give two of plaintiff's requested instructions.

A. *Instruction on defendant's affirmative defenses was erroneous.*

The court instructed the jury that:

1. The plaintiff was contributorily negligent and cannot recover in that:

* * * * * *

d. In the exercise of reasonable care and caution plaintiff should have observed that the stop sign was so situated as to be ineffective to the defendant as a motorist and, therefore, not have relied on a right of way.

In effect, it told the jury that plaintiff should not rely on the right-of-way if she should have seen that the stop sign was ineffective to the defendant. Defendant does not explain by what process of mental reasoning plaintiff could know what effect a stop sign turned edgewise can have on defendant driving into the intersection at 25 miles per hour. The jury could well have believed that plaintiff, in the exercise of reasonable care, had a duty at some time prior to the collision, to slow down or stop and observe the stop sign turned edgewise on an intersecting street, to see what effect the stop sign turned edgewise would have on a motorist driving into the intersection, and perhaps yield the right-of-way. This would require plaintiff to drive down defendant's street to make the determination of cause and effect.

We are not aware of any rule of the road that requires a driver on an arterial highway to examine stop signs on an intersecting street to see if they are properly in place or position and what effect the stop sign will have on a motorist driving into the arterial highway from an intersecting street. If the defendant had any complaint to make, he should have pointed his finger at the City, not the plaintiff.

A right-of-way is not exclusive. Plaintiff had a duty to exercise reasonable care to avoid a collision when she became aware of the fact that defendant would not yield the right-of-way. *Langenegger v. McNally,* 50 N.M. 96, 171 P.2d 316 (1946). This burden was placed on plaintiff in the above instruction. Instruction 1(a), (b) and (c) required plaintiff to keep a proper lookout, control her car and control speed. Defendant could ask for no more.

Furthermore, U.J.I. 3.1 contains a note:

Here set forth in simple form such affirmative defenses which are supported by the evidence such as

The plaintiff was contributorily negligent in that:

(1) The defendant was entitled to the right of way, which plaintiff failed to yield to him.

(2) The plaintiff was not keeping a proper lookout to avoid a collision.

Instruction 1(d) was not supported by any evidence.

U.J.I. 3.1, *Directions On Use* says:

This is the most important single instruction in the lawsuit, and court and counsel should give particular attention to it.

When court and counsel flagrantly abuse this cautionary directive, they must begin the trial all over again. Being clear, manifest and palpable error on one of the crucial issues in the case, it is prejudicial error.

B. *U.J.I. 3.1 on plaintiff's burden of proof is confusing.*

Plaintiff objected to a portion of U.J.I. 3.1 because it was misleading and it led the jury to believe plaintiff had a duty to prove all acts of negligence of the defendant instead of one act of negligence.

U.J.I. 3.1 reads, and the jury instructed, that:

> The plaintiff has the burden of proving that [she] sustained damage and *that one or more of the claimed acts of negligence* was the proximate cause thereof.
>
> * * * * * *
>
> If you find that the plaintiff has proved *those claims required of [her]* . . . 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* . . . then your verdict should be for the defendant. [Emphasis added.]

Plaintiff made only one claim for relief based on several acts or claims of negligence. The jury instructions were sent to the jury room. They are usually read and analyzed. The average mind of a juror could conclude that the plaintiff must prove "those claimed *acts* of negligence required of her," and if she does not prove "any one of the claims" she cannot recover. For example, the word "cloud" means a dark spot on the forehead of a horse between the eyes. To a jury it can mean a host of definitions. There is a difference between a "claim" and a "claim for relief". To avoid confusion, the concluding portion of U.J.I. 3.1 should read:

> If you find that the plaintiff has proved *"the claim(s) for relief"* required of her . . . then your verdict should be for the plaintiff.
>
> If on the other hand, you find that plaintiff's *"claim(s) for relief"* . . . has not been proved . . . then your verdict should be for the defendant. [Emphasis added.]

This suggestion also applies to affirmative defenses.

If the jury believed that plaintiff had to prove all of the alleged acts of negligence of the defendant set forth in the instruction, it could have affected the verdict.

C. *The sudden emergency instruction was erroneous.*

In the instant case, the facts show that defendant did not have a choice between two courses of action to take to avoid the collision. "The sudden emergency doctrine applies to the choice an actor makes after he is confronted with sudden peril through no fault of his own." *Martinez v. Schmick,* (Ct.App.) 90 N.M. 529, 565 P.2d 1046, decided May 10, 1977 (Sutin, J., dissenting). Under the facts of this case, giving U.J.I. 13.14, Sudden Emergency, was reversible error.

D. *Plaintiff's requested instruction on contributory negligence and "assumption" were properly refused.*

Plaintiff's requested instructions on "assumption" are set forth in Judge Lopez' opinion. The first one says: "[Y]ou must find that Dorothy Williams was not contributorily negligent." The error of this instruction needs no comment. The second one provides that plaintiff had a right to rely "upon the assumption" that defendant would see the stop sign and not undertake to cross the intersection, and need not anticipate that a driver will enter the intersection in violation of a stop sign.

These are not U.J.I. instructions and they were properly refused. Uniform jury instructions have been in existence for over eleven years. Yet, trial attorneys and district judges fail to read Rule 51(c) and (e) [§ 21–1–1(51)(c), (e), N.M.S.A.1953 (Repl. Vol. 4)]. Rule 51(c) says: ". . . [T]he U.J.I. instruction shall be used unless under the facts or circumstances of the particular case the published Uniform Jury Instruction is erroneous or otherwise improper, and the trial court so finds and states of record its reasons." The trial attorney and the district court should know that non-U.J.I. instructions are a nuisance; that the submission of them to the jury can be reversible error.

Rule 51(e) allows attorneys to request non-U.J.I. instructions on a subject like products liability where no applicable instruction on the subject is available. See, U.J.I. 16.5. Instructions on products liabili-

ty have been drafted by the Supreme Court Committee and will soon be made effective.

We recognize that a driver on a through highway has the right to assume that a driver on the intersecting stop road would obey the law by coming to a full stop before entering the highway. *Bunton v. Hull,* 51 N.M. 5, 177 P.2d 168 (1947). But the right to instruct upon this "assumption" is foreclosed until the Supreme Court adopts an instruction on this theory. "Assumption" is a matter of argument, in this case, to avoid contributory negligence.

E. *The "intervening cause" instruction was erroneous.*

The "intervening cause" instruction appears in Judge Lopez' opinion. To request and submit this instruction under the facts of this case is nonsense. To argue that a stop sign, turned edgewise, is an independent, intervening cause of an intersection collision is twiddle-twaddle. It does not require the citation of authority.

HERNANDEZ, Judge (specially concurring).

I concur in the result. I disagree with Judge Lopez on his point one, "Assumption Permitted to a Motorist on a Through Street." The cases on this point in other jurisdictions are generally in accord with *Ory v. Travelers Insurance Co.,* supra. I do not agree with Judge Lopez' analysis that *Schmit v. Jansen,* 247 Wis. 648, 20 N.W.2d 542, 162 A.L.R. 925 (1945) is an exception to the rule of *Ory,* supra. *Schmit* shares with *Ory* the view that a motorist on a through street has the right to rely on the assumption that traffic on a cross street will stop before entering an intersection with a through street, and that the assumption holds even when a stop sign on the cross street is missing or displaced. *Schmit* simply found that there was an unavoidable accident because, under the facts of the case, the motorist on the through street had the preferential right-of-way, while the motorist on the cross street had the general right-of-way because the other driver was approaching from her left. Although I agree with Judge Lopez about the rules of right-of-way and their application in this case, I cannot agree that it was error for the trial court to refuse the first of the tendered instructions on the subject, because the instruction does not state the law correctly. The last sentence quoted from *Ory* by Judge Lopez sums up what is missing from the tendered instruction:

> "But the right to rely on the assumption may be lost where the driver on the arterial road is not himself exercising due care while approaching or crossing the intersection, and motorist [sic] upon arterial highways will be held liable, of course, for collisions resulting from their failure to exercise due care toward traffic on the intersecting road." [*Ory v. Travelers Insurance Co.,* supra.]

Neither of the tendered instructions gives an adequate indication that plaintiff was still subject to the duty of ordinary care despite her right to rely on having the right-of-way, so that if she saw or *should have seen* defendant's car approaching, she had a duty to try to avoid the collision. The second sentence of the first instruction makes a stab at this, but the error has already been committed in the first sentence, which directs a verdict for plaintiff if she did not see defendant, without regard to whether she should have seen him. It is not error for the trial court to refuse an instruction which is incomplete, erroneous or repetitious. *LaBarge v. Stewart,* 84 N.M. 222, 501 P.2d 666 (Ct.App.1972); cert. denied, 84 N.M. 219, 501 P.2d 663 (1972); *Goodman v. Venable,* 82 N.M. 450, 483 P.2d 505 (Ct.App.1971).

Point two, "Plaintiff's Contributory Negligence." Part 1d of this instruction is so clearly lacking support in the evidence that comment is unnecessary. The other portion of the instruction to which plaintiff objects is as follows:

> "If, on the other hand, you find that any one of the claims required to be proved by the plaintiff has not been proved or that any one of the defendant's affirmative defenses have been proved, then your verdict should be for the defendant." [N.M.U.J.I. Civ. 3.1]

Plaintiff rightly contends that this instruction is misleading, since it might easily be understood to mean that plaintiff must prove all of the five claimed acts of negligence set forth in Instruction No. 1, while in fact plaintiff need only prove one of them. Rule 51(c) (N.M.R.Civ.P. 51(c), § 21–1–1(51)(c), N.M.S.A.1953 ((Repl. Vol. 4, 1970)) provides that "the U.J.I. instruction shall be used unless under the facts or circumstances of the particular case the published Uniform Jury Instruction is erroneous or otherwise improper . . . ." The purpose of instructing the jury is to make the issues that it is to determine plain and clear. *Embrey v. Galentin,* 76 N.M. 719, 418 P.2d 62 (1966). Changing the phrase "any one of the claims" to "any claim" would make Instruction No. 2 less likely to mislead the jury.

Point three, "Sudden Emergency." What Judge Lopez intends to hold on this point is not clear. He says, ". . . there was evidence the emergency was caused by the defendant's negligence; therefore, he cannot take advantage of a sudden emergency instruction." This court has held twice in recent months that the existence of a jury question with regard to whether the party offering the sudden emergency instruction contributed by his own negligence to creating the emergency is not a bar to giving the sudden emergency instruction where there is evidence to support it. *Martinez v. Schmick,* 90 N.M. 529, 565 P.2d 1046 (Ct.App.1977); *Barvier v. Jennings,* 90 N.M. 83, 559 P.2d 1210 (Ct. App.1976). Only if the court can rule as a matter of law that there was prior negligence which contributed to creating the emergency can the sudden emergency instruction be refused. It is not clear whether Judge Lopez intends to hold as a matter of law that defendant in the instant case was guilty of prior negligence. I believe this was a proper question for the jury and the emergency instruction should have been given. Defendant's testimony indicates that he had two possible courses of action in the emergency, to slam on his brakes or to try to go around plaintiff's car.

Point four, "Independent Intervening Cause." I concur with Judge Lopez on this, although I question the implication in his opinion that defendant ran a stop sign, since there was no visible sign for him to run.

567 P.2d 496

STATE of New Mexico, Plaintiff-Appellee,

v.

Kathleen RUUD, Defendant-Appellant.

No. 2849.

Court of Appeals of New Mexico.

June 28, 1977.

J. W. Anderson, Rowley, Bowen, Anderson & Purcell, P. A., Tucumcari, for defendant-appellant.

Toney Anaya, Atty. Gen., Ernesto J. Romero, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of unlawful possession of marijuana in an amount over eight ounces contrary to § 54–11–23(B)(3), N.M.S.A.1953 (Repl.Vol. 8, pt. 2, 1962, Supp.1975) defendant appeals asserting the trial court erred in: (1) not granting the motion to suppress; (2) the method of sentencing. The first point is dispositive. We reverse. The motion to suppress should have been granted.

Testimony of Officer Walsmith

Walsmith of the New Mexico State Police was patrolling westbound on I–40 out of Tucumcari. Defendant was driving eastbound. Walsmith observed that defendant was a "fairly, relatively young" female, driving a "fairly new pickup" with a camper shell and an Iowa license plate. Walsmith "turned around and I stopped her to check her driver's license and registration." He wanted to see if the driver's license and the registration were from the same state. Walsmith stated that ". . . [i]n checking for stolen cars, you check the driver's license to see if it is from the same state the car was from, that sort of gives you a hint, it may not be stolen there, it's not always true, but, it helps." When asked why he thought the vehicle might be

stolen Walsmith stated: ". . . [t]he driver just looked young to me, that's the only thing that I can tell you." He did not think defendant was too young to have a driver's license. The stop was made on a "hunch." Walsmith testified when they go out looking for a "load" (marijuana) they set up a roadblock then use the driver's license and registration to look for everything and that a young driver in a pickup with a camper, with an out-of-state vehicle license plate, would be a good indication that this "might be a good vehicle to search."

Defendant produced an Arizona driver's license but could not produce the registration. Defendant told Walsmith that the vehicle belonged to a friend. Walsmith then asked for permission to look in the back of the camper. He stated the purpose was ". . . [j]ust to look, for my protection, mostly, to see if it had been stolen or anything, I wanted to make sure that she was the only subject present." Walsmith further testified that he was looking for defendant's personal belongings so that he might find the ". . . owner's name, or something on some of the luggage, or something." Defendant gave Walsmith permission and opened the back of the camper. ". . . When she opened the camper door, you could smell a very strong odor of what I thought was marijuana, and also observed marijuana residue scattered all over the floor." A search disclosed several kilos of marijuana.

Motion to Suppress

The state attempts to justify the stop on the foregoing recited facts. We cannot. We have no more here than in *State v. Galvan,* 90 N.M. 129, 560 P.2d 550 (Ct.App.1977). In *Galvan* we held that the officer must have articulable facts available, when viewed by an objective standard, to warrant a person of reasonable caution to believe the action taken is appropriate. Here there was no articulable reason to stop defendant for the purpose of investigating possible criminal behavior. Walsmith was relying on a "hunch" or "intuition."

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) permitted an uncontested search of an automobile without a warrant and without probable cause for arrest where the police had probable cause to believe it is carrying contraband. But as *Almeida-Sanchez v. United States,* 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973) stated:

> ". . . the *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search. . . ."

The state argues that the stop can be justified on the statutory grounds that a driver of a vehicle, shall upon demand exhibit a registration certificate and a driver's license. See §§ 64–3–11 and 64–13–49, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2, 1972). Those statutes grant the police the unquestioned good faith right to detain motor vehicles for the purpose specified. See *State v. Severance,* 108 N.H. 404, 237 A.2d 683 (1968). But any such actions must be in conformity with the constitutional requirements of the Fourth Amendment of the United States Constitution. See *Carroll v. United States,* supra. When the detention becomes an excuse for some other purpose which would not be lawful the actions then become unreasonable and fail to meet the constitutional requirement. *Murphy v. State,* 194 Tenn. 698, 254 S.W.2d 979 (1953); *Morgan v. Town of Heidelberg,* 246 Miss. 481, 150 So.2d 512 (1963); *State v. Bloom,* 90 N.M. 226, 561 P.2d 925 (Ct.App.1976) reversed on other grounds, (scope of appellate review) 90 N.M. 192, 561 P.2d 465 (1977).

Although *United States v. Jenkins,* 528 F.2d 713 (10th Cir. 1975) and *United States v. Lepinski,* 460 F.2d 234 (10th Cir. 1972) have interpreted the foregoing statutes to permit random stopping for registration and driver's license checks, they did so prior to any New Mexico decisions ruling on the subject. New Mexico decisions, as long as they are not violative of minimum federal constitutional standards,

are controlling. *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). Accordingly, *Jenkins* and *Lepinski* are not controlling and are overruled insofar as they relate to the foregoing statutes.

What we hold here today does not however affect those routine roadblocks set up in good faith to check registration certificates and driver's licenses. See *State v. Bidegain,* 88 N.M. 466, 541 P.2d 971 (1975). In those instances all travelers are checked. It is a routine check and a legitimate purpose. However, the statutes do not nor cannot authorize a random selection of motorists based on a "hunch" or a "guesstimate." Such would violate minimum federal constitutional standards. *Ker v. California,* supra. The powers and duties of the State Police (§ 39–2–17, N.M.S.A.1953 (2d Repl.Vol. 6, 1972)) are rather broad and well they should be. But those powers are always controlled by constitutional standards. See *Almeida-Sanchez v. United States,* supra.

In the instant cause the facts are basically undisputed as to the reason for the stop. The facts will not support the random stop and thus will not meet the test of reasonableness under the Fourth Amendment. The facts did not provide the officer, as a person of reasonable caution, with a reasonable suspicion that the law had been or was being violated. See *State v. Galvan,* supra, and cases cited therein.

But the foregoing does not provide a complete answer as to whether there was a valid consent to search after the illegal stop. A voluntary consent can validate what might otherwise be an illegal search and seizure. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The only testimony (Walsmith) relating to consent is as follows:

"A. I just asked permission to look in the back.

* * * * * *

"Q. What was Miss Ruud's response to that?

"A. She advised yes, and opened the back of the camper."

Without more we cannot say, as a matter of law, that it constitutes a showing of a valid consent to search within the language of *State v. Carlton,* 83 N.M. 644, 495 P.2d 1091 (Ct.App.1972):

". . . we do not hold that the *Miranda* warnings must of necessity be given before there can be a valid consent to search. See *State v. Carlton,* 82 N.M. 537, 484 P.2d 757 (Ct.App.1971). All that is required is that a consent to search 'must be freely and intelligently given, must be voluntary and not the product of duress or coercion, actual or implied, *and must be proved by clear and positive evidence with the burden of proof on the state.' State v. Aull,* 78 N.M. 607, 435 P.2d 437 (1967), cert. denied, 391 U.S. 927, 88 S.Ct. 1829, 20 L.Ed.2d 668 (1968). . . ." (Emphasis Ours)

When we speak of voluntary, we speak in the terms as set forth in *Schneckloth v. Bustamonte,* supra, from which we quote extensively:

"The most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession for purposes of the Fourteenth Amendment. Almost 40 years ago, in *Brown v. Mississippi,* 297 U.S. 278 [56 S.Ct. 461, 80 L.Ed. 682], the Court held that a criminal conviction based upon a confession obtained by brutality and violence was constitutionally invalid under the Due Process Clause of the Fourteenth Amendment. In some 30 different cases decided during the era that intervened between *Brown* and *Escobedo v. Illinois,* 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977], The Court was faced with the necessity of determining whether in fact the confessions in issue had been 'voluntarily' given. It is to that body of case law to which we turn for initial guidance on the meaning of 'voluntariness' in the present context.

"Those cases yield no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen. 'The notion of

"voluntariness,"' Mr. Justice Frankfurter once wrote, 'is itself an amphibian.' *Culombe v. Connecticut,* 367 U.S. 568, 604–605 [81 S.Ct. 1860, 1880–1881, 6 L.Ed.2d 1037]. It cannot be taken literally to mean a 'knowing' choice. 'Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are "voluntary" in the sense of representing a choice of alternatives. On the other hand, if "voluntariness" incorporates notions of "but-for" cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.' It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.'

"Rather, 'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. See *Culombe v. Connecticut, supra,* at 578–580 [81 S.Ct., at 1865–1866]. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. *Haynes v. Washington,* 373 U.S. 503, 515 [83 S.Ct. 1336, 1344, 10 L.Ed.2d 513]. At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice. '[I]n cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.' *Blackburn v. Alabama,* 361 U.S. 199, 206–207 [80 S.Ct. 274, 280, 4 L.Ed.2d 242]. See also *Culombe v. Connecticut, supra,* [367 U.S.] at 581–584 [81 S.Ct., at 1867–1869]; *Chambers v. Florida,* 309 U.S. 227, 235–238 [60 S.Ct. 472, 476–478, 84 L.Ed. 716].

"This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect. 'The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.' *Culombe v. Connecticut, supra,* 367 U.S. at 602 [81 S.Ct., at 1879].

"In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, *e. g., Haley v. Ohio,* 332 U.S. 596 [68 S.Ct. 302, 92 L.Ed. 224]; his lack of education, *e. g., Payne v. Arkansas,* 356 U.S. 560 [78 S.Ct. 844, 2 L.Ed.2d 975]; or his low intelligence, *e. g., Fikes v. Alabama,* 352 U.S. 191 [77 S.Ct. 281, 1 L.Ed.2d 246]; the lack of any advice to the accused of his constitutional rights, *e. g., Davis v. North Carolina,* 384 U.S. 737 [86 S.Ct. 1761, 16 L.Ed.2d 895]; the length of detention, *e. g., Chambers v. Florida,* supra; the repeated and prolonged nature of the questioning, *e. g., Ashcraft v. Tennessee,* 322 U.S. 143 [64

S.Ct. 921, 88 L.Ed.2d 1192]; and the use of physical punishment such as the deprivation of food or sleep, *e. g., Reck v. Pate,* 367 U.S. 433 [81 S.Ct. 1541, 6 L.Ed.2d 948]. In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. *Culombe v. Connecticut, supra* [367 U.S.] at 603 [81 S.Ct., at 1879].

"The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. See *Miranda v. Arizona,* 384 U.S. 436, 508 [86 S.Ct. 1602, 1645, 16 L.Ed.2d 694] (Harlan, J., dissenting); id., at 534–535 [86 S.Ct., at 1659–1660]. (White, J., dissenting). In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they were not in and of themselves determinative. *See, e. g., Davis v. North Carolina, supra; Haynes v. Washington,* supra, [373 U.S.] at 510–511 [83 S.Ct., at 1341–1342]; *Columbe v. Connecticut,* supra, [367 U.S.] at 610 [81 S.Ct., at 1883]; *Turner v. Pennsylvania,* 338 U.S. 62, 64 [69 S.Ct. 1352, 93 L.Ed. 1810]." (Footnotes Omitted)

■ The state failed to meet its burden. Compare *Potts v. State,* 500 S.W.2d 523 (Tex.Cr.App.1973).

■ By what we say today we do not hold that a stop without reasonable suspicion that the law had been or was being violated taints all that follows. However, the voluntary nature of any consent that follows must be established by clear and positive evidence with the burden of proof on the state. *State v. Carlton,* supra. This does not mean that a person is without a remedy for an illegal stop. The civil law provides such a remedy.

Reversed and remanded.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

WOOD, C. J., concurring in part and dissenting in part.

WOOD, Chief Judge (concurring in part and dissenting in part).

Upon stopping the vehicle, the officer checked defendant's driver's license and sought to check the registration papers for the vehicle. This is undisputed. However, it is also undisputed that the reason for stopping the car was *not* for a good faith driver's license or a registration check. Rather, the stop was on the basis of the officer's "hunch" that the car was stolen. The officer arrived at this "hunch" after observing a young female driving a fairly new pickup with a camper shell and with an out-of-state license plate. These three facts do not provide a basis for an investigatory stop. See *State v. Galvan,* 90 N.M. 129, 560 P.2d 550 (Ct.App.1977).

The justification advanced for the stop is that New Mexico statutes authorize stops to check on driver's licenses and vehicle registrations. *State v. Bloom,* 90 N.M. 226, 561 P.2d 925 (Ct.App.1976), overruled on other grounds, 90 N.M. 192, 561 P.2d 465 (1977) held that such stops are constitutionally impermissible if the stop is a "subterfuge or excuse for some other purpose which would not be lawful . . . ." The uncontradicted evidence is that the stop in this case was for the purpose of following up a hunch that the vehicle was stolen. This was a pretext stop and was illegal. To this extent I agree with the majority opinion.

I disagree with the majority in holding all random stops to check driver's licenses and registration papers illegal and in purporting to overrule *United States v. Jenkins,* 528 F.2d 713 (10th Cir. 1975) and *United States v. Lepinski,* 460 F.2d 234 (10th

Cir. 1972). The stop in our case was not for the purpose of checking defendant's license or registration; thus, the validity of "random," stops need not be decided. Even if *Jenkins* and *Lepinski* are applicable, they go no further than to uphold a *good faith* stop. That is not the situation in this case.

I also disagree with the majority discussion of defendant's consent. There was no claim that her consent was involuntary. Defendant's argument to the trial court was "that this initial detention is in violation of her rights under the Fourth Amendment and everything that followed is tainted thereby." There was no reason for the State to prove a "voluntary" consent in the trial court because the validity of the consent was not attacked. The matter at issue in the trial court was the validity of the initial stop. While defendant asserted a "tainted" consent in the trial court, this "taint" was not developed in the trial court and is not argued on appeal. Whether the consent was tainted by the illegal stop is a question of fact. See *Potts v. State,* 500 S.W.2d 523 (Tex.Cr.App.1973); compare *State v. Bidegain,* 88 N.M. 466, 541 P.2d 971 (1975). No ruling of the trial court was invoked, either on "consent" or "tainted consent".

Although the initial stop was illegal, there is no basis for reversing unless the consent was invalid. Since the validity of the consent was not litigated in the trial court and since there is no "consent" ruling to review, I would affirm.

567 P.2d 965

GEORGE M. MORRIS CONSTRUCTION COMPANY, Plaintiff-Appellee,

v.

FOUR SEASONS MOTOR INN, INC., and Dale J. Bellamah Corporation, Defendants-Third-Party Plaintiff-Appellants,

and

American Bonding Company, a Nebraska Corporation, Third-Party Defendant-Appellee,

and

Named Individual Laborers, Intervenors-Appellees.

No. 11136.

Supreme Court of New Mexico.

Aug. 11, 1977.

Ahern, Montgomery & Pongetti, J. Victor Pongetti, Albuquerque, for defendants-third-party plaintiffs-appellants.

Menig, Sager, Curran & Sturges, Edward T. Curran, Albuquerque, for Morris Const.

Keleher & McLeod, Henry F. Narvaez, Albuquerque, for American Bonding.

Kool, Kool, Bloomfield & Eaves, John L. Hollis, Albuquerque, for Named Laborers.

OPINION

SOSA, Justice.

Plaintiff-appellee George M. Morris Construction Company [hereinafter Morris] sued Four Seasons Motor Inn, Inc. and Dale J. Bellamah Corporation [hereinafter Bellamah], defendants-appellants and third-party plaintiffs, for arrearages under a construction contract and also filed liens against its real property. Bellamah denied those amounts, counterclaimed for slander of title, and counterclaimed for failure to disburse $18,709.32 to thirty-four laborers. Those same laborers sued Bellamah for failure to pay $15,182.23 in fringe benefits and filed liens against its property. Mesa Concrete, Springer Corporation, and Burke Concrete sued Morris and Bellamah and filed liens for arrearages. All suits were consolidated. Bellamah in turn brought a third-party complaint against American Bonding Company [hereinafter ABC], its surety, on a performance bond and a labor-material bond. ABC cross-claimed against Morris on an indemnity agreement.

The factual circumstances from which the suits arose are the following: On November 1, 1972, Bellamah and Double R, Inc. entered into a written contract for adding one hundred units to the Four seasons Motor Inn for a price of $247,046. ABC issued performance and material-labor bonds in the amount of $247,046. Double R was unable to complete the contract, so on February 16, 1973, Bellamah and Morris, who was general foreman for Double R, entered into a written contract to complete the unfinished work for $175,896.75. ABC issued a rider to the bonds, substituting Morris as principal in place of Double R.

After several months Morris determined he would be unable to complete the contract

at that price. Bellamah then orally agreed to modify the contract to put payment on a cost plus basis. Whereupon Morris completed the construction of the additions for an additional $85,367.44 over the $175,-896.75 price. The additional cost included the cost of two written agreements to provide and install doors ($12,347.59) and bathroom vanities ($8,500).

After considering all claims and evidence the trial court ordered Bellamah to pay Morris $2,892.74, the unpaid portion of certain invoices; ordered Morris and Bellamah personally to pay the laborers $15,182.23 and granted the laborers a lien against the property in that amount; ordered Bellamah to pay Mesa Concrete, Springer Corporation, and Burke Concrete $4,822.30, $5,324.10, and $744.02 respectively (stipulated to by Bellamah); ordered Bellamah to pay the stipulated $331.28 to Morris for the laborers' fringe benefit fund; awarded Morris and the intervenors attorney fees; awarded Bellamah $10,914.60 on the performance bond against ABC; and awarded ABC $10,914.60 plus attorney fees against Morris.

On appeal all aspects of the trial court's judgment, except the stipulated amounts, are challenged by Bellamah and the other parties.

A. Morris v. Bellamah

Morris sued Bellamah for $27,425 allegedly owed, the debts consisting of amounts due on the concrete contract ($24,878), the door contract ($325), and the vanity contract ($2,200). On the stand Morris admitted that this claim actually included the $6,459.09 he owed to his subcontractors Mesa Concrete, Springer Corporation, and Burke Concrete; the $14,850 he had already been paid once by Bellamah and which he still owed to the laborers' fringe benefit fund; the $331.28 he still owed the fringe benefit fund (this amount he had never received from Bellamah).

The trial court awarded Morris $9,683.11, computed as follows: (1) $6,459.09, the amount due Burke, Mesa, and Springer; (2) $331.28, the amount due the laborers' fringe benefit fund but never received from Bellamah; (3) $2,892.74, the amount Bellamah refused to pay on the concrete contract (and perhaps the door and vanity contracts) starting about August, 1973. There is substantial evidence to uphold these awards. Bellamah argues that there should be a $109.20 set-off for the amount it paid Morris for the Mesa Concrete bill. There is substantial evidence supporting the claim for this set-off and the trial court should have allowed it against Morris.

As a set-off against the $2,892.74 owed only to Morris, Bellamah argues that Morris received from Bellamah $14,850.95 for the laborers' fringe benefit fund, which Morris never transferred to that fund but kept for himself. Morris himself testified to that effect. This set-off should have been granted by the trial court.[1]

B. Bellamah v. Morris Counterclaim

The only additional matter raised in the counterclaim was the slander of title claim for $25,500. The trial court rejected this claim by not making a finding thereon. No evidence was introduced at trial. There was substantial evidence to support the negative finding of the trial court.

C. Intervenors (thirty-four laborers) v. Bellamah

The trial court awarded intervenors both a personal judgment against Bellamah and liens against its real estate. Bellamah argues that both judgments were improper.

First, the laws of New Mexico do not give a subcontractor a personal cause of action against owners, only a lien against the land or structure. Section 61–2–2, N.M.S.A.1953 (2d Repl.Vol. 9, 1974). Most jurisdictions have rejected such quasi-contractual claims against owners, although two

1. Due to the various set-offs arising from the other transactions, a final accounting will not yet be attempted.

states have allowed such actions in narrow circumstances. For a general discussion of those cases and their legal theories, see Annot., 62 A.L.R.3d 288 (1975). We do not approve of such a personal judgment in this factual situation, and it should not have arisen here, thus we reverse the trial court. See *Allison v. Schuler,* 38 N.M. 506, 36 P.2d 519 (1934).

Second, the trial court granted intervenors a lien against the property. Bellamah argues that the thirty-four intervenors signed waivers of lien[2] and thus the trial court should have denied the liens. Intervenors counter that Bellamah failed to plead waiver as an affirmative defense, thus Bellamah was barred from asserting it during trial. Bellamah argues that intervenors broached the issue when they asked Bellamah's witness, Mr. McGregor, during cross-examination about the existence, identification, and usage of the lien waivers. Counsel to Bellamah on redirect pursued the subject further and sought to introduce Exhibit J, a copy of one of the waivers of lien. Only at that point did counsel for intervenors object on the grounds that there was no foundation, no authentication, and general inadmissibility. The trial court overruled the objection and received Exhibit J into evidence.

After a short recess, counsel for Bellamah sought to introduce Exhibit K, consisting of other lien waivers, into evidence. Counsel for intervenors again raised the same objections but added a new one: it was a new affirmative defense not raised in the pleadings. The trial court then ruled it would receive Exhibits J and K into evidence against all parties except intervenors. The trial court agreed to amend the pleadings to conform to the evidence, but it continued to hold that Bellamah had waived its affirmative defense of waiver of lien.

On appeal Bellamah argues that the issue of waivers of lien was properly before the court and that all evidence indicated that the liens had been waived. Intervenors argue that the waivers of lien were not before the court, were not properly in evidence as to the intervenors and that the testimony elicited from Mr. McGregor by Bellamah's counsel was for the limited purpose of determining that Mr. McGregor had no first-hand knowledge concerning the claimed execution of the lien waivers. First, the waivers of lien issue was broached by intervenors and tried by implied consent during cross-examination, and thus Bellamah on redirect could pursue the issue. N.M.R.Civ.P. 15(b) [§ 21–1–1(15)(b), N.M.S.A.1953]; N.M.R.Evid. 103(a)(1) [§ 20–4–103(a)(1), N.M.S.A.1953 (Supp. 1975)]. Furthermore, the trial court allowed Exhibit J into evidence. The trial court's subsequent withdrawal from evidence of Exhibit J has no supporting rationale and we cannot determine one from the record. The use of Exhibit J for the limited purpose of the cross-examination of Mr. McGregor as argued above by intervenors is not reflected in the record and is a new argument on appeal, and thus must be rejected.

The conclusion we must reach from the fact that intervenors raised the issue of waivers of lien during cross-examination,

2. The waiver of lien had the following provisions:

Each of the undersigned, having supplied labor or materials on the above described job(s), hereby represents and acknowledges the following:

* * * * * *

(2) That we have been PAID IN FULL for all labor or material supplied by each of us on the above-described job(s).

(3) Each of us understands that Dale Bellamah Corp. the prime contractor has in its hands, funds due and owing to our employer, or the person who purchased material from us, and from which we could collect all sums due us on the above-described job(s), if any sums were owed to us.

(4) That each of us hereby voluntarily releases the owner, the contractor, and the premises above-described, from any Mechanics' or Materialmens' lien which we had or may have had for labor or materials supplied to the above-described job(s) to date.

(5) Each of us understands that, as a result of these representations made by us, the prime contractor will disburse these funds to our employer, or the persons to whom we sold materials.

(6) Each of us have read the above before signing.

then failed to object to the testimony upon redirect until the end, is that the intervenors failed to object timely to the introduction of evidence as to the waivers of lien, and that the trial court improperly withdrew from evidence Exhibits J and K and ignored the uncontradicted testimony.

It is general policy to hear a case on the merits whenever the facts so permit. Even had Mr. Hollis objected timely, the trial court could have allowed the issue to be argued, if "the presentation of the merits of the action would have been subserved thereby." Rule 15(b), supra. Perhaps the trial court should have allowed a continuance if intervenors had shown surprise and the necessity of further research. *Dale J. Bellamah Corporation v. City of Santa Fe*, 88 N.M. 288, 291, 540 P.2d 218, 220 (1975).

Having determined the evidence is admissible, we must now determine whether the lien waivers are valid. Intervenors argue that (1) they in fact never received any funds (since Morris kept them); (2) they received no consideration for their waivers; and (3) they had to sign the waivers to get their paychecks. The general rule is that a party executing a lien waiver will not be heard to assert its invalidity as against an owner who has paid out money or otherwise changed his position to his detriment in reliance upon the waiver. *Mid-West Engineering & Const. Co. v. Campagna*, 397 S.W.2d 616 (Mo.1965). Thus, if Bellamah paid Morris the $14,850.95 in reliance upon the waivers of lien, intervenors essentially are estopped from asserting failure of consideration. There is substantial evidence that Bellamah did not disburse the funds until after it received the waivers.

With respect to the argument that intervenors could not receive their paychecks without first signing the waiver, the mechanics lien statutes were enacted to protect laborers and materialmen from such dealings. Here, the laborers could have refused to sign the waivers or put in a disclaimer as to those amounts they were unsure of having received (i. e. the fringe benefits). But by signing the waivers, the intervenors caused Bellamah to change its position (i. e. paying Morris their wages and fringe benefits). Bellamah in good faith turned the money over to Morris. Bellamah should not have to bear the costs of paying the fringe benefits twice. Intervenors' remedies lie against Morris.

D. Intervenors v. Morris

Since Morris kept the $14,850 Bellamah gave to him to pay into the fringe benefit fund, he will be liable to the intervenors for any deficiency arising after all payments and set-offs have been made herein.

E. Bellamah v. ABC

ABC issued two bonds on the construction project: a performance bond and a material-labor bond. The latter had a one year limitation period which had run before suit was filed. The former had a two year limitation period, which had not run at the time of the suit. The trial court found that ABC owed Bellamah $10,914.60 on the performance bond. There is substantial evidence to support this finding of the trial court. However, this sue should be held by Bellamah for intervenors, who shall receive a pro rata share thereof (based on each intervenor's fringe benefits).

F. ABC v. Morris

Under the surety contract Morris agreed to indemnify ABC for any amounts it had to expend to satisfy Bellamah on the construction contract. The trial court awarded ABC $10,914.60 plus $1,590.31 costs and attorney fees. There is substantial evidence to support this finding of the trial court.

G. Attorney fees

The trial court awarded Morris $3,663.63 in attorney fees and costs against Bellamah. In view of this decision this is reversed. Morris shall bear his own costs and attorney fees; Bellamah shall bear its own costs and attorney fees; Morris shall pay ABC costs and attorney fees; Morris shall also pay intervenors' costs and attorney fees. On appeal each party shall bear

its own costs and attorney fees, except for intervenors, who may recover their costs and attorney fees against Morris.

CONCLUSION

Bellamah shall pay Mesa Concrete, Springer Corporation, and Burke Concrete the stipulated amounts plus their attorney fees and costs. Bellamah shall pay the laborers' fringe benefit fund $331.28. Bellamah shall pay Morris, $2,892.74 less $109.20, or $2,783.54, but this amount shall be held by Morris and paid by him to the intervenors pro rata (based on their proportionate arrearages in the fringe benefit fund). ABC shall pay Bellamah $10,914.60, which amount shall be held by Bellamah and paid by it to the intervenors pro rata, again based on their proportionate arrearages. Morris shall indemnify ABC for the $10,914.60 plus $1,590.31 costs and attorney fees. Morris shall also pay intervenors' costs and attorney fees on appeal.

PAYNE and FEDERICI, JJ., concur.

567 P.2d 970

STATE of New Mexico, Plaintiff-Appellee.

v.

William Harvey WISE, Defendant-Appellant.

No. 2950.

Court of Appeals of New Mexico.

July 5, 1977.

Certiorari Denied Aug. 2, 1977.

Ken Cullen, Albuquerque, for appellant.

Toney Anaya, Atty. Gen., Roderick A. Dorr, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction for receiving stolen property. The property was recovered in Hobbs, Lea County, New Mexico. Trial was in Bernalillo County. Issues discussed are: (1) execution and return of the search warrant, (2) proof of venue, and (3) refused instructions on (a) venue, (b) verbal admissions, and (c) defendant as a witness.

Execution and Return of the Search Warrant

The affidavit for the search warrant was executed by two Albuquerque police officers. They presented the affidavit to a magistrate in Lea County. The magistrate issued a warrant "to any officer authorized to execute this warrant." Various officers participated in the search pursuant to the warrant. Various items of property were seized, including property involved in this conviction.

Laws 1967, ch. 245, § 1(C)—compiled as § 41–18–1(C), N.M.S.A.1953 (1st Repl.Vol. 6, Supp.1971)—provided: "The warrant shall be directed to a sheriff or his deputy or any

state or municipal police officer in the county." Laws 1967, ch. 245, § 2—compiled as § 41–18–2, N.M.S.A.1953 (1st Repl.Vol. 6, Supp.1971) was a statutory form for the search warrant. This form was addressed "to the sheriff or his deputy, or any state or municipal police officer in this county . . . ."

Defendant seems to argue that his motion to suppress should have been granted because the warrant was not directed either to a specific officer or not directed to an officer in Lea County. This claim is meritless. The above statutes were repealed by Laws 1972, ch. 71, § 18. The Rules of Criminal Procedure went into effect in 1972. Rule 17(b) states:

> "(b) *Contents.* A search warrant shall direct a full-time salaried state or county law enforcement officer, a municipal police officer, a campus security officer, or an Indian tribal or pueblo law enforcement officer to conduct a search of a designated person or place for the purpose of seizing designated property or kinds of property, and to deliver any property so seized to the court."

Rule 17(c) states:

> "(c) *Form.* A search warrant shall be substantially in the form approved by the Court Administrator."

The search warrant bears a notation that it was approved by the Court Administrator on October 1, 1974. The warrant is directed to any officer authorized to execute the warrant. This direction is consistent with Rule of Criminal Procedure 17(b). Under the applicable rules, the warrant need not be directed to a specific officer or to an officer in a specific county.

The Albuquerque police officers were municipal officers; Albuquerque is located within Bernalillo County. Defendant contends that Albuquerque police officers lack authority to execute a search warrant in Lea County. The State asserts that Rules of Criminal Procedure 17(b) and 17(c), considered in light of the repeal of Laws 1967, ch. 245, §§ 1 & 2, shows that the authority for execution of search warrants was meant to be enlarged.

The criminal procedure rules involved in this case state what officers may execute a search warrant; however, the rules say nothing about the geographical area within which the officers may execute the warrant. Rules 17(b) and (c) of the Rules of Criminal Procedure are not to be construed as a grant of authority to Albuquerque police officers to execute search warrants in Lea County. Although "in the county" references in Laws 1967, ch. 245, §§ 1 & 2 have been repealed, other statutes, still in force, contain geographical references and references to an officer's authority within the geographical area. See §§ 14–12–2(A)(2) and (B), 15–40–2, 15–40–14, 15–40–15.1, N.M.S.A.1953 (Repl.Vol. 3, pt. 2). However, it is not necessary to decide whether these, or other statutes, authorize Albuquerque police officers to execute a search warrant in Lea County.

A Hobbs police officer is a municipal police officer in Lea County. Under § 14–12–2, *supra,* a Hobbs police officer has authority to execute a search warrant in Lea County. Under § 39–1–2, N.M.S.A.1953 (2d Repl.Vol. 6), sheriffs and deputy sheriffs have authority, in their respective counties, to employ lawful means to "trace and discover" stolen property. Section 39–1–2, *supra,* authorizes a deputy sheriff to execute search warrants for stolen property. The search warrant was for the purpose of recovering stolen property.

The transcript shows that the Albuquerque police officers were working with the Lea County Sheriff and the Hobbs Police Department. One of the officers in charge of the search was a Hobbs police officer. A deputy sheriff and two or three Hobbs police officers participated in the search. Officers authorized to execute the warrant were present and participated in the search. In these circumstances it is immaterial whether the Albuquerque police officers had authority to execute the warrant because other officers, present and participating, did have the authority. The search warrant was validly executed. *Kirby v. Beto,* 426 F.2d 258 (5th Cir. 1970);

People v. Daily, 157 Cal.App.2d 649, 321 P.2d 469 (1958); *Seay v. State,* 93 Okl.Cr. 372, 228 P.2d 665 (1951); see *State v. Dudgeon,* 13 Ariz.App. 464, 477 P.2d 750 (1970).

Defendant claims the inventory in this case, required by Rule of Criminal Procedure 17(e), is too vague. He does not show in what way it is vague. The inventory before us is not vague. He claims that he was not given a receipt for the items seized as required by Rule of Criminal Procedure 17(d). The exhibits contain Wise's receipt for certain weapons and clothing. In addition, the "return and inventory" for other items bears defendant's signature that the inventory of these items was made in his presence. The contention of "no receipt" is no more than a technical objection. Defendant also claims that the property seized was not delivered to the magistrate issuing the warrant. See Rule of Criminal Procedure 17(b). Defendant does not show how he was prejudiced by having the property returned to Albuquerque, from where it was stolen, rather than being left with the magistrate in Lea County. *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (Ct.App. 1974).

The motion to suppress was properly denied.

Proof of Venue

The venue, or place of trial, is in the county where the crime was committed. See N.M.Const., Art. II, § 14. However, if "elements of the crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed." Section 40A–1–15, N.M.S.A.1953 (2d Repl.Vol. 6); see *Norton v. Reese,* 76 N.M. 602, 417 P.2d 205 (1966).

Defendant asserts that the State failed to prove a material element of the crime occurred in Bernalillo County. The claim is frivolous; there is an abundance of evidence that the "receiving" occurred in Bernalillo County.

Refused Instructions

(a) Venue

The trial court instructed the jury on the elements of the crime. Defendant requested an instruction which read:

> "In addition to these essential elements, for you to find the defendant guilty of receiving stolen property, the State must prove to your satisfaction, beyond a reasonable doubt, that a material element of the crime was committed in Bernalillo County, New Mexico."

There are two reasons why refusal of this instruction was not error.

First, in case of a failure to instruct (as in this case), a correct written instruction must be tendered. Rule of Criminal Procedure 41(d); *State v. Romero,* 86 N.M. 99, 519 P.2d 1180 (Ct.App.1974). The requested instruction was incorrect because venue need not be proved beyond a reasonable doubt. *State v. Glasscock,* 76 N.M. 367, 415 P.2d 56 (1966); overruled on other grounds in *State v. Lopez,* 84 N.M. 805, 508 P.2d 1292 (1973).

Second, no instruction on venue is required. See discussion on venue in Committee Commentary to U.J.I. Criminal. Prior to the adoption of U.J.I. Criminal, the practice was to instruct on venue. See *Nelson v. Cox,* 66 N.M. 397, 349 P.2d 118 (1960). This practice is discontinued in U.J.I. Criminal Instructions; the element instructions do not refer to venue. The reason is that venue is not jurisdictional; rather it is a personal right or privilege of the accused which may be waived. *State v. Lopez, supra.* Being a personal right or privilege, an instruction on venue is not an instruction essential for a conviction. Rule of Criminal Procedure 41(a). The distinction is this—a defendant may insist on this personal right or privilege, and the correctness of a venue decision is reviewable to determine whether defendant was tried in the proper county; however, an instruction on venue need not be given because, so long as the crime occurred in New Mexico, the county of the crime is not a necessary jury determination.

(b) Verbal Admission

This requested instruction read:

"Verbal admissions should be received with caution and be subjected to careful scrutiny."

Refusal of this requested instruction was not error because this is not a rule of law; rather it is a matter for jury argument. *Territory v. Douglas,* 17 N.M. 108, 124 P. 339 (1912).

(c) Defendant as a Witness

The requested instruction read:

"The defendant is a competent witness in his own behalf, and when he testified in this case, became as any other witness, and his credibility is to be tested by and subject to the same tests as are legally applied to any other witness; and in determining the degree of credibility that shall be accorded to his testimony, the jury has the right to take into consideration the fact that he is interested in the result of the trial, his conduct and demeanor while on the witness stand, and whether he has been corroborated or contradicted by credible evidence or facts and circumstances in evidence in this case."

The giving of similar instructions have been approved. *State v. Wesson,* 83 N.M. 480, 493 P.2d 965 (Ct.App.1972). This approval has been given in cases where the claim was that defendant was prejudiced by the giving of the instruction. *Faulkner v. Territory,* 6 N.M. 464, 30 P. 905 (1892). The contention here is the reverse; defendant claims it was error to refuse to give the instruction. We disagree.

Territory of New Mexico v. Romine, 2 N.M. (Gild.) 114 (1881) indicates the requested instruction might be considered as a comment upon the weight of the evidence and states that the "wisest course in similar cases" is to instruct the jury generally on the credibility of witnesses. This "wisest course" is followed in U.J.I. Crim. 40.20; that general instruction was sufficient; it was not error to refuse to instruct on the credibility of the defendant as a witness. *State v. Smith,* 88 N.M. 541, 543 P.2d 834 (Ct.App.1975).

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

568 P.2d 190

Miguel A. TERRAZAS, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 11495.

Supreme Court of New Mexico.

Aug. 10, 1977.

Rehearing Denied Aug. 24, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, Douglas A. Barr, Asst. Appellate Defender, Santa Fe, for petitioner.

Toney Anaya, Atty. Gen., Santa Fe, for respondent.

ORIGINAL PROCEEDING ON CERTIORARI MEMORANDUM OPINION

FEDERICI, Justice.

The writ in this case was granted on the same basis as the writ in the case of *Padilla v. State*, 90 N.M. 664, 568 P.2d 190 (1977). In view of our holding in *Padilla v. State supra*, we affirm the decision of the Court of Appeals.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, EASLEY and PAYNE, JJ., concur.

ORIGINAL PROCEEDING ON CERTIORARI

This matter coming on for consideration by the Court upon motion for Rehearing, and the Court having considered said motion and brief in support and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that Motion of Petitioner for a rehearing be and the same is hereby denied.

568 P.2d 190

Orlando PADILLA, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 11465.

Supreme Court of New Mexico.

Aug. 10, 1977.

Rehearing Denied Aug. 24, 1977.

Jan Alan Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, Douglas A. Barr, Asst. Appellate Defender, Santa Fe, for petitioner.

Toney Anaya, Atty. Gen., Santa Fe, for respondent.

OPINION

FEDERICI, Justice.

Defendant was convicted of robbery in 1976 and charged additionally as an habitual offender under § 40A–29–5, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972). The supplemental information alleged a prior conviction in 1972. Defendant moved to dismiss the supplemental information on the grounds that the sentence for the 1972 conviction was deferred by the court, that defendant had successfully completed the deferred sentence, and that the 1972 case had been dismissed prior to the subsequent habitual-offender charge in 1976.

The trial court granted the motion to dismiss. The Court of Appeals proposed summary reversal and reversed the trial court. Defendant filed a petition for writ of certiorari, which writ was granted by this court. We now affirm the Court of Appeals.

The habitual-offender statute, § 40A–29–5, supra, provides in pertinent part as follows:

> Any person who, *after having been convicted* within this state of a felony, or who has been convicted under the laws of any other state government or country, of a crime or crimes which if committed within this state would be a felony, commits any felony within this state not otherwise punishable by death or life imprisonment, shall be punished as follows: * * *. (Emphasis added.)

Section 40A–29–15, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972) provides that upon entry of a judgment of conviction and upon certain conditions, a court may enter an order deferring or suspending sentence.

Section 40A–29–18, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972) sets forth certain conditions which the court shall attach to its order deferring or suspending a sentence.

Section 40A–29–21, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972) sets forth the effect of termination of a period of *suspension* without revocation of the order and provides:

> Whenever the period of suspension expires without revocation of the order, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime. He shall thereupon be entitled to a certificate from the court so reciting such facts, and upon presenting the same to the governor, the defendant may, in the discretion of the governor, be granted a pardon or a certificate restoring such person to full rights of citizenship.

Section 40A–29–22, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972) applies to a *deferred sentence* and is the statute which is more particularly involved in this case. It provides:

> Whenever the period of deferment expires, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime, the court shall enter a dismissal of the criminal charges.

We note there is a difference in the wording of the statute which applies to suspended sentences and the statute which applies to deferred sentences. Under the suspended sentence statute, § 40A–29–21, supra, a defendant is entitled to a certificate from the court, reciting satisfactory completion of the sentence. Upon presentation of this certificate to the Governor, the Governor

may in his discretion grant a pardon or a certificate restoring such person to full rights of citizenship. Under the deferred sentence statute, § 40A–29–22, supra, it is provided that upon the expiration of the deferred sentence, the defendant has satisfied his criminal liability for the crime and the court must enter a dismissal of the charge.

There is some merit to the contention that upon dismissal of criminal charges under the deferred sentence provision of § 40A–29–22, supra, there has been no prior conviction. However, this court in previous cases has determined that the contrary is true, holding that a "conviction" refers to a finding of guilt and does not include the imposition of a sentence. *State v. Larranaga*, 77 N.M. 528, 424 P.2d 804 (1967); *Shankle v. Woodruff*, 64 N.M. 88, 324 P.2d 1017 (1958); *State v. Silva*, 78 N.M. 286, 430 P.2d 783 (Ct.App.1967).

In *State v. Larranaga*, 77 N.M. at 529, 424 P.2d at 805, this court stated:

> The pertinent portion of the statute, § 41–16–1, supra, under which the sentence was imposed provides: "Any person who, after having been convicted within this state, of a felony, * * * commits any felony, within this state, shall be punished upon conviction of such second offense as follows: * * *" *In our opinion, the "conviction" to which the statute refers is simply a finding of guilt and does not include the imposition of a sentence.* (Emphasis added.)

Habitual offender proceedings are based by statute on prior felony convictions. Since it is not necessary to impose sentence in order to constitute a conviction, the deferred sentence was of no consequence. It is the conviction that is crucial and not the sentence. We therefore hold that the decision of the Court of Appeals is affirmed.

IT IS SO ORDERED.

SOSA and EASLEY, JJ., concur.

PAYNE, J., not participating.

This matter coming on for consideration by the Court upon Motion of Petitioner for a rehearing, and the Court having considered said motion and brief in support thereof, and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that Motion of Petitioner for rehearing be and the same is hereby denied.

568 P.2d 192

Luciano TRUJILLO, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 11466.

Supreme Court of New Mexico.

Aug. 22, 1977.

Patricia D. Barth, Albuquerque, for petitioner.

Toney Anaya, Atty. Gen., Santa Fe, for respondent.

OPINION

SOSA, Justice.

Defendant Luciano Trujillo was convicted by a jury of various offenses in district court. The Court of Appeals summarily affirmed. We granted certiorari.

On appeal defendant argues, *inter alia*, that the Court of Appeals improperly summarily affirmed his conviction because his memorandum in opposition to summary disposition was untimely filed. The facts indicated that defendant's appeal was assigned to the summary calendar on May 3, 1977. Notice thereof was received on May 5 by defendant's counsel. The memorandum in opposition was mailed from Albuquerque on May 13 (Friday) and filed in the Court of Appeals on Monday, May 16. Defendant argues that in this case N.M.R. Crim. App. 302(b) [§ 41–23A–302(b), N.M.S.A. 1953 (Supp. 1975)] allows an extra three days for mailing. Rule 302(b) states: "Additional Time After Service by Mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, three [3] days shall be added to the prescribed period." Defendant's memorandum was not untimely filed.

The Court of Appeals' summary affirmance is reversed with directions to consider the issues raised on appeal.

McMANUS, C. J., and EASLEY, PAYNE and FEDERICI, JJ., concur.

568 P.2d 193

Monteine BAIRD, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 11400.

Supreme Court of New Mexico.

Aug. 23, 1977.

Rehearing Denied Sept. 7, 1977.

Anthony F. Avallone, Las Cruces, for petitioner.

Toney Anaya, Atty. Gen., Santa Fe, for respondent.

OPINION

FEDERICI, Justice.

Defendant was indicted by the Lincoln County Grand Jury for murder in the second degree in violation of § 40A–2–1(B), N.M.S.A.1953 (2d Repl.Vol. 6, 1972). Defendant refused to plead and the trial court entered a plea of not guilty on her behalf.

Before proceeding to selection of a jury, defendant filed a motion to dismiss the indictment and the trial court denied the motion. Directly thereafter, defendant entered into a Plea and Disposition Agreement with the district attorney's office. Under this agreement the charge against defendant was reduced to involuntary manslaughter. Defendant pleaded no contest to involuntary manslaughter. The court approved the agreement and defendant was found guilty of involuntary manslaughter by the trial court. Defendant appealed this conviction, and the judgment of the trial court was affirmed by the Court of Appeals. We affirm the decision of the Court of Appeals.

Defendant asserts that her plea and subsequent conviction should be set aside because of asserted improprieties in the grand jury proceedings which led to her indictment.

Foremost among defendant's assertions is that the district attorney was present in the grand jury room during the grand jury's deliberations. This allegation is made in the defendant's docketing statement in the Court of Appeals and in her petition for certiorari before this court, and appears to be admitted by the state in its brief. Two important issues are raised by the facts presented. The first is whether the presence of the district attorney in the grand jury room during the grand jury's delibera-

tions would, if properly raised in the trial court and preserved as an issue for appeal, be sufficient to require that the indictment against defendant be invalidated. The second is whether defendant's claims of impropriety in the grand jury proceedings may be waived by the plea negotiation process, the subsequent entry of a plea of no contest, and the conviction and sentence of the court based upon that plea bargain and plea.

The presence of the district attorney during deliberations of the grand jury is specifically and unequivocably prohibited by law. Section 41–5–4, N.M.S.A.1953 (2d Repl.Vol. 6, 1972) provides, insofar as applicable: "All deliberations will be conducted in a private room outside the hearing or presence of any person other than the grand jury members."

This statute is clear and is not subject to construction. *No one* other than the grand jury members may be present during the time the grand jury is deliberating. Like other statutes governing grand jury proceedings, it is to be rigorously observed and strictly enforced. *State v. Hill,* 88 N.M. 216, 539 P.2d 236 (Ct.App.1975). *Cf. Davis v. Traub,* 90 N.M. 498, 565 P.2d 1015 (1977).

It is most important that the secrecy of the grand jury be maintained. For centuries grand jury sessions have been surrounded by a cloak of seclusion and secrecy that has been jealously guarded and preserved as the only means of insuring that the jury be permitted the freedom of action necessary for a vigorous and effective discharge of its duties.

The reasons for this ancient policy are many. Among them are: promoting freedom in the disclosure of crime; preventing coercion of grand jurors through outside influences and intimidation, thus allowing a freedom of deliberation and expressions of opinion which would otherwise be impossible; prohibiting the safety and anonimity of witnesses, thus encouraging the greatest possible latitude in their voluntary testimony; preventing forewarning to those whose criminal conduct has been uncovered; and protecting the good names of persons considered by the grand jury but not indicted.

A further consideration calling for preservation of the secrecy which surrounds the grand jury is the limited rights of an accused so far as that body is concerned. Under normal circumstances, the accused has no right to appear before that body, with or without counsel. Since he has no right concerning the grand jury except that it be duly impaneled and conducted according to law, his right in this respect should be rigorously protected. *State v. Revere,* 232 La. 184, 94 So.2d 25 (1957).

The grand jury is our system's foundation for the protection of individual rights. It is also a powerful tool of the public and of American Society. It is a recognized method by which the public can be certain of protection against abuse of public responsibilities. The cloak of secrecy which has for centuries surrounded its sessions is designed to protect not only the jurors and witnesses, but to safeguard as well the interests of the state, the accused, and society as a whole. Attempts to modify, circumvent or even eliminate the grand jury system by legislative act or constitutional amendment will be forestalled only by rigorous observation and enforcement of the laws which govern it.

The question next arises whether, notwithstanding the improprieties in the grand jury proceedings asserted by defendant, she has waived her objections based upon them by entering into a Plea and Disposition Agreement which was approved and accepted by the trial court through a plea of no contest to the charge of involuntary manslaughter. We hold that defendant has waived her objections to the grand jury proceedings.

Defendant contends that the defects of the grand jury proceedings were so fundamental that they cannot be waived. We do not agree. Fundamental constitutional rights may be waived by a defendant. *Neller v. State,* 79 N.M. 528, 445 P.2d 949

(1968); *State v. Montoya,* 81 N.M. 233, 465 P.2d 290 (Ct.App.1970); *State v. Gonzales,* 80 N.M. 168, 452 P.2d 696 (Ct.App.1969). Likewise, violations of rights created by statute may also be waived.

A finding of waiver in this case has two sources. First is the Plea and Disposition Agreement, which was signed by defendant and defense counsel. By this plea bargain, defendant obtained dismissal of the murder charge and defendant agreed to plead no contest to involuntary manslaughter. Paragraph 4 of the plea bargain agreement provides as follows:

> 4. Unless this plea is rejected or withdrawn, that the defendant hereby gives up any and all motions, defenses, objections or requests which he has made or raised, or could assert hereafter, to be the court's entry of judgment against him and imposition of sentence upon him consistent with this agreement.

The judgment states that the plea bargain agreement had been approved by the trial court in accordance with Rule 21 of the Rules of Procedure. Defendant was represented by counsel throughout the plea negotiation process. Plea negotiation involves an exchange of concessions and advantages between the state and the accused. Erickson, The Finality of a Guilty Plea, 48 Notre Dame Lawyer 835, 839 (1973). In this case, the concession granted by the defendant in paragraph 4 of the plea agreement operated as a waiver of the objections raised in this appeal.

Second, the plea of no contest itself operated as a waiver of defendant's right to object to the claimed statutory defects in the grand jury proceedings. *State v. Raburn,* 76 N.M. 681, 417 P.2d 813 (1966). There is no claim that the no contest plea was involuntarily made or made with other than full awareness on the part of the defendant.

The judgment of the Court of Appeals is affirmed.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, EASLEY and PAYNE, JJ., concur.

568 P.2d 196

Jewel BIRTRONG, Plaintiff-Appellant,

v.

CORONADO BUILDING CORPORATION, all shareholders and officers of said Coronado Building Corporation, together with all unknown claimants of interest in and to the premises adverse to the plaintiff, Defendants-Appellees.

No. 11151.

Supreme Court of New Mexico.

Aug. 25, 1977.

Sherman & Sherman, Paul F. Sherman, Lordsburg, for appellant.

Martin, Martin & Lutz, Michael L. Winchester, Las Cruces, for appellees.

OPINION

PAYNE, Justice.

In 1927 the appellee, Jewel Birtrong and her husband, Alec Lee Birtrong conveyed by warranty deed a tract of land in Hidalgo County to Coronado Building Corporation. The deed on its face provides that it was given for consideration and conveyed the property together with all ". . . the hereditaments and appurtenances . . . the reversion and reversions, remainder and remainders, . . . and all the stake, right, title, interests, claim and demand whatsoever, ..." The property was used by Coronado Post Number 85 of the American Legion until the early 1940's when the post was disbanded. After World War II, another American Legion Post occupied the premises for several years until it, too, was disbanded. Since that time the property has been used by different community groups for various activities.

In 1973 Jewel Birtrong (her husband being deceased) filed a quiet title suit in district court alleging that she was entitled to the property on several theories. Her claim to the property is based on allegations of direct chain of title, reversion of title, and adverse possession.

In response to her complaint, W. H. Adams, Jr., W. H. Walter, Jr., J. R. Walter, Charles Hoggett and Betty E. Edington entered the suit as defendants. They denied any title in Jewel Birtrong and asserted that they were heirs of the original founders of the Coronado Building Corporation, and as such claimed title to the property by inheritance. After preliminary dis-

covery each of the parties moved for summary judgment. The trial court heard the matters and ruled in favor of the defendants. Jewel Birtrong appeals from that decision.

Plaintiff tried to establish a direct chain of title by documents which include a disclaimer and a quitclaim deed executed by the American Legion. The record does not reveal that the American Legion was ever in the chain of title to the real estate involved. A post of the American Legion did use the property for a period of time as a meeting place, as did numerous other community organizations. That alone does not establish that the American Legion had any interest in the real estate involved. Since a quitclaim deed conveys only such title, if any, as the grantor possessed, the deed to the plaintiff from the American Legion is of no value whatsoever. *Metzger v. Ellis*, 65 N.M. 347, 337 P.2d 609 (1959).

The plaintiff alleges that it was the intention of all the parties involved to convey the land from the Birtrongs to the Coronado Building Corporation upon the condition that it always be used as an American Legion Hall. The deed itself contains no such condition. The intention of the grantor must be derived from the language of the instrument of conveyance, and it will not be impeached except to correct or prevent injustice for such reasons as accident, mistake or fraud. *Garcia v. Garcia*, 86 N.M. 503, 525 P.2d 863 (1974); *Garry v. Atchison, Topeka & Santa Fe Railway Co.*, 71 N.M. 370, 378 P.2d 609 (1963); *Sharpe v. Smith*, 68 N.M. 253, 360 P.2d 917 (1961). Prior considerations, negotiations or stipulations are merged in the final and formal deed executed by the parties. Although the terms of the deed may vary from the prior negotiations, the deed alone must be looked to in determining the rights of the parties. *Chavez v. Gomez*, 77 N.M. 341, 423 P.2d 31 (1967); *Duvall v. Stone*, 54 N.M. 27, 213 P.2d 212 (1949); *Collier v. Sage*, 51 N.M. 147, 180 P.2d 242 (1947); *Fuqua v. Trego*, 47 N.M. 34, 133 P.2d 344 (1943); *Continental Life Ins. Co. v. Smith*, 41 N.M. 82, 64 P.2d 377 (1936).

The plaintiff has failed to allege in her complaint, or submit evidence of, any accident or fraud in the drafting and signing of the deed. The issue of mistake however, is supported by her affidavit, that the parties relied on the man who prepared the deed (a notary public) and that he did not carry out the intentions of the parties. There is a factual issue raised by her affidavit sufficient to defeat summary judgment.

Plaintiff also claims title by adverse possession. If any one of the elements necessary to constitute adverse possession is absent, then no title by adverse possession can be found. *Weldon v. Heron*, 78 N.M. 427, 432 P.2d 392 (1967); *Murray Hotel Co. v. Golding*, 54 N.M. 149, 216 P.2d 364 (1950); *Turner v. Sanchez*, 50 N.M. 15, 168 P.2d 96 (1946).

As of November 25, 1927, the date of execution of the deed to Coronado Building Corporation, the plaintiff divested herself of any and all color of title that she might have had to the property in question. *Wilson v. Kavanaugh*, 55 N.M. 252, 230 P.2d 979 (1951). The lack of such color of title is fatally defective to an adverse possession claim. *Thomas v. Pigman*, 77 N.M. 521, 424 P.2d 799 (1967); *Wilson v. Kavanaugh*, supra; *Sandoval v. Perez*, 26 N.M. 280, 191 P. 467 (1920). Since the plaintiff's claim lacks one of the prerequisites, we need not review any other of plaintiff's claims to title by adverse possession. The burden of proving title by adverse possession is upon him who asserts it. *Ward v. Rodriquez*, 43 N.M. 191, 88 P.2d 277 (1939). That burden must be met by clear and convincing evidence. *Frietze v. Frietze*, 78 N.M. 676, 437 P.2d 137 (1968); *Marquez v. Padilla*, 77 N.M. 620, 426 P.2d 593 (1967). Such title cannot be established by inference or implication. *Frietze v. Frietze*, supra; *Merrifield v. Buckner*, 41 N.M. 442, 70 P.2d 896 (1937); *Montoya v. Catron*, 22 N.M. 570, 166 P. 909 (1917).

The defendants entered their appearance in this case as successors in interest of the Coronado Building Corporation. We have no difficulty in recognizing title in

the disputed piece of land in the Coronado Building Corporation, but we cannot agree that the alleged successors in interest have shown by their pleadings or their affidavits that they are entitled to judgment as a matter of law. The record shows only that they are some of the heirs of the founders of Coronado Building Corporation. Other known heirs were not joined. Probate proceedings of the original founders of the Coronado Building Corporation made no mention of the property in question. We need not elaborate upon the other gaps in the record as it pertains to defendants' claims.

We reverse the trial court in granting summary judgment as to either party for the reasons set forth. The case is remanded for further proceedings in the district court as are consistent with this opinion.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, EASLEY and FEDERICI, JJ., concur.

568 P.2d 199

STATE of New Mexico,
Plaintiff-Appellee,

v.

David Wodajo ROGERS,
Defendant-Appellant.

No. 2652.

Court of Appeals of New Mexico.

Feb. 15, 1977.

Toney Anaya, Atty. Gen., Anthony Tupler, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, App. Defender, Santa Fe, for defendant-appellant.

OPINION

WOOD, Chief Judge.

Defendant was convicted of receiving stolen property by disposing of it. Section 40A–16–11, N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1975); *State v. Tapia,* 89 N.M. 221, 549 P.2d 636 (Ct.App.1976). He was also convicted of kidnapping. Section 40A–4–1, N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1975). The transcript does not support the claim that reversible error resulted from an accumulation of instances of alleged prosecutor misconduct. The transcript is insufficient to review the claim that the trial court improperly restricted the questioning of prospective jurors concerning pretrial publicity. We do not know what questions were asked or what line of questioning was limited. See *State v. Carrillo,* 88 N.M. 236, 539 P.2d 626 (Ct.App.1975); *State v. Romero,* 86 N.M. 99, 519 P.2d 1180 (Ct.App.1974). The dispositive issue involves New Mexico's prosecution of defendant after he had been acquitted of federal charges. This issue involves: (1) exhibits to briefs, (2) double jeopardy, (3) collateral estoppel, and (4) judicial policy.

In January, 1976 a branch of a national bank in Albuquerque was robbed of a substantial sum of money at gunpoint. During the course of the robbery, two employees of the bank were required, at gunpoint, to do certain things against their will. Examples of this forced action are: (1) requiring the employees to return to the inside of the bank after they had exited the bank building for the day, and (2) requiring one of the employees to telephone for the combination of the bank vault.

Defendant was indicted for violating certain provisions of 18 U.S.C.A. § 2113 (1970).

Trial was in the United States District Court for the District of New Mexico. The federal jury found defendant not guilty of the federal charges. Subsequent to the federal trial, New Mexico indicted and tried defendant on the two charges of which he has been convicted.

Exhibits to Briefs

Throughout the proceedings in New Mexico courts, defendant has claimed that acquittal on the federal charges barred the New Mexico prosecutions. In support of this contention, defendant has filed Exhibit A to the brief-in-chief. This exhibit purports to be the transcript of the federal trial. The transcript of the New Mexico trial does not show that the federal trial transcript was either identified or tendered as an exhibit. Exhibit A to the brief-in-chief will not be considered. *Baca v. Swift & Company,* 74 N.M. 211, 392 P.2d 407 (1964); *Vivian v. Atchison, Topeka and Santa Fe Railway Co.,* 69 N.M. 6, 363 P.2d 620 (1961).

Double Jeopardy

Defendant asserts that the New Mexico prosecution amounts to double jeopardy. The federal charges involved bank robbery contrary to paragraphs (a) and (d) of 18 U.S.C.A. § 2113 (1970). Assuming that the New Mexico charges were based on the "same transaction" as the federal charges, neither the receiving nor the kidnapping convictions are based on the "same evidence" as the federal charges. New Mexico has rejected the "same transaction" test; rather, double jeopardy is defined in terms of the "same evidence". *State v. Tanton* (hereinafter *Tanton I*), 88 N.M. 5, 536 P.2d 269 (Ct.App.1975), overruled in part in *State v. Tanton* (hereinafter *Tanton II*), 88 N.M. 333, 540 P.2d 813 (1975). There was no violation of double jeopardy as that term has been defined in New Mexico.

Collateral Estoppel

Defendant contends that the New Mexico prosecution was barred by the doctrine of collateral estoppel. This doctrine bars relitigation between the same parties of issues actually determined at a previous trial. *State v. Tijerina,* 86 N.M. 31, 519 P.2d 127 (1973). To decide what had been "actually determined" in the prior trial, ordinarily the record of the prior proceedings would have to be examined. *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Such an examination was not done in this case because the record of the federal proceedings was never presented to the trial court. However, the failure to present the federal proceedings does not bar review of the collateral estoppel question.

The collateral estoppel issue is before us on the basis of the State's concession designed "to clarify and simplify the issues, that there was no rational basis for the Federal jury's verdict other than the Defendant was not present at the bank." We agree with the concession; there is nothing indicating that the armed bank robbery did not occur or that the employees were not victims of that crime. The only rational basis for the federal verdict was that defendant was not the one who robbed the bank. Compare *Ashe v. Swenson, supra.*

The receiving by disposing conviction is not affected by the determination that defendant was not the robber. Defendant was neither charged nor prosecuted in federal court for disposing of stolen property. See paragraph (c) of 18 U.S.C.A. § 2113 (1970). New Mexico's receiving by disposing prosecution is the first prosecution for that offense. Defendant could dispose of stolen property without robbing the bank. See *State v. Tapia, supra.* The "disposing" issue was not actually determined at the federal trial; the doctrine of collateral estoppel is not applicable to the receiving by disposing conviction.

The kidnapping conviction is affected by the determination that defendant was not the robber. Under the jury instructions, the kidnapping conviction is necessarily based on holding the bank employees to service against their will. See § 40A–4–1, *supra.* This holding to service was done by

the bank robber; if defendant was not the robber, he did not hold the employees to service. In determining that defendant was not the bank robber, the federal jury actually determined that defendant was not the person who kidnapped the bank employees.

The federal jury determination that defendant was not the bank robber (and therefore not the kidnapper) is not disputed by the State. Rather, it relies on the definition of collateral estoppel—the doctrine bars relitigation *between the same parties* of issues actually determined. This limitation appears in both *State v. Tijerina, supra,* and *Ashe v. Swenson, supra.* The State points out that dual sovereigns were involved—the United States and New Mexico; because separate sovereigns were involved in the prosecution of defendant, the State claims that it is not collaterally estopped to prosecute defendant on the kidnapping charge.

Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) supports the State. Bartkus was charged with violating the same statute as defendant—18 U.S.C.A. § 2113. The federal jury acquitted. Illinois charged Bartkus with violating an Illinois robbery statute. "The facts recited in the Illinois indictment were substantially identical to those contained in the prior federal indictment." The United States Supreme Court held that the successive trials of Bartkus did not deprive him of due process.

Abbate v. United States, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959) held that a subsequent federal prosecution growing out of identical facts involved in a prior state conviction did not violate double jeopardy.

In limiting the doctrine of collateral estoppel to the same parties, *Ashe v. Swenson, supra,* does not conflict with either *Bartkus, supra,* or *Abbate, supra.* In addition, the dual sovereign approach has been applied subsequent to *Ashe v. Swenson, supra. United States v. James,* 532 F.2d 1161 (7th Cir. 1976); *United States v. Johnson,* 516 F.2d 209 (8th Cir. 1975); see authorities cited in *Commonwealth v. Mills,* 447 Pa. 163, 286 A.2d 638 (1971). The separate sovereign concept has been rejected as between a state and a municipality. *Waller v. Florida,* 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970). This rejection, however, does not appear to have affected the distinction made between the federal government and a state government. *United States v. Villano,* 529 F.2d 1046 (10th Cir. 1976); Compare *United States v. Leeds,* 505 F.2d 161 (10th Cir. 1974).

On the basis of the above authorities, the kidnapping conviction was not barred by the doctrine of collateral estoppel; different parties (separate sovereigns) were involved in the two prosecutions.

Judicial Policy

Although the New Mexico kidnapping charge was not barred by the doctrine of collateral estoppel, there is the question of whether judicial policy should bar the kidnapping conviction. If the acquittal on the robbery charges had occurred in a New Mexico court, the doctrine of collateral estoppel would have barred the kidnapping charges. Should the result be different because a different sovereign brings the subsequent prosecution? Our concern is with judicial policy which opposes piecemeal prosecutions; that policy is discussed in *Tanton I* and *Tanton II, supra.* Justice Black, dissenting in *Bartkus v. Illinois, supra,* stated:

> "Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the cannon law and the teachings of the early Christian writers. By the thirteenth century it seems to have been firmly established in England, where it came to be considered as a 'universal maxim of the common law.' It is not surprising, therefore, that the principle was brought to this country by the earliest settlers as part of their heritage of freedom, and

that it has been recognized here as fundamental again and again. Today it is found, in varying forms, not only in the Federal Constitution, but in the jurisprudence or constitutions of every State, as well as most foreign nations. It has, in fact, been described as a part of all advanced systems of law and as one of those universal principles 'of reason, justice, and conscience, of which Cicero said: "Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same."' While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong for a man to 'be brought into Danger for the same Offence more than once.' Few principles have been more deeply 'rooted in the traditions and conscience of our people.'

"The Court apparently takes the position that a second trial for the same act is somehow less offensive if one of the trials is conducted by the Federal Government and the other by a State. Looked at from the standpoint of the individual who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these 'Sovereigns' proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.

"The Court, without denying the almost universal abhorrence of such double prosecutions, nevertheless justifies the practice here in the name of 'federalism.' This, it seems to me, is a misuse and desecration of the concept. Our Federal Union was conceived and created 'to establish Justice' and to 'secure the Blessings of Liberty,' not to destroy any of the bulwarks on which both freedom and justice depend. We should, therefore, be suspicious of any supposed 'requirements' of 'federalism' which result in obliterating ancient safeguards. I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments." [359 U.S. at 151, 79 S.Ct. at 696, 3 L.Ed.2d at 706–708]

United States v. Watts, 505 F.2d 951 (5th Cir. 1974) affirmed a federal conviction after a prior acquittal in Georgia. The United States Supreme Court vacated the conviction at the request of the Solicitor General. The conviction was not vacated because the conviction was barred by legal doctrine; it was vacated because the conviction did not conform to Department of Justice policy of not prosecuting individuals previously tried in state court unless compelling reasons existed for such a prosecution. *Watts v. United States,* 422 U.S. 1032, 95 S.Ct. 2648, 45 L.Ed.2d 688 (1975).

Commonwealth v. Mills, supra, discussed policy considerations different than those stated by Justice Black in the above quotation. Yet, the Pennsylvania court in *Mills, supra,* held that as a matter of judicial policy it would bar a subsequent prosecution unless the interests of Pennsylvania were substantially different than the interests involved in the prior prosecution. *Mills, supra,* involved a prior federal conviction. In *People v. Cooper,* 398 Mich. 450, 247 N.W.2d 866 (1976), Michigan followed *Mills, supra,* in a case involving a prior acquittal in federal court.

The reasoning in *Commonwealth v. Mills, supra,* and *People v. Cooper, supra,* gave an expansive meaning to double jeopardy. We cannot adopt such reasoning because *Tanton II, supra,* defined double jeopardy in limited terms. This does not, however, bar this Court from considering double prosecutions in terms of policy.

The policy consideration is this: If the doctrine of collateral estoppel would bar New Mexico from prosecuting a defendant a second time, and the doctrine is inapplicable solely because of the concept of dual sovereignty, should the second prosecution be permitted? We adopt the reasoning of Justice Black in his dissent in *Bartkus v. United States, supra.* Except for the dual sovereign concept, the New Mexico prosecution for kidnapping would have been barred. In this situation, we hold as a matter of policy that the prosecution for kidnapping is barred. The statement of Department of Justice policy in *Watts v. United States, supra, Commonwealth v. Mills, supra,* and *People v. Cooper, supra,* support this result.

The conviction for receiving stolen property is affirmed. The kidnapping conviction is reversed. The cause is remanded for entry of an amended judgment and sentence consistent with this opinion.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

568 P.2d 204

STATE of New Mexico,
Plaintiff-Appellee,

v.

Monteine BAIRD, Defendant-Appellant.

No. 2901.

Court of Appeals of New Mexico.

April 12, 1977.

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

Anthony F. Avallone, Las Cruces, for defendant-appellant.

OPINION

WOOD, Chief Judge.

Defendant claims her no contest plea should be set aside because of the asserted invalidity of procedures before the grand jury.

The grand jury indictment charged defendant with second degree murder. When arraigned, defendant refused to plead. The trial court entered a not guilty plea on her behalf. After denial of a motion to dismiss the indictment, defendant pleaded "no contest" to involuntary manslaughter. Defendant was then found guilty of involuntary manslaughter; she appeals that conviction.

Testimony before the grand jury was electronically recorded. The docketing statement asserts the electronic device "was operated by a person who ordinarily works in the district court clerk's office . . ." The docketing statement asserts the operator was not authorized to be present during the taking of testimony by the grand jury. Section 41–5–4, N.M.S.A.1953 (2d Repl.Vol. 6) authorizes court reporters to be present. The docketing statement seems to assert that no reporter can be present unless the reporter bears the title "official court reporter". This claim is frivolous, there being no contention that the operator's presence was not for the purpose of monitoring the device that recorded the grand jury testimony. The monitor performed the function of court reporter.

The recorded testimony was transcribed by the "official court reporter" who, in typing the transcript, omitted testimony with the notation "inaudible". The docketing statement asserts the result is that the grand jury testimony was not "reported verbatim", a violation of § 41–5–8, N.M.S.A.1953 (2d Repl.Vol. 6). Other than a general claim of prejudice, the docketing statement makes no effort to connect the "inaudible" testimony with defendant's case; specifically, there is no claim that any grand jury testimony involving defendant was inaudible. See *State v. Vigil*, 85 N.M. 735, 516 P.2d 1118 (1973) and cases therein cited. In addition, defendant pled no contest and was found guilty without a trial. Even if a portion of the grand jury testimony was inaudible, there was no occasion for defendant to use the grand jury testimony. *State v. Vigil*, supra. There is no basis for the claim of prejudice.

The docketing statement asserts that the district attorney was present during grand jury deliberations. Such is prohibited by § 41–5–4, supra. See *State v. McGill*, 89 N.M. 631, 556 P.2d 39 (Ct.App.1976); *State v. Hill*, 88 N.M. 216, 539 P.2d 236 (Ct.App. 1975). Even with this claim, the case was calendared for summary affirmance on the basis that defendant's no contest plea "waived the defects complained of on appeal." *State v. Raburn*, 76 N.M. 681, 417 P.2d 813 (1966) was cited as authority. *Raburn* states that a no contest plea waives a defendant's right to object to prior defects, other than a claim of fundamental unfairness.

Defendant has filed a memorandum opposing summary affirmance N.M.Crim. App. 207(d)(3). The memorandum asserts the defects in the grand jury proceedings were so fundamental they could not be waived. We disagree. Constitutional rights may be waived. So may statutory rights. The right to counsel, the right to a speedy trial, the right to a trial—all may be waived. *Neller v. State*, 79 N.M. 528, 445 P.2d 949 (1968); *State v. Gonzales*, 80 N.M. 168, 452 P.2d 696 (Ct.App.1969); *State v. Montoya*, 81 N.M. 233, 465 P.2d 290 (Ct. App.1970). The asserted violation of statutes governing grand jury proceedings may also be waived. *State v. Hill*, supra, is not to the contrary; there was no issue of waiver in *Hill*.

The waiver in this case is shown in two ways: 1. A "Plea and Disposition Agreement" was signed by defendant and

defense counsel. By this plea bargain, defendant obtained dismissal of the murder charge; in exchange defendant agreed to plead no contest to involuntary manslaughter. The agreement expressly provides that defendant gave up "any and all motions, defenses, objections or requests which he has made or raised, or could assert hereafter . . . ." The judgment recites that the agreement had been approved by the trial court in accordance with R.Crim.P. 21. 2. There is no claim that the no contest plea was involuntary. Such a plea waived the right to object to the asserted statutory defects on which defendant relies. *State v. Raburn*, supra.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

568 P.2d 206

STATE of New Mexico, Plaintiff-Appellee,

v.

Mike SIERRA, Defendant-Appellant.

No. 2872.

Court of Appeals of New Mexico.

July 19, 1977.

Rehearing Denied July 29, 1977.

Writ of Certiorari Denied Aug. 23, 1977.

David L. Norvell, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Ernesto J. Romero, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of making or permitting a false public voucher contrary to § 40A–23–3, N.M.S.A.1953 (2d Repl. Vol. 6, 1972) defendant appeals asserting four points for reversal, namely: (1) unconstitutionality of the statute; (2) failure to grant a change of venue; (3) failure to give a requested instruction; and, (4) insufficiency of the evidence. Issues raised in the docketing statement and not argued on appeal are deemed abandoned. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App.1976). We affirm.

Constitutionality of the Statute

Section 40A–23–3, supra, states:

". . . Making or permitting false public voucher consists of knowingly, intentionally or willfully making, causing to be made or permitting to be made, a false material statement or forged signature upon any public voucher, or invoice supporting a public voucher, with intent that the voucher or invoice shall be relied upon for the expenditure of public money.

"Whoever commits making or permitting false public voucher is guilty of a fourth degree felony."

Defendant contends that the statute is unconstitutionally "vague, ambiguous and indefinite." He asserts that by the use of the word "material" a man of common intelligence would find it impossible to determine what statements were materially false. We disagree.

As we stated in *State v. Najera*, 89 N.M. 522, 554 P.2d 983 (Ct.App.1976):

"A statute violates due process if it is so vague that persons of common intelligence must necessarily guess at its meaning. 'The vagueness doctrine is based on notice and applies when a potential actor is exposed to criminal sanctions without a fair warning as to the nature of the proscribed activity.' *State v. Marchiondo*, 85 N.M. 627, 515 P.2d 146 (Ct.App.1973)."

We are guided by two rules.

First, words in the statute are given their ordinary meaning unless a different intent is clearly established by the legislature. *State v. Tapia*, 89 N.M. 221, 549 P.2d 636 (Ct.App.1976). We find no different intent expressed.

What is the ordinary meaning of "material?" Webster's Third New International Dictionary (Unabridged Ed.1966) states:

". . . being of real importance or great consequence: *substantial* . . . (2) *Essential* . . . ."

The Random House Dictionary of the English Language (Unabridged Ed.1969) states:

". . . of substantial import; of much consequence; important: . . . pertinent or essential (usually fol. by to): . . . *Law.* likely to influence the determination of a case: *material evidence.* . . ."

The meaning of "material" is not vague, ambiguous or indefinite. It does not import anything less than a matter which is so substantial and important as to influence a party.

Second, we consider the statute as a whole. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct.App.1972). Given the ordinary meaning of "material" we find that the statute gives notice of the following prohibitions: (1) knowingly or intentionally or willfully; (2) making or causing to be made or permitting to be made; (3) a false statement which would affect a decision to expend public money; (4) by an invoice to support a public voucher; (5) intending that the invoice would be relied upon for the expenditure of public money.

Accordingly, the statute is not vague, ambiguous or indefinite. It gives fair warning of the prohibited acts and declares those acts to be a crime.

Venue

Defendant filed a motion for a change of venue based upon an article which appeared

in the Albuquerque Journal and his own affidavit. The state offered no evidence. After a hearing the trial court stated that it would call forty jurors rather than the usual twenty-four and if it appeared they would run out of jurors, who had read the article and formed an opinion, then it would grant a change of venue. The trial court then stated it was ". . . going to hold in abeyance ruling on this until I have satisfied myself one way or another that he can get a fair trial or that he can't. . ."

Subsequently and after voir dire of the jury the trial court made the following findings. Each finding is substantially supported by the record:

"1. The Defendant's Motion for Change of Venue was set to be [heard] by the Court on Monday, January 10, 1977 at 9:30 a. m. The Court heard arguments of counsel and considered the Defendant's Affidavit at that time and date.

"2. After hearing the arguments of counsel and consideration of the Defendant's Affidavit, the Court deferred ruling on the Motion for Change of Venue until after Voir Dire of the prospective jurors was completed.

"3. Voir Dire of approximately forty (40) jurors in this cause commenced at approximately 1:30 p. m. on January 10, 1977.

"4. During Voir Dire only approximately eight (8) of the prospective jurors indicated that they had prior knowledge, through the newspaper or other news media, of the facts of this cause. Of these eight (8), all but one stated, after questioning, that such knowledge would not affect or prejudice his or her decision or deliberation in this cause.

"5. The one (1) juror (Barton Davis) who indicated that his prior knowledge of the case would affect or prejudice his decision or deliberation was excused for cause by the Court.

"6. Both the State and the Defense questioned all the prospective jurors about any news accounts they (the jurors) might have heard or read about this cause.

"7. When given the opportunity to challenge prospective [jurors] for cause, the Defendant's attorney challenged only one prospective juror (Barton Davis) for cause.

"8. Barton Davis was excused by the Court for cause.

"9. Twelve (12) jurors and two (2) alternates were selected to serve as jurors in this case. The Defendant's counsel never attempted to challenge any of these individuals for cause, and in fact, exercised only three (3) of his preemptory challenges during selection of the jurors.

"10. After the jurors and alternate jurors were selected, the Defendant's counsel did not make any objection to proceeding with the trial."

Defendant relies on *State v. Alaniz*, 55 N.M. 312, 232 P.2d 982 (1951) ". . . for the proposition that when a defendant seasonably files a Motion for Change of Venue, supported by the Affidavit of his counsel, which met the requirements of the statute, and the State did not controvert the charges in the Motion for Change of Venue by any positive pleading whatsoever, nor did it offer any testimony to the contrary, the Court is without discretion to deny the Motion for Change of Venue."

We assume, without deciding, that defendant properly characterizes *Alaniz*. However, here the trial court did not rule on the motion until after the voir dire of the jury. Whereas in *Alaniz* the trial court ruled solely on the basis of the motion and the affidavit. The voir dire was evidence to be used by the trial court in reaching its decision. *Deats v. State*, 80 N.M. 77, 451 P.2d 981 (1969). Thus, having been presented with evidence contrary to defendant's affidavit, the trial court could deny defendant's motion. Our review is then only for an abuse of discretion. *Deats v. State*, supra. A review of the record fails to reveal an abuse of discretion.

Instruction Requested

Defendant contends it was error to refuse a requested instruction. Defendant

does not cite us to the record for evidence to support his requested instruction. This is a clear violation of N.M. Crim.App. Rule 501(a)(4) and (e). The contention will not be considered. *City of Farmington v. Sandoval*, 90 N.M. 246, 561 P.2d 945 (Ct.App. 1977).

Insufficiency of the Evidence

Defendant contends the evidence is insufficient to show that he committed the offense on June 28, 1975, the date charged in the indictment. There is evidence that the false invoice was signed on October 30, 1975, but there is also evidence that it was signed on June 28, 1975. The date of signing was for the jury to determine.

Affirmed.

IT IS SO ORDERED.

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

568 P.2d 209

Mary R. WEISS, Plaintiff (Employee) Appellant,

v.

HANES MANUFACTURING COMPANY, Defendant (Employer),

and

Hartford Insurance Company through General Adjustment Bureau, Defendant (Employer's Compensation Carrier), Appellees.

No. 2820.

Court of Appeals of New Mexico.

July 19, 1977.

Writ of Certiorari Denied Aug. 23, 1977.

Anthony F. Avallone, Las Cruces, for plaintiff-appellant.

Edward E. Triviz, Las Cruces, for defendants-appellees.

OPINION

SUTIN, Judge.

After 17 months had passed from the date of the hearing, the trial judge rendered a decision in favor of plaintiff. Four and one-half months later, the trial judge, from a review of his notes and the pleadings, changed his mind and entered a decision and judgment in favor of defendants and dismissed plaintiff's complaint with prejudice. Plaintiff appeals and we reverse.

We repeat, as we have noted on many occasions, that the proceedings which occurred in the court below and the briefs filed on appeal, are a sad reflection of a search for justice in the trial and appeal of civil cases.

The record shows the following dates and events surrounding the change of course in the trial court.

(1) On November 25, *1974,* the court heard all the evidence adduced at trial.

(2) On December 3, *1974,* plaintiff filed requested findings and conclusions. On December 17, *1974,* defendants filed requested findings and conclusions.

(3) On April 22, *1976,* 17 months after the evidence was heard, the trial court signed its decision in favor of plaintiff, which decision consisted verbatim of plaintiff's requested findings and conclusions.

(4) On June 24, *1976,* the court *filed* its decision in favor of plaintiff. The record is silent on the cause of the delay and the reasons therefor. Plaintiff submitted a form of judgment, but it was left unsigned.

(5) On June 30, *1976,* defendants filed a motion to vacate the decision and requested the trial court to find the facts and conclusions pertinent to the case, and moved alternately, for a new trial. On the same day, defendant filed a memorandum of 22 pages consisting of exceptions, testimony, references to depositions, correspondence between the court and counsel, comments, arguments and court decisions.

(6) On July 24, *1976,* argument was held on defendants' motion.

(7) On September 2, *1976,* the court wrote to opposing attorneys that he went back over all of his notes and the pleadings and found that his decision made April 22, 1976, and filed June 24, 1976, was incorrect and did not follow the facts in the case; that the decision was vacated, held for naught, and that a new decision was mailed to opposing attorneys.

(8) On September 3, *1976,* 21½ months after the evidence was heard, the court filed its decision in favor of defendants, which decision consisted verbatim of defendants' requested findings and conclusions.

(9) On *November 12, 1976,* plaintiff filed a notice of appeal *"to be effective on the date the judgment is actually filed."* [Emphasis added.]

(10) On December 2, *1976,* 20 days later, judgment was entered that dismissed plaintiff's complaint with prejudice.

A. *Plaintiff's notice of appeal was timely.*

Defendants note a jurisdictional question. They think it is questionable whether the notice of appeal given by plaintiff was sufficient to lift this case up from the district court. The assistance given this Court on this issue by opposing attorneys adds up to nothing.

The record shows that on *September 3, 1976,* the trial court rendered its decision.

About September 22, 1976, a judgment was presented to plaintiff by defendants for signature but it was returned to defendants unsigned. Plaintiff had no knowledge if or when the judgment would be filed. It was not filed by November 12, 1976. We believe that due to unusual and inexcusably long delays which had occurred previously, plaintiff, in order to protect her rights, did on *November 12, 1976,* file a *premature* notice of appeal *"to be effective on the date the judgment is actually filed"*, and served a copy thereof on defendants. The judgment was filed on *December 2, 1976,* three months after the decision was rendered. No notice of appeal was thereafter filed.

Pursuant to Rules 3(a)(1) and 4(a) of the Rules Governing Appeals [§§ 21–12–3(a)(1) and 21–12–4(a), N.M.S.A. 1953 (Repl. Vol. 4, 1975 Supp.)], a notice of appeal must be filed with the clerk of the district court within 30 days *after* entry of any final judgment.

The validity of plaintiff's notice of appeal, as worded, filed before entry of the final judgment, is a matter of first impression.

A history of this subject matter over the last 50 years discloses many variables. In *1925,* beginning with *D. M. Miller & Co. v. Slease,* 30 N.M. 469, 238 P. 828 (1925), the rule was established that until judgment was entered, there could be no appeal. In *1948,* the Supreme Court adopted the view that its rules would be liberally construed to the end that causes brought to the Supreme Court for review would be heard on the merits if possible. *Fairchild v. United Service Corporation,* 52 N.M. 289, 197 P.2d 875 (1948).

In *1961,* when a notice of appeal was late in filing by two days, jurisdiction of the case in the Supreme Court vanished, *Driver-Miller Corporation v. Liberty,* 69 N.M. 259, 365 P.2d 910 (1961), but where the filing of the notice was one day late, caused by mailing a presumption of its receipt on time by the district clerk saved the appellant. *Adams v. Tatsch,* 68 N.M. 446, 362 P.2d 984 (1961).

In *1964,* the Supreme Court adopted the liberal doctrine that the formalistic rigorism of the past had faded away so that thereafter, when any notice *defective* in form is filed in time *after* judgment that gives the opposing party notice of intention to appeal from the judgment rendered, no prejudice arises, and the notice is sufficient. *Johnson v. Johnson,* 74 N.M. 567, 396 P.2d 181 (1964). Thereafter, various *defects* in the form of notice filed in time were held sufficient. *Nevarez v. State Armory Board,* 84 N.M. 262, 502 P.2d 287 (1972); *Spurlin v. Paul Brown Agency, Inc.,* 80 N.M. 306, 454 P.2d 963 (1969); *Baker v. Sojka,* 74 N.M. 587, 396 P.2d 195 (1964); *Westbrook v. Lea General Hospital,* 85 N.M. 191, 510 P.2d 515 (Ct.App. 1973). But where the notice does *not* designate the judgment, order or part thereof appealed, it is insufficient. *State ex rel. Norvell v. Credit Bur. of Albuquerque, Inc.,* 85 N.M. 521, 514 P.2d 40 (1973).

In 1966 and 1967, the Supreme Court held that when a notice of appeal is *prematurely* filed before the entry of judgment, jurisdiction also vanishes and the appeal is dismissed. *Bouldin v. Bruce M. Bernard, Inc.,* 78 N.M. 188, 429 P.2d 647 (1967); *Curbello v. Vaughn,* 76 N.M. 687, 417 P.2d 881 (1966).

For other variables of significance, see *Marquez v. Wylie,* 78 N.M. 544, 434 P.2d 69 (1967); *Varney v. Taylor,* 79 N.M. 652, 448 P.2d 164 (1968); *Mabrey v. Mobil Oil Corporation,* 84 N.M. 272, 502 P.2d 297 (Ct.App. 1972).

The above collection of cases are not set forth to encourage attorneys to file defective notices of appeal, nor are the various defective forms delineated. They represent a guideline for those attorneys who are delinquent in the protection of their client's right to appeal.

Attorneys who handle appeals must conform to the Supreme Court rules within the "liberal" concepts attached to them, or their clients will suffer the pangs of outrageous misfortune. Negligence, mistake or misapprehension is no excuse.

This warning could be made applicable to the instant case, but because of the trend

toward a liberal view that began 30 years ago, we have decided to "liberally" construe this notice of appeal to protect the plaintiff. By this decision, we do not approve the filing of this type of notice under normal circumstances.

We know of no statute or procedural rule that requires notice of the actual entry of the judgment. In the instant case, the record does not show that plaintiff was notified if and when the judgment would be filed of record. Due to the prior delays that occurred, plaintiff had good cause to believe that the time for signing and filing the judgment would be indefinite in time, and that plaintiff would not be notified of the date that the judgment would be filed. To avoid gambling her rights of appeal, plaintiff filed and served a notice of appeal prematurely, but made the notice effective as of the date the judgment was actually filed. We believe the plaintiff was justified in doing so. By a transmutation of the language used, we hold that the notice of appeal was actually filed as of December 2, 1976, the date that the judgment was filed.

The notice of appeal was timely.

B. *The uncertainty of the judgment rendered demands a new trial.*

This case took on the form of a chameleon, very changeable, shifting in hue, according to the objectives presented to the court at different times.

From a review of the evidence, there are two issues of fact upon which the solution to this case depends. Did defendants have actual knowledge of the accident and injury as required by § 59–10–13.4(B), N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1)? Did plaintiff establish that her disability was the natural and direct result of the accident as a medical probability as required by § 59–10–13.3?

Defendants seek to affirm the judgment below because plaintiff's brief in chief failed to properly challenge the court's findings, and failed to present the matter of plaintiff's requested findings. We are often confronted with serious defects in briefs filed in this Court. We have already noted that both briefs filed are a sad reflection of those services necessary to assist this Court. Because of the reasons for reversing this case, we abandon any discussion of defendant's criticism of plaintiff's brief.

The facts show that on March 20, 1974, plaintiff was employed as a material handler. Boxes of women's hosiery were sent out to her from the printing department on a small roller or dollie vehicle called a "truck." Her duty was to take the boxes off the truck and put them on the shelves. There was a stack of 20 boxes and to put them on the top shelves, she had to stand on a stool. While putting boxes on the top shelves, the boxes started falling and she stepped backward and almost fell off the stool She dropped the boxes and got hold of the divider of the shelf and swung around. She hit herself against the shelves, and was "grabbing to the table" and twisted her back. Mary Green, a checker, noted that plaintiff "caught my table", and made her sit down. Plaintiff was in pain.

Plaintiff testified that she told Rudy Burciaga, her superior, about the accident and injury. Burciaga testified that plaintiff told him she had pain and didn't feel right, and he told her to go to the employer's nurse or go home. We infer from this that plaintiff did not tell Burciaga that her pain was a result of the accident.

The determination of defendants' actual knowledge of the accident depends upon whom the judge would believe. The inexcusable delay of 17 months and 21½ months, respectively, in making his determination for plaintiff and defendants, after the evidence was heard, hindered and impeded a fair determination of this issue. By petition to the Supreme Court, either of the opposing attorneys could have obtained a peremptory writ of mandamus. Section 21–12–12, N.M.S.A. 1953 (Repl. Vol. 4, 1975 Supp.); *State ex rel. United Nuclear Corp. v. Montoya*, 76 N.M. 500, 416 P.2d 380 (1966). Both opposing attorneys sat idly by and waited, even though plaintiff must have anxiously awaited a decision of the trial court to determine her right to compensation. We have no sympathy for both

opposing attorneys who let this case sleep in their files.

Neither can we rely on the memory of the court. We do not know what notes were kept by the court that originally led to a decision for the plaintiff and then months later for the defendants. "Memory" is uncertain 21½ months later when "memory" is restricted to a recollection of the veracity of witnesses who testified and a remembrance of the evidence heard during trial. Many duties, affairs, events, occurrences and interests have intervened during the interim period. The certainty of memory begins to fade with the passage of time. Decisions based on memory are as uncertain as the testimony of witnesses who seek to recollect the facts of an event that occurred two years ago. Refreshment of memory by a court might take on the color of certainty if the testimony were read. If not read, experience teaches that a decision based upon memory alone is poor judgment and should be avoided.

Medical evidence was presented on plaintiff's disability as the natural and direct result of the accident as a medical probability under § 59–10–13.3.

Medical testimony consisted of the depositions of Dr. Mario Palafox, an orthopedic surgeon, Dr. Edmundo A. Kauffmann, a neurosurgeon, Dr. Carlos Arazoza, an orthopedic surgeon, and Dr. William J. Nelson, a neurosurgeon, all of El Paso, Texas.

There is sufficient evidence that, as a reasonable medical probability, plaintiff's disability was caused by the accident that occurred on March 20, 1974. However, the medical testimony can be construed to the contrary.

The doctors agreed that plaintiff's compensatory injury could have been caused by plaintiff coughing, sneezing, or performing housework and similar activity. The medical testimony created an issue of fact for the court.

Under the circumstances of this case, the symbolic terms of "equity and fair play" demand a retrial of the issues in conformity with the purposes of the Workmen's Compensation Act. The uncertainty of the judgment entered in this case cannot stand.

This case is reversed and remanded for a new trial.

IT IS SO ORDERED.

LOPEZ, J., and KASE, District Judge, specially concurring.

KASE, District Judge, (specially concurring).

I concur in the result. I also concur in the opinion, except that I do so on the following additional ground not articulated in the opinion.

The trial court filed two separate decisions in this case. In its initial decision filed on June 24, 1976 the court held in favor of the plaintiff. In its subsequent decision filed on September 3, 1976 the court held in favor of the defendants. Both decisions consist verbatim of the requested findings and conclusions of the prevailing parties. This practice has been denounced by the New Mexico Supreme Court in *Mora v. Martinez*, 80 N.M. 88, 451 P.2d 992 (1969). The court's mechanical adoption of the requested findings and conclusions of the prevailing parties in both decisions raises a serious question as to whether the court exercised the required independent judgment in determining this case.

This ground, coupled with the grounds contained in the opinion, require that this case be reversed and remanded for a new trial.

568 P.2d 214

Calvin HOWELL, as Next Friend of Patrick Howell, a minor, Plaintiff-Appellant,

and

City of Albuquerque, Cross-Claimant Defendant-Appellant,

v.

W. E. BURK, Jr., PPG Industries, Inc., and Universal Constructors, Inc., Defendants-Appellees.

No. 2801.

Court of Appeals of New Mexico.

July 19, 1977.

Writ of Certiorari Denied Aug. 23, 1977.

Stephen F. Lawless, McCulloch, Grisham & Lawless, P. A., Albuquerque, for plaintiff-appellant Howell.

D. James Sorenson, Johnson, Paulantis & Lanphere, Albuquerque, for cross-claimant defendant-appellant City of Albuquerque.

Stephen Durkovich, Peter C. Mallory, Jasper & Durkovich, Albuquerque, for appellee W. E. Burk, Jr.

Lawrence H. Hill, Civerolo, Hansen & Wolf, P. A., Albuquerque, for appellee PPG Industries.

Thomas L. Johnson, Kenneth L. Harrigan, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for appellee Universal Constructors, Inc.

OPINION

WOOD, Chief Judge.

These appeals involve the constitutionality of § 23–1–26, N.M.S.A.1953 (Supp.1975) and the applicability of that statute to the contentions in this case. We discuss: (1) title of the act; (2) special legislation and equal protection; (3) due process; and (4) application of the statute to the contentions of the parties.

The terminal building of the Albuquerque Airport was substantially completed on November 12, 1965. Patrick Howell, seven years of age, collided with a glass door or window on the observation deck of the building while walking between sections of the observation deck. The incident occurred on January 1, 1976. Suit for damages based on personal injuries was filed on July 14, 1976. The defendants are the City of Albuquerque, owner of the building; Universal (Universal Constructors, Inc.), the contractor who built the observation deck; Burk, the architect who designed the observation deck; and PPG (PPG Industries, Inc.) who manufactured and sold the glass, and, from the showing in this record, also installed the glass.

Albuquerque cross-claimed against Universal, Burk and PPG. Universal cross-claimed against Albuquerque and PPG. Burk cross-claimed against Albuquerque. PPG did not cross-claim.

All defendants, except Albuquerque, moved for summary judgment on the complaint and the cross-claims. The trial court's rulings on these motions are the basis for these appeals, all of which are interlocutory. The trial court ruled that § 23–1–26, supra, was constitutional. The trial court granted some, but not all, of the motions for summary judgment, applying the ten-year limitation period of § 23–1–26, supra.

Section 23–1–26, supra, reads:

"*Construction projects—Limitation on actions for defective or unsafe conditions.*—No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property, nor any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity, shall be brought after ten [10] years from the date of substantial completion of such improvement; provided this limitation shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith. The date of substantial completion shall mean the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the purpose for which it was intended, or the date on which the owner does so occupy or use the improvement, or the date established by the contractor as the date of substan-

tial completion, whichever date occurs last."

Title of the Act

N.M.Const., Art. IV, § 16 states in part:

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

Plaintiff contends that the subject of § 23–1–26, supra, was not clearly expressed in the title. The title reads:

"RELATING TO CONSTRUCTION PROJECTS; AND PROVIDING FOR A LIMITATION ON ACTIONS FOR DEFECTIVE OR UNSAFE CONDITIONS ON CONSTRUCTION PROJECTS."

The legal test is whether the title fairly gives reasonable notice of the subject matter of the statute. *Martinez v. Jaramillo,* 86 N.M. 506, 525 P.2d 866 (1974); *Bureau of Revenue v. Dale F. Bellamah Corporation,* 82 N.M. 13, 474 P.2d 499 (1970).

Plaintiff asserts that reasonable notice of the subject matter is not given in the title. Section 23–1–26, supra, states that no action shall be brought after ten years from the date of substantial completion. By its terms, the statute provides that after the specified time has elapsed there is no cause of action. *Rosenberg v. Town of North Bergen,* 61 N.J. 190, 293 A.2d 662 (1972). Plaintiff asserts that a no action statute is not a statute of limitations. Because the title refers to "limitation on actions", the contention is that the title fails to give reasonable notice of the subject matter. *Bagby Elevator and Electric Company, Inc. v. McBride,* 292 Ala. 191, 291 So.2d 306 (1974) so held. *Bagby* does not state New Mexico law.

"Subject" in N.M.Const., Art. IV, § 16 is to be given a broad and extended meaning so as to authorize the Legislature to include in one act all matters having a logical or natural connection. *State v. Romero,* 86 N.M. 99, 519 P.2d 1180 (Ct.App.1974). The no action provision in § 23–1–26, supra, literally is a limitation on actions that may be brought. The reference in the title to "limitation on actions" logically and naturally connects with the no action provision of the statute. The title provides reasonable notice of the subject matter and does not violate N.M.Const., Art. IV, § 16.

Special Legislation and Equal Protection

N.M.Const. Art. IV, § 24 pertains to special legislation. Special laws are prohibited in the areas of special immunity and limitations on actions. This constitutional ban on special legislation does not prohibit legislation classifying the subjects or objects of legislation; almost every matter of public concern is divisible; such division is necessary to methodical legislation. *State v. Atchison, Topeka & Santa Fe Ry. Co.,* 20 N.M. 562, 151 P. 305 (1915).

The question of special legislation involves the classification made by the Legislature. "If a statute is general in its application to a particular class of persons or things and to all of the class within like circumstances, it is a general law." On the other hand, if the statute applies to less than a class of persons, it is special legislation. *City of Raton v. Sproule,* 78 N.M. 138, 429 P.2d 336 (1967).

Whether the classification in § 23–1–26, supra, is general or special involves the question of equal protection. *Gruschus v. Bureau of Revenue,* 74 N.M. 775, 399 P.2d 105 (1965) states:

"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."

Thus, if there is no violation of equal protection in this case, § 23–1–26, supra, is not

special legislation. See *Davy v. McNeill,* 31 N.M. 7, 240 P. 482 (1925) where the two concepts are discussed jointly.

To answer the equal protection question we must consider the purpose of the statute. *McGeehan v. Bunch,* 88 N.M. 308, 540 P.2d 238 (1975).

The "no action" of § 23–1–26, supra, applies to actions "arising out of the defective or unsafe condition of a physical improvement to real property . . . ." It applies to actions "against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity . . . ." A general, but shorthand expression is that these statutory provisions refer to construction projects and builders. For convenience, we use this shorthand expression in the remainder of this first point.

The purpose of "no action" ten years after substantial completion of the construction project has a historical basis. The limited liability of the builder after the construction project has been completed and accepted by the owner was stated in *Wood v. Sloan,* 20 N.M. 127, 148 P. 507, L.R.A.1915E 766 (1915). In recent years, however, the liability of the builder has been expanded by judicial decision. This expansion appears in *Tipton v. Clower,* 67 N.M. 388, 356 P.2d 46 (1960); *Baker v. Fryar,* 77 N.M. 257, 421 P.2d 784 (1966); *Steinberg v. Coda Roberson Construction Co.,* 79 N.M. 123, 440 P.2d 798 (1968).

When did the builder become exposed to this expanded liability? The exposure came when the cause of action accrued. Section 23–1–1, N.M.S.A.1953. Generally, the cause of action does not accrue until injury occurs. *Peralta v. Martinez,* N.M., 564 P.2d 194 (Ct.App.1977). Since injury could occur years after the construction project had been completed, the builder was exposed to liability years after the action or event alleged to be the basis for requiring him to pay damages.

This increased exposure resulted from judicial decisions. Section 23–1–26, supra, is the legislative response. The Comment in XVIII Catholic U.L.Rev. 361 (1968–69), *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action,* states at 383–84:

> "The legislative solution to these problems evidences a skepticism that the normal judicial process . . . adequately isolates the tenuous from the substantial claim; or that, even if just adjudication is possible, the burden of tenuous claims upon both court and defendant sufficiently vindicates the denial of a right of action altogether after a period of years."

The purpose of § 23–1–26, supra, was to provide a reasonable measure of protection against the increased hazard to builders. *Rosenberg v. Town of North Bergen,* supra; see *Nevada Lakeshore Co., Inc. v. Diamond Electric, Inc.,* 89 Nev. 293, 511 P.2d 113 (1973).

There is no contention that a classification providing for no action arising out of defective or unsafe conditions of physical improvements to real property is an improper classification. Compare *Josephs v. Burns,* 260 Or. 493, 491 P.2d 203 (1971). Thus, there is no equal protection claim based on classification of potential plaintiffs. In light of the historical background, any such claim would be meritless.

The improper classification claim goes to those who benefit from the no action provision. The beneficiaries are "any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity . . . ." Under the statutory language, the owner or tenant of real property, or a materialman who does no more than manufacture or supply materials does not benefit from the statute. *Carter v. Hartenstein,* 248 Ark. 1172, 455 S.W.2d 918 (1970); *Skinner v. Anderson,* 38 Ill.2d 455, 231 N.E.2d 588 (1967); *Reeves v. Ille Electric Company,* 551 P.2d 647 (Mont. 1976).

The plaintiff, and Albuquerque, contend that owners, tenants and materialmen are in the same situation as those covered by the statute; that there is no substantial difference between owners, tenants and materialmen and those covered by the statute. This is the basis of the equal protection and special legislation claims. These claims are supported by three decisions. *Skinner v. Anderson,* supra, held a statute similar to the New Mexico statute was special legislation because there was no reasonable basis for distinguishing between architects and contractors (covered by the statute), and owners, tenants and materialmen (not covered by the statute). *Kallas Millwork Corporation v. Square D Co.,* 66 Wis.2d 382, 225 N.W.2d 454 (1975) and *Fujioka v. Kam,* 55 Haw. 7, 514 P.2d 568 (Hawaii 1973) follow *Skinner v. Anderson,* supra. We disagree with these decisions.

While both those covered and those not covered by the statute may be exposed to claims years after the construction project was completed, there is a difference in the problems of defending such claims. Architectural plans may have been discarded, copies of building codes in force at the time of construction may no longer be in existence, persons individually involved in the construction project may be deceased or may not be located. Due to the lapse of time, those persons covered by the statute may find it impossible to assert a reasonable defense.

Those covered by the statute have no control over the real estate improvement once it is completed and turned over to the owner. The owner or tenant may permit unsafe conditions to develop, or use the premises for a purpose for which it was not designed, or make defective alterations which may appear to be a part of the original construction. See *Grissom v. North American Aviation, Inc.,* 326 F.Supp. 465 (D.C.Fla.1971).

We have previously pointed out that § 23–1–26, supra, is a legislative response to the expanded liability imposed on those engaged in construction projects by judicial decisions. Liability of owners and occupiers of land has a different historical background. Such liability is not new. Compare the liability of the owner or occupier of land as stated in *Chavez v. Torlina,* 15 N.M. 53, 99 P. 690 (1909) with the liability of a contractor as stated in *Wood v. Sloan,* supra, which was decided six years later.

The difficulties of those covered by the statute in providing a reasonable defense to a claim made years after the construction project was completed, the absence of control of the premises by those covered by the statute, and the historical difference in liability between owners and occupiers of land and those covered by the statute provide a reasonable basis for excluding owners and tenants from the benefits of the statute.

There is also a reasonable basis for distinguishing between materialmen and persons covered by the statute. That reasonable basis lies in the work performed. "The manufacturer makes standard goods and develops standard processes. Defects are harder to find in the contractor's special jobs." 2 Harper and James, *The Law of Torts* (1956), page 1043. ". . . [T]he legislature could reasonably have concluded that evidentiary problems facing the architect and contractor are greater than those facing the materialmen." Comment, Catholic U.L.Rev., supra, at page 371.

We hold there is a reasonable basis for distinguishing between those covered by the statute and owners, tenants and materialmen. The legislative classification does not offend the equal protection requirement. Section 23–1–26, supra, is not special legislation. Apart from *Rosenberg v. Town of North Bergen,* supra, the following decisions provide little or no explanation for the result reached. Yet, the decisions accord with our view that there is no equal protection violation and that the statute is not special legislation. *Carter v. Hartenstein,* supra; *Regents of U. of Calif. v. Hartford Acc. & Indem. Co.,* 59 Cal.App.3d 675, 131 Cal.Rptr. 112 (1976); *Reeves v. Ille Electric Company,* supra; *Freezer Storage, Inc. v. Armstrong Cork Co.,* 341 A.2d 184, 234 Pa. Super. 441 (1975); *Good v. Christensen,* 527 P.2d 223 (Utah 1974); *Yakima Fruit & Cold*

Stor. Co. v. Central Heat. & P. Co., 81 Wash.2d 528, 503 P.2d 108 (1972).

Due Process

Albuquerque's amended application for an interlocutory appeal asserted that § 23–1–26, supra, violated due process "in that it bars the appellant's causes of action before they have accrued." We have previously pointed out that under § 23–1–1, supra, plaintiff's claim accrued at the time of injury. Under § 23–1–8, N.M.S.A.1953, plaintiff would have had three years from January 1, 1976 in which to bring suit. However, § 23–1–26, supra, is "entirely unrelated to the accrual of any cause of action." *Rosenberg v. Town of North Bergen,* supra.

Section 23–1–26, supra, provides no action is to be brought ten years after substantial completion of the construction project. The ten years expired on November 12, 1975; the ten years expired prior to the date of injury. Thus, plaintiff's complaint is that he had no cause of action at the time of the injury and due process is violated because § 23–1–26, supra, deprives him of a cause of action.

We do not have a situation where a specific constitutional provision pertains to the preservation of remedies. Compare, *Josephs v. Burns,* supra, with *Saylor v. Hall,* 497 S.W.2d 218 (Ky.1973). Nor do we have a situation involving any vested right; plaintiff had no right to damages when § 23–1–26, supra, was enacted in 1967. See *Rubalcava v. Garst,* 53 N.M. 295, 206 P.2d 1154 (1949); compare N.M.Const., Art. IV, § 34.

The applicable rule is "that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver v. Silver,* 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929). See *Smith v. Allen-Bradley Company,* 371 F.Supp. 698 (D.C.Va.1974); *Rosenberg v. Town of North Bergen,* supra; *Freezer Storage, Inc. v. Armstrong Cork Co.,* supra. The legislative purpose in enacting § 23–1–26, supra, was to provide a measure of protection against claims arising years after the construction was substantially completed. This is a permissible legislative object.

Inherent in the arguments of plaintiff and Albuquerque is the contention that § 23–1–26, supra, is unjust because it deprives an injured person of a remedy. It is not our function to question the social or economic policy which underlies the statute; our function is to determine whether it is unconstitutional. *McGeehan v. Bunch,* supra.

The trial court correctly ruled that § 23–1–26, supra, was constitutional.

Application of the Statute

1. Section 23–1–10, N.M.S.A.1953 states that "[t]he times limited for the bringing of actions by the preceding provisions of this chapter shall, in favor of minors . . . be extended . . . ." Plaintiff asserts that this provision applies in favor of the minor in this case and that the ten-year provision in § 23–1–26, supra, is not applicable. We disagree. Section 23–1–26, supra, is not a part of "this chapter" referred to in § 23–1–10, supra. See also § 23–1–17, N.M.S.A.1953. *Noriega v. City of Albuquerque,* 86 N.M. 294, 523 P.2d 29 (Ct.App.1974) is contrary to plaintiff's contention.

2. The summary judgment went to all contentions raised in the complaint and the cross-claims "with the exception of the claims of negligent maintenance set forth in Paragraph XI of Count I and negligent failure to warn set forth in Paragraph XIII of Count I of the Plaintiffs' complaint, as well as the Crossclaims based upon such allegations." Paragraph XI alleged that all defendants had a duty to maintain the premises in a safe condition for invitees. Paragraph XIII alleged that all defendants failed to warn plaintiff of the location and danger of the glass.

The reason the negligent maintenance and negligent failure to warn claims were excepted from the summary judgment was "an insufficient record . . . to deter-

mine whether . . . [this claimed negligence] occurred after the substantial completion of the airport and within ten years of the date the Complaint was filed . . . .

Universal and Burk contend the trial court erred in exempting these claims from the summary judgment; no other party raises this claim. The showing in this record is that Universal and Burk were involved with the glass as the general contractor and architect. To the extent the claims of negligent maintenance and negligent failure to warn, whether in the complaint or by cross-claim, are asserted against Universal and Burk in their capacity as general contractor and architect in designing, planning or performing the construction, in supervising the construction or in administering the construction, the claims come within § 23–1–26, supra. We do not read the summary judgment as being contrary to this view.

However, the summary judgment states that the record is insufficient to determine whether the negligent maintenance and negligent failure to warn occurred after substantial completion and within ten years of the date the complaint was filed. This phraseology suggests that *when* the negligence occurred is of significance, and that the type of negligence is also of significance. Thus, Albuquerque contends that § 23–1–26, supra, applies only to negligence which occurred prior to substantial completion and that Universal had a duty to warn if it learned of the danger after the terminal building was constructed.

Section 23–1–26, supra, is not worded in terms of *when* the negligence occurred. It does not matter if the negligence occurred before there was substantial completion, during the ten years after substantial completion or more than ten years after substantial completion. The statute states that no action shall be brought ten years after the date of substantial completion.

Section 23–1–26, supra, is not worded in terms of type of negligence. It states that "no action" is to be brought ten years after the date of substantial completion "arising out of the defective or unsafe condition of a physical improvement to real property". The "no action" applies to any duty of Universal or Burk to warn, regardless of when Universal or Burk learned of the danger, if the duty to warn arose out of a defective or unsafe condition of the improvement to real property. Compare the claim of negligent failure to warn or repair rejected in *Josephs v. Burns,* supra.

To the extent that claims of negligent maintenance and negligent failure to warn are asserted against Universal and Burk, and those claims arise out of defective or unsafe conditions of the improvements designed and supervised by Burk and constructed by Universal, these claims should not have been exempted from the summary judgments granted Universal and Burk. The claims of negligent maintenance and negligent failure to warn which are asserted against Universal and Burk arise out of the alleged defective or unsafe condition of the glass and thus are based on alleged defective or unsafe condition of the improvement to real property. The trial court erred in exempting these claims from the summary judgment entered in favor of Universal and Burk.

3. Plaintiff and Albuquerque complain of the summary judgment in favor of PPG; their contentions involve two questions.

Plaintiff's complaint against PPG alleges strict liability, negligent design and implied warranty. Albuquerque's cross-claim against PPG alleges express and implied warranty. The first question is whether these bases for liability are covered by § 23–1–26, supra. We have previously pointed out that the "no action" of § 23–1–26, supra, does not distinguish between types of negligence. Nor does § 23–1–26, supra, exclude strict liability claims. The statute does refer to warranty claims; it states the ten-year limitation "shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith." Neither plaintiff nor Albuquerque has demonstrated in this appeal that the warranties alleged

contain express terms inconsistent with § 23–1–26, supra. It was their obligation to do so. *Novak v. Dow,* 82 N.M. 30, 474 P.2d 712 (Ct.App.1970). There is no showing that the trial court's ruling on the bases for liability was error.

The complaint alleges that PPG manufactured, designed, sold and installed the glass. Albuquerque's cross-claim alleges that PPG manufactured, sold and installed the glass. The second question is whether these activities are covered by § 23–1–26, supra. In our discussion of the equal protection issue, we pointed out that a materialman who does no more than manufacture or supply materials does not benefit from the statute. The statute, however, applies to "any person performing or furnishing the construction or the design . . . . of construction". The complaint alleges that PPG "designed glass products for use" at the terminal building. To the extent that PPG is sued as manufacturer or seller of the glass, PPG is not covered by the statute and the summary judgment in favor of PPG as to these claims was error. To the extent that PPG is sued as the designer or installer of the glass, PPG is covered by the statute and the summary judgment in its favor was correct.

PPG objects to an analysis of its activities, asserting that it has the protection of the statute because it was a member of the "construction team". This approach disregards the statutory language. The benefits of § 23–1–26, supra, apply to "any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction . . and *on account of such activity* . . . ." (Our emphasis.) The statutory language requires an activity analysis.

4. In paragraph numbered 3 of this issue, we pointed out that warranties are covered by § 23–1–26, supra, unless the warranty contains "express terms" inconsistent with the statute. We also pointed out that there has been no showing, on appeal, that the warranties alleged contained any express terms inconsistent with the statute. Plaintiff contends that summary judgment was improper as to any warranties allegedly made by Universal, Burk or PPG because these defendants "did not address themselves to these facts and did not sustain their burden of proof in the Summary Judgment proceeding." We do not know what contentions were raised in the trial court; there is no transcript of the proceedings at the motion hearing. Questions for review are established only by the record; it is the duty of a litigant seeking review to see that a record is properly prepared. *Westland Development Co. v. Saavedra,* 80 N.M. 615, 459 P.2d 141 (1969). The summary judgment states that the motions for summary judgment were heard, that there were no genuine issues of material fact as to the counts where the warranties were pleaded. From the record we cannot say that the warranty claims were not presented to the trial court.

5. Universal cross-claimed against PPG, alleging an express contract of indemnification in which PPG agreed to hold Universal harmless from all claims resulting directly or indirectly from the performance of PPG's subcontract. PPG contends on appeal that § 23–1–26, supra, applies to Universal's indemnification claim. Universal moved to strike this portion of PPG's brief, contending that Universal's cross-claim against PPG was not considered by the trial court at the time of the summary judgment hearing. This is incorrect; Count II of this cross-claim was expressly ruled on in the summary judgment. The record is not clear whether Count I (the indemnification claim) was considered at the summary judgment hearing.

We grant Universal's motion to strike, not on the basis that the indemnity claim was not before the trial court, but on the basis that it is not an issue in any of the interlocutory appeals. Rule 6(b)(2) of the Rules of Appellate Procedure for Civil Cases requires the application for appeal to state the questions presented. The three parties applying for an interlocutory appeal were plaintiff, Albuquerque and Universal. None of the applications raised the indemnity issue. PPG did not seek an interlocu-

tory appeal. Universal's motion to strike is granted. In turn, PPG's motion to strike Universal's reply brief, filed contrary to this Court's order granting Universal's interlocutory appeal, is also granted.

Having affirmed the summary judgment in part and having reversed the summary judgment in part, the cause is remanded for entry of an amended summary judgment consistent with the views expressed herein. Plaintiff is to recover one-half of his appellate costs from PPG; other parties are to bear their own appellate costs, if any.

IT IS SO ORDERED.

HENDLEY, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

"It is true that the presumption of law is that the majority of the court are right and that I am wrong; yet, in the face of this presumption, and the positiveness with which the views of the majority are asserted, I cannot yield my convictions the other way [convictions which I submitted to my brethren], [convictions] which were never clearer or stronger in any case." *O'Neil v. Vermont,* 144 U.S. 323, 353, 12 S.Ct. 693, 704, 36 L.Ed. 450 (1892) (Justice Field, dissenting).

The bench and the bar have commented favorably and adversely on the role of the dissenting opinion. In this case, and in some prior thereto, my authorship of an opinion finds disfavor with my brethren, and my formal opinion becomes a dissent. The reasons should be made known to the bench, the bar and the public. The past experiences of judges as lawyers in the courtroom and on appeal, the past human and legal relationship in society, the development subconsciously of ideas of "equity," "fair play" and "morality" create differences of opinion on the juridical concepts of justice in the administration of the law. I am not a humorless self-righteous sort of judge who has a firm conviction that always I alone, of the regiment of this Court, is in step. But we must not surrender our honest convictions solely because of the opinions of our brethren. The Supreme Court of the United States is the exemplar of this truism.

When the legislature enacts an odd statute, many courts and lawyers are disposed to construe such legislation in the light of preconceived ideas. They often do this without being aware of it because it is natural for us to be prejudiced in favor of those things with which we are familiar. It is difficult to break away from preconceived ideas. However, when the legislature departs from the past, such as a departure from the statute of limitations, it is the duty of courts to lay aside their preconceived ideas and construe such legislation according to its spirit and reason, and the evil aimed at in its enactment. Ofttimes, with the aid of satisfying words and phrases, to express our ideas, we give ourselves the illusion of possession the ultra-mundane ability to decide constitutional questions. We perceive with an optical illusion instead of with the retina.

In anticipation of a petition for certiorari being filed, I want to lay my cards on the table so that the Supreme Court can decide which opinion holds the royal flush.

The evil at which § 23–1–26 was aimed and the reason given for its enactment are the potential liability of the architectural profession and construction industry. The spirit in which it was first enacted in 1967, generally in the United States and in New Mexico, resulted from pressures brought to bear upon state legislatures by architects and construction industry. Cotter, Comment/Limitation of Action Statutes for Architects and Builders-Blue Prints for Non-Action, 18 Catholic U. of Amer.L.Rev. 361 (1967). I see no evil and denigrate the spirit and the reason for which this Act was passed. My brethren feel otherwise.

Plaintiff and the City attack the statute on three constitutional grounds: (1) Article IV, Section 24 of the New Mexico Constitution, which prohibits local or special laws; (2) Article II, Section 18 of the New Mexico Constitution and United States Constitution Amendment XIV, the Equal Protection

Clause; (3) Article IV, Section 16, subject in title of the Act. This constitutional question is a matter of first impression.

Section 23–1–26, *enacted in 1967,* reads:

> *No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death,* arising out of the defective or unsafe condition of a physical improvement to real property, nor any action for contribution or indemnity for damages so sustained, *against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity, shall be brought after ten [10] years from the date of substantial completion of such improvement;* provided this limitation shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith. The date of substantial completion shall mean the date when construction is sufficiently completed *so that the owner can occupy or use the improvement for the purpose for which it was intended,* or the date on which the owner does so occupy or use the improvement, or the date established by the contractor as the date of substantial completion, whichever date occurs last. [Emphasis added.]

For purposes of convenience, I shall deem this statute to mean "any person" involved in a "construction project." *This statute covers every construction project in the past history of New Mexico.*

"No action to recover damages . . . shall be brought" is a limitation not only on the remedy, but also on the right to institute an action. *Wall v. Gillett,* 61 N.M. 256, 298 P.2d 939 (1956). Section 23–1–26 proceeds beyond this concept. It prevents a cause of action from ever arising. An injured party literally has no cause of action, *even though it takes two to make a tort.* It abrogates a remedy for a very real wrong, even though a plaintiff normally has a claim for relief. It abolishes what is termed "a cause of action" or "a claim for relief." Section 23–1–26 falls within the perimeter of confused and disordered tort concepts.

Before discussing the constitutionality of § 23–1–26, it is important to establish the following propositions (A) and (B).

A. *Section 23–1–26 is not a statute of limitations.*

Chitty, J., said in *Lavery v. Pursell,* 39 Ch.D. 508, 517 (1888):

> Courts of justice ought not to be puzzled by such old scholastic questions as to when a horse's tail begins and where it ceases. You are obliged to say, "This is a horse's tail" at some time.

I say: "This is the horse's tail." Section 23–1–26 is not a statute of limitations.

Seventy-five years ago, *Wilson v. Iseminger,* 185 U.S. 55, 62, 22 S.Ct. 573, 575, 46 L.Ed. 804 (1902) said:

> It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; *if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.* [Emphasis added.]

Two years later, *Lamb v. Powder River Live Stock Co.,* 132 F. 434 (8th Cir. 1904), said:

> It is sufficient to say that all of the cases recognize the true rule to be that a limitation is unreasonable which does not, before the bar takes effect, afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate, and that this opportunity must be afforded in respect of existing rights of action after they come within the present or prospective operation of the statute and in respect of prospective rights after they accrue. [132 F. at 442.]

* * * * * *

Nothing could be more unreasonable or more certainly violative of constitutional prohibitions than to bar rights of action because of the lapse of time prior to their accrual, when they could not have been exercised. [132 F. at 443.] [Emphasis added.]

A statute like 23–1–26 also "operates as a grant of immunity because its effect is to prohibit the injured person from recovering no matter how diligent he was in pressing his claim." *Bagby Elevator and Electric Company, Inc. v. McBride,* 292 Ala. 191, 291 So.2d 306, 311 (1974).

Section 23–1–26 is not a statute of limitations. It is "an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions." *Wilson v. Iseminger,* supra.

It has been said that § 23–1–26 "is a special statutory limitation or 'hybrid.' On the one hand, it bars a right of action from coming into existence if the accident occurs subsequent to the ten-year period; but as to those events happening before the statutory period has run, the provision disallows, like any other statute of limitations, the institution of suit after the prescribed ten years has expired." *O'Connor v. Altus,* 67 N.J. 106, 335 A.2d 545, 553 (1975). The purpose of the New Jersey statute, like our § 23–1–26, "is to cut off all claims of the sort referred to in the statute at the end of ten years from completion of the work." *O'Connor,* supra [335 A.2d at 554.]

This "hybrid" statute is a mixture of language that means this: A claim for tort relief that arises prior to the ten-year period must be commenced within the three-year limitation period fixed by statute. Section 23–1–8. If the claim for relief arises after a seven-year period has passed, the action must be commenced within the ten-year period after substantial completion of the work. The three-year period of limitation is shortened. I do not interpret this to mean that § 23–1–26 is a statute of limitations.

On the other hand, a statute of limitations determines whether an existing claim has become a stale claim because a party has slept on his rights. It must afford a person a reasonable time in which to commence the action before the bar takes effect. *Davis v. Savage,* 50 N.M. 30, 168 P.2d 851 (1946). It governs the time within which a legal proceeding must be instituted after the cause of action accrues. This was graphically illustrated by Circuit Judge Frank in a dissenting opinion. In *Dincher v. Marlin Firearms Co.,* 198 F.2d 821, 823 (2d Cir. 1952), he wrote:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. *For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i. e., before a judicial remedy is available to the plaintiff.* For a limitations statute, by its inherent nature, bars a cause of action solely because suit was not brought to assert it during a period when the suit, if begun in that period, could have been successfully maintained; the plaintiff, in such a case, loses for the sole reason that he delayed—beyond the time fixed by the statute—commencing his suit which, but for the delay, he would have won. [Emphasis added.]

In New Mexico, since territorial days, the limitation period in every action begins to run after the cause of action accrues, "and not afterwards, *except when otherwise specially provided.*" [Emphasis added.] Section 23–1–1, N.M.S.A. 1953 (Vol. 5). In wrongful death actions, the limitation period is "within three [3] years after the cause of action accrues." Section 22–20–2, N.M.S.A. 1953 (Vol. 5, 1975 Supp.). For personal injury, the accrual limitation period is three years. Section 23–1–8. For property damage, the accrual limitation period is four years, and this limitation period is applicable to "all other actions *not herein otherwise provided for*". [Emphasis added.] Section 23–1–4.

Section 23–1–26, supra, does not specially provide otherwise because it is not a statute of limitations, and it bars any action from ever arising.

B. *There is a conflict in judicial decisions.*

In 1967, "construction project" statutes began to sweep the country.

Since 1967, a conflagration has arisen among the courts to decide the constitutional issues. None of the courts upholding the statute have considered *Wilson,* supra. An analysis of cases which uphold a statute will show seriatim that (1) different types of statutes were involved; (2) appellate court decisions were not final; (3) constitutional issues were not involved; (4) different constitutional provisions exist; (5) misinterpretations have occurred; and (6) unfortunately, inapplicable cases are cited as authority. For examples seriatim:

(1) *Josephs v. Burns,* 260 Or. 493, 491 P.2d 203 (1971). Oregon enacted a *general* statute in 1967. It reads:

> In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of.

The court held this statute valid based upon a quotation from *Silver v. Silver,* 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929). *Silver* involved the validity of the New Jersey "guest" statute. The court said by way of dictum:

> We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, *to attain a permissible legislative object.* [Emphasis added.] [280 U.S. at 122, 50 S.Ct. at 58.]

A review of *Silver* and the cases cited therein do not disclose "a permissible legislative object" that abolishes "a tort claim for relief" to which a party is entitled. To deny a party the right to seek relief in court, public policy must justify the enactment of the statute. "Public policy" imports something that is uncertain and fluctuating, varying with changing economic needs, social customs, and moral aspirations of the people. A state has no public policy, properly cognizable by the courts, which is not derived by clear implication from the established law of the state, as found in its Constitution, statutes and judicial decisions. *Barwin v. Reidy,* 62 N.M. 183, 307 P.2d 175 (1957). The State of Oregon believed its *general* law to comport with public policy. *Silver* was brushed aside in *McGeehan v. Bunch,* 88 N.M. 308, 540 P.2d 238 (1975).

However, the ten-year statute specific to construction projects was adopted in Oregon in 1971. ORS 12.135. Its constitutionality has not yet been determined. *Mt. Hood Radio & T. Broad. Corp. v. Dresser Indus., Inc.,* 270 Or. 690, 530 P.2d 72 (1974).

(2) *Regents of U. of Calif. v. Hartford Acc. & Indem. Co.,* 59 Cal.App.3d 675, 131 Cal.Rptr. 112 (1976). *In this case "Hearing Granted Sept. 15, 1976."* The California statute does not apply to "injury to the person . . . or wrongful death . . . ." The Supreme Court of California has not yet rendered its decision.

Freezer Storage, Inc. v. Armstrong Cork Co., 234 Pa.Super. 441, 341 A.2d 184 (1975). *In this case "Application for Allocatur Granted Sept. 16, 1975."* The Supreme Court of Pennsylvania has not yet rendered its decision.

(3) *Nevada Lakeshore Co., Inc. v. Diamond Electric, Inc.,* 89 Nev. 293, 511 P.2d 113 (1973); *Grissom v. North American Aviation, Inc.,* 326 F.Supp. 465 (M.D.Fla. 1971). In these cases, no constitutional issue was involved.

(4) In some cases, constitutional provisions in these states on "local or special laws" are distinguishable in some respects from that in New Mexico. Article IV, Section 24 of our Constitution enumerates classes. Arkansas does not: *Carter v. Hartenstein,* 248 Ark. 1172, 455 S.W.2d 918 (1970).

(5) *Yakima Fruit & Cold Stor. Co. v. Central Heat. & P. Co.,* 81 Wash.2d 528, 503 P.2d 108 (1972).

Yakima Fruit misinterprets *Skinner v. Anderson,* 38 Ill.2d 455, 231 N.E.2d 588 (1967) which appears to be the first case that declared a statute like § 23–1–26 unconstitutional.

Yakima Fruit, in its misinterpretation of *Skinner,* says:

> The case of *Skinner v. Anderson,* 38 Ill.2d 455, 231 N.E.2d 588 (1967), declared the Illinois statute unconstitutional as being special legislation *in favor of only architects and contractors.* The same cannot be said of RCW 4.16.300 et seq. because the scope of the Washington provision is *not limited as to vocation.* The subject statute bars actions against *any person* having constructed, altered or repaired any improvement upon real property. [Emphasis added, except to "any person".] [503 P.2d at 111.]

The Illinois statute, like that in Washington and New Mexico, applies to "any person." *Skinner* said:

> The effect of section 29 of the Limitations Act is to grant to architects and contractors a special or exclusive immunity. [231 N.E.2d at 590.]

(6) *Reeves v. Ille Electric Company,* 551 P.2d 647 (Mont.1976), relied upon by defendants, held the statute *not* applicable to a materialman whose product was incorporated in the construction. In holding the statute unconstitutional, it relied on "other contrary authorities more persuasive and compatible with Montana law." Of the seven cases cited in *Reeves,* four of them are those referenced supra, which were either caught off base or disapproved. A sixth case, a Colorado case, *Housing Authority of Town of Limon v. Leo A. Daly Co.,* 35 Colo.App. 244, 533 P.2d 937 (1975), *did not approach a constitutional question. Its statute is a statute of limitations.*

The seventh case is *Good v. Christensen,* 527 P.2d 223 (Utah 1974). All that the Utah Court said was:

> The plaintiffs also attack the constitutionality of the statute, but the claim is without merit. [527 P.2d at 225.]

This unfortunate continued citation of cases that do not come to grips with the constitutional problem fool some of the courts some of the time, but not all of the courts all of the time.

The examples mentioned are some of the events that create the judicial conflagration in the field of statutes affecting construction projects. If we open the door to construction projects, we create a loophole for the entrance of other special laws affecting the special interests of other entities apart from architects and contractors, such as manufacturers of automobiles, airplanes, railroad cars and other products, legal and medical malpractice, etc.

The reasons for upholding the statute vary. Some courts say that the statute is one of limitation and it prevents stale and fraudulent claims. Some courts say that architects and construction industries, after the specific period has passed, do not preserve their records of services rendered; that witnesses are unavailable, memories have faded, and the defense becomes more difficult. This concept is a matter of speculation. The owner of real property, excluded from the statute, has a much greater difficulty on its defense. The plaintiff has equal or greater problems on burden of proof. The difficulty of a defense must be weighed in the balance against the right of the public to a remedy to protect a right.

I shall now meet the challenge of those jurisdictions which uphold the constitutionality of the construction project statute.

C. *Section 23–1–26 violates Article IV, Section 24, of the New Mexico Constitution on Special Laws.*

Plaintiff and the City contend that § 23–1–26 violates Article IV, Section 24, of the New Mexico Constitution. I agree.

Article IV, Section 24, provides in pertinent part:

> The legislature shall not pass local or *special laws* . . . in the following cases: . . . granting to *any corporation, association or individual the right to* . . . *any special or exclusive privilege, immunity or franchise* . . . ; *the limitation of actions;* . . . . *In*

every other case where a general law can be made applicable, no special law shall be enacted. [Emphasis added.]

This enumeration alone dismisses from consideration every jurisdiction except the States of Illinois and New Jersey. It prohibits any special law that grants exclusive privilege and *immunity* to any person. Illinois held this statute unconstitutional. *Skinner,* supra. New Jersey did not. *Rosenberg v. Town of North Bergen,* 61 N.J. 190, 293 A.2d 662 (1972). *Carter* concedes that the enumeration creates a problem. No court to date denies that § 23–1–26 grants to persons involved in construction projects a special privilege and *immunity* to suit.

A "special law" is one made for individual cases, or for less than a class of persons, or subjects, requiring laws appropriate to peculiar conditions or circumstances. *State v. A.T. & S.F. Ry. Co.,* 20 N.M. 562, 151 P. 305 (1915).

Under § 23–1–26, the "class of persons" means "any person" involved in a construction project. Such person is a "tortfeasor," one who commits or is guilty of a tort, i. e., a legal wrong such as that "arising out of the defective or unsafe condition of a physical improvement to real property," with resultant injury and consequential damage which is cognizable in a court of law.

Limited to this case, "'A privilege is a particular and peculiar benefit or advantage enjoyed by a person, company or class beyond the common advantage of other citizens.'" *Daigh v. Schaffer,* 23 Cal.App.2d 449, 73 P.2d 927, 930 (1937). "Immunity" simply means immune to, or free of, suit. *Barker v. City of Santa Fe,* 47 N.M. 85, 136 P.2d 480 (1943).

In 1925, the legislature enacted a law relating to insurance. One provision made it "unlawful for any company licensed to transact an insurance business in the state of New Mexico to appoint more than one agent in any city, town or village . . ." In holding this statute unconstitutional, *Franklin Fire Ins. Co. v. Montoya,* 32 N.M. 88, 92, 251 P. 390 (1926) said:

If, by law, those persons entrenched in the business with agency contracts are secured from competition, *they have been granted a special privilege not enjoyed by other citizens not so entrenched.* It may be conceded for the purposes of this case that constitutional provisions intended to preserve the rights of individual citizens may sometimes be forced to yield to the public welfare. *It should first appear, however, that it is the public welfare which is involved, rather than the interests of a favored few.* [Emphasis added.]

Let us apply the definition of "privilege" and "immunity" to the class created by § 23–1–26. The City is involved in the construction project. It contracted out the work. It is clear that the City as a tort-feasor steps into the shoes of defendants upon substantial completion of the work. As a tort-feasor, the City is liable for all torts committed by the defendants "arising out of the defective or unsafe condition of a physical improvement to real property" created by defendants. As a tort-feasor, the City is the same class as defendants; yet, the defendants are granted a privilege and immunity denied to the City. It requires a "verdictator" to say that the defendants have not been granted a privilege and immunity denied "to other citizens so entrenched."

Section 23–1–26 grants to persons such as defendants a privilege and immunity as a peculiar benefit or advantage denied to other persons, i. e., the right to be free of suit after ten years have passed from the completion of any physical improvement of real property. This immunity is not granted to an owner of real property or any person in control of the property, who makes the improvement. Any person, firm or corporation that owns property is in the same class as the architect or contractor, but lack the immunity granted the architect or contractor. The statute not only denies the owner immunity, it also denies the owner the right to contribution or indemnity. In the instant case, the City is confronted with this perplexing problem. Section 23–1–26 does not embrace all and exclude none whose conditions and circumstances render legisla-

tion necessary or appropriate to tort-feasors as a class. The defendants have not convinced me that the public welfare shall yield to the benefit of the defendants. It is a "special law" made "for less than a class of persons."

Article IV, Section 24, also provides that no special law shall be enacted in the following case: "the limitation of actions". Section 23–1–26, if construed as a "special statutory limitation or 'hybrid' ", applies only to "any person" involved in a construction project. Along with privilege, immunity, class and subject, discussed above, this provision of the Constitution is offended.

Article IV, Section 24, also provides:

> In every other case where a general law can be made applicable, no special law shall be enacted.

"The Legislature is . . . enjoined from passing special laws where a general law can be made applicable." *Scarbrough v. Wooten,* 23 N.M. 616, 620, 170 P. 743, 744 (1918). "Accordingly, when a general law cannot be made applicable, but a law is required, special laws are permissible." *Albuquerque Met. Arroyo Flood Con. A. v. Swinburne,* 74 N.M. 487, 490, 394 P.2d 998, 1000 (1964).

It is obvious that a general law can be made applicable. The State of Oregon enacted a general law set forth, supra, under *Josephs v. Burns.* In its statute, immunity is accorded to every alleged tort-feasor after the passage of ten years.

Kallas Millwork Corporation v. Square D Co., 66 Wis.2d 382, 225 N.W.2d 454 (1975) lays to rest the cases on which defendants rely. The court said with reference to *Rosenberg, Carter* and *Yakima Fruit:*

> None of those three cases is persuasive. Each of them recites the truism that the legislature can make reasonable classifications of persons or things and accord different treatment to different classes. *None of these cases, however, justify the special immunity accorded to the protected class but denied to others similarly situated.* The cases relied upon, which fail to find statutes . . . unconstitutional, do not come to grips with the real problem presented—what factors distinguish the favored class so that it requires or deserves an immunity not accorded others who appear to be similarly situated. [Emphasis added.] [225 N.W.2d at 460.]

I follow *Skinner* and *Kallas Millwork Corporation.* Section 23–1–26 violates Article IV, Section 24, of the New Mexico Constitution.

D. *Section 23–1–26 violates Article II, Section 18, of the New Mexico Constitution and Amendment XIV of the Constitution of the United States.*

Article II, Section 18, of the New Mexico Constitution reads:

> No person shall be deprived of life, liberty or property without due process of law; *nor shall any person be denied the equal protection of the laws.* [Emphasis added.]

Amendment XIV of the Constitution of the United States provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.

The business of engaging in construction projects is one clothed with a public interest. Section 23–1–26 makes no provision which protects the interest of owners of property. No reasonable connection is shown between granting special privileges and immunities to persons involved in construction projects and denying them to citizens who own the real property upon which improvements are made.

Equal protection means that a law enacted by the legislature must be so framed as to embrace equally all who may be in like circumstances and situations. Our duty is to determine whether the purpose behind the legislation is lawful and, if so, whether the legislation tends, in a rational manner, to promote that lawful purpose. *McGeehan v. Bunch,* supra.

The "equal protection" clause is aligned with immunity. The Hawaii statute is far more specific than § 23–1–26. However, *Fujioka v. Kam,* 55 Haw. 7, 514 P.2d 568, 571 (1973) quoted the following from a decision of the Supreme Court of the United States:

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitting working against, a larger class."

Fujioka followed the language in *Skinner* and held its statute unconstitutional because "the statute calls for arbitrary and capricious discrimination and must therefore be declared an invidious discrimination violative of the equal protection guaranty." *Kallas Millwork Corporation* followed the language in *Fujioka* and *Skinner.*

I say that § 23–1–26 violates Article II, Section 18, of the New Mexico Constitution and Amendment XIV of the United States Constitution.

E. *Section 23–1–26 violates Article IV, Section 16, of the New Mexico Constitution on the title of the Act.*

Article IV, Section 16, of the New Mexico Constitution, provides in pertinent part:

> The subject of every bill shall be clearly expressed in its title . . . .

The title of Laws of 1967, ch. 193, p. 1125, reads:

> AN ACT RELATING TO CONSTRUCTION PROJECTS; AND PROVIDING FOR A LIMITATION ON ACTIONS FOR DEFECTIVE OR UNSAFE CONDITIONS ON CONSTRUCTION PROJECTS.

"In our opinion, the true test of the validity of a statute under this constitutional provision is: Does the title fairly give such reasonable notice of the subject matter of the statute itself as to prevent the mischief intended to be guarded against? If so, the act should be sustained." *State v. Ingalls,* 18 N.M. 211, 219, 135 P. 1177, 1178 (1913). This has been the rule for sixty-four years. *Martinez v. Jaramillo,* 86 N.M. 506, 525 P.2d 866 (1974). *Martinez* says:

> The mischief to be prevented was hodgepodge or log-rolling legislation, surprise or fraud on the legislature, or not fairly apprising the people of the subjects of legislation so that they would have no opportunity to be heard on the subject. [86 N.M. at 508, 525 P.2d at 868.]

The words in the title "PROVIDING FOR A LIMITATION ON ACTIONS FOR DEFECTIVE OR UNSAFE CONDITIONS ON CONSTRUCTION PROJECTS" falls far short of advising the members of the legislature or the people that § 23–1–26 is not a statute of limitations; that it bars a cause of action before it arises; that it bars a right of action from coming into existence if the accident occurs subsequent to the ten-year period. This language would lead members of the legislature and the people to believe that this Act would fall within the "Limitation on time of bringing actions", § 23–1–1, et seq.

This Act was passed ten years ago. I do not know what pressure, if any, was brought to bear upon the legislature by the architectural profession and construction industries. But I do believe that the title of the Act, which must *clearly* express the subject, may have misled the members of the legislature who enacted the law and the governor who signed it.

Section 23–1–26 violated Article IV, Section 16 of the New Mexico Constitution.

F. *Miscellaneous Matters.*

The majority opinion, under the classification of Application of the Statute, pp. 221–224, has come to conclusions, some of which I do not understand, and some of which are not clear to me. To keep the record straight, I present these matters now as I presented them to my brethren.

(1) *Universal Constructors' cross-appeal is without merit.*

Universal Constructors cross-appealed from that portion of the judgment of the

district court which denied Universal Constructors' motion for summary judgment on plaintiff's claims of negligent maintenance and negligent failure to warn.

The claim of Universal Constructors is that plaintiff's complaint falls within the proscriptions of § 23–1–26. Having declared this statute unconstitutional, Universal Constructors' cross-appeal is without merit.

(2) *Motions filed on this appeal should be sustained.*

After the appeal was perfected and briefs filed, the following events occurred.

On February 25, 1977, Universal Constructors filed a motion to strike portions of briefs filed by PPG and plaintiff, or in the alternative for permission to file a reply brief. The parties were granted through March 7, 1977 to respond to the motion. On March 8, 1977, the responses having been filed, we held that the motion to strike would be considered at the same time the case was considered on the merits.

On March 15, 1977, this Court received a communication from Universal Constructors that "In the absence of any mention of a denial of the right to submit a reply brief, Universal is now preparing a reply brief, soon to be submitted to the Court . . ." On March 28, 1977, Universal filed a reply brief. On April 4, 1977, PPG filed a motion to strike the reply brief. On April 6, 1977, this motion to strike was deferred pending a decision on the merits.

We now turn to Universal Constructors' motion to strike portions of briefs filed by plaintiff and PPG. The first portion deals with plaintiff's argument that the statute is unconstitutional on the grounds that the title of the statute does not clearly express the subject of the Act. On this matter, the motion to strike should be overruled.

The second portion deals with the applicability of § 23–1–26 to Universal Constructors' claim for contractual indemnity.

On *November 8, 1976,* Universal Constructors filed a cross claim against PPG in two counts. One was based upon a subcontract between Universal Constructors and PPG, and the other on strict liability.

On *October 29, 1976,* ten days *before* the cross claims were filed, PPG moved for summary judgment on these cross claims.

I can find no determination in the trial court of PPG's motion for summary judgment on these cross claims. Nevertheless, PPG, in Point III of its answer brief, asserts that § 23–1–26 applies to actions of indemnity and contribution asserted against PPG by Universal Constructors. Universal Constructors moved to strike this portion of PPG's answer brief. Universal Constructors' motion to strike is sustained.

PPG sought to use a pole vault to jump over issues not decided in the trial court. In this case, the pole broke and the vault failed. This civil war should be returned to the district court. Any relief PPG seeks on its motion for summary judgment must be sought in the trial court.

PPG's motion to strike Universal Constructors' reply brief, except as to matters pertinent to plaintiff's brief-in-chief, should be sustained.

G. *Conclusion.*

The summary judgments granted Universal Constructors, PPG and Burk against plaintiff, Counts I–VI of plaintiff's complaint having been dismissed with prejudice, and all cross claims having been dismissed with prejudice, should be reversed. The judgment in favor of plaintiff on portions of Count I should be affirmed.

The trial court has the right to re-reconsider all motions for summary judgment on the complaint and cross claims, so long as motions are grounded on reasons other than § 23–1–26, the statute of repose. On Universal Constructors' cross claim for indemnity, see § 28–2–1, N.M.S.A. 1953 (Vol. 5, 1975 Supp.).

568 P.2d 233

Dolores AVILA, Plaintiff-Appellee,

v.

PLEASURETIME SODA, INC., a New Mexico Corporation, and Allstate Insurance Company, Inc., an insurance company authorized to issue insurance in the State of New Mexico, Defendants-Appellants.

No. 2865.

Court of Appeals of New Mexico.

July 26, 1977.

LeRoi Farlow, LeRoi Farlow, P. A., Albuquerque, for defendants-appellants.

Lorenzo A. Chavez, Albuquerque, for plaintiff-appellee.

OPINION

SUTIN, Judge.

The "going and coming" provision of the Workmen's Compensation Act, § 59–10–12.-12, N.M.S.A. 1953 (2d Repl.Vol. 9, pt. 1, 1975 Supp.) is the subject matter of this appeal by defendants. The trial court awarded a judgment for plaintiff and defendants appeal. We affirm.

Plaintiff was employed by defendant Pleasuretime Soda, Inc. as a manager of a retail soda pop outlet. She opened and closed the business. In addition to her usual duties during regular working hours, plaintiff closed the business and made nightly deposits at a bank every working day. The bank was located at 1900 Bridge

Boulevard, S.W. in Albuquerque, a point east of Coors Road and Bridge Boulevard. Plaintiff drove her own car at her own expense.

Defendant Pleasuretime's business was located at 1248 Coors Road, S.W. Plaintiff's residence was located at 425 65th Street, S.W., north of Bridge Boulevard and west of Coors Road.

Just giving addresses cannot adequately describe the problem. To perform her after hours banking duty for her employer, plaintiff had to drive north on Coors Road to Bridge Boulevard, then east on Bridge Boulevard to the bank and make the deposit for her employer. On her return home, plaintiff had to drive west on Bridge Boulevard to Coors Road, north on Coors Road to a point at which she would leave Coors Road to drive home.

On the night in question, plaintiff made the deposit at the bank. After leaving the bank, she drove west on Bridge Boulevard. Prior to reaching Coors Road, the accident in question occurred.

Section 59–10–12.12, supra, reads in pertinent part:

> As used in the Workmen's Compensation Act [59–10–1 to 59–10–37], unless the context otherwise requires, "injury by accident arising out of and in the course of employment" shall include accidental injuries to workmen, . . . as a result of their employment *and while at work in any place where their employer's business requires their presence, 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* . . . . [Emphasis added.]

The question for decision is:

> Did plaintiff, driving west on Bridge Boulevard from the bank to Coors Road, suffer an accidental injury "while at work in any place where [her] employer's business requires [her] presence," or did the accidental injury occur after leaving the duties of her employment as provided by Section 59–10–12.12?

To answer the question requires an interpretation of § 59–10–12.12.

The assistance of counsel on this appeal has been displeasing.

■ It requires no citation of authority that the Workmen's Compensation Act must be liberally construed to accomplish beneficent purposes for which it was enacted, and that all reasonable doubts must be resolved in favor of employees.

In a concurring opinion in *Cuellar v. American Employers' Ins. Co. of Boston, Mass.*, 36 N.M. 141, 148, 9 P.2d 685, 689 (1932), Justice Watson said:

> The situation of the workman on his way to and from his duties had long been a no man's land.

It still is.

■ The trial court found that defendant's business required plaintiff to "deviate" from her route home to make the bank deposit. We agree. At the time plaintiff closed her employer's business, she left the duties of her regular working hours at the place of business. She did not leave the duties of her employment. These duties continued to the time she deposited her employer's money in the bank and then returned to that point on the highway which would constitute her normal route home and the termination of her duties of employment.

The area of "deviation" was on Bridge Boulevard from Coors Road to the bank and a return to Coors Road. It naturally follows that during the time plaintiff drove east from Coors Road to the bank and then drove west to Coors Road, plaintiff was at work at a place where her employer's business required her to be.

■ If the facts in the case are termed a "deviation" or a "detour" for a business purpose, the business character persisted throughout the deviation until the plaintiff made her way back to the personal route home. 1 Larson's Workmen's Compensation Law §§ 19.36, 19.37 (1972); see, *Clark v. Electronic City*, 90 N.M. 477, 565 P.2d 348 (Ct.App. 1977).

Defendant relies on *Edens v. New Mexico Health & Social Services Dept.*, 88 N.M. 366, 540 P.2d 846 (Ct.App. 1975); *Rinehart v. Mossman-Gladden, Inc.*, 77 N.M. 470, 423 P.2d 991 (1967); *McDonald v. Artesia General Hospital*, 73 N.M. 188, 386 P.2d 708 (1963), and *Ross v. Marberry & Company*, 66 N.M. 404, 349 P.2d 123 (1960).

The trouble with many lawyers in the trial and appeal of a case is a failure to note whether certiorari has been granted in a case relied on. In *Edens*, supra, certiorari was granted and the case reversed in *Edens v. New Mexico Health & Social Services Dept.*, 89 N.M. 60, 547 P.2d 65 (1976), 8½ months before the present case was tried. The Supreme Court allowed recovery of workmen's compensation. Decedent and other employees of HSSD were required to attend a two-day conference in Santa Fe. They met at a parking lot in Albuquerque, proceeded to Santa Fe in decedent's car, and then returned to the parking lot. After the other employees disembarked, decedent proceeded on her way home. While driving from the parking lot, decedent was involved in a collision, sustaining injuries from which decedent subsequently died. In reversing this Court, the Supreme Court decided two matters of vital importance:

(1) The "special errand" rule is an exception to the "going and coming" rule. Each employee is covered under the Act during transportation to or from work so long as the travel was required at the direction of the employer.

(2) Where the historical facts of a case are undisputed, the question of whether an accident arose out of and in the course of employment is a question of law.

In the instant case, the historical facts are undisputed, and plaintiff performed a "special errand" every working day as a matter of law.

In *Rinehart* and *McDonald*, relied upon by defendant, the employee was injured after regular work had ended and the employee was on the way home. In *Ross*, the employee was on the way from home to the place of employment to assume the duties of employment. To these cases we may add, *Martinez v. Fidel*, 61 N.M. 6, 293 P.2d 654 (1956), and *Hayes v. Ampex Corporation*, 85 N.M. 444, 512 P.2d 1280 (Ct.App. 1973). The cases relied upon by defendant are not applicable when the zone of employment danger has been extended beyond the employer's premises, and plaintiff runs "special errands" every working day.

For other exceptions to the "going and coming" rule, see *Sullivan v. Rainbo Baking Company*, 71 N.M. 9, 375 P.2d 326 (1962); *Whitehurst v. Rainbo Baking Company*, 70 N.M. 468, 374 P.2d 849 (1962); *Wilson v. Rowan Drilling Co.*, 55 N.M. 81, 227 P.2d 365 (1950); *Clower v. Grossman*, 55 N.M. 546, 237 P.2d 353 (1951); *Allen v. D. D. Skousen Const. Co.*, 55 N.M. 1, 225 P.2d 452 (1950); *Barrington v. Johnn Drilling Co.*, 51 N.M. 172, 181 P.2d 166 (1947); *McKinney v. Dorlac*, 48 N.M. 149, 146 P.2d 867 (1944).

We hold that the instant case is outside the "going and coming" rule.

Plaintiff was employed to perform a "special errand" every working day—the deposit of the employer's funds in a bank after normal working hours. Here, there is less difficulty in concluding that plaintiff was acting within the scope of her employment.

Youngberg v. Donlin Company, 264 Minn. 421, 119 N.W.2d 746, 749 (1963), says:

> From an examination of the authorities which discuss the so-called special errand rule it appears that it has been applied where (a) there is an express or implied request that the service be performed after working hours by an employee who has fixed hours of employment; (b) the trip involved on the errand be an integral part of the service performed; and (c) the work performed, although related to the employment, be special in the sense that the task requested was not one which was regular and recurring during the normal hours of employment.

For cases which support the "special errand" rule, see: *Schreifer v. Industrial Accident Commission*, 61 Cal.2d 289, 38 Cal. Rptr. 352, 391 P.2d 832 (1964) where *Ross v. Marberry & Company*, supra, is criticized,

and cases cited; *Cymbor v. Binder Coal Co.*, 285 Pa. 440, 132 A. 363 (1926); *Traynor v. City of Buffalo*, 208 App.Div. 216, 203 N.Y.S. 590 (1924). And where it appears that employment "impelled" an employee to make a trip to his place of employment, see *In re Papanastassiou's Case*, 362 Mass. 91, 284 N.E.2d 598 (1972).

In the instant case, plaintiff was at work at the place where her employer's business required her to be. It was incident to the business. In addition, plaintiff falls within the "special errand" rule. From Coors Road to the bank on Bridge Boulevard, and plaintiff's return to Coors Road on Bridge Boulevard, before beginning her trip home, plaintiff was acting in the scope and in the course of her employer's business.

Plaintiff is awarded $1,500.00 as attorney fees on this appeal.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., and PAUL SNEAD, District Judge, concur.

568 P.2d 236

Robert PROPER, Plaintiff-Appellant,

v.

Frank W. MOWRY, Defendant-Appellee.

No. 2740.

Court of Appeals of New Mexico.

July 26, 1977.

Melvin L. Robins, Albuquerque, for plaintiff-appellant.

William S. Dixon, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendant-appellee.

OPINION

SUTIN, Judge.

This case involves a claim of slander made by one physician against another on December 3, 1973, at a staff meeting of doctors held at the Lovelace Clinic in Albuquerque, New Mexico. The jury returned a verdict for defendant and plaintiff appeals from the judgment entered in favor of defendant. We affirm.

Plaintiff's claims of error will be discussed seriatim.

A. *The trial court did not err in its ruling on plaintiff's "Motion in Limine" and a denial of mistrial.*

On September 15, 1976, two days before trial, plaintiff filed what is called a "Motion in Limine". This motion sought an order of court that defendant's attorney make no reference in his opening statement to the following evidence:

> [T]hat subsequent to his dismissal by the Lovelace Clinic, [December 31, 1973] Plaintiff has had his privileges suspended at local hospitals for failure to have his charts up to date and that there has been filed against him with the grievance committee of the County Medical Society grievances alleging excessive fee charges by the Plaintiff.

On September 17, 1976, the morning of trial, the motion was heard in the court's chambers. The court requested defendant's attorney to place of record what he intended to touch on in his opening statement. Defendant's attorney said:

> What my defense is *with respect to damages,* I would like to state the following: 1. That the reason for Doctor Proper enjoying a lack of esteem *in the year 1976* is not because of anything Doctor Mowry said, but rather because of his reputation for charging excessive fees; 2. The reputation for over-utilizing hospital facilities; 3. The reputation for sloppy record keeping and suspension from the hospitals for failure to keep records up, and his general attitude to the medical community in Albuquerque.
>
> With respect to excessive fees, I expect and want to say in my opening statement that the reason Doctor Proper may not be receiving referrals is referring physicians do not want to refer patients to a physician if he charges more than what the insurance company will reimburse, and since Doctor Proper's fees are in excess of that typically paid in the community, they are not reimbursable, and that is why Doctor Proper does not receive referrals, not because of anything Doctor Mowry said.
>
> * * * * * *
>
> May I make a record on the adultery matter? My theory would be: 1. The relation to reputation. He admitted he committed adultery. A public complaint was filed in this court alleging adultery. He admitted to it in the course of the divorce proceedings. It's relevant to reputation, and I am entitled to that, and also in terms of bringing out a bad act under these rules. If Your Honor would rule on that now I won't have to approach the bench. [Emphasis added.]

The court ordered defendant's attorney to refrain from mentioning, (1) the subject of adultery because it was irrelevant to plaintiff's reputation, (2) the grievance committee event, and (3) excessive fees charged.

Over objection, the court allowed defendant's attorney to state generally, (1) that plaintiff over-utilized diagnostic methods, (2) that record keeping was not up to community standards in Albuquerque, and (3) that plaintiff charged fees that would not be reimbursed by insurance companies.

In his opening statement, defendant's attorney with reference to the question of damages, said:

> We will show that Doctor Proper, among certain surgeons in town, enjoys a reputation of charging more fees than the insurance company will reimburse for the patient, and as a result, certain surgeons are reluctant to send patients to him, because the patients can't get reimbursement from the insurance company. So to the extent there has been a loss of reputation, or he does not enjoy a good reputation as he might, we contend the evidence will show this is a result of his own actions and nothing that Doctor Mowry did. We will also show that Doctor Proper has a reputation in some circles for over-utilization of procedures; that is doing too many tests, and that if there is a lack of good reputation being enjoyed by him, that may be another reason why he does not have as good a reputation as he would like.

Plaintiff moved for a mistrial. The motion was denied.

(1) *Briefs filed did not assist on issue of "Motion in Limine".*

Before we discuss the issue involved, we desire to continue to criticize attorneys for failure to properly assist this Court in a determination of the issue.

This pretrial motion is a matter of first impression in New Mexico, yet opposing attorneys must not have believed that this procedural matter deserved any mention, attention or comment. In briefs filed, no mention was made of the scope and purpose of the motion, nor whether it is an acceptable procedural process in New Mexico, nor whether it is covered by our Rules of Civil Procedure, nor what law governs the decision of the trial court.

Continued criticism of briefs filed on appeal reflects that appellate courts, not the attorneys involved, must search for a just and fair solution of the case. Attorneys who are inexperienced, or who do not have time in which to perform their duties properly, should seek assistance. Otherwise, their clients will suffer the pain of outrageous misfortune.

(2) *Pretrial procedure covers "Motion in Limine".*

On August 27, 1976, a pretrial conference was held. During this conference, defendant's attorney made comments that indicated he would make statements in his opening presentation to the jury that plaintiff believed were prejudicial.

Rule 16(6) of New Mexico Rules of Civil Procedure [§ 21–1–1(16)(6), N.M.S.A.1953 (Repl.Vol. 4)] provides that the court can consider "[s]uch other matters as may aid in the disposition of the action." This rule is derived from Rule 16 of the Federal Rules of Civil Procedure and is identical therewith. This all-encompassing provision gives the trial court independent authority to determine questions raised as to the admissibility of evidence at trial. *Aley v. Great Atlantic & Pacific Tea Co.,* 211 F.Supp. 500 (W.D.Mo.1962); *Carlock v. Southeastern Greyhound Lines, Inc.,* 8 Fed.Rules Serv. 16.261, Case 1 (E.D.Tenn.1944); *Bradbeer v. Scott,* 193 Cal.App.2d 575, 14 Cal.Rptr. 458 (1961); Herr, The Evidence Ruling at Pretrial in the Federal Courts, 54 Calif.L.Rev. 1016 (1966).

The written motion, the oral arguments, and the oral order of the trial court made on the morning of trial, places an undue burden on the court because he must shoot from the hip to reach a result. Attorneys should avoid this event whenever possible. If presented in advance of trial with briefs

filed and with time to hear argument, and study the issue involved, the court will be inclined to decide the matter presented with an appropriate order.

In the instant case, if the matter had been raised at the pretrial conference, it might have obviated plaintiff's "Motion in Limine" long before trial.

(3) *The "Motion in Limine" procedure is acceptable in New Mexico.*

Ofttimes a pretrial conference is held long before trial. Thereafter, by discovery procedures, conferences held, and by other ways, prejudicial matters may arise that require "in limine" procedure. Inasmuch as the "Motion in Limine" will be filed hereafter in many cases, we deem it essential to tour this subject matter and establish guidelines that may avoid reversible error.

Indiana adopted this procedural device in 1973. *Burrus v. Silhavy,* 155 Ind.App. 558, 293 N.E.2d 794 (1973), 63 A.L.R.3d 304 (1975). We quote from *Burrus* to set up our approach to a solution of the problem presented.

> A "motion in limine" is a term used to describe a written motion which is usually made before or after the beginning of a jury trial for a protective order against *prejudicial questions and statements.* Its purpose has been succinctly expressed in *Bridges v. City of Richardson* (1962), 163 Tex. 292, 354 S.W.2d 366, 367:
>
> "The purpose in filing a motion in limine to suppress evidence or to instruct opposing counsel not to offer it is to prevent the asking of *prejudicial* questions and the making of *prejudicial* statements in the presence of the jury with respect to matters which have no proper bearing on the issues in the case or on the rights of the parties to the suit. It is the *prejudicial* effect of the questions asked or statements made in connection with the offer of the evidence, *not the prejudicial effect of the evidence itself,* which the motion in limine is intended to reach . . . ."
>
> Its effect has been to shorten the trial, simplify the issues and reduce the possibilities of a mistrial. [Emphasis added] [293 N.E.2d at 796–97].

Burrus stated the reasons for adoption of this pretrial procedure as follows:

> A trial court has the inherent power to admit or exclude evidence. A "motion in limine" is a necessary adjunct to the inherent power of a trial court to exclude inadmissible and prejudicial evidence before and during trial. The granting of such motions may necessitate the issuance of protective orders which will assure a fair and impartial administration of justice. [293 N.E.2d at 795].

■ We have emphasized the word "prejudicial" because "[T]he purpose of a 'motion in limine' is to exclude prejudicial matter and not to exclude irrelevant evidence as was done in the present case." *Baldwin v. Inter City Contractors Service, Inc.,* 156 Ind.App. 497, 297 N.E.2d 831, 832 (1973). "Such a motion is [also] a useful tool in preventing immaterial matter from encumbering the record. It gives the court an opportunity to rule in advance on the admissibility of evidence." *Wagner v. Larson,* 257 Iowa 1202, 136 N.W.2d 312, 326 (1965).

It is also important that a proper motion be filed and a proper order be entered so that a mistrial or reversible error can be avoided.

■ For a proper form of motion to use, see Hyde, The Motion *In Limine*: Pretrial Trump Card in Civil Litigation, 27 U.Fla.L. Rev. 531 at 545 (1975); Davis, Motions in Limine, 15 Clev.-Mar.L.Rev. 255 (1966); Rothblatt & Leroy, The Motion in Limine in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence, 60 Ky.L.J. 611, 635–37 (1972). It is important that the motion state the *specific* matter that the party believes to be prejudicial, not that which is general in scope. *Lewis v. Buena Vista Mutual Insurance Association,* 183 N.W.2d 198, 201 (Iowa 1971) says:

> The motion should be used, if used at all, as a rifle and not as a shotgun, pointing out the objectionable material and showing why the material is inadmissible and prejudicial. Since no one knows exactly how the trial will proceed, trial courts

would ordinarily be well advised to require an evidentiary hearing on the motion when its validity or invalidity is not manifest from the face of the motion.

The Order entered should be clear and unequivocal. It "should provide and advise counsel such ruling is without prejudice to the right to offer proof during the course of the trial, in the jury's absence, of those matters covered in the motion and if it then appears in the light of the trial record that the evidence is relevant, material and competent it may then be introduced, subject to opposing counsel's objections, as part of the record of evidence for the jury's consideration." *Twyford v. Weber,* 220 N.W.2d 919, 923 (Iowa 1974).

We should also like to point out that the trial court has the right to take the motion under advisement, reserving the right to rule upon the matter when it arises at trial. *City of Indianapolis, Dept. of Met. Dev. v. Heeter,* Ind.App., 355 N.E.2d 429 (1976).

In addition to the law review articles cited supra, to know and understand the serious problems that arise, see, Lafferty, Motion in Limine, 29 Ark.L.Rev. 215 (1975); Fetscher, The Motion in Limine—A Useful Procedural Device, 35–36 Mont.L.Rev. 362 (1974); Love, Pretrial Exclusionary Evidence Rulings, 1967 Wisc.L.Rev. 738; Holtorf, Motions to Limit Evidence, 46 Nebr.L. Rev. 502 (1967); Davis, 5 Washburn L.J. 232 (1966); Annot., 63 A.L.R.3d 311 (1975).

An order granting a "motion in limine" is not reversible error. If the order is absolutely prohibitive in nature and forbids the mention of prejudicial matters in the opening statement or during trial, and the order is violated, the court may in its discretion, upon motion by a party, declare a mistrial, or await the outcome of the trial, and then grant an appropriate remedy. During trial, when prejudicial evidence is admitted, over objection, or relevant evidence is offered in the absence of the jury and then excluded, reversible error may occur.

A "motion in limine" is a comparatively new and novel procedural device and is now used increasingly in various states to change the traditional rules for excluding prejudicial matters. This pretrial ruling replaces the ineffective, unrealistic and psychologically invalid admonitions given by the court to the jury, because an attorney is not forced to choose between (1) permitting prejudice to be planted by opposing counsel or (2) stimulating this implantation by his own objections. There is a common practice of attorneys posing prejudicial statements and questions. A shrewd lawyer can phrase the language of his statement or question so that prejudice will be planted by the mere presentation of the statement or question. If an attorney objects, and the objection is sustained, it will call the jury's attention to the improper statement or question and create the impression that his client has something to hide. The "curative measures" used by a court to remove the prejudicial impact of an improper statement or question is subject to serious doubt. "Often, to all practical intents and purposes, the judge's statement of the legal rules might just as well never have been expressed." Frank, Courts on Trial, p. 111 (1949).

We must remind attorneys that "[T]he presentation of excluded matter to the jury by suggestion, by the wording of a question, or by indirection, violated professional standards and counsel's duty to the court." *Burdick v. York Oil Company,* 364 S.W.2d 766, 770 (Tex.Civ.App.1963).

We hold that the trial court had the inherent power to hear and determine plaintiff's "motion in limine".

(4) *Defendant's opening statement was proper.*

That portion of defendant's opening statement which plaintiff claims was prejudicial has been set forth supra. At the conclusion of the opening statement, plaintiff moved for a mistrial and the motion was denied. Plaintiff claims that reference was made to "specific acts of misconduct" which occurred after plaintiff's reputation

was allegedly damaged by defendant in 1973; that evidence of this nature is inadmissible.

Here again, opposing attorneys failed to discuss the scope and purpose of an opening statement, nor what effect remarks made have on the verdict of a jury, nor what is meant by "specific acts of misconduct". If this were done, it might assist this Court in arriving at a fair determination of the issue.

An opening statement is not evidence and the jury was so cautioned by the court prior to the opening statement, and later so instructed. U.J.I. 1.2; U.J.I. 17.7. The primary purpose of this procedure is to inform the jury of the nature of the case, both from the viewpoint of the plaintiff and the defendant. Each party attempts to show the jury how the evidence that will be presented will support its position. It has no binding force or effect. *State v. Alderette*, 86 N.M. 600, 526 P.2d 194 (Ct.App. 1974) (Sutin, J., dissenting). The burden is on the plaintiff to establish that the opening statements made by defendant, in all probability must have produced some effect upon the final results of the trial. *State Highway Commission v. Beets*, S.D., 224 N.W.2d 567 (1974); *State v. Wanrow*, 14 Wash.App. 115, 538 P.2d 849 (1975).

We have searched plaintiff's argument for reasons why defendant's opening statement affected the verdict of the jury and none were found.

There are at least four reasons why defendant's opening statement was proper.

First, defendant's opening statement did not refer to "specific acts of misconduct," if that reference is relevant. To be "specific", the statements must be detailed, minute, precise or particular in nature. A general statement of over-utilization of hospital facilities, record keeping, and fees charged to patients does not transform into specific acts of misconduct, until each act complained of is specified as to time, place, persons present, and the event that occurred. To hold that the statements made were specific, would deprive the defendant of any use of the language to inform the jury of the poor reputation of the plaintiff in the medical community. We do not believe that the phrase "specific acts of misconduct" means that defendant was limited to statements such as "defendant had a poor reputation in the medical community".

Plaintiff's argument on this issue is confined to the admissibility in evidence of "specific acts of misconduct." This contention will be met later.

Second, defendant's statements were directed only to the issue of damages for loss of reputation claimed by plaintiff, and not to defendant's non-liability for defamation. The jury was instructed not to discuss damages unless they first determined liability. U.J.I. 17.8. The jury determined that defendant made no defamatory statements and was not liable. We cannot see how defendant's opening statements could have affected the verdict of the jury.

Third, the trial court gave U.J.I. 17.7 and U.J.I. 1.2. U.J.I. 17.7 states in part, ". . . neither these final discussions nor any other remarks or arguments of the attorneys made during the course of the trial are to be considered by you as evidence . . ." U.J.I. 1.2 states in part: "Remarks, arguments and statements of lawyers are not evidence." These instructions were cautionary guidelines that assisted the plaintiff. Defense counsel reiterated and elaborated on these instructions during the opening statement. It applied to the opening statements made by defendant, so that the statements made were not prejudicial error. But see, *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct.App.1976) (Sutin, J., dissenting).

Fourth, plaintiff's opening statement discussed damages that plaintiff suffered up to the time of trial. The gate was opened to permit the defendant to state that plaintiff's lack of reputation in the medical community resulted from his own actions and not from what defendant said three years before.

Defendant's opening statement was proper.

B. *Testimony of doctors about plaintiff's reputation in 1975 and 1976 on the issue of damages was not prejudicial.*

Plaintiff claims that testimony of defendant's doctors, that plaintiff's reputation in the years 1975 and 1976 was poor in the matter of over-utilization of hospital facilities, record keeping, and making charges that would not be reimbursed by insurance companies, was prejudicial.

One doctor, on direct examination, testified as follows:

Q. . . . [C]an you tell us what Doctor Proper's reputation is and has been for the last two years with respect to record keeping.

A. It has been bad at St. Josephs Hospital.

* * *

Q. Now, can you tell us what Doctor Proper's reputation has been for the last two years with respect to over-utilization of facilities.

A. It has not been good.

Another doctor testified as follows:

Q. . . . [A]re you reluctant to refer patients to Doctor Robert Parsons [sic] [Proper]?

A. Yes, I am somewhat reluctant to do this at the present time.

Q. Can you tell the jury why you are reluctant.

A. I am reluctant, not because I am in any way concerned about his skills or ability, but because I am concerned about insurance coverage, insurance being able to cover the bills that might be incurred by utilizing his services.

Q. Do insurance companies cover only certain amounts for certain procedures?

A. Well, there are varying types of insurance contracts, but in New Mexico, most of the major insurance companies have a system under which they cover what is called usual and customary fees.

On the evidence with reference to record keeping, plaintiff contends that "the jury probably concluded this was a very serious offense and thus was prejudiced in its appraisal of the facts of the case."

On the evidence with reference to insurance coverage, plaintiff contends that "[T]his testimony as to not sending patients to Dr. Proper because all his charges would not be reimbursed by insurance companies was designed to prejudice the jury, had no probative value on the issue of the reputation that had been damaged by Dr. Mowry in 1973, and was again an attempt to overload the defense with inadmissible testimony. The cumulative effect of this type of testimony could only be prejudicial to the plaintiff."

Plaintiff believes the trial court admitted defendant's evidence of reputation in reliance on Rule 405(b) of the New Mexico Rules of Evidence [§ 20–4–405(b), N.M.S.A. 1953 (Repl.Vol. 4, 1975 Supp.)]. This rule allows proof of specific instances of conduct only when the character or trait of character of a witness is an essential element of a claim or defense. Therefore, the trial court erred. Plaintiff is mistaken.

The terms "character" and "reputation" are often used interchangeably and as synonyms. The distinction, however, is that "character" is what a person is. "Reputation" is what a person is thought to be. V Wigmore on Evidence § 1608 (Chadbourne Rev. 1974); *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); *Hassell v. State*, 229 Miss. 824, 92 So.2d 194 (1957); *State v. Blake*, 157 Conn. 99, 249 A.2d 232 (1968); *Rafuse v. State*, 215 So.2d 71 (Fla.App.1968).

Plaintiff's character and trait of character is not an essential element of defendant's defense. The trial court did not rely on Rule 405(b). The trial court carefully limited the testimony of defendant's witnesses to plaintiff's general reputation in the medical community, not plaintiff's character, and no specific acts of misconduct were permitted. The trial court made it clear that defendant must avoid "chapter and verse" as to specific acts of misconduct.

The trial court admitted the testimony because it was relevant under Rules 401, 402 of the New Mexico Rules of Evidence. If the evidence is not relevant, it is not admissible. But if the evidence tends to make a consequential fact more or less probable, it is relevant and, therefore, admissible.

Plaintiff misconceives the purpose for the admission of this testimony, and its relevance.

Plaintiff sued defendant for defamation growing out of allegedly false memoranda, statements and discussions defendant had with the Board of Governors of the Lovelace Clinic resulting in plaintiff's discharge from the staff of the clinic; that as a result of defendant's false accusations, plaintiff was damaged in his reputation as a competent physician and sustained a loss of income. Damage to plaintiff's reputation was one element of damages for which plaintiff sought relief.

Before plaintiff was entitled to any damages, plaintiff had to prove that defendant made slanderous statements about plaintiff in order to establish liability. The jury determined that no such slanderous statements were made and plaintiff was not entitled to any damages. Nevertheless, plaintiff claims that the admission of the reputation evidence was prejudicial error.

Harmless error vs. prejudicial error is discussed in *Maxwell v. Santa Fe Public Schools*, 87 N.M. 383, 534 P.2d 307 (Ct.App. 1975) (Sutin, J., specially concurring). The admission of evidence is harmless error unless it affects the substantial rights of a party. If the trial court errs in a ruling that relates to the substantial rights of a party, it is ground for reversal unless it affirmatively appears from the whole record that it is not prejudicial.

In cases of this nature, the reception of the evidence must be shown to have affected the verdict of the jury before this Court will hold that a substantial right has been impaired. We cannot speculate on whether the evidence affected the jury verdict because the manner in which they arrived at the verdict is an unknowable.

"The incompetent evidence complained of cannot be said to be of such a character as to affect the substantial rights of the [plaintiff] or to go to the merits of the cause." *Colbert v. Journal Publishing Co.*, 19 N.M. 156, 142 P. 146 (1914).

In *Tevis v. McCrary*, 75 N.M. 165, 402 P.2d 150 (1965), an action for damages was filed for an alleged contamination of plaintiff's domestic well by defendant. A judgment was entered for plaintiff and defendant appealed. Defendant claimed the trial court erred in the admission over objection, of an exhibit, which was an estimate of the cost of drilling and equipping a new well and piping water therefrom to the plaintiff's home. It was plaintiff's theory that this was proof of special damages. The Court said:

> It is implicit from the jury's verdict that no special damages were awarded, and it is therefore incumbent upon the defendant to show in what manner the admission of this evidence was prejudicial. . . . The defendant has totally failed to demonstrate how the admission of the exhibit operated to his prejudice. There is no showing in the record, other than pure speculation, that the introduction of this exhibit in any way influenced the jury. [75 N.M. at 167, 402 P.2d at 151].

This rule is applicable to the instant case. If plaintiff had been awarded general or special damages, a claim of error could be made that evidence of "specific acts of misconduct" two and three years after the defamation occurred was prejudicial error. The fact that no damages were awarded simply means that the jury found that no slanderous statements were made, and the jury did not consider the claimed inadmissible evidence on poor reputation.

"Whether in an action for *defamation* the defendant may use the *plaintiff's poor reputation* (or lack of reputation) *to mitigate the damages* has been one of the most controverted questions in the whole law." [Emphasis by author]. I Wigmore on Evi-

dence, § 70 at 492 (3rd Ed. 1940). See also, 50 Am.Jur.2d Libel and Slander § 476 at 1007–1008 (1970); V Wigmore on Evidence § 1618 (Chadbourne Rev. 1974); 53 C.J.S. Libel and Slander § 267 (1948).

We do not believe that the reputation evidence prejudiced the jury in its appraisal of the facts, nor was it cumulatively prejudicial.

C. *The refusal of plaintiff's requested instruction was not error.*

Plaintiff requested and the court refused the following instruction:

> It is not necessary in a libel or slander action that the defamatory words apply only to the plaintiff. A member of a group of identifiable persons to whom the words apply may maintain the action for libel or slander.

Plaintiff requested and the court gave the following instruction:

> A publication may be defamatory as to another person, although that person's name is not stated. In such circumstances, the plaintiff must introduce evidence that the defamatory meaning attached to him. The reference may be an indirect one, with the identification depending upon the circumstances known to the hearers, and it is not necessary that every listener understand it, so long as there are some who reasonably do understand it to apply to the plaintiff.

The facts surrounding plaintiff's claim for defamation arose during a meeting of the general staff on December 3, 1973. At this meeting, the minutes show that defendant said:

> ". . . [O]ne does not get a free ride with a M.D. degree, not here. . . . If one wants a security blanket, go get a government job." Defendant "stated that as he looked around the room, he certainly saw some men in the room who practiced damn good medicine who are old and he also sees some men who practice damn poor medicine. . . . [T]hat one had better make up his mind what kind of an institution is wanted right now, inasmuch as we do have a choice to make. One can either subscribe to the medocrity, [sic] year in and bloody year out or one can go after the kind of an institution that is wanted . . . ."

There was testimony pro and con whether these statements referred to plaintiff.

A review of the instructions refused and given show that the instruction given adequately covered the instruction refused and presented to the jury plaintiff's legal theory on this matter.

D. *Court's instructions on standard by which defendant was governed in making a statement was invited error.*

The trial court gave the following instruction:

> Reckless disregard of truth or falsity is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. It requires that Dr. Mowry must have in fact entertained serious doubts as to the truth of his statements.

Defendant objected as follows:

> Plaintiff objects to the court's Instruction No. 6 which states that the defendant must, in fact, have entertained serious doubts as to the truth of the statements, as this is contrary to the law in New Mexico as established in *Steward v. Ging* and *Reed v. Melnick*. The vice in the instruction is that if he operated from motives of his own, this would be sufficient to establish the liability of defendant.

Reed v. Melnick, 81 N.M. 608, 471 P.2d 178 (1970) and *Stewart v. Ging*, 64 N.M. 270, 327 P.2d 333 (1958) do not reach the vice complained of. In New Mexico, the rule was stated in *Salazar v. Bjork*, 85 N.M. 94, 97, 509 P.2d 569, 572 (Ct.App.1973):

> . . . [T]he law should protect only those who act reasonably and with a reasonable belief of the truth of their remarks.

"Reckless disregard of truth or falsity" is not the rule in New Mexico. But this

claimed error arose out of plaintiff's requested instruction on damages, which the court gave. It read in part as follows:

> 6. And in the event you find that defendant made a defamatory statement or statements and knew that the statement was false *or made the statement with reckless disregard for the truth*, then and in that case you may award damages for the making of the statement . . . . [Emphasis added.]

Defendant presented the above instruction to define the phrase, "reckless disregard of the truth". This language came from *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). This case involved a televised political speech in which a defamation action was brought by a public official. In the course of its opinion, the Court said:

> These cases are clear that 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. [390 U.S. at 731, 88 S.Ct. at 1325].

Since 1968, this standard by which to judge the truth or falsity of a statement made has been studiously followed in various states of the union, but it has not yet reached New Mexico.

Nevertheless, where "reckless disregard for the truth" is introduced into the case by plaintiff, complaints cannot be made of the standard by which this concept can be judged. We have consistently followed the ethical maxim that "no party can profit by his own wrong." *McCauley v. Ray*, 80 N.M. 171, 453 P.2d 192 (1968); *Hodgkins v. Christopher*, 58 N.M. 637, 274 P.2d 153 (1954); *Otero v. Physicians and Surgeons Ambulance Serv., Inc.*, 65 N.M. 319, 336 P.2d 1070 (1959); *Gonzales v. Sharp & Fellows Contracting Co.*, 48 N.M. 528, 153 P.2d 676 (1944).

The giving of the above instruction was invited error and not reversible error.

Plaintiff also complained of two instructions given on qualified privilege. Plaintiff did not object to these instructions.

Affirmed.

IT IS SO ORDERED.

LOPEZ and KASE, JJ., concur.

568 P.2d 246

Edith RALEY, Plaintiff-Appellant,

v.

MILK PRODUCERS, INC., Defendant-Appellee.

No. 2796.

Court of Appeals of New Mexico.

July 26, 1977.

Writ of Certiorari Denied Aug. 23, 1977.

Anthony F. Avallone, Las Cruces, for appellant.

H. John Underwood, Bivins, Weinbrenner & Regan, P. A., Las Cruces, for appellee.

OPINION

LOPEZ, Judge.

This appeal arose out of a complaint filed in the District Court of Dona Ana County. The complaint presented a cause of action for conversion of milk and proceeds in the amount of $16,000.00. Summary judgment was requested by both parties and the court granted summary judgment in favor of the defendant; accordingly, the court dismissed the plaintiff's complaint. The plaintiff appeals and we affirm.

The plaintiff presents two points: (1) the uncontradicted evidence showed that the defendant converted money proceeds from the sale of milk in which the plaintiff had a security interest; (2) if the defendant could use the defenses of waiver or estoppel, the defenses would raise genuine issues of fact which would preclude summary judgment. The defendant raises three defenses: (1) the authorization to sell the collateral extinguished any security interest in the proceeds; (2) there was no binding assignment of the milk proceeds; and (3) once the plaintiff exercised her right of repossession under the conditional sales contract the underlying indebtedness was extinguished.

We will discuss the defendant's points seriatim. All statutory references are to the Uniform Commercial Code, Chapter 50A, N.M.S.A.1953 (Repl. Vol. 8, pt. 1, 1962).

Three entities are involved: the plaintiff (the secured party), J. L. and Grace Nicholas (the debtors), and the defendant (the selling agent). Only the secured party and the selling agent are parties to this action.

On September 1, 1970, the secured party and the debtors executed a conditional sales contract for the sale of cattle and dairy equipment at a price of $59,180.00 plus nine percent interest. (This will be referred to as the security agreement). The security agreement provided, among other things, that one installment of $1,000.00 was payable on September 20, 1970, and another such installment was payable on October 20, 1970. Monthly installment payments of $2,000.00 were to commence on November 20, 1970 and continue until the debt was paid.

The security agreement also provided that the secured party would have a lien against all milk produced from the cows. The debtors assigned all of their right, title and interest in such milk to the secured party and agreed to sell all milk produced by the cows through the defendant. The defendant is a marketing or selling agent for various milk producers, retaining only a percentage of the proceeds for services rendered as a selling agent. The security agreement authorized the selling agent to pay the secured party, from the proceeds of the milk sold by the agent, $1,000.00 on September 20, 1970, $1,000.00, on October 20, 1970, and $2,000.00 on the 20th of each month thereafter until the $59,180.00 plus interest was paid. Although the security agreement executed by the secured party and the debtors mentioned the selling agent, the agent was not a party to this contract.

The secured party filed a financing statement in Valencia County where the debtors had their operations.

On September 3, 1970, the secured party's attorney sent a copy of the security agreement to the selling agent. Included was a request that the agent honor the terms of the security agreement. On October 27th of that year a follow-up letter was written by the attorney indicating that no response had been made by the selling agent. This letter did request a "consignment" form which is, presumably, a request for an assignment form.

On October 2, 1970, the selling agent signed an agreement with the debtors which provided, in essence, that the debtors would deliver all milk production to the selling agent who would handle the marketing and selling of the milk.

The selling agent signed a written assignment on October 23, 1970, which provided that effective November 15, 1970, the selling agent was authorized to deduct from the milk proceeds the sum of $1,000.00 per month for payment to the secured party. On record, no reason is given to explain why the amount authorized to be deducted from the debtors' proceeds was only $1,000.00 when the security agreement called for a payment of $2,000.00. Nevertheless the selling agent consented to and agreed to honor the written assignment.

The selling agent later notified the secured party that the authorization to pay contained in the security agreement was not acceptable as an assignment of proceeds. On November 19, 1970, Mrs. Raley, the secured party, received a direct response from the selling agent. This letter acknowledged the receipt of the September 3rd letter from the secured party's attorney along with a copy of the security agreement. Cited was 7 C.F.R. § 1138.80 (1970), which regulates the sale of milk in the Rio Grande Valley marketing area. This federal regulation, in effect at the time, permitted a selling agent (handler) to deduct from a producer's check only "proper deductions *authorized in writing by such producer*" (Emphasis added). The selling agent indicated a willingness to accept an assignment of milk proceeds payable to its members, but the agent would acknowledge and accept only those assignments made on the forms provided by the agent. The agent stated that the security agreement was not acceptable and specifically denied being bound by it.

Finally, the letter acknowledged receipt of an assignment for $1,000.00 per month effective November 15, 1970. Although it recognized that the security agreement called for different terms, the selling agent reiterated its policy that it could not guarantee payment of any assignment and disputes had to be settled between assignor and assignee. Enclosed were blank forms and a suggestion that the secured party, Mrs. Raley, reach an agreement with the debtors and memorialize such an agreement on forms acceptable to the agent.

The secured party never complied with the selling agent's request but the selling agent gave and the secured party accepted $1,000.00 for about twelve months, these payments being $1,000.00 less than the sum called for in the security agreement.

The debtors never made the first two payments called for in the security agree-

ment, and the only evidence of payments which were made indicate that the money came from the selling agent. After twelve months the secured party exercised her rights under the security agreement (the conditional sales contract) and repossessed the cows from the debtors. The secured party did not sue for a deficiency nor did she take any action against the debtors. Later, the secured party filed this suit against the selling agent.

Status of a Security Interest with Authorization to Sell–Waiver

The secured party argues that the evidence is clear and uncontroverted that the selling agent converted cash proceeds from the sale of milk. The secured party argues that when the marketing agent paid only $1,000.00 and did not pay the $2,000.00 as was stated in the security agreement, the selling agent converted the deficiency of $1,000.00. Although it is unclear from the complaint, it appears that the secured party asserts that the selling agent is also liable for the other payments which the debtors missed.

The secured party relies upon the security agreement, financing statement, and §§ 50A–9–306, 307. The secured party argues that § 50A–9–306 continues the security interest in identifiable proceeds, and that the money received by the selling agent for the sale of milk produced and delivered by the debtors was subject to the secured party's interest. We must keep in mind that there was no agreement between the secured party and the selling agent other than the acceptance of an assignment of $1,000.00 per month. Section 50A–9–306 states:

"*50A–9–306. 'Proceeds'—Secured party's rights on disposition of collateral.* —(1) 'Proceeds' includes whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of. The term also includes the account arising when the right to payment is earned under a contract right. Money, checks and the like are 'cash proceeds.' All other proceeds are 'non-cash proceeds.'

"(2) Except where this article otherwise provides, *a security interest continues in collateral notwithstanding sale*, exchange or other disposition thereof by the debtor *unless his action was authorized by the secured party in the security agreement or otherwise*, and also continues in any identifiable proceeds, including collections, received by the debtor. A security interest in farm products and the proceeds thereof shall not be considered waived by the secured party by any course of dealing between the parties or by any trade usage.

"(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten [10] days after receipt of the proceeds by the debtor *unless*:

"(a) *a filed financing statement covering the original collateral also covers proceeds*; . . . ." [Emphasis added].

It is undisputed that the goods involved in this case are "farm products." Section 50A–9–109(3). Products of livestock, such as milk, are included in the definition of "farm products". Section 50A–9–109(3).

In the case of *S & W Trucks, Inc. v. Nelson Auction Service Inc.*, 80 N.M. 423, 457 P.2d 220 (Ct.App.1969), this Court seemed to agree with a district court decision that the consent to the sale of collateral waived any interest the secured party had in the collateral, at least for the purpose of the sale. In *Clovis National Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967), the court said:

"When plaintiff [the secured party] consented to the sales and the collection of the proceeds of sales by [the debtor], [the secured party] lost its security interest in the collateral and was then looking to [the debtor] personally for payment."

We believe that under the Uniform Commercial Code, § 50A–9–306, and the law as stated in *Clovis National Bank*, the authorization for the sale of products contained in the security agreement waived

any interest the secured party had in proceeds of the collateral. See *Swift & Company v. Jamestown Nat. Bank*, 426 F.2d 1099 (8th Cir. 1970).

Otherwise the *Clovis National Bank* case is inapposite. The security agreement involved in *Clovis* expressly provided that the debtor was not to sell or otherwise dispose of the collateral without the written consent of the secured party. In *Clovis* the court nevertheless implied a consent or authorization to sell, *implied* from course of dealing and trade usage. See, e. g., *Planters Production Credit Association v. Bowles*, 256 Ark. 1063, 511 S.W.2d 645 (1974). In the case *sub judice* we have an *express* authorization to sell. Although the secured party in this case argues that she never consented to a sale of the milk, the evidence is overwhelmingly against this contention. The security agreement expressly authorized the sale of milk to the selling agent, and the secured party herself testified that she knew that the debtors would have to sell the milk in order to live.

The correct procedure which the secured party should have followed would have been to have the debtors' accounts covered by the security agreement, accompanied by a financing statement filed in the proper place covering these accounts. As stated in Coogan, Hogan, Vagts, Secured Transactions Under the Uniform Commercial Code, § 27.03[3] (1963):

> ". . . On the other hand it seems less likely that a lender who takes a security interest in chickens or dairy cattle would expect to include products since the products of chickens and dairy cattle (eggs and milk) are marketed on a daily or at least a weekly basis. If milk and eggs are used as collateral it would seem that permission to sell would be a necessary condition of the agreement because the farmer does not normally have adequate storage for such perishable products. There is no precedent in pre-Code farm law for a security interest in milk or eggs while such goods remain in the possession of the farmer. Conceivably the Code can be adapted directly to this type of collateral but it would seem more appropriate to use account financing when the principal products of the farm debtor is milk or eggs. There is some precedent for this type of financing."

Under the discussion of the milk check assignment, § 27.04[2], it is said:

> "It was observed earlier that milk as a product of livestock would probably not be considered appropriate collateral for a farm loan. Under the Code however the delivery of milk creates an account. Whenever the farmer delivers milk to the purchaser a right to payment for goods sold arises and this can be the subject of a security agreement. The agreement can include future accounts arising from future milk deliveries.
>
> "The security interest is valid without an acceptance by the milk purchaser. . . ."

The secured party relies heavily on *Baker Production Credit Association v. Long Creek Meat Company, Inc.*, 266 Or. 643, 513 P.2d 1129 (1973). The case is distinguishable because the security agreement involved therein provided that the debtor was not to sell or otherwise dispose of any of the collateral without the consent of the secured party.

Assignment of Proceeds

The only notice of assignment which the selling agent received was the authorization from the debtors to pay the secured party $1,000.00 per month. This was the only assignment which the selling agent accepted and agreed to under § 50A–9–318(3). We believe that if the assignment is of an entire claim, the consent of the debtor is not required. Assignments, 6 Am.Jur.2d § 100 (1963). But we also believe that under § 50A–9–318(3) the selling agent had a right to make the reasonable request that the secured party provide proof the assignment had been made. This is especially true if only a partial assignment has been made. The defendant requested proof and the plaintiff never complied with the request; therefore, no assignment was made.

The instant case presents a set of facts analogous to *S & W Trucks, Inc. v. Nelson Auction Service, Inc.*, supra. Although the language of an assignment can be informal or in writing, at least it must show an intent to transfer on the part of the assignor. In our opinion, the security agreement was a mere authorization for the selling agent to make particular payments. In the absence of an assignment, however, the selling agent's liability extended only to the debtors and the distribution of the proceeds was made at their direction. *S & W Trucks, Inc. v. Nelson Auction Service, Inc.*, supra.

Effect of Rescission and Repossession

Upon default the secured party terminated the contract and repossessed the cows. See §§ 50A–9–504, 505 and 507. She did not sue the debtors for deficiency. Now the secured party is attempting to sue the defendant for conversion.

It is the function of the courts to interpret and enforce contracts as made by the parties. *Woods v. Collins*, 87 N.M. 370, 533 P.2d 759 (Ct.App.1975). The primary objective in construing a contract is to ascertain the intent of the parties. *Schultz & Lindsay Construction Co. v. State*, 83 N.M. 534, 494 P.2d 612 (1972).

The contract in this case had a forfeiture clause:

> "It is agreed that if the monthly installment payments or any one of them be delinquent or unpaid on the date same should be paid or if default be made by the buyers in any of the conditions contained in this contract and they shall remain in default in any such respects for a period of fifteen (15) days after written notice of such default has been mailed to them at Route 1, Box 356 in Belen, New Mexico, the seller shall, at her option, have the right to cancel and terminate this contract and terminate the buyers' right to possession of the above described property and all sums paid hereunder shall be considered forfeited as rental and liquidated damages, and the seller shall have the right to take immediate possession of the property, with or without process of law and failure on the part of the buyers to surrender possession upon demand, shall render buyers guilty of unlawful detainer. The seller may, however, at her option in lieu of cancelling this contract, take such other steps at law or equity which she is allowed to take to enforce the provisions hereof. . . ."

The intention of the parties appears to be that the secured party could exercise an option to terminate the contract and declare a forfeiture if the debtors defaulted. This is what the secured party did. The secured party having declared a forfeiture, and having elected to rescind the contract, it follows as a matter of law that there can be no recovery of any amount the selling agent might have owed. The rescission and termination of the contract destroyed the consideration for any agreement between the debtors and the secured party. Assuming, arguendo, that there was an agreement of some kind between the selling agent and the secured party, the rescission of the contract destroyed that agreement. *Davies v. Boyd*, 73 N.M. 85, 385 P.2d 950 (1963).

We believe that the court was correct in granting a summary judgment in favor of the defendant. See *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972); *Withrow v. Woozencraft*, 90 N.M. 48, 559 P.2d 425 (Ct. App.1977); *First National Bank v. Nor-Am Agricultural Products, Inc.*, 88 N.M. 74, 537 P.2d 682 (Ct.App.1975).

Summary judgment is affirmed.

IT IS SO ORDERED.

SUTIN, J., specially concurs.

EDMUND H. KASE, III, District Judge, specially concurs.

SUTIN, Judge (specially concurring).

I concur in the result.

Plaintiff appeals the summary judgment granted in favor of the defendant.

Plaintiff sold cattle and dairy equipment to J. L. and Grace Nicholas (Nicholas) for which payments were to be made by monthly installments of $2,000 following two ini-

tial payments of $1,000 each. Plaintiff retained a lien on all milk produced by the cows. Plaintiff perfected her security interest in the collateral and proceeds by filing a financing statement in Valencia County, the county in which Nicholas operated their business. See §§ 50A–9–302, 303, 401 and 402, N.M.S.A. 1953 (Repl.Vol. 8, pt. 1, 1962 and 1975 Supp.).

Nicholas agreed to sell all milk produced through defendant, Milk Producers, Inc. [later, Associated Milk Producers, Inc.], a milk marketing association. Further, Nicholas authorized defendant, from the proceeds realized by the sale of the milk, to pay the monthly installments directly to plaintiff in accordance with the terms specified in the contract.

Plaintiff sued defendant and alleged that pursuant to these terms she was entitled to payments totaling $30,000 from the defendant; that she received only $14,000; that defendant's failure to remit the full amount constituted a conversion of the proceeds; and that she is entitled to judgment for $16,000.

A. *Plaintiff Waived Security Interest in the Proceeds*

Plaintiff insists that the conditional sales agreement, which, coincidentally served additionally as security agreement, § 50A–9–201, and financing statement, § 50A–9–402 (1975 Supp.), continued her security interest in all proceeds from the cows, including milk and cash receipts for the sale of the milk.

Section 50A–9–306(2) (1975 Supp.) governs:

> Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds, including collections, received by the debtor. *A security interest in farm products and the proceeds thereof shall not be considered waived by the secured party by any course of dealing between the parties or by any trade usage.* [Emphasis added.]

The italicized portion signals an amendment enacted by Laws 1968, ch. 12, § 2. Its intendment was to overcome an earlier judicial construction of this subsection.

Clovis National Bank v. Thomas, supra, had held that a debtor's sale of farm products authorized either expressly or impliedly according to trade usage or custom by the secured party extinguished the secured party's interest in the collateral.

The 1968 amendment provided that only an expressly authorized sale would discontinue the security interest. Otherwise, *Clovis* was left intact.

The only other New Mexico case to consider this issue was *S & W Trucks, Inc. v. Nelson Auction Service, Inc., supra.* Decided in 1969, subsequent to the amendment's enactment, it stated:

> It is undisputed that the consent on the part of S & W and Chicago to the auction sale had the effect of waiving their liens upon the rigs and related property, at least for the purpose of the sale. *Clovis National Bank v. Thomas* . . . . . [80 N.M. at 424, 457 P.2d at 221].

The only material issue is whether or not plaintiff expressly authorized Nicholas to sell the milk. According to the sales contract, the parties agreed that the Nicholas

> will sell all milk produced . . . through Milk Producers, Inc. . . .

Neither obfuscation nor sophistry disguises the nature of this term: an express authorization to sell the milk through defendant. The sale having been expressly authorized, seller's security interest was waived, § 50A–9–306(2); see Official Comment No. 3, § 9–306 and Official Comment No. 2, § 9–307.

Plaintiff argues that the New Mexico cases do not control, that the Oregon case of *Baker Production Credit Association v. Long Creek Meat Company, Inc., supra,* speaks more authoritatively. I would distinguish that case, not because, as the majority suggests, the security agreement prohibited sale of the collateral without con-

sent, but rather, because the consent given was conditional and the condition had not been met. In our case, consent to sale was also made conditional by the terms of the conditional sales contract; however, in our case, the conditions were satisfied.

The majority offers the "correct procedure" to preserve the seller's security interest: simply include "accounts" in the security agreement. I do not join in this advice for two reasons:

(1) Included among the meanings of "proceeds" is "account," § 50A–9–306(1). Because plaintiff's agreement accorded her a security interest in "proceeds," she necessarily obtained a security interest in the "accounts." The majority's advice, therefore, would perform a superfluous exercise.

(2) When the debtor defaults, § 50A–9–502(1) entitles the secured party to "notify an account debtor . . . to make payment to him . . . and also to take control of any proceeds to which he is entitled under section 9–306." An "account debtor" is one obligated on an account, § 50A–9–105(a). An "account" is a right to payment, § 50A–9–106. The evidence before us shows that the defendant remitted, either to the plaintiff or Nicholas, all the money due. Because defendant discharged its obligation, it was not an account debtor. The plaintiff, therefore, could not gain any additional advantage over the defendant by attempting to designate it an account debtor, the definitional requirements of which were not fulfilled.

B. *Assignment of proceeds to plaintiff was lost by Nicholas' assignment to defendant*

The majority holds that the conditional sales agreement was ineffective to create a valid assignment. The pertinent provision in the agreement reads:

> . . . buyers do hereby authorize Milk Producers, Inc. to pay to the seller, from the proceeds of the milk sold to M.P.I., . . . ($1,000.00) . . . on or before September 20, 1970, and . . . ($1,000.00) . . . on or before October 20, 1970, and . . . ($2,000.00) . . . on or before the 20th day of each month thereafter until . . . ($59,180.00) . . . plus interest, have been paid in full.

The document in its entirety was delivered to the defendant along with a cover letter drafted by plaintiff's attorney. The letter included the following explanation:

> By the Contract of Sale, the buyers have assigned unto Mrs. Raley as security for the payment of the consideration named in the contract, their interest in the milk produced by such cows, and Mrs. Raley has a lien against such milk securing the payment of the amount due her under the contract. By the terms of the contract, you are to mail to Mrs. Raley, on the 20th day of September, $1,000 and on the 20th day of October, $1,000 and on the 20th day of each month thereafter until the consideration and interest are paid, $2,000, from the proceeds of the sale of the milk belonging to the buyers.

Although I agree with the majority that New Mexico's law on assignments under the U.C.C. is adequately contained in *S & W Trucks, Inc., supra,* I do not agree with the majority's recitation of the law, nor do I agree that the facts are analogous.

(a) The Law

The Uniform Commercial Code, § 50A–9–318(3), N.M.S.A. 1953, provides, with respect to a notification to an account debtor of the assignment of the account, that a notification which does not reasonably identify the rights assigned is ineffective. [*S & W Trucks,* 80 N.M. at 425, 457 P.2d at 222].

Section 50A–9–318(3) also provides:

> If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

(b) The Facts

In *S & W Trucks, Inc.* the secured party consented to debtor's sale through the defendant auction house. The debtor there-

upon sent two letters to the auctioneer authorizing it to pay a given amount to S & W. These letters did not create an assignment because they did "not identify any rights or claimed rights of S & W and Chicago in any of the funds derived from sale." [80 N.M. at 425, 457 P.2d at 222].

In our case, as noted above, the documents received by the defendant clearly identified all "the rights or claimed rights [of plaintiff] in . . . the funds derived from sale." This measure of proof does not satisfy the majority, but I can think of no more probative evidence of an assignment than a duly executed agreement ratified, in effect, by the secured party's own lawyer.

This assignment, however, insofar as it determined defendant's obligations to plaintiff, as assignee, was superceded by the subsequent assignment executed by Nicholas and defendant. By its terms, defendant was to pay to plaintiff $1,000 each month rather than the $2,000 provided by the conditional sales agreement. The variance, to me, is prima facie evidence of fraud by Nicholas, but absent any showing of collusive participation or unlawful purpose by defendant (and no such allegation was made), it may lawfully assert the terms of the assignment to which it was privy. This assignment subjugated plaintiff's rights. Section 50A–9–318 reads:

> (1) . . . the rights of an assignee are subject to
>
> (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; . . . .

Based on the foregoing analysis, the assignment obligated defendant to pay $1,000 to plaintiff. The defendant fulfilled its obligation.

C. *Effect of Rescission and Repossession*

Let me note at the outset as an aside, that the plaintiff chose not to join Nicholas as defendants because plaintiff fully exercised her contractual remedies by retaining all monies paid and by repossessing the cows. The majority was puzzled why Nicholas was not made a party to the action.

The majority holds under this point that plaintiff relinquished all rights against Nicholas when she exercised her contractual rights against Nicholas. I would not reach this issue because the first two points, supra, dispose of the matter, and the issue presented has not been adequately joined for review.

I should like simply to respond to the majority's reasoning.

(1) The majority would enable the defendant to assert contractual defenses to which it was not a party. At the same time the majority vouchsafes the defendant from any contractual obligations. In other words, defendant gains whatever third party benefits may be forthcoming, but it escapes any duty. This seems inequitable on its face.

(2) The Uniform Commercial Code does not have a provision which resolves this contention. Section 50A–9–318 discusses the defenses available to defendant, an account debtor, against plaintiff, an assignee. This section does not say that defendant enjoys all the defenses against plaintiff that Nicholas might have. In other words, the statute does not allow defendant to fill the shoes of Nicholas whenever it suits defendant.

(3) If defendant converted the proceeds, the tort occurred at the moment defendant exercised unlawful dominion over the property; to await plaintiff's decision as to how it will enforce its contractual rights against Nicholas as determinative of whether or not conversion will lie, delays, in effect, the accrual of the cause of action until long after the tortious conduct was committed. Put more simply: plaintiff alleges that defendant converted the November, 1969 proceeds when it remitted $1,000 instead of $2,000; defendant answers that because over a year later plaintiff repossessed the cows from Nicholas that it could not have committed any tort.

(4) *Davies v. Boyd, supra,* cited by the majority cannot serve as authority for a rule that the rescission of a contract be-

tween X and Y terminates all rights that X may have against Z. In *Davies v. Boyd*, the court had before it a purchaser and seller of a home under a real estate contract. The contract provided that upon default by the buyer, the seller could cancel the contract and retain all amounts already paid. The Court ruled that once the seller exercised these rights, it could not enforce a note executed by the buyer as part of the purchase agreement. This case has no value as precedent for the rights which may be invoked against a third party.

EDMUND H. KASE, III, District Judge (specially concurring).

I concur in the result. I also concur in the opinion, except that:

1. I do not join in the obiter dictum under the first point of the decision as to the procedure which the secured party should have followed to preserve her security interest. It is unnecessary and at best advisory.

2. I do not join in the holding under the third point of the decision to the effect that the secured party's rescission and termination of her contract with the debtors bars recovery in this case. I would not reach this issue because the first two points of the decision adequately dispose of this case.

568 P.2d 255

STATE of New Mexico, Plaintiff-Appellee,

v.

Harry LINAM, Defendant-Appellant.

No. 2699.

Court of Appeals of New Mexico.

Aug. 2, 1977.

Writ of Certiorari Denied Aug. 24, 1977.

Jan A. Hartke, Chief Public Defender, Carol A. Koller, Asst. Public Defender, Reginald J. Storment, Appellate Defender, William H. Lazar, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

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

OPINION

HENDLEY, Judge.

Convicted of one count of forgery by falsely making a check and one count of forgery by issuing or transferring a forged writing, all being contrary to § 40A–16–9(A) and (B), N.M.S.A.1953 (2d Repl. Vol. 6, 1972) defendant appeals asserting: (1) that the evidence only showed an attempt to issue or transfer a forged writing; (2) the trial court erred in not giving a requested instruction on intoxication; and (3) the trial court erred in not granting a continuance.

Attempt

This issue is raised for the first time on appeal. Since it involves a question of failure of proof it is jurisdictional and may be raised for the first time on appeal. *State v. Losolla,* 84 N.M. 151, 500 P.2d 436 (Ct.App.1972).

Defendant, in the company of another, presented the check to a bank teller for cashing. The payee on the check was the same name as on defendant's driver's license. The teller was somewhat suspicious and took the check to her supervisor. The supervisor checked the signature card of the purported payor. The purported payor's signature on the check did not appear to be the same as the one on the signature card. The police were called and defendant was arrested.

Relying on *State v. Tooke,* 81 N.M. 618, 471 P.2d 188 (Ct.App.1970) defendant contends that since he received nothing for the check he is ". . . guilty of at most an attempted forgery, because there was no passing of an interest in the check." We disagree.

In *State v. Tooke,* supra, there was no transfer of rights in the check. More was to be done before the checkout clerk would accept the check. The check had to be approved by an "okayer." That was a physical transfer but not a transfer of any interest. It was a requirement of the store prior to permitting any transfer of interest. There was no expectation that the "okayer" would cash the check. No interest was intended to pass. It was nothing more than preparation.

The facts in the instant case show a complete transfer to the bank teller. The fact that the teller went to her supervisor after the transfer does not convert the crime into an attempt. The transfer of interest by the defendant had already occurred. The fact that defendant received nothing or that there was no injury or loss is immaterial. Compare *State v. Weber,* 76 N.M. 636, 417 P.2d 444 (1966).

Instruction

Defendant's requested instruction on intoxication was refused by the trial court. Defendant contends that there was evidence reasonably tending to sustain the giving of the required instruction. We disagree. The fact that liquor was smelled on defendant's breath or that the odor of liquor was coming from the area where defendant and his companion were standing will not support an instruction on intoxication. We cannot equate the odor of liquor, without more, with intoxication. See *State v. Watkins,* 88 N.M. 561, 543 P.2d 1189 (Ct.App.1975).

Continuance

Defendant notified the state in advance of trial that he was relying on the defense of lack of specific intent because of intoxication. A Court Clinic report was ordered by the trial court. Defendant moved for a one week continuance two days before trial because a Court Clinic report had not been received. The day of trial defendant was handed the report. The report concluded that defendant was able to form a specific intent at the time of the offense.

Defendant contends that his requested continuance should have been granted. This contention appears to be based on the fact that the report from the Court Clinic was not made by a qualified expert. The record does not support this contention nor did the state stipulate to that fact.

The trial court did not abuse its discretion in denying the motion for a continuance. *State v. Blea,* 88 N.M. 538, 543 P.2d 831 (Ct.App.1975).

Affirmed.

IT IS SO ORDERED.

WOOD, C. J., concurs.

SUTIN, J., specially concurs.

SUTIN, Judge (specially concurring).

The majority opinion distinguishes *State v. Tooke,* 81 N.M. 618, 471 P.2d 188 (Ct.App. 1970). This is a distinction without a difference. In *Tooke,* the defendant was convicted of *attempted* forgery because the defendant presented a forged check in a store. The check-out clerk asked the "okayer" to ascertain its validity. The "okayer" had physical possession of the check. This physical transfer to the "okayer" was *not* a passing of any interest in the check. This was *attempted* forgery.

In the instant case, defendant presented the check to the *bank teller.* This *was* a transfer of interest. The defendant was guilty of *forgery.*

The "okayer" in the store, and the bank teller in the bank were virtually identical. They were store/bank agents with authority to tender money to defendants in exchange for the check. There was or there was not a transfer of interest. Both defendants would be guilty of the same offense—either attempted forgery or actual forgery.

How the physical passing of the check in *Tooke* established *attempted* forgery, and physical passing of check in *Linam* established *forgery* disturbs the judicial mind. To me the distinction is gobbledygook.

The State says:

> The Court of Appeals should re-examine their decision and reasoning of *State v. Tooke, supra,* in light of U.J.I. Criminal, No. 16.34 and in light of the discussion herein.

The court gave U.J.I. Crim. No. 16.34:

> For you to find the defendant guilty of forgery as charged in Count II, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant gave or delivered to Albuquerque National Bank a check knowing it to have a false signature intending to injure, deceive or cheat Albuquerque National Bank or another;
>
> 2. This happened in New Mexico on or about the 21st day of May, 1976.

Committee Commentary says:

Relying on the Uniform Commercial Code for definitions, the Court of Appeals has held that this crime requires an issuing

> and transfer of an interest and not merely a transfer. *State v. Tooke,* 81 N.M. 618, 471 P.2d 188 (Ct.App.1970). A transfer, etc. which does not come within the commercial law definitions is an attempted forgery. *State v. Tooke, supra.* The court must determine the commercial law question as a matter of law. . . . *The instruction requires that the jury make only a determination of the physical transfer.* [Emphasis added.]

U.J.I. Criminal became effective September 1, 1975. "This Court is to follow precedents of the Supreme Court; it is not free to abolish instructions approved by the Supreme Court." *State v. Scott,* 90 N.M. 256, 561 P.2d 1349 (Ct.App.1977). Upon this rule, I specially concur. *Tooke* has been overruled. The State need not prove as an element of its case that the defendant transferred an interest to the victim.

An attempt to commit forgery "is an act done with intent to commit such crime but which fails of completion." *State v. Lopez,* 81 N.M. 107, 108, 464 P.2d 23, 24 (Ct.App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970). When such attempt fails of completion, it should be a matter of future concern.

Other portions of the opinion need clarification but since I concur, I concur.

568 P.2d 258

STATE of New Mexico, Plaintiff-Appellant,

v.

Sam B. DUNLAP and Mary G. Dunlap, Defendants-Appellees.

No. 2921.

Court of Appeals of New Mexico.

Aug. 2, 1977.

Toney Anaya, Atty. Gen., Vernon O. Henning, Sp. Asst. Atty. Gen., Santa Fe, Ira Robinson, Dist. Atty., Joseph P. Paone, Asst. Dist. Atty., Albuquerque, for plaintiff-appellant.

John P. Dwyer, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

On September 21, 1976 the Grand Jury of Bernalillo County returned a thirteen-count indictment against the defendants. Defendants were charged with five counts of attempts to evade or defeat the gross receipts tax, five counts of filing false or fraudulent statements, and three counts of conspiracy to attempt to evade or defeat the gross receipts tax pursuant to §§ 72–13–85 and 72–13–86(A), N.M.S.A. 1953 (Repl.Vol. 10, pt. 2, 1975 Supp.), and § 40A–28–2, N.M.S.A. 1953 (2d Repl.Vol. 6).

On January 10, 1977 defendants filed a motion to dismiss all counts of the indictment because defendants, in their individual capacities, were not, during any of the periods covered in the indictment, engaged in business and were, therefore, not required to file gross receipts tax returns under the provisions of § 72–13–30. The motion was set for hearing on January 17, 1977.

The evidentiary issue before the trial court was whether defendants were engaged in any business as individuals during the periods covered in the indictment. If any hearing was held on January 17, 1977, nothing appears of record. Evidently, only oral argument was had before the court.

On February 25, 1977 the trial court, absent any evidence in the record, made findings of fact. The findings showed that defendants were officers of the New Mexico Employment Agency, Inc.; that this corporation was obligated to pay the gross receipts tax, but the defendants were not obligated to pay in their individual capacities, and defendants were not criminally liable.

The court ordered eight counts of the indictment dismissed. The State appeals. We reverse.

The old common law motion to quash an indictment could raise only such defects or irregularities as were apparent on the face of the indictment and not extraneous facts or matters dehors the record. To reach such matters dehors the record, the procedure was by a plea in abatement, *State v. McKinley*, 30 N.M. 54, 227 P. 757 (1924) which plea in abatement required a trial and determination of the issues raised. 22 C.J.S. Criminal Law § 434 (1961).

This procedure was superseded by Rule 33(d), (e)(2) of the Rules of Criminal Procedure adopted in 1972 [§ 41–23–33(d), (e)(2), N.M.S.A. 1953 (2d Repl.Vol. 6, 1975 Supp.)]. This rule provides that defenses and objections can be raised by motion. One of the defenses or objections delineated is the failure of the indictment "to charge

an offense". In effect, defendants' "motion to dismiss" was the failure of the indictment "to charge an offense". As such, it may be "noticed by the court at anytime during the pendency of the proceeding." Rule 33(e)(2). Defendants' motion was proper. *State v. Elam*, 86 N.M. 595, 526 P.2d 189 (Ct.App.1974).

In this proceeding, the court may examine matters dehors the record. It can hear evidence, or the parties can stipulate, as to matters dehors the record to determine that, although the indictment is proper on its face, it is defective because the intended charge is different than that specified. Defendants were charged with violating gross receipts tax laws pertaining to the filing of forms. These violations are validly stated. It appears from the briefs filed that the parties agreed, at the time of the hearing on defendants' motion to dismiss, that the State intended to charge defendants as officers of the New Mexico Employment Agency, Inc. The trial court has jurisdiction. Defendants' only contention on appeal is that the indictment is defective because it failed to inform defendants of the charge that they attempted to evade a tax owed by the corporation that they owned.

This type of error in the indictment can be cured by an amendment provided it does not prejudice the substantial rights of the defendants upon the merits. Section 41–23–7(a), N.M.S.A. 1953 (2d Repl.Vol. 6, 1975 Supp.). Defendants agree that an individual can be prosecuted under the above statutes for allegedly attempting to evade a tax owed by a corporation that they own. *United States v. Lisowski*, 504 F.2d 1268 (7th Cir. 1974); *Blauner v. United States*, 293 F.2d 723 (8th Cir. 1961), cert. denied, 368 U.S. 931, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961); *Bernstein v. United States*, 234 F.2d 475 (5th Cir. 1956), cert. denied, 352 U.S. 915, 77 S.Ct. 213, 1 L.Ed.2d 122 (1956); reh. denied, 352 U.S. 977, 77 S.Ct. 351, 1 L.Ed.2d 330 (1957).

By an amendment to the indictment, that defendants were officers of the New Mexico Employment Agency, Inc., and owned this corporation, defendants' substantial rights are not prejudiced on the merits.

Reversed. This cause is remanded to the district court to set aside and hold for naught the order entered on February 25, 1977, and grant leave to the State to amend the indictment. This amendment may be made by a separate pleading signed by the district attorney that each count of the indictment is amended to include therein that "the above named defendants, as officers and owners of New Mexico Employment Agency, Inc. did commit the offense stated in each count," or such other language as the State shall choose to use.

IT IS SO ORDERED.

LOPEZ, J., concurs.

JAMES W. MUSGROVE, District Judge, specially concurs.

JAMES W. MUSGROVE, District Judge, specially concurring.

The Grand Jury of Bernalillo County returned a thirteen count indictment against the defendants charging them with five counts of attempt to evade or defeat the gross receipts tax contrary to Section 72–13–85, N.M.S.A. 1965 Supp. as amended, and three counts of conspiracy to attempt to evade or defeat the gross receipts tax contrary to Sections 40A–28–2, 72–13–85, N.M.S.A. 1953 Comp. and N.M.S.A. 1965 Supp. as amended, and charged defendant Mary G. Dunlap with five counts of making and subscribing false returns contrary to Section 72–13–86(A) N.M.S.A. 1965 Supp. as amended.

Defendants filed a motion to dismiss all counts of the indictment on the ground that in their individual capacities the defendants were not engaged in business and not required to file gross receipts tax returns.

Following a hearing on the motion the trial court found that the defendants in their individual capacities were not engaged in any business but were officers of New Mexico Employment Agency (Bureau) Inc., and that the defendants could not be held criminally liable for their failure or their

attempt to evade or not pay such gross receipts tax since it was the corporation and not the defendants individually that was subject to that tax.

The trial court dismissed all counts of the indictment except the five counts of false subscribing against Mary G. Dunlap. The State appealed.

Defendants concede, and correctly so, that they could be prosecuted under Section 72–13–85 N.M.S.A. 1965 Supp. as amended for allegedly attempting to evade a tax owed by a corporation of which they own. However, they argue that the indictment is fatally defective because it failed to inform the defendants of the charge that they attempted to evade a tax owed by a corporation which they own. We disagree.

Rule 5(d), Rules of Criminal Procedure, defines an indictment as a written statement returned by a grand jury containing the essential facts constituting the offense, common name of the offense and if applicable a specific section number of the New Mexico Statute. The indictment in this case met those requirements.

Rule 8, Rules of Criminal Procedure states, "It shall be unnecessary for a complaint, indictment or information to contain the following allegations unless such allegations are necessary to give the defendant notice of the crime charge: * * * (3) means by which the offense was committed. * * *"

The indictment gave the defendants notice that they were being charged with attempting to evade or defeat gross receipts tax on particular dates contrary to a particular statute. The fact that the defendants may have acted in their roles as officers or owners of a corporation goes to the means by which the offense was committed and is not an essential allegation of the indictment. If the defendants were desirous of such information, a motion pursuant to Rule 9, Rules of Criminal Procedure was available.

This cause is reversed and remanded to the District Court to set aside the order dismissing the eight counts of the indictment.

568 P.2d 261

STATE of New Mexico,
Plaintiff-Appellee,

v.

Raymond PATTERSON,
Defendant-Appellant.

No. 2908.

Court of Appeals of New Mexico.

Aug. 2, 1977.

Jan A. Hartke, Chief Public Defender, Douglas A. Barr, Asst. Appellate Defender, Santa Fe, for appellant.

Toney Anaya, Atty. Gen., Paquin M. Terrazas, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

The dispositive issue is whether the aggravated assault offense of which defendant was convicted was a lesser offense included within the offense charged in the indictment.

The indictment charged a violation of § 40A–3–3, N.M.S.A. 1953 (2d Repl. Vol. 6) in that defendant assaulted the victim with intent to kill. Section 40A–3–3, supra, reads:

"*Assault with intent to commit a violent felony.*—Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or to commit any murder, mayhem, rape, robbery or burglary.

"Whoever commits assault with intent to commit a violent felony is guilty of a third degree felony."

The trial court instructed the jury on aggravated assault with a deadly weapon. The aggravated assault statute, § 40A–3–2, N.M.S.A. 1953 (2d Repl. Vol. 6) reads:

"*Aggravated assault.*—Aggravated assault consists of either:

"A. unlawfully assaulting or striking at another with a deadly weapon;

"B. committing assault by threatening or menacing another while wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner, so as to conceal identity; or

"C. willfully and intentionally assaulting another with intent to commit any felony.

"Whoever commits aggravated assault is guilty of a fourth degree felony."

The State asserts that aggravated assault was a lesser offense included within the charge of assault with intent to kill. The State's argument is based on § 40A–3–2(C), supra. We do not consider whether § 40A–3–2(C), supra, is a lesser offense included within § 40A–3–3, supra, because that is not an issue in this case. No issue as to § 40A–3–2(C), supra, was submitted to the jury. The aggravated assault submitted to the jury was § 40A–3–2(A), supra—an assault committed with a deadly weapon.

The State's position, both at trial and on appeal, has been that the aggravated assault was a lesser offense included within the assault with intent to kill under the facts of the case. That is not the basis for determining whether an offense is a lesser included offense. In determining whether there is a lesser included offense "we look to the offense charged in the indictment." *State v. Medina,* 87 N.M. 394,

534 P.2d 486 (Ct.App.1975). Thus, Criminal Procedure Rule 44(d) refers to "an offense necessarily included in the offense *charged*". (Our emphasis.) *State v. Kraul,* 90 N.M. 314, 563 P.2d 108 (Ct.App.1977); see *State v. Sandoval,* 90 N.M. 260, 561 P.2d 1353 (Ct.App.1977).

For a lesser offense to be included within the greater, it must be necessarily included. To be necessarily included, the greater offense cannot be committed without also committing the lesser. *State v. Kraul,* supra; *State v. Sandoval,* supra; *State v. Medina,* supra.

Assault with intent to kill can be committed without use of a deadly weapon; thus, aggravated assault with a deadly weapon was not a lesser included offense. Compare *State v. Taylor,* 33 N.M. 35, 261 P. 808 (1927). The trial court erred in submitting aggravated assault with a deadly weapon because it was not included within the offense charged. *State v. Trivitt,* 89 N.M. 162, 548 P.2d 442 (1976).

Defendant's conviction is reversed. The cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

568 P.2d 263

Rosemary Gonzales LINDSEY and Sheldon Lindsey, Plaintiffs-Appellants,

v.

J. A. MARTINEZ, Defendant-Appellee.

Appeal of Sheldon LINDSEY, Contemnor-Appellant.

No. 2800.

Court of Appeals of New Mexico.

Aug. 2, 1977.

Manny M. Aragon, Lorenzo A. Chavez, Albuquerque, for plaintiffs-appellants.

Toney Anaya, Atty. Gen., Paquin M. Terrazas, Asst. Atty. Gen., Santa Fe, for defendant-appellee.

OPINION

WOOD, Chief Judge.

This appeal involves the constructive contempt of Sheldon Lindsey. We reverse the trial court's contempt decision because it was made in the absence of Sheldon. We discuss (1) the type of contempt; (2) notice of the contempt charge; and (3) appearance by counsel.

Plaintiffs and Martinez occupied adjoining property; they did not get along. Plaintiffs' suit against Martinez sought a resolution of the difficulties and included a request that Martinez be restrained from certain action. In March, 1975 the trial court entered an order restraining both parties. As to the plaintiffs, the restraining order read:

> "That the Plaintiffs are hereby restrained from in any way molesting, interfering with, or harassing the Defendant, in any way, manner or form."

Although Lindsey has various complaints as to the vagueness of this restraint, he is in no position to complain. His brief-in-chief states that the restraining order was entered by agreement between counsel for the parties.

In October, 1975 Martinez moved that the trial court require plaintiffs to show cause why they should not be held in contempt for disobeying the restraining order. The motion alleged the plaintiffs had "continuously disobeyed the Court's Order as more specifically set forth in the affidavit attached hereto." The affidavit of Martinez named specific instances of purported violations of the restraining order. This motion and the supporting affidavit are the contempt charge. *In Re Fullen*, 17 N.M. 394, 128 P. 64 (1912); see *Escobedo v. Agriculture Products Co., Inc.*, 86 N.M. 466, 525 P.2d 393 (Ct.App.1974).

An order to show cause was issued and a hearing date was set. Plaintiffs' attorney moved to vacate the hearing date. The trial court granted the motion. The hearing was subsequently held in November, 1975.

Plaintiffs did not personally attend the hearing. However, their counsel did appear. Counsel announced ready for trial and participated in the hearing. The participation consisted of cross-examining witnesses called by Martinez and argument to the court. Plaintiffs' counsel called no witnesses on behalf of plaintiffs. No objection was made by any one concerning the physical absence of plaintiffs or the sufficiency of service upon them of the order to show cause.

After the hearing, the trial court's order of November 14, 1975 held that Sheldon Lindsey was in contempt on the basis of evidence which "conclusively" showed that he had disobeyed the terms" of the restraining order. The trial court sentenced Sheldon to six months in the county jail; the trial court's order provided that Sheldon could purge himself of the contempt by complying with five items specified in the order. Four of the five items required affirmative action on Sheldon's part and thus contrast with the restraining order which required only that Sheldon refrain from action.

In June, 1976 Martinez moved that Sheldon be incarcerated pursuant to the contempt sentence. This motion alleged that Sheldon had failed to purge himself of the contempt. The motion was supported by the affidavit of Martinez. Sheldon was personally served with a copy of the motion and affidavit, and a copy of the court's show cause order. The transcript indicates that Sheldon was present in person for the evidentiary hearing and that his counsel participated fully in the hearing, including calling witnesses on Sheldon's behalf.

After the evidentiary hearing was concluded, the trial court found that Sheldon had willfully ignored the path outlined to him by which he could purge himself of the contempt of which he had been found guilty." The sentence "heretofore imposed" was ordered to be carried out.

Type of Contempt

Only one finding of contempt was made; it appears in the order of November 14, 1975. However the sentence, imposed at that time was stayed and Sheldon was given the opportunity to purge himself of the contempt. As of November 14, 1975, was the contempt civil or criminal? We recognize the difficulty in answering this question. *Jencks v. Goforth*, 57 N.M. 627, 261 P.2d 655 (1953); see *Rhodes v. State*, 58 N.M. 579, 273 P.2d 852 (1954). To the extent the trial court's purpose was to secure future compliance with the restraining order, the contempt was civil. The purging provision indicates a civil contempt. To the extent the trial court's purpose was punishment for past violations of the restraining order, the contempt was criminal. The same conduct may justify the court in resorting to both civil and criminal contempt. *State v. Our Chapel of Memories of New Mexico, Inc.*, 74 N.M. 201, 392 P.2d 347 (1964). In this case both civil and criminal contempt were involved.

Sheldon was found in contempt for past violations of the restraining order. He was given a fixed jail term because of those violations. The conditions for purging himself of the contempt and, thus, avoiding the jail sentence provided no remedy to Martinez for the past violations. In these circumstances, a primary purpose was punishment for disobedience and to that extent the contempt was criminal. *State v. Greenwood*, 63 N.M. 156, 315 P.2d 223 (1957).

To the extent the contempt was criminal, the contempt hearing and sentence were governed by rules of criminal law. *State v. Greenwood*, supra.

Notice of the Contempt Charge

The notice issue involves notice of the contempt charge. No issue as to this was raised during the evidentiary hearing resulting in the contempt decision. The issue was raised, and litigated, at the evidentiary hearing on Sheldon's failure to purge himself of contempt. The transcript at that hearing indicates that Mrs. Lindsey was personally served with notice, but that Sheldon was not personally served. The transcript shows that plaintiffs' counsel re-

ceived notice, that he informed the plaintiffs and advised them not to attend the contempt hearing.

Momsen-Dunnegan-Ryan Co. v. Placer Syndicate Mining Co., 41 N.M. 525, 71 P.2d 1034 (1937) states:

> "If the proceeding be one in criminal contempt, personal service is, of course, necessary and service on defendants' attorney would not suffice."

In a situation such as here, where Sheldon instituted the litigation out of which the contempt arose, why is personal service of the show cause order for contempt required? ". . . [A] proceeding to punish for constructive contempt is the institution of a new proceeding, though arising out of a pending cause and auxiliary thereto. The court would have no jurisdiction and no power to punish without the initiation of the proper proceeding." *State v. Armijo*, 38 N.M. 280, 31 P.2d 703 (1934). ". . . [I]t is essentially a new and independent proceeding in the sense that it involves the determination of new and different issues of fact and law, which may be foreign to the issues in the original action, and results in an entirely different judgment than in the original cause." *State v. Armijo,* supra.

Brown v. Brown, 96 N.J.Eq. 428, 126 A.36 (1924) cited in *Momsen-Dunnegan-Ryan Co.*, supra, in support of our quotation from that case, states:

> "Being a separate proceeding, it had to be started de novo, and that required a proper notice; that is, process to compel the defendant's appearance. Such process need not be a writ, but may be an order to show cause, as in this case. . . . And such process must be served within this state to lawfully initiate a proceeding against a person charged with criminal contempt of court."

There was no personal service of process upon Sheldon. What follows from the lack of personal service? Sheldon contends there was a lack of jurisdiction over his person. We look to the Rules of Criminal Procedure for the answer.

Criminal Procedure Rule 14(a) states: "Upon the docketing of any criminal action the court may issue a summons or arrest warrant." The criminal contempt action was docketed when the motion and supporting affidavit were filed. The order to show cause was the functional equivalent of a summons.

Criminal Procedure Rule 15(a) states: "A summons shall be served in accordance with the rules governing service of process in civil actions . . . ." We assume, but do not decide, that notice to Sheldon's counsel would be sufficient service of summons in a civil case. See Civil Procedure Rules 4(a), 4(e), 5(a) and 5(b). We make this assumption because the method of giving Sheldon notice is not a controlling consideration in this case.

Criminal Procedure Rule 15(b) states:

> "(b) FAILURE TO APPEAR. If a defendant fails to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may issue a warrant for the defendant's arrest, and thereafter the action shall be treated as if the warrant had been the first process in the action."

The first edition of the Committee Commentary to Criminal Procedure Rule 15 states:

> "Rule 15 allows the court to issue summons in any criminal case. Failure to respond to a summons is not contempt of court. If the defendant fails to respond to a summons, an arrest warrant may be issued pursuant to Rule 14."

Regardless of whether Sheldon was personally served or service was on his attorney, the question of jurisdiction over Sheldon's person depends upon the response made. If there is a total failure to respond, an arrest warrant was authorized. Here there was a response. Although Sheldon did not appear in person, he did appear through his counsel.

Criminal Procedure Rule 15(b) refers to an appearance "by counsel when permitted by these rules". The question is whether appearance by Sheldon's counsel was permitted by the Criminal Procedure Rules.

Appearance by Counsel

Criminal Procedure Rule 47 reads:

"RULE 47. Presence of the defendant—Appearance of Counsel

"(a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and the imposition of any sentence, except as otherwise provided by this rule.

"(b) *Continued Presence Not Required.* The further progress of the trial, including the return of the verdict, shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present:

"(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial); or

"(2) Engages in conduct which is such as to justify his being excluded from the courtroom.

"(c) *Presence Not Required.* A defendant need not be present in the following situations:

"(1) A corporation may appear by counsel for all purposes.

"(2) In prosecutions for offenses punishable by fine or by imprisonment for a term of less than one year, or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

"(3) At a conference or argument upon a question of law."

Paragraph (b) is not applicable to this case; subparagraphs (1) and (3) of Paragraph (c) are also not applicable to this case.

Subparagraph (2) of Paragraph (c) could be applicable, but is not because of the facts. The trial court did not permit Sheldon's absence nor is there a written consent by Sheldon concerning his absence.

Paragraph (a) is applicable; it provides that the defendant shall be present at the trial and imposition of sentence. Sheldon was not present. Under this paragraph, an appearance by counsel does not suffice; defendant's presence is required.

The appearance by counsel was not permitted under Criminal Procedure Rule 47. This appearance not being a permitted response, there was a total failure to respond to the show cause order, regardless of how it may have been served. Upon defendant's failure to appear, the trial court was authorized to issue an arrest warrant under Criminal Procedure Rule 15(b); however, the trial court was not authorized to try and sentence Sheldon under Criminal Procedure Rule 47 without Sheldon being present.

There was no jurisdiction over Sheldon's person. The order finding Sheldon in contempt is reversed; the cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

568 P.2d 267

STATE of New Mexico, Plaintiff-Appellee,

v.

Sammy DURAN, Michael Kaiser and Lonnie B. Smith, III, Defendants-Appellants.

No. 3095.

Court of Appeals of New Mexico.

Aug. 9, 1977.

Jan A. Hartke, Chief Public Defender, Santa Fe, Michael Stout, Asst. Public Defender, Roswell, William H. Lazar, Asst. Appellate Defender, Santa Fe, Tandy L. Hunt, Hunt and Shamas, John Capps, Roswell, for defendants-appellants.

Toney Anaya, Atty. Gen., Ernesto J. Romero, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

HENDLEY, Judge.

Defendants were charged with possession of over eight ounces of marijuana contrary to § 54–11–23(B)(3), N.M.S.A.1953 (Repl. Vol. 8, pt. 2, 1962, Supp.1975). Their motions to suppress the evidence seized were based on the insufficiency of the affidavit for the search warrant. The trial court denied the motions. We granted an interlocutory appeal on the condition that the parties show why the order denying the motion to suppress should not be summarily reversed on the authority of *Hudson v. State*, 89 N.M. 759, 557 P.2d 1108 (1976).

An affidavit, upon which the search warrant was issued, was filed in Chaves County New Mexico Magistrate Court in Cause No. 246872 with the heading of *State of New Mexico v. Orlando Quintana.* The place and persons described in the warrant were:

"1. A white house with pink trim facing north and giving the address of Number 7 East Wells, at the R.I. A.C.

"2. Orlando Quintana, and all occupants at this residence.

"3. All vehicles, all out buildings and ground at this residence."

The items described were marijuana, paraphernalia and "[a]ny fruits of the crime which is contrary to the statutes of New Mexico State Laws."

The factual aspects given in the affidavit are:

"1. That within the last 2 months have received information that the occupants of this house are selling marijuana.

"2. That on 2–10–77 received information from a confidential informant that subject or subjects at this residence did have a quanity (sic) of marijuana and were selling at this time.

"3. That this informant has furnished information which has led to the recovery of stolen property.

"4. That on several occassions (sic) this officer has seen several cars parked at this residence.

"5. That this is believed to be probable cause for the issuance of a search warrant."

The record does not reveal nor is it claimed that other information was brought to the attention of the issuing magistrate. R.Crim.P. Rule 17(f). Necessarily, we only consider the information brought to the magistrate's attention.

Pursuant to the warrant a search was made and contraband was found. The return and inventory shows that the warrant was served on Lonnie Smith. The trial court, in its order denying the motion to suppress, found the following:

"4. All parties stipulated that Orlando Quintana was not a resident of the place searched on February 10, 1977.

"5. All parties stipulated that at least two of the three defendants affected by this search have conspicuous physical handicaps. Lonnie B. Smith III is confined to a wheelchair and Michael Kaiser has an obviously disabled arm.

"6. The Court finds that the affidavit for search warrant present probable cause for the issuance of the search warrant."

The issue is whether the affidavit contained sufficient reliable factual information so that the issuing magistrate, acting as a neutral and detached evaluator, could determine whether probable cause existed for the issuance of the search warrant. Stated another way, was the magistrate informed of "the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was 'credible' or his information 'reliable.'" *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 723 (1964) cited in *Hudson v. State*, supra. See also, R.Crim.P. Rules 17(f).

We discuss the factual aspects of the affidavit and in doing so we are not unmindful of the standards set forth for viewing affidavits for search warrants, *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971); *State v. Torres*, 81 N.M. 521, 469 P.2d 166 (Ct.App.1970), that is, a common sense reading of the affidavit as a whole.

First, in so viewing the affidavit we find nothing more than conclusionary statements without a factual predicate. Given the nature of the physical characteristics of two of the occupants, coupled with the naming of Orlando Quintana (who does not appear to be a party, participant, or occupant of the house) we entertain serious doubts as to whether the informant's *present* information is truthful or reliable.

Second, common sense in the ordinary daily events, dictates that the affidavit was deficient for a neutral and detached evaluation of probable cause. The information gained appears as nothing more than rumor. It is of vital importance that the *reliable* confidential informant or affiant describe the criminal activity in sufficient detail so that the magistrate has something substantial to rely on and not a casual rumor circulating in the underworld. See *Hudson v. State*, supra. Nowhere are we given the factual basis of any personal knowledge either by the informant or the affiant.

The affidavit was deficient. The search and subsequent seizures were unlawful. The motion to suppress should have been granted.

Reversed.

IT IS SO ORDERED.

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

568 P.2d 270

STATE of New Mexico,
Plaintiff-Appellee,

v.

Johnny Kent BLAKLEY,
Defendant-Appellant.

No. 2852.

Court of Appeals of New Mexico.

Aug. 9, 1977.

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[redacted]

[redacted]

Jan A. Hartke, Chief Public Defender, Douglas A. Barr, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Toney Tupler, Asst. Dist. Atty., Paquin M. Terrazas, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Count I charged homicide by vehicle while driving recklessly. Sections 64–22–1 and 64–22–3, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2). Count II charged failure to stop and remain at the scene of an accident. Section 64–17–1, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2). Count III charged driving while license was suspended or revoked. Section 64–13–68, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2). Defendant was found guilty of each of the charges; he appeals. The claim that a verdict should have been directed because of insufficient evidence is frivolous; substantial evidence supports the verdicts of guilty. We discuss: (1) validity of the indictment; (2) severance; (3) deposition and testimony of a late discovered witness; (4) trial court's comments; (5) admission of exhibits; and (6) instructions and closing argument.

Validity of the Indictment

Defendant moved to dismiss the indictment, asserting it was not returned in accordance with law. There are two contentions under this issue: (a) the time when the indictment was "returned", and (b) the number of jurors making the "return".

(a) *Time of the Return*

At the hearing on the motion to dismiss, defendant's position was that "the entire grand jury voted the indictment Friday night" but the indictment was not "returned" until Monday morning. "Friday night" was August 27, 1976. The indictment is dated August 30, 1976 and was filed by the district court clerk at 10:46 a.m. on August 30, 1976.

Section 41–5–5, N.M.S.A.1953 (2d Repl. Vol. 6) states: "Indictments shall be returned by the grand jury, within twenty-four [24] hours following the day when the indictment is voted." Defendant asserts that the interval between Friday evening and the following Monday morning violated this statute. We disagree.

Section 41–5–4, N.M.S.A.1953 (2d Repl. Vol. 6) states: "The grand jury shall conduct its hearing during the *usual business hours* of the court which convened it." (Our emphasis.) The trial court ruled that court was not in session during the intervening Saturday and Sunday, and that the indictment had been returned on the next court day following the voting of the indictment. The twenty-four-hour period of § 41–5–5, supra, does not include Saturdays and Sundays if the court which convened the grand jury was not in session on those days. The return of the indictment on the following Monday complied with § 41–5–5, supra. Compare N.M.Crim.App. 302(a).

(b) *Number of Jurors Making the Return*

Section 41–5–5, supra, states that indictments shall be "returned by the grand jury". Defendant's contention is: ". . . at the time of the return, only the foreman and about three or four of the other members of the grand jury were present. It was not returned by the grand jury itself."

Section 41–5–2, N.M.S.A.1953 (2d Repl. Vol. 6) provides: "The foreman will sign all reports, indictments or other undertakings of the grand jury." *State v. Ellis,* 89 N.M. 194, 548 P.2d 1212 (Ct.App.1976) holds that court need not be formally convened to receive an indictment; that indictments need not be returned in open court. Under *State v. Ellis,* supra, the filing of the indictment with the district court clerk is sufficient.

"[R]eturned by the grand jury" in § 41–5–5, supra, means an indictment voted by the grand jury, signed by the foreman and filed either with the court clerk or the

judge. The indictment was properly "returned" in this case. The fact that the entire grand jury was not present at the time of the "return" did not invalidate the indictment.

Defendant claims that "less than the statutory minimum number of jurors returned the indictment." The concurrence of eight grand jurors is required to vote an indictment. N.M.Const., Art. II, § 14; § 41–5–10, N.M.S.A.1953 (2d Repl. Vol. 6). In the trial court, defendant's position was that "the entire grand jury voted the indictment". There is no factual basis for the claim that less than eight grand jurors voted the indictment.

The motion to dismiss was properly denied.

Severance

Defendant moved that Count I, the homicide by vehicle charge, be severed from Counts II and III, the charges of failure to stop and remain at the accident scene and driving while his license was suspended or revoked. The motion alleged that one trial on all three counts would prejudice him and was based on Rule of Criminal Procedure 34(a). Two claims of prejudice were asserted.

The first claim was that he wished to testify in defense of Count I, but did not wish to testify as to Counts II and III. The contention was that a failure to sever would either deprive him of his constitutional right to remain silent as to Counts II and III, or deprive him of his right to testify as to Count I. This claim is meritless; defendant was not legally prejudiced by the failure to sever on the basis of this first claim. *State v. Silver,* 83 N.M. 1, 487 P.2d 910 (Ct.App.1971).

The second claim was that evidence concerning Counts II and III would prejudice his defense of Count I. The contention was that even if evidence concerning Counts II and III was relevant to the Count I charge, the probative value of such evidence was substantially outweighed by the danger of unfair prejudice to the defense of Count I. Evidence Rule 403. The appellate issue is whether the trial court abused its discretion in denying severance on the basis of this claim. *State v. McGill,* 89 N.M. 631, 556 P.2d 39 (Ct.App.1976). Neither prejudice nor abuse of discretion has been shown.

The motion to sever was properly denied.

Deposition and Testimony of a Late Discovered Witness

A general discovery order required each party to disclose to the other, ten days prior to trial, a list of witnesses the party intended to call at the trial.

The State was aware of a motorcyclist who witnessed the accident but had been unable to locate this witness during its investigation. The witness was not identified in the police files on defendant's case.

On the evening of December 14, 1976 the prosecutor reviewed the case with police officers. During that review, a statement by the witness was found in a police file on the accident victim. On the morning of December 15, 1976 at approximately 10:00 a.m., the prosecutor telephoned defense counsel and gave defense counsel the name and telephone number of the witness. The prosecutor then interviewed the witness and on the evening of December 15th, gave defense counsel a copy of the witness's statement. In addition, the prosecutor read to defense counsel, the prosecutor's notes of the interview with the witness.

When trial began on the morning of December 16, 1976, defendant sought to prevent the witness from testifying and asked that he be permitted to depose the witness.

Rule of Criminal Procedure 29(a) states the showing required before the trial court may order the taking of a deposition in a criminal case. Defendant did not show that the deposition was necessary to prevent injustice, did not show that the witness would not cooperate in giving a voluntary, signed, written statement, and did not show that the witness might be unable to attend the trial. The only showing is that, after being informed as to where the witness might be located, defendant made no

effort to interview the witness. The witness testified at trial.

The trial court did not err in refusing to authorize the deposition. See dissenting opinion in *State v. Billington,* 86 N.M. 44, 519 P.2d 140 (Ct.App.1974).

The showing to the trial court was that the prosecutor gave oral notice to defendant promptly after the prosecutor learned the witness's name and on the same day furnished defendant with the information the prosecutor had acquired. These circumstances do not show that the trial court abused its discretion in permitting the witness to testify. Rule of Criminal Procedure 30; *State v. Smith,* 88 N.M. 541, 543 P.2d 834 (Ct.App.1975).

Trial Court's Comments

On appeal, defendant asserts that four comments by the trial court deprived him of a fair trial. No issue as to the appropriateness of the comments was raised in the trial court. *State v. Gurule,* 90 N.M. 87, 559 P.2d 1214 (Ct.App.1977). Compare *State v. Herrera,* 90 N.M. 306, 563 P.2d 100 (Ct.App.1977) where such an issue was raised. Accordingly, this issue need not be considered. N.M.Crim.App. 308.

In addition, the claim is without merit. The first alleged remark concerns the credibility of a witness. No such comment was made. The second remark was that a witness, a nurse, was the most qualified person in the courtroom to testify that on the night of the accident defendant did not appear in a state of shock. This remark was inappropriate and should not have been made. However, when the remark is considered in context—counsel's objection to the nurse testifying as to the nurse's observations—the remark did not deprive defendant of a fair trial. *State v. Herrera,* supra.

The third remark, made twice, was directed to defense counsel and was "[s]traighten your questions out". The remark came during defendant's cross-examination of a witness concerning the point on defendant's car where the car came into contact with the victim. The questioning was misleading. The trial court's remark was appropriate under Evidence Rule 611(a) inasmuch as the remark was the exercise of reasonable control to make the interrogation "effective for the ascertainment of the truth".

The fourth remark occurred during defendant's cross-examination of another witness. The prosecutor objected to a question; the trial court remarked: "You have a right to lead, but you do not have a right to put words in his mouth. Ask him what the man was doing." While this remark should not have been phrased as it was phrased, it nevertheless was appropriate under Evidence Rule 611(a).

The remarks, considered singly or cumulatively, did not deprive defendant of a fair trial. *State v. Herrera,* supra; *State v. Gurule,* supra.

Admission of Exhibits

(a) Two color photographs were admitted showing blood on the underside of defendant's vehicle. A black and white photograph was admitted which showed the body of the victim at the accident scene. The three photographs illustrated, clarified, and corroborated the testimony of various witnesses. Admission of the photographs was not an abuse of discretion. *State v. Noble,* 90 N.M. 360, 563 P.2d 1153 (1977).

(b) An exhibit consisting of five pages was certified by an officer of the division of motor vehicles as a true and correct copy of original records in the custody of the officer. The certification bears the seal of the motor vehicle division. The exhibit is a copy of public records concerning the revocation of defendant's driver's license. The exhibit was relevant to Count III, see Evidence Rule 401. It was admitted only in connection with Count III and the jury was so instructed. Evidence Rule 106. The exhibit was properly admitted under Evidence Rules 902(4) and 1005.

Instructions and Closing Argument

The trial court instructed the jury as follows:

"For you to find the defendant guilty of homicide by vehicle as charged in Count I, The State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

"1. The defendant operated a motor vehicle recklessly.

"2. The defendant thereby caused the death of Aubrey Gene McGuffin.

"3. This happened in New Mexico on or about the 7th day of July, 1976."

"For you to find that the defendant was driving recklessly, you must find that he drove with a total disregard or indifference for the safety of others."

These are approved instructions, being U.J.I. Crim. 2.60 and 2.61.

The trial court refused to give two requested instructions. One of the refused instructions defined reckless driving in accordance with § 64–22–3(A), supra. The other refused instruction defined "willful and wanton conduct" in conformity with U.J.I. Civil 12.9.

Defendant claims the refusal of his requested instructions was error because the instructions given, U.J.I. Crim. 2.60 and 2.61, do not "define the elements of the crime". He asserts that the jury was not instructed on an essential element of the crime—willful and wanton conduct.

The Commentary to U.J.I. Crim. 2.61 indicates that the prior practice of instructing on willful and wanton conduct was not considered to be helpful and was deliberately omitted from the instructions. We agree. The instructions quoted above adequately instructed the jury on reckless driving. The instructions given having adequately instructed on reckless driving, refusal of the requested instructions was not error. *State v. Beal,* 86 N.M. 335, 524 P.2d 198 (1974).

In addition, the trial court properly refused the requested instructions because U.J.I. Crim. instructions were applicable, and the trial court was bound to follow the Supreme Court order directing that the uniform instructions be used without substantive modifications or substitution. *State v. Scott,* 90 N.M. 256, 561 P.2d 1349 (Ct.App. 1977).

After the requested instructions were refused, defendant asked if he would be permitted "to argue the statute [§ 64–22–3(A), supra] to the jury". The trial court replied: "No, sir. You will be permitted to argue the instructions to the jury."

Defendant asserts this ruling denied him the right to defend against the State's accusation. This contention bottoms on the view that reckless driving requires willful and wanton conduct. The instructions given, defining reckless driving in terms of a total disregard or indifference to the safety of others, encompass willful and wanton conduct. To permit argument on a statutory wording not used in the instructions would have been confusing. Defendant was permitted to argue from the instructions and, thus, was permitted to argue the offense charged.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

568 P.2d 586

Joe PINO, Thomas J. Clear, Jr. and Belarmino R. Gonzales, Petitioners,

v.

W. J. BUDWINE and W. J. Budwine, Trustee, El Valle State Bank Trust, Respondent.

No. 11437.

Supreme Court of New Mexico.

Aug. 24, 1977.

Rehearing Denied Sept. 9, 1977.

Mary C. Walters, Terrance L. Dolan, Albuquerque, for petitioners.

Lamb, Metzgar, Franklin & Lines, Albuquerque, for respondent.

OPINION

SOSA, Justice.

Plaintiffs Joe Pino, Thomas Clear, Jr., and Belarmino Gonzales brought suit against W. J. Budwine individually and as trustee of the El Valle State Bank Trust for breach of trust and trover. The trial court found for the defendant. The Court of Appeals affirmed. We granted certiorari and reverse the Court of Appeals.

On December 18, 1972, plaintiffs, defendant W. J. Budwine [hereinafter Budwine] and others executed a trust indenture, forming the El Valle State Bank Trust [hereinafter Bank Trust]. The Bank Trust res consisted of 75,650 shares of stock [50.43% of the outstanding stock] in the El Valle State Bank.[1] At the same time all parties signed a buy-sell agreement which

1. The El Valle State Bank Trust's trustees are Anaya, Budwine, Cordova, Clear, and Padilla. Its beneficiaries, who also are the settlors, are Cordova, who contributed 1000 shares; Clear, 4300 shares; Padilla, 4000 shares; Pino, 4000 shares; Rudy Ortiz, who assigned his interest to Belarmino Gonzales, 5000 shares; Felix Moya, now his estate, 5000 shares; and the El Valle Trust, 52,350 shares. Mike Anaya contributed 20,000 shares, and Budwine, 32,350 shares of the El Valle State Bank to the El Valle Trust, which is separate from the El Valle State Bank Trust but a settlor-beneficiary thereof. Anaya and Budwine are trustees of the El Valle Trust. Thus, Budwine, as the major contributor to the El Valle Trust, had majority interest in the El Valle State Bank Trust, and by the terms of that trust, controlled the El Valle Bank.

provided for, *inter alia,* buying the interest of a defaulting party. On April 17, 1973, the shares of the bank held by the Bank Trust were pledged to secure a one-year loan of $365,662.50 from the American Bank of Commerce [hereinafter ABC] of El Paso, Texas. A sixty-day note was executed on April 17, 1974, and was renewed for one year or on demand on June 16, 1974. Because of the difficulties and delays in repayment, ABC, in a letter dated September 17 and addressed to Budwine as secretary of the Bank Trust, informed him that it did not wish to renew the loan and requested that he try to borrow the funds elsewhere. On October 9, 1974, ABC sent individual letters to Pino, Clear, and Budwine, demanding immediate payment.

On December 18, 1974, Budwine wrote a letter to Pino, Clear, Gonzales, Padilla, and Anaya, again demanding payment of all principal and interest. Budwine also stated that if payment was not made by December 24, he would buy out all their interests pursuant to the buy-sell agreement. Thereafter some payments of interest and principal were made by the various parties, but these payments were partial and infrequent.

On May 20, 1975, ABC called the note due, to be paid on June 10; notice apparently was given to all parties. On July 31, 1975, ABC demanded immediate payment from Budwine as guarantor of the $225,000 plus interest due. On August 1, 1975, Budwine paid the $225,000 plus $13,493.49 in interest to ABC, and in return he received the promissory note and the 75,650 shares of stock (represented by stock certificate number 513). On October 3, Budwine wrote to the plaintiffs and Padilla, demanding that each party pay his proportionate share of the principal plus interest by October 10 in order to preserve his interest in the Bank Trust, or Budwine would succeed to those interests pursuant to the buy-sell agreement. None of the parties paid his proportionate share.

On October 10, 1975, plaintiffs filed their complaint, seeking to enjoin Budwine from altering the existing interests in the Bank Trust, which the trial court temporarily agreed to by order on October 21. On April 13, 1976, a hearing on the merits was held, and on June 2 the trial court entered judgment for Budwine.

On appeal plaintiffs argue that the trial court erred in failing to find that Budwine breached his fiduciary duties to them and the Bank Trust. Plaintiffs argue that Budwine breached his duty of loyalty by failing to tell them of ABC's July 31 demand, that Budwine pledged his and their shares to secure the loan which in effect purchased their interest, and that Budwine failed to provide them with an accounting on demand to determine their obligations. Budwine argues that pursuant to the buy-sell agreement his actions were proper and no breach of any fiduciary duty occurred, and that his actions were necessary to protect the El Valle Trust and his own personal credit rating.

The decisive issue is whether Budwine's actions on July 31 and August 1 constituted a breach of the fiduciary duty of loyalty. Those actions were the following. After ABC's July 31 demand upon him personally, Budwine flew to Lubbock, Texas. There he arranged a loan for $225,000 from the Lubbock National Bank, and as security therefor Budwine stated he would deliver stock certificate number 513 representing the 75,650 shares of stock in the El Valle State Bank. He then flew to El Paso and paid off the ABC note. Thereafter he flew to Albuquerque, picked up the stock certificate, and delivered it to the Lubbock National Bank as promised on August 1. About two months later on October 3 Budwine, in a letter to each plaintiff, demanded payment of principal and interest in order for them to retain their interest in the Bank Trust. Even at this point these parties were not fully informed of Budwine's July 31 and August 1 transactions.

Paragraph *X* of the buy-sell agreement bears directly upon Budwine's authority to buy out defaulting parties to the Bank Trust. It provides:

> It is understood and agreed that certain of the stocks constituting the trust

estate have been pledged by the Trustees to secure the payment of certain promissory notes and any renewals and extensions thereof executed by certain of the settlors of said trust representing purchase money for those certain shares of stock, and it is agreed that in the event any Investor shall default in the payment of any promissory note or any portion thereof for which such Investor is liable and such defaulting Investor is unable to obtain within five (5) days after such default occurs a bona fide offer for the sale of his interest in said Trust and Stock as hereinabove provided for sums sufficient to satisfy such outstanding unpaid promissory note upon which default has occurred, then any or all of the other Investors, whether or not their stock has been pledged to secure a purchase money note, may cure such default and proceed to satisfy said unpaid promissory note in full and such Investor or Investors satisfying said default shall thereupon succeed to the interest of the defaulting Investor in said Trust and Stock in the same proportions that said Investor or Investors satisfy such defaulted promissory note without payment to the defaulting Investor of any sums for his interest, provided that any Investor shall be entitled, if he so elects, to satisfy such defaulted promissory note in the same proportion and by the use of such formula as such Investor would be entitled to purchase interest in the Trust and Stock offered for sale under Paragraph II hereof. Upon any or all of the other Investors satisfying such default, the defaulting Investor must and will immediately without receiving any payment therefor execute assignments of his interest in the Trust and Stock to each of such Investors in the same proportions as said Investors satisfy said promissory note in default.

By its terms paragraph *X* merely provides a method for the non-defaulting party or parties to cure any default on the promissory note by paying for the amount due and then succeeding to the defaulting party's interest.

Plaintiffs argue that the duty of loyalty imposed upon Budwine as a trustee called for full disclosure of and good faith in the Lubbock transactions. It is undisputed that plaintiffs did not receive notice that Budwine had been called upon personally as a guarantor by ABC to pay off the loan. Plaintiffs also did not receive notice that Budwine had refinanced the loan in Lubbock. These actions in themselves perhaps are not sufficient to be deemed a breach of the duty of loyalty, particularly since all parties knew the promissory note to be in default, no one did anything constructive to remedy the situation, and all had received notice in Budwine's December 18 letter that he planned to buy them out. What is a breach of the duty of loyalty is that Budwine used the other parties' shares of stock to secure his personal loan in Lubbock, rather than just using his 32,350 shares plus whatever other assets he might have needed. So, when the time came for the other parties to pay Budwine pursuant to his October 3 demand letter, they had no stock with which to collateralize their loans, and apparently they had no other source of funds to otherwise repay Budwine. By merely setting up the refinancing in Lubbock, with the other parties' shares used in part as collateral, Budwine succeeded to all of the shares in the Bank Trust. Such actions by a trustee, and his silence as to how he managed to refinance the loan, in our opinion, fall far short of his duty as trustee to the beneficiaries. A trust relationship imposes stringent and high standards of conduct upon the trustee. Cf. *Iriart v. Johnson,* 75 N.M. 745, 411 P.2d 226 (1965); 2 A. Scott, Law of Trusts § 170 (3d ed. 1967); 76 Am.Jur.2d Trusts §§ 315–24 (1975). Budwine either should have secured refinancing with his own assets or money, or, since he used the other parties' stock to secure the loan, he at most could demand that the other parties agree to pledge their stock and co-guarantee the Lubbock loan.

The decisions of the Court of Appeals and the trial court are reversed, with instructions to order an accounting to determine the proportionate liabilities of all the parties for their share of the accrued and paid

interest on the El Paso and Lubbock loans. Each party is to tender payment of their respective share of the accrued and paid interest to date to the payor of that interest debt within a reasonable time after the accounting, the time to be determined by the trial court. Contingent on each party pledging his individual stock interest in the trust as collateral for the Lubbock loan and personally co-guaranteeing the Lubbock loan, all parties shall be reinstated to their former respective interests. If any party is unable or unwilling to tender payment and retain his interest pursuant to this decree, then the terms of the buy-sell agreement contained in the trust instrument shall govern the buy-out.

McMANUS, C. J. and FEDERICI, J., concur.

EASLEY and PAYNE, JJ., dissenting.

568 P.2d 589

PHARMASEAL LABORATORIES, INC., Petitioner,

v.

William GOFFE, Respondent.

William GOFFE, Petitioner,

v.

PHARMASEAL LABORATORIES, INC., a California Corporation, Dr. J. Hunt Burress and Presbyterian Hospital Center, Inc., a New Mexico Corporation, Respondents.

Nos. 11221, 11223.

Supreme Court of New Mexico.

Sept. 1, 1977.

Rehearing Denied Sept. 14, 1977.

Toulouse, Krehbiel & DeLayo, James R. Toulouse, Albuquerque, for William Goffe.

Shaffer, Butt, Jones, Thornton & Dines, James M. Dines, Civerolo, Hansen & Wolf, Richard C. Civerolo, Johnson, Paulantis & Lanphere, Albuquerque, for Pharmaseal et al.

OPINION

EASLEY, Justice.

Plaintiff (Goffe) brought suit against his physician (Dr. Burress) and his physician's employer-hospital (Presbyterian) for malpractice and alleged a claim for product liability against the manufacturer of the medical equipment used (Pharmaseal). The trial court granted summary judgment in favor of all three defendants. The Court of Appeals affirmed summary judgment as to Dr. Burress and Presbyterian and reversed as to Pharmaseal.

Both Goffe and Pharmaseal petitioned for certiorari. We granted both petitions and reverse the decision of the Court of Appeals as to Dr. Burress and Presbyterian and affirm its decision with regard to Pharmaseal, holding that summary judgment was not proper as to any of the defendants.

With regard to the petition of Goffe, the principle issue is whether, in assessing the quantum of evidence bearing on summary judgment, our courts shall adhere to the "strict locality" rule, that is, whether they can consider only the opinions of doctors from a particular locality regarding the standard of care owed by physicians in that locality or whether they may also consider the opinions of doctors who can testify as to the standard of care of doctors in other localities practicing under similar circumstances. Another issue is whether negligence on the part of Dr. Burress and Presbyterian may be demonstrated by facts which can be evaluated by resort to common lay knowledge, instead of solely by expert medical testimony.

As to the complaint against Pharmaseal for defective equipment, the principal issue is whether the record supports the conclusion of the Court of Appeals that there is a genuine issue as to a material fact regarding the liability of Pharmaseal.

Facts

On August 26, 1971, Goffe was admitted into Presbyterian Hospital for the treatment of an intestinal obstruction. He was treated by Dr. Burress. The treatment consisted of inserting a K–2R Kaslow intestinal tube, manufactured by Pharmaseal, through his nose. To help in inserting the tube into the intestine, it was weighted with a small rubber balloon, also manufactured by Pharmaseal, containing metallic mercury. Dr. Burress poured an unknown amount of mercury into the balloon and tied it to the end of the tube. The tube was inserted through Goffe's nostril, down through his stomach, and was maneuvered into his intestines.

On August 30, 1971, Dr. Burress started to withdraw the tube. There was testimony that he pulled the tube fast, jerked it several times and forcefully pulled on the tube as though it had been stuck, thereby extracting it. Upon removal, Dr. Burress realized the balloon containing the mercury had broken. As a consequence, Goffe inhaled an undetermined amount of mercury into his lungs. X-rays were taken and then he was returned to his own room where he was placed on a tilt table with his head lower than his feet. Dr. Burress asked hospital employees to assist in postural drainage of the mercury. The hospital employees pounded on Goffe's back for several hours in an attempt to remove the mercury. His head constantly hit the foot of the bed and he experienced chest pain. The next morning he suffered a myocardial infarction.

The record shows that Dr. Burress and the hospital adduced expert testimony from Dr. Simms, that Dr. Burress had exercised that degree of care required by doctors in Albuquerque.

Plaintiff argues that he introduced evidence to the contrary (and thus put the issue of Dr. Burress's negligence in controversy) by the testimony of Dr. Ormsby, an internist practicing in the State of Washington. The doctor stated in his affidavit:

> That the practice of medicine in the State of Washington is of the same standard of care as practiced by physicians in the City of Albuquerque, State of New Mexico.
>
> . . . . .
>
> That he has reviewed the medical records of the incident which occurred in Presbyterian Hospital on August 30, 1971.
>
> That it is his opinion that the combination of the inhalation of mercury resulting from the rupturing of the naso-gastric tube, plus the procedure used to extract the mercury, resulted directly in Mr. Goffe suffering an acute myocardial infarction.
>
> Mr. Goffe related to me a description of the incident and I have reviewed the medical records furnished to me by Presbyterian Hospital; if the attending physician vigorously pulled against the obstruction to such a degree as to cause the balloon to rupture, it is my opinion that such action was not acceptable medical practice.
>
> It is my further opinion that if the attending physician did not vigorously pull against the obstruction to such a decree [sic] as to cause the balloon to rupture, then the naso-gastric tube would have been defective.

Summary Judgment

Summary judgment is a drastic remedy to be used with great caution. *Zengerle v. Commonwealth Ins. Co.*, 60 N.M. 379, 291 P.2d 1099 (1955). This is demonstrated by our rule under which summary judgment is improper, if, after resolving all reasonable doubts in favor of the opponent of the motion, the evidence adduced by the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits shows that there was a genuine issue as to any material fact. N.M.R,Civ.P. 56(c) [§ 21–1–1(56)(c), N.M.S.A.1953]. If Goffe has shown one genuine issue as to any material fact, then summary judgment against him cannot be granted. *Skarda v. Skarda,* 87 N.M. 497, 536 P.2d 257 (1975); *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972).

This court in *Goodman v. Brock*, id., quoted with favor from 3 Barron & Holtzoff, Federal Practice and Procedure, § 1234 at 124–126 (rev. Wright 1958) in adopting the rule to be applied in determining whether a motion for summary judgment should be granted:

> [T]he party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists. If there are such reasonable doubts, summary judgment should be denied. A substantial dispute as to a material fact forecloses summary judgment.

Interpretation of Dr. Ormsby's Testimony

A threshold question is whether any consideration is to be given to Dr. Ormsby's

testimony on the issue of the standard of care that should have been exercised by Dr. Burress. The Court of Appeals concluded that his testimony contained nothing as to the standard of care or departure from that standard. "The most that can be said about the testimony is that it presents an equal choice of two mere possibilities." We disagree.

If we do not adhere to the "strict locality" rule, Dr. Ormsby's testimony as to the standard of care of doctors in Washington is also evidence of the standard of care owed by doctors in Albuquerque. He testified that the standards he is familiar with are the same as those used by doctors practicing under similar circumstances in Albuquerque. The standard is that doctors, in extracting such tubes, do not pull so hard as to cause the balloon to break (absent some defect). Dr. Ormsby states that breakage is not a normal occurrence and that if it occurred and the tube was not defective, then the doctor vigorously pulling it out was not following acceptable medical practice.

The defendants point out that, in his deposition, Dr. Ormsby equivocated on the questions bearing on wrongdoing by Dr. Burress and whether he was in violation of reasonable standards of care. However, when he was asked his opinion as to the cause of Goffe's heart attack he stated ". . . it was caused by, in my opinion, two events. The rupture of a balloon containing mercury with inhalation into the lungs, and the subsequent unnatural, unphysiologic, perhaps well-meant or well-intended efforts to remove it." This court cannot erase the record; and after examining his testimony in its entirety and considering the test elucidated in *Goodman v. Brock*, supra, we hold that the evidence was sufficient to create a reasonable doubt as to the existence of a genuine issue, which precludes summary judgment.

Evidence of Standard of Care

Goffe contests the holding of the Court of Appeals that no issue regarding the defendant physician's negligence was raised because such negligence must be shown by expert testimony regarding the standard of care of physicians in the particular locality. If Dr. Ormsby's testimony cannot be considered, then summary judgment would be proper, provided lay testimony bearing on negligence is also unavailable. The Court of Appeals relied on language in our decision in *Cervantes v. Forbis*, 73 N.M. 445, 389 P.2d 210 (1964):

> Before a physician or surgeon can be held liable for malpractice in the treatment of his patient he must have departed from the recognized standards of medical practice *in the community*, or must have neglected to do something required by those standards.

Id. at 448, 389 P.2d at 213 (emphasis added).

This rule has been described as the so-called "strict locality" rule. N.M.U.J.I. Civ. 8.1, which was adopted after the decision in *Cervantes*, id., and became effective on September 1, 1966 states:

> In (treating) (operating upon) (making a diagnosis of) the plaintiff, the doctor was under the duty to possess and apply the knowledge and to use the skill and care that was ordinarily used by reasonably well qualified doctors of the same field of medicine as that of the defendant practicing under *similar* circumstances, *giving due consideration to the locality involved.* A failure to do so would be a form of negligence that is called malpractice. (emphasis added).

The adoption of this rule by the New Mexico Supreme Court indicated a change in the law. We hereby modify *Cervantes v. Forbis*, supra, and *Gandara v. Wilson*, 85 N.M. 161, 509 P.2d 1356 (Ct.App.1973) and other cases insofar as they purport to mandate a "strict-locality" rule and we declare that the first paragraph of N.M.U.J.I.Civ. 8.1 is the correct statement of New Mexico law. Evidence of the standard of knowledge, skill and care owed by a physician to his patient can be provided by expert testimony of the knowledge, skill and care ordinarily used by reasonably well-qualified doctors of the same field of medicine practicing

under similar circumstances, and this includes testimony from doctors from the same or other localities. *Los Alamos Medical Center v. Coe*, 58 N.M. 686, 275 P.2d 175 (1954).

Under N.M.U.J.I. Civ. 8.1 due consideration must be given by the fact-finder to the locality involved and the ways, if any, in which it differs from the locality about which the expert testifies, but this is merely one factor for the fact-finder to consider. See generally *Shier v. Freedman*, 58 Wis.2d 269, 206 N.W.2d 166 (1973) for a discussion of reasons for adopting rules such as our already-adopted N.M.U.J.I. Civ. 8.1. That court, after examining the myriad of cases, texts and law review articles on this highly controversial subject held as follows:

> Henceforth, in instructing juries in medical malpractice cases, the jury should be told in substance that a qualified medical (or dental) practitioner, be he a general practitioner or a specialist, should be subject to liability in an action for negligence if he fails to exercise that degree of care and skill which is exercised by the average practitioner in the class to which he belongs, acting in the same or similar circumstances. Geographical area and its attendant lack of facilities are circumstances that can be considered if appropriate.

Shier, id. at 283–284, 206 N.W.2d at 174. This language compares favorably with our N.M.U.J.I. Civ. 8.1. See Judge Sutin's dissenting opinion in the Court of Appeals, *Goffe v. Pharmaseal Laboratories, Inc.*, 90 N.M. 764, 568 P.2d 600 (Ct.App., filed December 7, 1976).

Lay Testimony as to Negligence

It is not mandatory in every case that negligence of the doctor be proved by expert testimony which shows a departure from reasonable standards of care. Negligence of a doctor in a procedure which is peculiarly within the knowledge of doctors, and in which a layman would be presumed to be uninformed, would demand medical testimony as to the standard of care. However, if negligence can be determined by resort to common knowledge ordinarily possessed by an average person, expert testimony as to standards of care is not essential. *Cervantes v. Forbis*, supra; *Williams v. Vandenhoven*, 82 N.M. 352, 482 P.2d 55 (1971); *Mascarenas v. Gonzales*, 83 N.M. 749, 497 P.2d 751 (Ct.App.1972). Such evidence includes lay testimony regarding nontechnical mechanical acts by the physician, as we have here.

Goffe, in raising the issue of improper judgment in the Court of Appeals, did not specifically point to the existence of evidence adduced by lay testimony as further support for his contention that a genuine issue of material fact had been raised. In deciding whether the summary judgment was proper, however, we must look to the whole record and take note of any evidence therein which puts a material fact in issue. N.M.R.Civ.P. 56(c) [§ 21–1–1(56)(c), N.M.S.A.1953].

In the present case both expert testimony from a qualified doctor in the same field, practicing under similar circumstances, as to the standard of care of physicians and lay testimony regarding matters within the ken of lay persons generally (regarding the violent extraction of the tube by Dr. Burress and the beating on plaintiff's back for several hours by Presbyterian's employees) were adduced.

We do not hold nor do we imply that such evidence was conclusive or even sufficient to prove negligence. Resolving all reasonable doubts in favor of plaintiff, however, such evidence was sufficient to raise a genuine factual issue as to negligence of both Burress and Presbyterian. The evidence was also sufficient, therefore, to raise a factual issue as to Presbyterian's negligence, on the theory of vicarious liability for the physician's negligence and that of the other employees of Presbyterian. See *Stake v. Woman's Division of Christian Service of Bd. of Missions*, 73 N.M. 303, 387 P.2d 871 (1963). Plaintiff Goffe should have been allowed to submit these issues to the fact-finder. Summary judgment was improper as to both Dr. Burress and Presbyterian.

Since summary judgment was improper in this case for the foregoing reasons, we do not reach the plaintiff's second assertion: the question of whether the application of the doctrine of res ipsa loquitur would have also rendered the judgment improper. We note that the doctrine of res ipsa loquitur can be employed in an appropriate case. *Cervantes v. Forbis*, supra; *Buchanan v. Downing*, 74 N.M. 423, 394 P.2d 269 (1964).

Evidence as to Pharmaseal

Pharmaseal asserts that there is no evidence to support plaintiff's claim that the mercury-filled balloon manufactured by Pharmaseal was defective. Pharmaseal contends since there was testimony that the balloon was not defective and there was no testimony in rebuttal, that the defectiveness of the balloon was not in issue. Pharmaseal is incorrect and the Court of Appeals correctly reversed the granting of a summary judgment in favor of Pharmaseal.

The testimony by the doctors shows that the tubes and the balloons come from the supplier, Pharmaseal, with instructions as to usage. Mercury is a poisonous substance that can have a serious effect if released in the intestinal tract. It can have a much more serious effect if it is inhaled into the lungs, in many cases causing such a serious transformation of the body tissues that surgery is required to remove the affected areas. Such testimony indicates that the tube must be designed to insure that there be no breakage of the balloon which would expel the mercury into the body cavities.

The instructions from the manufacturer call for the amount of mercury to be measured and that the quantity not exceed six milliliters. Dr. Burress did not measure the mercury but stated that he usually "poured in four or five cc's of mercury. It is not measured. I measure it before and I do it from—like an old cook with a teaspoon." He mentioned to Mrs. Goffe, the wife of the plaintiff, after the mercury had spilled that he did not measure the amount that he placed in the balloon and stated further that this was the first time that this had happened to him.

Dr. Simms testified that it has happened only occasionally in his career during which he had used hundreds of the tubes.

Dr. Burress testified that there were no visible defects in the tube or balloon. He explained the manner in which the tube was removed from Goffe's body and claims that he did the procedure in the usual and ordinary manner, that he exerted no unusual force on the tube, and that there was nothing out of the ordinary that Goffe did that might have caused the breaking of the balloon. He had no opinion as to what probably caused the balloon to burst.

Resolving all doubts in favor of Goffe the evidence raises a genuine issue as to a material fact. An issue is raised when there is some evidence in dispute. The evidence need not be conclusive to raise the issue. A summary proceeding is not used to decide an issue of fact, but, rather, to determine whether one exists. *Zengerle v. Commonwealth Ins. Co.*, supra; *First Nat'l Bank v. Nor-Am. Agr. Prods., Inc.*, 88 N.M. 74, 537 P.2d 682, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975). A motion for summary judgment is not to be used as a substitute for a trial on the merits. E. g., *Summers v. American Reliable Ins. Co.*, 85 N.M. 224, 511 P.2d 550 (1973); *Goodman v. Brock*, supra; *Southern Pac. Co. v. Timberlake*, 81 N.M. 250, 466 P.2d 96 (1970); *Shumate v. Hillis*, 80 N.M. 308, 454 P.2d 965 (1969).

Dr. Ormbsy testified that there was a causal connection between the release of the mercury, plus the rough treatment allegedly received by Goffe, with his heart attack. We also affirm the holding of the Court of Appeals that this opinion testimony raised a genuine issue as to a material fact, making a trial necessary on the issue of proximate cause. The trial court was in error in concluding otherwise.

The decision of the Court of Appeals is hereby reversed as to Dr. Burress and Presbyterian. As to the claim against Pharmaseal and on the issue of causal connection, the decision of the Court of Appeals is hereby affirmed.

The case is remanded for proceedings in conformity herewith, as regards all three defendants.

McMANUS, C. J., and SOSA, PAYNE and FEDERICI, JJ., concur.

568 P.2d 596

In the Matter of the Last WILL and Testament of Elizabeth J. BROOKS, Deceased.

Lucy Elizabeth Brooks SCHANEFELT, Petitioner-Appellant,

v.

Joseph R. PARADISO, Respondent-Appellee.

No. 10312.

Supreme Court of New Mexico.

Sept. 7, 1977.

Warren F. Reynolds, Hobbs, for petitioner-appellant.

L. George Schubert, Hobbs, for respondent-appellee.

OPINION

FEDERICI, Justice.

On April 2, 1973, there was filed in the Probate Court of Lea County, New Mexico, a petition for probate of the last will and testament of Elizabeth J. Brooks, deceased. By her will, Mrs. Brooks bequeathed and devised all of her estate to Joseph R. Paradiso, a stranger, who is not an heir. She also appointed him executor in the will. Mrs. Brooks left no surviving children, grandchildren or parents.

The proceedings were transferred to the District Court of Lea County, New Mexico, sitting in probate as provided by law. On April 15, 1974, the district judge entered a judgment approving the will and appointing Joseph R. Paradiso executor of the last will and testament of Mrs. Brooks.

The appellant, Lucy Elizabeth Brooks Schanefelt, filed a petition in the District Court of Lea County contesting the validity of the Brooks will and asking to be appointed administratrix under § 31–1–9, N.M.S.A. 1953, which provides for such appointment when a deceased person leaves no will.

By order dated November 14, 1974, the district court denied appellant's petition to contest, which order was appealed to the Supreme Court of the State of New Mexico. The Supreme Court of New Mexico affirmed the order of the district court.

In the 1976 term, the cause was submitted to the United States Supreme Court on a jurisdictional statement and motion to dismiss or affirm and on May 16, 1977, the Supreme Court of the United States issued its mandate with the following quoted directions to this court:

> ON CONSIDERATION WHEREOF, it was ordered and adjudged on May 16, 1977, by this Court that the judgement of the Supreme Court of New Mexico in this cause be vacated, and that this cause be remanded to the Supreme Court of the State of New Mexico for further consideration in light of *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) and *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

Pursuant to the mandate of the Supreme Court, we set forth below our further consideration of the cause.

This case raises no question of decedent's right to dispose of her property by will. In the case on appeal the decedent did leave a will by which she legally disinherited all heirs and by which she left her entire estate to a stranger as permitted by New Mexico law. Section 30–1–1, N.M.S.A. 1953 provides:

> 30–1–1. *Who may make a will—Disposition of property.*—Any person of the age of twenty-one [21] years or upwards, and in sound mind, may dispose by will of all his property, except what is sufficient to pay his debts and what is given by law as privileged property to his wife or family.

Rather, the question is whether appellant has a right to challenge decedent's will under Section 30–2–13, N.M.S.A. 1953, which provides:

> 30–2–13. *Contest of probate.*—When a will has been approved, any person interested may at any time within six [6] months after such probate, contest the same or the validity of the will. For that purpose he shall file in the court in which the will was proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked.

The question to be resolved, then, is this: Is the appellant a "person interested," as that term is employed in the above statute, and therefore entitled to challenge the

decedent's will? The answer must be found in the intestacy laws of this jurisdiction. "The effect of a successful will contest is to establish the contestant's right to property; for he must be pecuniarily interested (usually as an heir at law), so that when the will is eliminated the laws of descent and distribution are effective to establish his title." *In re Morrow's Will*, 41 N.M. 723, 73 P.2d 1360 (1937). The intestacy laws determine whose title is established in the event the will is set aside.

The pertinent New Mexico statutes are §§ 29–1–13, 29–1–14, 29–1–15 and 29–1–22, N.M.S.A. 1953.

29–1–13. *Dying without issue—Inheritance by widow or parents.*—If the intestate leave no issue, the whole of his estate shall go to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents. If one [1] of his parents be dead, the portion which would have gone to such deceased parent, shall go to the surviving parent.

29–1–14. *No issue or widow and both parents dead—Inheritance by heirs of parents.*—If both parents be dead, the portion which would have fallen to their share, by the above rule, shall be disposed of in the same manner as if they had outlived the intestate, and died in the possession and ownership of the portion thus falling to their share; and so on through the ascending ancestors and their issue.

29–1–15. *Inheritance by heirs of wife.*—If heirs are not thus found the portion uninherited shall go to the heirs of the wife of the intestate, if dead, according to like rules, and if he has had more than one [1] wife, who died, it shall be equally divided between the heirs of all such wives, taking by right of representation.

29–1–22. *Provisions concerning widows apply to widowers.*—All provisions of the law relating to wills and to estates of deceased persons made in regard to the widow of a deceased husband, shall be applicable to the surviving husband of a deceased wife.

Appellant alleges that she is the daughter of the brother of the decedent's only husband, Frank J. Brooks, who predeceased the decedent, and that since decedent died with no heirs by consanguinity, appellant, her brother and her nephew, the only living relatives by consanguinity of Frank J. Brooks, are heirs of the decedent under § 29–1–15, supra. Appellant claims that as an heir of decedent she has a right to contest the will under § 30–2–13, supra, and to be appointed administratrix, notwithstanding the will and the appointment of respondent as executor. Appellant further contends that under a literal reading of §§ 29–1–13, 29–1–14 and 29–1–15, supra, heirs of a predeceased husband are discriminated against on the basis of gender. We read the mandate of the United States Supreme Court as a directive to scrutinize these statutes for any gender-based discrimination which may be embodied in them.

Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977), addressed the gender-based difference in treatment afforded nondependent widows and widowers under the Federal Old-Age, Survivors, and Disability Insurance Benefits Program (OASDI), 42 U.S.C. §§ 401–431 (1970). The Supreme Court held that such gender-based differentiation constitutes invidious discrimination, denies equal protection of the laws, and therefore violates the due process clause of the fifth amendment. A careful reading of the case convinces us that the holding in *Califano,* supra, merely reaffirms the well established proposition that "administrative convenience" is an insufficient justification for a legislative classification scheme based upon sex. Appellant does not allege that the claimed sex discrimination in our intestacy statutes is in any way based upon a goal of mere "administrative convenience." Further, we are convinced that no such consideration underlies our intestacy laws. Rather, the statutes in question represent a well considered legislative scheme for the orderly distribution of property upon death, an area in which the states traditionally enjoy

a wide latitude. *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977). In *Trimble*, the United States Supreme Court states:

> The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance.

Trimble v. Gordon, id., held that statutory discrimination against illegitimates under Illinois intestacy law was violative of the equal protection clause of the fourteenth amendment. The issue of sex discrimination was also presented in the *Trimble* case, but the Supreme Court specifically declined to address that issue. We find in that case no application of existing sex discrimination case law to state intestacy statutes, and we find nothing in either *Califano* or *Trimble*, which reveals unconstitutional sex discrimination in the New Mexico intestacy statute in question.

However, a reconsideration of §§ 29–1–13, 29–1–14 and 29–1–15, supra, convinces us that the judgment of the trial court must be reversed, but not because the statutes permit an unconstitutional discrimination based upon gender.

We hold that §§ 29–1–13, 29–1–14, 29–1–15 and 29–1–22, supra, must be read *together*, as a unified scheme for the distribution of the property of an intestate who dies without issue. We begin with § 29–1–13, which provides:

> *Dying without issue—Inheritance by widow or parents.*—If the intestate leave no issue, the whole of his estate shall go to his wife, if he leaves no wife, the portion which would have gone to her shall go to his parents. If one [1] of his parents be dead, the portion which would have gone to such deceased parent, shall go to the surviving parent.

Although the language of the statute is phrased exclusively in terms of the *male* intestate, our case law indicates that the statute applies equally to a spouse of *either* sex who dies intestate and without issue. *Harrison v. Harrison*, 21 N.M. 372, 155 P. 356 (1916); *Teopfer v. Kaeufer*, 12 N.M. 372, 78 P. 53 (1904). In *Harrison*, the New Mexico Supreme Court considered an earlier codification of § 29–1–13, supra, and said:

> This statute was, we believe, intended to provide for the distribution of all estates where the decedent died, without issue, leaving a *husband or wife* surviving, or where there was no surviving spouse. *Harrison v. Harrison, id.*, 21 N.M. at 389, 155 P. at 361. (Emphasis added.)

This interpretation of the statute, it will be noted, conforms to and is reflected in the terms of § 29–1–22, supra.

Sections 29–1–14 and 29–1–15, supra, necessarily follow as the second and third steps of one unified scheme for the distribution of the property of such an intestate, and their language, although consistently phrased in terms of the male intestate, must be given a like reading. We hold that the heirs of a predeceased *male* spouse are not excluded from this unified scheme. Accordingly, the judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with appellant's right to challenge the deceased's will pursuant to § 30–2–13, N.M.S.A. 1953.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA and PAYNE, JJ., concur.

EASLEY, J., not participating.

568 P.2d 600

William GOFFE, Plaintiff-Appellant,

v.

PHARMASEAL LABORATORIES, INC., a California Corporation, Dr. J. Hunt Burress and Presbyterian Hospital Center, Inc., a New Mexico Corporation, Defendants-Appellees.

No. 2480.

Court of Appeals of New Mexico.

Dec. 7, 1976.

James R. Toulouse, Phil Krehbiel, Toulouse, Krehbiel & DeLayo, P.A., Albuquerque, for plaintiff-appellant.

James M. Dines, Shaffer, Butt, Jones & Thornton, Albuquerque, for defendant-appellee Pharmaseal Laboratories, Inc.

Richard Civerolo, Civerolo, Hansen & Wolf, Albuquerque, for defendant-appellee Dr. J. Hunt Burress.

J. T. Paulantis, Johnson, Paulantis & Lanphere, Albuquerque, for defendant-appellee Presbyterian Hospital Center, Inc.

OPINION

HERNANDEZ, Judge.

Plaintiff appeals the granting of a summary judgment in favor of the defendants.

On August 26, 1971, plaintiff entered the defendant Presbyterian Hospital (Hospital) suffering from an intestinal obstruction. He was treated by defendant Dr. J. Hunt Burress. The treatment consisted of inserting a K–2R Kaslow intestinal tube, manufactured by defendant Pharmaseal Laboratories, Inc. (Laboratory), through his nose, and thence through the stomach into the intestine. To help in inserting the tube into the intestine, it was weighted with a small rubber balloon tied to the end of the tube and containing metallic mercury, also called quicksilver. The tube, balloon and quicksilver were purchased from the Hospital. Dr. Burress put the mercury into the balloon and tied it onto the end of the tube. On the morning of August 30, 1971, the intestinal obstruction having been removed, Dr. Burress started to withdraw the tube. While he was in the process of removing the tube, the balloon containing the mercury broke as the bag started to enter the nasal passage. As a consequence, the plaintiff inhaled some of the mercury into his lungs. Dr. Burress, with the help of some of the hospital staff, turned the plaintiff upside down and pounded him on the back to cause him to cough up the mercury. How much he

inhaled is not known and how much stayed in his system is not known. There is nothing in the record to indicate that the mercury being in his system had any adverse effects. The tube and the balloon were disposed of and no one had the opportunity to examine them. On the day following these events the plaintiff suffered a myocardial infarction.

Plaintiff in his complaint alleged that Dr. Burress "did not exercise the degree of care or skill ordinarily exercised by others of his profession in similar treatment in that he removed said tube in a hasty, negligent, and unskilled manner, resulting in the rupture of a bag of mercury . . . ." He further alleged that Dr. Burress directed others to pound him on the back to remove the mercury and this "pounding resulted in a coronary thrombosis with a subsequent myocardial infarction." As to the Laboratory, the plaintiff alleged that the "tube was in a defective condition unreasonably dangerous to a user or patient in that the bag of mercury attached to the tube in the treatment is improperly designed and unsafe to persons undergoing treatment . . . ." Also, that the tube "was not of a merchantable quality nor was it fit for the purpose for which it was intended." That the Laboratory had "breached an implied warranty of merchantibility and fitness . . . ." In regard to the Hospital, the plaintiff alleged that Dr. Burress was its agent or employee and that in doing the various things he did he was acting within the scope of his employment.

The plaintiff alleges four points of error. We will discuss together points 1, 3 and 4, which are as follows:

"POINT I

"SUMMARY JUDGMENT WAS IMPROPER—ISSUES OF FACT FOR THE JURY TO DECIDE EXISTED.

* * * * * *

"POINT III

"EVEN IF DEFENDANTS ESTABLISHED THE LACK OF MATERIAL ISSUES, PLAINTIFF MET HIS BURDEN OF COMING FORTH WITH TANGIBLE EVIDENCE DEMONSTRATING THAT THERE EXISTS A TRIABLE ISSUE OF FACT, PRECLUDING SUMMARY JUDGMENT.

"POINT IV

"EVEN IF THE STRICT LOCALITY RULE HAS NOT BEEN SATISFIED, THE STANDARD TO BE USED IS A NATIONAL ONE, NOT LOCAL."

Section 21–1–1(56)(c), N.M.S.A. 1953 (Repl. Vol. 4) provides in pertinent part that: "The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Our Supreme Court in *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972) adopted the following language from 3 Barron & Holtzoff, Federal Practice and Procedure, § 1234 at 124–126 (rev'd Wright 1958) as the rule to be applied in determining whether a motion for summary judgment should be granted or not:

> " . . . the party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists. If there are such reasonable doubts, summary judgment should be denied. A substantial dispute as to a material fact forecloses summary judgment."

The Supreme Court went on to say that once the moving party has made a prima facie showing that he is entitled to summary judgment, the burden shifts to the opposing party to show that there is a genuine factual issue. "By a prima facie showing is meant such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. . . . The inferences, which the party opposing the motion for summary judgment is entitled to have drawn from all the matters properly before and considered by the trial court, must be *reasonable* inferences." [Emphasis ours.] The rules governing consideration of medical malpractice cases are set forth in *Cervantes v. Forbis*, 73 N.M. 445, 389 P.2d 210 (1964):

"Before a physician or surgeon can be held liable for malpractice in the treatment of his patient, he must have departed from the recognized standards of medical practice in the community, or must have neglected to do something required by those standards. [Citations omitted.] The fact that a poor result is achieved or that an unintended incident transpired, unless exceptional circumstances are present, does not establish liability without a showing that the result or incident occurred because of the physician's failure to meet the standard either by his acts, neglect, or inattention. Such facts must generally be established by expert testimony. [Citations omitted.] Likewise, expert testimony is generally required to establish causal connection."

Furthermore, the medical expert or experts must be qualified to express an opinion concerning the recognized standard of medical practice in the community and an opinion that the defendant departed from that standard or neglected to do something required by the standards. *Gandara v. Wilson*, 85 N.M. 161, 509 P.2d 1356 (Ct. App. 1973).

At the outset of our discussion, it is well to remind ourselves that a medical malpractice suit is a negligence action. The elements necessary to such a cause of action are:

"1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

"2. A failure on his part to conform to the standard required. These two elements go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.

"3. A reasonable [sic] close causal connection between the conduct and the resulting injury. This is what is commonly known as 'legal cause,' or 'proximate cause.'

"4. Actual loss or damage resulting to the interests of another." W. Prosser, Law of Torts, § 30, p. 143 (4th ed. 1971)

Speaking to the question of standard and a departure therefrom, Dr. Burress relies upon the deposition testimony and affidavit of Dr. A. Simms II, a surgeon residing and practicing in Albuquerque. Dr. Simms in his deposition testimony described the procedure for inserting and removing the tube. His affidavit recited in part:

"8. That Mr. Goffe was again seen by Dr. Simms on April 28, 1972, at which time he related the above episode of intestinal obstruction and told of the use of the mercury-weighted tube. He also told of the mishap in removing the tube.

"9. That Dr. Simms has reviewed the deposition of Dr. Burress in detail.

"10. That in Dr. Simms' opinion, the application and handling of the mercury-weighted intestinal tube by Dr. Burress fell within the acceptable standards of surgical care in this community."

The plaintiff for his part relies upon the affidavit and deposition of Dr. John W. Ormsby, an internist who graduated from Columbia Medical School and practices in the State of Washington. The pertinent parts of the doctor's affidavit are the following:

"That the practice of medicine in the State of Washington is of the same standard of care as practiced by physicians in the City of Albuquerque, State of New Mexico.

"Mr. Goffe related to me a description of the incident and I have reviewed the medical records furnished to me by Presbyterian Hospital; if the attending physician vigorously pulled against the obstruction to such a degree as to cause the balloon to rupture, it is my opinion that such action was not acceptable medical practice.

"It is my further opinion that if the attending physician did not vigorously pull against the obstruction to such a

decree [sic] as to cause the balloon to rupture, then the naso-gastric tube would have been defective."

The record reveals that Dr. Ormsby at his deposition was asked the following questions and gave the following answers among others:

"Q. Can you say as a matter of medical probability [that] the breakage and spillage of the mercury was caused by any of the acts of Doctor Burress?

* * * * * *

"A. No, I can't put a term 'probability' on that. I really don't know.

* * * * * *

"Q. Can you tell me specifically what, if anything, Doctor Burress did wrong?

"A. No, sir, I can't tell you anything specifically that I know he did wrong.

"Q. As far as you know, he did nothing wrong and everything met the standard of care with which you are familiar?

"A. Yes, as far as I know, he did nothing wrong."

Dr. Ormsby, when asked whether it was the vigorous pulling by Dr. Burress or a defect in the tube which caused it to break, answered:

"A. No. I can't say because I really don't know, and I am not even sure I would know if I had been there.

. . .

* * * * * *

"Q. Well, can you really even tell us, as a matter of medical probability, that it was even defective?

* * * * * *

"A. No, I have no knowledge that it was defective."

The purpose of a summary judgment proceeding is to expedite litigation by determining whether a party possesses competent evidence to support his pleadings so as to raise genuine issues of material fact and if not to dispose of the matters at that state of the proceeding. *Agnew v. Libby*, 53 N.M. 56, 201 P.2d 775 (1949). Dr. Ormsby's affidavit and deposition testimony is all that the record contains of plaintiff's evidence as to standard and failure to meet that standard. The affidavit of plaintiff's wife and his own deposition testimony and answers to interrogatories cannot be considered because they are not competent to testify as medical experts as to either of these matters. As was pointed out in *Cervantes, supra*, proof of malpractice requires evidence as to the recognized standard in the community and a showing that the doctor departed from that standard due to the lack of the requisite knowledge or lack of the requisite skill or failure to exercise the requisite care. However, because of the technical and specialized subject matter, expert medical testimony is usually required to establish both of these evidentiary steps. Plaintiff does not contend that this is a situation where laymen are competent to testify.

Assuming, without deciding, that the standard in the State of Washington is the same as in the Albuquerque community; and further assuming, without deciding, that Dr. Ormsby possessed the requisite medical expertise to give an opinion on this matter; his statements are of no help to the plaintiff.

Dr. Ormsby's affidavit and deposition testimony contains nothing as to the standard; and as to the departure from that standard the most that can be said about the testimony is that it presents an equal choice of two mere possibilities. Our Supreme Court in *Stambaugh v. Hayes*, 44 N.M. 443, 103 P.2d 640 (1940) quoted the following with approval from *P. F. Collier and Son Co. v. Hartfeil*, 72 F.2d 625 (8th Cir. 1934): "Where evidence is equally consistent with two hypotheses, it tends to prove neither." That is to say the mere choice of possibilities does not constitute competent evidence. "Competent evidence means that which the very nature of the things to be proved requires as the fit and appropriate proof in the particular case." *Chiordi v. Jernigan*, 46 N.M. 396, 129 P.2d 640 (1942). The plaintiff having failed to

show that there were genuine material issues of fact as to two of the essential elements of his cause of action against Dr. Burress and the Hospital, the trial court properly granted the motion for summary judgment as to them. Granting summary judgment as to Dr. Burress requires granting it also as to the Hospital because plaintiff's cause of action against the Hospital is premised on Dr. Burress being either its agent or its employee. *Smith v. Klebanoff*, 84 N.M. 50, 499 P.2d 368 (Ct.App. 1972); cert. denied, 84 N.M. 37, 499 P.2d 355 (1972).

The Laboratory failed to make an affirmative showing that there were no genuine issues of material fact as to it. Consequently, the burden did not shift to the plaintiff to show otherwise. Although parts of Dr. Ormsby's and Dr. Simm's deposition testimony are helpful to the Laboratory, these statements are not enough to make the affirmative showing necessary to shift the burden to plaintiff. Dr. Ormsby stated that he did not know whether the tube and bag were defective. Dr. Simms, speaking about these bags, said "occasionally, they will break. There is no way to keep from it." The trial court erred in granting summary judgment as to the Laboratory. *Kelly v. Board of Trustees of Hillcrest General Hospital, Inc.*, 87 N.M. 112, 529 P.2d 1233 (Ct.App. 1974); cert. denied, 87 N.M. 111, 529 P.2d 1232 (1974).

Plaintiff's second point is that "summary judgment was improper since the doctrine of res ipsa loquitur defeats the motion for summary judgment." He argues that "the only inference to be drawn is that the accident would not have occurred but for the negligence of the attending doctor or the defectiveness of the tube." As was stated in *Renfro v. J. D. Coggins Company*, 71 N.M. 310, 378 P.2d 130 (1963), in order to make the doctrine of res ipsa loquitur applicable, two elements must be present:

> "(1) that the accident be of the kind which ordinarily does not occur in the absence of someone's negligence; (2) that it must be caused by an agency or instrumentality within the exclusive control and management of defendant."

And as the Supreme Court also said in this case, more than the happening of an accident is required to set the doctrine in operation.

First as to Dr. Burress and the Hospital, we believe that the plaintiff failed to make a prima facie showing as to the first element, negligence. The only evidence that plaintiff presented which would go to this element was the deposition testimony and affidavit of Dr. Ormsby. We have previously discussed the shortcomings of that evidence as to the requisite medical standard and failure to observe the standard; it is equally deficient as to this first element. Dr. Ormsby did not say that this was the kind of incident which ordinarily does not occur in the absence of someone's negligence. Dr. Simms in his deposition testimony had this to say after discussing the procedures used:

> "A. Oh, no. You are undoubtedly referring to occasional accidents when you remove a tube, where the bag will break and suddenly dump the mercury wherever it's at.
>
> "Q. Well, is that a good thing to do that in the throat, so it gets into the throat?
>
> "A. Oh, no, it's not, but it's very difficult to avoid. Impossible at times.
>
> "Q. Why would you say that?
>
> "A. Because I have removed hundreds of them and, occasionally, they will break. There's no way to keep from it."

The plaintiff failed to meet the burden of establishing that there was a question of material fact as to the first element of the doctrine. The doctrine is not applicable to the Laboratory because the instrumentality was in the exclusive control and management of Dr. Burress. The trial court properly ruled that the doctrine of res ipsa loquitur was not applicable.

The summary judgment is affirmed as to Dr. Burress and the Hospital. It is reversed as to the Laboratory. We would point out to the trial court that the counter-

claim of the Hospital against the plaintiff remains unresolved, as does the cross claim of the Laboratory against the Hospital and Dr. Burress.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., concurs in part and dissents in part.

SUTIN, Judge (concurring in part and dissenting in part).

I concur in the reversal of summary judgment in favor of defendant Pharmaseal. I dissent in the affirmance of summary judgment in favor of Dr. Burress and Presbyterian Hospital.

The purpose of this dissent is not to declare defendants liable. That is not the function of this Court in an appeal from summary judgment. Our function is to determine whether a genuine issue of material fact exists. If it does exist, the jury shall then decide by verdict whether plaintiff is entitled to recover damages. The medical malpractice explosion should not deter this Court in scrutinizing the facts and the law.

A. *Summary judgment did not hasten the administration of justice.*

The claimed act of malpractice occurred August 30, 1971. The complaint was filed May 23, 1973. On October 21, 1974, seventeen months later, the trial setting of November 26, 1974 was vacated because considerable discovery was yet to be had. On February 27, 1975, defendant Pharmaseal moved to vacate the trial setting of April 29, 1975 because plaintiff's deposition was not taken until February 11, 1975. On April 21, 1975, almost two years after the complaint was filed, the trial setting was vacated a second time. On September 15, 1975, notice was issued of a pretrial conference to be held September 24, 1975. It was not held. It was reset in December. On November 26, 1975, plaintiff submitted interrogatories to defendant Pharmaseal. On December 1, 1975, the trial setting was vacated a third time and the court ordered that there shall be no continuance or vacating of the February, 1976 trial date. The trial date was set at Monday, February 2, 1976.

On January 16, 1976, almost three years after the complaint was filed, defendants moved for summary judgment. It was set for hearing on January 26, 1976. It was not heard on that date.

On January 26, 1976, the deposition of plaintiff's wife was taken *by defendants.* On January 29, 1976, *the defendants* took the depositions of plaintiff's witnesses, Doctors John W. Ormsby and Bernard S. Goffe in Seattle, Washington. *Plaintiff* took the deposition of Doctor G. Gordon Hale on January 30, 1976. On January 30, 31, 1976, *plaintiff* took the depositions of Doctors J. E. Goss and A. G. Simms, II, in Albuquerque.

On the morning of February 2, 1976, before the selection of the jury, defendants' motion for summary judgment was heard. After 94 pages of rambling argument, which took approximately two hours, the trial court granted all defendants a summary judgment without consideration of plaintiff's medical testimony. Two and two-thirds years had passed since the complaint was filed and four years and five months after the claimed act of malpractice. The trial court chose the summary judgment route rather than the trial by jury route.

More than five years have now elapsed since the claimed act of malpractice. Summary judgment, under the circumstances of this case, on the morning of trial, was an act of injustice to plaintiff.

In a specially concurring opinion, I said:

> Summary judgment is a dangerous instrument in the administration of justice when it denies a party the right to trial based upon factual issues. The obvious purpose of the rule from its origin in New Mexico in 1949, was to hasten the administration of justice and to expedite litigation by avoiding needless trials. *Agnew v. Libby*, 53 N.M. 56, 201 P.2d 775 (1949). This has not proven true in actual experience.

> The history of Rule 56(c) in New Mexico indicates that summary judgment does not hasten the administration of justice; that trial courts decide issues and grant summary judgments which, they believe, avoids a large trial docket. In the vast majority of summary judgments appealed, reversals occurred, and trial denied was trial delayed. It is the policy of courts of review to grant the right of trial whenever justice demands it. Trial courts must find a legal rather than a factual issue upon which to grant summary judgment.

Tapia v. McKenzie, 83 N.M. 116, 120, 489 P.2d 181, 185 (Ct.App. 1971).

In medical malpractice actions, summary judgment should not be a substitute for trial on the merits because, generally, the ultimate decision will be based on opinions of opposing medical experts or on the judicial determination of subjective facts. Expert opinion testimony is often based on facts or data made known to the expert, even though the facts or data are not admissible in evidence. Rules 702, 703 and 704 of the New Mexico Rules of Evidence [§§ 20–4–702, 703, 704, N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.)].

Summary judgment procedure involves a determination of whether there is a "genuine issue as to any material fact." Rule 56(c). This "material fact" relates to the events, or happenings or circumstances which give rise to a medical malpractice claim. In the instant case, the "material facts" relate to a mechanical, non-technical procedure undertaken by Dr. Burress and the proximate cause of the injury suffered by the plaintiff.

The "conspiracy of silence" in the medical field places a heavy burden on patients, and expert medical testimony of opposing doctors should be accepted with caution in making the determination of a "genuine issue as to any material fact."

Where defendants seek summary judgment, plaintiff is entitled to the benefit of all reasonable doubts in determining whether a genuine issue exists as to any material fact in the case. *Skarda v. Skarda*, 87 N.M. 497, 536 P.2d 257 (1975). This means that the trial court and this Court are required to resolve all doubts in connection therewith against the defendants. *Cervantes v. Forbis*, 73 N.M. 445, 389 P.2d 210 (1964). Where depositions and affidavits are filed, it is the function of the trial court to gather all of the facts presented to determine whether a genuine issue of fact exists with reference to whether defendants failed to exercise that degree of care which an ordinarily prudent person would have exercised in the fulfillment of the duty to protect plaintiff from injury. On appeal, we will review the testimony in the most favorable aspect it will bear in support of plaintiff's claim of the right to present the merits to the jury. *Coca v. Arceo*, 71 N.M. 186, 376 P.2d 970 (1962).

Under the circumstances of this case, the continued procedural delay, the late taking of medical depositions, the decision on summary judgment immediately after medical depositions were taken with a jury being present, and the large expense involved, mean to me that "we cannot countenance procedures in which the rights of parties are prejudiced or their substantive rights invaded, or in which trials are had on the issue of whether trials should be had." *Summers v. American Reliable Insurance Company*, 85 N.M. 224, 226, 511 P.2d 550, 552 (1973).

My review of this case indicates to me that the primary reason for the summary judgment was the application of the "strict locality" rule, to deprive plaintiff of the right to use medical depositions taken in the State of Washington.

To grant summary judgment after the claimed act of malpractice, without consideration of plaintiff's testimony and medical evidence based thereon, does not hasten the administration of justice.

B. *The "strict locality rule" was not involved.*

The only claim of malpractice in this case arises out of the withdrawal of an intestinal tube through plaintiff's nose by Dr. Bur-

ress, the manner of which resulted in the collapsing of a mercury-weighted bag. *The manner of withdrawal was a mechanical, non-technical procedure.* The withdrawal was not the unfortunate result of an operation, nor care involved in the treatment or diagnosis of a patient. Neither did withdrawal involve the care and skill of a specialist. We are not confronted with a *standard* of medical care. The "strict locality rule" was not involved.

We must distinguish the difference between the concept of a standard of medical practice and the concept of ordinary negligence. In medical malpractice actions, the standard of care is that degree of skill and learning which is ordinarily possessed and exercised by members of the medical profession in good standing. A physician or surgeon who has conformed to the standard of the profession in medical practice cannot be found negligent. In negligence actions, the standard of care is that degree of care which a reasonably prudent person would exercise under the same or similar circumstances.

We must not confuse these terms. Expert testimony is necessary to establish *a standard* of care and departure therefrom when the condition is such that knowledge about it is peculiarly within the knowledge of medical men. "However, where negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required." *Mascarenas v. Gonzales*, 83 N.M. 749, 751, 497 P.2d 751, 753 (Ct.App. 1972). Cited as authority is *Lanier v. Trammell*, 207 Ark. 372, 180 S.W.2d 818 (1944). In that case, the court held that expert testimony was not required when the asserted negligence lay within the comprehension of a jury of laymen, such as a surgeon's failure to sterilize his instruments or to remove a sponge from the incision before closing it. *Pry v. Jones*, 253 Ark. 534, 487 S.W.2d 606 (1972). For additional samples, see authorities cited in *Lanier, supra*; Annot., 141 A.L.R. 5 at 12 (1942), supplemented in Annot., 81 A.L.R.2d 597 at 608 (1962), and Later Case Service (1968 and 1976).

Expert testimony is not required in medical malpractice if the jury is capable of appreciating and evaluating the significance of the events that occurred. These events include those which are of a mechanical, non-technical nature which a layman might well comprehend and understand. A jury does not need guidance and enlightenment. The concept of ordinary negligence comes into play. This rule is applicable to a mechanical, non-technical procedure such as the withdrawal of an intestinal tube through a patient's nose. Under this event, *a standard* of care in medical practice disappears.

The strict locality rule was not applicable because *a standard* of medical practice was not present.

C. *If a standard of care was involved, a national standard controlled.*

Dr. Albert G. Simms, II, an Albuquerque physician and surgeon, stated that the use of gastrointestinal tubes is standardized nationwide. He testified as follows:

> The training of surgical residents in the United States in the last 30 years has pretty well standardized things like insertions of tubes and the use of tubes and so on, although any one hospital or any one physician might have certain little gimmicks that he uses with success. But, by and large, the use of a mercury-weighted long tube has been commonplace in the United States since the introduction of the Miller-Abbott Tube in about 1934.

Doctors Ormsby and Goff of Seattle, Washington, declared that the standard of care in Albuquerque is the same standard of care in Seattle. The testimony of doctors from Seattle, Washington, is competent testimony on the procedures used by Dr. Burress in Albuquerque.

Los Alamos Medical Center v. Coe, 58 N.M. 686, 275 P.2d 175 (1954) preceded *Cervantes v. Forbis, supra.* In *Coe*, the Supreme Court held that a Los Angeles surgeon was allowed to testify that defendant's patient in New Mexico was addicted to a drug. "Thus, it might be successfully

argued from *Coe* that, in New Mexico, the question of a physician's negligence in common medical matters may be determined by testimony of doctors from throughout the country who are knowledgeable in the particular field." Roehl, The Law of Medical Malpractice in New Mexico, 3 N.M.L.Rev. 294 at 298 (1973). I agree.

In 1964, the strict locality rule was adopted in New Mexico. *Cervantes v. Forbis, supra.* In 1973, this Court reluctantly declined to modernize the rule. We did suggest that the Supreme Court review *Cervantes* in the light of U.J.I. 8.1. *Gandara v. Wilson*, 85 N.M. 161, 509 P.2d 1356 (Ct.App. 1973). This instruction was approved in *Williams v. Vandenhoven*, 82 N.M. 352, 482 P.2d 55 (1971). All that is necessary to adopt a national standard is to eliminate the words "in the community" from the rule stated in *Cervantes.*

It should be noted under U.J.I. 8.2 that the duty of a specialist in medical practice is not limited to any locality.

I believe that U.J.I. 8.1 and 8.2, approved by the Supreme Court, modified the strict locality rule in *Cervantes.*

U.J.I. 8.1 provides that "due consideration" should be given "to the locality involved." "The 'locality rule' has no present-day vitality except that it may be considered as *one* of the elements to determine the degree of care and skill which is to be expected of the average practitioner of the class to which he belongs. . . . In other words, local practice within geographic proximity is one, but not the only factor to be considered." *Pederson v. Dumouchel*, 72 Wash.2d 73, 431 P.2d 973, 978, 31 A.L.R.3d 1100 (1967); *Shier v. Freedman*, 58 Wis.2d 269, 206 N.W.2d 166 (1973); *Brune v. Belinkoff*, 354 Mass. 102, 235 N.E.2d 793 (1968).

There appears to be a vast conglomeration of cases on the modernization of the "strict locality rule". Malpractice Testimony: Competency of physician or surgeon from one locality to testify, in malpractice cases, as to standard of care required of defendant practicing in another locality, 37 A.L.R.3d 420 (1971); King: In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula, 28 Vanderbilt L.Rev. 1213 (1975); *Edwards v. United States*, 519 F.2d 1137 (5th Cir. 1975), dissenting opinion.

A review of the history of the "strict locality rule" and the reasons for modernization have led to the adoption of a nationwide standard of care. *Shilkret v. Annapolis Emergency Hospital Ass'n*, 276 Md. 187, 349 A.2d 245 (1975); *Blair v. Eblen*, 461 S.W.2d 370 (Ky. 1970); *Pederson v. Dumouchel, supra.* In *Shilkret, supra*, Judge Levine stated the rule as follows:

> We align ourselves with the Kentucky court and hold that a physician is under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances. Under this standard, advances in the profession, availability of facilities, specialization or general practice, proximity of specialists and special facilities, together with all other relevant considerations, are to be taken into account. [349 A.2d at 253].

With regard to the rule applicable to hospitals, the following was adopted:

> We hold, therefore, that a hospital is required to use that degree of care and skill which is expected of a reasonably competent hospital in the same or similar circumstances. As in cases brought against physicians, advances in the profession, availability of special facilities and specialists, together with all other relevant considerations, are to be taken into account. [349 A.2d at 254].

This trend in the modernization of the "strict locality rule" has reached its summit. With the adoption of this rule, we will avoid the "conspiracy of silence." In *Graham v. Sisco*, 248 Ark. 6, 449 S.W.2d 949 (1970), the Court said:

> It is quite evident that if the members of the medical profession, the legal profession, or any similar occupation, can prevent a malpractice case from even coming to trial simply by agreeing not to

testify against one another, very few such cases will be heard in the future. Such a "conspiracy of silence," as it is usually called, would allow the most grossly negligent practitioner to avoid even the simple duty of making his own explanation, under oath, of how the plaintiff happened to be injured. With the issues now before us by no means free from doubt, we are wholly unwilling to sanction a procedure fraught with such serious possibilities of injustice to future litigants. [449 S.W.2d at 951].

In *Faulkner v. Pezeshki*, 44 Ohio App.2d 186, 337 N.E.2d 158, 164 (1975), the Court said:

> Locating an expert to testify for the plaintiff in a malpractice action is known to be a very difficult task, mainly because in most cases, one doctor is reluctant and unwilling to testify against another doctor. Although doctors may complain privately to each other about the incompetence of other doctors, they are extremely reluctant to air the matter publicly. [337 N.E.2d at 164].

Where compelling reasons exist in medical malpractice actions, the Supreme Court will accept jurisdiction to establish a standard of care required of physicians and surgeons. *Kronke v. Danielson*, 108 Ariz. 400, 499 P.2d 156 (1972).

D. *There are genuine issues of material fact.*

(1) *The proximate cause of plaintiff's heart attack.*

The trial court also granted summary judgment because plaintiff failed to prove any causal relationship between the withdrawal of the tube, the collapse of the mercury-weighted bag, and the resulting heart attack.

Defendants presented evidence by Dr. Burress and local physicians that no causal relationship existed.

Plaintiff presented the following evidence.

Plaintiff was 61 years of age at the time of the event in Presbyterian Hospital. On the insertion of the tube, Dr. Burress estimated he put four or five cc's of mercury in the bag, but he did not measure the amount. On the removal of the intestinal tube, Dr. Burress pulled the tube fast, jerked it three times, vigorously or forcefully or heavily pulled on the tube as though it had been stuck, and then yanked it out. The amount of mercury put in the bag may have contributed to this problem. After the collapse of the mercury-weighted bag and spillage of mercury, plaintiff was taken to the x-ray room, then returned to his own room where he was put on a tilt table with his head down lower than his feet. Dr. Burress asked the physiotherapy department to assist in postural drainage of the mercury. Physiotherapy employees pounded on plaintiff's back many times for several hours to help remove the mercury. Plaintiff's head hit the foot of the bed. He had chest pain. The next morning plaintiff suffered a myocardial infraction, a coronary heart attack.

Dr. John W. Ormsby, 45 years of age, a licensed physician in the State of Washington, specialized in internal medicine, endocrinology, and metabolism. He had training in cardiology for three years commensurate with his program in internal medicine. He had used an intestinal tube in his practice, absent the mercury-weighted tube. He examined plaintiff six times during the years 1969, 1970 and 1972. He had performed electrocardiograms and considered plaintiff to be within normal limits for his age. He reviewed plaintiff's medical records of the incident that occurred on August 30, 1971, had conversations with plaintiff and others and had correspondence with physicians in Albuquerque. Based upon these and additional facts, and with a medical explanation, Dr. Ormsby concluded that there was a causal relationship between the withdrawal of the tube, the collapse of the mercury bag, the procedure used to extract the mercury and plaintiff's heart attack.

Dr. C. Gordon Hale, who specializes in internal medicine with a subspecialty in cardiology, testified that a causal relationship existed.

There was a genuine issue of material fact on the proximate cause of plaintiff's heart attack.

(2) *The Negligence of Dr. Burress.*

Dr. Burress testified that care was exercised during the withdrawal of the tube, and the procedure used to extract the mercury. Plaintiff's evidence is to the contrary. A genuine issue of material fact exists on the negligence of Dr. Burress.

(3) *The doctrine of res ipsa loquitur is applicable.*

The trial court also granted summary judgment because the doctrine of res ipsa loquitur was not applicable.

"New Mexico decisions discussing res ipsa loquitur in malpractice cases have not applied the doctrine. These decisions have not held the doctrine could not be applied in an appropriate case." *Smith v. Klenbanoff*, 84 N.M. 50, 55, 499 P.2d 368, 373 (Ct.App. 1972).

Two essential elements are necessary to allow the use of the doctrine: (1) that the injury to plaintiff was proximately caused by the collapse of the mercury-weighted bag in the withdrawal of the intestinal tube, which was under the exclusive control and management of the defendant, and (2) that the event causing the injury to the plaintiff was of a kind which ordinarily does not occur in the absence of negligence, on the part of the doctor who was in control of the instrumentality. U.J.I. 12.14. *Waterman v. Ciesielski*, 87 N.M. 25, 528 P.2d 884 (1974).

Res ipsa loquitur is in a quagmire of judicial discussion in medical malpractice cases. Annot., 162 A.L.R. 1265 (1946), supplemented in Annot., 82 A.L.R.2d 1262 (1962) and Later Case Service (1968 and 1976); Walker, Parker, Williamson, The Application of Res Ipsa Loquitur in Texas Medical Professional Liability Actions, 12 Houston L.Rev. 1026 (1975); 70 C.J.S. Physicians and Surgeons § 62 at 991 (1951); 61 Am.Jur.2d Physicians, Surgeons, Etc., §§ 191–197 (1972); *Bardessono v. Michels*, 3 Cal.3d 780, 91 Cal.Rptr. 760, 478 P.2d 480 (1970), 45 A.L.R.3d 717 (1972).

Each case must be decided on its own facts. As heretofore pointed out, the negligence of Dr. Burress involves a mechanical, non-technical procedure in which expert testimony is not required.

Plaintiff's complaint did not allege the doctrine of res ipsa loquitur. It alleged that "during the removal of said intestinal tube, Defendant, Dr. Burress . . . removed said tube in a hasty, negligent, and unskilled manner, resulting in the rupture of a bag of mercury at the end of the tube in the nasal passage of Plaintiff". These are general allegations of negligence and the doctrine of res ipsa loquitur is applicable, though not pleaded. *Mares v. New Mexico Public Service Co.*, 42 N.M. 473, 82 P.2d 257 (1938).

"The doctrine of res ipsa loquitur is a rule of evidence peculiar to the law of negligence which recognizes that prima facie negligence may be established without direct proof and furnishes a substitute for specific proof of negligence." 65A C.J.S. Negligence § 220.4 (1966). "There must be some showing that the cause of the accident is directly or naturally the result of some act or condition with which the defendant is connected and which ordinarily does not happen if those who have control or management exercise proper care." *Renfro v. J. D. Coggins Company*, 71 N.M. 310, 316, 378 P.2d 130, 135 (1963).

In the instant case, the evidence most favorable to plaintiff shows that (1) Dr. Burress had exclusive control and management of the withdrawal of the intestinal tube, and the injury to the plaintiff was proximately caused by the manner in which Dr. Burress withdrew the intestinal tube and caused the mercury-weighted bag to collapse; (2) at the time the bag collapsed, Dr. Burress said, "My God, this has never happened before." The result of the act, the collapse of the tube, does not ordinarily happen if proper care is exercised.

With this evidence, the doctrine of res ipsa loquitur is applicable, and plaintiff is entitled to an inference of defendants' negligence.

The introduction of evidence by plaintiff to prove specific acts of negligence does not deny its application. Plaintiff is entitled to rely on the doctrine. He should not be penalized by the loss of the inference because he has been willing to go forward and do the best he can to prove specific acts of negligence. *Tuso v. Markey*, 61 N.M. 77, 294 P.2d 1102 (1956); *Harless v. Ewing*, 81 N.M. 541, 469 P.2d 520 (Ct.App. 1970); *Terry v. Dunlap*, 84 N.M. 86, 499 P.2d 1008 (Ct.App. 1972) (Sutin, J., dissenting).

Other issues raised by plaintiff were not answered in the majority opinion. I decline to extend this dissent.

The summary judgment in favor of Dr. Burress and Presbyterian Hospital should be reversed.

568 P.2d 612

STATE of New Mexico, Plaintiff-Appellee,

v.

John DOE, Defendant-Appellant.

No. 2983.

Court of Appeals of New Mexico.

Aug. 16, 1977.

Writ of Certiorari Denied Sept. 8, 1977.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Suzanne Tanner, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

The child was adjudicated a delinquent child in need of care or rehabilitation. The Children's Court found the child to have intentionally received or retained stolen property contrary to § 40A–16–11(A), N.M. S.A.1953 (2d Repl.Vol. 6, 1972, Supp.1975) with a value of less than $100.00—a petty

misdemeanor. This was a delinquent act. Section 13–14–3(N), N.M.S.A.1953 (Repl. Vol. 3, pt. 1, 1976). Cf. *Doe v. State*, 88 N.M. 627, 545 P.2d 93 (Ct.App.1976). However, had the crime been committed by an adult, jurisdiction would have been in the magistrate court. Section 36–3–4, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972, Supp.1975). Further, an adult would have been entitled to a jury trial on the charge. Section 36–10–1, N.M.S.A.1953 (2d Repl.Vol. 6, 1972, Supp. 1975).

The child's motion for a jury trial was denied. The sole issue on appeal is whether the child was entitled to a jury trial within the meaning of § 13–14–28(A), N.M.S.A. 1953 (Repl.Vol. 3, pt. 1, 1976) which states in part:

> ". . . A jury trial on the issues of alleged delinquent acts may be demanded . . . when the offense alleged would be triable by jury if committed by an adult. . . ."

We start with the premise that a jury trial in juvenile proceedings is not constitutionally mandated by the Sixth or Fourteenth Amendments. *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). However, states may require stricter constitutional standards. See *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963).

The child's reliance on *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968) is misplaced. *Peyton* dealt solely with charges which would be felonies if committed by an adult not petty misdemeanors. Further, although reference was made to *In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) as possibly requiring a jury in misdemeanor cases, that reference will not withstand scrutiny in light of *McKeiver v. Pennsylvania*, supra.

The child seems to assert that he is entitled to a jury trial by virtue of our Constitution. N.M.Const., art. II, § 12 states in part:

> "The right to trial by jury as it has *heretofore* existed shall be secured to all and remain inviolate." (Emphasis added)

This provision does not entitle the child to a jury trial. See *Hamilton v. Walker*, 65 N.M. 470, 340 P.2d 407 (1959). Compare *Guiterrez v. Gober*, 43 N.M. 146, 87 P.2d 437 (1939).

In view of the foregoing, which do not entitle the child to a jury trial, was it the legislative intent of § 13–14–28(A), supra, to grant the child a jury trial under the foregoing charge? The legislature is presumed not to have used any surplus words and each word has a meaning. *State v. Olive*, 85 N.M. 664, 515 P.2d 668 (Ct.App. 1973). If § 13–14–28(A), supra, is to be interpreted as meaning to cover instances of adults in magistrate court, then the entire phrase ". . . when the offense alleged would be triable by jury if committed by an adult . . ." would be superfluous. For the phrase to have any reasonable meaning it must be read in light of when an adult is entitled to have a jury trial in district court. To interpret otherwise would mean that a child would be entitled to a jury trial in all instances.

In reading the Act as a whole, § 13–14–1, et seq. N.M.S.A.1953 (Repl.Vol. 3, pt. 1, 1976), no other meaningful conclusion can be reached. Section 13–14–3(C), supra, defines *court* solely in terms of the children's court or family court division of the district court. Section 13–14–9, supra, places exclusive jurisdiction in the *court*. Section 13–14–45, supra, again speaks in terms of the district court having original jurisdiction or a discretionary transfer to the children's court.

A no less compelling reason is the policy considerations involved. For example, if a child committed a magistrate offense he would be entitled to a jury and if he committed the same offense contrary to a municipal ordinance he would not be entitled to a jury. If such were permitted, confusion would abound.

Accordingly, we hold that the phrase ". . . when the offense alleged would be triable by jury if committed by an adult . . ." to mean a district court offense.

Affirmed.

IT IS SO ORDERED.

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

568 P.2d 614

STATE of New Mexico, Plaintiff-Appellee,

v.

Danny LUJAN, Defendant-Appellant.

No. 3009.

Court of Appeals of New Mexico.

Aug. 16, 1977.

Peggy A. Bowen, Bowen & Shoesmith, Alamogordo, for defendant-appellant.

Toney Anaya, Atty. Gen., Dennis P. Murphy, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant was charged by supplemental information of being the same person who had been convicted of two felonies and that

he should be sentenced as an Habitual Offender. See §§ 40A–29–5 through 8, N.M.S.A.1953 (2d Repl. Vol. 6, 1972). The jury found that the defendant was the same person who committed both offenses. Section 40A–29–7, supra. Defendant appeals asserting: (1) that since the second felony was being appealed the trial court lost jurisdiction; (2) refusal to give a requested instruction was error. Issues raised in the docketing statement and not argued on appeal are considered abandoned. *State v. Vogenthaler*, 89 N.M. 150, 548 P.2d 112 (Ct.App.1976).

Jurisdiction

We start with the premise that a conviction is final pending appeal (*State ex rel. Chavez v. Evans*, 79 N.M. 578, 446 P.2d 445 (1968)) regardless of what might be the outcome of the appeal. See also Rule of Evidence 609(d).

Next, the filing of an Habitual Offender information does not create a new charge. It merely goes to the enhancement of the penalty. *State v. Stevens*, 83 N.M. 475, 493 P.2d 960 (Ct.App.1972). It provides a proceeding to determine the penalty to be imposed on one convicted of one or more prior felonies. *Lott v. Cox*, 76 N.M. 76, 412 P.2d 249 (1966).

Defendant's contention is that the trial court lost jurisdiction after the notice of appeal was filed on the second felony conviction and could not hear the issue to be tried on the supplemental information. This argument is without merit. The trial court is not without jurisdiction to impose sentence. Sentencing, in some prescribed statutory form, is a mandatory requirement of the Criminal Code—appeal or no appeal. See § 40A–29–1, et seq. N.M.S.A.1953 (2d Repl. Vol. 6, 1972). Compare *State v. Romero*, 73 N.M. 109, 385 P.2d 967 (1963).

In the event the appeal of the second conviction is affirmed the enhanced sentence will stand. In the event of a reversal, the conviction and sentence would naturally be vacated.

Our holding is premised on policy consideration and in the interest of judicial economy. Nothing can be served by awaiting the decision of the appeal of the second conviction on the merits.

Instruction

Section 40A–29–7, supra, states in part: " . . . If the defendant denies being the same person or refuses to answer, or remains silent, his plea or the fact of his silence, shall be entered of record and a jury shall be empaneled to inquire if the offender is the same person mentioned in the several records as set forth in the information. *If the jury finds that the defendant is the same person and that he has in fact been convicted of such previous crimes as charged*, or if 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 . . . ." (Emphasis added)

Defendant contends his requested instruction should have been given. It stated:

"Before you can return a verdict finding Danny Lujan an Habitual Offender as to Count I, [prior conviction] you must find beyond a reasonable doubt:

"1. That the Defendant is the same person previously convicted, and;

"2. That the prior conviction was valid."

The trial court's instructions were as follows:

"INSTRUCTION NO. 2

"For you to find the Defendant, DANNY LUJAN, is an Habitual Offender as charged in the Information, the State must prove to your satisfaction beyond a reasonable doubt each of the following:

"1. That the Defendant, DANNY LUJAN, is the same person convicted of Larceny (Over $100 but not more than $2500), a felony, in Criminal Cause No. 26721 in the District Court of the Second Judicial District, Bernalillo County, New Mexico on January 27, 1976.

"2. That the Defendant, DANNY LUJAN, is the same person convicted of Residential Burglary, a felony, in Criminal Cause No. 28099 in the District Court of the Second Judicial District, Bernalillo County, New Mexico on February 2, 1977."

"INSTRUCTION NO. 3

"You are instructed that the burden of proof on the issue of identity is upon the State. That burden is to prove identity with such reasonable certainty as to satisfy the conscience of the Jury of the truth of the Defendant's identity as the same person beyond a reasonable doubt. It is not required that the State prove identity beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life."

Defendant neither took the stand nor did he offer any evidence either on the question of identity or the validity of the prior conviction. *State v. Moser*, 78 N.M. 212, 430 P.2d 106 (1967) recognizes that only valid convictions are contemplated. *Moser* goes on to state that the burden of sustaining a charge of inadequate representation (invalid conviction) rests upon the defendant. *State v. Dalrymple*, 75 N.M. 514, 407 P.2d 356 (1965) is not to the contrary. Nor can *Dalrymple* be read to require, in the absence of evidence of an invalid conviction, that the issue must be submitted to the jury.

Thus, when the State offered proper proof of a conviction, until evidence of its invalidity is offered, a presumption of validity of the conviction stands. *State v. Gilbert*, 78 N.M. 437, 432 P.2d 402 (1967); See also *State v. Deats*, 82 N.M. 711, 487 P.2d 139 (Ct.App.1971).

Not having called the issue of validity into question the trial court properly refused defendant's requested instruction. The only issue raised by the defendant was that of identity. This he did by his denial of identity.

Affirmed.

IT IS SO ORDERED.

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

568 P.2d 616

STATE of New Mexico, Plaintiff-Appellant,

v.

Thomas HEYWARD, aka Heyward Thomas, aka Flaco, aka Thomas Heywood, Defendant-Appellee.

No. 3017.

Court of Appeals of New Mexico.

Aug. 23, 1977.

Toney Anaya, Atty. Gen., Dennis Murphy, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Jan A. Hartke, Chief Public Defender, Reginald J. Storment, Appellate Defender, William Lazar, Asst. Appellate Defender, Santa Fe, for defendant-appellee.

OPINION

WOOD, Chief Judge.

Does the enhanced sentence provision of the general habitual offender statute, § 40A–29–5(A), N.M.S.A.1953 (2d Repl. Vol. 6), apply to defendant's conviction for trafficking in heroin? No.

The information charges a felony conviction in 1972 for unlawful possession of heroin and a second felony conviction in 1977 for trafficking in heroin. The trafficking conviction was for violation of § 54–11–20, N.M.S.A.1953 (Repl. Vol. 8, pt. 2, Supp. 1975), a part of the Controlled Substances Act. The State sought to enhance the sentence for trafficking under § 40A–29–5(A), *supra*. The trial court granted defendant's motion to dismiss on the basis that the Legislature did not intend the enhanced sentence provision of the Habitual Offender Act should apply to the trafficking offense. The State appeals.

Several decisions have considered the relationship of the habitual offender statute to other sentencing statutes. In determining the applicable statute, two concepts are considered: (1) are the statutes in conflict, and (2) what was the legislative intent?

In *State v. Lujan*, 90 N.M. 103, 560 P.2d 167 (1977), the statute granting the trial court discretionary power to suspend a sentence conflicted with the mandatory sentencing provision of the habitual offender statute. Because of the wording of § 40A–29–5, *supra*, it was held that the Legislature intended the mandatory sentencing provision should apply.

In *State v. Roland*, 90 N.M. 520, 565 P.2d 1037 (Ct.App.1977), the sentencing provision for the first armed robbery conviction did not conflict with the mandatory sentencing provision of the Habitual Offender Act. There being no conflict, the legislative intent for a mandatory sentence applied.

The results are not different in cases involving drugs. In *State v. Lard*, 86 N.M. 71, 519 P.2d 307 (Ct.App.1974), the larceny sentence was enhanced under the habitual offender statute on the basis of prior convictions for the sale or delivery of a hallucinogenic drug. The applicable drug statute did not conflict with the Habitual Offender Act; legislative intent controlled.

In *State v. Lujan*, 76 N.M. 111, 412 P.2d 405 (1966), the applicable drug law conflicted with the Habitual Offender Act; the legislative intent was that narcotic violations were to be punished under the applicable drug law.

One decision has considered the relationship of the Habitual Offender Act to the Controlled Substances Act. It is *State v. Alderete*, 88 N.M. 150, 538 P.2d 422 (Ct.App. 1975). The State sought to enhance defendant's sentence for his third heroin possession offense by utilizing § 40A–29–5, *supra*. *Alderete* held there was no conflict between the penalty for unlawful possession of heroin and the enhancement provision of the habitual offender law. However, after examining the penalty provisions of the Controlled Substances Act and the legislative history of that act, we concluded:

> ". . . where the Legislature intended an enhanced penalty to apply to a violation of the Controlled Substances Act it so provided within the act."

Defendant has committed his first trafficking offense. The penalty for this first offense does not conflict with the enhanced sentence provision of the Habitual Offender Act. Compare *State v. Roland, supra*. Absent such a conflict, what was the legislative intent? In enacting the habitual offender statute, the Legislature intended the mandatory sentencing provision to apply generally. *State v. Lujan*, 90 N.M. 103, 560 P.2d 167, *supra*. However, the penalty provisions and legislative history of the Controlled Substances Act show a legis-

lative intent that the only enhanced sentences for Controlled Substances Act violations were the enhanced penalties provided in that act. *State v. Alderete, supra.* Section 40A–29–5(A), *supra,* is not applicable.

The order dismissing the habitual offender charge is affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

568 P.2d 618

Candido W. MARTINEZ, Plaintiff-Appellant,

v.

FLUOR UTAH, INC., and Hartford Insurance Group, Defendants-Appellees.

No. 2838.

Court of Appeals of New Mexico.

Aug. 23, 1977.

Benito Sanchez, Albuquerque, for plaintiff-appellant.

John A. Klecan and Linda G. Kluger, Klecan & Roach, P.A., Albuquerque, for defendants-appellees.

OPINION

REUBEN E. NIEVES, District Judge.

The plaintiff workman brings to this court a review of a judgment under the Workmen's Compensation Act of New Mexico. The judgment reflects a finding for plaintiff of a disability resulting from an accidental injury in the course and scope of his employment on September 10, 1975, and continuing until June 28, 1976, except for a period of time that the plaintiff continued to be employed by the defendant employer. The effect of this determination was that plaintiff was not totally disabled within the meaning of the Workmen's Compensation Act. We are compelled to affirm.

Two points are raised by plaintiff in this appeal seeking reversal of the judgment below: (1) The trial court's finding of temporary total disability to June 28, 1976, is not supported by substantial evidence; and (2) the trial court erred as a matter of law in not finding and concluding that claimant was totally disabled within the meaning of the Workmen's Compensation Act.

The trial court's finding of temporary total disability to June 28, 1976, is supported by substantial evidence.

Briefly, the salient facts herein are: plaintiff slipped and sprained his left ankle on or about September 8, 1975, while at work. He was treated by Dr. Rosenbaum and returned to his employment on or about September 29, 1975. On or about October 13, 1975, plaintiff sustained injury to his left knee within the scope of his employment, when a scaffold collapsed. Again he was treated by Dr. Rosenbaum, but such treatment was not commenced until November 13, 1975. Plaintiff continued to work at "light duty" from October, 1975, to March, 1976. In March of 1976, defendant insurance carrier referred plaintiff to Dr. Woolson, an orthopedic surgeon, who in turn referred him to Dr. Spingola, a general surgeon. Dr. Spingola took plaintiff from further employment activity and treated the left lower extremity until May, 1976, and then releasing him back to light duty for two or three weeks. From this medical evidence elicited from Drs. Spingola and Woolson, the court determined that plaintiff had no further impairment or disability subsequent to June 28, 1976.

It is firmly established that in reviewing the sufficiency of expert medical testimony on appeal, the evidence and inferences that may reasonably be drawn therefrom must be viewed in the light most favorable to support the judgment, and the fact that there may have been contrary evidence which would have supported a different finding or conclusion, does not permit an appellate court to weigh evidence. *Corzine v. Sears, Roebuck & Co.,* 80 N.M. 418, 456 P.2d 892 (Ct.App.1969), cert. denied, 80 N.M. 388, 456 P.2d 221 (1969); *Jensen v. United Perlite Corporation,* 76 N.M. 384, 415 P.2d 356 (1966).

In his arguments and briefs plaintiff seeks relief from this court on two premises: that (1) the medical testimony of the defendants is based on inaccurate and incomplete information and should be totally disregarded; (2) said medical testimony does not meet the substantial evidence test. We have carefully examined the expert medical testimony of all three doctors i. e., Drs. Rosenbaum, Woolson and Spingola and determined that the evidence adduced from each of these witnesses meets the substantial evidence test. The trial judge had the discretion to accept or reject the testimony of any of the medical witnesses. The Supreme Court in considering a similar issue in *Montano v. Saavedra et al.,* 70 N.M. 332, 373 P.2d 824, 826 (1962), said:

"It is sufficient to point out that the trial judge, being called to weigh the testimo-

ny of the doctor, was not convinced to the degree necessary to move him to make a finding that the accident in July, 1959, probably caused the injuries complained of and which the doctor found to be present in April, 1961. It is for the trier of the facts to weigh the testimony, determine the credibility of the witnesses, and, to reconcile inconsistent statements and say where the truth lies (authorities cited).

True enough, there was testimony of the medical expert from which the trial court might have found otherwise. Nevertheless, it was for the trial court, as the fact finder, to evaluate all the evidence and determine where the truth lay (authorities cited)."

Again, in *Wood v. Citizens Standard Life Insurance Company,* 82 N.M. 271, 480 P.2d 161 (1971) the Supreme Court of this state addressed itself to this point, held that the trial court and not the appellate court, shall determine the credibility of witnesses and the weight to be given their respective testimonies; that once a medical witness has qualified to give an expert medical opinion upon a particular issue, the weight, if any, to be given his opinion thereto, and the resolution of conflicts between his opinion and the opinions of other medical experts on the issue, are for the trier of facts. The trier of facts need not give greater weight to the expert medical opinions of treating physicians than to the medical opinions of physicians who conducted only medical examinations for purposes of evaluation.

Plaintiff cites this court's ruling in the case of *Niederstadt v. Ancho Rico Consolidated Mines,* 88 N.M. 48, 536 P.2d 1104 (1975), to anchor his position. That ruling cannot afford the plaintiff any comfort as the two situations are clearly distinguishable. Plaintiff displays for our consideration, minor omissions and relatively unimportant errors and contradictions in the testimonies of Drs. Woolson and Spingola, and urges that these omissions and contradictions unerringly zeros the instant case within the sphere of *Niederstadt,* supra. This cannot be. In *Niederstadt,* the medical authority testifying had not had available highly pertinent medical information in the form of an orthopedic surgeon's report from another doctor. As stated above, these factual situations are readily distinguishable and rest poles apart.

Plaintiff's plea in his appeal would have this court weigh the testimony of the doctors, or to find that the trial court should have disregarded the testimony of Drs. Woolson and Spingola. He has not shown nor demonstrated by the testimony of his medical expert, Dr. Rosenbaum, that the testimony of defendants' medical experts was inherently improbable, or incompetent. *Gonzales v. General Motors Corporation,* 89 N.M. 474, 553 P.2d 1281 (1976).

We have considered the cases cited by the plaintiff in support of this appeal, and determine that they do not alter our final determination herein.

Plaintiff's second point claiming error in the trial court's failure to find that he was totally disabled within the meaning of the Workmen's Compensation Act, is put to rest, since the conclusion we have reached as to plaintiff's first point obviates any further consideration herein.

At the conclusion of plaintiff's brief-in-chief, our attention is directed to a request for a reasonable attorney fee for plaintiff's attorney for his efforts in the District Court. The trial court made an award of $350.00 as attorney fees. We agree with plaintiff that this amount is not adequate considering the time and effort expended in this cause as reflected by the transcripts and briefs filed. Section 59–10–23(D), NMSA 1953, as amended.

The services of plaintiff's attorney command a more substantial attorney fee than awarded by the court. Judgment should be entered in favor of the plaintiff in the additional amount of $950.00 as attorney fees for plaintiff's attorney, making a total award of attorney fees of $1,300.00 for services rendered in the District Court. See, *Wright v. Schultz,* 55 N.M. 261, 265, 266, 231 P.2d 937 (1951).

The judgment of the trial court is affirmed in all matters except that a new judgment be entered as to attorney fees for plaintiff's attorney consistent with the views hereinabove expressed.

IT IS SO ORDERED.

SUTIN and LOPEZ, JJ., concur.

568 P.2d 621

David GONZALES, Petitioner-Appellant,

v.

CITY OF ALBUQUERQUE, Respondent-Appellee.

No. 3136.

Court of Appeals of New Mexico.

Aug. 23, 1977.

David H. Pearlman, Albuquerque, for petitioner-appellant.

Elizabeth N. Love, Asst. City Atty., Albuquerque, for respondent-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of reckless driving in municipal court. He appealed to the district court where he was again found guilty. He appeals the district court decision. Our calendar assignment proposed summary dismissal for failure to timely appeal. Defendant opposes dismissal, relying on a district court order entered subsequent to our calendar assignment.

The district court judgment and sentence was entered June 6, 1977. The notice of appeal was filed June 20, 1977; it was not timely under N.M. Crim. App. 202(a). The timely taking of an appeal is jurisdictional. *State v. Garlick*, 80 N.M. 352, 456 P.2d 185 (1969); *State v. Martinez*, 84 N.M. 766, 508 P.2d 36 (Ct.App. 1973).

The district court order purported to extend the time for filing the notice of appeal through June 21, 1977. The notice of appeal having been filed on June 20, 1977, the appeal is timely if the district court order effectively extended the appeal time.

N.M. Crim. App. 202(c) states:

> "*Time Extended—Excusable Neglect.* Upon good cause shown the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by these rules."

The district court could extend the time for filing the notice of appeal, after the time for appeal had expired, "for a period not to exceed 30 days from the expiration of the time otherwise prescribed by these rules." The district court order was entered on August 8, 1977. On that date, both the ten-day appeal time and the thirty-day extension time had expired. The order of August 8, 1977 was not effective to extend the appeal time unless entered nunc pro tunc.

The district court order states that it "is to be entered nunc pro tunc as of June 16, 1977." A nunc pro tunc order has reference to the making of an entry now, of something which was actually previously done, so as to have it effective as of the earlier date. "It is not to be used to supply some omitted action of the court or counsel, but may be utilized to supply an omission in the record of something really done but omitted through mistake or inadvertence." *Mora v. Martinez*, 80 N.M. 88, 451 P.2d 992 (1969). Here a timely notice of appeal was not taken; here an extension of appeal time was not granted until after the maximum time for extending the appeal time had expired. The nunc pro tunc provision of the district court order attempts to supply an omitted action; the order is not effective nunc pro tunc. *See State v. Soria*, 82 N.M. 509, 484 P.2d 351 (Ct.App. 1971).

The district court order did not effectively extend the appeal time.

The appeal not being timely, it is dismissed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

568 P.2d 1233

Arnold MELON, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 11560.

Supreme Court of New Mexico.

Aug. 25, 1977.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari be and the same is hereby denied. The Court agrees with the statement and conclusion of the Court of Appeals that in *Eller v. State,* 90 N.M. 552, 566 P.2d 101, this Court did not intend to abandon its prior decisions which hold that new issues may not be raised on appeal, regardless of whether they have been listed in the docketing statement.

This Court in *Eller, supra,* limited its application to the "[state] of the record in this (Eller) case," and to exceptions in *extreme* cases under the rules announced in *Olguin v. State,* 90 N.M. 303, 563 P.2d 97 (1977); *Linam v. State,* 90 N.M. 302, 563 P.2d 96 (1977); and *Vigil v. State,* 89 N.M. 601, 555 P.2d 901 (1976).

IT IS FURTHER ORDERED that the Record in Cause No. 3101 be and the same is hereby returned to the Clerk of the Court of Appeals.

The ESPANOLA HOUSING AUTHORITY, the City of Espanola, and John Doe, manufacturer, a corporation, Petitioners,

v.

Leroy G. ATENCIO, Individually, and Elizabeth Atencio, a minor, by her father and next friend, Leroy G. Atencio, Respondents.

No. 11514.

Supreme Court of New Mexico.

Sept. 12, 1977.

Civerolo, Hansen & Wolf, Wayne C. Wolf, David W. Yount, Albuquerque, for Espanola Housing Authority.

White, Koch, Kelly & McCarthy, William B. Kelly, Santa Fe, Scarborough & Scarborough, Espanola, for City of Espanola.

Zamora, Rael & Weinreb, Pedro G. Rael, Santa Fe, for respondents.

OPINION

McMANUS, Chief Justice.

Elizabeth Atencio was allegedly injured while playing on a merry-go-round owned by the Espanola Housing Authority in the City of Espanola. Suit to recover for her injuries was brought almost three years later and Espanola asserted the affirmative defense of the statute of limitations. The trial court dismissed the case and the respondents appealed challenging the constitutionality of § 23–1–23, N.M.S.A.1953, on equal protection grounds. The Court of Appeals reversed the district court and found that § 23–1–23 was unconstitutional. We granted certiorari and affirm the decision of the trial court.

Section 23–1–23 states:

> [N]o suit, action or proceeding to recover damages for personal injury or death resulting from the negligence of any city, town or village, or any officer thereof, shall be commenced except within one [1] year next after the date of such injury. All such suits, proceedings or actions not so commenced shall be forever barred . . .

Therefore, if this statute is applicable, the proceedings were properly terminated. However, respondents contend that § 23–1–23 denies victims of municipal torts equal protection under the law because it is inconsistent with § 23–1–8, N.M.S.A.1953, which provides a three-year limitation period for tort actions against the county or state. Section 23–1–23 has previously been challenged as special legislation, but in *Hoover v. City of Albuquerque,* 58 N.M. 250, 270 P.2d 386 (1954) this Court determined that the statute met the requirements of general legislation and therefore was valid. The question of the reasonableness of the classification and whether it operated as a denial of equal protection was not before the Court at that time. We now hold that § 23–1–23 does not violate the equal protection clauses as set forth in N.M.Const. art. 2, § 18 and U.S.Const. Amend. XIV, § 1.

It is well settled that there is a presumption of the validity and regularity of legislative enactments. This Court must uphold such statutes unless it is satisfied beyond all reasonable doubt that the Legislature went outside the Constitution in enacting the challenged legislation. *City of Raton v. Sproule,* 78 N.M. 138, 429 P.2d 336 (1967). This Court has repeatedly refused 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, 399 P.2d 105 (1965). "Only if a statutory classification is so devoid of reason to support it as to amount to a mere caprice, will it be stricken down. (Citation omitted.) If any state of fact can be reasonably conceived which will sustain a classification, there is a presumption that such facts exist. . . ." *Board of Trustees of Town of*

Las Vegas v. Montano, 82 N.M. 340, 343, 481 P.2d 702, 705 (1971). When an equal protection challenge is leveled against a legislative classification, this Court considers the guidelines set forth in *Davy v. McNeill,* 31 N.M. 7, 14, 240 P. 482, 486 (1925):

> If the classification is reasonable, it is valid. It is in the first instance a legislative question as to whether or not the classification is reasonable; that is, could it have seemed reasonable to the Legislature even though such basis seems to the court to be unreasonable, or is it arbitrary and unjust?

But "in order to avoid the constitutional prohibition [the classification] must be founded upon pertinent and real differences as distinguished from artificial ones. Mere difference, of itself, is not enough." *State v. Sunset Ditch Co.,* 48 N.M. 17, 25, 145 P.2d 219, 223 (1944).

The test as to whether a statute is unconstitutional is very strict since any redeeming value of the classification is sufficient. The statute in this instance authorizes a different statute of limitations for municipalities, i. e., one year for tort actions, than is authorized for the state or a county. The treatment of victims of municipal torts is consistent; however, this class is treated differently than the general class of tort victims or tort victims of a governmental division.

The city offered four reasons for upholding the validity of the classification. They are:

1. that a shorter statute of limitation substantially narrows the cities' exposure and would thus be a vital factor in determining insurance rates;
2. that cities are limited in their ability to raise taxes;
3. that cities are severely limited to raise funds; i. e., if claims against a city must be commenced within one year of their occurrence, the city is better able to predict its financial position for a given year;
4. that cities have a greater need to know what claims they may be faced with during a fiscal year because, potentially, they have a larger number of claims for services rendered and a greater potential liability.

The question then remains whether these reasons are real and pertinent differences or merely artificial differences which are not relevant to the classification involved.

The petitioners cite to a variety of cases dealing with the analogous situation wherein tort victims are required to give governmental tort-feasors notice of an injury within a specified period of time. These cases are indirectly applicable because such notice provisions operate as statutes of limitations since they are deemed to be conditions precedent to filing a suit. Although these analogous cases involve somewhat different policy considerations, the majority of the decisions hold that there was sufficient justification to treat private and public tort-feasors differently and that such types of classifications do not offend equal protection principles. See *Dias v. Eden Township Hospital District,* 57 Cal.2d 502, 20 Cal.Rptr. 630, 370 P.2d 334 (1962); *McCann v. City of Lake Wales,* 144 So.2d 505 (Fla. 1962); *Lunday v. Vogelmann,* 213 N.W.2d 904 (Iowa 1973). We recognize those cases to the contrary, e. g., *Reich v. State Highway Dept.,* 386 Mich. 617, 194 N.W.2d 700 (1972), but feel that the better view is to uphold the constitutionality.

The only case which is actually on point is *Jenkins v. State,* 85 Wash.2d 883, 540 P.2d 1363 (1975) where Washington law provided a different limitation period for counties than for other governmental entities. That state's supreme court determined that no rational basis existed for such disparate treatment. The majority of courts have concluded otherwise for varying reasons. In *Lunday v. Vogelmann,* supra, the Iowa Supreme Court held that such a classification was proper because the statutes were in derogation of sovereign immunity (and common law) and the legislature had the power to restrict and limit the state's liability. In *King v. Johnson,* 47 Ill.2d 247, 265 N.E.2d 874 (1970), that court held that the impact of tort liability on the planning of the public budget and the taxing system made the classification reasonable. When the bureaucracy of a public body and the

number of claims are considered, it is clear that different procedures are necessary and this is a relevant fact in such a determination. *Crowder v. Salt Lake County,* 552 P.2d 646 (Utah 1976).

In this state, cities are clearly limited in their expenditures. See § 11–6–1, N.M.S.A. 1953 [Repl. Vol. 2, pt. 2 (Supp.1975)] and § 11–6–6, N.M.S.A.1953 [Repl. Vol. 2, pt. 2, 1974]. The ability of cities to raise money to meet such extraordinary expense is also restricted.

Therefore, it appears that some rational basis does exist for limiting the time period in which a suit may be brought against a city. This determination is sufficient to overcome respondents' contention that § 23–1–23 is unconstitutional. Therefore, the decision of the Court of Appeals is reversed and the order of the District Court of Rio Arriba County dismissing the complaint is hereby affirmed.

IT IS SO ORDERED.

SOSA, EASLEY and FEDERICI, JJ., concur.

PAYNE, J., respectfully dissents.

568 P.2d 1236

STATE of New Mexico ex rel. Thomas Ray NEWSOME, Jr., Petitioner-Appellant,

v.

Phillip ALARID, Director of Personnel, University of New Mexico, Respondent-Appellee.

No. 11207.

Supreme Court of New Mexico.

Sept. 26, 1977.

[redacted]

[redacted]

[redacted]

Michael G. Rosenberg, Albuquerque, for petitioner-appellant.

Rodey, Dickason, Sloan, Akin & Robb, W. A. Sloan, Carl H. Esbeck, Albuquerque, for respondent-appellee.

OPINION

EASLEY, Justice.

Newsome, a student newspaper reporter at the University of New Mexico, applied for an alternative writ of mandamus against Alarid, personnel director of the university, seeking to gain access to the information contained in all non-academic staff personnel records, except that which is exempt from disclosure under the terms of § 71–5–1, N.M.S.A.1953 (Supp.1975). However, the alternative writ and the order to show cause that were issued spoke in terms of divulging "all personnel records" without reference to statutory exemptions. The trial court at the show-cause hearing quashed the writ and dismissed the petition. We affirm in part and reverse in part.

Newsome framed the issues by his requested conclusion of law asking that the court find that no portion of the personnel records of the employees was exempt under the disclosure statute or otherwise.

Alarid contended that confidential records are not "public records." The trial court agreed. Alarid claimed, and the trial court concluded, that information as to an employee's disabilities, illnesses, or injuries; type of military discharge; reason for leaving past employment or wanting to leave present employment; and arrest records were covered by the statutory exemptions or were of a sensitive and personal nature and should be kept confidential. The trial court concluded that the statutory exemptions cover letters of reference, matters of opinion such as answers to the questions "Would you rehire?" and "Why not hired?" and memoranda concerning disciplinary action.

Alarid testified that his office had thousands of personnel files to which Newsome was granted access by the alternative writ. He claimed that inspection should, therefore, be reasonable as to time, manner, and number of documents. The trial court so concluded.

Alarid testified that printed forms used for personnel information might contain both materials that could be made public and also confidential information. Each file may have letters of reference concerning employment or promotion; an application for employment; an applicant's resume; a personnel action notice; a payroll update sheet; letters or memorandum concerning personnel evaluations, infractions and disciplinary action; a referral for employment form; and letters from physicians concerning sick leave, temporary disability, inability to perform certain jobs, and other medical information.

Failure to Follow Rules

Counsel for Newsome was oblivious to, or chose to ignore, our N.M.R.Civ.App. 9(m)(2) [§ 21–12–9(m)(2), N.M.S.A.1953] which provides that the statement of proceedings shall contain:

> [A] concise, chronological summary of such findings as are material to the review with appropriate references to the transcript. If any finding is challenged, it must be so indicated by a parenthetical note referring to the appropriate numbered point in the argument.

Where there is such a failure the reviewing court may assume the findings are correct and conclusive on appeal. *Tafoya v. Tafoya,* 84 N.M. 124, 500 P.2d 409 (1972). We need only determine if the trial court's conclusions and the judgment are correct, based upon the facts found. *Springer Corp. v. American Leasing Co.,* 80 N.M. 609, 610, 459 P.2d 135, 136 (1969); *American General Companies v. Jaramillo,* 88 N.M. 182, 538 P.2d 1204 (Ct.App.1975).

Counsel for Newsome did not properly challenge specific findings nor properly refer either to the place where the finding is found in the transcript or to the point in his argument where the finding is challenged. However, there is little dispute as to the facts; and the right to inspect public documents being an important public issue, and being squarely before us for the first time, we will not, therefore, preclude review of the findings. Looking at the totality of the pleadings and the briefs we find that a sufficient challenge to the facts found by the trial court has been raised. We construe the requirement of our rule liberally in this case only, so that the cause on appeal may be determined on the merits. *Montgomery v. Cook,* 76 N.M. 199, 413 P.2d 477 (1966); *DesGeorges v. Grainger,* 76 N.M. 52, 412 P.2d 6 (1966).

Construction of the Statute

Section 71–5–1, supra, reads as follows:

> Every citizen of this state has a right to inspect any public records of this state except:
>
> A. records pertaining to physical or mental examinations and medical treatment of persons confined to any institutions;
>
> B. letters of reference concerning employment, licensing or permits;

C. letters or memorandums which are matters of opinion in personnel files or students' cumulative files; and

D. as otherwise provided by law.

The statute is not entirely clear in Section A as to whether all medical records are exempt from disclosure.

A statute should be interpreted to mean what the Legislature intended it to mean, and to accomplish the ends sought to be accomplished by it. *Burroughs v. Board of County Comm'ners,* 88 N.M. 303, 540 P.2d 233 (1975). The entire statute is to be read as a whole so that each provision may be considered in its relation to every other part. *Winston v. New Mexico State Police Bd.,* 80 N.M. 310, 454 P.2d 967 (1969). A construction must be given which will not render the statute's application absurd or unreasonable and which will not defeat the object of the Legislature. *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). Moreover, enactments of the Legislature are to be interpreted to accord with common sense and reason. *Westland Development Co. v. Saavedra,* 80 N.M. 615, 459 P.2d 141 (1969).

The intent of the Legislature to exempt doctors' opinions and other medical information in personnel files from disclosure is evident from an analysis of this statute, and the intent comports with common sense and reasoning as well as with good public policy.

Exemptions Under the Statute

Most of the information in dispute clearly falls within the exemptions allowed by statute. We hold that the personnel records of the employees which pertain to illness, injury, disability, inability to perform a job task, and sick leave shall be considered confidential under the statute and not subject to release to the public, except, of course, by the consent or waiver of the particular employee.

Letters of reference are specifically exempt from disclosure under Section B of the statute as are letters or memorandums which are matters of opinion as noted in Section C. The Legislature quite obviously anticipated that there would be critical material and adverse opinions in letters of reference, in documents concerning disciplinary action and promotions and in various other opinion information that might have no foundation in fact but, if released for public view, could be seriously damaging to an employee. We hold that letters of reference, documents concerning infractions and disciplinary action, personnel evaluations, opinions as to whether a person would be re-hired or as to why an applicant was not hired, and other matters of opinion are also exempt from disclosure under the statute.

Records Not Specifically Exempt

Alarid contends that in addition to those items which fall within the statutory exemptions, there are other matters of a personal or sensitive nature in the files that, for reasons of public policy, should be kept confidential and not be subject to disclosure. This argument is based on balancing the interests that favor disclosure against those interests that favor confidentiality.

Alarid claims that military discharge and arrest records are of a confidential nature but are not specifically exempted by statute. There is no New Mexico case which faces this issue squarely. Only three cases have mentioned this statute. *Ortiz v. Jaramillo,* 82 N.M. 445, 483 P.2d 500 (1971) (deciding that the county clerk's mag-card list of registered voters is a public record and must be made available on reasonable terms to persons demanding the list); *Sanchez v. Board of Regents of Eastern New Mexico University,* 82 N.M. 672, 486 P.2d 608 (1971) (holding that a preliminary list setting forth proposed faculty salaries which had not been submitted to or accepted by the faculty members was not a public record within the meaning of this statute); *State v. Harrison,* 81 N.M. 623, 471 P.2d 193 (Ct.App.1970), *cert. denied,* 81 N.M. 668, 472 P.2d 382 (1970) (assuming but declining to hold that there is an exemption under the statute permitting a criminal defendant to inspect police records during the investigation of a crime).

Although the facts in *Sanchez* are not analogous to those in this case, the majority referred favorably to *MacEwan v. Holm*, 226 Or. 27, 359 P.2d 413 (1961) as a case containing a scholarly review of the entire field of the public's right of inspection of records. The dissenting opinion in *Sanchez* also quoted extensively from *MacEwan*. In the Oregon case the defendant sought to inspect data relating to nuclear radiation sources collected by the State Board of Health. The Oregon Supreme Court held that the data involved were "public records" for purposes of inspection by the public. We quote at some length from *MacEwan* because of the importance of that analysis in arriving at a decision herein.

The court stated:

> Writings coming into the hands of public officers in connection with their official functions should generally be accessible to members of the public so that there will be an opportunity to determine whether those who have been entrusted with the affairs of government are honestly, faithfully and competently performing their function as public servants. *Nowack v. Auditor General*, supra. [243 Mich. 200, 219 N.W. 749 (1928)]. "Public business is the public's business. The people have the right to know. Freedom of information [about public records and proceedings] is their just heritage. . . . Citizens . . . must have the *legal* right to . . . investigate the conduct of [their] affairs." Cross, The People's Right to Know, p. xiii (1953).
>
> Id. at 38, 359 P.2d at 418.
>
> The public's right of inspection is not without qualification. There may be circumstances under which the information contained in a record can be justifiably withheld from the person seeking it. Obviously, if it is shown that the information is being sought for an unlawful purpose, the request for it may be denied. [Citations omitted.] Even where the request is made for a lawful purpose the public interest may require that the information be withheld. Thus where the information is received in confidence, it may be proper to refuse access to it. . . . And in *City and County of San Francisco v. Superior Court*, 38 Cal.2d 156, 238 P.2d 581 (1952) confidential information furnished to a municipal corporation by some of its employees for the purpose of establishing rates of compensation was held to be non-accessible. Similarly, in *Mathews v. Pyle*, supra, 75 Ariz. [76] at page 81, 251 P.2d [893] at page 897, it was held that a report of a state Attorney-General to the Governor was subject to inspection unless "confidential and privileged" or if "disclosure would be detrimental to the best interests of the state."
>
> Id. at 44, 359 P.2d at 420–421.

The Oregon court held that the burden is cast upon the agency to decide whether inspection will be permitted and to explain why the record sought should not be furnished and the court ruled:

> Ultimately, of course, it is for the courts to decide whether the explanation is reasonable and to weigh the benefits accruing to the agency from non-disclosure against the harm which may result to the public if such records are not made available for inspection.
>
> Id. at 46, 359 P.2d at 422.

The court stated that, since the justification for a refusal to permit inspection will depend upon the circumstances of the particular case, "we can offer no specific guide for that administrative decision."

MacEwan has been widely cited and quoted by courts and legal scholars as one of the leading cases in this area of the law. *MacEwan* was decided at a time when Oregon statutes provided that citizens had a right to inspect all public records, although there was no statutory definition of the term "public records." The court in *MacEwan* looked to the common law doctrine that the public had certain limited rights to inspect government documents. *Papadopoulos v. State Board of Higher Education*, 8 Or.App. 445, 494 P.2d 260 (1972).

Papadopoulos points out that shortly after *MacEwan* was decided the Oregon legis-

lature passed a law providing that the custodian of any public records, "unless otherwise expressly provided by statute," shall furnish proper and reasonable opportunities for inspection of all records. Also enacted was a statutory definition of "public records."

The Oregon court had under consideration a claim of confidentiality by Oregon State University for a report that had been made to university officials concerning the operation of the School of Science in which plaintiff was a faculty member. A team of four educators from out-of-state universities had been retained to make an investigation and give a confidential report to the university administration.

After a scholarly analysis of the competing theories of law and a detailed look at the facts in that case, the court held that the evidence did not justify keeping the records confidential.

In *Papadopoulos* the court stated that some claims of confidentiality might well be decided on the very nature of the document sought. However, the court held that it was necessary to establish the exact contents of the report in question in order for defendants to prove that it contained personal information about university employees, disclosure of which would damage the "public interest." The court recognized that there could be a case made for non-disclosure if the public record contained "confidential personal information," the disclosure of which would damage the public interest. Attention was also called to procedures suggested by the Supreme Courts of Wisconsin and Arizona for handling the evidence claimed to be confidential.

In *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 137 N.W.2d 470 (1965), *opinion modified on denial of rehearing*, 28 Wis.2d 672, 139 N.W.2d 241 (1966), the court established the following routine:

> [T]he proper procedure is for the trial judge to examine *in camera* the record or document sought to be inspected. Upon making such *in camera* examination, the trial judge should then make his determination of whether or not the harm likely to result to the public interest by permitting the inspection outweighs the benefit to be gained by granting inspection. [footnote omitted.]
>
> In reaching a determination so based upon a balancing of the interests involved, the trial judge must ever bear in mind that public policy favors the right of inspection of public records and documents, and, it is only in the exceptional case that inspection should be denied. . . . If . . . disclosure of only a portion [of a record] is found to be prejudicial to the public interest, the trial judge has the power to direct such portion to be taped over before granting inspection.

Id. at 682–683, 137 N.W.2d at 475.

In *Mathews v. Pyle*, 75 Ariz. 76, 81, 251 P.2d 893, 896–897 (1952) the Arizona Supreme Court established the following procedure:

> [The trial court should] require the . . documents . . . in question to be produced in court for the private examination of the trial judge in order that the court may determine whether such . . documents are confidential and privileged or whether their disclosure would be detrimental to the best interests of the state. In no other way can such questions be determined.
>
> Such . . . documents . . . , after examination by the trial judge, should be ordered placed in an envelope under seal of the court with a proviso that such seal shall not be broken or the envelope opened by any unauthorized person but that the same shall be properly identified and held by the clerk of the court as a confidential record until further order of either the trial court or supreme court.

There are a number of courts that hold that "right to know" statutes show a strong legislative policy to make all public records available to public inspection except where secrecy is specifically mandated by statute or rule: "[F]reedom of information is now, by statute, the rule, and secrecy is the ex-

ception." *Papadopoulos,* supra, 494 P.2d at 265; *MacEwan v. Holm,* supra; Forkosch, Freedom of Information in the United States, 20 DePaul L.Rev. 1 (1971); *See also State ex rel. Journal Co. v. County Court for Racine County,* 43 Wis.2d 297, 168 N.W.2d 836 (1969).

The greater weight of authority, however, supports Alarid's position in this case. These cases, although recognizing that there is a strong public policy favoring public access to government records, have added additional exceptions to those specified by statute. California cases are in predominance on this issue.

In *Bruce v. Gregory,* 65 Cal.2d 666, 56 Cal.Rptr. 265, 423 P.2d 193 (1967), the Supreme Court of California held that the rights created by the California statutes to inspect public records "are, by their very nature, not absolute, but are subject to an implied rule of reason." Id. at 676, 56 Cal.Rptr. at 271, 423 P.2d at 199; *Chronicle Publishing Co. v. Superior Court,* 54 Cal.2d 548, 7 Cal.Rptr. 109, 354 P.2d 637 (1960) (state bar records in disciplinary proceedings); *City and County of San Francisco v. Superior Court,* 38 Cal.2d 156, 238 P.2d 581 (1951) (communication in official confidence); *Runyon v. Board of California,* 26 Cal.App.2d 183, 79 P.2d 101 (1938) (letters and documents in possession of parole board).

In *Craemer v. Superior Court in and for Marin County,* 265 Cal.App.2d 216, 71 Cal. Rptr. 193 (1968), the court called attention to the numerous California cases that had passed on this question, and to the California statute, which provides that every citizen has the right of inspection "except as otherwise expressly provided by statute." That court stated the rule to be:

> [W]here there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed. In this regard the term "public policy" means anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel has a tendency to be injurious to the public or the public good.

Id. at 222, 71 Cal.Rptr. at 199.

New Mexico's "right to know" act, § 71–5–1, et seq. does not define "public record." It makes only the few exceptions discussed herein. There are numerous other exceptions created by statute that are not material hereto.

It is contended by Newsome that § 71–6–2(C), N.M.S.A. 1953 (Supp.1975) defining "public records" should apply in this case. That statute is part of the Public Records Act passed in 1959, § 71–6–1, N.M. S.A. 1953 et seq., ch. 245, 1959 N.M. Laws 694, to establish a system for preserving records. Section 71–5–1, supra, our "right to know" law was passed in 1947, ch. 130, 1947 N.M. Laws 239, and was amended in 1973, ch. 271 § 1, 1973 N.M. Laws 1222. The two laws have no relationship to each other for purposes of decision in this cause.

The definition of public records in § 71–6–2(C), supra, is so broad as to materials subject to preservation by the records division that it covers the trash in the waste basket. No reasonable interpretation of § 71–5–1, supra, could possibly include all of the records that would be subject to inspection by the public under that definition. *Sanchez v. Board of Regents,* supra, alluded to this statute but did not specifically rule that it applied in that case.

It would be helpful to the courts for the Legislature to delineate what records are subject to public inspection and those that should be kept confidential in the public interest. Until the Legislature gives us direction in this regard, the courts will have to apply the "rule of reason" to each claim for public inspection as they arise.

We hold that a citizen has a fundamental right to have access to public records. The citizen's right to know is the rule and secrecy is the exception. Where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed.

There may be circumstances under which the information contained in the rec-

ord can be justifiably withheld. The custodian has the initial duty to make this determination as to each record requested. He must first determine that the person requesting access is a citizen, § 71–5–1, supra, and that he is requesting the information for a lawful purpose. § 71–5–2, N.M.S.A. 1953. The burden is upon the custodian to justify why the records sought to be examined should not be furnished. It shall then be the court's duty to determine whether the explanation of the custodian is reasonable and to weigh the benefits to be derived from non-disclosure against the harm which may result if the records are not made available.

We subscribe to the procedures as set forth in *State ex rel. Youmans v. Owens,* supra, and *Mathews v. Pyle,* supra, as regards the handling of alleged confidential records when they reach the courts.

Applying these general principles to the case at hand, we decline to hold as Alarid would have us, that all information in the records regarding military discharges or arrest records should be exempted from disclosure. Blanket guidelines obviously are not practical. However, in any individual case where an employee has been solicited to give information, which information is vital to the University's employment procedure, and it is furnished after a promise to keep the information confidential, and where the release of that information would not be in the public interest, then it should be immune to disclosure. If, for instance, an employee was in military service during the Viet Nam conflict and received something less than an honorable discharge and this information was obtained under a promise of confidentiality, it would be in the public interest that this information be not released under the legal theories as above set forth. The same reasoning would apply as to arrest records.

The promise of confidentiality standing alone would not suffice to preclude disclosure. The promise would have to coincide with reasonable justification, based on public policy, for refusing to release the records, as was true in this case. Furthermore, the justification would have to be articulated by the custodian for the record.

Alarid complains that the request for inspection poses an extreme burden on his office. This is not a legitimate reason, by itself, for failure to make records available for inspection or for copying. The custodian may make reasonable restrictions and conditions on access to the records. Reasonable regulations may be made as to times when and places where they may be inspected or copied. The custodian may insist upon reasonable supervision for the safekeeping of the records. *Ortiz v. Jaramillo,* supra, and authorities cited therein, § 71–5–2, supra.

Granting of "Appropriate" Relief

The trial court's conclusions indicated that the alternative writ of mandamus was quashed because Newsome sought more relief than that to which he was entitled. He sought disclosure of "all personnel records" whereas he was entitled only to those which were not confidential. The effect of this ruling was to say "If you plead for too much relief, you get none at all."

Under N.M.R.Civ.P. 54(c) [§ 21–1–1(54)(c), N.M.S.A. 1953] the court below should have granted Newsome the relief to which he was entitled, by issuing a writ in conformity with the exemptions provided herein. The rule states in relevant part:

> Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

State ex rel. Gary v. Fireman's Fund Indemnity Co., 67 N.M. 360, 355 P.2d 291 (1960), dealt with this rule and modified a line of inconsistent prior cases which had limited parties to recovering only what had been prayed for in their pleadings.

New Mexico now clearly allows any appropriate relief to be granted in a case regardless of what is specifically re-

quested in the pleadings. Thus, *Fireman's Fund*, supra, allowed quantum meruit recovery, where the claim was based solely on express contract and *Honaker v. Ralph Pool's Albuquerque Auto Sales, Inc.*, 74 N.M. 458, 394 P.2d 978 (1964) allowed recovery of damages for breach of contract although the pleadings had prayed only for recission. Thus the filing of a complaint seeking relief of one sort is not an irrevocable election of remedies precluding the granting of relief of another kind. Id. at 464–465, 394 P.2d at 982.

Newsome was entitled to a ruling that he be granted the right to inspect those portions of the personnel records that are not specifically exempted by statute and are not considered to be confidential as defined herein. Failure to grant this relief was error.

This cause is remanded to the trial court for proceedings not inconsistent herewith.

IT IS SO ORDERED.

SOSA and PAYNE, JJ., concur.

568 P.2d 1245

Leroy G. ATENCIO, Individually, and Elizabeth Atencio, a minor, by her father and next friend, Leroy G. Atencio, Plaintiffs-Appellants,

v.

The ESPANOLA HOUSING AUTHORITY, the City of Espanola, and John Doe, manufacturer, a corporation, Defendants-Appellees.

No. 2881.

Court of Appeals of New Mexico.

June 28, 1977.

Pedro G. Rael, Zamora, Rael & Weinreb, Santa Fe, for plaintiffs-appellants.

Wayne C. Wolf, David W. Yount, Civerolo, Hansen & Wolf, Albuquerque, for defendant-appellee Espanola Housing Authority.

W. Booker Kelly, White, Koch, Kelly & McCarthy, Santa Fe, Scarborough & Scarborough, Espanola, for defendant-appellee City of Espanola.

OPINION

SUTIN, Judge.

The only question for determination is whether § 23–1–23, N.M.S.A.1953 (Vol. 5), a limitation statute, is unconstitutional because it denied plaintiffs the equal protection of the law. We say that it is unconstitutional and reverse the judgment of the trial court.

The statute reads in pertinent part as follows:

> . . . *[N]o suit, action or proceeding to recover damages for personal injury* or death *resulting from the negligence of any city, town or village,* or any officer thereof, *shall be commenced except within one [1] year next after the date of such injury.* All such suits, proceedings or actions not so commenced shall be *forever barred,* Provided, however, that as to all such actions heretofore accrued, suit to recover thereon may be instituted at any time on or before December 31, 1941, but not otherwise.

"[N]o suit, action or proceeding to recover damages . . . shall be commenced" is a limitation not only on the remedy but also on the right to institute an action. *Wall v. Gillett,* 61 N.M. 256, 298 P.2d 939 (1956). Section 23–1–23 stands as a bar to recovery where the action is brought more than one year after the date of the injury. *Seiler v. City of Albuquerque,* 57 N.M. 467, 260 P.2d 375 (1953). It is not special legislation contrary to Article IV, Section 24, of the New Mexico Constitution, *Hoover v. City of Albuquerque,* 58

N.M. 250, 270 P.2d 386 (1954), and it denies to a minor the benefit of an extension of the limitation period. *Noriega v. City of Albuquerque*, 86 N.M. 294, 523 P.2d 29 (Ct. App.1974).

Plaintiffs contend the statute is unconstitutional because it violates Article II, Section 18, of the New Mexico Constitution. It provides in pertinent part:

> . . . [N]or shall any person be denied the equal protection of the laws.

On *April 10, 1973*, plaintiff Elizabeth Atencio, nine years of age, was injured while playing on a merry-go-round for small children provided for them by the City of Espanola. The complaint was filed *April 8, 1976*, within a *three-year* period. The claim was barred by § 23–1–23, but it was not barred by § 23–1–8 that provides for a *three-year* limitation period after a cause of action accrues. Plaintiffs' complaint was dismissed with prejudice.

Plaintiffs contend that they were denied the equal protection of the law because under §§ 23–1–8 and 23–1–10, Elizabeth, nine years of age, would have had ten years (until her nineteenth birthday) to bring her claim against any person, firm or corporation, any county in the State, and the State of New Mexico, after her cause of action accrued, but, under § 23–1–23, her claim against the City was barred.

Were plaintiffs denied the equal protection of the law? This is a matter of first impression.

A. *The Legislative History of Limitation Statutes And Their Application to Persons Who Are Injured*

Before a determination on the constitutionality of § 23–1–23 can be made, we must explore the history of statutes of limitation in New Mexico and their application to persons who suffer injuries proximately caused by another. We are not confined to the "four corners" of § 23–1–23. We must view it in its relationship with other limitation statutes. "We regard the substance rather than the form [of § 23–1–23], and the controlling test is found in the operation and effect of the statute as applied and enforced by the State." *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 476, 52 S.Ct. 631, 633, 76 L.Ed. 1232 (1932), 84 A.L.R. 831 (1933).

Limitation statutes involving the State, its agency or a political subdivision have suffered a "tortious" adventure in New Mexico.

Since territorial days, the limitation period in every action began to run after the cause of action accrued, "and not afterwards, *except when otherwise specially provided*." [Emphasis added.] Section 23–1–1, N.M.S.A.1953 (Vol. 5). *For an injury to the person a claim could be brought within three years after the cause of action accrued.* Section 23–1–8. The limitation period for minors was extended "so that they shall have one [1] year from and after the termination of such disability within which to commence said action. Section 23–1–10.

In 1941, § 23–1–23 was enacted. Prior thereto, a victim of tortious conduct of a municipality could commence his action within three years when corporate or proprietary activity was performed. For governmental activity, the municipality was protected from suit by sovereign immunity. This statute, by fixing a one-year limitation period, specially provided otherwise within the exception stated in § 23–1–1. What prompted the legislature to enact this statute is unknown. Prior to 1941, we find only two cases that involved actions against municipalities for injuries to the person. *Alarid v. Gordon*, 35 N.M. 502, 2 P.2d 117 (1931); *Johnson v. City of Santa Fe*, 35 N.M. 77, 290 P. 793 (1930). These were actions against the City of Santa Fe. No towns or villages had been sued. No fund raising problems were involved. Municipalities were not burdened with such tort actions. The City says that since corporate and proprietary acts of the City were denied the defense of sovereign immunity, the statute was passed for the benefit of the City. True, but why was the limitation period fixed at one year instead of three years? Three years was the general statute of limitations for injury to the person. If it was an arbitrary classification, it was unconstitutional.

However, in 1959, to overcome the doctrine of sovereign immunity, the legislature allowed actions to be brought against the State, county, city and public agencies for their negligence and the negligence of officers, deputies, assistants, agents or employees acting in the course of their employment, provided these entities carried liability insurance. Section 5–6–20, N.M.S.A.1953 (Repl.Vol. 2, pt. 1), repealed by Laws 1975, ch. 334, § 18. No limitation period was fixed for protection of the State, county and public agencies. *But during the period in question, and prior to the 1975 repeal of the above statute, the three-year limitation period provided by § 23–1–8 was applicable to the State, county and public institutions for an injury to the person.*

In 1975, the legislature enacted the Public Officers and Employees Liability Act, § 5–13–1, et seq., N.M.S.A.1953 (Repl.Vol. 2, pt. 1, 1975 Supp.) [repealed Laws 1976, ch. 58, § 27]. This 1975 Act did not expressly repeal § 23–1–23. Section 5–13–14 of this Act fixed a *three-year* limitation for every suit, action or proceeding for recovery of judgment, commenced against the State or any political subdivision of the State for "bodily injury" and "personal injury" as defined in the Act. For purposes of discussing "equal protection of the law," we note that the limitation period of *three years* applied uniformly to claims filed against the State and "local public body." This phrase was defined as "all political subdivisions of the state and their agencies, instrumentalities and institutions". Section 5–13–3(B). This definition, of course, included municipalities.

In 1976, the Tort Claims Act was enacted. Section 5–14–1, et seq., N.M.S.A.1953 (1976 Interim Supp.). It is effective until July 1, 1978. It repealed the Public Officers and Employees Liability Act, supra. It also covers the State and any political subdivision. Section 5–14–14(A) provides:

> Actions against a governmental entity or a public employee for torts shall be forever barred, *unless such action is commenced within two [2] years* after the date of occurrence resulting in loss, injury or death, except that a minor under the full age of eight [8] years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability. [Emphasis added.]

The Tort Claims Act did not expressly repeal § 23–1–23.

What action the legislature will take in 1978 is unknown.

For a history of the doctrine of sovereign and governmental immunity, see Kovnat, Torts: Sovereign and Governmental Immunity in New Mexico, 6 N.M.L.Rev. 249 (1976).

From a review of the history of limitation statutes, we note that victims of tortious conduct of municipalities have *one year* in which to commence an action for personal injury; that from 1959 to 1975, victims of tortious conduct of the State, the county, and public agencies carrying liability insurance, and any person, firm or corporation, had *three years* in which to commence such action; *that from 1975 to 1976, victims of tortious conduct of all public and private entities, except cities, had three years in which to commence an action for personal or bodily injury*; that from 1976 to 1978, victims of tortious conduct of all public entities have *two* years in which to commence an action, and yet, § 23–1–23 remains undisturbed on our statute books.

From 1959 to 1975, we can say that the legislature was moving toward the establishment of a uniform limitation period of three years on governmental and private tort liability except for "any city, town or village". It has not by implication repealed § 23–1–23 because this statute also applies to municipal liability in other fields of law and equity separate and apart from tort liability. However, the legislature has so emasculated this statute that its effectiveness has become a "stale defense" to a "stale claim." We must now determine whether it was effective against plaintiffs.

B. *Section 23–1–23 created an arbitrary classification and denied plaintiffs the equal protection of the law*

McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975) delineates all of the rules of

law involved, when the validity of a statute is challenged, to determine whether a person is denied the equal protection of the law. In *McGeehan*, the New Mexico "guest statute" was declared unconstitutional because the classification, as between those who are denied and those who are permitted recovery for personal injuries, did not bear any substantial and rational relation to the legislative purposes of protecting the hospitality of the host driver and of preventing collusive lawsuits. The applicable standard was quoted as follows:

> "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.'" [88 N.M. at 310, 540 P.2d at 240]

To determine whether a special classification such as a municipality is reasonable, we must scrutinize two factors: (1) Are tort victims within this classification similarly circumstanced with those who are not? (2) Is there such a rational distinction between them that tort victims of municipal misconduct alone shall have one year in which to commence an action under § 23–1–23?

A victim of tortious conduct of a municipality is a plaintiff who seeks a claim for relief against a municipality. A victim of tortious conduct of a state, county, public agency, person, firm or corporation is a plaintiff who seeks a claim for relief against these entities. These are similarly circumstanced and should be treated alike unless there is some rational distinction that prevents equal treatment. We can find no such rationalization.

■ The doctrine of sovereign immunity was judicially discarded because it was obsolescent. It cannot be interposed as a defense in a tort claim by any governmental entity. *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975). Today, all governmental entities are subject to liability in accordance with the same rules of law as are applied to civil actions against any person, firm or corporation. Government entities, therefore, as tort-feasors, are put on an equal footing with private tort-feasors.

■ *Absent sovereign immunity*, any legislative classification must conform to constitutional guarantees so that all persons similarly circumstanced have equal access to the courts for the redress of wrongs. Under this concept, the classification consists of the State of New Mexico and its political subdivisions, and not the municipality alone. This is a reasonable classification. There is no rational basis for treating victims of tortious acts committed by municipalities differently than victims of tortious acts of all other governmental entities.

In determining limitation periods, the legislature should also consider the relationship of public to private entities.

Absent sovereign immunity, a municipality which is a public corporation is placed as a defendant in the same classification as a private corporation or partnership, all of these entities being creatures of the legislature. All of these entities serve the public within the municipality in varying degrees and in different respects. There is no rational basis for treating victims of tortious acts committed by municipalities differently than victims of tortious acts of private firms or corporations. A legislative classification that singles out one entity to the exclusion of all others may be arbitrary and unreasonable.

A statutory classification that treats victims of municipal torts differently from victims of private torts appears to be without a rational basis. For example, a citizen who is hit by a truck driven by an employee who works for a private company or public entity has three years to pursue his claim. Yet the same citizen, unfortunate enough to be hit by an employee of the municipality, must commence his action within one year or be forever barred, even though the victim of the municipal tort suffers a personal injury no less painful, disabling, costly or damage producing than the one he may have incurred when struck by the vehicle driven by any of the other entities. This is contrary to the spirit of the law in existence

at the time of the personal injury suffered by Elizabeth. It impedes the progress of the law toward a goal of uniform and even-handed justice. It impinges upon a fundamental right of equal access to a court to seek compensation for injuries suffered through the wrongful acts of another. It creates a repugnant discrimination that denies the equal protection of the law.

When we speak in terms of "equal protection of the law," we say that that which is equitable *in its application* is just and fair, and where a statute such as § 23–1–23 fails for lack of generality *in its application*, we must rectify the law.

We can find no authority, and none has been submitted to us, in which a court has determined the validity of a limitation statute like § 23–1–23. All authority submitted involves the validity of statutes or ordinances requiring *notice of a tort claim* against a local governmental entity. Annot., 59 A.L.R.3d 93 (1974). The courts are hopelessly in conflict with dissenting opinions prevalent. Notice of a tort claim is a condition precedent to the commencement of an action. The purpose of the notice is to give the city time to negotiate an amicable agreement with an injured party and to give a municipality time to investigate a claim, determine its merit and to prepare a defense if necessary. This constitutional issue is not before us. Section 23–1–23 bears no relationship to this purpose. It simply bars a remedy when an action is not commenced in time.

The only type of "notice case" that is directly in point is one that arises when a notice has been given but the action was not commenced in time. *Jenkins v. State*, 85 Wash.2d 883, 540 P.2d 1363 (1975) follows the precept that we have adopted in the instant case. The Washington statute reads:

> No action shall be maintained on any claim for damages until it has been presented to the board of county commissioners and sixty days have elapsed after such presentation, but *such action must be commenced within three months after the sixty days have elapsed.* [Emphasis by Court] [540 P.2d at 1365].

The Court said:

> As stated above, we have been unable to discern any rational basis for treating counties and victims of their tortious conduct any differently than other governmental entities and victims of their tortious conduct. Accordingly, we hold RCW 36.45.030 unconstitutional as violative of Const. art. 1, § 12 and U.S.Const. amend. 14 insofar as it purports to impose a different time limitation on the commencement of tort actions against counties than is imposed on the commencement of tort actions against other governmental entities in the state. [540 P.2d at 1368].

The Espanola Housing Authority says:

> The fact that a Washington court found that there were no valid reasons for distinguishing cities, counties and states in Washington is not authority for the proposition that no such valid reasons exist in New Mexico.

The City says:

> The *Jenkins* case is certainly distinguishable from the instant situation on its facts for in the State of Washington, as the court observed, the legislature had established a comprehensive uniform scheme of governmental tort liability so that all units of government, whether county, city or state, were exposed to the same areas of liability.

To distinguish is: "To point out an essential difference; to prove a case cited as applicable, inapplicable." Black's Law Dictionary (Rev. 4th ed. 1968) at 561. The defendants state a distinction without a difference.

The defendants claim that there are many distinctions between cities, counties and states: (1) That a shorter statute of limitations substantially narrows the cities' exposure and would thus be a vital factor in determining insurance rates; (2) that cities are limited in their ability to raise taxes; (3) that cities are severely limited to raise funds, i. e., if claims against a city must be commenced within one year of their occur-

rence, the city is better able to predict its financial position for a given year; (4) that cities have a greater need to know what claims they may be faced with during a fiscal year because, potentially, they have a larger number of claims for services rendered and a greater potential liability.

None of these distinctions meet the test to establish a reasonable classification. The test is not the effect that the statute has upon the economic policy of the city. As *McGeehan* says:

> 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. [88 N.M. at 310, 540 P.2d at 240].

McGeehan also said:

> 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. [88 N.M. at 312, 540 P.2d at 242].

The guest statute was enacted in 1935. Section 23–1–23 was enacted in 1941, over a third of a century ago. Since 1941, time and conditions have changed. New legislative enactments have been made. Housing authorities have been created. Playground equipment has been furnished. Even if the classification made in 1941 may have had a fair and substantial relation to the objectives of the statute, which we do not concede, circumstances have changed.

We hold § 23–1–23 to be unconstitutional and reverse.

IT IS SO ORDERED.

LOPEZ, J., specially concurring.

HERNANDEZ, J., dissenting.

LOPEZ, Judge (specially concurring).

I concur in the result only.

The traditional equal protection test (as opposed to the strict standard of review) requires three steps in determining the reasonableness of a statutory classification: (1) the classification itself must be a rational one; *and* (2) the classification must further a proper governmental purpose; *and* (3) all persons within the classes established must be treated equally.

It must be emphasized that laws are almost always inherently unequal, involving some disparity in treatment and seldom affecting everyone in the country in like manner. The usual legislative method is to provide for or regulate *classes* of persons or property. Moreover, where *no* "fundamental" rights or "suspect criteria" are involved, classifications are generally presumed reasonable; i. e., if *any* state of facts can reasonably be conceived that would justify the classification, the existence of those facts will be assumed by the court to be the basis of the classification in order to uphold the statute. *Lindsley v. Natural Carbonic*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911). The majority has not effectively countered this presumption, nor effectively established that the classifications involved *do not* further any proper governmental purpose.

Given a justiciable constitutional controversy, the court must nevertheless temper its constitutional analysis with the traditional reluctance to substitute a judicial determination for the conclusion of the legislature. In the case *sub judice*, however, the longstanding principle of deciding constitutional questions only when necessary must yield. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). I concur in Judge Sutin's opinion because the classification *itself* is irrational, although it may treat all persons within the class alike and may reasonably further a proper governmental purpose.

568 P.2d 1252

STATE of New Mexico,
Plaintiff-Appellee,

v.

Melquides C. DeBACA,
Defendant-Appellant.

No. 2954.

Court of Appeals of New Mexico.

Aug. 9, 1977.

Thomas A. Tabet, Marchiondo & Berry, P. A., Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Roderick A. Dorr, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted in magistrate court of driving while under the influence of liquor and careless driving, defendant appealed to the district court. The notice of appeal was filed in the district court on August 6, 1976. The district court trial was held on March 3, 1977. The district court found defendant guilty; he appealed to this Court. The dispositive issue concerns the time of the district court trial and involves three rules adopted by the Supreme Court.

The three rules are: (1) old Magistrate Criminal 40 (Rule 40 of the Rules of Criminal Procedure for the Magistrate Courts, effective October 1, 1974); (2) new Magistrate Criminal 41 (this was formerly old Magistrate Criminal 40 renumbered to Rule 41 upon adoption of amendments effective October 1, 1976); (3) Criminal Procedure 37 (Rule 37 of the Rules of Criminal Procedure for the District Courts).

Old Magistrate Crim. 40 reads:

"(h) *Disposition—Time Limitations.* Any appeal pending in the district court ninety days after the filing of the notice of appeal without disposition shall be: (1) reversed and an order shall be entered by the district court dismissing the complaint with prejudice, unless the defendant was responsible for the failure of the district court to complete the disposition of the proceeding; (2) affirmed, if, after a hearing, the district court finds that the defendant, without good cause, was responsible for the failure of the district court to complete the disposition of the case.

"(i) *Extension of Time.* The time limits specified in subsection (h) of this rule may be extended one time for a period not exceeding ninety days upon a showing of good cause to the district court. The party seeking an extension of time beyond the ninety-day appeal limit of subsection (h) of this rule shall, within said ninety-day period, file with the clerk of the district court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause and forthwith serve a copy thereof on the opposing party. Hearings on such petitions will be held by the district court on at least five days' notice to the parties.

No other extension of time shall be allowed."

New Magistrate Crim. 41 reads:

"(i) *Disposition—Time Limitations.* The district court shall try the appeal within six months after the filing of the notice of appeal. Any appeal pending in the district court six months after the filing of the notice of appeal without disposition shall be dismissed and the cause remanded to the magistrate court for enforcement of its judgment.

"(j) *Extension of Time.* The time limits in paragraph (i) of this rule may be extended one time for a period not exceeding ninety days upon a showing of good cause to a justice of the Supreme Court. The party seeking an extension of time beyond the six months appeal limit of paragraph (i) of this rule shall, within said six month period, file with the clerk of the Supreme Court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause and forthwith serve a copy thereof on the opposing party. No other extension of time shall be allowed."

Criminal Procedure 37 reads:

"(b) *Trial.* The trial shall be commenced within six months after the date of filing in the district court of the complaint, information, indictment, or notice of appeal from the magistrate court or the date of arrest, whichever is later. In the event of a new trial, mistrial or reversal of a conviction on appeal, a subsequent trial shall be commenced within six months after the date of the order granting the new trial, the declaration of the mistrial or the mandate of the appellate court.

"(c) *Extension of Time.* The time for commencement of trial as specified in the preceding paragraph may be extended only by the Supreme Court of New Mexico, a Justice thereof, or a Judge designated by the Supreme Court, for good cause shown. The party seeking an extension of time beyond the six-month period shall, within said six-month period, file with the clerk of the Supreme Court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause and forthwith serve a copy thereof on opposing counsel. Hearings on such petitions will be held in Santa Fe, or such other place as may be designated by the Supreme Court, on five days notice to the parties.

"(d) *Effect of Noncompliance With Time Limits.* In event the trial of any person described in paragraph (b) of this rule does not commence within the time therein specified, or within the period of any extension granted as provided in this rule, the information or indictment filed against such person shall be dismissed with prejudice, unless the Supreme Court finds that the defendant is responsible for failure to comply with the time limits. If the Supreme Court finds that the defendant is responsible for the failure to comply with the time limits, the defendant not in custody may have his release revoked unless there is good cause shown for the failure to comply."

Which of the Two Magistrate Rules is Applicable?

The difference between old Magistrate Crim. 40(h) and new Magistrate Crim. 41(i) is substantial. Where time requirements for hearing the appeal in the district court are not met, instead of dismissal of the *complaint* with prejudice as provided under the old rule, the *appeal* is dismissed and the magistrate court *judgment is enforced* under the new rule.

The appeal in this case was pending at the time the amendments of October 1, 1976 became effective. N.M.Const., Art. IV, § 34 provides that no act of the Legislature shall change the rules of procedure in any pending case. This constitutional provision applies to court rules as well as legislation. *Marquez v. Wylie*, 78 N.M. 544, 434 P.2d 69 (1967).

Old Magistrate Crim. 40 is the magistrate court rule applicable to this case; new Magistrate Crim. 41 is not applicable.

Dismissal Under the Applicable Magistrate Rule

Old Magistrate Crim. 40 provides for dismissal of the complaint with prejudice if the appeal is pending in the district court ninety days after the filing of the notice of appeal. The ninety-day period expired on November 4, 1976. Because the appeal was pending on that day, defendant was entitled to a dismissal after November 4, 1976 unless (1) the avoidance provisions in the magistrate rule applied, or (2) the magistrate rule was not to be applied because of Criminal Procedure Rule 37.

One avoidance provision, appearing in old Magistrate Crim. 40(h), is that dismissal is not required if "the defendant was responsible for the failure of the district court to complete the disposition of the proceeding".

There is nothing in the appellate record showing defendant was responsible for a failure to complete the appeal *within* ninety days. An order of the district court, filed November 8, 1976, states that the case came on for trial, that the State appeared and was ready for trial, and that neither defendant nor his attorney appeared because defendant was in the hospital. The order continues the cause and declares "that Rule 37 [Crim. Procedure 37] be and hereby is tolled during the period of this continuance." Neither the order filed November 8, 1976 nor anything else in the record shows that the case came on for trial within the ninety-day period or that defendant's hospitalization caused a delay within the ninety-day period. Delay by defendant does not provide a basis for avoiding the ninety-day requirement.

A second avoidance provision, appearing in old Magistrate Crim. 40(i), authorizes a "one time" extension of the time limits appearing in old Magistrate Crim. 40(h). We do not consider whether the district court order of November 8, 1976 should be considered as an attempted extension because, even if so intended, it was not effective to extend the time limit. The extension authorized by old Magistrate Crim. 40(i) must have been sought within the original ninety-day period. This was not done. The extension provision does not provide a basis for avoiding the ninety-day requirement.

The showing in this appeal is that defendant was entitled to a dismissal when he moved to dismiss at the beginning of the trial on March 3, 1977. Although defendant moved to dismiss, he did not rely on old Magistrate Crim. 40; he claimed he was entitled to dismissal under Criminal Procedure 37. Under the liberal approach to raising issues adopted in *Albertson v. State*, 89 N.M. 499, 554 P.2d 661 (1976) we hold the motion to dismiss sufficiently raised the issue of dismissal under old Magistrate Crim. 40.

The question then is whether old Magistrate Crim. 40 was not to be applied because of Criminal Procedure 37.

Applicability of Criminal Procedure 37

Generally speaking, Criminal Procedure 37(b) provides for the commencement of trials within six months from the filing in the district court of the notice of appeal from the magistrate court.

Again, generally speaking, Criminal Procedure 37(d) provides for dismissal with prejudice if the trial is not commenced within the six-month period "unless the Supreme Court finds that the defendant is responsible for failure to comply with the time limits.

There are two items involving delay by the defendant. Both items occurred after the ninety-day provision of old Magistrate Crim. 40 had elapsed; both, however, occurred within six months of the date the notice of appeal was filed in the district court. One item is a motion for continuance filed on December 14, 1976 in which defendant expressed a willingness to execute "any necessary waiver regarding any delay caused hereby." We do not consider this motion further because it does not appear that the district court ever ruled on the motion. The second item is the order of November 8, 1976 which continued the case because of defendant's hospitalization and stated that Criminal Procedure 37 was "tolled" during the period of continuance.

We do not consider the tolling provision further; Criminal Procedure 37 does not authorize the district court to toll the time requirement stated therein and no claim is made that the district court had tolling authority.

The delay due to defendant's hospitalization does require consideration. The fact of hospitalization could support a finding that defendant was responsible for failure to comply with the time requirements. Criminal Procedure 37(d) provides such a finding is to be made by the Supreme Court.

■ Does "Supreme Court" in Criminal Procedure 37(d) include the Court of Appeals? No. The history of the six-month time requirement appearing in former Civil Procedure Rule 95, in the wording of Criminal Procedure 37 as originally adopted in 1972, and the present wording of Criminal Procedure 37 after being amended in 1976 indicates that control of time requirements was intended to be exclusively in the Supreme Court. Extensions of time can be granted only by the Supreme Court, a justice thereof or a judge designated by the Supreme Court. In the light of these extension provisions, "Supreme Court" in Criminal Procedure 37(d) is not to be construed to include the Court of Appeals.

■ Since only the Supreme Court can make the finding that defendant was responsible for the delay and since the order of November 8, 1976 raises that issue as a matter of fact, this Court lacks subject matter jurisdiction to decide the factual question. Should this case be transferred to the Supreme Court under § 16–7–10, N.M.S.A. 1953 (Repl.Vol. 4)? Such a transfer appears to be required if Criminal Procedure 37 applies to appeals from the magistrate court to the district court.

Is Criminal Procedure 37 applicable?

The six-month provision for commencing a prosecution first appeared in Civil Procedure Rule 95 which was effective July 1, 1971. This rule did not refer to appeals from magistrate courts; it was limited to "persons charged . . . in the district courts". The Supreme Court order adopting Rules of Criminal Procedure repealed Rule 95 by the language "any rules of civil procedure governing criminal proceedings are hereby repealed". See Compiler's Notes to § 41–23–1, N.M.S.A. 1953 (2d Repl. Vol. 6, Supp.1975).

The Rules of Criminal Procedure were effective July 1, 1972. Compiler's Notes to § 41–23–1, *supra*. As originally worded, Criminal Procedure 37 did not apply to appeals from the magistrate court. The original wording of Criminal Procedure 37(b) applied the six-month time requirement to the "trial of all cases *not* within magistrate court trial jurisdiction . . . ." (Our emphasis.) Section 41–23–37, N.M.S.A. 1953 (2d Repl.Vol. 6, Supp.1975). Consistent with this original wording, Criminal Procedure 37(d) provided for the dismissal of informations and indictments for violation of the six-month requirement. This original wording of Criminal Procedure 37 remained until the amendment of Criminal Procedure 37(b), effective April 1, 1976.

Magistrate Court Rules, effective January 1, 1969, contain no time limits in connection with an appeal to the district court from the magistrate's judgment. Sections 36–21–1 through 36–21–75, N.M.S.A. 1953 (2d Repl.Vol. 6).

The 1969 Magistrate Court Rules were replaced, effective October 1, 1974, with two sets of Magistrate Court Rules—criminal and civil. The criminal rules for magistrate courts included the Rule 40 referred to in this opinion as old Magistrate Crim. 40. This rule was the first which imposed a time requirement on appeals from the magistrate court.

Old Magistrate Crim. 40(h) and (i) imposed specific time limit provisions; these were discussed earlier in this opinion. Old Magistrate Crim. 40(g), however, states:

> "The Rules of Criminal Procedure for the District Courts shall apply to and govern the procedure in the district courts on appeal from the magistrate court."

Did this provision incorporate the six-month provision of Criminal Procedure 37 into appeals from the magistrate court? As of

October 1, 1974, Criminal Procedure 37(b) applied only to the trial of cases not within magistrate court trial jurisdiction. Although old Magistrate Crim. 40(g) incorporated the Rules of Criminal Procedure, the six-month provision was not incorporated because Criminal Procedure 37(b) did not apply to appeals from the magistrate court.

Until April 1, 1976, the only time limitation on appeals from the magistrate court was old Magistrate Crim. 40(h) and (i). On that date an amendment to Criminal Procedure 37(b) became effective. As amended, the rule states:

> "The trial shall be commenced within six months after the date of filing in the district court of the complaint, information, indictment, or notice of appeal from the magistrate court or the date of arrest, whichever is later."

The use of the words "complaint" and "notice of appeal from the magistrate court" are indications of an intent to apply the six-month provision to magistrate court appeals. Such an indication raises questions as to the interrelationship between Criminal Procedure 37 and old Magistrate Crim. 40(h) and (i).

(a) The maximum time, including the one authorized extension, for the appeal under the magistrate rule was 180 days; under Criminal Procedure 37 the time is six months plus extensions granted by the Supreme Court.

(b) The magistrate rule permitted one extension by the district court; "[n]o other extension of time shall be allowed." Old Magistrate Crim. 40(i). Criminal Procedure 37 permits extensions only by the Supreme Court, or its designee; no limit is placed on the number of extensions.

(c) The ninety-day dismissal provision of the magistrate court rule was not to be applied if the district court found defendant was responsible for the delay. Criminal Procedure 37 permits such a finding only by the Supreme Court.

(d) The magistrate court rule expressly provided for dismissal if the time requirements of the magistrate rule were not met. Criminal Procedure 37(d) was *not* amended to provide for dismissal of appeals from magistrate court; Criminal Procedure 37(d) provided only for the dismissal of indictments and informations.

In adopting the amendment to Criminal Procedure 37(b), did the Supreme Court intend to abolish the time requirements of the magistrate rule? If so, wouldn't the magistrate rule have been amended?

Did the Supreme Court intend that Criminal Procedure 37 apply to magistrate appeals only subsequent to the expiration of the magistrate rule time requirements? If so, there would be little effect on appeals from magistrate court because the magistrate rule provides for dismissals prior to the time Criminal Procedure 37 would apply.

If the time requirements of Criminal Procedure 37(b) were intended to apply to magistrate appeals, wouldn't Criminal Procedure 37(d) have been amended at the time of the amendment to Criminal Procedure 37(b)?

We draw alternate conclusions from the foregoing. (1) The inclusion of "complaint" and "notice of appeal from the magistrate court" in Criminal Procedure 37(b) was inadvertent and the Supreme Court did not intend that Criminal Procedure 37 was to apply to appeals from the magistrate court. (2) If Criminal Procedure 37 was intended to apply, the intent was not carried out because of the failure to amend Criminal Procedure 37(d).

[redacted] These conclusions are bolstered by the amendments to old Magistrate Crim. 40 effective October 1, 1976. These amendments appear as new Magistrate Crim. 41 (see the second paragraph of this opinion). New Magistrate Crim. 41 is more consistent with Criminal Procedure 37 than was old Magistrate Crim. 40, with a major exception. That exception, previously noted in this opinion, is that noncompliance with the time limits of new Magistrate Crim. 41 results in dismissal of the appeal and enforcement of the magistrate court judgment. Under old Magistrate Crim. 40, and under

Criminal Procedure 37, if applicable, there would be a dismissal of the complaint for noncompliance with the time limits. Thus, if Criminal Procedure 37 applies to appeals from the magistrate court, there is a conflict between Criminal Procedure 37 and new Magistrate Crim. 41. There is no conflict if Criminal Procedure 37 is not applicable to appeals from magistrate court. The new provisions appearing in new Magistrate Crim. 41, adopted subsequent to the amendment of Criminal Procedure 37(b), and the continued failure to amend Criminal Procedure 37(d) support our conclusions that Criminal Procedure 37 does not apply to appeals from the magistrate court.

Criminal Procedure 37 not being applicable, the time limits of old Magistrate Crim. 40 control and defendant is entitled to a dismissal.

The judgment and sentence of the district court is reversed. The cause is remanded with instructions to dismiss the criminal complaint on which the magistrate court and district court judgments are based and to discharge the defendant.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.