582 P.2d 378

STATE of New Mexico, Petitioner,

v.

Floyd LANKFORD, Respondent.

No. 11941.

Supreme Court of New Mexico.

July 25, 1978.

Rehearing Denied Aug. 9, 1978.

Toney Anaya, Atty. Gen., Charlotte Hetherington Roosen, Asst. Atty. Gen., Santa Fe, for petitioner.

Reginald J. Storment, Appellate Defender, Douglas Barr, Asst. Appellate Defender, Santa Fe, for respondent.

OPINION

EASLEY, Justice.

Defendant was convicted by a jury of unlawful taking of a vehicle. The Court of Appeals reversed the conviction. We reverse the Court of Appeals and reinstate the judgment of conviction.

The dispositive issue is whether there is substantial evidence in the record to support the jury verdict as to the charge that the offense was committed between August 16 and 31, 1976.

The Facts

The criminal information charged the defendant with unlawful taking of a motor vehicle "on or about August 31, 1976." Defendant filed a "Demand for Particulars" and the District Attorney responded with a "Bill of Particulars" stating that the crime was committed sometime between August 16 and 31, 1976.

The automobile in question, a Volkswagen, had been left by the owner, Mrs. Yoeman, at Bowlin's Teepee, twenty miles west of Deming for a period of about six weeks. Darroll Homer testified that he went with the defendant to unlawfully take the automobile "approximately somewhere in August." On being cross-examined as to how he knew the incident occurred in August he stated "because I was there." Homer later stated that the incident "could have happened in August." The manager of Bowlin's testified that the car disappeared from the "very end of August up to the 10th of September." A sheriff's report which was introduced as an exhibit without objection showed that the owner had called the sheriff's office on September 8, 1976, and reported to a deputy sheriff that she had just talked with someone at the Teepee and was informed that the last time the car had been seen was on Saturday, September 4. There was other evidence which showed the taking may have been in September.

The trial court gave defendant's requested instruction that required the jury to find that the crime was committed between August 16 and 31, 1976. The jury brought back a guilty verdict.

Opinion of the Court of Appeals

The Court of Appeals by memorandum opinion reversed the conviction, ruling that there was no substantial evidence in the record that the taking of the vehicle occurred within the specified dates. Other holdings of that court are not material hereto.

In determining whether the evidence supports a criminal charge or an essential element thereof, the appeals court must view the evidence in a light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of a verdict of conviction. *State v. Lucero*, 88 N.M. 441, 541 P.2d 430 (1975); *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975); *State v. Parker*, 80 N.M. 551, 458 P.2d 803 (Ct.App.1969), *cert. denied*, 80 N.M. 607, 458 P.2d 859 (1969). The appellate court does not weigh the evidence and may not substitute its judgment for that of the jury. *State v. Santillanes*, 86 N.M. 627, 526 P.2d 424 (Ct.App.1974); *see State v. Vigil*, supra.

Where testimony is conflicting, such conflict raises questions of fact for a jury to decide. *State v. Ellis*, 89 N.M. 194, 548 P.2d 1212 (Ct.App.1976), *cert. denied*, 89 N.M. 206, 549 P.2d 284 (1976); *State v. Seaton*, 86 N.M. 498, 525 P.2d 858 (1974).

The issue was clearly drawn. The pleadings claimed the offense occurred between August 16 and 31. The evidence was conflicting, but there was evidence that the taking occurred at the "very end of August." The jury was charged that, in order to convict they must find that the defendant committed the offense within the specified dates. The jury convicted.

We hold that there is substantial evidence upon which the jury could find the defendant committed the offense during the time claimed by the state. We do not reach the other issues addressed by the Court of Appeals.

We reverse the Court of Appeals and order the judgment of conviction reinstated in the trial court.

IT IS SO ORDERED.

McMANUS, C. J., and PAYNE and FEDERICI, JJ., concur.

582 P.2d 379

NEW MEXICO BANK AND TRUST COMPANY, Plaintiff-Appellant,

v.

LUCAS BROTHERS, a partnership composed of Raymond A. Lucas and Johnny T. Lucas, Raymond A. Lucas, Johnny T. Lucas and Louise V. Lucas, husband and wife, Liberty National Bank and Nathan G. Howry, Defendants-Appellees.

No. 11511.

Supreme Court of New Mexico.

July 26, 1978.

Rehearing Denied Aug. 8, 1978.

Heidel, Samberson, Gallini & Williams, Jerry L. Williams, Lovington, for plaintiff-appellant.

Sanders, Templeman & Crutchfield, C. Barry Crutchfield, Lovington, for defendants-appellees.

OPINION

PAYNE, Justice.

New Mexico Bank & Trust Company filed a mortgage foreclosure action on several notes. The defendants included the Lucas Brothers partnership, maker of the notes, and Liberty National Bank. Liberty counterclaimed to foreclose a mortgage it held on the property. The trial court granted judgment in favor of the New Mexico Bank in the amount of $110,855.77 and in favor of Liberty in the amount of $32,169.30. It further ruled that $5,000 of the New Mexico Bank judgment would constitute a first lien on the real estate superior to Liberty's lien. We are asked to review the priorities.

A chronology of the loans is helpful in understanding the issues:

Loan	Amount	Date of filing real estate mortgage	Comment
A. N.M. Bank	$15,000	12-29-69	
B. N.M. Bank	$20,000	2-9-70	Paid off "A" but mortgage for "A" was not released.
C. N.M. Bank	$25,500		No mortgage filed on real estate. Dated 4-1-73 and secured by personal property.
D. N.M. Bank	$15,700		No mortgage filed on real estate. Dated 5-10-73 and secured by personal property.
E. N.M. Bank	$9,000		No mortgage filed on real estate. Dated 8-30-73 and secured by personal property.
F. Liberty	$35,959.31	9-20-73	
G. N.M. Bank	$52,226		Total from five different loans all made after the date of Liberty's mortgage "F."

On the date of the Liberty loan and mortgage Lucas Brothers owed a balance of $55,200 to New Mexico Bank. The real estate mortgages securing New Mexico Bank loans "A" and "B" each contained what is referred to as a "dragnet clause." The clause provides that the real estate will secure,

> [t]he payment of all loans, advances, indebtedness or liabilities, whether now

existing or which hereafter come into existence, whether matured or unmatured, whether direct or indirect, absolute or contingent, primary or secondary, including any extensions and renewals thereof, and however acquired by mortgagee, due the mortgagee from the mortgagor.

After this action was commenced Lucas Brothers filed bankruptcy. It did not answer the complaint and default judgment was entered against it. The personal property pledged as collateral was sold and the amount credited to New Mexico Bank.

The trial court found that at the time Liberty made its loan the outstanding balance on the New Mexico Bank loan directly secured by the real estate mortgage was $5,000. On the basis of that finding, it ruled that New Mexico Bank was entitled to priority on only that amount plus interest, costs and attorney's fees. The trial court further found that Liberty was entitled to second priority for the full amount of its claim. The court then held that all other monies loaned by New Mexico Bank were secured by a lien on the property which was inferior to Liberty's lien.

The issue on appeal is whether the trial court correctly set the priority between the parties. New Mexico Bank argues that the trial court erred in one of two ways:

(1) It claims that under the "dragnet clause" of the mortgage all subsequent loans were secured by the mortgage and relate back to the date of the original loan. It maintains that its agreement with the Lucas Brothers was to finance a "hog-feeding operation." Thus all the loans made pursuant to this agreement were secured by the original mortgage.

(2) In the alternative, it contends that even if not entitled to priority on the entire amount it is entitled to priority on the total amount loaned to Lucas Brothers prior to the Liberty loan.

Liberty maintains that the trial court correctly ruled that the loans made subsequent to the $20,000 loan of January, 1970 were unrelated to the purpose of that loan and that any subsequent loans did not relate back to the original date.

The issue considered in this appeal has been resolved in future cases by the Legislature through the enactment in 1975 of § 61–7–9, N.M.S.A.1953 (Supp.1975), which provides as follows:

> Every mortgage or other instrument securing a loan upon real estate and constituting a lien, or the full equivalent thereof, upon the real estate securing such loan, may secure future advances and the lien of such mortgage shall attach upon its execution and have priority from the time of recording as to all advances, whether obligatory or discretionary, made thereunder until such mortgage is released of record; Provided, that the lien of such mortgage shall not exceed at any one time the maximum amount stated in the mortgage.

Although not controlling in the present case, we are persuaded by the rationale and the logic of the statute.

The importance of allowing open-ended lending made possible by the "dragnet clause" is well recognized. *First Nat. Bank of Guntersville v. Bain*, 237 Ala. 580, 188 So. 64 (1939); *Smith Eng. & Const. Co. v. United States Fid. & Guar. Co.*, 199 So.2d 302 (Fla.Dist.Ct.App.1967); *Estes v. Republic National Bank of Dallas*, 462 S.W.2d 273 (Tex.1970). However, in lending money secured by property, recording statutes provide for notice to other potential lenders and indicate the upper limits of that financing. § 71–2–1, N.M.S.A.1953 (Repl.1961). Because potential lenders rely upon the recorded mortgages to determine whether to make other loans there must be certainty as to the extent to which a mortgage encumbers property. It would defeat the purpose of recording to allow "dragnet clauses" to extend to the bounds argued by appellants.

In the present case the trial court found that the first mortgage given by Lucas Brothers was paid off by the proceeds from the second loan. There is substantial evidence to support the finding. When the underlying obligation was discharged, New Mexico Bank had the obligation of releasing the mortgage. § 61–7–4, N.M.S.A.1953 (Repl.1974).

The validity of the second mortgage given by Lucas Brothers to New Mexico Bank is not questioned. The face amount of the mortgage was $20,000 and it contained a "dragnet clause." Liberty had notice of that mortgage and of the "dragnet clause." We, therefore, hold that New Mexico Bank's lien has first priority in the real estate in the amount of $20,000 plus costs, interest and attorney's fees instead of the $5,000 allowed by the trial court. We affirm the trial court's ruling that the Liberty lien has second priority in the amount of $28,144.82 plus costs, interest and attorney's fees. New Mexico Bank is entitled to a third priority lien on the real estate in the amount of the balance of the money owed to it by Lucas Brothers.

We affirm the decision of the trial court except as to the amount of New Mexico Bank's first lien. The case is remanded for the entry of an appropriate order.

IT IS SO ORDERED.

SOSA and FEDERICI, JJ., concur.

582 P.2d 382

STATE of New Mexico, Plaintiff-Appellee,

v.

Kenneth CRANFORD, Defendant-Appellant.

No. 11767.

Supreme Court of New Mexico.

Aug. 4, 1978.

John B. Bigelow, Chief Public Defender, John L. Walker, Asst. Public Defender, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Dennis Murphy, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SOSA, Justice.

After losing on his appeal from a conviction for first-degree murder, the petitioner-appellant urges this Court to reverse the

order of the trial court denying him post-conviction relief, stating as grounds for such relief that he was denied his right to be present at all critical stages of his trial, alleging that he was not present when a supplementary instruction was read to the jury. Inasmuch as the petitioner failed to raise this issue during his first appeal, we affirm the trial court. Furthermore, the record being silent as to his presence during this critical stage of the trial, the petitioner has failed to preserve the alleged error and therefore there is nothing to review.

Petitioner-appellant was tried and convicted of first-degree murder in the district court. A direct appeal was taken raising certain errors in procedure at the defendant's trial and is reported in *State v. Cranford,* 83 N.M. 294, 491 P.2d 511 (1971).

Petitioner claims that on April 16, 1971, during his trial, a supplementary shotgun instruction was read to the jury, allegedly outside his presence. Subsequently, petitioner filed a Rule 93 motion on September 11, 1974, requesting post-conviction relief. N.M.R.Civ.P. 93 [§ 21–1–1(93), N.M.S.A. 1953 (Repl. 1970)]. The trial court summarily denied this motion and an appeal was filed. This Court issued a mandate on November 10, 1975, directing the trial court to hear petitioner's claim that he was not present during the submission of a supplementary instruction to the jury. This matter also came before this Court on petitioner's original habeas corpus proceeding, alleging that he had not been given a hearing pursuant to the previous mandate of this Court. Another mandate was issued on October 19, 1977, directing the trial court to comply with the November 1975 mandate.

In compliance with these mandates a hearing was held on November 8, 1977, during which time testimony was taken on behalf of the petitioner. No testimony was offered by the prosecution. The trial court entered its finding of facts and conclusions of law and an order denying relief to petitioner. This appeal was taken pursuant to Rule 93(e) which governs appeals from post-conviction motions of this type. § 21–1–1(93)(e).

The relevant facts presently before this Court are as follows. At the culmination of the defendant's trial for first-degree murder, the jury retired to deliberate on the evening of August 15, 1971. The jury was sent home that evening with instructions to return the following morning to continue deliberations. On that second day of deliberations, the jury was excused for lunch and upon returning from the lunch recess the members were given the contested shotgun supplementary instruction. The record is silent as to the presence of the defendant both at the time the court announced its intentions to give the additional instruction and also at the time the jury was brought in for the reading of the instruction. The only transcript reference to petitioner's presence in this portion of the trial appears at the time of the return of the jury for its verdict on April 16, 1971.

On November 8, 1977, pursuant to his Rule 93 motion, a hearing was held on petitioner's allegations that he was not present in the courtroom during the giving of the supplemental instruction to the jury. During this hearing, the petitioner testified that he specifically remembered that he was not present in the courtroom during the reading of any jury instructions dealing with the materials contained in the supplemental instruction. He testified that he learned about the supplemental instruction from having read the newspaper after his conviction while awaiting sentencing in the county jail.

Further testimony elicited during the hearing was received from an investigator for the public defender. The testimony of the investigator revealed that none of the jurors who had sat on the petitioner's trial, and who had been contacted, was able to remember whether or not the petitioner was present when the instruction was read to them.

The petitioner also presented testimony of his polygraph expert. However, after lengthy foundation testimony required to establish the relevance of the examination, the trial court ruled that the questions used on the polygraph test were not relevant and

that all the testimony of the petitioner's expert should be stricken.

The trial court also found that the petitioner failed to meet his burden of proof by preponderance of the evidence that he was not present at the time of the giving of the shotgun instruction; and even if he was not present, there was no prejudice resulting from the lack of his presence at that time. From this decision the petitioner appeals.

The petitioner urges this Court to reverse the order of the trial court denying him relief under Rule 93. He argues that where the only evidence is that presented on behalf of the petitioner, and where that evidence is allegedly uncontradicted and unimpeached, then this Court should reverse the findings of the trial court if the evidence does not support those findings. He further argues that where the evidence of a passing polygraph score indicates truthfulness, such evidence should be admitted.

However, as the State accurately points out, the petitioner, during the appeal from his conviction, never raised the issue regarding his not being present when the supplemental instruction was given. The petitioner not having raised the issue at that time, is foreclosed from raising it now. *State v. Gillihan,* 86 N.M. 439, 524 P.2d 1335 (1974).

Moreover, if it is true that the petitioner was not present when the supplemental instruction was given, there was no objection made to preserve the alleged error. It is undoubtedly the law that the defendant in a case of this nature should be present during his trial. Certainly, if so fundamental a right of the defendant be violated, his counsel should make due objection and exception, and see to it that the record affirmatively shows that the defendant was not present. *O'Steen v. State,* 92 Fla. 1062, 111 So. 725 (1927). The record being silent as to this point, there is essentially no record upon which the review of this issue can be made by this Court. *State v. Lujan,* 79 N.M. 200, 441 P.2d 497 (1968). The burden is on appellant to provide the necessary record in this Court. *State v. Duran,* N.M., 581 P.2d 19 (1978).

The decision of the trial court is therefore affirmed.

IT IS SO ORDERED.

McMANUS, C. J., and EASLEY, J., concur.

582 P.2d 384

STATE of New Mexico, Plaintiff-Appellee,

v.

Timothy Jerome HERRERA, Defendant-Appellant.

No. 3238.

Court of Appeals of New Mexico.

April 25, 1978.

Writ of Certiorari Denied May 25, 1978.

Lynn Pickard, Pickard & Singleton, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Don Montoya, Asst. Atty. Gen., C. Richard Baker, Deputy Dist. Atty., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of kidnapping in the second degree, four counts of criminal sexual penetration in the second degree (two of sexual intercourse, one of anal intercourse and one of fellatio) and robbery. We answer two of the appellate issues summarily. We discuss § 40A–9–26, N.M.S.A. 1953 (2d Repl. Vol. 6, Supp.1975) and how it was applied in this case. This discussion involves the constitutionality of § 40A–9–26, supra, limitation upon discovery, and cross-examination concerning past sexual conduct. We also discuss the trial court's refusal to permit defendant to inspect and the refusal of the trial court to inspect, in camera, the notes of a physician.

Issues Answered Summarily

These two issues involve jury instructions.

[redacted] (a) The indictment charged the kidnapping was by holding the victim to service against her will. Defendant claims the instruction setting forth the elements of kidnapping failed to instruct the jury on the required intent. The elements instruction can properly be viewed as ambiguous as to the intent required; however, this ambiguity was cleared up in the immediately following instruction which told the jury how the intent to hold to service may be proved. Accordingly, we do not consider the fact that the instruction complained of on appeal was given at defendant's request.

[redacted] (b) Each of the four CSP offenses were submitted to the jury in the alternative—by use of force or coercion which resulted in personal injury or was perpetrated in the commission of another felony. Section 40A–9–21(B)(2) and (4), N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1975). Defendant objected that "instructing the jury that they can select from either one of two ways within the same count is confusing to the jury". There was no confusion in the instructions given. On appeal defendant claims the alternative instructions denied him due process, right to trial by jury and his right to proof beyond a reasonable doubt as to each element of the crimes charged. Defendant speculates that six jurors could have found CSP by personal injury and six jurors could have found CSP in the commission of another felony. No such speculation was presented to the trial court. It will not be considered for the first time on appeal. N.M.Crim.App. 308.

Section 40A–9–26, supra, and its Application

The statute reads:

40A–9–26. Testimony—Limitations—In camera hearing—A. As a matter of substantive right, in prosecutions under sections 2 through 6 of this act [40A–9–21 to 40A–9–25], evidence of the victim's past sexual conduct, opinion evidence thereof, or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent that the court finds, that evidence of the victim's past sexual conduct is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

B. If such evidence is proposed to be offered, the defendant must file a written motion prior to trial. The court shall hear such pretrial motion prior to trial at an in camera hearing to determine whether such evidence is admissible under subsection A of this section. If new information, which the defendant proposes to offer under subsection A of this section, is discovered prior to or during the trial, the judge shall order an in camera hearing to determine whether the proposed evidence is admissible under subsection A of this section. If such proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted.

1. Defendant asserts the statute is unconstitutional on its face.

Defendant points out that the power to regulate pleading, practice and procedure in the district court is vested in the Supreme

Court. *State v. Roy,* 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936). See N.M.Const., Art. III, § 1; *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).

The State asserts the statute does not involve pleading, practice and procedure; rather, that the statute involves substantive rights. The State refers us to the phrase, "[a]s a matter of substantive right," appearing in § 40A–9–26(A), supra. The word "substantive" does not provide an answer. The Legislature intended to regulate the admission of evidence pertaining to the victim's past sexual conduct. The manner of regulation goes to practice and procedure and, thus, pertains to matters within the control of the Supreme Court. *Ammerman,* supra.

The fact that the Legislature has attempted to regulate practice and procedure in regard to the victim's past sexual conduct does not mean that the legislation is unconstitutional in that it violates the provisions for separation of governmental power. See N.M.Const., Art. III, § 1. *Alexander v. Delgado,* 84 N.M. 717, 507 P.2d 778 (1973) states: "This court has no quarrel with the statutory arrangements which seem reasonable and workable and has not seen fit to change it by rule." While a statute regulating practice and procedure is not binding on the Supreme Court, it nevertheless is given effect until there is a conflict between the statute and a rule adopted by the Supreme Court. See *Ammerman v. Hubbard Broadcasting, Inc.,* supra; *State ex rel. Anaya v. McBride,* supra. Thus, in *Alexander v. Delgado,* supra, the Supreme Court applied the statutory provision for review of Court of Appeals decisions by writ of certiorari (there being no contrary rule), while pointing out that it had such power of review regardless of the statute.

Defendant asserts that § 40A–9–26, supra, not only conflicts with evidentiary rules but changes the rules. We disagree.

Section 40A–9–26, supra, permits evidence of the victim's past sexual conduct, opinion evidence thereof, or of reputation for past sexual conduct only to the extent the court finds that such evidence is material to the case and that its inflammatory and prejudicial nature does not outweigh its probative value. Section 40A–9–26, supra, was enacted by Laws 1975, ch. 109, § 7. The Supreme Court adopted the Rules of Evidence, effective July 1, 1973. Evidence Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice". The balancing approach in Evidence Rule 403 did not state new law. See *State v. Day,* 91 N.M. 570, 577 P.2d 878 (Ct.App. decided February 7, 1978). The balancing approach to be applied in admitting evidence concerning past sexual conduct under § 40A–9–26, supra, does not conflict with, rather it is consistent with, Evidence Rule 403.

Defendant's argument that § 40A–9–26, supra, not only conflicts, but changes evidentiary rules, and our answers, follow:

(a) *State v. Ulmer,* 37 N.M. 222, 20 P.2d 934 (1933) dealt with the admissibility of the "bad character of the prosecutrix for chastity" and states that "proof of specific acts of unchastity is excluded." Evidence Rule 405 permits proof of specific instances of conduct in certain situations. Defendant states: "To the extent that § 40A–9–26, *supra,* provides otherwise, it is in conflict and unconstitutional." Defendant infers a conflict between *State v. Ulmer* supra, and Evidence Rule 405, but does not attempt to demonstrate a conflict between the statute and Evidence Rule 405. There is no conflict between the statute and the rule because the balancing approach of Evidence Rule 403 is applicable to evidence admissible under Evidence Rule 405. See *State v. Day,* supra.

(b) Defendant asserts, without citation of authority which supports the claim, that in New Mexico the burden is on the opponent to exclude inadmissible evidence. "To the extent that § 40A–9–26, *supra,* places the burden of demonstrating admissibility on the proponent of the evidence and prior to trial, it is in conflict and hence

unconstitutional." Rule of Crim.Proc. 36 gives the trial court authority to conduct pretrial hearings to consider "matters as may aid in the disposition of the trial." The procedures in § 40A–9–26(B), supra, do not conflict with, but are consistent with, Rule of Crim.Proc. 36. See *Proper v. Mowry,* 90 N.M. 710, 568 P.2d 236 (Ct.App.1977).

(c) Defendant contends that "if the constitutional *power* is vested exclusively in the Supreme Court, all attempts at rule making by the legislature, regardless of conflict, would be ineffectual." This is contrary to the approach taken by the Supreme Court. See *Alexander v. Delgado,* supra. The legislation may not be binding upon the Supreme Court but, nevertheless, is to be given effect until a conflict exists. Generally, the Rules of Evidence apply to the trial of criminal cases. Rule of Crim.Proc. 48(b). Evidence Rule 402 provides that relevant evidence is admissible "except as otherwise provided . . . by statute". Thus, the Supreme Court, by rule, has recognized statutory provisions concerning evidence, absent a conflict. In civil cases, see *United Nuclear Corp. v. General Atomic Co.,* 90 N.M. 97, 560 P.2d 161 (1976).

(d) "The State's basic assertion, however, is that there is no conflict between § 40A–9–26, *supra,* and various rules . . . . The short answer to this contention is that this Court can do none other than to construe the statute to be conflicting because that is what the Court below did." This claim is frivolous; the trial court ruled there was no conflict. In addition, the Court of Appeals is a court of review. N.M.Const., Art. VI, § 29; § 16–7–8, N.M.S.A.1953 (Repl. Vol. 4). We are not bound by trial court interpretation of statutes and rules; rather, we review them to determine whether they are legally correct.

Section 40A–9–26, supra, is not unconstitutional on its face.

2. Defendant contends that the trial court's application of § 40A–9–26, supra, to pretrial proceedings was unwarranted by the statute, the statute was unconstitutionally applied to create a privilege, and the trial court's application deprived defendant of due process and the right to present his defense.

The basis for these claims is that the trial court authorized the taking of the victim's deposition but ruled "there will be no inquiry made of her [the victim] concerning past sexual conduct."

Defendant's arguments are based on a misreading of the transcript. The trial court limited the deposition but it did not do so on the basis of § 40A–9–26, supra. The trial court stated:

> You will be permitted to take her deposition then, but the Court will rule that any questions relating to her prior sexual conduct, at least at this stage of the proceedings and with the information that the Court now has upon the proposition, are irrelevant, and she can refuse to answer those questions.
>
> In discovery both in civil and criminal cases a witness cannot be required to answer irrelevant questions.

After limiting the deposition, there was a discussion between the trial court and counsel concerning defendant's motion under § 40A–9–26(B), supra, and a statement by the trial court that in ruling on admissibility under the statute, the trial court would largely be governed by Evidence Rule 403. The transcript is clear that "relevancy" and not the statute was one of the reasons for limiting the deposition.

Defendant asserts § 40A–9–26, supra, "speaks only of the admissibility of evidence of past sexual conduct. It says nothing of discoverability." We agree; however, the issue in this subpoint involves discovery, to which the statute does not speak.

Defendant contends that by limiting deposition questions concerning past sexual conduct, the trial court created a privilege which does not exist under the Rules of Evidence. Evidence Rule 501(2) states that "[e]xcept as otherwise required" no person has a privilege to "[r]efuse to disclose any matter". Whether the trial court's ruling violated Evidence Rule 501(2) depends on

what is otherwise provided. Evidence Rule 402 does not supply the answer because it deals with admissibility, not discoverability.

An "otherwise provided" provision is Rule of Crim.Proc. 29, which deals with depositions in criminal cases. Rule of Crim.Proc. 29(b) states:

> Unless otherwise limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the accused person . . . .

This provision restricts discovery to relevant matter, not privileged. It also states that the trial court can restrict the discovery of relevant matter.

Rule of Crim.Proc. 29(b) also states:

> It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

To be admissible, the evidence must be relevant. Evidence Rule 402. At a minimum, this provision requires that the information sought must be reasonably calculated to discover relevant evidence. For a comparable provision in civil depositions, see *Fort v. Neal,* 79 N.M. 479, 444 P.2d 990 (1968).

Defendant does not claim, under this subpoint, that he made a showing that he sought discovery of relevant evidence or matter reasonably calculated to discover relevant evidence. We discuss the showing made in the next subpoint. He does state that regardless of his actual showing, he was after relevant evidence. However, he "does not know what information he was seeking because he was denied the opportunity to ask any questions." According to defendant, this denial deprived him of the due process right to develop a defense through discovery of relevant exculpatory material. See *Chacon v. State,* 88 N.M. 198, 539 P.2d 218 (Ct.App.1975); *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). This claim is too broad.

The issue in this subpoint is the limitation upon the deposition. Defendant has no constitutional right to depose the victim in a criminal case; this right exists solely under Rule of Crim.Proc. 29. *State v. Armijo,* 72 N.M. 50, 380 P.2d 196 (1963); *State v. Berry,* 86 N.M. 138, 520 P.2d 558 (Ct.App.1974); *State v. Barela,* 86 N.M. 104, 519 P.2d 1185 (Ct.App.1974).

We have previously pointed out that Rule of Crim.Proc. 29(b) permits the trial court to limit discovery of relevant matter. On what basis may this limitation be imposed? Rule of Crim.Proc. 31 permits the trial court "for good cause shown" to:

> [M]ake any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden, or from the risk of physical harm, intimidation, bribery, or economic reprisals. The order may include one or more of the following restrictions: . . . (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters . . . .

Rule of Crim.Proc. 31 authorizes limitations upon a deposition. Apart from the question of relevancy, the trial court limited inquiry into the victim's past sexual conduct because defendant's reason for the inquiry was to harass the victim and possibly frighten her from appearing as a witness. Harassment and intimidation are grounds for restricting a deposition. Defendant does not claim that this reason for restricting the deposition lacks record support.

The contention that the limitation upon the deposition deprived defendant of due process reduces, then, to a claimed violation of due process because defendant was "denied the opportunity to ask questions." This is a claim that any restriction on questioning at a deposition is a deprivation of due process. We disagree.

Reasonable restrictions on the exercise of a constitutional right are permissible. See *Carlile v. Continental Oil Company,* 81 N.M. 484, 468 P.2d 885 (Ct. App.1970). Similarly, reasonable limitations, authorized by rule, on questions to be asked at a deposition do not deprive the defendant of due process. See *State v. Smith,* 88 N.M. 541, 543 P.2d 834 (Ct.App. 1975).

The prohibition against questioning the victim concerning past sexual conduct was reasonable, and not a deprivation of due process, inasmuch as defendant's purpose was harassment and intimidation of the victim. The trial court properly limited the questioning at the deposition.

3. Defendant claims the trial court's application of § 40A–9–26, supra, to preclude questions at trial relating to past sexual conduct and sexually related medical problems, deprived defendant of his constitutional right to present a defense.

(a) Past Sexual Conduct

Defendant filed a written motion asserting that he wished to offer evidence of the victim's past sexual conduct. At the hearing at which the deposition was limited, the trial court ruled that the evidence was inadmissible because not relevant. A second pretrial hearing was scheduled, but defendant did not appear for this hearing. During the trial, defendant submitted a list of written questions which were excluded by the trial court because no "proper predicate" had been laid. Throughout, the trial court gave defendant a continuing opportunity to present relevant evidence, so as to invoke the balancing requirement of § 40A–9–26, supra, and Evidence Rule 403. Throughout, the trial court's rulings were on the basis of relevance, the balancing requirement of the statute was never reached. Thus, this contention involves only that portion of the statute which requires a showing that past sexual conduct "is material to the case".

Defendant sought to question the victim concerning past sexual conduct because the victim was fitted with an intra-uterine device (IUD) at the time of offenses. "[This] would indicate to me something concerning either prior sexual conduct immediately prior to this incident, a readiness to engage in sexual conduct. She is a single woman, Your Honor. . . . We can determine what type of woman she is."

Defendant does not claim that the IUD, in itself, is evidence of past sexual conduct. His claim is that this fact suggests past sexual conduct and was a sufficient showing for questioning concerning such conduct. Alternatively, he claims an absolute right to question the victim concerning her past sexual conduct. Such questioning, he asserts, would go to his defense that the victim consented to the sex acts.

Is evidence of past sexual conduct relevant to the defense of consent?

State v. Ulmer, supra, states that the bad character of the prosecutrix for chastity is relevant to the issue of consent; however, proof of specific acts of unchastity is excluded. See *Territory v. Pino,* 9 N.M. 598, 58 P. 393 (1899). Other jurisdictions also distinguish between proof of reputation and proof of specific acts. *State v. Ruhr,* 533 S.W.2d 656 (Mo.App.1976); *Wynne v. Commonwealth,* 216 Va. 355, 218 S.E.2d 445 (1975). This distinction is not applied by our evidence rules when a pertinent trait of character of the victim is offered by an accused as an essential element of a defense. Evidence Rules 404(a)(2) and 405(b). Since, however, the trait of character must be "pertinent" the question of relevance remains.

The question of relevance (pertinent trait of character, Evidence Rule 404(a)(2); material to the case, § 40A–9–26, supra) in this case goes only to specific acts; at no time did defendant raise a "reputation" issue. However, in answering the question of relevance we follow Evidence Rule 405 and make no distinction between reputation and specific acts.

The decisions have taken two approaches with which we do not agree. One such approach, not specifically held, but nevertheless indicated, is that past sexual conduct of the victim is simply not relevant to the issue of consent. Thus, *Wilson v. State,* 548 S.W.2d 51 (Tex.Cr.App.1977) states, without explanation, that the past sexual activities of the victim "were not germane to the issue of the victim's acquiescence, or any other fact at issue in the case". See *Young v. State,* 547 S.W.2d 23 (Tex.Cr.App. 1977). A second approach is to determine relevancy in terms of the balancing approach required by Evidence Rule 403 and

§ 40A–9–26, supra. Thus, *People v. Thompson,* 76 Mich.App. 705, 257 N.W.2d 268 (1977) states: "Inquiry on cross-examination into the rape victim's sexual behavior with third persons is not relevant. Evidence is relevant when it is sufficiently probative of a fact in issue to offset the prejudice its admission produces." Until relevancy has been demonstrated, the balancing approach does not come into play.

The proper approach, in our opinion, is to recognize that past sexual conduct, in itself, indicates nothing concerning consent in a particular case. This is the starting point because 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. *State v. Martin,* 90 N.M. 524, 565 P.2d 1041 (Ct.App.1977).

If defendant claims a victim's past sexual conduct is relevant to the issue of the victim's consent, it is up to defendant to make a preliminary showing which indicates relevancy. This is similar to the approach required of a defendant to raise "a question" concerning a defendant's competency to stand trial. See Rule of Crim.Proc. 35(b); *State v. Noble,* 90 N.M. 360, 563 P.2d 1153 (1977). The question of relevancy is not raised by asserting that it exists, there must be a showing of a reasonable basis for believing that past sexual conduct is pertinent to the consent issue. See *State v. Hovey,* 80 N.M. 373, 456 P.2d 206 (Ct.App. 1969).

This approach is consistent with that taken in other jurisdictions. The following cases recognize there can be situations where past sexual conduct could, in fact, be relevant. *State ex rel. Pope v. Superior Court,* 113 Ariz. 22, 545 P.2d 946 (1976); *McLean v. United States,* 377 A.2d 74 (D.C. App.1977); *State v. Hill,* 309 Minn. 206, 244 N.W.2d 728 (1976), cert. denied, 429 U.S. 1065, 97 S.Ct. 794, 50 L.Ed.2d 782 (1977); *State v. Blum,* 17 Wash.App. 37, 561 P.2d 226 (1977). In each of these cases, the facts were examined to determine whether past sexual conduct was relevant.

Absent a showing sufficient to raise an issue as to relevancy, questions concerning past sexual conduct are to be excluded. Once such a showing is made, the balancing test of Evidence Rule 403 and § 40A–9–26, supra, is to be applied in determining admissibility.

Because the victim was fitted with an IUD, defendant wanted to "determine what type of woman she is." This contention must be considered in the factual content, stated in the brief-in-chief, as follows:

> The prosecutrix's version of the events was that defendant picked her up where her car had run out of gas on the highway, drove her into town to get gas, got the gas, began to drive her back to her car but took a side road to an isolated spot where he sexually assaulted and robbed her, and then drove her back to her car. The defendant's version was similar except that he denied that he assaulted or robbed her; he claimed they engaged in consensual intercourse.

Defendant tendered nothing raising an issue as to the relevancy of the victim's past sexual conduct on the consent question.

Defendant asserts, however, that he had a constitutional right to question the victim concerning her past sexual conduct. This right, according to defendant, is to confront the witnesses against him. By prohibiting questioning concerning past sexual conduct, defendant contends the trial court improperly limited his right of confrontation. The claim is nonsense. Defendant has no constitutional right to ask a witness questions which are irrelevant. *People v. Thompson,* supra.

(b) Sexually Related Medical Problems

The so-called sexually related medical problems are discussed in the following issue. Under this subpoint, defendant contends he was denied his constitutional right to put on a defense when the trial court prohibited questions, before the jury, concerning the victim's vaginitis some eleven months prior to the crimes. Defendant asserts this vaginitis condition was relevant to the question of whether the victim's sexual

organ (vagina) was injured by defendant's sex offenses. The answer is that defendant, as a part of his tender out of the presence of the jury, questioned the physician. This questioning established no connection between the vaginitis and defendant's physical condition after the sex offenses were committed. Again, as in prior sub-issues, defendant is claiming an absolute right to present a matter to the jury without regard to whether the matter is relevant.

Inspection of Physician's Notes

The crimes were committed during the night of April 14, 1977. A physician examined the victim in the early morning hours of April 15, 1977 and again later in the day, and treated the victim thereafter. The physician testified as to what the victim reported to him, and what his examinations revealed. The physician observed bruises over various parts of the victim's body, inflammation of the perianal area, and a hemorrhoid in the rectum. The physician described the victim's emotional problems which followed the crimes.

The physician also testified that tissues at the opening of the vagina, the inner labial, were somewhat swollen. On cross-examination, defendant sought to go into the victim's prior complaints. Out of the presence of the jury, and as part of defendant's tendered evidence, defendant questioned the physician concerning the victim's complaint of vaginitis on May 13, 1976, almost eleven months prior to the sexual offenses in this case. The physician testified that the vaginitis had been caused by a fungus, that the condition was not dependent on intercourse, that the condition was more common in women who are diabetic or who are taking antibiotics. The physician testified that there was no causal connection between the vaginitis of May, 1976 and the swollen inner labial on April 15, 1977.

Asserting there was a "question" that the conditions existing on April 15, 1977 "might have existed" prior to that time, defendant demanded that he be supplied with all medical records in the physician's possession which showed the medical history of the victim. The trial court denied the demand, ruling there was no showing of the relevancy of the records, that the only showing to the court was that the records were not relevant to any issue in the case. "If you want to present additional evidence by way of tender of proof to show that this material is relevant you may proceed."

Defendant continued with the tender. The questioning went to the condition of the rectal area and a complaint of diarrhea prior to the crimes. This questioning did not involve any prior vaginal complaints. The trial court again ruled that relevancy of the one prior vaginal complaint had not been established and that defendant was not entitled to examine "irrelevant records".

Defendant then asked the trial court to examine the physician's records, in camera, and determine whether any of the records were "[r]elevant to the issue of the inflammation of the vaginal area". The trial court refused to do so. Instead it questioned the physician and brought out that the only reference to vaginitis, prior to the offense, was the complaint on May 13, 1976. Subsequent to the offenses on July 8, 1977, the physician again observed vaginitis, but testified that the two vaginitis conditions were of different kinds, were unrelated and had independent causes. The trial court again ruled there was no relevance to defendant's inquiries. Defendant insisted that "relevancy of the matter [victim's prior medical history], I believe it's a factual question, which the jury should be allowed to pass on".

On appeal, defendant does not pursue his startling claim that the jury should determine what evidence is relevant. The appellate claim is that the trial court erred in ruling that the physician's records were irrelevant and therefore not to be disclosed to the defendant. There are two contentions: 1) "that if a witness uses a writing while testifying, the adverse party is entitled to have the writing produced"; and 2) "that the judge must examine the writing in camera and must preserve the writing and

make it available to the appellate court for purposes of review."

Defendant asserts Evidence Rule 612 supports both of the claims. Evidence Rule 612, as amended April 1, 1976, reads:

Writing Used to Refresh Memory

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. If it is claimed that the writing contains matters not related to the subject matter of the testimony the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in his discretion determines that the interests of justice so require, declaring a mistrial.

The parties disagree as to the meaning of the phrase "if the court in its discretion determines it is necessary in the interests of justice". The State asserts that the discretion applies to both "(1) while testifying" and "(2) before testifying". Defendant contends the phrase applies only to "(2) before testifying". The history of the rule shows defendant is correct. The discretionary phrase was not a part of Evidence Rule 612 as originally adopted in New Mexico; rather, the right to have the writing produced and inspected was not limited. However, Evidence Rule 612, quoted above, was amended in April, 1976; the discretionary language was added by the amendment. 3 Weinstein's Evidence, Cum.Supp.1977, at page 94, states that New Mexico "amended Rule 612 to conform to the Congressional version of the Rule." The congressional version applies the discretionary language only to "(2) before testifying". See 3 Weinstein's Evidence, page 612–1.

This, however, does not aid defendant. The rule applies to use of a writing to refresh a witness' memory "for the purpose of testifying". The physician did not refer to his notes, to refresh his memory, for that purpose. Rather, the physician reviewed his notes, at defendant's request, as a part of defendant's unsuccessful attempt to find a relationship between the vaginitis of May, 1976 and the inner labial condition which existed immediately subsequent to the sex offenses. The refreshed memory was not for the purpose of testifying, but was a part of defendant's exploration into the victim's medical history. This is shown by the repeated rulings of the trial court concerning relevancy.

The Federal Advisory Committee's Note to proposed Evidence Rule 612 states:

The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

See also 3 Weinstein's Evidence, page 612–6.

The fact, established by the tender, was that the victim's vaginitis in May, 1976 had no connection to the victim's complaints in April, 1977. The May, 1976 vaginitis having no impact on the physician's testimony, the production and inspection provisions of Evidence Rule 612 were not applicable.

In so holding, we have not overlooked *State v. Bazan,* 90 N.M. 209, 561 P.2d 482 (Ct.App.1977), which points out that anything may be used to revive a memory. The issue in this case does not involve *how* memory may be refreshed. The issue is whether defendant is entitled to the pro-

duction and inspection of the writing used to refresh memory when it is uncontradicted that the writing (the physician's record of the victim's complaint in May, 1976), and the refreshed memory (the physician's testimony at the tender) were unrelated to the issues being tried. Evidence Rule 612 is not to be construed to authorize defendant's fishing expedition in this case.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

582 P.2d 396

STATE of New Mexico,
Plaintiff-Appellee,

v.

Orlando J. PADILLA,
Defendant-Appellant.

No. 3468.

Court of Appeals of New Mexico.

June 20, 1978.

Writ of Certiorari Denied July 19, 1978.

John B. Bigelow, Chief Public Defender, Santa Fe, Joseph N. Riggs, III, Asst. Public Defender, Mark H. Shapiro, Asst. Appellate Defender, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Dennis P. Murphy, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Found to be, and sentenced as, an habitual offender, defendant appeals. We discuss: (1) applicability of Rule of Crim.Proc. 37; (2) trial court jurisdiction; (3) admission of documentary evidence; and (4) right of confrontation.

Applicability of Rule of Crim.Proc. 37(b)

Final judgment for defendant's robbery conviction was entered November 20, 1976. A supplemental information, charging defendant as an habitual offender on the basis of prior burglary and larceny convictions in 1971 (1972), was filed January 20, 1977. In March, 1977 the trial court granted defendant's motion to dismiss on the basis that the sentence for the 1971 (1972) convictions had been deferred. The State appealed, we reversed, and the Supreme Court affirmed the reversal. *Padilla v. State*, 90 N.M. 664, 568 P.2d 190 (1977). This Court's mandate was issued September 9, 1977.

Defendant then moved to dismiss the supplemental information on the basis of Rule of Crim.Proc. 37(b). That rule states:

> (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.

Rule of Crim.Proc. 37(b) applies to habitual offender proceedings. *State v. Lopez,* 89 N.M. 82, 547 P.2d 565 (1976). The question is whether the rule applies to the facts of this case.

The trial court dismissed the supplemental information; the State appealed. During the pendency of the appeal, the State did not seek an extension of time for trial under the supplemental information, nor did it seek a determination that defendant was responsible for the delay. See *State v. DeBaca,* 90 N.M. 806, 568 P.2d 1252 (Ct. App.1977). Defendant sought dismissal under Rule of Crim.Proc. 37(b) prior to trial on the supplemental information and after six months had run, whether it ran from the filing of, or arrest under, the supplemental information. See *State v. Dominguez,* 91 N.M. 296, 573 P.2d 230 (Ct.App.1977). Avoidance of Rule of Crim.Proc. 37(b) depends on the effect of the State's appeal from dismissal of the supplemental information.

We hold that Rule of Crim.Proc. 37(b) was inapplicable on each of the following grounds, but without ruling as to which ground is controlling.

(1) The second sentence of Rule of Crim.Proc. 37(b) states: "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."

While this language does not expressly refer to the appellate court's reversal of the trial court's dismissal of an information, the reference to "reversal of a conviction" is sufficiently analogous to indicate the Supreme Court did not intend the six-month provision to apply to delay resulting from appellate proceedings. Under this reasoning, there were six months from September 9, 1977 in which to try the habitual offender charge. Trial was on December 30, 1977 and was timely.

(2) In *State v. Peavler,* 88 N.M. 125, 537 P.2d 1387 (1975) the trial court's dismissal of an indictment was reversed. The opinion states: "All time deadlines arising under the Rules of Criminal Procedure, including Rule 37, are tolled for the period commencing with the filing of defendants' motions in district court and ending on the date of our mandate." Defendant filed his motion to dismiss the supplemental information, on the basis of the deferred sentence, on March 17, 1977; our mandate issued September 9, 1977. Under *Peavler,* supra, this time period was tolled. The dates that count against the six-month period are January 20, 1977 to March 17, 1977 and September 9, 1977 to trial on December 30, 1977. Under *Peavler,* supra, the trial was timely.

(3) Once the trial court dismissed the supplemental information, there was no case to be tried in the district court and, thus, no case to which the time limitation of Rule of Crim.Proc. 37(b) applied. Only upon reversal of the trial court's dismissal and the issuance of a mandate returning the case to the district court, would there be a case in the district court to which a time limitation was applicable. This reasoning does not choose between (1) and (2) above, but supports both.

Trial Court Jurisdiction

There was a two-month interval between the final judgment on the robbery conviction, entered November 20, 1976, and the filing of the supplemental information on January 20, 1977. The robbery conviction was after a non-jury trial.

Section 21–9–1, N.M.S.A. 1953 (Repl.Vol. 4) gives a trial court jurisdiction over its final judgment in a non-jury trial for thirty days after entry of the final judgment. Defendant contends that under § 21–9–1, supra, the trial court lacked jurisdiction over the supplemental information, filed two months after entry of the final judgment. We disagree.

Section 40A–29–6, N.M.S.A. 1953 (2d Repl.Vol. 6) provides for the institution of habitual offender charges "at any time, either after sentence or conviction". See also § 40A–29–8, N.M.S.A. 1953 (2d Repl. Vol. 6). The provisions of the Habitual Offender Act are mandatory. *State v. Lujan,* 90 N.M. 103, 560 P.2d 167 (1977). The specific provision of filing "at any time" controls over the general provision of § 21–9–1, supra. *State v. Blevins,* 40 N.M. 367, 60 P.2d 208 (1936); *State v. Riley,* 82 N.M. 235, 478 P.2d 563 (Ct.App.1970).

Admission of Documentary Evidence

The evidence involved under this issue consists of a series of documents taken from the records of the penitentiary. The eleven series—11A through 11C—consist of a photograph, a judgment and sentence, and a fingerprint card—all purporting to pertain to Orlando J. Padilla; 11D is a certification, signed by the records manager and the warden, and bears the penitentiary seal. The twelve series—12A through 12C—consist of a photograph, a commitment, a judgment and sentence, and a fingerprint card—all purporting to pertain to Orlando J. Padilla; 12D is a certification, signed by the records manager and the warden, and bears the penitentiary seal.

Defendant contends these documents were never admitted as evidence. The tapes show that defendant objected to the admission of the documents on various grounds, that the trial court considered the objections, ruled the documents were properly authenticated and were admissible under Evidence Rule 803(8) as an exception to the hearsay rule. Defendant's argument is that the trial court ruled the documents "are admissible" but never actually stated that the documents "are admitted". This argument is frivolous; the tapes show the documents were considered as admitted and that defendant, by questions directed toward the photographs and fingerprint cards, understood that the documents were admitted.

Defendant points out that the State never offered the certifications into evidence. He argues that, without the authentication provided by the certifications, the other documents were improperly admitted. This claim is also frivolous. The documents in both the eleven and twelve series are stapled together. The trial court remarked that each series was "basically one exhibit"; its ruling of admissibility applied to the entire series as one exhibit. There is no factual basis for defendant's claim.

Evidence Rule 803(8) exempts public records and reports from the hearsay rule. It reads in part:

> (8) *Public Records and Reports.* Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel . . . .

Defendant contends the photographs and fingerprint cards were improperly admitted under either paragraphs (A) and (B) of the rule because there was no evidence "that the photographs and fingerprints fit either category." We do not consider the arguments directed to paragraph (B) because no issue as to paragraph (B) was raised in the trial court. N.M.Crim.App. [Rule] 308. Admissibility under paragraph (A) was raised in the trial court by defendant's argument that the certifications were an insufficient foundation for admissibility of the photographs and fingerprint cards.

The certifications of the record manager are that the photographs and fingerprint cards are true and correct copies of the original records of Orlando J. Padilla, a person "heretofore committed to said penal institution". The certifications of the warden are that the records manager was in fact the records manager, had custody of the original records, and the signature of the records manager was genuine. The warden's signature bears the penitentiary seal. The certifications were sufficient to

authenticate the documents under Evidence Rule 902(1) and (4). Extrinsic evidence of authenticity was not required. See *State v. Dawson,* 91 N.M. 70, 570 P.2d 608 (Ct.App. 1977).

Although the photographs and fingerprint cards were authenticated as records of the penitentiary, defendant contends the "foundation" for admissibility was insufficient because there is nothing showing these records were "activities of the office or agency". See Evidence Rule 803(8)(A). Defendant claims that for the photographs and fingerprint cards to be admissible, there must be testimony showing that it was an activity of the penitentiary to include photographs and fingerprint cards in the penitentiary records. Compare *State v. Gallegos,* 91 N.M. 107, 570 P.2d 938 (Ct.App. 1977).

We agree there is no testimony that photographs and fingerprint cards are a part of the penitentiary's activities.

State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct.App.1976) discusses the differences in admissibility requirements under Evidence Rule 803(6) and 803(8). Admissibility under Evidence Rule 803(8) does not require the testimony of the custodian or other qualified witness. Why? Because of the assurance of accuracy for public records. 4 Weinstein's Evidence, ¶ 803(8)[01] (1977) states that "generally, the record itself can be admitted as proof of the facts which it relates without foundation testimony" and "the sole criteria is whether the record is that of a *public* body."

The Penitentiary of New Mexico is a public body. Section 42–1–2, N.M.S.A. 1953 (2d Repl.Vol. 6). The certifications establish that the photographs and fingerprint cards were records of the penitentiary. Defendant claims this is insufficient, that there must be something showing that records of photographs and fingerprint cards were activities of the penitentiary. Our answer is that such "activity" is necessarily implied from certifications stating that the photographs and fingerprint cards are part of the original records of a person committed to the penitentiary.

The foundation for admission of the photographs and fingerprint cards was supplied by the certifications.

Right of Confrontation

Defendant contends that his right to confront the witnesses against him was denied because basically he received a "paper trial", that "[a]s each paper was offered, he objected that he wanted to confront the witnesses and cross-examine them about what those papers said." The use of properly authenticated public records was not an unconstitutional deprivation of defendant's right of confrontation. *State v. Dawson,* supra; *Tomlin v. Beto,* 377 F.2d 276 (5th Cir. 1967).

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

582 P.2d 400

Cuca GILLILAND, Plaintiff-Appellant,

v.

HANGING TREE, INC., d/b/a Territorial House, and Associated Indemnity Corp., Defendants-Appellees.

No. 3421.

Court of Appeals of New Mexico.

June 20, 1978.

Writ of Certiorari Denied July 19, 1978.

Michael D. Bustamante, Ortega & Snead, Albuquerque, for plaintiff-appellant.

George J. Hopkins, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendants-appellees.

OPINION

WOOD, Chief Judge.

The widow sought death benefits under the Workmen's Compensation Act. On the basis of affidavits and answers to interrogatories, the trial court granted defendants' motion for summary judgment. Plaintiff appeals; we affirm. Assuming there was an issue of fact as to whether deceased was a "workman", the summary judgment was proper because no compensation benefits were payable under the "average weekly wage" provisions of the Workmen's Compensation Act.

Decedent was a part owner of Hanging Tree, Inc.; at the time of his death he owned a one-third interest in the corporation. At the time of incorporation, it was agreed among the owners that decedent would manage the business (restaurant and bar); decedent did manage the business from the incorporation on March 1, 1972 until his death in October, 1975. Decedent supervised the day-to-day operation of the business including ordering supplies, paying bills, and working as bartender and waiter. Without decedent's work, the business would not have survived.

It is uncontradicted that decedent received "no wages and no income" and no salary from Hanging Tree, Inc. The showing as to wages is as follows:

> 5. At the time of the formation of Hanging Tree, Inc., it was agreed among the three owners . . . that Mr. Gilliland would not be paid a salary by the corporation until such time as the business was able to more fully bear such a cost. However, it was expressly agreed that at such time as the business did improve to our satisfaction, that Mr. Gilliland would commence receiving a salary at such a level that he would be paid currently, and also be paid enough to make up for the period of time during which he did not receive a salary.
>
> 4. At the time of his death, Mr. Gilliland was not receiving a salary from the corporation. However, it was contemplated by him and the other owners of Hanging Tree, Inc., that at such time as they deemed the business able to bear it, Mr. Gilliland would begin receiving a salary which would pay him currently and also reimburse him for the period during which he worked for the corporation without a salary being paid current.

Defendants contend that the lack of payment for the services of decedent results in

decedent not being a "workman" under the Workmen's Compensation Act. Defendants cite decisions which refer to the payment of wages in describing the relationship between employer and employee. See *Mendoza v. Gallup Southwestern Coal Co.*, 41 N.M. 161, 66 P.2d 426 (1937); *Burton v. Crawford and Company*, 89 N.M. 436, 553 P.2d 716 (Ct.App.1976). Plaintiff, in turn, relies on the expectancy of payment in the future for the services decedent performed. Plaintiff cites cases from other jurisdictions in support of her view that an accumulated claim for wages, to be paid at a future date by a closely held corporation, is a sufficient "hire" so that decedent should be considered an employee. Defendants, relying upon the above-quoted matter, state that the wage claim is too speculative and also assert that the cases cited by plaintiff are inapplicable. We answer none of these contentions; the statutory provisions concerning "average weekly wage" are dispositive of this appeal.

Assuming there is a factual issue, sufficient to defeat summary judgment, as to whether decedent was an employee, on what basis would compensation benefits be paid? The answer to this question is not provided by § 59–10–18.2, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1, Supp.1975). This statute provides for payment of compensation benefits on the basis "of the average weekly wage in the state" effective July 1, 1976. However, this same statute provides that compensation is to be paid on the basis of the workman's "average weekly wages" effective July 1, 1975. Thus, compensation benefits were to be paid on the basis of decedent's "average weekly wage" at the time of his death in October, 1975. See § 59–10–18.7, N.M.S.A.1953 (2d Repl. Vol 9, pt. 1, Supp.1975).

Section 59–10–12.13, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1) provides for the determination of the average weekly wage. Paragraph A defines wages "to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the accident, either express or implied". Since there was no "money rate" at the time of the accident, neither paragraph A nor B provide a basis for payment of compensation benefits.

Plaintiff contends compensation benefits should be determined under paragraph C of § 59–10–12.13, supra, because other statutory provisions do not result in a fair computation. Paragraph C provides for a computation of the average weekly wage "in such other manner and by such other method as will be based upon the facts presented fairly determine such employee's average weekly wage."

In the decisions applying § 59–10–12.13(C), supra, or a similar provision under prior statutes, there was a payment of wages in some monetary amount. Here there has been no monetary payment. See *Kendrick v. Gackle Drilling Company*, 71 N.M. 113, 376 P.2d 176 (1962); *Bailey v. Farr*, 66 N.M. 162, 344 P.2d 173 (1959); *LaRue v. Johnson*, 47 N.M. 260, 141 P.2d 321 (1943); *Stevens v. Black, Sivalls & Bryson*, 39 N.M. 124, 42 P.2d 189 (1935).

What we have here is, at most, an expectancy. When the business improved to the "satisfaction" of the owners, decedent would then "commence receiving a salary" and would "also be paid enough to make up for the period of time during which he did not receive a salary." This expectancy was speculative, depending upon the "satisfaction" of the owners; this satisfaction depended in turn upon the business being able to bear the cost. The undisputed showing is that the business had operated at a loss through 1975, the year of decedent's death.

"Average weekly wage" has a statutory meaning. *LaRue v. Johnson* supra. It means the money rate at which services are recompensed "at the time of the accident." Section 59–10–12.13(A), supra. See *Stevens v. Black, Sivalls & Bryson*, supra. The fair determination of average weekly wage under § 59–10–12.13(C), supra, requires a wage of some kind "at the time of the accident." It is undisputed that at the time of the accident, decedent had no wage and thus had no basis for computing an average weekly wage. The speculative possibility that some time in the future decedent

might be paid for services performed prior to his death was not a wage within the statutory meaning.

Oral argument is unnecessary. See *Garcia v. Genuine Parts Co.*, 90 N.M. 124, 560 P.2d 545 (Ct.App.1977).

The summary judgment is affirmed.

HENDLEY and LOPEZ, JJ., concur.

582 P.2d 403

James C. STOTLAR, and Susan Stotlar, Petitioners-Appellants,

v.

James M. HESTER, James C. Hester Company, a/k/a J. C. Hester Company, and George Campbell and Gayle Campbell, Defendants-Appellees.

No. 3547.

Court of Appeals of New Mexico.

July 5, 1978.

Writ of Certiorari Denied July 28, 1978.

Randolph B. Felker, Felker & McFeeley, P. A., Santa Fe, for petitioners-appellants.

Joseph A. Roberts, Burttram & Roberts, Santa Fe, for defendants-appellees.

OPINION

WOOD, Chief Judge.

Plaintiffs purchased residential real property from the Campbells. Alleging that they relied on an appraisal made by Hester and that this appraisal was erroneous, plaintiffs sought damages from Hester and the Campbells. The trial court denied the Campbells' motion for summary judgment. It granted Hester's summary judgment motion. Plaintiffs appeal the ruling in favor of Hester. We discuss: (1) appealability of the judgment; (2) negligent representation; (3) third party beneficiary of a contract; and (4) the propriety of summary judgment as to (a) liability and (b) damages.

Appealability of the Judgment

The summary judgment dismissed plaintiffs' claims against Hester with prejudice. Hester moved to dismiss plaintiffs' appeal, asserting the summary judgment was not an appealable final judgment. The motion was denied.

The basis for plaintiffs' appeal is that the summary judgment was a "final judgment". See Rule of App.Proc., Civil, 3(a)(1). The dismissal of plaintiffs' claims against Hester with prejudice was in the form of a final judgment. *Campos v. Brown Construction Company,* 85 N.M. 684, 515 P.2d 1288 (Ct.App.1973).

In multiple party suits, Rule of Civ. Proc. 54(b)(2) authorizes a judgment adjudicating "all issues" as to one or more, but fewer than all parties. "Such judgment shall be a final one unless the court, in its discretion, expressly provides otherwise and a provision to that effect is contained in the judgment." The summary judgment adjudicated all of plaintiffs' claims against Hester; there was no provision in the summary judgment that it was not final. The summary judgment was an appealable final judgment under Rule of Civ.Proc. 54(b)(2). The motion to dismiss the appeal was properly denied. *Montano v. Williams,* 89 N.M. 86, 547 P.2d 569 (Ct.App.1976), aff'd, 89 N.M. 252, 550 P.2d 264 (1976).

Negligent Representation

One of plaintiffs' theories of liability was that Hester appraised the property negligently. The issue is whether plaintiffs can recover from Hester on the basis of this negligence. This issue arises because it was the Campbells who arranged for Hester to

appraise their property. The showing made is that there was no privity of contract between plaintiffs and Hester.

Hester cites *Staley v. New,* 56 N.M. 756, 250 P.2d 893 (1952) for the proposition that one not a party to a contract cannot maintain a suit upon it. The suit in *Staley* was for breach of contract; the theory of liability involved in this issue is the asserted negligence of Hester. *Staley* is not applicable.

Hester relies on *Fidelity & Deposit Co. of Maryland v. Atherton,* 47 N.M. 443, 144 P.2d 157 (1943) for the view that Hester is not liable to plaintiffs for his asserted negligence. In *Atherton,* supra, the claim was that accountants negligently performed their audit contract with the county commissioners. A deputy county treasurer embezzled money, the bonding company paid the loss and sought to recover from the accountants. *Atherton* disposes of the bonding company's negligence claim as follows:

> They . . . [the accountants] owed a duty to third persons, if any, [the bonding company] to whom they knew, or reasonably should have known, their employer intended to exhibit their reports, and upon which they might act to their injury, to make such reports without fraud. But there is no finding that appellees made a fraudulent report, or of a reliance upon appellees' report by . . . [the bonding company], nor, of course, that . . . [the bonding company] was injured by such reliance, so as to bring the case within the doctrine of *Ultramares Corp. v. Touche,* 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 1139.

Hester cites *Atherton,* supra, for the view that he cannot be liable to plaintiffs because there is no claim that his appraisal was fraudulent.

Another case involving the negligence theory of liability is *Valdez v. Gonzales,* 50 N.M. 281, 176 P.2d 173 (1946). Valdez sued the secretary of state and the county clerk for negligently failing to properly instruct election officials in the manner of conducting an election. The *Valdez* opinion cites *Atherton,* supra, and quotes with approval from *Ultramares,* cited above in the quotation from *Atherton,* supra. *Valdez,* supra, approves the view that liability for negligent language arises only when the person furnishing information, spoken or written, owes a duty to give it with care, and the person receiving it has a right to rely on the information. *Valdez,* supra, also approves the view that negligent words are not actionable absent a contract relation or something in the nature of privity of contract.

We understand the holdings of *Atherton,* supra, and *Valdez,* supra, to be as follows: The tort of negligence by words is recognized. Absent fraud, the tort requires a duty on the part of the person furnishing the information and requires the person receiving the information have a right to rely on it. However, under *Valdez,* supra, one cannot recover for this tort in the absence of privity of contract. This requirement was removed in *Steinberg v. Coda Roberson Construction Co.,* 79 N.M. 123, 440 P.2d 798 (1968).

Steinberg, supra, held that the second purchaser of a home (the purchaser from the original purchaser), could recover from the builder for negligent installation of a roof. In so holding, *Steinberg,* supra, states "the great weight of authority no longer recognizes privity of contract as having a place in tort law" and that privity of contract is "no longer . . . recognized as a factor when considering liability on a negligence theory". *Steinberg,* supra, did not involve a claim of negligent language. However, that decision unqualifiedly rejected the need for privity of contract in a claim based on negligence.

With privity of contract removed as a requirement for a negligence claim, and thus removed as a requirement for negligence by words, our concern is with the limitations on the tort. *Maxey v. Quintana,* 84 N.M. 38, 499 P.2d 356 (Ct.App.1972) called the tort "negligent misrepresentation" and held the tort was determined by the general principles of the law of negligence. In support of this statement, *Maxey,* supra, cited Restatement of Torts

(Second) § 552. *Neff v. Bud Lewis Company,* 89 N.M. 145, 548 P.2d 107 (Ct.App.1976) refers to the same Restatement section in discussing the "reliance" requirement stated in *Valdez v. Gonzales,* supra.

3 Restatement of Torts (Second) § 552 (1977) reads:

> *Information Negligently Supplied for the Guidance of Others*
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

The Restatement of Torts is persuasive authority. With the exception of the discarded privity requirement, 3 Restatement of Torts (Second) § 552 (1977) is consistent with the tort recognized in *Valdez v. Gonzales,* supra. This Restatement section states limitations to the tort, limitations with which *Valdez v. Gonzales,* supra, was concerned. We hold that the New Mexico tort of negligence by words is set forth in 3 Restatement of Torts (Second) § 552 (1977). Compare *Proctor v. Waxler,* 84 N.M. 361, 503 P.2d 644 (1972).

The limitations on the tort, of concern in this case, are stated in 3 Restatement of Torts (Second) § 552(2)(a) and (b) (1977). The comment to the Restatement explains these limitations.

> The rule . . . subjects the negligent supplier of misinformation to liability only to those persons for whose benefit and guidance it is supplied.
>
> [I]t is not necessary that the maker should have any particular person in mind as the intended, or even the probable, recipient of the information. In other words, it is not required that the person who is to become the plaintiff be identified or known to the defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it. It is enough, likewise, that the maker of the representation knows that his recipient intends to transmit the information to a similar person, persons or group. It is sufficient, in other words, insofar as the plaintiff's identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given. It is not enough that the maker merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon it, on the part of anyone to whom it may be repeated.

We refer to the showing made as to these limitations in discussing the propriety of summary judgment.

Third Party Beneficiary

Plaintiffs' alternate theory of liability was that they were the beneficiaries of the

contract by which the Campbells engaged Hester to appraise the property and, as beneficiaries, could sue Hester for breach of contract. The breach would be the asserted failure of Hester to properly appraise the property.

Two or more parties may contract so that a third party, or parties, will be beneficiaries of the agreement. One claiming to be a beneficiary must show either that he is the beneficiary intended by the parties or a member of a class of beneficiaries intended by the parties. *Hoge v. Farmers Market & Supply Co. of Las Cruces,* 61 N.M. 138, 296 P.2d 476 (1956).

A third party beneficiary does not have to be named in the contract. However, where, as here, the third party would be a donee beneficiary, the third party may enforce the contract only if the provided performance would be a pecuniary benefit to the third party and the promisor had reason to know the benefit was contemplated by the promisee as one of the motivating causes for entering the contract. "[T]he third party can show by evidence extrinsic to a contract which contains no indication of intent to benefit him that its provisions were in fact intended for his benefit." *Permian Basin Investment Corporation v. Lloyd,* 63 N.M. 1, 312 P.2d 533 (1957).

Plaintiffs could enforce the contract between the Campbells and Hester for an appraisal of the Campbells' property if plaintiffs were third party beneficiaries of the contract. The financial benefit of an accurate appraisal to plaintiffs, as prospective purchasers of the Campbells' property, may be assumed. However, to be third party beneficiaries, Hester must have had reason to know that the Campbells intended such a benefit for prospective purchasers of their property. This intent may be shown by extrinsic evidence if not stated in the contract.

We refer to the showing made as to these requirements in discussing the propriety of summary judgment.

Propriety of Summary Judgment

Hester, as the movant for summary judgment, had the burden of establishing, prima facie, that he was entitled to summary judgment. *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972). Hester failed to meet this burden as to either theory of liability and as to one of the damage claims; he did meet this burden for one of the damage claims.

(a) Liability

There clearly is a factual issue as to plaintiffs' reliance on Hester's appraisal. The Campbells hired Hester to appraise the Campbells' property. There is no showing as to the express provisions of this contract. However, inferences as to the intent of the parties in entering the contract were shown. The appraisal report limits its use by anyone other than the Campbells, the mortgagee, other financial institutions or appraisal organizations, or government organizations without the prior written consent of the appraiser. This limitation carries an inference that the appraisal was not intended for the benefit of prospective purchasers. Such an inference supports summary judgment as to both theories of liability.

However, there is a showing which conflicts with the limitation in the appraisal. The affidavit of the real estate selling agent, who was the agent of the Campbells, states that the appraisal was for the purpose of refinancing the property. The listing agreement and the affidavit of the Campbells support the view that the appraisal was for the purpose of refinancing. The Campbells' willingness to sell depended on receiving a price sufficient to enable them to buy another residence. The real estate agent advised plaintiffs that the property was being appraised; the agent obtained the appraised valuation from Hester and supplied the appraised valuation to the plaintiffs. The plaintiffs' offer to purchase was based on this appraisal. Hester's affidavit states that his appraisal was transmitted to a financial institution. This institution held the Campbells' mortgage on

the property. This showing carries an inference that the appraisal was obtained so that a purchaser from the Campbells could finance the purchase through the financial institution. This showing in this paragraph raises a factual issue as to whether a prospective purchaser was an intended beneficiary of the appraisal, and a factual issue as to whether Hester knew of this intention. This showing is in opposition to summary judgment on the theories of liability.

The showing to the trial court was of disputed issues of material fact. There being disputed issues of material fact, summary judgment was improper as to each theory of liability. *Goodman v. Brock*, supra.

(b) Damages

There are two damage claims. One is based on the allegation that Hester's appraisal erroneously reported the square footage of the property. Plaintiffs never saw Hester's appraisal before contracting to buy the property; they were not told of Hester's report as to the square footage before contracting the purchase. What plaintiffs relied on was Hester's appraisal as to the value of the property. An erroneous square footage figure is of consequence if this error contributed to an erroneous valuation. Hester made no showing that the alleged error in square footage did not result in an erroneous valuation. Thus, summary judgment was improper as to the damage claim based on an erroneous square footage.

The second damage claim is that Hester "allocated no deduction on the market value of the premises for a poor roof condition, when in fact the roof was in poor condition." The undisputed showing is that the property was listed for sale as approximately 20-year-old property with its original roof. Hester appraised the property "as is" and, in so doing, stated that he assumed there were no hidden or unapparent property conditions, and assumed no responsibility for such conditions. This showing is uncontradicted that the property, including the roof, was valued "as is"; thus, the valuation included the alleged poor roof condition. With this showing, it was plaintiffs' burden to show the "as is" valuation was improper; they did not do so. Summary judgment was properly granted in connection with the damage claim based on a poor roof condition.

The summary judgment in favor of Hester is reversed, except as to the damage claim based on the roof condition. Summary judgment as to that claim is affirmed. The cause is remanded to the trial court for proceedings consistent with this opinion.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

582 P.2d 804

In re H. Gregg PRIVETTE, attorney at law.

No. 11901.

Supreme Court of New Mexico.

May 4, 1978.

Order Sept. 1, 1978.

McMANUS, Chief Justice.

JUDGMENT

This matter came on for hearing before the Court upon a report and recommendations of the Disciplinary Board after a hearing on formal charges pursuant to the rules of this Court governing discipline in Hearing Committee A of the Southern Disciplinary District. Upon consideration of the records and files herein, the Findings of Fact of the Hearing Committee and the Disciplinary Board, the briefs of the parties and the arguments of Chief Disciplinary Counsel and the Respondent appearing pro se and being fully advised:

It is by the Court adjudged that the Respondent H. Gregg Privette is guilty of professional misconduct in that for a period beginning in December 1973 and ending in June 1975, he handled trust funds belonging to clients in a grossly negligent manner, failed to keep adequate records or properly to supervise his employee, with the result that funds belonging to clients were commingled with his own, were not properly accounted for or reported upon, and were eventually embezzled by his employee; all as more fully set forth in the Findings of Fact of Hearing Committee A and all contrary to Rule 9–102(B)(3) and (4) and reflecting adversely upon his fitness to practice law, contrary to Disciplinary Rule 1–102(A)(6), Code of Professional Responsibility-Canons of Ethics.

IT IS THEREFORE ORDERED AND DECREED that discipline shall be imposed as follows:

A. That the Respondent H. Gregg Privette shall be suspended from the practice of law in all courts in the State of New Mexico or in any other capacity, effective May 15, 1978 for a period of 150 days.

B. That upon the expiration of 90 days after the effective date of his suspension aforesaid, the remainder thereof may be deferred upon his filing with this Court his acceptance of probationary status for a period of 12 months following the expiration of said 90 days, upon the terms and conditions hereinafter specified, and may thereupon resume the practice of law upon his further filing in this Court satisfactory proof that he has:

(1) Paid Senaida Evaro all sums due her;

(2) Accounted for and paid to the proper persons entitled thereto all monies in his Trust Account;

(3) Demonstrated to the satisfaction of the Supreme Court through its Chief Disciplinary Counsel that he has established an adequate system for the maintenance, con-

trol and monitoring of his Trust Account records; and

(4) Supplied to the Supreme Court through its Chief Disciplinary Counsel a certificate from a certified public accountant that a satisfactory audit of his Trust Account has been completed, that the debt to Senaida Evaro has been paid, and that all remaining funds in Respondent's Trust Account have been accounted for and paid to the owners thereof, and that there are no additional sums owing to any clients of the Respondent by reason of the deficiency in his Trust Account.

C. The terms and conditions of probation referred to above are that for a period of 12 months following the expiration of the first 90 days of the Respondent's suspension, or his readmission to practice, whichever is later, he shall submit to the supervision of the record-keeping and Trust Account management in his law office at least monthly by an attorney knowledgeable in accounting practices to be designated by the Supreme Court for the purpose. Such supervising attorney shall report to the Court through its Chief Disciplinary Counsel at least quarterly concerning Respondent's compliance with the foregoing terms of probation.

D. Violation of any condition of Respondent's probation or failure to comply strictly with the terms of such probation at any time during the period of Respondent's suspension or the 12 months following his readmission to practice shall upon written certification of the fact by Chief Disciplinary Counsel to the Supreme Court with notice to the Respondent result in immediate automatic imposition of the entire deferred portion of his suspension, following which Respondent shall not resume the practice of law in the State of New Mexico until formal reinstatement proceedings have been instituted and successfully concluded as provided in Rule 19 of the Rules Governing Discipline.

E. Upon full and faithful compliance with all of the terms of probation, his probationary status shall terminate on his filing in this Court of an Affidavit of Compliance in accordance with the provisions of the last sentence of Rule 4(b), Rules Governing Discipline and the approval of the Court upon the report of Chief Disciplinary Counsel attesting thereto.

AND IT IS FURTHER ORDERED AND DECREED that Respondent pay the taxable costs of this proceeding to be assessed.

ORDER

This matter having come on for hearing upon the Petition of the Respondent, H. Gregg Privette, and the representations of Chief Disciplinary Counsel;

And it appearing to the Court that the Respondent has:

(1) Paid Senaida Evaro all sums due her;

(2) Accounted for and paid to the proper persons entitled thereto all monies in his Trust Account;

(3) Demonstrated to the satisfaction of Chief Disciplinary Counsel and this Court that he has established an adequate system for the maintenance, control and monitoring of his Trust Account records.

And it further appearing to the Court that the Respondent's Trust Account records have been examined by Thomas S. Cooper, C.P.A. of Cooper & Company, Accountants, Las Cruces, New Mexico, but because of the theft and loss of all of the Respondent's Trust Account records prior to June 18, 1975, a complete and definitive audit thereof is impossible and will be impossible in the future. But that all remaining funds therein have been accounted for and paid to the owners.

Now it is ordered that the Respondent, H. Gregg Privette, be and he hereby is readmitted to the practice of law in all Courts of the State of New Mexico, upon the following terms and conditions:

A. That for a period of twelve (12) months from the effective date of this Order, the Respondent shall submit to the supervision of the record keeping and Trust Account management in his law office at least monthly by *Ralph William Richards,*

Esquire, Las Cruces, New Mexico, who is hereby designated and appointed by the Court for the purpose. Such supervising attorney shall report to the Court through the Chief Disciplinary Counsel at least quarterly concerning Respondent's compliance with the foregoing terms of probation.

B. Violation of any condition of Respondent's probation or failure to comply strictly with the terms of such probation at any time during the period of Respondent's suspension or the 12 months following his readmission to practice shall upon written certification of the fact by Chief Disciplinary Counsel to the Supreme Court with notice to the Respondent result in immediate automatic imposition of the entire deferred portion of his suspension, following which Respondent shall not resume the practice of law in the State of New Mexico until formal reinstatement proceedings have been instituted and successfully concluded as provided in Rule 19 of the Rules Governing Discipline.

C. Upon full and faithful compliance with all of the terms of probation, his probationary status shall terminate on his filing in this Court of an Affidavit of Compliance in accordance with the provisions of the last sentence of Rule 4(b), Rules Governing Discipline and the approval of the Court upon the report of Chief Disciplinary Counsel attesting thereto.

582 P.2d 806

HUMANA OF NEW MEXICO, INC., Plaintiff-Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF LEA, New Mexico, Defendant-Appellee.

No. 11599.

Supreme Court of New Mexico.

May 9, 1978.

Maddox, Maddox & Cox, Don Maddox, Hobbs, for plaintiff-appellant.

Thomas A. Rutledge, Asst. Dist. Atty., Carlsbad, for defendant-appellee.

OPINION

SOSA, Justice.

A declaratory judgment action was brought by Humana of New Mexico, Inc. (Hospital) seeking a declaration of the rights and responsibilities of the Hospital and the Board of County Commissioners of the County of Lea, New Mexico (Board) under the Indigent Hospital Claims Act (Act). §§ 13–2–12 et seq., N.M.S.A.1953 (Repl.1976).

The Hospital in its petition alleged that since March 6, 1974, it had met and corresponded with the Board to arrive at some understanding concerning the methods and procedures to be followed by the Board in paying indigent claims. The Hospital also claimed that at the Board's insistence it had adopted procedures and expended large sums of money; that the Board had only made token payments of the amounts claimed by the Hospital; and that the Board had arbitrarily refused to pay all legal claims submitted.

The Board in its amended answer set up as an affirmative defense that "indigent patient" as defined in the Act, § 13–2–15(B), N.M.S.A.1953 (Repl.1976) was violative of N.M.Const. art. 9, § 14.

After briefs were submitted, the trial court entered its declaratory judgment finding that the portion of the Act which provides for the counties to pay hospital claims for individuals defined as "indigent patients" under the Act is in violation of N.M.Const. art. 9, § 14 and that such definition is also vague and overbroad. The trial court also found that the definition of "indigent patients" under the Act is severable from the remainder of the Act. The Hospital appealed this decision.

Section 13–2–15(B) defines "indigent patient" as:

> [A] person who has been admitted to a hospital for care, and who can normally support himself and his dependents on present income and liquid assets available to him but taking into consideration this income and those assets, and his requirement for other necessities of life, for himself and his dependents, is a person who is unable to pay the cost of the hospital care administered; the term includes a minor who has been admitted to a hospital for care, and whose parent or the person having his custody is normally able to support the minor on present income and liquid assets available, but, taking into consideration this income and those assets and the requirements for necessities of life for himself and for his dependents, is a person who cannot pay the hospital cost of the minor's care.

This definition is attacked as being vague and overbroad. The appellee contends that the constitution mandates that individuals to be entitled to governmental aid should be poor, without maintenance, and subjects of charity.

New Mexico Constitution, art. 9, § 14 provides:

> Neither the state, nor any county, school district, or municipality, except as otherwise provided in this Constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; *Provided nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.*

It is urged upon us that the construction to be given to "sick" and "indigent" in our constitution is the construction that was intended by the people who drafted and adopted the constitution at the time of enactment. It is further urged that the intent was to prohibit governmental aid to private enterprises or individuals except in those cases where a person was "sick" *and* "indigent" and that this required a person to be poor and without maintenance and subject to charity.

The appellee further contends that the definition of "indigent patient" under § 13–2–15(B) is overly broad and allows persons who are not poor to obtain assistance and thus is contrary to N.M.Const. art. 9, § 14. It continues to assert that the statute is so vague that persons of common intelligence must necessarily guess at its meaning. *State v. Orzen,* 83 N.M. 458, 493 P.2d 768 (Ct.App.1972).

At the outset, we must state that "[e]very presumption is to be indulged in favor of the validity and regularity of legislative enactments, and they will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the Legislature went outside the Constitution in enacting them." *Board of Trustees of the Town of Las Vegas v. Montano,* 82 N.M. 340, 343, 481 P.2d 702, 705 (1971).

To follow the reasoning advanced by the appellee would be to say that our constitution would have to be interpreted in the 21st century as it was in 1912 leaving no room for contemporaneous construction. It would also mean that the document would not cover many cases or transactions that were not in existence at the time of the constitution's enactment.

The term "poor" in 1912 may have meant penniless but in 1978 it ought to include persons on welfare who barely eek out an existence. Under appellee's interpretation, poor persons today could never qualify for hospital aid because welfare assistance brings them above the penniless state.

Constitutional law, to some extent, can be likened to a progressive science. *Holden v. Hardy,* 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780 (1898). Words employed in a constitution are not necessarily static in meaning but grow and change as the conditions of modern society and knowledge grow and change through the passage of years. *State v. Cannon,* 55 Del. 587, 190 A.2d 514 (1963).

We, therefore, find that contemporaneous construction of constitutional provisions—especially in regards to economic matters—is not only proper, but necessary to give life to the constitution in today's society. The constitution is not amended by a contemporaneous interpretation. What occurs is that passage of time does not in and of itself amend the constitution, although it does amend the factual problems, both human and physical, to which the constitution applies contemporaneously.

> It has been generally stated that contemporaneous construction of a constitutional provision by the legislature, continued and followed, is a safe guide as to its proper interpretation, and should not be departed from unless manifestly erroneous. There is a strong presumption that such contemporaneous construction rightly interprets the meaning and intention of a constitutional provision.

16 Am.Jur.2d *Constitutional Law,* § 85 (1964).

Therefore, we hold that the Legislature's definition of "indigent patient" in § 13–2–15(B) is not unconstitutional under N.M.Const. art. 9, § 14. *See Goodall v. Brite,* 11 Cal.App.2d 540, 54 P.2d 510 (1936) (adopting a substantially similar definition of the word "indigent" as enacted by our Legislature). Nor do we find it vague or overbroad.

This issue being dispositive of the case, there is no need to consider whether or not the Act is severable.

For the foregoing reason the lower court is reversed and the case is remanded to it for further proceedings not inconsistent herewith.

McMANUS, C. J., and PAYNE, J., concur.

582 P.2d 809

ENGINE PARTS, INC., Petitioner,

v.

The CITIZENS BANK OF CLOVIS and the Citizens State Bank of Albuquerque, Respondents.

CITIZENS STATE BANK OF ALBUQUERQUE, New Mexico, Petitioner,

v.

CITIZENS BANK OF CLOVIS and Engine Parts, Inc., Respondents.

Nos. 11738, 11740.

Supreme Court of New Mexico.

May 17, 1978.

As Amended June 8, 1978.

Keleher & McLeod, Charles A. Pharris, Robert H. Clark, Albuquerque, for petitioner in No. 11738.

Dickson & Dubois, Frank P. Dickson, Jr., John F. Caffrey, Albuquerque, for petitioner in No. 11740.

Charles C. Spann, Dickson & Dubois, Frank P. Dickson, Jr., John F. Caffrey, Albuquerque, Lynell C. Skarda, Clovis, for respondents in No. 11738.

Keleher & McLeod, Charles A. Pharris, Robert H. Clark, Charles C. Spann, Albuquerque, Lynell C. Skarda, Clovis, for respondents in No. 11740.

OPINION

EASLEY, Justice.

Appellant, Engine Parts, seeks to recover $17,370.00 either from Citizens Bank of Clovis (Clovis Bank) or alternatively from Citizens Bank of Albuquerque (Albuquerque Bank). The trial court entered judgment in favor of Engine Parts against the Clovis Bank and dismissed its action against the Albuquerque Bank. The Court of Appeals reversed. We affirm in part and reverse in part.

K & W Enterprises, Inc., purchased twenty-seven engines from Engine Parts. As partial payment for the engines, it delivered to Engine Parts two drafts dated September 15, 1973 and October 15, 1973, each in the amount of $8,658.00. When the drafts became due, Engine Parts presented them to the Albuquerque Bank. The Albuquerque Bank forwarded the drafts to the Clovis Bank.

The September draft was received by the Clovis Bank on September 21, 1973 and the October draft was received on October 18, 1973. Albuquerque Bank credited Engine Parts' account for the amount of the drafts. The Clovis Bank immediately acknowledged receipt of the drafts and contacted K & W Enterprises and was informed that the drafts would not be paid because the amount was not correct. Two and one half months later, on January 3, 1974, the Clovis Bank gave notice to the Albuquerque Bank that the drafts were dishonored and returned them to Albuquerque, whereupon the Albuquerque Bank notified Engine Parts of the dishonor and charged back the amount of the drafts to Engine Parts' account. By this time Engine Parts' chance of recovery from K & W was severely prejudiced since K & W was by then in financial distress.

The trial court held that the Clovis Bank was a "payor bank" and that it failed to handle the draft before its midnight deadline and was liable for the face amount of the drafts. In the alternative the trial court held that if the Clovis Bank was not a payor bank, it was a "collecting bank" and failed to use ordinary care in handling the drafts and thus was liable for the $17,370.00.

The Court of Appeals held that from the face of the drafts, the Clovis Bank was a payor bank but that since the collection instructions said the draft was payable "thru" the Clovis Bank it therefore became a collecting bank. It held that, as collecting bank, it did use ordinary care in following its instructions in handling the drafts, and was not liable to Engine Parts. The Court of Appeals also reversed the trial court's decision as to the Albuquerque Bank and remanded the case to the trial court to determine if the Albuquerque Bank breached its duty to Engine Parts.

The Clovis Bank was a Payor Bank and not a Collecting Bank

Engine Parts claims that the Clovis Bank was a drawee of the draft and as such was a payor bank. The Clovis Bank argues that when the Clovis Bank received the draft it was accompanied by a collection letter which indicated that the draft was to

be paid "thru" [sic] it. It argues also that it followed the instructions on the collection letter, and thus followed the instructions of its immediate transferor. § 50A–4–203, N.M.S.A.1953 (Repl.1962). Engine Parts argues that the collection letter should not be considered in determining whether the Clovis Bank was a payor bank. This latter contention is correct. The status of a negotiable instrument is to be determined from its face—from the language used or authorized to be used thereon by its drawer or maker—and not from documents attached thereto by other parties. *First State Bank at Gallup v. Clark,* 91 N.M. 117, 570 P.2d 1144 (1977).

It is not, of course, the subjective intent of the drawer which is determinative. *Wilhelm Foods, Inc. v. National Bank of North America,* 382 F.Supp. 605, 610 (S.D.N.Y.1974). It is not what he intended to put on the draft, but was actually written there when he signed the instrument which controls the validity, the negotiability, and the character of the parties thereto as drawer, drawee and payee. The status of a party to the instrument as drawer, drawee, or payee is determined by the drawer when he executes a negotiable instrument which meets the required definition of such an instrument under the U.C.C. Thus, information or instructions on a collection letter attached by a depository or collecting bank are irrelevant in ascertaining who the drawee of the instrument is or whether a bank is a payor or collecting bank. *First State Bank, supra.*

The draft before completion read as follows:

Albuquerque, New Mexico, _____ 19__
_____ Pay to the order of
_____ $_____
_____ Dollars
value received and charge to account of with exchange
To_____
_____
_____
_____ _____

Usually the blank before "Pay to the order of" is used to fill in limitations on the time of payment, not the name of the drawee. Thus phrases such as "On sight," "Five days after sight," "On demand," or "On receipt of goods," etc. are usually inserted. If nothing is inserted, the draft is deemed payable on sight (on demand) after the date it is drawn. § 50A–3–108, N.M.S.A.1953 (Repl.1962). In the present case the name "Citizens Bank of Clovis" was inserted before "Pay to the Order of." Although unusual, this is a clear designation of who the drawee is, since the order sentence reads in plain English:

> "Citizens Bank of Clovis pay to the order of Engine Parts, Inc. $8685.00 Eight Thousand Six Hundred Eighty Five and No/100 Dollars . . .."

This constitutes a clear order to the Citizens Bank of Clovis to pay the designated amount.

Normally the name of the drawee is placed after the promise to pay, often, but not always, with the designation "To" before it. That is, where the drawee is not otherwise designated, a name placed on the drafts before the order to pay or after it (with or without the designation "To") will usually be intended to be the drawee of the draft.

Here the name of the drawer's own corporation and its address was typed in after the designation "To." Thus on its face the draft appears to have two drawees. There are various possible interpretations as to what the draft means by purportedly designating two drawees. But at the very least, it is clear from the face of the instrument that Citizens Bank of Clovis is designated as a drawee and is ordered to pay the money.

Where a draft is unclear as to whether a party named in a draft is a drawee, the court, if necessary, must resolve the ambiguity. *Wilhelm, supra,* at 609. The U.C.C. provides no rule for resolving such ambiguities. *Wilhelm, id.*; *see* § 50A–3–118 N.M.S.A.1953 (Repl.1962). Here there is no need to look to extrinsic facts and surrounding circumstances as in *Wilhelm* because the two names purportedly designating drawees do not occur together. Thus the situation is not like that in *e. g. Farmers Coop. Livestock Mgt. v. Second*

Nat'l Bk., 427 S.W.2d 247 (Ky.1968) (draft "To Second National Bank to be charged to account of Robert Martin"—bank held drawee), *San Antonio Livestock Mkt. Inst. v. First Nat'l Bk.,* 431 S.W.2d 408 (Tex.Ct. Civ.App.1968) (draft "To Julius Caesar Cattle Account, First National Bank"—bank held not drawee); *Branch Banking & Trust Co. v. Bank of Washington,* 255 N.C. 205, 120 S.E.2d 830 (1961) (draft "To Washington Hog Market, The Bank of Washington"—bank held not drawee); or *Tyler Bank & Trust Co. v. T. B. Saunders,* 159 Tex. 158, 317 S.W.2d 37 (1958) (draft "To Shaw Pkg. Co., Tyler State Bank & Tr. Co.—bank held not drawee). Here the bank was designated as drawee in the order sentence of the draft. The insertion of the additional name of K & W Enterprises in the spaces after "To" does not nullify the fact that the Clovis Bank is designated separately as drawee in a way that is clear, and is designated in a manner that even an unlearned drawer would know meant that the bank was to pay.

No party to this appeal has advanced any reasonable meaning for inserting the words "Citizens Bank of Clovis" before "pay to the order of" other than that the drawer intended the Clovis Bank to pay. Only the designation of K & W Enterprises is ambiguous. This latter ambiguity is irrelevant since a draft may designate more than one drawee, § 50A–3–504, N.M.S.A. 1953 (Repl.1962), and whether or not K & W Enterprises is a drawee does not change the fact that the Clovis Bank is a drawee. Presentment for payment can be made to any named drawee since each is ordered to pay. § 50A–3–504.

Because it was a drawee and a bank, the Citizens Bank of Clovis was clearly a "payor" bank under § 50A–4–105(b), N.M.S.A.1953 (Repl.1962), since it was a bank by which the item is payable as drawn. It is a "payor" bank based on the words used on the instruments, and we are, therefore, not dependent on testimony in the record or on findings of fact or conclusions of law made by the lower court to ascertain its status as payor. Because the Clovis Bank is a "payor" bank, it cannot be deemed a "collecting" bank, since § 50A–4–105(d) defines "collecting bank" as "any bank handling the item for collection *except the payor bank.*" (Emphasis added.) Nor was the draft merely to be paid "through" the Clovis Bank or "at" the Clovis Bank. To make a draft payable "through" or "at" a bank, and thus designate the bank as a mere conduit for payment and not as a "payor" bank directly ordered to pay, the *drawer* of the draft must expressly write the word "through," "pay through," "at," "payable at," or similar words before the name of the bank *on the instrument itself.* §§ 50A–3–120 and 121, N.M.S.A.1953 (Repl. 1962). A party who is not the drawer cannot, without authority from the drawer, add these words to the instrument, and saying "payable thru" on some attached document (as on the collection letter attached to the draft in this case) has no effect on the terms set out in the instrument itself. *First State Bank, supra.*

Strict Liability of the Clovis Bank

The Albuquerque Bank failed to read the entire instrument carefully, but apparently simply read the name of K & W Enterprises in the space following "To" on the form draft and decided that K & W Enterprises was the drawee. It then attached a collection letter stating that the attached draft was sent to the Clovis Bank for "collection" and that it was "One envelope draft in the amount of $8685.00 drawn on K. $[sic] W. Enterprises and payable to us thru [sic] you for our customer Engine Parts, Inc." The words "our customer" and "Inc." were left out on the other otherwise identical collection letter. The collection letter also contained the following instructions:

1. Return at once if not paid on maturity.
2. If unpaid give full reason.
3. Deliver documents only when paid.
4. Do not credit until paid.
5. No protest unless otherwise instructed.
6. Protest—none.
7. Date due—sight.

The mere forwarding of an item to the bank upon which it was drawn accompanied by a letter stating the item was enclosed for "collection" and the treatment of the item by the drawee bank as a "collection" item does not establish that the bank upon which the item was drawn is a "collecting" bank. *Farmers Coop. Livestock Mkt., supra.*

The words on the form envelope draft are printed on the *outside* of an envelope which is approximately the size of a regular business envelope. The attached "collection letter" is printed on a small form of about the same size. It barely covers the printed draft form and in no way prevents a quick inspection of the draft to determine such routine things as whether it is dated, whether it has matured, whether it has been properly completed, whether there appear to be any unauthorized changes or alterations, who the drawer and drawee are, and whether there are any apparent irregularities in the instrument, etc.

Regarding the instruction to "return at once if not paid on maturity," the Court of Appeals held since the drafts were dated September 15 and October 15 and were received by the Clovis Bank after those dates, that the drafts had already matured and that this instruction was a nullity. This is incorrect. The drafts were sight drafts. Sight instruments are demand instruments and mature, not on the date drawn, but any time after that date when demand for payment is made. § 50A–3–108, N.M.S.A.1953 (Repl.1962). The drafts were matured when they were presented to the Clovis Bank. *Flintkote Company v. Grimes,* 281 Ala. 707, 208 So.2d 87 (1968). Therefore when it learned that K & W Enterprises would not honor the draft it should have immediately sent the items back.

Engine Parts argues that the Clovis Bank is liable to it for the full amount of both drafts because it was a payor bank and it held the drafts past its "midnight deadline." Engine Parts relies on § 50A–4–302(a), N.M.S.A.1953 (Repl.1962) which states:

In the absence of a valid defense such as breach of a presentment warranty (subsection (1) of section 4–207 [50A–4–207]), settlement effected or the like, *if an item is presented on* and received by a payor bank the bank is accountable for the amount of

(a) *a demand item* other than a documentary draft whether properly payable or not if the bank, *in any case where it is not also the depositary bank,* retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depositary bank, does not pay or return the item or send notice of dishonor until after the midnight deadline.

Section 50A–4–105(a) defines "depositary bank" as "the first bank to which an item is transferred for collection even though it is also the payor bank." The items in question here were first transferred to the Albuquerque Bank, therefore the Clovis Bank is not a "depositary bank." Under § 50A–4–302(a) therefore it is liable as a payor bank for the amount of demand items *presented for payment* which it either fails to settle for before "midnight of the banking day of receipt" or which it fails to pay or return before its "midnight deadline" [which § 50A–4–104(1)(h), N.M.S.A.1953 (Repl.1962) defines as "midnight on its next banking day following the banking day on which it receives the relevant item."] But to be liable, two other important conditions must be met.

1. The item must be presented for payment;

2. The payor bank must not have, or must fail to raise, any valid defenses including but not limited to breach of the warranties of presentment.

The record in the instant case does not show whether any such valid defenses were raised at the trial court level, and their existence, if any, or validity was not raised on appeal. Thus we do not have to consider whether the Clovis Bank had any such valid defenses.

The only remaining inquiry regarding the applicability of § 50A–4–302(a) is whether the items were properly "presented on" the Clovis Bank.

Presentment is defined in § 50A–3–504 as:

> "A demand for *acceptance or payment* made *upon the . . . drawee or other payor* by or on behalf of the holder [emphasis added]."

The uncontroverted testimony and evidence in the record shows that the Albuquerque Bank, acting on behalf of its customer Engine Parts, sent the draft to the Clovis Bank, inadvertently stating the draft was payable *through* the Clovis Bank not *by* it.

The Albuquerque Bank thought that the Clovis Bank was a mere collection conduit for payment, not the drawee and payor bank. It thought that K & W Enterprises was the drawee. Thus, since it thought incorrectly that the Clovis Bank was *not* the drawee, it did not intend by sending the drafts to the Clovis Bank, to make a "demand for *payment . . .* upon the *. . . drawee*" as required by § 50A–3–504.

The process of collection is, however, simply an attenuated demand for payment. Each collecting bank in the chain of collection becomes an agent for the owner of the item and acts for him to demand payment of the drawee. § 50A–4–201, N.M.S.A.1953 (Repl.1962). Thus every collecting bank aids in demanding payment of the drawee. Any item sent for collection is sent for eventual payment. That the Albuquerque Bank was mistaken as to who the drawee was does not change the fact that the Clovis Bank was the drawee. When the Albuquerque Bank sent the drafts to the Clovis Bank, even though it thought it was demanding payment through another collecting bank, it was in fact demanding payment "upon . . . the drawee." Thus it effectively presented the drafts upon the Clovis Bank as required by § 50A–3–504. The Clovis Bank is therefore accountable for the full amount of the two demand items here involved.

The measure of damages herein is that provided in § 50A–4–302, namely the full value of the drafts which the Clovis Bank failed to promptly return, and not the measure of a bank's breach of it's duty of ordinary care set out in § 50A–4–103(5), N.M.S.A.1953 (Repl.1962). *Rock Island Auction Sale, Inc. v. Empire Packing Co.,* 32 Ill.2d 269, 204 N.E.2d 721 (1965). The liability created by § 50A–4–302 is independent of negligence and is an absolute or strict liability for the full amount of the items which it fails to return. *Bank of America Nat. T. & S. Ass'n v. Security Pac. Nat. Bank,* 23 Cal.App.2d 638, 100 Cal.Rptr. 438 (1972); *Central Bank and Trust Co. v. First Northwest Bank,* 332 F.Supp. 1166 (E.D.Mo. 1971); *See National City Bank of Rome v. Motor Contract Co.,* 119 Ga.App. 208, 166 S.E.2d 742 (1969). Even where a draft is arguably ambiguous as to whether the bank is the drawee or someone else is, where it handles the item which it in fact is obligated to pay, it takes the risk of loss if it fails to comply with § 50A–4–302. *Farmers Coop. Livestock Mkt., supra.* The fact that the drafts were sent for "collection" does not alter a payor bank's liability under this section. *Kane v. American National Bank & Trust Company,* 21 Ill.App.3d 1046, 316 N.E.2d 177 (1974). Moreover, we hold that since the Clovis Bank held the drafts for an unreasonable period, namely two and a half months beyond the time when it should have returned them, the petitioner Engine Parts is entitled to interest on its claim at the legal rate. *Conn. v. Bank of Clarendon Hills,* 133 Ill.App.2d 574, 273 N.E.2d 612 (1971), *rev'd on other grounds,* 53 Ill.2d 33, 289 N.E.2d 425 (1972); *accord, Sun River Cattle Co. v. Miners' Bank of Montana,* 164 Mont. 479, 525 P.2d 19 (1974). Not to award interest where there has been an unreasonable and unjustified delay would be an abuse of discretion.

Liability of the Albuquerque Bank

The Clovis Bank argues that the responsibility for seeing that the draft was paid or returned should not be on it but should be on the Albuquerque Bank. It reasons that since it does not get paid for the service, it

should not have any liability for its gratuitous acts. It claims that the Albuquerque Bank should have sent out tracers on the drafts to determine their status. This reasoning is contrary to the Uniform Commercial Code.

Section 50A–4–202 clearly provides that a collecting bank must use ordinary care in presenting the draft for payment, and if the draft is not paid it must use ordinary care in returning the drafts. Ordinary care obligates a collecting bank to take seasonable action on the item. § 50A–4–202(2).

The Albuquerque Bank was a collecting bank, § 50A–4–105(d), N.M.S.A.1953 (Repl.1962), and could be liable only if it failed to use ordinary care in sending the draft for presentment. § 50A–4–202(1)(a). The trial court found that the Albuquerque Bank did use ordinary care in handling the draft and did not breach the duty it owed to its customers, Engine Parts. We therefore affirm the trial court's decision as to the Albuquerque Bank.

Although both Engine Parts and the Clovis Bank raised the issue of whether the Albuquerque Bank's erroneous instruction (that the drafts were payable "thru" the Clovis Bank) changed the draft's designation of the Clovis Bank as drawee and payor bank, neither raised the issue of whether sending the drafts with the erroneous instruction was a breach of the Albuquerque Bank's duty of ordinary care in passing on the drafts for collection and payment and whether such a breach was a concurrent cause of the Clovis Bank's failure to promptly return the drafts upon dishonor. Since neither party properly raised the issue, we cannot consider it on appeal.

The trial court is affirmed in all respects except for its erroneous conclusion that the Clovis Bank could, alternatively, be a "collecting" bank and its failure to award interest on the judgment. This case is remanded with directions that the trial court enter judgment for Engine Parts against the Clovis Bank together with interest from the day after the Clovis Bank's midnight deadline.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA and FEDERICI, JJ., concur.

582 P.2d 816

Johnny ALVAREZ, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 11875.

Supreme Court of New Mexico.

May 23, 1978.

John B. Bigelow, Chief Public Defender, Reginald J. Storment, Appellate Defender, Martha A. Daly, Asst. Appellate Defender, Santa Fe, for petitioner.

Toney Anaya, Atty. Gen., Santa Fe, for respondent.

OPINION

SOSA, Justice.

The defendant appealed his conviction of trafficking in heroin.

The Court of Appeals addressed three issues: (1) the unavailability of the informer at trial; (2) entrapment as a matter of law; and (3) jury selection. The Court of Appeals declined to hold for the defendant in each of the three issues. The defendant then applied for a writ of certiorari on the third issue, jury selection. We decided to hear the matter.

During voir dire it was revealed that certain jurors had served on at least one heroin trafficking case in which the defendants had been convicted primarily on the basis of testimony by the same witness for the prosecution who would be called in the case at bar. Each of these jurors was seated on the defendant's jury after he had exhausted all of his peremptory challenges. The defendant challenged each of the jurors for cause but these challenges were denied by the trial court. The prosecution then presented as a witness a narcotics agent, who was the only witness to the alleged sale and upon whose testimony the State's case hinged. The defendant was subsequently convicted.

On appeal, the defendant presented a question of first impression in New Mexico by challenging the competency of the seven jurors, arguing that their prior jury duty on cases involving a similar charge based on the same prosecution witness' testimony, whom they had already determined to be believable, established bias sufficient to render them unable to sit as fair and impartial jurors and to decide the case solely on the basis of evidence introduced in defendant's trial. After acknowledging a sharp

conflict between the jurisdictions, and even judges on the same bench, the Court of Appeals determined that, as voir dire failed to expressly elicit statements of actual partiality from these jurors, the trial court's denial of the challenges for cause was not an abuse of discretion. We disagree.

In rejecting the defendant's argument regarding the incompetency of the seven members of the jury panel, the Court of Appeals stated that during voir dire of these jurors the defendant failed to establish partiality upon the part of any juror. The Court of Appeals went on to state that the jurors indicated they could try defendant solely on evidence and instructions in the defendant's case. Furthermore, the Court of Appeals relied on the fact that upon the State's inquiry the jurors stated that they would not believe the prosecution witness, who they previously found believable, more than any other witnesses.

The particular question presented here is disqualification because of prior service on similar cases which arose out of independent transactions and in which identical witnesses are used by the prosecution to establish similar but disconnected criminal acts. On this question a sharp conflict exists in the decisions. *Casias v. United States,* 315 F.2d 614 (10th Cir. 1963).

At Annot., 160 A.L.R. 753 at 769 (1946), it is stated:

> [I]t has been held that a defendant in a criminal proceeding does not receive a fair and impartial trial where it appears that some of the members of the jury at his trial previously served on a jury at the trial of another defendant charged with a similar but independent offense, and witnesses who testified for the prosecution at the first trial were also used to establish the guilt of the defendant at the second trial. Some courts have reasoned further that, the credibility of such witnesses at the first trial having been sustained, particularly where the main defensive matter is the incredibility of such witnesses, an avowal of impartiality by the jurors will not remove their disqualification. (Footnotes omitted.)

Since the defendant's theory was one of entrapment, the credibility of the State's witness was clearly at issue. The jurors, having sustained the credibility of the witness once before should not be allowed to overcome the implied bias in this situation by avowals of impartiality given in response to leading questions by the trial court and the prosecutor. In these circumstances, these jurors cannot be judges of their own impartiality. *Temple v. State,* 15 Okl.Cr. 176, 175 P. 733 (1918).

In *Priestly v. State,* 19 Ariz. 371, 171 P. 137 at 139 (1918) the court, in discussing jurors, held that:

> Having passed upon the credibility of witnesses in a similar case upon substantially the same testimony, and having theretofore rendered a verdict on their oaths, it is not to be believed that they could sit upon this case with such an opinion previously formed without it influencing their action.

It also has been held that in a prosecution for the unlawful sale of intoxicating liquors, where the principal matter of defense was an attack on the credibility of the prosecuting witness, it was error to compel the defendant to select a jury from a panel including six jurors who had previously sat in a similar case, in which almost the sole defensive matter was the credibility of the same prosecuting witness. *Edgar v. State,* 59 Tex.Cr.R. 488, 129 S.W. 140 (1910).

The dissent filed in *Casias v. United States, supra,* at 620 by three judges of the equally divided panel noted:

> There is nothing new or novel in the concept of implied bias or disqualification based on consideration of policy. It is not uncommon for the law to say that one occupying a status or relationship which raises a suspicion of bias or prejudice shall not be called into the jury box, and if called, shall be excused for cause.

We agree with this concept.

Affirmances of impartiality by jurors should not be regarded as conclusive evidence. *See Mares v. State,* 83 N.M. 225, 490 P.2d 667 (1971). Since it is not conclu-

sive, the jurors' avowal of impartiality is not sufficient to protect defendant's constitutional right to impartial jury as guaranteed by the Sixth Amendment to the United States Constitution and Article II, § 14 of the New Mexico Constitution.

We, therefore, hold that a juror, who has served in a previous similar criminal trial in the same term of court where the same or another defendant was tried primarily on the basis of the credibility of the same material witness the State intends to use in the subsequent trial, when challenged for cause, may not serve in the subsequent trial, unless the prosecution can satisfy the court that the testimony of the material witness will be corroborated by the testimony of other witnesses. This rule shall not apply to expert or technical witnesses whose testimony is, for example, based upon experiments, chemical analysis, or the like. This rule shall be given modified prospectivity. It shall be applicable to the case at bar, all similar pending actions and all actions which may arise in the future.

This being the only issue addressed by the appellant on his petition for a writ of certiorari, we deem all other points raised by the appellant in the Court of Appeals as having been waived. The Court of Appeals is reversed and the cause remanded to the trial court for proceedings not inconsistent herewith.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

McMANUS, C. J., and FEDERICI, J., dissent.

582 P.2d 819

PHELPS DODGE CORPORATION, Petitioner,

v.

Pablo (Paul) GUERRA, Respondent.

No. 11792.

Supreme Court of New Mexico.

July 10, 1978.

Rehearing Denied Aug. 21, 1978.

Shantz, Dickson & Young, Silver City, Sutin, Thayer & Browne, LaFel E. Oman, Santa Fe, for petitioner.

Neumeyer & Hill, Glenn B. Neumeyer, Las Cruces, for respondent.

OPINION

EASLEY, Justice.

Plaintiff Pablo Guerra (Guerra) filed suit for workmen's compensation against the defendant Phelps Dodge Corporation (Phelps). The trial court dismissed the claim on the ground that Guerra had settled the claim along with a previous compensation case between the parties. The Court of Appeals held for Guerra and awarded him attorneys fees for the appeal. We reverse the Court of Appeals as to all issues and sustain the decision of the trial court.

The controlling issue is whether, as a matter of law, the trial court is precluded from going behind an unambiguous judgment and considering evidence, the admission of which was stipulated to by the parties and which clearly shows that the claim sued on was previously paid. Subsidiary issues relate to whether the stipulated facts fairly bring this case within the purview of N.M.R.Civ.P. 60(b)(5) [§ 21–1–1(60)(b)(5), N.M.S.A. 1953 (Repl.1970)], and whether an award of attorney's fees on appeal was proper.

After injuring his back on September 26, 1972, Guerra received weekly benefits. He later filed a claim for workmen's compensation, alleging only the 1972 injury. The doctors released him for work as fully cured, although he was still having some trouble with his back. On March 8, 1974, he fell and again injured his back in the same general area as before. Plaintiff was paid weekly benefits for the second injury. Plaintiff did not make a new accident report. Defendant reported it as an "old injury."

On February 14, 1975, a stipulated settlement agreement and judgment were filed. These two documents made reference to the claim filed for the first injury but did not mention the second injury.

On September 19, 1975, Guerra filed this claim based on his second injury. Phelps claimed in its answer that Guerra had been paid compensation and medical expenses resulting from the second injury at the time the stipulated settlement agreement and judgment had been entered previously. The parties stipulated that the trial court "should" consider all pleadings, depositions, exhibits, attachments to pleadings, the transcript of proceedings in the first cause, medical reports of Dr. Van Horman and certain correspondence between the attorneys for the parties.

The stipulated documents reflect that Guerra was released as cured by the doctors after treatment for the first injury and after he had been paid compensation for the time that he was off the job. He felt that he could go back to work and that there was nothing wrong with him any more. Guerra's attorney and the doctor made statements that he was "completely healed of the residuals and all of the injuries." The second injury occurred later.

The record shows that the two injuries were considered as one injury in the statement showing the compensation paid to Guerra over the entire period, in the listing of the dates and amounts of medical expenses incurred, in the doctor's reports wherein one percentage figure for disability was used, obviously for both injuries, and in the letters exchanged between Guerra's attorney and Phelps' attorney.

After Guerra had been off work and had been treated medically for the second injury for a considerable length of time, and on being questioned at the time the settlement agreement was presented to the trial court for approval, Guerra answered in the affirmative when asked if he was aware that "this is a settlement of your entire workmen's compensation claim" and "this will terminate your workmen's compensation benefits with Phelps Dodge Corporation."

There is other substantial evidence in the documents that were admitted by stipulation that tends to show that the intention of the parties and their attorneys was to settle the claims of Guerra for both injuries, with the second injury being considered as an aggravation of the first or, inferentially, simply lumped in with it for convenience.

Decision of the Trial Court

The trial court dismissed the second claim of Guerra after finding that the parties agreed that the court should consider all the pleadings and other papers in the court file. The court further found that the "intent and understanding of the parties on February 14, 1975, was to settle both accidents and the resulting injuries and disabilities suffered by Plaintiff therefrom." These findings were not objected to below.

Court of Appeals Decision

The Court of Appeals in a memorandum opinion held as a matter of law that the

trial court could not go behind the judgment and the stipulation incorporated therein, citing *Owen v. Burn Const. Co.*, 90 N.M. 297, 563 P.2d 91 (1977) and other authorities, even though the parties had agreed that the other evidence should be considered by the trial court. That court also awarded attorney's fees to Guerra.

Rule 60(b)

The general rules regarding 60(b) actions are reasonably well-settled in New Mexico and elsewhere in jurisdictions employing the Federal Rules or modifications thereof.

Judgments of a district court are presumptively correct. *Louis Lyster General Contr., Inc. v. City of Las Vegas*, 83 N.M. 138, 489 P.2d 646 (1971); *State v. Glens Falls Insurance Company*, 78 N.M. 435, 432 P.2d 400 (1967); *Porter v. Mesilla Valley Cotton Products Co.*, 42 N.M. 217, 76 P.2d 937 (1937). It is horn-book law that a final judgment should not be lightly disturbed. 7 Moore's Federal Practice ¶ 60.19, at 237 (2d ed. 1975); *Southern Pacific Railr'd v. United States*, 168 U.S. 1, 18 S.Ct. 18, 42 L.Ed. 355 (1897). To allow a party to correct alleged errors of law at any time by means of Rule 60 would significantly weaken the policy of finality embodied in the rules. *Warner v. City of Bay St. Louis*, 526 F.2d 1211 (5th Cir. 1976).

Rule 60, however, was created to provide a simplified method for correcting errors in final judgments. *State v. Romero*, 76 N.M. 449, 453, 415 P.2d 837, 839 (1966). The rule provides a reservoir of equitable power to do justice. *Battersby v. Bell Aircraft Corporation*, 65 N.M. 114, 332 P.2d 1028 (1958), but it is not to be used as a substitute for appeal. *Chavez v. Village of Cimarron*, 65 N.M. 141, 146, 333 P.2d 882, 885 (1958); *Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950). Where the rule is properly invoked, it should be liberally construed for the purpose of doing substantial justice. *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949); *Schwab v. Bullock's, Inc.*, 508 F.2d 353 (9th Cir. 1974); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951); *see Battersby, supra.*

The intendment of Rule 60(b) is to carefully balance the competing principles of finality and relief from unjust judgments. The courts should and do give it liberal construction, 7 Moore's Federal Practice ¶ 60.18(8), at 216.1 (2d ed. 1975). The courts, however, must consider whether there are any intervening equities that make it inequitable to grant relief. *Weisberg v. Garcia*, 75 N.M. 367, 404 P.2d 565 (1965); *Erick Rios Bridoux v. Eastern Air Lines*, 93 U.S.App.D.C. 369, 214 F.2d 207 (1954); *Tozer, supra; Vecchione v. Wohlgemuth*, 426 F.Supp. 1297 (E.D.Pa.1977); *In re Cremidas' Estate*, 14 Alaska 234, 14 F.R.D. 15 (1953).

No court has authority to open or vacate a judgment without some material grounds to support the claims on which the application for relief depends. *See Springer Corporation v. Herrera*, 85 N.M. 201, 510 P.2d 1072 (1973). The pleading should contain allegations which if true would invalidate the judgment or destroy its effect as to the matters under complaint. *Berry v. Chitwood*, 362 S.W.2d 515 (Mo.1962).

It is convenient for the petitioner if the existence of the grounds for relief is obvious from the record, but there are many cases, like this one, in which the introduction of extrinsic evidence is necessary and is deemed proper, contrary to the holding of the Court of Appeals in this case. *Arias v. Springer*, 42 N.M. 350, 78 P.2d 153 (1938).

Application of Rule 60(b)

In our case Phelps' request for relief did not specifically mention Rule 60(b). The pleading simply stated that the claim for the second injury had been settled and paid. The manner in which the relief is requested and the nomenclature used is not significant. *State v. Romero*, 76 N.M. 449, 415 P.2d 837 (1966); *Turknett v. Western College*, 19 N.M. 572, 145 P. 138 (1914); *Kassman v. American University*, 178 U.S. App.D.C. 263, 546 F.2d 1029 (1976); *See*

Winfield Associates, Inc. v. Stonecipher, 429 F.2d 1087 (10th Cir. 1970); *In re Cremidas, supra*. Quite obviously the facts bring this case within Rule 60(b)(5) which permits a judgment to be opened when there is a meritorious allegation that a claim has been "satisfied, released, or discharged."

Our courts and others have not hesitated to afford equitable relief against a judgment, if to enforce it would give an unconscionable advantage to one party, procured through his own excusable mistake or through unavoidable accident on the part of the other litigant. *Turknett, supra; Oliver v. City of Shattuck*, 157 F.2d 150 (10th Cir. 1946).

> One of the long recognized grounds of relief from a judgment, is an agreement or understanding between the parties, which if observed would have obviated the judgment, especially if the agreement operated to lull the judgment debtor into security and inactivity in order that some unconscientious advantage could be taken of him.

Id. at 153.

Setting aside a judgment under Rule 60(b) is discretionary with the trial court. *Springer Corporation, supra; Weisberg, supra; Adams & McGahey v. Neill*, 58 N.M. 782, 276 P.2d 913 (1954); *Foundation Reserve Ins. Co. v. Martin*, 79 N.M. 737, 449 P.2d 339 (Ct.App.1968). Appellate courts will not interfere with the action of the trial court in vacating a judgment except upon a showing of abuse of discretion. *Battersby, supra.*

The court should be liberal in determining what constitutes good cause to vacate a judgment so that the ultimate result will address the true merits and substantial justice will be done. *Weisberg, supra.*

Our Court in *Home Savings & Loan Ass'n v. Esquire Homes, Inc.*, 87 N.M. 1, 528 P.2d 645 (1974) had under consideration a petition for relief from a six year old default deficiency judgment in a mortgage foreclosure action in which the defendant sought to open the judgment on the grounds that defendant had been released from all liability prior to the time the judgment was entered. The trial court received evidence that a letter of release had been issued by the plaintiff and found that the debtor had a meritorious defense. This Court held that the deficiency judgment was unjust and should be set aside. The facts in *Home Savings* are reasonably analogous to those in the instant case.

In *Gilmore v. Griffith*, 73 N.M. 15, 385 P.2d 70 (1963), a wife sued for the gambling losses of her husband against defendants who claimed that they had been advised by the wife that a divorce action she had filed against her husband would terminate the suit. The defendants, therefore, did not contest the complaint and a default judgment was entered. The trial court set aside the default judgment and this Court held that it was not an abuse of discretion.

Owen, supra, relied upon by the Court of Appeals, is not applicable. The person who attacked the results of that judgment was not a party to the suit in which it was rendered, thus it was a collateral attack and not a direct one as is true here. The case was not tried at any level as a Rule 60(b) action. *See Lemon v. Morrison-Knudsen Co.*, 58 N.M. 830, 277 P.2d 542 (1954).

Rule 60(b) is tailored to fit exactly the type of situation that exists here. To have before us such substantial, persuasive and admissible evidence that Guerra has been paid all that he was ever entitled to receive from Phelps, and then refuse to reopen the judgment is not consistent with substantial justice. We hold that the interest of maintaining the finality of judgments is overridden in this case by the desirability of avoiding an unwarranted windfall to Guerra. We find no intervening equities which make it inequitable to grant the relief requested. We see no abuse of discretion by the trial judge in sustaining the motion to dismiss this case.

In light of the above holdings, we reverse the Court of Appeals also on the issue of the award of attorney's fees to Guerra for the appeal to the Court of Appeals. We are constrained to state that,

even if Guerra had prevailed in this Court on the other issues, the awarding of attorney's fees would have been in error since, even if Guerra had won this appeal, there would not yet have been any decision by the trial court as to his entitlement to compensation until after the case had been remanded. Until there has been an award of compensation at the trial court level, an allowance of attorney's fees is improper. § 59–10–23(D), N.M.S.A. 1953 (Repl.1974); *Geeslin v. Goodno, Inc.*, 75 N.M. 174, 402 P.2d 156 (1965); *Ennen v. Southwest Potash Company*, 65 N.M. 307, 336 P.2d 1062 (1959).

The decision of the Court of Appeals is reversed and the trial court's decision is affirmed.

IT IS SO ORDERED.

McMANUS, C. J., and PAYNE and FEDERICKI, JJ., concur.

SOSA, J., not participating.

582 P.2d 824

Calvin ELLER and Dennis Richardson, Petitioners,

v.

STATE of New Mexico, Respondent.

No. 12016.

Supreme Court of New Mexico.

Aug. 9, 1978.

John B. Bigelow, Chief Public Defender, Martha A. Daly, Asst. Appellate Defender, Santa Fe, for petitioners.

Toney Anaya, Atty. Gen., Santa Fe, for respondent.

OPINION

McMANUS, Chief Justice.

Defendants were each charged with multiple counts of issuing worthless checks in violation of §§ 40–49–4 and 5(B), N.M.S.A. 1953 (Repl. 1972) and one count of conspiracy in violation of § 40A–28–2, N.M.S.A. 1953 (Repl. 1972).

Defendant Eller entered into a plea and disposition agreement with the district attorney which provided that the defendant would plead guilty to all counts in exchange for a recommendation of the district attorney that any sentence of incarceration would be suspended and the defendant would be placed on probation. Full restitu-

tion was to be made within sixty (60) days. Defendant Richardson had not entered into a written plea and disposition agreement at the time he pled guilty, but did sign a plea and disposition agreement prior to sentencing. The agreement as to defendant Richardson provided the same conditions as defendant Eller's agreement. The trial court was informed of the recommendation of the district attorney but refused to follow the recommendation for a suspended sentence. Both defendants were sentenced to terms in the penitentiary.

After sentencing the defendants moved to withdraw their guilty pleas. The motion was denied. The defendants appealed to the Court of Appeals from the denial of their motion. The Court of Appeals affirmed without reaching this issue. We granted certiorari. We reversed and remanded in *Eller v. State*, 90 N.M. 552, 566 P.2d 101 (1977).

Upon remand this Court directed the Court of Appeals to determine "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." *Id.* at 554, 566 P.2d at 103.

In the Court of Appeals the defendants challenged the trial court's denial on the basis that an opportunity to withdraw a plea is required under N.M.R.Crim.P. 21(g)(4) [§ 41–23–21(g)(4), N.M.S.A. 1953 (Supp. 1975)].

The Court of Appeals determined that Rule 21(g)(4) does not require an opportunity to withdraw a plea since the plea agreement was to recommend probation, which the district attorney did. The court noted a distinction between an agreement for a specific sentence and an agreement *to recommend* a sentence. *United States v. Sarubbi*, 416 F.Supp. 633 (D.N.J., 1976); *United States v. Savage*, 561 F.2d 554 (4th Cir. 1977); N.M.R.Crim.P. 21(g)(4) and 21(g)(2).

A dissenting opinion was filed in the Court of Appeals stating that the majority opinion made a "distinction without a difference." *State v. Eller*, No. 2976 (N.M.Ct. App. May 2, 1978).

We granted certiorari to determine whether a rejection of a sentencing recommendation contained in a plea agreement amounts to a rejection of a plea agreement under Rule 21(g)(4). This is a case of first impression.

Rule 21(g)(4) provides:

> Rejection of plea—If the court rejects the *plea agreement*, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, *afford the defendant the opportunity to then withdraw his plea*, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement. (Emphasis added.)

N.M.R.Crim.P. 21(g) is similar to the Fed. R.Crim.P. 11(e) [18 U.S.C. (1975)]. Federal Rule 11(e) provides for specific distinctions as to dismissal of charges, recommendations for a particular sentence and an agreement conditioned upon a specific sentence. The rule also provides that "[i]f the court rejects the plea agreement, the court shall . . . afford the defendant the opportunity to then withdraw his plea."

In *Sarubbi* and *Savage, supra*, relied upon in the majority opinion of the Court of Appeals, these federal courts held that where a defendant plea bargains only for a recommendation which the defendant knows is not binding on the trial court, the non-acceptance of the recommendation by the trial court is not a rejection of the plea agreement. In *Sarubbi* the court held that an agreement to recommend could be approved and satisfied even though the recommendation or request failed to persuade the court to impose the recommended sentence. 416 F.Supp. at 636.

We do not agree with such a narrow construction of the contents of a "plea agreement." If the trial court rejects the "plea agreement" the defendant must be given an opportunity to withdraw his plea. It is implicit in a plea agreement that the

court will either accept the recommendation and plea to the charges, or reject *both* the recommendation and the plea.

In *People v. Wright*, 559 P.2d 249 (Colo. App. 1976) *aff'd* 573 P.2d 551 (Colo. 1978) the court construed a criminal rule similar to Rule 21(g). The Colorado rule refers to "sentence concession" in lieu of sentence recommendation. The rule permits withdrawal of a plea if the court determines that the final disposition should not include the charge or sentence concessions. The court determined that sentence concession was akin to a recommendation and that if the recommendation is not followed the defendant must be given an opportunity to withdraw. *Id.* at 252. The court quoted with approval from *Thomas v. State*, 327 So.2d 63 (Fla.App. 1976) where it was stated:

> [t]o say that in these circumstances that all which was bargained for and agreed to was fulfilled by the prosecutor's mere act of recommending probation would reduce the bargain to a trap or, at best, a formality.

327 So.2d at 64.

On appeal, the Supreme Court of Colorado affirmed, stating:

> When, as in this case, the trial judge rejects a plea agreement, he removes the basis upon which the defendant entered his plea and draws into question the voluntariness of the plea. Even where the only "promise" is a prosecutorial recommendation for a lighter sentence, "there nevertheless remains at least the taint of false inducement." ABA, *Standards Relating to the Functions of the Trial Judge*, 34.1[c] (commentary).

573 P.2d at 553.

We believe that the reasoning in the *Wright* decision is sound. When a plea agreement is reached the agreement is "rejected" in all its parts if it is not followed by the trial court. The sentencing disposition is an integral part of the agreement and bears directly upon whether the plea is voluntary. *See, Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

We therefore hold that the trial court's refusal to follow the sentencing recommendations of the district attorney constitutes a rejection of the plea agreement under Rule of Crim.P. 21(g)(4).

This cause is reversed and remanded to the trial court with directions to permit the defendants to withdraw their pleas of guilty and to enter a new plea, and for further proceedings.

IT IS SO ORDERED.

SOSA and FEDERICI, JJ., concur.

EASLEY and PAYNE, JJ., respectfully dissenting.

582 P.2d 826

STATE of New Mexico,
Plaintiff-Appellant,

v.

Kenneth W. WILSON,
Defendant-Appellee.

No. 3474.

Court of Appeals of New Mexico.

July 25, 1978.

Toney Anaya, Atty. Gen., Lawrence A. Gamble, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Brian M. Gross, Albuquerque, for defendant-appellee.

OPINION

HENDLEY, Judge.

Defendant was arrested and charged with homicide by vehicle while under the influence of intoxicating liquor contrary to § 64–22–1, N.M.S.A.1953 (2d Repl.Vol. 9, pt. 2, 1972). He was taken from the scene of the automobile accident to the Bernalillo County Medical Center by a State Police officer. Defendant refused to consent to a blood sample being taken and the officer directed the technician to obtain a blood sample.

The trial court granted defendant's motion to suppress the blood sample and its analysis. The state appealed. We affirm.

The state argues as follows: There is no constitutional prohibition against the taking of the blood sample; "[T]he rationale behind the exclusionary rule is that evidence obtained in violation of *Constitutional rights* must be suppressed"; "Here, however, we have evidence not obtained unconstitutionally, but rather arguably obtained in violation of a statute"; and "that suppressing the instant evidence through the use of the exclusionary rule is inappropriate." This argument is totally without merit.

Section 64–22–2.6, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972) states:

> Implied consent to submit to chemical test.—A. Any person who operates a motor vehicle within this state shall be deemed to have given consent, subject to the provisions of the Implied Consent Act [64–22–2.4 to 64–22–2.12], to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood, if arrested for any offense arising out of the acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle while under the influence of an intoxicating liquor.
>
> B. A breath test shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state, while under the influence of intoxicating liquor. If the person comes under the provisions of section 64–22–2.8 NMSA 1953 the law enforcement officer may designate the test or tests to be given.

Section 64–22–2.11, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972) states:

> Refusal to submit to chemical test—Revocation of license or privilege to drive.—A. If a person under arrest refuses upon request of a law enforcement officer to submit to chemical tests designated by the law enforcement agency as provided in section 64–22–2.6 NMSA 1953, none shall be administered.
>
> B. The commissioner, upon receipt of a sworn report of a law enforcement officer that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within this state while un-

der the influence of intoxicating liquor and that, upon his request, the person refused to submit to a chemical test, after being advised that failure to submit could result in revocation of his privilege to drive, shall revoke the person's New Mexico driver's license or any nonresident operating privilege for a period of one [1] year. If the person is a resident, or will become a resident within one [1] year and is without a license to operate a motor vehicle in this state, the commissioner shall deny the issuance of a license to him for a period of one [1] year.

It is apparent that the implied consent given by § 64–22–2.6, supra, must be read in conjunction with § 64–22–2.11(A) and that § 64–22–2.11(B) is the state's remedy for refusal to give consent to administer the test. Any other reading of the Implied Consent Act would be contrary to the plain meaning of the Act. Compare, *State v. Richerson,* 87 N.M. 437, 535 P.2d 644 (Ct.App.1975).

The rights given an individual by a statute may be an enlargement of the constitutional guarantees. *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). A right afforded an individual by the legislature is nonetheless a right whether it is an enlargement of a constitutional right or a legislative right. See, *Cooper v. California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). The exclusion of the blood test was appropriate. The sample was taken in violation of a statutory right. Section 64–22–2.11, supra.

The order granting the motion to suppress is affirmed.

IT IS SO ORDERED.

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

582 P.2d 1270

GENUINE PARTS COMPANY and Sentry Insurance Company, Petitioners,

v.

Mary Ann GARCIA, Respondent.

No. 11883.

Supreme Court of New Mexico.

July 25, 1978.

Klecan & Roach, John A. Klecan, Linda G. Kluger, Albuquerque, for petitioners.

Michael Bustamante, Albuquerque, for respondent.

OPINION

McMANUS, Chief Justice.

This is a workmen's compensation action originally commenced in Bernalillo County by Mary Ann Garcia (plaintiff) against her employer, Genuine Parts Company and its insurer Sentry Insurance Company (defendants). The trial court found that the plaintiff was permanently disabled and awarded plaintiff maximum benefits under the Workmen's Compensation Act, § 59–10–1, *et seq.*, N.M.S.A.1953 (Repl.1974 & Supp. 1975). The court also awarded past and future medical and hospitalization expenses, attorney fees and costs.

Defendants appealed to the Court of Appeals which affirmed the judgment of the trial court. The Court of Appeals awarded $3,000 in attorney fees for services on appeal. The defendants had requested oral argument before the Court of Appeals but such request was denied. *Garcia v. Genuine Parts Co.*, 90 N.M. 124, 560 P.2d 545 (1977) *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977).

Thereafter, defendants petitioned this Court for a writ of mandamus directing the Court of Appeals to grant the defendants oral argument and to withdraw the mandate of the Court of Appeals. This Court denied the petition. *State ex rel. Genuine Parts Company v. Court of Appeals of the State of New Mexico*, No. 11,333 (N.M. Mar. 23, 1977). Defendants sought review of the judgment of this Court in the Supreme Court of the United States. The Supreme Court declined to hear the action for want of jurisdiction and denied certiorari. *Genuine Parts Company v. Court of Appeals of New Mexico*, 434 U.S. 806, 98 S.Ct. 36, 54 L.Ed.2d 63 (1977).

Following the decision of the Court of Appeals, a mandate was issued from that court to the District Court of Bernalillo County. Attached to the mandate was the opinion of the court. The mandate stated that "this decision being now final, the cause is remanded to you for any further proceedings consistent with said decision." After the mandate and opinion of the Court of Appeals were filed in the district court, plaintiff filed a motion for entry of a judgment on the mandate of the Court of Appeals. Notice of hearing was served on defendants, and thereafter, on March 24, 1977, a judgment was entered on the mandate. The judgment made four findings: (1) a summary of the initial judgment entered on March 11, 1976; (2) the appeal to the Court of Appeals; (3) the denial of defendants' petition for writ of certiorari to this Court; and (4) the award by the Court of Appeals of attorney fees in the amount of $3,000 for services rendered on the appeal.

Following the findings, the judgment on the mandate read:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Judgment hereinbefore entered on March 11, 1976 should be, and the same hereby is, *withdrawn and the following Judgment is substituted in its place*: (Emphasis added.)

The recitation of the substituted judgment followed. The initial judgment of March 11, 1976 was copied verbatim in the judgment on mandate with the following additions thereto:

> (1) That pursuant to statute, defendants were ordered to pay plaintiff interest on the original lump sum award at the rate of 6% per annum from the date of the original judgment to the date of payment.

(2) That the defendants were ordered to pay plaintiff's attorneys the sum of $6,500.00 for their services rendered in the prosecution of this action. (The trial court had awarded the sum of $3,500 for services at the trial court level and the Court of Appeals awarded $3,000 for services on appeal.)

(3) That defendants were ordered to pay interest on the original $3,500.00 of attorney fees awarded plaintiff at the rate of 6% per annum from the date of the entry of the original judgment to the date of payment.

Defendants filed a second appeal from the judgment on the mandate. The Court of Appeals determined that any review of the trial court's proceedings was limited to the question as to whether the second judgment conformed to its mandate. The Court of Appeals affirmed the trial court's judgment but directed the trial court to award attorney fees to the plaintiff rather than to the plaintiff's attorney. The Court of Appeals held that the trial court properly awarded interest on the original award of attorney fees on the basis that attorney fees are included within the compensation award and are not to be taxed as costs. The court further awarded the amount of $4,500 to plaintiff for attorney fees for the second appeal and the appeal to the United States Supreme Court. Damages were assessed against the defendants in the amount of ten per cent (10%) of the judgment on the finding that the second appeal was frivolous. *Garcia v. Genuine Parts Company*, No. 3000 (N.M.Ct.App. Feb. 14, 1978). Following this decision defendants petitioned this Court for a writ of certiorari which we granted. We affirm in part and reverse in part.

Defendants raise numerous issues on appeal which will be treated separately. Initially, defendants argue that they were entitled to a full review of the original judgment on the second appeal since the judgment on the mandate rendered by the trial court provided that the judgment "entered on March 11, 1976 should be, and the same hereby is withdrawn and the following judgment is substituted in its place." Defendants argue that since the earlier judgment was "withdrawn and substituted" the first judgment entry was entirely abandoned and the trial court could not consider that judgment as effective for any purpose. Appellant analogizes this case to a judgment which is set aside or vacated. The Court of Appeals held that the trial court's jurisdiction upon receipt of the mandate was only to conform to the mandate and that the district court merely modified its original judgment. We agree.

Upon review of a second appeal the only issue is whether the trial court followed the appellate mandate. This limited review has been consistently followed by this Court. *Sanchez v. Torres*, 38 N.M. 556, 37 P.2d 805 (1934); *State v. Halsey*, 34 N.M. 223, 279 P. 945 (1929); *State ex rel. Garcia v. Brd. Com'rs.*, 22 N.M. 562, 166 P. 906 (1917); *Davisson v. Bank*, 16 N.M. 689, 120 P. 304 (1911).

The district court has only such jurisdiction as the opinion and mandate of the appellate court specifies. *Bank of New Mexico v. Earl Rice Construction Co.*, 79 N.M. 115, 440 P.2d 790 (1968). The only necessary action of the trial court is to comply with the mandate of the appellate court. In this action the original judgment was affirmed and continued to be effective. The judgment on the mandate modified the initial judgment to conform to the mandate. Therefore the Court of Appeals properly refused to review all proceedings before the trial court.

The defendants challenge interest awarded from the date of the original judgment. Since the original judgment remained effective and was merely modified on appeal, interest awarded from the date of the original judgment is proper. *Bank of New Mexico, supra.* Plaintiff became entitled to interest as of March 11, 1976, the day the final judgment on disability was determined. It would be inequitable to impose costs associated with the use of money on her rather than on the defendants who had use of the money during the pendency

of these appeals. *Mascuilli v. United States*, 383 F.Supp. 50 (E.D.Pa.1974) *aff'd.*, 519 F.2d 1398 (3d Cir. 1975); *Morris v. Baker Auto Parts*, 57 Mich.App. 65, 225 N.W.2d 179 (1974); *See generally*, Annot., 4 A.L.R.3d 1221 (1965).

Appellant argues that the time period between the original judgment and the judgment on mandate of one year provides an award for a period of time not litigated.

The basis for this argument is that the March 11, 1976 judgment was withdrawn and the judgment on the mandate provided for permanent disability from the date of the original judgment. We have determined that the trial court did not vacate the judgment but modified the judgment.

The initial and subsequent judgments both provided for payment of the maximum benefits ($65 weekly) under the Workmen's Compensation Act from the date of injury in 1973 for a period not to exceed 500 weeks. The subsequent judgment provided for lump-sum payment from 1973 to the date of entry of judgment on the mandate. The trial court had found total and permanent disability and awarded payments accordingly.

The defendants argue that they have been foreclosed from applying for a diminution of future benefits every six months under § 59–10–25, N.M.S.A.1953 (Repl.1974). The record does not reflect a request for a stay of judgment pending appeal. The original judgment continued to be operative. Under § 59–10–25 a person bound by a judgment awarding compensation may apply for a diminution of benefits. Defendants were bound by this judgment and were not precluded from applying for a reduction of future benefits while an appeal was pending. *Turrieta v. Creamland Quality Chekd Dairies, Inc.*, 77 N.M. 192, 420 P.2d 776 (1966).

The attorney fees awarded by the trial court and the Court of Appeals as a result of the first appeal were awarded directly to plaintiff's counsel in the judgment on the mandate. Defendants argue that the entire judgment is void due to this error. It is true that attorney fees are to be awarded to the plaintiff and not to counsel for the plaintiff.

There is authority that this error will void a judgment when plaintiff's counsel obtains a direct award of attorney fees in a divorce action. *Lloyd v. Lloyd*, 60 N.M. 441, 292 P.2d 121 (1956). However, this Court has held that in a workmen's compensation action an error in awarding attorney fees directly to plaintiff's counsel can be corrected on remand and a corrected judgment entered. *Feldhut v. Latham*, 60 N.M. 87, 287 P.2d 615 (1955); *La Rue v. Johnson*, 47 N.M. 260, 141 P.2d 321 (1943). This error will not operate to void the entire judgment. This was properly corrected on remand.

Defendants challenge the trial court award of interest on the $3,500 in attorney fees awarded plaintiff for the services of her attorneys at the trial court level. The interest runs from the date of the original judgment on March 11, 1976. Defendants challenge not the amount of the interest award but the award of interest itself arguing that the fees are costs not damages.

The applicable statute, § 59–10–23(D), N.M.S.A.1953 (Repl.1974) provides in part:

> [T]he compensation to be paid the attorney for the claimant shall be fixed by the court trying the same or the Supreme Court upon appeal in such amount as the court may deem reasonable and proper and when so fixed and allowed by the court shall be paid by the employer *in addition to the compensation allowed* the claimant under the provisions of the Workmen's Compensation Act . . . . (Emphasis added.)

The Court of Appeals determined that the statute requires attorney fees to be compensation and not taxed as costs. Sections 59–10–23(B), (C) and (E) set forth that attorney fees will be taxed as costs in settlement situations or court proceedings to increase or reduce awards. The Court of Appeals determined that the different language in subsection (D) reflects legislative intent that where an employer pursues

court proceedings the fees shall be compensation and part of the compensation award. We agree. Since the award of attorney fees is included within the compensation award the fees are considered part of the judgment and interest thereon is proper. The running of interest is not tolled by appeal. *Stone v. Jeffres*, 208 So.2d 827 (Fla.1968); *Simon v. New Jersey Asphalt & Paving Co.*, 123 N.J.L. 232, 8 A.2d 256 (1939); *Chanticleer Skyline Room, Inc. v. Greer*, 19 Md.App. 100, 309 A.2d 638 (1973).

We hold that under the circumstances outlined in § 59–10–23(D) attorney fees are part of the judgment proper and not costs. This holding is limited to § 59–10–23(D). To the extent the Court of Appeals has adopted a broader holding we disagree and decline to affirm the broader holding.

The Court of Appeals included in the award of attorney fees an amount for services in the federal appeal based upon the rationale that it is proper to award additional fees for "all other proceedings necessary to sustain, enforce and collect the workmen's compensation benefits allowed claimant." *Garcia v. Genuine Parts Co.*, No. 3000 (Ct.App., N.M. Feb. 14, 1978). The issue on appeal to the Supreme Court of the United States was denial of oral argument without prior notice to counsel. The Court of Appeals stated that the plaintiff's counsel spent a great deal of time in responding to the federal appeals.

Defendants state that the federal appeal was never heard and no action was necessary on the part of plaintiff to sustain the judgment. Plaintiff was not a party in the federal appeal. The action of plaintiff's counsel in federal court is not reflected in the record.

Recovery of compensation is a prerequisite to allowance of attorney fees. *Chapman v. John St. John Drilling Company*, 73 N.M. 261, 387 P.2d 462 (1963); *Perez v. Fred Harvey, Inc.*, 54 N.M. 339, 224 P.2d 524 (1950); *Wuenschel v. New Mexico Broadcasting Corp.*, 84 N.M. 109, 500 P.2d 194 (Ct.App.1972). The defendants challenged a procedural rule concerning notice of denial of oral argument. There was no challenge in the federal court to the compensation award. Whether the United States Supreme Court directed oral argument may or may not have permitted the defendants to present a persuasive agreement resulting in reversal of the award. Nonetheless, the efforts of plaintiff's counsel did not result in compensation for the plaintiff. In this case, the award of attorney fees for the services in the United States Supreme Court is improper. The Court of Appeals did not stipulate what portion of the award of $4,500 is attributable to the appeal to the United States Supreme Court.

The attorney fees awarded in this action amount to the sum of $11,000. The trial court award of $3,500 and the award on the first appeal of $3,000 became the "law of the case" and could only be reviewed prior to the second appeal. Therefore, our review is limited to the $4,500 award. *Davisson, supra.*

We have carefully reviewed the record and recent decisions in cases of this nature in determining a proper award of attorney fees for services rendered on appeal. *See, Am. Tank & Steel Corp. v. Thompson*, 90 N.M. 513, 565 P.2d 1030 (1977); *Avila v. Pleasuretime Soda, Inc.*, 90 N.M. 707, 568 P.2d 233 (Ct.App.1977); *Martinez v. Earth Resources Co.*, 90 N.M. 590, 566 P.2d 838 (Ct.App.1977); *Casaus v. Levi Strauss & Co.*, 90 N.M. 558, 566 P.2d 107 (Ct.App.1977) *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977); *Clark v. Electronic City*, 90 N.M. 477, 565 P.2d 348 (Ct.App.1977) *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977); *Moorhead v. Gray Ranch Co.*, 90 N.M. 220, 561 P.2d 493 (Ct.App.1977) *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977); *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).

An award of attorney fees is a matter entirely within the discretion of the court. *Ortega v. New Mexico State Highway Department*, 77 N.M. 185, 420 P.2d 771 (1966). However, in light of a review of

recent awards and the record we find that the Court of Appeals abused its discretion not only in awarding fees for the appeal to the United States Supreme Court but in awarding an excessive amount overall. Accordingly, the award is reduced to $1,500 for services rendered on the second appeal to the Court of Appeals.

Defendants also challenge the award of damages to plaintiff in the amount of ten per cent (10%) of the judgment for a frivolous appeal. The defendants argue that they were clearly not barred from a second appeal and that errors in the judgment entry were corrected, in particular, the award of fees directly to plaintiff's attorney and the language of the judgment on the mandate. Whether the appeal can be considered frivolous is a matter within the discretion of the reviewing court.

N.M.R.Civ.App. 20 [§ 21–12–20, N.M.S.A. 1953 (Supp.1975)] permits an appellate court to award damages under § 21–10–24, N.M.S.A.1953 (Repl.1970) if it is "determined that the appeal is frivolous, not in good faith, or merely for purposes of delay." Section 21–10–24 authorizes damages not to exceed ten per cent (10%) of the judgment. The Court of Appeals determined that the appeal was frivolous, that is, "without merit."

There is no reported authority where a court has awarded damages of this nature. It is a matter clearly within the discretion of the Court of Appeals. Thus, the question is whether the reviewing court abused its discretion. While we recognize that under § 21–10–24 damages may be assessed where an appeal is found to be frivolous or merely for delay, we also recognize that a court should be reluctant to penalize litigants who take advantage of their right to appeal. Under the circumstances of this case and the generous award of attorney fees, we reverse the award of damages of ten per cent (10%) of the judgment.

Defendants further argue that the Court of Appeals exhibited such bias and prejudice in the second opinion that this Court must review all issues in this cause in the manner of a full appeal. We have reviewed the record and find nothing which would warrant such a drastic departure from proper appellate procedure. Accordingly, we decline to review the merits of the original action which were reviewed on the first appeal.

Finally, we again affirm our decision in *State ex rel. Garcia v. Genuine Parts Company*, No. 11,333 (N.M. Mar. 23, 1977) in which we declined to issue a writ of mandamus to the Court of Appeals directing oral argument. Defendants have not presented us any authority as to the requirement of notice of denial of oral argument. We are not persuaded to reverse our position in denying the writ of mandamus.

The remaining issues raised by the defendants could have been or were raised on the first appeal. Accordingly, these issues will not be considered since the first decision became the "law of the case" and cannot be reviewed by this Court. *Davisson, supra.*

Since plaintiff's counsel was not obliged to participate on appeal on certiorari no attorney fees will be awarded on this appeal.

The judgment on the mandate entered March 24, 1977 by the district court is affirmed in all respects. The Court of Appeals' decision is affirmed with the exception of the award of attorney fees which is reduced to $1,500 and the award of damages in the amount of ten per cent (10%) of the judgment.

This cause is remanded to the district court to enter a judgment not inconsistent herewith.

IT IS SO ORDERED.

SOSA, EASLEY, PAYNE and FEDERICI, JJ., concur.

582 P.2d 1277

Frank TORRES, Ernest Trujillo and Willie Romero, Plaintiffs-Appellants,

v.

The VILLAGE OF CAPITAN, a Municipal Corporation, Jay Johnston, Mayor, Dick Beck, Norman Renfro, Herman Otero and Valton Hall, members of the Village Trustees, Defendants-Appellees.

No. 11567.

Supreme Court of New Mexico.

Aug. 9, 1978.

Steve Herrera, Santa Fe, for plaintiffs-appellants.

Archie Witham, Carrizozo, Rodey, Dickason, Sloan, Akin & Robb, Victor Marshall, Albuquerque, for defendants-appellees.

OPINION

EASLEY, Justice.

Plaintiffs-appellants, Frank Torres, Ernest Trujillo and Ernie Romero (hereinafter Torres) brought suit in the Lincoln County District Court against the Village of Capitan and the Village Trustees (hereinafter Village) seeking to invalidate an annexation of contiguous land by the Village. The court denied Torres' motion for summary judgment on the pleadings and entered judgment on a stipulated record in favor of the Village. Torres appeals. We affirm.

Issues

The issues are:

1. Whether the doctrine of either res judicata or collateral estoppel is an effective bar against the annexation by the Village under the circumstances where the Village had previously annexed "the same territory", where the annexation was challenged in court by Torres with the "same parties" participating, and where the district judge in the first trial ruled that § 14–7–17, N.M. S.A. 1953, the annexation statute relied upon in both cases, was unconstitutional.

2. Whether the statute, § 14–7–17, *supra*, which authorizes a municipal corporation to annex contiguous territory upon the petition of the *owners of a majority of the acres* in the territory in question, is unconstitutional as being in violation of the "one man-one vote" principle of the equal protection clause of the United States Constitution, in that it does not provide for annexation by a petition of a *majority of the landowners* in the area to be annexed without regard to the number of acres each owns.

In order to decide the second issue, we must also decide whether signing a petition to initiate an annexation proceeding is equivalent to casting a ballot and thus entitled to the special protection accorded voting rights under the equal protection clause of the Constitution.

3. Whether § 14–7–17, *supra*, was the proper statute since allegedly the Village was the prime-mover in the efforts to obtain signatures on the annexation petition. We handle this question summarily for the reason that, even if the Village promoted the annexation effort, which does not clearly appear from the record, the evidence plainly shows that the landowners were the real petitioners instead of the Village and proper proceedings were conducted under the terms of the statute.

The Dispositive Facts

The Village concluded the first annexation on December 1, 1975, after having received a petition which was allegedly signed by owners of a majority of the acreage in the area to be annexed. The number of residents in the area was established as between 29 and 31.

Of the thirteen signatures on the petition seven had been placed there by an attorney-in-fact, rather than by the property owners. The trial court held that these signatures were not proper for the reason that the powers-of-attorney had not been recorded.

However, the trial court held that the question of the adequacy of the signatures was a moot issue, since it was ruling that § 14–7–17, *supra*, was unconstitutional as being violative of the "one man-one vote" rule.

The record included a copy of the first petition for annexation which showed that the total acreage to be annexed was 256.25 acres and that the owners of 153.51 acres had signed the petition. The court's holding that the signatures of Hollis Cummins as attorney-in-fact for owners of 87.27 acres of land were invalid would necessarily mean that the petition was insufficient under the statute since the six owners that remained on the petition held less than a majority of the acreage in the area to be annexed.

The trial court concluded that § 14–7–17, *supra*, is unconstitutional as being in violation of the "one man-one vote" rule of the equal protection clause of the Fourteenth Amendment to the United States Constitution because it allocates "votes" based on the acres involved rather than the number of owners. The Village did not appeal the decision of the court.

A second annexation was approved by the Village on October 19, 1976. This was based on a new petition, purportedly signed not only by owners representing a majority of the acreage to be annexed but also by a majority of the owners of land in the territory involved.

The same petitioners, including Torres, challenged the legality of the second annexation in the district court with a different judge presiding.

The record is quite complicated. The Village in its answer admitted that "the identical territory" was involved in the second petition as in the first one, although the record does not sustain this fact. Nevertheless, the court made a finding to this effect. The second Petition for Annexation showed that the landowners who signed owned 174.94 acres of a total of 250.70 acres in the area proposed to be annexed. This contrasts with the evidence at the first trial which showed that thirteen owners holding 153.51 acres in a tract of 256.25 acres were involved in the first annexation.

A plat of the acreage to be annexed became part of the record in the second case. It showed that there had been changes in the ownership of several of the tracts of land since the first trial.

The trial court in the second case held that the parties in the two cases were identical, that the territory was identical and that the capacity of the persons in both suits was identical. On the other hand, the court concluded that the subject matter of the first cause was the 1975 annexation attempt, while the subject matter of the second cause was the 1976 annexation attempt. Therefore, since the subject matter was not identical, the doctrine of res judicata was not applicable. Collateral estoppel was also rejected by the court. The court further held that § 14–7–17, *supra*, is not unconstitutional for the reasons claimed.

Doctrine of Res Judicata

Many New Mexico cases have stated the requirements for applying the doctrine of res judicata to bar a subsequent case. The second suit must be identical with the prior suit in four respects: (1) identity of the subject matter, (2) identity of the cause of action, (3) identity of persons and parties, and (4) identity of the capacity or character of the persons for or against whom the claim is made. *E. g. City of Santa Fe v. Velarde*, 90 N.M. 444, 564 P.2d 1326 (1977); *Atencio v. Vigil*, 86 N.M. 181, 521 P.2d 646 (1974); *Adams v. Cox*, 55 N.M. 444, 234 P.2d 1043 (1951).

The key question is whether the court was correct in holding that the essential element of identity of subject matter in the two suits is lacking. The subject matter of the first suit was the 1975 annexation attempt which turned out to be based on an invalid annexation petition. It was not necessary in the first suit that the trial judge reach the question of constitutionality of the annexation statute. The subject matter of the second suit was the 1976 annexation which was based on an entirely different ordinance, on a petition that con-

tained a majority of the owners of land in the area to be annexed and representing a majority of the acres involved, and proceedings that were free of any valid objection.

The ultimate facts necessary for the resolution of the two suits were different. The issues necessarily dispositive in the prior cause were therefore different from those in the present cause. *City of Santa Fe, supra.*

We hold that the doctrine of res judicata is inapplicable.

Doctrine of Collateral Estoppel

The doctrine of collateral estoppel, sometimes referred to as "issue preclusion", is an entirely distinct concept. *City of Santa Fe, supra; Atencio, supra.* It applies to identical issues in two suits where the same parties are involved in both suits even though the "subject matter" or the "cause of action" in the second is different from the first. Collateral estoppel applies to prevent the relitigation, as between the parties, of ultimate facts or issues actually and necessarily decided by the prior suit. *Lawlor v. National Screen Service*, 349 U.S. 322, 326, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *City of Santa Fe, supra; Atencio, supra; Paulos v. Janetakos*, 46 N.M. 390, 129 P.2d 636 (1942). In the situation before us the "subject matter" of the two suits is different since the "subject matter" of the suits is not simply the land involved, but the two different attempts to annex the same land. Likewise the "cause of action" in each suit is different because each seeks review of the validity of different annexation attempts.

Nevertheless collateral estoppel can be applied to bar relitigation of any ultimate facts or issues common to both suits, and actually and necessarily decided in the first. Torres contends that the doctrine of collateral estoppel should likewise apply to prevent the remaking of any conclusions of law made in the first case and asserts that the parties and the trial court in the second case are estopped to reconsider the conclusion of law made in the first case that the annexation statute is unconstitutional.

We do not agree with this contention. The whole concept underlying collateral estoppel is to aid the finality of judgments by preventing *parties* from endlessly relitigating the same issues under the guise of different "causes of action." It is not intended to tie the hands of judges nor to be a way to amend the law of New Mexico by forcing one judge to accept the conclusions of pure law made by another without benefit of an appeal to this Court. Where a judge's ruling on a matter of law is intertwined with the facts of a particular case it is collaterally binding in a subsequent suit between the same parties or privies because the ruling on the factual issue, which is final under the doctrine of collateral estoppel, cannot be separated from the legal conclusion and thus both must be binding if the factual determination is to be. *McDonald v. Padilla*, 53 N.M. 116, 202 P.2d 970 (1948). However, a conclusion or statement purely of law which is not dependent for its meaning or validity on the facts of a particular case is not binding on the judge in a later suit between the parties; "litigants have no vested right to an erroneous conclusion of law." *Id.* at 125, 202 P.2d at 976.

As the United States Supreme Court has observed, the collateral estoppel effect of res judicata "does not apply to unmixed questions of law. Where, for example, a court in deciding a case had enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases." *United States v. Moser*, 266 U.S. 236, 242, 45 S.Ct. 66, 67, 69 L.Ed. 262 (1924). *Accord, Commissioner v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948); *Hadge v. Second Federal Savings and Loan Ass'n of Boston*, 409 F.2d 1254 (1st Cir. 1969); *McDonald, supra.*

We hold that the conclusion reached by the judge in the first case that the statute was unconstitutional was a conclusion purely of law and therefore is not collaterally binding on the judge in a second case between the same parties or privies.

McDonald, supra. The Village was not collaterally estopped to assert that the statute was constitutional in the second suit.

One Man-One Vote Theory

The City proceeded under § 14–7–17, N.M.S.A. 1953 to annex the property in question. This section provides in pertinent part that a city government may annex:

> Whenever a petition:
>
> (1) seeks the annexation of territory contiguous to a municipality; [or]
>
> (2) is signed by the owners of a majority of the number of acres in the contiguous territory.

The extension of municipal boundaries falls exclusively within the legislative power. It is not a function of the judiciary. Great latitude must of necessity be accorded the discretionary acts of the legislature, and every reasonable presumption in favor of the validity of its action must be indulged. *E. g. Hughes v. City of Carlsbad,* 53 N.M. 150, 203 P.2d 995 (1949); *Botsford v. City of Norman,* 354 F.2d 491, 494 (10th Cir. 1965); *see Weber v. City Council of Thousand Oaks,* 9 Cal.3d 950, 109 Cal.Rptr. 553, 513 P.2d 601 (1973).

The Supreme Court of the United States has adopted two different tests to be applied to statutes attacked on the basis of the equal protection clause of the Fourteenth Amendment. In the ordinary equal protection case the classification need only bear a rational relationship to a conceivable state purpose to be upheld. However, when the classification deals with a "suspect classification" or touches on "fundamental interest" the court has ruled that the statute must be subjected to the strictest scrutiny and be upheld only if the state can show a compelling interest that justifies the classification. Voting rights have been declared by that court to be one of those "fundamental interests" that must be subjected to the strictest standard. *Reynolds v. Simms,* 377 U.S. 533, at 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

Torres equates the signing of an annexation petition with voting rights. There is respectable and somewhat persuasive authority in support of this theory. *E. g. Town of Fond du Lac v. City of Fond du Lac,* 22 Wis.2d 533, 126 N.W.2d 201 (1964); *Levinsohn v. City of San Rafael,* 40 Cal. App.3d 656, 115 Cal.Rptr. 309 (1974); *Curtis v. Board of Supervisors of Los Angeles County,* 7 Cal.3d 942, 104 Cal.Rptr. 297, 501 P.2d 537 (1972).

Neither the United States Supreme Court nor this Court has considered the precise issue with which we are concerned.

There is no federal constitutional requirement that elections be held on local matters. Non-electoral means are used by states to resolve local matters without the action being considered in violation of the "fundamental" right to vote. *See, Murphy v. Kansas City, Missouri,* 347 F.Supp. 837, 845–47 (W.D. Mo. 1972).

Where the denial is challenged on the grounds that elections are conducted to decide other similar matters, it has been held that the traditional equal protection test requiring a minimum rational basis for the discrimination is the applicable standard of review rather than that of strict scrutiny since there has been no infringement of a "fundamental" right. *Lowe v. City of Jackson,* 336 So.2d 490 (Miss. 1976), *U.S. cert. denied,* 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1977); *Murphy, supra.* Under "minimum" scrutiny, a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *Murphy, supra; see McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

In states where some statutory annexation procedures were electoral, challenges to the non-electoral annexation laws turn on whether there was a rational or reasonable basis for allowing elections in one situation while denying them in another. *Adams v. City of Colorado Springs,* 308 F.Supp. 1397 (D. Colo. 1970); *aff'd per mem.,* 399 U.S. 901, 90 S.Ct. 2197, 26 L.Ed.2d 555 (1970); *Weber, supra.*

In *Adams, supra,* the court reasoned that since *no person* was allowed to vote on the

annexation there was no fundamental right to vote and standards of equal protection were inappropriate.

The *Adams* court also held that there was a rationale basis for the classification and that it was not unreasonable to deny the residents of the area proposed to be annexed the right to vote on the matter. This denial of an annexation election when there is a "rational or reasonable" basis for such action was summarily affirmed by the United States Supreme Court. 399 U.S. 901 (1970).

Under New Mexico law, none of the three procedures provided for annexation of a territory by a municipal corporation mandates an election. § 14–7–1, N.M.S.A. 1953 provides three methods of annexing territory to a municipality:

1. The arbitration method as provided in § 14–7–5 through § 14–7–10, N.M.S.A. 1953.

2. The boundary commission method as provided in § 14–7–11 through § 14–7–16, N.M.S.A. 1953.

3. The petition method as provided in § 14–7–17, N.M.S.A. 1953 and used in this case.

There being no provision in our law for an election on this issue, we have even less need to apply strict scrutiny regarding the issue bearing on violations of the equal protection clause than was true in *Adams, supra.* Only minimum scrutiny need be applied to uphold the constitutionality of our statutes since they do not involve elections and therefore do not infringe upon the fundamental right to vote. Under this level of scrutiny a statutory discrimination or inequality will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan, supra.* The record need not show what the reasonable basis is since the appellate court may on its own find a reasonable basis. *Id.* One obvious and rational basis for the initiation of the annexation by owners of a majority of the acreage is that taxes to support the Village will be partially apportioned in accordance with the amount of land owned by the new residents or landowners brought into the Village. Our statutes meet the test of minimum scrutiny.

There are numerous decisions establishing a general rule that law providing for annexation without the consent of the inhabitants are constitutional and do not violate the equal protection rights of those inhabitants. *E. g., Lowe, supra; General Battery Corp. v. City of Greer,* 263 S.C. 533, 211 S.E.2d 659 (1975); *Weber, supra; Pomponio v. City of Westminister,* 178 Colo. 80, 496 P.2d 999 (1972); *Fairview Public Util. Dist. No. 1 v. City of Anchorage,* Alaska, 368 P.2d 540 (1962), *appeal dismissed,* 371 U.S. 5, 83 S.Ct. 39, 9 L.Ed.2d 49 (1962).

We hold that petitioning for annexation of land in this case is not a fundamental voting right and that § 14–7–17, *supra,* is constitutional. We affirm the decision of the trial court.

IT IS SO ORDERED.

McMANUS, C. J., and FEDERICI, J., concur.

582 P.2d 1283

Arthur W. MOORE, Jr., Shirley Ann Noah, Howard J. Edwards and Mary C. Martin, Plaintiffs-Appellees,

v.

Sherry E. SUSSMAN, Laura E. Staley and Barbara Edwards, Defendants-Appellants.

No. 11790.

Supreme Court of New Mexico.

Aug. 16, 1978.

Gordon H. Schnaufer, Ruidoso, for defendants-appellants.

Bill G. Payne, Carrizozo, for plaintiffs-appellees.

OPINION

SOSA, Justice.

This cause presents the question of whether or not the trial court after appointing commissioners in an action for partition, pursuant to § 22–13–1 *et seq.*, N.M.S.A. 1953, may contravene the recommendation from the commissioners without first filing findings of fact and conclusions of law expressing the reasons for not following such recommendation. We vacate the trial court's order and remand the cause to it to enter proper findings of fact and conclusions of law. We decide that no decision from the trial court may be filed without proper findings of fact and conclusions of law supporting its decision.

This suit was brought in the District Court of Lincoln County requesting partition or sale of certain lands owned jointly by the parties. The land involved consists of one large ranch of approximately 3400 acres, a small parcel of unfenced land not adjacent to the large ranch consisting of 320 acres, and three other small parcels of land in the townsite of Oscuro. Pursuant to § 22–13–1 *et seq.*, the trial court appointed commissioners and a hearing was held on their report.

The commissioners' report stated that they went to the premises and viewed all the lands, tenants and hereditaments. The commissioners reached a unanimous decision that the 320 acre parcel which was separate and apart could be divided. However, they also found that the large ranch could not be divided without manifest prejudice to the owners. Consequently, the commissioners proceeded to appraise the real estate. § 22–13–7, N.M.S.A.1953 (Supp.1975). The trial court ordered partition of all the property and defendants appealed.

The trial court's order was to the effect that appellants should receive the 320 acre vacant unfenced tract plus the three small parcels of land, and the appeals were awarded the 3400 acre working ranch. In rendering its decision the trial court never stated its reasons for overruling the commissioners' report.

The rule is plain. The trial judge is required to file his decision in a single document consisting of the findings of ultimate fact and conclusions of law, stated separately. *Sanchez v. Sanchez,* 84 N.M. 498, 505 P.2d 443 (1973); *Moore v. Moore,* 68 N.M. 207, 360 P.2d 394 (1961); N.M.R.Civ.P. 52(B)(a)(1) [§ 21–1–1(52)(B)(a), N.M.S.A. 1953 (Repl.1970)]. This is true even though the appellants never tendered any requested findings of fact and conclusions of law. *Edington v. Alba,* 74 N.M. 263, 392 P.2d 675 (1964).

In the case at bar, the trial court's order, not having been substantiated by findings of fact nor conclusions of law, must be vacated.

This cause is remanded to the trial court for entry of findings of fact and conclusions of law.

IT IS SO ORDERED.

McMANUS, C. J., and FEDERICI, J., concur.

582 P.2d 1285

Joseph M. BUSTAMANTE and Tomasita R. Bustamante, Plaintiffs-Appellees,

v.

Nepomocino SENA, Pedro Sena, Miguel Sena, Rosa S. Ruiz, Ismael Sena and Charlie Sena, et al., Defendants-Appellants.

No. 11467.

Supreme Court of New Mexico.

Aug. 16, 1978.

Rehearing Denied Sept. 5, 1978.

G. Emlen Hall, Pecos, for defendants-appellants.

Michael L. Gregory, Las Vegas, for plaintiffs-appellees.

OPINION

SOSA, Justice.

Plaintiffs brought suit in the San Miguel County District Court to quiet title to a tract of land within the Pecos Pueblo Grant. Defendants answered and counter-

claimed for a decree quieting title in them to a one-third undivided interest of the real property claimed exclusively by the plaintiffs. The trial court sitting without a jury found for plaintiffs and entered a decree quieting title to the entire premises in plaintiffs. Defendants appeal.

It is requested of this Court to rule on the effect of the federal government's patents issued to non-Indian claimants residing within previously patented pueblo land grants. The trial court concluded that it had jurisdiction over the question even though defendants objected due to the failure of the trial court to join indispensable parties to a statutory quiet title suit. Those alleged indispensable parties are the spouses to some of the defendants. The trial court then went on to rule that the 1936 patent from the United States to non-Indian claimants of land within the Pecos Pueblo Grant was not the beginning of reviewable title to the tract in question and concluded on the basis of evidence that pre-dated the patent that the plaintiffs were entitled to exclusive ownership of the tract despite the patent.

The trial court found that the land at issue lay within the Pecos Pueblo Grant and that one of the two plaintiffs was the only daughter and heir-at-law of a deceased man who together with two other families, defendants' predecessors, received a 1936 patent from the United States to the tract in question.

The trial court then found that two years prior to the patent's issuance, the plaintiff's deceased father obtained a warranty deed for the entire premises. The trial court also found that in 1935, one year prior to the patent's issuance, the plaintiff's deceased father quieted title in himself to the entire tract. The trial court also found that prior to 1936 defendants' predecessors, who are also named in the 1936 patent, had no claim to the tract in question. As a result the trial court ruled that the patent had been issued in error. The trial court went on to find various ways in which plaintiffs and their predecessors had treated the tract as their exclusive property subsequent to the patent's issuance and various ways in which defendants and their predecessors had not treated the property compatible with their interests.

Did the trial court err in concluding that the June 1, 1936, patent from the United States to plaintiffs' and defendants' predecessors in interest was not a duly issued federal patent?

The trial court concluded as a matter of fact and law that the 1936 patent did not constitute the beginning of reviewable title to this tract. On that basis and over defendants' objection the trial court admitted evidence which pre-dated the 1936 patent, and made findings of fact and conclusions of law based on those pre-patent facts. Those conclusions of law were based on a finding of title by adverse possession. By doing so, the trial court held that a 1935 state court quiet title decree in favor of plaintiffs' predecessor in interest in a suit involving Pueblo Indian land in which neither the Pueblo, the United States nor defendants' predecessors in interest were joined and the 1934 deed took precedence over a federal patent issued subsequent to both. We do not agree.

The trial court, in order to award to appellees title to Indian land, had to set aside the 1936 patent. Appellants contend that the trial court allowed a collateral attack on the patent and this was error since a trial court cannot go behind a patent and look to the antecedent proceedings on which it is founded. This point is well taken.

Stated in *Martinez v. Mundy*, 61 N.M. 87, 89, 295 P.2d 209, 211 (1956) is the principle that:

> It is fundamental that a patent is the highest evidence of title, and with it passes all control of the executive department of the government over the title and as a general rule it is impeachable only for fraud or mistake and is presumptive evidence of the true performance of every prerequisite to its issuance. It is also well settled that a patent is, on collateral attack, deemed to be conclusive that the government has passed its title to the

> lands granted and that all prerequisites existed and were complied with so far as to render it a complete and lawful act.

Further, a patent, regular on its face and issued in a case in which the land department has jurisdiction, constitutes an implied finding of every fact which is made a prerequisite to its issue; and upon collateral attack, a court cannot go behind it and look to the antecedent proceedings on which it is founded. *United States v. Price*, 111 F.2d 206 (10th Cir. 1940).

Inasmuch as there was no allegation in the trial court of fraud or mistake in the issuance of the patent, nor was there an allegation that the patent was not regular on its face, the trial court erred in going behind the patent.

Furthermore, the 1935 quiet title decree was void. The complaint filed in that action never named the United States nor the Pueblo of Pecos as parties defendant. In *United States v. Candelaria*, 271 U.S. 432, 46 S.Ct. 561, 70 L.Ed. 1023 (1925), the United States Supreme Court stated:

> A judgment or decree which operates directly or indirectly to transfer the lands from the Indians, where the United States has not authorized or appeared in the suit, infringes [upon the restriction that the pueblo lands cannot be alienated without the consent of the United States].

Id. at 443, 46 S.Ct. at 563. The *Candelaria* case rightly held that the United States was an indispensable party. Failure to join an indispensable party deprived the 1935 trial court of jurisdiction to hear the matter. *State v. Scarborough*, 78 N.M. 132, 429 P.2d 330 (1967).

These issues being dispositive of the case, we find no need to address the other issues raised.

The trial court is reversed and this case is remanded with instructions to quiet title in the plaintiffs and defendants consistent with the patent and this opinion.

McMANUS, C. J., and FEDERICI, J., concur.

582 P.2d 1287

John DOE, a child, Petitioner,

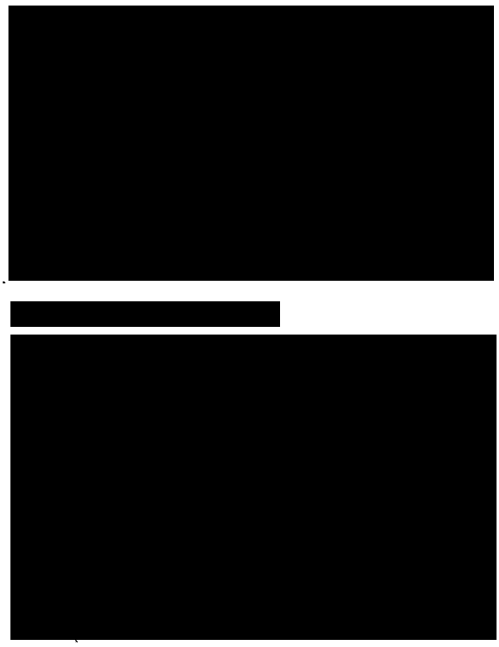
v.

STATE of New Mexico, Respondent.

No. 11965.

Supreme Court of New Mexico.

Aug. 21, 1978.



John B. Bigelow, Chief Public Defender, Karen Marlene Foster, Asst. Public Defender, Mark H. Shapiro, Asst. Appellate Defender, Albuquerque, for petitioner.

Toney Anaya, Atty. Gen., Roderick A. Dorr, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

EASLEY, Justice.

The prior opinion filed in this case on July 10, 1978 is hereby withdrawn and this opinion substituted therefor.

The trial court found that this child committed a delinquent act—the offense of larceny of less than $100, a misdemeanor. That court also found the child to be in need of care and rehabilitation, although there was no evidence received at the trial except that which related to the larceny charge. The trial judge then committed the child to the Boy's School in Springer. The Court of Appeals affirmed. We reverse.

We inquire whether the trial court could properly find that the child was in need of care and rehabilitation where the only evidence upon which the court could base its opinion was contained in a pre-disposition report submitted after trial.

Statutory Requirements

On a petition alleging delinquency under the Children's Code, § 13–14–28, N.M.S.A. 1953 (Repl. 1976), the hearing proceeds in three phases. The first two phases are adjudicatory proceedings to determine delinquency, and jeopardy attaches to them. *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975). The third phase is not adjudicatory but merely dispositional. The standard for admissibility of evidence in adjudicatory phases of the hearing is clearly different from that in the dispositional phase of the hearing.

The Code requires in the first phase that the court determine whether the child committed the delinquent act. § 13–14–28(D). If the court finds "on the basis of proof beyond a reasonable doubt based upon competent, material and relevant evidence" that the child committed the act, § 13–14–28(E), then the court proceeds, in the second phase, to determine whether or not the child is in need of care and rehabilitation. The offense in question here not being a felony,[1] the court must then find, "on the basis of clear and convincing evidence, competent, material and relevant in nature," that the child is in need of care and rehabilitation. § 13–14–28(F). Only after the above findings are made may the court proceed in the third phase, either immediately or at a postponed hearing, to make a disposition of the child. § 13–14–28(F).

> 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

1. Where the act committed would be a felony if committed by an adult, the evidence of the commission of the act, in the absence of evidence to the contrary, is sufficient to sustain a finding that the child is in need of care or rehabilitation. § 13–14–28(E).

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.*

§ 13–14–28(G) (emphasis added).

Use of the Pre-disposition Report

The pre-disposition report received by the judge in this case is composed primarily of hearsay evidence which would be clearly incompetent within the meaning of the statute in either of the adjudicatory phases of the proceedings. *In re R.*, 1 Cal.3d 855, 83 Cal.Rptr. 671, 464 P.2d 127 (1970). It was not shown to be "competent, material and relevant in nature" as the statute mandates. To use such hearsay and untested evidence to determine delinquency is constitutionally impermissible as a denial of the child's constitutional right to confront and cross-examine the witnesses against him. U.S.Const. Amend. VI; N.M. Const. art. II, § 14. The juvenile is entitled to a fact-finding process that measures up to the essentials of due process and fair treatment. *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

It was error to rely solely on the pre-disposition report to support the finding that the child was in need of care and rehabilitation. Since jeopardy attached at the first hearing where the issue of delinquency was tried, *Breed, supra*, it would violate the constitutional prohibition against double jeopardy to remand this case for a new adjudication of delinquency. U.S.Const. Amend. V; N.M.Const. art. II, § 15; *see State v. Doe*, 91 N.M. 158, 571 P.2d 425 (Ct.App.1977).

The Court of Appeals and the trial court are reversed and the case is remanded with instructions that the trial court dismiss the petition.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, PAYNE and FEDERICI, JJ., concur.

582 P.2d 1289

Chris HANDLEY, a minor, and Rolland B. Handley, as guardian and next friend of Chris Handley, Petitioners,

v.

Mark A. HALLADAY, Respondent.

No. 12038.

Supreme Court of New Mexico.

Aug. 23, 1978.

Klecan & Roach, James T. Roach, Albuquerque, for petitioners.

Richard M. Reidy, Albuquerque, for respondent.

OPINION

McMANUS, Chief Justice.

Respondent, Mark Halladay, brought this action seeking damages for injuries incurred as a result of a fall from the top of a car driven by petitioner, Chris Handley. The trial court granted summary judgment for petitioner. The Court of Appeals reversed and remanded for trial. We granted the petition for writ of certiorari and now reverse the Court of Appeals. We affirm the trial court's decision granting petitioners' motion for summary judgment.

The facts are undisputed. Chris Handley and Mark Halladay were at a party in the foothills of the Sandia Mountains in Albuquerque. About 10:30 p. m., Handley prepared to leave. Halladay, over Handley's objection, insisted on riding on top of the Handley car. Handley attempted to persuade Halladay to get inside the car, but he refused. Handley was not anxious to stay in the foothills waiting for Halladay to come down, so she began to drive slowly down the dirt portion of Menaul Boulevard. After reaching pavement, Handley decided to get off Menaul at the first side street. While the car was moving, Halladay was spinning his body around on top of the car. He fell from the car as Handley negotiated a slight curve in the roadway.

The Court of Appeals remanded for factual determinations pertaining to the doctrine of last clear chance. We hold that the doctrine is not applicable to the facts before us.

The doctrine of last clear chance is, in effect, an exception to rules applicable in negligence-contributory negligence situations. *Montoya v. Williamson*, 79 N.M. 566, 446 P.2d 214 (1968). The doctrine was developed as a means of neutralizing the harsh consequences resulting from a contributory negligence defense. It allows a negligent plaintiff to recover if the defendant knew or should have known of the plaintiff's peril and had a clear chance, by the exercise of ordinary care, to avoid the injury. *Lucero v. Torres*, 67 N.M. 10, 350 P.2d 1028 (1960); *Sanchez v. Gomez*, 57 N.M. 383, 259 P.2d 346 (1953); *Floeck v. Hoover*, 52 N.M. 193, 195 P.2d 86 (1948).

Application of this doctrine must be limited, however. A plaintiff who is so reckless as to be in disregard of his own safety cannot be protected by the doctrine. *Harbor v. Wallace*, 31 Tenn.App. 1, 211 S.W.2d 172 (1946). *See also, Boyles v. Hamilton*, 235 Cal.App.2d 492, 45 Cal.Rptr. 399 (1965); *Miller v. General Accident Fire & L. Assur. Corp., Ltd.*, 280 So.2d 280 (La.

App.1973); *Matlock v. Allstate Insurance Company*, 155 So.2d 484 (La.App.1963). The defendant is not required to exercise a greater degree of care than that required of plaintiff for his own safety. *Floeck v. Hoover, supra.*

In this case, respondent voluntarily assumed a position of imminent danger when there was at hand and accessible to him a place of safety. Halladay refused to get off the top of the car and spun his body around while the car was in motion. He cannot shift the burden of his own willful recklessness by asserting that petitioner had the last clear chance to prevent his injury.

As the doctrine of last clear chance is not applicable to the facts of this case, the ordinary rules of negligence and contributory negligence apply. A plaintiff who has chosen to ride on the outside of a vehicle is contributorily negligent as a matter of law. For example, in *DeWinne v. Waldrep*, 101 Ga.App. 570, 114 S.E.2d 455 (1960), the plaintiff was found contributorily negligent in riding on the back end of a pickup truck while hunting. Similarly, in *Peeler v. Cruse*, 14 N.C.App. 79, 187 S.E.2d 396 (1972), the court found the plaintiff contributorily negligent in riding on the blade of a motor grader. Courts have also denied recovery where the decedent took a seat on the right front fender of a truck, *Presnell v. Payne*, 272 N.C. 11, 157 S.E.2d 601 (1967); while standing on a rear bumper, *Matlock v. Allstate Insurance Company, supra; Kirby v. Golden*, 215 Kan. 583, 527 P.2d 962 (1974); while riding on top of a luggage carrier, *Gerritsma v. Vogelaar*, 266 Cal.App.2d 210, 72 Cal.Rptr. 89 (1968); while straddling a fender, *Miller v. General Accident Fire & L. Assur. Corp., Ltd.*, supra; and while riding on a truck platform, *Nordahl v. Farmers Mut. Automobile Ins. Co.*, 250 Wis. 609, 27 N.W.2d 707 (1947).

We find respondent contributorily negligent as a matter of law and affirm the trial court's decision granting summary judgment.

IT IS SO ORDERED.

SOSA, EASLEY, PAYNE and FEDERICI, JJ., concur.

582 P.2d 1293

STATE of New Mexico,
Plaintiff-Appellee,

v.

Jesse CALLAWAY, Defendant-Appellant.

No. 11745.

Supreme Court of New Mexico.

Aug. 29, 1978.

Freedman, Boyd & Daniels, Charles W. Daniels, David A. Freedman, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Don D. Montoya, Suzanne Tanner, Asst. Attys. Gen., Santa Fe, Peter McDevitt, Asst. Dist. Atty., Albuquerque, for plaintiff-appellee.

OPINION

McMANUS, Chief Justice.

Defendant was charged with alternative counts of first and second-degree murder for the shooting death of his former wife. The primary issue at trial was whether the evidence presented as to the state of mind of the defendant warranted an instruction to the jury on the lesser-included offense of voluntary manslaughter.

After trial by jury the defendant was convicted of first-degree murder and sentenced to life imprisonment. Defendant appeals.

Defendant has raised three points on appeal. Due to the result we reach on the first issue, we need not address the remaining issues.

Defendant argues that the prosecutor's repeated prejudicial comments denied him a fair trial. The conduct of the prosecutor alleged to be reversible error was his questioning the defendant as to his refusal to make a formal statement to the police and as to whether the defendant requested counsel after arrest. We agree.

During cross-examination of the defendant the following exchange occurred:

"Q. [By prosecutor.] Did you refuse to make a formal statement to the police?

"[By defense counsel.] Your Honor, I am going to object to that as a comment on a person's right to remain silent once they are placed under arrest—Fifth Amendment right to the Constitution.

"[THE COURT.] Overruled. He has taken the stand.

"Q. [By the prosecutor.] Did you refuse to make a formal written statement to the police officers?

"[By defense counsel.] Your Honor may we approach the bench?

"[THE COURT.] Sure.

"(Whereupon, counsel approached the bench and a discussion was held outside of the hearing of the jury.)

"[THE COURT.] Ladies and gentlemen of the jury the last question asked by the—by Mr. McDevitt, 'Did you refuse to make a formal statement?' which was objected to by counsel for the defense, the objection has been sustained by the Court and you are to disregard that last question and you are not supposed to guess or speculate and ordered not to and charged not to speculate as to the answer to any such question as that or and as to that question. Do you understand ladies and gentlemen? You may proceed Mr. McDevitt.

Shortly thereafter, the prosecutor asked:

"Q. Did you request an attorney?

"A. [By Callaway.] No.

"Q. You did not request an attorney?

"[By defense counsel.] Your Honor, may we approach the bench again?

"(Whereupon, counsel approached the bench and a discussion was held outside of the hearing of the jury.)

"Q. [By the prosecutor.] Mr. Callaway, do you know David Freedman?

"A. [By Callaway.] Yes.

"[By defense counsel.] Your Honor I would ask the Court to instruct Mr. McDevitt—

"[THE COURT.] Just a moment. Remove the jury for a moment please—Now, what do you want to say Ms. Steinmetz?

"[By defense counsel.] Your Honor, I would just ask the Court to instruct Mr. McDevitt to stop asking questions that go to this defendant's Fifth Amendment right to remain silent and go to the fact that when he exercised his *Miranda* rights which he is entitled to do, that none of that can be brought up before the jury and—I am tired of insinuations—Someone has the right to remain silent. They have a right to request an attorney. They have a right not to make a statement and to keep insinuating to the jury that he had something to hide or that he should have made a statement at the time is in violation of those rights and I would ask the Court to instruct Mr. McDevitt to stay away from that area.

"[THE COURT.] The Court has already instructed Mr. McDevitt and the prosecutor to go to some other subject and I am stating that again. The objections to his prior questions were made on this record and I have ruled on them and now let's go to something else. Is that understood Mr. McDevitt?

"[By defense counsel.] Your Honor, when the Court admonishes Mr. McDevitt to go on to something else the prosecutor does not go on to something else and that is the problem in this particular matter. We have stated our objection and—

"[THE COURT.] Now, in open court and outside of the hearing of the jury, I am instructing Mr. McDevitt to go on to something else in his cross-examination. Do you understand?

"[By the prosecutor.] Your Honor, I request a recess so that we can prepare legal arguments on this point.

"[THE COURT.] No, denied. I have ruled on the legal arguments and on the objections and I am instructing you as the Court, Mr. McDevitt, to proceed to other matters and not to return to this matter about the Fifth Amendment rights or any formal statements made by this individual. He made statements informally that have all come into evidence and that is sufficient and those statements made by him have been admitted by this Court and the instructions of the Court to you is to get off of this point now and go to another area of cross-examination. Do you understand that, sir?

"[By the prosecutor.] Yes, sir, I do.

"[THE COURT.] All right.

"[By the prosecutor.] To which I except.

"[THE COURT.] Your exception is noted. The instruction to you still stands. Bring in the jury."

During the first bench conference the objection of the defense counsel was sustained. At the second bench conference, which for the most part is unintelligible on the taped transcript, the trial court directed the prosecutor to "go on to something else." Despite the direction of the trial court the next question asked by the prosecutor was, "Mr. Callaway, do you know David Freedman?" Mr. Freedman was one of the attorneys representing the defendant.

The line of questioning was designed to elicit testimony concerning the defendant's post-arrest silence and his request for counsel. The use of evidence of post-arrest silence for the purpose of raising an inference of guilt is clearly erroneous. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

In *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) the United States Supreme Court held that the use for impeachment purposes of a defendant's silence, at the time of arrest, and after receiving *Miranda* warnings violated the Due Process Clause of the fourteenth amendment. *Id.* at 619, 96 S.Ct. 2240. In *Doyle* the state did not claim that the use of the statement was harmless error.

In this cause, the State in its answer brief, concedes that the questioning may constitute error, but argues that such error is harmless and does not provide grounds for reversal. The State is correct that many lower courts have found that the harmless error doctrine is applicable to the kind of constitutional violation outlined in *Doyle. See, Stone v. Estelle,* 556 F.2d 1242 (5th Cir. 1977); *Chapman v. United States,* 547 F.2d 1240 (5th Cir. 1977), *cert. denied* 431 U.S. 908, 97 S.Ct. 1705, 52 L.Ed.2d 393 (1977). However, reference to a defendant's silence and/or request for counsel, both in testimony and in closing argument, has been held to constitute reversible error. *See, United States v. Arnold,* 425 F.2d 204 (10th Cir. 1970); *United States v. Nolan,* 416 F.2d 588 (10th Cir. 1969), *cert. denied,* 396 U.S. 912, 90 S.Ct. 227, 24 L.Ed.2d 187 (1969).

In *State v. Baca,* 89 N.M. 204, 549 P.2d 282 (1976) this Court held that unsolicited and possibly inadvertent testimony regarding both post-arrest silence and a request for an attorney would not constitute reversible error. In *Baca* this Court limited the holding in *State v. Lara,* 88 N.M. 233, 539 P.2d 623 (Ct.App.1975) to those comments on a defendant's exercise of constitutional rights directly attributable to the prosecutor as opposed to inadvertent testimony of a witness. The *Doyle* decision, which was rendered since *Baca,* does not affect this result since harmless error may be found. *Stone, supra.*

In *Lara* the Court of Appeals had held that if the reference to a defendant's silence lacks significant probative value, it has an intolerable prejudicial impact. In more recent New Mexico cases, it has been held that the question on review as to a comment regarding a request for counsel is whether the probative value of the evidence was outweighed by its prejudicial effect. *See, State v. Day,* 91 N.M. 570, 577 P.2d 878 (Ct.App.1978); *State v. Hogervorst,* 90 N.M. 580, 566 P.2d 828 (Ct.App.1977); *State v.*

McGill, 89 N.M. 631, 556 P.2d 39 (Ct.App. 1976).

There are also other decisions which distinguish *Lara* on its facts and hold that a comment on a defendant's silence under the circumstances is not prejudicial since the defendant chose not to remain silent. *State v. Hamilton,* 89 N.M. 746, 557 P.2d 1095 (1976) (defendant declined to talk to one particular detective); *State v. Olguin,* 88 N.M. 511, 542 P.2d 1201 (Ct.App.1975) (defendant chose to make an exculpatory statement).

The State, during oral argument, contended that the questions of the prosecutor were designed to elicit testimony properly admissible under *Day* and *Olguin, supra.* To present a point for our consideration, a party must submit written argument, transcript references and authorities thereon. *See, State v. Vogenthaler,* 89 N.M. 150, 548 P.2d 112 (Ct.App.1976). In its brief the State conceded error but relies upon the harmless error rule to sustain the conviction. This is the issue before us.

It is true, as the State argues, that a curative instruction was given that may have initially mitigated the error and that the prosecutor did not refer to the defendant's silence and request for counsel in closing argument. *United States v. Wycoff,* 545 F.2d 679 (9th Cir. 1976), *cert. denied* 429 U.S. 1105, 97 S.Ct. 1135, 51 L.Ed.2d 556 (1977); *Arnold, supra*; *Nolan, supra.* Nor did the questions focus on the defendant's silence so as to attack the defendant's innocence or exculpatory story. *Stone, supra.* The State further argues that the questions constituted only a brief portion of the context of the whole trial and that these factors, in addition to the amount of evidence, compel a finding of harmless error. We disagree.

The questioning compelled a considerable interruption in the trial. The prosecutor, despite the admonition of the trial court, insisted on following a line of questions that violated the defendant's constitutional rights. His initial questions were directed specifically to the defendant's right to remain silent and the following questions specifically related to the defendant's right to counsel. This line of questioning was unwarranted and prejudicial. *Miranda, supra.* We cannot approve of such prosecutorial tactics. This action compelled the court to conduct two bench conferences and to remove the jury, drawing considerable attention to the entire line of questioning. This constitutes more than harmless error.

The questions were deliberate and fall within the prohibitions outlined in *Miranda* and *Baca.* Although the State presented considerable evidence in rebuttal of the claim of provocation, we cannot say that this evidence was so overwhelming as to find that the questioning of the prosecutor constituted harmless error or that there is no reasonable possibility that the improper questioning contributed to the conviction. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). We find the actions of the prosecutor constituted reversible error.

We find no merit in the defendant's claim of double-jeopardy which would bar a new trial. This cause is reversed with instructions to grant the defendant a new trial.

IT IS SO ORDERED.

SOSA and PAYNE, JJ., concur.

582 P.2d 1296

STATE of New Mexico,
Plaintiff-Appellee,

v.

Billy Richard UTTER,
Defendant-Appellant.

No. 3321.

Court of Appeals of New Mexico.

June 27, 1978.

Rehearing Denied July 10, 1978.

Writ of Certiorari Denied Aug. 18, 1978.

John B. Bigelow, Chief Public Defender, Santa Fe, Mark Shapiro, Asst. Appellate Defender, Steven H. Schiff, Albuquerque, for appellant.

Toney Anaya, Atty. Gen., Robert G. Sloan, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

LOPEZ, Judge.

Defendant Utter appeals his jury conviction for child abuse resulting in death contrary to § 40A–6–1C, N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1975). We affirm.

The defendant presents two points for reversal: (1) a jury instruction allowing the jury to find child abuse resulting in death in six alternative ways deprived Mr. Utter of his right to a unanimous verdict; and (2) the admission of defendant's confession was error because the police did not comply with *Miranda* and his statement was not voluntary.

Two other points raised in the defendant's docketing statement have not been

briefed and are deemed to have been abandoned. See *State v. Vogenthaler,* 89 N.M. 150, 548 P.2d 112 (Ct.App.1976).

In June of 1977, Mr. Utter, his wife and five week-old daughter were living in a motel in Bernalillo County, New Mexico. Defendant and a friend had been drinking wine during the day. About 2:30 a. m. Mr. Utter was awakened by the baby's crying and found his wife was not home. The evidence regarding what then transpired is conflicting. According to a statement which the defendant signed on June 29, 1977, when he went in to change the baby, he discovered she had breathing problems. He then notified his neighbors at the motel. At that time the defendant could offer no explanation for the baby's injuries. There is also evidence that the defendant became furious and threw the baby. The baby died a few days later as a result of bodily injuries. Further, on July 8, Mr. Utter gave the arresting officer a second statement in which he incriminated himself. The defendant moved to suppress this statement and the trial court denied the motion. The cause proceeded to trial and the jury found him guilty of child abuse resulting in death. From this conviction, defendant appeals.

Point I

The jury instruction on abuse of a child resulting in death was proper because it was supported by substantial evidence introduced at trial and did not deprive defendant of his right to a unanimous verdict.

Under this point, the defendant challenges Instruction no. 2, claiming that the instruction judicially sanctioned a verdict which was not unanimous. He objected on the grounds that separate instructions should have been prepared and given to the jury for each of the six ways in which the child abuse statute could be violated because the jury could render a verdict of guilty without agreement on which of the six alternative elements defendant had committed. The court's Instruction no. 2 reads as follows:

For you to find the defendant guilty of Abuse of a Child Resulting in Death, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The Defendant did cruelly punish Jeanette Utter, a child, or did place her in a situation dangerous to her health;

2. That Defendant did this act knowingly, intentionally or negligently;

3. That the act was without justifiable cause;

4. That said act resulted in the death of Jeanette Utter;

5. That this happened in New Mexico on or about the 29th day of June, 1977.

Instruction no. 2 was based on § 40A–6–1C, supra, which reads as follows:

C. Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be:

(1) placed in a situation that may endanger the child's life or health; or

(2) tortured, cruelly confined or cruelly punished; or

(3) exposed to the inclemency of the weather.

Whoever commits abuse of a child is guilty of a fourth degree felony, unless the abuse results in the child's death or great bodily harm, in which case he is guilty of a second degree felony.

The defendant offered no instructions on this issue. The State argues that technically, the defendant waived his right to appeal because he failed to preserve the alleged error by offering alternative written instructions. Section 41–23–41b, N.M.S.A. 1953 (2d Repl. Vol. 6, Supp.1975). We disagree.

Section 41–23–41d, N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1975) provides in pertinent part:

. . . objection to any instruction given must be sufficient to alert the mind of the court to the claimed vice therein, or, in the case of failure to instruct on any issue, a correct written instruction must be tendered before the jury is instructed . . . .

The defendant objected properly and timely, and although he did not offer any counter-instruction, the court was aware of his objection to the instruction. Defendant did not waive his right to present this issue on appeal.

Defendant's argument, however, that Instruction no. 2 sanctioned a verdict which was not unanimous is without merit. The instant case is analogous to *State v. Gurule,* 90 N.M. 87, 559 P.2d 1214 (Ct.App. 1977), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977). *Gurule* involved the paying *or* receiving *or* causing payment to be made for services not rendered. The defendant in that case challenged the alternative language of the indictment which charged one crime committed in varying ways as not providing him notice of the crime charged in sufficient detail to prepare his defense. This Court held that the charge in the indictment followed the language of the statute, and the charge was not legally deficient just because the indictment charged one crime which could be committed in possibly varying ways. *Gurule,* supra, at 91, 559 P.2d 1214.

In the instant case the court's Instruction no. 2 was based on the child abuse statute. We see no difference between an indictment in the alternative, in which the charge follows the language of the statute, and the giving of an instruction which includes alternative intent requirements based on the language of the statute. If the alternative charging in *Gurule,* supra, could not be legally deficient, we do not see how the instruction in the instant case would be legally deficient.

The defendant's sole authority on the issue of unanimity of a verdict is *United States v. Gipson,* 553 F.2d 453 (5th Cir. 1977). *Gipson,* is distinguishable from the case at bar. In *Gipson* the defendant was involved in a stolen car operation. The statute read alternatively, "Whoever receives, conceals, stores, barters, sells or disposes of any motor vehicle . . . ." The jury instruction given in *Gipson,* supra, was also given in the alternative. The jury asked the trial court whether they had to agree on which of the six acts the defendant committed, or if it was sufficient if they unanimously concluded he committed any of the six acts. The trial court instructed the jury that it was sufficient if they found that the defendant had committed any of the six acts. As explained in *United States v. Bolts,* 558 F.2d 316 (5th Cir. 1977):

> Gipson involved a situation where the court expressly sanctioned a non-unanimous verdict; *the jurors were told that they could disagree* as to what particular acts were committed, as long as each juror found that one of the acts had been done. [Emphasis added].

In the instant case, the fact that the instruction was in the alternative does not mean that the jury reached a non-unanimous verdict. There is no evidence to this effect. The trial court expressly instructed the jury in Instruction no. 1 that the verdict must be unanimous. When the jury rendered the verdict, they were asked by the trial court if their verdict was unanimous; they indicated it was. This Court has no reason to assume that an inconsistent or alleged compromise verdict is not unanimous, and no justification exists for inquiring into the logic behind a jury verdict. See *United States v. Dotterweich,* 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943); *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1931).

Further, to determine whether the instruction was properly given, we look at whether the instruction given conformed to the evidence at trial. We have reviewed the record and conclude that the record contains substantial evidence to support the giving of Instruction no. 2.

The verdict reached did not violate any right of the defendant to a unanimous jury verdict under either our state or federal constitution.

Point II

Defendant was advised of and knowingly and intelligently waived his Miranda rights prior to making his voluntarily given statement.

At the pre-trial hearing on the motion to suppress there was conflicting evidence regarding whether defendant effectively invoked his right to counsel, and whether he was informed of his *Miranda* rights and knowingly and intelligently waived them.

There is substantial evidence that defendant was advised of his constitutional rights before making a statement and that he made his statement voluntarily. *State v. Ramirez,* 89 N.M. 635, 556 P.2d 43 (Ct. App.1976). Further, it is for the trial court to resolve the conflicts in the evidence at the suppression hearing, and this Court should not substitute its own judgment for that of the trial court. *State v. Ramirez, supra; State v. Burk,* 82 N.M. 466, 483 P.2d 940 (Ct.App.1971).

The alleged errors claimed by defendant have no basis, and the judgment should be affirmed.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

I adhere to my position stated in *State v. Lucero,* 87 N.M. 242, 531 P.2d 1215 (Ct.App. 1975) that § 40A–6–1, N.M.S.A.1953 (2d Repl.Vol. 6, 1973) is unconstitutional.

Furthermore, the facts illustrate why today's *Miranda* warnings require additional safeguards to effectively protect an individual's Fifth and Sixth Amendment rights. I do not carry a bag of sympathy on my back for defendant as I write down the avenue of constitutional rights. These rights have been heralded in the courts for 200 years.

On June 29, 1977, the police went to the motel in which Utter was staying to question him about the death of his child. Utter was read his *Miranda* rights and was told that he was a suspect in the case. He then voluntarily accompanied the officers to the police station where he signed an acknowledgment and a waiver of his rights before giving the police a written statement. At this time Utter was not charged with a crime nor held in custody.

On July 8, 1977, pursuant to a Grand Jury Indictment, Utter was arrested in Taos for a crime, the conviction of which he is now appealing. At the time the Albuquerque police arrested Utter he was in the Taos jail having been taken into custody for drinking in public, though the Taos police had neither given him his *Miranda* rights nor formally charged him with this violation.

On the day of his arrest for child abuse, Utter was trembling and shaking as he was driven by the Albuquerque police from Taos to Albuquerque. He was *not* readvised of his *Miranda* rights *prior* to this journey. He testified that he told the police officers he wanted to speak with a lawyer before talking to the police; that he wanted to hire a local Albuquerque attorney who once represented his sister, and that the police officer asked him why he would spend ten thousand dollars to hire an attorney when he could get a public defender for free. In contrast, the police officer testified that defendant made no specific statement requesting an attorney; that a reference was made to the law firm only in the context of their representation of the defendant for a land sale in New Jersey; and that the officer did not try to dissuade defendant from representation by the attorney. At least twice during the course of the drive the police told Utter that his statement on June 29 had not been the truth, that they had medical evidence to the contrary and that the defendant's conscience would feel better if he were to talk to the police. In other words, Utter was subjected to custodial interrogation.

During the ride from Taos to Albuquerque, Utter either made essentially the same incriminating statement that he was later to give on tape to the police or said that he would give such a statement when he got to Albuquerque. At Utter's request, upon arriving in Albuquerque, the police notified his wife that he was in custody; the police did not contact the law firm or any other attorney for Utter. At the Albuquerque police station, Utter was advised of his *Miranda* rights and signed a waiver of them.

Utter then gave a statement which was tape recorded and stenographed. This statement was never signed because while it was being typed an attorney from the Public Defender's office, having been contacted by Utter's wife, arrived to counsel Utter. From these facts the trial judge found that Utter had not invoked his right to remain silent or his right to counsel.

As required by *Miranda v. State of Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) the defendant was not advised on July 8 that "prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." [86 S.Ct. at 1630.] The State, alleging that defendant waived these rights, submitted two statements of waiver made by defendant on June 29 and July 8 as State's Exhibits Nos. 1 and 2. The trial court refused to suppress the oral statement taken on July 8, 1977, but the trial court did not find that Utter voluntarily, knowingly and intelligently waived his right to remain silent and his right to counsel.

In *State v. Greene,* 91 N.M. 207, 572 P.2d 935, 941 (1977), Justice Federici said:

> We hold that (1) once a person is arrested and has asserted his right to counsel he may, upon receiving *new and adequate "Miranda* warnings," change his mind for reasons satisfactory to himself and voluntarily submit to questioning, and (2) once the right to counsel has been effectively invoked, *the State bears a heavy burden in demonstrating that a subsequent waiver is knowing and voluntary.* [Emphasis added.]

On July 8, Utter did not receive "new and adequate warnings" prior to the statements made. Neither did the State bear the heavy burden if Utter had actually asserted his right to counsel. The trial court believed the police and not Utter. I have no quarrel with this conclusion, but a higher standard for the waiver of fundamental rights should be adopted.

Before initiating a discussion which could lead to any form of interrogation, the police officer should not only remind the individual in custody of his *Miranda* rights, he should seek an explicit answer as to the individual's waiver of those rights. For instance, the police might say, "Mr. Utter, you have the right to an attorney before you talk to me. Do you want an attorney here before talking to me?" If Utter responds with an unequivocal "No, I do not want an attorney" then the police may proceed to question him; if he says "Yes" prior to or during the questioning, the police must either desist from or terminate the interrogation.

These requirements form the holding of *Sullins v. U. S.,* 389 F.2d 985 (10th Cir. 1968). In that case defendants were given their *Miranda* rights twice by two different sheriffs immediately after their arrest. During the drive to the sheriff's office defendants made incriminating oral statements which were of the "same general tenor" as the written statements which they subsequently signed two days after their arrests. Defendants had been advised of their *Miranda* rights at least five times during the course of two days and each had executed a signed waiver of rights before giving his or her written statement to the police.

At the hearing on the motion to suppress the written statements, defendants contended that they had asked for counsel immediately upon their arrival at the sheriff's office "and on several subsequent occasions." The police denied that "any one of them had at any time asked to have counsel present at their interrogation." The court found it crucial that

> [t]he officers did testify, however, *that at no time had any one of the four expressly said that he or she did not want to consult a lawyer before making a statement.*
>
> . . .
>
> *The testimony of the officers that none of the accused specifically declined consultation with a lawyer before answering questions is fatal to the admissibility of their inculpatory statements* for the

Court in *Miranda v. United States,* supra, pointed out . . . that not only does "a heavy burden" rest upon the Government to show a waiver of the constitutional privilege against self-incrimination and the right to retained or appointed counsel but also that waiver is never to be presumed from failure to ask for counsel. . . . .

* * * * * *

The written statements given after execution of the notices and waivers of constitutional rights do not stand in any better position than the oral statements previously made. The written statements merely reiterate the preceding oral statements. They were made after the damage had been done. [Emphasis added.] [389 F.2d at 988.]

Contra: *Daro v. U. S.,* 380 F.2d 23 (10th Cir. 1967); *Bond v. U. S.,* 397 F.2d 162 (10th Cir. 1968); *U. S. v. Montos,* 421 F.2d 215 (5th Cir. 1970); *U. S. v. Hayes,* 385 F.2d 375 (4th Cir. 1967).

In addition, today's *Miranda* warnings do not inform the individual that if he chooses to remain silent, his silence will not operate as evidence against him. The absence of a warning of this kind leads many suspects to speak who would not do so otherwise. A person facing arrest might hope that arrest or prosecution could be avoided by talking with the police; that cooperation will lead the police and prosecutor to believe in the suspect's innocence. The suspect should be given a clear understanding of the consequences of exercising his right to remain silent so that he can more intelligently choose whether or not to try to talk his way out of arrest. See Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona,* 67 Colum.L.Rev. 645 (1967).

It has been suggested that a knowing and intelligent waiver of one's rights to counsel and against self-incrimination is practically impossible because any disclosure under our adversary system of criminal justice is potentially damaging. *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona,* 35 Fordham L.Rev. 169, 233 (1966). One philosophy is that interrogation should never be permitted without counsel present and no statements made in the absence of counsel should be admissible.

I would not go to these lengths in implementing *Miranda,* but I do recommend a higher standard for the waiver of fundamental rights.

[redacted]

582 P.2d 1302

Denise B. ARVAS, Plaintiff-Appellee,

v.

FEATHER'S JEWELERS, Defendant-Appellant.

No. 3131.

Court of Appeals of New Mexico.

Aug. 1, 1978.

[redacted]

[redacted]

[redacted]

[redacted]

E. Douglas Latimer, Albuquerque, for defendant-appellant.

Donald C. Schutte and Robert R. Fredlund, Jr., Albuquerque, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Plaintiff sued defendant for negligence. Plaintiff and defendant were employee and employer, but the employer had not complied with the provisions of the Workmen's Compensation Act. This case was submitted to the trial court on a stipulation of facts, a deposition of plaintiff and affidavits filed. Judgment was entered for plaintiff and defendant appeals. We affirm.

The parties stipulated that on November 20, 1973, plaintiff was on duty in defendant's store. Christmas decorations were stored in the *attic area.* Plaintiff ascended to the attic to obtain the decorations for display below and, after ascending, *plaintiff fell off of the attic floor platform area and through a suspended ceiling*, landing on the store floor below. There were no witnesses. Plaintiff does not remember anything after reaching for a box of styrofoam. As far as she can recall, she simply lost her balance and fell off the platform. She had no idea how she fell, but she always exercised care when in the area. No one warned her that the ceiling was dangerous, but she herself considered the area dangerous and exercised extra caution when in the area.

This stipulation was only a partial statement of the facts. In addition to the stipulated facts, the trial court considered the deposition and affidavits. The trial court found that at the time plaintiff fell, the attic had an opening from a small platform onto the false ceiling. The opening was approximately four feet across, being located immediately beyond the small floor area.

The opening was not protected by a railing or other protective device. *The Christmas decorations were stored on the false ceiling* just beyond the small floored area, *and the only way plaintiff could get the decorations was to reach onto the false ceiling from where she stood on the small floored area way.* Defendant was aware of these conditions in the attic. *It was reasonably foreseeable that an employee or other person, in reaching for the Christmas decorations stored on the false ceiling might lose her balance, fall through the false, non-weight-bearing ceiling, onto the floor below.*

The trial court "concluded" that defendant owed plaintiff a duty to provide her with a safe place to work; that defendant, in storing Christmas decorations on the false ceiling of its attic, or in allowing them to be stored thereon, committed negligence as a matter of law; that this negligence was the proximate cause of plaintiff's fall; that common law defenses were not available by reason of defendant's failure to abide by the Workmen's Compensation Act. These conclusions of law are, in effect, mixed questions of law and fact.

The defendant did not challenge the trial court's findings. Defendant challenged the trial court's conclusions and the failure of the court to make a finding and a conclusion. Therefore, the findings of the trial court are correct and conclusive on appeal if the trial court's conclusions and the judgment are correct, based upon the facts found. *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977).

Defendant raises two points on appeal: (1) the trial court failed to apply the proper test and rules to determine the presence or absence of negligence of defendant; and (2) the trial court's findings on negligence and conditions of the premises are contrary to stipulated facts and unsupported by evidence. We disagree.

A. *The trial court applied the proper rules applicable to defendant's negligence.*

In common law master and servant cases, the master is under a duty to exercise ordinary care to protect the servant from injury. *Within the perimeter of this duty, the master must exercise reasonable care to provide a servant with a reasonably safe place in which to work. Dawes v. McKenna*, 100 R.I. 317, 215 A.2d 235 (1965); *Haynie v. Haynie*, 426 P.2d 717 (Okl.1966); *Sears, Roebuck & Co. v. Skeen*, 207 Okl. 180, 248 P.2d 582 (1952); *Smith v. Goodman*, 6 Ariz.App. 168, 430 P.2d 922 (1967); *Jackson v. Powe*, 241 S.C. 35, 126 S.E.2d 841 (1962); 56 C.J.S. *Master and Servant* §§ 171, 183 (1948); 53 Am.Jur.2d, *Master and Servant*, § 142 (1970). See, Annot., *Duty and liability of employer to domestic servant for personal injury or death*, 49 A.L.R.2d 317 (1956).

Defendant claims that plaintiff's "reach" is not sustained by substantial evidence. Although this issue is not reviewable, it is reasonable to infer that if plaintiff did not reach from the platform to the false ceiling area to retrieve the decorations, she would have to step from the platform area onto the false ceiling and plunge to the floor below.

The facts, and reasonable inferences drawn therefrom, establish that defendant failed to provide plaintiff with a reasonably safe place in which to work.

In passing, we note that plaintiff claimed defendant was negligent as a matter of law because the business was conducted in violation of § 59–14–5(A), N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1, 1975 Supp.), of the Occupational Health and Safety Act, (OSHA). It reads:

> Every employer shall furnish to each of his employees . . . a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

After citing the statute, plaintiff was silent. Lawyers should not try to lead courts astray. "Nowhere in the Act or in its legislative history can be found any indication that . . . (the legislature) intended to allow additional civil actions instituted by aggrieved employees injured through viola-

tions of OSHA standards." *Otto v. Specialties, Inc.*, 386 F.Supp. 1240, 1242 (D.C.Miss. 1974).

The trial court did not err in applying the proper test and rules of law.

B. *The court's findings on negligence and condition of premises were correct.*

Defendant says:

> Judge Ryan concluded that the plaintiff had to reach out over a suspended ceiling *through an area unguarded by railing or other devices.* The stipulated facts are contrary and there is nothing in the record upon which the judge could properly so conclude. [Emphasis added.]

Defendant claims that the stipulated facts are contrary to the court's finding that the opening from the platform area onto the false ceiling was not protected by a railing or other protective device. This argument is based upon the affidavit of Clinton Chandler, manager of defendant. Chandler explained the physical condition of the area from which plaintiff fell at the time of her fall. Chandler's affidavit stated that a round glass table top blocked the open area. Plaintiff testified that the four foot space was open, not blocked, at the time she reached for the Christmas decorations.

The parties did not stipulate that Chandler's affidavit in fact constituted the condition of the area at the time plaintiff fell. It was an "explanation." The trial court was not obliged to accept Chandler's "explanation" or the contents of his affidavit. The court believed the plaintiff. The area did not have a railing or any other object that blocked the opening through which plaintiff reached for the Christmas decorations and fell. The stipulated facts were not contrary to the trial court's findings.

The trial court's findings were sustained by substantial evidence.

C. *Contributory negligence was not an issue in the case.*

During the course of its argument, defendant claimed that plaintiff was blameworthy by reason of contributory negligence.

Under the Workmen's Compensation Act, where an employer is subject to the Act and has failed to comply therewith, an employee who sustains compensable injuries is afforded one of two remedies.

(1) An employee may maintain a civil action against the employer for damages suffered. In this action, the employer is denied the common law defenses of contributory negligence, assumption of risk and the fellow servant rule. Section 59–10–5, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1). *Addison v. Tessier*, 62 N.M. 120, 305 P.2d 1067 (1957); *Mirabal v. International Minerals & Chemical Corp.*, 77 N.M. 576, 425 P.2d 740 (1967).

(2) Under § 59–10–2, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1), an employee may in lieu of a common law action apply to the district court for compensation benefits under the Act. *Kempel v. Streich*, 196 N.W.2d 589 (N.D.1972); *State ex rel. Dushek v. Watland*, 51 N.D. 710, 201 N.W. 680 (1924), and the employer is also denied any common law defenses.

There is one exception to this rule. If an employer has less than four employees, the employer is not subject to the Workmen's Compensation Act and the Act "itself would not apply to the employer." An employer would be entitled to all common law defenses in a common law action for negligence brought by an employee. *Castillo v. Juarez*, 80 N.M. 196, 453 P.2d 217 (Ct.App.1969).

Defendant did not come within this exception. Although defendant argues that plaintiff was contributorially negligent, this argument is stalled.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., concurring in result only.

582 P.2d 1306

STATE of New Mexico,
Plaintiff-Appellee,

v.

Robert GABALDON,
Defendant-Appellant.

No. 3519.

Court of Appeals of New Mexico.

Aug. 8, 1978.

John B. Bigelow, Chief Public Defender, Michael J. Dickman, Asst. Appellate Defender, Santa Fe, for appellant.

Toney Anaya, Atty. Gen., Jacob G. Vigil, Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of CSP II (criminal sexual penetration in the second degree) and aggravated battery. Subsequently, an enhanced sentence was imposed upon defendant as an habitual offender. Defendant's appeal presents one issue—that the CSP II in this case is the same offense as criminal sexual contact, that equal protection of the law was violated by submitting to the jury the second degree felony, CSP II, rather than the fourth degree felony, criminal sexual contact. See *State v. Chavez*, 77 N.M. 79, 419 P.2d 456 (1966); *State v. Vickery*, 85 N.M. 389, 512 P.2d 962 (Ct.App.1973).

Both the CSP II offense submitted to the jury, and the criminal sexual contact offense which defendant contends should have been submitted, provide for the perpetration of the crime "by the use of force or coercion which results in personal injury to the victim". Compare § 40A–9–21(B)(2) with § 40A–9–22(A)(1), N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1975).

The CSP offense in this case was fellatio. Criminal sexual contact is defined in terms of touching "the unclothed intimate parts of another". Compare § 40A–9–21, supra, with § 40A–9–22, supra.

U.J.I. Crim. 9.45 was the appropriate instruction stating the elements of the CSP offense in this case. U.J.I. Crim. 9.04, an approved instruction stating the elements of criminal sexual contact, is the instruction

defendant contends should have been given. Comparing these two instructions, the only significant difference is that U.J.I. Crim. 9.45, as given by the trial court, used the word "fellatio" while U.J.I. Crim. 9.04, if given, would have used the word "penis". See Use Notes to both instructions.

U.J.I. Crim. 9.82 defines "penis" as the male organ of urination and sexual intercourse. U.J.I. Crim. 9.84 defines "fellatio" as the touching of the penis with the lips or tongue.

Under the above statutes and instructions, defendant could not have committed fellatio without also touching the intimate parts of another inasmuch as § 40A–9–22, supra, defines "intimate parts" to include the primary genital area. This, however, does not mean that CSP II, by fellatio, is the same offense as criminal sexual contact; fellatio requires a particular type of touching—with the lips or tongue.

Section 40A–9–22, supra, is a general statute prohibiting a touching of intimate parts. Section 40A–9–21, supra, is a specific statute prohibiting a touching of the penis with the lips or tongue. Section 40A–9–21, supra, was the applicable statute because the specific statute prevails over the general statute. *State v. Blevins*, 40 N.M. 367, 60 P.2d 208 (1936).

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

582 P.2d 1307

STATE of New Mexico, Plaintiff-Appellee,

v.

James FRENCH, Defendant-Appellant.

No. 3497.

Court of Appeals of New Mexico.

Aug. 8, 1978.

John B. Bigelow, Chief Public Defender, Reginald J. Storment, Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Santa Fe, Charlotte Hetherington Roosen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

This appeal involves: (1) effective representation of counsel and (2) motion to withdraw guilty pleas.

Defendant was charged with, and pled guilty to, four counts of criminal sexual penetration in the second degree. Defendant was given a diagnostic commitment. Section 40A-29-15(C), N.M.S.A.1953 (2d Repl. Vol. 6).

Effective Representation of Counsel

The diagnostic report to the trial court stated that defendant claimed he pled guilty because his counsel threatened to withdraw if he did not plead guilty.

At the sentencing hearing, defendant's counsel moved for permission to withdraw giving as his reasons (a) the alleged threat claimed by defendant, (b) counsel's denial that any such threat was made, and (c) counsel's belief that no "working relationship" remained between counsel and defendant.

The trial court took the motion to withdraw under advisement "until I order a final disposition in this case." After sentence was imposed, the trial court advised defendant of his right to appeal and granted the motion of counsel to withdraw, effective after entry of the formal judgment and sentence.

During the sentencing hearing, the trial court asked both counsel and defendant if they had any statement they wished to make before sentence was pronounced. Counsel had nothing to say. Defendant moved to withdraw his guilty pleas; this motion was denied. Sentence was then pronounced.

Defendant asserts that counsel "did not act as an advocate but as a disinterested observer during sentencing." Defendant asserts this "in itself might constitute inadequate counsel". Defendant also claims that he was entitled to counsel to advocate his motion to withdraw his guilty pleas, and infers that because counsel did not "advocate" this motion, that counsel at the sentencing hearing was "ineffective".

The standard for determining ineffective assistance of counsel is whether the proceedings were a sham, farce or mockery of justice. *State v. Trivitt*, 89 N.M. 162, 548 P.2d 442 (1976). The transcript does not show this standard was violated.

This record does not show that counsel "did not act as an advocate" during the sentencing proceedings. Counsel remained silent, but that could have been a choice of tactics; at least, there is nothing showing silence was not a tactical decision by counsel. The choice of tactics is within the control of counsel. *State v. Hines*, 78 N.M. 471, 432 P.2d 827 (1967). Assuming silence, as a tactic, was bad, this does not necessarily show ineffective assistance of counsel. *State v. Hines*, supra.

The fact that counsel and defendant disagreed as to whether counsel made a threat does not show ineffective assistance of counsel. Effective assistance of counsel could be rendered regardless of such a disagreement. *State v. Salazar*, 81 N.M. 512, 469 P.2d 157 (Ct.App.1970).

The trial court found as a fact that counsel never made the threat alleged by defendant. The failure of counsel to advocate the motion to withdraw the guilty pleas, which was based on a nonexistent fact, does not show ineffective assistance of counsel. Counsel had an obligation to see that defendant's contention was presented, and it was presented by defendant. Counsel, however, had no obligation to argue a motion he considered to be without merit. *State v. Franklin*, 78 N.M. 127, 428 P.2d 982 (1967).

Thus far we have only considered the proceedings at the sentencing hearing; those proceedings do not show the denial of effective assistance of counsel. However, the question of effective assistance of counsel is not to be decided by considering only the sentencing hearing. The proceedings, "considered as a whole", must be reviewed. *State v. Garcia*, 85 N.M. 460, 513 P.2d 394 (1973). The proceedings, up through acceptance of the guilty pleas, affirmatively show able and effective assistance of counsel. This fact must also be considered in deciding the question of effective assistance of counsel.

This record does not show ineffective assistance of counsel.

Motion to Withdraw Guilty Pleas

In accepting the guilty pleas, the trial court fully complied with Rule of Crim.Proc. 21. No issue as to this rule is involved. Compare *State v. Eller*, (Ct.App.) No. 2976, decided May 2, 1978, pending before the Supreme Court on certiorari. Accordingly, the question is whether the trial court abused its discretion in denying the motion to withdraw the pleas. *State v. Kincheloe*, 87 N.M. 34, 528 P.2d 893 (Ct. App.1974).

The only ground advanced that arguably supported the motion was defendant's claim that counsel threatened to withdraw as counsel if defendant did not plead guilty. The trial court found that no such threat was made. Counsel's representations to the court, the affidavit of counsel's partner, and defendant's denial at the guilty plea hearing that his pleas resulted from threats or force, provide substantial support for this finding.

There is nothing showing the trial court abused its discretion in denying the motion to withdraw the guilty pleas.

Defendant contends, however, that the trial court erred in not granting an

evidentiary hearing on the motion and in not appointing "a real advocate" to represent defendant in connection with this evidentiary hearing. Defendant presented his contention, it was ruled on, the ruling was proper. There is nothing indicating any further evidence was available on the contention made, and nothing indicating other contentions would be made. No reason having been advanced as to why an additional evidentiary hearing should be held, the trial court did not abuse its discretion in failing to hold such a hearing.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

583 P.2d 462

Teresa M. STRINGER and Manuel Garcia, Guardian ad litem for Rebecca Rachel Stringer, Plaintiffs-Appellants,

v.

Stephen P. DUDOICH, Defendant-Appellee.

No. 11743.

Supreme Court of New Mexico.

Sept. 6, 1978.

Wycliffe V. Butler, Albuquerque, for plaintiffs-appellants.

Alarid & Riley, Michael Alarid, Jr., James E. Riley, Jr., Albuquerque, for defendant-appellee.

OPINION

PAYNE, Justice.

This is an appeal from a summary judgment in a paternity action. The complaint contains two counts. In the first count, Teresa Stringer, the mother, alleged that the defendant, Stephen P. Dudoich, was the father of her child, Rebecca. In the second count, Manuel Garcia, as guardian ad litem for the child, alleged that the defendant was Rebecca's father and was liable for her support. The trial court dismissed both counts. Both the mother and the child appealed. We affirm the trial court's ruling as to the mother's claim but reverse its ruling as to the child's claim.

Section 22–4–24, N.M.S.A.1953 (Supp. 1975), upon which the trial court relied in granting summary judgment, provides:

> Proceedings to enforce the obligation of the father shall not be brought after the lapse of more than two [2] years from the birth of the child unless paternity has been judicially established or has been acknowledged by the father in writing or by the furnishing of support, except that there shall be no time limitation on proceedings initiated by the state.

There is no dispute that the child was five years old when the suit was filed. The mother, however, maintains that the statute was tolled by the defendant's actions. In a motion for summary judgment, the party claiming that a statute of limitation should be tolled has the burden of alleging sufficient facts that if proven would toll the statute. *Hernandez v. Anaya*, 66 N.M. 1, 340 P.2d 838 (1959). In the present case the trial court ruled that even if the allegations contained in the complaint and the affidavits submitted by the mother were true, the statute was not tolled and the defendant should prevail as a matter of law. We agree and affirm the trial court on this issue.

The trial court also found that the child did not have a cause of action against the defendant. We do not agree.

At early common law an illegitimate child was considered *nullius filius* —the son of no one—of no mother and no father. He was not entitled to support from anyone. In New Mexico, however, both legitimate and illegitimate children are entitled to support from their mothers and fathers. *Petition of Quintana*, 83 N.M. 772, 497 P.2d 1404 (1972); *State ex rel. Terry v. Terry*, 80 N.M. 185, 453 P.2d 206 (1969); *Wilson v. Wilson*, 45 N.M. 224, 114 P.2d 737 (1941); § 40A–6–2, N.M.S.A.1953 (Supp.1975); § 22–4–1, N.M.S.A.1953 (Supp. 1975). Section 22–4–1 provides:

> The father and mother of a child born out of wedlock are jointly and severally liable for the support of the child until he reaches the age of majority.

Illegitimate children are entitled to the same support rights as legitimate children. Any other interpretation of § 22–4–1 would violate the equal protection clauses of the United States and New Mexico Constitutions. *See Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973). In *Gomez* the United States Supreme Court stated:

> We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust."

Id. at 538, 93 S.Ct. at 875.

The question remaining is whether the two-year statute of limitations imposed by

§ 22–4–24 bars a child from bringing an action beyond his second birthday. We hold that it does not.

In New Mexico there is no time limitation on the right of the child born in wedlock to require the natural father to support him. A child has the right of support from his parents whether or not he is in their custody. *Terry, supra; Wilson, supra.*

The United States Supreme Court in *Gomez* held that the equal protection clause prohibits a state from granting a right to legitimate children and withholding the same right from illegitimate children. The Court stated:

> Under these decisions, [*Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 and *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551] a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.

409 U.S. at 538, 93 S.Ct. at 875. If there is no limitation on the right of a legitimate child to seek support from his parent, then there can be no limitation on the same right for an illegitimate child. Other states have come to the same conclusion. *S. L. W. v. Alaska Workmen's Compensation Board*, 490 P.2d 42 (Alaska 1971); *Barrett v. Barrett*, 44 Ariz. 509, 39 P.2d 621 (1934); *Cessna v. Montgomery*, 28 Ill.App.3d 887, 329 N.E.2d 861 (1975); *Huss v. DeMott*, 215 Kan. 450, 524 P.2d 743 (1974); *Wiczynski v. Maher*, 48 Ohio App.2d 224, 356 N.E.2d 770 (1976).

We hold that § 22–4–24 is unconstitutional to the extent that it limits the right of an illegitimate child to seek a determination of his paternity and support.

The matter is remanded to the trial court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, J., concur.

583 P.2d 464

STATE of New Mexico, Petitioner,

v.

John DOE, a child, Respondent.

No. 11983.

Supreme Court of New Mexico.

Sept. 6, 1978.

Toney Anaya, Atty. Gen., Charlotte Hetherington Roosen, Asst. Atty. Gen., Santa Fe, for petitioner.

John B. Bigelow, Chief Public Defender, Martha A. Daly, Asst. Appellate Defender, Santa Fe, for respondent.

OPINION

McMANUS, Chief Justice.

John Doe (defendant) was adjudged a delinquent child when he was convicted of disorderly conduct in violation of § 40A–20–1, N.M.S.A. 1953 (Repl.1972) and battery upon a police officer in violation of § 40A–22–23, N.M.S.A. 1953 (Repl.1972). He was committed to the Boys' School. The defendant appealed and the Court of Appeals reversed both convictions. The State petitioned for a writ of certiorari. We granted the writ and now affirm in part and reverse in part the decision of the Court of Appeals.

The defendant was a passenger in a car which was stopped by a police patrol after the car had pulled into the parking lot of a liquor store twice. While the officers were questioning the driver, the defendant got out of the car and started arguing with the officers in a loud voice. After several warnings, the defendant was arrested for disorderly conduct. He was then taken to the police station and turned over to the booking officers to be incarcerated. When a routine search was attempted, the defendant struck and kicked the officers searching him.

On appeal the defendant challenged the constitutionality of § 40A–20–1. The Court of Appeals did not reach the constitutionality issue. Instead, it reviewed the evidence and found that there was no probable cause to arrest the defendant because his words and actions did not violate the disorderly conduct statute. The State contends that the Court of Appeals exceeded the permissible scope of review since the defendant did

not raise the issue of sufficiency of the evidence to support the defendant's conviction. We disagree with the State's position.

Although sufficiency of the evidence was not challenged in the lower court nor raised on appeal, the Court of Appeals may clearly consider such a question if it constitutes "fundamental error."

> The doctrine of fundamental error is resorted to in criminal cases only if the innocence of the defendant appears indisputable, or if the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to stand.

State v. Torres, 78 N.M. 597, 599, 435 P.2d 216, 218 (Ct.App.1967); *State v. Sedillo*, 81 N.M. 47, 462 P.2d 632 (Ct.App.1969), *cert. denied*, 81 N.M. 40, 462 P.2d 625 (1969).

The Court of Appeals found as a matter of law that the defendant's words and actions did not constitute disorderly conduct. Section 40A–20–1 states:

> *Disorderly conduct.*—Disorderly conduct consists of:
>
> A. engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace . . .

The defendant was a passenger in the car when the officers began questioning the driver. He started asking in a loud voice why they were being stopped and harassed. He was angry and had his fist clenched, but he made no gesture or movement toward the officers. There was no evidence that a crowd was gathering, that the defendant was inciting belligerent behavior, or that the defendant was causing consternation or alarm. The statute contemplates conduct which tends to disturb the peace. As set forth in *State v. Florstedt*, 77 N.M. 47, 49, 419 P.2d 248, 249 (1966), a "breach of the peace" is "'[A] disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community. . . .'" *See also, State v. Oden*, 82 N.M. 563, 484 P.2d 1273 (Ct. App.1971).

Here, no act of violence was attempted. The officer stated that he arrested the defendant because he was getting angry "and with his actions I didn't know that at any time he might go ahead and become combative." But at the time of the arrest the defendant was not "combative," nor was it apparent that his words or actions would produce violence or disturb the peace. *Norwell v. City of Cincinnati*, 414 U.S. 14, 16, 94 S.Ct. 187, 188, 38 L.Ed.2d 170 (1973) states, "[O]ne is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer." We feel that this principle applies here and agree with the Court of Appeals that there was no probable cause for the arrest and that there was insufficient evidence to sustain the conviction.

However, we cannot agree with the second conclusion reached by the Court of Appeals. The Court of Appeals held that the defendant was not guilty of battery upon a police officer under § 40A–22–23. Section 40A–22–23 provides:

> 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.

The Court of Appeals reasoned that since the arrest was illegal the search was illegal, and the officers were not acting in the "lawful discharge of their duties."

Even if the arrest was illegal, we cannot condone the use of force in resisting every subsequent act made in good faith by a law enforcement officer. In this case, the search was conducted by booking officers according to regular jail procedures. There is no evidence that the booking officers were acting in bad faith or using unreasonable force. Police officers acting in good faith, although mistakenly, should be relieved of the threat of physical harm.

Self-help measures undertaken by a potential defendant who objects to the le-

gality of the search can lead to violence and serious physical injury. The societal interest in the orderly settlement of disputes between citizens and their government outweighs any individual interest in resisting a questionable search. *United States v. Ferrone*, 438 F.2d 381, 390 (3rd Cir. 1971), *cert. denied*, 402 U.S. 1008, 91 S.Ct. 2188, 29 L.Ed.2d 430 (1971). *Accord, State v. Hatton*, 116 Ariz. 142, 568 P.2d 1040 (1977); *State v. Miller*, 282 N.C. 633, 194 S.E.2d 353 (1973). One can reasonably be asked to submit peaceably and to take recourse in his legal remedies.

We hold that a private citizen may not use force to resist a search by an authorized police officer engaged in the performance of his duties whether or not the arrest is illegal. The question remains whether the use of force in resisting a search pursuant to an illegal arrest constitutes a battery upon a police officer acting in the "lawful discharge of his duties," as set forth in § 40A–22–23.

The meaning of "lawful discharge of his duties" was discussed in *State v. Frazier*, 88 N.M. 103, 537 P.2d 711 (Ct.App.1975). The policeman in *Frazier* admitted that, prior to stopping the defendant, he had no grounds to believe the defendant was committing or had committed a criminal offense. Nor was any evidence of suspicious activity offered by the State. The policeman was intervening in what was actually a civil matter. When the defendant resisted, the policeman placed her under arrest. Since the police officer had no legitimate reason for stopping the defendant, the Court of Appeals found that the police officer was not acting in the lawful discharge of his duties. Thus, the Court held that the defendant was not guilty of "resisting . . . any peace officer in the lawful discharge of duties," under § 40A–22–1, N.M.S.A. 1953 (Repl.1972).

The facts in the case before us are clearly distinguishable from those in *Frazier*. Here, the police officer was conducting a search pursuant to routine jail procedures. The State had a legitimate interest in requiring that a person undergo a search prior to custodial confinement. Such a search was necessary for the protection of the officers in charge of the facility, to prevent escape, and for the protection of the other inmates. *See, Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964). We hold that a police officer conducting a search prior to confinement is engaged in the lawful discharge of his duties as required by § 40A–22–23.

An arrest undertaken without probable cause does not vitiate all the authority of the arresting officer. Even if an arrest is effected without probable cause, a police officer is engaged in the performance of his official duties if, "[h]e is simply acting within the scope of what the agent is employed to do. The test is whether the agent is acting within that compass or is engaging in a personal frolic of his own." *United States v. Heliczer*, 373 F.2d 241, 245 (2d Cir. 1967), *cert. denied*, 388 U.S. 917, 87 S.W. 2133, 18 L.Ed.2d 1359 (1967). *Accord, United States v. Martinez*, 465 F.2d 79 (2d Cir. 1972); *State v. Hatton, supra*. A police officer who makes an arrest should not lose all his authority if the arrest is subsequently judged to be unlawful. Police officers must be free to carry out their duties without being subjected to interference and physical harm.

Here the police officer was clearly acting within the scope of what he was employed to do. Thus, we affirm the defendant's conviction for battery upon a police officer acting in the lawful discharge of his duties.

The Court of Appeals also held that the trial court erred in committing the defendant to the Boys' School in excess of the statutory maximum set forth in § 13–14–35, N.M.S.A. 1953 (Repl.1976). We agree with the Court of Appeals on this point and affirm its decision.

Therefore, we affirm in part and reverse in part the decision of the Court of Appeals as stated above. We hold that the defendant's conviction for disorderly conduct is reversed, his conviction for battery on a police officer is affirmed, and his commit-

ment in excess of the statutory limit is improper. We remand this case to the district court for further proceedings in accordance with this opinion

IT IS SO ORDERED.

SOSA, EASLEY, PAYNE and FEDERICI, JJ., concur.

583 P.2d 468

STATE of New Mexico ex rel. Toney ANAYA, Attorney General of New Mexico, Plaintiff-Appellee,

v.

COLUMBIA RESEARCH CORPORATION, an Illinois Corporation, Raymond D. Anderson, et al., Defendants-Appellants.

No. 11486.

Supreme Court of New Mexico.

Sept. 13, 1978.

Catron, Catron & Sawtell, Thomas B. Catron, III, Santa Fe, for defendants-appellants.

Toney Anaya, Atty. Gen., Steven Asher, Robert N. Hilgendorf, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HILL, District Judge, sitting by designation.

The Attorney General of the State of New Mexico, pursuant to § 4–3–2, N.M.S.A. 1953 (Supp. 1975), § 49–15–7, N.M.S.A. 1953

(Supp. 1975), and § 49–15–15, N.M.S.A. 1953 (Supp. 1975), filed suit in the District Court of Santa Fe County against Columbia Research Corporation, an Illinois corporation, and Raymond D. Anderson, a resident of Ohio, individually and as president and director of Columbia Research Corporation. Service was made upon Raymond D. Anderson by personal service of process upon him in the State of Illinois pursuant to § 21–3–16 A(1) and B, N.M.S.A. 1953 (Supp. 1975).

On March 2, 1977 defendants filed a motion to dismiss for lack of jurisdiction pursuant to N.M.R. Civ. P. 12(b)(2), (4) and (5) [§ 21–1–1(12)(b)(2), (4) and (5), N.M.S.A. 1953 (Repl. 1970)]. The district court determined that the allegations of plaintiff's complaint, together with the proof offered at the hearing, vested the court with in personam jurisdiction over Raymond D. Anderson and jurisdiction over Columbia Research Corporation, and it entered an amended order denying the defendants' motion to dismiss.

Defendants Columbia Research Corporation and Raymond D. Anderson filed an application for an order allowing immediate appeal in the Supreme Court. Following a hearing, this Court entered an order granting the appeal as to Raymond D. Anderson only.

This appeal is from the decision of the district court denying defendant Raymond D. Anderson's motion to dismiss and its specific finding that it has personal jurisdiction over the defendant Anderson. We reverse.

The complaint contains certain allegations which, if proven, bring the defendant Anderson personally within the jurisdiction of the District Court of Santa Fe County, New Mexico. *McGee v. International Life Ins. Co.,* 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223, (1957); *Internat. Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *United Nuclear Corp. v. General Atomic Co.,* 90 N.M. 97, 560 P.2d 161 (1976); *Blount v. TD Publishing Corporation,* 77 N.M. 384, 423 P.2d 421 (1966); *State v. Reader's Digest Association, Inc.,* 81 Wash.2d 259, 501 P.2d 290 (1972), *appeal dismissed,* 411 U.S. 945, 93 S.Ct. 1927, 36 L.Ed.2d 406 (1975). These allegations are essentially that the defendant Raymond D. Anderson is president and director of the corporate defendant, Columbia Research Corporation, that he managed and controlled the unlawful acts and practices conducted throughout the State of New Mexico, and that he did or authorized such acts while acting in the scope of his authority, duties or employment.

Defendant Anderson, in his verified motion to dismiss, stated under oath that he had never been physically within the State of New Mexico, that he had not transacted any business within the State of New Mexico, and that he had not done any act which would submit him to the personal jurisdiction of any court of the State of New Mexico.

Properly challenged allegations of jurisdictional facts in a complaint must be supported by competent proof. *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936), *Taylor v. Portland Paramount Corporation,* 383 F.2d 634 (9th Cir. 1967).

We hold that the allegations of jurisdictional facts in the instant case were properly and adequately traversed and challenged. Consequently, the State had the burden to prove the jurisdictional allegations at the hearing on Raymond D. Anderson's motion to dismiss. *McNutt v. General Motors Acceptance Corp., supra, Taylor v. Portland Paramount Corporation, supra.* The record of the hearing before the district court on the motion to dismiss fails to reveal proof of the jurisdictional allegations contained in the complaint. Therefore, it follows that the State failed to establish in personam jurisdiction over the defendant Raymond D. Anderson.

For the foregoing reasons, we reverse the decision of the trial court.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, PAYNE and FEDERICI, JJ., concur.

583 P.2d 470

FIDELITY NATIONAL BANK, a New Mexico Corporation, Plaintiff-Appellee,

v.

TOMMY L. GOFF, INC., a New Mexico Corporation, Tommy L. Goff, Janey Rue Goff, Defendants,

v.

Robert W. BAKER, Defendant-Appellant.

No. 11803.

Supreme Court of New Mexico.

Sept. 14, 1978.

Lamb, Metzgar & Lines, John S. Campbell, Albuquerque, for appellant.

Threet, Threet, Glass & King, Martin E. Threet, Rolf A. Melkus, Albuquerque, for appellee.

OPINION

FEDERICI, Justice.

Plaintiff Fidelity National Bank (appellee) brought this action against Tommy L. Goff, Inc. to recover money allegedly due

under promissory notes executed in favor of appellee by the corporation. The action was also brought against Tommy L. Goff, individually, Janey Rue Goff and appellant Robert W. Baker (appellant) as guarantors of the notes. The complaint alleged that appellant Baker had executed a continuing guaranty agreeing to guarantee up to $500,000.00 of the indebtedness of Tommy L. Goff, Inc. The action was dismissed as against all defendants except appellant Baker with the consent of the appellee. Following a hearing on appellee's motion for summary judgment pursuant to N.M.R. Civ. P. 56 [§ 21-1-1(56), N.M.S.A. 1953 (Repl.1970)], judgment was entered for appellee in the amount of $302,264.86, together with interest, costs and attorney fees. Appellant Baker appeals as to both the propriety of the entry of summary judgment against him and the amount of attorney fees awarded. This appeal presents a question of summary judgment procedure under Rule 56.

The second amended answer to the complaint denied generally the allegations of the complaint and raised twelve affirmative defenses. Appellant's affirmative defenses were brief statements of the following theories under which his liability as guarantor of the notes might be avoided: (1) fraud in the inducement; (2) failure of a condition precedent; (3) failure of consideration; (4) no actual reliance on the guaranty; (5) lack of consideration; (6) unconscionability of the guaranty; (7) fraud in the factum; (8) negligent extension of credit with consequent unenforceability of the guaranty; (9) alteration of the terms of the principal obligation with consequent discharge of appellant as guarantor; (10) failure to enforce certain security agreements with consequent discharge of appellant as guarantor; (11) premature acceleration of the principal obligation with consequent discharge of appellant as guarantor; (12) discharge of appellant as guarantor pursuant to terms of the guaranty itself. No factual amplification of any of these defenses was made in the answer.

Appellee's motion for summary judgment stated, generally, that there were no genuine issues of material fact and that all of the issues raised by appellant's answer were legal issues and not factual issues. Along with and in support of its motion the appellee filed an affidavit by its Vice President, stating the principal and interest due under the various notes, unanswered requests for admissions directed to appellant, the deposition of appellant and deposition testimony of a non-party. We may assume, for purposes of our discussion here, that these materials established the existence and amount of appellant's continuing guaranty on behalf of Tommy L. Goff, Inc. However, nothing contained in the affidavit or other materials submitted by appellee in support of its motion contravenes the allegations made in appellant's affirmative defenses. Appellant filed no affidavits or other extraneous materials in opposition to the motion and supporting materials filed by appellee.

Appellant now claims that the trial court erred in entering summary judgment for appellee because appellee failed to make a prima facie showing that it was entitled to judgment as a matter of law. *See Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972). More specifically, appellant argues that appellee failed to carry its burden of demonstrating that no genuine issue of fact existed as to the twelve affirmative defenses raised by appellant in his second amended complaint. Appellee argues in response that having made a prima facie showing as to its own case in chief (appellant Baker's liability under the continuing guaranty signed by him) it was incumbent upon appellant to come forward, by affidavit or otherwise, and make a showing that genuine and material factual issues were raised by one or more of his affirmative defenses.

The precise issue presented is whether a party moving for summary judgment on the basis of its complaint must demonstrate that no genuine issue of material fact exists as to affirmative defenses stated in the opposing party's pleadings before summary judgment can properly be granted in his favor. We hold that under Rule 56(c) the moving party carries that burden, which appellee failed to meet in this case.

It is a familiar rule that summary judgment is a drastic remedy, to be used with great caution, and never as a substitute for a trial on the merits. *Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 568 P.2d 589 (1977). Under this fundamental principle it has consistently been held that the burden rests upon the party moving for summary judgment to show that there is no genuine issue of material fact to submit to the court before summary judgment may properly be granted. *Southern Union Gas Co. v. Briner Rust Proofing Co.*, 65 N.M. 32, 331 P.2d 531 (1958). So long as one issue of material fact remains, summary judgment may not properly be granted. *Pharmaseal Laboratories, Inc. v. Goffe, supra.*

We have additionally recognized that the burden on the movant "does not require him to show or demonstrate beyond all possibility that no genuine issue of fact exists." *Goodman v. Brock*, 83 N.M. 789, 793, 498 P.2d 676, 680 (1972). Rather, once the movant has made a prima facie showing that it is entitled to summary judgment, the burden shifts to the party opposing the motion to show that a genuine issue as to a material fact remains. *Goodman v. Brock, supra.* In meeting this burden, the opponent cannot rely solely on allegations in the pleadings. *Hately v. Hamilton*, 81 N.M. 774, 473 P.2d 913 (Ct.App.1970), *cert. denied*, 81 N.M. 773, 473 P.2d 912 (1970); *Rekart v. Safeway Stores, Inc.*, 81 N.M. 491, 468 P.2d 892 (Ct.App.1970). This burden is contemplated and imposed by Rule 56(e). *Goodman v. Brock, supra.*

The operation of these basic procedural rules is no different when, as here, a plaintiff moves for summary judgment on the theory stated in its complaint but defendant has interposed one or more affirmative defenses. A leading commentator has observed:

> Since one good defense will defeat recovery on a claim, where a defendant pleads both a sufficient negative and an affirmative defense, plaintiff is entitled to summary judgment only in the event that there is no genuine issue of material fact as to both the negative and affirmative defenses and he is entitled to judgment as a matter of law. When these conditions are satisfied, summary judgment may properly go for the plaintiff; otherwise not. Where the defendant's defenses are limited to one or more affirmative defenses and there is no triable issue of fact as to *any* of the affirmative defenses, or they are all legally insufficient, then the case is ripe for summary adjudication in accordance with applicable principles of substantive law. If, on the other hand, there is a triable issue of fact as to any *one* or more legally sufficient affirmative defenses, the plaintiff would not be entitled to summary judgment. . . .

6 Moore's Federal Practice (Part 2) ¶ 56.-17[4] at 56–735, 736 (2d ed. 1976).

Under the rules reviewed by us above, the appellee Bank had the burden of making a prima facie showing that no genuine issue of material fact existed in the case, and that it was therefore entitled to judgment as a matter of law. Appellee's burden cannot be discharged unless the record upon which it moved reflected the lack of a genuine issue of material fact. The record falls short in this regard. The record is silent as to any effort whatever to contravene appellant Baker's averment of affirmative defenses with respect to liability under the continuing guaranty. It was appellee's obligation to produce the necessary affidavits or other material to expose appellant's affirmative defenses as unmerited. *Jacobson v. Maryland Casualty Co.*, 336 F.2d 72 (8th Cir. 1964), *cert. denied*, 379 U.S. 964, 85 S.Ct. 655, 13 L.Ed.2d 558 (1965). This obligation is no different than the original obligation on a movant for summary judgment, namely, that it does not require him to show or demonstrate beyond all possibility that no genuine issue of fact exists. It is enough if the movant submits some material in order to shift the burden to the other party.

We recognize the existence of New Mexico case law which seems to point to a result contrary to that reached by us here. In *Kassel v. Anderson*, 84 N.M. 697, 507 P.2d 444 (Ct.App.1973), plaintiffs brought a statutory action for unlawful detainer. The

defendant's amended answer asserted various affirmative defenses, and on appeal defendants contended that "the refusal of the trial court to permit the defenses set out in the tenant's amended answer which obviously raised all kinds of factual issues, was error." The Court of Appeals concluded that once plaintiffs had made a prima facie showing entitling them to summary judgment under the elements of the statute governing the action, defendants had the burden of demonstrating the existence of a genuine issue of material fact. The Court of Appeals declared:

> The fact that affirmative defenses have been pleaded is no more than a bare contention that factual issues exist concerning those defenses. Such a bare contention is insufficient to defeat the motion for summary judgment.

Id. at 699, 507 P.2d at 446. This view is clearly in conflict with the rule announced by us in this opinion, and to that extent *Kassel v. Anderson, supra*, is hereby overruled.

Appellee contends that the rule adopted by us in this opinion will work hardship because a defendant's alleged affirmative defenses "must be based in fact, and usually only the defendant has the particular knowledge to support those affirmative defenses." Rule 56(c), which permits the trial court to consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," clearly contemplates the pretrial discovery mechanisms by which spurious or sham defenses may be exposed as such.

We hold that appellee, having failed to supply the trial court with an affidavit or other supporting material sufficient to contravene in any way the affirmative defenses raised by appellant in his second amended complaint, has failed to meet the burden imposed upon it, as movant, by Rule 56.

The trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA and PAYNE, JJ., concur.

583 P.2d 473

STATE of New Mexico, Plaintiff-Appellee,

v.

John DOE, a child, Defendant-Appellant.

No. 3393.

Court of Appeals of New Mexico.

April 18, 1978.

[redacted]

[redacted]

[redacted]

[redacted]

Toney Anaya, Atty. Gen., Charlotte Hetherington Roosen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

John B. Bigelow, Chief Public Defender, Reginald J. Storment, Appellate Defender, Martha A. Daly, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

OPINION

WOOD, Chief Judge.

In this Children's Court case, the child was found to be delinquent on the basis of disorderly conduct and battery upon a police officer. He was committed to the Boys' School. We discuss: (1) disorderly conduct; (2) battery upon a police officer; and (3) the commitment.

Disorderly Conduct

The pertinent portion of § 40A–20–1, N.M.S.A.1953 (2d Repl.Vol. 6) reads:

> *Disorderly conduct.*—Disorderly conduct consists of:
>
> A. engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace . . .

We do not reach the claims that this statute is unconstitutional because the evidence does not show the child violated the statute.

The child was a passenger in a car, stopped on "suspicion", after officers twice saw the car pull into the parking lot of a liquor store. While officers were conducting a "field interrogation" of the driver, the child "started in a very loud voice questioning why they were continually stopped, always being harassed and everything else." Asked several times to hold his voice down, the child did not comply. The "loud voice" continued even after the child was advised that he could be arrested for disorderly conduct.

"Due to his drawing attention to the officers and persons there from other people in the area, the subject was then placed under arrest and placed in the patrol vehicle. * * It was just the questioning of the stop and why he was always being harassed, but it was in a very loud voice that was bringing attention from surrounding areas close to our immediate area."

"He did appear to be aggressive by clenching his fists at times while he was talking with us, but he never did make a

move on an officer until we had made an attempt to put him under cuffs. * * * I could tell that he was becoming angered and with his actions I didn't know that at at any time he might go ahead and become combative."

The Children's Court referred to the child's "gestures towards the police" but there is no evidence of gesturing. The child used a loud voice, clenched his fists and was angry, but he never made a move on an officer prior to the arrest for disorderly conduct. The arresting officer could say no more than that he thought the child "might become combative" in the future.

The conduct to which § 40A–20–1(A), supra, refers must be conduct which tends to disturb the peace. Up to the point of his arrest, the child's conduct had not been unlawful. There is no evidence that this conduct tended to cause consternation and alarm, or tended to produce violence so as to tend to disturb the peace and quiet of the community. See *State v. Florstedt*, 77 N.M. 47, 419 P.2d 248 (1966); *State v. Oden*, 82 N.M. 563, 484 P.2d 1273 (Ct.App.1971).

Norwell v. Cincinnati, 414 U.S. 14, 94 S.Ct. 187, 38 L.Ed.2d 170 (1973) states:

> [O]ne is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer. Regardless of what the motivation may have been behind the expression in this case [the defendant's words], it is clear that there was no abusive language or fighting words. If there had been, we would have a different case.

The defendant's conduct—using a loud voice in questioning the stop and clenching his fists—did not amount to disorderly conduct and did not provide probable cause for such an arrest. The child was illegally arrested.

Battery on a Police Officer

Taken to the police station in a patrol car, the child was booked but refused to strip in order to be searched before being jailed. Officers forcibly removed the child's clothes. The child fought back. This fighting back is the basis for finding that the child committed battery upon a police officer.

The strip search was an incident of the child's illegal arrest for disorderly conduct. *State v. Adams*, 80 N.M. 426, 457 P.2d 223 (Ct.App.1969). That arrest being illegal, in this case the search was illegal.

Section 40A–22–23, N.M.S.A.1953 (2d Repl.Vol. 6) defines battery upon a police officer to include an "unlawful" touching of a police officer "in the lawful discharge of his duties". We need not consider whether resisting an illegal search was unlawful action by the child. Clearly, an officer conducting an illegal search is not in the lawful discharge of his duties. Under the evidence, § 40A–22–23, supra, was not violated. See *State v. Frazier*, 88 N.M. 103, 537 P.2d 711 (Ct.App.1975).

The Commitment

The amended "judgment and disposition" reads:

> It is adjudged that the respondent is hereby committed to the New Mexico Boys' School at Springer, New Mexico for a period of two years.

Whether this commitment be read as placing the child in confinement or merely ordering that the child be confined, see *State v. Garcia*, 78 N.M. 777, 438 P.2d 521 (Ct.App.1968), it was improper.

Section 13–14–35(A), N.M.S.A.1953 (Repl. Vol. 3, pt. 1) states:

> A judgment vesting legal custody of a child in an agency shall remain in force for an indeterminate period not exceeding two [2] years from the date entered, except that *not more than one [1] year in an institution for the housing of delinquent children may be authorized without further order of the court* . . . . (Our emphasis.)

Compare § 13–14–35(F) and (H).

The amended judgment was improper to the extent it purported to commit the child to an institution for housing delinquent children for more than one year.

However, the remedy for the improper commitment would be to correct the commitment, not discharge the child. See *Shankle v. Woodruff*, 64 N.M. 88, 324 P.2d 1017 (1958).

The amended judgment and disposition is reversed because the evidence does not show disorderly conduct and because the child did not batter a police officer who was in the lawful discharge of his duties.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

583 P.2d 476

Alicia GUTIERREZ, Plaintiff-Appellant,

v.

ARTESIA PUBLIC SCHOOLS and Travelers Insurance Company, Insurer, Defendants-Appellees.

No. 3327.

Court of Appeals of New Mexico.

Aug. 15, 1978.

John E. Brooks, Albuquerque, for appellant.

Charles A. Pharris, Keleher & McLeod, P. A., Albuquerque, for appellees.

OPINION

SUTIN, Judge.

Plaintiff sued defendants to recover workmen's compensation benefits that arose out of the murder of plaintiff's husband on the premises of the Hermosa School in Artesia, New Mexico. Judgment was entered for defendants and plaintiff appeals. We affirm.

The trial court found that decedent died as a result of gunshot wounds inflicted by Isuaro Gonzales (Sonny) on October 1, 1975. The shooting took place on the premises of the Artesia Public Schools, specifically Hermosa School. Sonny went to the Hermosa School only for the purpose of finding decedent. His motives for shooting decedent were purely private and bore no relation to decedent's employment. The fact of decedent's employment and the duties thereof did not contribute to the hazard or danger of decedent being shot to death by Sonny. Decedent's death did not arise out of, was not incident to, and did not occur in the course of his employment.

The parties stipulated that decedent sustained an accidental injury from the gunshot wound which led to his death even though the shooting was purposeful and intentional. From decedent's standpoint, it was an accidental injury.

The evidence most favorable to defendants shows:

Decedent was director of bilingual programs in the Artesia Public Schools and appeared at the Hermosa School when called by the principal. Della Gonzales (Della), the wife of Sonny, taught at the Hermosa School. The Gutierrezes and the Gonzaleses were very close friends. They visited at each other's homes two or three times a week and maintained a friendly relationship. A week prior to the shooting, decedent and Della went to Las Cruces on a work related trip. Della denied that any illicit conduct occurred on this trip. Sonny became suspicious and questioned her on Sunday before the shooting that took place the following Wednesday. Della confessed to two acts of sexual intercourse with decedent in decedent's office located in a public school other than Hermosa. These acts occurred several months prior to this occasion. The following day, Sonny told decedent to leave town and decedent agreed. Sonny also told plaintiff that if he ever caught decedent with Della again, he would kill him.

On Wednesday morning, October 1, Della was on sick leave. Decedent had been engaged as a substitute teacher. He was required to be at school at 8:30 a. m., but his teaching would begin at 8:55 a. m. At about 8:30 a. m. Sonny went to the Hermosa School and met decedent in the hallway. Sonny and decedent went into an office to be used by decedent, and Sonny asked decedent when he would leave town. Decedent said he planned to leave but nothing yet had been done. Decedent laughed and Sonny shot and killed him.

The only motivation for Sonny killing decedent was his knowledge of the sexual relationship between decedent and Della.

Sonny pled guilty to second degree murder and was sentenced to 10 to 50 years in the state penitentiary.

Plaintiff contends that decedent sustained an accidental injury arising out of and in the course of his employment and that the accident was reasonably incident to his employment. Section 59–10–13.3, N.M. S.A.1953 (2d Repl. Vol. 9, pt. 1).

This case is a matter of first impression in New Mexico. Heretofore, it has been held that where one employee was killed by a co-employee for unexplained reasons, an issue of fact exists whether decedent's daughter was entitled to workmen's compensation benefits. *Ensley v. Grace*, 76 N.M. 691, 417 P.2d 885 (1966). It has also been held that where one employee was shot by a co-employee, an issue of fact existed whether claimant was entitled to workmen's compensation benefits. *Perez v. Fred Harvey, Inc.*, 54 N.M. 339, 224 P.2d 524 (1950). An issue of fact existed because the relationship of co-employees and the quarrels that arise between them may be reasonably incident to the employment.

We are now confronted with the murder of an employee by a third person for reasons personal to the third person. This is a "risk" personal to the employee. In *Ensley*, Justice Moise pointed out that "risks" personal to a claimant and unrelated to his employment are universally held noncompensable. It was so held in *Berry v. J. C. Penney Co.*, 74 N.M. 484, 394 P.2d 996 (1964).

The facts are undisputed that Sonny went to the Hermosa School for the sole purpose of finding decedent to determine when he would leave Artesia. They did not discuss any matter related to decedent's employment. Sonny shot and killed decedent for purely personal reasons. There was nothing about decedent's employment that created the risk of being shot. The nature of decedent's employment was not such as to invite an assault. This risk became operative by reason of decedent's illicit relationship with Della. If Della had murdered decedent, perhaps an issue of fact would exist whether this accidental injury arose out of and in the course of decedent's employment.

"Course of employment" refers to the time, place and *circumstances* under which the injury occurred. "Arise out of" relates to the *cause* of the injury. Both of these factors must co-exist. One without the other is not enough. *Gough v. Famariss Oil and Refining Company*, 83 N.M. 710, 496 P.2d 1106 (Ct.App.1972); *Walker v. Woldridge*, 58 N.M. 183, 268 P.2d 579 (1954).

The murder occurred at about 8:30 a. m. in the Hermosa School. All of the other circumstances surrounding the killing indicate the decedent was not acting in the course of his employment. Decedent was not teaching a class. He was not at work. He was not fulfilling the duties of his employment or engaged in doing something incidental thereto. *McKinney v. Dorlac*, 48 N.M. 149, 146 P.2d 867 (1944). See *McDonald v. Artesia General Hospital*, 73 N.M. 188, 386 P.2d 708 (1963); *Wilson v. Rowan Drilling Co.*, 55 N.M. 81, 227 P.2d 365 (1950).

We must keep in mind also that while an injury may have arisen out of his employment, it could not be said to have been sustained in the "course of his employment." *Fautheree v. Insulation & Specialties, Inc.*, 67 N.M. 230, 354 P.2d 526 (1960).

Plaintiff relies upon the deposition testimony of the principal of the school. The principal stated that he visited with decedent at 8:20 a. m. When asked whether decedent had started his duties by that time, he answered:

> Well, he started his duties. He was making preparations, but as far as having children in there and teaching them, no, he had not started, because the children were on the playground. They weren't in the building.

Coupled with Sonny's testimony that decedent was in the hall when he met decedent, we find no difficulty in affirming the district court. Decedent was not fulfilling his duties as a substitute teacher and he was doing nothing incidental to his work. Decedent was not injured in the "course of his employment."

For an injury to "arise out of" the employment, there must be a showing that *the injury was caused by a risk to which the decedent was subjected by his employment. The employment must contribute something to the hazard, Williams v. City of Gallup,* 77 N.M. 286, 421 P.2d 804 (1966).

A definition of "arise out of," adopted by almost every state in the union and referenced to in *Perez,* supra, comes from an opinion written by Chief Justice Rugg, *In re McNicol,* 215 Mass. 497, 102 N.E. 697, L.R.A. 1916A, 306, 4 N.C.C.A. 522 (1913). An employee was assaulted and killed by an obviously intoxicated fellow workman whose quarrelsome and dangerous disposition when intoxicated was well known to the employer. In holding for claimants, the court said:

> It is sufficient to say that an injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. [102 N.E. at 697.]

This incisive language should put to rest any quarrel with respect to the meaning of "arise out of." By the application of this rule to the instant case, we cannot fathom any basis for plaintiff's argument that decedent's murder arose out of decedent's employment. Decedent's death cannot be traced to his employment as a contributing proximate cause. Decedent would have been equally exposed apart from the employment. It could have occurred anywhere other than the Hermosa School. The danger was not peculiar to decedent's work or incidental to the school system in Artesia.

Apart from Louisiana, the rule is uniform that where an employee's death or resulting injuries is caused by wilful or criminal assault of a third person intending to injure him because of reasons personal to the third person and not for any cause connected with the employee's employment, the injury does not arise out of the employment, and the resulting death or injuries is not compensable. *Freeman v. Callow,* 525 S.W.2d 371 (Mo.App.1975); *Liberty Mutual Insurance Company v. Upton,* 492 S.W.2d 623 (Tex.Civ.App.1973); *Robbins v. Nicholson,* 281 N.C. 234, 188 S.E.2d 350 (1972); *Belden Hotel Company v. Industrial Commission,* 44 Ill.2d 253, 255 N.E.2d 439 (1970); *Wood v. Aetna Casualty & Surety Company,* 116 Ga.App. 284, 157 S.E.2d 60 (1967); *Ellis v. Rose Oil Company of Dixie,* 190 So.2d 450 (Miss.1966); *Devlin v. Ennis,* 77 Idaho 342, 292 P.2d 469 (1956); *Epperson v. Industrial Commission,* 26 Ariz.App. 467, 549 P.2d 247 (1976); 1 Larson's Workmen's Compensation Law; 82 Am.Jur.2d *Workmen's Compensation,* § 329 (1976); 99 C.J.S. Workmen's Compensation § 227 (1958).

Sonny pled guilty to murder. Plaintiff is not entitled to workmen's compensation benefits.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

583 P.2d 480

STATE of New Mexico,
Plaintiff-Appellant,

v.

Dennis WHEELER, Defendant-Appellee.

No. 3573.

Court of Appeals of New Mexico.

Aug. 15, 1978.

Toney Anaya, Atty. Gen., Charlotte Hetherington Roosen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Robin C. Blair, Raton, for defendant-appellee.

OPINION

HENDLEY, Judge.

Defendant was charged with assault with intent to commit a violent felony—robbery—contrary to § 40A–3–3, N.M.S.A.1953 (2d Repl.Vol. 6, 1972); two counts of kidnapping contrary to § 40A–4–1, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972, Supp.1975) and the unlawful taking of a motor vehicle contrary to § 64–9–4, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972, Supp.1975). He filed a motion to suppress a statement given to police and the physical evidence—a knife and a gun. The motion was granted and the state appeals. We reverse as to the

knife and affirm as to the statement and gun.

Defendant was in an apartment when the police arrived to arrest a co-defendant. Defendant opened the door and the officers told him they had an arrest warrant for Gallegos. Defendant let the officers in the apartment. The officers told defendant that the Springer authorities wanted to talk to him about the crime for which Gallegos was being arrested. A knife and gun had been used in the crime.

Defendant was asked to get dressed and one officer followed him into the bedroom where he saw a knife lying on top of the dresser. The officer seized the knife "more or less for my own safety." Defendant was asked if he owned a gun. Defendant said he did and "he walked into the kitchen part of the apartment and picked up the handgun and handed it to Joe—Sergeant Ulibarri."

It is undisputed that defendant was not given his *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966) rights prior to the time he was asked about owning a gun. It is also undisputed that defendant was not free to go. He was being detained since he fit the general description of Gallegos' companion. *State v. Lewis*, 80 N.M. 274, 454 P.2d 360 (Ct.App.1969).

The Knife

Defendant asserts that since he was not free to leave the apartment that he was under arrest and that the arrest was illegal. We disagree.

Defendant was known as a constant companion of Gallegos and fit the general description of the second person involved in the Springer crimes. Under these circumstances the detention of defendant was appropriate. *State v. Lewis*, supra.

By virtue of the arrest warrant the officers were legally on the premises. Defendant's detention was proper. When defendant went to dress the officer saw the knife in plain view. *State v. Miller*, 80 N.M. 227, 453 P.2d 590 (Ct.App.1969). The officer could properly seize the knife for his own protection. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). See *State v. Rhodes*, 80 N.M. 729, 460 P.2d 259 (Ct.App.1969); *Rodriquez v. State*, 91 N.M. 126, 580 P.2d 126 (Sup.Ct.) filed June 6, 1978.

The motion to suppress the knife should have been denied.

The Statement and the Gun

The warnings dictated by *Miranda v. Arizona*, supra, are to be given when custodial interrogations are "initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." When an investigation has focused on the accused he is entitled to the *Miranda* safeguards.

According to the officer's testimony it was known that a gun was used in the Springer crimes. The officer also stated that defendant fit the general description of one of the suspects. Because of this it cannot seriously be challenged that the investigation had focused on defendant. Defendant was being detained for investigation when he was asked about owning a gun.

Absent the *Miranda* warnings the affirmative response in answer to the question of whether defendant owned a gun was properly suppressed. *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969); *State v. Avila*, 86 N.M. 783, 527 P.2d 1221 (Ct.App.1974). Accordingly, the gun delivered to the officers as a result of the improper question was also properly suppressed as fruits of the poison tree. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The motion to suppress the statement and gun was properly granted. The suppression of the knife is reversed.

IT IS SO ORDERED.

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

584 P.2d 165

STATE of New Mexico,
Plaintiff-Appellant,

v.

John BARTON, Steve Rodriguez, and Nancy Galloway,
Defendants-Appellees.

Nos. 3212, 3213 and 3214.

Court of Appeals of New Mexico.

March 14, 1978.

Writ of certiorari denied Aug. 17, 1978.

Toney Anaya, Atty. Gen., Roderick A. Dorr, Asst. Atty. Gen., Anthony Tupler, Asst. Dist. Atty., Santa Fe, for plaintiff-appellant.

Tom Cherryhomes, Carlsbad, for appellee Rodriguez.

James L. Shuler, Shuler, Murphy & Shuler, Carlsbad, for appellee Galloway.

Joseph Erwin Gant III, Carlsbad, for appellee Barton.

OPINION

WOOD, Chief Judge.

These consolidated appeals involve the propriety of the trial court's order suppressing evidence. We discuss: (1) the initial stop; (2) probable cause to arrest; and (3) search contemporaneous with the arrest. We hold the stop, the arrest, and the search were valid. This results in reversal of the trial court's order. Accordingly, we need not discuss the question of the trial court's sua sponte dismissal of the charges against the defendants. See *State v. Session,* 91 N.M. 381, 574 P.2d 600 (Ct.App.), decided January 3, 1978.

The Initial Stop

Deputy West received a telephone call from an informer. "The information was that there were more [four?] people in the motel room at the Stagecoach Inn, Room 259, he named the four people". There were two males and two females. One of the four was a "fellow by the name of Steve, described his physical appearance, from Oklahoma". The informer said "they had approximately an ounce and a half of heroin. . . . He indicated they were getting ready to leave for Oklahoma and described the vehicle they were driving. . . . A late model red Ford pickup with Oklahoma plates and a motorcycle in the back."

The sheriff and Deputy West went to the motel and ascertained that the occupants of Room 259 had left. They immediately put out a radio call to be on the lookout for the vehicle. It was located, stopped, at the Quicky Mart, where it and its occupants were detained.

"The Court finds that the reliability of the informant was not established by the complainant officer, therefore, such information gained from the informant was not sufficient to establish probable cause to stop the Defendants at the Quicky Mart."

The above finding is erroneous. No probable cause for arrest was necessary; what was required of the officers was a reasonable suspicion that the law has been or was being violated. *State v. Galvan,* 90 N.M. 129, 560 P.2d 550 (Ct.App.1977).

The trial court was of the view that the information provided by the informer was an insufficient basis for the investigatory detention because the reliability of the informer had not been established. We need not review Deputy West's testimony to determine whether he had a sufficient factual basis for believing the informer. See *Hudson v. State,* 89 N.M. 759, 557 P.2d 1108 (1976), cert. denied, 431 U.S. 924, 97 S.Ct. 2198, 53 L.Ed.2d 238 (1977). We need not do so because the officer acquired sufficient verification of the informer at the motel to provide a basis for an investigatory detention.

At the motel, the officers checked the registration. Room 259 had been occupied by Steve Rodriguez, with a rural route box number of Krebbs, Oklahoma. The officers learned from motel personnel that the occupants of Room 259 "had just left in a red Ford pickup with an Oklahoma license on it. I believe he stated there was a Mexican male, an Anglo male and two females."

After checking with motel personnel, the informer's information had been verified in the following details—there was a Steve from Oklahoma, there was a red Ford pickup with Oklahoma license plates, there had been four people in the motel room, two were male and two female. The informer said they were getting ready to leave; motel personnel said they had just left. With

these specific facts verifying the informer's information, the officers, as persons of reasonable caution, could believe that an investigatory stop was appropriate. *State v. Hall,* 90 N.M. 554, 566 P.2d 103 (Ct.App. 1977); *State v. Garcia,* 83 N.M. 490, 493 P.2d 975 (Ct.App.1971).

Probable Cause to Arrest

The trial court found there was no probable cause to arrest. We disagree.

After putting out the radio call to stop defendants' vehicle, the sheriff and Deputy West went to Room 259 which had been registered to Rodriguez. There were three rooms. On the dressers in each of the rooms was a quantity of burnt matches, but no evidence of cigarettes having been smoked. In addition, there were two towels with blood spots on them. The spots were the size of a dime. Based on his training and experience, the sheriff was of the view that the towels had been used to dab blood from an arm in which a hypodermic needle had been used.

At this point, the sheriff and Deputy West had three items of information: 1) information from motel personnel, 2) information from the search of the motel rooms, and 3) informer's information which had been verified. These items were sufficient to warrant the officers, as men of reasonable caution, to believe that an offense had been or was being committed. This was probable cause for arrest. *State v. Santillanes,* 89 N.M. 727, 557 P.2d 576 (Ct.App. 1976).

Search Contemporaneous With Arrest

The trial court ruled that the search of the pickup, contemporaneous with the arrest of defendants, was not

> a valid search incident to the arrest. The Defendants were outside the vehicle and the contents within the truck were not within the Defendants immediate control. Further, the warrantless search of the truck and its contents was not justifiable as an exigent circumstance of an automobile search, due to the fact that there were seven police officers and five police units surrounding the Defendants and the truck. There was no likelihood that the vehicle could be moved, nor could any possible evidence have been lost from the control of the police or destroyed by an outside agency.

This ruling of the trial court overlooks the automobile exception to the requirement for searches pursuant to a warrant. *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

If there was probable cause to search the car where it was detained, the search was constitutionally valid. *Chambers v. Maroney,* supra; *Texas v. White,* 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975), rehearing denied, 423 U.S. 1081, 96 S.Ct. 869, 47 L.Ed.2d 91 (1976).

There was probable cause to search the vehicle for heroin. The probable cause was the information providing probable cause to arrest defendants for possession of heroin, and the fact that the defendants had checked out of the motel and were leaving in the pickup. With so much of the informer's information verified, the officers had reasonable grounds to believe that heroin would either be on the person of defendants or in the pickup. See *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). There being probable cause to search, we need not consider whether the search is also justified as incident to a valid arrest. See *Adams v. Williams,* 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *State v. Vallejos,* 89 N.M. 23, 546 P.2d 871 (Ct.App.1976).

The order suppressing evidence and dismissing the charges is reversed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

584 P.2d 168

Jay CORNELL and Joseph Minichello, Plaintiffs-Appellees,

v.

ALBUQUERQUE CHEMICAL CO., INC., Defendant-Appellant.

No. 3018.

Court of Appeals of New Mexico.

Aug. 8, 1978.

Orville C. McCallister, Steven R. Fairfield and Bruce H. Strotz, McCallister, Fairfield, Query & Strotz, Albuquerque, for defendant-appellant.

John M. Eaves and John L. Hollis, Kool, Kool, Bloomfield & Eaves, P. A., Albuquerque, for appellee Cornell.

Joseph M. Fine, Albuquerque, for appellee Minichello.

OPINION

SUTIN, Judge.

A judgment was entered in favor of Cornell and Minichello against defendant growing out of a conversion by defendant of a tree sprayer owned and possessed by Cornell, and a subsequent sale to Minichello. Trial was before the court. The trial court awarded Cornell and Minichello compensatory and punitive damages. Defendant appeals. We affirm.

The trial court found:

Cornell had been in the business of tree spraying and tree surgery in Albuquerque. Defendant was engaged in wholesale distribution of agricultural and lawn supplies, chemicals and equipment.

On August 1, 1974, Cornell was the owner and in possession of the tree sprayer located at, and used in, his business. On that date Phil Baxter, the vice-president of defendant corporation, and another authorized agent came to Cornell's property, took and unlawfully converted this sprayer to their own use and benefit without Cornell's knowledge.

On June 17, 1975, Minichello purchased this tree sprayer from defendant. In this sale, Phil Baxter represented that the defendant possessed a valid title to the sprayer; that it had been repossessed, and that defendant had obtained title through the judicial system. The bill of sale by which defendant allegedly received title was a false document.

Defendant knew that it did not possess valid title and intended that Minichello would rely on its false representation, and Minichello did rely.

On September 27, 1975, Cornell discovered that Minichello had purchased the sprayer from defendant and on December 31, 1975, Cornell regained possession from Minichello.

In his conversion of Cornell's sprayer, Phil Baxter was wielding the executive power of the defendant corporation; that his wanton, malicious and oppressive intent in doing wrongful acts on behalf of the corporation should be treated as the intent of the corporation itself.

Defendant only challenged the trial court's finding that Cornell was the owner of the sprayer on August 1, 1974, the finding relative to Phil Baxter's conduct, and the findings on compensatory and punitive damages.

A. *Cornell was the owner and Possessor of the sprayer on August 1, 1974.*

Defendant's first point is directed to Finding No. 6. It reads in pertinent part:

> On or about August 1, 1974, Plaintiff Jay Cornell was the owner and had possession of a certain sprayer described as follows: a Hudson tank and sprayer with a Meyers pump
>
> . . . . .

The burden was on defendant to prove this finding erroneous. Defendant introduced in evidence Cornell's Voluntary Petition in Bankruptcy, filed July 23, 1974, his Report of Exempt Property, and the Petitions and Orders of Abandonment of Property by the Trustee in Bankruptcy and the Referee, filed on August 19, 1974, and August 30, 1974. The sprayer mentioned in the finding was not abandoned.

Defendant claims that "The undisputed evidence shows that title to the sprayer had vested with the trustee-in-bankruptcy, on July 23, 1974, when the plaintiff, Cornell, filed his petition in bankruptcy."

Cornell was adjudicated a bankrupt on July 23, 1974, 11 U.S.C.A. *Bankruptcy*, § 41(f) (1977 P.P.). Did title vest with the Trustee in Bankruptcy on July 23, 1974, long prior to his qualification and appointment? The answer is "no."

Defendant relies on *Broadmoor Enter. Corp. v. G.L.G. Iron Works Co.*, 84 Misc.2d 120, 374 N.Y.S.2d 1013 (1975). Defendant misread this case. *Broadmoor* involved a general assignment for the benefit of creditors prior to bankruptcy. When property is held by such an assignee, title to the bankrupt's property does pass to the trustee at the date of filing the petition. 11 U.S.C.A. *Bankruptcy*, § 110(a)(8). This is not the rule in the absence of such a prior assignment. The *Broadmoor* court said:

> The law is settled that while the filing of the petition operates in the nature of an attachment upon the bankrupt's assets, *his title is still not divested until the election, qualification and appointment of the trustee. Until such procedures are consummated, the bankrupt has defeasible title* sufficient to authorize the institution and maintenance of a suit or the filing of any claim possessed by him. [Emphasis added.] [374 N.Y.S.2d at 1017.]

A "defeasible title" is "one that is liable to be annulled or made void, but not one that is already void or an absolute nullity." Black's Law Dictionary (Rev. 4th

Ed. 1968) p. 506; *Home Insurance Company of New York v. Dalis*, 206 Va. 71, 141 S.E.2d 721 (1965); *Elder v. Schumacher*, 18 Colo. 433, 33 P. 175 (1893), Elliott, J., dissenting.

The *Broadmoor* rule was borrowed from *Johnson v. Collier*, 222 U.S. 538, 32 S.Ct. 104, 56 L.Ed. 306 (1912); *Danciger, Etc. Oil Co. v. Smith*, 276 U.S. 542, 48 S.Ct. 344, 72 L.Ed. 691 (1928); and *Rand v. Iowa Cent. R. Co.*, 186 N.Y. 58, 78 N.E. 574 (1906). In *Johnson*, the court said:

> While for many purposes the filing of the petition operates in the nature of an attachment upon choses in action and other property of the bankrupt, *yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee*, who thereupon becomes "vested by operation of law with the title of the bankrupt" as of the date of adjudication. [Emphasis added.]

Defendant also relies upon 4A Collier on Bankruptcy (14th Ed.), § 70.05(4) (1976). The pertinent part reads:

> *Section 70a, (Section 110) however, retains the fictional device of relation back*, for it is provided that "the trustee . . *upon his . . . appointment and qualification*, shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act." [pp. 67–68.] [Emphasis added.]

This "fictional device" is simply a restatement of the rule set forth in § 70.04:

> Section 70a provides that the trustee . . . *upon his . . . appointment* . . . shall in turn be vested by operation of law as of the date of the filing of the petition with the title of the bankrupt to all the property enumerated in the subdivision. [Emphasis added.]

The crucial question is: When was the trustee in bankruptcy appointed? Was it before or after August 1, 1974? Upon whom rests the burden of proof? Defendant denied that Cornell was the owner and possessor of the sprayer on August 1, 1974. A defendant who seeks to defeat a plaintiff's claim must present the necessary substantial evidence. To establish that Cornell was divested of title, the burden rested on defendant to show that the trustee was appointed prior to August 1, 1974. Defendant failed to do so. Defendant, for some unexplained reason, did not produce the Order and the date thereof, under which the trustee was appointed by the Referee in Bankruptcy.

Cornell's Answer Brief stated that the trustee was appointed August 13, 1974. Briefs are, of course, not the avenue to travel to establish a fact on appeal. If counsel made a false statement, it would jeopardize his position in this appeal. If the attorney who made the statement did not examine the bankruptcy records and falsified the statement made, the attorney would be guilty of misconduct under Rule 1–102 of the Code of Professional Responsibility, [Section 18–5–1 (Rule 1–102), N.M.S.A.1953 (Repl.Vol. 4, 1975 Supp.)].

In its Reply Brief, defendant did not deny the truth of Cornell's statement. It said:

> This assertion is not to be found in the record of this case and may not properly be considered on appeal. *Assuming that Cornell's assertion is true*, moreover, does not change Cornell's situation.

Defendant, with apparent knowledge of the date of the trustee's appointment, avoided the admission of the truth of Cornell's statement.

In its Brief-in-Chief, defendant also said:

> The record shows, without contradiction, that the bankruptcy trustee . . *was, in fact, administering the bankrupt's estate after August 1, 1974*, although the exact date of his appointment does not appear therein. [Emphasis added.]

From the foregoing statements made by the parties in their briefs, a reasonable inference can be drawn that the Trustee in Bankruptcy was duly appointed *after* August 1, 1974.

On August 1, 1974, Cornell was the owner of the sprayer and had actual physical possession of the sprayer. The finding of the

trial court is sustained, both on the facts presented and the statements made by the parties in their briefs on appeal.

B. *Cornell was the party in whom a cause of action for conversion existed.*

It is defendant's position that the Trustee in Bankruptcy, not Cornell, was the sole party in interest with a cause of action for conversion of the sprayer; that his absence is a jurisdictional defect. Defendant did not challenge the finding of the trial court that it had jurisdiction, but claims that a jurisdictional question can first be raised on appeal. To resolve this issue, we shall decide the question on the merits.

Defendant says that Cornell cannot institute a suit in his own name *pending* bankruptcy proceedings. 9 Am.Jur.2d, *Bankruptcy*, § 877 (1964). In effect, this was a defense to Cornell's cause of action. The burden of proof is on defendant to show that at the time suit was filed, the bankruptcy proceedings were pending.

Defendant took the sprayer from Cornell's property on August 1, 1974. Cornell did not discover its whereabouts until September 1975. On July 16, 1976, two years after the petition in bankruptcy had been filed, Cornell filed his claim against defendant.

Was the Cornell bankruptcy *pending* on July 16, 1976? Cornell again states in his Answer Brief that Cornell was discharged on October 17, 1974 and the bankruptcy closed on December 6, 1974. Defendant again says in its Reply Brief that these facts are not of record.

We do not commend either of the parties for failure to produce the bankruptcy record as evidence in the trial court. Defendant brought forward only that portion of the record that it believed to be favorable to its defense. We must assume that defendant knew whether Cornell's statements were true, but it did not deny their truth. Neither do we believe that Cornell falsified the facts.

We hold that defendant had the burden of showing that the bankruptcy proceeding had not closed before July 16, 1976, the time Cornell's complaint was filed. Defendant failed in this regard.

The 150 gallon sprayer was not formally abandoned by the trustee so that on July 16, 1976, Cornell had ownership of the sprayer or the right to possession as of August 1, 1974, the time of conversion. His action for conversion lies. *Aragon v. General Electric Credit Corp.*, 89 N.M. 723, 557 P.2d 576 (Ct.App.1976).

At the time of filing the complaint, Cornell was the sole party in which the cause of action for conversion existed.

C. *Cornell and Minichello were entitled to compensatory damages.*

Defendant challenged the trial court's findings that awarded Cornell and Minichello compensatory damages in the sums of $1,500 and $2,000 respectively.

New Mexico has adopted as the measure of damages for conversion of a chattel, that measure set forth in the Restatement of Law, Torts, Vol. IV, page 647, § 927. *Frank Bond & Son, Inc. v. Reserve Minerals Corp.*, 65 N.M. 257, 261, 335 P.2d 858 (1959).

In an action for conversion, "the damages include

> (a) the exchange value of the subject matter or the plaintiff's interest therein at the time and place of the conversion . . . and
>
> (b) the amount of any further loss suffered as the result of the deprivation, and
>
> (c) interest from the time at which the value is fixed or compensation for the loss of use."

Defendant did not challenge the court's Finding No. 16 that Cornell and Minichello suffered damages. Therefore, recovery will not be denied because the damages are difficult of ascertainment. Although there may be some uncertainty respecting the amount of damages sustained, it is enough if the evidence presented is sufficient to enable the court to make a fair and reasonable approximation. *Frank Bond & Son,*

Inc., supra; *Crosby v. Basin Motor Company*, 83 N.M. 77, 488 P.2d 127 (Ct.App.1971).

We have reviewed the evidence on damages proven by plaintiffs. We conclude that the court made a fair and reasonable approximation. The trial court's findings on compensatory damages are sustained.

D. *Cornell and Minichello were entitled to punitive damages.*

The trial court made the following findings that were not challenged:

> 7. On or about August 1, 1974, . . . Phil Baxter Vice-President of the Defendant Company and another agent *authorized by the Defendant Company* came on Plaintiff Cornell's property without his knowledge and took and unlawfully converted such personal property to their own use and benefit.
>
> * * * * * *
>
> 9. *The Defendant, through its authorized agent*, Phil Baxter, represented to Joseph Minichello that it possessed valid title to such sprayer.
>
> 10. *The Defendant, through its authorized agent*, Phil Baxter, represented to Joseph Minichello that the sprayer had been repossessed and that Albuquerque Chemical Company, Inc. had obtained title through the judicial system.
>
> 11. The *Defendant knew* that it did not possess valid title to the sprayer in question at the time of the sale to Joseph Minichello.
>
> 12. The *Defendant intended* that Joseph Minichello would rely upon its false representation that it had valid title.
>
> 13. Joseph Minichello did in fact rely upon the *Defendant's representation* that it had valid title.
>
> 14. *The Bill of Sale, by which the Defendant* allegedly received title to the sprayer, was a false document. [All emphasis added.]

Defendant challenged Finding No. 18. It read:

> 18. In his conversion, Phil Baxter . . was wielding the executive power of the corporation and thus was representing the corporation and should be identified with the corporation. *Thus Phil Baxter's wanton, malicious and oppressive intent in doing wrongful acts on behalf of the corporation to the injury of plaintiff Cornell should be treated as the intent of the corporation itself.* [Emphasis added.]

For more than 10 years, Mr. Baxter was vice-president of the defendant corporation and ran the business. The other officers were his father and mother. Baxter bought and sold used equipment, managed the employees, hired and fired them, signed the checks, did its mechanical and janitorial work and any of the duties necessary in running the business. He was in charge of the day-to-day functions of the business. In the performance of all his functions, he acted on behalf of the corporation. No other officers or board members, if any, performed any duties. It was a family corporation with Baxter as the one man who "wielded the executive power of the corporation." He was authorized to commit these acts.

We have researched the record, the transcript and defendant's briefs. We are unable to find any evidence or statements made that justify Baxter's conduct in taking Cornell's property and selling it to Minichello, or any challenge to the trial court's findings that Baxter's conduct in doing these wrongful acts were authorized by, and done on behalf of defendant. Baxter entered Cornell's property without Cornell's knowledge or consent and took Cornell's property. This conduct is likened unto trespass and larceny. His acts were the acts of defendant. They were committed with a wanton disregard of Cornell's rights and as a fraud against Minichello. We stand firm on our judicial concept that fairness, justice and right dealing is an equity concept that dominates all commercial practices and transactions. *Ott v. Keller*, 90 N.M. 1, 558 P.2d 613 (Ct.App.1976).

Punitive damages is a penalty awarded against a corporation whose vice-president wields the whole executive power of the corporation. His wanton, malicious or oppressive intent in the doing of the wrongful

acts in behalf of the corporation to the injury of another, may be treated as the intent of the corporation. *Couillard v. Bank of New Mexico*, 89 N.M. 179, 548 P.2d 459 (Ct.App.1976). Punitive damages may also be awarded where a corporation authorized the actual tortious conduct of its officer or employee. *Sanchez v. Securities Acceptance Corp.*, 57 N.M. 512, 260 P.2d 703 (1953). To state the same principal more succinctly, the Supreme Court has adopted the rule that a master or principal is liable for punitive damages if it can be shown in some way that he also was guilty of the wrongful motives upon which such damages are based. *Samedan Oil Corporation v. Neeld*, 91 N.M. 599, 577 P.2d 1245 (1978).

Defendant and Baxter walked in the same shoes during the conversion of Cornell's property and the fraud committed on Minichello. Defendant was guilty of the wrongful motives of Baxter as found by the trial court.

Cornell and Minichello were entitled to punitive damages.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

584 P.2d 174

STATE of New Mexico, Plaintiff-Appellee,

v.

Dante SCHIFANI, Defendant-Appellant.

No. 3470.

Court of Appeals of New Mexico.

Aug. 8, 1978.

Writ of Certiorari Denied Sept. 14, 1978.

Jack Smith and Stephen C. M. Long, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Dennis P. Murphy, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The evidence shows that, as a part of a continuing scheme, defendant obtained money, or checks which he cashed, from the victims and used the money for his own purposes. Convicted of two counts of fraud

(Counts I and III), and one count of embezzlement (Count II), defendant appeals. We discuss: (1) severance and (2) Evidence Rule 404(b). Other issues argued (some were abandoned, *State v. Evans*, 89 N.M. 765, 557 P.2d 1114 (Ct.App.1976) go to the sufficiency of the evidence. In answering the evidentiary claims, we discuss: (3) defendant's use of promissory notes in connection with all counts; (4) the victims' illegal conduct in connection with all counts; (5) defendant's representations in connection with the frauds; and (6) ownership of the checks, conversion and repayment in connection with the embezzlement.

Severance

Each of the three counts charged fraud, or in the alternative, embezzlement. A pretrial motion sought "to separate and bifurcate each count into separate trials". At a pretrial hearing on this motion, the only argument went to the propriety of alternative pleading. See *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App.1977); *State v. Gurule*, 90 N.M. 87, 559 P.2d 1214 (Ct. App.1977). The motion was continued; there was no ruling on the motion prior to trial.

After the jury was sworn, defendant moved that the State be required to elect on which count it would proceed. This motion was denied. In arguing the motion to elect, defendant also argued that the three counts should be severed. Assuming that this argument alerted the trial court to the severance claim, and assuming the trial court's denial of the motion to elect was also a denial of a motion to sever, we consider the severance claim on the merits.

This issue involves the severance of counts against a single defendant. The applicable rule is Rule of Crim.Proc. 34(a) which authorizes severance "[i]f it appears that a defendant . . . may be prejudiced". This rule "leaves the decision to grant or deny a separate trial largely in the hands of the trial court." *State v. Rondeau*, 89 N.M. 408, 553 P.2d 688 (1976). The appellate issue is whether the trial court abused its discretion in denying the motion to sever. *State v. McGill*, 89 N.M. 631, 556 P.2d 39 (Ct.App.1976).

Defendant points out that the three counts involved different victims and different dates for the offenses. He also points out that evidence of "other wrongs" was admitted under Evidence Rule 404(b). He asserts the verdicts against him were "unsound" because "not based on the evidence relating to any one charge but on a large volume of adverse evidence which would not have been sufficient to convict him in separate trials."

We disagree. Substantial evidence supports each of the convictions. The "adverse evidence" admitted was relevant to each of the charges being tried. In reaching its verdicts, the jury followed the evidence and applied it to each count. The conviction under Count I was for fraud over $2,500 and not the alternative charge of embezzlement. The conviction under Count II was for embezzlement over $2,500 and not the alternative charge of fraud. The conviction under Count III was for fraud under $2,500 and not the alternative charge of embezzlement. *State v. McGill*, supra; *State v. Sero*, 82 N.M. 17, 474 P.2d 503 (Ct.App. 1970).

The trial court did not abuse its discretion in denying the motion to sever.

Evidence Rule 404(b)

This evidence rule permits the admission of evidence of other wrongs to show, among other things, a defendant's "intent" and "plan". The trial court admitted the testimony of persons, other than the victims' in the three counts being tried, who testified to dealings with defendant similar in nature to the victims' dealings with defendant. This testimony was admitted to show defendant's intent, and a common scheme or plan; the testimony was clearly relevant for that purpose. *State v. McCallum*, 87 N.M. 459, 535 P.2d 1085 (Ct.App. 1975).

Defendant asserts that the prejudice from this testimony outweighed its usefulness in establishing any plan or scheme.

This claim involves Evidence Rule 403; see *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct.App.1978). When the trial court has applied the balancing approach required by Evidence Rule 403, the appellate issue is whether the trial court has abused its discretion. *State v. Fuson*, 91 N.M. 366, 574 P.2d 290 (Ct.App.1978). In determining whether discretion was abused, we consider the probative value of the testimony. The probative value of the "other wrongs" testimony was significant because it tended to negate defendant's claim that his transactions with the three sets of victims in this case were no more than loans. There was no abuse of discretion in admitting the "other wrongs" testimony.

Defendant's Use of Promissory Notes

In the two fraud offenses, defendant obtained money from the victims; in the embezzlement offense, defendant obtained checks from the victims and later cashed them. Throughout, defendant gave the victims promissory notes in an amount equal to the money or checks, plus the monetary amount of a promised return.

Defendant asserts the promissory notes show commercial transactions in which he borrowed money, evidenced by the promissory notes given. This contention overlooks the evidence to the contrary. The fraud victims testified the money defendant received from them was for investment purposes. There was evidence that the promissory notes given to the embezzlement victims included "tremendous profits" over and above the amount of the checks.

With conflicting evidence whether the money and the checks were loans, or were for investments, was for the jury to decide.

Victims' Illegal Conduct

In connection with Counts I and II defendant infers, and in connection with Count III defendant specifically claims, that usurious interest was involved. This contention is based on the amount of the various promissory notes over and above the money, or the amount of the checks received, by defendant.

Defendant seems to contend that the victims' willingness to obtain usurious interest somehow mitigates his conduct. "[T]he great weight of authority holds appellant [defendant] amenable, regardless of the fact that his victim was himself ready and willing to commit an offense." *State v. Foster*, 38 N.M. 540, 37 P.2d 541, 95 A.L.R. 1247 (1934).

Assuming the "return" over and above the amount of money or checks was usurious interest, such does not aid defendant.

Defendant's Representations

Fraud, as defined in § 40A–16–6, N.M.S.A. 1953 (2d Repl. Vol. 6) requires "fraudulent conduct, practices or representations." See *State v. Thoreen*, 91 N.M. 624, 578 P.2d 325 (Ct.App.1978).

(a) Defendant states "at a minimum, the Defendant must have made some representation to the complainants *before* any money changed hands." (Emphasis his.) Defendant asserts there were no such representations.

(b) As to Count I, there was evidence that the victims did not know where their money was going before it was turned over to defendant. However, there was also evidence that defendant represented the money would be used as an investment, and that it was not so used. The fact that the victims did not know the type of investment does not aid defendant because the evidence shows that defendant obtained the money by fraudulently representing the money would be invested.

(c) As to Count III, defendant argues that his fraudulent representations as to all but one of the transactions should be ignored because of his repayments. This is fallacious. "Once the misappropriation or taking occurs, and this occurrence is by means stated in the statute, the crime of fraud is complete." *State v. Thoreen*, supra. Defendant's fraud was complete when he got the money from the victims; repayment did not mitigate defendant's offense. *United States v. Braverman*, 552 F.2d 218

(7th Cir. 1975), cert. denied, 423 U.S. 985, 96 S.Ct. 392, 46 L.Ed.2d 302 (1975); *People v. Ross*, 25 Cal.App.3d 190, 100 Cal.Rptr. 703 (1972); see *State v. Odom*, 86 N.M. 761, 527 P.2d 802 (Ct.App.1974). The fraud being complete when defendant obtained the money, the fact that he ultimately repaid the Count III victims an amount of money greater than the amount he obtained, does not show the crime did not occur and did not mitigate the offense.

As to one of the Count III transactions, defendant asserts he made no representations to the victims in obtaining their money because he did not tell the victims where their money was going. Here, as in the Count I transactions, defendant overlooks the evidence that he represented that the money would be invested and that he obtained the money on the basis of this false representation.

(d) As to the fraud transactions in both Counts I and III, defendant claims the trial court erred in admitting evidence of representations made to the victims *after* he obtained their money. These representations went into the specific details of the alleged investments. These representations were properly admitted since they explained defendant's "investment" representations and tended to show defendant's intent.

Ownership of the Checks, Conversion and Repayment in Connection with the Embezzlement

"Embezzlement consists of the embezzling or converting to his own use of anything of value, with which he has been entrusted, with fraudulent intent to deprive the owner thereof." Section 40A–16–7, N.M.S.A. 1953 (2d Repl. Vol. 6); see *State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct.App. 1971).

(a) Defendant contends that his embezzlement conviction cannot stand because when he obtained the checks from the victims in Count II, he issued promissory notes to the victims and, thus, "title and ownership . . . vested in Defendant. Title and ownership thus being vested in Defendant, he could not have appropriated the property of another." Defendant argues "as a matter of law" that he could not have embezzled the money represented by the checks.

This argument overlooks evidence to the contrary. This evidence was that the victims gave checks to defendant, knowing they had insufficient funds in the bank to cover the checks, on defendant's representations that defendant wanted the checks to show to investors. "Al, give me a check for $500.00 and I will not even take it to the bank." There was evidence that defendant obtained approximately $10,000 in checks in this manner; that is, by promising they would not be cashed. This evidence raised a factual question as to whether ownership of the funds represented by the checks passed, or was intended to pass to defendant. *State v. Cramer*, 90 N.M. 157, 560 P.2d 948 (Ct.App.1977). With this evidence, ownership of the checks cannot be held to have passed as a matter of law.

(b) Contrary to his promises, defendant cashed several of the checks. The checks were cashed at a grocery store. After the checks were cashed, defendant would call the bank to see if the cashed check would clear and then would deposit sufficient money, obtained from cashing the check into the victims' account in order that the cashed check would in fact clear the bank. By this method, defendant covered approximately $3,900 in checks.

(c) Defendant was convicted of embezzling over $2,500. He points out that the victims in Count II "lost no more than $2150" and, on this basis, argues he can only be convicted of embezzling less than $2,500, and his present embezzlement conviction must be reversed.

The fact that the victims eventually "lost" an amount less than $2,500 is not dispositive. There was substantial evidence that defendant, with the requisite fraudulent intent, negotiated checks in the amount of $3,900 for his own use, checks which defendant had been entrusted to hold and not cash. Under the definition of embezzlement in § 40A–16–7, supra, the embezzle-

ment was complete when defendant converted those checks. See 2 Wharton's Criminal Law and Procedure, § 516 (1957). The fact that a portion of the $3,900 was repaid, so that the victims lost only $2,150, does not aid defendant. Restitution does not allow the embezzler to escape prosecution and conviction. *People v. Rafalko*, 26 Mich.App. 565, 182 N.W.2d 732 (1970); *Sherman v. State*, 234 Miss. 775, 108 So.2d 205 (1959).

(d) Defendant tendered proof that the victims in Count II had filed a civil lawsuit "against Defendant on the promissory notes . . . praying for $2150 and . . . [were awarded] judgment for $1050." Defendant asserts this tender was improperly rejected because it tended to prove an embezzlement of less than $2,500. We disagree. We are not concerned with the *amount owed* by defendant; our concern is with the *amount converted* in violation of § 40A–16–7, supra. The amount of defendant's ultimate civil debt did not tend to controvert the showing as to the amount converted. The tender as to the civil debt was not relevant to the amount converted and was properly refused.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

584 P.2d 179

Paula V. HOPKINS, Plaintiff-Appellant,

v.

FRED HARVEY, INC., Employer, Defendant-Appellee.

No. 3288.

Court of Appeals of New Mexico.

Aug. 15, 1978.

Writ of Certiorari Denied Sept. 12, 1978.

Leof T. Strand, Albuquerque, for plaintiff-appellant.

Clarence R. Bass, Albuquerque, for defendant-appellee.

OPINION

SUTIN, Judge.

The question for decision is whether tips obtained by an employee who is a waitress and bartender should be included in the computation of compensation payments in a workmen's compensation case. This is a matter of first impression.

Section 59–10–12.13(A), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1) reads in pertinent part:

> [T]he average weekly wage of an injured employee shall be taken as the basis upon which to compute compensation payments and shall be determined as follows:
>
> A. . . . "[W]ages" . . . shall be construed to mean the money

rate at which the services rendered are recompensed under the contract of hire . . . *either express or implied, and shall not include gratuities received from employers or others,* . . . but the term "wages" shall include the reasonable value of board, rent, housing, lodging *or any other similar* advantages received from the employer . . . . [Emphasis added.]

The trial court found that plaintiff earned, in addition to her hourly wage, an average of approximately $110.00 per week in tips. The court concluded that tips were gratuities and were not to be included in the determination of plaintiff's average weekly wage for purposes of computing her compensation payments. Plaintiff appeals. We reverse.

Colorado has a statute identical with § 59–10–12.13(A), supra. *Petrafeck v. Industrial Commission,* 554 P.2d 1097 (Colo. 1976). *Petrafeck* overruled a 42 year old prior decision that denied claimant's tips as part of her average weekly wage. The court held that to so construe the statute would render it unconstitutional. Citing a large number of jurisdictions in support thereof, Justice Erickson said:

In the 42 years that have elapsed . . a majority of the jurisdictions which have considered the same question which is before us today have reached a result that is diametrically opposed to that which reflected the judgment of this court in 1934. [554 P.2d at 1098.]

2 Larson's Workmen's Compensation Law, § 60.12 reads:

In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but anything of value received as consideration for the work, as, for example, tips, bonuses, and room and board constituting real economic gain to an employee.

We do not find it necessary to cite all of the cases which support the general rule. When it is within the contemplation of the parties that tips are to be retained by an employee as part of his compensation, they are to be regarded as wages for compensation purposes.

Defendant quarrels with the cases cited, except, *Sturgill v. M & M, Inc.,* 329 A.2d 360 (Del.Supp.1974); that these cases are not concerned with statutes that specifically exclude "gratuities received from employers or others." Defendant relies on *Makris v. Top Hat Restaurant,* 16 N.J.Misc. 26, 195 A. 857 (1937), and *Durnil v. Grant,* 187 Kan. 327, 356 P.2d 872 (1960). *Makris* is a short opinion by a deputy commissioner of the Workmen's Compensation Bureau without the citation of authority. It did not influence a subsequent deputy commissioner who felt that *Makris* was erroneous and should not be followed. *Coates v. Warren Hotel,* 18 N.J.Misc. 122, 11 A.2d 436 (1940). *Durnil* did not involve "tips." These cases fall short of meeting the challenge of the general rule supported by extensive authority.

Sturgill said:

In brief, a gift or gratuity is not what one earns—it is what he receives without earning. [329 A.2d at 362.]

In the instant case, the trial court found:

At the time of sustaining said compensable accidental injury, plaintiff while employed as a cocktail waitress and bartender *was earning,* in addition to the hourly wage, an average of approximately $110.00 per week in tips. [Emphasis added.]

The word "gratuity" has many meanings. See, 38 C.J.S. p. 1073 (1943); 18A Words and Phrases, p. 435 (1956). If we followed dictionary definitions we could hold that "gratuity" was synonymous with "tip." But in workmen's compensation cases we do not make a fortress out of the dictionary to deny a workman adequate compensation benefits. It is a well known, notorious fact that waitresses are employed at a fixed salary with the further understanding that tips received are retained as further recompense for services rendered. The amount of tips received influences the amount paid the employee by the employer. *Coates,* supra. An employer and the compensation carrier

must not search a haystack for a needle to seek relief. Each time that it is done, they discover ultimately that the needle is not worth the search.

Reversed. This case is remanded to the district court (1) to set aside the judgment entered, (2) determine that the average weekly wage of plaintiff is $169.33 as found by the court and award plaintiff workmen's compensation benefits for total liability as provided by § 59–10–18.2, N.M.S.A.1953 (Vol. 9, pt. 1, 1975 Supp.) during the period of that disability, (3) award plaintiff a reasonable attorney fee for the prosecution of the case in the district court and, in its discretion, take into consideration the services of her attorney on this appeal.

IT IS SO ORDERED.

HERNANDEZ, J., specially concurring.

LOPEZ, J., concurs.

HERNANDEZ, Judge (Specially Concurring).

I think it important to reemphasize a part of § 59–10–12.13(A), supra: ". . . 'wages' . . . shall be construed to mean the money rate at which the services rendered are recompensed under the contract of hire . . . either express or implied . . . ." Ms. Rene Gaffin, regional personnel manager for the defendant testified:

"Q. Is it contemplated, then, by Fred Harvey and a prospective employee that that employee will receive tips as a cocktail waitress while working at the Airport Marina?

"A. Yes.

"Q. And that will be part of that employee's compensation for the efforts expanded by that employee?

"A. Yes."

The plaintiff when asked if she would have accepted employment with the defendant solely on the hourly wage that was offered answered: "Well, no, sir. Cocktail waitresses or bartenders live on their tips. Their pocket money is their wages." The foregoing establishes, without equivocation, that tips formed part of the compensation that the plaintiff was to receive under the contract of employment. The Supreme Court of Delaware when presented with the identical question we are confronted with here, stated the following in the case of *Sturgill v. M & M, Inc.*, supra:

> ". . . it is beyond dispute that the claimant 'earned' more than $24.00 for 48 hours of services. Since the employer paid her only 50¢ per hour, any amount of earnings in addition thereto necessarily came from tips. Common sense tells us that this employer did not simply agree to pay the claimant 50¢ and nothing more. . . . And the only reasonable conclusion from the undisputed facts is that any tips received by claimant were necessarily a very part of her contract of hiring.
>
> . . . . .
>
> We are not called upon to determine the nature or character of tips as between claimant and the employer's customers. To the latter, they may well have been (and are commonly) regarded as 'gratuities' and not part of the purchase price for food and services. But our inquiry is to the relationship between employer and waitress . . . .
>
> . . . . .
>
> In short, this case falls under the general rule that when it is within the contemplation of the parties that tips are to be retained by an employee as part of his compensation, they are to be regarded as wages for compensation purposes."

Southern Ry. Co. v. Black, 127 F.2d 280 (4th Cir. 1942), was an action brought by four porters under the Fair Labor Standards Act of 1938 to recover minimum wages and liquidated damages. One of the questions presented on appeal was whether the trial court had erred in directing the jury to deduct from the amount of minimum wages the amount of the tips which plaintiffs had received. The court of appeals in affirming the trial court had this to say:

> "The fact that the tips are received from the passengers rather than from defendants is immaterial, for they constitute the

very compensation which it was agreed between plaintiffs and defendants that plaintiffs should receive when they entered upon the service and a compensation which, while not paid by defendants, could not be received except as an incident to the service which defendants permit plaintiffs to render."

In New Mexico's Minimum Wage Act tips were taken into account in setting the wage scale. Section 59–3–22(C), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1, Supp.1975):

"All employers covered by subsection A of this section, who customarily and regularly receive more than forty dollars ($40.00) a month in tips shall be paid a minimum hourly wage of one dollar fifty cents ($1.50). All tips received by such employees shall be retained by the employees, except that nothing herein shall prohibit the pooling of tips among employees."

In situations such as this, it is my opinion, that tips are not "gratuities" (to the contrary they are wages) within the meaning of § 59–10–12.13(A), supra.

584 P.2d 182

STATE of New Mexico, Plaintiff-Appellee,

v.

Roger MAESTAS, Defendant-Appellant.

No. 3315.

Court of Appeals of New Mexico.

Aug. 15, 1978.

John H. Lewis, D'Angelo & Farrah, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Charlotte Hetherington Roosen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant was convicted of Aggravated Battery in violation of § 40A–3–5, N.M.S.A. (2d Repl.Vol. 6), and Abuse of Child in violation of § 40A–6–1(C) (1975 Supp.). Defendant appeals. We affirm as to Aggravated Battery and reverse as to Abuse of Child.

During the week of November 28 to December 3, 1976, a 25 year old mother and her three year old son, the victims in this case, lived with defendant in his home in Alcalde, New Mexico. Over the course of several days during that week the mother [victim] was severely beaten by someone.

The subject of the controversy is the identification of the person who committed aggravated assault upon the victim.

At about 5:00 p. m. in the late afternoon of December 3, 1976, the victim, with the assistance of defendant, walked from defendant's home across the road to the home of defendant's mother to obtain transporta-

tion from Alcalde to Embudo Clinic. Upon arrival at Embudo Clinic, the victim was medically checked and then taken by ambulance to the Espanola Hospital, arriving at about 5:40 p. m. The doctor in attendance began his examination at about 6:00 p. m. He found the victim's condition extremely serious and at the shock level. She was confused, disoriented, with multiple bruises and injuries that covered 75% of her body. She also had a renal failure. The following morning, the victim was taken to the Bernalillo County Medical Center.

The victim was subpoenaed by the State to testify. She did not appear voluntarily. When asked by the State whether defendant had beat her, the victim would either give no response or answer "no." Nor would the victim respond when asked who it was who beat her severely. After the victim testified that defendant did not strike or hit her with an iron pipe or wooden stick of some sort, nevertheless, the following testimony of the victim appears of record:

Q. Roger [defendant] did not hit you?
A. Would you repeat the question?
Q. Sure. Did Roger hit you during the time span we have been speaking of?
A. (No Response)
Q. You can answer yes or no, if you choose?
A. (No Response)
THE COURT: Can you answer the question . . .?
A. No.

* * * * * *

Q. You cannot answer that question, is that what you are telling the jury and the Court, Dorothy; is that right?
A. Yes.

* * * * * *

Q. Do you know who it was that beat you up?
A. I think I do.
Q. Who do you think it was?
A. I can't answer it—the question.

* * * * * *

THE COURT: Why can't you tell, or why can't you answer the question?
A. It's just too hard to answer, Your Honor.

* * * * * *

THE COURT: Do you think you can ever answer the question before this jury?
A. No.
THE COURT: You realize that it's very important that that question be answered, don't you?
A. Yes, Your Honor, but I just can't, it's just too hard to answer

* * * * * *

THE COURT: Tell us who beat you?
A. I don't know.
THE COURT: I am ordering you to do that?
A. I can't Your Honor, because I am confused.
THE COURT: Are you confused between persons or what is the confusion?
A. Yes.
THE COURT: Yes, what?
A. Between persons, people.
THE COURT: That is, are you confused as to who beat you?
A. Yes.
THE COURT: What is the confusion?
A. I don't know, Your Honor.
THE COURT: Do you remember who beat you?
A. I am confused about it.
THE COURT: But, do you remember, now who beat you?
A. (No Response)
THE COURT: You can answer that question. Please answer the question?
A. I can't say who beat me.
THE COURT: Was it one or more persons who beat you?
A. I am confused Your Honor, I am. I am.
THE COURT: Well, explain the confusion to me, to us, to this jury?
A. Well, I—I can't.
THE COURT: You cannot explain the confusion?

A. No.

THE COURT: Do you—Was your son beaten . . . ?

A. I never saw anybody beat him up, Your Honor.

THE COURT: Alright.

The State also questioned the victim about her prior statements made to the sister-in-law and the mother, but not about the statements made to the victim's sister. The victim remembered seeing her mother shortly after the victim was beaten and while at the Espanola Hospital. The victim's testimony about that event is as follows:

Q. Do you remember what you told her?

A. I told her a lot of things.

Q. Can you tell us what you told her?

A. I can't.

Q. You do remember these things, though?

A. Yes.

The district attorney then asked the victim what the truth was. The victim's response was:

"I don't know" and that "nothing was true."

Her sister-in-law asked who had beat her up and the victim answered that she did not know. When her sister asked if it was defendant, the victim testified that she answered:

Yes, because I couldn't tell her the truth, the real . . . .

The victim's reticence at trial is explained to some extent by the testimony of a psychologist who treated the victim for 8 or 9 months prior to trial. The psychologist's opinion (tendered out of the presence of the jury) stated that the victim suffered a mental illness or infirmity such as "psychological blocks."

To establish the identity of the victim's assailant, the State produced as witnesses, the victim's sister, sister-in-law and mother.

Sometime that evening, the victim's mother visited the victim in the hospital. The victim's face and feet were black and blue. She was shaking, her lips were trembling, and her eyes were big, frightened and yellow. The mother asked who did it. When the victim indicated she wanted to tell her mother something, her mother bent over to hear, and the victim identified defendant.

At 8:00 p. m. that evening, about 3 hours after the victim's severe beating, the victim's sister-in-law spoke with the victim. At this time, the victim was "clear headed" and coherent in conversation with her sister-in-law and identified defendant.

At 8:00 a. m. the following morning, the victim's sister spoke with the victim at the hospital as preparation was being made to transport the victim to the Bernalillo County Medical Center *due to her renal failure.* At that time the victim identified defendant. The victim told her sister that defendant had beaten her for a week; that the victim made efforts to leave the house, but defendant would not allow it; that defendant hit her with a pipe and a fire log; that he kicked her and threw her outside the house.

Defendant continually objected to the identification of defendant as the person who beat her up.

At the close of the case, the court announced that this was an extremely unusual case; that it permitted critical evidence to be admitted within Rule 804, and if incorrect, then Rule 803 of the Rules of Evidence. Sections 20–4–804, 20–4–803, N.M. S.A.1953 (Repl. Vol. 4, 1975 Supp.).

At the close of the State's case, the State and defendant rested.

On appeal, defendant asserts that the admission in evidence of the witnesses' testimony of prior statements of the victim was inadmissible as hearsay; that the only evidence to sustain defendant's conviction was unreliable and contradicted hearsay testimony; that defendant was denied the right to be confronted with the witnesses; and that there was no evidence that defendant harmed the child.

A. *The testimony of two State witnesses were not admissible in evidence under Rule 803(1) and (2).*

The pertinent part of Rule 803 says:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or *immediately thereafter.*

(2) *Excited Utterance.* A statement relating to a startling event or condition made *while the declarant was under the stress of excitement* caused by the event or condition. [Emphasis added.]

In this case, the victim is the declarant.

Rule 801(c) defines "hearsay" as "a statement, other than one made by the declarant [victim] while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Under Rule 803(1) and (2), the victim's statements made to her family to identify the defendant as the assailant and to prove the beating by him were hearsay and were not admissible in evidence unless (1) she made her statements while the beating took place "or immediately thereafter," or (2) unless the victim's statements were made while she was under the stress of the excitement caused by the beating she received.

None of the statements were made while the beating took place or within a slight lapse of time thereafter. Neither were the statements made to the victim's sister-in-law at 8:00 p. m., or to the sister, the following morning, under the stress of excitement. The record does not disclose what treatment, if any, the doctor ministered to the victim between 6:00 p. m. and 8:00 p. m. that evening. Nevertheless, there was no evidence from 8:00 p. m. onward that the victim suffered from shock or stress.

State v. Sanford, 44 N.M. 66, 97 P.2d 915 (1939) involved a victim who was allegedly poisoned by defendant, her husband. A witness came to the victim's bedside approximately three to three and one-half hours after the poison had been administered. The victim was still vomiting, was pretty sick and did not talk much, but she identified the defendant as the person who had given her some poison. This hearsay evidence was held inadmissible and reversible error. Justice Zinn said:

> The determination of whether or not the particular testimony is admissible must depend upon the particular circumstances of each case. Declarations which are spontaneously and instinctively made are considered by the courts as part of the res gestae. We find no such spontaneous situation here. Mrs. Sanford, under the ministrations of Dr. Doyne, was relaxed and dozing. She did not as at first sight of a close friend following her tragic experience give impulsive utterance to the questioned declaration. Her utterances were not spontaneous exclamations forming a part of and interwoven with the criminal act. They were not made under the immediate strain and influence of an exciting or terrifying occurrence. We cannot sustain the admission of such hearsay testimony under the conditions disclosed by the record in this case without stretching the res gestae rule beyond recognition. [44 N.M. at 74, 97 P.2d at 919.]

State v. Buck, 33 N.M. 334, 266 P. 917 (1927) was distinguished by Justice Zinn. In *Buck,* the wife of defendant, after being beaten by defendant, ran two miles to her nearest neighbors, and related what occurred. At the time of trial, the victim refused to testify against her husband, but the testimony of the neighbors was held admissible. Under the "Excited Utterance" doctrine, the time sequence continues as long as the victim is under the stress and strain of the excitement caused by the event of the beating. There is no definite or fixed limit of time. Admissibility depends more on circumstances than on time and each case must depend upon its own circumstances. In the application of the "Excited Utterance" rule, the Supreme Court said:

> . . . Under the immediate influence of a horrible experience, it was her outraged feelings, her physical and mental distress, her desolate and forlorn condition, that spoke. They spoke the truth.

The name of her assailant was not asked. The question was, "What is the matter?" Yet there rushed to her lips the fact uppermost in her mind, the grievous fact, that it was her husband who had beaten her. But after reflection and deliberation, conjugal affection has resumed its sway and has overcome resentment. . . [33 N.M. at 339, 266 P. at 919.]

There is no resemblance between *Buck* and the instant case. *Buck* adopted the Wigmore test for the admissibility of utterances under the stress of excitement. It was stated as follows:

First. "There must be some shock, startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting."

Second. "The utterance must have been before there has been time to contrive and misrepresent, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance."

Third. "The utterance must relate to the circumstances of the occurrence preceding it." [33 N.M at 336–37, 266 P. at 918.]

This test was followed in *State v. Godwin,* 51 N.M. 65, 178 P.2d 584 (1947); *State v. Gunthorpe,* 81 N.M. 515, 469 P.2d 160 (Ct.App.1970); *State v. Beal,* 48 N.M. 84, 146 P.2d 175 (1944); *State v. Fernandez,* 37 N.M. 151, 19 P.2d 1048 (1933).

Ofttimes, one of the stumbling blocks that confront us on review is that the determination of the admissibility of statements under the exceptions to the hearsay rule rest within the discretion of the trial court. *State v. Gunthorpe,* supra. The trial court must be careful during trial not to "shoot from the hip" in making a determination. The utterance relating to a startling event, such as a beating, made while the victim is under the stress of excitement caused thereby, must be "so inherently truthful that the ordinary sanctions and tests may be dispensed with. It is a sound doctrine, and easily grasped. The difficulty is in its application." Justice Watson in *Buck,* supra. [33 N.M. at 336, 266 P. at 918.]

"The assumption underlying this exception is that a person under the sway of excitement precipitated by an external startling event will be bereft of the reflective capacity essential for fabrication, and that, consequently, any utterance he makes will be spontaneous and trustworthy." 4 Weinstein's Evidence, 803–80 (1977).

Under Rule 803(1) and (2), we hold that the victim's statements made to the sister-in-law at 8:00 p. m., the evening of the beating, and to the sister the following morning, were not an exception to the hearsay rule and were not admissible. The statements made to the mother were admissible.

B. *The testimony of the State's two witnesses was admissible under Rule 804.*

The trial court admitted the testimony of the State's witnesses in evidence pursuant to Rule 804 of the New Mexico Rules of Evidence, [Section 20–4–804, N.M.S.A.1953 (Repl.Vol. 4, 1975 Supp.).] This rule is also an exception to the hearsay rule.

Rule 804(a) is designated as "Unavailability as a witness." The pertinent definitions of an unavailable witness are set forth in Rule 804(a)(2), (3) and (4) as a person who:

* * * * * *

(2) Persists in refusing to testify concerning the subject matter of his statement *despite an order of the judge to do so*; or

(3) Testifies to *a lack of memory* of the subject matter of his statement; or

(4) Is unable . . . to testify at the hearing because of . . . *then existing physical or mental illness or infirmity*; . . . [Emphasis added.]

The trial court held the victim unavailable as a witness only as to her refusal to identify the person who beat her.

It should be noted that the crucial factor is not the unavailability of the witness, but rather the unavailability *of his/her testimony. Mason v. United States,*

408 F.2d 903 (10th Cir. 1969); *Johnson v. People,* 152 Colo. 586, 384 P.2d 454 (1963); *People v. Pickett,* 339 Mich. 294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954); *State v. Stewart,* 85 Kan. 404, 116 P. 489 (1911); McCormick, Evidence, Section 253 at 608 (2d Ed. 1972); 4 Weinstein's Evidence, 804–35 (1977).

Whether the victim's testimony was unavailable rests within the discretion of the trial court. *United States v. Bell,* 500 F.2d 1287 (2d Cir. 1974); 4 Weinstein's Evidence, 804–40.

As shown by the record, supra, despite an order of the court, the victim did persist in a refusal to identify the person who beat her. Also, she suffered a mental illness, and infirmity, certain psychological blocks, and some loss of memory that affected the quality of her testimony as to the identification of the specific person who beat her. She denied that defendant beat her and yet she refused to identify the person who did beat her. In this respect the victim was defendant's witness. We, therefore, hold that the trial court did not abuse its discretion in its determination that the victim was an "unavailable witness" for failure to identify the person who beat her. We must now decide whether the testimony of the sister and sister-in-law comes within the exceptions to the hearsay rule set forth in Rule 804(b). In pertinent part, this section reads:

> (b) *HEARSAY EXCEPTIONS.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * * *
>
> (2) *Statement of Recent Perception. A statement* . . . which narrates, describes, or explains an event or condition *recently perceived* . . . *made in good faith* . . . *while his recollection was clear.*
>
> * * * * * *
>
> (6) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having comparable *circumstantial guarantees of trustworthiness.* [Emphasis added.]

In the instant case, the statements made by the victim to the sister and sister-in-law were that defendant beat her, and in addition thereto, that the defendant beat her with a pipe and a fire log; that he kicked her and threw her outside the house. The assertions were made within twenty-four hours of the time the events occurred. The record established that the statements were made in good faith and while the victim's recollection was clear.

We also hold that the victim's statements fall within item "(6) Other Exceptions," as "circumstantial guarantees of trustworthiness." The victim and the State's witnesses held a close family relationship. The victim had no probable motive to falsify the statements made fairly soon after the brutal events occurred, and while she was mentally alert. See, *Gichner v. Antonio Troiano Tile & Marble Co.,* 133 U.S.App.D.C. 250, 410 F.2d 238 (1969); *Johnson v. Sleizer,* 268 Minn. 421, 129 N.W.2d 761 (1964). The statements made in identification of the defendant were certain and not equivocal in nature. As Justice Cardozo said in *Snyder v. Massachusetts,* 291 U.S. 97, 108, 54 S.Ct. 330, 333, 78 L.Ed. 674, 90 A.L.R. 575 (1934):

> . . . The risk that they would lie is no greater than the risk that attaches to testimony about anything. . . . Here the change is so remote that it dwindles to the vanishing point. . . .

The use of "Other Exceptions" is an effective method of avoiding the exclusion of hearsay testimony that is clothed with special assurances or guarantees of trustworthiness. The admissibility of trustworthy testimony will aid in the search for truth. It is highly reliable, highly probative, and the witness is subject to cross-examination. Today, under our Rules of Criminal Procedure, defendants are also clothed with the protection of discovery by way of depositions to probe the competency, the veracity and the trustworthiness of witnesses relevant to the offense charged or the defense of an accused person. Section

41–23–29, N.M.S.A.1953 (2d Repl.Vol. 6, 1975 Supp.). Defendant had the opportunity to depose the victim and the witnesses to test the credibility of the prior statements made.

"Other Exceptions" is an innovation that helps to disentangle us from the archaisms that impede our pursuit of truth. "We are loathe to reduce the corpus of hearsay rules to a straight-jacketing, hypertechnical body of semantical slogans to be mechanically invoked regardless of the reliability of the proffered evidence." *United States v. Castellana,* 349 F.2d 264, 276 (2d Cir. 1965). See also, *Wilson v. Leonard Tire Co. Inc.,* 90 N.M. 74, 77, 559 P.2d 1201 (1976); *United States v. Medico,* 557 F.2d 309 (2nd Cir. 1977).

In other words, hearsay testimony that is trustworthy captures a significant place in the trial of the case. It stands on an equal footing with direct testimony even though the prior statements made were not under oath, were not subject to cross-examination and the jury was not present to observe the declarant's demeanor as the statements were made.

Wigmore says:

> " . . . [T]he testing required by the hearsay rule is spoken of as cross-examination *under oath.* But is it clear beyond doubt that the oath, as thus referred to, is merely an incidental feature customarily accompanying cross-examination, and that cross-examination is the essential and real test required by the rule. [V Wigmore on Evidence, § 1362, p. 10.]

The instant case proves the insignificance of an oath. The victim testified under oath that she could not answer and did not know who beat her, even though she could answer and did know. This disrespect for the oath makes her non-oath prior trustworthy statements to witnesses fairly soon after the events occurred take on a greater semblance of the truth.

The inability to cross-examine the victim at the time the prior statements were made, was not crucial as long as the discovery process was available and the defendant was assured of full and effective cross-examination at the time of trial.

True, a jury would be in a better position to evaluate the truth of the prior statements if it could be whisked back to observe the demeanor of the victim at the time the prior statements were made. In the instant case it would have been appalling to the jury to hear and view the examination of the battered victim in the hospital when she uttered her statements. Nevertheless, the subsequent examination of the victim at trial afforded the jury a satisfactory basis for evaluating the truth of the prior statements. The jury did scrutinize the victim's demeanor as she explained or denied the earlier statements made. Though the victim's testimony was not available at trial, the circumstances surrounding the earlier statements made render them as trustworthy as that which would have been made at trial subject to cross-examination.

The inferiority of prior trustworthy statements made disappears. Trustworthy statements admitted in evidence meet the test of what can be termed "substantial" evidence to prove the matters asserted by a declarant.

The testimony of the victim's sister and sister-in-law were admissible under Rules 804(a) and (b) because the testimony fell within an exception to the hearsay rule.

C. *The testimony of the sister-in-law and the mother was not hearsay, and therefore admissible under Rule 801(d).*

In addition to Rule 804, supra, we hold that the testimony of the sister-in-law and the mother was not hearsay, and therefore admissible. Our conclusion is reached by reason of Rule 801 of the Rules of Evidence, [§ 20–4–801(d)(1) N.M.S.A. 1953 (Repl. Vol. 4, 1975 Supp.)]. It reads in pertinent part:

> (d) *A statement is not hearsay if—*
>
> (1) the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, *and the statement is (A) inconsistent with his testimony* . . . . [Emphasis added.]

The victim was the declarant. Her testimony at trial was inconsistent with prior statements made to her sister-in-law and mother. She was not questioned on statements made to her sister.

Under Rule 801(d)(1), supra, the prior inconsistent statements made were not hearsay. *Weiland v. Vigil,* 90 N.M. 148, 560 P.2d 939 (Ct.App.1977). Non-hearsay testimony is substantive evidence to be considered by the jury in its determination of the identification of defendant as the person who beat her. *State v. Skinner,* 110 Ariz. 135, 515 P.2d 880 (1973); *Beavers v. State,* 492 P.2d 88 (Alaska, 1971); *State v. Igoe,* 206 N.W.2d 291 (N.D.1973); *Jett v. Commonwealth,* 436 S.W.2d 788 (Ky.1969); *Gelhaar v. State,* 41 Wis.2d 230, 163 N.W.2d 609 (1969).

After the prior statements were proven, the victim was subject to cross-examination by the defendant.

As previously drafted, Rule 801(d)(1) of the Federal Rules of Evidence was identical with that adopted by New Mexico. As officially adopted in 1975, Federal Rule 801(d)(1) limited the use of prior inconsistent statements as substantive evidence when "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." New Mexico did not amend its version. The drafted version of Rule 801(d)(1) was subject to severe criticism, criticism that lead to the official version. See *Rhodes v. Harwood,* 544 P.2d 147 (Or.1975); 28 U.S.C.A., Federal Rules of Evidence, Rule 801, p. 525.

The United States Supreme Court version of the drafted rule appears in 28 United States Code Service, Appendix, Federal Rules of Evidence, pp. 519–23 (1975). Pages 520–521 read as follows:

> (A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. *Under the rule they are substantive evidence.* As has been said by the California Law Revision Commission with respect to a similar provision:
>
> "Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. *In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation.* The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. . . . Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements." [Emphasis added.]

4 Weinstein's Evidence 801–71 (1977) says:

> There are two basic reasons for giving substantive effect to prior inconsistent statements: (1) since juries may consider these statements for purposes of impeachment . . . *it is realistic to assume that,* despite limiting instructions, *the jury will decide which statement is true* instead of concluding solely that the witness' credibility is impaired, and (2) *statements made closer in time to the event in question* and before the exertion of external pressures *may be more trustworthy than testimony at trial* and should not be excluded.

All inconsistent statements spoken by the victim under oath and "on the stand" were admissible as substantive evidence. *United States v. Librach,* 536 F.2d 1228 (8th Cir. 1976); *United States v. Castro-Ayon,* 537 F.2d 1055 (9th Cir. 1976); *Rhodes v. Harwood,* supra; O'Connell, Chief Justice, dissenting (544 P.2d at 160); *United States v.*

Insana, 423 F.2d 1165 (2d Cir. 1970); *People v. Green,* 3 Cal.3d 981, 92 Cal.Rptr. 494, 479 P.2d 998 (1971).

The testimony of the sister-in-law and the mother was not hearsay, and therefore admissible in evidence to identify the defendant as the person who beat her.

D. *The evidence was sufficient to sustain defendant's conviction.*

The question raised by defendant is whether his conviction can be sustained where the State's case rests solely on contradicted hearsay statements.

Defendant moved for a directed verdict. The question presented by this motion is whether there is substantial evidence to support the charge. *State v. McKay,* 79 N.M. 797, 450 P.2d 435 (Ct.App. 1969). The prior statements made by the victim constituted substantial evidence of the guilt of defendant.

The serious problem in this case revolves around the question:

> Will the admission in evidence of prior statements of the victim sustain defendant's conviction?

4 Weinstein's Evidence, 801–76.1 reads:

> (6) The fact that the prior statement is admitted and given substantive effect does not mean that it will suffice *as the sole basis for a conviction.* The question of the sufficiency of the evidence remains, "for the due process clause of the fourteenth amendment may require a minimal standard of evidentiary support to sustain a conviction." [Emphasis added.]

The "Hearsay Rules" are addressed to the admissibility in evidence of prior statements made by a witness. Is the admissibility of hearsay and non-hearsay prior statements sufficient to convict a defendant?

In the instant case, in prior statements made, the victim told three family witnesses that defendant had beaten her. At the trial, she denied that defendant was the assailant. With respect to this issue, any judgment as to the credibility of the witnesses and the weight to be given their testimony rests with the jury and not with this Court. "However, a statement, [made by a witness out of court] when established as trustworthy, may properly be considered together with independent or corroborative evidence as proof that the crime charged was committed, see *State v. Paris,* 76 N.M. 291, 414 P.2d 512, March 7, (1966)." *State v. Buchanan,* 76 N.M. 141, 143, 412 P.2d 565, 566 (1966).

Buchanan and *Paris* establish that the "corpus delicti," [the body or substance of a crime] may be proved by circumstantial evidence. "The corpus delicti of a particular offense is established simply by proof that the crime was committed; the identity of the perpetrator is not material." *State v. Nance,* 77 N.M. 39, 44, 419 P.2d 242, 246 (1966). The corpus delicti of aggravated battery is "the unlawful touching or application of force to the person of another with intent to injure that person or another." Section 40A–3–5, supra. Unquestionably, the victim suffered an aggravated battery.

The sole question is: Who committed the crime? Is there sufficient independent or corroborative evidence, circumstantial in nature, that defendant committed the crime?

As we view the record as a whole, we note that in addition to the prior statements made, the victim lived with defendant in his home for a week; that no other person bore any unfavorable relationship with the victim that would lead to a severe beating; that defendant presented no witnesses nor any evidence that caused doubt upon the truth of the prior statements made; that no evidence of defendant's good character was presented. These facts and circumstances corroborate the truth of the prior statements made by the victim. The prior statements made were not the "sole basis for a conviction."

We conclude that the prior statements made by the victim, together with the circumstantial evidence, established that defendant committed the crime charged.

Defendant claims that the facts submitted to the jury were unreliable because the victim was "unavailable" as a witness, and the defense was precluded from an effective cross-examination. The victim was declared to be "unavailable," not because she denied that defendant had beaten her, but because she refused to disclose who the assailant was. The best evidence defendant could obtain by cross-examination was to question the witness as the State did. The victim was asked two or three times whether defendant had hit her during the time span involved, and her answer was "no." She also denied that defendant had kicked her, or hit her with an iron pipe or a wooden stick of some sort. The State made an effective cross-examination for defendant. Defendant was not precluded from an effective cross-examination.

E. *Defendant's V Amendment and VI Amendment Rights were not violated.*

Defendant contends that his V Amendment right to due process and his VI Amendment right to confront and cross-examine witnesses against him were violated when the trial court permitted the victim's statements, made to her mother, sister and sister-in-law, to be introduced in evidence. We disagree. Defendant's V Amendment right to due process was not argued.

Article II, Section 14 of the New Mexico Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him . . . .

"To be confronted with the witnesses against him" also appears in the VI Amendment to the Constitution of the United States.

"The purposes of confrontation are to secure to the accused the right of cross-examination; the right of the accused, the court and the jury to observe the deportment and conduct of the witness while testifying; and the moral effect produced upon the witness by requiring him to testify at the trial." *State v. James,* 76 N.M. 376, 380, 415 P.2d 350, 352 (1966).

In *State v. Lunn,* 82 N.M. 526, 484 P.2d 368 (Ct.App.1971), the hearsay testimony of two boys who were present at the time of a shooting in their home was admitted in evidence. The two boys were not called as witnesses. The boys identified defendant as being present, but the right to determine whether the statements were consistent, trustworthy, or res gestae did not exist because defendant did not have the opportunity to cross-examine. The court said:

> We hold the admission of the statements attributed to the boys was error because defendant was denied his constitutional right of confrontation, here, the right to cross-examine. . . . Our holding is limited to the circumstances of this case. . . . We announce no rule of general application when an established exception to the hearsay rule is opposed to the constitutional right of confrontation. Where these concepts are opposed, their opposition must be resolved on a case by case basis. [82 N.M. at 530, 484 P.2d at 372.]

In *Lunn,* the boys were the declarants who made the out-of-court statements. Their statements were questionable and they were not subject to cross-examination. In the instant case, the victim was the declarant who made the out-of-court statements. Her out-of-court statements were trustworthy and reliable. Yet she was subject to cross-examination. All of the witnesses whose testimony indicated the guilt of the defendant were present and were cross-examined. The purpose of the confrontation clause was satisfied. Defendant was "confronted with the witnesses against him."

All that we can gather from defendant's argument is that she was not subject to full and effective cross-examination, and that she denied all recollection or knowledge of the ultimate event. Both contentions are without merit.

F. *There was no evidence that defendant abused victim's son.*

Defendant claims there was no evidence to show that defendant abused the

victim's son, Miguel, in violation of § 40A-6-1(C). We agree.

The only testimony on the subject is that of the victim. She stated that she never saw defendant hit her son. Out of the presence of the jury, the sister testified that the victim told her that defendant had hit Miguel. When called to testify before the jury, the sister said that she never questioned the victim about what happened between the victim's son, and the victim never told her.

At the close of the evidence, the trial court asked the State:

> Where is the testimony concerning great bodily harm, insofar as Miguel is concerned?
>
> MR. TUPLER: Your Honor, there is no such testimony.

Nevertheless, the trial court submitted this charge to the jury.

Now, the State claims that defendant had the clear opportunity to abuse the son, that the victim was not an eye witness to any beating of her son, that the sister testified (not before the jury) as to beating of the child. Therefore, "The weight of evidence and credibility of witnesses are for the jury to determine."

The State seeks to pole vault to conviction without a pole.

The conviction of the defendant for aggravated battery is affirmed. The conviction of the defendant for abuse of the victim's son is reversed.

The trial court shall enter an amended "Judgment and Sentence" in which the court shall find that defendant was not guilty of a violation of § 40A-6-1(C), Abuse of Child, by reason of the decision of this Court; that the consecutive sentence imposed on defendant in addition to aggravated battery be deleted.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

584 P.2d 194

Valentin VARELA, Plaintiff-Appellant,

v.

J. B. MOUNHO, as employer and John Doe Insurance Co., Defendants-Appellees.

No. 3504.

Court of Appeals of New Mexico.

Aug. 22, 1978.

Writ of Certiorari Denied Sept. 12, 1978.

David H. Pearlman, Albuquerque, for plaintiff-appellant.

Frank H. Allen, Jr. and Ruth M. Schifani, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendants-appellees.

OPINION

WOOD, Chief Judge.

Plaintiff, seeking workmen's compensation, alleged that while employed at defendant's dairy and while attempting to steady a cow being milked by another employee, "the cow bolted, jerking Plaintiff" with the result that plaintiff was injured. No claim is made that plaintiff was not a farm laborer. See *Greischar v. St. Mary's College*, 176 Minn. 100, 222 N.W. 525 (1928); *Selvey v. Robertson*, 468 S.W.2d 212 (Mo.App.1971); *Plemmons v. Pevely Dairy Co.*, 241 Mo.App. 659, 233 S.W.2d 426 (1950). No claim is made that the employer carried workmen's compensation insurance. See *Nix v. Times Enterprises, Inc.*, 83 N.M. 796, 498 P.2d 683 (Ct.App.1972). The trial court granted summary judgment against plaintiff, who appeals. The issues involve the applicability of § 59–10–4(A), N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1, Supp.1975). Plaintiff claims: (1) the statute does not apply to commercial dairies; (2) the statute was repealed by implication; and (3) the statute was enacted in violation of N.M.Const., art. IV, § 16.

Plaintiff's injury is alleged to have occurred in 1977. Plaintiff's claims involve the workmen's compensation statute as amended by Laws 1975, ch. 284. As amended, § 59–10–4(A) reads:

> A. 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]. The Workmen's Compensation Act shall not apply to employers of private domestic servants or to employers of farm and ranch laborers. Provided, however, that effective January 1, 1978, the provisions of the Workmen's Compensation Act shall apply

to employers of three [3] or more workmen, except to employers of private domestic servants and farm and ranch laborers.

This statute clearly provides that the Workmen's Compensation Act "shall not apply to employers . . . of farm . . laborers." Plaintiff contends the language should not apply to his claim.

Commercial Dairies

1A Larson's Workmen's Compensation Law, § 53.10 (1973) at page 9–106 states: "The exemption of farm labor is usually explicit, but sometimes takes the form of omission from the list of hazardous employments".

Our 1929 workmen's compensation law excluded agricultural laborers from workmen's compensation benefits because agricultural pursuits were not included as an ultrahazardous occupation. *Koger v. A. T. Woods, Inc.*, 38 N.M. 241, 31 P.2d 255 (1934). This exclusion continued until the extra hazardous occupation requirement, § 59–10–10, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1) was repealed by Laws 1975, ch. 284, § 14. See *Graham v. Wheeler*, 77 N.M. 455, 423 P.2d 980 (1967); *Thomas v. Gardner*, 75 N.M. 371, 404 P.2d 853 (1965).

In 1937 a provision was added which explicitly excluded the employer of farm labor from the Workmen's Compensation Act. Laws 1937, ch. 92, § 2. From 1937 until the 1975 amendments, farm labor was excluded from compensation benefits both by the explicit exclusion and by the failure to include agricultural labor as an extra hazardous occupation. Since the 1975 repeal of the extra hazardous requirement, the exclusion of farm labor from compensation benefits is under § 59–10–4(A), supra.

Plaintiff contends that the employer was engaged in a commercial enterprise; that § 59–10–4(A), supra, does not apply to a commercial dairy. Summarized, his argument is: (1) the farm labor exclusion was based on the now outdated view that farm labor was not extra hazardous, a view repudiated by the repeal of § 59–10–10, supra; (2) the law in other jurisdictions has been changed to provide compensation coverage for farm labor; (3) the farm labor exclusion has been criticized by legal writers, see 1A Larson's, supra, § 53.32 and § 53.33; and (4) New Mexico decisions hint that the farm labor exclusion would not apply where the employer's activity was a commercial enterprise, see *Koger v. A. T. Woods, Inc.*, supra, and *Thomas v. Gardner*, supra.

Plaintiff's contention does not state New Mexico law. Section 59–10–2, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1, Supp.1975) defines employers who come within the Workmen's Compensation Act, to include "every private person, firm or corporation engaged in carrying on for the purpose of business or trade within this state, and which employs four [4] or more workmen, except as provided in section 59–10–4 NMSA 1953". This wording includes employers engaged in "business or trade"; "business or trade" covers employers engaged in commercial enterprise, including commercial dairies. Section 59–10–2, supra, excepts employers engaged in commercial enterprise from the workmen's compensation law, as provided in § 59–10–4, supra. Section 59–10–4(A), supra, provides the Workmen's Compensation Act does not apply to employers of farm labor.

Assuming the employer was operating a commercial dairy, § 59–10–4(A), supra, excludes the employer from the Workmen's Compensation Act to the extent of employment of farm labor. Plaintiff was a farm laborer.

Plaintiff asserts that unless we hold that commercial dairies do not come within § 59–10–4(A), supra, our decision would be contrary to the purposes of the Workmen's Compensation Act which is "to provide a humanitarian and economical system of compensation for injured workmen". *Graham v. Wheeler*, supra. To achieve that purpose, plaintiff asserts the statute must be liberally construed in his favor. See *Schiller v. Southwest Air Rangers, Inc.*, 87 N.M. 476, 535 P.2d 1327 (1975). Plaintiff also asserts there must be liberal construction in order to obtain fundamental fair-

ness. See *Transport Indemnity Company v. Garcia*, 89 N.M. 342, 552 P.2d 473 (Ct.App. 1976). Our answer is that the provisions of the Workmen's Compensation Act "may not be disregarded in the name of liberal construction." *Graham v. Wheeler*, supra. The asserted unfairness to farm laborers "is a matter of legislative policy, and we are bound to interpret and apply the law as it is given us." *Koger v. A. T. Woods, Inc.*, supra.

Repeal by Implication

Plaintiff contends that the failure of § 59–10–10, supra, to include farm labor as an extra hazardous occupation was based on a legislative presumption that farm labor was not extra hazardous, and that repeal of the extra hazardous requirement in 1975 shows an "obvious legislative intent" to, in effect, provide compensation benefits for farm labor. On this basis, plaintiff asserts that § 59–10–4(A), supra, "is irreconcilably in conflict with that legislative intent" and therefore the repeal of § 59–10–10, supra, must be deemed to have repealed § 59–10–4(A), supra, to the extent it excludes farm labor from workmen's compensation benefits.

Plaintiff's reasoning is specious. A statute will not be deemed repealed by implication unless necessary to give effect to an obvious legislative intent. *Galvan v. City of Albuquerque*, 87 N.M. 235, 531 P.2d 1208 (1975). There was no legislative intent that the farm labor exclusion be repealed.

Plaintiff's argument bottoms on his contention that the Legislature presumed farm labor was not extra hazardous because not included within § 59–10–10, supra. No such presumption exists; § 59–10–10, supra, does not purport to catalog *all* extra hazardous occupations; rather, the occupations listed in § 59–10–10, supra, are referred to as *the* extra hazardous occupations to which the Workmen's Compensation Act applied. The failure to include an occupation within § 59–10–10, supra, does not permit the conclusion that the Legislature presumed an excluded occupation was not extra hazardous. Section 59–10–10, supra, did no more than state the extra hazardous occupations made subject to the Workmen's Compensation Act.

Even if we assume a legislative judgment that an occupation not included within § 59–10–10, supra, was not extra hazardous, plaintiff's argument still is without merit. Since 1937, the Legislature has provided an exclusion for farm labor independent of any extra hazardous classification. This exclusion is stated in § 59–10–4(A), supra. The last legislative statement of this exclusion was a part of the 1975 legislation. Specifically, § 59–10–10, supra, was repealed by a section of the same 1975 law which restated the farm labor exclusion.

Not only is there no "obvious legislative intent" to require compensation benefits for farm labor, the 1975 amendment to § 59–10–4(A), supra, affirmatively shows a legislative intent to continue the exclusion of farm labor from compensation benefits. There is no basis for holding § 59–10–4(A), supra, was repealed by implication by the repeal of § 59–10–10, supra.

Constitutionality

Plaintiff contends the enactment of the farm labor exclusion appearing in § 59–10–4(A), supra, violated N.M.Const., art. IV, § 16 because "[t]hat subject" is not referred to in the title to the legislation. We are not sure of the particular legislation that is supposed to violate the above constitutional provision—the 1929 law, the 1937 law, the 1959 law or the 1975 law—but it makes no difference.

N.M.Const., art. IV, § 16 requires the subject of every bill to be clearly expressed in its title. Each of the laws mentioned in the preceding paragraph—Laws 1929, ch. 113, Laws 1937, ch. 92, Laws 1959, ch. 67, and Laws 1975, ch. 284—had the subject of the act clearly expressed in its title. The subject was workmen's compensation benefits. The title need not set forth the details of the enactment; however, the statutory details must be germane or related to the subject matter expressed in the title. *State v. Romero*, 86 N.M. 99, 519 P.2d

1180 (Ct.App.1974). The farm labor exclusion was germane to the title of the 1937 law which enacted this exclusion, and germane to the 1959 and 1975 laws that continued the exclusion. The claim that § 59–10–4(A), supra, was enacted in violation of N.M.Const., art. IV, § 16 is without merit.

The summary judgment is affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

584 P.2d 198

Ernest H. CHRISTMAN and Ruth E. Christman, Plaintiffs-Appellants,

v.

J. Read HOLLAND and Elizabeth C. Holland, his wife, Defendants-Appellees.

No. 3216.

Court of Appeals of New Mexico.

Aug. 22, 1978.

E. Douglas Latimer, Albuquerque, for plaintiffs-appellants.

Harry O. Morris, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

Christman sued Holland for fraud arising out of the sale to Christman of a residential dwelling. On motion to dismiss on grounds of res judicata, the trial court dismissed Christman's complaint with prejudice. Christman appeals. We reverse.

The judgment entered grew out of two prior lawsuits.

(1) On May 2, 1975, Cause No. 5–75–02127 was filed in the Bernalillo County District Court. J. B. McIntire was plaintiff, with Christman and Holland as two of four defendants. McIntire sought to foreclose a lien upon the property described in the Holland-Christman real estate contract. McIntire's claim against Holland was dismissed with prejudice because Holland's real estate contract was superior to McIntire's claim of lien. McIntire and Christman settled their dispute, and the McIntire complaint was dismissed with prejudice.

(2) On April 25, 1976, in Cause No. 38821, Christman, pro se, filed a civil complaint against Holland in the Albuquerque Small Claims Court. Christman claimed damages in the sum of $1,996.56. Holland answered and filed a counterclaim in the sum of

$260.00. Christman employed an attorney, and on Christman's motion, the court entered a final order dismissing Christman's complaint *without* prejudice, having been advised that Christman wanted to file suit in the district court for an amount in excess of the jurisdiction of the small claims court.

These prior lawsuits were not final judgments rendered after a hearing on the merits, and they did not adjudicate any issue of fact. *McIntire* involved a settlement with Christman. Holland says:

> The critical question is whether the party being bound by the former [McIntire] judgment *had a full and fair opportunity to litigate the matter.* The Christmans did. [Emphasis added.]

Holland is mistaken. Merely because Holland and Christman were co-defendants in the *McIntire* foreclosure action, and could have cross-claimed against each other does not give rise to res judicata.

Holland relies on *Air Engineering v. Corporacion de la Fonda,* 91 N.M. 135, 571 P.2d 402 (1977) as explained by the law stated in *Ealy v. McGahen,* 37 N.M. 246, 21 P.2d 84 (1933). *Air Engineering* was a summary judgment case in which res judicata was absent. *Ealy* held:

> Final judgments are conclusive as to the claim or demand in controversy as to the parties in the suit and those in privity with them, not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Public policy requires that there be an end to litigation and that rights once established by a final judgment shall not again be litigated in any subsequent proceeding. [37 N.M. at 251, 21 P.2d at 87.]

Ealy speaks strongly against Holland's claim of res judicata. Res judicata would apply if a judgment had been entered upon the merits of a controversy between Christman and Holland in the *McIntire* action. It would have been conclusive upon every question of fact directly in issue determined in the action. *Trujillo v. Acequia de Chamisal,* 79 N.M. 39, 439 P.2d 557 (Ct.App.1968); *Ealy, supra.* This event never occurred. The difference between Holland's position and res judicata is apparent. "The difference" as Mark Twain once said, "between the right word and the almost right word is the difference between lightning and the lightening bug."

Holland relies on deposition testimony taken in the *McIntire* action. He seeks to catch at a straw to sustain the doctrine of res judicata. This is not even a slender seed to lean upon.

We can find no legal basis upon which to sustain the judgment of dismissal entered below.

Reversed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

584 P.2d 199

Sandra Y. ELDRIDGE and Tina M. Ulibarri, Plaintiffs-Appellants,

v.

SANDOVAL COUNTY, Defendant-Appellee.

No. 3476.

Court of Appeals of New Mexico.

Aug. 29, 1978.

James L. Brandenburg and Fred M. Calkins, Jr., Albuquerque, for plaintiffs-appellants.

Louis E. Valencia, Chief Deputy Dist. Atty., Bernalillo, for defendant-appellee.

OPINION

WOOD, Chief Judge.

The appeal involves the 1976 Tort Claims Act (Laws 1976, ch. 58) prior to the 1977 amendments to that Act (Laws 1977, ch. 386). Sandoval County did not have insurance coverage for the negligence alleged in plaintiffs' complaint. The trial court granted Sandoval County's motion to dismiss on the basis that plaintiffs were without a remedy. The issues are: (1) whether the County may be liable in the absence of insurance coverage; and (2) the propriety of dismissal for failure to state a claim upon which relief can be granted.

Plaintiffs assert they were the driver of, and a passenger in, a car which struck a protruding manhole cover in a road allegedly negligently maintained by the County. Plaintiffs sought damages for the alleged negligence. Laws 1976, ch. 58, § 4 grants "immunity from liability for any tort except as provided in the Tort Claims Act." Under § 11(A) of the 1976 law, the immunity granted in § 4 does not apply to negligence in the maintenance of a roadway except as provided in § 11(B). Section 11(B) is not involved in this appeal. The waiver of immunity in § 11(A) is limited; under § 17(E), immunity is waived "to the extent there exists any valid insurance coverage." It being undisputed that the County did not have insurance covering plaintiffs' claims, the trial court granted the County's motion to dismiss.

Liability in the Absence of Insurance

Plaintiffs contend that public policy and legislative intent prohibit the County from escaping liability by failing to acquire insurance coverage. They rely on language in *Hicks v. State,* 88 N.M. 588, 544 P.2d 1153 (1975) which describes sovereign immunity as a "legal anachronism" that "can no longer be justified". *Hicks* delayed abolition of the immunity defense until July 1, 1976 in order to permit governmental units to plan in advance for this change. Plaintiffs point out that the 1976 Tort Claims Act contemplated the purchase of insurance to cover immunity from liability waived by that Act. Discussing the Act, *England v. New Mexico State Highway Com'n,* 91 N.M. 406, 575 P.2d 96 (1978) states "that the insurance coverage was required by legislative mandate." Plaintiffs assert that the policy considerations stated in *Hicks, supra,* and the legislative intent of the 1976 Act prohibit the County from escaping liability. Plaintiffs argue that having failed to comply with the legislative mandate, the County should be held liable as a self-insurer. See *Sturdivant v. City of Farmington,* 255 Ark. 415, 500 S.W.2d 769 (1973).

While plaintiffs' contentions are attractive, they overlook other provisions of the 1976 Act which overrode the policy statements in *Hicks v. State, supra,* and stated a

legislative intent to limit liability in the absence of insurance. See *Chavez v. Mountainair School Board,* 80 N.M. 450, 457 P.2d 382 (Ct.App.1969).

Section 2 of the 1976 Act states: "[I]t is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act". Section 18 of the 1976 Act states: "Notwithstanding any other provision of the Tort Claims Act, the liability assumed under that act shall be limited to insured risks and the amount of insurance coverage." These provisions negate plaintiffs' theory of self-insurance, limit the County's liability to the amount of insurance coverage, and permit the County to escape liability on the basis there was no insurance coverage.

Dismissal for Failure to State a Claim

The trial court's dismissal of the complaint for failure to state a claim upon which relief could be granted was a dismissal under Rule of Civ.Proc. 12(b)(6). Dismissal under this rule is proper only if it appears that plaintiffs cannot recover under any state of facts provable under the claims made. *Delgado v. Costello,* 91 N.M. 732, 580 P.2d 500 (Ct.App.1978).

Since the Legislature "mandated" insurance coverage for the negligence alleged in the complaint, *England v. New Mexico State Highway Com'n, supra,* plaintiffs contend that the County was required to make a good faith effort to obtain insurance. Absent a showing by the County that it made such a good faith effort, plaintiffs contend that dismissal was premature. "[I]f it were established . . . that the County of Sandoval simply ignored the legislative mandate to purchase insurance, then there would be no question that Sandoval County would have to pay any damages assessed by a Court or Jury."

We do not answer this contention on procedural grounds; that is, on the basis that dismissal was improper because there was a required "showing" that was missing which, if made, would have converted the motion to dismiss to a motion for summary judgment. See Rule of Civ.Proc. 12(b). We answer plaintiffs' claim on the merits.

Plaintiffs' claim is based on that part of Laws 1976, ch. 58, § 18 which reads:

> It shall be the duty of governmental entities to make a good faith effort at the earliest practical time to purchase and maintain insurance coverage for the liabilities assumed under the Tort Claims Act to the extent such coverage may be reasonably available in a competitive market. If such insurance is available, it shall be the duty of the governmental entity to purchase and maintain such insurance.

Plaintiffs contend that if the County failed to make a good faith effort to obtain insurance coverage, the County would be liable even in the absence of insurance. Under this contention, dismissal would have been improper because plaintiffs could recover if the good faith effort was not made. We disagree.

We have previously quoted another provision in § 18 of the 1976 Act which limits liability to the amount of insurance coverage "[n]otwithstanding any other provision of the Tort Claims Act". The legislative intent expressed in the "notwithstanding" provision is clear—if there is no insurance, there is no liability.

If, as plaintiffs contend, the County failed to make a good faith effort to obtain insurance, plaintiffs obtain no benefit from this failure because liability is limited to the amount of the insurance coverage. Laws 1976, ch. 58, § 18. If the failure to make a good faith effort to obtain insurance should be considered as a separate tort, see *Brennen v. City of Eugene,* 30 Or.App. 1093, 569 P.2d 1083 (1977), the County is immune from this separate tort liability. Section 4(A) of the 1976 Act grants "immunity from liability for *any* tort except as provided in the Tort Claims Act." (Emphasis added.) Section 15 of the 1976 Act states the remedy "provided by the Tort Claims Act shall be exclusive". The 1976 Act does not provide for liability of the County for failure to make a good faith effort to ob-

tain insurance. See Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M.L.Rev. (1975) 249 at 263.

Since the County is not liable to plaintiffs even if the County failed to make a good faith effort to obtain insurance, the motion to dismiss was properly granted. With this result, we do not reach the related question of whether, under the 1976 Act, plaintiffs had standing to sue to compel the County to obtain insurance. We note the standing question has been resolved by the 1977 amendments. Compare Laws 1976, ch. 58, § 15 and 6 N.M.L.Rev., supra, Note 86 at 266 with Laws 1977, ch. 386, § 19(C).

The order dismissing plaintiffs' complaint is affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

584 P.2d 202

STATE of New Mexico, Plaintiff-Appellant,

v.

Rose RIVERA and Gloria Chavez, Defendants-Appellees.

No. 3619.

Court of Appeals of New Mexico.

Aug. 29, 1978.

Toney Anaya, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Donaldo A. Martinez, Las Vegas, for defendants-appellees.

OPINION

HENDLEY, Judge.

We are called upon to interpret Rules of Criminal Procedure for the Magistrate Courts adopted October, 1974 as amended October 1, 1976. Section 36–23–1 through § 41, 1976–77 Interim Supp.

This cause was placed on the Legal Calendar. N.M.Crim.App. Rule 207(c). Thus, the facts set forth in the docketing statement are accepted as true unless challenged. The facts are not challenged. *State v. Pohl*, 89 N.M. 523, 554 P.2d 984 (Ct.App.1976).

The district court clerk's record and the docketing statement reflect the following. Defendants were found guilty of assault and battery, and criminal damage to property in Magistrate Court on September 20, 1977. No record of the hearing was requested or made of these proceedings. Theresa Trujillo's, a co-defendant, case was continued. On October 4, 1977 defendants filed a notice of appeal in the district court. On October 11, 1977 the magistrate's final order of September 20, 1977, which placed the defendants "on a deferred sentence for 6 months" was filed in the district court together with the criminal complaint.

Subsequently, on November 28, 1977, a second amended final order was filed in the district court. At the bottom of the second amended final order was the following language:

"1. ROSE RIVERA & GLORIA CHAVEZ are placed on a deferred sentence for 6 months.

"2. THERESA TRUJILLO case is pending.

"3. The first AMENDED FINAL ORDER was hand carried to Napoleon Martinez County Clerk for filing. The document was never filed therefore I am issueing [sic] AMENDMENT # 2. The court has requested an investigation as to the disappearence [sic] of the document and why it was not filed."

The clerk's record shows that Napoleon Martinez is both the county clerk and the deputy district court clerk of Guadalupe County, New Mexico.

On March 20, 1978 defendants filed a motion to hear the appeal at the court's earliest convenience. No hearing was ever obtained. On April 10, 1978 defendants filed a motion to dismiss the charges because the magistrate did not file a proper transcript of the proceedings as required by Magistrate Rule 41(e).

The state, on April 19, 1978, filed a motion to dismiss and remanded the appeal to Magistrate Court for enforcement of the judgment pursuant to Magistrate Rule 41(i). Six months from the date of the notice of appeal, October 4, 1977, would be April 4, 1978.

On May 18, 1978 the district court ordered that the cause be "dismissed with prejudice", and by a letter of the same date to the assistant district attorney stated:

"With reference to the above-captioned case, I hereby grant the State's Motion to Dismiss the Appeal, and also, I hereby grant Defendants' Motion to Dismiss the case.

"Because of the peculiar status of this case, I find that I am able to grant both Motions, the State's Motion being granted on the basis of Rule 41(J) of the Rules of the Magistrate Court Concerning Criminal Procedure, and Defendant's Motion to Dismiss by virtue of the confused and improper condition of the pleadings, especially the transcript, which terminates the action ex proprio vigore."

The state appeals. The question is what relief is proper under the state of the record. The state contends that Magistrate Rule 41(i) applies and therefore the cause should have been remanded for enforcement of the judgment. The defendant contends that Magistrate Rule 41(d), (e) and (i) apply and the district court could properly "dismiss the case (1) for failure of the magistrate to file a proper transcript, (2) because the cause was moot, [the 6 month period of probation had expired] and (3) because the 6 month period [Rule 41(i)] had lapsed."

Magistrate Rule 41(d), (e) and (i) reads as follows:

"(d) DOCKETING THE APPEAL. The clerk of the district court shall collect the docket fee or an appropriate affidavit of indigency for filing an appeal. The magistrate court shall transmit to the district court the order fixing conditions of release and bond, if any, and a transcript of all the proceedings taken in the action to the clerk of the district court within ten days after the filing of the notice of appeal. Upon the filing of the notice of appeal, the magistrate court shall give notice of the appeal to each party in the action or to the attorney for any party who is represented by an attorney.

"(e) TRANSCRIPT. The transcript shall include: (1) title page containing caption of the case in the magistrate court and names and mailing addresses of counsel; (2) all pleadings including any record of proceedings made by the magistrate court; (3) any exhibits; (4) the judgment sought to be reviewed with date of filing noted thereon; and (5) the record of the hearing in the magistrate court, if any.

". . .

"(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."

Defendants' claim concerning an insufficient transcript elevates form over substance. We, of course, note that there was not a title page. We fail to see how the absence of a title page could prejudice the defendants. Defendants do not point to any item omitted which would prejudice them. Neither do defendants claim a lack of notice of the filing of the criminal complaint and the final order in the district court.

Even though Magistrate Rule 41(d) states that the magistrate court shall transmit a transcript of all proceedings to the district court, this does not relieve defendants who are initiating the appeal of their responsibility to see that a proper transcript is forwarded. *State v. Duran*, 91 N.M. 756, 581 P.2d 19 (1978). They cannot lay in wait until a time limitation has expired and then take advantage of a situation they helped create. See *State v. Garcia*, 80 N.M. 466, 457 P.2d 985 (1969); *State v. Cruz*, 86 N.M. 455, 525 P.2d 382 (Ct.App.1974); *State v. Harrison*, 81 N.M. 324, 466 P.2d 890 (Ct. App.1970).

Defendants next assert that Rule 37 of the Rules of Crim.Procedure for district court applies with regard to the 6 month rule. See §§ 41–23–1 through 57, N.M.S.A. 1953 (2d Repl.Vol. 6, 1972, Supp.1975). This assertion is totally without merit. See *State v. DeBaca*, 90 N.M. 806, 568 P.2d 1252 (Ct.App.1977).

Defendants' assertion that Rule 31(b) is applicable is totally without merit. The rule referred to by defendants was repealed October 1, 1976. The same is true with regard to § 36–6–9, N.M.S.A.1953 (2d Repl. Vol. 6, 1972). That section was repealed by the Laws of 1975, ch. 242, § 12.

Defendants' claim of mootness is likewise without merit. Magistrate Rule 41(c) provides for an automatic stay when an appeal is filed.

The district court had no authority to dismiss the appeal, with prejudice, under the facts of this case. Absent a hearing on the appeal within 6 months of the date of the notice of appeal, its only authority was to dismiss the appeal and remand the cause to the magistrate court for enforcement of its judgment. Cf. *State v. DeBaca*, supra.

The order of the district court is reversed. The cause is remanded. The district court is directed to set aside its order of May 18, 1978 and enter an order dismissing the appeal and remand to the magistrate court for enforcement of its judgment.

IT IS SO ORDERED.

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

584 P.2d 205

David S. TENNEY, Debra L. Tenney and David Lane Tenney, a minor, by his next friend, David S. Tenney, Plaintiffs-Appellees,

v.

The SEVEN-UP COMPANY, and Seven-Up Bottling Company, Defendants-Appellants.

No. 3313.

Court of Appeals of New Mexico.

Sept. 5, 1978.

Writ of Certiorari Denied Sept. 19, 1978.

Joe L. McClaugherty, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, for defendants-appellants.

Ken Cullen, Knott & Associates, Albuquerque, for plaintiffs-appellees.

OPINION

HERNANDEZ, Judge.

Plaintiffs' complaint pled alternatively strict products liability and negligence. However, at trial plaintiffs abandoned the theory of negligence and stipulated that the only theory under which they were proceeding was strict products liability. Plaintiffs prevailed and the defendants appeal alleging two points of error; the first of "which is dispositive of this appeal . . . neither the court's findings of fact nor the evidence adduced at trial supports the judgment entered herein on the theory of strict products liability."

The plaintiff, Debra Tenney, purchased 7-Up from the defendant, Piggly-Wiggly.

She took them home and placed them in the refrigerator. Two days later she removed a bottle, opened it, poured a portion for herself and gave her 4 or 5 month old son a portion in his bottle. While feeding her baby, she noticed what appeared to be worms in the bottom of the bottle. She called the 7-Up bottler who sent a representative over. He took a sample of the substance for analysis. Mrs. Tenney retained a sample to have her own analysis done.

The 7-Up representative returned sometime later and informed Mrs. Tenney it was not worms in the bottle and that the substance was not harmful. Sometime later the Environmental Health Department of the City of Albuquerque advised her that the substance she had asked to be analyzed was "blood vessels of unknown origin."

The doctrine of strict products liability in tort became the law of New Mexico in the case of *Stang v. Hertz Corp.*, 83 N.M. 730, 497 P.2d 732 (1972) when the Supreme Court adopted the Restatement of Torts, 2nd § 402A.

"§ 402A. *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 product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

The elements which a plaintiff has the burden of proving under this doctrine are: (1) the product was defective; (2) the product was defective when it left the hands of the defendant and was substantially unchanged when it reached the user or consumer; (3) that because of the defect the product was unreasonably dangerous to the user or consumer; (4) the consumer was injured or was damaged; (5) the defective condition of the product was the proximate cause of the injury or damage. *Suvada v. White Motor Company*, 32 Ill.2d 612, 210 N.E.2d 182 (1965); *Swain v. Boeing Airplane Co.*, 337 F.2d 940 (2nd Cir. 1964).

Comments g, h, and i to Section 402A, supra, recite in part as follows:

"g. *Defective condition.* The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

"Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

"h. A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable.

. . .

"i. *Unreasonably dangerous.* The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous' in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

As our Supreme Court pointed out in *Stang*, prior to the doctrine of strict product liability, a buyer of a defective and dangerous product had two possible theories of recovery against the manufacturer, negligence or breach of warranty. However, because of "shortcomings" in each of these theories, centering on matters of proof, the doctrine of strict liability evolved. The rationale being that the loss suffered by the injured party should be placed on the manufacturer, regardless of negligence or bad faith, to be included as a cost of the product. See, *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841 (5th Cir. 1967). Notwithstanding, the doctrine does not make the manufacturer an absolute insurer. The strict liability is imposed as a matter of public policy because the product involves a risk of death or serious personal injury or substantial damage. *Suvada v. White Motor Company*, supra.

Viewing the evidence in the light most favorable to the plaintiffs and indulging in all reasonable inferences to be drawn therefrom, it is clearly insufficient to support a judgment. It was plaintiffs' burden to prove that the product was not only defective, defining the word defective in this circumstance as unsuitable for its intended purpose, but they also had to prove that it was unreasonably dangerous. This they failed to do. Mrs. Tenney's reaction of stomach cramps, etc., and her anxiety over her child were normal reactions over seeing some foreign object in the bottle. But the only evidence in the record was that the blood vessels were harmless.

The judgment is reversed and the case remanded with instructions to the trial court to vacate the judgment and enter judgment in favor of the defendants.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

Evidence little, damages small, issues and law in the court below formless, and the change of position taken on this appeal, proves the inadequacy in the presentation, both in the trial court and on this appeal.

The first count in plaintiffs' complaint proceeded on the strict liability theory that a bottle of 7-Up was in an *unwholesome condition, unreasonably dangerous.* The second count proceeded on the theory of negligence. During the trial plaintiffs abandoned their claim of negligence without explanation. Plaintiffs' attorney apparently overlooked the New Mexico Food Act, § 54–1–1, et seq., N.M.S.A. 1953 (Repl. Vol. 8, pt. 2); 35 Am.Jur.2d *Food*, § 92 (1967), and 36A C.J.S. *Food* § 59, p. 913

(1961). Good law on the subject of negligence had no value. See also, 35 Am.Jur.2d *Food*, § 89; 36A C.J.S. *Food* § 59; and *Tafoya v. Las Cruces Coca-Cola Bottling Company*, 59 N.M. 43, 278 P.2d 575 (1955).

Plaintiffs and defendants submitted requested findings of fact on defendants' negligence. *None of the requested findings proceeded on the theory of strict liability, and, as a result, the court made none. Both parties proceeded here on the theory of strict liability.*

Defendants claim that plaintiffs "must prove that the product of defendants was erroneously dangerous to them as user or consumer and that it was sold to them in a defective condition."

Neither of the parties submitted authority precisely in point. Under the doctrine of strict liability, plaintiffs were entitled to recover damages. *Shoshone Coca-Cola Bottling Company v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966); *Coca-Cola Bottling Co. of Plainview v. White*, 545 S.W.2d 279 (Tex. Civ.App. 1976); *Slonsky v. Phoenix Coca-Cola Bottling Company*, 18 Ariz.App. 10, 499 P.2d 741 (1972); *Allen v. Coca-Cola Bottling Company*, 403 S.W.2d 20 (Ky. 1966).

Judge Hernandez reversed because there was no evidence that the contents of the 7-Up bottle was "unreasonably dangerous." This terminology has not been defined. John W. Wade, distinguished professor and renown authority on the subject, believed that the courts were trying to say that "unreasonably dangerous" meant that "the product must be *harmful* or *unsafe* because of something wrong with it. . . . It may suggest an idea like ultrahazardous, or abnormally dangerous, and thus give rise to the impression that the plaintiff must prove that the product was unusually or extremely dangerous. . . . There are other terms that might be used. For example, unsafe, or harmful, *or injurious*—or, *in the case of foodstuffs, unwholesome*. . . . *Selling unwholesome food is negligence in itself, without anything more. This, by accurate analysis, is a form of strict liability.*" [Emphasis added.] Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 830, 832, 835 (1973). For defenses in products liability, see Noel, *Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk*, 25 Vand.L.Rev. 93. See also Restatement, Torts 2d (1965) § 402A, comment (h). "Over a span of more than a century, several states adopted a strict form of liability for food, which Titus argues is the 'only legitimate case-law support' for the strict liability rule in section 402A of the Second Torts Restatement. This 'special food warrant' supported precedents dated to medieval times, supplied the basis for a number of strict liability decisions concerning products that had analogously close contact with the [human] body." Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 Va.L.Rev. 1109, 1251 (1974); Titus, Restatement (Second) of Torts Section 402A and the Uniform Commercial Code, 22 Stan.L.Rev. 713, 742 (1970).

Based on reasons of public policy, the doctrine of strict liability was evolved to place responsibility on the party responsible for the injury occurring. In this case, it falls upon defendants. The judgment should be affirmed.

584 P.2d 713

Pamela C. WASSON,
Petitioner-Appellant,

v.

Glenn W. WASSON,
Respondent-Appellee.

No. 3411.

Court of Appeals of New Mexico.

Sept. 12, 1978.

R. Thomas Dailey, Dailey & Cardin, P. C., Farmington, for petitioner-appellant.

OPINION

SUTIN, Judge.

Pursuant to § 22–2–23, N.M.S.A.1953 (Vol. 5, 1975 Supp.), petitioner, divorced wife of respondent, and mother of two children born of the marriage, petitioned the trial court to terminate the parental rights of respondent. The petition was denied and the mother appeals. The father, respondent, is absent in this appeal. We affirm.

The trial court found that no parent-child relationship existed between the father and the children; that the father abandoned the children; and that the only basis for not ordering termination of the rights immediately after the hearing was the court's concern with property rights of the children. Furthermore, the court found that property rights which would be given up by the children were not substantially different in this case than would be present in any case involving termination of parental rights. The rights of the minor children to inherit, not only from their father but as issue of his forbears, is a right that should not be dispensed with by the court. To cut off the rights of the children to their natural father would in effect penalize them through no fault of theirs to protections of inheritance, Social Security benefits, veteran's benefits, medical insurance and other protective devices and services obtainable by most if not all children upon the death of a father.

The court concluded that the father was not otherwise unfit; that the continuation of the father's conduct will probably not cause any serious harm to the minor children nor cause any disintegration of the parent-child relationship; and that the minor children were entitled to a legal father.

Even though neither the father nor guardian ad litem appointed by the district court submitted briefs nor appeared on appeal, this Court must recognize and consider all aspects of the legal problems before it. As a matter of public policy, in every proceeding in which minor children are involved, a court's primary obligation is to further the best interests of the child. We note that an attorney is required for an infant not otherwise represented in an action. Section 21–1–1(17)(c), N.M.S.A.1953 (Repl.Vol. 4). In fact it would have been plain error for the court to proceed in the absence of counsel for the children. *People In Interest of M. B. v. J. B.*, 535 P.2d 192 (Colo.1975). A court of equity, if cognizant of the necessary facts, should on its own motion protect the rights of minors, when involved in litigation to which they are not parties. *Workman v. Workman*, 167 Neb. 857, 95 N.W.2d 186 (1959). Furthermore, if no guardian ad litem has been appointed, it would be the duty of this Court to see that rights of minor children are protected. *Jackson v. Walters*, 246 S.C. 486, 144 S.E.2d 422 (1965). *See Haden v. Eaves*, 55 N.M. 40, 226 P.2d 457 (1950). Minor children in court are represented not only by a guardian ad litem, but by the court itself. *Bond v. Joplin's Heirs*, 64 N.M. 342, 328 P.2d 597 (1958); *Haden, supra.*

It is the duty of a trial court and this Court to protect legal rights of children. If the rights of children were not divested, the trial court and this Court would favor a termination of the father's parental rights with the children.

With this policy in mind, we approach the mother's contention raised in this appeal.

Section 22–2–23(G) reads:

> A judgment of the court terminating parental rights divests the parent *and the child of all legal rights, privileges,* duties and obligations, *including rights of inher-*

itance, with respect to each other . . . [Emphasis added.]

See *Anguis v. Superior Court,* 6 Ariz.App. 68, 429 P.2d 702 (1967); *Roelfs v. Sam P. Wallingford,* 207 Kan. 804, 486 P.2d 1371 (1971).

Section 22–2–21(I) defines "parental rights" to mean "all rights of a parent with reference to a minor, including parental right to control, or to withhold consent to an adoption, or to receive notice of a hearing on a petition for adoption." We are not concerned with these "parental rights"; we are concerned with the children's rights in regard to their parent's property.

The mother claims that a finding of "no parent-child relationship" between the father and his children is decisive and that the court should not have considered the rights of the children because those rights have not vested and are remote. Her argument is that the parent-child relationship is non-existent and that this relationship is the sole consideration in termination proceedings. Therefore, the trial court went beyond the "sole consideration" defined in *Huey v. Lente,* 85 N.M. 597, 514 P.2d 1093 (1973), adopting the special concurring opinion of Judge Hernandez at 85 N.M. 585, 514 P.2d 1081 (Ct.App.1973). We disagree.

In *Huey v. Lente,* Huey operated a foster parent home. After HSSD determined that the Lente child should be returned to his mother, Huey sued Lente to terminate her parental rights to her son. Judge Hernandez said:

> As a threshold matter, a large part of the focus of *the trial court's findings* and the greater part of the petitioners' presentation of evidence involved matters which I would hold to be irrelevant as a matter of law. . . . By the clear and unambiguous language of the statute, *the sole consideration to be applied in termination proceedings is the relationship of "a parent with respect to a minor."* § 22–2–23, supra. [Emphasis added.] [85 N.M. at 595, 514 P.2d at 1091.]

In the instant case, the court did give sole consideration in its findings to the relationship of the father to his children. The trial court did not go beyond the sole consideration defined in *Huey, supra.* In effect, the court said that it is more important to protect the rights of the children than to cut them off to satisfy the desires of the mother.

When the court found the parental relationship between respondent and children non-existent, the court simply meant that the father was not carrying on the duties of a father with respect to his relationship with his children.

The mother overlooks the opening language of § 22–2–23(A). It reads:

> The parental rights of a parent with respect to a minor *may* be terminated by the court . . . . [Emphasis added.]

The word "may" is not mandatory. It is permissive or directory. Section 1–2–2(I), N.M.S.A.1953 (Repl.Vol. 1). When a child has been abandoned by a father, i. e., when the parental relationship between father and child is non-existent, it is not mandatory that the court terminate parental rights. The decision rests within the judicial discretion of the court. The trial court did not find the father "unfit" as provided in § 22–2–23(A)(3). See *In re Moody,* 21 Or.App. 396, 535 P.2d 102 (1975). To the contrary, the court concluded that the father was "not otherwise unfit." This meant that the father-children relationship could be controlled by the divorce decree and any subsequent proceedings thereunder.

We believe the trial court envisioned among many protective devices, one, for example—the right of the children to recover wrongful death damages arising out of the death of their father due to the negligence of a third person. See *Webb v. Scully,* 430 F.Supp. 672 (E.D.La.1977); *Roelfs, supra.* The welfare of the children was uppermost in the court's mind. This it has

been, and should always be in cases involving the termination of parental rights.

The trial court did not abuse its discretion.

The other points raised by plaintiff are without merit.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., dissents.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

I recognize that the use of the word "may" in the opening sentence of § 22–2–23, supra, clearly indicates a legislative intention that the termination of parental rights under this section should rest in the sound discretion of the trial court. However, it is my opinion that there was an abuse of that discretion in this instance.

For point of emphasis, I wish to repeat the following findings and conclusions of the trial court:

"2. Since the time of the divorce, Respondent has willfully failed to support the children or to provide for their financial, emotional, educational or spiritual needs.

"3. Since the time of the divorce Respondent has not maintained a parental relationship with the children and has performed none of the duties normally performed by a father."

The following, although entitled findings, are in fact conclusions:

"4. No parent-child relationship exists between Respondent and the children.

"5. Respondent has abandoned the children."

These findings were supported by clear and convincing evidence.

Section 22–2–23, supra, is the statutory embodiment of a long standing rule of law in New Mexico, namely; that parental rights although entitled to considerable legal deference are not absolute and are subject to control or termination by legislative or judicial action. See *Focks v. Munger,* 20 N.M. 335, 149 P. 300 (1915); *Shorty v. Scott,* 87 N.M. 490, 535 P.2d 1341 (1975). I also recognize that there is another long standing rule, and that is, in all matters involving child-parent relationships, principle consideration should be given to what the best interests and welfare of the child are. *Pra v. Gherardini,* 34 N.M. 587, 286 P. 828 (1930). The trial court gave as its reason for refusing to terminate respondent's parental rights "was concern with the property rights of the children." There is nothing in the record to indicate that the respondent has or will possibly ever have anything to leave to his children. To continue the child-parent relationship upon the vague possibility that the children might receive some benefits upon respondent's death in light of the trial court's own findings that respondent has not fulfilled one of his duties of parenthood is an abuse of discretion, in my opinion. Accordingly, I would reverse the order of the trial court.

584 P.2d 1306

STATE of New Mexico,
Plaintiff-Appellee,

v.

Virginia ORTIZ and Rolanda Velasquez,
Defendants-Appellants.

Nos. 3443, 3448.

Court of Appeals of New Mexico.

July 25, 1978.

Rehearing Denied Aug. 7, 1978.

Writ of Certiorari Denied Sept. 1, 1978.

John B. Bigelow, Chief Public Defender, Michael Dickman, Asst. Appellate Defender, Sante Fe, for defendants-appellants.

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

OPINION

WOOD, Chief Judge.

Defendants were convicted of burglary and larceny under $100. No sentence was imposed for the larceny convictions; the appeals are from the burglary convictions. See *State v. Morris*, 69 N.M. 89, 364 P.2d 348 (1961). Defendants were tried jointly, but took separate appeals which are hereby consolidated. The issues involve: (1) unauthorized entry, (2) surrebuttal evidence, and (3) identification of Ortiz.

Unauthorized Entry

The victim and her husband operate several businesses in Tucumcari. They keep coins in their home so that change will be available to the businesses when change is needed. On the evening of the crime there was $73.00 in rolled coins in a money bag on a stereo in the living room.

Ronnie Young is acquainted with the victim and her family; he had been a visitor to her home. About 7:00 p. m. he came to the victim's home and talked to the victim who was sitting in an easy chair near the stereo. Ronnie wanted the victim to give him some money; she declined, Ronnie left.

About 8:45 p. m. two females knocked on the victim's door. The victim responded to the knock and was told "there was something the matter with my daughter, that I needed to get hold of her." The females mentioned the daughter by name. This information "shook" the victim up; she asked the females to come in. The victim went to the kitchen where the telephone was located. The victim picked up the telephone but could not remember the telephone number of her daughter, who was in Albuquerque. "I hung the telephone back up and I heard the door bang, and I looked and the girls was gone." The money bag was missing.

Ronnie Young and the two defendants are good friends; earlier in the day of the burglary the defendants had been with Ronnie. On the day after the burglary, Ronnie returned some rolled coins to the victim's husband.

Section 40A–16–3, N.M.S.A.1953 (2d Repl. Vol. 6) defines burglary in terms of an "unauthorized entry". The evidence is uncontradicted that the victim invited the females into her home. However, the trial court instructed the jury:

> If you find beyond a reasonable doubt that authorization or permission to enter the dwelling . . . was obtained by means of fraud, deceit or pretense, then entry into the dwelling house constitutes entry without authorization or permission.

Defendants contend there was no evidence to support this instruction, but that even if the evidence were sufficient, the instruction is legally incorrect.

There is no direct testimony that the tale told by the females to gain entry was false. However, the evidence was sufficient to present a jury question as to entry by fraud, deceit or pretense. That evidence was: 1) Ronnie's acquaintanceship with both the victim and the defendants; 2) Ronnie's visit to the home on the evening of the crime, enabling him to view the money bag; 3) Ronnie's return of rolled coins on the day after the burglary; and 4) the departure of the females from the home as soon as the victim left the living room, before the telephone call could be made and, thus, before the entry tale could be checked.

Is entry by fraud, deceit or pretense an unauthorized entry? The answer to this question involves the effect to be given to an entry by consent. Where burglary has been defined in terms of entry with the requisite criminal intent or unlawful entry with the requisite criminal intent, it has

been held that consent was no defense to a burglary charge. Annot., 93 A.L.R.2d 531 (1964); *Pinson v. State*, 91 Ark. 434, 121 S.W. 751 (1909); *State v. Montague*, 10 Wash.App. 911, 521 P.2d 64 (1974).

New Mexico requires more than an entry with the requisite criminal intent. The entry must be unauthorized.

The common law defined burglary in terms of breaking and entering. 4 Blackstone's Commentaries (Lewis's Ed.1902) 226–227 states:

> [T]o knock at the door, and upon opening it to rush in with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was no actual breaking; for the law will not suffer itself to be trifled with by such evasions . . . .

The fact of "no actual breaking" did not bar a burglary conviction so long as there was a constructive breaking. *Nicholls v. State*, 68 Wis. 416, 32 N.W. 543, 546, 60 Am.Rep. 870 (1887) states:

> [I]t has frequently been held in this country that "to obtain admission to a dwelling-house at night, with the intent to commit a felony by means of artifice or fraud, or upon a pretense of business or social intercourse, is a constructive breaking, and will sustain an indictment charging a burglary by breaking and entering." [Case citations omitted.]

See *Johnston v. Commonwealth*, 85 Pa. 54, 27 Am.Rep. 622 (1877).

Although New Mexico no longer defines burglary in terms of a "breaking", the offense of burglary remains an offense against the security of the property which is entered. See *State v. Tixier*, 89 N.M. 297, 551 P.2d 987 (Ct.App.1976). Where the consent to enter is obtained by fraud, deceit or pretense, the entry is trespassory because the entry is based on a false consent; that is, the entry is outside the consent that was given. See *State v. Keys*, 244 Or. 606, 419 P.2d 943 (1966). Stated another way, a consent obtained by fraud, deceit or pretense is no consent at all. *People v. Sipult*, 234 Cal.App.2d 862, 44 Cal.Rptr. 846 (1965). Such entries are similar to the constructive breaking at common law.

A trespassory entry would be an unauthorized entry; an entry without consent would be an unauthorized entry. Similarly, entry on the basis of an unauthorized consent would be an unauthorized entry. See *State v. Tolley*, 30 N.C.App. 213, 226 S.E.2d 672 (1976) where it was held that a son's consent to enter the home and steal his parents' valuables was an unauthorized consent.

Whether entry by fraud, deceit or pretense is characterized as trespassory, without consent, or without authorized consent, such an entry is unauthorized. Thus, the trial court did not err in refusing to direct a verdict and did not err in instructing the jury on entry by fraud, deceit or pretense.

Surrebuttal Evidence

Defendants presented an alibi defense; that on the night of the burglary and during the time of its commission, they were visiting Michael Davis at his apartment. Davis' testimony supported the defendants. During his cross-examination, Davis testified that he did not work on the evening the crime was committed. According to Davis, he was employed in several capacities—night auditor, cocktail waiter and bartender. Although on a salary, Davis was "pretty sure" his hours of work would be noted and that Weigel "does" the payroll system.

At the conclusion of Davis' testimony, the defendants rested. At the request of defendant Velasquez, without objection, Davis was excused.

The prosecutor called Weigel as a rebuttal witness. She testified that Davis had two days off each week, the slowest days, either a Monday-Tuesday or a Tuesday-Wednesday. The burglary occurred on a Friday. She testified that Davis worked on

the night of the crime; "I have bar tickets with his signature on them." The bar tickets carried a date stamp for the night of the crime and had "Michael" written on them. The only "Michael" employed at this business was Davis.

After rebuttal testimony was concluded, defendant Velasquez testified in surrebuttal. See Rule of Crim.Proc. 40. At the conclusion of Velasquez' testimony the defense rested.

Motions were then argued and ruled on. The instructions were then settled.

After the instructions were settled, Ortiz moved to reopen the evidence and recall Davis as a witness "for an explanation as to how his signature appears on these [bar] tickets" which were dated on the night of the crime. In support of this motion, she tendered some explanatory testimony by Davis.

The trial court denied the motion, explaining that if Davis were allowed to be recalled to testify, the prosecution would want to recall Weigel to contradict Davis. Defendants claim the trial court erred in denying the motion to recall Davis as a witness. We disagree.

Whether to permit the case to be reopened for additional testimony is within the discretion of the trial court. *State v. Deaton*, 74 N.M. 87, 390 P.2d 966 (1964); *State v. Wilkerson*, 83 N.M. 770, 497 P.2d 981 (Ct.App.1972). The appellate issue is whether the trial court's ruling was an abuse of discretion.

Davis was excused as a witness at the request of defendant Velasquez. Rebuttal and surrebuttal testimony was presented. The motion to reopen was not made until the instructions had been settled. Denying such a late motion was not an abuse of discretion.

Defendants claim there was an abuse of discretion because Davis was their only alibi witness, that the rebuttal evidence (of signed and dated bar tickets) "was highly damaging and virtually incontrovertivle [sic] without Davis' explanation" and the denial of the opportunity to offer an explanation "unreasonably limited defendant's right to present a defense and call witnesses on her behalf." Both defendants testified to other persons allegedly present at Davis' apartment on the night of the crime; there is no showing as to why these other persons could not have been called as alibi witnesses. There was no improper limitation on calling witnesses for the defense. Defendants presented surrebuttal testimony but did not call Davis at that time and did not offer an explanation why they failed to do so. There was no abuse of discretion in denying the motion to reopen in order to call Davis as a witness on surrebuttal.

Identification of Ortiz

The victim "positively" identified Velasquez as one of the burglars. As to Ortiz, "I'm sure she is the one, but I can't positively identify her." The victim identified Ortiz as one of the burglars on the basis of her slim build, her "real pretty eyes and high cheek bones." This in-court identification of Ortiz was sufficient.

> It is not essential for a conviction that a positive identification be made of the accused. It is sufficient if the witnesses testify that in their belief, opinion or judgment the person accused is the person who perpetrated the crime and want of positiveness goes only to the weight of the testimony.

State v. Williamson, 78 N.M. 751, 438 P.2d 161, 164 (1968), cert. denied, 393 U.S. 891, 89 S.Ct. 212, 21 L.Ed.2d 170 (1968); *State v. White*, 83 N.M. 354, 491 P.2d 1165 (Ct.App. 1971).

Ortiz contends her in-court identification was so impermissibly tainted as to render it invalid.

The victim was unable to describe the second burglar (Ortiz) to the police on the night of the crime. After thinking about it for a day or two, she told the police the second robber was slim, had pretty eyes, high cheek bones, and was wearing some kind of scarf or turban.

After the burglary, the victim next saw Ortiz at the preliminary hearing. The police had told the victim they thought they had the girl who had taken the money. There is no evidence that the victim identified Ortiz at the preliminary hearing; the "taint" claim is what the police told the victim and the victim's observations of Ortiz at the preliminary hearing.

Subsequent to the preliminary hearing, the victim observed Ortiz at a dance. The victim testified that the observations at the dance helped in her identification of Ortiz; that neither the preliminary hearing nor statements by the police affected her identification, "No, I can picture them eyes, those pretty eyes and the high cheek bones."

Whether the victim's identification of Ortiz was impermissibly tainted depends on the totality of the circumstances. *State v. Ellis*, 88 N.M. 90, 537 P.2d 698 (Ct.App. 1975). The statements by the police to the victim and the victim's observations of Ortiz at the preliminary hearing are circumstances to be considered. *State v. Self*, 88 N.M. 37, 536 P.2d 1093 (Ct.App.1975). Other circumstances are: 1) the description to the police a day or two after the crime; 2) the observation of Ortiz at a dance; 3) the lack of identification of any person other than Velasquez; 4) the fact that Ortiz matched the victim's description; 5) the victim's disclaimer that she was influenced by the police or the preliminary hearing; 6) the care with which the victim identified Ortiz—sure but not positive; and 7) the fact that the in-court identification was based on items given to the police prior to the preliminary hearing. With these circumstances, we cannot say the trial court erred in refusing to strike the victim's testimony identifying Ortiz.

The judgment and sentence, for each defendant, are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

584 P.2d 1310

J. R. POTEET, Individually and as next friend of Renee Poteet, a minor, and Mrs. J. R. Poteet, Plaintiffs-Appellants,

v.

ROSWELL DAILY RECORD, INC., Defendant-Appellee.

No. 3241.

Court of Appeals of New Mexico.

Sept. 12, 1978.

David L. Norvell, Albuquerque, for plaintiffs-appellants.

T. T. Sanders, Jr., Sanders, Bruin & Baldock, Roswell, for defendant-appellee.

OPINION

LOPEZ, Judge.

The plaintiffs appeal a summary judgment granted against them in a suit for invasion of privacy resulting from an article which appeared in the defendant's newspaper. We affirm.

The only issue on appeal is whether the trial court erred in granting the summary judgment.

The plaintiffs filed a complaint against the defendant newspaper alleging that on January 6, 1977, the defendant published a fourteen year-old's name, Renee Poteet, as having been the victim of an attempted sexual criminal act. The complaint alleged that Renee was not a public figure; that the publication was not newsworthy; and under the circumstances, the publication would be offensive to persons of ordinary sensibilities. The plaintiffs asked for special, general and punitive damages. The defendant filed a motion for summary judgment, and both parties filed affidavits. The court granted the defendant's motion for summary judgment, and plaintiffs appeal.

Facts

Renee Poteet was kidnapped and criminally sexually assaulted on December 19, 1975. A complaint was filed with the magistrate on December 20th. The assistant district attorney stated in his affidavit that one of the reporters promised that Renee's name would not be published in the article appearing at the time of the incident. Irrespective of whether such a promise was made, no article releasing plaintiff's name was published prior to the preliminary hearing of January 6, 1977. After the preliminary hearing an article was published in the defendant's newspaper naming Renee Poteet as the victim of a sexual assault. Notes for the story had been taken by a reporter at the preliminary hearing.

The plaintiffs do not allege that the publication was erroneously reported. They only allege: (1) that the publication was not newsworthy and was, therefore, not privileged; and (2) even if it was privileged, the defendant had no right to publish it on the grounds of estoppel and waiver.

In a recent United States Supreme Court case, *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 1046, 43 L.Ed.2d 328 (1975), the Supreme Court said:

> [T]he prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record.

In the instant case the article was published following an open preliminary hearing in magistrate court. The New Mexico Supreme Court, quoting from Prosser on Torts, 2d Ed., 623–624, stated:

> "Since it obviously is to the interest of the public that information be made available as to what takes place in public affairs, a qualified privilege is recognized under which a newspaper . . . may make such a report to the public. * *
>
> "An important field for the privilege is the reporting of any judicial proceeding, no matter how inferior the tribunal . . . ." *Hubbard v. Journal Publishing Company*, 69 N.M. 473, 368 P.2d 147 (1962).

The incident was a matter of public record and was therefore newsworthy. The trial court correctly ruled that the article published in defendant's newspaper was privileged.

Plaintiffs argue that the newspaper had a general policy of refraining from using minors' names in sexual assault incidents and that this policy estopped defendant from publishing the plaintiff's name. The requirements of estoppel have been set out in *Tome Land & Improvement Co. v. Silva*, 83 N.M. 549, 494 P.2d 962 (1972). In *Tome Land*, the New Mexico Supreme Court stated:

> It is the rule in New Mexico that estoppel by conduct arises when a party has been induced by the conduct of the other to do, or forbear from doing, something he would not have done but for such conduct. [citation omitted] . . . the party asserting the estoppel must rely, to its detriment, on the conduct of the party against whom the estoppel is being asserted.

Plaintiffs introduced no affidavits which would indicate that they relied on defendant's policy, or that they even had knowledge of the policy prior to the time Renee testified at the preliminary hearing. Without knowledge there can be no reliance. Estoppel was not applicable to this case as a matter of law.

Plaintiffs further argue that the newspaper waived its privilege by virtue of the reporter's representations to the district attorney that plaintiff's name would not be published.

Even assuming that the reporter made statements to the district attorney regarding non-publication of Renee's name, such statements do not raise an issue of material fact which would preclude summary judgment.

As the New Mexico Supreme Court stated in *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972):

> Unquestionably the burden was on defendants to show an absence of a genuine issue of fact, or that they were entitled as a matter of law for some other reason to a summary judgment in their favor. [citations omitted] However, once defendants had made a prima facie showing that they were entitled to summary judgment, the burden was on plaintiff to show that there was a genuine factual issue and that defendants were not entitled as a matter of law to summary judgment. [citations omitted]

As the party moving for summary judgment, the defendant made a *prima facie* showing by raising the defense of privilege, thus making it immune from suit as a matter of law. At that point the burden shifted to plaintiffs to show why defendant was not immune. Plaintiffs sought to do so by claiming that defendant had waived its privilege. When plaintiffs raised this claim, they had to show that there was an issue of fact as to waiver. They attempted to do this by saying the reporter had promised plaintiff's name would not be published. This was insufficient to show waiver without raising the additional requirement of the reporter's authority to speak for the defendant. Plaintiffs made no showing that the reporter had any authority to make

the statements attributed to him. Absent authority, the statements of the reporter could not be considered as a waiver of a constitutional privilege by the defendant newspaper. See *Rekart v. Safeway Stores, Inc.*, 81 N.M. 491, 468 P.2d 892 (Ct.App. 1970).

Summary judgment was proper because defendant's publication of the information was privileged as a matter of law, and waiver and estoppel do not apply as a matter of law. In spite of the unfortunate incident which occurred, we have no alternative but to affirm the trial court's granting of summary judgment.

The summary judgment is affirmed.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (specially concurring).

I specially concur.

Justice Jackson, dissenting in *Craig v. Harney*, 331 U.S. 367, 394, 67 S.Ct. 1249, 1263, 91 L.Ed. 1546 (1947), said:

> This is one of those cases in which the reasons we give for our decision are more important to the development of the law than the decision itself.

With this corollary in mind, the Supreme Court of New Mexico allowing publication of this opinion, I shall state the reasons why the present status of the doctrine of the right to privacy versus freedom of the press should be modified wherein the child victim of a crime is exposed by the press to public disclosure.

The Court of Appeals does not have the power to reverse decisions of the Supreme Court. It does have the power of suggestion that cases be overruled or exceptions made, even though its opinion is denied publication.

"It cannot be repeated too often that the freedom of the press so indispensable to our democratic society presupposes an independent judiciary which will, when occasion demands, protect that freedom." [331 U.S. at 384, 67 S.Ct. at 1258, Justice Frankfurter, dissenting.] The judiciary continues to protect the press even though the judiciary is criticized and condemned by the press. This criticism is essential to the continuum of an independent judiciary. Personal feelings must not thwart our duty to protect constitutional rights of the media. Nevertheless, because of the importance of the effect of freedom of the press on family life, we should seek a solution to this vexatious problem.

It is now established law in the United States and in the State of New Mexico, that the right to privacy fades when a newspaper article reflects accurate information obtained from public documents or from testimony given in a public hearing. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Hubbard v. Journal Publishing Company*, 69 N.M. 473, 368 P.2d 147 (1962); *Rockafellow v. New Mexico State Tribune Co.*, 74 N.M. 652, 397 P.2d 303 (1964). The purpose of this opinion is to suggest three ways in which the detriment caused a child victim can be protected under the doctrine of the right to privacy.

In passing, it is important to note why the name of the family and the child victim should be deleted from the caption and the opinion rendered in this appeal.

Because of a news article in the Roswell Daily Record, parents of a child, deeply concerned with disclosure of the name and address of a 14-year-old daughter, the victim of a 25-year-old "independent-fundamental minister" who feloniously kidnapped and assaulted her, moved from Roswell, New Mexico to the State of Texas. If this opinion, or one published by the Supreme Court, is placed in the New Mexico Reports and the Pacific Reporter, the family name, including that of the daughter, will become known to judges and lawyers throughout the land who research the doctrine of the

right of privacy, and in some respects to the public. By taking this appeal, the parents cause this odious event to be indelibly printed on the pages of public books, law review articles and comments. During the lifetime of the family and thereafter, this written discourse will be a matter of public record. To delete the family name would help the family.

If the Supreme Court allows television in the courtroom to screen proceedings in criminal trials and hearings involving child victims, and publicly show the movie, the effect on families and children will be devastating.

In the instant case, the Roswell Daily Record was not able to disclose the name of the child when it first had knowledge of this atrocious event and disseminated the news. The information was withheld by the assistant district attorney and the police. The conduct of the government was laudable. It protected the dignity of the family. A police report that shows the name and address of a rape victim is a public record not exempt from inspection by the public and the press. *Ayers v. Lee Enterprises Inc.*, 277 Or. 527, 561 P.2d 998 (1977). The Daily Record did not force the government to produce the information. The conduct of the press was laudable.

A few days later, the daughter appeared at a preliminary hearing in magistrate court and testified. A reporter for the newspaper was present who saw, heard, and reported the name and address of the child. It is common knowledge that the public who reads the event in the news article is shocked. To read the name and address of the child is distressing to the family and the child. The child victim, an ordinary young female, is not a celebrity, a public official or public figure.

The disclosure of the name and address of a young rape victim has no news value for public consumption. The name of a rape victim is not necessary to tell the story. It may be said with some degree of certainty that the American family scorns disclosure of this nature. Disclosure does not serve the public interest because the name of the child is not newsworthy. The public need not know the name to function in a democratic society. To deny the press the right of disclosure of the name did not impinge upon the right to freedom of the press.

This young female testified to assist the State and the public in the conviction of a criminal. Yet, because freedom of the press is declared to be essential to a healthy government in a free society, the courts grant the press the right to broadcast to the world with impunity the name and address of a child rape victim. Parents are unaware of this constitutional right. If notice to the parents were required, parents could exercise their discretion in submitting their children to the whimsey of the press. It would not harm the press or the public to require consent of parents to disclose the name of child victims. A New York written consent statute was held constitutional in *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). To hold that names of children may be publicized without parental consent with absolute immunity runs counter to their rights to " 'the pursuit of happiness' " as contemplated by those who founded this nation. *Deaton v. Delta Democrat Publishing Company*, 326 So.2d 471 (Miss.1976).

In *Cox Broadcasting Corp.*, Mr. Justice White said:

> [P]owerful arguments can be made, and have been made, that however it may be ultimately defined, there *is* a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity. [Emphasis by Court.] [420 U.S. at 487, 95 S.Ct. at 1042, 43 L.Ed.2d at 345.]

Justice White relied on a scholarly book and law review articles. In closing his opinion, Justice White said:

> *If there are privacy interests to be protected in judicial proceedings*, the States must respond by means which avoid pub-

lic documentation or other exposure of private information. *Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.* [Emphasis added.] [420 U.S. at 496, 95 S.Ct. at 1047, 43 L.Ed.2d at 350.]

In *Time, Inc.*, Justice Fortas dissenting, said:

> Privacy, then, is a basic right. The States may, by appropriate legislation and within proper bounds, enact laws to vindicate that right. [385 U.S. at 415, 87 S.Ct. at 556.]

The right of citizens to inspect public records is limited in three respects and "as otherwise provided by law." Section 71–5–1, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, 1975 Supp.). See, *Deaton, Ayers, supra*; *Winegard v. Larsen*, 260 N.W.2d 816 (Iowa 1977); *McLaughlin v. Philadelphia Newspapers, Inc.*, 465 Pa. 104, 348 A.2d 376 (1975).

Apart from the Legislature, a solution rests in the wisdom of the Supreme Court.

The right to privacy is a most fundamental human right older than the Bill of Rights in the United States Constitution. Privacy did not make its appearance as a cause of action in legal literature until 1890 when the Warren and Brandeis article on *The Right to Privacy* appeared in 4 Harv.L. Rev. 193. The cause of action first appeared in statute in 1903 and in judicial decision in 1905. *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905). This scholarly opinion has been followed in many states of the union in the development of the law. The court then said:

> The stumbling block which many have encountered in the way of a recognition of the existence of a right of privacy has been that the recognition of such right would inevitably tend to curtail the liberty of speech and of the press. [50 S.E. at 73.]

The First Amendment to the Constitution of the United States reads in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Article II, § 17, New Mexico Constitution reads:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

The Georgia Constitution has the same language.

Under the constitutional provisions, only the Congress and the Legislature are denied the power to intrude upon freedom of speech and the press. Yet, the Supreme Court of New Mexico has advised the public and the press that "If the Congress and the Legislature are prohibited from abridging the freedom there is no reason why the courts be given greater power." *Blount v. T D Publishing Corporation*, 77 N.M. 384, 388, 423 P.2d 421, 424 (1966). I disagree. In the adoption of the Constitution, the people did not restrict or restrain judicial power to be exercised by the Supreme Court. It is a separate, independent department of government whose powers are not subject to intrusion. Article III, § 1, New Mexico Constitution. The judicial department was not denied the power to intrude upon the freedom of speech and the press. Early in state history, the Supreme Court declared that *"The officers of each department*, except in certain instances, *are answerable only to the people."* [Emphasis added.] *Kelley v. Marron, State Treasurer*, 21 N.M. 239, 243, 153 P. 262, 263 (1915).

Whenever the Supreme Court wants to administer justice between the press and the child victim who testifies in court, it can step in and create rules of evidence, practice and procedure that protect the child and its right to privacy. The Legislature lacks this power. *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976). In 1973, the Legislature enacted a law that protected journalists and newscasters from disclosure of news sources and information unless disclosure was essential to prevent injustice. In *Ammer-*

man, the Supreme Court held that this statute was governed by rules of evidence and procedure and declared it unconstitutional. In this area of the law, the power of the Supreme Court is absolute, not relative.

In recent years, this power has been exercised to meet the changes that have occurred in the social development of the State. See *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977) where a student newspaper reporter at the University of New Mexico who sought disclosure of all of the nonacademic staff personal records under the Right to Inspect Public Records Act, § 71–5–1, *supra*, was entitled to disclosure of such records only that were not confidential; *Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 568 P.2d 589 (1977) where proof of medical malpractice was delineated; *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975) where the defense of sovereign immunity was abolished; *Valley Utilities, Inc. v. O'Hare*, 89 N.M. 262, 550 P.2d 274 (1976) where as a matter of substantial public interest, absent members of the "spurious" class in a class action suit were not allowed to intervene after the jury had rendered its verdict; *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975) where the guest statute was held unconstitutional; *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973) where the defense of unavoidable accident was abolished; *Williamson v. Smith*, 83 N.M. 336, 491 P.2d 1147 (1971) where assumption of risk was no longer held to be a defense; *State ex rel. Gomez v. Campbell*, 75 N.M. 86, 400 P.2d 956 (1965) where the Supreme Court exercised its absolute discretion to decide constitutional questions of public interest even though the party bringing the action had no standing to raise the issues.

Article VI, § 3, New Mexico Constitution grants the Supreme Court superintending control over all inferior courts. The Court of Appeals is an "inferior" court. Under this absolute power, the Supreme Court has often summarily denied publication of opinions of the Court of Appeals whether brought before the Supreme Court or not, even though a statute grants to the Court of Appeals the right to determine publication of opinions. Each judge of the Court of Appeals, though answerable to the people, does not have the right to "freely speak, write and publish his sentiments on all subjects."

Pursuant to its absolute power, the Supreme Court may adopt rules (1) that require the press to seek the consent of parents before the name of the child can be disclosed, and (2) a rule of evidence that the name of the child shall not be disclosed during any trial or hearing.

Under Rule 510(a) of the Rules of Evidence [§ 20–4–510(a) N.M.S.A. 1953 (Repl. Vol. 4, 1975 Supp.)], the Supreme Court granted government "a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer . . . conducting an investigation." See, *State v. Robinson*, 89 N.M. 199, 549 P.2d 277 (1976).

In 1972, the Legislature adopted the "Children's Code." Sections 13–14–1, et seq., N.M.S.A. 1953 (Repl. Vol. 3, pt. 1). Section 13–14–36 provides that "The name of the child shall not appear in the record on appeal." In 1976, the Supreme Court adopted "Children's Court Rules." Sections 13–14A–1, et seq., N.M.S.A. 1953 (Repl. Vol. 3, pt. 1, 1976 Supp.). Section 13–14A–23(b) provides that *the name of the child shall be stated in the petition filed.* By this rule, the Supreme Court made the name of the child a matter of public record open to the press, but on appeal, the Legislature declared that the name of the child shall not be disclosed to the press. The Supreme Court did not exercise its power to declare the name of the child to be disclosed on appeal. As long as the Supreme Court holds the power to protect the disclosure of a child's name, that protection does not exist until the power is exercised. The Supreme Court can adopt a rule of evidence

that denies the press the right to disclose the child's name.

The Supreme Court has the power to intrude upon the freedom of the press, radio and television, yet protect the right to privacy. If it does so, it has the power to make its opinion retroactive. Protection of child victims should be our primary concern. It should be an exception to the present applicable rule of law. This exception lies outside the umbrella of the pertinent constitutional provisions, *supra*.

All that is required to reverse this case is to weigh the interest of the press, the public, and the child victim in the disclosure of the name. How important was it to the freedom of the press, or the right of the public to know, that in a news article of an event, the name of the child be published? How serious was the injury to the female child victim who was harmed by a man, and whose suffering was opened to public view? Can anyone doubt that the press is likely to have rough sledding? A decision that nondisclosure of the name outweighs freedom of the press under our present law will require unusual judicial courage.

The protection of a family and a child victim, the essence of a democratic society, has greater significance than freedom of the press, that, in cases of this kind, thwart that protection. I feel reasonably safe in asserting that owners of media communications agree.

The press have adopted a code of ethics whereby the names of juvenile offenders are not identified to the public. *Brian W. v. Superior Court of Los Angeles Cty.*, 20 Cal.3d 618, 143 Cal.Rptr. 717, 574 P.2d 788 (1978). This is a moral, not a legal, concept that the press does not need to follow. *State v. Allen*, 73 N.J. 132, 373 A.2d 377 (1977).

Blount casts a shadow upon this doctrine. *Blount* says that "the right of privacy is generally inferior and subordinate to the dissemination of news. *Garner v. Triangle Publications*, 97 F.Supp. 546 (S.D.N.Y. 1951)." [77 N.M. at 389, 423 P.2d at 424.] *Garner* said:

> The common-law right of privacy cannot be infringed by items of current news which come under the category of dissemination of information. [97 F.Supp. at 549.]

Over a half century ago, Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) said:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

The right to privacy is not generally inferior to the dissemination of news. In becomes subordinate only when the right to privacy is overbalanced by the general public interest to know and to be kept informed. Whether the right of privacy is overbalanced is a risk the press assumes, a risk resolved by the trier of fact.

In the development of the law of freedom of the press and the right to privacy, we should view these matters in the light of late 20th century social progress. We must unswervingly believe that a free press lies at the heart of our democracy and its preservation is essential to the survival of liberty. But what is the lawful zone of this freedom? If it would fulfill its historic function in this nation, freedom of the press embraces all issues about which information is needed or appropriate to enable the people to cope with the demands of the time. "A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Time, Inc.* [385 U.S. at 389, 87 S.Ct. at 543]. The nonpublication of the name of a child, a victim of an intended rape who testifies in court, cannot infringe upon the maintenance of our political system nor affect the continuance of an open society. To the contrary, it acts as a coaxial cable that runs toward the protec-

tion given a child under the doctrine of the right of privacy. The protection of a family and a child, the essence of a democratic society, has greater significance than the freedom of the press to thwart that protection.

Nevertheless, *Cox Broadcasting Corp.* holds the contrary. *Cox* involved the constitutionality of a Georgia statute that imposed sanctions on the accurate publication of the name of a rape victim obtained from court records maintained in connection with the public prosecution open to public inspection. The child was murdered. A general assignment reporter for WSB-TV of Atlanta was assigned to cover the proceedings. He learned the identity of the rape victim from indictments shown to him at his request by the county clerk of courts, who was present in the courtroom. The name of the victim was later televised that day and the next. The United States Supreme Court held that the freedom of expression guaranteed by the First Amendment precluded a state from imposing liability for publication of accurate information properly obtained from court records open to public inspection. The opinion was limited to inspection of "court records."

Cox is not held in high esteem. It "proceeds from dubious assumptions, and ultimately evades the important first amendment issue presented in that case." Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum.L.Rev. 1205, 1207 (1976).

Hubbard v. Journal Publishing Company, supra, "is apparently the first reported case in the country brought against a communications medium for invasion of privacy by a female victim of a sexual attack." Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 Stan.L.Rev. 107, 108 (1963). "The appearance of the victim's name on a police blotter or in a court record of indictment in order to identify the incident with specificity would provide no basis for newspaper publicity." (Id. p. 121). The name of a female child rape victim is a simple fact, not news.

In *Hubbard*, the Journal published a verbatim copy of official records in the juvenile court. However, the statute relied upon that made records of juvenile delinquents public records and open to inspection [§ 13–8–66, N.M.S.A. 1953 (Repl. Vol. 3)] was repealed in 1972 by adoption of the "Children's Code." Laws 1972, ch. 97, § 71. What the decision of the court would have been absent the statute is an unknowable. Nonetheless, *Hubbard* has been extensively cited, even in *Cox Broadcasting Corp.*, and in my dissent in *Bitsie v. Walston*, 85 N.M. 655, 661, 515 P.2d 659 (Ct.App.1973), that the right to privacy fades with publication of court records.

Freedom of the press is relative, not absolute. The press is liable for defamation. *Ammerman v. Hubbard Broadcasting, Inc.*, 91 N.M. 250, 572 P.2d 1258 (Ct.App.1977). *Ammerman* distinguished defamation from wide-open criticism by the press. We commend wide-open criticism that finds fault with methods, policies and intentions of persons and public officials, including the writer of this opinion and other judges. But I do not commend the publication of unworthy news that names a young female rape victim, details the privacy of an ordinary person, sexual relations, gossip or any other unworthy news that intrudes upon the privacy of the domestic family and allows it to be exploded to every nook and corner of the land.

George Santyana once wrote that "The family is one of nature's masterpieces." Children are our most valuable natural resource. Freedom of the press should not mar nature's great contribution to a healthy democratic society.

585 P.2d 323

Reinstatement of William P. RUNNELS.

Supreme Court of New Mexico.

Sept. 22, 1978.

CERTIFICATE

I, ROSE MARIE ALDERETE, Clerk of the Supreme Court of the State of New Mexico, do hereby certify that the following named person was, on September 22, 1978, reinstated to active membership in the State Bar of New Mexico.

William P. Runnels
11208 Bellamah N.E.
Albuquerque, New Mexico 87112

WITNESS, My official signature and the seal of the Court on this 22nd day of September, 1978.

(s) Rose Marie Alderete
Clerk of the Supreme Court of the State of New Mexico
(SEAL)

585 P.2d 325

Ronald McKAY and wife, Georgia McKay, Plaintiffs-Appellants,

v.

The FARMERS AND STOCKMENS BANK OF CLAYTON, New Mexico, et al., Defendants-Appellees.

No. 3146.

Court of Appeals of New Mexico.

July 11, 1978.

Rehearing Denied July 20, 1978.

Bill Cornett and James D. Durham, Jr., Durham & Cornett, Amarillo, Tex., for plaintiffs-appellants.

Alvin F. Jones, Roswell, for defendants-appellees.

OPINION

LOPEZ, Judge.

Appellants (the McKays) brought suit to recover monetary damages for tortious and wrongful acceleration of secured promissory notes held by the appellees, Farmers and Stockmens Bank of Clayton, et al. (the Bank). The Bank moved for summary judgment and their motion was granted. The McKays appeal and we reverse.

Appellants present one issue for reversal: that the trial court erred in granting appellees' motion for summary judgment because a material question of fact exists as to whether or not the Bank's foreclosure of appellants' secured promissory notes was in good faith.

Facts

The McKays executed several promissory notes to the Bank. Their notes came due on January 20, 1976; thereafter appellants were in default. On January 20, 1976, the Bank estimated that its security exceeded

appellants' debt by approximately $20,000.00. On February 13, 1976, the Bank reviewed the notes, extended the maturity date to April 1, 1976, and waived any prior default with regard to the past due status of the notes.

On March 3, 1976, however, the Bank deemed itself to be insecure; accelerated the maturity of the McKays' notes; declared them in default; took possession of the security (chattels mortgaged); and sold part of the security. The McKays' complaint seeks about $350,000.00 in damages and arose as a result of the acceleration of the secured promissory notes and the seizure and partial sale of the security.

Summary Judgment was Erroneously Granted

The McKays argue that the Bank was not, in good faith, insecure and that, therefore, the court erred in granting the motion for summary judgment. The Bank contends that it did in good faith deem itself insecure in the acceleration of the notes and that summary judgment was the proper method to dispose of the issues below.

The notes in question contain the following pertinent clauses:

> At the option of the holder, the payment of all principal and interest due in accordance with the terms of this note will be accelerated and such principal and interest shall be immediately due and payable without notice or demand, upon the occurrence of any of the following events of default:
>
> (a) when the holder hereof in good faith deems itself insecure * * *

The New Mexico Uniform Commercial Code governs the acceleration of notes. Sections 50A–1–208 and 50A–1–201, N.M. S.A. 1953 (Repl. Vol. 8, pt. 1, 1962) are applicable:

> *Option to accelerate at will.*—A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that *he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired.* The burden of establishing lack of good faith is on the party against whom the power has been exercised. [Emphasis added]

Section 50A–1–201(19)

> (19) "Good faith" means honesty in fact in the conduct or transaction concerned.

As stated above, § 50A–1–201, supra, requires the showing of a lack of good faith by the party against whom the power has been exercised. The New Mexico courts have not defined "good faith" beyond the statutory definition. The only discussion in this context with regard to "good faith" is this Court's ruling in *Merchant v. Worley*, 79 N.M. 771, 449 P.2d 787 (Ct.App.1969). That ruling served to reiterate the last sentence of § 50A–1–208, *supra*, that the burden of establishing the lack of good faith is on the debtor. The burden of proof set out in § 50A–1–208, *supra*, and discussed by this Court in *Merchant v. Worley, supra*, applied to a directed verdict and not to a motion on summary judgment. The burden of proof applied to the quantum of evidence and sufficiency of proof as to the lack of good faith *after* all the evidence was before the court. That burden of proof does not apply to a motion for summary judgment where the sole question before the court is whether a genuine issue of material fact exists. On the contrary, the burden of proof is on the movant to show the absence of a genuine issue of fact. *Goodman v. Brock*, 83 N.M. 789, 498 P.2d 676 (1972).

Although § 50A–1–208, supra, requires a showing of a lack of good faith by the party against whom the power to accelerate has been exercised, this does not mean that the non-movant has this same burden of proof on a motion for summary judgment.

As stated many times in this jurisdiction, summary judgment is a drastic remedy and is to be used with great caution. *Pharmaseal Laboratories, Inc. v.*

Goffe, 90 N.M. 753, 568 P.2d 589 (1977); *Zengerle v. Commonwealth Insurance of N.Y.*, 60 N.M. 379, 291 P.2d 1099 (1955).

The New Mexico Supreme Court, in *Goodman v. Brock, supra*, adopted 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."

The question before us is whether the evidence in the entire record shows that there exists material issues of fact as to the Bank's good faith or lack of good faith in the acceleration of the McKays' notes.

The Bank contends that the issue of good faith, or lack thereof, can be decided as a matter of law and is therefore amenable to a summary judgment. It argues that the question of fact involved in the determination of good faith on the part of the accelerating party is a no more unique or different question of fact than any other fact question and as such does not merit any different treatment on a motion for summary judgment. In support of its position, the Bank refers to *Van Horn v. Van De Wol, Inc.*, 6 Wash.App. 959, 497 P.2d 252, 61 A.L.R.3d 241 (1972), and *Fort Knox National Bank v. Gustafson*, 385 S.W.2d 196 (Ky. 1964). However, the court in *Van Horn v. Van De Wol, Inc., supra*, made a clear distinction between secured and unsecured creditors finding that a secured creditor must show more compelling facts because he is in a less precarious position than is an unsecured creditor. In contrast there is no question that the Bank is a secured creditor.

The court in *Fort Knox, supra*, construed the latter portion of § 1–208 of the Uniform Commercial Code as requiring the submission to the jury of the issue of good faith unless the evidence relating to it is no more than a scintilla, or lacks probative value having fitness to induce conviction in the minds of reasonable men. Although the court in *Fort Knox* held the evidence was so conclusive as to warrant a directed verdict on the issue of good faith, a directed verdict is procedurally different from a motion for summary judgment, requiring of the trial court a different approach to the evidence.

Furthermore, "good faith" is not generally a question of law, but is usually a question of fact.

> Ordinarily the question of whether the holder of the option to accelerate has or has not acted in good faith presents a question of fact for the trier of fact. Anderson, Uniform Commercial Code, § 1–208:15 (1970).

A summary of the conflicting evidence with all reasonable doubts resolved in favor of the non-moving party is as follows: When the Bank seized the security of appellants, the McKays were attempting to secure financing from other sources. The Bank refused to cooperate with the McKays in attempting to obtain the financing from other sources and mislead them by telling them they were ineligible for FHA government financing. The Bank's secured position with respect to appellants' property would be the same either before or after bankruptcy, thus it is questionable as to whether the Bank could have believed and did believe that a default had occurred by a mere suggestion of bankruptcy. The value of the Bank's security in the McKays' property was greater than their indebtedness, and the Bank had agreed to continue its support of the McKays.

We hold the evidence was sufficient to create a reasonable doubt as to the existence of a genuine issue, thus precluding summary judgment.

We conclude that the trial court erred in granting the summary judgment. Summary judgment is reversed and the cause is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

SUTIN, J., specially concurring.

HERNANDEZ, J., dissenting.

SUTIN, Judge (specially concurring).

I concur.

This is another of many summary judgments in which oral arguments and the court's comments, if any, were not recorded. Findings of fact or reasons for rendering judgment are absent. Good memorandum briefs were filed. I compliment the attorney who can convince a trial judge of the righteousness of his cause though he is wrong. I also compliment the attorney who can appeal and convince an appellate court of the righteousness of his cause when he is right.

In summary judgment proceedings, the court should request opposing attorneys to submit findings of fact and conclusions of law, and state the reasons why summary judgment should be granted or denied. Due to the silence of the court, we do not know the facts upon which the court relied, the basis upon which summary judgment was rendered and the reasons therefore. Generally, a formal summary judgment is not a fair "Declaration of Rights." It has no appellate value and deserves no consideration. The trial court has shifted to this Court the burden of assessing the facts to determine whether a genuine issue of material fact exists.

This criticism of summary judgments has continued in the belief that the Supreme Court will return to its former position and welcome findings of fact or reasons given by a district judge for granting or denying summary judgment.

The only issue on this appeal is whether the bank, as a matter of law, had the right to accelerate payment of plaintiff's promissory note because it deemed itself insecure under a good faith belief that prospect of payment was impaired.

This issue is a matter of first impression. We must marshall case authority, the rules of law involved and their application to the facts of this case.

Section 50A–1–208, set forth in Judge Lopez' opinion, "has the dual elements of whether (1) a reasonable man would have accelerated the debt under the circumstances, and (2) whether the creditor acted in good faith." *Blaine v. G. M. A. C.*, 82 Misc.2d 653, 370 N.Y.S.2d 323 (1975); *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369 (5th Cir. 1969); *Universal C. I. T. Credit Corporation v. Shepler*, Ind.App., 329 N.E.2d 620 (1975); II Gilmore, *Security Interests in Personal Property*, § 43.4, p. 1197 (1965).

Gilmore says:

> * * * The creditor has the right to accelerate if, under all the circumstances, a reasonable man, motivated by good faith, would have done so. * * * The Code adopts such a rule in § 1–208:

A "reasonable man" is one with a "reasonable mind," and "A *reasonable* mind is a sensible one, fairly judicious in its action, and at least somewhat cautious in reaching its conclusions." [Emphasis by Court.] *Anderson v. Welsh*, 86 N.M. 767, 769, 527 P.2d 1079, 1081 (Ct.App.1974).

Section 1–208 "seems to recognize that acceleration is a harsh remedy which should be allowed only if there is some reasonable justification for doing so, such as a good faith belief that the prospect of payment is impaired." This is an equitable doctrine firmly established in the Uniform Commercial Code because acceleration is a severe covenant unfavored in the law. One who seeks to impose these severe conditions must not permit the debtor to assume that the covenant will not be strictly enforced and then "crack down" by rigidly insisting on enforcement without giving some notice and opportunity to comply. *Williamson v. Wanless*, 545 P.2d 1145, 1149 (Utah, 1976); *State Bank of Lehi v. Woolsey*, 565 P.2d 413 (Utah, 1977). Even without regard to the provisions of the Uniform Commercial Code, a court of equity will protect a debtor against an inequitable acceleration of the maturity of the debt. *Seay v. Davis*, 246 Ark. 201, 438 S.W.2d 479 (1969).

Judge Lopez' opinion also sets forth the statutory definition of "Good Faith." The test of good faith under that section is a wholly subjective one of honesty. It has been stated in various ways. The cases are collected in *Farmers Co-op El., Inc., Dun-*

combe v. State Bank, 236 N.W.2d 674 (Iowa, 1975).

"Good faith" as "honesty in fact" is essentially a subjective test which focuses on the state of mind of the person in question. *Bowling Green, Inc. v. State Street Bank and Trust Co.*, 425 F.2d 81 (1st Cir. 1970). "It must be remembered that here we are dealing with the 'good faith' *belief* of the bank—that is, its state of mind." [Emphasis by Court.] *Fort Knox National Bank v. Gustafson*, 385 S.W.2d 196, 200 (1964); *General Investment Corp. v. Angelini*, 58 N.J. 396, 278 A.2d 193 (1971). "The test as to the good faith of the creditor in accelerating under an insecurity clause is a matter of the creditor's actual mental state and this is not negatived by showing there was no basis for the creditor's belief . . . ." *Blaine*, supra. [370 N.Y.S.2d at 327.] "The test is not diligence or negligence; and it is immaterial that appellee [bank] may have had notice of such facts as would put a reasonably prudent person on inquiry which would lead to discovery, unless appellee [bank] had actual knowledge of facts and circumstances that would amount to bad faith." *Riley v. First State Bank, Spearman*, 469 S.W.2d 812, 816 (Tex.Civ.App. 1971); *Richardson Company v. First Nat. Bank in Dallas*, 504 S.W.2d 812 (Tex.Civ. App.1974); *First State Bank & Trust Co. of Edinburg v. George*, 519 S.W.2d 198 (Tex. Civ.App.1974). The good faith "test requires *honesty of intent* rather than absence of circumstances which would put an ordinarily prudent holder on inquiry in order to constitute good faith. . . . In short, it is an issue of *honesty of intent* rather than of diligence or negligence. Some term it the 'white heart' test." [Emphasis added.] *Eldon's Sup. Fresh Stores, Inc. v. Merrill, Lynch, Etc.*, 296 Minn. 130, 207 N.W.2d 282, 287 (1973).

Nothing in the definition of "good faith" suggests that in addition to being honest, the creditor must exercise due care or reasonable commercial standards or lack of negligence to be in good faith. *Industrial Nat. Bank of R. I. v. Leo's Used Car Ex., Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973). The standard of this test is what facts the bank actually knew, or believed it knew, not what it could or should have known. *Van Horn v. Van De Wol, Inc.*, 6 Wash.App. 959, 497 P.2d 252 (1972), 61 A.L.R.3d 241 (1975). By a "good faith" belief, I mean one resting on a reasonable assessment of the facts available to the bank. See *State v. Sanchez*, 88 N.M. 378, 540 P.2d 858 (1975), rev'd, 88 N.M. 402, 540 P.2d 1291 (1975).

To sum up in precise language, "The test is what the particular person did or thought in the given situation and whether or not he was honest in what he did." *Balon v. Cadillac Automobile Company of Boston*, 113 N.H. 108, 112, 303 A.2d 194, 196 (1973). No one but that particular person can possibly know what his good faith is. *Custom Panel Systems, Inc. v. Bank of Hampton*, 143 Ga. App. 681, 239 S.E.2d 558 (1977).

By using the "good faith belief" doctrine, the main problem to solve is how a trier of fact can obtain knowledge of the minds of others, to whose states we have no direct, introspective access. This knowledge can only be obtained from perceptible manifestations in speech, conduct and behavior of a person, or reasonable inferences to be drawn therefrom. This requires a trier of the fact to glean from the testimony and evidence such manifestations in speech, conduct, and behavior of a person that it can know or infer what a person thought in a given situation and whether the person was honest in what the person did. It is foreseeable that an expert opinion may be necessary to assist the trier of the fact.

From memorandum briefs filed in the district court and briefs filed on this appeal, these rules of law and their meaning were not submitted in depth to the trial court or to this Court.

Under these rules, for the bank to make a prima facie case to support a summary judgment, the bank must prove that from facts which it actually knew or believed it knew, it deemed itself insecure; that under these circumstances, a reasonable person would believe that prospect of payment was impaired, would accelerate the maturity of plaintiff's promissory note and seize and

sell a part of its security; that in taking this action, the bank made a reasonable assessment of the facts, thought that it had the right to take this action, and in acting as it did, its intention was honest.

The record shows: the loan officer of the bank testified that plaintiff's note was past due on January 20, 1976; that the bank extended the payment to April 1, 1976 and waived any prior default. The reason the note was extended was to have an orderly liquidation of the security. Plaintiff was told that the bank would be unable to finance him in the future. Prior to February 13, 1976 the bank reviewed the collateral. It was questionable whether the bank was secure when its security was matched against the indebtedness, and as of February 13, 1976, the bank felt that it was secure if the security remained at value. The security exceeded the indebtedness by $20,000, and by February 13, 1976, it deteriorated in value by $10,000.

On March 3 or 4, 1976, the bank declared plaintiff to be in default because plaintiff threatened bankruptcy, that the collateral was in jeopardy, and on that basis, it accelerated the notes. The president of the bank testified that plaintiff gave the bank an ultimatum that the bank was either going to re-finance him or charge off $50,000, or he would take bankruptcy. There was no doubt in his mind that plaintiff intended to go into bankruptcy because that's what he said they were going to do. Nevertheless, the bank did not fear that it would be treated by any bankruptcy court in any manner other than a secured creditor. Upon the advice of counsel, the bank felt it was to its advantage to marshall all plaintiff's assets covered in the security agreement despite plaintiff's objections. Plaintiff did not go into bankruptcy.

Even though the bank had extended payment of plaintiff's note to April 1, 1976, and waived any default, the bank, on March 9, 1976, filed a petition against plaintiff and requested an order to show cause, in which petition the loan officer swore that "all such notes evidencing such indebtedness are in default."

Based upon these facts, plaintiff was not in default. A genuine issue of material fact exists (1) whether the bank deemed itself insecure and (2) whether under these circumstances a reasonable person would accelerate the maturity of plaintiff's promissory note and take the action it did.

Plaintiff's affidavit and testimony controverted the bank's, and, in addition, according to plaintiff's affidavit, plaintiff was in the process of securing financing from other sources at the time the bank seized his property. The bank refused to cooperate and mislead plaintiff by stating that plaintiff was ineligible for certain F.H.A. government financing when in fact plaintiff was eligible; that the bank knew plaintiff was not in default. Nevertheless, in a concerted effort to eliminate plaintiff from the farming business, the bank, in bad faith, caused plaintiff's property to be seized and disposed of. Based upon these facts, a genuine issue of material fact exists on the good faith belief of the bank in taking the action it did.

Summary judgment should be reversed.

HERNANDEZ, Judge (dissenting).

The defendant bank was entitled to summary judgment as a matter of law. There is nothing in the record to show a lack of good faith by the bank. There are, therefore, simply no inferences which the plaintiffs are entitled to have drawn from the evidence before the court. The defendant has met its burden of showing that there is no reasonable doubt as to whether or not a genuine issue of material fact exists. *Goodman v. Brock*, 83 N.M. 789, 489 P.2d 676 (1972).

585 P.2d 331

Julia T. WHITE, Plaintiff-Appellee,

v.

John W. SUTHERLAND, Defendant,

and

Health and Social Services Department of the State of New Mexico, Intervenor-Appellant.

No. 3378.

Court of Appeals of New Mexico.

Aug. 1, 1978.

Rehearing denied Aug. 11, 1978.

Writ of Certiorari Denied Sept. 5, 1978.

Toney Anaya, Atty. Gen., Santa Fe, Muriel McClelland, Asst. Atty. Gen., Albuquerque, Carolyn Cosner, Asst. Atty. Gen., Santa Fe, for defendant.

Matteucci & Matteucci, Willard F. Kitts and Elizabeth E. Whitefield, Albuquerque, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Plaintiff sought damages from defendant chiropractor, alleging malpractice. H.S. S.D. (Health and Social Services Department of the State of New Mexico) paid

various medical bills of plaintiff and intervened in the damage suit. H.S.S.D. sought to recover the amount of medical assistance payments made. The damage suit was settled. This appeal is concerned with the division of the settlement money between plaintiff and H.S.S.D. We discuss: (1) § 13–1–20.1, N.M.S.A. 1953 (Repl. Vol. 3, pt. 1); (2) N.M.Const. art. IV, § 32; and (3) equitable division of the settlement money.

Section 13–1–20.1, supra

One hundred thousand dollars was paid in settlement. The settlement involved both plaintiff's damage claims and H.S.S.D.'s medical payments.

Plaintiff's injuries were serious and permanent. Her damage claim was for $2,000,000. The testimony of defendant's attorney, introduced by stipulation, was that this damage claim was " 'not out of line' ". The testimony of defendant's attorney, and the representations made by plaintiff's attorney, as an officer of the court, agree that there was a fifty percent chance that defendant would be held liable to plaintiff and if found liable "a verdict of $1,000,000 or more was likely". The settlement for $100,000 was for the amount of the insurance coverage. According to plaintiff's attorney, the $100,000 amount was accepted because of two factors: (1) the fifty percent chance that defendant would be found liable and (2) information that most of defendant's assets were in Mexico, making it unlikely that a judgment in excess of the insurance coverage would be collectable.

H.S.S.D. introduced no evidence to the contrary. Its position was that the information in the preceding paragraph had no legal significance in connection with its repayment claim. It asserted the only significant fact was that it made medical assistance payments and it was entitled to one hundred percent repayment. The amount of the H.S.S.D.'s payments were a few dollars short of $39,000.

The trial court applied equitable concepts and awarded H.S.S.D. less than one hundred percent of its claim. H.S.S.D. appeals.

Section 13–1–20.1, supra, states:

A. The health and social services department shall make reasonable efforts to ascertain any legal liability of third parties who are or may be liable to pay all or part of the medical cost of injury, disease or disability of an applicant or recipient of medical assistance.

B. When the department makes medical assistance payments in behalf of a recipient, the department is subrogated to any right of the recipient against a third party for recovery of medical expenses to the extent that the department has made payment.

This statute pertains to the recovery of medical assistance payments made by H.S.S.D.; the statute pertains to the recovery of such payments from third parties; it pertains to the recovery of such payments from third parties legally liable for the payments made by H.S.S.D. The statute does not pertain to the recovery of payments from the recipient or beneficiary of such payments; in this case, the plaintiff. Compare § 13–1–20, N.M.S.A. 1953 (Repl. Vol. 3, pt. 1).

Defendant was a third party; it is not disputed that defendant was legally liable for the medical payments to the extent of the settlement money paid. See definition of "legal liability" in Black's Law Dictionary (1951). Section 13–1–20.1, supra, is the applicable statute.

H.S.S.D. states that the "intent" of both federal and state law is for states to be reimbursed for medicaid payments from third party sources. H.S.S.D. states: "The legislative intent . . . is expressed in terms that can leave no doubt that states are mandated by Act of Congress to secure reimbursement of medicaid costs."

42 U.S.C.A. 1396a(a)(25) (1974) provides that a state plan for medical assistance must:

> (25) provide (A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties to pay for care and services (available under the

plan) arising out of injury, disease or disability, . . . and (C) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability[.]

The federal statute does show an intent that medical assistance payments be reimbursed; it requires a state to "seek reimbursement" to the extent of the legal liability of a third party. This statute does not, however, show an intent that a state is to receive one hundred percent reimbursement from a legally liable third party, regardless of the facts. As to the *amount* of reimbursement, this statute says nothing.

Similarly, § 13–1–20.1, supra, shows an intent that medical assistance payments be repaid. Similarly, the state statute says nothing as to one hundred percent repayment to H.S.S.D., regardless of the facts.

Section 13–1–20.1(B), supra, states that H.S.S.D. "is subrogated to any right of the recipient against a third party for recovery of medical expenses to the extent the department has made payment." H.S.S.D. seems to argue that "to the extent . . . [of] payment" indicates a legislative intent of one hundred percent repayment, regardless of the facts of the case. Such an argument ignores the words "subrogated to any right . . . against a third party for recovery". The statute is to be read to give effect to all of its provisions. *Keller v. City of Albuquerque*, 85 N.M. 134, 509 P.2d 1329 (1973).

Subrogation, historically, is an equitable remedy. *United States Fidelity & G. Co. v. Raton Nat. Gas Co.*, 86 N.M. 160, 521 P.2d 122 (1974). " 'Subrogation' is a term of legal art which we assume would not be employed by the drafters of the statute unless they intended it to be construed in its normal sense." *United States v. Greene*, 266 F.Supp. 976 (D.C.Ill.1967). In its normal sense, subrogation gives the payor a right to collect what it has paid from the party who caused the damage. *Herrera v. Springer Corporation*, 85 N.M. 6, 508 P.2d 1303 (Ct.App.1973), rev'd on other grounds, 85 N.M. 201, 510 P.2d 1072 (1973). This right to collect, being an equitable remedy, is subject to equitable principles. *United States Fidelity & G. Co. v. Raton Nat. Gas Co.*, supra.

Absent a clearly expressed legislative intent requiring otherwise, "subrogated" is to be given its usual, ordinary meaning. *Tafoya v. New Mexico State Police Board*, 81 N.M. 710, 472 P.2d 973 (1970). No such legislative intent being expressed, H.S.S.D.'s "subrogation" in § 13–1–20.1(B), supra, is a right of recovery subject to equitable principles.

Our holding is consistent with federal decisions construing the federal government's independent right, established by statute, to recover medical assistance payments from a liable third party. The applicable statute also provides that the United States is subrogated to any claim of the injured person against the tortfeasor. Because of statutory language, the right of the United States is more than standing in the shoes of the tort-feasor through subrogation, *United States v. Greene*, supra; rather, Congress specified the "equitable remedy of subrogation" in aid of an independent right of recovery. *United States v. Merrigan*, 389 F.2d 21 (3rd Cir. 1968).

Our holding is also consistent with *Hedgebeth v. Medford*, 74 N.J. 360, 378 A.2d 226 (1977). *Hedgebeth* held that when the state exercised its right of subrogation, it was governed by equitable principles and, in seeking reimbursement from a medicaid recipient who had recovered from a third party, the state must pay its pro rata share of recipient's counsel fees.

There is no basis, however, for concluding that the Legislature did not intend by its very careful use of the term "subrogation" to import the equitable incidences of that remedy. As we pointed out, that doctrine is distinctively equitable in nature and is generally understood to mean that a party entitled to the right of subrogation should bear or share reasonable costs which have been incurred in bringing that right to fruition.

Neither 42 U.S.C.A. 1396a(a)(25), supra, nor § 13–1–20.1, supra, provide that H.S.S.D. must obtain one hundred percent repayment of medical assistance payments from a legally liable third party. Rather, under § 13–1–20.1, supra, H.S.S.D.'s right of repayment depends on the application of equitable principles. The facts of the case do matter.

N.M.Const., art. IV, § 32

H.S.S.D. contends that the application of equitable principles, resulting in less than one hundred percent repayment, would violate N.M.Const., art. IV, § 32 which reads:

> No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed, or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court.

The later portion of the above quotation provides that an obligation or liability owing to the State may be extinguished "by proper proceeding in court." *State v. State Inv. Co., et al.*, 30 N.M. 491, 239 P. 741 (1925). H.S.S.D. does not assert that the trial court's award of less than one hundred percent repayment was not a proper proceeding in court.

H.S.S.D. recognizes that the obligation to the State may be extinguished in proper proceedings, but contends that the power to extinguish does not include the power to compromise or reduce the obligation. The claim is frivolous; to the extent the claimed obligation is reduced by the court, the obligation has been extinguished. In *State v. State Inv. Co., et al.*, supra, the settlement of suits for disputed taxes, for amounts less than the amount claimed to be owing, was held not to violate this constitutional provision. See also, *Lyle v. Luna*, 65 N.M. 429, 338 P.2d 1060 (1959).

Equitable Division of the Settlement Money

The trial court found:

> 20. The plaintiff and the Intervenor both participated in the settlement with the defendant for $100,000.00, and this was a compromise settlement in view of the liability factors in the case, the liability insurance limits, and other potential financial resources of the defendant.

H.S.S.D. complains of this finding to the extent it states that H.S.S.D. compromised its claim for repayment. It asserts that nothing supports this part of the finding. We agree. Plaintiff and H.S.S.D. jointly moved to dismiss the claim against defendant with prejudice "reserving to the Court only such jurisdiction as necessary to decide between the plaintiff and the intervenor as to the disposition between them of the settlement monies offered herein by the defendant and accepted by the plaintiff and intervenor." In arguing for one hundred percent repayment, H.S.S.D. informed the trial court that "we settled". These items do not support an inference that in settling, H.S.S.D. had compromised its claim because the motion to dismiss made it clear that the division of the settlement money was in dispute. There is nothing else to support a finding that H.S.S.D. compromised the amount of its claim in settling with defendant.

Although the "compromise" portion of the finding is not supported by the evidence, this does not aid H.S.S.D. The trial court gave additional reasons for not awarding H.S.S.D. one hundred percent repayment out of the settlement proceeds. If these reasons are correct, the trial court's decision is to be affirmed. *Beall v. Reidy*, 80 N.M. 444, 457 P.2d 376 (1969); *Adoption of Doe*, 89 N.M. 606, 555 P.2d 906 (Ct.App. 1976).

The trial court concluded:

> 5. The equities in this case require the Court to consider that even if the plaintiff was awarded the full $100,000.00 settlement, that would constitute but a small fraction of her actual damages.

H.S.S.D. says there is nothing to support this conclusion. The claim is frivolous. Findings, fully supported by evidence, are that plaintiff's injury was an infarction of the brain stem which resulted in plaintiff's quadraplegia. This injury totally and permanently disabled plaintiff from pursuing any gainful activity or employment. Plaintiff has partial use of her right arm, no use of any other extremity, and is confined to a wheel chair. Her ability to speak has been greatly impaired. Her physical condition has reached a plateau, little future improvement is anticipated. Plaintiff will need full care by others for the rest of her life. Plaintiff was a registered nurse. For several years prior to her injury, working part-time, her earnings were between $6,000 and $9,000 per year. Her life expectancy at the time of injury was approximately 39 years. These findings fully support the conclusion.

The trial court concluded:

> 6. The equities in this case require the Court to consider also that any money which the Intervenor may recover in this case has been due, to a very large extent, to the fact that suit was filed by the Plaintiff against the Defendant, and to the energies expended in pursuing the claim by plaintiff's attorneys; the Court must also consider the fact that plaintiff's attorneys are charging a contingent fee of 25% of the recovery.

H.S.S.D. asserts nothing supports this conclusion. Certain findings, going to the preparation of the case, support the conclusion.. Evidentiary support for the findings appear in the court file. That file shows the preparation of the case through motions, interrogatories, depositions and the pretrial order. H.S.S.D. did not intervene until *after* the pretrial conference.

The trial court concluded:

> 9. The equities in this case require that the Intervenor be awarded $10,000.00 from the settlement proceeds of $100,000.00, and that the balance of the $90,000,00 [sic] shall go to the Plaintiff.

H.S.S.D. challenges this conclusion on the basis that it is contrary to § 13–1–20.1, supra. We have held that H.S.S.D.'s subrogation right under § 13–1–20.1, supra, is subject to equitable principles.

H.S.S.D. asserts that "the equities inure to the one who has paid the bills." To do equity, that is, to accomplish the substantial ends of justice, see *United States Fidelity & G. Co. v. Raton Nat. Gas Co.*, supra, more than the payment of the bills is to be considered. Here, it was proper to consider the extent of plaintiff's injury, the extent to which her damage claim was compromised, the fact that the $100,000 settlement was largely accomplished through the efforts of plaintiff's attorneys, the uncontradicted testimony of defendant's attorney that the medical expenses "were only a very small factor in his evaluation of the case", and the indication in the court file that H.S.S.D. was in effect taking a "free ride" on plaintiff's efforts. Under this record, an award smaller than the $10,000 which H.S.S.D. received would have been justified. However, we do not understand H.S.S.D. to complain of the amount of its award; its basic contention is that equitable considerations could not be applied. We have held to the contrary.

The judgment is affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

585 P.2d 336

Dallas McCASLAND, and Sims and McCasland, a partnership, Plaintiffs-Appellants,

v.

Paul D. PRATHER, Defendant-Appellee.

No. 3342.

Court of Appeals of New Mexico.

Sept. 26, 1978.

Glen L. Houston, Hobbs, for plaintiffs-appellants.

Maddox, Maddox & Cox, Hobbs, George J. Hopkins, Modrall, Sperling, Roehl, Harris

& Sisk, Albuquerque, for defendant-appellee.

OPINION

LOPEZ, Judge.

The plaintiffs sued the defendant for breach of contract to purchase acid, brine and fresh water and to enjoin future breaches of contract. The defendant moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The trial court dismissed the suit with prejudice. The plaintiffs appeal and we reverse.

The sole issue presented on appeal is whether the dismissal of plaintiffs' complaint pursuant to Rule 12(b)(6) of the New Mexico Rules of Civil Procedure, § 21–1–1(12)(b)(6), N.M.S.A. 1953 (Repl. Vol. 4, 1970) was appropriate.

The defendant in his brief posits the proceeding as a motion to dismiss for failure to state a claim under Rule 12(b)(6), and the plaintiffs posit the proceeding as a motion for summary judgment. The trial court's ruling is set out as follows:

ORDER OF DISMISSAL

> The above cause having come on before this Court on Defendant's Motion to Dismiss pursuant to Rule 12(b), the Court having considered said Motion and the Briefs filed in support and in response thereto, and having considered Plaintiff's [sic] Complaint and the contract attached thereto, and argument of counsel, and being otherwise fully advised in the premises, finds that Defendant's Motion is well taken and should be granted, and Plaintiff's [sic] Complaint fails to state a claim upon which relief can be granted, and it is, therefore,
>
> ORDERED, that Plaintiff's [sic] Complaint be, and it hereby is, dismissed with prejudice.

It is clear from this order that the judge's order was made pursuant to a 12(b)(6) motion.

The United States Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) set out a rigorous test for determining whether a complaint fails to state a claim upon which relief may be granted:

> . . . In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. 355 U.S. at 45–46, 78 S.Ct. at 102.

The purpose of a motion under 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; i. e., to test the law of the claim, not the facts that support it. *Niece v. Sears, Roebuck & Co.*, 293 F.Supp. 792 (N.D. Okla. 1968). Also, in considering whether a complaint states a cause of action upon which relief may be granted, the court must accept as true all the facts which are pled. *Jones v. International Union of Operating Engineers*, 72 N.M. 322, 383 P.2d 571 (1963). Further, a motion to dismiss for failure to state a claim is granted infrequently. *International Erectors v. Wilhoit Steel Erectors & R. Serv.*, 400 F.2d 465 (5th Cir. 1968).

New Mexico adheres to the broad purposes of the rules and construes the rules liberally, particularly as they apply to pleading. As the New Mexico Supreme Court stated in *Carrol v. Bunt*, 50 N.M. 127, 130, 172 P.2d 116, 118 (1946):

> "The general policy of the Rules requires that an adjudication on the merits rather than technicalities of procedure and form shall determine the rights of the litigants."

Generally, a complaint on breach of contract must allege: (1) the existence of a valid and binding contract; (2) the plaintiff's compliance with the contract and his performance of the obligations under it; (3) a general averment of the performance of any condition precedent; and (4) damages suffered as a result of defendant's breach. Wright and Miller, Federal Practice and Procedure: Civil § 1235 (1969).

The plaintiffs alleged in their complaint that the parties entered into a Contract for Sale of Business and Agreement not to Compete; that under the terms of the contract the defendant agreed to buy all the brine and fresh water he needed from the plaintiffs; that the defendant has refused to buy all brine and fresh water from the plaintiffs, although such has always been available to him, and although plaintiffs have specifically asked him to do so; and that plaintiffs have been damaged.

Attached to the complaint was a copy of the contract, the pertinent portions of which are set out below:

> 1. That Seller, for and in consideration of the sums to be paid and the covenants and agreements to be kept and performed by the Purchaser, agrees to sell to the Purchaser and the Purchaser agrees to buy from the Seller the four hot oil units . . . ..
>
> 2. The Purchaser shall pay the Seller as purchase price the sum of $125,000.00, payable as follows: the sum of $100,000.00 cash, receipt of which is acknowledged by Seller, and the sum of $25,000.00, payable according to the terms of a promissory note executed separately, by which the Purchaser agrees to pay simple interest at the rate of 8 per cent per annum on said principal balance, and agrees to make payments in full of interest accrued at the end of the month of September of each year, commencing September 1972.
>
> 3. Seller agrees that for a five year period beginning on September 3, 1971, he will not, directly or indirectly . . engage in the hot oil treating service business, within a radius of 100 miles of Eunice, New Mexico.
>
> 4. To the extent that the same is permissible under New Mexico and federal law, Purchaser agrees to buy all acid he needs from McCasland Hot Oil Service and agrees to buy all brine and fresh water he needs from Sims & McCasland, a partnership.

Our inquiry on appeal is essentially limited to the contents of the complaint and the contract which was attached to it. The question, therefore, is whether, in the light most favorable to the plaintiffs, and with every doubt resolved in their behalf, the complaint states any valid claim for relief.

The defendant took the position in his motion to dismiss that under paragraph four of the contract, the defendant is obliged to buy all his acid, and fresh water from the plaintiffs, but the plaintiffs are not mutually obligated to sell the required acid and fresh water to the defendant. Thus, the defendant contends this paragraph of the contract is unenforceable because there is no mutuality of obligation or consideration.

This kind of contract is generally labeled a requirements or output contract, and defendant does not argue this point. The defendant only argues that since plaintiffs are under no obligation to sell, there is no mutuality of obligation. The Uniform Commercial Code is controlling in New Mexico and § 50A–2–306, N.M.S.A. 1953 (Repl. Vol. 8, pt. 1, 1962) reads as follows:

> 50A–2–306. Output, requirements and exclusive dealings.—(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
>
> (2) *A lawful agreement by either the seller or the buyer* for exclusive dealing in the kind of goods concerned *imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.* (Emphasis added.)

The defendant relies on *Porter and Sons v. National Distiller Products, Co.*, 324 F.2d 202 (10th Cir. 1963), a case which arose from New Mexico prior to the adoption of the Uniform Commercial Code. In that case the trial court held a lack of mutuality

existed, and after reasonable notice, the defendant could terminate the oral contract.

The *Porter* case is distinguishable. First of all, the court ruled that the contract at issue in *Porter* was not a requirements contract; secondly, the major issue in that case was whether the notice of termination was reasonable.

In *Gruschus v. C. R. Davis Contracting Co., Inc.*, 75 N.M. 649, 409 P.2d 500 (1965), the New Mexico Supreme Court held that an agreement wherein *one party* agrees to furnish material " 'necessary to the preparation of said concrete pavement' " was in reality a requirements contract within the meaning of § 50A–2–306(1). A lawful agreement by either seller or buyer imposes a corresponding duty on the other party under § 50A–2–306, N.M. S.A. 1953, supra.

Defendant also contends there was no consideration. A contract must be considered and construed as a whole, with meaning and significance given to each part in its proper context with all other parts, so as to ascertain the intent of the parties. *Schultz & Lindsay Construction Co. v. State*, 83 N.M. 534, 494 P.2d 612 (1972). In addition to paragraph four, other sections of the contract set out that the plaintiffs agree to sell certain hot oil units to the defendant, and agree not to compete with the defendant in the hot oil business. This constitutes legal consideration. *Schultz, supra.* Further, inadequacy of consideration is not, of itself, sufficient to avoid a contract in the absence of evidence of fraud. *Featherstone v. Walker*, 43 N.M. 181, 88 P.2d 271 (1939).

The defendant also argued, in the motion to dismiss hearing, that the contract was unenforceable because the price and the duration of the contract had been omitted, and in fact, were never specified by the parties.

The contract was made after the Uniform Commercial Code was adopted in New Mexico. Section 50A–2–305 and § 50A–2–309, quoted in pertinent part below, are controlling.

50A–2–305. *Open price term.*—(1) The parties . . . can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

50A–2–309. *Absence of specific time provisions—Notice of termination.*—(1) The time for shipment or delivery or any other action under a contract if not provided in this article or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

No previous New Mexico cases have interpreted § 50A–2–305. However, in *Illinois Commerce Com'n. v. Central Ill. Pub. Serv. Co.*, 25 Ill.App.3d 79, 322 N.E.2d 520 (1975) a contract providing that an electrical cooperative would supply "necessary electrical services" to a lot and which lacked a stated price term did not make the contract unenforceable. The court held that the owner of the lot would have to pay a reasonable price.

As to the duration of the contract, although paragraph four of the contract at bar does not spell out the duration of the contract, this fact does not in and of itself invalidate it. As set out in § 50A–2–309, supra, in the absence of specific time provisions, the contract is valid for a rea-

sonable time. *National Civil Service League v. City of Santa Fe, N.M.*, 370 F.Supp. 1128 (D.N.M. 1973).

Plaintiffs argue that their complaint stated a claim upon which relief could be granted. Defendant argues that, even if the contract was not too indefinite and thus enforceable, under subsection two of § 50A–2–309, supra, the contract may be terminable by either party. Subsection 2 and subsection 3 of § 50A–2–309 when read together, set out that a contract is terminable at will upon reasonable notification.

Under 8(c) of the New Mexico Rules of Civil Procedure, § 21–1–1(8)(c), N.M.S.A. 1953 (Repl. Vol. 4, 1970), the burden is on the defendant to raise any matter which will constitute an avoidance or an affirmative defense to plaintiffs' complaint. It was up to the defendant to assert that the contract was terminable at will because notice had been given. Failure of the plaintiffs to allege lack of notice in no way signifies a failure to state a claim upon which relief may be granted.

The plaintiffs' complaint, taking all well-pleaded facts as true, states a claim upon which relief may be granted. The trial court's dismissal of the complaint with prejudice is reversed and the case remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, J., dissents.

SUTIN, Judge (dissenting).

I dissent.

On September 3, 1971, McCasland sold Prather four hot oil units under Contract for Sale of Business and Agreement Not to Compete. McCasland agreed not to compete for a five-year period. The subsequent sale of McCasland products to Prather had no fixed tenure. Paragraph 4 of the contract reads:

> To the extent that the same is permissible under New Mexico and federal law, Purchaser agrees to buy all acid he needs from McCasland Hot Oil Service and agrees to buy all brine and fresh water he needs from Sims & McCasland, a partnership.

On May 28, 1976, McCasland filed a complaint against Prather and alleged:

> In violation of the terms of the Contract, defendant has failed and refused to buy all brine and fresh water from Sims & McCasland, although such brine and fresh water has been available at all times to him, and although plaintiffs have specifically requested that he do so.

The trial court ordered plaintiffs' complaint to be dismissed with prejudice for failure to state a claim upon which relief can be granted. No reasons were stated. As long as district judges and attorneys fail to insert in such judgments the basis for its conclusion, it renders no assistance to this Court. Criticism will continue to flow. Silence is golden below, but lead on appeal.

The complaint did not allege, and the contract did not provide for, any fixed tenure for Prather to purchase brine and fresh water from McCasland. A fixed tenure existed for McCasland not to compete with Prather. That tenure expired on September 3, 1976 after the complaint was filed. McCasland could then compete with Prather.

The complaint did not allege any duty of Prather to give notice of termination of the agreement to buy, if such notice may have been necessary, nor any duty of McCasland to sell Prather *ad infinitum* though its source of supply should end.

The only issue on this appeal is:

> If a written contract fails to provide any fixed tenure for Prather to buy brine and fresh water, is that portion of the contract terminable at will?

The answer is "yes." *Southwest Distributing v. Olympia Brewing*, 90 N.M. 502, 565 P.2d 1019 (1977); *Weilersbacher v. Pittsburgh Brewing Company*, 421 Pa. 118, 218 A.2d 806 (1966); *Kraftco Corporation v. Kolbus*, 1 Ill.App.3d 635, 274 N.E.2d 153 (1971); *House of Crane Incorporated v. H. Fendrich, Inc.*, 146 Ind.App. 478, 256 N.E.2d 578 (1970); *Scanlan v. Anheuser-Busch,*

Inc., 388 F.2d 918 (9th Cir. 1968); *Robert Porter & Sons, Inc. v. National Distillers Prod. Co.*, 324 F.2d 202 (10th Cir. 1963); *Century Refining Company v. Hall*, 316 F.2d 15 (10th Cir. 1963); *Superior Concrete Accessories v. Kemper*, 284 S.W.2d 482 (Mo. 1955); Annot., "*Termination by Principal of Distributorship Contract Containing No Express Provision for Termination*," 19 A.L.R.3d 196, 264 (1968).

Superior Concrete Accessories said:

> It is the general rule in both Illinois and Missouri, as well as elsewhere, that contracts for an indefinite period of time may be terminated at the will of either party. [284 S.W.2d at 490.]

McCasland relies solely on the Uniform Commercial Code. Section 50A–2–309(2), N.M.S.A. 1953 (Repl. Vol. 8, pt. 1) reads:

> Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time *but unless otherwise agreed may be terminated at any time by either party.* [Emphasis added.]

Weilersbacher, supra, said:

> The adoption of the Uniform Commercial Code in Pennsylvania did not change the existing law so as to aid plaintiffs' cause. [218 A.2d at 807.]

This case is directly in point, unanswered by McCasland and the majority opinion. See also, *Aaron E. Levine & Co., Inc. v. Calkraft Paper Co.*, 429 F.Supp. 1039 (E.D. Mich. 1976); *Rockwell Engrg. Co. v. Auto. Timing & Controls Co.*, 559 F.2d 460 (7th Cir. 1977).

This judgment should be affirmed.

585 P.2d 342

STATE of New Mexico, Plaintiff-Appellee,

v.

John DOE, a child, Defendant-Appellant.

No. 3610.

Court of Appeals of New Mexico.

Sept. 26, 1978.

Narciso Garcia, Jr., Toulouse, Krehbiel & DeLayo, P. A., Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Lawrence A. Gamble, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

The issue in this case involves the preliminary inquiry required before the filing of a petition under the Children's Code. Section 13–14–14, N.M.S.A.1953 (Repl. Vol. 3, pt. 1) and Rule 23. All rule references herein are to the Children's Court Rules. We discuss: (1) notice; (2) the inquiry; and (3) the finding required for filing a petition.

The record indicates the child committed battery on January 24, 1978 and was placed in detention on January 25, 1978 at 4:15 p. m. Because the child was in detention, the preliminary inquiry was to be completed "no later than 2 days from the date of detention", Rule 20(a) and a petition, if filed, was required to be filed "[w]ithin 2 days from the date of detention". Rule 23(c).

No written notice of the preliminary inquiry was given. As the probation officer testified: "It was too short of time." With a two-day requirement, we agree. Further, written notice of the preliminary inquiry is not required when the child is in detention. Rule 5(b)(2); see Committee Commentary to Rule 21.

The child was released from detention after a hearing held on the morning of January 27, 1978. Prior to the detention hearing, the probation officer talked with the child's mother by telephone. "[W]e talked about the incident and detention hearing." Asked if he told the mother that a preliminary inquiry would be held, the probation officer replied: "I don't remember if I stated it that way. I told her we would be meeting before the detention hearing." The probation officer testified a preliminary inquiry was held at 8:30 a. m., prior to the detention hearing, on January 27, 1978. At that meeting the charge against the child was discussed, "they" said they understood the charge and would get "our own attorney".

The transcript shows a preliminary inquiry was in fact held. A petition charging the child was delinquent and in need of care or rehabilitation was filed, apparently prior to 9:00 a. m., on January 27, 1978. The child moved to dismiss the petition, alleging that no valid preliminary hearing was held. The appeal is from the denial of this motion.

Notice of Preliminary Inquiry

Rule 21(b) requires that prior to the preliminary inquiry notice be given "[o]f the time and place of the initial conference in the preliminary inquiry and of the purpose of the inquiry". The purpose of the inquiry "is to determine whether the best interests of the child and the public require that a petition alleging delinquency . . . be filed." Rule 20(b); *State v. Doe*, 91 N.M. 232, 572 P.2d 960 (Ct.App.1977).

The child contends that notice was not given of the purpose of the preliminary inquiry. Although the probation officer testified that in the telephone conversation he told the mother "we would be meeting before the detention hearing", he did not testify that he informed the mother of the purpose of the meeting. The mother knew of the detention hearing but denied that she received notice of a preliminary inquiry. The evidence then is that notice of the purpose of the inquiry was not given.

Did the failure to give notice of the purpose of the preliminary inquiry require that the petition be dismissed? In our opinion, No.

Since the purpose of the inquiry is a "best interests" determination of whether a petition should be filed, since a preliminary inquiry was in fact held, and since a petition was in fact filed, we consider whether the child was prejudiced by the lack of notice as to the purpose of the preliminary inquiry. The trial court found that the child committed the delinquent act of battery and was in need of care and rehabilitation. These findings are not challenged.

In light of the foregoing, how has the child been hurt? In our opinion, he has not been hurt by the lack of notice of the purpose of the preliminary inquiry. We note that the child does not claim prejudice by the lack of notice, only that it was not given. Thus, the child's contention is based on a technicality which exalts form over substance. See *State v. Doe*, 88 N.M. 137, 537 P.2d 1399 (1975). Not having been harmed by the technical violation, the lack of notice of the purpose of the preliminary inquiry did not require dismissal of the petition. *Matter of Doe*, 88 N.M. 481, 542 P.2d 61 (Ct.App.1975).

The Preliminary Inquiry

The child asserts that, in essence, no preliminary inquiry was held because at the meeting prior to the detention hearing there was no inquiry as to whether the best interests of the child and the public required that a petition be filed. This overlooks the evidence that at the meeting the charge was discussed and a decision was reached by the mother to retain private counsel for the child then in detention. Clearly, the meeting involved a discussion of the best interests of the child at that point in time. Whether the discussion involved a "best interests" discussion in connection with the filing of a petition, we do not know. The probation officer was not asked whether this was discussed. The child was the movant. If the child felt the meeting was such an inadequate preliminary inquiry that the petition should have been dismissed, it was up to the child, as movant, to come forward with evidence tending to establish the asserted inadequacy. Compare *State v. Lopez*, N.M., 581 P.2d 872 (1978) and *State v. Dawson*, 91 N.M. 70, 570 P.2d 608 (Ct.App.1977). He did not do so.

Finding for Filing a Petition

Rule 22(a) provides that upon the conclusion of the preliminary inquiry, probation services "may authorize the filing of a petition upon a finding that informal adjustment is not in the best interests of the child and the public."

Section 13–14–15, N.M.S.A.1953 (Repl. Vol. 3, pt. 1) states that a petition "shall not be filed unless probation services, the children's court attorney, the court or other person authorized by the court has determined and endorsed upon the petition that the filing of the petition is in the best interest of the public and the child."

There is no testimony that the probation officer authorized the filing of the petition, nor is there testimony that he did not. However, the petition, signed by the Children's Court attorney, states that probation services "has determined that the best interests of the child and the public require that this Petition be filed." This statement, uncontested, complies with § 13–14–15, supra, and is sufficient to satisfy the requirement of a "finding" in Rule 22(a). See *State v. Doe*, N.M., 578 P.2d 345 (Ct. App.1978).

The judgment and disposition of the Children's Court are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

585 P.2d 647

STATE of New Mexico,
Plaintiff-Appellee,

v.

Stephen FRIED, Defendant-Appellant.

No. 3548.

Court of Appeals of New Mexico.

Sept. 19, 1978.

Writ of Certiorari Denied Oct. 23, 1978.

John B. Bigelow, Chief Public Defender, Michael Dickman, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of trafficking in cocaine, defendant appeals. Issues listed in the docketing statement, but not briefed, are deemed abandoned. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App.1977). Two issues are argued. They concern: (1) closing argument; and (2) the jury listening to a tape recording during its deliberations.

Closing argument

Defendant's conviction is based on the sale of cocaine to an undercover agent on January 22, 1977 in Santa Fe. The agent identified defendant as the seller;

the identification testimony was supported by a tape recording of telephone conversations between the agent and a voice the agent identified as defendant's. The agent testified, on direct examination, that he had met defendant in Las Vegas during the course of an undercover operation there, and that the cocaine obtained in the Santa Fe purchase had been used as evidence in a criminal proceeding in San Miguel County. The agent also testified that in his dealings with defendant in connection with the Santa Fe purchase of cocaine, defendant and the agent discussed both heroin and Columbian marijuana.

On cross-examination of the agent, defendant brought out that in the Las Vegas undercover operation, the agent had purchased cocaine and heroin from defendant and that the San Miguel County criminal proceeding had involved the Las Vegas purchase.

On redirect examination of the agent, the prosecutor elicited the details of the Las Vegas purchase which occurred January 12, 1977. When questioned about simulating the snorting of cocaine during the Las Vegas purchase, defendant objected on the grounds of relevancy. The trial court overruled the objection, stating that the Las Vegas purchase had been talked about "by counsel for the last thirty or forty minutes."

Defendant testified that in the San Miguel County criminal proceeding he had been convicted of the cocaine charge but acquitted of the heroin charge.

During closing argument the prosecutor referred to both cocaine and heroin in connection with the Las Vegas transaction, and also referred to defendant as a dealer in different types of drugs. Defendant claims he was denied a fair trial because this argument was improper. We disagree.

The references to the Las Vegas cocaine transaction and defendant's activities as a drug dealer were well within the evidence and raise no arguable issue as to an improper argument. Defendant's specific claim is that the prosecutor made "repeated references" to the Las Vegas heroin transaction and this was unfair because defendant was acquitted of that charge. The prosecutor's argument made two references to the Las Vegas heroin transaction. Defendant's contention overlooks the fact that defendant's cross-examination brought out that the agent purchased heroin from defendant in Law Vegas. The prosecutor could properly comment upon this evidence, as upon any other evidence, in closing argument. The fact that defendant testified that he had been acquitted of the Las Vegas heroin charge did not eliminate the evidence that defendant had sold heroin in Las Vegas.

The prosecutor's closing argument does not involve a "reasonable latitude" comment on the evidence. See *State v. Polsky*, 82 N.M. 393, 482 P.2d 257 (Ct.App.1971), cert. denied, 404 U.S. 1015, 92 S.Ct. 688, 30 L.Ed.2d 662 (1972). Here there was specific evidence that defendant sold heroin in Las Vegas. It was not unfair of the prosecutor to comment on that specific evidence in arguing the State's case to the jury.

Jury Listening to a Tape Recording During Deliberations

The tape recording of the telephone conversations was admitted as an exhibit. At the time the exhibit was admitted, defendant objected "to the jury being allowed to play the tapes subsequently in the jury room." During deliberations, the jury requested that it be allowed to hear the tape again. Defendant stated that he had no objection to the tape going to the jury room but he did object to the tape being replayed, either in the jury room or open court. The trial court directed the tape be "set up" so that the jury could listen to only the portion of the tape involving conversations identified as being between the agent and the defendant. With that "safeguard", the tape was submitted to the jury, along with a device for playing the tape.

Defendant contends it was error to allow the jury to replay the tape during its deliberations because the result was "prejudicial overemphasis on that one piece of evi-

dence." *State v. Ross*, 85 N.M. 176, 510 P.2d 109 (Ct.App.1973) supports defendant's claim, but *Ross* was decided before the adoption of the rules of criminal procedure.

Rule of Crim.Proc. 42(c) states:

> (c) *Exhibits.* Upon its request to review any exhibit during its deliberations, the jury shall be furnished all exhibits received in evidence.

Rule of Crim.Proc. 43(a) states:

> (a) After the jurors have retired to consider their verdict, if they desire additional instructions or to have any testimony read to them, they may in the discretion of the court be returned into the courtroom and the court may give them such additional instructions if authorized by U.J.I. Criminal or may order such testimony read to them. Such instruction shall be given and such testimony read only after notice to, and in the presence of, the attorneys and the defendants.

The tape in *State v. Ross*, supra, was played to the jury in the presence of the trial judge and counsel. With the addition of a requirement for the defendant's presence, Rule of Crim.Proc. 43(a) now authorizes the procedure held improper in *Ross*, supra. The argument that hearing only a portion of the evidence overemphasizes the portion heard is answered in *State v. Montoya*, 86 N.M. 316, 523 P.2d 814 (Ct.App. 1974); if jurors are intelligent enough to be entrusted to decide the case, they are intelligent enough to have their memories refreshed only as to portions of the testimony about which they are in doubt. Our point, simply, is that the rules of criminal procedure changed pre-existing case law.

In *State v. Chavez*, 86 N.M. 199, 521 P.2d 1040 (Ct.App.1974), we held that doctor's reports, along with other exhibits, were properly sent to the jury, during its deliberations, under Rule of Crim.Proc. 42(c). Defendant had no objection to the tape being sent to the jury; however, he did not want the jury to be able to hear the tape that was sent. We see no conceptualistic distinction between reviewing an exhibit that is typed or written, and an exhibit that is recorded. Rule of Crim.Proc. 42(c) permits a jury to review any exhibits during its deliberations; the rule does not exclude recorded exhibits.

The trial court did not err in allowing the jury to hear the tape exhibit during its deliberations.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

585 P.2d 649

Cecil Dwaine SHORT,
Plaintiff-Appellant,

v.

ASSOCIATED MILK PRODUCERS, INC., Employer, and Fireman's Fund American Insurance Companies, Insurer, Defendants-Appellees.

No. 3511.

Court of Appeals of New Mexico.

Sept. 26, 1978.

James A. Mungle, Albuquerque, for plaintiff-appellant.

William F. Brainerd, Roswell, for defendants-appellees.

OPINION

SUTIN, Judge.

Plaintiff recovered judgment on *February 3, 1978* in a workmen's compensation case and was awarded compensation for temporary total disability. The judgment further ordered that the parties appear before the court before *November 1, 1978* for the purpose of determining the plaintiff's condition at that time. Plaintiff appeals. We affirm.

Plaintiff challenges the court's finding No. 5.

> The Plaintiff is temporarily, totally disabled as a result of his injury * * *.

He states:

> This appeal presents only one issue, that being whether a trial court can disregard uncontradicted, unimpeached testimony and unrebutted presumptions establishing the permanency of the workman's disability.

The issue is misstated. The issue is:

> Can the trial court award temporary total disability when plaintiff's doctor testified that plaintiff should be reevaluated within 8 to 10 months after trial?

On direct examination, plaintiff's doctor testified that plaintiff was permanently disabled, but his condition had not yet stabilized; that the passage of a year would better indicate what his condition would be. On cross-examination, the doctor was asked this question to which he made this answer:

> Q. So that you think that this man ought to go through another eight or nine or ten months and then come back for evaluation at that time?
>
> A. Yes.

The reason given by the doctor was to see how plaintiff was coping with the situation, whether he can live with it or not or whether his back was stabilized, "whether there has been any change *for the better or worse.*" At the close of the evidence, the trial court stated that this testimony was the turning point; that the doctor had to have a year to see if the plaintiff's back will stabilize. The doctor's testimony was substantial evidence of temporary total disability.

Pacheco v. Alamo Sheet Metal Works, Inc., N.M.App., 580 P.2d 498, 1978, is directly in point. The trial court found that plaintiff was totally disabled; and this disability should continue to improve until approximately two years from the date of the accident. The court concluded that plaintiff had been temporarily totally disabled and should receive compensation benefits as long as temporary total disability continued. Judge Wood asked this piercing question:

> Since plaintiff is receiving temporary total disability payments until some change occurs, what is his complaint?

Defendant asked the same question. Plaintiff answers "*Pacheco* is not applicable." This answer is nugacious.

Even though plaintiff had been awarded total permanent disability, this Court raised

the issue during oral argument whether defendant could proceed within six months thereafter to re-evaluate plaintiff. Section 59–10–25(A), N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1).

Plaintiff strongly contended that if the court found plaintiff permanently disabled, the employer would be denied any six-month right to re-evaluate plaintiff. This appears to be a matter of first impression in New Mexico. The pertinent part of § 59–10–25(A) reads:

> The district court in which any workman has been awarded compensation * * * may, upon the application of the employer * * * fix a time and place for hearing upon the issue of claimant's recovery and if it shall appear upon such hearing that diminution or termination of disability has taken place, the court shall order diminution or termination of payments of compensation as the facts may warrant * * * Hearings may not be held more frequently than at six-month intervals * * *.

It is important to note that the only essential element necessary to allow the employer to proceed for diminution or termination of disability is the fact that a "workman has been awarded compensation." Whether the disability is total or partial, permanent or temporary plays no role in any subsequent hearing. Judgment was entered February 3, 1978. On August 3, 1978, the defendant could have "fixed a time and place for hearing upon the issue of claimant's recovery." The trial court ordered that the parties appear before November 1, 1978 for the purpose of determining plaintiff's condition at that time. No date was fixed for attendance before the court. Unless the parties agree on a date, the defendant shall fix a date for such attendance and notify plaintiff. A hearing shall be held to determine whether plaintiff remains totally disabled.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

585 P.2d 651

STATE of New Mexico, Plaintiff-Appellee,

v.

Clemente RAMIREZ, Defendant-Appellant.

No. 3531.

Court of Appeals of New Mexico.

Oct. 3, 1978.

John B. Bigelow, Chief Public Defender, Martha Daly, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant's appeal involves a question of venue. He has been convicted of ten counts of CSP II (criminal sexual penetration in the second degree) perpetrated by the use of force or coercion which results in personal injury to the victim. He has also been convicted of one count of kidnapping.

Five of the CSP offenses involve fellatio; five involve anal intercourse. The victim of these events was a hitchhiker. Defendant and two companions picked up the hitchhiker in El Paso, Texas and drove north on the interstate highway to Albuquerque. There is no claim that venue, in Bernalillo County, was improper for the kidnapping offense and the last four CSP offenses. Defendant's claim is that the first six CSP offenses (3 fellatio and 3 anal intercourse) did not occur in Bernalillo County and trial in Bernalillo County as to these six offenses was improper. He relies on N.M.Const., art. II, § 14 and § 40A-1-15, N.M.S.A.1953 (2d Repl. Vol. 6) which provide that a defendant has a right to trial in the county where the crime was committed. *State v. Lopez*, 84 N.M. 805, 508 P.2d 1292 (1973).

Immediately prior to trial, defendant sought dismissal of the "counts . . that did not occur in Bernalillo County," claiming improper venue. Denial of this motion is asserted to be error. The State asserts this issue is not before us for review. The State contends that the motion, made immediately prior to trial, was untimely under Rule of Crim.Proc. 33(f). On the basis of the claimed untimeliness, the State argues that the venue question was waived. Compare *State v. Lopez*, supra. The State's argument disregards the proceedings before the trial court. Defendant's motion was not denied as untimely; the trial court denied the motion on the merits. See *State v. Hogervorst*, 90 N.M. 580, 566 P.2d 828 (Ct. App.1977). The venue question is before us for decision.

In denying defendant's venue motion, the trial court pointed out that the question had already been argued. "And I think this is one of those continuing offenses, part of which occurred out of the County and part of which occurred in the County, at least that's the representation of the State." That the parties and the court were relying on a prior hearing is shown by the prosecutor's response. The prosecutor stated: "That's correct, your Honor. And we further stated in our argument to the Court that the venue statute has been interpreted to mean that if a material element of the offense has occurred within Bernalillo County that was sufficient for venue purposes." The court then stated: "And there was also a problem about this defendant not being able to testify when he passed the County line or so on."

The prior venue motion was filed by a co-defendant. The motion was heard, and denied, before a nolle prosequi was entered in connection with the charges against the co-defendant. This motion relied on the victim's written statement, which was before the court as an attachment to still another motion of the co-defendant. The factual basis for both the co-defendant's and the defendant's venue motions was this statement. The question is whether the facts in the victim's statement support the trial court's decision. *Rodriguez v. State*, 91 N.M. 700, 580 P.2d 126 (1978). We add, however, that the trial testimony, insofar as it pertains to venue, is not materially different from the victim's written statement.

The victim's statement, which is uncontradicted, identifies two of the CSP offenses (first fellatio and first anal intercourse) as occurring at a "pressure dam", identifies two CSP offenses (second fellatio and second anal intercourse) as occurring when the car overheated on Highway I–25, and identifies two CSP offenses (third fellatio and third anal intercourse) as occurring at the time of the "second flat tire". The victim's statement is to the effect that these six sex acts occurred south of Socorro, New Mexico. The State does not contend to the contrary; rather, the State recognizes that the acts on which the first six CSP offenses are based occurred outside of Bernalillo County. Not only did the acts occur outside of Bernalillo County, the acts occurred before defendant and the victim arrived in Bernalillo County in the course of the trip which originated in El Paso, Texas.

Contending that a Bernalillo County venue was proper for the first six CSP offenses, the State relies on § 40A–1–15, supra, which provides that trial may be held in any county in which a material element of the crime was committed. *State v. Wise*, 90 N.M. 659, 567 P.2d 970 (Ct.App.1977).

Section 40A–9–21, N.M.S.A.1953 (2d Repl. Vol. 6, Supp.1975) defines CSP as "the unlawful and intentional causing of a person . . . to engage in . . . fellatio or anal intercourse". If this offense is "perpetrated . . . by the use of force or coercion which results in personal injury to the victim", § 40A–9–21(B), supra, it is a second degree felony. There is no claim that the fellatio and anal intercourse did not occur. There is no claim that the acts of fellatio and anal intercourse were other than by force or coercion resulting in personal injury to the victim. The State's claim is that the force or coercion that defendant used was a "continuing element"; that "[t]his same force continued throughout all of the incidents of fellatio and anal intercourse until the victim was able to escape from Defendant in Albuquerque." We disagree.

"Perpetrated" in § 40A–9–21, supra, means "accomplished"; "performed"; "committed". See "perpetrate" in Webster's Third New International Dictionary (1966); *People v. Harrison*, 176 Cal.App.2d 330, 1 Cal.Rptr. 414 (1960). What was accomplished by the use of force or coercion? Specifically, the fellatio and anal intercourse; generally, the CSP offense. Compare *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct.App.1977).

Rape is not a continuing offense. *Peterson v. State*, 116 Neb. 268, 216 N.W. 823 (1927). Neither is CSP. When the CSP was perpetrated, that CSP was a completed offense. The State's "same force" argu-

ment is a contention that none of the CSP offenses were completed before reaching Bernalillo County. A similar contention was made by the State, and rejected by this Court, in *State v. Thoreen*, 91 N.M. 624, 578 P.2d 325 (Ct.App.1978). The fallacy of the State's contention is in failing to recognize that once the fellatio and anal intercourse occurred, in a manner set out in § 40A–9–21, supra, the CSP offense was complete. The force used to commit fellatio A or anal intercourse A did not continue *as to those acts* after that fellatio or that anal intercourse was accomplished.

The only showing is that the first six CSP offenses were completed before reaching Bernalillo County. Being completed offenses, no material element of those crimes was committed in Bernalillo County. In so holding, we have not overlooked the venue problem when a continuing series of sex offenses are committed in different counties and only one offense is charged. See *State v. Overman*, 269 N.C. 453, 153 S.E.2d 44 (1967). That is not the situation here. Defendant was charged with an offense for each of his sex activities with the victim; defendant recognizes that charges for each of the activities was proper. See *State v. Elliott*, 89 N.M. 756, 557 P.2d 1105 (1977).

The State seeks to avoid our holding. Our answers to these efforts follow:

(a) New Mexico does not have a venue statute applying to in-transit crimes, such as the statute discussed in *People v. Bradford*, 17 Cal.3d 8, 130 Cal.Rptr. 129, 549 P.2d 1225 (1976). Nor does New Mexico have a statute providing for venue when it cannot be determined in which county a material element of the crime was committed.

(b) The State contends that venue in Bernalillo County should be considered proper for all the charges in order to avoid harassment of the defendant. This overlooks the fact that defendant is not claiming harassment, but is claiming his right to be tried in the county where the crime was committed.

(c) The State asserts that even if venue in Bernalillo County was improper, no substantial right of defendant was violated and no reversible error occurred. This overlooks the rights, which we deem substantial, conferred both by the Constitution and a statute. See the citations in the second paragraph of this opinion.

(d) The argument that the denial of defendant's motion was simply a discretionary ruling of the trial court ignores the rights conferred by the Constitution and statute.

Because defendant's venue motion as to the first six counts should have been granted, the judgment and sentences as to those six counts are reversed. The judgment and sentences as to the last four CSP offenses and the kidnapping offense are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

585 P.2d 1091

SENTRY INSURANCE COMPANY,
Plaintiff-Appellee,

v.

GEORGE A. RUTHERFORD, INC.,
Defendant-Appellant.

No. 11902.

Supreme Court of New Mexico.

Oct. 23, 1978.

Oldaker, Oldaker & Watkins, Michael P. Watkins, Albuquerque, for defendant-appellant.

Keleher & McLeod, Russell Moore, Robert H. Clark, Albuquerque, for plaintiff-appellee.

OPINION

McMANUS, Chief Justice.

George A. Rutherford, Inc. (Rutherford) entered into a contract with the Regents of the University of New Mexico to construct an addition to the basketball arena. As part of the contract, Rutherford was required to obtain builder's risk insurance to insure against the "perils of fire, extended coverage, vandalism and malicious mischief." The Regents had a blanket policy from Sentry Insurance Company (Sentry) which covered all University of New Mexico property. Rutherford was added to this policy by the following special endorsement:

> It is agreed that policy is amended to include George A. Rutherford, Inc. as Additional Named Insured *as his interest may appear.* General Contractor for purposes of modifying Arena Complex. All other terms and conditions remain unchanged. (Emphasis added.)

During the course of the modification, one of Rutherford's employees ignited a fire in the arena while using a welding torch. The fire caused substantial damage to the super-structure of the arena itself, but it did not damage any portion of the arena where the expansion and remodeling were

going on. Sentry paid the Regents the sum of $370,020.46.

After paying the loss, Sentry filed this subrogation action against Rutherford seeking recovery thereof on the theory that the negligence of Rutherford and its employees had caused the fire and attendant damage to the arena. In its answer, Rutherford asserted that it was not liable under a subrogation theory because it was a named insured under the Sentry-Regents policy. Sentry moved to strike this defense. A hearing was held on this motion and an order was entered granting the motion to strike. Rutherford took an interlocutory appeal from this order.

The issue is whether the language "as his interest may appear" extends insurance coverage to the full value of the arena or only to that part of the arena being expanded and modified.

In our opinion, the plain meaning of the language "as his interest may appear," does not affirmatively support either position. In addition, the only evidence in the record is presented through three affidavits. These affidavits are very short and do not indicate the intent of the contracting parties at the time the endorsement was drawn up. The record does indicate that the parties negotiated over the language, but details as to these negotiations were not supplied.

Therefore, it is the opinion of this Court that the decision of the trial court be reversed and the case be remanded for the purpose of obtaining evidence that will more clearly reveal the intention of the parties pertaining to those negotiations.

IT IS SO ORDERED.

PAYNE and FEDERICI, JJ., concur.

585 P.2d 1092

Samuel S. SPENCER, Plaintiff-Appellant,

v.

J. P. WHITE BUILDING, a partnership, Roy Norton and Marian Norton, his wife, Defendants-Appellees.

No. 11711.

Supreme Court of New Mexico.

Oct. 24, 1978.

Hinkle, Cox, Eaton, Coffield & Hensley, Paul M. Bohannon, Roswell, for plaintiff-appellant.

Sanders, Bruin, Baldock & Coll, Charles H. Coll, Roswell, for defendants-appellees.

OPINION

SOSA, Justice.

Samuel Spencer (lessee) sued Roy and Marian Norton (lessor) and J. P. White Building (sublessee) in the District Court of Chaves County seeking specific performance of the first right of refusal clause contained in a lease agreement or, alternatively, to recover damages for breach of a lease agreement. Lessee appeals from summary judgment rendered in favor of the lessor and sublessee.

On October 21, 1966, a lease agreement (hereafter Spencer Lease) was entered into by lessee and lessor. The lease related to certain land which was to be used as a commercial parking lot facility for a term of ten years commencing November 15, 1966. The lease provided that lessor would receive $100 per month. On November 15, 1966, lessee executed a sublease agreement with sublessee for a ten-year period commencing that same date at the rate of $200 per month. The sublease agreement contained essentially the same terms and conditions as the Spencer Lease. Lessor was aware of this sublease agreement. The Spencer Lease included a first right of refusal clause in favor of lessee. It stated:

> *Paragraph 12: First Right of Refusal*: Upon the expiration of the subject lease term, if Lessors desire the leased premises to be continued to be used for the purpose of a commercial parking lot facility, then and in that event Lessee shall have the first right of refusal to meet any bona fide offer from any person, persons, partnerships or corporations who desire to lease the premises for such use from Lessors upon such terms and conditions upon which the parties may agree.

Prior to the expiration of the Spencer Lease and the sublease agreement, sublessee approached lessor about the possibility of obtaining a new lease directly from lessor once the Spencer Lease had expired. Lessor erroneously assured sublessee that lessee had no further right in the property beyond the first ten years.

Lessor leased the land to sublessee by instrument dated March 26, 1976, at the rate of $250 per month for a period of ten years commencing on November 15, 1976. It appears that lessee approached lessor on

or about October 6, 1976, to negotiate a new lease. At this time, lessor advised lessee of lessor's March 26, 1976 lease agreement with sublessee. Lessee orally notified lessor that he would accept the terms of the March 26, 1976 lease by exercising his first right of refusal. On the next day, October 7, 1976, lessor allowed lessee to read the lease agreement between lessor and sublessee. Upon reviewing the agreement, lessee again orally advised lessor that he was accepting the terms of the agreement between lessor and sublessee by exercising his preferential right under the Spencer Lease. Lessee went home and wrote a letter, dated October 7, 1976, confirming the exercise of his first right of refusal.

On October 6, 1976, lessor contacted sublessee and informed him of lessee's exercise of his first right of refusal. Together lessor and sublessee visited an attorney who advised them that they should immediately rescind their March 26, 1976 lease agreement. They orally agreed to cancel this agreement without giving any notice to lessee. The attorney then advised lessor to immediately give lessee notice of cancellation of the Spencer Lease. Such notice was presumably mailed on October 7, 1976. This was pursuant to a clause in the Spencer Lease which provided that:

> All notices required or permitted by this lease shall be written and shall be deemed to have been properly given when delivered personally or by mail with all postage full prepaid to the parties hereto . . .

The Spencer Lease was subject to an addendum which provided that the lease could not be terminated for the purpose of allowing the premises to be used for a parking lot facility. It stated in pertinent part:

> Lessors, during the term hereof, shall have the right to cancel and terminate this lease upon sixty days written notice to Lessee; provided, however, that no cancellation shall be had for the purpose of allowing the premises to be used for a parking lot facility for a period of ten years from this date . . .

Subsequently, on October 11, 1976, sublessee approached lessor about the possibility of purchasing the parking lot rather than leasing it. Lessor and sublessee then agreed on an undisclosed purchase price. The conveyances and sale were effected by warranty deed on October 13, 1976. The property is still used as a parking lot facility.

Shortly thereafter, lessee instituted this suit for specific enforcement of the first right of refusal clause contained in the Spencer Lease or, in the alternative, for damages for breach of the Spencer Lease.

The decisive question in this case is whether lessee's oral exercise of his first right of refusal with written confirmation on the next day resulted in a binding lease agreement between lessor and lessee. We hold that it did.

There is no dispute that lessee exercised his preferential right. Lessee contends that the written notice requirement of the Spencer Lease was inapplicable to the first right of refusal. He argues that the first right of refusal, by its very terms, did not contemplate preliminary notice of the desire to exercise the right of refusal. Lessee urges that all that was required of him was that he evidence acceptance of the terms of a bona fide offer to the lessor, which he did by oral acceptance of the terms of the March 26, 1976 agreement. Lessor and sublessee contend that written notice was required under the Spencer Lease and that lessee did not properly exercise his first right of refusal. They argue that because they orally rescinded the March 26, 1976 agreement before written exercise of the preferential right, lessee is precluded from claiming its benefit. The Spencer Lease is silent as to how the preferential right must be exercised. It should be noted that there is no express written notice requirement within the first right of refusal paragraph. In contrast, several clauses of the Spencer Lease individually prescribe written notice.

This is a case of first impression in New Mexico. Neither party has cited any decision of this Court involving language identical, or even similar, to that contained

in the present lease, nor have we been able to find any such decision. Where a lease provides that the lessee shall have the "first right" or "first privilege" to re-lease the premises, a conditional rather than an absolute option is granted the lessee. Thus, a lessee under such a clause has the right to re-lease provided the lessor desires to relet the premises and does not desire to sell them or to use them himself or to make other use of the property inconsistent with a future leasing arrangement. *Buddenberg v. Welch,* 97 Ind.App. 87, 185 N.E. 865 (1933).

The right of lessee to exercise the option or privilege to renew will be protected regardless of whether the option is deemed conditional or unconditional. This view has been adopted where it clearly appears that the lessor does not desire to use the property for his own purpose or to sell it, yet, in spite of a first privilege clause, desires to lease the property for another term at an increased rental to someone other than the lessee. *See* 50 Am.Jur.2d *Landlord and Tenant* § 1174 (1970).

The existence of the March 26, 1976 agreement, executed eight months before the termination of the Spencer Lease, is clear evidence of lessor's desire to relet his property. The word "first" in the first right of refusal clause has a meaning to which we give a definite effect. As used in the Spencer Lease, it implies a priority in the lease signifying that before anyone else, lessee had the privilege of re-leasing the premises if lessor decided to re-lease them as a commercial parking lot and not to sell or to occupy them himself, so long as lessee met the offer of a prospective lessee.

The agreement between lessor and sublessee, executed on March 26, 1976, was a valid lease agreement creating a present interest in the property subject to lessee's rights under the Spencer Lease, and was in existence at the time lessee orally exercised his preferential right. This agreement was a bona fide offer to lease, the terms of which lessee accepted as binding between himself and lessor.

Both lessor and sublessee had actual notice that lessee had exercised the preferential right before they thought of cancelling the Spencer Lease and March 26, 1976 agreement. Both lessor and sublessee treated the preferential right as properly exercised by lessee's oral acceptance. Had this not been so, lessor and sublessee would not have begun cancelling the leases, for it was only after lessee orally exercised his preferential right that the cancellations were attempted. Lessee's written confirmation of his exercise of the first right of refusal under the Spencer Lease, together with the terms of the March 26, 1976 agreement, resulted in a binding agreement between lessor and lessee.

If lessor had acted in good faith under the contract, lessee's rights would not have been frustrated. We disagree with lessor's assertion that motives of the parties to a contract for a mutual rescission are not pertinent to their right to so act. "[W]hether expressed or not, every contract includes a covenant of good faith and fair dealing between the parties." *Flying Tiger Lines, Inc. v. United States Aircoach,* 51 Cal.2d 199, 331 P.2d 37, 41 (1958). *See also Tabet v. Sprouse-Reitz Co.,* 75 N.M. 645, 409 P.2d 497 (1966) and *Carter v. Adler,* 138 Cal.App.2d 63, 291 P.2d 111 (1955).

Lessor did not act in accordance with his obligation of good faith and fair dealing toward lessee; he sought to avoid his contractual duties to lessee. This is clearly demonstrated by lessor's conduct when he advised sublessee that they would have to cancel the March 26, 1976 agreement because lessor had made a mistake.

Where the first right of refusal clause specifies no particular time within, nor manner in, which it is to be exercised, the preferential right must be exercised within a reasonable time and in a reasonable manner. The written notice requirement of the Spencer Lease is a general notice provision; it does not directly relate to the manner of exercising the first right. Absent a provision specifying the manner in which the first right of refusal must be exercised, oral exercise is sufficient. *See*

generally 1 *American Law of Property* § 3.86 (A. J. Casner ed. 1952). Other jurisdictions have recognized that an option or preferential right can be orally exercised. *Detwiler v. Capone,* 357 Pa. 495, 55 A.2d 380 (1947). We hold that in the case at hand, lessee's oral exercise of his preferential right, with written confirmation the next day, was reasonable and proper. We find that lessee timely exercised his first right of refusal within the period of the Spencer Lease and that the special circumstances of this case justify the granting of the equitable relief sought by lessee.

As a result of the oral exercise and the written confirmation of his preferential right, lessee obtained a fixed property interest which could not be defeated by the attempted cancellations of the lease agreements. Because a lease existed, the lower court erred in refusing to grant specific enforcement of lessee's exercise of his preferential right. The fact that the land was ultimately sold rather than leased is of no significance since the notion of a sale did not arise until after the first right had been exercised and a new lease created. Nonetheless, the sale of the land is valid; but, it is subject to a ten-year lease in favor of lessee at the rate of $250 per month.

Therefore, the decision of the district court granting summary judgment in favor of lessor and sublessee is reversed and the cause remanded for the entry of judgment in favor of lessee consistent with this opinion.

PAYNE and FEDERICI, JJ., concur.

585 P.2d 1096

MOGUL ENTERPRISES, INC.,
Plaintiff-in-Intervention-Appellant,

v.

COMMERCIAL CREDIT BUSINESS LOANS, INC.,
Defendant-in-Intervention-Appellee.

No. 11841.

Supreme Court of New Mexico.

Oct. 27, 1978.

Bruce E. Pasternack, Albuquerque, for appellant.

Keleher & McLeod, Russell Moore, Margo J. McCormick, Albuquerque, for appellee.

OPINION

McMANUS, Chief Justice.

Commercial Credit Business Loans, Inc. (Commercial Credit) filed a complaint seeking replevin against A–1 Industries, Inc. (A–1). The complaint alleged that A–1 and Jerry Powers, president of A–1, entered into two contracts with Commercial Credit secured by A–1's inventory and accounts receivable. Mogul Enterprises, Inc. (Mogul) filed a motion to intervene alleging that Mogul had a prior interest in the same property. Commercial Credit moved for summary judgment alleging that its security interest took precedence over Mogul's. The trial court granted partial summary judgment in favor of Commercial Credit. Mogul appeals. We affirm the trial court's decision.

Mogul bases its claim to the A–1 inventory and accounts receivable on a document designated as "Mortgage Agreement," which was filed as a financing statement with the County Clerk. The Mortgage Agreement lists certain collateral by item (*e. g.,* three folding-type account's work tables) and other collateral by type (*e. g.,* trucks, cars, equipment, machinery and hand tools). Mogul alleges that accounts receivable and inventory are included within the general language which follows the specific listings. This language reads:

> This agreement shall and does hereby apply to trucks, cars, equipment, machinery, hand tools and *all assets of A–1 Industries regardless of type or description now owned by A–1 Industries, or to be bought in the future by A–1 Industries* until all obligations of A–1 to Mogul are paid in full plus all interest, due or to become due thereon. (Emphasis added.)

The primary issue on appeal is whether the words "all assets * * * regardless of type or description now owned * * * or to be bought in the future * * *" sufficiently denote the type or item of property subject to the security interest so as to comply with § 50A–9–402, N.M.S.A.1953.

■ The filing of a financing statement perfects the security interest only if the statement substantially complies with the requirements of § 50A–9–402(1), which provides:

> A *financing statement is sufficient if it is* signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor *and contains a statement indicating the types, or describing the items, of collateral.* (Emphasis added.)

Section 50A–9–402 adopts a system of notice filing designed to replace rigid description requirements. Subsection (5) provides that "[a] financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading." While the description requirements have been liberalized, the language of subsection (1) clearly requires some specificity of description—the financing statement must indicate the *type* or describe the *item* of collateral. Compliance with this requirement is essential if the filing system is to operate effectively.

Cases considering the degree of specificity required by § 9–402 of the Uniform Commercial Code indicate that all-inclusive, vague language such as that presently before us is not sufficient to perfect a security interest. For example, in *In re Lehner,* 303 F.Supp. 317 (D.Colo.1969), *aff'd,* 427 F.2d 357 (10th Cir. 1970), the court held that a recorded financing statement listing "all consumer goods" as secured collateral did not comply with a Colorado provision identical to § 50A–9–402. The court referred to the following passage from Professor Gilmore's treatise on Secured Transactions:

> A filed financing statement must describe the types of collateral in which the secured party claims, or may claim, an interest. The description by "types" is understood to require a certain degree of specificity: it would not be sufficient for the notice to claim "all the debtor's property." * * * Gilmore, Security Interests in Personal Property § 15.3, at 477 (1965).

303 F.Supp. at 319.

The sufficiency of a financing statement purporting to secure "all personal property" of the debtor was considered in *In re Fuqua,* 461 F.2d 1186 (10th Cir. 1972). In construing the notice requirements of § 9–402(1) of the Kansas Commercial Code, which is identical to our statute, the court said: "Certainly, the phrase 'all personal property' does not even approach a description of property by type or description as is required by K.S.A. 84–9–402(1) * * *" *Id.* at 1188.

In *In re E.P.G. Computer Services, Inc.,* 20 U.C.C.Rptg.Serv. 1084 (S.D.N.Y.1976) the court specifically held that the phrase "all assets" failed to perfect a security interest under a similar New York statute. The court indicated that the phrase did not denote either the type or item of collateral secured and would not alert third parties to the possible existence of prior encumbrances and the need for investigation. The court also mentioned that the use of the phrase "all assets" would frustrate the purpose of § 9–402 of the New York Commercial Code.

Following the reasoning of these cases, we hold that the words "all assets * * * regardless of type or description now owned * * * or to be bought in the future * * *" fail to satisfy the requirements of § 50A–9–402. The language is too general and vague to fulfill the statutory demand that the financing statement at least reveal "the type" of collateral. The language is misleading and does not give subsequent secured parties adequate notice of a security interest in inventory and accounts receivable.

As the financing statement failed to perfect a security interest in A–1's inventory and accounts receivable, the trial court properly granted summary judgment in favor of Commercial Credit. We affirm.

IT IS SO ORDERED.

SOSA and PAYNE, JJ., concur.

585 P.2d 1098

Rudi WYRSCH, Plaintiff-Appellee,

v.

Rolf MILKE and Kenneth Blair, and Helen Moncreiff-Adams, Defendants-Appellants,

Helen Moncreiff-Adams, Defendant-Appellee.

No. 3022.

Court of Appeals of New Mexico.

Aug. 15, 1978.

On Motion For Rehearing Sept. 28, 1978.

OPINION

SUTIN, Judge.

Defendants Milke and Blair (M & B) appeal from a judgment in favor of plaintiff, Wyrsch, and from a judgment in favor of cross-claimant, Adams. We affirm.

The trial court made extensive findings of fact, none of which are challenged by M & B. Therefore, these findings are binding on this Court on appeal. *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 568 P.2d 1236 (1977). In fact, M & B in their brief do not attack any of the findings of the court.

A. *Wyrsch v. M & B is affirmed.*

The pertinent findings are summarized as follows:

On July 3, 1974, Milke entered into a written contract with Adams for the purchase of a business in Taos, New Mexico, one paragraph of which provided that Milke shall not convey the property without the prior written consent of Adams. At the time Milke entered into the contract, he had an undisclosed partner, Blair. M & B took possession of and operated the business.

On April 1, 1976, M & B entered into a written contract with Wyrsch, one paragraph of which provided that the contract was contingent upon M & B obtaining the written consent of Adams.

The total purchase price was $140,000 payable $34,000 on April 1, 1976, and monthly payments thereafter. The balance was due and payable on May 1, 1979.

The parties delayed closing the sale until April 15, 1976 due to M & B's failure to obtain the written consent of Adams. To protect Wyrsch's down payment of $34,000, M & B signed a promissory note in the sum of $34,000 payable to Wyrsch 60 days from April 15, 1976, or upon delivery to Wyrsch of a signed consent from Adams.

Wyrsch and M & B orally agreed that if M & B obtained the written consent of Adams to the sale within 60 days from April 15, 1976, then the $34,000 was to be

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Eliu E. Romero, Taos, for defendants-appellants.

Bruce D. Black, Campbell, Bingaman & Black, P. A., Santa Fe, for appellee Helen Moncreiff-Adams.

Morton S. Simon, Friedland, Simon, Lopez & Vigil, Santa Fe, and Jacob Rabinowitz, New York, N.Y., for appellee Wyrsch.

kept by M & B as the down payment under the contract. If M & B could not obtain the consent within the 60 days allotted, then M & B would repay the $34,000 to Wyrsch and the contract would not be consumated. Paragraph 7 of the contract stated that the agreement was contingent upon Adams' consent to the sale. After M & B executed the promissory note Wyrsch took possession of and operated the business.

At the end of the 60 days, on or about June 15, 1976, M & B had not succeeded in obtaining the consent.

M & B urged Wyrsch to remain in possession; that M & B would obtain the necessary consent from Adams within a reasonable period of time. Wyrsch remained in possession until October 2, 1976.

Adams had demanded from M & B a conditional consent under which M & B could convey the business to Wyrsch. Adams' consent that was withheld was not unreasonable. M & B told Adams that any conditional consent would be unacceptable. M & B continued to make payments on the Milke-Adams escrow until October 1, 1976, but failed to tender any payments for the months of October or November, 1976. Wyrsch tendered Adams a payment for October which Adams refused since it would indicate her unconditional consent to the M & B-Wyrsch contract.

On October 2, 1976, Adams gave notice to M & B and Wyrsch of M & B's default on the contract, which notices were received.

On October 2, 1976, Wyrsch advised M & B that due to the failure of Adams to give written consent to the transfer and sale of the business to him he considered the contract to be invalid due to M & B's failure to fulfill a material condition precedent within a reasonable time.

Wyrsch fulfilled all conditions required of him under the contract until such time as it became evident that M & B would not be able to comply with the condition precedent in the contract, i. e., obtaining the consent of Adams.

On November 22, 1976, Wyrsch instituted two separate lawsuits, one on the promissory note and the other for recision of the contract, damages for breach of contract, and other relief. These claims were consolidated for trial.

M & B appear to contend that they had a "reasonable time" in which to obtain consent of Adams; that Wyrsch knew consent had not been acquired at the inception of, or at the time of entering into, the contract; that at this time, there was no evidence that M & B refused to comply with the requirement of obtaining Adams' consent; and that Wyrsch was in default at the time of filing his complaint. Therefore, M & B say the trial court erred in allowing a recision of the contract.

We are unable to follow the syllogistic reasoning of M & B. M & B had six months from April 1, 1976 to October 2, 1976 to obtain the written consent of Adams. Certainly, this was a "reasonable time." No default of Wyrsch occurred during this period of time. Wyrsch fulfilled all conditions required of him under the contract until he declared the contract invalid.

The agreement between M & B and Wyrsch was contingent upon M & B obtaining Adams' consent to the attempted transfer of interest.

"If an agreement is made subject to the consent of an additional party, it must be viewed as conditional and if the consent is not given, the agreement is not binding." *Watts v. Hogan*, 111 Ariz. 536, 534 P.2d 741, 743 (1975); *Coe v. State Farm Mut. Auto. Ins. Co.*, 66 Cal.App.3d 981, 136 Cal.Rptr. 331 (1977). "When, as in the present situation, two parties execute a contract with the understanding that the approval of a third party is necessary for the agreement to take effect, the contract is not complete until the third party has approved. Until that happens neither party is bound by the agreement." *Santa Clara-San Ben. Chap., Etc. v. Local U. No. 332, Etc.*, 40 Cal.App.3d 431, 114 Cal.Rptr. 909, 912 (1974).

M & B failed to perform a condition precedent and allowed the Adams' contract to reach a point of default. M & B knew that if the Adams' contract failed, their

contract with Wyrsch also failed. It was too late in the day for M & B to cast any blame on Wyrsch for the wrong committed by M & B.

M & B rely on *Keleher v. Ash*, 37 N.M. 263, 21 P.2d 94 (1933). This case holds that a purchaser of real property may not take advantage of his own default to claim a recision. We agree with that statement but find it inapplicable here; Wyrsch was not in default.

M & B also rely on cases which protect the vendor of real property. *Mountain View Corporation v. Horne*, 74 N.M. 540, 395 P.2d 676 (1964); *Montgomery v. First Mortgage Co.*, 38 N.M. 148, 29 P.2d 331 (1934); *Clark v. Ingle*, 58 N.M. 136, 266 P.2d 672 (1954). These cases hold that a purchaser cannot rescind a contract when the vendor can correct defects in title or otherwise make the title marketable *before the date set for performance*. As long as the vendor is not in default the purchaser cannot rescind because the purchaser can show no breach of contract. To construe the contract otherwise would unquestionably be harsh against a vendor.

The above mentioned cases do not support M & B's position. M & B did not perform in time and therefore breached the contract. They did not obtain Adams' consent within a reasonable time to fulfill the condition precedent which would have given rise to a binding contract.

M & B are precluded from invoking equitable considerations because they have sullied the circumstances with their own "unclean hands." M & B sold the Taos business to Wyrsch without the consent of Adams, and, with knowledge that this was wrong, intentionally defaulted in payments. They obtained $34,000 from Wyrsch as a down payment, relied upon Wyrsch's tender as an excuse for their delinquency, failed to repay Wyrsch, and caused extensive litigation. This conduct does not fall within any equitable maxim or concept. Equity encourages courts to amend wrongs of this nature. On general principles, equity will prevent a party having knowledge of the just rights of another from defeating such rights. Equity does not create a fetish of exactitude or technical niceties. It is concerned with ultimate consequences. The trial court correctly declared the M & B-Wyrsch contract null and void.

B. *Adams v. M & B is affirmed.*

M & B made Adams a third party defendant. Adams "cross-claimed" against M & B to terminate their interest in the property.

The trial court found that on October 11, 1976, Adams sent a second Notice of Breach and Default to M & B which was received; that they had 60 days to cure the default. On December 14, 1976, Adams notified M & B of her intention to terminate the contract and filed an affidavit of M & B's default with the County Clerk of Taos County. Adams did not unreasonably withhold her consent; that the conditions she requested were fair and reasonable inasmuch as Adams, if she granted her unconditional consent, could personally be liable for liens and encumbrances incurred by Wyrsch in the event of default. Adams did not waive the provision of the contract requiring her consent, and M & B were not current at any time after October 1, 1976, on the monthly installments due under the Adams' contract.

M & B argue that Adams caused the default of M & B by refusing to accept Wyrsch's tender of payment of the October, 1976 installment due and owing from M & B; that Adams' notice of cancellation was premature. Relying on these claims, M & B argue the principle that equity disfavors forfeiture; that the trial court could not deprive M & B of its equitable ownership of the property. This argument is contrary to the findings of the trial court, without merit and without the citation of any authority.

M & B have ignored both an essential fact of the Adams-M & B contract and the rules of law applicable to that contract provision. Paragraph 19 of the Adams-M & B contract reads:

> This contract of sale and the property described herein shall not be subject to conveyance, transfer or assignment by

the Buyer without the prior written consent of the Owners and Adams. Owners and Adams shall not unreasonably withhold their consent to a conveyance, transfer or assignment of the contract of sale or the property described herein.

This "consent provision" means that Adams had the right to determine with whom she would contract, and M & B did not have the right to thrust Wyrsch upon her without her consent. *Kinman v. Howard*, 465 S.W.2d 400 (Tex.Civ.App.1971); *Bethel v. Matthews*, 187 Wash. 175, 59 P.2d 1125 (1936). This right of Adams is held in high esteem. Even had Wyrsch tendered the full purchase price to Adams, Adams did not have to accept Wyrsch as an assignee of her contract with Milke. *Lockerby v. Amon*, 64 Wash. 24, 116 P. 463, 35 L.R.A.(N.S.) 1064, Ann.Cas.1913A, 228 (1911). In fact, it has been held that if Adams' husband accepted a payment from Wyrsch, this would not constitute consent unless M & B proved that Adams' husband acted as an agent of his wife. *Boyd v. Bondy*, 113 Wash. 384, 194 P. 393 (1920). M & B could not avoid their liability to Adams by assigning their contract obligation to Wyrsch. *Navin v. New Colonial Hotel*, 228 Ind. 128, 90 N.E.2d 128 (1950).

Bethel, supra, is directly in point. It denied an assignee in the position of Wyrsch any rights under a contract obtained without the consent of the owner. *Bethel* quoted the following from *Lockerby, supra*:

> "Whatever may have been the reasons for reserving the right to decline to deal with an assignee, such reservation contravenes no rule of public policy, and is enforceable. We attach no importance to the clauses of the contract in which the word 'assignee' is used. They will be construed in the light of the whole contract, and, when so regarded, must be taken to mean such assignees as the vendor is willing to accept." [59 P.2d at 1128.]

It is obvious that Adams' refusal to accept Wyrsch's tender of payment did not cause M & B's default on the Adams-M & B contract. Even when Wyrsch made a tender of payment on October 2, 1976, he was not acting as M & B's agent and Wyrsch's tender did not excuse M & B's continued delinquency. M & B never sought to make the Adams' contract current from October 2, 1976 to May 4, 1977, a period of seven months that ended with the trial of the case. M & B cannot excuse this continued delinquency in reliance on Wyrsch's tender.

"He who seeks equity must do equity," and "He who will have equity done to him must do equity to the same person." Black's Law Dictionary (Rev. Fourth Ed.) page 850 (1968).

M & B decry the inequity of foreclosure as related to contracts. 17 Am.Jur.2d, *Contracts*, § 500 (1964). This section relates to judicial construction of forfeiture provisions in contracts. Its relationship to Wyrsch's tender of payment is a mystery.

Section 499 reads in part:

> The law permits a person to make a contract which will result in a forfeiture; and when it is clear from the terms of the contract that the parties have so agreed, a court of law, as well as a court of equity, will enforce the forfeiture. Thus, the time of payment specified in a contract may be material and by its terms a failure to pay within that time may involve an absolute forfeiture; if it does, this forfeiture will not be relieved against, even in a court of equity.

Fairness, justness and right dealing is an equity concept that dominates all commercial practices and transactions. *Ott v. Keller*, 90 N.M. 1, 558 P.2d 613 (Ct.App. 1977).

Adams was on the right side of the coin. M & B were not.

Adams judgment against M & B is affirmed.

C. *The trial court did not abuse its discretion in procedural matters related to the hearing on the merits.*

The record shows that on December 14, 1976, the Honorable Thomas A. Donnelly of

the First Judicial District was designated to try this case in Taos, New Mexico. On December 15, 1976, a hearing was held on Order to Show Cause entered on November 24, 1975. By reason of this Order, M & B had been restrained from attempting to interfere with Wyrsch's possession of the property and also restrained from attempting to take control. M & B were ordered to show cause, if any they had, why the Order should not remain in effect.

At the December 15th hearing, the court announced that it would vacate its other cases to dispose of this matter promptly, and that it would set a prompt date for hearing on the merits. After some testimony by Wyrsch, the court recessed and reconvened on January 3, 1977. Additional testimony was taken, and the court gave notice of hearing on January 19. M & B gave notice of taking Wyrsch's deposition on January 14. On January 13, M & B filed a motion for continuance of the hearing because Wyrsch's attorneys could not attend the deposition and M & B could not go to trial without making proper discovery. On January 19, M & B's motion was heard. After the close of argument, the court announced that the case was scheduled to commence January 20, the following day; that it was in the best interests of all the parties that discovery take place; that the Wyrsch deposition take place January 20, at 9:00 a. m., and that the trial would start at 1:30 p. m.; that Wyrsch furnish M & B a xerox copy of official documents for review in advance of the deposition to allow M & B to prepare for the examination of Wyrsch; that the court's secretary would xerox the documents, and that counsel make all arrangements immediately for the place of the deposition. M & B thanked the court. The deposition of Wyrsch was not taken by M & B.

On January 20 the court reconvened. The trial began. During the hearing the court said:

> Gentlemen, I have tried to assist counsel in expediting the case and I have been repeatedly asked to take continuances and postponements. * * * I'd like to move this case along. *I have been told by all the parties that it is urgent that this matter be heard.* [Emphasis added.]

At the end of the day, the court recessed. On January 28, Adams moved the court that M & B employ an alternate attorney because their counsel was physically incapacitated and could not continue with the trial. The court reconvened on February 1 for a hearing on the motion. Assistant counsel of M & B who previously appeared in the case, informed the court that chief counsel would be unable to appear for a month. The court directed M & B to select an attorney of their choice, and ordered the trial to resume February 10, 1977, nine days later. On February 10, assistant counsel appeared and adequately represented M & B to the termination of the case. In fact, the court commended opposing counsel for the manner in which the case was presented.

In retrospect and upon reading the transcript, M & B argue that the court abused its discretion in two respects: (1) the denial of the right to make discovery until the morning before trial, and (2) assistant counsel was inducted into duty without proper familiarization with the proceedings and facts.

We recognize the importance of discovery before trial. But chief counsel had the right to depose Wyrsch without leave of court after the commencement of the action on November 22, 1976, § 21–1–1(26)(a), N.M.S.A.1953 (Repl.Vol. 4), by giving notice of the time and place. Rule 30. Furthermore, M & B do not point to any errors or omissions of assistant counsel that prejudiced M & B.

Because of the jeopardy in which the business had been placed, all parties urged the court to hear the case on the merits. The court used extraordinary diligence in meeting this emergency. M & B were not prejudiced. The trial court did not abuse its discretion.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

ON MOTION FOR REHEARING

SUTIN, Judge.

On appeal, Adams claimed the right to an attorney fee from M & B for services rendered in this appeal. This claim was not decided in the original opinion.

Paragraph 8 of the Adams-Milke real estate contract reads:

> In the event of a default by any of the parties hereto, all expenses and attorney fees of all other parties incident to such default shall be paid by the defaulting party.

Of course, this clause is valid, *Budagher v. Sunnyland Enterprises, Inc.*, 90 N.M. 365, 563 P.2d 1158 (1977), *Shortle v. McCloskey*, 39 N.M. 273, 46 P.2d 50 (1935), and a contract which provides for payment of attorney fees by a defaulting party does cover attorney fees on appeal. *First National Bank of Santa Fe v. Wood*, 86 N.M. 165, 521 P.2d 127 (1974); *Cabot v. First National Bank of Santa Fe*, 81 N.M. 795, 474 P.2d 478 (1970). The Court's decision in *Cabot* is the majority approach to this issue. See Annot., 52 A.L.R.2d 863 (1957), *"Contractual provision for attorneys' fees as including allowance for services rendered upon appellate review"* and the A.L.R. Later Case Service on this topic.

The original judgment is hereby modified only by awarding to Adams an attorney fee for $2,500 for services rendered in this appeal.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

LOPEZ, J., dissents.

585 P.2d 1105

Doroteo GABALDON and Clementina Gabaldon, his wife, Plaintiffs-Appellees,

v.

Lorenzo SANCHEZ, d/b/a Sanchez Land Company, Defendant-Appellant.

No. 3153.

Court of Appeals of New Mexico.

Oct. 3, 1978.

Floyd D. Wilson, Ahern, Montgomery & Pongetti, Albuquerque, for defendant-appellant.

Juan G. Burciaga, Ussery, Burciaga & Parrish, Albuquerque, for plaintiffs-appellees.

OPINION

SUTIN, Judge.

This action was brought in the District Court of Valencia County to recover damages to plaintiffs' real property and to obtain injunctive relief as a result of sand and dirt blowing onto plaintiffs' property from defendant's adjoining property. The cause was tried to the court without a jury and judgment was entered awarding plaintiffs $3,000.00 in damages and ordering defendant to implement a terrain management program. Defendant appeals. We reverse.

In pertinent part, the trial court found that plaintiffs' land was adjacent and contiguous with defendant's land; *that defendant stripped natural vegetation from his land without insuring proper and adequate terrain management; that as a result, plaintiffs' property was damaged due to windblown topsoil*; that defendant failed and refused to undertake *proper terrain management*, although required to do so; that although defendant acknowledged a responsibility for implementation of an adequate *terrain management program*, and stated to soil conservation authorities and Valencia County representatives that such a plan would be implemented, defendant willfully failed to comply and to implement such a plan; *that the failure of defendant to implement an adequate terrain management plan is the cause of plaintiffs' damages.*

The trial court concluded that defendant violated the New Mexico Subdivision Act [§§ 70–5–1, et seq., N.M.S.A.1953 (Repl.Vol. 10, pt. 2, 1975 Supp.)] and, in addition, the trial court concluded that defendant's acts and omissions constituted nuisance, negligence and trespass. The defendant was ordered by the court to immediately implement an adequate terrain management plan, and to remove the sand which accumulated on his land adjacent to plaintiffs' irrigation ditch.

Plaintiffs' fourth count was based upon a violation of § 70–5–11(A)(6) of the New Mexico Subdivision Act. Section 70–5–11(A)(6) provides that:

> Any subdivider having an approved type-one or type-two subdivision *shall furnish*:
>
> * * * * * *
>
> (6) *terrain management* to fulfill the provisions for terrain management proposed by the subdivider in his disclosure statement. [Emphasis added.]

" '[T]errain management' means * * * measures required for adapting proposed

development to existing soil characteristics and topography." Section 70–5–2(F).

It is obvious from the findings made that the only conclusion at which the court could arrive was defendant's violation of the New Mexico Subdivision Act. No findings were made that could support any theory that defendant owed plaintiffs a duty as to negligence, nuisance or trespass, and that defendant breached that duty. On the other hand, defendant requested findings of fact that the actions of the defendant in grading and leveling his property were a reasonable and natural use of his land; that defendant's grading and leveling of the land was not negligence, did not constitute a nuisance, nor did it result in trespass on lands of plaintiffs. The trial court did not refuse these findings, nor adopt any findings to the contrary.

Nevertheless, to resolve the issues on the merits, there are two questions to decide:

A. Are the plaintiffs allowed to file a claim for damages under the New Mexico Subdivision Act?

and

B. Does the defendant have a common-law right to remove brush and vegetation free of liability to adjoining landowners?

The answer to the first question is "No." The answer to the second question is "Yes."

A. *Plaintiffs had no claim under New Mexico Subdivision Act.*

Plaintiffs alleged that among the class of persons and lands the statute was designed to protect were landowners owning land adjoining the lands being subdivided and that plaintiffs are members of that class.

Defendant's subdivision is within the meaning of the New Mexico Subdivision Act and, therefore, controlled by that statute. The Board of County Commissioners of Valencia County, the county in which the defendant's land is located, approved defendant's subdivision.

In his disclosure statement, defendant stated that he would plant the leveled part with winter wheat before the water season was over or, in the alternative, he would install a sprinkler system. Defendant did not furnish this terrain management.

Section 70–5–26 provides civil remedies for injunctive relief and mandamus. The only persons permitted to compel defendant to comply with the Act are the district attorney or the attorney general. In addition, this section reads:

> However, nothing in this section shall be construed as limiting *any common-law right of any person in any court relating to subdivisions.* [Emphasis added.]

Plaintiffs had the common-law right to pursue defendant in court and defendant had the common-law right of defense. However, the legislature did not provide that a person's common-law rights shall extend to enforcement of the New Mexico Subdivision Act or that plaintiffs have a claim for relief against defendant for violating § 70–5–11(A)(6). Section 70–5–26 does not impose civil liability for damages against defendant for violating any provisions of the Act. Nor does the statute refer to adjoining landowners directly or indirectly, nor to sand and dirt blowing on adjacent property. The Act did not grant plaintiffs' claim for relief against defendant. We are unable to agree with plaintiffs that the Act was designed to protect landowners owning land adjoining land being subdivided.

We believe, however, that defendant should be compelled to comply with the Act. This result can be obtained if plaintiffs will convince either the district attorney of Valencia County or the attorney general to proceed for injunctive relief or mandamus.

Plaintiffs did not have a claim for relief under the New Mexico Subdivision Act.

B. *Defendant had common-law right to remove brush and vegetation free of liability to adjoining landowners.*

Defendant's first point is that the findings of the trial court did not establish any breach of duty owing by defendant to plaintiffs. It is the essence of defendant's argument that under the common law, a land-

owner has a legal right to clear his own land of natural brush and vegetation even if it causes dirt to blow on the land of an adjacent landowner. This is the only issue to decide.

In argument, defendant relies upon the common-law doctrine that grants landowners the right to clear their lands. Plaintiffs did not dispute this concept. Defendant cited the following cases in support of his position. *Stewart v. Birchfield*, 15 Cal.App. 378, 114 P. 999 (1911); *Preston v. Schrenk*, 77 Idaho 481, 295 P.2d 272 (1956); *Robinson v. Whitelaw*, 12 Utah 2d 240, 364 P.2d 1085 (1961); *Hoover v. Horton*, 209 S.W.2d 646 (Tex.Civ.App.1948).

In *Stewart*, plaintiff's complaint alleged that defendant removed all brush and leveled his adjoining land and left it wholly unirrigated and uncared for; that large quantities of sand and soil were permitted to blow over on plaintiff's land to plaintiff's damage. A demur to plaintiff's complaint was sustained and affirmed on appeal. The court said:

> * * * If the defendant had the right to remove brush or trees growing upon his property, which right he undoubtedly possessed as an incident to the ownership of the ground, then, *unless he was guilty of some negligent act while removing the same*, he would not be responsible in damages to plaintiff. He had the right not only to clear his ground, but to leave it unirrigated, if he saw fit, thereafter, even though his failure to so irrigate it might have produced the damage of which plaintiff complains. "*Every man may use his own land for all lawful purposes* to which such lands are usually applied, without being answerable for the consequences, provided he exercises ordinary care and skill to prevent any unnecessary injury to the adjacent landowner. It is not, therefore, necessarily negligence on the part of the landowner to make a use of his land which inevitably produces loss to his neighbor; *for as he may willfully adopt such a course, and yet not be a wrongdoer, much less is he liable for unintentionally doing that which he has a right to do intentionally.*" Sherman & Redfield on Negligence, § 700 (Revised Edition, 1941, Vol. 4, § 773). [Emphasis added.] [114 P. at 1000.]

In *Preston*, defendant permitted a band of sheep to pasture on his land. That the sheep caused tumbleweeds to become loosened, the topsoil to become pulverized and susceptible to blowing, and the prevailing winds to blow tumbleweeds and soil on plaintiff's wheat crop to plaintiff's damage. The court instructed the jury that:

> [A] land owner may use his land in any manner which he sees fit, *provided it is not for an unlawful purpose*, and provided he shall so use and enjoy his property that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property. [Emphasis added.] [295 P.2d at 275.]

But see *McIntosh v. Brimmer*, 68 Cal. App. 770, 230 P. 203 (1924) where maintaining chicken corrals was declared to be a nuisance. In the instant case we are not involved with a landowner that brings something on his land that causes dirt and dust to damage the property of another.

Robinson held that a landowner who removed sagebrush and natural growth from his land in order to plant crops but who later stopped cultivation, was not liable in damages caused by sand and dirt which blew onto adjoining property, and the adjoining landowner was not entitled to abatement of an alleged nuisance. The court said:

> * * * Under the circumstances we think defendant would have difficulty in stopping the wind or replacing the sagebrush, and are constrained to believe and hold that equitable principles could do no better. [364 P.2d at 1085.]

Hoover holds the test to be, not whether the injury was a natural consequence, or whether the act is in the nature of a nuisance, but whether the landowner's use of the property was a reasonable exercise of dominion which the owner has by virtue of his ownership. In determining this, the court will consider all the interests affected,

the landowner's and those of his neighbors, and the court will weigh each interest in view of public policy.

We turn to additional authority on this subject matter. *Boarts v. Imperial Irr. Dist.*, 80 Cal.App.2d 574, 182 P.2d 246 (1947) followed *Stewart, supra.* It held that a landowner has no duty to cut and destroy weeds naturally growing on its land, and hence is not liable for damages to crops on adjacent land as a result of weed seeds being blown thereon by prevailing winds. *United States v. Shapiro, Inc.*, 92 U.S.App. D.C. 91, 202 F.2d 459 (1953) held that the landowner who did nothing more than grade his land in a manner that was reasonable, usual and non-negligent, and who discharged nothing but surface water directly from its land onto neighboring land, committed no wrong. The court said:

> * * * In this jurisdiction the rule is—as it is in all the states following the so-called "common law" or "Massachusetts" rule—that surface water is a common enemy which may be repelled or deflected onto the land of other proprietors, *provided such deflection is the result of an ordinary use of the land* and is not accomplished by means of channels, ditches or other extraordinary construction. * * * [Emphasis added.] [202 F.2d at 460.]

The wind, like surface water, is a common enemy, but, unlike surface water, cannot be repelled or deflected. The landowner does not know which way the wild wind blows.

Ratcliffe v. Indian Hill Acres, 93 Ohio App. 231, 113 N.E.2d 30 (1952), also a surface water case, followed *Stewart, supra.*

In *Middlesex Co. v. McCue*, 149 Mass. 103, 21 N.E. 230, 14 Am.St.Rep. 402 (1889), Justice Holmes put the matter in this light:

> The respective rights and liabilities of adjoining land-owners cannot be determined in advance by a mathematical line, or a general formula; certainly not by the simple test of whether the obvious and necessary consequence of a given act by one is to damage the other. *The fact that the damage is foreseen, or even intended, has nothing to do with the matter apart from statute. Some damage a man must put up with, however plainly his neighbor foresees it before bringing it to pass.* [Citation omitted.] Liability depends upon the nature of the act, and the kind and degree of harm done, considered in the light of expediency and usage. For certain kinds there is no liability, no matter what the extent of the harm. * * We are of the opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain, and that damage to the lower proprietor of the kind complained of [filling up plaintiff's millpond] is something that he must protect himself against as best he may. *The plaintiff says that wall would stop the trouble. If so, it can build one upon its own land.* [Emphasis added.] [21 N.E. at 231.]

For 100 years, the law has denied relief to an adjoining landowner for legal acts done by the owner of adjoining property which does not infringe on the rights of the neighbor, even though he was influenced in the doing of it by wrong and malicious motives. The courts will not inquire into the motive actuating a person in the enforcement of a legal right. *Phelps v. Nowlen*, 72 N.Y. 39 (1878).

We conclude that defendant had the legal right to remove brush and vegetation from his land and was not negligent in removing them. Its purpose was to improve the land for subdivision purposes, and this was not an unlawful purpose.

C. *Orders entered against defendant are erroneous.*

The trial court ordered defendant to remove the sand and soil which accumulated on his land adjacent to the irrigation ditch of plaintiffs or, in the alternative, to take such steps to insure that the accumulated soil does not fall into plaintiffs' irrigation ditch; that defendant immediately implement an adequate terrain management program to insure that there is not recurrence of damage to plaintiffs. As stated, supra,

the only persons permitted to compel defendant to comply with the Act are the district attorney or the attorney general. The trial court's orders are reversed.

D. *The restraining order affecting defendant is affirmed.*

The trial court restrained defendant from harassing, threatening and molesting plaintiffs until the further order of the court. This order is affirmed.

Reversed. Apart from the order of restraint, this case is reversed, and the judgment shall be vacated and judgment entered for defendant. Defendant shall recover his costs on this appeal.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, Judge (dissenting).

I respectfully dissent. The defendant requested findings that in grading and leveling his property was a reasonable and natural use of his land and that this did not constitute a nuisance. The majority state that the trial court did not refuse these findings, nor adopt any findings to the contrary. The trial court's findings 4, 5, and 7 and conclusion of law 3 are directly contrary to defendant's requested findings.

In my opinion the trial court's findings are supported by substantial evidence and that it correctly concluded that defendant's actions constituted a private nuisance. I believe that the majority misconstrue the basic issue. The issue is not whether defendant's actions were negligent or were a violation of the Subdivision Act, or constituted a trespass, but whether his actions substantially interfered with plaintiff's use and enjoyment of his property. The record shows a very substantial interference with plaintiff's use of his property due to the acts of the defendant. I would affirm on the basis of private nuisance.

585 P.2d 1352

STATE of New Mexico,
Plaintiff-Appellee,

v.

Orlando GABALDON,
Defendant-Appellant.

No. 3507.

Court of Appeals of New Mexico.

Sept. 26, 1978.

Writ of Certiorari Denied Oct. 26, 1978.

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

Toney Anaya, Atty. Gen., Santa Fe, Janice M. Ahern, Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of three robberies while armed with a deadly weapon. The deadly weapon was a firearm. One of the issues listed in the docketing statement was not briefed; that issue is deemed abandoned. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App.1977). We discuss three issues: (1) competency; (2) witness immunity; and (3) validity of enhancing the sentence because of use of a firearm.

Competency

In October, 1977 defendant was found incompetent to stand trial. In January, 1978 the State moved for a redetermination of competency. An evidentiary hearing was held on January 13, 1978, after which the trial court ruled there was no reasonable doubt that defendant was competent to stand trial. See *State v. Santillanes*, 91 N.M. 721, 580 P.2d 489 (Ct.App.1978).

At arraignment in a separate case on January 27, 1978, defense counsel questioned whether defendant was competent to be arraigned. The trial court ordered an examination that day "because the other case [the convictions involved in this case] is set for trial on Monday."

At a short hearing on January 30, 1978, prior to the beginning of trial in this case, the trial court was informed of a report from a psychiatrist and a psychologist concerning the examination of January 27, 1978. The report concluded that defendant was competent to stand trial. Defense counsel wanted the "doctor" to testify; the trial court granted a five-minute recess to get him. It was the State that attempted to obtain the doctor's presence during the recess. Apparently the doctor's presence could not be obtained in such a short period of time because the doctor's testimony was not taken at that point. Rather, the trial of the case began.

On January 31, 1978 a competency hearing was held. After conclusion of the hearing, at which the report referred to on January 30, 1978 was introduced as an exhibit, the trial court found there was no reasonable doubt that the defendant was competent to stand trial in the separate case. Defendant was then arraigned in the separate case. These proceedings took place after the guilty verdicts in this case. The testimony at this January 31, 1978 hearing was that, at the time of the examination on January 27, 1978, defendant was competent to stand trial.

Defendant contends he was deprived of a proper finding of competency. Our understanding of his contentions and our answers, follow.

(a) The evidence was insufficient to support the ruling of competency at the redetermination hearing of January 13, 1978. The evidence at that hearing supports the ruling of no reasonable doubt as to competency. The conclusion of the expert that defendant was competent at that time is essentially uncontradicted. See *State v. Lopez,* 92 N.M. 779, 581 P.2d 872 (1978).

(b) An issue of competency to stand trial in this case was raised on January 27, 1978 at the arraignment in the separate case. We will assume that the issue was raised.

(c) No hearing was held on the issue of competency after it was raised on January 27, 1978. We disagree; there was a short hearing prior to beginning the trial on January 30, 1978. Defendant, however, argues there was no hearing because the doctor did not testify on January 30, 1978 even though defendant requested that the doctor be called as a witness. If defendant wanted the doctor to testify on January 30, 1978 it was defendant's obligation to have the witness available to testify. Having been found competent on January 13, 1978, it was defendant's burden to show by a preponderance of the evidence that he was incompetent. *State v. Lopez,* supra. Defendant made no such showing.

(d) A finding of competency on January 30, 1978 was an abuse of discretion. We disagree; the only information before the court was that defendant was competent. Defendant presented no evidence of any kind to show incompetency.

(e) The hearing on January 31, 1978 did not cure the prejudice of failing to conduct a competency hearing prior to trial on January 30, 1978. There was a hearing prior to trial, at which defendant introduced no evidence.

Defendant was not deprived of a proper finding as to his competency.

Witness Immunity

As to one of the armed robberies, the prosecutor, in the opening statement referring to a witness to be called, stated that it was "quite likely that the first thing he is going to do is plead the Fifth Amendment and there will be a procedural way of getting him to give his testimony."

When the witness was called to the stand and asked if he knew the defendant, the witness' attorney advised the witness to claim his privilege against self-incrimination. Defendant objected and moved for a mistrial, asserting the prosecutor knew this was going to happen and purposely called the witness to the stand knowing the privilege would be invoked. The prosecutor then stated: "Under Rule 58 of the Rules of Criminal Procedure and pursuant to an agreement which has been entered into by

. . . [the witness, the witness' lawyer and the prosecutor] we move the Court to order that this man be given a limited immunity, and that he be given an immunity from anything more severe than a deferred sentence for a conviction in this matter." A written order was entered which states that the witness is to be given limited immunity in exchange for his testimony; the immunity was "for any penalty more severe than a deferred sentence". The witness testified; defendant objected to the entire procedure.

(a) *State v. Thoreen*, 91 N.M. 624, 578 P.2d 325 (Ct.App.1978) questioned the validity of Rule of Crim.Proc. 58; however, *Campos v. State*, 91 N.M. 475, 580 P.2d 966 (1978) upheld the rule. *Campos* answers defendant's claim that the rule is invalid.

(b) Defendant also claims that Rule of Crim.Proc. 58 was not followed. Our answer is that the rule was not applicable. Referring to the written order required by the rule, *Campos v. State*, supra, states: "The order must also contain a specific condition that the State of New Mexico shall forego the prosecution of the person for criminal conduct about which he is questioned and testifies." See Rule of Crim. Proc. 58(b). Here the "deal" involved a limitation upon the witness' sentence, if convicted; there was no immunity from prosecution.

Although Rule of Crim.Proc. 58 applies only to immunity from prosecution, this does not mean that other agreements are not to be enforced. Agreements for reduced charges have been enforced "within the dictates of due process"; that is, on constitutional grounds. *State ex rel. Plant v. Sceresse*, 84 N.M. 312, 502 P.2d 1002 (1972); *State v. Session*, 91 N.M. 381, 574 P.2d 600 (Ct.App.1978). Compare *State v. Plant*, 86 N.M. 2, 518 P.2d 961 (Ct.App. 1973). The agreement in this case, for a reduced sentence if conviction occurs, was an enforceable agreement on due process grounds and dealt with a type of agreement not covered and not prohibited by Rule of Crim.Proc. 58.

(c) Defendant also contends that he was denied due process by the misconduct of the prosecutor. He asserts there were two items of misconduct: 1) knowingly causing the witness, who was defendant's accomplice, to invoke his privilege against self-incrimination, and 2) granting immunity to the witness in the presence of the jury. These claims overlook the facts.

The prosecutor did call the witness to the stand knowing the witness would claim the testimonial privilege. However, the prosecutor also knew that an agreement had been reached under which the witness would testify. The calling of the witness under these circumstances did not result in the prosecutor building a case on the basis of inferences arising from use of the testimonial privilege *because the witness testified. State v. Vega*, 85 N.M. 269, 511 P.2d 755 (Ct.App.1973) is not applicable to this situation.

Disclosure to the jury of the agreement between the prosecutor and the witness was not a violation of due process. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) states: "[E]vidence of any understanding or agreement as to a future prosecution would be relevant to his [the witness'] credibility and the jury was entitled to know of it."

(d) Defendant asserts that informing the jury of the agreement was somehow an improper comment on defendant's failure to testify. We disagree; the agreement did not refer to defendant in any way. See *State v. Palmer*, 89 N.M. 329, 552 P.2d 231 (Ct.App.1976). Defendant also contends that the prosecutor's opening argument which characterized the witness as defendant's accomplice, together with informing the jury of the agreement between the prosecutor and witness somehow amounted to an expression of opinion concerning defendant's guilt prior to receipt of evidence establishing guilt. We disagree. The opening statement went only to what the witness would testify. We have previously pointed out that it was proper to inform the jury of the agreement because such went to the witness' credibility. Neither was an expression of opinion of guilt.

Validity of Sentences

The robberies while armed with a deadly weapon were, in this case, second degree felonies. Section 40A–16–2, N.M.S.A.1953 (2d Repl.Vol. 6, Supp.1975). The sentence for a second degree felony is not less than ten nor more than fifty years. Section 40A–29–3(B), N.M.S.A.1953 (2d Repl.Vol. 6). However, there were separate findings of fact that a firearm was used. When there is a separate finding of fact that a firearm was used in the commission of "any felony except a capital felony," the minimum and maximum sentence is to be increased by five years. Section 40A–29–3.1, N.M.S.A. 1953 (2d Repl.Vol. 6, Supp.1975). In accordance with the above statutes, defendant was sentenced to a prison term of not less than fifteen nor more than fifty-five years for each of the armed robberies.

Defendant asserts the five-year enhancements were invalid. His arguments and our answers, follow.

(a) The Legislature did not intend that the firearm enhancement provision should apply to armed robbery. Defendant relies on *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978). In *Simpson*, defendant was convicted of bank robbery by use of a dangerous weapon and of using a firearm to commit a felony. He was sentenced for both the bank robbery and the use of the firearm. *Simpson* held that these were two distinct felonies and that Congress did not intend that the sentence for use of a firearm should be imposed in addition to the sentence for bank robbery by use of a dangerous weapon.

Section 40A–29–3.1, supra, does not create a new class of crimes. Rather, this statute provides for additional consequences for felonies committed by use of a firearm. *State v. Barreras*, 88 N.M. 52, 536 P.2d 1108 (Ct.App.1975). The wording of § 40A–29–3.1, supra, providing for an enhanced sentence for the use of a firearm in committing "any felony except a capital felony," shows a legislative intent that the statute should apply to the noncapital felony—armed robbery. This legislative intent is clearly shown by amendments which increased the felonies to which the firearm enhancement provisions apply. Compare the statutory language set out in *State v. Barreras*, supra, with the language set out in *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct.App. 1977).

Simpson v. United States, supra, is not applicable because (1) two distinct felonies were involved in *Simpson* and only one felony is involved in our case, and (2) contrary to the interpretation of congressional intent in *Simpson*, supra, the intent of the New Mexico Legislature was that the firearm enhancement should apply to any felony other than a capital felony.

(b) The special-general statute rule prevents application of § 40A–29–3.1, supra. Our understanding of defendant's argument is that the sentencing provisions for robbery while armed with a deadly weapon are specific, that the firearm enhancement provisions are general and that because of the specific provisions, the general firearm enhancement provisions cannot be applied. This argument overlooks the fact that the special-general statute rule comes into play only when the two statutes conflict and cannot be harmonized to give effect to a consistent legislative policy.

The two statutes involved here do not conflict. The offense, robbery while armed with a deadly weapon, was declared to be a second degree felony for which the prison sentence is not less than ten nor more than fifty years. This offense can be committed in various ways, without using a firearm—by using a knife, brass knuckles, slingshots, bludgeons, etc. See definition of "deadly weapon" in § 40A–1–13(B), N.M.S.A.1953 (2d Repl.Vol. 6); see also *State v. Trujillo*, 91 N.M. 641, 578 P.2d 342 (Ct.App. 1978); *State v. Duran*, 91 N.M. 38, 570 P.2d 39 (Ct.App.1977). When, however, the deadly weapon used is a firearm, the enhanced sentence is imposed. The legislative policy is that any felony, other than a capital felony, committed by use of a firearm, should be more severely punished than felonies committed without using a firearm. There being no conflict between the first

offense penalty for robbery while armed with a deadly weapon and the enhanced penalty because the deadly weapon was a firearm, there is no basis for application of the special-general statute rule. *State v. Wilkins*, 88 N.M. 116, 537 P.2d 1012 (Ct.App. 1975); see *State v. Roland*, 90 N.M. 520, 565 P.2d 1037 (Ct.App.1977).

(c) The enhanced penalty for use of a firearm is barred by double jeopardy. Defendant relies on *United States v. Busic*, 22 Cr.L.Rep. 2444, 587 F.2d 577, which is a decision of the Federal Third Circuit in January, 1978. Since this decision had not been published in the Federal Reporter, we inquired as to the status of this decision. We are informed that the opinion in *United States v. Busic*, supra, has been withdrawn and that the case was resubmitted for decision in June, 1978.

State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975) applied the same evidence test in determining whether double jeopardy applied. Under that test, if either criminal charge requires proof of facts which the other does not, the offenses are not the same and there is no double jeopardy. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct.App.1977). This approach to double jeopardy does not differ from the federal approach discussed in *Simpson v. United States*, supra.

We have previously pointed out that robbery while armed with a deadly weapon may be committed without using a firearm. Since proof of the offense does not require proof that a firearm was used, it is not a violation of the double jeopardy clause to enhance the penalty when the offense is committed by using a firearm.

The firearm enhancement penalties were validly imposed. We are aware that a ruling of the Supreme Court denying a petition for a writ of mandamus may not be a decision on the merits of a particular legal issue when the Supreme Court does not explain its basis for denying the petition. See *State v. Reese*, 91 N.M. 76, 570 P.2d 614 (Ct.App.1977). Nevertheless, the result we have reached is consistent with the unreported Supreme Court decision in *State ex rel. Anaya v. Traub*, No. 12,059, decided August 2, 1978 in which the Supreme Court made permanent an alternative writ of mandamus. The Supreme Court commanded Judge Traub to "[c]omply with his mandatory, non-discretionary authority to impose the sentence for armed robery [sic] and firearm enhancement required by law". The result herein is also consistent with the unreported memorandum decision of this Court in *State v. Apodaca*, (Ct.App.) No. 3445, decided March 14, 1978. We held it was not fundamental error to impose the enhanced penalty for use of a firearm onto the sentence for armed robbery. The Supreme Court granted, but then quashed, its writ of certiorari in *State v. Apodaca*, supra.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

586 P.2d 317

SOCORRO LIVESTOCK MARKET, INC., Plaintiff-Appellee,

v.

Willie ORONA, Defendant-Appellant.

No. 11791.

Supreme Court of New Mexico.

Nov. 9, 1978.

Houston, Housman, Freeman & Dawe, R. Thomas Dawe, Albuquerque, for defendant-appellant.

John R. Gerbracht, Socorro, for plaintiff-appellee.

OPINION

SOSA, Justice.

The sole question presented in this case is whether or not a party notified by mail of judgment entered against him can take advantage of the three-day extension provision set forth in N.M.R.Civ.P. 6(e) [§ 21–1–1(6)(e), N.M.S.A.1953 (Repl.1970)]. We hold he cannot.

On August 29, 1977 judgment was entered against appellant in the Magistrate Court of Socorro County. A photocopy of the judgment was mailed to appellant. Thereafter, appellant filed a notice of appeal to the District Court of Socorro County on September 14, 1977. This was sixteen days after entry of the magistrate court judgment. The district court granted appellee's motion to dismiss the appeal. The basis for its ruling was that the notice of appeal was not filed within fifteen days after entry of judgment as required by N.M.Magis.R.Civ.P. 37 [§ 36–22–37, N.M.S.A.1953 (Supp.1975)].

Rule 37 provides in pertinent part:

> (a) *Right of Appeal.* If a party is aggrieved by the final order in a civil action, he may appeal to the district court of the county within which the magistrate court is located within fifteen days after entry of the judgment or final order.
>
> (b) *Notice of Appeal.* An appeal from the magistrate court is taken by filing with the clerk of the district court a notice of appeal.

Rule 6(e) of the Rules of Civil Procedure provides:

> (e) *Additional Time After Service By Mail.* Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three [3] days shall be added to the prescribed period.

Appellant asserts that since the photocopy of the August 29, 1977 judgment was a "paper" served upon him by mail, the situation is within the parameters of Rule

6(e) and that the time to file the notice of appeal should be extended three days beyond the required fifteen days. Appellee counters that Rule 6(e) is inapplicable because it only deals with pleadings by a party to a law suit. Appellee argues that Rule 37 establishes a fixed fifteen-day period after the entry of a judgment during which an aggrieved party may appeal.

Case law heavily favors appellee. In *Merrill Lynch, Pierce, Fenner & Smith v. Kurtenbach*, 525 F.2d 1179, 1181 (8th Cir. 1975) it was stated:

> However, Rule 6(e) has no application when computing time for a notice of appeal. The time for appeal starts to run from *entry of judgment*. Rule 6(e) only applies to enlarge periods of time in which a party has to act after *service of a notice* by mail.
>
> (Citations omitted.)

The court in *Sonnenblick-Goldman Corp. v. Nowalk*, 420 F.2d 858 (3d Cir. 1970) was faced with a situation similar to that presently before us. In that case appellant asserted that since the clerk had notified the parties by mail of entry of judgment, he should have three additional days within which to file a motion to vacate the judgment entered and for a rehearing. The court rejected appellant's contention; it concluded that Rule 6(e) did not apply to that situation nor did Rule 6(e) extend the time for service of the motion. *See also* 2 Moore's Federal Practice ¶ 6.12, at 1500.209 (2d ed. 1948).

We hold that appellant had fifteen days from the date of *entry* of the August 29, 1977 judgment against him within which to file his notice of appeal with the district court. Because he was not served with any pleading by a party to the law suit, he was not entitled to an additional three days. Appellant did not file his notice of appeal within the required fifteen-day period. The district court's dismissal of his appeal was proper; therefore, the decision of the district court is hereby affirmed.

IT IS SO ORDERED.

McMANUS, C. J., and PAYNE, J., concur.

586 P.2d 318

ROYAL INTERNATIONAL OPTICAL COMPANY, d/b/a Texas Optical, a Texas Corporation, Plaintiff-Appellee,

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, Defendants-Appellants.

No. 3112.

Court of Appeals of New Mexico.

Sept. 12, 1978.

Rehearing Denied Sept. 22, 1978.

Writ of Certiorari Denied Oct. 26, 1978.

OPINION

SUTIN, Judge.

This is the second appeal of the defendants. The first appeal arose from a judgment that restrained defendants from using the trade name "Texas State Optical" or any other name deceptively similar to plaintiff's trade name "Texas Optical." This judgment was affirmed by the Supreme Court in *Royal Intern'l Optical Co. v. Texas State Optical Co.*, 90 N.M. 21, 559 P.2d 398 (1976). The second appeal arises out of a judgment that awarded plaintiff damages, and, by way of contempt proceedings, an attorney fee for defendants' use of the trade name "Texas State Opticians."

Because the Opinion of this Court in the first appeal was ordered by the Supreme Court not to be published, and the opinion of the Supreme Court was perfunctory, a resume of the history of this case follows:

In the original trial, the court found that plaintiff and defendants were doing business in Albuquerque, New Mexico. Plaintiff registered to do business in April, 1971, under the trade name of "Texas Optical," and opened for business at that time. It had done business continuously under its trade name in the Albuquerque and Santa Fe trade areas. In September, 1974, defendants opened for business in competition with plaintiff, under the trade name of "Texas State Optical." "Texas Optical" and "Texas State Optical" were confusingly similar to the public within the trade areas and by reason thereof, plaintiff would likely suffer dilution of its trade name and clientele and would suffer irreparable injury to its business, trade, and business reputation.

The trial court concluded that plaintiff had the prior right to the exclusive use of the trade name "Texas Optical" in the Albuquerque and Santa Fe trade areas.

On February 26, 1975, a Judgment and Restraining Order was entered. (1975 Judgment.) Defendants were "enjoined and restrained from advertising their product or in any manner whatsoever, using the trade name Texas State Optical, *or any other name deceptively similar to plaintiff's*

William E. Snead, Ortega & Snead, Albuquerque, Sumner G. Buell, Jasper & Buell, Santa Fe, Robert Q. Keith, Mehaffy, Weber, Keith & Gonsoulin, Beaumont, Tex., for defendants-appellants.

E. Douglas Latimer, E. Douglas Latimer, P. A., Charles C. Spann, Charles C. Spann, P. A., Albuquerque, for plaintiff-appellee.

trade name Texas Optical . . . ." [Emphasis added.]

Defendants appealed the 1975 Judgment to this Court. The injunction was suspended during this appeal.

The unpublished majority opinion of this Court, Judge Sutin dissenting, reversed the judgment rendered in the trial court.

By way of certiorari, the Supreme Court in *Royal, supra,* reversed the opinion of this Court in the following language.

> There being substantial evidence to support the judgment of the trial court, its decision is affirmed.

Thereafter, the trial court entered Judgment On Mandate. The 1975 Judgment was affirmed. The order suspending the injunction had expired and was no longer in force, and the court retained jurisdiction to determine the amount of damages sustained by plaintiff and to grant judgment accordingly.

Without seeking the guidance of the court, defendants began to use the trade name "Texas State Opticians" in place of "Texas State Optical," and a second action arose in the same court. Plaintiff moved the court to hold defendants in contempt for use of the trade name "Texas State Opticians" because it was deceptively similar to plaintiff's trade name and in violation of the 1975 Judgment. Three hearings were held on the issues of contempt and damages.

At the end of the last hearing held on March 31, 1977, the trial court orally ordered defendants to be in contempt. Defendants were fined $5,000.00, suspended if defendants would, within 30 days, stop the use of the trade name "Texas State Opticians." On April 13, 1977, defendant filed a Certificate of Compliance and changed its trade name to "TSO Opticians."

Thereafter, the trial court entered its findings that the trade name "Texas State Opticians" was deceptively similar to the name "Texas Optical"; that the defendants had been found in contempt of court for a willful violation of the plain wording of the Court Mandate and were fined $5,000.00; that the fine was suspended pending compliance with the court's Order; and that plaintiff suffered damages in the total sum of $4,175.00.

Judgment was entered accordingly, and, in addition thereto, plaintiff was awarded an attorney fee of $2,500.00 "incurred in bringing the proceedings to enforce the Court's Order."

Defendants appeal. We affirm.

Defendants raise three points on appeal:

(1) The injunction in the 1975 Judgment is vague, overbroad and not sufficiently definite to support a judgment of contempt for using a trade name said to be "deceptively similar" to the name "Texas Optical."

(2) The name "Texas State Opticians" is not deceptively similar to the name "Texas Optical" as a matter of law.

(3) Any damage award or award of attorney's fees is not supported by substantial evidence and was unlawful.

A. *Defendants are barred from attacking the 1975 Judgment.*

Plaintiff moved the court for an order requiring defendants to show cause why they should not be held in contempt of court for continued use of the trade name "Texas State Opticians," in violation of the 1975 Judgment, a name deceptively similar to plaintiff's trade name "Texas Optical."

By way of response, defendants attacked the validity of the following language in the 1975 Judgment:

> ". . . any other name deceptively similar to plaintiff's trade name Texas Optical."

The basis for the attack is the claim that the words "deceptively similar" are vague, over broad and ambiguous, insufficiently definite to support a judgment of contempt; that "there is no guidance anywhere in the trial court's judgment that would give TSO any notice as to what it is restrained from doing."

Defendants have not explained, nor given any reasons why they did not seek the guidance of the court before they adopted

the use of the trade name "Texas State Opticians." Neither have the defendants explained nor given any reasons why they did not directly attack the 1975 Judgment by motion to vacate or set aside the Judgment because of the vagueness of the language.

Plaintiff claims that defendants made a collateral attack on the judgment and this they cannot do. We agree.

"The general rule is that a judgment is not subject to collateral attack where the court had jurisdiction of the subject matter and of the parties . . . ." 46 Am. Jur.2d *Judgments,* § 621 (1969). " . . . [It] is not open to contradiction or impeachment, in respect of its validity, verity, or binding effect, by parties or privies, in any collateral action or proceeding, except . . for fraud in its procurement." 49 C.J.S. *Judgments* § 401 (1947).

However, where lack of jurisdiction affirmatively appears on the face of the judgment, the judgment is void and therefore open to collateral attack. *St. Paul Fire and Marine Insurance Co. v. Rutledge,* 68 N.M. 140, 359 P.2d 767 (1961). But where the lack of jurisdiction does not affirmatively appear on the face of the record, the judgment is not subject to collateral attack. *McDonald v. Padilla,* 53 N.M. 116, 202 P.2d 970 (1948); *Arthur v. Garcia,* 78 N.M. 381, 431 P.2d 759 (1967).

If defendants wanted to challenge the validity of the 1975 Judgment, it had to be done by way of a direct attack, exampled by motion to vacate or set aside the Judgment. *Barela v. Lopez,* 76 N.M. 632, 417 P.2d 441 (1966).

Beginning almost 60 years ago, in *Acequia Llano v. Acequia Las Joyas,* 25 N.M. 134, 142, 179 P. 235, 237 (1919) the Supreme Court said:

> . . . The universal rule adhered to by the courts is that the judgment or final order of a court having jurisdiction of the subject matter and the parties, *however erroneous,* irregular, or informal *such judgment or order may be, is valid until reversed or set aside.* Black on Judgments, § 190. *And the general rule is that an error of law does not furnish ground for collateral attack on a judgment.* 15 R.C.L. 861. [Emphasis added.]

It was repeated in *McDonald v. Padilla, supra; In re Field's Estate,* 40 N.M. 423, 60 P.2d 945 (1936); and in *State v. Patten,* 41 N.M. 395, 69 P.2d 931 (1937).

State v. Patten, involved an injunction restraining an election. In subsequent contempt proceedings for violating the injunction, the court held that the judgment was conclusive against collateral attack. The court said:

> . . . *The appellees having disobeyed the injunction, cannot now claim that the injunction decree was erroneous. The judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be merely erroneous.* The method of correcting error is by appeal, and not by disobedience. *A party proceeded against for disobedience to an order or judgment is never allowed to allege as a defense for his misconduct that the court erred in its judgment.* He must go further, and make out that in point of law there was no order and no disobedience by showing that the court had no right to judge between the parties upon the subject. [41 N.M. at 402, 69 P.2d at 935.] [Emphasis added.]

See, *State ex rel. Mix v. Newland,* 277 Or. 191, 560 P.2d 255 (1977).

Furthermore, the contempt proceeding was one undertaken to enforce the 1975 Judgment.

"A proceeding to enforce a judgment is collateral to the judgment, and therefore no inquiry into its regularity or validity can be permitted in such a proceeding." 49 C.J.S. *Judgments* § 409 (1947); *Pitts v. Dallas Nurseries Garden Ctr., Inc.,* 545 S.W.2d 34 (Tex.Civ.App.1976); *Travelers Ins. Co. of Hartford, Conn. v. Staiger,* 157 Or. 143, 69 P.2d 1069 (1937); *Friesen v. Friesen,* 196 Kan. 319, 410 P.2d 429 (1966).

Pitts was a post-judgment garnishment proceeding against State Farm Insurance

Companies as garnishees and holders of monies owed to Pitts. Pitts intervened and sought to quash the writ of garnishment because the judgment was "too vague and indefinite." The court said:

> . . . Appellant's [Pitts] questioning of the original judgment in the garnishment proceedings was a collateral attack upon the judgment and is not permitted, [citation omitted]. The original judgment does not appear to be fatally defective upon its face. . . . [545 S.W.2d at 37.]

Defendants' response is not clear. They claim that plaintiff entirely missed defendants' point. Defendants' point is that the phrase "any other name deceptively similar to plaintiff's trade name Texas Optical" was so vague and indefinite that the 1975 Judgment could not be enforced by contempt proceedings; that "a collateral attack is an attempt to impeach the judgment by matters dehors the record, in an action other than that in which it was rendered," and "that matters dehors the record were not presented to the trial court, nor are they being presented to this Court." Defendants rely on *Barela v. Lopez, supra.* Defendants misinterpret this case.

Defendants seem to dance around the doctrine of collateral attack, and attempt to pole vault to reversal without a pole.

We hold that the defendants are barred from attacking the 1975 Judgment.

B. *The name "Texas State Opticians" is deceptively similar to the name "Texas Optical."*

Defendants' second point is that "The name 'Texas State Opticians' is not deceptively similar to the name 'Texas Optical' *as a matter of law.*" [Emphasis added.]

The trial court found:

> 3. The name "Texas State Opticians" is deceptively similar to the name "Texas Optical."
>
> 4. There has been confusion to the public by the use of the trade name Texas State Opticians by respondent and the name Texas Optical by petitioners.

Plaintiff had the exclusive use of the trade name "Texas Optical" from April 1, 1971 to June 2, 1977, the date the judgment was entered, a period of over six years.

There was substantial evidence to support the trial court's findings of fact, and such findings supported by substantial evidence cannot be disturbed on appeal. *Boone v. Boone,* 90 N.M. 466, 565 P.2d 337 (1977).

Defendants claim that the trade names are not deceptively similar *as a matter of law* because plaintiff did not prove that the word "Texas" had acquired a "secondary meaning," and the trial court made no such finding; that in the absence of a specific finding that the word "Texas" had acquired a "secondary meaning," defendants were free to use the trade name "Texas State Opticians."

Defendants acquired their "secondary meaning" theory from the trade mark case of *G. & C. Merriam Co. v. Saalfield,* 198 F. 369 (6th Cir. 1912), a case followed generally in the United States. With reference to "secondary meaning," the court said:

> . . . It contemplates that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, *because geographically* or otherwise descriptive, *might nevertheless have been used so long and so exclusively* by one producer with reference to his article *that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product*; in other words, had come to be, to them, his trade-mark. *So it was said that the word had come to have secondary meaning* . . . . [Emphasis added.] [198 F. at 373.]

If we understand defendants' position correctly, the failure to specifically find that the word "Texas" has a geographical descriptive word in plaintiff's trade name meant "Texas" to the trade and to the public, then the trade names were not deceptively similar as a matter of law.

The "secondary meaning" theory was not raised in the district court.

Defendants did not point to any place in the contempt proceedings where this "secondary meaning" theory was mentioned or presented. The record shows that defendants made no reference to any duty of plaintiff to shoulder this burden as a condition precedent to recovery or to any such defense stated in their response to plaintiff's motion, or to any evidence on the subject or to any requested finding by defendants on this issue. It came to plaintiff and to this Court like a comet out of the sky, and like the comet, plaintiff's attack disappears from view. "It is fundamental that matters not brought into issue by the pleadings and upon which no decision of the trial court was sought, or fairly invoked, cannot be raised on appeal." *Groendyke Transp., Inc. v. New Mexico St. Corp. Com'n,* 85 N.M. 718, 723, 516 P.2d 689, 694 (1973).

We note that at the 1975 trial defendants submitted a finding of fact and conclusion of law that the trade name "Texas State Optical" had acquired a secondary meaning and that defendants were entitled to protection as a common law trade name. Defendants' position lay at rest there. It was not revived.

It has long been the rule that a final judgment is conclusive as to a claim in controversy between the parties as to every matter which was offered to sustain or defeat the claim. "Public policy requires that there be an end to litigation and that rights once established by a final judgment shall not again be litigated in any subsequent proceeding." *Ealy v. McGahen,* 37 N.M. 246, 251, 21 P.2d 84, 87 (1933). This rule of law has been consistently followed. *Board of County Com'rs of Quay County v. Wasson,* 37 N.M. 503, 24 P.2d 1098 (1933); *Miller v. Miller,* 83 N.M. 230, 490 P.2d 672 (1971). The right and the power of plaintiff to recover against defendants was established in the 1975 trial. It is too late in the day for defendants in a contempt proceeding to attempt to defeat plaintiff's claim for failure to establish a "secondary meaning" of the word "Texas."

If we assumed that the contempt proceeding was a different cause or demand, defendants are estopped by judgment or collateral estoppel. The judgment in the prior action operated as an estoppel as to those matters which were actually litigated and determined in the first proceeding. Once a party has fought a matter in litigation he cannot later renew that duel. *State v. Nagel,* 87 N.M. 434, 535 P.2d 641 (1975); *Atencio v. Vigil,* 86 N.M. 181, 521 P.2d 646 (1974); *State v. Tijerina,* 86 N.M. 31, 519 P.2d 127 (1973); *Town of Atrisco v. Monohan,* 56 N.M. 70, 240 P.2d 216 (1952). The "secondary meaning" theory was decided in the 1975 Judgment. Defendants' second attempt to defeat plaintiff's claim is thwarted.

Finally, when the Supreme Court in *Royal Intern'l Optical Co., supra,* affirmed the judgment of the trial court, the "law of the case" doctrine became effective. It established the right and power of plaintiff to further prosecute its claim against defendants irrespective of the "secondary meaning" concept. The law of the case, whether right or wrong, is controlling on the second appeal. This doctrine applies to questions which might have been, but were not, raised or presented in the prior appeal. *Sanchez v. Torres,* 38 N.M. 556, 37 P.2d 805 (1934); *Davisson v. Bank,* 16 N.M. 689, 120 P. 304 (1911). It also applies to those questions which are necessarily involved in reaching the decision. *Fmrs.' S. Bank of Texhoma v. Clayton N. Bk.,* 31 N.M. 344, 245 P. 543 (1926); *United States v. D. & R. G. Railroad,* 11 N.M. 145, 66 P. 550 (1901).

We affirm the finding of the trial court that the name "Texas State Opticians" is deceptively similar to the name "Texas Optical."

C. *The damage award was supported by substantial evidence.*

The trial court found:

7. The issue was presented to the Court by agreement of the parties as to any damages that might have been suffered by petitioners by respondents use of

the trade name "Texas State Optical" during the pendency of the appeal in this matter between the entry of the original order of the Court on February 26, 1975, and the final order of September 15, 1976.

8. The Court has found the petitioners have suffered damages in the amount of $2,750.00 to the East Central Store and $1,425.00 damages to the Five Points Store for a total judgment of $4,175.00.

At the close of the case, the court orally announced:

As everybody's mentioned here, the calculation of damages is indeed difficult, that there is no precise way of calculating damages. The evidence that has been presented to the Court in certain instances is rather sophomoric and rather elemental, and perhaps even the way that this Court will calculate damages admittedly is not precise but I think the cases hold the difficulty of calculating damages is no way a bar to the—to the awarding of damages if there is some basis in the proof, the evidence before the Court.

We're talking about a 19 month period and we've talked about 30-day months, that's approximately 570 days, 570 business days, probably less than that and . . . it would appear to the Court that two stores particularly have been shown to me to have suffered some loss.

* * * * * *

I think a fair measure would be $5.00 a day, and the Court is going to award damages of $2,750.00 on the East Central Store and half that amount on the Five Points store of $1,425.00, for a total of $4,175.00.

Whether we agree or disagree, we compliment a district judge who lays his/her cards on the table for guidelines of attorneys and appellate courts. It is important that we know the basis upon which the trial court reaches its decision. "It is hornbook law that the decision of a trial court will be upheld if it is right for any reason." *Scott v. Murphy Corporation,* 79 N.M. 697, 700, 448 P.2d 803, 806 (1968).

While damages must be susceptible of ascertainment otherwise than by mere speculation, conjecture, or surmise, it is now generally held that uncertainty which prevents a recovery is uncertainty as to the fact of the damage, and not as to the amount; and that where it is certain that damage has resulted mere uncertainty as to the amount will not preclude the right to recovery. *J. R. Watkins Co. v. Eaker,* 56 N.M. 385, 244 P.2d 540 (1952); *Nichols v. Anderson,* 43 N.M. 296, 92 P.2d 781 (1939).

Defendants committed a willful violation of the order of the 1975 Judgment and were held in contempt. We deem this such a case of wrongdoing that sound policy requires that the risk involved in the estimation of damages by the district court should be a burden of the defendants. We decline to quibble over the question of whether the exact damages have been clearly established. We experience no misgiving in sustaining the findings of the trial court under circumstances like those here present, where willful conduct and contempt are established. *Stewart v. Potter,* 44 N.M. 460, 104 P.2d 736 (1940). To view the vexatious difficulty in ascertaining damages in an injunction proceeding see *Gonzales v. Rivera,* 37 N.M. 562, 25 P.2d 802 (1933). For an extensive review of damages for misuse of a trade secret, see *DeVries v. Starr,* 393 F.2d 9 (10th Cir. 1968).

4 Callmann, *Unfair Competition Trademarks and Monopolies* (3d Ed. 1970). Section 89.1(a), pp. 247–248 says:

"Damages" as a term of art has acquired a clear and definite legal meaning; it is limited to the actual pecuniary loss sustained by the plaintiff. Whether the damage results from infringement in the strict sense of the patent or trademark law or from unfair competition, it can seldom be measured with any assurance of mathematical accuracy. Sometimes, the plaintiff's claim of damages is judicially characterized as an attempt to seek unjust enrichment at the defendant's expense. The difficulty besetting any showing of damages to intangible values and the radial repercussions of a competi-

tive injury can hardly be over-estimated. The competitive tort does not differ from other torts and a wrongdoer should answer for all the consequences naturally resulting from his wrongful act, whether anticipated or contemplated. Recoverable damages, therefore, include compensation for all injury to a plaintiff's business naturally and proximately caused by the defendant's tortious act. This includes injury to reputation or goodwill, loss of business, additional expenses incurred because of the tort, such as change of name, and all other elements of injury to the business.

We hold that the trial court's finding on damages was a fair determination of the loss suffered by plaintiff.

D. *Plaintiff was entitled to an attorney fee.*

Defendants decry the award of attorney fees to plaintiff. We disagree. "An injunction while it is in force must be obeyed in order to preserve respect for and obedience to the mandates of the court. Any other approach would be intolerable." *Thomas v. Wollen,* 255 Ind. 612, 266 N.E.2d 20, 22 (1971); *State ex rel. Mix, supra.* In civil contempt, "the punishment is remedial and designed to reimburse complainants for the wrong done as a result of the noncompliance with a valid order of the court." *Nelson v. Progressive Realty Corp.,* 81 R.I. 445, 104 A.2d 241, 243 (1954). Reimbursement includes attorney fees. In the prosecution of the contempt proceedings the trial court in its discretion may allow the complainant a reasonable attorney's fee to be assessed against the violator as a part of the expenses and costs incurred by the complainant. *R. E. Harrington v. Frick,* 446 S.W.2d 845 (Mo.App. 1969), 43 A.L.R.3d 787 (1972); *Folk v. Wallace Business Forms, Inc.,* 394 F.2d 240 (4th Cir. 1968); *Chas. Pfizer & Co. v. Davis-Edwards Pharmacal Corp.,* 385 F.2d 533 (2d Cir. 1967); *Lyon v. Bloomfield,* 355 Mass. 738, 247 N.E.2d 555 (1969); *Novo Industrial Corp. v. Nissen,* 30 Wis.2d 123, 140 N.W.2d 280 (1966); *Lewis v. Lorenz,* 144 Colo. 23, 354 P.2d 1008 (1960). See, *Costilla Co. v. Allen,* 15 N.M. 528, 110 P. 847 (1910).

Plaintiff was entitled to an award of $2,500.00 as an attorney fee for successfully pursuing the contempt proceeding.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

586 P.2d 717

The FARMERS AND STOCKMENS BANK OF CLAYTON, a New Mexico banking Corporation, and Commerce Agricultural Loan Company, a New Mexico Corporation, Plaintiffs-Appellees,

v.

Albert W. LAYTON, also known as A. W. Layton, Lucille Layton, the United States of America, Boise City Farmers Cooperative, Harold Butler Enterprises, Inc., Colfax Mills, Inc., and Farmers Supply Company, a corporation, Defendants-Appellants.

No. 3186.

Court of Appeals of New Mexico.

Oct. 24, 1978.

Emmett C. Hart, Albuquerque, James K. Ribe, Tesuque, for defendants-appellants.

Alvin F. Jones, Roswell, for plaintiffs-appellees.

OPINION

SUTIN, Judge.

On April 14, 1965, Layton executed a note and mortgage on his land to Commerce Agricultural Loan Company (Commerce) showing an indebtedness of $113,384.55. On December 31, 1970, Layton executed a promissory note to Commerce in the sum of $36,372.22 with interest at the rate of 10 percent per annum. This 1970 note is the subject of this litigation. It was due and payable on December 31, 1971. Interest was paid on May 1, 1971 and July 12, 1971, but no further payments were made and the note lay dormant until July 31, 1973 when *Commerce assigned the note and mortgage to Farmers and Stockmens Bank* (Bank). Layton was also indebted to the Bank secured by a mortgage on his land.

Commerce and the Bank filed suit against Layton on June 18, 1976, Commerce to seek judgment on the note, and the Bank to foreclose on its mortgage. The trial court awarded Commerce judgment against Layton in the sum of $56,013.83 plus 10 percent interest. The court found that, *as evidenced by the intention of the parties, Commerce assigned the mortgage but did not assign the note*; that the note was placed by Commerce in its "Reserve for losses ledger" and that Commerce was the

owner and holder of the note which was due and owing. Layton appeals, we reverse.

The record, the testimony of the parties, the various transactions between the parties have been carefully reviewed, and there is no evidence that Commerce assigned to the Bank the mortgage but not the note. Both instruments were actually assigned unconditionally.

First, the evidence is uncontradicted that Commerce unequivocally assigned the 1970 note to the Bank; that Commerce was not the holder of the note at the time suit was instigated and therefore was not the real party in interest pursuant to Rule 17(a) of the Rules of Civil Procedure [§ 21–1–1(17)(a), N.M.S.A.1953 (Repl.Vol. 4)]. It had no right to prosecute this claim on the promissory note.

Second, Layton contends that parol testimony cannot be admitted to vary or contradict the terms of the Assignment. Commerce argues that Layton was a stranger to the Assignment and Layton cannot invoke the Parol Evidence Rule. Neither contention is relevant because *there was no parol testimony that varied or contradicted the terms of the Assignment.*

The Bank and Commerce were owned and controlled by the Chilcote family and, at the time of the assignment, John Chilcote was vice-president of Commerce, and, at the time of filing suit, he was president. W. H. Cantrell was vice-president and loan officer of both the Bank and Commerce.

On July 31, 1973, Chilcote executed the following assignment for Commerce:

> COMMERCE . . . hereby assigns and transfers such mortgage *and the obligations secured thereby to The . . . BANK* . . . . [Emphasis added.]

It is undisputed that the 1970 note was one of the obligations secured.

The day following the assignment to the Bank, August 1, 1973, Cantrell as vice-president of the Bank, and Layton executed a Mortgage Extension Agreement. "WHEREAS" clauses recited that on April 14, 1965, Layton executed a note to Commerce in the amount of $113,384.55 together with a mortgage; that on July 12, 1971, Commerce extended the time of payment; that $96,640.00 remained unpaid. The following "Whereas" clause states:

> WHEREAS, Commerce . . . has assigned and transferred all of its right, title and interest in such mortgage *and the obligations secured thereby to The . . . Bank . . . which is the present holder and owner of said obligations* and the securing lien evidenced by the above described mortgage . . . .

The parties agreed that the maturity date for payment of the $96,640.00 obligation acquired from Commerce would be extended to January 15, 1974.

The indebtedness of $96,640.00 represented $60,000.00 *paid by the Bank to Commerce.* The balance of $36,640.00 was the balance due on Layton's 1970 note. The Commerce ledger sheet, as of August 1, 1973, shows the Layton account *paid in full.* The Bank, in fact, extended the payment of the 1970 note from August 1, 1973 to January 15, 1974, and no payments were made or collected thereafter. Commerce claimed that the 1970 note was a "charge off." Mr. Cantrell testified that, although the Mortgage Extension Agreement covered the 1970 note and the Bank extended payment of the note, *the note would not be incorporated in Layton's existing loan with the Bank until Layton secured additional financing;* it was not disclosed in the instrument "that it was agreed that the charge off, of course, from the loan would be taken care of." A "charge-off" note is one no longer considered an asset.

Mr. Chilcote testified *that the Layton loan was transferred to the Bank because the note,* not discountable, *could not be kept by Commerce*; that Layton was unable to pay the note, and *Commerce would have to pay the Bank for the note. There was no evidence that Commerce paid the Bank to obtain a return of the note.* Chilcote did tell Layton that Commerce would keep the

loan; that Layton said nothing and did not protest and object that he did not owe the amount of the note. It is upon this testimony alone that Commerce claims:

> The testimony of the representatives of the loan company and the bank was unequivocal that the obligations transferred by the assignment . . . did not include the charged off note . . . which continued to be the property of the loan company and was such at the time of trial.

This claim is frivolous.

Commerce had no right, title or interest in the note at the time suit was filed; yet Commerce now claims that the note was a "charge-off," and for reasons unknown, now claims that it had ownership and possession of the note. The record does not show any dealings between these family corporations in which the note was reassigned to Commerce.

It is noted with much interest that Chilcote did not refer to additional financing by Layton as a condition attached to the assignment of the note. Based upon this testimony alone, the Commerce assignment of the note to the Bank was clear, unambiguous and unconditional with sufficient consideration therefor. The extension agreement confirmed that all of Layton's obligations to Commerce were transferred to the Bank. It was Cantrell only, speaking for the Bank, who testified, despite the assignment and transfer, that the Bank would not incorporate the note in Layton's existing loans with the Bank until Layton secured additional financing. This fact did not constitute a nonacceptance of the assignment. To make such a claim would be frivolous because the assignment was accepted by the Bank in the execution of the Mortgage Extension Agreement and the Bank, in fact, extended the time for payment of the note.

The struggle between the parties in the trial court and on this appeal centers around the application of "The Parol Evidence Rule."

■ The "Parol Evidence Rule" is applicable when the terms of a written instrument are plainly stated, without ambiguity, and a party seeks to contradict or vary its terms by the use of parol testimony. It is a fundamental principle of law that the use of such parol testimony is prohibited. *Armijo v. Foundation Reserve Insurance Company*, 75 N.M. 592, 408 P.2d 750 (1965).

■ This rule is inapplicable because none of the parol evidence shown above varied the terms of the assignment.

We are faced with two family corporations dealing separatively with the same debtor, dealing privately between themselves, intermingling the debtor's various loans, and entering into assignments and agreements, separately. For some undisclosed reason, both sue the debtor in the same action, Commerce to collect on a note already assigned to the Bank, and the Bank foreclosing a mortgage. With a common vice-president and loan officer, acting on behalf of both corporations, knowledgeable of Layton's relationship with both corporations, with a vice-president raised to the office of president of Commerce, with some official relationship with the Bank, knowledgeable of Layton's relationship with both corporations, the Assignment and the Mortgage Extension Agreement are read together as one instrument entered into between both corporations and Layton. The corporations or their officers are not charged with any willful or fraudulent conduct. They were mistaken in the procedures used to collect the principal and interest on the 1970 note.

Commerce also argues that the 1970 note was not paid by Layton and Layton should be required to pay the note. If this note was payable, it was payable to the Bank and not to Commerce. Commerce and the Bank do not have the right to collect twice on this note. A serious question of fact exists whether the "charged-off" 1970 note was paid by judgment entered for the Bank on the foreclosure of its notes and mortgag-

es. This question does not arise on this appeal.

What cannot be understood is why Commerce, instead of the Bank, stepped in to try and collect the 1970 Layton note. If the Bank had sued, the issue would have been resolved. Inasmuch as Commerce had no right, title or interest in the note, it does not have the power to sue and collect.

Reversed. The trial court shall vacate its judgment rendered in favor of Commerce and against Layton, and enter judgment for Layton, together with costs expended and interest thereon. Layton shall recover its costs on this appeal.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., concurring in result only.

586 P.2d 1079

AMERICAN BANK OF COMMERCE, Plaintiff-Appellee and Cross-Appellant,

v.

M & G BUILDERS, LTD., Sunland Builders, Inc., Defendants-Appellees and Cross-Appellees,

v.

COACHMAN REAL ESTATE INVESTMENT CORP., William Wieman, George Headrick, Doug Stock, Bob Bowersock and Coachman Albuquerque Partnership, Defendants-Appellants and Cross-Appellees.

No. 11727.

Supreme Court of New Mexico.

Oct. 23, 1978.

Rehearing Denied Nov. 27, 1978.

Thomas L. Grisham, Albuquerque, for plaintiff-appellee and cross-appellant.

William Madison, Albuquerque, for defendants-appellees and cross-appellees.

Kool, Kool, Bloomfield & Eaves, John L. Hollis, Albuquerque, Warren S. Zweiback, Omaha, Neb., for defendants-appellants and cross-appellees.

OPINION

FEDERICI, Justice.

Coachman Real Estate Investment Corporation (Coachman), appellant and cross-appellee, is a general contractor. It entered into subcontracts with M & G Builders, Ltd. and Sunland Builders, Inc. (M & G–Sunland). Coachman's subcontract with M & G–Sunland was for the original sum of $138,727.02. Various oral modifications were made to the subcontract, but these modifications were found by the trial court to be irrelevant to the issues involved in the lawsuit. Subsequently, Coachman signed a "Letter of Assignment" addressed to the American Bank of Commerce (ABC), appellee and cross-appellant, the text of which reads:

> This letter is to inform you that funds in the amount of $138,727.02 will be paid to Sunland Builders Inc./M & G Builders, Ltd. per subcontract agreement dated March 4, 1976. These funds are available through an interim financing loan at Bank of New Mexico and will be disbursed by an Albuquerque New Mexico title co. Payments will be made by checks written payable to Sunland Builders Inc./M & G Builders, Ltd. and American Bank of Commerce. This assignment of funds is made at the request of Wayne H. Gribble, President of Sunland Builders Inc./M & G Builders, Ltd.

The trial court found that the Letter of Assignment was given for the purpose of inducing the bank to lend M & G–Sunland funds for the performance of the subcontract with Coachman.

The subcontract between Coachman and M & G–Sunland required that M & G–Sunland provide waivers of lien and evidence of payment of labor and material costs as a condition to final payment. In accordance with the Letter of Assignment, Coachman made payment by check payable to M & G–Sunland and ABC in the amount of $126,984.00. M & G–Sunland did not furnish waivers of lien or releases in connection with a request for final payment of the balance of the amount stated in the Letter of Assignment or $11,743.02. ABC brought this action against M & G–Sunland for advances made to them and joined Coachman as a party defendant. The trial court granted judgment to ABC against Coachman for the balance owing under the Letter of Assignment for advances made by ABC, but not to exceed a total of $138,727.02. The trial court held against ABC on its claim for amounts advanced by ABC in excess of $138,727.02.

Appellant Coachman contends, first, that the trial court failed to make sufficient findings of fact and conclusions of law to show on what basis judgment was granted for ABC, and, second, that the trial court erred in concluding that the Letter of Assignment created an independent obligation on the part of Coachman to pay the amount stated in the Letter of Assignment.

By its findings of fact and conclusions of law the trial court made clear that the case was decided upon the basis that the Letter of Assignment constituted a binding agreement or contract between Coachman and ABC to pay up to but not to exceed the

entire $138,727.02. The trial court determined that this agreement was breached by Coachman. We do not agree with Coachman's contention that this theory of relief was not litigated before the trial court. ABC did plead this theory in its complaint and introduced evidence without objection. ABC also mentioned this theory in its opening statement and final argument to the trial court. The issue was litigated. Under Rule 15(b), Rules of Civil Procedure [§ 21–1–1(15)(b), N.M.S.A.1953 (Repl.1970)] and prior opinions of this Court, the pleadings are considered amended to conform to the evidence. *In re Sedillo,* 84 N.M. 10, 498 P.2d 1353 (1972); *Luvaul v. Holmes,* 63 N.M. 193, 315 P.2d 837 (1957).

As to Coachman's second contention, the trial court ruled that the liability of the parties under the Letter of Assignment was on a contract basis; that the Letter of Assignment created an independent obligation on the part of Coachman to pay. We agree. The Letter of Assignment, which was signed by Coachman and relied upon by the bank in making the loans to M & G–Sunland, was more than a simple assignment. We hold that by virtue of this instrument Coachman agreed to pay the entire stated amount to ABC. This instrument constituted an independent contract between Coachman and ABC and simply provided additional protection to the bank for the making of the loan to M & G–Sunland. *Farmers & Merchants State Bank v. Snodgrass & Sons Const. Co.,* 209 Kan. 119, 495 P.2d 985 (1972). Being an independent contract, rather than a simple assignment, this written agreement is not governed by the Uniform Commercial Code—Secured Transactions [§§ 50A–9–101 to 50A–9–507, N.M.S.A.1953 (Repl.1962 and Supp.1975)]. It is our opinion that the trial court did not err in granting judgment to ABC against Coachman for the balance owed ABC (approximately $11,000) for advances made to M & G–Sunland under the Letter of Assignment.

It is further our opinion that the trial court did not err in denying relief to ABC for amounts in excess of a total of $138,727.02, the amount specified in the Letter of Assignment. The transcript reveals that the trial court found the Letter of Assignment ambiguous as to the amount owed by Coachman to ABC under it. Where a contract is ambiguous, the intent of the parties is to be ascertained from the language and conduct of the parties and the surrounding circumstances, and oral evidence as to that intent is admissible. Prior to admitting the evidence the court must find that there is an ambiguity. *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.,* 84 N.M. 524, 505 P.2d 867 (Ct.App. 1972). The trial court concluded that the contract was ambiguous and properly permitted evidence to be introduced to determine the intent of the parties. The amount in excess of the sum specified in the Letter of Assignment was a result of oral modifications between Coachman and M & G–Sunland. ABC was not a party to these modifications, and the contract between Coachman and ABC was not affected thereby.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

McMANUS, C. J., and PAYNE, J., concur.

EASLEY, Justice, dissenting:

The implications of the rule contained in the majority opinion extend far beyond this dispute. It will have a statewide impact on present practices in banking, contracting and other businesses.

The Coachman letter to ABC simply said "funds * * * will be paid to Sunland * * * *per subcontract* agreement dated March 4, 1976 * * * by checks * * * to Sunland * * * and American Bank * * * This *assignment of funds* is made at the request of Wayne H. Gribble, President of Sunland * * *" (Emphasis added.)

Does this mean that only when the funds become due to Sunland, under the terms of the contract, they are assigned to ABC? If so, under U.C.C. § 50A–9–318, N.M.S.A. 1953, ABC's right to the funds is subject to

the defenses asserted by Coachman against his defaulting subcontractor.

Or, is this an "independent contract" whereby Coachman agreed to pay $138,-727.02 to ABC, regardless of contract obligations and whether or not Sunland did any work at all? In substance, the majority answers this question in the affirmative. We disagree.

Coachman plainly agreed to assign the funds to ABC "per" contract, which means "by, through, or by means of" the Sunland contract. Black's Law Dictionary, Fourth Ed., Rev'd (1968). The phrase "per charter party" has been held to effect an incorporation by reference of a charter party agreement into a later writing. *Lowery & Co. v. S.S. Le Moyne D'Iberville,* 253 F.Supp. 396 (S.D.N.Y.1966); *Lea v. Helgerson,* 228 S.W. 992 (Tex.Civ.App.1921).

The subcontract specified that the final payment would be due Sunland when the work was completed *in accordance with the contract;* that Sunland would pay for all materials and labor; that, if Sunland failed, Coachman would make good the deficiencies and deduct the cost from the payments. Where a writing refers to a separate agreement, that agreement or so much as is referred to should be considered as part of the writing. *Turner v. Wexler,* 14 Wash. App. 143, 538 P.2d 877 (1975). All writings forming a part of a transaction are interpreted as a harmonious whole. *McDonald v. Journey,* 81 N.M. 141, 464 P.2d 560 (Ct. App.1970). Thus, the letter, together with the subcontract, constitute a conditional promise to pay.

The arrangement indicated by the letter, which undoubtedly occurs many times daily in New Mexico, was a simple device to insure the bank of receiving money owed to Sunland by Coachman when the amounts came due. The total content of the letter meant: "I'll put your name on the check when I pay Sunland what is owed." The letter did not guarantee payment of Sunland's debts. The terms of the letter are not ambiguous, although the case was tried on the theory of ambiguity.

If it be construed that there is ambiguity, then, we must look to the record for evidence showing the intentions of the parties. *In re Will of Carson,* 87 N.M. 43, 529 P.2d 269 (1974). This intent is to be ascertained from the language and conduct of the parties and the surrounding circumstances; parol testimony is admissible. *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.,* 84 N.M. 524, 505 P.2d 867 (Ct.App.1972). In this regard, the testimony of ABC's Mr. Vogl made it clear no less than six different times that it was understood that the payments of money to ABC were to be made by Coachman only if Sunland performed under its contract with Coachman and became entitled to payment. Both writings concern the same subject matter and were executed at about the same time. Present values were to accrue at about the same time. It is not the province of the court to amend or alter a contract by construction. It must interpret and enforce the contract which the parties made for themselves. *Owen v. Burn Const. Co.,* 90 N.M. 297, 563 P.2d 91 (1977). In effect the agreement here, as understood by both parties, is being changed by the majority opinion to mean something entirely different.

Farmers & Merchants State Bank v. Snodgrass & Sons Const. Co., 209 Kan. 119, 495 P.2d 985 (1972) is the sole case relied upon to support the holding that the letter here constitutes an "independent contract." We respectfully suggest that this reliance is unfounded. That case is inapposite for the reason that the agreement between the contractor and the bank did not specify "per" the subcontract, as here. It stated that the contractor held an amount in retainage and that when all work was completed he would pay the entire amount retained by making a check to the subcontractor and the bank. The court noted in *Snodgrass* that the agreement did not even refer to the subcontract. Id. 495 P.2d at 990.

The contracts in *Snodgrass* were not executed at or about the same time, as here. The bank in that case was not aware that the phrase "work is completed" had a special meaning in the construction industry which required the subcontractor to pay for

all labor and materials provided. In our case ABC knew that Sunland was to pay for these items before final payment would be due.

Although our majority cites *Snodgrass* in support of an "independent contract" theory, *Snodgrass* did not turn on that principle, but was decided on the theory of "reliance" or promissory estoppel. Id. 495 P.2d at 989. There is no evidence that ABC relied on receiving the total amount even if there was a failure of performance by Sunland.

The key difference is that *Snodgrass* involves an unconditional promise to pay the bank, while in our case payment is to be made "per" contract, thus creating a conditional promise to pay.

There is no substantial evidence to support the findings of fact and conclusions of law entered by the trial court and relied upon for its holding that there was an unconditional contract to pay to ABC the entire amount mentioned in the letter. The cause should be reversed and judgment ordered for Coachman on this issue.

We agree with the disposition made by the majority on the second issue.

SOSA, J., concurs.

586 P.2d 1083

Eloy ESQUIBEL and Mary L. Esquibel, Plaintiffs-Appellants,

v.

Dan M. HALLMARK et al., Defendants-Appellees.

No. 11474.

Supreme Court of New Mexico.

Oct. 24, 1978.

Rehearing Denied Nov. 27, 1978.

Solomon, Roth & Van Amberg, Charles S. Solomon, Santa Fe, for plaintiffs-appellants.

White, Koch, Kelly & McCarthy, John F. McCarthy, Jr., Santa Fe, New Mexico for Santistevans & Lavadie.

Karelitz & Flores, Leon Karelitz, Las Vegas, for Lavadie.

OPINION

FEDERICI, Justice.

This action was commenced to quiet title to lands claimed by plaintiffs Esquibel (appellants). Following a non-jury trial, title was quieted in appellants against all defendants except Lavadie and Santistevan (appellees). Appellants seek review of the judgment of the District Court of Mora County.

The subject property was originally a part of the Mora Grant. Subsequently, title was acquired by the common grantor, State Investment Company, and later was sold to all of the predecessors of all of the present parties. Appellants' claim to title is based on a series of written conveyances, all of which instruments described the property by the terms of the original 1917 survey of the property. The description in the 1946 deed to appellants was copied from the previous deeds in the series.

In the original division of the larger tract involved, which was to be divided equally between appellants and appellees, or their predecessors, each was to receive about 614 acres under their deeds. The record shows that appellants had fences erected shortly after they purchased the land in 1946 and that, through the years, appellants assessed and paid taxes upon 614 acres. The area within the fence line boundary claimed by appellants contains over 900 acres. It is uncontested that appellants have made use of all of the land within the fences erected by them since 1946, for cattle grazing and other purposes.

The dispute in this case arises because the fence lines erected by appellants do not conform to what the trial court found to be the true legal description of the appellants' lands as contained in their 1946 deed. The trial court found that appellants' west and south fence lines were erected some distance beyond the western and southern boundaries of their land, as those boundaries appear in appellants' 1946 deed. Title to the land claimed by appellants, which lies within their western fence line boundary, but beyond the western boundary of their property as described in the 1946 deed, was quieted in appellee Lavadie, the adjoining land owner to the west. Title to the land claimed by appellants which lies within their southern fence line boundary, but beyond the southern boundary of their property as described in their 1946 deed, was quieted in appellee Santistevan, the adjoining landowner to the south. The trial court found that the legal description in appellants' 1946 deed is easily ascertainable on the ground and held that appellants had proved their title in fee simple to lands so described. However, the trial court also found that appellants were without right, title or interest in the lands outside the description, but within their fences, either under the doctrine of acquiescence (sometimes referred to as mutual recognition) or by adverse possession.

Appellants' first claim is that the trial court erred in finding that neither appellee ever acquiesced, agreed to or honored the altered and enlarged dimensions of appellants' land caused by the misplaced fence line. While it is true that a boundary line may be established by acquiescence, the establishment of a boundary line is a question of fact. *Platt v. Martinez*, 90 N.M. 323, 563 P.2d 586 (1977); *Velasquez v. Cox*, 50 N.M. 338, 176 P.2d 909 (1946). The trial court found against appellants.

We are limited to a determination of whether there is substantial evidence to

support the trial court's findings of fact, and, if there is, to decide whether the trial court properly applied the law. It is the duty of the Court on review to entertain all reasonable presumptions in favor of the correctness of the trial court's findings, conclusions and judgment. *Velasquez v. Cox, supra.*

We find that there is substantial evidence to support the finding of the trial court that appellees Lavadie and Santistevan did not acquiesce in appellants' fence line.

The second claim presented by appellants is that they own title to all of the land within the fence boundaries through adverse possession. The elements necessary to establish title by adverse possession in a grant are: (1) actual, visible, exclusive, hostile and continuous possession; (2) under color of title; (3) for a period of ten years. *Flores v. Bruesselbach*, 149 F.2d 616 (10th Cir. 1945); *Marquez v. Padilla*, 77 N.M. 620, 426 P.2d 593 (1967). *See* § 23–1–21, N.M. S.A. 1953 (Supp.1975).

Appellees point out that appellants failed to show color of title to the land in dispute. We agree with appellees. The trial court found: (1) that appellants' title is based on a written deed; (2) that the legal description contained in that deed is easily ascertainable on the ground; and (3) that since appellants' fences lie beyond the area granted to them in the deed, they did not show color of title.

The burden of proving title by adverse possession is upon him who asserts it. The plaintiff in a quiet title action must rely upon the strength of his own title and not upon the weakness of the title claimed by his adversary. *Birtrong v. Coronado Bldg. Corp.*, 90 N.M. 670, 568 P.2d 196 (1977).

Appellants failed to prove title in themselves under either theory, therefore, the judgment of the trial court is affirmed.

IT IS SO ORDERED.

McMANUS, C. J., and PAYNE, J., concur.

586 P.2d 1085

STATE of New Mexico, Plaintiff-Appellee,

v.

Simon MARTINEZ, Defendant-Appellant.

No. 11838.

Supreme Court of New Mexico.

Nov. 8, 1978.

Rehearing Denied Dec. 1, 1978.

Theodore E. Lauer, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

PAYNE, Justice.

Defendant Simon Martinez was convicted of criminal sexual penetration in the second-degree and of a separate charge of armed robbery. He was sentenced to a term of ten to fifty years for each offense. The court ordered that the terms be served consecutively. Thereafter, habitual offender charges were filed against him based on these two convictions and three previous convictions. Defendant was tried and convicted on the habitual offender charges and was resentenced to two consecutive life sentences pursuant to § 40A–29–5 C, N.M.S.A. 1953 (Repl.1972) (repealed by Laws 1977, ch. 216, § 17, effective July 1, 1979).

Defendant raises three issues on appeal from his conviction of and sentencing on the habitual offender charges: (1) Whether the trial court erred in refusing to submit to the jury the issue of the alleged invalidity of two of defendant's prior convictions; (2) whether consecutive life sentences may be imposed under § 40A–29–5 C; and (3) whether defendant was properly credited with time he served on the original vacated sentences. We affirm the trial court on the first two issues, but remand the case for the purpose of crediting defendant for time he served prior to his conviction in the habitual offender proceedings.

I. *Validity of Prior Convictions*

At his trial on the habitual offender charges, defendant attempted to introduce evidence to show that his guilty pleas to burglary charges in 1964 and 1969 were entered as a result of coercion by law enforcement officers, and were therefore involuntary. The proffered evidence consisted of the testimony of the attorney who represented defendant on the two burglary charges and the defendant's own testimony. The trial court heard the testimony, ruled that the validity of the prior convictions was a question of law which was not to be submitted to the jury, and held that the challenged convictions were valid.

Section 40A–29–7, N.M.S.A.1953 (Repl. 1972) (repealed by Laws 1977, ch. 216, § 17, effective July 1, 1979) provides for trial by jury in habitual proceedings. That section requires the jury to decide two issues: (1) Whether the defendant in an habitual proceeding is "the same person mentioned in the several records as set forth in the infor-

mation"; and (2) whether the defendant has been convicted of the previous crimes as charged.

Defendant contends that because the jury must decide whether defendant was previously convicted of the crimes set forth in the habitual offender information, it must also determine whether those prior convictions were legally valid. We do not agree.

The constitutional validity of the prior convictions upon which the habitual offender charges are brought is subject to attack in an habitual offender proceeding. *State v. Dalrymple,* 75 N.M. 514, 407 P.2d 356 (1965); *State v. Dawson,* 91 N.M. 70, 570 P.2d 608 (Ct.App.1977). However, we cannot subscribe to the view that all issues of validity are to be decided by the jury in such a proceeding. This is particularly the case where the attack on the prior convictions goes to the validity of defendant's guilty pleas. The Court of Appeals stated in *State v. Gallegos,* 91 N.M. 107, 111, 570 P.2d 938, 942 (Ct.App.1977):

> It is the trial court that determines whether a guilty plea is voluntary. Rule of Crim. Proc. 21(f). It is the trial court that determines whether a plea of guilty may be withdrawn. *State v. Kincheloe,* 87 N.M. 34, 528 P.2d 893 (Ct.App.1974). Similarly, the trial court should determine whether a guilty plea is invalid.

Defendant contends that this problem is analogous to the manner in which allegations that a confession was involuntary are decided. In such a case the trial judge makes a preliminary determination of the issue, and if he concludes that it was voluntarily given, the defendant may have the issue submitted to the jury for a final determination. *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); *State v. Burk,* 82 N.M. 466, 483 P.2d 940 (Ct.App.1971), *cert. denied,* 404 U.S. 955, 92 S.Ct. 309, 30 L.Ed.2d 271 (1971); N.M.U.J.I. Crim. 40.40 [Vol. 6, N.M.S.A.1953 (Supp. 1975), at 324]; N.M.R.Evid. 104(c) [§ 20–4–104(c), N.M.S.A.1953 (Supp.1975)]. Defendant argues that the voluntariness of a guilty plea to an offense which is relied upon to support an habitual offender charge should be decided in the same manner.

There are two significant differences between proceedings to determine voluntariness of confessions and voluntariness of pleas. The first difference lies in the manner in which guilty pleas are entered. Unlike confessions, guilty pleas are made before an impartial magistrate in a judicial forum with a verbatim record. Such pleas may not be accepted by the court unless a defendant is informed of the nature of the charges against him, the penalties that may be imposed, his right to plead not guilty and the fact that he relinquishes his right to trial by jury by so pleading. N.M.R.Crim.P. 21(e) [§ 41–23–21(e), N.M.S.A.1953 (Supp. 1975)]. Furthermore, the court must determine from the defendant himself whether the plea is voluntary, and whether it is the result of force, threats, or promises. N.M. R.Crim.P. 21(f) [§ 41–23–21(f), N.M.S.A. 1953 (Supp.1975)]. Any failure to comply would be grounds for appeal. No such safeguards are present at the time extrajudicial confessions are made.

The second major difference lies in the nature of the proceedings in which the issue arises. The determination of the admissibility of confessions is made in a judicial proceeding to determine the defendant's guilt or innocence of the charges to which the alleged confession relates. Matters other than the confession may also be presented to the jury in determining guilt or innocence and may affect the determination. In an habitual offender proceeding, the function of the jury is set forth in § 40A–29–7. Here defendant seeks to retry in an habitual offender proceeding the question of voluntariness of guilty pleas he made a decade ago. Although the validity of the prior convictions upon which the habitual offender charge is based is subject to attack in such a proceeding, the purpose of § 40A–29–7 was not to provide a defendant with a trial by jury on previous convictions where the defendant waived such a trial in the original criminal proceedings.

The trial court did not err in refusing to submit the question of the voluntariness of defendant's guilty pleas to the jury.

II. *Imposition of Consecutive Life Sentences*

Defendant contends that the imposition of consecutive life sentences following his conviction in the habitual offender proceedings was error in light of § 42–1–59, N.M.S.A.1953 (Repl.1972).

Section 42–1–59 provides:

> Whenever any convict shall have been committed under several convictions with separate sentences, they shall be construed as one continuous sentence for the full length of all the sentences combined.

Where a person received eight consecutive sentences each for a term of not less than one nor more than five years, it has been held that the sentence must be considered one continuous sentence of not less than eight nor more than forty years. *Deats v. State,* 84 N.M. 405, 503 P.2d 1183 (Ct.App.1972).

Defendant argues that since multiple sentences can never exceed a single life, § 42–1–59 cannot affect his sentences, and consecutive life sentences are therefore meaningless. He contends that his parole eligibility will accrue in ten years under § 41–17–24(D)(4), N.M.S.A.1953 (Inter. Supp.1976–77).

Consecutive life sentences have meaning as they relate to the time that must be served before becoming eligible for parole under § 41–17–24(D)(4). We do not construe the statutory scheme of sentencing adopted by the Legislature to mandate eligibility for parole on consecutive life sentences at the same time as if a defendant had committed a single such crime. In the absence of more specific statutory language evidencing a contrary legislative intent, we hold that consecutive life sentences may be imposed.

III. *Deduction for Time Served*

Defendant contends that the trial court failed to properly credit him under § 40A–29–7 for the time he served on the original vacated sentences upon which the habitual charges were based.

The original sentences commenced as of the date of sentencing, February 2, 1977. On January 20, 1978 these sentences were vacated and the life sentences were imposed. The commitment to the State Penitentiary expressly provided that the life sentences were to begin as of that date. Therefore, it appears from the record that defendant did not receive the credit to which he was entitled under § 40A–29–7 for time served between February 2, 1977 and January 20, 1978.

Under § 40A–29–25, N.M.S.A.1953 (Repl. 1972) defendant was also entitled to credit on his sentences for any period he spent in confinement on these charges prior to imposition of the original sentences on February 2, 1977. It would appear that such credit was not given, although the record is not clear as to what time was actually served.

The State contends that if it is not clear whether defendant received proper credit, this issue should be raised in a post-conviction proceeding under N.M.R.Crim.P. 57 [§ 41–23–57, N.M.S.A.1953 (Supp.1975)]. However, since proper credit may be given on remand of this case to the trial court, there is no reason why defendant should be forced to re-litigate the matter in a new forum at a later date. *But see State v. DeSantos,* 91 N.M. 428, 575 P.2d 612 (Ct. App.1978).

The convictions of the habitual offender charges and the imposition of consecutive life sentences are affirmed. The case is remanded to the trial court for the purpose of crediting defendant for the time he has served as required by §§ 40A–29–7 and 40A–29–25.

IT IS SO ORDERED.

McMANUS, C. J., and EASLEY, J., concur.

586 P.2d 1090

Harriet MARABLE, Plaintiff-Appellant,

v.

SINGER BUSINESS MACHINES, Employer and Liberty Mutual Insurance Company, Insurer, Defendants-Appellees.

No. 3544.

Court of Appeals of New Mexico.

Oct. 31, 1978.

Stephen L. ReVeal, Albuquerque, for plaintiff-appellant.

Peter G. Prina & Kenneth J. Ferguson, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

Plaintiff sued defendants under the "New Mexico Occupational Disease Disablement Law." Sections 59–11–1, et seq., N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1). She alleged two separate "occupational diseases": (1) a "severe neurotic mental depression" allegedly developed by continued mental and physical harassment by male employees on the loading dock who objected

to a female dock employee; and (2) "curvature of her spine and arthritis from repeated lifting of heavy objects."

The amended complaint was dismissed with prejudice for failure to state a claim upon which relief can be granted. Plaintiff appeals. We affirm.

Plaintiff's brief is of no assistance. It does not discuss the definition of "occupational disease" nor its relationship to the allegations in plaintiff's complaint. It cites no authority on the subject matter and raises no questions that are real and substantial. The argument lacks substance. Plaintiff relies on workmen's compensation cases which are irrelevant to the issue in this appeal. Though plaintiff's brief states that the question involved is a matter of first impression, it postulates three pages of vacuous statements to reverse the trial court. Plaintiff's transfer of her burden to this Court does not earn our plaudit.

By the citation of workmen's compensation cases, plaintiff has established that traumatic and compensation neurosis can be an accidental injury compensable under the Workmen's Compensation Act. *Ross v. Sayers Well Servicing Company*, 76 N.M. 321, 414 P.2d 679 (1966); *Jensen v. United Perlite Corporation*, 76 N.M. 384, 415 P.2d 356 (1966). Yet, plaintiff did not plead in the alternative that her injury was compensable under the Workmen's Compensation Act. See *Underwood v. National Motor Castings Division*, 329 Mich. 273, 45 N.W.2d 286 (1951).

Plaintiff wants us to accept as true the facts alleged in the amended complaint and plaintiff seeks an opportunity to prove, at trial, that the "diseases" alleged were "occupational diseases." We accept the alleged facts as true. We shall determine as a matter of law whether the "diseases" alleged were "occupational diseases," permissible to be proven at trial.

Section 59–11–21 defines an "occupational disease":

> . . . "occupational disease" *includes any disease peculiar to the occupation* in which the employee was engaged *and due to causes in excess of the ordinary hazards of employment as such* . . . . [Emphasis added.]

" 'To come within the definition, an occupational disease must be a disease which is *a natural incident of a particular occupation*, and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of that attending employment in general.' " [Emphasis added.] *Herrera v. Fluor Utah, Inc.*, 89 N.M. 245, 247, 550 P.2d 144, 146 (Ct.App.1976).

"Thus an occupational disease is one which results from the nature of the employment, and by nature is meant, not those conditions brought about by the failure of the employer to furnish a safe place to work, *but conditions to which all employees of a class are subject, and which produce the disease as a natural incident of a particular occupation*, and attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general." [Emphasis added.] *Goldberg v. 954 Marcy Corporation*, 276 N.Y. 313, 12 N.E.2d 311, 313 (1938). "It must be one which is commonly regarded as natural to, inhering in, an incident and concomitant of, the work in question. There must be a recognizable link between the disease and some distinctive feature of the claimant's job, common to all jobs of that sort." *Harman v. Republic Aviation Corporation*, 298 N.Y. 285, 82 N.E.2d 785, 786 (1948). "In short," said Justice Fuld, "to borrow from a typical opinion—to be occupational the disease must be one 'due wholly to causes and conditions which are normal and constantly present and characteristic of the particular occupation; that is, those things which science and industry have not yet learned how to eliminate. Every worker in every plant of the same industry is alike constantly exposed to the danger of contracting a particular occupational disease.' " [82 N.E.2d at 786–87.]

■ In the application of these rules, each disease must be linked with the process used by the employee by which the

disease is caused. Some examples are lead poisoning contracted in a process involving the use of a direct contact with lead, *Glodenis v. American Brass Co.*, 118 Conn. 29, 170 A. 146 (1934) relied on in *Herrera, supra*; a station manager of a gasoline station who becomes disabled from breathing gasoline fumes, *Holman v. Oriental Refinery*, 75 N.M. 52, 400 P.2d 471 (1965); a miner who breathes into the lungs fine particles of silicon dust, *Vincent v. United Nuclear-Homestake Partners*, 89 N.M. 704, 556 P.2d 1180 (Ct.App.1976); *Simion v. Molybdenum Corporation*, 49 N.M. 265, 161 P.2d 875 (1945); *Aranbula v. Banner Min. Co.*, 49 N.M. 253, 161 P.2d 867 (1945); a painter exposed to certain paint fumes, *Herrera, supra*; a telephone installer and repairman who contracted histoplasmosis from pigeon droppings and dead pigeons, *State ex rel. Ohio Bell Telephone Co., v. Krise*, 42 Ohio St.2d 247, 327 N.E.2d 756 (1975); a linotype operator who developed dermatitis due to fumes volatilized from melting antimony, *Le Lenko v. Wilson H. Lee Co.*, 128 Conn. 499, 24 A.2d 253 (1942) relied on in *Herrera, supra.* To illustrate this distinction ". . . pneumoconiosis resulting from wet grinding is an occupational disease, [citation omitted]; but pneumonia resulting from exposure incurred in highway construction is not." *Madeo v. I. Dibner & Bro.*, 121 Conn. 664, 186 A. 616, 105 A.L.R. 1408, 1411 (1936).

On the other hand, an occupational disease does not include a disease which results from peculiar conditions surrounding the workmen's employment as long as the nature of that work is not more likely to cause the disability than other kinds of employment carried on under the same conditions. For example, a workman has not suffered an occupational disease when exposed to an infection in a factory under crowded and unsanitary conditions. *Madeo, supra.* Nor does occupational disease include a communicable disease contracted from a fellow employee, *Harman, supra;* nor to benzol poisoning caused by an employee in a car factory who ignorantly or negligently shut off ventilation and allowed the benzol to escape in a room, *Seattle Can Co. v. Department and Industries*, 147 Wash. 303, 265 P. 739 (1928); nor to a miner who breathes foul air in a mine wherein the employer failed to provide a safe place to work, *Gay v. Hocking Coal Co.*, 184 Iowa 949, 169 N.W. 360 (1918).

The rules of law stated above, when applied to the two diseases alleged in the complaint, show that they are not "occupational diseases." A disease caused by harassment of male employees is not a natural incident of the employment. It is not linked with the process used by the employer by which the disease is caused, therefore, it is not an occupational disease.

Lifting heavy objects while working on a loading dock is "peculiar to the occupation of plaintiff, i. e., a condition of employment to which all dock workers are subject." Nevertheless, other kinds of employment involve the lifting of heavy objects.

An "occupational disease" does not include the ordinary disabilities of life such as a neurotic mental depression, curvature of the spine or arthritis to which the general public is exposed unless the claimant can allege and prove how and why that disability is peculiar to claimant's occupation. It must be distinguished from disabilities suffered by the general population. These diseases alleged are not "occupational diseases."

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concurring in result only.

587 P.2d 42

Anna MULLER, Petitioner-Appellant,

v.

CITY OF ALBUQUERQUE, Respondent-Appellee,

and

Jack L. Felter, Joseph M. Peterson and Stephen N. Sanchez, Respondents-in-Intervention-Appellees.

No. 11915.

Supreme Court of New Mexico.

Nov. 30, 1978.

Stephen Durkovich, Albuquerque, for petitioner-appellant.

John A. Myers, William L. Kraemer, Albuquerque, for City of Albuquerque.

W. W. Atkinson, Albuquerque, for respondents-in-intervention-appellees.

OPINION

FEDERICI, Justice.

This suit was brought in the District Court of Bernalillo County for review by writ of certiorari of the action of respondent (appellee), City of Albuquerque, granting a zoning change to landowners (intervenors).

Intervenors applied to the City of Albuquerque Planning Department for a change of zoning on their property from SU–2–HDA to SU–2–RC. The zone change would allow the construction of a Winchell's Donut House on the property. The Planning Department recommended that the application be denied. Intervenors appealed to the Environmental Planning Commission (EPC) which affirmed the Planning Department's decision and recommendation. Intervenors then appealed to the City Council. The Land Use, Planning and Zoning Committee of the City Council recommended that the appeal be heard by the full Council. The City Council, after hearing, granted the zone change.

Protestant (appellant) is the owner of property in Albuquerque near the property owned by intervenors and is chairperson of the Downtown Neighborhood Association. Appellant filed a petition for writ of certiorari with the District Court of Bernalillo County. In her first amended petition, appellant alleged that the decision of the City Council was illegal. The trial court reviewed the record of the City Council proceedings, and, after oral arguments, issued findings of fact and conclusions of law and entered judgment affirming the decision of the City Council. This appeal followed. We affirm the district court.

The trial court made the following findings:

2. The City Council followed the procedures prescribed by statute and municipal ordinance in approving the zoning change in question.

3. The decision of the City Council to approve the requested zone change is supported by substantial evidence.

4. The City Council considered all of the factors set forth in § 14 20 3 N.M. S.A. in making their determination.

* * * * * *

6. The findings upon which the action of the City Council was based, the reasoning of the Council, and the basis on which it acted, can be determined from the discussion and the basis set forth in the motion to approve the change in zoning, and that this reasoning is supported by substantial evidence.

7. At the time set for hearing before this Court upon the Petition, more than six months after the issuance of the original writ of certiorari in this action, the Petitioner, by her said attorney, first raised the assertion that the Respondent had failed to make the necessary findings of fact and conclusions of law required to sustain its action in the proceedings here under review, no such assertion having been set forth in the Petitioner's pleadings.

The court then concluded:

3. The action of the City Council of the City of Albuquerque in zoning matter AC–77–11 (Z–77–24) was in compliance with the requirements of statute and municipal ordinance.

4. The City Council's decision is supported by substantial evidence. The City Council's said action was not arbitrary, capricious, or illegal in any respect.

5. The assertion that the City failed to make appropriate findings and conclusions was not timely raised by the Petitioner. The appeal proceedings prescribed by 14–20–7, N.M.S.A.1953, are intended to be handled expeditiously. To allow Petitioner to amend at the time of hearing would be unduly prejudicial to Respondent.

The main issue presented for review in this appeal is whether the action of the City Council was illegal for its failure to follow § 45E(4) of Albuquerque's Comprehensive Zoning Code, which requires that the Council adopt findings and include those findings in the Council's journal. Appellant contends that the case should be returned to the Council for compliance with § 45E(4). It is not clear from the record whether the City of Albuquerque Comprehensive Zoning Code was offered in evidence. It was stipulated that Exhibit "A", the Downtown Neighborhood Sector Development Plan, be admitted in evidence. The City Zoning Code was not specifically mentioned.

An appellate court will not take judicial notice of municipal ordinances. They are matters of fact which must be pleaded and proved as any other fact. *Coe v. City of Albuquerque*, 81 N.M. 361, 467 P.2d 27 (1970); *General Services Corp. v. Board of Com'rs*, 75 N.M. 550, 408 P.2d 51 (1965). It is appellant's duty to see that a proper record is made for review. Upon a deficient record, every presumption must be made by this Court "in favor of the correctness and regularity of the trial court's judgment." *Id.* at 552, 408 P.2d at 52.

Assuming that the zoning regulations are properly before this Court for review, still, appellant is not entitled to relief because there was substantial compliance with those regulations by appellee City of Albuquerque. The purpose of the statute and regulations has been met. Upon reviewing the entire record, the court found that there was substantial evidence to sustain the City Council's determination. *Hawthorne v. City of Santa Fe*, 88 N.M. 123, 537 P.2d 1385 (1975).

In *City of Roswell v. New Mexico Water Qual. Con. Com'n*, 84 N.M. 561, 565, 505 P.2d 1237, 1241 (Ct.App.1972), *cert. denied*, 84 N.M. 560, 505 P.2d 1236 (1973), the Court of Appeals said:

> We cannot effectively perform the review authorized by § 75–39–6, supra, unless the record indicates what facts and circumstances were considered and the weight given to those facts and circum-

stances. *We do not hold that formal findings are required. We do hold the record must indicate the reasoning of the Commission and the basis on which it adopted the regulations.* (Emphasis added.)

In *City of Roswell* the record did not contain any indication of what the Commission relied upon as a basis for adopting the regulations.

Appellant cites *Miller v. City of Albuquerque*, 89 N.M. 503, 554 P.2d 665 (1976) in support of her argument that a municipal legislative body is bound to follow regulations which it has adopted in the exercise of its delegated legislative powers, and that failure to do so violates procedural due process. *Miller* is distinguishable from the case before us. In *Miller* the zoning authority, rather than a landowner, sought the zone change. The municipal committee responsible for adopting the regulations failed to meet the statutory requirements necessary for initial validity; there was no substantial compliance. The City Attorney had advised the EPC that it had no authority to initiate the change. The City Commission did not follow its own established procedures for accepting zone change applications and therefore denied petitioner a meaningful and impartial hearing. The EPC acted with knowledge that it had no authority and, in doing so, failed to follow the ordinances and its own procedures *which were imposed upon others.* It was this type of conduct by a governing body which the court held to be impermissible in *Miller.*

In the present case, the transcript of the proceedings before the City Council and the trial court presented the issues to be determined. None of the parties were misled. The record indicates the reasoning for the Council's decision and the basis for its actions. The Council's decision was verified and approved by the trial court in its findings of fact and conclusions of law.

The findings of fact made by the trial court are supported by substantial evidence. The court did not err as a matter of law. The trial court is affirmed.

IT IS SO ORDERED.

SOSA and EASLEY, JJ., concur.

587 P.2d 44

STATE of New Mexico, Plaintiff-Appellee,

v.

Thomas C. GALIO and Joe Cruz, Defendants-Appellants.

No. 3276.

Court of Appeals of New Mexico.

July 5, 1978.

Writ of Certiorari Quashed Nov. 15, 1978.

Timothy P. Woolston, Albuquerque, for defendants-appellants.

Toney Anaya, Atty. Gen., Santa Fe, Michael E. Sanchez, Roderick A. Dorr, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant, Galio, was convicted of one count of dismantling a motor vehicle without a license contrary to § 64–8–1(A)(2), N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972, Supp.1975), conspiracy to dismantle a motor vehicle without a license contrary to § 40A–28–2, N.M.S.A.1953 (2d Repl. Vol. 6, 1972), four counts of vehicles without manufacturer's numbers contrary to § 64–9–7, N.M.S.A.1953, (2d Repl. Vol. 9, pt. 2, 1972), three counts of receiving or transferring stolen vehicles contrary to § 64–9–5, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972) and § 64–37–4, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972, Supp.1975), and one count of receiving stolen property contrary to § 40A–16–11(A) and (E), N.M.S.A.1953 (2d Repl. Vol. 6, 1972, Supp.1975). Defendant, Cruz, an employee of Galio's, was convicted on one count of conspiracy supra and one count of receiving stolen property supra. They appeal alleging several points for reversal. Point I regarding a warrantless search (inspection) is dispositive and we reverse.

A warrantless inspection, whereby the numerous criminal violations were discovered, was conducted of Galio's business premises (Auto Diagnostic and Repair Clinic) by the Albuquerque Police Department. The inspection was made pursuant to § 64–2–14, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972) which states in part:

> "POLICE AUTHORITY OF DIVISION.—The Commissioner and such officers, deputies and inspectors of the division as he shall designate by the issuance of credentials shall have the powers:
>
> "* * *
>
> "(d) Inspect any vehicle of a type required to be registered hereunder in any public garage or repair shop or in any place where such vehicles are held for sale or wrecking, for the purpose of locating stolen vehicles and investigating the title and registration thereof;
>
> "(e) To determine by inspection that all dealers and wreckers of vehicles are in compliance with the provisions of this act with particular reference to but not limited to the requirements for an established place of business and for records."

We are not here concerned with a consent search or with probable cause to search. The sole issue is whether § 64–2–14(d) and (e), supra, meets the requirements of a warrantless search as set forth in *State ex rel. Environmental v. Albuquerque Pub.*, 91 N.M. 125, 571 P.2d 117 (1977) and the subsequent United States Supreme Court case of *Marshall v. Barlow's Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305, decided May 23, 1978. We hold that it does not.

State ex rel. Environmental v. Albuquerque Pub., supra, lists four tests. We discuss the third test of whether the warrantless inspection is a crucial part of a regulatory scheme designed to further an urgent government interest. See *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970); *Compare, Ca-*

mara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *See v. City of Seattle*, 387 U.S. 541, 18 L.Ed.2d 943, 87 S.Ct. 1737 (1967).

We must first decide what is an urgent governmental interest. Historically it is one that involves some inherent danger of public concern or an interest in excisable or dutiable articles as opposed to a private concern or interest. The *Biswell* rationale was that a close scrutiny of interstate firearms traffic was undeniably of key importance to federal efforts to prevent violent crimes and to assist the states in regulating firearm traffic within their borders. Warrantless inspections were deemed to be reasonable official conduct and essential to properly supervise firearms traffic. The *Colonnade* rationale was that of an interest in an historically regulated industry with deep concern in the revenues to the government. Further, it was in response to a relatively unique circumstance. See *Marshall.*

Unless the statutory or regulatory standards involve a relatively unique circumstance a warrant is required to make an inspection as was made in the instant case. See *Marshall.*

Although not enacted as a part of the law which enacted § 64–2–14, supra, § 64–37–1, N.M.S.A.1953 (2d Repl. Vol. 9, 1972, pt. 2, Supp.1975) reflects the policy of the legislature with respect to motor vehicles which states:

> ". . . The distribution and sale of motor vehicles in this state vitally affects the general economy of the state and the public interest and welfare of its citizens. It is the policy of this state and the purpose of this act [64–37–1 to 64–37–16] to exercise the state's police power to ensure a sound system of distributing and selling motor vehicles and regulating the manufacturers, distributors, representatives and dealers of those vehicles to provide for compliance with manufacturer's warranties, and to prevent frauds, unfair practices, discriminations, impositions and other abuses of our citizens."

That policy is similar to 29 U.S.C.A. § 651 of the Occupational Safety and Health Act, which states:

> "(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
>
> "(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—"

Marshall held that a warrantless search under the OSHA policy would not be reasonable under the Fourth Amendment. In light of *Marshall* and the foregoing cases we fail to see what urgent government interest would be served by a warrantless inspection. Our holding does not foreclose warrantless inspections in case of consent or in an emergency situation. However, what constitutes an emergency situation must be decided case by case. See *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486, decided May 31, 1978.

We hold that § 64–2–14, supra, requires the issuance of an administrative warrant, absent consent or an emergency situation. *Marshall* sets forth the grounds for issuance of such a warrant as follows:

> ". . . Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' *Camara v. Municipal Court, supra*, [387 U.S.] at 538, 87 S.Ct. 1727. A warrant showing that a

specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights. . . ."

The act is unconstitutional insofar as it purports to authorize a warrantless inspection outside the generally recognized exceptions. Accordingly, the motion to suppress should have been granted.

Reversed and remanded.

IT IS SO ORDERED.

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

WOOD, Chief Judge (Specially Concurring).

The State contends the inspection scheme involved in this case plays a crucial part in regulating motor vehicles. By inference, the argument is that the inspection scheme plays a crucial part in the State's efforts to control the traffic in stolen vehicles. I agree that the Legislature could properly consider an inspection scheme to be crucial. But that does not answer the question. Is there an urgent governmental interest that this crucial inspection scheme be implemented by warrantless searches?

The majority opinion cites cases which required warrants for fire, health, and housing inspection programs (*Camara*, supra) and for safety hazards (*Marshall*, supra). These important programs cannot be distinguished from the motor vehicle inspection in this case which inspected vehicles in a commercial business. The special circumstances involving liquor (*Colonnade*, supra) and firearms (*Biswell*, supra) do not exist in this case.

Although the motor vehicle business is a pervasively regulated business and there cannot be any great expectation of privacy in a business so pervasively regulated, there is no urgent governmental interest justifying a warrantless inspection scheme. Since probable cause in the criminal law sense is not required, the warrant requirement imposes no great impediment to the statutory inspection scheme.

I concur with Judge Hendley's opinion. The purpose of this special concurrence is to point out that the inspection scheme will not be impeded by requiring a warrant.

587 P.2d 47

STATE of New Mexico, Plaintiff-Appellee,

v.

Danny P. BLEA, Defendant-Appellant.

No. 3669.

Court of Appeals of New Mexico.

Oct. 10, 1978.

Writ of Certiorari Denied Nov. 22, 1978.

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

Toney Anaya, Atty. Gen., James F. Blackmer, Asst. Atty. Gen., Albuquerque, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction for trafficking in heroin. He asserts that, at trial, there was not a sufficient foundation for testimony about a narcotics sniffing dog. The claim is frivolous. Defendant never informed the trial court as to what "foundation" was lacking and did not, on cross-examination, attempt to attack the propriety of the testimony that the dog was "trained for sniffing out narcotics, specifically heroin." See *Dahl v. Turner*, 80 N.M. 564, 458 P.2d 816, 39 A.L.R.3d 207 (Ct.App. 1969). In addition, testimony concerning use of the dog went to the absence of heroin in the area where it was found after defendant arrived on the scene. Several witnesses testified to this absence. Even if there was an insufficient foundation concerning the dog's qualifications, the use of the dog testimony did not harm defendant because cumulative of other testimony. See *State v. Brown*, 91 N.M. 320, 573 P.2d 675 (Ct.App.1977). The issue for discussion concerns the trial court's refusal to suppress the heroin at a pretrial motion hearing.

Officers were at a residence searching for heroin pursuant to a search warrant. Defendant drove onto the premises and parked his pickup truck near the rear of the residence. Four officers immediately approached the pickup. Defendant was told to get out of his vehicle and did so. He was patted down for weapons. There is no issue as to the propriety of the officers detaining defendant until the search, pursuant to the warrant, was concluded. *State v. Valdez*, 91 N.M. 567, 577 P.2d 465 (Ct.App.1978). There is no issue concerning the propriety of requiring defendant to exit his vehicle or concerning the propriety of frisking defendant for weapons. The evidence is uncontradicted that persons coming upon the scene of a heroin search are often armed and often will attempt to leave the scene, using their vehicle "for a fast getaway". See *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977).

The search and seizure issue arises because of a conflict in the evidence as to how the heroin was found. The State's theory, supported by testimony of officers, is that the heroin fell to the ground as defendant got out of his pickup. Defendant's theory,

supported by defendant's testimony, is that when he saw the officers approaching he placed the packet of heroin in the sleeve of his jacket, which was lying on the seat of the pickup. According to defendant, after he was frisked, an officer reached into the pickup, took his jacket and searched it. Defendant testified the officer "kept jiggling the jacket around, the heroin must have kept sliding slowly down the sleeve, cause its a real thick leather jacket, and it fell out, and he didn't see it, and he patted the—and then he went and threw the jacket back in the truck or on top of the hood." This is the only evidence at the suppression hearing as to the nature of the "search" of the jacket. According to defendant, the heroin was discovered on the ground, after the jacket "search".

The trial court found:

> 13. Either when Blea exited the vehicle, or while the officer was searching the jacket, the tinfoil containing the heroin fell the [sic] the ground.

Defendant recognizes that if the heroin fell to the ground when he exited his vehicle, the seizure of the heroin was proper. *State v. Everidge*, 77 N.M. 505, 424 P.2d 787 (1967); *State v. Garcia*, 76 N.M. 171, 413 P.2d 210 (1966). Defendant states:

> On the other hand, if the packet of heroin fell to the ground as a result of the police officers [sic] search of Defendant's jacket, then the evidence must be suppressed. Police had no right, either to remove Defendant's jacket from the cab of the pick-up truck, or to search it once it had been removed. . . . Consequently, the seizure of the heroin would be inadmissible as fruit of the poisoned tree.

Defendant contends he is entitled to a specific finding as to when the heroin fell to the ground. This contention does not involve a question of whether the trial court was required to make findings in connection with the motion to suppress. Rule of Crim. Proc. 33 does not require findings in connection with a pretrial motion. Compare Rule of Crim.Proc. 38(c). Defendant claims that since the trial court made findings, he is entitled to more than the either/or findings of the trial court which he asserts lead to legally inconsistent results. The State claims defendant did not ask for a specific finding; a stipulation in the record shows that he did.

The State also asserts that it makes no difference whether the trial court's alternative finding was proper. It argues: "[T]he jury itself appears to have resolved this issue by its unanimous verdict finding the Defendant Guilty". This argument is without merit. In reviewing the trial court's decision on the motion to suppress, the facts reviewed on appeal are the facts before the trial court at the suppression hearing. Further, there is no claim that the motion to suppress was renewed at trial. See *Rodriguez v. State*, 91 N.M. 126, 580 P.2d 126 (1978). Even if it had been, it was not a jury issue. The reasonableness of a search or seizure is a matter of law to be determined by the trial court. *State v. Garcia*, 83 N.M. 490, 493 P.2d 975 (Ct.App. 1971); see *State v. Whiteshield*, 91 N.M. 96, 570 P.2d 927 (Ct.App.1977). No issue as to the propriety of police seizure of the heroin was presented to the jury by the instructions in this case.

If, as defendant asserts, the alternative finding of the trial court is incorrect, the proper disposition would be a remand to the trial court for a specific finding as to when the heroin fell to the ground. Compare *State v. Anaya*, 76 N.M. 572, 417 P.2d 58 (1966). We do not remand for a specific finding because the alternative finding is not erroneous.

There is nothing showing probable cause to arrest defendant or probable cause to search defendant's pickup prior to discovery of the heroin. Thus, there is no basis for applying the automobile exception to the law of search and seizure. *State v. Luna*, 91 N.M. 560, 577 P.2d 458 (Ct.App. 1978); *State v. Barton*, 92 N.M. 118, 584 P.2d 165 (Ct.App.1978). Not having been arrested, under defendant's version of facts, until after the heroin was discovered, police activity in connection with the jacket can-

not be justified on the basis of a search incident to arrest. See *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

The trial court found:

> 15. It is the common practice, when executing heroin searches on premises where there is probable cause to believe heroin is being sold, for officers to "pat down" and examine the people who come on the premises during the search and make inquiries as to their business on the premises. Such persons are commonly asked to exit vehicles to accomplish the "pat down" and questioning. This is done because those frequenting premises where heroin is sold are often purchasers of heroin and (a) often carry dangerous weapons, (b) the vehicles may be used for a fast getaway or a weapon, and (c) they will often attempt to dispose of narcotics or other evidence.

The trial court concluded:

> 2. It was not unreasonable for the police officers to search the jacket lying on the front seat of the truck in that it was an article of wearing apparel where weapons or contraband could likely be carried, and which jacket was and would be within easy access by Blea prior to his exiting the truck and while he was being frisked and examined, and upon his re-entry into the truck.

The trial court's conclusion is to be sustained in this case because the only evidence as to the nature of the jacket "search" shows that this search was a search for weapons. There was a shaking and a patting of the jacket, then it was discarded. This was consistent with requiring defendant to exit the pickup because officers could not tell whether defendant was armed while in the pickup. This was also consistent with the frisk of defendant for weapons as soon as he got out of the pickup.

The evidence is uncontradicted that the jacket was within defendant's "grabbing" range once he exited the pickup. Defendant testified that after being frisked and after emptying his pockets, he reached into the pickup for a check stub in order to explain the amount of cash he was carrying. The fact that the jacket, inside the pickup, was within defendant's grabbing range, distinguishes *Government of Canal Zone v. Bender*, 573 F.2d 1329 (5th Cir. 1978), on which defendant relies. Because the jacket was within defendant's grabbing range, the officer could properly search the jacket for weapons. *Williams v. State*, 19 Md.App. 204, 310 A.2d 593 (1973).

The fact that the officers did not have probable cause to believe that this defendant was armed does not make illegal the search of the jacket for weapons. It was sufficient that the officers had probable cause to believe that visitors to the premises were heroin purchasers, and such persons "often" are armed. There was some danger that such a person, detained to preserve the integrity of the search pursuant to warrant, might seek to use a weapon. See *United States v. Chadwick*, supra. This justifies a weapons search, both of defendant and the jacket within defendant's grabbing range.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

587 P.2d 50

STATE of New Mexico,
Plaintiff-Appellee,

v.

David BALDONADO,
Defendant-Appellant.

No. 3656.

Court of Appeals of New Mexico.

Oct. 24, 1978.

Writ of Certiorari Denied Nov. 22, 1978.

John B. Bigelow, Chief Public Defender, Santa Fe, Joseph N. Gandert, Asst. Public Defender, Mark H. Shapiro, Asst. App. Defender, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Janice M. Ahern, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Defendant ran a red light and collided with another vehicle which was legally within the intersection. He was charged and convicted of careless driving contrary to § 64–22–3.1(B), N.M.S.A.1953 (2d Repl. Vol. 9, pt. 2, 1972). He appeals claiming the statute is unconstitutionally vague. Other issues listed in the docketing statement and not argued on appeal are deemed abandoned. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App.1977).

Section 64–22–3.1, supra, states:

> ". . . Any person operating a vehicle on the highway shall give his full time and entire attention to the operation of the vehicle.
>
> "B. Any person who operates a vehicle in a careless, inattentive or imprudent manner, without due regard for the width, grade, curves, corners, traffic, weather and road conditions and all other attendant circumstances is guilty of a misdemeanor."

In deciding whether a statute is unconstitutionally vague we must decide if it gives fair notice of the proscribed criminal activity. *State v. Najera*, 89 N.M. 522, 554 P.2d 983 (Ct.App.1976). In so deciding we view the statute as a whole and words are given their ordinary meaning unless the legislature indicates to the contrary. *State v. Sierra*, 90 N.M. 680, 568 P.2d 206 (Ct.App. 1977).

Since no statutory definition of "careless", "inattentive" or "imprudent" is given, their ordinary meaning applies. The Random House Dictionary (1969 Unabridged Edition) defines "careless" as "not paying enough attention to what one does", "not exact or thorough", "done or said heedlessly or negligently." It lists as synonyms of careless; inattentive, incautious, unwary, indiscreet, reckless, inaccurate, negligent, unthoughtful, unmindful, thoughtless, forgetful and inconsiderate. Imprudent is defined as not prudent, lacking discretion, unforeseeing or rash. Inattention simply means failure to pay attention. Thus, the statute prohibits driving while not paying enough attention under the existing circumstances. The fact that one cannot predict what the circumstances might be does not make the statute vague. See *State v. Najera*, supra; *State v. Lucero*, 87 N.M. 242, 531 P.2d 1215 (Ct.App.1975).

The statute is not void for vagueness. The words of the statute are clear and definite. It gives fair warning of the proscribed activity. Under the circumstances described in the statute defendant's manner of driving was prohibited by the statute.

Affirmed.

IT IS SO ORDERED.

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

587 P.2d 52

STATE of New Mexico, Plaintiff-Appellee,

v.

Daniel Donald LARA, Defendant-Appellant.

No. 3537.

Court of Appeals of New Mexico.

Oct. 24, 1978.

Rehearing Denied Nov. 22, 1978.

John B. Bigelow, Chief Public Defender, Santa Fe, Mark H. Shapiro, Asst. Appellate Defender, Michael L. Danoff, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of burglary and larceny, defendant appeals. Two contentions are answered summarily. The photographic identification procedure was not impermissibly suggestive under the totality of the circumstances. *State v. Armstrong*, 85 N.M. 234, 511 P.2d 560 (Ct.App.1973); *State v. Jones*, 83 N.M. 600, 495 P.2d 380 (Ct.App. 1972). The refusal to give defendant's requested instruction on alibi was not error. The Use Note to U.J.I.Crim. 41.30 states that no instruction on the subject shall be given. See *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct.App.1977); compare *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977). The issue to be discussed concerns the structure that defendant burglarized; the specific issue is whether defendant burglarized a dwelling house.

Defendant was convicted of burglary of a dwelling house, a third degree felony. Other burglary is a fourth degree felony. Section 40A–16–3, N.M.S.A.1953 (2d

Repl.Vol. 6). U.J.I.Crim. 16.21 defines a dwelling house as "any structure, any part of which is customarily used as living quarters." See *State v. Hudson*, 78 N.M. 228, 430 P.2d 386 (1967).

Defendant made an unauthorized entry into the victim's garage and stole a power saw and some wrenches. The garage is part of the structure in which the victim lived; one wall of the garage is also a wall of one of the rooms of the residence. The garage has a back door which opens onto the patio and an overhead door which opens onto the driveway. However, there is no door between the garage and the interior of the residence. To enter the residence from the garage, one must go either onto the patio or the driveway.

Defendant contends that an attached garage, with no opening to the house, is not a part of a dwelling house within the meaning of § 40A–16–3, supra. Because the garage "did not communicate directly" he asserts it was as effectively separated from the house as the garages in *People v. Picaroni*, 131 Cal.App.2d 612, 281 P.2d 45 (1955) and *Bean v. Commonwealth*, 229 Ky. 400, 17 S.W.2d 262 (1929). In *Picaroni*, supra, the garage was a separate building, a cement walk led from the garage to the house. The garage in *Bean*, supra, was also a separate building at the rear of the lot.

We do not agree with defendant. U.J.I. Crim. 16.21 defines dwelling house as *any* structure, *any part of which* is customarily used as living quarters. Under this definition, and the facts in the case, burglary of the garage was burglary of the dwelling house because the garage was a part of the structure used as living quarters. See *People v. Gargano*, 10 Ill.App.3d 957, 295 N.E.2d 342 (1973).

The fact that there was no direct access to the interior of the house from the garage does not aid defendant. The garage was a part of the habitation; it was "directly contiguous to and a functioning part" of the residence. *Burgett v. State*, 161 Ind. App. 157, 314 N.E.2d 799 (1974). See also *Bousman v. State*, Ind.App., 338 N.E.2d 723 (1975); *State v. Parker*, 501 S.W.2d 3 (Mo. 1973); *State v. Haas*, 13 Or.App. 368, 510 P.2d 852 (1973), rev'd on other grounds, 420 U.S. 714, 43 L.Ed.2d 570, 95 S.Ct. 1215 (1975). Defendant was properly convicted of burglary of a dwelling house.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

587 P.2d 53

STATE of New Mexico, Plaintiff-Appellee,

v.

Jimmy Lee WAITS, Defendant-Appellant.

No. 3654.

Court of Appeals of New Mexico.

Nov. 7, 1978.

Paquin M. Terrazas, Terrazas & Dorr, P. A., Santa Fe, for defendant-appellant.

John Humphrey, Jr., Trial Counsel, Lovington.

Toney Anaya, Atty. Gen., Lawrence A. Gamble, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of receiving stolen property contrary to § 40A–16–11(E), N.M.S.A.1953 (2d Repl.Vol. 6, 1972, Supp.1975), defendant appeals. He contends that:

> "THE TRIAL COURT ERRED IN ADMITTING THE PRELIMINARY HEARING TESTIMONY OF A CRITICAL WITNESS FOR THE STATE WHEN THERE WAS AN INSUFFICIENT SHOWING THAT THE WITNESS WAS UNAVAILABLE, THEREBY DENYING THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO CONFRONT AND CROSS–EXAMINE WITNESSES AGAINST HIM AT TRIAL."

Other issues listed in the docketing statement have been abandoned. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App.1977). We reverse.

The victim, Mr. Allen, appeared and testified at the preliminary hearing and was cross-examined by defendant. Approximately two months prior to trial, Allen was served with a New Mexico subpoena in Texas. The subpoena was not issued in accordance with the Uniform Act to Secure the Attendance of Witnesses from without a State in Criminal Proceedings. See §§ 41–12–13 through 18, N.M.S.A.1953 (2d Repl.Vol. 6, 1972). Allen did not appear at trial. Allen had not appeared the previous day in a related criminal case. The trial court concluded that since Allen had been served with a subpoena, the state had made a diligent effort to procure his attendance and over defendant's objection allowed the use of Allen's preliminary hearing testimony.

The state asserts that a proponent of evidence must meet the good faith and due diligence standards in determining whether process or other reasonable means has been employed in securing the attendance of a witness. We agree, but the definition of "process or other reasonable means" must first be determined before the question of unavailability can be decided.

New Mexico Rule of Evidence 804(a)(5) [§ 20–4–804(a)(5), N.M.S.A.1953 (Repl.Vol. 4, 1970, Supp.1975)] states:

> "(a) *Definition of Unavailability.* 'Unavailability as a witness' includes situations in which the declarant:
>
> " * * *
>
> "(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means."

Process must be defined as legal process. That is, it must not only be fair on its face but also valid. Black's Law Dictionary, (4th Ed. 1957) p. 1370. New Mexico has no legal authority to compel a person living in Texas to appear in its courts by issuance of a New Mexico subpoena. See Rules of Crim.Proc. 48(a) and Rule Civ.Proc. 45(e). The subpoena issued in New Mexico and served in Texas had no legal effect. Its issuance and service did not constitute good faith or due diligence on the part of the state in attempting to secure the attendance of Allen. The state did not meet its burden of showing unavailability.

What were "other reasonable means" available to the state? The Uniform Act was available. See Tex.Code Crim.Proc.Annot., art. 24.28 (Vernon) as amended. The Uniform Act was a reasonable means. Compare *State v. Lucero*, 86 N.M. 686, 526 P.2d 1091 (1974); *State v. Sibold*, 83 N.M. 678, 496 P.2d 738 (Ct.App.1972); *State v. Holly*, 79 N.M. 516, 445 P.2d 393 (Ct.App. 1968). *Lucero*, supra, held that where an action had been initiated under the Uniform Act for an out-of-state witness, absent an admission of facts, the trial court had no discretion in denying a request for a continuance when the out-of-state witness did not respond. The court went on to state that it should have been granted as a matter of right.

The ruling in the instant case that the witness was unavailable was error. It deprived defendant of his right of confrontation and cross-examination. *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). Accordingly, we hold that under the facts of this case that before a witness can be declared unavailable the state must use the procedures of the Uniform Act. *State v. Mann*, 87 N.M. 427, 535 P.2d 70 (Ct.App.1975), special concurring opinion. *Smith v. State*, 546 P.2d 267 (Okl. Cr.App.1976).

Reversed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

587 P.2d 425

Jose Manuel MOYA et ux., Plaintiffs-Appellees,

v.

The CATHOLIC ARCHDIOCESE OF NEW MEXICO, a corporation sole, Joe Moya, et al., Defendant-Appellant.

No. 11756.

Supreme Court of New Mexico.

Oct. 23, 1978.

Rehearing Denied Dec. 6, 1978.

Solomon, Roth & Van Amberg, Ronald J. Van Amberg, Santa Fe, Leof T. Strand, Albuquerque, for defendant-appellant.

Ruben Rodriguez, Santa Fe, for plaintiffs-appellees.

OPINION

FEDERICI, Justice.

This is a suit to quiet title brought by plaintiff Jose Manuel Moya (appellee) in the District Court of Santa Fe County. The district court entered default judgment against defendant Joe Moya (appellant). Following a hearing, appellant's motion to reopen the proceedings and set aside the default judgment was denied. Appellant appeals. We reverse.

The pertinent facts concern the method by which process was served upon appellant. The suit was filed on April 28, 1977. On May 27, 1977, a copy of the complaint and summons was left at appellant's home. It is undisputed that the papers were rolled up and inserted in the door handle of a screen door on the front porch of appellant's house. The front porch is enclosed. There is evidence that the documents were found under a couch on the porch and were not discovered by appellant until some time in August 1977, after default judgment had been entered on August 8, 1977. Seventeen

days later appellant filed his motion to reopen the proceedings and to set aside the default judgment, which the trial court denied.

Appellant contends that the district court lacked jurisdiction over him because the method by which process was served failed to meet the requirements of N.M.R.Civ.P. 4(e)(1) [§ 21–1–1(4)(e)(1), N.M.S.A.1953 (Repl.1975)].

N.M.R.Civ.P. 4(e)(1) reads, in pertinent part: "[A]nd if no such person be found willing to accept a copy, then service shall be made by *posting such copies in the most public part of defendant's premises.*" (Emphasis added.) In this jurisdiction, "posting" is substituted service. *Vann Tool Co. v. Grace*, 90 M.M. 544, 566 P.2d 93 (1977). Statutes authorizing substitute service are to be strictly construed. *Household Finance Corporation v. McDevitt*, 84 N.M. 465, 505 P.2d 60 (1973). The word "posting" as used in Rule 4(e)(1) means to affix, attach or otherwise fasten up physically *and to display in a conspicuous manner. Moody v. Winchester Management Corp.*, 321 A.2d 562 (D.C.App.1974).

This is a case of first impression in this jurisdiction. Other jurisdictions have held that posting summons, in the manner done in this case, does not constitute valid substituted service. An often quoted case on point is *Sours v. State Director of Highways*, 172 Ohio St. 242, 175 N.E.2d 77 (1961). The Ohio statute permitted substituted service upon a defendant by "leaving a copy at his usual place of residence." The deputy sheriff, finding no one at home, attempted to make service by placing a rubber band around the summons and complaint and attaching the same to the outside doorknob of the house. The defendants did not enter an appearance or plead to the action and were defaulted. In holding that there was no valid service, the court stated:

> For substituted service by leaving a copy of the summons at the usual place of residence to be valid, the summons must be left at the residence of the defendant in such a place and in such a manner that it is reasonably probable that the defendant will actually receive the notice of the action against him. (Citations omitted.)
>
> Does the fastening of a summons to the doorknob of the residence fulfill the above requirements? . . .
>
> One must take into consideration the fact that today it is common practice of large numbers of advertisers and other door-to-door canvassers to attach their sundry materials to the doorknobs of homes by means of rubber bands or otherwise. In the usual case, it is unlikely that these numerous papers so attached will receive careful attention from the occupants of the household. The occupant does not expect to find important legal or business papers in such a place. It is a common experience for persons first entering the house, be they adult members of the family, their children, or merely visitors, to remove such matter from the door and to immediately dispose of it or at best to make no more than a cursory inspection of such papers.
>
> In addition, it seems apparent that the attachment of a summons to a doorknob by means of a rubber band hardly represents a secure means of attachment to the door. Wind, rain or any small physical disturbance of the summons so attached may easily lead to its falling from the door and being blown away or falling into such a place as to cause the paper to pass unnoticed by the occupants of the residence.
>
> Therefore, our conclusion is that the placing of a rubber band around a summons and attaching it to the outside doorknob of either the side door or the front door of a house fails to constitute the leaving of the summons at the usual place of residence, in such place and in such manner that the defendant may reasonably be expected to receive it.

175 N.E.2d at 79. *See also Ohio Casualty Insurance Company v. Reese*, 24 Ohio Misc. 34, 259 N.E.2d 183 (1970). Annot., 87 A.L.R.2d 1163 (1963).

It is a fundamental due process requirement that summons be served in a manner reasonably calculated to bring the

proceedings to the defendant's attention. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). This requirement was not met in this case. Therefore, the trial court did not acquire jurisdiction over appellant.

The cause is reversed and remanded with directions to set aside the default judgment against appellant Moya, and for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA and PAYNE, JJ., concur.

587 P.2d 427

In the Matter of Application No. C-1593 of George H. Brantley to Supplement Surface Waters of the Carlsbad Irrigation District.

George H. BRANTLEY,
Applicant-Appellee,

v.

CARLSBAD IRRIGATION DISTRICT,
Protestant-Appellant,

and

S. E. Reynolds, New Mexico State Engineer, Respondent-Appellant.

No. 11610.

Supreme Court of New Mexico.

Oct. 31, 1978.

Rehearing Denied Nov. 27, 1978.

McCormick & Forbes, Jay W. Forbes, Carlsbad, for protestant-appellant.

Toney Anaya, Atty. Gen., Richard A. Simms, Peter T. White, Don Klein, Jr., Sp. Asst. Attys. Gen., Santa Fe, for respondent-appellant.

J. Lee Cathey, Carlsbad, for applicant-appellee.

OPINION

EASLEY, Justice.

Applicant-appellee, George H. Brantley, filed an application with the New Mexico State Engineer seeking to supplement his rights to irrigation waters. The Carlsbad Irrigation District (C.I.D.) protested. After a hearing the State Engineer denied the application. On appeal to the District Court of Eddy County the case was tried de novo. Judgment was entered in favor of Brantley. The State Engineer and C.I.D. appeal. We reverse.

The issue is whether the owner of 3 acre-feet per year of surface water irrigation rights, who has lost a portion of this water below the diversion point from the river due to seepage from a twenty-five mile long transporting canal, may recapture the loss by drilling a well in a declared underground basin into which the seepage has gone.

The C.I.D., under contract with the United States and with the individual owners of water rights within the district, diverts waters from the surface flows of the Pecos River at Avalon Dam and delivers these waters into the main canal. The main canal begins at Avalon Dam and runs south for about twenty-five to twenty-eight miles, where water allocated to Brantley is delivered into the "Brantley Ditch." From there Brantley's water is dumped into the north side of the Black River and he pumps an equal amount out of the Black River from the south side. Brantley has a right, as do the other owners of water rights in the district, to 3 acre-feet per year for irrigation.

The C.I.D. diverts an average of 3 acre-feet per year for the 25,055 acres irrigated by the project into the main canal at Avalon Dam. However, due to evaporation, drainage, and seepage losses in the canal system, the C.I.D. delivers only approximately 2.1 acre-feet per year to the farms irrigated by the project.

The seepage, as well as drainage from the irrigated lands, percolates downward into the alluvium of the Pecos Valley Fill and becomes part of the Carlsbad Underground Basin. Applicant seeks to supplement his water supply by drilling a well into the Pecos Valley Fill to recapture the .9 acre-feet of water to which he claims to be entitled, but which is not now being delivered to him.

This Court in *Langenegger v. Carlsbad Irrigation District*, 82 N.M. 416, 419, 483 P.2d 297, 300 (1971) stated:

> [A]ppropriators of water from the main-stream or channel of the Pecos River . . . are entitled, subject to the rights of other appropriators, to rely and depend upon *all the sources* which feed the main stream *above their points of diversion*, all the way back to the farthest limits of the water shed. *Templeton v. Pecos Valley Artesian Conserv. Dist.* [65 N.M. 59, 332 P.2d 465 (1958)]. (Emphasis added.)

Templeton established what has become known as the "Templeton Doctrine" under which appropriators of surface waters, whose volumes have diminished, have been allowed to supplement their appropriations by drilling wells upsteam into underground

waters which are a source of the surface waters in which they have rights.

Brantley tendered and the trial court adopted the following findings of fact:

15. That there has been an average of 3 acre-feet of water per annum for the 25,055 acres of land of the Carlsbad Irrigation Project *delivered at the main canal of said Project.*

30. That the proposed appropriation of water by applicant from a ground water well to bring his surface water rights to 3 acre-feet per acre per annum amounts to a recapture of the waters *delivered at the main canal* of the Carlsbad Irrigation District which are lost by leakage from the canal system and drainage from the irrigated land of the Project; that *this is the same water which applicant proposes to appropriate* from a ground water well *as is diverted at the main canal* of the Carlsbad Irrigation District and which applicant is entitled to have delivered on his land. (Emphasis added.)

The above findings establish that the point of diversion for the lands irrigated by the project is the point where surface water is delivered into the main canal at Avalon Dam. Brantley proposes to drill a well on his farm approximately twenty-five miles below this point of diversion. There is no evidence that the ground water under Brantley's farm is a source of the surface flow of the Pecos at Avalon Dam. In fact, the trial court found the opposite; that the surface flow of the Pecos, diverted into the main canal, leaks from that canal and drains from irrigated lands, and is itself a source of the underground water which Brantley seeks to tap. This finding is based on substantial evidence.

There is even evidence that the particular area of the valley fill where Brantley's surface water is lost is separated from where he seeks to drill by an impermeable underground geologic formation. If correct, this evidence would indicate that there is no connection at all between his lost water and the water he seeks by this application. In either case the "Templeton Doctrine" does not apply since Brantley seeks to drill *below* his point of diversion into waters which are not a source of his surface right.

Kelley v. Carlsbad Irrigation District, 76 N.M. 466, 415 P.2d 849 (1966) is controlling here. This court held in that case:

> When an artificial or natural flow of surface water, through percolation, seepage or otherwise, reaches an underground reservoir and thereby loses its identity as surface water, such waters become public under the provisions of § 75–11–1, N.M. S.A., 1953 Comp., and are subject to appropriation in accordance with applicable statutes. It follows that one having a water right in a surface flow, which has thus been lost to the underground reservoir, can neither transfer his surface right nor change his point of diversion to the underground reservoir.

Id. at 472, 415 P.2d at 853. The underground reservoir in *Kelley* was the declared Roswell Artesian Basin.

On recross examination by counsel for the C.I.D., Brantley's expert witness testified:

A. . . . in my opinion, any well drilled anywhere in the alluvium under the Carlsbad Irrigation District is all water from the valley fill, . .

* * * * * *

Q. Now, this is a declared underground basin, isn't it?

A. Yes, sir.

The same expert witness testified on direct examination that the Black River was a "gaining stream" at the point of Brantley's farm. This means that the ground water under Brantley's farm flows into the Black River and is a contributing source to that river's surface flow at and below the point of Brantley's farm. There is uncontradicted evidence that the surface flow of the Black River is fully appropriated.

Brantley seeks to recapture water lost into a declared underground basin which is also a source of a fully appropriated surface flow. Since the "Templeton Doctrine" does not apply, the application must be denied as a matter of law. *Kelley, supra.*

In addition to ruling on the application, the trial court rendered findings of fact regarding the asserted failure of the C.I.D. to perform under its contracts with the United States and the owners of water rights within the district. These issues were not raised by the application, nor by the appeal from the State Engineer's denial of it, and they are not material to a disposition of the application. The trial court is not privileged to determine matters outside the issues of the case. *Ford v. Guarantee Abstract and Title Co., Inc.*, 220 Kan. 244, 553 P.2d 254 (1976); *Poole v. Poole*, 287 S.W.2d 372 (Mo.Ct.App.1956). It follows that the findings regarding the C.I.D.'s failure to perform under its contracts are of no force or effect.

The decision of the trial court is reversed. The trial court shall issue an order affirming the denial of Brantley's application by the State Engineer.

IT IS SO ORDERED.

PAYNE and FEDERICI, JJ., concur.

587 P.2d 430

W. D. BAKER and Lois M. Barnes, Plaintiffs-Appellees,

v.

Marguerite BENEDICT, Jasper O. Bliss and Bertha Bliss, his wife, Raymond Kelly, Lewis Kelly, a/k/a Louis Kelly, Willie Kelly, Jr., a/k/a Willie Kelly, a/k/a Willie Kelley, Willie Kelly, Sr., Pat E. Kelly, The following named defendants by name if living, if Deceased, their unknown heirs, Candida K. Anaya, et al., Defendants-Appellants.

No. 11958.

Supreme Court of New Mexico.

Nov. 17, 1978.

Rehearing Denied Dec. 13, 1978.

J. Wayne Woodbury, Silver City, for defendants-appellants.

John W. Reynolds, Silver City, for plaintiffs-appellees.

OPINION

PAYNE, Justice.

Baker and Barnes brought suit to quiet title to twenty-two acres of land in Catron County against appellants Lewis Kelly, Willie Kelly, Jr., and Willie Kelly, Sr. The trial court found for Baker and Barnes. Appellants allege that the trial court erred in quieting title in Baker and Barnes for three reasons: (1) Baker and Barnes or their predecessors in interest failed to take possession of the property at anytime; (2) Baker and Barnes delayed in bringing this action; and (3) the 1952 judgment quieting title to this property in Baker and Barnes' predecessor in interest was invalid. We affirm.

Most of the facts in this case are undisputed. Pat E. Kelly, predecessor in interest to Baker and Barnes, obtained various quitclaim deeds and disclaimers to the property from appellants and other heirs of Patricia Kelly and Felicita F. Kelly. In 1952 Pat E. Kelly brought a quiet title action with respect to this property. Title was quieted in him on November 12, 1952. At no time was Pat E. Kelly in possession of the property.

Appellants Willie Kelly, Jr., Willie Kelly, Sr. and Lewis Kelly have been in actual physical possession of this property for a continuous period of at least forty-six years, including the entire period since entry of the 1952 judgment. During that time they have made approximately $35,000 in improvements. Appellants concede that since entry of the 1952 judgment they have never had color of title to or paid taxes on the property. Baker and Barnes and their predecessors in interest have paid the taxes on this property since 1952, although they have not been in actual physical possession of the property.

The first issue raised by appellants is whether a plaintiff in a quiet title action may prevail notwithstanding the fact that he has never been in actual physical possession of the subject property. Appellants contend that the plaintiff in a quiet title

action must not only hold the property under color of title and pay property taxes, but must also be in actual possession of the property for a period of at least ten years prior to the institution of the action.

Section 22–14–1, N.M.S.A.1953 specifically provides that an action to quiet title may be brought by one "whether in or out of possession." *See Caranta v. Pioneer Home Improvements, Inc.*, 81 N.M. 393, 396, 467 P.2d 719, 722 (1970). Appellants contend, however, that §§ 23–1–21 and 23–1–22, N.M.S.A.1953 (Supp.1975) require a different result.

Section 23–1–21 provides:

> In all cases where any person . . . shall have had possession for ten [10] years of any lands, . . . holding or claiming the same by virtue of a deed or deeds of conveyance, devise, grant or other assurance purporting to convey an estate in fee simple, and no claim by suit in law or equity effectually prosecuted shall have been set up or made to the said lands, . . . within the aforesaid time of ten [10] years, then and in that case, the person . . . so holding possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands, . . . in preference to all, and against all, and all manner of person or persons whatsoever; and any person . . . who shall neglect or who have neglected for the said term of ten [10] years, to avail themselves of the benefit of any title, . . . within this state, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in possession, shall be forever barred, and the person or persons . . . so holding or keeping possession as aforesaid for the term of ten [10] years, shall have a good and indefeasible title in fee simple to such lands. . . .

Section 23–1–22 provides:

> In all cases where any person . . . shall have had adverse possession continuously and in good faith under color of title for ten [10] years of any lands . . . and no claim by suit in law or equity effectually prosecuted shall have been set up or made to the said lands, . . . within the aforesaid time of ten [10] years, then and in that case, the person . . . so holding adverse possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in some writing purporting to give color of title to such adverse occupant, in preference to all, . . . and any person or persons, . . . who shall neglect or who have neglected for the said term of ten [10] years, to avail themselves of the benefit of any title, legal or equitable, which he . . . may have to any lands . . . within this state, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in adverse possession, shall be forever barred, and the person . . . so holding or keeping possession as aforesaid for the term of ten [10] years shall have a good and indefeasible title in fee simple to such lands. . . . "Adverse possession" is defined to be an actual and visible appropriation of land, commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another; . . . and Provided further in no case must "adverse possession" be considered established within the meaning of the law, unless the party claiming adverse possession, his predecessors or grantors, have for the period mentioned in this section continuously paid all the taxes . . . which during that period have been assessed against the property.

Appellants' reliance on these two sections is misplaced. Section 23–1–22 provides for acquiring title by adverse possession and specifically requires that the party relying on adverse possession have color of title to and have paid taxes on the property for the statutory period. Appellants have done neither. While this section purports to bar the claims of those who for ten years have taken no action to avail themselves of the benefit of their title, it does so only as against those who are in adverse possession. Therefore, § 23–1–22 does not support appellants' position.

Section 23–1–21 is no more helpful to appellants. This section is similar to § 23–1–22, except that it applies to land grants and does not require that the party relying on it have paid taxes on the property for the statutory period of ten years. Both §§ 23–1–21 and 23–1–22 require that the party in possession have color of title, and both sections bar the claims of others only if the party in possession meets the criteria of the statutes. Since appellants have no color of title, §§ 23–1–21 and 23–1–22 do not require Baker and Barnes to be in physical possession of the property in order to prevail in a quiet title action.

Appellants properly contend that a plaintiff in a quiet title action must recover on the strength of his own title and cannot rely on any weaknesses in a defendant's title. *Jackson v. Hartley*, 90 N.M. 428, 564 P.2d 992 (1977). This principle does not dictate a different result in the present case. Baker and Barnes established their claim to title to the property by deed and by payment of taxes thereon. It then became incumbent upon appellants to show a weakness in the title of Baker and Barnes to prevent title from being quieted in them. They sought to do this by attempting to prove superior title in themselves under §§ 23–1–21 and 23–1–22. Their reliance was misplaced. Baker and Barnes prevailed in the trial court on the strength of their title, and not on the basis of any weakness in appellants' claim of title.

Appellants' second contention is that the trial court erred in finding that their claim, rather than that of Baker and Barnes, is barred by the doctrine of laches. The elements that must be proved to establish laches are: (1) Conduct on the part of the defendant, giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is not held to be barred. *Cave v. Cave*, 81 N.M. 797, 474 P.2d 480 (1970).

Appellants point out that Baker and Barnes and their predecessors in interest had an immediate right to possession of the property upon entry of the quiet title decree in 1952, but they took no legal action until bringing this suit in 1973. During the twenty-one year interval Baker and Barnes knew that appellants were in possession of the property and had made improvements on it. Appellants contend that they were unaware that any action would be taken by Baker and Barnes to recover possession.

The trial court found that appellants have had personal knowledge since the 1952 quiet title decree that they were divested of their right, title and interest in the property by virtue of quitclaim deeds, disclaimers and the 1952 final decree, but they took no action for twenty-six years. There is substantial evidence to support this finding. There is also evidence that one of the predecessors in interest of Baker and Barnes informed appellants that he claimed title to the property and threatened to evict them. Therefore, the third element of laches is missing.

In *Thomas v. Pigman*, 77 N.M. 521, 424 P.2d 799 (1967), this Court held that the doctrine of laches would not bar plaintiffs' action to quiet title to certain property which was within a fence line erected by defendants' predecessor in interest fifty years earlier, despite the fact that plaintiffs had taken no action to correct the boundary line. The Court recognized that lapse of time alone does not necessarily constitute an unreasonable delay; it must appear that the delay worked to the injury of another. The Court noted that where there was a well-known boundary, the location of which was not in dispute, defendants were not injured by plaintiffs' delay in asserting their rights.

Likewise, in this case we cannot say that appellants were injured by the delay of

Baker and Barnes in bringing this action when they knew that they had been divested of title, had notice that others claimed title to the property, and had never paid taxes on the property. Although appellants did make improvements on the property, they did so at a time when they were fully aware of the risk involved. There is substantial evidence to support the trial court's refusal to find that the claim of Baker and Barnes was barred by laches.

The third contention of appellants is that the trial court erred in holding that appellants failed to prove that the 1952 decree was invalid because it was based on fraud.

Appellants testified that the quitclaim deeds to Pat E. Kelly, upon which the 1952 decree was based, were forgeries. Baker and Barnes offered the testimony of three notary publics, who notarized the deeds, that they never had notarized any document unless they saw the person sign it in their presence. As appellants concede, the evidence is conflicting. The testimony of the notary publics was clearly sufficient to support the trial court's finding. This Court will not disturb such findings, weigh the evidence, resolve conflicts or pass on the credibility of witnesses where the evidence substantially supports the findings made by the trial court. *First National Bank of Santa Fe v. Wood*, 86 N.M. 165, 521 P.2d 127 (1974); *Cooper v. Burrows*, 83 N.M. 555, 494 P.2d 968 (1972).

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

McMANUS, C. J., and FEDERICI, J., concur.

587 P.2d 434

Mary HERNDON, Petitioner,

v.

ALBUQUERQUE PUBLIC SCHOOLS and Commercial Standard Insurance Company, Respondents.

No. 12139.

Supreme Court of New Mexico.

Nov. 28, 1978.

Thomas E. Jones, Albuquerque, for petitioner.

Vance A. Mauney, Albuquerque, for respondents.

OPINION

PAYNE, Justice.

Petitioner Mary Herndon seeks certiorari for the purpose of reviewing the decision of the Court of Appeals denying her request for attorney's fees incurred during the appeal of this case.

The trial court awarded petitioner $37,500 on her workman's compensation claim

and $3,800 in attorney's fees. This award was appealed by her employer, Albuquerque Public Schools. Albuquerque Public Schools filed a brief of some thirty-three pages raising three major points for reversal. Petitioner, through her attorney, responded with an answer brief of thirty-eight pages responding to the points raised by Albuquerque Public Schools and raising two additional points. The Court of Appeals affirmed the trial court on the issues raised by appellant and accepted the arguments of petitioner regarding the proper date of total disability of the petitioner. On appeal the award was increased from $37,500 to approximately $54,000. However, the Court of Appeals allowed no additional attorney's fees. We reverse and hold that the Court of Appeals abused its discretion in failing to award additional attorney's fees.

We recently held that the award of attorney's fees in a workmen's compensation case is discretionary with the court. *Genuine Parts Co. v. Garcia*, 92 N.M. 57, 582 P.2d 1270 (1978); *Ortega v. New Mexico State Highway Department*, 77 N.M. 185, 420 P.2d 771 (1966).

The Workmen's Compensation Law is very specific as to attorney's fees and restricts an attorney to those fees which are permitted by the court. § 59–10–23, N.M. S.A. 1953 (Repl.1974). If attorneys are denied fees for work prosecuted on behalf of an injured workman, there would be a chilling effect upon the ability of an injured party to obtain adequate representation. Through their insurance companies, employers regularly obtain exceptional and well-qualified counsel to defend them in such cases. It is imperative that courts foster and protect the ability of an injured workman to obtain counsel of his choice. We must avoid a policy or a practice which would discourage representation or the taking of appeals where counsel feels that an injured workman has been aggrieved at the trial court level. We must also preserve the right of an injured workman to have representation where the employer has appealed.

The Court of Appeals is therefore reversed as to the refusal to award additional attorney's fees. Counsel for the petitioner is granted additional fees of $2,500 for the appeal to the Court of Appeals, and an award of an additional $500 for prosecuting the petition for writ of certiorari.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, EASLEY and FEDERICI, JJ., concur.

587 P.2d 435

RUIDOSO STATE BANK,
Plaintiff-Appellant,

v.

Danny GARCIA and Lillian Garcia,
Defendants-Appellees.

No. 11950.

Supreme Court of New Mexico.

Nov. 30, 1978.

Ronald G. Harris, Ruidoso, for plaintiff-appellant.

Stagner, Higginbotham & Oas, Ronald Higginbotham, Keith R. Oas, Roswell, for defendants-appellees.

OPINION

EASLEY, Justice.

Ruidoso State Bank seeks replevin, under security agreements, of two vehicles owned by Danny and Lillian Garcia. The Bank had previously obtained a default judgment in this case on promissory notes and had levied on the two vehicles. However, the Garcias claimed an exemption and the district court released the vehicles. The trial court denied the writ of replevin. The Bank appeals.

The issues are:

1. Is the Bank precluded from replevying the vehicles under the security agreements by having first sued on the debt and having obtained a default judgment thereon?

2. Did the Bank's security interest in the two vehicles "merge" into the judgment for the debt?

The Bank's complaint asked for judgment on two promissory notes covering loans on an automobile and a truck owned by the Garcias, upon which the Bank also had security agreements. However, the complaint did not seek to foreclose the security agreements. Default judgment was entered. Thereafter the Bank filed an affidavit in replevin seeking possession of the vehicles pursuing to its security agreements. There were allegations that the automobile was "consumer goods" and that the truck was used for business. The court denied the writ and concluded that the Bank, by suing on its debt instead of foreclosing its security agreements, had elected its remedy under the New Mexico Uniform Commercial Code and was therefore precluded from pursuing its collateral through a replevin action. The trial court further concluded that the security agreements had merged into the judgment on the notes.

The New Mexico Uniform Commercial Code provisions are controlling in this case. Section 50A–9–501(1), N.M.S.A.1953 (Supp.1975) states:

> When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by an available judicial procedure. . . . *The rights and remedies referred to in this subsection are cumulative.* (Emphasis added.)

There is nothing ambiguous about this statutory provision. It plainly states that the remedies of proceeding on the note and the security agreement are cumulative. Each of them remains in force although efforts may have been made to collect the debt by the alternate means. 2 G. Gilmore, *Security Interests in Personal Property* § 43.7, at 1209–10 (1965). The comments under U.C.C. § 9–501 indicate that a judgment lien acquired by a secured creditor creates no new interest in the creditor but is instead a continuation of the original interest created by the security agreement. 3 Uniform Laws Anno., U.C.C. § 9–501, Comment 6 (1978 Pamphlet at 138). Section 50A–9–501(5) provides that:

> [T]he lien of any levy which may be made upon [the] collateral by virtue of any execution based upon the judgment shall relate back to the date of the perfection of the security interest in such collateral.

It was the obvious purpose of these sections to abolish the doctrine of election of remedies. In White and Summers, *Uniform Commercial Code*, § 26–4 at 964–65 (1972) it is stated:

> Under pre-Code law, courts often held that the secured creditor who sued on the debt irrevocably elected to seek his sole remedy by that method. Thus, the courts thought that a suit on the debt was inconsistent with a subsequent claim by the seller-creditor that he retained title to the goods under a conditional sales contract. The election of remedy issue arose early under the Code, and the Third Circuit held that the creditor could first recover in an action on the underlying obligation and if that proved unsuccessful, later enforce the security agreement.

See In re Adrian Research & Chemical Co., 269 F.2d 734 (3d Cir. 1959); P. Coogan, *Secured Transactions of the Uniform Commercial Code*, § 8.08(1) (1977).

The Garcias' claim of merger of the debt into the judgment is not persuasive, considering that the statutes give the Bank two separate and independent causes of action. It has been held by this Court that a debt and a mortgage securing it are separate and independent causes of action. *Flint v. Kimbrough*, 45 N.M. 342, 115 P.2d 84 (1941). The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a mortgage or other lien given to secure its payment. This Court has held that the creditor is not deprived by the judgment of his right to resort to a fund, or to avail himself of a lien or security held for the debt. *Tindall v. Bryan*, 54 N.M. 114, 215 P.2d 355 (1950). Although the cause of action may be merged into the judgment, the debt may be carried forward to prevent the destruction of contract rights. *Cabot v. First National Bank of Santa Fe*, 81 N.M. 795, 474 P.2d 478 (1970).

Merger does not apply here for the reason that the Bank had two separate causes of action. It could sue and reduce the debt to judgment. In that case the debt would be merged into the judgment. However, the debt would be carried forward so that the Bank's rights under the security agreement would not be destroyed. The security agreements, under the statutory prohibition, would not be merged into the judgment.

The Garcias claim that the 1971 amendment to the New Mexico Uniform Commercial Code, § 50A–9–504(2), N.M.S.A.1953 (Supp.1975), prohibits the payment of a deficiency by the debtor in the event the creditor chooses to repossess the collateral. This section reads:

> (2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency, except, a debtor is not liable for any deficiency where the collateral involved is consumer goods.

The Garcias claimed, and the trial court agreed, that by taking judgment first on the underlying obligation on consumer goods covered by a security agreement, the Bank forfeited its right to replevin the security, since the above statute prohibits taking a "deficiency."

This position is not sound for the reason that the 1971 amendment by its own terms contemplates a "deficiency." There can be no deficiency unless there has been a repossession and sale of the consumer goods. Thus, until there has been a sale of the consumer goods in this case and an attempt made to collect any deficiency, the Garcias have not been harmed. At such time as an effort is made to collect a deficiency, if any, the Garcias will then have cause to complain insofar as it pertains to any consumer goods involved.

We hold that the Bank is not barred under the doctrine of election of remedies from pursuing its remedies under the security agreements and that the security agreements were not merged into the judgment for the debt.

The decision of the district court is reversed and the case is remanded. The court shall consider the replevin action of the

Bank in conformity with the principles set out herein.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, J., concur.

587 P.2d 438

STATE of New Mexico, Plaintiff-Appellant,

v.

Linda MARTINEZ, Defendant-Appellee.

No. 3620.

Court of Appeals of New Mexico.

Sept. 12, 1978.

Rehearing Denied Supreme Court Order Quashing Certiorari Nov. 15, 1978.

Toney Anaya, Atty. Gen., Don D. Montoya, Dennis P. Murphy, Asst. Attys. Gen., Santa Fe, for plaintiff-appellant.

Joseph A. Sommer, Sommer, Lawler & Scheuer, P.A., Santa Fe, for defendant-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of two counts of fraud over $2,500. We are not concerned here with defendant's appeal. After the verdicts were returned, the trial court held that conviction of one of the counts was barred by the statute of limitation. The State has appealed that ruling. We discuss: (1) commencement of prosecution; (2) tolling; and (3) whether tolling may be applied.

Commencement of Prosecution

A criminal complaint was filed in magistrate court on August 5, 1977 charging that defendant committed fraud over $2,500 on August 7, 1974. On August 25, 1977 an indictment was filed which charged the same offense. Defendant was convicted of this charge; the trial court vacated the jury's verdict, and dismissed the charge because "the indictment was not returned by the Grand Jury within three years of the date of the commission of the offense".

The fraud involved was a third degree felony. Section 40A–16–6, N.M.S.A.1953 (2d Repl.Vol. 6). The limitation period, as stated in § 40A–1–8, N.M.S.A.1953 (2d Repl. Vol. 6) reads:

> No person shall hereafter be prosecuted, tried or punished in any court of this state, unless the indictment shall be found or information or complaint filed therefor within the time hereinafter provided:
>
> * * * * * *
>
> D. for a third or fourth decree felony, within three [3] years from the time the crime was committed[.]

A prosecution may be commenced by the filing of a complaint. Rule of Crim. Proc. 5. See also Rule of Crim.Proc. for Magis.Cts. 4 and *State v. Ergenbright,* 84 N.M. 662, 506 P.2d 1209 (1973).

In this case the complaint, filed August 5, 1977 for an offense committed August 7, 1974, was filed within the three-year period. The prosecution commenced by the complaint was filed within the time requirement of § 40A–1–8, supra.

The complaint charged a felony. The magistrate's jurisdiction over the complaint was to conduct a preliminary hearing and, if probable cause was found that defendant committed an offense, to bind defendant over to district court for trial. N.M.Const., art. II, § 14; Rule of Crim.Proc. 20; Rule of Crim.Proc. for Magis.Cts. 15.

In the district court the prosecution proceeds either on the basis of indictment or information. N.M.Const., art. II,

§ 14. The choice is the State's. *State v. Peavler,* 88 N.M. 125, 537 P.2d 1387 (1975). The State proceeded by indictment, with the result that defendant was no longer entitled to a preliminary hearing. *State v. Peavler,* supra.

Although the complaint was filed within the three-year period provided in § 40A–1–8, supra, the indictment, filed August 27, 1977, was not within the three-year period. The trial court applied the time limitation to the filing of the indictment rather than the filing of the complaint. The State contends this was incorrect. Under the circumstances of this case, we agree.

Tolling

Once the indictment was filed, the magistrate could no longer proceed with a preliminary examination. Consistent with Rule of Crim.Proc. for Magis.Cts. 15(e), the prosecution filed a voluntary dismissal in the magistrate court which informed the magistrate of the indictment. The magistrate dismissed the complaint, pursuant to Rule of Crim.Proc. for Magis.Cts. 17(a) on September 8, 1977.

At the time the indictment was filed, the magistrate court complaint was pending. In *State v. Thoreen,* 91 N.M. 624, 578 P.2d 325 (Ct.App.1978), we posed, but did not answer, the question as to whether in this situation "the indictment was a continuation of the charges in the complaint for purposes of the statute of limitation". Since upon being advised that a defendant was indicted prior to the preliminary examination "the magistrate shall take no further action in the case," Rule of Crim.Proc. for Magis.Cts. 15(e), it would seem that charges initiated by the complaint in the magistrate court should be considered as continued by the indictment.

Civil cases consider whether the later case is a "continuation" of the earlier case. Section 23–1–14, N.M.S.A.1953 (Vol. 5); *State ex rel. Brown v. Hatley,* 80 N.M. 24, 450 P.2d 624 (1969). However, in criminal cases, the limitation question is usually discussed in terms of tolling. See Annot., 90 A.L.R. 452 (1934). We view the "continuation" consideration to be valid, however, we decide the case on the basis of "tolling".

Upon the filing of the indictment prior to dismissal of the complaint, the indictment was timely because the limitation period was tolled by the filing of the complaint. *United States v. Grady,* 544 F.2d 598 (2d Cir. 1976); *United States v. Panebianco,* 543 F.2d 447 (2d Cir. 1976); *United States v. Wilsey,* 458 F.2d 11 (9th Cir. 1972); *United States v. Garcia,* 412 F.2d 999 (10th Cir. 1969); *State v. Morris,* 81 Idaho 267, 340 P.2d 447 (1959); *State v. Donoho,* 190 Neb. 593, 210 N.W.2d 850 (1973).

Whether Tolling May be Applied

(a) Section 40A–1–9, N.M.S.A.1953 (2d Repl.Vol. 6) covers specific instances when the limitation period is tolled. Relying on the rule, *expressio unius est exclusio alterius,* defendant claims that tolling may not be applied in this case. He contends that having stated the situations in which tolling occurs, the Legislature excluded all other tolling situations.

"The maxim 'expressio unius est exclusio alterius' is only an aid to construction and not a rule of law . . . and is of limited application". *Wilson v. Rowan Drilling Co.,* 55 N.M. 81, 227 P.2d 365 (1950).

The aim of statutory construction is to arrive at the legislative intent; rules of construction are but aids in determining legislative intent. *Montoya v. McManus,* 68 N.M. 381, 362 P.2d 771 (1961).

Section 40A–1–9, supra, provides for the tolling of the limitation period when, because of procedural problems, the prosecution cannot proceed. The statute covers situations such as a defendant's flight or concealment, a lost indictment, an arrested judgment, a quashed indictment and dismissal because of a variance between the charge and proof. Section 40A–1–9, supra, does not expressly apply to the voluntary dismissal of the complaint in this case, nor did the Legislature intend it to apply.

Section 40A–1–9, supra, shows a legislative intent that the limitation period is not to be utilized to bar a prosecution delayed by procedural problems. This statute does not show a legislative intent to bar a prosecution not beset with procedural problems; rather, application of the tolling rule in this case is consistent with the legislative intent in § 40A–1–9, supra.

In our opinion, § 40A–1–8, supra, shows a legislative intent that the tolling rule applies to this case. Although a felony charge may be initiated by the filing of a complaint, the felony must be prosecuted by indictment or information. N.M.Const., art. II, § 14. At some point the complaint is superseded by an indictment or information. However, § 40A–1–8, supra, does not distinguish between complaint, indictment or information. Rather, the statute provides that a complaint, charging a felony, may be filed within the specified time limitation. By including a complaint charging a felony within the time limitation, the Legislature intended that the time of filing the superseding indictment or information should not control the limitation question.

Defendant's claim that the rule of construction relied on prevents application of the tolling rule is without merit. Compare *United States v. Wilsey,* supra; *State v. Morris,* supra.

(b) *State v. Bilbao,* 38 Idaho 92, 222 P. 785 (1923), relied on by defendant, is of no assistance. The Idaho statute under consideration in *Bilbao* did not apply to a complaint. Compare *State v. Morris,* supra.

(c) *State v. Fogel,* 16 Ariz.App. 246, 492 P.2d 742 (1972) is also relied on by defendant. *Fogel* holds "that the return of an indictment on which no valid conviction or judgment can be had will not operate to toll the running of the statute of limitations pending the return or filing of a valid indictment or information in the absence of a statute expressly so providing." *Fogel* is not applicable; there is no claim that the complaint was invalid and § 40A–1–9, supra, has a tolling provision.

(d) Defendant asserts that application of the tolling rule would lead to absurd results; that in this case the filing of the complaint would toll the limitation period indefinitely. We disagree. The prosecution could be dismissed if defendant should be significantly prejudiced by a delay in prosecution of the criminal charge. *United States v. Panebianco,* supra. If there is a dismissal for failure to prosecute, a new prosecution would be barred if initiated after the limitation period expires. *United States v. DiStefano,* 347 F.Supp. 442 (D.C. N.Y.1972); see *State v. Shawan,* 77 N.M. 354, 423 P.2d 39 (1967).

(e) Defendant contends that limitation periods are to be construed liberally in favor of an accused, and against the prosecution. *State v. Fogel,* supra. Assuming this is true, it does not aid the defendant. Liberal construction cannot avoid the fact that the felony prosecution, initiated by a complaint, was timely filed and that New Mexico's system for prosecuting felonies requires that the complaint be superseded by an indictment or information.

Defendant has not demonstrated why the tolling rule should not be applied. Under the circumstances of this case, the limitation period was tolled upon the filing of the complaint. The trial court erred in reckoning the limitation period from the filing of the indictment, and in failing to reckon the limitation period from filing of the complaint.

The order of the trial court setting aside the jury verdict of guilty and dismissing Count I is reversed. The cause is remanded with instructions to reinstate the jury verdict.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

587 P.2d 442

Nick ARMIJO, Plaintiff-Appellant,

v.

CO-CON CONSTRUCTION CO., and Mountain States Mutual Casualty Co., Defendants-Appellees.

No. 3510.

Court of Appeals of New Mexico.

Oct. 17, 1978.

Certiorari Denied Nov. 22, 1978.

James A. Mungle, Albuquerque, for plaintiff-appellant.

George J. Hopkins, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

On February 28, 1977, plaintiff suffered total disability arising out of an accidental injury in the course of his employment. Since that date, defendants have paid plaintiff all maximum compensation benefits.

On November 8, 1977, plaintiff filed a complaint in which he (1) sought recovery for failure of defendants to provide safety devices, and (2) requested that compensation be awarded in a lump sum.

Defendants filed a motion for summary judgment. The trial court found that all benefits due and payable to plaintiff were paid to date and defendants were not delinquent in weekly compensation benefits. The court ordered plaintiff's complaint dismissed *without prejudice* for being prematurely filed, and plaintiff appeals.

A dismissal of a complaint *without prejudice* is not a final order and is not appealable. *Ortega v. Transamerica Ins. Co.*, 91 N.M. 31, 569 P.2d 957 (Ct.App.1977), Sutin, J., Dissenting. The effect of a dismissal without prejudice implies further proceedings. In order to avoid "further appeals" in this case arising out of "further proceedings" it is necessary to delineate for plaintiff what "further proceedings" are available to him.

Plaintiff sought recovery of the penalty allowed by § 59–10–7(B), N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1). It reads in pertinent part:

> [I]f an injury to . . . a workman results from the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the workman, then the compensation otherwise payable under the Workmen's Compensation Act shall be increased ten per cent [10%].

Section 59–10–36, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1) is entitled *Premature Filings.* It reads:

> *No claim shall be filed by any workman who is receiving maximum compensation benefits*; Provided, however, a workman claiming additional compensation benefits, because of his employer's alleged failure to provide a safety device, may file suit therefor, *but in such event only the safety device issue may be determined therein.* [Emphasis added.]

The failure of an employer to supply reasonable safety devices allows the workman to recover a penalty of ten percent as an increase in compensation payable under the Workmen's Compensation Act. *Garza v. W. A. Jourdan, Inc.*, 91 N.M. 268, 572 P.2d 1276 (Ct.App.1977). In *Garza*, defendant defaulted in payment and plaintiff filed his claim for workmen's compensation and the ten percent penalty. Defendant then resumed payments until after the court's hearing. The trial court found plaintiff to be totally and permanently disabled, but denied relief because of the defense of the statute of limitations. This Court reversed and held that the statute of limitations did not apply to the penalty provision of § 59–10–36, *supra.* The court concluded that:

> Thus, a workman, pursuant to the exception stated in this statute, may file a suit for the penalty despite the fact that he is receiving "maximum compensation benefits" or has been receiving regular semimonthly benefits. [572 P.2d at 1280.]

Section 59–10–36 means that if a workman is receiving maximum compensation benefits, he has the right to sue an employer for failure to provide a safety device as an additional compensation benefit, "but in such event only the safety device issue may be determined therein." A workman receiving "maximum compensation benefits" cannot sue for the penalty *and* any other claim under the Workmen's Compensation Act. As long as the workman is paid maximum compensation benefits, "no claim shall be filed." By this mandatory commandment of the Legislature, the workman is denied the right to seek any relief, other than the penalty, which bears upon or is related to receiving compensation benefits. The purpose of this rule is to save the employer the expense and cost of litigation. This burden should not be needlessly imposed upon an employer who complies with the law. Naturally, any such claim filed by a workman during the period that maximum compensation payments are received is premature.

In addition to the penalty, plaintiff sought recovery of a lump sum award under § 59–10–13.5(B), N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1, 1975 Supp.). It reads:

> B. If, *upon petition of any party* in interest, *the court, after hearing, determines in cases of total permanent disability* that it is in the interest of the rehabil-

> itation of the injured workman or in case of death that it is for the best interests of the persons entitled to compensation, and after due notice to all parties in interest of a hearing, *the liability of the employer for compensation may be discharged by the payment of a lump sum* . . . . [Emphasis added.]

To allow a petition to be filed for a lump sum payment under § 59–10–13.5 would directly conflict with § 59–10–36.

Section 59–10–13.5 requires a court hearing and determination as a forerunner to lump sum payment so that the employer is not prejudiced by a voluntary payment of benefits to an employee. The voluntary payment of maximum compensation benefits over a period of time does not establish total permanent disability; such payment is not an admission by the employer of the totality or permanency of any injury. The employer may at any time discontinue payments and the onus would then be on the employee to establish the permanency and totality of his injury in order to seek a lump sum payment.

A distinction must be made between a workman's "right to compensation" and the payment of compensation by the employer." The right to compensation is *established* by the order or judgment of the court. "The payment of compensation by the employer" reflects a duty imposed on the employer to compensate the injured employee without the necessity of a court action. A lump sum payment discharge of an employer is not authorized until the "right to compensation" has been previously determined or established by the trial court. Inasmuch as no claim for compensation benefits has been filed, and compensation benefits have not been established in court, the claim filed by plaintiff was premature.

The same issue was addressed in *Arther v. Western Company of North America*, 88 N.M. 157, 538 P.2d 799 (Ct.App.1975) where plaintiff petitioned the trial court " 'for a *lump sum settlement* of the widow's death benefits' " within three months after the accident. [Emphasis added.] A "lump sum settlement" falls within the provisions of § 59–10–25, N.M.S.A.1953 (2d Repl. Vol. 9, pt. 1). A "lump sum settlement" was not allowed. However, in discussing the statutes referred to above, *Arther* held that a lump sum award is not authorized *until the right to compensation has been previously established.* See also, *Codling v. Aztec Well Servicing Co.*, 89 N.M. 213, 549 P.2d 628 (Ct.App.1976).

If plaintiff is still receiving maximum compensation benefits and if plaintiff desires to proceed only for recovery of the penalty, he must drop the claim for a lump sum award.

The appeal is dismissed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

587 P.2d 444

LAS LUMINARIAS OF the NEW MEXICO COUNCIL OF THE BLIND, Plaintiff-Appellant,

v.

Chris S. ISENGARD, Kenneth L. Watkins, Leo Hollins, Barbara J. Thrash, Career Services for the Handicapped, Inc., City of Albuquerque, County of Bernalillo, Office of Comprehensive Employment and Training Administration, Orlando D. Sedillo, Community Development Administration, James J. Jaramillo, Defendants-Appellees.

No. 3459.

Court of Appeals of New Mexico.

Nov. 7, 1978.

Narciso Garcia, Jr., Toulouse, Krehbiel & DeLayo, P.A., Albuquerque, for plaintiff-appellant.

Albert Simms, Albuquerque, for defendants-appellees.

OPINION

LOPEZ, Judge.

Plaintiff-appellant filed a complaint containing four counts against defendants-appellees and other defendants not involved in this appeal. These latter defendants are the City of Albuquerque, the County of Bernalillo, the Office of Comprehensive Employment and Training Administration, Orlando D. Sedillo, Community Development Administration and James C. Jaramillo. Counts I, III and IV request injunctive and declaratory relief and an order of mandamus against certain of these defendants. Count II seeks damages from appellees based upon a theory of civil conspiracy. With respect to these four counts, the trial court granted appellees' motion for dismissal for failure to state a cause of action under Rule 12(b)(6) of the New Mexico Rules of Civil Procedure. Section 21–1–1(12)(b)(6), N.M.S.A.1953 (Repl. Vol. 4, 1970). Appellant appeals from this order of dismissal. We reverse and remand.

The issue presented on appeal is whether the trial court erred in dismissing appellant's complaint under Rule 12(b)(6). In determining this issue, we note that no argument is addressed to the trial court's dismissal of Counts I, III and IV for failure to state a cause of action. Accordingly, the order of the court is affirmed insofar as it relates to these counts. Section 21–2–1(15)(14)(d), N.M.S.A.1953 (Repl. Vol. 4, 1970); *Perez v. Gallegos,* 87 N.M. 161, 530 P.2d 1155 (1974); *Petritsis v. Simpier,* 82 N.M. 4, 474 P.2d 490 (1970).

In determining whether a complaint states a claim upon which relief can be granted, we assume as true all facts well pleaded. *Ramsey v. Zeigner,* 79 N.M. 457, 444 P.2d 968 (1968); *Jones v. International*

Union of Operating Engineers, 72 N.M. 322, 383 P.2d 571 (1963). In addition, a motion to dismiss a complaint is properly granted only when it appears that the plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim. *Hall v. Budagher,* 76 N.M. 561, 417 P.2d 71 (1966); *Jones v. International Union of Operating Engineers, supra.* Only when there is a total failure to allege some matter which is essential to the relief sought should such a motion be granted. *Pillsbury v. Blumenthal,* 58 N.M. 422, 272 P.2d 326 (1954); *Michelet v. Cole,* 20 N.M. 357, 149 P. 310 (1915). Moreover, a motion to dismiss for failure to state a claim is granted infrequently. *International Erectors, Inc. v. Wilhoit Steel Erectors & Rental Service,* 400 F.2d 465 (5th Cir. 1968).

New Mexico adheres to the broad purposes of the Rules of Civil Procedure and construes the rules liberally, particularly as they apply to pleading. As the New Mexico Supreme Court stated in *Carroll v. Bunt,* 50 N.M. 127, 130, 172 P.2d 116, 118 (1946):

> The general policy of the Rules requires that an adjudication on the merits rather than technicalities of procedure and form shall determine the rights of the litigants.

To constitute an actionable civil conspiracy, there must be a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Bourland v. State,* 528 S.W.2d 350 (Tex.Civ.App.1975); *International Bankers Life Insurance Company v. Holloway,* 368 S.W.2d 567 (Tex. 1963); *Boman v. Gibbs,* 443 S.W.2d 267 (Tex.Civ.App.1969); 16 Am.Jur.2d *Conspiracy* § 43 (1964). Civil conspiracy is not of itself actionable; the gist of the action is the damage arising from the acts done pursuant to the conspiracy. *Armijo v. National Surety Corp.,* 58 N.M. 166, 268 P.2d 339 (1954); *Lindbeck v. Bendziunas,* 84 N.M. 21, 498 P.2d 1364 (Ct.App.1972); *Barber's Super Markets, Inc. v. Stryker,* 84 N.M. 181, 500 P.2d 1304 (1972), *cert. denied,* 84 N.M. 180, 500 P.2d 1303 (1972). Generally, to state a cause of action for conspiracy, the complaint must allege: (1) the existence of the conspiracy; (2) the wrongful act or acts done pursuant to the conspiracy; and (3) the damage resulting from such act or acts. *James v. Herbert,* 149 Cal.App.2d 741, 309 P.2d 91 (Ct.App.1957); *see also Wu v. Keeney,* 384 F.Supp. 1161 (D.D.C.1974), *aff'd mem.* 174 U.S.App.D.C. 71, 527 F.2d 854 (1975); *Black & Yates v. Mahogany Ass'n, Inc.,* 129 F.2d 227 (3d Cir. 1941), *cert. denied,* 317 U.S. 672, 63 S.Ct. 76, 87 L.Ed. 539 (1942); *Browning v. Blair,* 169 Kan. 139, 218 P.2d 233 (1950). The existence of the conspiracy must be pled either by direct allegations or by allegation of circumstances from which a conclusion of the existence of a conspiracy may be reasonably inferred. 16 Am.Jur.2d *Conspiracy* § 58 (1964); *accord, Nardyz v. Fulton Fire Ins. Co.,* 151 Kan. 907, 101 P.2d 1045 (1940).

With respect to Count II, appellant in its complaint makes the following allegations: (1) plaintiff is a non-profit organization which provides training and job development services to the severely disabled of the Albuquerque-Bernalillo County area; (2) defendants, Chris S. Isengard, Kenneth L. Watkins, Leo Hollins and Barbara J. Thrash, are former employees of plaintiff; before the hiring of these defendants, plaintiff was a strong, healthy organization; (3) defendant, Office of Comprehensive Employment and Training Administration (OCETA), is a federally funded program of the United States Department of Labor and acts as the administrative support organization for the Albuquerque-Bernalillo County Manpower Programs; (4) defendants, the City of Albuquerque and Bernalillo County, formed a consortium to serve as prime sponsor of the Comprehensive Employment and Training Act (CETA) in the Albuquerque-Bernalillo County area; (5) defendant, Community Development Administration (CDA), is an agency created by the Council of the City of Albuquerque to supervise activities authorized by the Congress of the United States under Title I of the Housing and Community Development Act of 1974; (6) funds were made available by the feder-

al government to the City of Albuquerque and County of Bernalillo as prime sponsor under the CETA program for fiscal year 1977–1978; $57,360.00 of such funds were channeled by the prime sponsor into OCETA to be used for services to the handicapped; (7) funds were also made available to the City of Albuquerque by the federal government under the Housing and Community Development Act for fiscal year 1977–1978; $30,000.00 of such funds were channeled by the City of Albuquerque into CDA to be used for services to the handicapped; (8) Joint Requests for Proposals (RFP) were delivered to applicants for these funds; (9) the resulting contract with the selected agency for delivery of services to the handicapped included the two categories of funding in one contract; (10) plaintiff received a RFP and began preparation of its proposal; defendants, Isengard, Watkins, Hollins and Thrash, were all employed by plaintiff during the preparation of plaintiff's proposal and all had access to plaintiff's corporate records and documents; (11) during the course of their employment, these defendants owed plaintiff a duty of loyalty, a duty to serve faithfully and be regardful of the interests of plaintiff, a duty to discharge carefully their duties to plaintiff, a duty to conduct themselves in such a manner as not to destroy or to threaten the financial existence of plaintiff and a duty to avoid competition with plaintiff through the use of confidential information obtained during the course of their employment; (12) these defendants were instrumental in the formation and incorporation of defendant, Career Services for the Handicapped, Inc., (hereinafter referred to as Career); this corporation was organized to apply for the same two categories of funding; (13) while employed by plaintiff, these defendants actively worked on the preparation of a proposal to be submitted on behalf of Career and used plaintiff's records and papers to prepare this competitive proposal; (14) in forming this new corporation and using plaintiff's records and papers to prepare Career's proposal, these defendants violated the duties they owed to the plaintiff; (15) plaintiff submitted its proposal to CDA and OCETA; (16) similarly, a proposal was submitted on behalf of Career; the proposal of Career included the resume of its proposed director, defendant Isengard; (17) it was the unanimous opinion of the Technical Review Panel of OCETA that the contract for services should be awarded to plaintiff; of all the proposals submitted, plaintiff's proposal received the highest points in three evaluations based upon points; (18) defendants, Isengard, Watkins, Hollins and Thrash, made it known to the OCETA and CDA staffs that if plaintiff were awarded the contract, they would resign from their employment with plaintiff, and if Career were funded, they would seek employment with it; (19) the Executive Task Force of the OCETA Planning Board recommended that the contract be awarded to Career; (20) the contract was awarded to Career; (21) defendants, Isengard, Watkins, Hollins and Thrash, conspired and combined among each other and with Career and others to prevent the award of the contract to plaintiff; (22) as a result of this conspiracy, the contract was awarded to Career and plaintiff's offices will have to be closed; (23) this conspiracy and combination was a willful and wanton violation of the duty of loyalty owed by these defendants to plaintiff; and (24) due to the actions of these defendants, plaintiff has been damaged in the amount of $87,360.00.

To summarize, appellant alleges that appellees combined to accomplish a lawful purpose, i. e. participation in a public competition for public funds, by unlawful means, i. e. by breaching their duty of loyalty to appellant. In response, appellees contend that appellant's allegations do not state an actionable civil conspiracy. They base this contention upon two grounds. First, they argue that appellees' actions did not constitute a breach of their duty of loyalty to appellant but instead were merely preparations to compete with appellant at the expiration of their employment. Secondly, they argue that, since appellant is a non-profit corporation dependent upon public funds for its existence, the usual

duty of loyalty owed an employee to an employer should be viewed in the light of another general duty of loyalty owed to the public. Appellees conclude that the effect of such a viewing is to subject a non-profit corporation dependent upon public funding to the risk of competition for such funding from any other member of the public, including its own employees. We will answer each argument separately.

Appellees and their Duty of Loyalty

It is well settled that the employment relationship is one of trust and confidence and places upon the employee a duty to use his best efforts on behalf of his employer. *C–E–I–R, Inc. v. Computer Dynamics Corporation,* 229 Md. 357, 183 A.2d 374 (Ct.App.1962); *accord, Berry v. Goodyear Tire and Rubber Company,* 242 S.E.2d 551 (S.C.1978); *Town and Country House and Homes Service, Inc. v. Evans,* 150 Conn. 314, 189 A.2d 390 (1963); *Coker v. Wesco Materials Corporation,* 368 S.W.2d 883 (Tex. Civ.App.1963); 53 Am.Jur.2d *Master and Servant* § 97 (1970); Restatement (Second) of Agency, § 387 (1958). The general rule is that he who undertakes to act for another in any matter of trust or confidence shall not in the same matter act for himself against the interest of the one relying upon his integrity. *Rice v. First Nat. Bank in Albuquerque,* 50 N.M. 99, 171 P.2d 318 (1946); *Canfield v. With,* 35 N.M. 420, 299 P. 351 (1931). Concern for the integrity of the employment relationship has led courts to establish a rule that demands of a corporate officer or employee an undivided and unselfish loyalty to the corporation. *See Guth v. Loft, Inc.,* 5 A.2d 503 (Del.1939); *Maryland Metals, Inc. v. Metzner,* 282 Md. 31, 382 A.2d 564 (Ct.App.1978).

There exists, however, an exception to this general requirement of loyalty. Thus an employee does not violate his duty of loyalty when he merely organizes a corporation during his employment to carry on a rival business after the expiration of this term of employment. *Plastics Research & Development Corporation v. Norman,* 243 Ark. 780, 422 S.W.2d 121 (1967); *Hamilton Depositors Corporation v. Browne,* 199 Ark. 953, 136 S.W.2d 1031 (1940); *accord,* 56 C.J.S. *Master and Servant* § 70 (1948). Although an employee may lawfully plan to compete with his employer, it is also well established that an employee has a duty not to do disloyal acts in anticipation of future competition. *Lowndes Products, Inc. v. Brower,* 259 S.C. 322, 191 S.E.2d 761 (1972); *see also James C. Wilborn & Sons, Inc. v. Heniff,* 95 Ill.App.2d 155, 237 N.E.2d 781 (Ct.App.1968); *Hercules Packing Corporation v. Steinbruckner,* 28 A.D.2d 635, 280 N.Y.S.2d 423 (1967), *appeal dismissed,* 20 N.Y.2d 757, 283 N.Y.S.2d 174, 229 N.E.2d 842 (Ct.App.1967). Thus, in making arrangements to compete, an employee may not use confidential information peculiar to his employer's business and acquired through the course of employment. Restatement (Second) of Agency, § 393, Comment e, (1958); *accord, Town and Country House and Homes Service, Inc. v. Evans, supra; Allen Manufacturing Company v. Loika,* 145 Conn. 509, 144 A.2d 306 (1958). In addition, an employee may not solicit customers before the end of his employment or do other similar acts in direct competition with the employer's business. Restatement (Second) of Agency, § 393, Comment e, (1958); *accord, Maryland Metals, Inc. v. Metzner, supra; Becker v. Bailey,* 268 Md. 93, 299 A.2d 835 (Ct.App.1973).

Appellees rely upon *Lincoln Stores, Inc. v. Grant,* 309 Mass. 417, 34 N.E.2d 704 (1941) as support for the proposition that, even during employment, an employee may compete with his employer if he does so in good faith. Appellees' reading of this case is too broad. The *Lincoln* court restricted its approval of competition to directors or officers of a corporation. However, even if this case may be so read, the soundness of this proposition is questionable. Other authorities state that an employee may only make arrangements to compete and cannot properly engage in actual competition. Restatement (Second) of Agency, § 393, Comment e (1958); 3 Am.Jur.2d *Agency* § 222 (1962); *accord, Pratt v. Shell Petroleum Corporation,* 100 F.2d 833 (10th Cir. 1938),

cert. denied, 306 U.S. 659, 59 S.Ct. 775, 83 L.Ed. 1056 (1939); *see also Hercules Packing Corporation v. Steinbruckner, supra; James C. Wilborn & Sons, Inc. v. Heniff, supra.* Assuming, without deciding, however, that this proposition is correct, appellants, by alleging that appellees, Isengard, Watkins, Hollins and Thrash, used appellant's records and papers to prepare Career's competitive proposal charge that these appellees did not compete in good faith. Moreover, in *Lincoln,* the court affirmed an award of damages based partly on the use of confidential information by a competing director. By this affirmance, the court indicated that such a use was not competition in good faith. In concluding that appellant has sufficiently alleged that appellees, Isengard, Watkins, Hollins and Thrash, did not compete in good faith, we recognize that appellant is a non-profit corporation and that thus some of its records and papers may be a matter of public record. However, appellant may have other records and papers which are confidential. Therefore, the allegation that these appellees used appellant's records and papers to prepare Career's competitive proposal is sufficient to allege a use of confidential information.

Judged against the foregoing legal principles, we conclude that, as alleged in Count II of appellant's complaint, the actions of appellees, Isengard, Watkins, Hollins and Thrash, were not merely preparations to compete with appellant at the expiration of their employment but instead constituted a breach of their duty of loyalty to appellant. This conclusion is based upon the allegations that these appellees were instrumental in the formation of Career; that Career was organized to apply for the same funding for which appellant was applying; that these appellees prepared Career's competitive proposal and used appellant's records and papers for this preparation; and that these appellees made it publicly known that if appellant were awarded the funding contract, they would resign from their employment with appellant and if Career were funded, they would seek employment with it.

Furthermore, we conclude that Count II of the appellant's complaint states an actionable civil conspiracy. It is clear that a conspiracy to injure another's business which results in damages is actionable. *James C. Wilborn & Sons, Inc. v. Heniff, supra*; 16 Am.Jur.2d *Conspiracy* § 53 (1964); *see also Monroe College of Optometry v. Goodman,* 332 Ill.App. 78, 74 N.E.2d 153 (1947). Appellant's allegations are sufficient to state a cause of action under this theory. Appellant alleges directly that appellees conspired and combined with each other to prevent the award of the funding contract to appellant; appellant also alleges adequate circumstances from which a conclusion of the existence of the conspiracy may be reasonably inferred. In addition, appellant's allegations concerning the formation of Career by appellees, Isengard, Watkins, Hollins and Thrash, the purpose for which Career was organized, the circumstances surrounding the preparation of Career's competitive proposal, and the announcement of the intent of these appellees to resign from their employment with appellant are sufficient charges of the wrongful acts done pursuant to the conspiracy. Finally, those allegations concerning the health of appellant's organization before the hiring of these appellees and the present financial position of appellant as a result of the conspiracy and the direct allegation of damages is an adequate charge of damages. In reaching this conclusion, we note that with respect to those other defendants named in Count II of appellant's complaint and not parties to this appeal, no cause of action is stated.

Appellant's Status as a Non-profit Corporation and Appellees' Duty of Loyalty

Appellees argue that appellant's status as a non-profit corporation dependent upon public funds for its existence affects appellees' usual duty of loyalty. Essentially, appellees argue that an employee of such a corporation owes no duty of loyalty to the employer. We disagree. *See Rywalt v. Writer Corporation,* 526 P.2d 316

(Colo.App.1974). In stating our disagreement, we note that appellees cited no authority in support of their position. Furthermore, assuming without deciding that, in the instant case, the usual duty of loyalty owed an employee to an employer should be viewed in the light of another general duty of loyalty owed to the public, we cannot say as a matter of law that this latter duty, if its exists, sanctions appellees' use of appellant's records and papers to prepare Career's competitive proposal.

Thus we conclude that the trial court erred in dismissing Count II of appellant's complaint for failure to state a cause of action under Rule 12(b)(6). Section 21–1–1(12)(b)(6), *supra*. The order of the trial court is reversed with respect to this count and the cause is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

SUTIN, J., specially concurs.

HERNANDEZ, J., concurs in result only.

SUTIN, Judge (specially concurring).

I specially concur.

The reason Count II of plaintiff's complaint was dismissed was failure to state a claim upon which relief can be granted. After extensive oral arguments, the district court summarily ruled, without reason or authority, that plaintiff's complaint be dismissed. It was not dismissed with prejudice. If any reasons had been stated, plaintiff would have a peremptory right to amend. *Buhler v. Marrujo,* 86 N.M. 399, 524 P.2d 1015 (Ct.App.1974).

Count II was lost in the milieu of complex issues raised in three other counts. Defendants' oral argument did not approach the result achieved. If plaintiff had submitted a memorandum brief to the court on Count II, the adverse ruling might have been avoided. Trial lawyers must remember that when complicated claims and a motion to dismiss are filed, the court often "shoots from the hip" to dispose of the case. A year is lost in delay and expenses of appeal mount. Thus it has been and thus it will always be.

All that a complaint has to state is "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Section 21–1–1(8)(a), N.M.S.A. 1953 (Repl. Vol. 4). "All pleadings shall be so construed as to do substantial justice." Rule 8(f). The function of pleadings under these rules is to give fair notice of the claim asserted so as to enable the adverse party to answer and prepare for trial. 2A Moore's Federal Practice ¶ 8.13 (1975). "Notice pleading" mandated by Rule 8(a) requires a complaint to be construed liberally and fair notice of the nature of the action will withstand a motion to dismiss under Rule 12(b)(6). Plaintiff's complaint adequately complied with "fair notice pleading."

I repeat once again:

"The time has come to recognize that justice does not mean 'hang in haste and try at leisure.' It means to do justice; to see justice done. . . . " *Rice v. Gideon,* 86 N.M. 560, 564, 525 P.2d 920, 924 (Ct.App.1974), Sutin, J. dissenting.

587 P.2d 451

CITY OF FARMINGTON,
Plaintiff-Appellee,

v.

Willie PHILLIPS, Defendant-Appellant.

No. 3667.

Court of Appeals of New Mexico.

Nov. 14, 1978.

John B. Bigelow, Chief Public Defender, Michael Dickman, Asst. App. Defender, Santa Fe, for defendant-appellant.

Dwight D. Arthur, Farmington, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of keeping a disorderly house contrary to Farmington's municipal ordinance § 21–17 which was in effect on February 5, 1978, appellant appeals asserting the ordinance is either unconstitutionally vague or overbroad.

The evidence showed that during a periodic all-day observation by the police there were between fifteen to twenty people in various stages of intoxication in defendant's yard and house. There was loud music and some of the people were shouting, quarrelling, shoving and fighting. During the day the area became littered with alcoholic beverage cans and bottles. There were young children playing in the immediate area where the shoving and fighting occurred.

Section 21–17, supra, states:

> ". . . DISORDERLY HOUSE.
>
> "It shall be unlawful for any person to keep any common, ill-governed or disorderly house, or to suffer any drunkenness, quarrelling, fighting, gambling or any riotous or disorderly conduct whatever on his premises, or the premises under his direct possession or control."

The vagueness rule 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); *State v. Ferris*, 80 N.M. 663, 459 P.2d 462 (Ct.App.1969).

In approaching the question of the constitutionality of a statute every presumption is indulged in favor of the validity and regularity of the legislative act. *Board of*

Trustees of Town of Las Vegas v. Montano, 82 N.M. 340, 481 P.2d 702 (1971); *State v. Armstrong*, 31 N.M. 220, 243 P. 333 (1924). *State v. Strance*, 84 N.M. 670, 506 P.2d 1217 (Ct.App.1973) states:

> " 'It is well established in this jurisdiction that a part of a law may be invalid and the remainder valid, where the invalid part may be separated from the other portions, without impairing the force and effect of the remaining parts, and if the legislative purpose as expressed in the valid portion can be given force and effect, without the invalid part, and, when considering the entire act it cannot be said that the legislature would not have passed the remaining part if it had known that the objectionable part was invalid. . . . ' "

See also *State v. Spearman*, 84 N.M. 366, 503 P.2d 649 (Ct.App.1972); *Bradbury & Stamm Const. Co. v. Bureau of Revenue*, 70 N.M. 226, 372 P.2d 808 (1962).

Given the foregoing rules of statutory construction, we examine the ordinance. The words "common" and "ill-governed" are not words of precise definition. They have a wide variety of interpretations and meanings. They are such that a person of ordinary intelligence would have to guess at their meanings. See Random House Dictionary (Unabridged Ed. 1969). These words are unconstitutionally vague.

The fact that the words are unconstitutionally vague does not void the entire ordinance. We only declare the words unconstitutional and sever them from the ordinance. *State v. Strance*, supra. We then view the statute as a whole and give words their ordinary meaning unless a different intent is clearly established. *State v. Sierra*, 90 N.M. 680, 568 P.2d 206 (Ct.App.1977).

Webster's Third International Dictionary (Unabridged Ed. 1971) defines "disorderly house" as a brothel. Random House, supra, defines it as "a house of prostitution", "brothel" or "gambling place." The meaning of "disorderly house" is plain. It is not ambiguous or vague.

The words "to suffer" implies a willingness of the mind, to approve, to consent to, or permit and not to hinder. Bouvier's Law Dictionary (8th Ed.). The remainder of the ordinance uses words of common meaning which are not subject to a variety of interpretations. There is nothing vague in prohibiting a person from knowingly allowing conduct on his premises inconsistent with peaceable and orderly conduct. It is clear what the ordinance as a whole prohibits. Due process was not violated in forbidding the proscribed activity. Persons of common intelligence would not have to guess at the meaning of the ordinance. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct.App.1972).

Defendant's overbroad argument is misplaced. A statute is overbroad when constitutionally permissible behavior is made illegal. The ordinance does not restrict the freedom of speech. It only places restrictions on the time, place and manner. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

We have considered defendant's other arguments and find them to be without merit.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

587 P.2d 960

BERNALILLO COUNTY MEDICAL CENTER EMPLOYEES' ASSOCIATION LOCAL UNION NO. 2370 OF the SOUTHWESTERN COUNCIL OF INDUSTRIAL WORKERS, UNITED BROTHERHOOD OF CARPENTERS, AFL-CIO, et al., Plaintiffs-Appellants and Cross-Appellees,

v.

Mario L. CANCELOSI, Stephen Franks, Lawrence Yehle, the Board of Trustees of the Bernalillo County Medical Center, et al., Defendants-Appellees and Cross-Appellants.

No. 11645.

Supreme Court of New Mexico.

Nov. 16, 1978.

Rehearing Denied Dec. 14, 1978.

Dickson & Dubois, Frank P. Dickson, Jr., Albuquerque, for plaintiffs-appellants and cross-appellees.

Rodey, Dickason, Sloan, Akin & Robb, Duane C. Gilkey, Albuquerque, for defendants-appellees and cross-appellants.

OPINION

FEDERICI, Justice.

This action was commenced in the District Court of Bernalillo County by Bernalillo County Medical Center Employees' Association Local Union No. 2370 and others (appellants) for injunctive relief and damages arising out of the dismissal and suspension from employment of the individually-named plaintiffs by the Bernalillo County Medical Center and others (appellees).

On November 1, 1976, certain appellant employees were discharged or suspended from their employment. The district court found that, with two exceptions, these employees were covered by a collective bargaining agreement which contained a detailed grievance procedure. On November 2, an oral complaint regarding the suspensions and terminations was made by appellant union's president. The grievance procedure specifically requires a written griev-

ance, but the district court found that the practice between the parties was not to enforce this requirement. The grievance was reduced to writing on November 24, 1976. On November 4, 1976, appellant union filed a complaint in the district court seeking an injunction against further violations of the collective bargaining agreement and reinstatement of the affected employees with back pay and monetary damages. On December 8, 1976, appellants filed a motion to compel arbitration, pursuant to the New Mexico Uniform Arbitration Act, § 22–3–10, N.M.S.A.1953 (Supp.1975). On January 3, 1977, the trial court denied the motion specifically on the ground that the right to arbitrate, if any, was waived and abandoned. The court's findings of fact and conclusions of law, entered with final judgment, made clear that the finding of waiver was based on the fact that appellants had filed an action in district court.

The pleadings and orders found in the record proper present only one issue for determination by this Court: Did the district court properly find and conclude that the appellants had waived the right to arbitration and proceed to address the merits of the case?

In this jurisdiction the Legislature and the courts have expressed a strong policy preference for resolution of disputes by arbitration. The New Mexico Uniform Arbitration Act in § 22–3–10(A),(D), N.M.S.A. 1953 (Supp.1975) provides:

> *22–3–10. Proceedings to compel or stay arbitration.*—A. On application of a party showing an agreement [to arbitrate] and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.
>
> * * * * * *
>
> D. Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

Under this Act it is the court's duty to order arbitration where provision for it is clear. Where provision for arbitration is disputed, the court's function is to determine whether there is an agreement to arbitrate and to order arbitration where an agreement to arbitrate is found.

This Court, in *K. L. House Const. Co. v. City of Albuquerque*, 91 N.M. 492, 576 P.2d 752 (1978), construed the Uniform Arbitration Act and quoted the following language from the New York Court of Appeals in *Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am.*, 37 N.Y.2d 91, 95–96, 371 N.Y.S.2d 463, 466, 332 N.E.2d 333, 335 (1975):

> [T]he announced policy of this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties. * * * To this end the Legislature has assigned the courts a minimal role in supervising arbitration practice and procedures.
>
> Generally it is for the courts to make the initial determination as to whether the dispute is arbitrable, that is "whether the parties have agreed to arbitrate the particular dispute" * * *
>
> * * * * * *
>
> Basically the courts perform the initial screening process designed to determine in general terms whether the parties have agreed that the subject matter under dispute should be submitted to arbitration. Once it appears that there is, or is not a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract, the court's inquiry is ended.

91 N.M. at 493–494, 576 P.2d at 753–54. This Court added to the New York Court's language:

> When a broad and general arbitration clause is used, as in this case, the court

should be very reluctant to interpose itself between the parties and the arbitration upon which they have agreed. * * [T]he courts only decide the threshold question of whether there is an agreement to arbitrate. If so, the court should order arbitration. If not, arbitration should be refused.

Id. at 494, 576 P.2d at 754.

It appears to be quite clear in the present case that the grievance procedure contained in the collective bargaining agreement between the parties covers suspension and termination of the individual appellants. *See International Tel. & Tel. Corp. v. Local 400, Etc.*, 286 F.2d 329 (3d Cir. 1960); *United Textile Workers v. Newberry Mills, Inc.*, 315 F.2d 217 (4th Cir. 1963), *cert. denied*, 375 U.S. 818, 84 S.Ct. 54, 11 L.Ed.2d 53 (1963); *Trailways of New England, Inc. v. Amalgamated Ass'n, Etc.*, 343 F.2d 815 (1st Cir. 1965), *cert. denied*, 382 U.S. 879, 86 S.Ct. 164, 15 L.Ed.2d 120 (1965).

When the demand for arbitration follows initiation of proceedings in court, going to the merits of the dispute, a question of waiver is sometimes raised. An extensive and brutally diverse body of law exists as to what stage of the court proceedings waiver may be presented and determined. It has been held on numerous occasions in other jurisdictions that the filing of a complaint where nothing of consequence has occurred in the court proceedings does not constitute a waiver. *Farr & Co. v. Cia. Intercontinental de Navegacion*, 243 F.2d 342 (2d Cir. 1957); *Chatham Shipping Co. v. Fertex Steamship Corp.*, 352 F.2d 291 (2d Cir. 1965); *Richard Nathan Corp. v. Diacon-Zadeh*, 101 F.Supp. 428 (S.D.N.Y.1951); *Commercial Metals Co. v. International Union Marine Corp.*, 294 F.Supp. 570 (S.D.N.Y. 1968); *Guthrie v. Texaco, Inc.*, 89 LRRM, 2510 U.S.D.C. (S.D.N.Y.1975).

In *Commercial Metals Co. v. International Union Marine Corp., supra*, the Court had before it an issue quite similar to the issue raised under this point. In that case, the plaintiff and defendant were parties to a contract which provided for arbitration of disputes arising under the contract. For various reasons, the plaintiff sued for an alleged breach of the contract. A copy of the contract containing the arbitration clause was attached to the complaint filed in court, but the complaint did not request enforcement of the arbitration clause. Defendant moved to dismiss the action for failure to state a claim. In the meantime, plaintiff's counsel was attempting to get the basic issue before an arbitrator as provided in the contract and sent out various letters and communications for that purpose. Defendant refused to participate in the selection of an arbitrator under the arbitration clause of the agreement. Subsequently, plaintiff filed an action for the purpose of enforcing the arbitration clause of the contract. Defendant then alleged that the right to arbitration had been waived by plaintiff by the filing of the action for damages. In making its decision ordering arbitration, the Court stated:

The mere filing of a complaint does not constitute a waiver. * * * Moreover, except for defendant's motion to dismiss pursuant to Rule 12(b)(6), F.R.C.P., which did not constitute the equivalent of an answer, see 3 Moore's Federal Practice § 15.07[2], p. 852, nothing of consequence occurred in the lawsuit prior to the plaintiff's filing of the amended complaint which clearly reserved plaintiff's right to arbitrate under the charter party contract and negated any inference of intent to waive. Defendant has not shown that it expended any substantial amounts or took any other steps to its detriment prior to the filing of the amended complaint. * * * (Emphasis added.)

Id. at 574.

In *Chatham Shipping Co. v. Fertex Steamship Corp., supra*, the Court said:

The cases are altogether clear that the mere filing of an action for damages on a contract does not preclude a subsequent change of mind in favor of arbitration therein provided, see *Richard Nathan Corp. v. Dacon-Zadeh*, 101 F.Supp. 428, 430 (S.D.N.Y.1951); *Farr & Co. v. Cia. Intercontinental de Navegacion*, 243 F.2d 342, 348 (2 Cir. 1957) * * *

There are authorities on the other hand which hold that the taking of a position inconsistent with an intent to arbitrate the controversy is a waiver of the arbitration rights contained in the agreement. *Ojus Industries, Inc. v. Mann*, 221 So.2d 780 (Fla. App.1969); *Bolo Corporation v. Homes & Son Construction Co.*, 105 Ariz. 343, 464 P.2d 788 (1970). The record in this case does not support a conclusion that the appellants took a position inconsistent with an intent to arbitrate or intended to litigate, rather than arbitrate.

With reference to waiver of arbitration, the pertinent dates and proceedings by the parties and the trial court consisted of the following:

November 4, 1976 :	Complaint filed by appellants.
November 5, 1976 :	Notice of hearing on injunction filed by appellants. (No hearing or action by the court.)
November 15, 1976:	Motion to dismiss complaint filed by appellants.
December 1, 1976 :	First amended complaint filed by appellants.
December 8, 1976 :	Motion for arbitration filed by appellants.
December 28, 1976 :	Motion to dismiss first amended complaint filed by appellees.
January 3, 1977 :	Order of the court granting to appellants leave to file first amended complaint.
January 3, 1977 :	Order of the court denying appellants' motion for arbitration.

Between November 4, 1976 (the date the complaint was filed) and December 8, 1976 (the date the motion for arbitration was filed), the only pleadings filed were: (1) a complaint; (2) a motion to dismiss; (3) a first amended complaint; and (4) a motion requesting the trial court to submit the issues to arbitration. The case was not at issue and since no hearings had been held, the judicial waters had not been tested prior to the time the motion for arbitration had been filed.

Based upon the record of proceedings in this case, we hold that the trial court erred in ruling that appellants waived their right to arbitration.

Although argued in the briefs the question of whether waiver of arbitration is to be determined by the courts or by the arbitrators was not presented in the trial court below, and we reach no opinion on this issue.

The cause is reversed and remanded to the trial court to enter an order directing the parties to submit the issues involved to arbitration under the terms of the "Collective Bargaining Agreement."

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, J., concur.

587 P.2d 963

Aleta Carol GOMEZ, Petitioner-Appellant,

v.

Vincent GOMEZ, Respondent-Appellee.

No. 11852.

Supreme Court of New Mexico.

Dec. 1, 1978.

Rehearing Denied Dec. 20, 1978.

Richard M. Reidy, Albuquerque, for petitioner-appellant.

Lamb, Metzgar & Lines, Farrell L. Lines, Albuquerque, for respondent-appellee.

OPINION

SOSA, Justice.

Appellant filed a petition in the District Court of Bernalillo County against appellee for child support arrearages and future child support. Appellant appeals from the court's judgment denying the petition. The issue presented by this appeal is whether or not child support payments, once they have accrued, may be forgiven. We hold they may not.

The original final decree of divorce was entered in 1976 and states in pertinent part:

> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS: . . .
>
> 2. That the Petitioner is hereby awarded the care, custody and control of the two minor children of the parties.
>
> 3. That Respondent shall pay reasonable child support in the amount of $31.00 per week.
>
> 4. The Respondent's visitation rights with the two minor children shall be initially directed and controlled by the staff at Programs for Children, and that the parties shall work toward establishing a relationship between the Respondent and the children. In the event that such attempt is unsuccessful, the Court will *reconsider the issue of child support.* . . (Emphasis added.)

Appellee made several child support payments as directed by the decree. The payments then ceased. In November 1977, appellant filed a petition seeking child support arrearages and future child support and asking that appellee be held in contempt of court. Appellee filed a response alleging that he should be relieved of his support obligation because the children were his adopted children and appellant would not allow him to visit with or be a father to the children.

The district court determined that appellee was not obligated to make child support payments, that appellant was not entitled to a judgment for child support arrearages, and that appellee was not in contempt of court. The district court found that appellant refused to allow appellee to have any contact with the children, that appellant did not cooperate with appellee in making arrangements for the children to visit with him, and that the child support payments ordered in the 1976 decree were conditioned upon appellant's cooperation in allowing appellee to establish a relationship with the children. The court concluded that appellant was not entitled to arrearages in child support payments or to future child support.

Section 22–7–6(B)(4), N.M.S.A.1953 (Supp.1975), provides that the district court may enter orders as may be appropriate for the care, custody and maintenance of minor children. Section 22–7–6(C), N.M.S.A.1953 (Supp.1975) provides:

> The court may modify and change any order in respect to the guardianship, care, custody, maintenance or education of the children, whenever circumstances render such change proper. The district court shall have exclusive jurisdiction of all matters pertaining to the guardianship,

> care, custody, maintenance and education of the children, and with reference to the property decreed or funds created for their maintenance and education, so long as they, or any of them remain minors.

The statute is clear. It allows a court to modify or change any child support order for care, custody and maintenance whenever the circumstances render the change proper. The question arises whether the statute permits a court to forgive child support arrearages.

In *Corliss v. Corliss*, 89 N.M. 235, 549 P.2d 1070 (1976), this Court looked to Missouri's statute, which is similar to our statute, to determine whether or not it had discretion to forgive accrued alimony or child support granted in a Missouri decree. This Court stated:

> [T]he Missouri trial court had no expressed power to modify arrearages. Mo. Rev.Stat. § 452.070 (1969) provided in part that "[t]he court, on application of either party, may make such alteration, from time to time, as to the allowance of alimony and maintenance, as may be proper * * *." In *Schaffer v. Security Fire Door Company*, 326 S.W.2d 376 (Mo.Ct.App.1959), rev'd on other grounds, 332 S.W.2d 860 (1960), the words "make such alteration, from time to time" were construed to refer only to the *future and to confer no power upon a court to cancel accrued child support under a former decree.* (Emphasis added.)

Id. at 237, 549 P.2d at 1072. Because the Missouri court granting the divorce lacked power to modify accrued alimony and child support, the New Mexico district court similarly lacked this power. This Court reversed the district court for failing to grant judgment for the entire amount of alimony and child support arrearages due and owing at the time of the hearing.

In *Barela v. Barela*, 91 N.M. 686, 688, 579 P.2d 1253, 1255 (1978), this Court recently stated:

> Where a custodial parent is financially able to support the children and the children refuse to visit their other parent due to the emotional influence of the custodial parent, the court in its discretion has the power to terminate *future* support obligations of the noncustodial parent. (Citations omitted and emphasis added.)

See Spingola v. Spingola, 91 N.M. 737, 580 P.2d 958 (1978). This Court affirmed the trial court's decision in *Barela* granting judgment for arrearages and relieving the father of paying future child support.

In the case at bar, the 1976 decree provided that the parties should work toward a proper relationship between appellee and the children; if that failed, the court would reconsider the issue of child support. It should be noted that appellee never filed an application seeking modification of the 1976 child support order.

We hold that under § 22–7–6(C) a court does not have discretion to modify *past*, as distinguished from future, child support payments. Arrearages once accrued cannot be forgiven. *See Catlett v. Catlett*, 412 P.2d 942 (Okl.1966). Therefore, the child support payments should have continued at the same rate until appellee brought the matter to the attention of the court. Appellee is responsible for child support payments up to the date of the hearing.

The trial court is affirmed as to its conclusion that appellee is not obligated to make future child support payments and reversed as to its conclusion that appellee is not obligated to pay child support arrearages. The matter is, therefore, remanded to the district court with directions to enter a judgment in favor of appellant in the amount of the arrearages.

IT IS SO ORDERED.

McMANUS, C. J., and EASLEY, PAYNE and FEDERICI, JJ., concur.

587 P.2d 966

R. John TURNER, Plaintiff-Appellee,

v.

Edward M. SILVER, Defendant, Third Party Plaintiff-Appellant,

v.

DAVID B. HIBLER AND GREEN CHAPARRAL TURF RANCH, INC., Third Party Defendants-Appellees.

No. 3193.

Court of Appeals of New Mexico.

Oct. 17, 1978.

Writ of Certiorari Denied Nov. 28, 1978.

James C. Ritchie and Kenneth J. Ferguson, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for third party plaintiff-appellant.

Harold D. Stratton, Jr. and Robert N. Singer, Coors, Singer & Broullire, Albuquerque, for third party defendants-appellees.

OPINION

SUTIN, Judge.

Silver is the defendant who as a third party plaintiff filed a third party complaint against Hibler and Green Chaparral Turf Ranch, Inc., his employer, as third party defendants (Hibler). Hibler was granted

summary judgment. Silver appeals. We affirm.

Hibler was operating a pickup truck east on Highway I–40 approaching an exit to Louisiana Boulevard in Albuquerque when his motor stopped. Turner, plaintiff, stopped some five or six cars behind Hibler. Without any explanation, Silver, while operating his car, smashed into the rear end of Turner's car, injuring Turner. The trial court found that "There is no issue of fact or evidence that the third party defendants were negligent in proximately causing the accident in question."

The only question on this appeal is whether a genuine issue of material fact exists that Hibler's negligence proximately caused Silver to smash into Turner.

The facts most favorable to Silver are as follows:

Hibler, about 16½ years old, was driving a pickup truck 55 to 60 miles per hour east in the center lane of Highway I–40, a three lane highway, intending to exit on Louisiana Boulevard. It was noon time and traffic was heavy. The pickup had two gas tanks; the main tank and an auxiliary tank. The pickup was operating on the auxiliary tank. Hibler had not checked the amount of fuel in the tanks. Suddenly the auxiliary tank became empty, the motor stopped running, and the pickup coasted for about a quarter of a mile and stopped in the center lane. Hibler turned on his emergency flashers as soon as he thought something was wrong.

The gas lines were empty. Hibler thought the gas lever was pointed to the main tank, but it was on the auxiliary tank. He switched the lever and tried to start the motor for about two minutes, but the pickup moved so slowly that the gasoline would not pump into the gas lines, and the battery went dead.

While coasting, Hibler tried to turn to the right lane and off the road, but traffic was moving in the right lane and no one allowed him to do so. He could not turn to the left because "the drainage ditch" was there. After the pickup stopped, Hibler and his guests tried to push the pickup off the center lane. Approximately 5 or 6 minutes had passed from the time the motor stopped to the time the pickup was pushed. Vehicles in the right lane had stopped and were backed up for a half mile or a mile to the rear, or west. Vehicles in the left lane were moving. There were about five or six vehicles stopped behind Hibler's pickup which were unable to pass. Plaintiff, Turner, operated the last vehicle that stopped behind Hibler's pickup.

As Hibler was trying to push his pickup off the road, another man with a pickup began to push the Hibler truck off the road. During this event, Silver, driving east, smashed into the rear end of Turner's vehicle.

Hibler was given a traffic citation for "obstructing traffic" and paid a $10.00 fine, but understood that he was guilty.

Silver presented no affidavits, evidence, facts or testimony to explain his own conduct with reference to striking Turner's vehicle.

Silver claims that a genuine issue of material fact exists whether Hibler was negligent, and whether his negligence was a direct contributing cause of the accident.

A. *A genuine issue of material fact exists whether Hibler was negligent.*

A genuine issue of material facts exists whether Hibler was negligent in one respect.

Hibler was driving the truck on a heavily trafficked freeway in Albuquerque. He knew or should have known that if the truck ran out of gas, traffic in the center lane would back up behind the stalled truck. Hibler owed a duty to other drivers on the highway to take reasonable precautions to prevent the truck from stopping on the highway. *Keller v. Breneman,* 153 Wash. 208, 279 P. 588, 67 A.L.R. 92 (1929). Hibler seems to have taken no precautions to avoid this event. A genuine issue of material fact exists whether Hibler was negligent.

Hibler strenuously argues that the pickup did not run out of gas; that it was a

mechanical failure and that "it is incredible that Silver could contend that Hibler ran out of gas." A party granted summary judgment should not persist in searching for evidence most favorable to its position. We find sufficient evidence from Hibler's testimony that the auxiliary tank ran out of gas and the gas lines were empty.

Hibler was cited for obstructing traffic under a municipal ordinance and paid the fine. He admitted that when he paid his fine, he understood that he was guilty of the charge.

Evidence that a party charged with a traffic offense merely paid a fine, is not an admission against interest in the civil case involving the offense, and is not admissible in evidence. *Barrios v. Davis,* 415 S.W.2d 714 (Tex.Civ.App.1967); *Lucas v. Burrows,* 499 S.W.2d 212 (Tex.Civ.App. 1973); *Kelly v. Simoutis,* 90 N.H. 87, 4 A.2d 868 (1939), cited on other grounds in *Trujillo v. Chavez,* 76 N.M. 703, 417 P.2d 893 (1966). However, where that person pays a fine because he thought he was guilty, evidence of the offense committed is admissible in evidence. *Kelly, supra.* We have held that a plea of guilty to an offense is admissible in evidence in a civil case. *Valencia v. Dixon,* 83 N.M. 70, 488 P.2d 120 (Ct.App.1971); *Vargas v. Clauser,* 62 N.M. 405, 311 P.2d 381 (1957). It has also been held that absent a plea of guilty, proof of conviction of criminal charges is inadmissible in the trial of a subsequent civil action for tort arising out of the same act. *Gray v. Grayson,* 76 N.M. 255, 414 P.2d 228 (1966).

We hold the rule to be that a party who is charged with a traffic offense and pays a fine because he understood or thought that he was guilty, is akin to a party who pleads guilty. It constitutes an admission against interest and is admissible in evidence. Admissions made by a party are the strongest kind of evidence. Such admissions are binding and conclusive upon him if uncontradicted and unexplained. *Hiniger v. Judy,* 194 Kan. 155, 398 P.2d 305 (1965). We have held that such admissions constitute substantial evidence sufficient to support a finding. *Svejcara v. Whitman,* 82 N.M. 739, 487 P.2d 167 (Ct.App.1971).

However, Silver relies on Albuquerque Traffic Code Section 71.35 that: "It shall be unlawful for any person to operate or to stand a vehicle on any public way in such a manner as to obstruct the free use of such public way."

Silver did not plead or prove the existence of this ordinance. We cannot take judicial notice of municipal ordinances where summary judgment is granted. Such ordinances are matters of fact which must be pleaded and proved the same as any other fact. *Coe v. City of Albuquerque,* 81 N.M. 361, 467 P.2d 27 (1970). For purposes of summary judgment, Hibler's violation of the municipal ordinance was not available to Silver.

Silver also relies on § 64–18–49, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 2). It reads:

> (a) Upon any highway outside of a business or residence district *no person shall stop,* park, *or leave standing any vehicle,* whether attended or unattended, *upon the paved or main-traveled part of the highway when it is practicable to stop,* park, *or so leave such vehicle off such part of said highway,* but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of 200 feet in each direction upon such highway.
>
> (b) This section shall *not* apply to the driver of any vehicle *which is disabled while on the paved or main-traveled portion of a highway* in such manner and *to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position.* [Emphasis added.]

Did Hibler violate this statute? *Shelton v. Lowell,* 196 Or. 430, 249 P.2d 958, 961–62 (1952) says:

> In construing the statute, we must give it a practical and common-sense meaning

> and try to ascertain the intent of the legislature. The obvious meaning of that section of the statute relied upon is that where the car is temporarily disabled so that it is impossible to avoid temporarily leaving such vehicle on the highway, the driver of the stalled car is relieved from responsibility. Where an emergency is created . . . the disabled car is not permitted to remain on the highway for a protracted length of time when there is a reasonable opportunity to remove it, and in the exercise of reasonable care, it could have been removed.

The only excuse for stopping on the pavement is an emergency or exigency which leaves no other choice. *Fitzpatrick v. California & Hawaiian Sugar R. Corp.,* 309 Ill. App. 215, 32 N.E.2d 990 (1941).

Under § 64–18–49, *supra,* a driver must always park off the highway when practical to do so. *Horrocks v. Rounds,* 70 N.M. 73, 370 P.2d 799 (1962). If the vehicle is *disabled* and it is *impossible* to avoid stopping and temporarily leaving it in such position, the statute is not applicable. *Gutierrez v. Koury,* 57 N.M. 741, 263 P.2d 557 (1953); *Terrel v. Lowdermilk,* 74 N.M. 135, 391 P.2d 419 (1964).

The meaning of the words "disabled" and "impossible" are stated with clarity in the Editorial Comment in the Annotation in 15 A.L.R.2d 909, 911 (1951), entitled "*When is motor vehicle 'disabled,'* " etc. It reads:

> Thus, it has been held in a number of cases that in construing a statute forbidding vehicles to stop or park on a highway, but exempting vehicles so disabled that it is impossible to avoid stopping or temporarily leaving them in such position, the word "impossible" should not be given a literal construction, but should be interpreted to mean "not reasonably practical." And it has been said in some cases that a vehicle is disabled within the meaning of the statutory exemption when it cannot be moved under its own power.

A vehicle is "disabled" when it runs out of gasoline. *Floyd v. Johnston,* 193 Ark. 518, 100 S.W.2d 975 (1937); *Hornshuh v. Alldredge,* 149 Or. 419, 41 P.2d 423 (1935); *Martin v. Tracy,* 187 Minn. 529, 246 N.W. 6 (1932). Hibler's pickup truck was disabled.

As applied to the instant case, § 64–18–49 simply means this: When his vehicle became disabled, Hibler had a duty to stop or leave his pickup truck off Highway I–40 if it was reasonably practical to do so. The legal excuse is broad and comprehensive in scope. Hibler was exempt from this duty if it was not reasonably practical to move his vehicle to avoid stopping and leaving his vehicle temporarily in the center lane of Highway I–40. *Silvia v. Pennock,* 253 Iowa 776, 113 N.W.2d 749 (1962); *Shelton, supra.*

Hibler's vehicle coasted for a quarter of a mile. Ordinarily, it would be a question of fact for the jury whether Hibler could have driven his vehicle off the highway before it stopped. *Hine v. Leppard,* 5 Cal.App.2d 154, 42 P.2d 389 (1935). The evidence is undisputed, however, that he tried to turn to the right lane and off the road, but traffic was moving in the right lane and he was not able to turn. Under these circumstances, it was not reasonably practical as a matter of law for Hibler to leave his vehicle temporarily standing in the center lane.

Hibler was exempt from the duty expressed in § 64–18–49(a) and was not negligent.

Silver relies strongly on *Kelly v. Montoya,* 81 N.M. 591, 470 P.2d 563 (Ct.App.1970). *Kelly* was a second accident case. There were two separate collisions. In this respect, the facts are not similar with those in the instant case. There is, however, one factual material difference. Two of the *Kelly* defendants, involved in the *second accident,* admitted that a factual issue existed as to their violation of § 64–18–49(a). Two of the defendants involved in the *first accident* did not. However, there was a factual dispute whether the latter defendants' vehicles were on or off the highway at the time of the second collision. Because of this factual dispute, a genuine issue of material fact existed. All of the *Kelly* defendants argued that even though the statute

was violated, they could not be held negligent for lack of foreseeability. On this issue, the court disagreed. The court said:

> There being factual issues as to a statutory violation, there were factual issues as to the negligence of each of the four defendants. The factual issue of negligence includes the factual issue of foreseeability. [81 N.M. at 594, 470 P.2d at 566.]

In the instant case, there was no prior accident, no admission of factual issues, no dispute over the position of Hibler's pickup on the highway, and no violation of the statute. *Kelly v. Montoya, supra,* does not assist Silver.

We conclude that a genuine issue of material fact exists with reference to Hibler's negligence in one respect as heretofore shown. Even though other acts of negligence had been shown, none of them were a proximate contributing cause of Turner's injuries.

B. *The negligence of Hibler was not a proximate contributing cause of Turner's injuries.*

Summary judgment was granted Hibler. Hibler fulfilled his burden of positing a prima facie showing that his negligence was not a proximate or contributing cause of the Silver-Turner accident; that Silver's conduct would have produced Turner's injury independently of Hibler's negligence.

The Turner vehicle was stopped in the center lane of the highway. The mere presence of Turner's vehicle behind Hibler's was a passive condition. Silver presented no evidence that under favorable traffic conditions in a three lane highway, and with a view of long distance, the mere presence of Turner's vehicle stopped on the highway caused or contributed to cause Silver to smash into Turner's car. It naturally follows that Hibler's negligence did not cause Silver to smash into Turner's vehicle. Hibler met his burden.

The burden then shifted to Silver to establish that the presence of Turner's vehicle on the highway was a proximate contributing cause.

Silver presented no facts or evidence. He gave no explanation of his conduct in the operation of his vehicle under the circumstances prevailing. The record is silent. We cannot assume that the presence of Turner's vehicle proximately contributed to the accident. The Turner-Silver litigation will disclose Silver's conduct. But for purposes of summary judgment, we view Silver as being on a blindman's holiday operating a dangerous instrumentality. In smashing into Turner's vehicle, he was as blind as a bat and in reckless disregard of the consequences. From the cold record, Silver's negligent, wanton, or reckless conduct was the sole cause of Turner's injury. Silver failed to meet his burden.

Hibler contends that Silver's conduct was an "independent intervening cause," sufficient in and of itself to break the natural sequence of events that followed Hibler's negligence. We agree.

This legal concept involves two theories of liability: (1) Was Hibler's negligence "a" proximate cause of Turner's injury, one that concurred with that of Silver? The answer is "no." (2) Was Silver's conduct an "independent intervening cause" of Turner's injury, a cause that produced Turner's injury independent of Hibler's negligence? The answer is "yes."

To resolve the issue of "proximate cause" vs. "independent cause" creates a complex and confounded matter. Definitions are difficult to understand and apply, and New Mexico courts are in disagreement as to the application of these concepts in *second accident* cases. *Griego v. Marquez,* 89 N.M. 11, 546 P.2d 859 (Ct.App.1976); *Kelly v. Montoya, supra; Thompson v. Anderman,* 59 N.M. 400, 285 P.2d 507 (1955). See also, *Archuleta v. Johnston,* 83 N.M. 380, 492 P.2d 997 (Ct.App.1971); *Latimer v. City of Clovis,* 83 N.M. 610, 495 P.2d 788 (Ct.App.1972); *Harless v. Ewing,* 80 N.M. 149, 452 P.2d 483 (Ct.App.1969). *Shephard v. Graham Bell Aviation Service, Inc.,* 56 N.M. 293, 243 P.2d 603 (1952); *Reif v. Morrison,* 44 N.M. 201, 100 P.2d 229 (1940); *Ferreria v. Sanchez,* 79 N.M. 768, 449 P.2d 784 (1969).

In New Mexico, and elsewhere, "The rule appears to be uniform, that, whether the intervening act in a second motor vehicle accident case was the proximate cause of plaintiff's injury, is a question of fact for the jury." *Griego, supra.* [89 N.M. at 14, 546 P.2d at 862.] The primary reason is based upon foreseeability of the subsequent injury by the first negligent offender. Ordinarily foreseeability of a subsequent injury is a question of fact for the jury. It is not so in this case.

For example, in *Ferreria, supra,* a live bullet rather than a blank was inserted in a pistol used in a school play. The pistol was discharged and plaintiff was injured. The court held that the injury was not caused by the negligence of the teacher but by the intervening act of a third person. The court said:

> It is true that the mere fact that the injury stemmed from such an intervening act does not of itself exonerate these defendants from negligence, if under the facts of this case the intervening force is reasonably foreseeable.
>
> * * * * * *
>
> After reading the entire record we cannot say, as a matter of law, that the intervening act of George Chavez was reasonably foreseeable by the teachers. [79 N.M. at 771, 449 P.2d at 787.]

Ferreira is cited in *Fagan v. Summers,* 498 P.2d 1227 (Wyo.1972). *Fagan* also holds that a defendant will be relieved of liability for his negligence by an unforeseeable intervening cause. The court said:

> In the case before us, plaintiff was not injured by negligence, if any, from rocks being on the playground. The injury was clearly caused by the intervening act of a third person—the boy who picked up and threw the rock. Appellant cites no authority for the proposition that such a result was reasonably foreseeable. [498 P.2d at 1229.]

See also *Allen v. Shiroma,* 266 Or. 567, 514 P.2d 545 (1973); *Thomas v. Bokelman,* 86 Nev. 10, 462 P.2d 1020 (1970); *Hoke v. Holcomb,* 186 So.2d 474 (Miss.1966); *Illinois Central Railroad v. Vincent,* 412 S.W.2d 874 (Ky.1967); *Commonwealth, Department of Highways v. Graham,* 410 S.W.2d 619 (Ky. 1966).

In the instant case, without any explanation by Silver, Hibler could not reasonably foresee that a "blindman" operating a motor vehicle as a dangerous instrumentality on this large highway would smash into Turner's car. Silver's conduct was an unforeseeable intervening cause as a matter of law.

The trial court properly granted Hibler summary judgment.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs in result.

HERNANDEZ, J., dissents.

HERNANDEZ, Judge (dissenting).

I respectfully dissent. In my opinion the trial court erred in granting the third party defendant, David E. Hibler's motion for summary judgment. There were several issues of material fact about which reasonable minds could differ and were for the jury to resolve, to-wit: (1) Did the defendant, Hibler, run out of gas; (2) was the defendant, Hibler, negligent if he did in fact run out of gas; (3) if the defendant, Hibler, was negligent was his negligence the proximate cause of the injury to the plaintiff; (4) was the defendant, Silver, contributorily negligent; (5) if the defendant, Silver, was negligent was his negligence the sole proximate cause of the injury to the plaintiff. The law on the subject is so well established that the citation of authority is not necessary.

587 P.2d 973

STATE of New Mexico,
Plaintiff-Appellee,

v.

Danny R. COE, Defendant-Appellant.

No. 3639.

Court of Appeals of New Mexico.

Oct. 17, 1978.

Writ of Certiorari Denied Dec. 4, 1978.

Hank Farrah, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Santa Fe, Charlotte Hetherington Roosen, Asst. Atty. Gen., Albuquerque, for plaintiff-appellee.

OPINION

HENDLEY, Judge.

Convicted of child abuse resulting in death contrary to § 40A–6–1(C), N.M.S.A. 1953 (2d Repl. Vol. 6, 1972, Supp.1975) defendant appeals. He asserts two grounds for reversal: (1) failure of the trial court to grant a directed verdict based on insufficient evidence; (2) whether § 40A–6–1(C), supra, is unconstitutional. We affirm.

Substantial Evidence

Defendant asserts that at the time of his motion for dismissal the state had failed to offer any evidence that defendant either abused the child or had any reason to

be aware that the child was being abused. We disagree.

The evidence established that the child was abused; that defendant was living with the child and the child's mother, Esther Smith; that defendant abused the child; that defendant was alone with the child when it became unconscious; and, that the abuse resulted in death. The medical evidence supports the conclusion indicating child abuse and not injuries from falling down the stairs. *State v. Adams*, 89 N.M. 737, 557 P.2d 586 (Ct.App.1976).

Constitutionality of § 40A–6–1(C), supra.

Defendant was charged and convicted only under § 40A–6–1(C)(1) and (2), supra. Consequently, he has standing to challenge only those particular sections. *State v. Herrod*, 84 N.M. 418, 504 P.2d 26 (Ct.App. 1972). Therefore, any contention by defendant that § 40A–6–1(C)(3), supra, is vague will not be considered.

Defendant maintains that § 40A–6–1(C), supra, is unconstitutionally vague so as to violate due process. *State v. Najera*, 89 N.M. 522, 554 P.2d 983 (Ct.App.1976) held that a statute violates due process "* * * if it is so vague that persons of common intelligence must necessarily guess at its meaning * * *." The underlying doctrine is one of notice and fair warning as to the nature of the proscribed activity. *State v. Marchiondo*, 85 N.M. 627, 515 P.2d 146 (Ct.App.1973). In determining questions of vagueness that court considers the statute as a whole. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct.App.1972).

Section 40A–6–1(C), supra, is not vague. It clearly sets forth and segregates the type of conduct proscribed by the law. It contains specific sections on neglect, abandonment, and abuse. Each section contains its own definition. Section 40A–6–1(C), supra, defines *abuse* as conduct which:

> "* * * consists of a person knowingly, intentionally, or *negligently*, and without justifiable cause, causing or permitting a child to be:
>
> "(1) placed in a situation that may endanger the child's life or health; or
>
> "(2) tortured, cruelly confined or cruelly punished; or
>
> "(3) exposed to the inclemency of the weather.
>
> "Whoever commits abuse of a child is guilty of a fourth degree felony, unless the abuse results in the child's death or great bodily harm, in which case he is guilty of a second degree felony." [Emphasis added].

Reasonable adults of common intelligence would have no difficulty in ascertaining the type of conduct proscribed by the statute and the type not so restricted. Defendant's contention, that because of its negligence requirement the statute covers any and all harm that might befall the child, is without substance. *State v. Lucero*, 87 N.M. 242, 531 P.2d 1215 (Ct.App.1975), held that § 40A–6–1, supra, to be a strict liability statute. *State v. Adams*, 89 N.M. 737, 557 P.2d 586 (Ct.App.1976) sustained a conviction of child abuse resulting in death upon a negligence theory where the father had knowledge of the child abuse and failed to take any action to halt that abuse.

The statute then does not apply to ordinary situations where a child is injured, but only to those where the parent performs or fails to perform some abusive act. The statute requires *abuse* and not mere normal parental action or inaction. The statute gives fair warning to any reasonable person that child abuse is prohibited and punishable behavior.

In construing legislative enactments *State v. Pacheco*, 81 N.M. 97, 463 P.2d 521 (Ct.App.1969) stated:

> "Every presumption is to be indulged in favor of the validity and regularity of legislation, and it will not be declared unconstitutional, unless the court is satisfied beyond all reasonable doubt that the Legislature went outside the Constitution in enacting it. [Citations omitted]."

The legislature in enacting § 40A–6–1(C)(1) and (2), supra, acted within its province to protect abused children. The legislature did not act outside its constitutional limits.

Defendant's contention that the punishment under this statute is cruel and unusual is without merit. It is based on matters which are not a part of this case.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concurs.

587 P.2d 1334

ALTO VILLAGE SERVICES CORPORATION, Petitioner-Appellant,

v.

NEW MEXICO PUBLIC SERVICE COMMISSION, Respondent-Appellee.

No. 11548.

Supreme Court of New Mexico.

Nov. 9, 1978.

Olmsted & Cohen, Charles D. Olmsted, Santa Fe, for petitioner-appellant.

Toney Anaya, Atty. Gen., Leonard A. Helman, David S. Cohen, Asst. Attys. Gen., Santa Fe, for respondent-appellee.

OPINION

FEDERICI, Justice.

Upon rehearing, the original opinion is withdrawn and this opinion substituted therefor.

This is an appeal to this Court pursuant to § 68–9–7, N.M.S.A.1953 (Repl.1974), from a judgment of the Lincoln County District Court affirming an order of defendant-appellee New Mexico Public Service Commission (Commission). The order established the rates plaintiff-appellant Alto Village Services Corporation (Alto) shall charge its several classes of customers for water utility services within the Alto Village Subdivision in Lincoln County, New Mexico (Subdivision). The service rate order of the Commission was entered following two hearings

held before it, and the order was reviewed and affirmed by the district court.

Alto is a New Mexico corporation engaged in the business of producing, distributing and selling water within the Subdivision, which consists of 940 lots and the Alto Lakes Golf and Country Club.

On January 26, 1976, Lakeside Corporation transferred to Alto 501.94 acre feet of water rights and the entire Subdivision water system which had an original cost value of $1,023,256.21. The water rights alone had a value of $501,940.00. Although Alto's water plant and system were built to serve all 940 lots of the Subdivision, as well as the golf course and country club at the time of the transfer, it was actually serving the golf course, the country club and metered residences on 140 lots throughout the entire Subdivision. It was anticipated that by the year 1981, an additional 60 homes would have been added for a total of 200 residential customers.

The original cost of Alto's "water plant in-service" on December 31, 1975 was $1,023,256.21. Accumulated depreciation and amortization deductible from that amount was $109,620.99. After adding cash working capital, materials and supplies, and prepayments in the total amount of $11,714.48, Alto's "net original cost rate base" was $925,349.70. Its "fair value rate base" was $1,272,365.61. Although all of Alto's water plant is "in-service" the Commission found that the "whole system is not needed to serve the present number of customers." That is, during the five years from 1976 to 1981, only 32.52% of Alto's water plant will be "used and useful" to serve the customers and the golf course and the country club. Accordingly, the Commission concluded that Alto's "used and useful," test-year, original cost rate base is $308,828.65 and its "used and useful" test-year reproduction cost rate base is $421,678.23.

Alto's annual net operating income after payment of test-year operation and maintenance, depreciation and amortization, and tax costs under its proposed service rates would be $57,895.03. The Commission found that an annual net operating income in the amount of $27,799.03 (9% rate of return on Alto's "used and useful" original cost rate base of $308,828.65 and a 7.61% rate of return on Alto's "used and useful" fair value rate base of $421,768.23) is "just and reasonable." Based upon the foregoing and the recommendation of its staff, the Commission set the monthly rates to be charged by Alto to its customers and to the Golf and Country Club.

On appeal Alto contends that:

(1) The finding of the Commission that only 32.52% of Alto's water plant was currently "used and useful" is not supported by substantial evidence and the overwhelming weight of the evidence supports Alto's requested finding that 75% of its water plant was currently "necessary, used and useful" in furnishing water services to its customers, and

(2) The finding of the Commission that a net return on "used and useful" rate base of $27,799 is just and reasonable is not supported by substantial evidence, and the overwhelming weight of the evidence supports Alto's request for service rates that will generate a net return on "used and useful" rate base of at least $57,895 from the golf course and 200 residential customers.

It is undisputed that the original cost of Alto's water plant actually "in service" as of December 31, 1975 (end of the test year) was $1,023,256, and that, after deducting accumulated depreciation and amortization, and adding cash working capital, materials, supplies and prepayments, the value of Alto's "net original cost rate base" was $925,349. Nor is it disputed that the "fair value" of Alto's rate base was $1,272,365. What is challenged by Alto is the Commission's determination that only 32.52% of Alto's "in-service" water plant is currently "used and useful" to serve existing residences, the country club and the golf course

within the Subdivision. Alto contends that the value of its existing plant which is actually "necessary, used and useful" to currently serve these customers, after deducting the value or cost of excess capacity is 75% of the total value, whether determined on a fair value or original cost basis.

It is settled in this jurisdiction that on appeal from administrative bodies the questions to be resolved are restricted to whether the Commission acted fraudulently, arbitrarily or capriciously, whether the Commission order was supported by substantial evidence, and whether the action of the Commission was within the scope of its authority. *Llano, Inc. v. Southern Union Gas Company*, 75 N.M. 7, 399 P.2d 646 (1964). Alto does not contend that the Commission acted fraudulently or outside the scope of its authority. Rather, Alto claims that the Commission refused to give any weight to Alto's "used and useful" testimony, and that, therefore, the Commission's order is arbitrary and not supported by substantial evidence. Alto contends further that the service rates fixed by the Commission upon the basis of those findings are arbitrary.

Alto does not object to the amount of the rate of return or the type of rate base set by the Commission to which its percentage rates of return were matched. Alto does object to the Commission's determinations of the rate base values and therefore to the Commission's quantification of the return requirement and the service rates fixed by it. There is no dispute on the Commission's valuations of Alto's water rights and plant. There is a dispute concerning the portions of those values allowed by the Commission in Alto's rate bases designated as "used and useful."

Sterling Freeman, a graduate civil engineer and former chief engineer at the El Paso Water Utility, testified for Alto. Mr. Freeman determined the percentage of Alto's water plant which would be "used and useful" (i. e., actually needed to furnish water services to the residences, golf course and country club) during the five years immediately following December 31, 1975. For purposes of his study, Mr. Freeman assumed a beginning population of 140 residences and a period-ending population of 200, an increase of 12 new residences per year for five years, which corresponded to the Commission's calculation. Mr. Freeman noted four items which could be reduced and still permit the plant to serve 200 customers plus the golf course.

While he nevertheless believed that all existing water rights and plant, without any reduction, were "necessary to serve the property covered by Alto's application to the Commission," Mr. Freeman concluded "that 75% of the total utility plant is *used and useful* and that without such 75% the 200 customers and the golf course simply could not be properly served."

The only other witness who testified as to what part of Alto's existing water rights and plant were "used and useful" was Commission staff rate analyst, Robert R. Johnson. He made no engineering analysis to determine how much of Alto's existing water rights and plant were "actually needed to serve the 200 customers that we have been talking about." Mr. Johnson, after lengthy direct examination and cross-examination, concluded that in his opinion Alto's water plant was overbuilt in relation to the number of customers and concluded that 32.52% of the existing water rights and plant were "used and useful" for serving Alto's customers during the period of time that the service rates fixed by the Commission would be in effect.

While we have not set out in full the complete testimony of the witnesses, we have set forth sufficient evidence to show that the testimony of the expert witnesses was at complete variance with reference to the percentage of Alto's water plant which would be "used and useful." On this issue the Commission apparently accepted only the testimony of its own rate analyst and

the recommendations of its staff and gave no weight to the testimony presented by Alto. The rule is well established in this jurisdiction that the testimony of witnesses, whether interested or disinterested, cannot arbitrarily be disregarded by the trier of the facts unless any of the following appear from the record: (a) that the witness is impeached; (b) that the testimony is equivocal or contains inherent improbabilities; (c) that there are suspicious circumstances surrounding the transaction testified to; or (d) that there are legitimate inferences from the facts which cast doubt upon the truth or accuracy of the testimony. *Tauch v. Ferguson-Steere Motor Company,* 62 N.M. 429, 312 P.2d 83 (1957); *Heron v. Gaylor,* 52 N.M. 23, 190 P.2d 208 (1947); *Medler v. Henry,* 44 N.M. 275, 101 P.2d 398 (1940). The rule applies in this case. We do not find in the record anything which even infers that the testimony of witness Freeman comes within the exceptions to the rule. We do not direct appellee to accept the testimony of appellant's witness *to the exclusion* of appellee's witness. We do direct appellee to *weigh all of the evidence* in the case and not arbitrarily disregard particularly important and qualified testimony whether it be a witness for the Commission or a witness for the utility, absent an exception to the rule set forth above.

While the specific question does not appear to have been considered by the courts of this jurisdiction, it nevertheless has been established that whether utility property is "used and useful" and therefore to be included in the rate base is a factual determination. *Idaho Underground Wat. Us. Ass'n v. Idaho Power Co.,* 89 Idaho 147, 404 P.2d 859 (1965); *Kansas Gas & Electric Co. v. State Corp. Com'n,* 218 Kan. 670, 544 P.2d 1396 (1976); *State ex rel. Utilities Com'n v. General Tel. Co. of the S. E.,* 281 N.C. 318, 189 S.E.2d 705 (1972); *Lake Superior District P. Co. v. Public Service Com'n,* 235 Wis. 667, 294 N.W. 45 (1940). Since the matter of "used and useful" utility plant for purposes of establishing a rate base is a factual determination, it must be supported by substantial evidence. *Maestas v. New Mexico Public Service Commission,* 85 N.M. 571, 574, 514 P.2d 847, 850 (1973); *Llano, Inc. v. Southern Union Gas Company, supra.*

Appellee's counsel call our attention to prior opinions of this Court defining substantial evidence and prescribing the function of appellate review relative to substantial evidence and to the indulgence of appellate court in reasonable inferences in support of a judgment. We have no quarrel with the principles announced in those cases. It is equally well established, however, that this Court will declare a judgment or administrative order void when there is a lack of substantial evidence to support it. *Southern Union Gas Co. v. New Mexico Pub. Serv. Com'n,* 84 N.M. 330, 503 P.2d 310 (1972).

In the light of the particular facts in this case, and the testimony presented by appellee, and the law which we deem applicable, we find the Commission's order to be arbitrary, not supported by substantial evidence, and, therefore, void.

IT IS SO ORDERED.

McMANUS, C. J., and EASLEY and PAYNE, JJ., concur.

SOSA, J. (dissenting).

SOSA, Justice, dissenting.

I respectfully dissent.

The findings of the trial court having been based on substantial evidence, I would affirm its decision. The trial court made a specific finding, with which I concur, that the Commission's findings were not unreasonable. The evidence indicated that the plant was overbuilt; therefore, it would be inequitable to saddle the present residents with the costs of maintaining the entire water system when those residents only comprise less than one-fourth of the projected development.

Furthermore, the majority takes the position that the appellant's expert witness' testimony was arbitrarily disregarded by the trier of fact. I cannot agree with this. I firmly believe that although the two expert witnesses' testimony were at a complete variance with each other, the Commission and the trial court viewed the testimony of the two and chose to find for the Commission's witness. This in my mind was not an abuse of their discretion.

I would therefore affirm.

587 P.2d 1338

The STATE BAR of New Mexico, the San Juan County Bar Association, the Unauthorized Practice of Law Committee of the San Juan County Bar Association, John Cain, Joseph A. Palmer and C. C. Koogler, Plaintiffs-Appellees,

v.

GUARDIAN ABSTRACT AND TITLE COMPANY, INC., a corporation, and San Juan County Abstract and Title Company, a corporation, Defendants-Appellants.

No. 11989.

Supreme Court of New Mexico.

Dec. 13, 1978.

Sommer, Lawler & Scheuer, Tom A. Simons, IV, Santa Fe, Clement Koogler, Aztec, for defendants-appellants.

John D. Cain, J. A. Palmer, Flora Vista, for plaintiffs-appellees.

OPINION

EASLEY, Justice.

The parties to this are the same as those in *State Bar v. Guardian Abstract & Title Co.,* 91 N.M. 434, 575 P.2d 943 (1978), to which case we refer for the factual details and the pertinent law. That case was reversed in part and affirmed in part and remanded for the trial court to enter an order consistent with the opinion therein. The trial court entered an order on the mandate, and Guardian appeals from that order. We affirm in part and reverse in part.

Guardian complains that the trial court's order in response to our mandate states the terms of the injunction in "a negative rather than a positive form" in describing what can or cannot be done by Guardian regarding the preparation of forms and the giving of advice to customers. We agree.

We hold that Guardian is authorized to fill in the blanks on statutory forms (statutory forms for warranty deed, special warranty deed, quitclaim deed, mortgage, release and partial release of mortgage; forms for real estate contract [form 103], right-of-way easement, promissory note, VA and FHA mortgages and notes, HUD disclosure-settlement, lender's mortgage and note, affidavits as to debts and liens, lien waiver, surveyor's affidavit, closing statement form allocating the costs of the transaction) and other forms prepared by lawyers only, or which are used in conjunction with the closing of government insured loans.

We further hold that Guardian and the other defendants are permanently enjoined from giving advice to their clients about the legal effect of the language contained in, or the use of, any particular forms, or from choosing between competing forms for their customers.

We reverse the decision of the trial court as contained in paragraphs 1 and 2 of the order on appeal and direct that language be inserted to correspond with the above holdings.

We affirm as to language contained in paragraphs 3 through 5 of the trial court's order which read as follows:

3. From holding himself out to the public as an expert or consultant in the field of closing loans or describe himself by any similar phrase which implies that he has a knowledge of the law.

4. From obtaining more information from the parties than that necessary to fill in the blanks on statutory standardized forms used for company purposes, for the purpose of advising the parties of their rights and the action to be taken concerning those rights.

5. From making a separate additional charge to fill in blanks in the documents mentioned in paragraph No. 1.

The cause is remanded for entry of an amended order.

IT IS SO ORDERED.

PAYNE and FEDERICI, JJ., concur.

587 P.2d 1339

Joseph E. BROSSEAU, Jr., Plaintiff-Appellee,

v.

NEW MEXICO STATE HIGHWAY DEPARTMENT, Defendant-Appellant,

Atchison, Topeka and Santa Fe Railway Company, Defendant-Appellee.

No. 11861.

Supreme Court of New Mexico.

Dec. 21, 1978.

Toney Anaya, Atty. Gen., V. Henry Rothschild, Deputy Chief Counsel, State Highway Dept., Santa Fe, for appellant.

Kegel & McCulloch, W. R. Kegel, Santa Fe, for appellee Brosseau.

Johnson & Lanphere, Bryan G. Johnson, Albuquerque, for appellee Atchison, Topeka and Santa Fe Railway.

OPINION

PAYNE, Justice.

Plaintiff-appellee Brosseau brought this quiet title action to extinguish title to certain property against both the New Mexico State Highway Department and the Atchison, Topeka and Santa Fe Railway Company. The Department filed a motion to dismiss the case on the ground that quiet title actions against the State are barred by the doctrine of sovereign immunity. From denial of that motion by the trial court, the Department brought this interlocutory appeal. By order we affirmed the trial court's decision. However, we granted the State's motion for a rehearing to more fully address the question presented on appeal.

The land which is the subject of this suit had allegedly been used by the Railway for railroad purposes until February 1974. The railway line was rerouted over land conveyed to the Railway by the Highway Department. This land had been condemned by the Department from Brosseau. In return for this conveyance, the Railway allegedly attempted to convey the abandoned property to the Department by quitclaim deed. Brosseau contends that under the federal statute by virtue of which the Railway acquired the right to use this land, the land reverted to him upon abandonment by

the Railway. He further contends that by its attempt to secure a conveyance of the allegedly abandoned property from the Railway, the Department claims an interest adverse to him which operates as a cloud on his title.

The Department contends that §§ 22–14–12 through 22–14–17, N.M.S.A.1953 establish a statutory scheme by which the State can be made a party to a quiet title action. The Department argues that this statutory scheme has the effect of establishing statutory sovereign immunity with respect to quiet title actions which fall outside the scope of § 22–14–12.

Section 22–14–12 provides:

> Upon the conditions herein prescribed for the protection of the state of New Mexico, the consent of the state is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of competent jurisdiction of the state to quiet title to or for the foreclosure of a mortgage or other lien upon real estate or personal property, for the purpose of securing an adjudication touching any mortgage or other lien the state may have or claim on the premises or personal property involved.

The Department contends that because Brosseau's suit does not fall within the language of § 22–14–12, it is barred by the doctrine of sovereign immunity. We do not agree.

Section 22–14–12 was enacted before this Court's decision in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975) in which the doctrine of sovereign immunity was abolished in tort actions against the State. At the time this section was enacted and at the time it was later interpreted to bar quiet title actions against the State which did not fall within its scope, the judicially-created doctrine of sovereign immunity was intact. *Nevares v. State Armory Board*, 81 N.M. 268, 466 P.2d 114 (1969); *Maes v. Old Lincoln County Memorial Commission*, 64 N.M. 475, 330 P.2d 556 (1958). The purpose of § 22–14–12 was to create an exception to that doctrine, rather than to statutorily adopt it.

In *Hicks* this Court rejected the argument that another statutory scheme, §§ 64–25–8 and 64–25–9, N.M.S.A.1953 (Repl.1972) (repealed by Laws 1975, ch. 334, § 18), amounted to a legislative enactment of sovereign immunity. We said:

> [T]hese statutory schemes were in harmony with the common law doctrine of sovereign immunity, but had the effect of lessening, to a certain extent, the oftentimes harsh results of that doctrine. They definitely did not, as argued by defendants, create statutory sovereign immunity.

Id. at 589, 544 P.2d at 1154.

We also said:

> The doctrine of sovereign immunity has always been a judicial creation without statutory codification and, therefore, can also be put to rest by the judiciary. (Citations omitted.) [A]nd all other cases holding that the legislature and not the judiciary is the proper forum to decide the fate of sovereign immunity are expressly overruled.

Id. at 589–90, 544 P.2d at 1154–55.

We hold that § 22–14–12 did not statutorily create sovereign immunity in quiet title actions against the State.

The Department points out that the decision in *Hicks* was limited to sovereign immunity as it applied to tort actions against the State and argues that its rationale should not be extended to quiet title actions. Although *Hicks* did apply only to tort actions, its essential premise was that the doctrine of sovereign immunity was an out-moded, archaic doctrine. We said: "There are presently in New Mexico no conditions or circumstances which could rationally support the doctrine of sovereign immunity." *Id.* at 590, 544 P.2d at 1155.

We can find no reason why the decision in *Hicks* should not be extended to

quiet title actions. A suit to quiet title does not involve a claim for damages. *Chavez v. Gomez*, 77 N.M. 341, 423 P.2d 31 (1967). It does not ask the judiciary to compel the legislative or executive branches to do anything. The plaintiff in such an action does not seek a dollar judgment. He seeks only that it be decided that he, rather than the State, is the owner of some specific property. This issue must be decided at some point if the Department persists in its claim to the land. This land and other similar lands may be idled by the cloud which the State's claimed interest places on title to the property. It is in the public interest that such clouds be removed in order that land be put to its full potential use. *O'Neill v. State Highway Department*, 50 N.J. 307, 235 A.2d 1 (1967).

A further justification for our decision is the fact that Brosseau and others in his position may have no adequate substitute to obtain an adjudication of their property rights as against the claimed interest of the State. An inverse condemnation action under § 22–9–22, N.M.S.A.1953 (Supp. 1975) would not lie if this property was not acquired for a public use. The doctrine of sovereign immunity may not be interposed to bar quiet title actions if its effect is to deny one a remedy for the taking of his property without compensation.

The Department asserts that if the *Hicks* decision is applied to quiet title actions against the State, the prospectivity rule established in that decision should be followed as well.

In *Hicks* this Court held that its ruling abrogating the doctrine of sovereign immunity in tort actions would be applied only to torts which occurred on or after July 1, 1976. The Department contends that if this rule is applied, this suit would be barred because the quitclaim deed which purportedly conveyed this property to the Department was executed before July 1, 1976.

We decline to apply the prospectivity rule. This rule was adopted in *Hicks* because of the unique circumstances posed by subjecting the State to tort liability without providing the State with an opportunity to secure liability insurance coverage and to promptly investigate tort claims made against it. No such considerations are present here.

The decision of the trial court denying the Department's motion to dismiss the case is affirmed and the case is remanded to the trial court for further proceedings.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, EASLEY and FEDERICI, JJ., concur.

587 P.2d 1342

Roberto HERRERA, Appellant,

v.

HEALTH AND SOCIAL SERVICES, Department of the State of New Mexico, Appellee.

No. 3329.

Court of Appeals of New Mexico.

Nov. 7, 1978.

Rehearing Denied Nov. 21, 1978.

Writ of Certiorari Denied Dec. 18, 1978.

Clark De Schweinitz, Santa Fe, and Clifford M. Rees, Espanola, for appellant.

Toney Anaya, Atty. Gen., Carolyn A. Cosner, Sp. Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

LOPEZ, Judge.

Roberto Herrera, appellant, has appealed a decision of the Health and Social Services Department, appellee, denying him benefits under the New Mexico Special Medical Needs Act, § 13–15–1, et seq., N.M.S.A. 1953 (Repl. Vol. 3, pt. 1, 1976). We reverse and remand.

The primary issue on appeal is whether the decision of the appellee was arbitrary and capricious, not supported by substantial evidence, or not otherwise in accordance with the law. Section 13–18–4 F(1), (2), (3), N.M.S.A. 1953 (Repl. Vol. 3, pt. 1, 1976). If this decision is of such a nature, this Court has the power to set it aside. Section 13–18–4 F(1), (2), (3), supra. In order to determine this issue, the secondary issue of whether community property law dictates the definition of "income" as found in Section 352.9, Public Assistance Manual, Vol. II–A, must be decided.

Recitation of the following facts is essential for a clear understanding and determination of this case. Appellant married his present wife in 1942; since that time, they have lived together as husband and wife. Since 1944, appellant has been a teacher in New Mexico and has paid into the New Mexico Educational Retirement Fund. Appellant retired from his teaching job in 1974 and began receiving a pension from the New Mexico Educational Retirement Board at the end of September 1974, retroactive to July 1, 1974, in the sum of $301.29. This retirement pay was later increased to $310.29 and constitutes the sole support for appellant, his wife and two children. It is uncontroverted that appellant earned his pension during the course of his present marriage. On June 28, 1976, as the result of an automobile accident, appellant suffered serious lung injuries requiring the continuous use of supplied oxygen to survive. Consequently, appellant applied for and received assistance under the Special Medical Needs Act, § 13–15–1 et seq., supra. On June 14, 1977, the Rio Arriba County Welfare Office notified appellant that this assistance would be terminated. The sole reason given for this action was that his income exceeded the countable income level allowed under Section 352.9, supra, promulgated for the Special Medical Needs Act. Appellant requested a hearing pursuant to § 13–18–3, supra. Appellee's hearing officer concluded that appellant's pension was community property, that one-half of this pension belonged to appellant's wife, and that consequently appellant was eligible to continue to receive medical assistance under the Special Medical Needs Act. Based upon this conclusion, the hearing officer recommended that appellant's appeal be upheld. However, this recommendation was not followed by appellee's executive director. On October 12, 1977, the director denied the appeal thereby denying appellant continued medical assistance.

This case involves our interpretation of Section 352.9, supra, which reads in part as follows:

> INCOME—To be eligible for the Special Medical Need Program, the eligible individual(s) countable income, as determined below, may not exceed $240 per month for an eligible individual, or $360 for an eligible couple.

By virtue of § 13–15–4 B, supra, appellee has been given the authority to define by regulation exempt and nonexempt income and resources for purposes of establishing eligibility under the Special Medical Needs Act. Section 352.9, supra, was promulgated pursuant to this authority. However, in issuing this regulation, appellee failed to define "income." It is this failure which constitutes the central dispute in this case.

Appellee argues that the plain meaning of income, without regard to com-

munity property principles, should be used in interpreting the regulation and refers us to *Davis v. Commissioner of Revenue*, 83 N.M. 152, 489 P.2d 660 (Ct.App. 1971); *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct.App. 1972); and Webster's Third New International Dictionary for the definition of income. Appellee further contends that, even if community property principles are applied, such an application, although vesting in appellant's wife a present, one-half interest in appellant's income, would not assure the availability of this interest to her. Because this assurance does not exist, appellee argues that appellant's income amounts to $310.29 thereby making him ineligible for continued medical assistance. Appellant argues that community property principles should determine the definition of income and that such a determination results in only one-half of his income being available to him. According to appellant, the consequence of such a situation is that his income amounts to $155.15 and that therefore he is eligible for continued medical assistance. We accept appellant's position and hold that community property law dictates the definition of "income" as found in Section 352.9, supra. We further hold that the resulting definition of "income" in Section 352.9, supra, makes appellant eligible for continued medical assistance under the Special Medical Needs Act.

In so holding, we do not disagree with the law stated in *Davis* and *Orzen* regarding rules of construction of words in regulations and statutes. But we conclude that, with respect to the case at bar, these cases are not controlling and that therefore there is no need to rely on Webster's Dictionary for the definition of income. This conclusion is based upon the fact that in New Mexico property acquired during marriage by either husband or wife, or both, is presumed to be community property. Section 57–4A–6 A, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, Supp. 1975). For the purposes of determining the definition of income in Section 352.9, supra, we rule that the ordinary meaning of income must give way to the recognition of this well established fact.

Applying this ruling to the case at bar, we find that appellant's income is community property. It is undisputed that appellant's income derives solely from his pension. In this jurisdiction, retirement pay is regarded as a mode of employment compensation for services rendered in the past. *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969). Therefore, appellant's pension is employment compensation for services rendered in the past. The record indicates that appellant rendered these services while married to his present wife; therefore, this pension was earned during the course of his present marriage. Under these facts, appellant's pension is presumed to be community property. Section 57–4A–6 A, supra. In absence of proof to the contrary, this presumption stands. *In re White's Estate*, 41 N.M. 631, 73 P.2d 316 (1937); *Carron v. Abounador*, 28 N.M. 491, 214 P. 772 (1923); *Barnett v. Wedgewood*, 28 N.M. 312, 211 P. 601 (1922). The record shows no evidence to rebut the presumption that appellant's income is community property.

In addition, our conclusion that appellant's income is community property is further supported by New Mexico case law. Appellant's sole income is his pension. It has been held that the character of retirement pay is determined by the law of the state where it is earned. If earned in a community property state during marriage, it is community property, and if earned in a non-community property state during marriage, it is separate property. *Otto v. Otto*, 80 N.M. 331, 455 P.2d 642 (1969); accord *LeClert v. LeClert*, supra. Therefore, appellant's income is community property since it was earned both in New Mexico and during his present marriage.

Since appellant's income is community property, appellant's wife has a present, vested, one-half interest in this property, in every respect equal to that of

appellant. *Reed v. Nevins*, 77 N.M. 587, 452 P.2d 813 (1967); *In re Stutzman's Estate*, 57 N.M. 710, 262 P.2d 990 (1953); *Dillard v. New Mexico State Tax Commission*, 53 N.M. 12, 201 P.2d 345 (1948); *In re Miller's Estate*, 44 N.M. 214, 100 P.2d 908 (1940); *In re Chavez Estate*, 34 N.M. 258, 280 P. 241 (1929); *Baca v. Village of Belen*, 30 N.M. 541, 240 P. 803 (1925); *Beals v. Ares*, 25 N.M. 459, 185 P. 780 (1919).

Although appellee agrees that, if applied, community property law vests appellant's wife with one-half present interest in appellant's income, appellee argues that this law does not assure the availability of this interest to her. The fallacy of such an argument can be seen by looking at the statutory scheme governing the community property law in New Mexico. Under § 57–4A–4 A, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, Supp. 1975), the separate debts of appellant's wife may be satisfied out of her one-half interest in the community property. Although the direct import of the provision is to assure that this interest is available to the creditors of appellant's wife, logic necessitates the conclusion that this interest is also guaranteed as available to her since she may contract her own separate debts and choose her creditors. Because of this assurance, it follows that appellant's income, practically speaking, amounts to no more than his present, vested, one-half interest in his pension. Appellee's reliance upon *Lewis v. Martin*, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1969) and *Martinez v. Health and Social Services Dept.*, 90 N.M. 345, 563 P.2d 608 (Ct.App. 1977), as authority for the proposition that community property law does not assure the availability to appellant's wife of her interest in appellant's pension is misplaced. Both those cases dealt with the availability of a mother's interest in community property for purposes of determining A.F.D.C. benefits (Aid to Families with Dependent Children). The special considerations involved in determining A.F.D.C. benefits dictated the results in those cases. No such considerations are present in the case at bar. Therefore, we find that appellant's income under Section 352.9, supra, amounts to $155.15 and that he is eligible for continued medical assistance under the Special Medical Needs Act.

In making such a finding, we note that § 57–4A–8 A, N.M.S.A. 1953 (Repl. Vol. 8, pt. 2, Supp. 1975) gives either spouse alone the full power to manage, control, dispose of and encumber the entire community personal property. However, it does not follow that this power makes the entire community of personal property always available to each spouse. There exists a distinction between the power to manage and control and actual availability. The power provided under § 57–4A–8 A, supra, is based upon the general recognition that marriage is a partnership which is in many ways similar to a commercial partnership. Acting upon this recognition, the legislature determined that community personal property should be subject to the management and control of either spouse alone. Bingaman, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," 5 N.M.L.Rev. 1 (1974). However, the legislature placed limits upon this power by providing that a spouse's one-half interest in the community property would be available to satisfy his or her separate debts. Section 57–4A–4 A, supra. If a creditor sought to collect a spouse's separate debt, the power of the nondebtor spouse to manage and control could conceivably extend only to his or her one-half interest in the community personal property. The power to manage and control must thus yield whenever a creditor seeks to collect a separate debt. Therefore, it does not necessarily follow that the power given by § 57–4A–8 A, supra, makes the entire community personal property always available to each spouse.

Because we believe, from the foregoing statutory construction, that ultimately no more than one-half of the community property is available to each spouse and because the record shows no proof that all of appellant's income is available to him, we hold

that the decision of the appellee was arbitrary and capricious, not supported by substantial evidence, or not otherwise in accordance with the law. By so holding, this Court is not creating any medical program or programs. Cf. *Health & Social Services Department v. Garcia*, 88 N.M. 640, 545 P.2d 1018 (1976). The medical program in the case at bar is still in existence. We are merely defining "income" as it applies to eligibility standards under the Special Medical Needs Act. In arriving at this definition, we note that the legislature declared a state of emergency when it enacted the Special Medical Needs Act. New Mexico Laws 1973, ch. 311, § 7. This declaration indicates an intent to provide medical assistance to individuals like appellant.

This case is reversed and remanded to the appellee to reinstate medical assistance to appellant retroactively and to proceed in a manner consistent with this opinion.

IT IS SO ORDERED.

SUTIN and HERNANDEZ, JJ., concur.

587 P.2d 1347

STATE of New Mexico,
Plaintiff-Appellee,

v.

Charles Ruben GALLEGOS,
Defendant-Appellant.

No. 3666.

Court of Appeals of New Mexico.

Nov. 21, 1978.

OPINION

WOOD, Chief Judge.

The victim was knifed in a fight; defendant appeals his conviction of aggravated battery. Issues listed in the docketing statement, but not briefed, were abandoned. *State v. Ortiz,* 90 N.M. 319, 563 P.2d 113 (Ct.App.1977). Defendant's appellate contention is that statements made by him to the investigating officer were improperly admitted. This contention involves: (1) requirements for admissibility; (2) procedure for admissibility; and (3) propriety of admitting the statements.

Requirements for Admissibility

The statements made by defendant were inculpatory statements. Without considering whether the statements were confessions, we apply the standard for admissibility of confessions to the admissibility of these statements. See *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Two prerequisites, or foundation requirements, for admissibility are: 1) a prima facie showing of voluntariness, *State v. Barnett,* 85 N.M. 301, 512 P.2d 61 (1973); *State v. Watson,* 82 N.M. 769, 487 P.2d 197 (Ct.App.1971); and 2) compliance with the advice of rights required by *Miranda v. Arizona,* supra "to secure the privilege against self-incrimination."

It is, of course, defendant's right to require that these foundational requirements are met. "[A]bsent some contemporaneous challenge" to these foundational requirements in the trial court, an appellate claim that foundational requirements were not met will not be reviewed. See *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), reh. denied, 434 U.S. 880, 98 S.Ct. 241, 54 L.Ed.2d 163 (1977); *State v. Word,* 80 N.M. 377, 456 P.2d 210 (Ct.App.1969). This is no more than the application of procedural rules. Error may not be predicated upon a ruling admitting

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David R. Lee, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Janice M. Ahern, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

evidence unless there was "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context". Evidence Rule 103(a)(1). "To preserve a question for review it must appear that a ruling or decision by the trial court was fairly invoked". N.M.Crim.App. 308; *Melon v. State,* 90 N.M. 787, 568 P.2d 1233 (1977).

Procedure for Admissibility

(a) During the direct examination of the investigating officer, the prosecutor sought to introduce statements made to the officer by defendant. When defendant objected to the admissibility of the statements, the prosecutor claimed that defendant's objection should not be considered because defendant never sought to suppress the statements under Rule of Crim.Proc. 18(c). This rule reads:

> (c) *Time for Filing.* A motion to suppress shall be made within twenty days after the entry of a plea, unless, upon good cause shown, the trial court waives the time requirement of this rule.

Because defendant did not seek suppression of the statements prior to trial, the State claims defendant could not object to admission of the statements at trial. The State relies on *State v. Helker,* 88 N.M. 650, 545 P.2d 1028 (Ct.App.1975), cert. denied, 429 U.S. 836, 97 S.Ct. 103, 50 L.Ed.2d 102 (1976).

State v. Helker, supra, held that the time limitation of Rule of Crim.Proc. 18(c) was proper and did not violate a defendant's constitutional right to be heard on the voluntariness of a confession. *Helker* did not consider whether defendant's objection to the admission of a statement at trial should not be heard if there was no pretrial motion to suppress.

If defendant had affirmatively sought suppression of the statements and had offered evidence to support suppression, the trial court could properly have excluded such evidence and denied the motion to suppress because untimely under Rule of Crim.Proc. 18(c). See *State v. Aragon,* 89 N.M. 91, 547 P.2d 574 (Ct.App.1976). Defendant did not, however, seek to suppress the statements. His trial court claim was a limited claim. Defendant's claim went only to the foundation requirements for the admission of the statements. These foundation requirements were preliminary questions concerning admissibility. Evidence Rule 104(a). These preliminary questions went to evidence being offered by the prosecutor. Defendant's right to be heard on whether the prosecutor had laid a sufficient foundation for admission of the statements was not barred by the fact that defendant had not sought to suppress the statements under Rule of Crim.Proc. 18(c).

(b) We consider the contents of defendant's objection later in this opinion. After objecting, defendant sought, and was permitted, to voir dire the officer. The voir dire was conducted in the presence of the jury. Defendant contends it was plain or fundamental error to conduct the hearing in the presence of the jury.

Defendant has presented nothing which demonstrates fundamental error, as that term is explained in *State v. Rodriguez,* 81 N.M. 503, 469 P.2d 148 (1970). His plain error claim is necessarily predicated on Evidence Rule 103(d), which requires notice of plain errors affecting substantial rights even though the asserted errors were not brought to the attention of the trial court. Defendant did not ask the trial court to exclude the jury during the voir dire of the officer, and no question concerning the jury's presence during the voir dire was raised in the trial court.

Defendant asserts there were two errors, either of which amounted to plain error.

First, defendant relies on Evidence Rule 104(c) which states: "Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury." The voir dire of the officer was a hearing on the admissibility of defendant's inculpatory statements. Since the hearing

was in the presence of the jury, Evidence Rule 104(c) was violated. This error did not, however, adversely affect any substantial right of defendant because defendant's statements were properly admitted. The violation of Evidence Rule 104(c) was not plain error because the violation did not result in a miscarriage of justice and the violation did not affect the fairness or integrity of the trial. *State v. Marquez,* 87 N.M. 57, 529 P.2d 283 (Ct.App.1974). Compare *State v. Lara,* 88 N.M. 233, 539 P.2d 623 (Ct.App.1975) with *State v. Baca,* 89 N.M. 204, 549 P.2d 282 (1976).

Second, defendant asserts that he had a right, under the Constitution, to have a hearing on the voluntariness of his statements out of the presence of the jury. He relies on *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964). Assuming at this point there was a "voluntariness" issue, *Pinto v. Pierce,* 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967), reh. denied, 389 U.S. 997, 88 S.Ct. 462, 19 L.Ed.2d 499 (1967) pointed out that *Jackson v. Denno,* supra, did not so hold. *Pinto v. Pierce* states:

> This Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances. *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), held that a defendant's constitutional rights are violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing. A confession by the defendant found to be involuntary by the trial judge is not to be heard by the jury which determines his guilt or innocence. Hence, because a disputed confession may be found involuntary and inadmissible by the judge, it would seem prudent to hold voluntariness hearings outside the presence of the jury. In this case, however, the confession was held voluntary and admitted as evidence suitable for consideration by the jury. In addition, there is no claim that because the hearing was held in the presence of the jury it was inadequate or had any other unfair consequences for the respondent.

See *State v. Soliz,* 79 N.M. 263, 442 P.2d 575 (1968).

If there were a voluntariness issue, there was no error and, thus, no plain error, in holding the hearing in the presence of the jury because the statements were properly admitted.

(c) Defendant complains, on appeal, of the failure of the trial court to instruct the jury on the voluntariness of defendant's statements. This complaint does not involve a requested instruction which was refused. See *State v. Zamora,* 91 N.M. 470, 575 P.2d 1355 (Ct.App.1978). Defendant did not request that the jury be instructed on the voluntariness of his statements. See U.J.I.Crim. 40.40. Not having requested such an instruction, the trial court did not err in failing to give the instruction. Rule of Crim.Proc. 41(d).

Propriety of Admitting the Statements

(a) When the prosecutor asked the officer about defendant's statements, defendant objected:

> "Your Honor, I'm going to object to this. There has not been a proper foundation laid for this, Judge. He should know the foundation."

This "foundation" objection did not inform the trial court as to what requirement for admissibility was lacking. When the prosecutor commented that the statements were defendant's admissions, defendant stated:

> "There is something known as *Miranda,* Judge. I think we have a uniform cop, may I voir dire?"

Permission to voir dire was granted. Defendant's voir dire went only to whether defendant was free to leave at the time he made the statements to an armed, uniformed officer.

Defendant recognizes, on appeal, that neither the objection in the trial court nor the voir dire proceedings directly raised a

"voluntariness" claim. Defendant's brief states: "Defense counsel did raise the issue of compliance with *Miranda* and thereby impliedly the issue of voluntariness." We disagree.

The advice of rights required by *Miranda* was to secure the privilege against self-incrimination. This requirement applies regardless of the voluntariness of the statement and, thus, is a requirement separate from the voluntariness requirement. *Michigan v. Tucker,* 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974) stated that "*Miranda,* for the first time, expressly declared . . . that a defendant's statements might be excluded at trial despite their voluntary character under traditional principles." *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) states:

> In the *Miranda* case this Court promulgated a set of safeguards to protect the there-delineated constitutional rights of persons subjected to custodial police interrogation. In sum, the Court held in that case that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary. See *Michigan v. Tucker,* 417 U.S. 433, 443, 94 S.Ct. 2357, 2363, 41 L.Ed.2d 182.

The *Miranda* requirements for admissibility and the "voluntariness" requirements for admissibility are separate concepts.

Defendant's objection to admissibility of his statements went only to the *Miranda* requirements. No issue as to voluntariness was raised in the voir dire. No ruling by the trial court, concerning voluntariness, was fairly invoked. N.M.Crim. App. 308.

(b) Defendant contends that "the trial court did not make a determination of voluntariness," as required by *Jackson v. Denno,* supra. Our answer is that no issue as to voluntariness was raised either by defendant's *Miranda* objection or by defendant's voir dire of the officer. After this voir dire was concluded, the prosecutor asked a series of *Miranda* foundation questions, after which defendant's statements were admitted without objection by defendant. After these questions by the prosecutor, the trial court was never asked to rule, and never made an express ruling, on the admissibility of the statements—either under *Miranda* or on the basis of voluntariness. There being no objection from defendant after the prosecutor's foundation questions, and no motion to strike the officer's testimony concerning the statements, error cannot be predicated upon the absence of an affirmative ruling by the trial court concerning voluntariness. Evidence Rule 103(a)(1).

(c) Defendant asserts that his statements were admitted without a showing of compliance with the *Miranda* requirements. There are several answers to this claim. 1. After the prosecutor's foundation questions, no objection was made to the admission of the statements and no motion to strike was made. 2. The foundation questions asked by the prosecutor show that defendant's first statement, an admission that he had been fighting, was made when the officer was attempting to learn what had occurred and who was involved. *Miranda* states: "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." The *Miranda* warnings were not applicable to this first statement. *State v. Chambers,* 84 N.M. 309, 502 P.2d 999 (1972). 3. After defendant admitted he had been fighting, he was searched but nothing was found on his person. A bloody knife was found on the ground nearby. Defendant was then placed under arrest and given the *Miranda* advice of rights. The officer asked defendant "if this was the knife he was using." "He said yes." This was the second statement. Defendant states:

"There is no testimony or showing that the defendant indicated he understood those [*Miranda*] rights and wished to waive them." We agree, but this does not aid defendant. No issue as to lack of understanding of his rights or as to lack of waiver of those rights was ever raised in the trial court. Compare *State v. Burk,* 82 N.M. 466, 483 P.2d 940 (Ct.App.1971), cert. denied, 404 U.S. 955, 92 S.Ct. 309, 30 L.Ed.2d 271 (1971). This claim of defendant, similar to the claim of psychological coercion in *State v. Harrison,* 81 N.M. 623, 471 P.2d 193 (Ct.App.1970), was not raised in the trial court and, thus, presents no issue for review.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

587 P.2d 1352

STATE of New Mexico, Plaintiff-Appellee,

v.

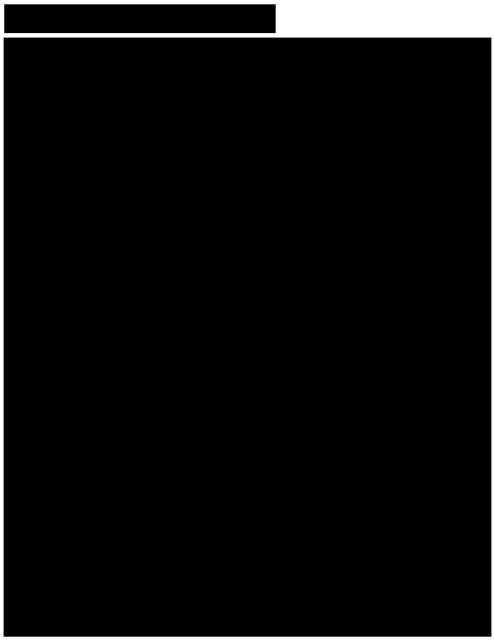
Charles DAVIS, Defendant-Appellant.

No. 3492.

Court of Appeals of New Mexico.

Nov. 21, 1978.

Writ of Certiorari Denied Dec. 15, 1978.



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

Toney Anaya, Atty. Gen., Donald D. Montoya, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of conspiring to have a public officer or public employee solicit or accept a bribe, defendant appeals. We reverse because the evidence is insufficient to sustain the conviction. We review the pleadings and the evidence to show what was *not* submitted to the jury, and to illustrate the limited charge that was submitted. We also review the evidence to show its insufficiency as to the limited charge submitted.

The object of the alleged conspiracy involved a public officer or public employee. That public officer or public employee was Ortiz who was executive director and chairman of the Employment Security Commission. Cottrill was in the insurance business. Davis was an acquaintance of both Ortiz and Cottrill.

There are two statutes involving the bribery of a public officer or public employee. Section 40A–24–1, N.M.S.A.1953 (2d Repl. Vol. 6) states bribery *of* such an official:

> [C]onsists of any person giving or offering to give, directly or indirectly, anything of value to any public officer or public employee, with intent to induce or influence such public officer or public employee to:
>
> * * * * * *
>
> D. execute any of the powers in him vested; or
>
> E. perform any public duty otherwise than as required by law . . . .

Section 40A–24–2, N.M.S.A.1953 (2d Repl. Vol. 6) states that bribery *by* such an officer:

> [C]onsists of any public officer or public employee soliciting or accepting, directly or indirectly, anything of value, with intent to have his decision or action on any question, matter, cause, proceeding or appointment influenced thereby, and which by law is pending or might be brought before him in his official capacity.

The crime of conspiracy is defined in § 40A–28–2, N.M.S.A.1953 (2d Repl. Vol. 6) to consist "of knowingly combining with another for the purpose of committing a felony". For there to be a "knowing combination", there must be a common design or agreement which may be no more than a mutually implied understanding. This mutually implied understanding may be established by circumstantial evidence. *State v. Thoreen*, 91 N.M. 624, 578 P.2d 325 (Ct.App. 1978).

There is evidence that Cottrill sold bogus workmen's compensation insurance policies to the State. He also sold a valid policy insuring the Economic Security Commission Building and a valid policy of "police professional liability" insurance covering a number of political subdivisions. Other than as evidentiary items, neither the validity nor invalidity of these policies was involved in the subsequent criminal proceedings.

There is evidence that Davis solicited, and Cottrill agreed to pay to Davis, a portion of Cottrill's commissions on the insurance policies. The evidence is uncontradicted that Cottrill did pay money to Davis. Most of these payments were made soon after Cottrill received payment from the State in connection with the insurance policies. According to Cottrill, these payments were in exchange for Davis' "influence" in connection with State insurance business and also, according to Cottrill, the payments were for Davis and Ortiz.

There is evidence that Davis solicited, and Cottrill agreed to, a loan of $10,000. This loan was to Davis but was for the benefit of Ortiz. According to Cottrill, he made the loan "to continue doing business and keep the ongoing relationship".

The grand jury indictment, subsequently quashed, see *Davis v. Traub*, 90 N.M. 498, 565 P.2d 1015 (1977), charged six offenses against Davis and Ortiz. Five of the counts charged bribery *by* Ortiz, aided and abetted by Davis, in violation of § 40A–24–2, supra. Four of these five counts involved payments made in connection with insurance policies; one involved the $10,000 loan. The only charge in the indictment involving bribery *of* a public officer or public employee in violation of § 40A–24–1, supra, was a conspiracy count. The conspiracy count charged that Ortiz and Davis combined with Cottrill for the purpose of violating either § 40A–24–1, supra, or § 40A–24–2, supra.

After the grand jury indictment was quashed, a criminal information was filed against Ortiz and Davis. The information had five counts. Four of the counts charged bribery *by* Ortiz, aided and abetted by Davis, in violation of § 40A–24–2, supra. One of the four counts went to the $10,000 loan. These four counts were among the five substantive counts of the quashed indictment.

The fifth count of the information, a conspiracy charge, enlarged the conspiracy charged in the indictment by charging a conspiracy between Davis and Ortiz or, alternatively, a conspiracy between Ortiz, Davis, and Cottrill. The conspiracy charged was to violate either § 40A–24–1, supra, or § 40A–24–2, supra.

Subsequently an amended criminal information was filed. The counts were now down to four. Three of the counts charged Ortiz and Davis of violating § 40A–24–2, supra. The fourth count charged conspiracy, either between Ortiz and Davis, or between Ortiz, Davis, and Cottrill, to violate § 40A–24–2, supra.

The case went to trial on the four counts of the amended criminal information. As amended, there was no charge of violating § 40A–24–1, supra. The conspiracy charged in the amended information still alleged in the alternative as to the participants in the conspiracy; however, the charged conspiracy no longer alleged a conspiracy *to* bribe Ortiz. The alleged conspiracy was a conspiracy to have Ortiz demand or accept a bribe.

At the close of the State's case-in-chief, the trial court dismissed two of the four counts being tried. These dismissals involved the payments made by Cottrill in connection with the insurance policies. After these dismissals, the alleged "kickback" scheme in connection with Cottrill's insurance commissions was no longer in the case. After these dismissals, two charges remained—a bribery charge against Ortiz and Davis in connection with the $10,000 loan, and a conspiracy charge against Ortiz and Davis. In addition, the trial court dismissed the conspiracy charge against Ortiz.

As a result of the dismissals referred to in the preceding paragraph, only three charges were submitted to the jury. One of the three charges accused Ortiz of soliciting or accepting the $10,000 loan in violation of § 40A–24–2, supra, and one charge accused Davis of aiding and abetting Ortiz. The jury acquitted Davis and Ortiz of these charges. The third charge submitted was the conspiracy charge, modified to reflect the dismissal of that charge against Ortiz.

The conspiracy charge submitted to the jury was that Davis and Cottrill agreed to have Ortiz solicit or accept the $10,000 loan.

The jury convicted Davis of this charge. We quote the instruction in its entirety because it aids in understanding the contentions of the parties on appeal.

The instruction reads:

For you to find the defendant Charles Davis guilty of knowingly combining with Richard M. Cottrill for the purpose of committing the crime of demanding or receiving a bribe by a public officer or public employee as charged in Count IV of the Amendment Information, the State must prove to your satisfaction and beyond a reasonable doubt each of the following elements of the crime:

1. That Rudy A. Ortiz was a public officer or public employee.

2. The defendant Rudy A. Ortiz did solicit or accept, directly or indirectly, a thing of value, a $10,000.00 loan, with the intent to have his decision or action on any question, matter, cause, proceeding, or appointment influenced thereby.

3. That there was pending before Rudy Ortiz at the time in question a decision or action on any question, matter, cause, proceeding, or appointment which might be brought before him in his official capacity, to wit: the granting of insurance business of the State to Richard M. Cottrill.

4. That the defendant Charles Davis and Richard M. Cottrill by words or acts agreed together to have Rudy Ortiz solicit or accept, directly or indirectly, a thing of value, to wit: a $10,000.00 loan with the intent that his decision on said matter would be influenced thereby.

5. That the defendant Charles Davis and Richard M. Cottrill had the specific intent to commit the crime of demanding or receiving a bribe by a public officer or public employee.

6. That this agreement was entered into between May 1975 and January 30, 1976.

Our conspiracy statute, § 40A–28–2, supra, does not require an overt act in connection with the conspiracy. Conspiracy in New Mexico is complete when the prohibited agreement is reached. See 1 Wharton's Criminal Law & Procedure (Anderson), § 86 (1957). Thus, it is puzzling that the conspiracy instruction required the jury to find that *Ortiz* committed bribery by, in effect, violating § 40A–24–2, supra. See paragraphs 2 and 3 of the conspiracy instruction.

Davis contends that having acquitted Ortiz of the substantive charge of violating § 40A–24–2, supra, it was inconsistent for the jury to find that Ortiz did commit that offense in connection with the conspiracy. This argument is not predicated on an inconsistency, generally, between a substantive offense and a conspiracy to commit the substantive offense. Rather, Davis' contention is based on an asserted inconsistency as a result of the conspiracy charge submitted to the jury in this case. We do not answer this contention; however, see *State v. Leyba*, 80 N.M. 190, 453 P.2d 211 (Ct.App.1969) and *United States v. Lester*, 363 F.2d 68 (6th Cir. 1966).

Davis points out that § 40A–28–2, supra, requires a combination of persons "for the purpose of committing a felony". Once the conspiracy charge against Ortiz was dismissed, no public officer or public employee was charged with conspiracy to violate § 40A–24–2, supra. Neither Cottrill nor Davis were public officials or public employees; they could not have violated § 40A–24–2, supra. Davis argues that since he could not have violated § 40A–24–2, supra, he could not have conspired to violate that section. We do not answer this contention, but note that the federal statute requiring a conspiracy to commit an offense against the United States has been held to include a conspiracy to cause such an offense to be committed. *United States v. Lester*, supra; see *Joyce v. United States*, 153 F.2d 364 (8th Cir. 1946).

Davis contends the evidence is insufficient to sustain the conviction. The State argues that Davis did not challenge the sufficiency of the evidence. We disagree; Davis' brief states: "There is *no* evidence that Cottrill and Davis conspired 'to have Rudy Ortiz solicit or accept . . . a

$10,000 loan with the intent that his decision on said matter would be influenced thereby' ".

In considering the sufficiency of the evidence we note what is *not* involved. 1. The conspiracy charge does not involve the alleged kickback scheme in connection with Cottrill's insurance commissions; the conspiracy charge involves only the $10,000 loan made by Cottrill. 2. The conspiracy instruction states the agreement must have been entered between May, 1975 and January 30, 1976. These dates mix up the evidence of a conspiracy in connection with the alleged kickback scheme and evidence of a conspiracy in connection with the loan. There is no evidence of a conspiracy in connection with the loan prior to December 9, 1975. 3. The charge was *not* that Cottrill and Davis conspired to *offer* Ortiz the loan as a bribe; the charge was that Cottrill and Davis conspired to have Ortiz solicit or accept the loan as a bribe.

The evidence is uncontradicted that Ortiz had borrowed money from Davis prior to any dealings between Davis and Cottrill in connection with insurance policies and, thus, prior to the time of Cottrill's $10,000 loan. The evidence is uncontradicted that Ortiz was in need of money. Cottrill testified that on October 9, 1975 at the time he made a payment to Davis in connection with an insurance policy, "Mr. Davis stated to me that 'Rudy Ortiz is in desperate need of money and he has to have this money, and that's why we are asking for this money.' "

On December 8, 1975 Cottrill made a payment to Davis in connection with the workmen's compensation insurance policies. On December 9, 1975 Cottrill received and deposited warrants from the Economic Security Commission in payment of the premiums on the workmen's compensation policies. After depositing the warrants, according to Cottrill, Davis went to Cottrill's office and said:

> "Rudy Ortiz is in desperate need of money and he has to have twenty-five thousand dollars immediately, and we would like for you to loan him"—or "I would like for you to loan him some money."
>
> * * * * * *
>
> This discussion lasted for some several minutes. Charlie [Davis] said, "Well, I am going to loan Rudy fifteen thousand dollars. He needs twenty-five. If you will loan him ten thousand dollars, I will give you my note for thirty days, and we will have your money back to you in thirty days from now."

Cottrill loaned $10,000 to Davis to "keep the ongoing relationship". Davis borrowed $15,000 from a bank and loaned $25,000 to Ortiz. These loans were made on December 9, 1975.

Ortiz received $25,000 from Davis and deposited $21,800 of the money into his bank account on December 9, 1975. The evidence is uncontradicted that Ortiz had an overdraft in his bank account of approximately $21,200. According to Ortiz, he received a telephone call from the bank on December 9, 1975 informing him that the overdraft had to be taken care of because an audit of the bank was to start the following day, and the bank did not want that " 'big overdraft on our account, so do something about it.' " According to Ortiz, after receiving the call from the bank, he immediately called Davis and told Davis that he needed $25,000 to cover an overdraft. According to Davis, he contacted Cottrill for a $10,000 loan after receiving Ortiz' telephone call.

■ We assume that the above evidence, together with the evidence of the dealings between Cottrill, Davis, and Ortiz after the loan was made, would support an inference that Cottrill and Davis conspired to loan $10,000 to Ortiz as a bribe, but that is not the charge. The charge is that Cottrill and Davis conspired "to have Rudy Ortiz solicit or accept, . . . a $10,000.00 loan". The evidence does not support such a conspiracy. The evidence is uncontradicted that Ortiz was trying to borrow $25,000 before Cottrill and Davis discussed Cottrill's loan of $10,000. Any agreement between Cottrill and Davis in connection with Cottrill's loan of $10,000 was not an agreement "to have

Rudy Ortiz solicit or accept," because Ortiz had already solicited and by that solicitation had indicated his willingness to accept a loan (his uncontradicted mental state) before Cottrill and Davis discussed a loan to Ortiz.

The judgment and sentence are reversed. Because the reversal is for insufficient evidence, the cause is remanded with instructions to dismiss the conspiracy charge which was submitted to the jury. *State v. Malouff,* 81 N.M. 619, 471 P.2d 189 (Ct.App. 1970).

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

588 P.2d 548

STATE of New Mexico,
Plaintiff-Appellant,

v.

A. Alan GREENE, Defendant-Appellee.

No. 11837.

Supreme Court of New Mexico.

Dec. 21, 1978.

Toney Anaya, Atty. Gen., Lawrence A. Gamble, Asst. Atty. Gen., Santa Fe, Fred Chris Smith, Asst. Dist. Atty., Farmington, for plaintiff-appellant.

Reginald J. Storment, Appellate Defender, Martha A. Daly, Asst. Appellate Defender, Santa Fe, for defendant-appellee.

OPINION

SOSA, Justice.

The State appeals from the trial court's order suppressing statements made by defendant on September 30 and October 4. The issue on appeal is whether the trial court abused its discretion in suppressing defendant's incriminating statements made to a police officer in Tampa, Florida on September 30, 1976, and to a police officer in Farmington, New Mexico on October 4, 1976, as having been made involuntarily. We find that the trial court properly suppressed the two statements of September 30 and improperly suppressed the statement of October 4.

Defendant A. Alan Greene is charged with first-degree murder under § 40A–2–1, N.M.S.A.1953 (Repl.1972). He was arraigned in magistrate court in Farmington on October 4, 1976, at which time he completed a certificate of indigency and requested a court-appointed attorney. A preliminary hearing was held on October 11, 1976. Defendant was arraigned in the District Court of San Juan County, New Mexico on November 1, 1976; an order appointing counsel was entered. On November 18, 1976, defendant filed a motion seeking suppression of all his oral and written statements to officers of the Tampa and Farmington police departments, and suppression of a .22 caliber hand gun alleged by police to be the murder weapon. Following an evidentiary hearing on March 4, 1977, the trial court ordered the suppression of all statements made by defendant to the police officers and ordered the suppression of the gun as evidence.

The State appealed, contending that the trial court's conclusions of law were based upon an erroneous application of legal principles drawn from *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This Court agreed and reversed the March 4, 1977 order suppressing defendant's statements. The cause was remanded to the trial court for reconsideration on application of the rule announced in *State v. Greene*, 91 N.M. 207, 572 P.2d 935 (1977).

On February 8, 1978, the trial court ruled that, considering the totality of the circumstances, the statements made by defendant on September 30, October 4, and October 9, 1976, as well as the .22 caliber gun obtained as a result of those statements, should be suppressed. The trial court found that the State did not meet its burden of showing that defendant had knowingly and voluntarily waived his constitutional rights in giving the statements.

The State now appeals from the February 8, 1978 order insofar as it suppresses the two statements of September 30 and the additional statement of October 4. The State contends that the statements were voluntarily made with a knowing and intelligent waiver of defendant's right to counsel and that the trial court abused its discretion in suppressing the statements.

We discussed the role of the trial court in our earlier opinion. We stated:

> It is for the trial judge in the first instance to hear the evidence as to voluntariness, weigh the conflicts in the evidence presented at the suppression hearing, and determine whether the State has carried its "heavy burden." Where there is evidence to support the ruling of the trial court, we will not find error as a matter of law. (Citation omitted.)

State v. Greene, supra, at 213, 572 P.2d at 941 (1977).

The admission or exclusion of evidence resides within the sound discretion of the trial court, and a trial court's ruling will not be overturned absent a showing of an abuse of discretion. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977); *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct.App.1976); *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). Judicial discretion is abused if the action taken by the trial court is arbitrary or capricious. *State v. Madrigal*, 85 N.M. 496, 513 P.2d 1278 (Ct.App. 1973), *cert. denied*, 85 N.M. 483, 513 P.2d 1265 (1973). Such abuse of discretion will not be presumed; it must be affirmatively established. *State v. Serrano*, 76 N.M. 655, 659, 417 P.2d 795, 797 (1966).

In *State v. Greene, supra*, we announced the proper rule of law to be applied in determining the voluntariness of a waiver of an individual's constitutional rights. We stated:

> A determination of the voluntariness of the subsequent waiver depends not merely on a formal utterance of waiver, but upon all the facts and circumstances of the particular case. *State v. Crump* , 82 N.M. 487, 484 P.2d 329 (1971). These facts and circumstances include the background, experience and conduct of the accused. *State v. Sexton*, 82 N.M. 648, 485 P.2d 928, *cert. denied*, 82 N.M. 639, 485 P.2d 973 (Ct.App.1971).

In *State v. Ramirez*, 89 N.M. at 638, 556 P.2d at 46, the Court of Appeals stated:

> [W]aiver of rights relates to the compliance with the strictures of *Miranda*. *Miranda* requires law enforcement officers, before questioning someone in custody, to give specified warnings and follow specified procedures during the course of an interrogation. Any statement given without compliance with these procedures cannot be admitted in evidence against the accused over his objection. This is true even if the statement is wholly voluntary. *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

In *Mosley*, the United States Supreme Court stated that the *Miranda* requirement that police interrogation cease when the person in custody indicated he wished to remain silent did not create a *per se* proscription of indefinite duration upon further questioning by a police officer, nor impose a blanket prohibition against the taking or admission in evidence of voluntary statements, nor permit a resumption of the interrogation after a momentary cessation. The admissibility of incriminating statements obtained after a person in custody has initially decided to remain silent depends on whether his right to cut off questioning is scrupulously honored. 423 U.S. at 104, 96 S.Ct. 321. In *Mosley*, defendant's incriminating statements were admissible because he had been properly advised of his *Miranda* rights; when he exercised his right to remain silent, the officer immediately ceased the questioning and did not try to resume the interrogation. A second interrogation occurred after a significant time lapse, was directed to a murder not related to the crime with which he was charged, and was conducted at another location in the building by another officer.

This Court has held that a person in custody, having once invoked his right to have counsel present after being advised of his *Miranda* rights, may subsequently waive the right during questioning and give statements which are admissible at a later trial. *State v. Greene, supra*, at 215, 572 P.2d at 943. However, once a defendant invokes either the right to remain silent or the right to retained or appointed counsel, the State bears a heavy burden of demonstrating that a subsequent waiver is knowing and volun-

tary. *See State v. Ramirez, supra; State v. Sanchez,* 85 N.M. 368, 512 P.2d 696 (Ct.App. 1973).

The State bears a heavy burden of establishing such waiver by a preponderance of the evidence. Courts indulge in every reasonable presumption against waiver. *Brewer v. Williams,* 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977).

> [W]aiver of an accused's right to counsel, after such right has been asserted, "may properly be viewed with skepticism." And this "skepticism" finds increased justification if there is no substantial lapse of time between the request for counsel and its alleged waiver. (Footnotes omitted.)

United States v. Grant, 549 F.2d 942, 946 (4th Cir. 1977). An investigating officer's conduct, once the right to counsel is asserted, will be scrutinized with special care for any possibility of imposition, coercion, or unfair suggestion. *United States v. Crisp,* 435 F.2d 354 (7th Cir. 1970) *cert. denied,* 402 U.S. 947, 91 S.Ct. 1640, 29 L.Ed.2d 116 (1971). *See also Collins v. Fogg,* 425 F.Supp. 1339 (E.D.N.Y.1977), *aff'd,* 559 F.2d 1202 (2d Cir. 1977).

In order to determine whether the trial court abused its discretion in suppressing defendant's statements in this case, we examine each statement separately.

The September 30 Statements

Defendant was arrested in Tampa at approximately 4 p. m. on the authority of a New Mexico fugitive warrant. Upon being arrested, defendant was given full *Miranda* warnings; he refused to talk to the arresting officers and invoked his right to remain silent. At about 5 p. m., in the presence of Tampa officers, defendant spoke to officers of the Farmington police department by telephone. After receiving full *Miranda* warnings from the Farmington officers, defendant told them that they would be "wasting their time" until he had consulted counsel because he did not wish to incriminate himself. This was an effective invocation of defendant's right to counsel.

At about 7:10 p. m. a Tampa police detective, who had not been present during the telephone conversation, approached defendant. The detective had been informed that defendant had refused to talk to the arresting officers and that he had asserted his right to remain silent. The detective read defendant his *Miranda* rights. At this time defendant refused to sign a waiver of rights form or to allow the interview to be taped. The detective then began questioning defendant on the murder charge.

Defendant testified that he informed the detective that he did not wish to discuss the murder of his father, that he told the detective that he would enjoy talking to someone, but that he did not want to say anything relating to his father's murder. Thus, defendant for the third time attempted to invoke his right to remain silent. Nonetheless, the detective continued the interrogation. This is unlike the situation in *Michigan v. Mosley, supra,* where the police officer promptly ceased the interrogation when defendant stated he did not want to answer any questions about the crime with which he was charged, and where the defendant at no time asked to consult with an attorney or indicated that he did not want to discuss the unrelated crime. *See also State v. Clemons,* 27 Ariz.App. 193, 552 P.2d 1208 (1976).

The detective also told defendant that he knew he was a homosexual, that he sympathized with defendant's situation, and that he would see if defendant could be moved into a "gay" cell. During the course of this fifty-minute interview, defendant made incriminating statements concerning the murder of his father. Defendant was returned to his cell.

At this time the detective told the jailer to double check defendant because of an alleged statement made by defendant that he might "freak out." All of defendant's clothing was removed. The detective then spoke with one of the arresting officers and told him the statements defendant had made. The arresting officer placed a call to the Farmington police authorities, with whom the Tampa detective spoke for ap-

proximately seven to ten minutes. The Farmington authorities informed the detective that the case they had in New Mexico against defendant was "not all that good." After this call, the detective and arresting officer met with their supervisors for about twenty minutes. They discussed different procedures of interviewing defendant. As indicated in the detective's report, it was decided that he would return and attempt to get defendant to talk in detail of his father's murder.

At about 9:30 p. m. defendant was again brought to the interrogation room. He was given his *Miranda* rights; he indicated he understood them and recited them back to the detective. The detective told defendant that the information he was giving him would help the Tampa police understand why people commit murders and why people violate the law. The detective testified that when defendant became leary of further testimony, he did not cease the interrogation but rather assured defendant that his main concern was in helping him. The detective also testified that when defendant asked him if he would testify against defendant at his trial, he replied that the New Mexico authorities probably could not afford to fly him to New Mexico and that defendant had nothing to worry about.

Defendant testified that the detective told him he should not worry about what he said because the Farmington police officers were a "bunch of idiotic yokels" who did not have enough money to fly the detective to New Mexico to testify. Only after defendant was told that he had "nothing to worry about," that "he had it made," and that whatever he said would in all likelihood never be used against him, did he proceed to make further incriminating statements.

The interview lasted about one hour and twenty-five minutes; at its conclusion, defendant was returned to his cell. Defendant was again stripped and was kept naked for the remainder of the night.

Although the record reflects defendant waived his constitutional rights to assistance of counsel and to remain silent immediately preceding each statement, the record also shows repeated refusals by the interrogating officer to honor defendant's invocations of these rights, the coercive effect of placement of defendant in detention without his clothing in a "straight" cellblock, and misrepresentations regarding the use and effect of his statements.

Considering the totality of the circumstances, we find defendant's initial statements were not the result of an intelligent and knowing waiver of his right to counsel. The State has failed to meet its burden of showing defendant knowingly and voluntarily waived his constitutional rights in giving the statements; therefore, they are inadmissible. We affirm the trial court's order suppressing these two statements.

The October 4 Statement

A more difficult question is presented by defendant's October 4 statement. On October 1, 1976, defendant waived extradition and was turned over to New Mexico and Colorado police officers. He was returned to Farmington on October 3, 1976. Defendant was questioned for three hours by Farmington police officers on October 4. This questioning was preceded by a recitation of *Miranda* rights. Defendant was informed by a Farmington officer that he would have an opportunity to correct a transcription of his oral statement; he was further informed that he would be allowed to consult with an attorney before signing the statement. After being so informed and advised, defendant voluntarily signed a *written* waiver of rights form. He proceeded to make an oral statement which was recorded in shorthand by a secretary and thereafter transcribed. Defendant refused to sign the statement until he could see an attorney.

There is no evidence that defendant was misled by the Farmington officials. At no time was he advised that his statement would not be used against him if he did not sign it. He received no assurances that the statement was for any limited purpose. *See United States v. Massey,* 550 F.2d 300 (5th Cir. 1977). Nothing in the record sug-

gests defendant lacked knowledge or understanding of his rights or that he was not acting voluntarily when he waived those rights. *See State v. Maples,* 82 N.M. 36, 474 P.2d 718 (Ct.App.1970). There is also no evidence that defendant's will was overcome. *See State v. Lopez,* 80 N.M. 130, 452 P.2d 199 (1969). In fact, during the interview, defendant stated: "My lawyer is going to kick my ass for this." The Farmington officer *immediately* told defendant that he could stop the interview at any time. Defendant answered that he was aware of that and said "[b]ut what the hell? Defendant continued to make the statement. We find defendant voluntarily and knowingly waived his right to remain silent and right to counsel when he made the October 4 statement. The trial court erred in suppressing that statement. Therefore, we reverse the trial court's order insofar as it suppressed the October 4 statement.

IS IS SO ORDERED.

McMANUS, C. J., and FEDERICI, J., concur.

EASLEY and PAYNE, Justices, respectfully dissenting.

We dissent to the extent that the majority has upheld the suppression of defendant's statements of September 30. We feel defendant was adequately informed of his rights, fully understood those rights and knowingly waived them before making his statements.

588 P.2d 555

STATE of New Mexico,
Plaintiff-Appellant,

v.

John DOE, Defendant-Appellee.

No. 3710.

Court of Appeals of New Mexico.

Dec. 5, 1978.

Writ of Certiorari Denied Jan. 4, 1979.

Toney Anaya, Attorney General, Charlotte Hetherington Roosen, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

J. Kent Cooper, Gary M. Jeffreys, P. C., Deming, for defendant-appellee.

OPINION

WOOD, Chief Judge.

After the district attorney refused to provide information requested by the Children's Court in connection with a proposed consent decree and after considering a proposed juvenile agreement, the court dismissed the petition for delinquency. The State appealed. We affirm, discussing (1) the district attorney's refusal, (2) right to appeal, (3) the proposed consent decree, (4) court's authority to dismiss, and (5) propriety of the dismissal. References to the Children's Court rules are to the rules effective November 1, 1978.

A petition was filed charging that the child was delinquent and in need of care or rehabilitation. The alleged factual basis was misdemeanor aggravated battery. See § 40A–3–5(B), N.M.S.A.1953 (2d Repl. Vol. 6).

On May 30, 1978 at the child's first appearance, the child denied the allegations of the petition. A proposed consent decree

was presented to the court. This proposal consisted of: (a) a motion for a consent decree signed by the Children's Court attorney, the juvenile probation officer, the child and the child's attorney, and (b) a juvenile agreement signed by the juvenile probation officer, the child and the child's parents. In addition, there was a form of consent decree which would have required the child to obey the terms and conditions of the juvenile agreement.

The proposed juvenile agreement was, primarily, a probation agreement. In reviewing the probation agreement, the court pointed out that the agreement would require the child to "comply with all regulation's [sic] set by the Childrens Court." The court commented: "I do not know the child and do not know what regulations . . . would be appropriate." The court remarked that the information presented to the court was incomplete. The court asked for a pre-disposition report and continued the hearing until additional information could be supplied.

The continued hearing was held on June 8, 1978. At that hearing the court pointed out that the pre-disposition report showed the child had been arrested in November, 1977 on a complaint of possession of stolen property. The court remarked that it had asked the juvenile probation officer for information concerning the stolen property matter, and the probation officer had reported that the district attorney had refused to furnish the information. At the continued hearing, the Children's Court attorney stated that the district attorney still refused to supply information to the court concerning the stolen property matter. The court's order reads:

> [I]t appearing to the Court that the District Attorney's Office had refused to furnish information about the child for the Court's use in this matter, and it further appearing from the Juvenile Agreement that the child was not in need of care of [sic] supervision . . . .
>
> IT IS, THEREFORE, ORDERED that the Motion for Consent Decree be and it hereby is denied; and
>
> IT IS FURTHER ORDERED that conditioned upon restitution being made as stated, the cause be and it hereby is dismissed.

The restitution, stated in the proposed juvenile agreement, was for $142.50 for medical expenses, presumably the cost of medical services to the victim. On appeal, the State asserts the court had no authority to condition dismissal upon restitution. We do not consider this contention because the child makes no complaint concerning the restitution provision.

District Attorney's Refusal

The Children's Court attorney stated the district attorney's position as follows: The child was arrested for receiving stolen property; further investigation revealed an adult had been responsible; the child "was offered total immunity from any prosecution, no record, no nothing, in exchange for his testimony in the prosecution of the adult. He cooperated fully, testified. The matter went to a conclusion and on that basis . . . [the district attorney's] position is that nothing associated with that should be used against" the child. The district attorney seemed to be of the view that making the information available to the court would be a use of the information against the child but, regardless of any such use, supplying the information to the court would violate the district attorney's agreement with the child and "would jeopardize agreements with other potential witnesses later on in other cases".

The propriety of the district attorney's refusal is not an issue in this appeal; rather, the issue involves the consequences of the refusal. However, we point out: (a) immunity is not granted by the district attorney but by the court, *Campos v. State*, 91 N.M. 745, 580 P.2d 966 (1978); (b) prosecutors' agreements are enforced on due process grounds, *State v. Gabaldon*, (N.M. Ct.App.) 585 P.2d 1352 decided September 26, 1978, cert. denied N.M., 586 P.2d 1089 (1978); (c) upon failure to obey a discovery order, the court may enter such order as is appropriate under the circumstances, Rule

of Crim.Proc. 30; and (d) dismissal may be an appropriate order, see *Pizza Hut of Santa Fe, Inc. v. Branch*, 89 N.M. 325, 552 P.2d 227 (Ct.App.1976); *Beverly v. Conquistadores, Inc.*, 88 N.M. 119, 537 P.2d 1015 (Ct. App.1975). Concerning nondisclosure of an informer, Evidence Rule 510 authorizes the trial court to dismiss the charges to which the non-disclosed testimony would relate.

Right to Appeal

The appeal is by the State. It had a right to appeal. Appeals from dispositions on petitions alleging delinquency are governed by the Rules of Appellate Procedure for Criminal Cases. Children's Court Rule 50(c). N.M.Crim.App. 201(a) provides for appeals "permitted by law". Section 13–14–36(A), N.M.S.A.1953 (Repl. Vol. 3, pt. 1) states that any party may appeal from a judgment in the manner provided by law. See *State v. Doe*, 90 N.M. 572, 566 P.2d 121 (Ct.App.1977). The State is a party. Children's Court Rule 9(a).

Proposed Consent Decree

Children's Court Rule 44(a) reads:

(a) *Admissions.* The respondent may make an admission by:

(1) admitting sufficient facts to permit a finding that the allegations of the petition are true; or

(2) declaring his intention not to contest the allegations in the petition.

Children's Court Rule 44(b) states: "A consent decree is an order of the court, after an admission has been made, that suspends the proceedings on the petition".

The child made no admission under Children's Court Rule 44(a)(1); he denied the allegations of the petition. The only statement by the child, or on his behalf, in connection with the proposed consent decree, is found in the motion for a consent decree signed by the child and his attorney. The motion stated "the child does not object to the entrance of a Consent Decree." We consider this statement as declaring the child's intention not to contest the allegations in the petition and, thus, an admission under Children's Court Rule 44(a)(2) sufficient to authorize a consent decree under Children's Court Rule 44(b).

Children's Court Rule 44(f) authorizes the court to do one of three things: (a) accept the proposed consent decree as negotiated, (b) provide for a disposition more favorable to the child, or (c) reject the proposed consent decree. The State contends that the trial court's request for information about the stolen property matter was a "demand for disclosure" and "was an act outside its authority and had no legal effect." Compare *Eller v. State*, 92 N.M. 52, 582 P. 824 (1978).

There are two reasons why the court's request for information was not a violation of Children's Court Rule 44(f).

First, the court could properly call for information in deciding whether to accept or reject the consent decree or provide for a more favorable disposition of the child. Although § 13–14–29, N.M.S.A.1953 (Repl. Vol. 3, pt. 1) does not expressly refer to pre-disposition reports in connection with consent decrees, the import of that section is that pre-disposition reports are relevant in deciding an "appropriate disposition of the case." Calling for information on the child's background is also consistent with the legislative purpose of providing a "program of supervision, care and rehabilitation". Section 13–14–2(B), N.M.S.A.1953 (Repl. Vol. 3, pt. 1).

Second, the State's argument is necessarily based on the view that the court was considering action not authorized by Children's Court Rule 44(f). This view is incorrect. The transcript shows the court was considering the provision of the juvenile agreement which would have required the child to "comply with all regulation's [sic] set by the Childrens Court." The proposed consent decree required the child to obey such regulations. The court remarked: "I do not know the child and do not know what regulations . . . would be appropriate." After this remark, the trial court called for a pre-disposition report and then learned of the district attorney's refusal to provide the requested information.

Since the court was seeking to determine what, if any, restrictions would be appropriate as to the child, the court's request was consistent with the proposed consent decree and was consistent with the action of the court authorized by Children's Court Rule 44(f).

Court's Authority to Dismiss

The State contends the court had no authority to dismiss the petition. We have previously pointed out that the court has authority to dismiss a case for failure to obey a discovery order. This authority exists in Children's Court cases as well as in other proceedings.

The State's contention is based on the view that the court may not dismiss a Children's Court petition absent a statutory grant of authority to dismiss. See *State v. Madrigal*, 85 N.M. 496, 513 P.2d 1278 (Ct. App.1973). This statutory power argument is presented as separate from, and overlooks, the authority of the district court (of which the Children's Court is a division, § 13–14–3(C), N.M.S.A.1953 (Repl. Vol. 3, pt. 1)) to dismiss for noncompliance with its order.

Section 13–14–28(E), N.M.S.A.1953 (Repl. Vol. 3, pt. 1) provides:

> If the court finds that a child alleged to be delinquent or in need of supervision is not in need of care or rehabilitation, it shall dismiss the petition and order the child released from any detention or legal custody imposed in the proceedings.

This action is authority for that portion of the court's order which dismissed the petition on the basis that the child was not in need of care or supervision.

Propriety of the Dismissal

The court dismissed the petition for two reasons—the refusal of the district attorney's office to furnish information and on the basis that the child was not in need of care or supervision. If either reason was correct, the dismissal was proper. See *State v. Ross*, 86 N.M. 212, 521 P.2d 1161 (Ct.App.1974). Here, both reasons for dismissal were correct.

The district attorney had refused to provide information requested by the court in connection with the stolen property matter. This information was relevant to whether the consent decree should be approved and was relevant to the child's need for care or supervision. The district attorney's position was that the information would not be provided. In view of this position, the court was not required to reject the proposed consent decree, conduct an adjudicatory hearing, determine that the child was delinquent, and then take up the question of the child's need for care or supervision. See Children's Court Rule 44(f), supra, and *Doe v. State*, 92 N.M. 74, 582 P.2d 1287 (1978). Knowing that relevant information would not be provided, the court could properly dismiss on the basis of the refusal to disclose.

Nor was the court required to go through the procedural steps stated in the preceding paragraph before dismissing on the basis that the child was not in need of care or supervision. The juvenile agreement, in effect, provided for an unsupervised probation. The child was to reside with an uncle in California and report by mail, each week, to the probation officer in Deming, New Mexico. There are other terms such as allowing visits by the probation officer and complying with regulations set by the probation office in California, but the effect of the agreement, essentially, was an unsupervised probation. The Children's Court attorney represented to the court that these provisions were acceptable to the probation officer.

The record supports the court's ruling that it appeared "from the Juvenile Agreement that the child was not in need of care of [sic] supervision". The State's claim is that there is no substantial evidence to sustain dismissal on this ground; the juvenile agreement is substantial evidence. The State does not contend that it was denied the opportunity to present additional evidence on the child's need for care or supervision; that issue is not before us. When the State's representatives took the position that an appropriate disposition was that the

child be placed on unsupervised probation, the trial court could properly rule that the child was not in need of care or supervision and dismiss the petition.

The order of dismissal is affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

588 P.2d 560

John W. HORT, Plaintiff-Appellant,

v.

GENERAL ELECTRIC COMPANY and Electric Mutual Liability Insurance Company, Defendants-Appellees.

No. 3617.

Court of Appeals of New Mexico.

Dec. 5, 1978.

Writ of Certiorari Denied Jan. 4, 1979.

John P. Faure, Alfred M. Carvajal, P. A., Albuquerque, for plaintiff-appellant.

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

OPINION

SUTIN, Judge.

On November 22, 1976, following a trial on the merits, plaintiff was awarded judgment against defendants in the sum of $3,000.00 for unpaid workmen's compensation, and 40% disability payments bi-weekly for 376 weeks from and after November 22, 1976. This award was subject to modification in accordance with law.

Following this first award, the parties negotiated and agreed to a lump sum settlement. Thereafter, on February 3, 1977 defendants filed a motion to enforce this oral agreement. On March 1, 1977, a second judgment was entered which approved the lump sum agreement and ordered payment of $7,500.00 in full settlement of all plaintiff's claims. This second judgment superceded the first judgment which arose from the trial. Plaintiff appealed the second judgment but was late in filing the appeal. This Court dismissed the appeal and remanded the cause to the district court.

On February 10, 1978, pursuant to Rule 60(b)(4) of the Rules of Civil Procedure [§ 21–1–1(60)(b), N.M.S.A. 1953 (Repl. Vol. 4)], plaintiff filed a petition to vacate the second judgment. Plaintiff sought to declare the second judgment void because it was in contravention of § 59–10–13.5, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1) and therefore beyond the district court's subject matter jurisdiction. Rule 60(b)(4) affords relief to a party if "the judgment is void." Concurrently, plaintiff petitioned to vacate the judgment through an independent action in equity, claiming both lack of subject matter jurisdiction and manifest inequity.

The petition of plaintiff was denied and plaintiff appeals a second time. We affirm.

The second judgment was a non-modifiable final judgment which could have been set aside or vacated in one of two ways: (1) It may be done for the first time on appeal, "OR," (2) if the issue were a lack of subject matter jurisdiction it might be collaterally attacked in the same or other proceedings long after judgment has been entered. Collateral attack might be effectuated under Rule 60(b)(4). *Chavez v. County of Valencia,* 86 N.M. 205, 521 P.2d 1154 (1974). Furthermore, if relief is denied under Rule 60(b)(4) then a party has a right to appeal. These two approaches, direct appeal and collateral attack followed by appeal, are alternative rights, not cumulative rights. Only one right of appeal exists, not two or more.

Parks v. Parks, 91 N.M. 369, 574 P.2d 588 (1978) lays this case at rest. In *Parks,* the plaintiff sought to reopen a judgment under Rule 60(b)(6) long after the time for appeal had expired. Relying upon *Chavez,* the Supreme Court said:

> . . . *Rule 60(b) may not be used to aid counsel who neglect to prosecute an appeal. Rule 60(b)(6) may not be used as*

a substitute for appeal and does not toll the time for appeal. [Emphasis added.] [574 P.2d at 590.]

In the instant case plaintiff's attorney neglected to prosecute the appeal to vacate the second judgment within the requisite time fixed by Rule 3 of the Rules Governing Appeals [§ 21–12–3, N.M.S.A. 1953 (Repl. Vol. 4, 1977 Supp.)]. Upon this jurisdictional problem, the appeal was dismissed as untimely. The judgment below became unassailable. To procure a second appeal, plaintiff now seeks to vacate or set aside the second judgment via Rule 60(b)(4) to acquire a second appeal. "As an apple of Sodom," plaintiff's second appeal turns into ashes. Rule 60(b)(4) lost its flavor and cannot be used as a substitute for the first appeal.

Upon this basis, plaintiff's first point lacks merit.

Plaintiff's second point seeks relief by way of an independent action in equity as provided by Rule 60(b) which states:

> . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . . .

Under this provision, a party can bring an action in equity attacking the validity of a judgment and seeking to enjoin its enforcement. This action may be brought in the court that rendered the original judgment, in another court, or by collateral attack in any proceeding in which the validity of the judgment was in issue. 7 Moore's Federal Practice, ¶ 60.25[3], pp. 311–12 (1978).

But the facts in the instant case are not appropriate for recourse in equity.

Plaintiff seeks equitable relief on the same claim as that under Rule 60(b)(4)—that the second judgment is in contravention of § 59–10–13.5 and therefore void. Of course, it is not. Plaintiff gave this issue a passing fancy in argument. Section 59–10–13.5 reads in pertinent part:

> If, upon petition of any party in interest, the court determines in cases of *total permanent disability* . . . that it is for the best interests of the parties entitled to compensation, . . . the liability of the employer for compensation may be discharged by the payment of a lump sum . . . . [Emphasis added.]

Defendants did not seek a discharge of liability wherein the plaintiff was totally and permanently disabled. See for cases involving § 59–10–13.5, *Briscoe v. Hydro Conduit Corporation,* 88 N.M. 568, 544 P.2d 283 (Ct.App.1975), Sutin, J., specially concurring; *Arther v. Western Company of North America,* 88 N.M. 157, 538 P.2d 799 (Ct.App.1975); *Sanchez v. Kerr McGee Company, Inc.,* 83 N.M. 766, 497 P.2d 977 (Ct.App.1972).

Defendants sought the relief allowed under § 59–10–25 which reads in pertinent part:

> The district court . . . has the right and power to . . . *approve any settlement* . . . of any claim for compensation by any injured workman . . . for the . . . lump sum . . . . [Emphasis added.]

The trial court did approve the "claimed" lump sum settlement agreement.

On appeal, plaintiff also asserts that the trial court could not authorize a lump sum settlement because there was no such agreement, that even if there were such an agreement it is obviously unfair, and that therefore, plaintiff should be afforded equitable relief.

It is established law that equitable relief is discretionary and to be invoked only upon a showing by plaintiff of "exceptional circumstances." *Chavez, supra.* The guidelines for granting equitable relief under Rule 60(b)(6) are equally applicable to an independent action in equity as Rule 60(b) provides a modern statutory restatement of the ancient writs for equitable relief. *Preveden v. Hahn,* 36 F.Supp. 952 (S.D.N.Y.1941); 3 Barron and Holtzoff, Federal Practice & Procedure, §§ 1331, 1332 (Wright Ed. 1958). If a party seeking relief cannot point to "exceptional circumstances," discretion plays no role in a determination of the relief requested. Relief is auto-

matically denied. Unfortunately, the second judgment states that the cause came "on for hearing upon the Stipulation of the parties for a lump sum settlement"; that the court "heard the evidence," and was "advised that the plaintiff entered into the Stipulation for Settlement and consented that Judgment be entered thereon of his own accord . . . ." No record of the hearing was requested and none was made. Plaintiff's response is:

> The facts clearly show that there was no meeting of the minds as to this alleged stipulation.

Plaintiff's argument may have some merit, but we must remind attorneys that we do not sit as a trial court, weigh the evidence and find the facts. This function lies entirely within the province of the trial court. The appellate function is to determine questions of law. *Maisel v. Wholesome Dairy, Inc.,* 79 N.M. 310, 442 P.2d 800 (Ct.App.1968). We have a well-established rule that upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the decision of the trial court, and we indulge such presumption in support of the order entered. *Fisher v. Terrell,* 51 N.M. 427, 187 P.2d 387 (1947).

HERNANDEZ, J. (concurring in result only).

LOPEZ, J., concurs.

588 P.2d 563

James R. LEWIS, Plaintiff-Appellee,

v.

Delora ENGLISH, Defendant-Appellant.

No. 3206.

Court of Appeals of New Mexico.

Dec. 12, 1978.

David H. Pearlman, Albuquerque, for defendant-appellant.

William K. Stratvert and Robert H. Clark, Keleher & McLeod, P. A., James C. Ritchie, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Lewis sued English for damages sustained in a motor vehicle collision in Bernalillo County. English counterclaimed based on the doctrine of last clear chance. The trial court granted Lewis summary judgment on English's counterclaim and English appeals. We affirm.

These parties are in the Court of Appeals for the second time as a result of the same accident. In the first appeal, *Catalano v. Lewis*, 90 N.M. 215, 561 P.2d 488 (Ct.App. 1977), English was represented by Catalano, her natural parent and guardian ad litem. In that case, which was filed in *Valencia County*, English sued Lewis on the theory of last clear chance. Summary judgment in favor of Lewis was affirmed by this Court but affirmance was based upon the fact that English was contributively negligent as a matter of law. In reviewing the evidence presented in *Catalano*, including the affidavit of English's expert witness, we concluded as a matter of law the doctrine of last clear chance was not applicable. However, the opinion stated that:

> . . . If the evidence in the case of *Lewis v. English*, supra, [the instant case], *is supplemented on the issues decided in this case*, this opinion shall not control, otherwise it shall control. . . [Emphasis added.] [90 N.M. at 218, 561 P.2d at 491.]

The purpose of this language was to avoid the doctrine of res judicata and to accord English a second opportunity to proceed against Lewis under the doctrine of last clear chance. It was fair to give plaintiff this benefit because Lewis created two separate and independent actions by filing suit against English in *Bernalillo County* four months after the *Catalano* case had been filed in Valencia county. Had Lewis filed a counterclaim in the *Catalano* action in *Valencia County* a single appeal would have resolved all the issues.

In *Catalano*, the following facts were established:

> 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 zigzagged 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. [90 N.M. at 217, 561 P.2d at 490.]

The solitary question in this appeal is: Did English present supplementary evi-

dence to avoid the conclusion reached in *Catalano* on last clear chance?

Lewis' deposition was the only evidence advanced by English to supplement the record. This deposition testimony was not sufficient to sustain the English counterclaim of last clear chance.

In his deposition, Lewis states that he saw English when he was about 100 yards from the intersection light. English was driving south on Coors Road toward the intersection; Lewis was travelling north at 50 m. p. h. or 73 feet a second. English's car slowed a bit. Lewis then checked the traffic light, and when he looked to the road again, he saw the English car in front of him. As the English car darted in front of him, he simultaneously hit his brakes and the English car. The testimony is uncontradicted.

In seeking to establish that Lewis had the last clear chance to avoid the accident, English submitted an affidavit by an expert witness which stated that:

> If Mr. Lewis had decided to panic stop when he first perceived the [initial braking and slowing] movement of the Pinto he could have stopped well before reaching the intersection and the point of impact.

The factual questions crucial to this appeal are at what point did Lewis become aware of English's danger and what opportunity did Lewis have to prevent the accident. The expert assumes that Lewis was aware of her danger at the point he saw her car slow, i. e., when Lewis was 100 yards from the intersection. But the evidence does not support this assumption. Too many questions remain unanswered.

When Lewis was a hundred yards south of the intersection, at what distance north of the intersection was the English car positioned? At what speed was it travelling south and to the point of collision? At what point in time thereafter did the car swerve to the left at the intersection, cross almost four lanes of traffic and dart in front of the Lewis car? What period of time elapsed from English's sudden left turn to the point of collision? At what point in time, if at all, could Lewis see and know that the English car had made the sudden left turn and was travelling in Lewis' direction? These facts are all unknown.

What we do know is that it took both parties four seconds to reach the point of collision in Lewis' lane of traffic. The expert's opinion does not state how Lewis in this four second interval could have prevented the accident. When Lewis first saw English slow down, he did not have a duty to make a "panic stop." Before English completed the left turn and created a dangerous condition which placed her in a position of peril, Lewis had no duty to react with proper caution. His duty arose after the left turn was made and the English car was within his vision. This was almost instantaneous. It could not have prevented the accident. *Catalano* is dispositive on the issue of last clear chance. In *Catalano*, we said:

> . . . The defendant must have a clear chance, by the exercise of ordinary care, to avoid injury to the plaintiff. (Citation omitted). Were we to apply the mathematical computations necessary, we hold, as a matter of law, that last clear chance was not applicable. [90 N.M. at 217, 561 P.2d at 490.]

For the first time during oral argument, English takes us back to *Thayer v. D. & R. G. R. R. Co.*, 21 N.M. 330, 154 P. 691 (1916) where the court said:

> . . . In other words, in an action predicated upon the doctrine of "last clear chance," it must appear that plaintiff was negligent, but that such negligence was not the proximate cause of the accident, but that the proximate cause thereof was the negligence or want of due care on the part of the defendant. [21 N.M. at 347, 154 P. at 695.]

English fails to present any evidence that Lewis' negligence caused the accident.

Furthermore, a careful reading of *Thayer* discloses that:

> . . . *Where the negligence of the plaintiff continues up to the very moment of the injury* and is contemporaneous and

concurrent with the negligence of the defendant, *and where the exercise of reasonable diligence before the injury would have warned the plaintiff of his danger and have enabled him to escape by his own efforts, there can be no recovery.* . . . [Emphasis added.] [21 N.M. at 353, 154 P. at 697.]

"The doctrine [of last clear chance] cannot be invoked where there is concurrent negligence such as where the injured party's negligence continues up to the very moment of injury." *Bryan v. Phillips*, 70 N.M. 1, 5, 369 P.2d 37, 39 (1962). English can make no reasonable argument that her negligence stopped at any time prior to the accident. From the record before us, we cannot assume that English was unconscious of the danger in time to avoid the injury. Her view of the area surrounding the intersection was clear and unobstructed. We can only conclude that English drove blindly with respect to traffic approaching the intersection from the south, or that she attempted to speed through Lewis' lane of traffic before he arrived at the intersection.

Thayer and *Bryan* make it clear that:

> [I]f the plaintiff could show that he was unconscious of the threatened danger in time to have avoided the injury, and that the defendant actually saw or knew of the danger to which the plaintiff was exposed, and also knew or should have known that the plaintiff was unconscious thereof, and the defendant failed to use due diligence to avoid the injury, the plaintiff would be entitled to recover. [21 N.M. at 353, 154 P. at 697–98.]

There are no facts in the record, nor reasonable inferences to be drawn therefrom, that fall within the perimeter of that rule.

The overwhelming weight of authority denies the application of the "last clear chance" doctrine where the party to be charged is required to act instantaneously. *Lucero v. Torres*, 67 N.M. 10, 350 P.2d 1028 (1960); *McCoy v. Gossett*, 79 N.M. 317, 442 P.2d 807 (Ct.App.1968).

From the facts before us we are loathe to condone English's reckless driving that led to her tragic injury. In the hands of a reckless driver, the automobile is a dangerous instrumentality that often performs the dance of death. "A plaintiff who is so reckless as to be in disregard of his [or her] own safety cannot be protected by the doctrine [of last clear chance]." *Handley v. Halladay*, 92 N.M. 76, 582 P.2d 1289, 1290 (1978).

The district court correctly granted summary judgment on the issue of last clear chance. The only issue in the instant case to submit to the jury on the matter of liability of English is whether Lewis was contributively negligent in failing to see English after the left turn was made, and whether this negligence contributed to cause the accident.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ. (concurring in result only).

588 P.2d 1041

Sharon C. COLLINS, Petitioner,

v.

Richard C. MICHELBACH and Southeastern Public Service Co., Respondents.

No. 12189.

Supreme Court of New Mexico.

Jan. 2, 1979.

Smith, Ransom & Gilstrap, William G. Gilstrap, Albuquerque, for petitioner.

Keleher & McLeod, Henry Narvaez, Albuquerque, for respondents.

OPINION

FEDERICI, Justice.

This action was brought by the petitioner Collins (plaintiff) in the District Court of Bernalillo County to recover damages for injuries arising out of a collision. The jury returned a verdict for respondents (defendants). At the trial, the court instructed the jury on plaintiff's burden of proof. It gave N.M.U.J.I. Civ. 3.1. On appeal, the Court of Appeals held that there was substantial evidence to support the jury's verdict, but it refused to discuss or review plaintiff's second point, which challenged the validity of the above instruction.

The question presented by the petition for writ of certiorari is whether it was error for the trial court to give a jury instruction as to plaintiff's burden of proof based upon

N.M.U.J.I. Civ. 3.1, without excluding the words "any one of" which appear in the last paragraph of the instruction. The entire instruction reads:

> No. 2. The plaintiff claims that she sustained damages and that the proximate cause thereof was one or more of the following claimed acts of negligence:
>
> (1) The defendant, Richard C. Michelbach, was not keeping a proper lookout to avoid a collision with the car driven by Sharon Collins; and/or
>
> (2) The defendant, Richard C. Michelbach, backed his truck without determining whether the movement could be made with safety and without interfering with other traffic; and/or
>
> (3) The defendant, Richard C. Michelbach, did not have his vehicle under control.
>
> 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.
>
> The defendants deny the plaintiff's claims and assert the following affirmative defense:
>
> The plaintiff was contributorily negligent for any one or more of the following reasons:
>
> (1) She failed to keep a proper lookout to avoid a collision; or
>
> (2) She did not have her automobile under control; or
>
> (3) She failed to sound her horn when it was necessary to do so to avoid an accident; or
>
> (4) She did not shift into reverse and back up her automobile.
>
> The defendants have the burden of proving the affirmative defense.
>
> If you find that plaintiff has proved those claims required of her and that defendants' affirmative defense has not been proved, then your verdict should be for the plaintiff.
>
> If on the other hand you find that <u>any one of</u> the claims required to be proved by plaintiff has not been proved or that defendants' affirmative defense has been proved, then your verdict should be for the defendants. (Emphasis added.)

The Directions on Use of N.M.U.J.I. Civ. 3.1 reads:

> This is the most important single instruction in the lawsuit, and court and counsel should give particular attention to it. This instruction usually cannot be drawn until all the evidence is in and the court has determined which issues are supported by the pleadings and evidence justifying their submission to the jury.

It is plaintiff's contention that the underlined portion of the instruction would lead the jury to believe that she would have to prove all of the possible theories of negligence in order to prevail and that since a favorable determination by the jury on *one* or more of the claims is all that is required, the instruction is contrary to New Mexico law.

Defendants contend that considering all of the instructions given, the trial court did not err in the use of N.M.U.J.I. Civ. 3.1, and that even if the court did err, such error was harmless since plaintiff has not shown any prejudice.

The Court of Appeals correctly refused to review plaintiff's objection to the giving of N.M.U.J.I. Civ. 3.1 since it is bound to follow the Supreme Court's order requiring the use of uniform jury instructions and it has no authority to alter, modify or abolish any such instruction. *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973); *Williams v. Cobb*, 90 N.M. 638, 567 P.2d 487 (Ct.App.1977), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977); *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct.App.1977), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977). However, the Supreme Court in appropriate cases is charged with the duty to amend, modify or abolish uniform jury instructions. Also, a trial court may refuse to use a uniform jury instruction as published, if "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." Section 21–1–1, rule 51(1)(c), N.M.S.A. 1953 (Repl.1970).

We are of the opinion that the use of the words "any one of" in the last paragraph of N.M.U.J.I. Civ. 3.1 is erroneous in a case such as this where more than one negligent act is alleged by the plaintiff and the several acts of negligence are included by the court in the instruction. Under the instruction given by the trial court, a verdict for defendants could result if the jury found that *any one of* plaintiff's claims of negligence was not proved, notwithstanding that the plaintiff is only required to prove *one of several claims* of negligence in order to recover, absent, of course, a proven defense thereto.

In cases where multiple claims of negligence are alleged, as in this case, and sufficient evidence is introduced to submit those claims to the jury, as the trial court found here, the words "any one of" should be excluded from N.M.U.J.I. Civ. 3.1. Under these circumstances the last paragraph of the instruction given by the trial court should be modified to read:

> If on the other hand you find that plaintiff has not proved any of her claims, or that any one of defendants' affirmative defenses has been proved, then your verdict should be for defendants.

With reference to defendants' contention that the error was harmless since plaintiff has not shown prejudice, we stated in *Jewell v. Seidenberg,* 82 N.M. 120, 124, 477 P.2d 296, 300 (1970):

> In determining whether it is reversible error, we will accept the slightest evidence of prejudice, and all doubt will be resolved in favor of the party claiming prejudice. Thus, our determination will be made by viewing the record in light of the standards we have adopted for a fair trial, rather than indulging in a presumption of prejudice if the U.J.I. is not followed.

See also Anderson v. Welsh, 86 N.M. 767, 527 P.2d 1079 (Ct.App.1974).

Although *Jewell, supra,* involved a failure to give a uniform jury instruction, the rationale of that case applies to a challenged instruction given by the court. In view of the importance of N.M.U.J.I. Civ. 3.1 and viewing the record below in the light of the standards of fair trial announced in *Jewell,* the giving of the instruction without excluding the words "any one of" was prejudicial to appellant and constitutes reversible error.

The trial court is reversed and the cause remanded for a new trial.

IT IS SO ORDERED.

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

588 P.2d 1043

DALE BELLAMAH LAND CO., INC., Carter, Hawley, Hale Stores, Inc., H–B Associates Albuquerque, a general Partnership, and Adcor Realty Corporation, Plaintiffs-Appellants,

v.

COUNTY OF BERNALILLO et al., Defendants-Appellees.

No. 3117.

Court of Appeals of New Mexico.

July 11, 1978.

Writ of Certiorari Quashed Jan. 12, 1979.

J. Victor Pongetti, and Floyd Wilson, Ahern, Montgomery & Pongetti, Albuquerque, for plaintiffs-appellants.

Joe C. Diaz, County Atty., Vance Mauney, Associate Counsel, Albuquerque, Toney Anaya, Atty. Gen. (amicus), John C. Cook, Asst. Atty. Gen., Santa Fe (amicus), for defendants-appellees.

OPINION

HERNANDEZ, Judge.

Plaintiffs filed their respective claims for refunds for ad valorem taxes levied against their respective properties for the year 1976, on December 23, 1976, pursuant to Section 72–31–39, N.M.S.A.1953 (Repl.Vol. 10, pt. 2, Supp.1975). The statute reads as follows:

> "After receiving his property tax bill and after making payment prior to the delinquency date of all property taxes due in accordance with the bill, a property owner may protest the value determined for his property for property taxation purposes or the allocation of value of his property to a particular governmental unit by filing a claim for refund in the district court."

Section 72–31–40(A)(1), N.M.S.A.1953 (Repl. Vol. 10, pt. 2, Supp.1975) provides in pertinent part that such claims "shall be filed no later than December 15 of the year in which the first installment of the property tax for which a claim for refund is made is due."

Defendants filed motions to dismiss each respective claim on the ground that they were not timely filed and therefore the trial court lacked jurisdiction to entertain them. The trial court granted these motions and dismissed the claims with prejudice.

Plaintiffs' first point is not relevant to this appeal and will not be considered.

Plaintiffs' second point is that the trial court erred in that they had until December 15, 1977, to file their claims. Property taxes are payable in two equal installments, the first being due on November 1, of the tax year and the second on April 1 of the succeeding year. Plaintiffs made timely payment of the first installment and subsequent to the filing of their claims made timely payment of the second installment. They argue that they did not claim nor were they entitled to a refund of any part of the first installment and that it is not until a taxpayer has paid more taxes than they admit owing, that the time for filing a claim for refund begins to run. Therefore, in the instant situation, the time for filing a claim for refund did not expire until December 15, 1977.

We do not agree. The language of § 72–31–40(A)(1), supra, is clear and unambiguous and requires no interpretation. "Legislative intent is to be determined primarily by the language of the act, and resort may be had to construction only in case of ambiguity." *Montoya v. McManus*, 68 N.M. 381, 389, 362 P.2d 771 (1961). A claim "shall be filed no later that December 15 of the year in which the *first* installment . . . is due." (Emphasis added.) § 72–31–40(A)(1), supra. The first installment was due on November 1, 1976.

The plaintiffs failed to file their claims within the time permitted by the statute. The trial court correctly dismissed the action with prejudice. As our Supreme Court pointed out in *Swallows v. City of Albuquerque*, 61 N.M. 256, 266, 298 P.2d 945 (1956):

> "Where a statute grants a new remedy, and at the same time places a limitation of time within which the person com-

plaining must act, the limitation is a limitation of the right as well as the remedy, and in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations."

We affirm.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (specially concurring).

I concur.

Taxpayers claim that they did not have a right to claim a refund until they had paid more taxes than were owing. Amicus Curiae point out that the "claims for refund" referred to in § 72–31–40 is a claim for refund of taxes *imposed, not taxes paid.* Notice of imposition of the tax was given taxpayers when the property tax bill was mailed, so that the taxpayer had more than eight months notice of the tax valuation of the property. The installment payment plan provided by statute is a convenient way for the taxpayers to meet the debt which was incurred in April, 1976; and that the claim for refund is based on this April valuation, not the installments paid.

588 P.2d 1045

STATE of New Mexico,
Plaintiff-Appellee,

v.

Ernest Victor GALLEGOS,
Defendant-Appellant.

No. 3559.

Court of Appeals of New Mexico.

Oct. 31, 1978.

Rehearing Denied Nov. 15, 1978.

Writ of Certiorari Denied Dec. 15, 1978.

John B. Bigelow, Chief Public Defender, Reginald J. Storment, Appellate Defender, Barbara Nobel Farber, Santa Fe, for defendant-appellant.

Toney Anaya, Atty. Gen., Lawrence A. Gamble, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Adjudged guilty and sentenced for aggravated battery with a deadly weapon, defendant appeals. Issues listed in the docketing statement, but not briefed, are deemed abandoned. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App.1977). We (1) answer to issues summarily and discuss (2) polygraph test results, (3) disclosure by defendant, (4) state of mind, and (5) merger.

The victim, Parlomino, was dancing with Marcella at a lounge when defendant stabbed Parlomino.

Issues Answered Summarily

(a) Defendant sought to exclude identification testimony based on a photographic identification.

(1) The evidence does not show that the circumstances of this identification created a substantial likelihood of a mistaken identification. *State v. Jones*, 83 N.M. 600, 495 P.2d 380 (Ct.App.1972).

(2) Defendant contends the photographic identification was "unnecessary because an actual lineup could have been con-

ducted." That a lineup could have been conducted was not relevant to the question of whether the photographic identification procedure was impermissibly suggestive. *United States v. Sutherland*, 428 F.2d 1152 (5th Cir. 1970), cert. denied, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972).

(3) Defendant asserts he was prejudiced because his photograph contained a date. This date showed the date of his arrest on the charges for which he was tried. This did not put defendant's criminal record in issue and did not establish that defendant was prejudiced. See *State v. Jacobs*, 91 N.M. 445, 575 P.2d 954 (Ct.App. 1978).

(4) Defendant complains that admission of the six "mug-shots" into evidence was improper because irrelevant. Identification of defendant as the one who stabbed Parlomino was a crucial issue in the case. Testimony showing that Parlomino identified defendant's photograph as a picture of his assailant, five weeks after the stabbing, and never deviated from that identification, was relevant. See *State v. Mordecai*, 83 N.M. 208, 490 P.2d 466 (Ct.App.1971).

(5) Defendant asserts the use of any mug-shot photographs was prejudicial. Since all of the photographs were mug-shots, these photographs did not suggest an identification in this case. Further, Parlomino testified he never looked at the numbers on the pictures.

(b) Defendant asserts there was prosecutor misconduct during the State's closing argument. We disagree.

(1) The comments concerning defendant's beard were well within the evidence.

(2) The comments concerning Marcella's refusal to testify before the grand jury and her denial of being at the scene when Parlomino was stabbed, were based on evidence at the trial. There was also evidence that defendant and Marcella were friends, were sitting together outside the courtroom and kissed as they came into the courtroom. The prosecutor's comment must be considered in relation to this evidence. The prosecutor stated, in connection with Marcella's denial of being at the scene and of her refusal to testify before the grand jury: "I submit to you that the reason is because both she and the defendant know that the defendant is guilty and the only question in their mind is whether or not you know it, ladies and gentlemen." The comment attempts to explain Marcella's actions on the basis of Marcella's and defendant's knowledge. Such a comment is not the same as the comment in *State v. Leyba*, 89 N.M. 28, 546 P.2d 876 (Ct.App. 1976). In light of Marcella's friendly relations with defendant, we do not consider it as a comment on defendant's failure to testify.

(3) The prosecutor's comment as to why he had Parlomino take a polygraph examination was invited by defendant's closing argument.

Polygraph Test Results

Parlomino was given a polygraph examination. The results of this test were offered by the prosecution and admitted as evidence during the State's case-in-chief. Defendant makes a comprehensive attack on the propriety of admitting the test results. The defense contentions, and our answers, follow.

(a) The foundation requirements for the admissibility of the results of polygraph examinations are set forth in *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977).

(1) Defendant asserts the examiner, Rodriguez, was not qualified to administer the test to Parlomino because of Rodriguez' minimal exposure to the fields of physiology and psychology, and because of Parlomino's inability to communicate in English. Rodriguez testified that he had had "some" physiology and psychology at the school he attended. These subjects were discussed in relation to polygraph techniques. He also testified that at the pretrial interview he asked Parlomino about hospitalization, whether Parlomino had ever sought psychiatric help, had ever been a patient in a

mental hospital or sanitarium, had ever had a brain wave test, ever been treated for alcoholism, or nervousness or nerves, ever had dizzy spells, plus numerous other questions directed to Parlomino's physical condition. Rodriguez testified that the questions were from a prepared form; the questions were based on his training. Rodriguez also testified that there was no communications problem because he was bilingual. Rodriguez conducted the pretest interview with Parlomino in both English and Spanish. In administering the test, Rodriguez questioned in English, Parlomino answered in Spanish. Rodriguez found nothing that would indicate Parlomino was not a suitable subject for testing.

(2) Defendant asserts the testing procedure was not valid because the "relevant" questions, see *State v. Brionez*, 91 N.M. 290, 573 P.2d 224 (Ct.App.1977), were ambiguous and permitted rationalization by Parlomino. Rodriguez used two relevant questions.

The first was, "Before you were stabbed did you provoke the man who stabbed you?" Defendant argues that the words "did you provoke" invites rationalization. Rodriguez testified that Parlomino defined English "provoke" as Spanish "provocar", that this was discussed at length because Parlomino was denying that he did anything other than to tell defendant to leave the lady alone. Before the jury, Rodriguez gave more explanation. Rodriguez testified that Parlomino explained "provocar" to mean a confrontation, argument or use of bad language toward someone. Defendant also asserts this first "relevant" question was improper because not relevant to issues at trial. This argument is specious. The polygraph test is for truthfulness. See *State v. Bell*, supra. "Relevant" questions in a polygraph examination go to the validity of the test. See *State v. Fuentes*, 91 N.M. 554, 577 P.2d 452 (Ct.App. 1978).

The second relevant question was, "Is the man in the picture line-up the same man who stabbed you?" The evidence is uncontradicted that Parlomino had twice identified defendant by picking his photograph from a group of pictures. Defendant says the second relevant question was improper because Parlomino's answer merely manifests his belief that he picked the right photograph. This argument develops nothing as to the ambiguity of the question or rationalization of the answer.

(3) Defendant asserts the testing procedure was invalid because the reliability of the scoring system was not explained or established by competent evidence. Rodriguez testified that he used three charts with the two relevant questions, thus, Parlomino's response to the relevant questions was scored six times. The scoring was cumulative. The cumulative score was plus ten. Rodriguez testified that on the basis of the charts and relevant questions used, a plus six was "the cut-off point" for a truthful answer. Rodriguez testified that for a valid polygraph examination there should be "[n]o less" than three charts and no more than three relevant questions. As to the number of relevant questions to be used, it depends on the examiner and the "issue" to be tested. Rodriguez "would call an examination truthful with plus 10 with three relevants." Parlomino was "reacting stronger" to his examination when he had a plus ten cumulative score with only two relevant questions asked. Certainly, this is an explanation of a scoring system.

The evidence reviewed above is essentially uncontradicted. Defendant contends that Rodriguez' testimony is unreliable, but his argument is not based on evidence. Rather, defendant relies on *State v. Brionez*, supra. In *Brionez* we held that the trial court did not err in excluding the results of the polygraph test. The facts in *Brionez* are not the same as this case. For example, in *Brionez* there was evidence that the person to be examined was "mentally off"; there is nothing indicating Parlomino had, or ever had, a mental problem. In *Brionez* the relevant questions included rationalization; in this case the evidence is that Rodriguez discussed the questions with Parlomino to make sure that Parlomino understood them; the purpose was to try and eliminate rationalization from Parlomino's response.

Defendant's argument overlooks the holding of *State v. Brionez*, supra. It is: The admission or exclusion of polygraph test results, like the admission of other expert testimony, is within the discretion of the trial court. The trial court's ruling is reviewed to determine whether there was an abuse of discretion." See *State v. Bell*, supra; *State v. Fuentes*, supra. The evidence does not show an abuse of discretion in admitting the polygraph test results. The evidence being different than the evidence in *State v. Brionez*, supra, the *Brionez* decision does not support the implied claim that the trial court abused its discretion as a matter of law.

(b) Defendant makes two general arguments as to the constitutionality of using the polygraph test results.

(1) Defendant contends that a) admission of Rodriguez' testimony concerning the polygraph test results was an indirect comment on defendant's silence, because defendant did not take a polygraph examination; b) references to the polygraph examination during voir dire of the jury, the prosecutor's opening statement and the prosecutor's closing argument, and asking Parlomino whether he had taken a polygraph examination, denied defendant a fair trial. These claims are frivolous. The fact that Parlomino took the polygraph examination is not a comment on defendant's failure to take such an examination. Establishing that Parlomino did take such an examination, and references to admissible evidence did not deprive defendant of a fair trial.

(2) Defendant asserts, in effect, that only a defendant may introduce the results of a polygraph examination, that the prosecution may not do so. The argument is that polygraph examination results are admissible by a defendant because a defendant has a right to defend against accusations, and the prosecution does not have a similar right. This argument overlooks the fact that relevant evidence and expert testimony are admissible, regardless of whether offered by the defendant or the prosecution. Evidence Rules 402 and 702; *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975). The prosecution must prove its case beyond a reasonable doubt, U.J.I.Crim. 1.00. Relevant evidence which assists the prosecution in meeting this burden is admissible. The Constitution, considered generally, does not bar the prosecution from introducing relevant evidence.

(c) Defendant asserts that Rodriguez' testimony as to the results of the polygraph examination, that Parlomino was truthful in his answers to the two relevant questions, was improperly admitted. He relies on *State v. Alaniz*, 55 N.M. 312, 232 P.2d 982 (1951) which states that the prosecution "cannot corroborate its own witness by showing his prior consistent statements." Defendant recognizes that this rule does not apply when the witness' credibility has been attacked. See *State v. Bell*, supra; *State v. Maes*, 81 N.M. 550, 469 P.2d 529 (Ct.App. 1970). Defendant contends, however, that evidence to corroborate the witness is limited to evidence that "will rebut the attack on credibility." Defendant asserts that Parlomino's answers were prior statements consistent with Parlomino's trial testimony, and that these answers were inadmissible because self-serving. See *State v. Hunt*, 83 N.M. 753, 497 P.2d 755 (Ct.App.1972). Defendant asserts his only attack on Parlomino's credibility went to his ability to perceive, and since there was no charge of improper influence, or lying, see *State v. Bell*, supra, the applicable rule is stated in *State v. Alaniz*, supra.

Evidence Rule 608 disposes of defendant's arguments. The pertinent portions state:

> (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.

Rodriguez gave his opinion that Parlomino was truthful in answering the relevant questions; this opinion supported Parlomino's credibility. Rodriguez' testimony was admissible because the cross-examination of Parlomino was an attack on Parlomino's truthfulness. Rodriguez' testimony was admissible under Evidence Rule 608(a).

Defendant asserts Rodriguez' testimony was inadmissible under Evidence Rule 608(b) because it was extrinsic evidence of the conduct of Parlomino. The argument misconceives the nature of polygraph examination testimony. Rodriguez gave his opinion of Parlomino's truthfulness. All the rest of his testimony went to Rodriguez' qualifications, the reliability of the testing procedure, and the validity of the tests. *State v. Bell*, supra. This testimony showed the facts and data on which Rodriguez based his opinion. See Evidence Rule 703. It was not the conduct of Parlomino in taking the test and reacting to the questions asked that supported Parlomino's credibility; rather, it was Rodriguez' opinion that supported Parlomino's credibility. Evidence Rule 608(b) did not exclude Rodriguez' opinion testimony.

(d) Defendant asserts that Rodriguez' opinion was of marginal relevance and the probative value of the opinion was outweighed by its prejudicial effect. The cross-examination of Parlomino attempted to show that he did not really know the size of the blade of the knife with which he was stabbed, was unsure of the hand in which the assailant held the knife, was unsure of when the assailant took the hand of Marcella and ran away with her. The cross-examination also brought out that when Parlomino viewed the group of photographs, some five weeks after the stabbing, Parlomino expected to see a photograph of the assailant, but had not given a description of the assailant before viewing the photographs. With this cross-examination, we cannot say the trial court abused its discretion in refusing to exclude Rodriguez' testimony under Evidence Rule 403. *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct.App.1978).

Disclosure by Defendant

Pursuant to Rule of Crim.Proc. 27, defendant moved, and the trial court ordered, that the "charts, reports, recordings, notes and any other documents" made in connection with the polygraph examination, be made available to the defense.

Defendant also moved that Dr. David Raskin be appointed by the court to "testify and to analyze, on behalf of the Defendant" the information made available under the discovery order. This motion was granted in part; Dr. Raskin was not appointed to testify, he was appointed to "examine, advise and consult with the defense" as to the polygraph examination.

"After Raskin analyzed the results [of the polygraph examination] and reported his conclusions", defense counsel refused to disclose the analysis and conclusions to the prosecutor. The prosecutor moved to require disclosure, relying on Rule of Crim. Proc. 28. The pertinent portion of this rule states:

(a) *Information Subject to Disclosure.* Upon motion of the state at any time after the filing of the information or indictment and subject to constitutional limitations, the court may order the defendant to permit the state to inspect and copy or photograph:

* * * * * *

(2) Any results or reports of physical or mental examinations and of scientific

> tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at trial if the results or reports relate to his testimony.

The prosecutor sought disclosure on the basis that under this rule it was entitled to "the results of scientific examination conducted by . . . defendant's expert, which defendant intends to use at trial".

Defendant made various arguments in an attempt to avoid disclosure of any kind. Defendant contended that disclosure of any kind denied defendant due process, the right to put on a defense and equal protection of the law. We disagree. See *State v. Smith,* 88 N.M. 541, 543 P.2d 834 (Ct.App.1975). Defendant claimed that disclosure would violate his privilege against self-incrimination. Again we disagree. *Gray v. Sanchez,* 86 N.M. 146, 520 P.2d 1091 (1974); *State v. Smith,* supra. We add that the self-incrimination claim is frivolous; no disclosure of any kind, by defendant, is involved in this issue. See *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).

As a part of defendant's efforts to avoid disclosure of any kind, defendant asserted that disclosure would violate the lawyer-client privilege. The privilege applies to confidential communications. A communication is confidential "if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client". Evidence Rule 503.

Having been employed to assist the lawyer in the rendition of professional legal services, Dr. Raskin was a representative of the lawyer. There is no evidence as to whether Dr. Raskin's communications with the lawyer were "not intended to be disclosed to third persons" other than in furtherance of professional legal services to the client. The only showing is the trial court order authorizing consultation with Dr. Raskin. That order authorized examination of the polygraph examination material and authorized Dr. Raskin to "advise and consult with the defense". The prosecutor's position throughout was that he was not seeking discovery of any advice or consultation: "I am not asking her for how Mr. Raskin proposed to attack my witness." The prosecution sought only the results of Dr. Raskin's analysis of the polygraph examination material which had been supplied by the State. That is all the trial court ordered be disclosed; the "results you received from Dr. Raskin shall be made available to counsel for the State."

There being no evidence that Dr. Raskin's analysis of the polygraph examination conducted by Rodriguez was not intended to be disclosed, there is no evidence that the Raskin analysis was a confidential communication and, thus, no evidence that the lawyer-client privilege was violated. We cannot look to the contents of the analysis because that is not in the appellate record. Dr. Raskin's analysis, in itself, was a fact constituting evidence; disclosure of that analysis, in itself, did not amount to a violation of the lawyer-client privilege absent a showing that the analysis was a confidential communication. See *State v. Steinkraus,* 76 N.M. 617, 417 P.2d 431 (1966). Defendant, objecting to discovery, had the burden of establishing the existence of the privilege. *Biliske v. American Live Stock Ins. Co.,* 73 F.R.D. 124 (W.D.Okl. 1977). He did not meet this burden. We do not hold there was or was not a violation of Evidence Rule 503. We hold only that a violation is not shown in this record.

Defendant also claims that discovery was not authorized under Rule of Crim.Proc. 28, quoted above. He points out that he was not authorized by the trial court to call Dr. Raskin as a witness; thus, the rule authorized discovery only to results "which the defendant intends to introduce in evidence at the trial". We agree.

The question is whether defendant intended to introduce Dr. Raskin's analysis

into evidence at trial. Throughout the extensive hearing on the disclosure motion, defense trial counsel consistently maintained that she could not introduce any information from Dr. Raskin because it was not in a form to be admitted as evidence. She indicated she had no written report. She eventually produced a letter from Dr. Raskin; the prosecutor stated he did not ask for the letter because it "goes beyond the scope of what I asked for." The prosecutor stated that he only wanted Dr. Raskin's analysis of the charts; "this [the letter] talks about how he feels the polygraph should be attacked." Defense trial counsel then stated: "I will give . . . [the prosecutor] the oral results that I have."

Defendant's trial counsel pointed out that she had no way of getting the information from Dr. Raskin admitted into evidence. The prosecutor argued that the defense could get Dr. Raskin's analysis before the jury through cross-examination of Rodriguez, because Rodriguez would admit Dr. Raskin's expertise. When queried by the trial court as to how Dr. Raskin's analysis could be introduced during cross-examination of Rodriguez, the prosecutor agreed it could not be introduced. Thus, trial counsel were in agreement that Dr. Raskin's analysis could not be introduced into evidence at trial.

With the only showing to the trial court that Dr. Raskin's analysis could not be introduced into evidence, the requirement that it be intended to be introduced into evidence was not met and the order for disclosure was erroneous, being in violation of Rule of Crim.Proc. 28.

Although the disclosure order was erroneous, how was defendant hurt? Defendant asserts he was deprived "of his constitutional right to a fair trial and to put on a defense." The appellate record does not support this claim. Dr. Raskin's analysis of Rodriguez' polygraph examination is not referred to in the proceedings before the jury. Defendant seems to argue that the disclosure apprised the prosecutor of questions to be asked by defense counsel on cross-examination. That cannot be determined because the record contains neither the letter nor defendant's oral disclosure. Thus, there is nothing indicating the prosecutor had advance information concerning defendant's intended cross-examination of Rodriguez. See *State v. Bustamante*, 91 N.M. 772, 581 P.2d 460 (Ct.App.1978). The only indication in the record is to the contrary; during the hearing concerning disclosure, defendant stated that cross-examination would be on the basis of books and other writings authored by Dr. Raskin.

There being nothing indicating that defendant was in any way prejudiced by the erroneous disclosure order, no reversible error occurred. See *State v. Wesson,* 83 N.M. 480, 493 P.2d 965 (Ct.App.1972).

State of Mind

Garrison, a part owner of the lounge where the stabbing occurred, and Parlomino were waiting to be called before the grand jury. Someone walked by. Parlomino commented, " 'Isn't that the guy that stabbed me? Why is he walking around.' "

Defendant attempted to introduce this comment into evidence during cross-examination of Garrison. The prosecutor's objection, that the comment was hearsay, was sustained. Defendant asserts this was error, contending the comment was admissible as "state of mind".

Evidence Rule 803(3) reads:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * * * *
>
> (3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, . . . but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

The state of mind exception in Evidence Rule 803(3) does not include a statement of memory or belief to prove the fact remembered or believed. Parlomino's comment to Garrison, " 'Isn't that the guy

that stabbed me?' " was a statement of memory. Defendant offered the comment to show "any kind of doubt or certainty that he [Parlomino] has as to his identification"; that is, to prove the fact remembered.

The Advisory Committee Notes to Evidence Rule 803(3) states:

> The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind.

The trial court did not err in excluding the hearsay comment when its admission was sought through cross-examination of Garrison.

Merger

Count I of the indictment charged aggravated assault under § 40A–3–2(A), N.M.S.A.1953 (2d Repl.Vol. 6). Count II charged aggravated battery under § 40A–3–5(C), N.M.S.A.1953 (2d Repl.Vol. 6). We are not concerned with the denial of defendant's pretrial motion to elect under a theory of lesser included offenses. See *State v. Sandoval,* 90 N.M. 260, 561 P.2d 1353 (Ct.App.1977).

The alternatives charged in the indictment counts were not submitted to the jury. Rather, the aggravated assault charge was submitted solely on the basis of threat or menacing conduct by use of a knife. U.J.I.Crim. 3.04. The aggravated battery charge was submitted solely on the basis of battery by stabbing with a knife. U.J.I.Crim. 3.52.

Defendant requested that the aggravated assault charge be submitted as a lesser included offense to the aggravated battery charge. Defendant requested an instruction, based on U.J.I.Crim. 50.01, that the jury should first determine whether he was guilty of aggravated battery and if the jury had reasonable doubt as to his guilt of the battery charge, it was then to consider the aggravated assault charge. The trial court refused this requested instruction, but stated that if the jury returned a guilty verdict as to both charges, the rule of merger would apply.

The jury returned verdicts of guilty as to both charges. The trial court ruled that the offenses merged and adjudged defendant guilty of and sentenced defendant solely on the aggravated battery charge.

There is no claim that merger was improperly applied on an evidentiary basis, *State v. Sandoval,* supra, called "the factual test" in *State v. Quintana,* 69 N.M. 51, 364 P.2d 120 (1961).

Defendant claims refusal of his requested instruction was error for two reasons.

First, defendant asserts that the aggravated assault charge was a lesser included offense, that conviction of a lesser included offense constitutes an acquittal of the greater crime, *State v. Medina,* 87 N.M. 394, 534 P.2d 486 (Ct.App.1975), that there is no way of knowing which guilty verdict was first reached, that U.J.I.Crim. 50.01 was designed to avoid this problem, that the giving of his requested instruction would have avoided the problem, and refusal of the instruction prejudiced defendant because if the jury first found defendant guilty of the assault charge, he was thereby acquitted of the battery charge.

This argument overlooks the fact, that by definition, the lesser included offense concept is determined by looking to the offenses charged in the indictment. *State v. Sandoval,* supra; *State v. Medina,* supra. Defendant attempts to apply the lesser included concept, not to the offenses charged in the indictment, but to the offenses to be submitted to the jury at the close of the evidence and as limited by the evidence. The double jeopardy concern at the time the requested instruction was refused was not with a previous conviction or acquittal, see *State v. Tanton,* 88 N.M. 333, 540 P.2d 813 (1975), because neither has occurred. The double jeopardy concern was to prevent multiple punishment for one offense "when multiple charges are brought in a single

trial." *State v. Sandoval*, supra. This involves the concept of merger, and merger was the applicable concept at this point in the trial.

While the giving of the requested instruction would have avoided guilty verdicts on multiple charges that merged under the evidence, the failure to give the instruction is not error in the absence of prejudice to the defendant. Defendant was not prejudiced by a verdict on the aggravated battery charge because under his requested instruction, the jury was to decide that charge before considering the aggravated assault charge. Since the verdict on the aggravated battery charge was "guilty", under the requested instruction there would have been no verdict on the aggravated assault charge.

Second, defendant asserts prejudice in that collateral consequences may flow from the fact of a conviction, apart from any sentence. He relies on *Padilla v. State*, 90 N.M. 664, 568 P.2d 190 (1977) which states "that a 'conviction' refers to a finding of guilt and does not include the imposition of a sentence." We agree, but defendant is incorrect when he states that because of two guilty verdicts, there have been two "convictions."

Section 40A–1–11, N.M.S.A.1953 (2d Repl. Vol. 6) states: "No person shall be convicted of a crime unless found guilty by the verdict of the jury, accepted and recorded by the court". "[A]n express adjudication of conviction, or finding of guilt, is not necessary if it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt." *State v. Apodaca*, 80 N.M. 155, 452 P.2d 489 (Ct.App.1969); compare *Nance v. State*, 80 N.M. 123, 452 P.2d 192 (Ct.App. 1969).

The amended judgment recites there were two convictions "pursuant to a jury verdict". However the amended judgment also recites: "[T]he Court having found that said offenses merge; . . . Defendant . . . is hereby found and adjudged guilty and convicted of the merged crime" of aggravated battery with a deadly weapon.

It is apparent from the record that the judicial determination of guilt was for one offense only. This determination was correct because the determination that the offenses merged was a determination that only "one offense has occurred". See *State v. Sandoval*, supra.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

588 P.2d 1056

James Price MATHIESON, James P. Mathieson, Jr., John W. Mathieson, and Joy L. Johnston, Petitioners-Appellants,

v.

Michael B. HUBLER, Personal Representative of the Estate of Helen C. Mathieson, Deceased, Respondent-Appellee.

Nos. 3236, 3352.

Court of Appeals of New Mexico.

Nov. 7, 1978.

Writ of Certiorari Denied Dec. 15, 1978.

Steven L. Tucker, Jones, Gallegos, Snead & Wertheim, P. A., Santa Fe, for appellants.

Roger L. Copple, LaFel E. Oman; Sutin, Thayer & Browne, Santa Fe, for appellees.

OPINION

WOOD, Chief Judge.

These consolidated appeals involve the administration of the estate of Helen C. Mathieson. Cause No. 3236 involves the attempted reopening of the order of the district court adjudicating intestacy and determining heirship. Cause No. 3352 involves an extension of time in which to prosecute a claim against the estate. References to the Probate Code, §§ 32A–1–101, et seq., N.M.S.A.1953 (1976–77 Int.Supp.) are cited only by article and section number. References to the Rules of Civil Procedure, § 21–1–1, N.M.S.A.1953 (Repl.Vol. 4) are cited only by rule numbers. In Cause No. 3236 we discuss: (1) 3–412 of the Probate Code; (2) applicability of Rule 60(b); and (3) inherent power to reopen. In Cause No. 3352 we discuss: (4) the interrelationship of 3–804(C) and 3–806(A) of the Probate Code; and (5) applicability of Rule 6(b).

The two sons of Helen, Michael B. Hubler and William K. Mathieson, applied for the informal appointment of Michael as the personal representative of the estate. The probate court granted the application. There is no issue as to these proceedings or as to Michael's status as personal representative.

Thereafter, Helen's sons, pursuant to 3–402(C), by verified petition, asked the district court for an adjudication of intestacy, determination of heirship and supervised

administration. The petition alleged that Helen had married twice and that both marriages ended in divorce. The petition also alleged that Helen had two surviving sons, Michael and William. Notice of hearing on this petition was given by publication and by mailing to the last known addresses of the former husbands and to children of the second former husband. 1–401. The first husband was Hubler, the second husband was Mathieson. Mathieson's children, of a prior marriage, are James P. Mathieson, Jr., John W. Mathieson and Joy L. Johnston. They are referred to hereinafter as "the stepchildren".

In addition to the notice by publication and by mail, the first husband, Hubler, and each of the stepchildren executed an "acknowledgment of service, disclaimer, and waiver of notice". These acknowledgments were filed in the court file at the time of the hearing. The acknowledgment "admits the statements contained in said Petition are true; disclaims any lien upon or any right, title or interest in or to the estate of the decedent except in the event of subsequent testacy; consents to the entry of the order requested in said petition". The second husband, hereinafter referred to as Mathieson, executed the same acknowledgment prior to the hearing. However, it was not filed until a later date. All of the acknowledgments are under oath.

At the hearing on the petition, the trial court found that "the matters requested by the Petitioners are unopposed." The trial court adjudged that Helen left no will, that her only heirs were the sons, Michael and William, who were the only persons entitled to distribution of Helen's estate. It also adjudged that proceedings should be subject to supervised administration. The trial court's order was filed April 1, 1977.

On May 3, 1977 Mathieson and the stepchildren filed a petition which requested that the order of April 1, 1977 be "set aside" and to "reopen this matter, and make a true and complete redetermination of the facts concerning the testacy or intestacy of Helen C. Mathieson, a truthful and proper redetermination of heirship". On appeal, Mathieson and the stepchildren quibble as to what they sought by this petition. They claim they did not seek vacation or modification of the order of April 1, 1977, see 3–412, but only that they be given a hearing at which they would have opportunity to show that the order of April 1, 1977 should be vacated or modified. Arguments before the trial court show they sought alternative relief, either that the April 1, 1977 order be vacated or "a thorough and contested inquiry into the issues" of testacy and heirship.

The alternative claims made by the petition of May 3, 1977 sought relief under 3–412, Rule 60(b), and the inherent power of the court. We discuss each of those claims. The appellate argument raised an issue as to the evidentiary material before the court when it ruled on the petition of May 3, 1977. Mathieson and the stepchildren seem to argue that the evidentiary material to be considered is limited to the testimony taken at the hearing held May 31, 1977. We disagree. The trial court could properly consider the sworn application of Michael and William when they sought a formal adjudication of intestacy, the evidence tendered by Mathieson and the stepchildren at the hearing of May 31, 1977, the evidence tendered by Michael at the hearing of July 14, 1977, and affidavits filed on behalf of both parties, prior to the July 14th hearing. All of this material was before the court and referred to in arguments of counsel, without objection, at the July 14th hearing.

3–412

The pertinent portion of 3–412 reads:

> A. Subject to appeal and subject to vacation as provided in this section and in Section 3–413 [32A–3–413], a formal testacy order under Sections 3–409 through 3–411 [32A–3–409 to 32A–3–411], including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant

to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

(1) the court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication;

(2) if intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of his death or were given no notice of any proceeding concerning his estate, except by publication;

(3) a petiton [sic] for vacation under either Paragraphs (1) or (2) of this subsection must be filed prior to the earliest of the following time limits:

(a) if a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six months after the filing of the closing statement;

(b) whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by Section 3–108 [32A–3–108] when it is no longer possible to initiate an original proceeding to probate a will of the decedent; or

(c) twelve months after the entry of the order sought to be vacated;

(4) the order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs;

The May 3, 1977 petition to reopen alleged that Mathieson and the stepchildren were "potential heirs or devisees" of Helen. Mathieson alleged, upon information and belief, that Helen died "leaving a validly executed will . . . . In the short time available to his attorneys they have found evidence that such a will was at one time, in the recent past, in existence." Mathieson and the stepchildren alleged they were erroneously omitted from the determination of heirship made in the order of April 1, 1977.

The above allegations break down as follows: 1) Mathieson and the stepchildren claimed they were devisees under a will of Helen's. 1–201(6) and (7). 2) The stepchildren did not claim as heirs, it being undisputed that they were not Helen's children, and no claim was made that they were adopted by Helen. 1–201(17); 2–103, 2–109. 3) Mathieson claimed an as heir. This was a claim that, regardless of the divorce proceedings, he was a "surviving spouse". 1–201(17), 2–102.

On appeal, Helen's sons and the estate argue that the May 3, 1977 petition to reopen raised no issue as to Mathieson's heirship. This is contrary to the position taken in the trial court. Their response to the petition alleged that Mathieson's claim of heirship was an impermissible collateral attack on the Santa Fe County divorce decree. This response attached, as exhibits, copies of Mathieson's appearance in the divorce proceedings, the divorce decree, and the property settlement agreement. Another exhibit to this response was Mathieson's sworn acknowledgment, dated March 30, 1977. The contents of this acknowledgment are the same as the acknowledgments of the stepchildren. In the acknowledgment, Mathieson admitted the statements in the petition for adjudication of intestacy were true and disclaimed any interest in Helen's estate "except in the event of subsequent testacy".

Under 3–412, the order of April 1, 1977 to the effect that Helen left no valid will and determining heirs was "final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and

to the determination of heirs". This final order may be modified or vacated "as provided in this section" and in 3–413. 3–413 is not applicable in this appeal. One basis for modification or vacation is a "later-offered will". 3–412(A)(1). Another basis for modification or vacation is the omission of an heir from the determination of heirs. 3–412(A)(2).

The trial court found: "While afforded an opportunity to do so, the Petitioners [Mathieson and the stepchildren] have not made or have been unable to make any of the showings required by Section 32A–3–412(A)(1) and (2), N.M.S.A.1953." This finding is supported by substantial evidence.

Mathieson and the stepchildren had the opportunity to present evidence at the hearings held on May 31 and July 14, 1977. At the May 31, 1977 hearing, the trial court did remark: "I think I have enough on all of that." This, however, went only to the tender of certain cumulative evidence and did not foreclose evidence that was noncumulative. At the conclusion of the July 14, 1977 hearing, the trial court gave counsel opportunity to "[s]ubmit whatever you deem encessary [sic]." Under the evidence, and by this we mean the testimony, the tender, the sworn pleadings and affidavits presented to the trial court, the trial court could properly rule there was no showing of a will or that Mathieson was an omitted heir. Mathieson and the stepchildren had the burden of producing evidence and the ultimate burden of persuasion as to these matters. 3–407. They failed to meet these burdens.

The evidence concerning the lack of a will need not be reviewed. We comment on the evidence as to Mathieson's heirship, as a spouse, because there seems to be a shifting basis for this claim.

Mathieson's sworn disclaimer of any interest in Helen's estate, except insofar as he might be a devisee under a will, is substantial evidence, in itself, to support the trial court's finding that Mathieson had not brought himself within 3–412(A)(2). After executing this disclaimer, Mathieson filed the May 3, 1977 petition to reopen which was understood by all to attack the validity of his 1964 divorce from Helen. Mathieson filed another sworn pleading on May 3, 1977 entitled "petition and claim". This document alleged that the 1964 divorce in Santa Fe County "was a sham agreed upon in advance between the parties for reasons of business and without the existence of legal grounds for divorce." The trial court ruled that Mathieson and Helen were divorced in Santa Fe County District Court on October 31, 1964. It concluded the validity of that divorce could only be attacked in the divorce proceeding in Santa Fe County District Court. Neither the finding nor conclusion is challenged. This disposes of Mathieson's invalid divorce claim insofar as it is pertinent to this appeal.

The "petition and claim" of May 3, 1977 also asserted a claim for support from Helen on the basis of a "non-marital" relationship following this divorce. The details of this claimed non-marital relationship were not involved in the hearings on the petition to reopen, but the fact that Mathieson had, under oath, asserted a non-marital relationship with Helen following the divorce was evidence relevant to Mathieson's assertion that he was a spouse.

After disclaiming as an heir, then claiming an invalid divorce, and also claiming a non-marital relationship following the divorce, Mathieson shifted his position again at the July 14, 1977 hearing. Mathieson's attorney asserted that following the divorce, Mathieson and Helen entered a common-law marriage "by their cohabiting and representing themselves as husband and wife in a number of states". No evidence was introduced or tendered in support of the common-law marriage claim.

The trial court properly denied the May 3, 1977 petition to reopen insofar as it sought modification or vacation of the April 1, 1977 order under 3–412.

Mathieson and the stepchildren assert that even if modification or vacation of the April 1, 1977 order was properly denied, the trial court erred in refusing to authorize

an evidentiary hearing at which they could attempt to show grounds for modification or vacation. The claim is that such a hearing is authorized by 3–412(A)(4) which states: "the order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs". Mathieson and the stepchildren assert that 3–412(A)(4) contemplates a proceeding to redetermine heirship, if appropriate under the circumstances, and is authority to reopen the April 1, 1977 order independent of the showing required under 3–412(A)(1) and (2).

We disagree; 3–412 requires a showing of a will or an omitted heir. Such a showing is a necessary circumstance without which it would be inappropriate to modify or vacate the "final" order of April 1, 1977. Absent such a showing, there is no basis for modification or vacation "as provided in this section".

Applicability of Rule 60(b)

A. The trial court concluded that:

> A Petition to Reopen for Full Hearing on Testacy and Heirship can be entertained by this Court only if Petitioners can show that the requirements of Section 32A–3–412(A)(1), (2), (3) and (4), N.M.S.A., 1953, have been met.

Mathieson and the stepchildren had contended that even though they failed to make the showing required by 3–412, the trial court had authority under Rule 60(b) to grant them a hearing in which they could attempt to show a basis for modification or vacation of the order of April 1, 1977. The above-quoted conclusion rejected that contention. Mathieson and the stepchildren assert this was error.

Rule 60(b) states:

> (b) *Mistakes — Inadvertence — Excusable neglect—Newly discovered evidence—Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one [1] year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the proceeding for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

There are two contentions concerning the applicability of the rule.

1. The rule authorizes relief for "a party or his legal representative". There is no issue concerning representative of a party. Helen's sons, and the estate, assert that Mathieson and the stepchildren were not parties and, therefore, do not come within the rule. This assertion is based on a meaning of parties in the technical sense of opposing litigants. See *State v. Chavez*, 45 N.M. 161, 113 P.2d 179 (1941). The meaning of "party" in Rule 60(b) is not limited to this technical sense.

(a) A bill in the nature of a bill of review, at common law, was brought by one techni-

cally not a party to the original action, but whose interests were affected by the court's decree." 7 Moore's Federal Practice, ¶ 60.-15[1] (2d Ed. 1978).

Moore's, supra, ¶ 60.15[6] states:

> Bills of review were generally maintainable only by parties to the original suit and their privies and would not lie at the instance of a total stranger to the original suit and decree. When new parties whose rights or interests were affected by the decree wished a review thereof before the court rendering the decree, the proper practice was to file a supplemental bill in the nature of a bill of review.

Rule 60(b) abolished bills in the nature of a bill of review; however, the substance of this common-law remedy was preserved by the rule. *Moore's*, supra, ¶ 60.15[7]; see *State v. Romero*, 76 N.M. 449, 415 P.2d 837 (1966). In petitioning to reopen, Mathieson and the stepchildren were claiming they were adversely affected by the order of April 1, 1977, and were seeking relief of the type afforded by a bill in the nature of a bill of review.

(b) The order of April 1, 1977 provided for a supervised administration, which is defined in 3–501(A) as a "single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the district court". In an in rem proceeding, there are no parties in the sense of opposing litigants. In an in rem proceeding, the court may properly hear anyone who claims an interest and who seems in a position to throw light upon the questions under consideration. Such a person is a party in an in rem proceeding. *In re Roeder's Estate*, 44 N.M. 429, 103 P.2d 631 (1940); compare *In re Morrow's Will*, 41 N.M. 723, 73 P.2d 1360 (1937).

For each of the above reasons, Mathieson and the stepchildren were parties within the meaning of Rule 60(b).

2. As originally enacted, 1–304 provided:

> Unless specifically provided to the contrary in the Probate Code, or unless inconsistent with its provisions, the Rules of Civil Procedure govern formal proceedings under the code.

A 1978 amendment, Laws 1978, ch. 159, § 3 which enlarged this section to apply to informal as well as formal proceedings, is not applicable. The proceedings in this case were begun in 1977 and were formal proceedings. 3–401(A).

It is not specifically provided that Rule 60(b) is inapplicable. The estate's claim is that Rule 60(b) is inconsistent with provisions of the Probate Code and therefore inapplicable. We recognize there can be inconsistencies where the Probate Code would control. Compare the time requirements of 3–412 with the time requirements of Rule 60(b); particularly compare the time provisions applicable to fraud in 1–106 with Rule 60(b). It is inappropriate, however, to consider "inconsistency" as a general proposition; rather, we consider the Rule 60(b) claims made and, where necessary, decide whether they are inconsistent with the Probate Code. Mathieson and the stepchildren have made three claims under Rule 60(b).

(a) The petition to reopen alleged fraud. It is unnecessary to determine whether the fraud relief provisions in Rule 60(b) are inconsistent with 1–106. Mathieson and the stepchildren requested the trial court to find that execution of the acknowledgments, referred to earlier in this opinion, were obtained "through false representations as to their legal significance." The trial court refused to so find; rather, it found: "No fraud has been perpetrated upon the Petitioners." The evidence sustains the finding of the trial court. Thus, inconsistency as to fraud relief need not be decided.

(b) In their brief-in-chief, Mathieson and the stepchildren argued that the trial court erred in failing to grant the petition to reopen under Rule 60(b)(6), which authorizes relief for "any other reason justifying relief". No claim was made in the trial court that a hearing should be accorded under Rule 60(b)(6). This theory was raised for the first time in the brief-in-chief. Accordingly, no claim under Rule 60(b)(6) is

before us for review. Civ.App.Proc. Rule 11. We add that the evidence fails to show the exceptional circumstances required for relief under Rule 60(b)(6). *Parks v. Parks*, 91 N.M. 369, 574 P.2d 588 (1978).

(c) Mathieson and the stepchildren contended, in the trial court and at oral argument, that they were entitled to a hearing under Rule 60(b)(1), which provides for relief for mistake, inadvertence, surprise, or excusable neglect. Relief on these grounds would not be inconsistent with the grounds for relief stated in 3–412. There being no issue as to timeliness under either Rule 60(b)(1) or 3–412, we hold the trial court had authority to grant a hearing under Rule 60(b)(1). The trial court erred in holding to the contrary.

B. Since Rule 60(b)(1) did authorize relief, Mathieson and the stepchildren contend the order denying the petition to reopen must be reversed. Relying on oral remarks of the trial court, they assert the trial court was of the view that it had no authority to grant such relief and therefore did not consider whether relief should be granted. We disagree.

1. *Moore's*, supra, ¶ 60.28[3] at page 412 states that "Rule 52 does not literally require the court to make findings of fact and conclusions of law in connection with a 60(b) hearing. Many courts do, however, follow the commendable practice of making findings and conclusions where there has been a hearing on the evidence." The trial court did make findings and conclusions. The trial court's oral remarks were subject to change at any time before entry of its decision. *Stone v. Stone*, 79 N.M. 351, 443 P.2d 741 (1968). Accordingly, the oral remarks do not establish what the trial court ultimately decided. Although findings and conclusions were not literally required, they do show what the trial court ultimately decided.

2. We have previously pointed out that the trial court ruled that it had no authority to grant relief under Rule 60(b). The trial court also made alternative rulings. "Rule 60(b) . . . *does not authorize the relief requested in the Petition* to Reopen and For Full Hearing on Testacy, Heirship, and Appointment of Personal Representative". (Our emphasis.) "The Petition to Reopen for Full Hearing . . . is hereby denied." "All Requested Findings . . . and Conclusions . . . inconsistent herewith are hereby specifically denied."

The alternative rulings are distinct from the ruling that Rule 60(b) was not applicable; the alternative rulings are rulings that relief should not be granted under Rule 60(b)(1).

C. Why didn't Rule 60(b) authorize the relief requested in the petition to reopen? *Springer Corporation v. Herrera*, 85 N.M. 201, 510 P.2d 1072 (1973) states:

> Two issues arise on every application to open or vacate a judgment, namely, the existence of grounds for opening or vacating the judgment, and the existence of a meritorious defense or cause of action, as the case may be. . . .
>
> Actually, there is no universally accepted standard as to what satisfies the requirement that a party show a meritorious defense. . . . We think that matter is best left to the discretion of the trial judge—as is the decision regarding whether a good excuse has been shown. We must insist, however, that in exercising its discretion the trial court apply a liberal standard.

1. The grounds, the good excuse, in seeking to reopen in this case were mistake, inadvertence, surprise, or excusable neglect.

(a) There is nothing showing surprise; the evidence is undisputed that Mathieson and the stepchildren were notified of the hearing which resulted in the order of April 1, 1977. The unchallenged finding of the trial court is that Mathieson and the stepchildren "were afforded all of the rights and opportunities provided by law with respect to the April 1, 1977, hearing." We add that Mathieson and the stepchildren did not request a finding on surprise.

(b) Evidence was introduced concerning inadvertence or excusable neglect. This evidence was, basically, that Mathieson

and the stepchildren lived in different localities, and because of the time provisions under the Probate Code and because of distance factors, they were unable to consult with one another or with counsel. While this evidence was an excuse, the trial court could properly consider this was not a "good" excuse under *Springer Corporation v. Herrera*, supra. Mathieson and the stepchildren were promptly notified of Helen's death on February 6, 1977; they attended her funeral; they did nothing toward instituting probate proceedings; when notified of the hearing on the petition for adjudication of intestacy, they executed the acknowledgments under oath, but "did not file any instrument or pleading or appear in person or by an attorney at the hearing on April 1, 1977." We add that Mathieson and the stepchildren did not request a finding on inadvertence or excusable neglect.

(c) Evidence was introduced concerning mistake. This evidence was to the effect that the "acknowledgments" executed by Mathieson and the stepchildren were executed under the mistaken belief that their legal rights would not be affected and there was no intent on the part of any of them to relinquish or, in any way, impair any rights they might have in relation to the property involved in the estate. The trial court was requested to find that "the Acknowledgments resulted from mistake of fact and law." The trial court's refusal of this requested finding had the effect of a finding against Mathieson and the stepchildren on the "mistake" ground for relief. *Lopez v. Barboa*, 80 N.M. 338, 455 P.2d 842 (1969); *State ex rel. Thornton v. Hesselden Const. Co.*, 80 N.M. 121, 452 P.2d 190 (1969). We add, that under the evidence and the permissible inferences, the trial court could properly find there was no mistake.

(d) Apart from the evidence, is any effect to be given to the failure to request findings on surprise, inadvertence, or excusable neglect? The rule is that a failure to request a finding on an ultimate issue is a waiver of findings on that issue. *Worland v. Worland*, 89 N.M. 291, 551 P.2d 981 (1976); *Goldie v. Yaker*, 78 N.M. 485, 432 P.2d 841 (1967). The question arises because findings were not "literally required" on the petition to reopen. We hold the rule is applicable because Mathieson and the stepchildren submitted requested findings. Having omitted from their requested findings any request for findings on surprise, inadvertence, or excusable neglect, Mathieson and the stepchildren waived findings as to those issues.

(e) In summary, applying the liberal standard of *Springer Corporation v. Herrera*, supra, there is nothing showing the trial court abused its discretion in denying the petition to reopen in connection with the "good cause" issue.

2. Concerning the meritorious claim issue, the trial court found:

> 14. Prior to April 1, 1977, Michael B. Hubler and William K. Mathieson exercised reasonable diligence to discover a duly executed, valid and unrevoked Last Will and Testament of the decedent.
>
> 15. Subsequent to April 1, 1977, Michael B. Hubler and William K. Mathieson have continued to exercise reasonable diligence to discover a duly executed, valid and unrevoked Last Will and Testament of the decedent as evidenced by the Order of this Court entered April 21, 1977, which declared the February 19, 1947, Last Will and Testament of the decedent completely revoked.

Mathieson and the stepchildren assert these findings are not supported by substantial evidence, but make no effort to state the substance of all evidence bearing on these findings as required by Civ.App. Proc. Rule 9(d). We add that substantial evidence supports these findings.

Mathieson has not challenged the finding that he was divorced from Helen in Santa Fe County District Court in 1964, and has not challenged the ruling that the validity of the divorce cannot be attacked in these probate proceedings.

The oral claim of Mathieson's attorney is that subsequent to the divorce, Mathieson and Helen entered a common-law marriage, but there is no evidentiary support for this claim.

There is also the finding, previously discussed that, although having the opportunity to do so, Mathieson and the stepchildren have been unable to make the showings required by 3–412(A)(1) and (2). Thus, although having the opportunity to do so, Mathieson and the stepchildren have been unable to show there was a valid will or an omitted heir.

In *Springer Corporation v. Herrera*, supra, a *claim* of a meritorious defense was held sufficient to meet the meritorious defense requirement. However, *Springer* does not discuss the situation in this appeal—an opportunity was afforded to show a basis for a meritorious claim and with that opportunity, the showing could not be made. The fact of the opportunity distinguishes *Springer*.

Applying the liberal standard of *Springer Corporation v. Herrera*, supra, there is nothing showing the trial court abused its discretion in denying the petition to reopen in connection with the meritorious claim issue.

D. Mathieson and the stepchildren remind us that under this Rule 60(b) issue, the question is whether they "can reopen this proceeding to prove their claims . . . to pursue discovery, to prepare for a full hearing on the merits, and to participate in a full hearing on the merits at which their substantive claims will be decided by the Court." We have been aware of this question throughout our discussion of the Rule 60(b) issue. Our answer, again, is that the trial court ruled that Rule 60(b) did not authorize the relief requested. This ruling was not an abuse of discretion under the showing made as to the two requisites for reopening—grounds for reopening and meritorious claim.

E. The trial court found:

> 23. The prompt and orderly administration of this estate *may* be impeded to the detriment of the estate and the heirs of the decedent if the Order of April 1, 1977, is set aside or reopened on the basis of the matters which have been presented or asserted by the Petitioners. (Our emphasis.)

Mathieson and the stepchildren assert this finding is not supported by substantial evidence. Our answer is that this finding was unnecessary to support the order denying the petition to reopen. Mathieson and the stepchildren failed to make a sufficient showing so that a refusal to reopen would have been an abuse of discretion. An erroneous finding, unnecessary to support the court's order, is not grounds for reversal. *Specter v. Specter*, 85 N.M. 112, 509 P.2d 879 (1973).

However, the finding does have substantial evidentiary support. The finding refers to matters "presented or asserted". Those matters, under this record, are no more than speculative claims made subsequent to the intestacy adjudication hearing, of which Mathieson and the stepchildren had notice, and at which they failed to appear. Hearings were held in May and July, at which Mathieson and the stepchildren had the opportunity, but failed, to show their claims were more than speculation. The prompt and orderly administration would, rather than might, be impeded by an order authorizing still more hearings on the basis of the showing made.

Inherent Power to Reopen

Mathieson and the stepchildren assert that the trial court had inherent power to reopen, independent of Rule 60(b). Assuming this is true, they receive no benefit. "With reference to the claimed abuse by the trial court in refusing to reopen the case, we would point out that we have consistently held that such a determination is within the sound discretion of the trial court and will not be lightly overturned." *Foreman v. Myers*, 79 N.M. 404, 444 P.2d 589 (1968). There being no abuse of discretion in denying the petition to reopen under Rule 60(b), there was no abuse of discretion in denying the petition under the asserted inherent power of the trial court.

Interrelationship of 3–804(C) and 3–806(A)

The "claim" portion of Mathieson's "petition and claim" filed May 3, 1977, asserted

three claims against the estate. Notice of disallowance of these claims was mailed to Mathieson and his attorney on May 9, 1977. The notice of disallowance was filed in the court file on May 11, 1977.

On September 8, 1977 Mathieson mailed to counsel for the estate a request for an extension of time "for pursuing allowance of his claim". This request was filed in the court file on September 13, 1977. After a hearing, the request was granted over the estate's objection. The trial court's order, filed October 27, 1977 extended the period for claim prosecution; "he shall have twenty (20) days from the entry hereof to commence such proceedings against the Personal Representative."

The pertinent portions of 3–804 state:

> Claims against a decedent's estate may be presented as follows:
>
> A. The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed, or he may file a written statement of the claim with the district court. The claim is presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the district court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.
>
> * * * * * *
>
> C. If a claim is presented under subsection A of this section, no proceeding thereon may be commenced more than sixty days after the personal representative has mailed a notice of disallowance. However, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the sixty-day period, or to avoid injustice, the district court, on petition, may order an extension of the sixty-day period, but in no event shall the extension run beyond the applicable statute of limitations.

Mathieson did not commence a proceeding against the personal representative within sixty days after notice of disallowance of his claim was mailed on May 9, 1977. Rather, one hundred twenty-two days after notice of disallowance was mailed, and sixty-two days after the expiration of the sixty-day period for commencing a proceeding against the personal representative, Mathieson sought an extension of the time for commencing such a proceeding.

Authority for extending the time is stated in 3–804(C). Extensions may be granted only for claims not presently due, contingent or unliquidated. The claims filed by Mathieson do not inform us whether they came within these classifications, but this did not invalidate the claims. See 3–804(A). The briefs dispute whether the claims made are the type of claims for which an extension may be granted. The record is insufficient to determine whether the claims were of the appropriate type. We proceed on the assumption that Mathieson's claims were either not presently due, contingent or unliquidated.

The personal representative did not consent to an extension.

The court may order an extension "to avoid injustice". There is no contention that the extension was improperly granted under this "justice" requirement.

The estate claims the trial court lacked authority to grant the extension. Its position is that extensions of time may not be granted under 3–804(C) after the sixty-day period has expired. The estate relies on 3–806(A), which states:

> A. As to claims presented in the manner described in section 3–804[32A–3–804] within the time limit prescribed in section 3–803[32A–3–803], the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If, after allowing or disallowing a claim, the personal representa-

tive changes his decision concerning the claim, he shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. *Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the district court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance or partial allowance.* Failure of the personal representative to mail notice to a claimant of action on his claim for sixty days after the time for original presentation of the claim has expired has the effect of a notice of allowance. (Our emphasis.)

"Barred" in 3–806(A) means a barrier, which if interposed, prevents legal redress or recovery. See "barred" in Black's Law Dictionary (4th Ed. 1951). If the time may be extended under 3–804(C) after expiration of the sixty-day period, then "barred" in 3–806(A) would not be given effect as a barrier.

We are to give effect to all of the provisions of a statute. We are also to reconcile different provisions so as to make them consistent and harmonious. *Fort v. Neal,* 79 N.M. 479, 444 P.2d 990 (1968); *State v. Scarborough,* 78 N.M. 132, 429 P.2d 330 (1967).

Applying the above stated rules of construction, 3–806(A) is to be applied as stated. A disallowed claim is barred unless the claimant files a petition for allowance in district court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance or partial disallowance. 3–804(C) is consistent and harmonious with 3–806(A) if the extension authorized by 3–804(C) is granted prior to expiration of the sixty-day period.

We hold that the trial court had no authority, under 3–804(C) to extend the time for proceeding against the personal representative after the sixty-day period had expired. This holding is consistent with New Mexico decisions prior to enactment of the Probate Code which required actions based on the denial of a claim to be brought within the statutory time period. See *Levers v. Houston,* 49 N.M. 169, 159 P.2d 761 (1945); *Buss v. Dye,* 21 N.M. 146, 153 P. 74 (1915). This holding is also consistent with the statutory purpose of promoting a speedy and efficient system for the settlement of estates. 1–103; see *Levers v. Houston, supra.* See also *Barnett v. Hitching Post Lodge, Inc.,* 101 Ariz. 488, 421 P.2d 507 (1966); 3 Bancroft's Probate Practice, § 879 (2nd Ed. 1950).

Louisiana Power & Light Company v. Lasseigne, 255 La. 579, 232 So.2d 278 (1970) discussed extension of the return day for an appeal as follows:

> The word *extend* is used in the Code and in the Revised Statutes in its usual and ordinary sense, meaning to increase the duration of, to lengthen, or to prolong. That which no longer exists, that which has terminated, cannot be extended.

State v. Scott, 113 Mo. 559, 20 S.W. 1076 (1893) states: "The word 'extended,' as employed in this statute, means 'prolonged;' and of course a prolongation of time cannot occur after the time originally limited has expired."

3–804(C) states the trial court "may order an extension of the sixty-day period". Once the sixty-day period has expired there is nothing to extend. *Schlosser Leather Co. v. Gillespie,* 157 Tenn. 166, 6 S.W.2d 328 (1928). See also *In re Parent,* 30 F.Supp. 943 (D.N.H.1940). *In re Estate of Herskowitz,* 342 So.2d 530 (Fla.App.1977) is to the contrary but is not persuasive. In *Herskowitz* the trial court's refusal to extend the time for filing a claim was reversed because good cause was shown. *Herskowitz,* however, does not discuss the propriety of granting an extension after the time limitation had expired.

Applicability of Rule 6(b)

Rule 6(b) states:

> (b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done; but it may not extend the time for taking any action under Rules 50(b), 50(c)(2), 52B(b), 59(b), (d) or (e), 60(b) or 62(d), or any Supreme Court Rule, except to the extent and under the conditions stated in them.

Part 2 of the rule authorizes a trial court to permit an act to be done after the expiration of the specified time period. The act which may be permitted to be done must, however, be an act allowed to be done "by these rules".

Rule 6(b) "is limited to such matters as arise under the rules of civil procedure or by order of the court, and not to periods of time which are definitely fixed" by statute. *Lusk v. Lyon Metal Products*, 9 F.R.D. 250 (W.D.Mo.1949). The rule does not authorize the trial court to extend a time period fixed by statute. *United States v. Easement and Right-of-Way*, 386 F.2d 769 (6th Cir. 1967); *Carroll v. Manufacturers Trust Co.*, 14 F.R.D. 84 (S.D.N.Y.1952), aff'd, 202 F.2d 714 (2d Cir. 1953).

Mathieson contends that 1–304 authorizes an extension under Rule 6(b). 1–304 provides that the rules of civil procedure govern in this case "unless inconsistent" with the provisions of the Probate Code.

3–806(A) provides that a disallowed claim is "barred" unless a petition for allowance is filed or a proceeding is commenced "not later than" sixty days after the mailing of notice of disallowance. Thus, the statute states a limitation, beyond which, the claim is barred. See *Anderson v. McNally*, 150 Cal.App.2d 778, 310 P.2d 975 (1957); *Bancroft*, § 879, supra. Rule 6(b) may not be applied to extend the time because such an extension would be inconsistent with the barring of a disallowed claim unless proceedings were commenced not later than sixty days after mailing of notice of disallowance.

Neither Rule 6(b) alone nor Rule 6(b) in conjunction with 1–304, authorized the extension granted by the trial court.

The order in Cause No. 3236, denying the petition to reopen, is affirmed. The order in Cause No. 3352, extending the time for commencing proceedings on a disallowed claim after the sixty-day period had expired, is reversed. The cause is remanded with instructions to set aside the order in Cause No. 3352 which extended the time and to dismiss any proceedings instituted pursuant to that order.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

589 P.2d 180

Edward J. GERETY, M.D., Petitioner,

v.

Henry C. DEMERS, Respondent.

No. 11847.

Supreme Court of New Mexico.

Dec. 13, 1978.

Rodey, Dickason, Sloan, Akin & Robb, Bruce D. Hall, Albuquerque, for petitioner.

Marchiondo & Berry, Charles G. Berry, Albuquerque, for respondent.

OPINION

EASLEY, Justice.

In the first trial of this medical-malpractice case plaintiff-appellant, Henry G. Demers, won a $67,000.00 jury verdict against defendant-appellee, Edward J. Gerety, M.D. On Dr. Gerety's appeal to the Court of Appeals the decision was affirmed. *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct.App.1973). Certiorari was granted to Dr. Gerety by this Court which reversed and returned the case to the Court of Appeals with instructions to address certain issues. *Gerety v. Demers*, 86 N.M. 141, 520 P.2d 869 (1974). The Court of Appeals remanded the case to the trial court for a new trial. *Demers v. Gerety*, 87 N.M. 52, 529 P.2d 278 (Ct.App.1974). Demers applied for certiorari on his cross-appeal only. *Cert. denied*, 87 N.M. 47, 529 P.2d 273 (1974).

The second trial resulted in a verdict for Dr. Gerety and Demers appealed. The Court of Appeals again reversed and remanded the case to the lower court for a third trial. *Demers v. Gerety*, 17 N.M.St.B. Bull. 2373, March 16, 1978. We granted certiorari; and now on the *sixth* appellate proceeding for this case, we affirm in part and reverse in part.

Issues

The complexities of the facts, the law and the procedure in this case are incredible. The complaint was filed November 17, 1969, for injuries allegedly caused by the operation on November 13, 1967. The case has been haunting the parties and the judicial system for almost nine years. Generally the issues are:

1. Whether a trial judge who has presided over the first trial of a case may voluntarily recuse himself from presiding in the second trial without stating on the record that he has constitutional, statutory or ethical cause for so doing.

2. Where the time had long since expired under § 21–5–9, N.M.S.A.1953 (Supp. 1975) (current version at Interim Supp. 1976–77) for disqualifying a judge, whether the second trial judge, who was not even serving as a judge when the issues were joined in 1973, was legally precluded from trying the case by the filing of an affidavit of disqualification after the first judge recused himself and notice was given of the designation of the new judge.

3. Where the Court of Appeals held that a verdict should have been directed in favor of Dr. Gerety in the first trial because there was no expert medical testimony showing causation on the issue of negligent surgery, but the Court of Appeals, nevertheless, reversed and remanded the case for a new trial without specific directions or stated limitations, and then Demers did not apply for certiorari, whether the second trial judge was correct in refusing to admit additional evidence on negligent surgery and was correct in granting Dr. Gerety summary judgment on that issue.

4. Whether Demers' instructions given in the first trial without objections, which were refused in the second trial on the grounds that they did not accurately reflect the dispositive facts adduced in the second trial, are nevertheless the law of the case and should have been submitted in their original form to the second jury.

5. Whether a distinction exists in New Mexico between common law battery, based on unlawful touching because of an operation by a physician without the patient's consent, and malpractice, based on negligence in the care and treatment of a patient.

6. Where the first trial judge erroneously ruled and instructed the jury that the "clear and convincing" test of written contract law as applicable in appraising Demers testimony as to his competency to sign a consent, and where Demers did not apply for certiorari after the Court of Appeals erroneously affirmed the trial court's decision on this issue, whether the application of written contract law became the law of the case and thus controlling on the second trial judge when he appraised and rejected Demers' testimony regarding drug induced incompetency as being insubstantial and refused to submit instructions on the issue to the jury.

7. Assuming that the evidence on motion for summary judgment must be considered without the application of the restrictive presumptions and the "clear and convincing" test of written contract law, erroneously applied by the two lower courts on the incompetency claim of Demers, was the evidence in the record sufficient to create a jury issue as to whether Demers consented to the revision of his ileostomy?

8. Whether in a physician-battery case it is necessary in all cases for the plaintiff to present expert medical witnesses to prove a medical standard against which to test the acts of the physician in diagnosing, treating and informing the patient, as well as to prove a violation of the standard and causation.

9. Where the issue of informed consent is raised in malpractice cases, whether it is mandatory that the claim of lack of informed consent be proved by testimony of expert medical witnesses as to the standard of care demanded, as to whether there has been a violation of that standard and as to whether the physician's acts or failure to act were the proximate cause of the patient's injuries.

10. If the strict rule mandating expert medical evidence in informed consent cases is relaxed, as it applies to proving the three issues above enumerated, whether an objective standard, based on the knowledge or skill of an *ordinary* patient or physician is to be used, or a subjective standard, based on the particular knowledge or skill of the parties involved.

The facts and the law pertaining to each of the above issues will be discussed in the order given.

Need to State Reasons for Recusal

After the first remand, District Judge Gerald D. Fowlie, who presided at the first trial, recused himself without stating for

the record that he had a statutory, ethical or constitutional cause for disqualification. There was no evidence showing the reason for his disqualification. Judge Stowers was designated, after which nothing happened in the case for approximately twenty months. Judge Stowers recused himself, giving no reason therefor. Judge Maurice Sanchez was assigned to the case, at which time Demers filed an affidavit of disqualification which Judge Sanchez refused to honor. On appeal Demers claimed that it was error for Judge Fowlie to recuse himself and for Judge Sanchez to sit.

The Court of Appeals held that a district judge has a duty to enter an order stating that he has valid reasons for recusing himself, that to remain mute on this point constitutes an abuse of discretion and that refusing to hear the case without a compelling reason constitutes neglect of duty. That court reversed and ordered that Judge Fowlie sit for the third trial.

There are no constitutional or statutory provisions which specifically set forth the authority or the procedure for a judge to voluntarily recuse or disqualify himself. N.M.Const. art. 6, § 18 provides that a judge is disqualified when a party to the suit is related to him by affinity or consanguinity within the degree of first cousin, when he has been counsel in the suit or has presided over the trial as judge in an inferior court, or where he has an interest in the case. The New Mexico Code of Judicial Conduct provides that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding". Canon 3(C)(1)(a) [§ 16–11–3(C)(1)(a), N.M.S.A.1953 (Supp.1975)]. Section 21–5–8, N.M.S.A.1953 (Repl.1970) provides that a judge may be disqualified by a party by the filing of an affidavit alleging that the judge cannot preside with impartiality.

In *Doe v. State*, 91 N.M. 51, 570 P.2d 589 (1977) this Court was called upon to interpret art. 6, § 15 of the New Mexico Constitution which states that if any judge shall be "disqualified" from hearing any cause the parties may select some member of the bar to act as judge pro tempore. We held that the term "disqualified" encompasses voluntary recusal. We further held that when a judge believes he will not be able to remain impartial he should use his discretion and remove himself from the case in order to avoid any hint of impropriety. We quoted with approval from *State v. Allen Superior Court No. 3*, 246 Ind. 366, 206 N.E.2d 139, 143 (1965) in which that court stated that the reasons for the judge to disqualify himself may be personal and that he need not state them.

We hold with the well-established principle that a judge has a duty to perform the judicial role mandated by the statutes, and he has no right to disqualify himself unless there is a compelling constitutional, statutory or ethical cause for so doing. *E.g., Rosen v. Sugarman*, 357 F.2d 794, 797–98 (2d Cir. 1966); *Duplan Corporation v. Deering Milliken, Inc.*, 400 F.Supp. 497, 526–27 (D.S.C.1975); *Arizona Conference Corp. v. Barry*, 72 Ariz. 74, 231 P.2d 426, 428 (1951); *Williams & Mauseth Ins. Brokers, Inc. v. Chapple*, 11 Wash.App. 623, 524 P.2d 431, 434 (1974). Recusal should be used only for the most compelling reasons. *Nelson v. Fitzgerald*, 403 P.2d 677 (Alaska 1965). A judge "has a duty to *sit* where *not disqualified* which is equally as strong as the duty to *not sit* where *disqualified*." *Laird v. Tatum*, 409 U.S. 824, 837, 93 S.Ct. 7, 15, 34 L.Ed.2d 50 (1972).

We approve of this statement by Justice Rehnquist in *Laird*, and hold that, except in those cases where a judge's impartiality might be reasonably questioned, he must exercise his judicial function. *See United States v. Haldeman*, 181 U.S.App.D.C. 254, footnote 360 at 362, 559 F.2d 31, footnote 360 at 139 (1976) (interpreting the latest version of the federal disqualification statute), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977).

However, when a judge recuses himself we must presume, in the absence of any evidence to the contrary, that he is doing so

in full conformity with his duty. We are very reluctant to interfere with a lower court's exercise, or refusal to exercise, its jurisdiction, and see no reason to do so here. *State v. Scarborough*, 75 N.M. 702, 410 P.2d 732 (1966). In holding that the judge must have good cause for recusal but need not state for the record that he has cause nor state the cause, we overrule the decision of the Court of Appeals on this issue. That court was in error in remanding the case for retrial by Judge Fowlie.

Timeliness of Disqualification

The affidavit of disqualification directed to Judge Sanchez was filed after the first trial and the first appeal, which was several years after the time had expired under § 21–5–9 within which to disqualify a judge. Demers contends that the limitation in this statute should be read by this Court to mean that the time starts to run when the party who later seeks to disqualify the judge is given notice that the particular judge will try the case on its merits. To rule otherwise, Demers suggests, is to admit that, in cases such as this one, there is no method by which a judge, whom the moving party thinks to be partial, can be removed from the case without a hearing and actual proof of disqualification.

Section 21–5–9 provides for an affidavit of disqualification to be filed within ten days "after the cause is at issue" or within ten days "after the time for filing a demand for jury trial has expired", whichever is later. It does not say within ten days "after a new judge is designated to hear the case." The latter provision might be just and desirable, but it cannot be read into the statute. The provision for disqualification is not a court-made rule. It is a substantive right granted by the legislature, *Beall v. Reidy*, 80 N.M. 444, 457 P.2d 376 (1969). We have construed it strictly according to its plain language. *See State v. Hernandez*, 89 N.M. 698, 556 P.2d 1174 (1976).

The Court of Appeals was in error in holding that Judge Sanchez was properly disqualified.

History of the Proceedings

Considering the volatility of the law of malpractice in the past decade and knowing that our courts and the litigants have had little New Mexico law to guide them, it is not surprising that a number of mistakes were made in this complicated suit. The mutually inconsistent actions of battery and malpractice were scrambled throughout the history of this case. "Malpractice" was replaced as an issue with "negligent surgery" in most of the proceedings. "Informed consent" was considered most of the time as a separate and distinct issue from "legal consent." The law of written contracts was erroneously applied to construe the written consent for surgery. Numerous other errors committed by the parties and the courts have made a morass of the issues.

Demers' complaint alleged "negligent surgery", "lack of legal consent" and performance of an operation "different from the one authorized." The alleged unauthorized surgery was not described as "battery" in the complaint. These three claims were submitted to the jury in an instruction requested by Demers in which he described all three of the acts as "malpractice." None of the other instructions made a specific distinction between battery based on unauthorized touching, and malpractice based on negligence. In fact, on Demers' own request, the jury was instructed that it is "malpractice" for a physician to perform an operation which was not agreed to by the patient.

Dr. Gerety protected his record by motions for directed verdicts and for a judgment n. o. v., all of which were denied by the first trial court. Numerous Demers' instructions bearing on informed consent were also submitted to the jury without objection. The jury returned a verdict for Demers.

Dr. Gerety appealed, alleging errors by the judge in refusing his motions for a directed verdict and for judgment n. o. v. He also claimed there were errors in submitting each of Demers' claims to the jury. Demers' third issue of "performance of an

operation different from the one authorized" raised in Demers' complaint and in his theory instruction, was not mentioned. The third issue on appeal became one of "informed consent." Two other issues were raised by Dr. Gerety that are not material at this point.

Demers cross-appealed claiming errors in giving and refusing instructions which will be discussed elsewhere.

The issue instruction submitted by Demers and given to the jury specified that the jury should find for Demers if they determined that he had proven any one of his three claims. Dr. Gerety did not object to this instruction. The Court of Appeals held that the submission of the three issues in the alternative without objection thus became "the law of the case," and ruled that it was only necessary to determine whether there was evidence to support "any" of Demers' three theories. The court then held that Demers' claim regarding lack of consent to the surgery was supported by substantial evidence and declined to rule on Dr. Gerety's other two issues.

The court further held that "[t]here was medical testimony that all the subsequent medical complications plaintiff suffered were the result of the hernia repair and ileostomy revision," that the entire course of surgery was "unconsented to and therefore tortious" and that the incisions were "injuries inflicted by the defendant." 85 N.M. at 646, 515 P.2d at 650. (However, that court in the second opinion repudiated this finding of causation and held that, because of lack of any expert medical testimony to prove proximate cause, a verdict should have been directed by the trial court on the issue of negligent surgery.) The court did not reach the issues raised in Demers' cross-appeal.

When the case came to this court on certiorari, Justice Stephenson stated in our decision that the issues were negligent performance of surgery, lack of consent to surgery and lack of informed consent. This Court held that under the provisions of N.M.R.Civ.P. 50(b) [§ 21–1–1(50)(b), N.M.S.A.1953 (Repl.1970)] a motion for a directed verdict and its denial always preserves for review the question whether, under the law applicable to the case, there is an adequate evidentiary basis. We then remanded the case to the Court of Appeals with directions to consider whether there was substantial evidence to justify the submission of plaintiff's theories of negligent surgery and lack of informed consent.

Upon remand the Court of Appeals proceeded to consider the two issues mentioned. The details of the operations performed and the surrounding circumstances are contained in the prior Court of Appeals' decisions, 85 N.M. at 644–45, 647–654, 515 P.2d at 648–49, 651–58; 87 N.M. at 53, 529 P.2d at 279; 17 N.M.St.B.Bull. 2373, March 16, 1978; and will not be repeated here. Based on these facts the Court of Appeals held that Dr. Gerety's failure to make a "long enough stoma" was not traced by expert medical testimony as the cause of the "boil" or abscess on Demers' bowel wall that had produced a bowel obstruction which had in turn caused a second operation and injuries to Demers. The court correctly held that lay testimony under the facts would not suffice to show causation. *Pharmaseal Laboratories, Inc. v. Goffe*, 90 N.M. 753, 568 P.2d 589 (1977). The Court of Appeals stated: "Since there was no expert testimony, there was no issue as to causation and the trial court incorrectly denied defendant's motion to direct a verdict on the issue of negligent surgery." The court further pointed out that in the prior opinion it had decided there was lack of consent; thus, "it goes without saying, there could not have been any informed consent." *Demers*, 87 N.M. at 53, 529 P.2d at 279.

The court reversed and remanded for a "new trial consistent with this opinion." There were no other specific directions or limitations contained in the remand order or the mandate regarding issues to be tried. Neither party asked for clarification as to what issues would properly be for trial after remand. Although Demers applied for certiorari on a requested instruction on burden of proof, he did not ask for certiorari to review the holding of the Court of Appeals

that the trial court was in error in denying Dr. Gerety's motion to direct a verdict on the issue of negligent surgery. On the other hand, Dr. Gerety could have applied for certiorari to review the decision ordering a new trial and could have moved to limit the issues in the second trial. He did neither.

After the case was remanded and Judge Sanchez was assigned to try it, he refused to hear additional expert medical evidence on causation, ruling that the issue had been fully litigated through the Court of Appeals and had been definitely decided against Demers. The court held that action "consistent with this opinion" meant dismissing negligent surgery from the case. The second trial judge submitted the case to the jury only on the question of "legal consent." The second jury verdict was in favor of Dr. Gerety. Demers went to the Court of Appeals, claiming his right to a new trial on all questions and also raising numerous questions about the instructions and disqualification of the judge, which are discussed elsewhere.

On the third time before the Court of Appeals, the court ruled that the first trial judge had erroneously recused himself and that the second trial judge was disqualified, issues that have heretofore been discussed. That court further held that the trial court was in error in refusing Demers' request that negligent surgery be again submitted to the jury and in failing to follow the doctrine of the law of the case by refusing to give instructions from the first case. The case was remanded for a third trial on all issues.

Negligent Surgery as Issue in Second Trial

We now consider whether medical malpractice, or negligent surgery as it was called throughout the proceedings, should have been submitted to the jury in the second trial. Dr. Gerety urged that the courts had effectively adjudicated that issue, had eliminated it as a part of a new trial, and had made it mandatory that the second trial judge direct a verdict without further evidence. Demers contended that the mandate for a "new trial" without specific limitations meant that he was entitled to a new trial on all of the issues.

In *Montoya v. Ortiz*, 24 N.M. 616, 175 P. 335 (1918), we held that the court is invested with the discretion to either render the final judgment, direct a lower court to enter final judgment, or remand the case for a new trial or other proceeding. *See Ortega v. Ortega*, 33 N.M. 605, 273 P.2d 925 (1928); *In re Keels' Estate*, 37 N.M. 569, 25 P.2d 806 (1933). The early case of *State ex rel. Bujac v. District Court*, 28 N.M. 28, 205 P. 716 (1922) contains an analysis of the law that indicates logical and reasonable parameters for the court's authority in these cases. However, *Bujac* is somewhat different on the facts from our case. This Court in *Bujac* did not specifically order a new trial but simply reversed and remanded the case with directions to "proceed in accordance herewith." In that decision, however, this Court had ruled that Bujac failed to establish his claim. On remand the case was redocketed; notice was given to Bujac that a judgment would be entered against him on a given date by the district court without further trial; he failed to respond to the notice; and the court entered a judgment against him based on this court's finding that he had not established his claim. Bujac sought to vacate the judgment, but failed. He appealed. This Court on affirming the judgment below said:

> In most jurisdictions it is said that, where it appears that the facts have been fully developed upon the trial, a new trial will not be ordered upon reversal of the judgment, but the proper judgment will be rendered by the appellate court, or ordered to be rendered by the court below.

Id. at 36, 205 P. at 719–20.

The *Bujac* court stated further that the appellate court should:

> [E]ither render the proper judgment or direct the lower court to do so, except in those cases where such action is prevented by the circumstances, or where legal injustice would thereby result to one of the parties. Ordinarily the parties should go back to the point where the error

> occurred, and the case should proceed from that point to a conclusion, unless the circumstances prevent such a course.

Id. at 50, 205 P. at 725.

In *Bujac*, the court's ruling, based on the fact situation as it exists in the instant case, would be as follows:

> [T]here is no reason why, upon reversal, and in the absence of controlling circumstances of necessity, that there should be another trial of the issues. Unless prevented by the erroneous rulings of the trial court, each party to the cause is presumed to have put forward all of the facts in his possession reflecting upon the issues involved. If they fail to do so, the facts and circumstances not so presented are deemed to have been lost or waived. (Citations omitted.)

Id. at 52, 205 P. at 726. The reasoning is fully applicable here.

We reject the principle advanced by the Court of Appeals, based on *Byrne v. Prudential Ins. Co. of America*, 88 S.W.2d 344 (Mo.1935) and other authorities, that a new trial may be ordered on the sole basis of the court finding that, although there is a failure of proof, the court is convinced that the plaintiff on retrial can adduce further proof to make out a prima facie case.

In *Porter v. Porter*, 65 N.M. 14, 331 P.2d 360 (1958), on the issue here addressed, almost identical facts as in this case were present. This Court, on rehearing of the second appeal, held that the case had been fully tried on the merits as to the sufficiency of the evidence to sustain the judgment and that, even though there was an error of law, no further proof on that matter would be allowed.

It would appear from this analysis of the law that the Court of Appeals should have either ordered judgment for Dr. Gerety on the issue of negligent surgery or should have instructed the trial court to do so. It did neither, but simply sent the case back for a "new trial consistent with this opinion." There is no showing of "controlling circumstances of necessity" for another trial on negligent surgery, and we find that no legal injustice has been done to either party. We overrule the Court of Appeals.

Law of the Case

In *Ute Park Summer Homes Ass'n v. Maxwell Land G. Co.*, 83 N.M. 558, 494 P.2d 971 (1972) this Court stated that the doctrine of the law of the case has long been recognized in New Mexico, describing the substance of the doctrine to be:

> If an appellate court has considered and passed upon a question of law and remanded the case for further proceedings, the legal question so resolved will not be determined in a different manner on a subsequent appeal.

Id. at 560, 494 P.2d at 973.

In *Varney v. Taylor*, 79 N.M. 652, 448 P.2d 164 (1968), as here, the case had been up for the third time on appeal to this Court. The court reiterated our rule that we are committed to the "right or wrong" principle under which a decision upon a former appeal is binding upon the appellate court on the second appeal, whether or not it is in error. The Court further held, "that the law of the case doctrine applies not only to questions which are expressly or by necessary implication raised and ruled upon in the prior appeal, but also to questions which might have been but were not raised or presented. *Jencks v. Goforth*, 57 N.M. 627, 261 P.2d 655; *Sanchez v. Torres*, [38 N.M. 556, 37 P.2d 805 (1934)]." *Id.* at 654, 448 P.2d at 166. The court in *Varney*, then proceeded to rule that an erroneous adjudication even as to jurisdiction becomes the law of the case and is binding in all subsequent proceedings.

We hold that the second trial court was correct in directing a verdict for Dr. Gerety on the issue of negligent surgery. We realize it raises a question as to whether any litigable issue remained after causation was eliminated, considering that battery was not properly raised; but we are here confronted with the accomplished fact that a new trial has already been conducted with the issue of legal consent as the only claim litigated.

On the basis of the rule laid down in *Varney* and other cases we also reject the

sua sponte holding of the Court of Appeals that Dr. Gerety waived his right to rely on his motion for a directed verdict by waiting twenty months after the first mandate came down to again assert his claim. This question was not raised by Demers at any level. There was no evidence showing the cause for delay, and Demers had the burden of proof. The trial court made no finding of waiver. This must be regarded as a finding against Demers. *Farrar v. Hood*, 56 N.M. 724, 249 P.2d 759 (1952). The question was presumptively decided against Demers on the second appeal and became the law of the case.

The Court of Appeals holding that the trial court should have directed a verdict on negligent surgery, not having been brought to this Court for review has been waived and cannot now be relied upon as error by Demers.

First Instructions as Law of the Case

Demers made numerous objections in both trials to the court's giving and refusing to give instructions. Only a few of these are material at this point. The Court of Appeals in its last opinion held that four instructions on informed consent and one on circumstantial evidence that were given and not objected to by Dr. Gerety in the first trial became the law of the case and should have been given in the second trial.

Before determining whether these instructions were proper, it is necessary to analyze other instructions that were given in the first trial. Regarding Demers' written consent to surgery the jury was instructed that the law presumes that a person was competent at the time he signed a written instrument; that it is plaintiff's burden to overcome the presumption of his competency; that he must do this by "clear and convincing" evidence; that evidence is only clear and convincing if it "instantly tilts the scales in the affirmative"; that it is the duty of every person to read an instrument before he signs; that, if he fails to read the instrument, he cannot claim his intentions were other than as represented in the instrument.

The giving of the above instructions was sustained by the Court of Appeals by its first two opinions, except that the second opinion found error in the first trial court's failure to instruct that "if a party is incompetent (or under such sedation as would destroy competency) at the time of entering in a contract, that agreement is invalid. (Citations omitted)." *Demers, supra*, 87 N.M. at 54, 529 P.2d at 280. Demers applied for certiorari to review only a small number of the issues involving the consent, and the writ was denied by this Court. *Demers, supra*, 87 N.M. 47, 529 P.2d 273 (1974).

If we follow Demers' admonition that instructions given in the first trial become the law of the case, he has snared himself with his own noose. In fact, Demers tendered instructions in the second trial that contained most of the language set forth in the instructions given in the first trial. The issue of the application of written contract law to Demers' written consent was fully litigated and erroneously decided adversely to Demers' position. N.M.U.J.I. Civ. 8.1 specifies that malpractice is a "form of negligence". In *Schrib v. Seidenberg*, 80 N.M. 573, 458 P.2d 825 (Ct.App.1969) it was so held. Contract law is patently inapplicable and the Court of Appeals was in error in this regard.

This decision on the law became more important on remand than merely a holding that instructions once given and not objected to become the law of the case. The Court of Appeals held that "competency is presumed in the law", and that plaintiff "must rebut that presumption". *Demers, supra*, 87 N.M. at 53, 529 P.2d at 280; *Grannum v. Berard*, 70 Wash.2d 304, 422 P.2d 812 (1967). At the time the second trial judge was assessing Demers' proof that he was drugged and incompetent to sign the consent to revise his ileostomy, the judge had before him the decisions of the Court of Appeals. He relied upon the law of written contracts to decide whether there was a proper quantum of evidence to warrant submission of the question of informed consent to the jury. He applied the presump-

tions called for in the first instructions and the "clear and convincing" test to Demers' claim of incompetency and found that there was insufficient evidence to warrant submission to the jury.

There being no justiciable issue, the instructions bearing on informed consent were refused by the trial judge. We find no abuse of discretion since the evidence introduced to support Demers' claim that he was under sedation when he signed the consent to the operation was obviously short of being clear and convincing, and there was no substantial evidence of failure to properly inform Demers. Since informed consent was not properly an issue in the second trial, giving the instructions from the first trial on that issue would have introduced false questions before the jury that would have been clearly misleading.

The law of the case as to the application of written contract law was properly applied. *Varney, supra.* Demers did not take the necessary steps to establish as the law of the case the Court of Appeals' decision that there was no consent or informed consent to surgery. We reverse the part of the last decision of the Court of Appeals holding that these instructions should have been given.

As to Demers' claim that the court erred in failing to give his requested instruction on circumstantial evidence, he did not call the attention of the trial court or of either appellate court to evidence in the record that justified the submission of this instruction. We will not review the record to find support for Demers' claim. *Chavez v. Chenoweth*, 89 N.M. 423, 553 P.2d 703 (Ct.App.1976). We reverse the decision of the Court of Appeals on this question.

Battery v. Malpractice

Because of the shambles that this case has left in the New Mexico law of malpractice and physician-battery, we are compelled to analyze and define the nomenclature and the components of various issues arising in these cases.

In the past twenty years, since the decision in *Salgo v. Leland Stanford, Jr. Univ. Bd. of Trustees,* 154 Cal.App.2d 560, 317 P.2d 170 (1957), which first introduced the theory of "informed consent" in medical malpractice suits, few legal issues have generated as great confusion and as great a volume of cases and law review articles. The cases, which deal with a vast number of conflicting theories, demonstrate rapid and radical changes in this field of law. *E. g.*, the list of authorities in the concurring opinion of Sutin, J., in *Demers, supra*, 85 N.M. at 649, 515 P.2d at 653; *Woods v. Brumlop*, 71 N.M. 221, 377 P.2d 520 (1962); *Canterbury v. Spence*, 150 U.S.App.D.C. 263, 464 F.2d 772 (1972), *cert. denied,* 409 U.S. 1064, 93 S.Ct. 560, 34 L.Ed.2d 518 (1972); *Shetter v. Rochelle*, 2 Ariz.App. 358, 409 P.2d 74 (1965) *modified on rehearing,* 2 Ariz.App. 607, 411 P.2d 45 (1966); *Cobbs v. Grant*, 8 Cal.3d 229, 104 Cal.Rptr. 505, 502 P.2d 1 (1972); *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093 (1960); *Bang v. Charles T. Miller Hospital*, 251 Minn. 427, 88 N.W.2d 186 (1958); *Aiken v. Clary*, 396 S.W.2d 668 (Mo.1965); *Mitchell v. Robinson*, 334 S.W.2d 11 (Mo.1960), *aff'd after remand*, 360 S.W.2d 673 (Mo.1962); *Corn v. French*, 71 Nev. 280, 289 P.2d 173 (1955), *aff'd after remand*, 74 Nev. 329, 331 P.2d 850 (1958); *Gray v. Grunnagle*, 423 Pa. 144, 223 A.2d 663 (1966); Plant, *The Decline of "Informed Consent"*, 35 Wash. & Lee L.Rev. 91 (1978); Riga, *Informed Consent*, 10 Lincoln L.Rev. 159 (1977).

A favorite starting place for literature on "informed consent" is the statement of Justice Cardozo in *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92, 93 (1914) that:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.

The right of self-determination by an informed patient has developed as the most important ingredient in the law on this subject.

At the outset it must be emphasized that one of the greatest causes of confusion is the failure to distinguish between causes of action founded on battery and those based on negligence. *Cobbs, supra*; Plante, *An Analysis of "Informed Consent,"* 36 Fordham L.Rev. 639, 650 (1968).

> Under the legal rubric of battery, courts have jealously guarded a patient's right to know and to agree to what a physician or surgeon intends to do to him. An intentional touching to which a patient has given no consent is considered a battery. W. Prosser, Handbook of the Law of Torts, § 18, at 102–6 (4th ed. 1971).

Katz, *Informed Consent—A Fairy Tale? Law's Vision*, 39 U.Pitt.L.Rev. 137, at 144 (1977).

To defeat a battery claim, however, the information which must be disclosed is quite narrow in scope. A physician only has to inform the patient of the *nature* of the procedure; that is, what the doctor proposes to do to him. Failure to advise the patient of this minimal basic information admits of no excuse, except when an emergency requires intervention without delay. Katz, *supra*, citing *Cobbs, supra; Schloendorff, supra*; and, McCoid, *A Reappraisal for Liability for Unauthorized Medical Treatment,* 41 Minn.L.Rev. 381 (1957).

The only question that is asked in a battery case is did the patient know and agree to what was going to be done to him. If not, the law does not require the patient to be physically damaged by the intervention. Even if his health is significantly improved, the doctor is still liable. Informed consent is not a key issue. There need be no proof that the patient may have gone ahead with the operation had the doctor fulfilled his duty to disclose the nature of the procedure.

Generally included in the battery cases are those instances where the patient consented to the performance of one kind of operation and the physician performed a substantially different one for which consent was not obtained, as is alleged by Demers in this case. These are considered to be clear cases of battery, as opposed to malpractice, which is based on negligence. *Cobbs, supra; Bang, supra,* (plaintiff consented to a prostrate resection when uninformed that this procedure involved tying off his sperm ducts); *Corn, supra,* (patient consented to an exploratory surgery but the doctor performed a mastectomy).

The importance of distinguishing between the two types of action becomes apparent when it is considered that in most medical malpractice suits expert medical testimony must be adduced to establish a standard of care, to assess the doctor's performance in light of the standard, and to prove causation. In battery cases it has generally been held that expert medical testimony is not required to establish a standard of care or to show causation. *Cobbs, supra.* This makes the case much easier for the plaintiff to prove. The factual issue is whether the patient did or did not consent to the specific operation performed by the physician. It is not a question of what the doctor *should* have told his patient about the nature of the operation but whether he *did* tell him what was going to transpire. In other areas of litigation jurors have the daily responsibility of assessing conflicting testimony and determining what was said and what agreements were reached by litigants. There is nothing unique about the doctor-patient relationship that warrants a rule that in all cases expert medical testimony is required to establish what was agreed to by the parties. *Shetter, supra; Cobbs, supra.*

As to causation in a battery action, the tort of battery is the wrongful touching of the patient's body which by itself gives the patient a claim for substantial damages. *Shetter, supra.*

In *Cobbs, supra*, the court held:

> The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate

> intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence.

104 Cal.Rptr. at 512, 502 P.2d at 8.

We agree that there should be such a distinction between battery and malpractice.

It is now generally held that an action involving lack of informed consent does not lie within the traditional concepts of battery. Where a patient is informed by a physician as to the nature and extent of the operation but is not reasonably informed of the risk involved, the cause of action is in negligence. *Murriello v. Crapotta*, 51 App.Div.2d 381, 382 N.Y.S.2d 513 (1976). This failure is considered in most jurisdictions to be a negligent breach of professional standards of conduct. *Di Filippo v. Preston*, 3 Storey 539, 53 Del. 539, 173 A.2d 333 (1961); *Kaplan v. Haines*, 96 N.J. Super. 242, 232 A.2d 840 (1967). This line of authority holds that where a physician does not disclose all the information deemed material to his patient's decision, it nullifies the consent obtained prior to treatment. This has become known as the "materiality" standard. The physician is required to disclose the factors that might reasonably influence the patient in his decision, such as the inherent potential hazards of the proposed treatment, any alternatives to that treatment, and the results likely if the patient remained untreated.

There is no New Mexico authority precisely in point. This may well be a case of first impression on the narrow question of whether expert medical testimony is mandatory to establish the care which would be used by reasonably well-qualified specialists in the same field practicing under similar circumstances in disclosing the risks and complications of the procedures employed in an operation.

Other than the earlier Demers case, the only New Mexico case that comes close to the question is *Woods, supra*, which is not wholly analogous to the facts. That case caused a considerable amount of criticism and discussion. Karchmer, *Informed Consent: A Plaintiff's Medical Malpractice "Wonder Drug"*, 31 Mo.L.Rev. 29 (1966); Myers, *Informed Consent in Medical Malpractice*, 55 Cal.L.Rev. 1396 (1967); Plante, *supra*, 36 Fordham L.Rev. 634; Waltz & Scheuneman, *Informed Consent to Therapy*, 64 N.W.Univ.L.Rev. 628 (1970).

In *Woods, supra*, the patient claimed that the doctor failed to inform her of the dangers inherent in the medical procedures and told her that "no harmful results could occur, knowing that statement to be untrue." *Id.* 71 N.M. at 223, 377 P.2d at 521. It was shown that the plaintiff had no knowledge of the procedures and no basis on which to predicate her consent to the treatment. There was no medical testimony establishing the causal relationship, and the doctor contended that the lay testimony of plaintiff as to the cause of a physical condition was inadmissible. Mrs. Woods had taken electroshock treatments and claimed that it resulted in loss of hearing. Her testimony was the only evidence on the causal connection between the electroshock treatments and the loss of hearing. This Court considered the duties of a doctor to advise his patient as to the probable consequences and the dangers connected with it, and, in ruling on a motion of the doctor for a directed verdict, stated:

> A physician who misleads a patient by not only failing to give a warning of reasonable and recognized risks inherent in a treatment after which the patient would have refused the treatment, but by affirmatively assuring her that there are no risks, knowing such statement to be untrue, is liable for the harmful consequences of the treatment. Such a failure to disclose, or the giving of an untrue answer as to the probable consequences of a treatment constitutes malpractice;

> and a doctor who fails to so advise his client, or gives an untrue answer as to such consequences, is liable for malpractice unless his failure to do so comes within one of the exceptions to the rule requiring candor and disclosure. Under the circumstances of this case, a fact issue was presented for determination by the jury upon which there was no necessity for expert medical testimony.

Id. at 229, 377 P.2d at 525.

To the extent that *Woods* may hold that it is never necessary to have medical testimony on the question of the quantum of information to be given a patient about the dangers of medical procedures in order to obtain the consent to an operation, *Woods* is opposed to the general rule. Many jurisdictions that have decided the issue hold that it is necessary that standards be established by expert medical testimony on this issue, as well as on the issue of causation, so that the acts of the doctor in question may be measured by the usual practices of specialists in the same field under similar circumstances. Plante, *supra,* 36 Fordham L.Rev. 639. Reading *Woods* more strictly, it is arguable that the court's decision was based on the misrepresentation practiced by the physician.

The case of *Canterbury, supra,* is by far the best reasoned and authoritative in the field. *Canterbury* recognized that a majority of the courts at that time made the duty to disclose depend on whether it was the custom of physicians practicing in the community to make the particular disclosure to the patient. *E. g., Di Filippo, supra; Roberts v. Young,* 369 Mich. 133, 119 N.W.2d 627 (1963); *Aiken, supra.* Thus the physician could be held liable for an unreasonable and injurious failure to divulge, but no recovery would be forthcoming unless the omission forsakes a practice prevalent in the profession. However, *Canterbury* disagreed that there must be an existence and non-performance of a professional tradition. The court claimed that the physician's obligation is not limited by medical practice. The court senses a danger that such a holding would be taken as an affirmative custom to maintain silence. Binding the disclosure obligation to medical usage would be "to arrogate the decision on revelation to the physician alone. Respect for the patient's right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves." *Canterbury,* 150 U.S.App.D.C. at 275, 464 F.2d at 784. (Footnotes omitted.)

In discussing the "reasonably prudent person" doctrine, the *Canterbury* court quoted from *Wash. Hosp. Center v. Butler,* 127 U.S.App.D.C. 379, 383, 384 F.2d 331, 335 (1967):

> The law requires those engaging in activities requiring unique knowledge and ability to give a performance commensurate with the undertaking;

and held that physicians are required to act as reasonable men who possessed their medical talents presumably would, stating:

> There is * * * no basis for operation of the special medical standard where the physician's activity does not bring his medical knowledge and skills peculiarly into play. * * * The decision * * is ofttimes a non-medical judgment and, if so, is a decision outside the ambit of the special standard.
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> * * * * * *
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> When medical judgment enters the picture and for that reason the special standard controls, prevailing medical practice must be given its just due. In all other instances, however, the general standard exacting ordinary care applies, and that standard is set by law. * * * We hold that the standard measuring performance of that duty by physicians, as by others, is conduct which is reasonable under the circumstances.

Canterbury, 150 U.S.App.D.C. at 276, 464 F.2d at 785 (footnotes omitted).

Canterbury held that "full disclosure" is obviously prohibitive and unrealistic. It expects physicians to discuss with their patients every risk of proposed treatment no matter how small or remote:

> [The physician] cannot know with complete exactitude what the patient would consider important to his decision, but on the basis of his medical training and experience he can sense how the average, reasonable patient expectably would react. * * *
>
> The scope of the standard is not subjective as to either the physician or the patient; it remains objective with due regard for the patient's informational needs and with suitable leeway for the physician's situation.
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> * * * * * *
>
> The topics importantly demanding a communication of information are the inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the results likely if the patient remains untreated. * * *
>
> There is no bright line separating the significant from the insignificant; the answer in any case must abide a rule of reason. Some dangers—infection, for example—are inherent in any operation; there is no obligation to communicate those of which persons of average sophistication are aware. Even more clearly, the physician bears no responsibility for discussion of hazards the patient has already discovered, or those having no apparent materiality to patients' decision on therapy. * * * Whenever non-disclosure of particular risk information is open to debate by reasonable-minded men, the issue is for the finder of the facts.

Id. 150 U.S.App.D.C. at 278–79, 464 F.2d at 787–88 (footnotes omitted).

The *Canterbury* court recognized exceptions to the general rule of disclosure, such as, "when the patient is unconscious or otherwise incapable of consenting," and when the patient is so ill or emotionally distraught as to foreclose a rational decision, or complicate or hinder the treatment. In these cases it becomes a question of sound medical judgment that the risk information would present a threat to the patient's well-being.

The court in *Canterbury* held that there must be a causal connection between the physician's failure to adequately inform and damage to the patient:

> [A] technique which ties the factual conclusion on causation simply to the assessment of the patient's credibility is unsatisfactory. * * *
>
> * * * It places the physician in jeopardy of the patient's hindsight and bitterness. * * *
>
> Better it is, we believe, to resolve the causality issue on an objective basis: in terms of what a prudent person in the patient's position would have decided if suitably informed of all perils bearing significance. * * * The patient's testimony is relevant on that score of course but it would not threaten to dominate the findings.
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> * * * * * *
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> * * * [T]he patient has the burden of going forward with evidence tending to establish prima facie the essential elements of the cause of action, and ultimately the burden of proof—the risk of nonpersuasion—on those elements. * * The burden of going forward with evidence pertaining to a privilege not to disclose, however, rests properly upon the physician.

Id. 150 U.S.App.D.C. at 281–82, 464 F.2d at 790–91 (footnotes omitted).

Most jurisdictions have now accepted an objective test based upon what a prudent person in plaintiff's position would have decided if suitably informed of the significant perils involved. *Karp v. Cooley*, 493 F.2d 408, 422, n.18 (5th Cir. 1974), *cert. denied*, 419 U.S. 845, 95 S.Ct. 79, 42 L.Ed.2d 73 (1974); *Bowers v. Garfield*, 382 F.Supp. 503, 505–6 (E.D.Pa.1974), *aff'd*, 503 F.2d 1398 (1974); *Cobbs, supra.* Under this theory, the cause of action would then be available only if the non-disclosed facts would have altered a reasonably prudent person's decision to undergo treatment, rather than that of the particular patient. *Zeleznik v. Jewish Chronic Disease Hospital*, 47 App. Div.2d 199, 366 N.Y.S.2d 163, at 171–72 (1975).

In discussing the need for expert testimony in non-disclosure cases, the *Canterbury* court stated that experts are ordinarily indispensable to identify and elucidate for the fact-finder the risks of therapy and consequences of leaving existing maladies untreated, as well as the cause of injuries or disability and the nature and seriousness of any impact upon the patient from risk disclosure. However, that court also recognized that,

> medical facts are for medical experts and other facts are for any witnesses—expert or not—having sufficient knowledge and capacity to testify to them. * * * [M]any of the issues * * * do not reside peculiarly within the medical domain. Lay witness testimony can competently establish a physician's failure to disclose particular risk information, the patient's lack of knowledge of the risk, and the adverse consequences following the treatment.

Canterbury, 150 U.S.App.D.C. at 283, 464 F.2d at 792 (footnotes omitted).

We approve of and adopt the language from *Canterbury* repeated herein.

In light of the above law, some of the evidence introduced by Demers indicates what amounts to a classic case of common law battery, based on Dr. Gerety's performing an operation which he had, allegedly, been specifically told not to perform; which constituted an unlawful touching. On the other hand, Demers also made allegations which would, if proved, sustain a claim of medical malpractice based on negligence. N.M.U.J.I. Civ. 8.2. However, Demers failed to properly plead or request valid instructions on battery. On the issue of medical malpractice no expert medical testimony was produced to prove causation and a verdict was properly directed on that issue.

On the question of the validity of Demers' consent to surgery, the second trial court did not commit error in applying the "clear and convincing" test to Demers' evidence of drug-induced incompetency, that rule having been established as the law of the case. In any event, the combined record in both trials furnishes no substantial evidence to justify the submission of this issue to the jury or to support a verdict based upon the incompetency of Demers at the time he signed the consent. The Court of Appeals was in error in ordering a new trial.

We held in *Pharmaseal, supra*:

> 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 the standards of care is not essential.

Id. 90 N.M. at 758, 568 P.2d at 594.

We see no reason to deviate from the rationale behind the decision in *Pharmaseal* that the use of expert medical testimony should be employed when the trial court reasonably decides that it is necessary to properly inform the jurors on the issues. This includes establishing the standard of care, treatment and information by which the actions of the physician are to be judged, the manner in which he measures up to the standard and whether his alleged acts were the proximate cause of the injuries involved.

We reject the wording in *Woods, supra*, relied upon by the Court of Appeals, which would establish a principle of "full and complete disclosures" and to the "subjective" method of determining the standard for informing the patient. *See Demers, supra*, 85 N.M. at 645, 515 P.2d at 649. We adopt an "objective" standard, based on the knowledge or skill of an ordinary patient or physician, as being the most reasonable theory for both parties involved.

The Court of Appeals' decision is reversed. The trial court's decision is affirmed. Judgment is hereby granted in favor of Dr. Gerety.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, PAYNE and FEDERICI, JJ., concur.

589 P.2d 196

Judy K. HIGGINBOTHAM,
Plaintiff-Appellee,

v.

Ronald M. HIGGINBOTHAM,
Defendant-Appellant.

No. 11735.

Supreme Court of New Mexico.

Jan. 11, 1979.

Ronald M. Higginbotham, pro se.

John P. Cusack, Roswell, for plaintiff-appellee.

OPINION

EASLEY, Justice.

The parties were divorced in 1974. Mr. Higginbotham reopened the case in July, 1977, to litigate a child custody problem. Mrs. Higginbotham counterclaimed for alleged non-payment of child support and claimed that she was entitled to have the original judgment for division of the community assets enforced. The court, among other rulings, held that Mrs. Higginbotham should prevail on the community property question and awarded her a monetary judgment. We reverse the trial court's decision.

We inquire whether, in an action to enforce the terms of a decree for division of community property, a party may introduce parol evidence that the parties had agreed upon a different method of satisfying the judgment than that provided in the decree.

Another issue is whether the court has jurisdiction to reopen a decree for division of community property to entertain a claim for enforcement of a verbal contract between the parties that was designed to supplant the terms of the decree.

The divorce decree called for the sale of the home of the parties and an equal division of the proceeds. The house remained on the market for some time. The evidence is undisputed that the parties thereafter agreed that it would be traded for another house and $2600.00. Mr. Higginbotham claimed that the $2600 was to be spent by him to improve the second house after which it would be sold and the profits split equally. Mrs. Higginbotham claims that she only loaned her one-half of the $2600 to her ex-husband and was to receive the money back when the property was sold. Mr. Higginbotham claimed that no money was made on the second transaction and that he owed her nothing. All of this evidence found its way into the record although the court held that is was inadmissible.

The question litigated was whether the disputed terms of an oral agreement were admissible to establish a change in the manner that the original stipulated property division was to be satisfied. The court held that the evidence was not admissible for the reason that the new agreement should have been in writing and filed in the lawsuit. The court refused to consider the oral agreement and ordered Mr. Higginbotham to pay his ex-wife approximately $1300, representing one-half of the money received in the house trade.

The effect of the undisputed oral agreement between the parties to use the money from the sale of their residence to repair the second house, instead of dividing it equally, was to substitute a new contract for the terms of the decree. This constitutes a lawful agreement discharging the judgment. *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 88 N.M. 472, 542 P.2d 52 (Ct.App.1975), *aff'd in part, rev'd in part, Fortuna Corp. v. Sierra Blanca Sales Co., Inc.*, 89 N.M. 187, 548 P.2d 865 (1976). The trial court erroneously held that evidence of this oral agreement was inadmissible because it was not in writing and filed. It is not challenged that Mr. Higginbotham relied upon the agreement and repaired and sold the second house. There was at least part performance of the contract to seal the bargain. Thus the reliance of the trial court on the parol evidence rule is misplaced. *Powell v. Van Donselaar*, 162 Neb. 96, 75 N.W.2d 105 (1956).

To dispose of this case it is necessary to consider whether the trial court has any jurisdiction to proceed further in settling the dispute between these parties. This issue was not considered below. We raise it *sua sponte*. *Worland v. Worland*, 89 N.M. 291, 551 P.2d 981 (1976); *State ex rel. Overton v. New Mexico State Tax Com'n*, 81 N.M. 28, 462 P.2d 613 (1969). The new contract to satisfy the judgment is not subject to the jurisdiction of the district court where its enforcement is raised in the divorce case. Section 39–1–1, N.M.S.A.1978 (Formerly § 21–9–1, N.M.S.A.1953 (Repl. 1970)) provides for final judgments to remain under the control of the court for a period of thirty days. The exceptions to this rule contained in § 40–4–7, N.M.S.A. 1978 (Formerly § 22–7–6, N.M.S.A.1953 (Supp.1975)) and N.M.R.Civ.P. 60(b), N.M.S.A.1978 (Formerly § 21–1–1(60)(b), N.M.S.A. 1953) do not apply to the facts in this case.

The Court held in *Zarges v. Zarges*, 79 N.M. 494, 445 P.2d 97 (1968), that once the time has lapsed within which an appeal may be taken from the divorce decree, a court's change of the original division of the property cannot be sustained as an exercise of its continuing jurisdiction.

We reverse and remand the case for entry of judgment for Mr. Higginbotham.

IT IS SO ORDERED.

McMANUS, S. J., and FEDERICI, J., concur.

589 P.2d 198

Fred M. REID, Petitioner-Appellant,

v.

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY, Respondent-Appellee.

No. 11785.

Supreme Court of New Mexico.

Jan. 15, 1979.

Sommer, Lawler & Scheuer, Standley & Suzenski, Santa Fe, for petitioner-appellant.

Toney Anaya, Atty. Gen., Mary Anne McCourt, Bruce Kohl, Asst. Attys. Gen., Santa Fe, for respondent-appellee.

OPINION

McMANUS, Senior Justice.

Following an administrative hearing, the New Mexico Board of Examiners in Optometry rendered a decision revoking Dr. Fred M. Reid's license to practice. Reid appealed to the District Court of Santa Fe County. The district court affirmed the Board's decision. Reid now appeals the decision of the district court. We reverse.

Upon receipt of a complaint, the Board initiated disciplinary proceedings against Dr. Reid. The Board accused Reid of having made sexual advances to female patients in violation of § 61–2–8(B), N.M.S.A. 1978 [formerly § 67–1–7(B), N.M.S.A.1953 (Repl.1974)] and Rule No. 4 of the New Mexico Board of Examiners in Optometry. Prior to the scheduled administrative hearing, Reid disqualified two of the five board members pursuant to § 61–1–7, N.M.S.A. 1978 [formerly § 67–26–7, N.M.S.A.1953 (Repl.1974)]. After the hearing commenced, Reid moved to disqualify Dr. Carl Zimmerman on the basis of bias or pecuniary interest. Reid's motion was denied on the ground that there was no good cause for disqualification. Reid's motion to disqualify the entire Board for prejudice, bias, or pecuniary interest was also denied. Reid then moved to dismiss the proceedings because they were brought under an inapplicable statute and because they were brought under a statute and regulation which were unconstitutionally vague. The Board denied both of these motions.

In his appeal to the district court, Reid objected to the Board's refusal to disqualify its members and to the Board's failure to dismiss the charges. Reid also argued that the Board's decision was arbitrary, capricious, and not supported by substantial evidence. The district court decided in favor of the Board on all these issues. Reid raises essentially the same issues in his appeal to this Court.

Reid's first contention is that the Board's failure to disqualify Dr. Zimmerman for bias denied him due process of law. Prior to the hearing, the Board heard testimony concerning Dr. Zimmerman's ability to hear the case. Carol Pederson, a former secretary to Dr. Reid, testified as to a conversation she had with Dr. Zimmerman. Ms. Pederson testified that upon mentioning to Dr. Zimmerman that she was leaving Reid's employment, Dr. Zimmerman replied that ". . . it didn't matter . . . because Dr. Reid would be losing his license soon anyway, or wouldn't be practicing soon anyway . . ." On voir dire examination, Dr. Zimmerman admitted making the statement. However, Dr. Zimmerman also testified that he could render a fair and impartial decision.

■ Reid argues that Dr. Zimmerman's testimony clearly constitutes prejudgment of the charges brought against him. Thus, the failure of the Board to disqualify Dr. Zimmerman plainly denied him due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and under Article II, Section 18 of the New Mexico Constitution. The Board contends its action was proper because, although Dr. Zimmerman admitted to making a prejudicial statement, he also testified that he could render a fair and impartial decision. We agree with Dr. Reid.

■ "The Fourteenth Amendment guarantees every citizen the right to procedural due process in state proceedings." *Matter of Protest of Miller*, 88 N.M. 492, 497, 542 P.2d 1182, 1187 (Ct.App.1975, *cert. denied*, 89 N.M. 5, 546 P.2d 70. In *Miller*, the Court of Appeals stated:

> By "procedural due process" we mean the following:
>
> > Procedural due process, that is, the element of the due process provisions of the Fifth and Fourteenth Amendments which relates to the requisite characteristics of proceedings seeking

> to effect a deprivation of life, liberty, or property, may be described as follows: one whom it is sought to deprive of such rights must be informed of this fact (that is, he must be given notice of the proceedings against him); he must be given an opportunity to defend himself (that is, a hearing); *and the proceedings looking toward the deprivation must be essentially fair.* (Citation omitted.)
>
> (Emphasis added.)

Id. at 497–98, 542 P.2d at 1187–88. In other words, a state cannot deprive any individual of personal or property rights except after a hearing before a fair and impartial tribunal.

At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. *See Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *National Labor Relations Board v. Phelps*, 136 F.2d 562 (5th Cir. 1943). In addition, our system of justice requires that the appearance of complete fairness be present. *See Wall v. American Optometric Association, Inc.*, 379 F.Supp. 175 (N.D.Ga.1974), *aff'd*, 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974). The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him. *See generally Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1974).

These principles apply to administrative proceedings as well as to trials. *Matter of Protest of Miller, supra.* When government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed. *National Labor Relations Board, supra.*

In the case before us, Dr. Zimmerman admitted making a statement indicating his bias and prejudgment of the issues. According to the principles outlined above, the Board's failure to disqualify Dr. Zimmerman clearly violated Reid's constitutional right to procedural due process.

The Board argues that even if the Court should find that Dr. Zimmerman was biased, § 61–1–7 does not allow for disqualification where exercise of this privilege would result in the absence of a quorum. We refuse to accept the Board's argument. Any utilization of § 61–1–7 which has the effect of allowing an administrative hearing, punitive in nature, to be conducted by a patently prejudiced tribunal must necessarily violate the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and Article II, Section 18 of the New Mexico Constitution.

Therefore, we reverse the decision of the district court upholding the Board's refusal to disqualify Dr. Zimmerman. We remand the case to the Board so that Dr. Reid will have the opportunity to present all his defenses before a fair and impartial tribunal.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

589 P.2d 201

Charles Earnest COOPER, and Ruby Thelma Cooper,
Plaintiffs-Appellants,

v.

R. L. CURRY, M.D., and Memorial Hospital, Inc., Defendants-Appellees.

No. 3176.

Court of Appeals of New Mexico.

Oct. 3, 1978.

Writ of Certiorari Quashed Jan. 2, 1979.

William J. Darling, Kool, Kool, Bloomfield & Eaves, P. A., Albuquerque, for plaintiffs-appellants.

Dan B. Buzzard, Harry L. Patton, Clovis, Sarah M. Singleton, Pickard & Singleton, Santa Fe, for defendants-appellees.

OPINION

LOPEZ, Judge.

The plaintiffs-appellants (Mr. and Mrs. Charles Cooper), filed suit against Dr. Curry and the defendant-appellee, Memorial Hospital, Inc., (the hospital) to recover damages for injuries connected with eye surgery performed upon Mrs. Cooper by Dr. Curry at the hospital. Both plaintiffs sought damages for the resulting total blindness to Mrs. Cooper. The jury returned a verdict for the plaintiffs in the amount of $600,000.00 against Dr. Curry, but found the hospital not liable. The appellants now appeal the judgment in favor of the hospital. Dr. Curry is not a party to this appeal. We affirm.

The plaintiffs present several points for reversal: (1) the hospital had a duty to obtain an informed consent from Mrs. Cooper; (2) the trial court erred in excluding certain evidence; (3) the trial court committed prejudicial error by refusing to give an instruction on joint venture; and (4) the trial court committed prejudicial error in giving its Instruction No. 34, which disclaimed the hospital's vicarious liability.

Facts

Mrs. Cooper was admitted to the hospital for a bilateral cataract extraction. When Mrs. Cooper entered the hospital, the admitting clerk had Mrs. Cooper sign a standard consent for surgery form. Mrs. Cooper had discussed the operation with Dr. Curry before going to the hospital. She had approved the operation on both eyes, and had requested that both cataracts be removed during one hospital stay. The first operation was on her right eye and the second operation was on her left eye. Mrs. Cooper did not sign a second consent form before the second operation. Subsequent to the second operation, she became blind.

At trial, the plaintiffs contended that Dr. Curry failed to disclose all the pertinent facts relevant to Mrs. Cooper's condition; failed to warn the plaintiffs of the inherent risks involved; and did not get an informed consent from Mrs. Cooper. The plaintiffs also contended that the hospital failed to get an informed consent, or failed to determine whether an informed consent had been obtained.

The court gave its instructions, among which was Instruction No. 34, which generally instructed the jury that the hospital could not be found liable on the basis of Dr. Curry's malpractice.

Point I

The hospital had no duty to obtain an informed consent from Mrs. Cooper.

The informed consent issue arises when a patient is informed that he or she is to be touched in a specific way and is in fact touched in that way but a harmful result arises from a risk about which the patient was not informed. Plant, *An Analysis of an Informed Consent,* 36 Fordham L.Rev. 639, 656 (1968).

Mrs. Cooper testified that she knew she was to have a bilateral cataract operation; she consented to the operation; and such an operation was performed. However, Mrs. Cooper testified that she was not fully informed of the risks involved in the bilateral cataract operation. The question we must decide is whether the hospital had a duty either to inform Mrs. Cooper of the risks involved in the bilateral cataract operation or to determine whether an informed consent had been obtained.

We first discuss the history of the doctrine of informed consent and the history of a hospital's liability for malpractice committed on a patient while in a hospital. *Schloendorff v. Society of New York Hospital,* 211 N.Y. 125, 105 N.E. 92 (N.Y.App. 1914), was one of the earliest cases to deal with the subject. That case establishes a medical patient's right to control his or her own body in relation to treatment, and gives such patient a cause of action for assault and battery when medical treatment is administered without consent.

Salgo v. Leland Stanford Jr. University Bd. of Trust., 154 Cal.App.2d 560, 317 P.2d 170 (1957), a major case in the development of modern informed consent law, requires that a physician not only obtain consent to treatment, but also inform the patient of sufficient facts to enable the patient to intelligently consent to treatment. A failure to do so results in a cause of action for negligence. In New Mexico, a physician's failure to obtain an informed consent constitutes negligence. *Woods v. Brumlop,* 71 N.M. 221, 377 P.2d 520 (1962); accord, *Demers v. Gerety,* 85 N.M. 641, 515 P.2d 645 (Ct.App.1973), *rev'd on other grounds,* 86 N.M. 141, 520 P.2d 869, *on remand,* 87 N.M. 52, 529 P.2d 278 (Ct.App. 1974).

Schloendorff, supra, also addressed the issue of a hospital's liability vis-a-vis the acts of physicians in the performance of an operation without a patient's consent. *Schloendorff,* supra, posited one rationale for relieving the hospital of liability. The court said that the relationship between a hospital and a physician was not a master-servant relationship, but was instead one in which the physician operated as an independent contractor. The doctrine of *respondeat superior* was therefore inapplicable.

After *Schloendorff,* supra, courts expanded the liability of hospitals for the torts of employees, including physician-employees, under the doctrine of *respondeat superior. Bing v. Thunig,* 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957); *Westbrook v. Lea General Hospital,* 85 N.M. 191, 510 P.2d 515 (Ct.App.1973), *cert. denied,* 85 N.M. 228, 511 P.2d 554 (1973). However, courts remain reluctant to hold hospitals liable for torts committed by non-employee physicians. Courts consider it irrelevant that a physician has "staff privileges" at a hospital, since such privileges merely permit the physician to use the hospital for his or her private patients. As stated in Southwick, *The Hospital as an Institution—Expanding Responsibilities Change Its Relationship with the Staff Physician,* 9 Cal.W. L.Rev. 429, 440 (1973):

> [A] staff doctor having no more relationship to the hospital than a staff appointment is solely responsible for his personal malpractice or negligence: The hospital is not vicariously liable for the tort of a physician who is not an "employee".

See *Smith v. Klebenoff,* 84 N.M. 50, 499 P.2d 368 (Ct.App.1972), *cert. denied,* 84 N.M. 37, 499 P.2d 355 (1972); 41 C.J.S. Hospitals, § 8 (1944).

The majority view is that when a physician receives no salary from a hospital, he or she is an independent contractor, and, as such, the hospital is not liable for the doctor's malpractice. *Hundt v. Proctor Com-*

munity Hospital, 5 Ill.App.3d 987, 284 N.E.2d 676 (1972); *Mayers v. Litow,* 154 Cal.App.2d 413, 316 P.2d 351 (1947); *Lundahl v. Rockford Memorial Hospital Association,* 93 Ill.App.2d 461, 235 N.E.2d 671 (1968); *Fiorentino v. Wenger,* 19 N.Y.2d 407, 280 N.Y.S.2d 373, 227 N.E.2d 296 (1967).

Plaintiffs concede that Dr. Curry was not an employee of the hospital. They attempt, however, to lay legal responsibility on the hospital under a corporate negligence theory. In a few instances, courts have imposed liability on hospitals under a corporate negligence theory, but this liability has been limited to the negligent granting of staff privileges or the negligent supervision of treatment. *Mitchell County Hospital Authority v. Joiner,* 229 Ga. 140, 189 S.E.2d 412 (1971); *Darling v. Community Memorial Hospital,* 33 Ill.2d 326, 211 N.E.2d 253 (1965). In no case has a hospital been held liable for failing to obtain an informed consent.

The court in *Fiorentino,* supra, even stated that the only possible reason for requiring a hospital to obtain consent might be the nature of the operation. The court then negated this, saying:

> So long as it cannot be said that a spinal-jack operation is per se an act of malpractice, *the hospital does not share and should not share in the responsibility to advise patients* of the novelty and risks attendant on the procedure. [Emphasis added] *Fiorentino,* supra, 280 N.Y.S.2d at 380, 227 N.E.2d at 301.

Plaintiffs' position, that hospital liability arises from the admission clerk's failure to fill out the consent form fully and the hospital's failure to obtain a second consent form, runs counter to the purposes of obtaining an informed consent. We agree with *Stivers v. George Washington University,* 116 U.S.App.D.C. 29, 320 F.2d 751 (1963) where the court said:

> While the consent to the operation was obtained in writing by a lay employee it seems clear he was performing only a ministerial or administrative function to implement the consultation between appellant [the patient] and Dr. Barrett [the doctor]; *a lay person would not be competent to describe the procedure or discuss the possible consequences.* [Emphasis added]

Based upon *Stivers,* the admission clerk was merely performing an administerial function for Dr. Curry who had sent Mrs. Cooper to the hospital. The admission clerk could not be expected to inform Mrs. Cooper fully about all the risks of the operation she was about to undergo, and the hospital cannot be held liable for the clerk's failure to obtain an informed consent. For the admission clerk to have asked Mrs. Cooper questions regarding the operation would have interfered with the doctor-patient fiduciary relationship. *Demers v. Gerety,* supra; *Fiorentino v. Wenger,* supra.

Hospital liability should not be extended in the area of informed consent. Such an extension would serve to interfere in the delicate doctor-patient relationship. It would discourage hospitals from allowing physicians to use their facilities for novel or experimental medical procedures and could induce hospitals to discourage patients from undergoing such operations. *Fiorentino v. Wenger,* supra.

The facts support the trial court's ruling that the hospital was not liable for the negligence of the doctor because he was an independent contractor. We conclude that the hospital did not have a duty to obtain an informed consent from Mrs. Cooper.

Point II

Exclusion of Dr. Schultz' testimony.

Under this point the plaintiffs argue that the court erred in excluding Dr. Schultz' testimony regarding Dr. Curry's malpractice because it was relevant to the question of whether the hospital exercised due care in the reappointment of its staff physicians.

We fail to see anywhere in the record where Dr. Schultz' testimony would have borne any relationship to the hospital's duty of care in staff reappointments. Part of Dr. Schultz' testimony went to alleged acts

that occurred from four to ten years prior to his testimony. The trial court properly considered the remoteness and vagueness of the testimony in determining the probative value of the testimony. *In re Williams' Will,* 71 N.M. 39, 376 P.2d 3 (1962).

Another portion of Dr. Schultz' testimony went to Dr. Curry's excessive visits to welfare patients. While this might show that Dr. Curry was taking advantage of the Welfare Department, it hardly demonstrates an incompetence relevant to the hospital's duty to exercise care in staff reappointments.

Further, at no time during this time, did Dr. Schultz convey this information regarding Dr. Curry's incompetence to the hospital. In *Hull v. North Valley Hospital,* 159 Mont. 375, 498 P.2d 136 (Mont.1972), the same question of hospital liability for appointment of an incompetent physician was at issue. The plaintiff in *Hull,* supra, introduced opinion testimony of other doctors on the staff. The court there said:

> "Knowledge within these doctors' minds, uncommunicated to the Board, is not a demonstration of knowledge of the Board as a matter of law, only a matter of conscience of the individual doctors."

The tendered testimony was inadmissible with regard to Dr. Curry. It was completely irrelevant with regard to the hospital's liability.

Point III

The hospital and Dr. Curry were not engaged in a joint venture.

Appellants argue that a joint venture existed because the doctor and the hospital had a community of interest in treating the plaintiff. This has been held to be insufficient to create a joint venture. *Underwood v. Holy Name of Jesus Hospital,* 289 Ala. 216, 266 So.2d 773 (1972). In *Underwood,* supra, at 776 the court said:

> "As a general rule, in order to constitute a joint adventure there must be a community of interest in the performance of a common purpose, a joint proprietary interest in the subject matter, a mutual right to control, a right to share in the profits, and a duty to share in any losses which may be sustained." [Emphasis added]

Accord, *Fullerton v. Kaune,* 72 N.M. 201, 382 P.2d 529 (1963). The elements of a joint venture are absent in the relationship between Dr. Curry and the hospital. The record does not show that Dr. Curry had a proprietary interest in the hospital's property, that there existed a mutual right to control, or that Dr. Curry was to share in the hospital's profits or losses. As such, there was not even a colorable showing of joint venture.

Under the facts and the law the hospital was not engaged in a joint venture with Dr. Curry. A party to a suit is entitled to an instruction of his theory of the case if there is evidence to support such an instruction. *Tapia v. Panhandle Steel Erectors Company,* 78 N.M. 86, 428 P.2d 625 (1967). There was no evidence to support a theory of joint venture in the case at bar and the trial court properly refused such an instruction.

Point IV

The trial court did not commit prejudicial error in giving Instruction No. 34.

Under this point plaintiffs contend that the court erred in giving its Instruction No. 34 which basically instructed the jury that the hospital could not be found liable on the basis of Dr. Curry's malpractice.

This issue is not before this Court because the plaintiffs failed to challenge the court's Instruction No. 34 in the proceedings below. *Gonzales v. Allison & Harvey, Inc.,* 71 N.M. 478, 379 P.2d 772 (1963).

The trial court committed no error. The judgment of the trial court is affirmed.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, J. (dissenting).

SUTIN, Judge (dissenting).

I dissent.

On May 24, 1973, Mrs. Cooper entered the Memorial Hospital for a bilateral cataract examination. The admitting clerk had Mrs. Cooper sign a consent for surgery form. The pertinent part reads as follows:

> I HEREBY GRANT PERMISSION TO AND AUTHORIZE THE DOCTORS OF MEMORIAL HOSPITAL TO GIVE SUCH ANESTHETICS AND TO PERFORM SUCH OPERATIONS AS IN THEIR OPINION ARE FOUND NECESSARY UPON _____ WITH A DISTINCT UNDERSTANDING THAT THERE IS SOME DANGER IN THE OPERATION, THAT COMPLICATIONS MIGHT ARISE AND, I LEAVE THE WHOLE MATTER OF OPERATIVE PROCEDURE AND TREATMENT TO THE BEST JUDGMENT OF SAID DOCTOR.

The signing of this consent form was in accord with the Nursing Procedures Manual prepared by the hospital medical staff. Instruction No. 2(b) in the section on Pre-operative care states: "Have operative permit signed. (Necessary for all house patients.)"

On May 25, 1973, Dr. Curry performed the surgical procedure on her right eye. Four days later, on May 29, 1973, Dr. Curry performed a surgical procedure on her left eye. The nurses' pre-operative checklist stated "Permit signed" but no consent to this surgical procedure was obtained by the hospital.

Dr. Cleon L. Schultz, an ophthalmologist, testified that, as the patients enter the hospital for surgery, the standard for hospitals across the nation is to obtain a consent from a patient before any surgical procedure is performed. The consent which Mrs. Cooper gave was a deviation from the accepted standard because there was no definition of what the operation was to be. The failure to obtain the second surgical consent was also not in keeping with accepted practice. To obtain two surgical consents for two separate surgical procedures is a common practice. A second consent is essential because if something unfortunate happens during the first surgery, the patient has an opportunity to reconsider the second surgery.

The hospital adopted the above practices as rules on June 27, 1973, a month following the second surgery. Two of the provisions read as follows:

> 2. Written, signed, informed, surgical consent shall be obtained prior to the operative procedure except in those situations where the patient's life is in jeopardy and suitable signatures cannot be obtained due to the conditions of the patient. . . .
>
> 3. Should a second operation be required during the patient's stay in the hospital, a second consent specifically worded should be obtained. . . .

The trial court refused to instruct the jury on one of plaintiff's theories of recovery. It reads:

> Defendant Hospital had a duty to exercise reasonable care in ascertaining whether Plaintiff Ruby Thelma Cooper had consented to the surgical procedure in treatment of her at Defendant Hospital and that Defendant Hospital breached the duty of care proximately causing Plaintiff Ruby Thelma Cooper to become blind in both eyes.

The trial court also refused to instruct the jury that:

> A hospital has a duty to its patients to exercise reasonable care in ascertaining whether the patient has consented to a surgical procedure or other medical treatment which takes place at the hospital.

The failure to so instruct the jury was reversible error.

To the best of my knowledge, the duty of a hospital to ascertain whether a patient has consented to surgical procedure is a matter of first impression, not only in New Mexico, but in the United States. This hospital consent relationship should be carefully scrutinized to determine its effect on the liability of a hospital.

Memorial Hospital and the district court misconstrued the position Cooper took in the court below and now on appeal. Cooper contended that the hospital had a duty to exercise reasonable care to ascertain wheth-

er she consented to a surgical procedure. Memorial Hospital argues that:

> The hospital was under no duty to obtain the informed consent from Mrs. Cooper.

The trial court refused to instruct the jury on Cooper's theory of liability, and *ruled that the hospital had no legal duty to obtain an informed consent from Mrs. Cooper.*

The hospital and the trial court view the crucial issue as being whether it was the hospital's duty to *obtain* an informed consent from Mrs. Cooper; Mrs. Cooper construes the issue as being whether the hospital had a duty to *ascertain* whether informed consent had been obtained. Mrs. Cooper's contention is correct.

The duty of obtaining informed consent rests with the surgeon. In cases where medical treatment involves a grave risk of collateral injury, the physician is under a duty to advise the patient of such risks before initiating treatment. The patient, faced with a choice of undergoing the proposed treatment, must be given sufficient information to intelligently exercise his or her own judgment by balancing the probable risks against the probable benefits. *ZeBarth v. Swedish Hospital Medical Center,* 81 Wash.2d 12, 499 P.2d 1, 52 A.L.R.3d 1067 (1972). I call it an "educated consent." *Demers v. Gerety,* 85 N.M. 641, 645, 515 P.2d 645 (Ct.App.1973), id., 86 N.M. 141, 520 P.2d 869 (1974), id., 87 N.M. 52, 529 P.2d 278 (Ct.App.1974), id., 92 N.M. 396, 589 P.2d 180, cert. granted March 16, 1978. The failure to obtain an educated consent can render the physician liable for medical malpractice.

The jury found Dr. Curry liable for medical malpractice. By its verdict it found that Dr. Curry did not obtain an educated consent from Mrs. Cooper. The question then becomes whether an educated consent is of such importance that a hospital should exercise *reasonable care* to ascertain whether one has been obtained by the surgeon? The answer is "Yes."

A. *The hospital had a duty to ascertain patient consent.*

A hospital has a profound interest in maintaining high standards of medical care in protecting the health and lives of its patients. It has a duty to review the quality of patient care and provide safeguards to insure that its staff, agents and servants perform their duties with reasonable care.

The standard by which a hospital is judged is whether it exercised that degree of care and skill which is expected of a reasonably competent hospital in the same or similar community. *Goffe v. Pharmaseal Laboratories, Inc.,* 90 N.M. 764, 773, 568 P.2d 600 (Ct.App.1976), Sutin, J., Dissenting; reversed, 90 N.M. 753, 568 P.2d 589 (1977).

A fiduciary relationship exists between hospital-patient and physician-patient. *Wohlgemuth v. Meyer,* 139 Cal.2d 326, 293 P.2d 816 (1956); *Gopaul v. Herrick Memorial Hospital,* 38 Cal.App.3d 1002, 113 Cal. Rptr. 811 (1974); *Demers v. Gerety,* 85 N.M. at 645, 515 P.2d 645 supra. From these fiduciary relationships stem two duties: The duty of the physician to obtain the educated consent of a patient prior to surgery and the duty of a hospital to ascertain whether the doctor has obtained consent. These are twin duties essential for the protection of life and health.

The Memorial Hospital nurses knew that the hospital had a duty to ascertain whether consent had been obtained. They did obtain one consent that did not meet the standards required; they did not obtain consent for the second operation.

Defendant has misread *Fiorentino v. Wenger,* 19 N.Y.2d 407, 280 N.Y.S.2d 373, 227 N.E.2d 296 (1967). The principal issue was whether a hospital had an obligation to a patient using the facilities *to make certain* that the patient had given an informed consent to the patient's privately retained surgeon. In holding that certainty was not required, the court established a rule that confirms the contention of Cooper. The court said:

> Assuming whatever degree of reprehensibility in the surgeon's conduct and

however drastic or radical the operation, liability does not attach to the hospital *unless it knew or should have known that there was lacking an informed consent* or that the operation was not permissible under existing standards. [Emphasis added.] [280 N.Y.S.2d at 381, 227 N.E.2d at 301.]

The hospital in *Fiorentino* was held immune to liability "just because it did not intervene into the patient-physician relationship." (Id). *Fiorentino* holds that the doctor is primarily responsible for obtaining consent from the patient and the hospital should ascertain whether consent was procured. Memorial Hospital was not strictly liable for making certain that consent had been obtained prior to surgery, but it did have a duty to exercise reasonable care to ascertain whether such consent had been procured.

The regulations, standards and bylaws of the hospital are evidence that aids "the jury in deciding what was feasible *and what the defendant knew or should have known.*" [Emphasis added.] *Darling v. Charleston Comm. Mem. Hospital,* 33 Ill.2d 326, 211 N.E.2d 253, 14 A.L.R.3d 860, 867 (1965). The Nursing Procedures Manual directed the nurses at Memorial Hospital to ascertain whether Mrs. Cooper had consented to surgery. The hospital standard, later promulgated into a rule, demanded that consent be obtained not only for the first, but for the second operative procedure. This was sufficient to apprise the jury whether the hospital "knew or should have known" whether consent had been given by Mrs. Cooper.

B. *The distinction between respondeat superior and independent contractor is no longer a viable method for determining a hospital's liability for a doctor's actions.*

In describing the relations that exist between a hospital and a surgeon who operates on a patient in that hospital, two ostensible principles of law have emerged: (1) Under the doctrine of *respondeat superior,* a hospital is liable for the malpractice of a surgeon who is an agent or servant of the hospital. (2) A hospital is not liable for the malpractice of a surgeon, an *independent contractor,* who exercises an independent employment and contracts to perform his services according to his own method without being subject to the control of the hospital, except as to the results of his work. Annot., Liability of hospital or sanitarium for negligence of physician or surgeon, 69 A.L.R.2d 305 (1960).

Defendant relies on *Stivers v. George Washington University,* 116 U.S.App.D.C. 29, 320 F.2d 751 (1963). Here, the jury exonerated the doctor, *the hospital's agent,* but returned a verdict for the plaintiff against the hospital. The district court thereafter granted the hospital's motion for judgment in its favor notwithstanding the verdict. The Court of Appeals affirmed because the two verdicts were inconsistent and incompatible. The hospital, absent any independent duty, could not be liable if its agent was not. In passing, the court said:

> . . . While the consent to the operation was obtained in writing by a lay employee it seems clear *he was performing only a ministerial or administrative function to implement the consultation between appellant and Dr. Barrett; a lay person would not be competent to describe the procedure or discuss the possible consequences.* The patient was entitled to rely on Dr. Barrett and the evidence is such that a jury could reasonably find she did so. [Emphasis added.] [116 U.S.App.D.C. at 31, 320 F.2d at 753.]

The distinction between ministerial and medical function is archaic and it renders *Stivers* outmoded.

In 1914, Justice Cardozo established the doctrine of the difference between an "administrative" function of a nurse and a "medical" inquiry-producing act to determine the existence of the doctrine of *respondeat superior. Schloendorff v. Society of New York Hospital,* 211 N.Y. 125, 105 N.E. 92 (1914). Time passed, conditions in hospitals changed, and 43 years later *Schloendorff* was overruled in *Bing v. Thunig,* 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143

N.E.2d 3 (1957), on the issue of the liability of a hospital for the negligence of its nurses. Justice Fuld said:

> . . . Certainly, the person who avails himself of "hospital facilities" *expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.* [Emphasis added.]
>
> * * * * * *
>
> The doctrine of *respondeat superior* is grounded on firm principles of law and justice. Liability is the rule, immunity the exception. It is not too much to expect that those who serve and minister to members of the public should do so, as do all others, subject to that principle and within the obligation not to injure through carelessness. [163 N.Y.S.2d at 10, 143 N.E.2d at 8.]
>
> The rule of nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. It should be discarded. To the suggestion that *stare decisis* compels us to perpetuate it until the legislature acts, a ready answer is at hand. It was intended, not to effect a "petrifying rigidity," but to assure the justice that flows from certainty and stability. *If, instead, adherence to precedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive, and no principle constrains us to follow it.* . . . [Emphasis added.] [163 N.Y.S.2d at 11, 143 N.E.2d at 9.]

Professor Llewellyn, in his book, *The Common Law Tradition Deciding Appeals* (1960), page 118, wrote:

> The fact is that every opinion is in one aspect an argument, an argument prepared by a lawyer. . . . And in all of this the opinion-writing judge is not only a lawyer but an advocate.

This description of an appellate judge is correct. I advocate that a hospital should be liable for the malpractice of a surgeon whether he is an agent or an independent contractor. The distinction between independent contractor and agent does not realistically reflect the symbiotic relationship between a hospital and its medical staff. To me, this distinction is a distinction without a difference.

The hospital and the medical staff bear a fiduciary relationship with a patient in the hospital; the public, and the hospital itself, view the hospital and its staff as one entity; there is a community of interest in the promotion of good health for patients. The bylaws of the Memorial Hospital provide that a member of the medical staff serves as a director of the hospital. The medical committee of the hospital, composed of staff members and hospital administrators, recommends the type of professional work permitted to be done by each member of the medical staff and all rules and regulations that govern the medical staff to assure the proper care of the patients. In addition, the committee communicates to the directors the requests or recommendations of the medical staff and receives and considers all reports on the work of the medical staff to formulate recommendations to aid the hospital and patients. The bylaws provide *that each member of this medical staff created by the board shall have appropriate authority and responsibility for the care of patients.* The bylaws evidence how the hospital and the medical staff, together, monitor and review the performance of staff doctors and restrict or suspend their privileges.

The reality of Memorial Hospital's governing structure and distribution of power permits no basis for distributing liability between a doctor and the hospital based on an agent-independent contractor distinction. Therefore, we should be guided by the realities of the situation and find a hospital liable for the negligence of a doctor who has been permitted by the hospital to use its facilities.

C. *Even if the distinction between independent contractor and agent is retained, a physician is an agent of the hospital and not an independent contractor.*

The potential for control, evidenced by the disciplinary structure of the hospital's

bylaws, is the determinative factor in deciding whether Dr. Curry was an independent contractor or an agent of the hospital. *Shaver v. Bell,* 74 N.M. 700, 397 P.2d 723 (1964). It is of no significance that any control was not exercised by the employer. *Scott v. Murphy Corp.,* 79 N.M. 697, 448 P.2d 803 (1968).

The hospital creates a medical staff, supervises and reviews the work of the physician to determine whether the physician is competent to remain on the medical staff. The medical staff's authority is limited by the hospital's bylaws, as well as the bylaws, rules and regulations of the medical staff. In cases of dispute, the board's decision is final. The medical staff's bylaws provide that the hospital board can terminate any staff member at any time, after consultation with the active staff, for a violation of bylaws, rules and regulations. In fact, if the medical staff is negligent in failing to take any action against an unskilled surgeon, the hospital is also negligent. *Purcell v. Zimbelman,* 18 Ariz.App. 75, 500 P.2d 335 (1972).

It is undisputed that the hospital controlled the right of Dr. Curry to practice medicine in the hospital. On prior occasions, Dr. Curry was suspended until his medical records were current. On March 28, 1973, two months prior to this surgical operation, the administrator notified Dr. Curry that his admitting privileges were suspended and that he would be notified when he would again be able to admit patients. The record does not show when or under what circumstances Dr. Curry was allowed to once again admit patients.

It is also undisputed that the hospital exercised control over Dr. Curry as to the details of keeping medical records for the hospital. Did the hospital have the right to control the manner and method of performance of his services? There is no question in my mind that this right of control existed through the interrelationship of the hospital and the medical staff. I am not prepared to accept the conclusion that the members of the medical staff are independent contractors when, as a whole, the staff has a representative on the hospital board, has rules and regulations which are supervised by the medical committee and whose services in the hospital are governed by the medical board. One cannot exist without the other. Both cooperate like master and servant so that hospitalization will protect the life and health of every patient.

This conclusion is not unique. A doctor employed at a salary to run a sanitarium is an agent or employee of the hospital and the hospital is liable for the doctor's malpractice. *Brown v. Moore,* 247 F.2d 711, 69 A.L.R.2d 288 (3d Cir. 1957). A medical center is also liable to a patient for malpractice of a non-center doctor called in by a center doctor on a theory of agency or agency by estoppel. *Howard v. Park,* 37 Mich.App. 496, 195 N.W.2d 39 (1972). Yet, we have held without reason or authority that a medical center doctor *who assisted a non-center doctor* in surgery did not establish liability of the medical center *because the center-doctor acted independently of his relationship with the clinic. Smith v. Klebanoff,* 84 N.M. 50, 499 P.2d 368 (Ct.App. 1972).

On the other hand, an issue of fact, concerning the doctor's status as an agent of the hospital, existed where a patient entered a hospital in an emergency and was assigned to an active medical staff doctor on service in rotation. *Vanaman v. Milford Memorial Hospital, Inc.,* 272 A.2d 718 (Del. Supr.1970). Yet a hospital was held not liable for negligence of a doctor in the operation of an emergency room *even though the doctor was employed by the hospital under a written agreement, Pogue v. Hospital Authority of De Kalb County,* 120 Ga.App. 230, 170 S.E.2d 53 (1969), and even though it has been held that such a contract is not controlling. A patient can assume that the doctor and staff were acting on behalf of the hospital and the patient is not bound by the secret limitations in the private contract. A hospital is liable whether the doctor is an independent contractor or not. *Mduba v. Benedictine Hospital,* 52 A.D.2d 450, 384 N.Y.S.2d 527 (1976).

New Mexico should not hobble or wobble from one theory to another; if New Mexico continues to cling to the agent-independent contractor distinction, it should commit itself to the view of a doctor as an agent of a hospital.

D. *Even assuming that Dr. Curry was an independent contractor, the hospital is still liable for his negligence.*

If a holding establishing the hospital's liability on an agency theory is too radical to stomach, nonetheless, the hospital is still liable if it is assumed that the doctor is an independent contractor.

A well recognized exception to the general rule of nonliability exists in a situation wherein the work to be performed is inherently dangerous. The contractee cannot escape the responsibility for damage resulting from such tasks. *Southern California Petroleum Corp. v. Royal Indem. Co.,* 70 N.M. 24, 369 P.2d 407 (1962); *Pendergrass v. Lovelace,* 57 N.M. 661, 262 P.2d 231 (1953).

When a hospital admits a patient for surgical procedures it knows that the procedures are inherently dangerous to the life and health of the patient. This dangerous condition exists in the hospital until surgery is performed. At this point in time, a hospital owes a duty to a patient to admit only competent physicians to staff privileges so that a competent surgeon will remedy this dangerous condition. The hospital cannot escape liability by delegating this duty to an incompetent surgeon. *Corleto v. Shore Memorial Hospital,* 138 N.J.Super. 302, 350 A.2d 534 (1975). The social implications of such a holding will not disrupt the medical world; the court in *Corleto* noted that to permit the malpractice lawsuit to proceed would not have a wide-spread impact on New Jersey hospitals and doctors. The court felt that the suit would not affect the composition of medical staffs and medical boards because it is more important that competent physicians practice within their hospitals to raise the level of medical care within the state.

E. *Failure to submit theory to jury was prejudicial error.*

The major issue is whether the failure to submit to the jury Cooper's theory of hospital liability is reversible error.

Cooper pled that the hospital allowed surgical procedures to take place without obtaining the consent from Cooper prior to each operation. There was evidence to support this claim. The hospital, to protect the health of Mrs. Cooper, had a duty to ascertain whether Dr. Curry had obtained the consent of Mrs. Cooper to each operation. It is established law that the failure to instruct specifically on a litigant's theory of the case is prejudicial error. *Stewart v. Oberholtzer,* 57 N.M. 253, 258 P.2d 369 (1953); *Le Doux v. Martinez,* 57 N.M. 86, 254 P.2d 685 (1953); *Clay v. Texas-Arizona Motor Freight,* 49 N.M. 157, 159 P.2d 317 (1945).

Upon this basis, Mrs. Cooper is entitled to a new trial.

F. *Other reversible error noted.*

(1) The nature of the relationship between Dr. Curry and the hospital was a matter of law to be determined by the trial court from the facts. *Roybal v. Bates Lumber Company,* 76 N.M. 127, 412 P.2d 555 (1966). The trial court made no such determination.

(2) The hospital rules, with reference to consent, adopted a month following the second surgery were admitted in evidence.

The jury read the hospital rules and the instructions, and found that Mrs. Cooper made no claim with reference to consent. The jury was not instructed to disregard the hospital rules. Neither did the hospital request such an instruction. It logically follows the jury concluded that the hospital was immune to liability.

Reversible error occurs where the substantial rights of a party have been affected. The record is read in the light of those standards adopted for a fair trial. We do not search for evidence of obvious prejudice. The slightest evidence thereof is sufficient. In fact, we will resolve all doubt in

favor of the party claiming prejudice. *Anderson v. Welsh*, 86 N.M. 767, 527 P.2d 1079 (Ct.App.1974).

An appellate court reviews a record to determine whether the litigants had a fair trial. If it believes a matter is confusing to itself, it says it was confusing to the jury. If it believes a jury was misled, it says the jury was misled. If it believes the slightest evidence of prejudice exists, it says the litigant was prejudiced. An appellate court judges the conduct of the jury in accordance with the personal knowledge and experience of each member of the court as he truly understands the facts of life in the courtroom. It will reverse or affirm in accordance with its personal feelings, or on its own interpretation of the law. Thus, reversal or affirmance changes from court to court and from judge to judge.

The expansion of tort liability in most of its aspects has been a continuant in the 20th century. We should extend it to hospital liability. I would reverse and grant Mrs. Cooper a new trial.

589 P.2d 212

Eleanora T. MURPHY and Kevin P. Murphy, Individually and as next friend for and on behalf of Theresa Gail Murphy, Plaintiffs-Appellants,

v.

Edward J. FRINKMAN, Defendant-Appellee.

No. 3304.

Court of Appeals of New Mexico.

Dec. 19, 1978.

Ron H. Ricks and John D. Donnell; Zinn & Donnell, Santa Fe, for appellants.

Russell W. Ruud; Ruud & Wells, P. A., Albuquerque, for appellee.

OPINION

SUTIN, Judge.

This is just another rear end collision case in which plaintiff was driving the forward car, and defendant operated the car following plaintiff. The jury returned a verdict for defendant and plaintiffs appeal from the judgment entered. We affirm.

A. *Facts most favorable to defendant.*

Plaintiff and defendant were driving north in the left hand lane of San Mateo Boulevard in Albuquerque. The speed limit was 40 miles per hour. Both cars were travelling at about 34 miles per hour. Traffic was heavy and moving rapidly. As plaintiff and defendant approached the intersection with Montgomery Boulevard, the traffic light was green. When plaintiff's car was about 50 yards from the intersection, it decelerated. When it was 30 to 40 yards from the intersection, its brake lights "flashed" on and off in a second. At this moment, both vehicles were close to the intersection and defendant believed plaintiff's car would turn left in the left turn bay. When plaintiff proceeded past the turn bay, the light was still green and defendant assumed plaintiff would proceed directly ahead through the intersection. The light turned yellow and plaintiff's car stopped abruptly even though plaintiff had sufficient time to drive through the intersection. At the moment of plaintiff's sudden stop, defendant was about 30 feet behind plaintiff. Defendant sought to swerve into the right hand lane but was prevented from doing so because of a car in that lane. (The car in the right lane proceeded through the intersection). Defendant slammed on his brakes and stopped simultaneously with, or a split second after plaintiff's car stopped, barely bumping it forward about a car length.

Negligence, contributory negligence and causation were submitted to the jury. At the close of the case, plaintiffs did not move for a directed verdict. On appeal plaintiffs' primary contention is the insufficiency of the evidence to support the jury's verdict.

B. *Plaintiffs are without grounds to challenge the sufficiency of the evidence.*

We hold that plaintiffs are without grounds to challenge the sufficiency of the evidence. The failure to move for a directed verdict precludes plaintiffs from challenging the sufficiency of the evidence on appeal. Having accepted the submission of the issues to the jury, the same became the law of the case. *Nally v. Texas-Arizona Motor Freight, Inc.*, 69 N.M. 491, 368 P.2d 806 (1962); *Bryan v. Clovis*, 54 N.M. 235, 220 P.2d 703 (1950); *Martinez v. Schmick*, 90 N.M. 529, 565 P.2d 1046 (Ct.App.1977), Sutin, J., dissenting.

We might well rest our opinion on that rule and decline to examine the law of the case further. However, the flow of rear end cases, this one being a "yellow light" intersection case, leads us to believe that a complete review is essential.

C. *Negligence and contributory negligence in ordinary rear end collisions applies to "yellow light" cases.*

It has often been said that negligence, contributory negligence and causation are

questions for the trier of the facts and not a question of law. *Williams v. Neff*, 64 N.M. 182, 326 P.2d 1073 (1958); *Proctor v. Waxler*, 84 N.M. 361, 503 P.2d 644 (1972). Even in rear end collisions, it has been said "that questions concerning a defendant's negligence and a plaintiff's contributory negligence are usually questions of fact and should be withdrawn from the jury only in rare cases." *Rhoades v. DeRosier*, 14 Wash. App. 946, 546 P.2d 930, 933 (1976).

Among these rare cases only one exists in New Mexico. In *Kight v. Butscher*, 90 N.M. 386, 564 P.2d 189 (Ct.App.1977), (Sutin, J., dissenting), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977). Judgment for defendant was reversed and the case was remanded to the district court for a new trial. The majority opinion held:

(1) "[T]here 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." [90 N.M. at 389, 564 P.2d at 192.]

(2) It was reversible error to instruct the jury with reference to a statute affecting intersections in a rear end collision case that occurred 40 feet east of the intersection.

See also, *Turner v. McGee*, 68 N.M. 191, 360 P.2d 383 (1961).

What is meant by "certiorari denied?" In *Brown v. Allen*, 344 U.S. 443, 497, 73 S.Ct. 397, 441, 97 L.Ed. 469 (1953), Mr. Justice Frankfurter, the leading authority on procedural matters, said:

> And so we conclude that . . . denial of certiorari cannot be interpreted as an "expression of opinion on the merits."

Certiorari was denied in *Kight* because an erroneous instruction was submitted to the jury.

As already indicated, the vast majority of rear end collision cases have uniformly held that negligence and contributory negligence are matters to be determined by the trier of the fact and judgments should not be disturbed on appeal. *Romero v. Melbourne*, 90 N.M. 169, 561 P.2d 31 (Ct.App.1977); *Sandoval v. Cortez*, 88 N.M. 170, 538 P.2d 1192 (Ct.App.1975); *Fierro v. Murphy*, 85 N.M. 179, 510 P.2d 112 (Ct.App.1973); *May v. Baklini*, 85 N.M. 150, 509 P.2d 1345 (Ct.App. 1973); *Tafoya v. Whitson*, 83 N.M. 23, 487 P.2d 1093 (Ct.App.1971); *Goodman v. Venable*, 82 N.M. 450, 483 P.2d 505 (Ct.App. 1971); *Boyd v. Cleveland*, 81 N.M. 732, 472 P.2d 995 (Ct.App.1970).

Plaintiff relies on *Brock v. Boss*, 416 S.W.2d 456 (Tex.Civ.App.1967); *Felder v. City of Tacoma*, 68 Wash.2d 726, 415 P.2d 496 (1966); *Amon v. Lockett*, 66 Wash.2d 5, 400 P.2d 784 (1965); *Brummett v. Cyr*, 56 Wash.2d 904, 355 P.2d 994 (1960); and *Bernstein v. Crossman*, 172 So.2d 462 (Fla. App.1965). These cases involved rear end collisions at intersections controlled by traffic lights. In each case, the forward vehicle approached or appeared to enter the intersection when the light was yellow or turned to yellow and then stopped. It was struck by the vehicle following. Each case was submitted to the jury on negligence, contributory negligence and causation as issues of fact.

We point to this tautological history to emphasize that in rear end collision cases negligence, contributory negligence and causation, except in rare cases, are questions of fact for the jury and not matters of law for the court. We hope to dispel the myth that liability is consistently imposed as a matter of law on the driver of a car "rear-ending" a car in front of it; that justice is denied because the driver's story is improbable. The front driver should not overlook the shrewd proverbial admonition that, before a trier of fact, sometimes truth is stranger than fiction.

However, the primary duty of avoiding a collision does rest with the driver of the second car; he is negligent unless an emergency or unusual condition such as a sudden stop exists. Under certain conditions, a driver is required to foresee the likelihood of a sudden stop of a preceding car.

In *Romero, supra*, we said:

> Whether Romero stopped too suddenly is a question of fact for the jury. [90 N.M. at 171, 561 P.2d at 33.]

Whether the circumstances were such that a sudden stop *or decrease in speed* should have been anticipated rests with the jury. *Ryan v. Westgard*, 12 Wash.App. 500, 530 P.2d 687 (1975); *Rhodes, supra; Ray v. Cyr*, 17 Wash.App. 825, 565 P.2d 817 (1977); *Kahler v. Martin*, 570 P.2d 720 (Wyo.1977).

When a case is appealed on the question of substantial evidence, there are two factors to be considered: (1) relevant facts and (2) credibility of witnesses.

A pertinent fact in this case upon which the jury was instructed was § 4.33 of the Traffic Code of the City of Albuquerque. It reads:

> No person shall suddenly stop or suddenly decrease the speed of a vehicle thereby endangering any other vehicle, person, or property without good cause.

We adopt the language in *Kahler, supra*:

> This record contains evidence from which the jury could reasonably conclude that there was an unwarranted, sudden and abrupt stopping by the plaintiff, which the defendant could not have anticipated, and under these circumstances the jury could conclude—as it did—that the plaintiff was negligent and the defendant was free from negligence. [570 P.2d at 722.]

This conclusion was also reached in "yellow" light cases. *Bernstein, supra; Amon, supra.*

> Relevant facts, when clearly illustrated and properly interpreted, *become the strongest witness that appear in a court of law*; they stand silent but unassailable. They are not injured by cross-examination. [Emphasis added.] Osborn, The Problem of Proof 1 (2d Ed. 1926).

Defendant established the "relevant facts" pertinent to his defense.

A "credible witness" is nothing more than a witness whom the jury gives credit for telling the truth. *Territory v. Garcia*, 12 N.M. 87, 75 P. 34 (1904). After hearing witnesses testify, the jury tests the credibility of the witness. They may disbelieve either party. From facts presented, the jury can determine that one or both parties were negligent. The basis of the jury verdict is unknown unless special interrogatories are requested. The trier of facts, not this Court, is the sole judge of credibility of witnesses. UJI 17.5; *Dungan v. Smith*, 76 N.M. 424, 415 P.2d 549 (1966). The jury believed defendant.

We must accord the jury verdict its broadest scope; in this case, that defendant was not negligent.

As credibility is unavoidably involved, we will not disturb the jury's verdict.

D. *Passenger in plaintiff's car cannot recover.*

Plaintiff's daughter was a passenger in plaintiff's car. She was not contributively negligent. However, defendant's freedom from negligence bars her recovery. *See, Romero, supra.*

E. *Eliciting testimony regarding injuries is irrelevant on this appeal.*

Plaintiff, Kevin Murphy, is the husband of Eleanora T. Murphy, the driver of the forward car. Kevin was not a witness to the accident and was called to the scene after the accident occurred. He testified about the injuries to Eleanora and damages to the Murphy car. On cross-examination, defendant interrogated Kevin over objection regarding the preparation of joint tax returns filed by the Murphys. This testimony had no bearing on the issues of liability. In arriving at a verdict of non-liability, testimony on the matter of damages is irrelevant. "A ruling as to the admission or rejection of such evidence, in the face of the verdict of the jury, would not constitute error, regardless of its character." *Cunningham v. Springer*, 13 N.M. 259, 289, 82 P. 232, 239 (1905), *aff'd*, 204 U.S. 647, 27 S.Ct. 301, 51 L.Ed. 662, 9 Ann.Cas. 897; *Crouch v. Most*, 78 N.M. 406, 432 P.2d 250 (1967).

The rule is uniform that where the issue of liability is determined by the jury

adversely to the plaintiff, the admission or rejection of evidence of injuries and damages is immaterial or harmless error. It becomes unnecessary for the trier of the fact to resolve the issue of injury or damages. *Lewyn v. Morris*, 135 Ga.App. 289, 217 S.E.2d 642 (1975); *Millsap v. Williamson*, 294 Ala. 634, 320 So.2d 649 (1975); *Patterson v. Burt*, 213 Kan. 463, 516 P.2d 975 (1973); *Larson v. Puyallup School District No. 3*, 7 Wash.App. 736, 502 P.2d 1258 (1972); *Crosby v. Smith*, 13 Ariz.App. 243, 475 P.2d 728 (1970); *DiMaio v. Del Sesto*, 102 R.I. 116, 228 A.2d 861 (1967).

F. *Granting a new trial is discretionary.*

Finally, plaintiffs argue that the district court had a duty to grant a motion for a new trial where the evidence was insufficient to support a jury verdict. This point is without merit. In any event, the granting or denial of a motion for a new trial rests within the sound discretion of the trial court whose ruling will not be disturbed in the absence of a clear abuse of discretion. *Martinez v. Schmick, supra.* There was no abuse of discretion.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ, J., concurring in result only.

LOPEZ, J., concurs.

589 P.2d 673

OCCIDENTAL LIFE OF CALIFORNIA, Plaintiff-Appellee,

v.

STATE of New Mexico, Defendant-Appellant.

No. 12066.

Supreme Court of New Mexico.

Jan. 23, 1979.

Toney Anaya, Atty. Gen., Andrea R. Buzzard, Asst. Atty. Gen., Santa Fe, for defendant-appellant.

Rodey, Dickason, Sloan, Akin & Robb, Rex D. Throckmorton, Jonathan W. Hewes, Albuquerque, for plaintiff-appellee.

OPINION

PAYNE, Justice.

Occidental Life of California brought suit against the State of New Mexico to recover an overpayment of premium taxes. The taxes were paid on premiums received on an insurance policy issued by Occidental to an Albuquerque-based retail clerk's union for the purpose of furnishing insurance benefits to members of the union in El Paso, Texas. The trial court held that Occidental was entitled to a full refund of the overpayment. The State appealed. We reverse.

The overpayment of taxes arose as a result of an error by an employee of Occidental. Occidental's usual business practice was to assign a code to an insurance policy which identified the state where the greater number of the insured persons resided. All premiums received under the policy were identified by this code and attributed for tax purposes to the state represented by that code. An Occidental employee assigned a New Mexico code number to the policy, although virtually all the insured parties lived in Texas. As a result of this error, all premium taxes on the policy from 1967 through 1973 were erroneously paid to New Mexico instead of Texas.

The trial court held that since the erroneous coding of the policy was an innocent mistake of which Occidental had no knowledge or notice until 1974, it was entitled to a full refund.

It is well established that in the absence of a statute permitting a recovery, taxes paid voluntarily and without compulsion cannot be recovered. *Jaynes v. Heron*, 46 N.M. 431, 130 P.2d 29 (1942); *Johnson v. Greiner*, 44 N.M. 230, 101 P.2d 183 (1940). Occidental does not dispute that this is an accurate statement of the law, nor is it disputed that at the time these taxes were paid there was no statute which permitted a refund.

Occidental's argument is based on the theory that taxes paid pursuant to an inno-

cent mistake of fact are not paid voluntarily. It contends that the cases of *Rabbit Ear Cattle Company v. Frieze*, 80 N.M. 203, 453 P.2d 373 (1969) and *Elgin v. Gross-Kelly Co.*, 20 N.M. 450, 150 P. 922 (1915) establish the rule that payments made as a result of a mistake of fact are regarded as involuntary and are recoverable. Neither of these cases, however, involve the payment of taxes; both are consistent with the rule of *Jaynes, supra*, and *Johnson, supra*, that the recovery of taxes is governed by statute in the absence of duress.

The trial court found that Occidental did not pay these taxes under duress. Occidental does not challenge that finding on appeal. Had the taxes been paid under duress they would have been recoverable, even in the absence of a statute permitting their recovery. *Jaynes, supra.* The mere fact that Occidental placed the wrong code on the policy in 1966, and perpetuated the error until 1974, does not render the payment of taxes pursuant to this error "involuntary." The payment of taxes may be voluntary, and hence unrecoverable, even though it is made as a result of a mistake on the part of the taxpayer. *City of Phoenix v. Phoenix Newspapers, Inc.*, 100 Ariz. 189, 412 P.2d 693 (1966); *Sierra Investment Corporation v. County of Sacramento*, 252 Cal.App.2d 339, 60 Cal.Rptr. 519 (1967); *E. A. Stephens & Co. v. Board of Equalization*, 104 Colo. 556, 92 P.2d 732 (1939); *Scoa Industries, Inc. v. Howlett*, 33 Ill.App.3d 90, 337 N.E.2d 305 (1975); *Bateson v. City of Detroit*, 143 Mich. 582, 106 N.W. 1104 (1906). This is especially the case where, as here, it is within the ability of the taxpayer to ascertain the actual facts.

Occidental contends that the passage of § 59–3–7 B, N.M.S.A.1978 (formerly § 58–3–7 B, N.M.S.A.1953 (Inter.Supp.1976–77)) is an expression of a legislative intent that taxes paid by mistake should be recoverable. If this Court were to judicially adopt the proposition advocated by Occidental, the statute permitting recovery would be rendered meaningless. The effect of such a holding would be to permit a recovery of taxes erroneously paid notwithstanding the absence of a statute permitting recovery. We believe that whether a recovery should be allowed is properly a question for the Legislature. The Legislature did not give § 59–3–7 B retroactive effect.

We hold that the district court erred in permitting the recovery of the premium taxes Occidental erroneously paid. In light of this conclusion, it is unnecessary to consider the other issues raised by the State.

The judgment of the district court is reversed and the cause remanded with instructions to enter judgment in favor of the State.

IT IS SO ORDERED.

McMANUS, Senior Justice, and FEDERICI, J., concur.

589 P.2d 674

STATE of New Mexico, Petitioner,

v.

James SILAS, Respondent.

No. 12177.

Supreme Court of New Mexico.

Jan. 24, 1979.

Toney Anaya, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for petitioner.

G. Hank Farrah, III, Albuquerque, for respondent.

OPINION

EASLEY, Justice.

Defendant was sentenced as a second offender under the habitual offender statute, § 31-18-5, N.M.S.A.1978 (formerly § 40A-29-5, N.M.S.A.1953 (2d Repl.1972)). The Court of Appeals reversed the sentence, and remanded with instructions to vacate the enhanced sentence and reinstate the original sentence entered upon conviction of the principal offense. *State v. Silas*, 17 N.M.St. B.Bull. 2810 (1978). Certiorari was granted, and we affirm in part and reverse in part.

We consider two questions. First, whether the State furnished the requisite proof that the Colorado juvenile charge against Silas for assault with intent to commit rape was ordered transferred to the district court, and that Silas was thereafter convicted as an adult, so as to make the offense a felony subject to being used for enhancement of his sentence under our habitual offender statute. Second, whether the case should be remanded for vacation of the enhanced sentence and reinstatement of the original sentence, or remanded for a new trial on the habitual offender charge.

The State claimed that the evidence established that Silas was tried in Colorado as an adult and this was the basis for the enhanced sentence. Silas was a juvenile at the time that offense was committed. A prior conviction in another jurisdiction which was not a felony under the laws of New Mexico will not support an enhanced sentence. *State v. Knight*, 75 N.M. 197, 402 P.2d 380 (1965). In Colorado, defendant could have been convicted of a felony only after the juvenile court entered an order transferring him to the district court for criminal proceedings. *People v. District Ct. In And For City & Co. of Denver*, 164 Colo. 530, 436 P.2d 672 (1968). Thus, to be the basis for sentence enhancement, it must appear that defendant was transferred to and convicted in district court in Colorado, rather than tried in that state's juvenile court. *Trujillo v. Cox*, 75 N.M. 257, 403 P.2d 696 (1965).

Citing *Trujillo*, the Court of Appeals held, *inter alia*, that the entry of a proper transfer order from juvenile court to district court is a jurisdictional fact; and, that the State had the burden of affirmatively establishing that a transfer to district court was ordered.

State's exhibits 1 and 2 are a petition in juvenile court to transfer defendant to district court and a notice of hearing on the petition; they bear a juvenile court docket number. There is no evidence that the hearing was held. State's exhibit 3 bears a district court docket number and orders the filing of a criminal information against defendant. No order explicitly

transferring defendant or explicitly waiving the jurisdiction of the juvenile court was introduced into evidence. Nor was there any testimony that a transfer order was ever entered by the juvenile court in Colorado. The Court of Appeals found this evidence insufficient and held that the State had failed to carry its burden of showing that a transfer had been ordered. This holding we affirm.

The Court of Appeals then stated, "Because of the failure of proof, the cause is remanded with instructions to vacate the enhanced sentence and reinstate the original sentence. . . ." In the absence of bad faith, or other unusual circumstances, we find no reason not to remand for a new trial on the habitual charge, rather than for reinstatement of the original sentence. *State v. Linam*, No. 11,816 (Filed January 11, 1979).

We therefore reverse and remand this case to the district court for a new trial.

IT IS SO ORDERED.

SOSA, C. J., McMANUS, Senior Justice, and PAYNE and FEDERICI, JJ., concur.

589 P.2d 1028

Charles AUGUSTUS, Plaintiff-Appellee,

v.

JOHN WILLIAMS & ASSOCIATES, INC., a Missouri Corporation, Defendant-Appellant.

JOHN WILLIAMS & ASSOCIATES, INC., a Missouri Corporation, Plaintiff-Appellant,

v.

Charles AUGUSTUS and Peggy Augustus, his wife, Defendants-Appellees.

STATE of New Mexico, ex rel. Toney ANAYA, Attorney General, Plaintiff-Appellee,

v.

JOHN WILLIAMS & ASSOCIATES, INC., a Missouri Corporation, Defendant-Appellant,

and

Charles Augustus, Defendant-Appellee.

No. 11734.

Supreme Court of New Mexico.

Jan. 8, 1979.

Rehearing Denied Feb. 5, 1979.

Dow & Feezer, James L. Dow, Carlsbad, for defendant-appellant.

Matkins & Martin, W. T. Martin, Jr., Carlsbad, for plaintiff-appellee Augustus.

Toney Anaya, Atty. Gen., Santa Fe, for plaintiff-appellee State of New Mexico, ex rel. Toney Anaya.

OPINION

FEDERICI, Justice.

Originally three separate causes of action were filed in the District Court of Eddy County: *Augustus v. John Williams & Associates, Inc. and John Williams, individual-*

ly, No. 31791; *John Williams and Associates, Inc. v. Augustus,* No. 32223; and *State of New Mexico, ex rel. Toney Anaya, Attorney General v. John Williams, John Williams Associates, Inc. and Augustus,* No. CV–77–13. The three cases were consolidated for trial. Judgment was entered for the State in Cause No. CV–77–13 based upon a settlement stipulation and no appeal was taken therefrom. The remaining two causes were tried to a jury. The court directed a verdict for John Williams, individually. The jury returned a verdict for Augustus (appellees) and against John Williams Associates, Inc. (appellant). Judgment was entered in accordance with the jury verdict. This appeal followed.

The main issue presented for review by appellant is whether the trial court erred in refusing to enforce an alleged oral settlement agreement between the parties.

Negotiations were commenced in early February 1977, between attorneys for the parties, James L. Dow, for appellant, and Harvey W. Fort, for appellees. These discussions resulted in an oral offer being made by appellant's attorney to appellees' attorney, which was rejected by appellees' attorney.

Thereafter, by letter dated February 24, 1977, a counter-offer was made by appellees' attorney to appellant's attorney. This letter said:

> Dear Les:
>
> In order to dispose of the above cases and the matter outstanding with the State of New Mexico, my client makes the following offer:
>
> Williams to deed Augustus the acreage under the sales contract. Augustus will give up all rights to any monies under the escrow contracts and all rights and claims under his counterclaims in Cause No. 32223, will ask for no reimbursements for finishing the old water line or the money expended on the new water line, and will turn everything over to Williams.

This counter-offer was never accepted by appellant or his attorney.

The attorneys for appellant and appellees met several times thereafter to discuss the possibility of a settlement agreement. The attorneys met in the office of appellant's attorney on March 11, 1977, and again on March 14, 1977. At the March 14 meeting, a proposed oral agreement to settle the lawsuits was agreed upon by the attorneys.

On March 14 and 15, 1977, attorneys for appellant and appellees began the preparation of documents, including a judgment which incorporated the provisions of the proposal oral settlement. The judgment and form of the other documents were approved by the respective attorneys.

Late in the afternoon on March 15, 1977, appellees' attorney called appellant's attorney by telephone and informed him that appellees refused to sign the deeds and other instruments as purportedly agreed to in the alleged oral agreement *unless appellant would assume all liability and responsibility for the water lines and sewer lines placed on the property.* The attorney for appellant then informed appellees' attorney that he considered the matter settled and would not agree to the changes requested by appellees. On March 25, 1977, appellees changed attorneys.

With reference to the authority of an attorney to bind his client to an agreement, § 36–2–11.B, N.M.S.A.1978 (formerly § 18–1–10(2), N.M.S.A.1953 (Repl.1970)), provides:

> *36–2–11. [Authority of attorneys.]*
>
> An attorney has authority:
>
> . . . . .
>
> B. to bind his client to any agreement in respect to any proceeding *within the scope of his proper duties and power* . . (Emphasis added.)

An oral settlement made for a client by his attorney who has specific authority to settle is enforceable under certain circumstances. *Bogle v. Potter,* 72 N.M. 99, 380 P.2d 839 (1963); *Zamouski v. Gerrard,* 1 Ill.App.3d 890, 275 N.E.2d 429 (1971). Certain basic principles of law applicable to the authority of attorneys to settle cases are well established. They are stated in *Nehleber v. Anzalone,* 345 So.2d 822 (Fla.App. 1977):

(1) A party seeking judgment on the basis of compromise and settlement has the burden of establishing assent by the opposing party. . . .

(2) The mere employment of an attorney does not of itself give the attorney the implied or apparent authority to compromise his client's cause of action. . . .

(3) An exception to the general rule is a situation in which the attorney is confronted with an emergency which requires prompt action to protect his client's interest and consultation with his client is impossible. . .

(4) A client may give his attorney special or express authority to compromise or settle his cause of action, but such authority must be clear and unequivocal. . . .

(5) An unauthorized compromise, executed by an attorney, unless subsequently ratified by his client, is of no effect and may be repudiated or ignored and treated as a nullity by the client. . . .

Id. at 822–23 (citations omitted).

In *Hayes v. Eagle-Picher Industries, Inc.,* 513 F.2d 892, 893 (10th Cir. 1975), the court said:

It is fundamental that an attorney does not by reason of his employment have authority to compromise his client's cause of action absent an emergency requiring prompt action. Numerous cases enunciating this are noted in Annotations 30 A.L.R.2d 944, 945 (1953) and 56 A.L.R.2d 1290, 1291–92 (1957). Our court has recognized and applied this well recognized rule in the relatively recent decision in *Thomas v. Colorado Trust Deed Funds, Inc.,* 366 F.2d 136 (10th Cir. 1966). While there are some cases which say that a presumption exists that the attorney of record has authority to settle his client's claim, if such a presumption exists it is rebutted easily . . . .

■ There are other exceptions to the rule announced in *Nehleber* and *Hayes* that the mere employment of an attorney does not of itself give the attorney the implied or apparent authority to settle his client's cause of action. For example, one exception to the rule exists where, although the attorney has not been authorized to settle, the client accepts the benefits of the settlement before attempting to treat the settlement as unauthorized and unenforceable. In that case, the client is bound by his attorney's settlement. *Nagymihaly v. Zipes,* 353 So.2d 943 (Fla.App.1978); *Appeal of Scott Tp.,* 31 Pa.Cmwlth. 505, 377 A.2d 826 (1977).

For other cases which present the case law on the rule and its exceptions *see: United States v. Beebe,* 180 U.S. 343, 21 S.Ct. 371, 45 L.Ed. 563 (1901); *Richfield Oil Corporation v. La Prade,* 56 Ariz. 100, 105 P.2d 1115 (1940); *Radosevich v. Pegues,* 133 Colo. 148, 292 P.2d 741 (1956); *Sheffield Poly-Glaz, Inc. v. Humboldt Glass Co.,* 42 Ill.App.3d 865, 1 Ill.Dec. 555, 356 N.E.2d 837 (1976); *Scott v. Moore,* 52 Okl. 200, 152 P. 823 (1915); *Anderson v. Oldham,* 82 Tex. 228, 18 S.W. 557 (1891); *McMillan v. McMillan,* 72 S.W.2d 611 (Tex.Civ.App.1934); *Kreis v. Kreis,* 57 S.W.2d 1107 (Tex.Civ. App.1933). *See also* Annots., 56 A.L.R.2d 1290 (1957) and 30 A.L.R.2d 944 (1953).

■ Section 36–2–11.B does not alter the case law which governs the authority of an attorney to settle or compromise cases for his client.

It is true in this case that appellant's attorney thought that all major issues had been covered in the settlement negotiations; however, when appellees' attorney was called as a witness, he testified that he had no authority to enter into a final settlement agreement nor to approve the judgment without his client's consent. In his testimony he said:

I did not have any authority in the case to sign that judgment as I explained to the Court yesterday, without the okay of the client, because there were things in there he had to see. *I explained that to Mr. Dow.* I thought he [appellee] would accept it at the time and would sign, *but I had no authority.* (Emphasis added.)

The attorney also testified that appellees had not seen the proposed judgment and had not approved it.

Appellant relies on *Bogle v. Potter, supra,* to support his argument that the alleged settlement should be enforced. In *Bogle* one party made a written offer of settlement which was accepted by the other party. The offer did not include the details of carrying out the agreement in such a manner as to eliminate a tax liability. This Court said:

> The failure of Potter to include in the letter, making the offer, all details of carrying the proposal into effect to accomplish its purpose did not prevent there being a meeting of the minds and an intention to be bound. *Those details were not essential to the proposal, because, without them, the offer was not too indefinite for enforcement.* The details of carrying out the agreement in such manner as not to create a tax liability did not change the terms or purpose to be accomplished by the offer. *Stites v. Yelverton,* 60 N.M. 190, 289 P.2d 628; *Duggan v. Matthew Cummings Co.,* 277 Mass. 445, 178 N.E. 825. (Emphasis added.)

Id. 72 N.M. at 105, 380 P.2d at 843.

In this case the record clearly shows that appellees would not accept the settlement because they demanded that appellant agree to install the water and sewer lines at its own expense. The liability for the water and sewer lines was not a minor detail. It was an essential element to be included in the proposed settlement; without it the proposed settlement was incomplete. Thus, *Bogle* is distinguishable. It does not apply to the facts in this case.

There is substantial evidence in the record to support the conclusion reached by the trial court that the alleged settlement should not be enforced.

Appellant further contends that appellees are estopped from denying that their attorney had the authority to represent them in negotiating the settlement and approving the form of judgment. Appellant cites *In Re Williams' Will,* 71 N.M. 39, 68–69, 376 P.2d 3, 23 (1962), in support of its equitable estoppel argument:

> 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.

See also: Westerman v. City of Carlsbad, 55 N.M. 550, 237 P.2d 356 (1951). We have no quarrel with the elements set forth in *In re Williams' Will.* However, all of the elements of equitable estoppel are not present in this case. The record quoted above indicates that appellant's attorney knew that appellees' attorney had no authority to settle the case.

Appellant contends finally that the trial court erred in removing from the jury the issue of liability for installation of the subdivision water lines. The court found that a health hazard existed, ordered the lines repaired and the proceeds of the receivership used to pay for the repairs. The court also found that both appellant and appellees were subdividers under New Mexico law. Appellant acknowledges in his brief that he agreed to the entry of the order regarding payment for the water line from receivership proceedings and that the order in CV–77–13 was to be treated as final. In addition, at trial, the jury, under a special interrogatory, found that appellee acted as an agent for appellant. No challenge to the special interrogatory or its answer was made by appellant. Appellant did not tender to the court any instruction

on the water line liability, nor did it submit a special interrogatory to the jury on the issue. There was no misrepresentation upon which appellant was entitled to rely. With appellees acting as agent for appellant, the responsibility and liability for furnishing water of proper quality to the subdivision rested upon appellant.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SOSA and PAYNE, JJ., concur.

589 P.2d 1032

Charles Fred McGUINNESS, Petitioner,

v.

STATE of New Mexico, Respondent.

No. 12155.

Supreme Court of New Mexico.

Jan. 15, 1979.

Rehearing Denied Feb. 5, 1979.

Reginald J. Storment, Appellate Defender, Martha A. Daly, Asst. Appellate Defender, Santa Fe, for petitioner.

Toney Anaya, Atty. Gen., Charlotte H. Roosen, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

SOSA, Chief Justice.

The questions presented for review are: Did the Court of Appeals err in holding that the deposition of the State's chief witness was properly admitted in this criminal trial under the applicable procedural rules? Did the Court of Appeals err in holding that such admission did not violate defendant's right to confront and cross-examine the witnesses against him? We hold that the Court of Appeals erred in holding the deposition was properly admitted.

Defendant was charged with second-degree murder. Prior to trial and at the

State's request, the deposition of a Ben Vigil was taken. In that deposition, Vigil testified as an eyewitness to the murder. He related that defendant was present at the scene of the crime; defendant was in the bedroom with the decedent when the first shot was fired in that room; decedent ran from the bedroom with defendant behind him; defendant fired a shot from the living room through the screen door after decedent had exited through the door; and defendant followed decedent outside, after which Vigil heard two more shots. Defendant and his counsel were at the deposition. Defense counsel cross-examined Vigil regarding his testimony. At that time, counsel did not know the name of an informant, Bernie Lovato, and was unable to test Vigil's credibility by cross-examining him as to Lovato's presence at the scene of the crime.

On February 21, 1977, Vigil called defense counsel and made statements which directly conflicted with his testimony at the deposition. Defense counsel was unable to introduce testimony regarding these statements at trial. Lovato appeared as an eyewitness for the State. He testified to essentially the same story that Vigil had told at the deposition. However, Lovato testified that no shot was fired through the screen door and that he heard five shots fired.

The State subpoenaed Vigil to testify at trial. He appeared and was sworn in before the jury. Prior to the State asking him any questions, the jury was sent out. Vigil then informed the court that he would invoke his fifth amendment privilege in response to any questions regarding the subject matter of his testimony at the deposition. Vigil asserted that his testimony at trial regarding the events on the night of the murder would directly conflict with his prior sworn testimony, that this conflict would expose him to a prosecution for perjury, and that the privilege applied because of this exposure. The trial court ruled that the privilege was properly claimed. Vigil was excused. The State then moved to admit the deposition; it was admitted over defendant's objection. The court told the jury that Vigil was absent and unavailable.

Defendant contends that use of the deposition at trial was error because it was inadmissible under applicable procedural rules and denied him his right to confront witnesses testifying against him. The Court of Appeals held that Vigil's assertion of his privilege against self-incrimination made him unavailable and that the deposition was therefore admissible under N.M.R. Crim. P. 29(n)(3) [N.M.S.A. 1978 (formerly § 41–23–29(n)(3), N.M.S.A. 1953 (Supp. 1975)].

The general rule governing the use of depositions in criminal cases is stated in 23 C.J.S. *Criminal Law* § 1001 (1961), at page 1059, as follows:

> [D]epositions of witnesses cannot be used where such witnesses are within the jurisdiction of the court and it is possible to obtain their *attendance* by proper process. (Footnote omitted and emphasis added.)

While depositions are allowable in criminal cases, the circumstances permitting their use must be exceptional. *State v. Barela*, 86 N.M. 104, 519 P.2d 1185 (Ct.App. 1974); 26A C.J.S. *Depositions* § 16 (1956). The necessity must be clearly established, and the burden of showing that necessity is on the prosecution. *Haynes v. People*, 128 Colo. 565, 265 P.2d 995 (1954).

In New Mexico, the only authority for the use of a deposition in a criminal proceeding is N.M.R. Crim. P. 29(n). *State v. Berry*, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974). Rule 29 governs the taking and use of depositions in criminal cases; it is an exception to the general rule of evidence requiring the prosecution to confront the accused face to face with those witnesses against him and deals with one of the most sacred rights of the individual. The use of a deposition at trial by the State requires strict compliance with Rule 29. *State v. Berry, supra; State v. Barela, supra.* Unless the statute is followed in all substantial particulars, the deposition will not be permitted to be read to the trier of fact. 26A C.J.S. *Depositions* § 16 (1956).

Rule 29(n) provides:

> *Use of Depositions.* At the trial, or at any hearing, any part or all of a deposi-

tion, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used:

(1) If the witness is dead;

(2) If the witness is unable to attend to testify because of illness or infirmity;

(3) If the party offering the deposition has been *unable to procure the attendance* of the witness by subpoena;

(4) If the witness is out of the state, his presence cannot be secured by subpoena or other lawful means, and his absence was not procured by the party offering the deposition; and

(5) To contradict or impeach the witness.

If only part of a deposition is offered in evidence by a party, any adverse party may require him to offer any other part or parts relevant to the part offered, and any party may introduce any other parts, subject to the rules of evidence. (Emphasis added.)

Rule 29 specifies five situations in which depositions may be used in evidence as if the witness were present and examined in open court. These are situations of unavailability such as death, physical inability to attend the trial, and uncontrived absence.

There is authority that a deposition may, in the discretion of the court, be admitted although the deponent is present at trial; however, the general rule is that under such circumstances a deposition is inadmissible. 26A C.J.S. *Depositions* § 92(2)(e) (1956). Where a witness is excused from testifying on the ground that he cannot do so without incriminating himself, his deposition is not thereby rendered admissible. *Hayward v. Barron*, 38 N.H. 366 (1859).

We recognize that there is authority to the contrary. In *State v. Yates*, 442 S.W.2d 21 (Mo. 1969), the Missouri Supreme Court held that where the witness invoked her privilege against self-incrimination at trial, she made herself as "unavailable" as if she were dead or out of state. Defendant was allowed to read the portions of the witness' deposition taken by his counsel indicating that the witness, not defendant, had made the sale of the drug which was the subject of the prosecution. The court said:

When the testimony of a witness, produced in open court to testify for a defendant, becomes unavailable to defendant because the witness invokes his constitutional privilege against self-incrimination, a necessity arises for the admission of his previously given testimony from a secondary source, in order that *defendant* may be accorded a fair trial. In such case the witness is unavailable as a practical matter and his testimony should be received. (Citations omitted and emphasis added.)

Id. at 28. *Yates* is distinguishable from the case presently before us. In *Yates*, defendant was the one seeking to introduce the deposition. Here the State was the one seeking admission of the deposition.

We prefer to follow the rationale of *People v. Lawrence*, 168 Cal.App.2d 510, 336 P.2d 189 (1959). There the lower court's refusal to allow defendant to read to the jury the witness' prior testimony was held proper. The court determined that the case was not within the purview of its penal code, which admitted former testimony by a witness who is deceased, insane, or out of the jurisdiction, or who can not, with due diligence, be found within the state. The court stated that the witness did not come within any of the quoted exceptions.

He was physically present in the courtroom. His failure to testify stemmed merely from the exercise of his legal right to assert his privilege against self-incrimination, not because of death, insanity, absence from the jurisdiction or lack of anybody's ability to find him.

336 P.2d at 194.

Similarly, in the case at bar, we find that Vigil's deposition was not within the purview of Rule 29. This rule provides for the use of a deposition at trial "[i]f the party offering the deposition has been unable to procure the attendance of the witness by subpoena." Rule 29(n)(3). The State offered the deposition as evidence despite the fact that it was able to procure Vigil's attendance.

We agree with the Court of Appeals that once Vigil was permitted to claim his privilege against self-incrimination, he became unavailable as a witness under N.M.R. Evid. 804(a)(1) [N.M.S.A. 1978 (formerly § 20–4–804(a)(1), N.M.S.A. 1953 (Supp. 1975))]. As a result of this unavailability, the deposition would not be excluded because of the hearsay rule. N.M.R. Evid. 804(b)(1), [N.M.S.A. 1978 (formerly § 20–4–804(b)(1), N.M.S.A. 1953 (Supp. 1975))]. However, the fact that the deposition was not to be excluded as hearsay does not authorize its admission if it is excludable on other grounds. We find the deposition was excludable because of N.M.R. Crim. P. 29.

The Court of Appeals' decision that Vigil's deposition was admissible under N.M.R. Crim. P. 29(n)(3) is hereby reversed. This cause is, therefore, remanded for a new trial.

McMANUS, Senior Justice, and EASLEY, PAYNE and FEDERICI, JJ., concur.

589 P.2d 1035

Raymond C. HANNAH and Vonnie B. Hannah, Plaintiffs-Appellees,

v.

Edward A. TENNANT and Josefina V. Tennant, Defendants-Appellants.

No. 12170.

Supreme Court of New Mexico.

Jan. 24, 1979.

Coors, Singer & Broullire, Henry G. Coors, IV, Albuquerque, for plaintiffs-appellees.

Johnson & Lanphere, John M. Kirk, Jr., Albuquerque, for defendants-appellants.

OPINION

FEDERICI, Justice.

Raymond and Vonnie Hannah (appellees) are husband and wife. They brought this action against Edward and Josefina Tennant (appellants) seeking specific performance of an executory contract for the sale of a portion of appellees' community real property.

A handwritten document, apparently considered by appellees to be a contract for the sale of certain real property in Albuquerque, was signed by both appellants, as buyers, and by appellee Vonnie Hannah, alone, as seller. Less than 72 hours after signing this document, appellants sent appellee Vonnie Hannah a letter in which they stated their intent to withdraw from the proposed real estate purchase. Appellees filed suit in the District Court of Bernalillo County asking for specific performance of the alleged contract. Appellants' answer included a third affirmative defense which is the only subject involved in this appeal. It stated:

> Exhibit "A" [the executory contract] is not a valid and binding contract in the State of New Mexico because of the Plaintiffs [appellees'] failure to comply with the provisions of Section 57–4A–7, N.M.S.A., 1953 Comp.; the Complaint must therefore be dismissed.

There is no indication in the record that a power of attorney from appellee Raymond Hannah to appellee Vonnie Hannah was ever executed or recorded.

Prior to the trial, the court granted appellees' motion to strike appellants' third affirmative defense. Appellants applied for, and this Court granted, an order allowing an interlocutory appeal.

The issue in this case is whether both spouses must *sign* a contract for the sale of community real property in order to meet the requirement of § 40–3–13, N.M.S.A.1978 (formerly § 57–4A–7, N.M.S.A.1953 (Supp. 1975)), that both spouses join in the contract to transfer, or whether the word "join" as used in the statute merely refers to a state of mind.

Section 40–3–13 provides:

> *Transfers, conveyances, mortgages and leases of real property; when joinder required.*
>
> A. Except for purchase-money mortgages and except as otherwise provided in this subsection, *the spouses must join in all* transfers, conveyances or mortgages or *contracts to transfer*, convey or mortgage *any interest in community real property* and separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common. . .
>
> *Any* transfer, conveyance, mortgage or lease or *contract to transfer*, convey, mortgage or lease *any interest in the community real property* or in separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common, *attempted to be made by either spouse alone in violation of the provisions of this section shall be void and of no effect*, except that either spouse may transfer, convey, mortgage or lease directly to the other without the other joining therein.
>
> . . . . . .
>
> B. *Nothing in this section shall affect the right of one of the spouses to* transfer, convey, mortgage or lease, or *contract to transfer*, convey, mortgage or lease, *any community real property*, or separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common, without the joinder of the other spouse, *pursuant to a validly executed and recorded power of attorney* as provided in Section 47–1–7 NMSA 1978. (Emphasis added.)

Appellants argue that § 40–3–13 requires both spouses to sign a contract to convey community real property absent a validly executed and recorded power of attorney, and that the absence of one spouse's signature renders the contract in question void and of no effect if it is proved that the property in question is appellees' community property. Therefore, appellants argue, it was error for the trial court to strike their third affirmative defense.

Appellees contend that the purpose of § 40–3–13 is to protect one spouse from an act of the other spouse conveying away community real property, and that the statute only requires that a spouse who does not sign be willing and able to join in a contract conveying community real property. Therefore, appellees argue, the trial court did not commit error in striking appellants' third affirmative defense.

We believe that the intention expressed by the language of § 40–3–13 is clear: contracts to transfer an interest in community real property are *void and of no effect unless signed by both husband and wife.*

All of the cases cited by appellees involved § 57–4–3, N.M.S.A.1953, the predecessor of the present statute. That statute only required that both spouses join in the execution of *deeds* and *mortgages* involving community real property. The present statute, § 40–3–13, specifically includes *contracts* to transfer or convey community real property. We hold that under § 40–3–13 a contract for the sale of an interest in community real property, which has not been *signed* by *both* husband and wife, is unenforceable, void and of no effect, absent a validly executed and recorded power of attorney. The words "join in" used in the statute mean "sign." *Marquez v. Marquez,* 85 N.M. 470, 513 P.2d 713 (1973); *McGrail v. Fields,* 53 N.M. 158, 203 P.2d 1000 (1949); *Jenkins v. Huntsinger,* 46 N.M. 168, 125 P.2d 327 (1942). *See also Gregg v. Owens,* 37 Minn. 61, 33 N.W. 216 (1887).

The order of the trial court striking appellants' third affirmative defense is reversed and the cause remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, C. J., and PAYNE, J., concur.

589 P.2d 1037

MAC TYRES, INC., a corporation, Petitioner,

v.

Ben VIGIL, Respondent.

No. 12191.

Supreme Court of New Mexico.

Jan. 25, 1979.

Montgomery, Andrews & Hannahs, Frank Andrews, III, Walter J. Melendres, Santa Fe, for petitioner.

Byron L. Treaster, Los Alamos, for respondent.

OPINION

McMANUS, Senior Justice.

Ben Vigil (Vigil) brought this action in the District Court of Santa Fe County to recover damages for an alleged injury sustained when he tripped over a large metal jack at Mac Tyres, Inc. (Mac Tyres). The jury returned a verdict in Vigil's favor and awarded him $12,000.00 in damages. The trial court denied Mac Tyres' motion for a new trial. Mac Tyres appealed the judgment and the denial of its motion, and the Court of Appeals affirmed. This Court granted certiorari, and we now reverse the Court of Appeals.

In its petition for a writ of certiorari, Mac Tyres presents two grounds for reversal: (1) the trial court's exclusion of evidence regarding a misrepresentation made by Vigil to his employer's workmen's compensation carrier; and (2) the trial court's refusal to grant Mac Tyres' requested instruction No. 5.

Mac Tyres' first contention is that it was erroneously denied its right to impeach Vigil. The record indicates that Vigil tripped over a large metal jack at Mac Tyres, Inc. Vigil told Mary Tobin, a representative of his employer's workmen's compensation carrier, that he had tripped on a tree stump on his employer's property instead of a jack on Mac Tyres' property. Vigil's deposition was taken, and he admitted the lie. Vigil stated that he lied to the insurance representative to assure the receipt of benefits.

At trial Vigil presented a motion *in limine* asking that Mac Tyres be denied the right to identify Mary Tobin or otherwise mention that Vigil had lied to the workmen's compensation carrier. The trial court ruled that Mac Tyres could inquire whether the misrepresentation was made and the reason for the misrepresentation. However, Mac Tyres could not identify the person to whom the misrepresentation was made as an insurance representative unless Vigil first stated this fact.

During direct and cross-examination, Vigil testified that he told Mary Tobin that he tripped on a tree stump instead of the jack. However, he changed his testimony regarding the reason for the lie. Vigil testified that he lied because he was afraid his boss would be upset if his boss knew he was at Mac Tyres. Again, Mac Tyres sought to impeach Vigil with his deposition testimony. The trial court denied Mac Tyres' request.

The trial court based its rulings on two grounds. First, the court determined that

under N.M.R.Evid. 403, N.M.S.A.1978, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Secondly, the trial court felt that the collateral source rule would not permit evidence of collateral source insurance to be admitted. *See Trujillo v. Chavez,* 76 N.M. 703, 417 P.2d 893 (1966).

The Court of Appeals held that the trial court's allowance of limited impeachment was a proper application of Rule 403 and was an appropriate solution to the balancing test set forth in Rule 403 and N.M.R. Evid. 411, N.M.S.A.1978.

Rule 403 states, in pertinent part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .

Rule 411 states as follows:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Evidence that a party is insured is generally inadmissible because it is immaterial to the issues tried and because it is prejudicial. *See Fort v. Neal,* 79 N.M. 479, 444 P.2d 990 (1968); *Falkner v. Martin,* 74 N.M. 159, 391 P.2d 660 (1964). However, New Mexico courts have not adhered to a rule that insurance can never be mentioned when it is highly relevant to an issue in the lawsuit. *Wood v. Dwyer,* 85 N.M. 687, 515 P.2d 1291 (Ct.App.1973).

The Court of Appeals interpreted and applied Rule 411 in *Selgado v. Commercial Warehouse Company,* 86 N.M. 633, 526 P.2d 430 (Ct.App.1974). In *Selgado,* the court reversed a judgment in favor of plaintiff, in part because the trial court refused to admit a subsequent insurance claim. The court said:

> The tender was relevant even though it mentioned insurance. . . . [T]he proof of loss, if inconsistent with the plaintiffs' claims at trial, might cast doubts upon plaintiffs' claims generally and Mrs. Selgado's testimony in particular. The tendered testimony was an admission of Mrs. Selgado against her interest and was admissible as such. (Citations omitted.)

Id. at 638, 526 P.2d at 435.

The trial court has a great deal of discretion in applying Rules 403 and 411. *Anderson v. Welsh,* 86 N.M. 767, 527 P.2d 1079 (Ct.App.1974). In *Anderson,* the Court of Appeals stated:

> We recognize that the question of insurance before a jury can be prejudicial as well as proper and dignified. (Citation omitted.)
>
> Because of this difference in view, to weigh the probative value of impeachment testimony versus the question of insurance rested in the sound discretion of the trial court.

Id. at 771, 527 P.2d at 1083. The trial court's ruling can only be held to be reversible error in the event of an abuse of that discretion. *Phillips v. Smith,* 87 N.M. 19, 528 P.2d 663 (Ct.App.1974), *cert. denied,* 87 N.M. 5, 528 P.2d 649 (1974).

In the present case, Mac Tyres attempted to impeach Vigil by showing that Vigil had lied to his employer's workmen's compensation carrier about the location and nature of his accident for the sole purpose of getting benefits under false pretenses. In our opinion, the trial court abused its discretion by limiting Mac Tyres' presentation of impeachment evidence.

The right to impeach a witness is basic to a fair trial. Mac Tyres was clearly prejudiced by the trial court's ruling. It could not establish Vigil's admitted dishonesty regarding this incident, nor his sudden and complete change in testimony at trial. Vigil's fraud to get benefits should have been brought to light, even if the fraud involved an insurance company. The jury should be allowed to measure what it heard

from the litigant against the litigant's demonstrated lack of credibility. Any possible prejudice could have been avoided by a simple instruction limiting the applicability of the evidence to credibility.

Mac Tyres' second contention is that the trial court erred in refusing defendant's requested instruction No. 5. This instruction, which is similar to N.M.U.J.I. Civ. 9.3, reads as follows:

> A person is required to actually see what is in plain sight or obviously apparent to one under like or similar circumstances in the exercise of ordinary care.
>
> Further, with respect to that which is not in plain sight or readily apparent, a person is required to appreciate and realize what is reasonably indicated by that which is in plain sight.

The trial court agreed that the proffered instruction was a correct statement of the law but felt that the issue had been covered by three other instructions. These instructions dealt with (1) a definition of ordinary care, (2) whether plaintiff was an invitee or lessee, and (3) the duties of a possessor of land. The Court of Appeals affirmed the trial court's decision. The court stated that U.J.I. 9.3 is a motor vehicle instruction which does not apply to the case at bar, and that the plaintiff's duty to look out for his own safety was made clear to the jury. We disagree.

It is well established in this jurisdiction that each party is entitled to an instruction on his theory of the case if he has pled it and there is evidence upon which the theory might be supported. *Falkner, supra; Lucero v. Torres,* 67 N.M. 10, 350 P.2d 1028 (1960). N.M.R.Civ.P. 51(e), N.M.S.A. 1978 allows attorneys to request non-U.J.I. instructions, or modifications thereof, where no applicable instruction on the subject is available. *Williams v. Cobb,* 90 N.M. 638, 567 P.2d 487 (Ct.App.1977), Sutin, J., specially concurring; *O'Hare v. Valley Utilities, Inc.,* 89 N.M. 105, 547 P.2d 1147 (Ct. App.1976), *rev'd on other grounds,* 89 N.M. 262, 550 P.2d 274 (1976). Rule 51(e) provides:

> Whenever the court determines that the jury should be instructed on a subject and no applicable instruction on the subject is found in U.J.I. the instruction given on that subject shall be brief, impartial, and free from hypothesized facts.

It is the opinion of this Court that the trial court erred in refusing to give defendant's requested instruction No. 5. It was the defendant's theory of the case that the plaintiff was contributorily negligent for tripping over a plainly visible six-foot long metal jack being used to raise a truck. The general instructions given by the trial court did not pertain to the duty of the plaintiff to actually see what was in plain sight. In addition, defendant's instruction No. 5 meets the test of Rule 51(e).

Therefore, we reverse the Court of Appeals and remand the case for a new trial to be held in accordance with this opinion.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

SOSA, C. J., specially concurring.

FEDERICI, J., not participating.

SOSA, Chief Justice, specially concurring.

I concur with the result reached by the Court insofar as it pertains to Mac Tyres' first contention. The limiting of Mac Tyres' presentation of impeachment evidence under the circumstances of this case was improper. Therefore, I concur with the Court of Appeals being reversed and the case being remanded for a new trial.

I cannot, however, agree with reversal as to Mac Tyres' second contention. The trial court did not err in refusing to give defendant's requested instruction No. 5, which is similar to N.M.U.J.I. Civ. 9.3, a motor vehicle instruction. In my opinion, U.J.I. Civ. 9.3 is not applicable to this particular case. The instruction should be the subject of argumentation to the jury, rather than a specific instruction. Giving defendant's requested instruction No. 5 might, in my judgment, be construed by the jury as a directive from the court that contributory negligence was present as a matter of law.

589 P.2d 1041

STATE of New Mexico,
Plaintiff-Appellee,

v.

Eloy Jerry ORONA, Defendant-Appellant.

No. 11799.

Supreme Court of New Mexico.

Jan. 25, 1979.

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

Toney Anaya, Atty. Gen., Charlotte Hetherington Roosen, Asst. Atty. Gen., Santa Fe, Ira Robinson, Dist. Atty., Chester A. Bowerman, Asst. Dist. Atty., Albuquerque, for plaintiff-appellee.

OPINION

PAYNE, Justice.

Defendant was convicted of the first-degree felony of criminal sexual penetration of a person under thirteen years of age and of criminal sexual penetration in the third-degree. Defendant appeals both convictions alleging that various errors committed during the course of the proceedings deprived him of his right to a fair trial.

We address three of these contentions: (1) The trial court's order prohibiting defense counsel from interviewing the State's main witnesses; (2) the prosecutor's leading questions to the complaining witness; and (3) the trial judge's communications with the jury outside the presence of defendant and his counsel.

I.

Defendant contends that the trial court committed reversible error in ordering defense counsel not to interview the complaining witness and her older sister. The sisters were the State's main witnesses. Defendant argues that this order prevented investigation and preparation of a defense, and denied him his right to effective assistance of counsel.

Prior to trial, the State filed a motion to revoke defendant's bond on the ground that defendant had been contacting the older sister. Evidence was presented that defendant attempted to persuade the older sister not to testify against him. The trial judge denied the motion to revoke bond and ordered that neither defendant, nor his attorneys, could contact either sister. The court also denied a defense request to depose the sisters. The court did allow copies of the witnesses' grand jury testimony to be made available to defense counsel in order to assist defendant in the preparation of his case.

N.M.R.Crim.P. 27(b), N.M.S.A.1978 provides that a defendant is entitled to a list of the names and addresses of all witnesses which the district attorney intends to call at trial and any statements made by these witnesses. The State contends that having

provided defense counsel with this information, along with the sisters' grand jury testimony and the deposition of the complaining witness, defendant was entitled to nothing more. The State contends that the trial court did not err in ordering defense counsel not to contact either sister. We do not accept this argument.

In *Gregory v. United States,* 125 U.S. App.D.C. 140, 369 F.2d 185 (1966) the prosecutor instructed the government's witnesses not to discuss the case with defense counsel outside of his presence. In construing a federal statute which required the submission of a list of the names and addresses of the government's prospective witnesses, the court stated that the purpose of such discovery was to assist defense counsel in the preparation of a defense by providing the opportunity to interview the government's witnesses. The court stated:

> Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them. Here the defendant was denied that opportunity which . . . elemental fairness and due process required that he have . . . .
>
> . . . [T]here seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to. In fact, Canon 39 of the Canons of Professional Ethics makes explicit the propriety of such conduct: "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party." Canon 10 of the Code of Trial Conduct of the American College of Trial Lawyers is an almost verbatim provision.

Id. 125 U.S.App.D.C. at 143, 369 F.2d 188 at 188. *See also United States v. Vole,* 435 F.2d 774 (7th Cir. 1970).

The State contends that *Gregory* is inapposite authority because in this case the judge on his own ordered defense counsel to refrain from contacting the sisters, whereas in *Gregory* the prosecutor prevented interviews of government witnesses. We see no basis for such a distinction. Regardless of who prevents the interviews, the effect may be to deprive defendant of his right to prepare a defense.

The State argues that defendant has failed to show that he was prejudiced by this particular order. No more prejudice need be shown than that the trial court's order may have made a potential avenue of defense unavailable to the defendant. As the court said in *Gregory*:

> It is not suggested here that there was any direct suppression of evidence. But there was unquestionably a suppression of the means by which the defense could obtain evidence. The defense could not know what the eye witnesses to the events in suit were to testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview.

125 U.S.App.D.C. at 144. 369 F.2d at 189.

Furthermore, the United States Supreme Court has pointed out:

> [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. (Footnote omitted.)

Dennis v. United States, 384 U.S. 855, 874–75, 86 S.Ct. 1840, 1851, 16 L.Ed.2d 973 (1966).

We do not hold that the defendant has an absolute and unlimited right of access to the State's prospective witnesses. This is not a case in which there are compelling justifications for totally limiting defendant's access to the witnesses against him. Although there may have been good reason to limit access by the defendant himself, there does not appear to have been any justification for the court's absolute prohi-

bition against any contact by defense counsel. Although defendant had been in contact with one of the sisters, we cannot impute his motives, whatever they may have been, to his attorneys. Furthermore, as the court stated in *Gregory*:

> Tampering with witnesses and subornation of perjury are real dangers . . . . But there are ways to avert this danger without denying defense counsel access to eye witnesses to the events in suit . . . . Defense counsel are officers of the court. And defense counsel are not exempted from prosecution under the statutes denouncing the crimes of obstruction of justice and subornation of perjury.

125 U.S.App.D.C. at 143, 369 F.2d at 188.

The State contends that defendant's conduct in contacting the older sister amounted to a waiver of any right he had to further contact with either girl. Although in some cases such conduct might conceivably rise to the level of a waiver, defendant's conduct in this case, which the trial court did not consider sufficient to justify a revocation of bond, did not constitute a waiver of his right to prepare a defense.

We are aware of the sensitive nature of this case, and of the problems that might arise in light of the ages of the witnesses, their past relationship to defendant, and the nature of the alleged crimes. None of these facts, however, justify an outright prohibition against all contact with the witnesses. The trial court could fashion some means to ensure that the witnesses will be protected from intimidation without unduly impairing defendant's right to prepare a defense. However, in the absence of some demonstrable good cause, a trial court may not impose an absolute restriction on defense counsel's access to the State's prospective witnesses.

II.

The second issue we address on this appeal is defendant's contention that he was deprived of a fair trial by the use of leading questions put to the young complaining witness by the prosecuting attorney. The particular testimony which defendant contends deprived him of a fair trial concerns the offense of criminal sexual penetration in the first-degree allegedly committed in June 1977.

The complaining witness testified that she and her sister went to defendant's house. Her sister then left, taking defendant's car to visit a friend. When asked to describe what happened thereafter, the witness said:

> Well, I was just listening to the radio or something. Listening to the radio I think, and I [pause] don't think, excuse me, [pause] I'm not sure he tried anything and then I told him to leave me alone.

After a pause, the prosecutor asked a leading question to which defense counsel objected. The court sustained defense counsel's objection to that question and instructed the State not to lead the witness on the crucial elements of the offense.

At this point the prosecutor asked the witness if she remembered giving a written statement to the police. The witness answered affirmatively. Defendant objected to the use of the statement and the prosecutor responded that the witness had already said she did not recall exactly what had occurred. The court then asked the witness if it would help her to read the statement, to which she answered "yes." The witness was then allowed to read the statement. Without the prosecutor inquiring if her memory had been refreshed, the following exchange took place:

> Prosecutor: Now, did you say in your statement to the police as follows: "I was wearing a dress. . . . "
>
> Defense Counsel: I'll object to this Your Honor. It's improper, highly improper. The witness is in person, she can testify. You've permitted her to refresh her recollection.
>
> Judge: Yes, I'll sustain that. I'll ask you to just ask those questions and if she still needs additional refreshing on her recollection then you can use the statement then.

Ignoring the judge's ruling, the prosecutor then asked:

> Did you tell the police on July 6 that on one occasion you saw Jerry Orona alone when you were wearing a dress?

Defense counsel again objected on the same grounds and the judge again sustained the objection. After asking if her statement to the police was true, the prosecutor went right back to the leading questions which the court had twice prohibited. The only evidence which would support criminal sexual penetration in the first-degree was then elicited by the following exchange:

> Prosecutor: On this occasion were you wearing a dress and did he left up your dress and start pulling down your panties?
>
> Witness: Yes.
>
> Prosecutor: Did he start kissing your vagina and stick his tongue inside your vagina?
>
> Defense Counsel: Objection Your Honor. The district attorney is now testifying. This is. . . . This is shocking. The witness has a right to relate what occurred. She is now being spoon-fed the story.

At this point the trial court permitted the witness to be led, citing N.M.R.Evid. 611(c), N.M.S.A.1978. The direct examination continued with the prosecutor graphically describing sexual acts of defendant by way of leading questions, to each of which the witness gave a simple answer of "yes."

Rule 611(c) provides in part:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony.

Developing testimony by the use of leading questions must be distinguished from substituting the words of the prosecutor for the testimony of the witness. Here, the trial court, in permitting every word describing the alleged offense to come from the prosecuting attorney rather than from the witness, abused its discretion in such a manner as to violate principles of fundamental fairness.

The State argues that the complaining witness could not recall the events in June and the trial court permitted her memory to be refreshed by use of the police statement consistent with N.M.R.Evid. 612, N.M.S.A.1978. The trial court was correct in permitting the witness to refresh her recollection, but Rule 612 does not permit the use of leading questions as was done in this case.

There are several requirements that must be met before a writing can be used to refresh recollection. The witness's memory on the subject must be exhausted. *State v. Bazan,* 90 N.M. 209, 561 P.2d 482 (Ct.App. 1977), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977); 3 Weinstein's Evidence, ¶ 612[01] (1978). The time, place, and person to whom the statement was given must be established. *Goings v. United States,* 377 F.2d 753 (8th Cir. 1967). If the witness acknowledges the statement, the court may allow the witness to use it to refresh his recollection. "It then becomes proper to have the witness, if it is a fact, to say that his memory is refreshed and, independent of the exhibit, testify what *his present recollection is.* [Citation omitted.]" *Id.* at 760–61.

In this case the threshold requirement of exhausted memory was met. The witness's first description of what occurred in June was uncertain and hesitant. The trial court properly determined that she needed to read the statement. However, after reading the statement, the witness was never asked if her memory was thereby refreshed. Rather, the prosecutor began leading the witness as to the contents of the statement as follows:

> Now, did you say in your statement to the police as follows: "I was wearing a dress. . . . "

When an objection to this question was sustained, the prosecutor ignored the court's ruling and went right on with additional leading questions. The witness was never given an opportunity to testify independently of the statement.

As the court said in *Goings, supra*:

> Refreshing a witness's recollection by memorandum or prior testimony is per-

> fectly proper trial procedure and control of the same lies largely in the trial court's discretion. However, if a party can offer a previously given statement to substitute for a witness's testimony under the guise of "refreshing recollection," the whole adversary system of trial must be revised. *The evil cf this practice hardly merits discussion. The evil is no less when an attorney can read the statement in the presence of the jury and thereby substitute his spoken word for the written document.* (Citation and footnote omitted.)

Id. at 759–60.

The fact that the witness adopted her prior statement by her simple affirmative answers to the prosecutor's leading questions did not cure the error.

> It [the prior statement] is still a hearsay statement suggested to the witness rather than his own statement given under oath in court. The procedure utilized cannot be sanctioned to fill in memory gaps of any witness who is called to testify. (Citation omitted.)

Id. at 761–62.

Leading questions are often permissible when a witness is immature, timid or frightened. 3 Weinstein's Evidence, ¶ 611[05] (1978). Although the age of a witness might justify the use of leading questions under some circumstances, the youth and inexperience of such a witness might also create a much greater danger from the use of suggestive questions than might otherwise be the case.

In this case the witness, without the use of leading questions, described another incident with defendant which occurred in January 1977. Although her answer to the first question about the events in June was hesitant and equivocal, she was never given an opportunity to testify independently after reviewing her statement. The purpose of permitting her to refresh her recollection by the use of that statement was to assure that the witness testify in her own words. *Goings, supra* at 762. Since she was never given that opportunity, we cannot say that she was too timid, frightened or immature to testify on her own.

We hold that there was an abuse of discretion by the trial court in allowing the prosecutor to lead the witness as to each critical element of the offense.

III.

Defendant's third contention is that the trial judge committed reversible error when he answered two notes from the jury outside the presence of defense counsel and without informing counsel of the receipt of the notes, their contents, or the nature of his answers to those notes.

The first note asked how the case got before the grand jury. The judge's answer was:

> All criminal cases start with a grand jury proceeding or a criminal information filed by the District Attorney.
>
> This is simply the way charges are brought against defendants. The triggering mechanism to bring the matter to the attention of the District Attorney can come from any source—and that is immaterial.
>
> It really does not matter how a case gets started—the important thing is that you, the jury, hear and decide the entire case on your own.

The second note simply said: "Four not guilty, eight—guilty—both counts." The court's answer was:

> Your verdict must be unanimous. You have not been deliberating all that long, and I request that you continue to see if you can arrive at a unanimous verdict.

After the notes were answered, the court informed counsel of their existence. After the verdict was returned, defense counsel moved for a mistrial because of the court's answers to the notes. The motion was denied.

Defendant contends that the trial court's communications with the jury outside the presence of defendant and his counsel and without informing them of the communications violated defendant's right to be present at all stages of the proceedings and

his right to assistance of counsel. Although we are not certain whether the court's answers to the notes affected the jury's verdict, we agree that they violated proper trial procedure.

The law in New Mexico is well settled that it is improper for the trial court to have any communication with the jury concerning the subject matter of the court proceedings, except in open court and in the presence of the accused and his counsel. *State v. Beal,* 48 N.M. 84, 146 P.2d 175 (1944); *State v. Brugger,* 84 N.M. 135, 500 P.2d 420 (Ct.App.1972). When such communication takes place, a presumption of prejudice arises which the State has the burden to overcome. *State v. Brugger, supra.* The State made no attempt whatsoever to overcome this presumption. Having failed to rebut the presumption, we must hold that the judge's communications with the jury were prejudicial and entitled defendant to a new trial.

Defendant raises other issues which he argues would require reversal of his convictions. We are not persuaded by defendant's contentions as to those matters.

The convictions are reversed and the cause is remanded to the district court for a new trial.

IT IS SO ORDERED.

SOSA, C. J., and McMANUS, Senior Justice, concur.

589 P.2d 1047

STATE of New Mexico, Plaintiff-Appellee,

v.

Robert FRANK, Defendant-Appellant.

No. 12021.

Supreme Court of New Mexico.

Jan. 31, 1979.

Hynes, Eastburn & Hale, Thomas J. Hynes, Farmington, for defendant-appellant.

Toney Anaya, Atty. Gen., Sammy J. Quintana, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

PAYNE, Justice.

Defendant appeals his convictions on separate charges of first-degree murder and aggravated burglary. He was charged with having killed Tina Marie Alexander while committing an aggravated burglary in Farmington, New Mexico.

Prior to trial, defendant moved for a change of venue alleging that adverse pretrial publicity prevented him from receiving a fair trial. The motion was denied by the trial court. At trial defendant asked to voir dire each prospective juror individually and out of the presence of other prospective jurors concerning certain newspaper articles about the crime. Defendant also requested that he be allowed to show the articles to the jurors and to question them as to their knowledge of the matters contained in the articles. These requests were denied. Six of the jurors selected to sit on the case admitted that they had read the articles, but indicated that they would not be adversely affected and could render a fair verdict. The trial court refused to disqualify these jurors for cause.

During closing argument the prosecutor referred to the failure of defendant's wife to testify. Defendant moved for a mistrial, but the trial court denied the motion . We reverse the trial court on the denial of the motion for mistrial and affirm as to the other issues raised.

I.

Under his first point, defendant raises three contentions with respect to two newspaper articles concerning the alleged crime. First, he contends that because of the publicity given to this crime, as evidenced by the articles, it was impossible for him to receive a fair trial in San Juan County. Therefore, he argues that the trial court abused its discretion in denying his motion for a change of venue.

There is no record before us of the hearing on the motion for change of venue. Requested findings of fact were not submitted by defendant and none were entered by the trial court. Under these circumstances we have nothing to review and the decision of the trial court denying the motion must be upheld. *State v. Fernandez*, 56 N.M. 689, 248 P.2d 679 (1952).

Defendant next contends that the trial court abused its discretion by restricting defense counsel in his voir dire examination of the prospective jurors. Defendant argues that the ABA Standards for Criminal Justice Relating to Fair Trial and Free Press are valid considerations in ensuring that defendants are given a fair trial. He argues that the trial court should have followed those standards and granted individual voir dire of prospective jurors.

There are times when individual voir dire of prospective jurors is not only helpful, but also essential in providing a fair trial. However, some of the questions defense counsel sought to ask the prospective jurors would have been prejudicial, regardless of whether they had been asked before the entire panel or only before a single juror.

The determination of whether to allow individual voir dire lies within the discretion of the trial court. N.M.R.Crim.P. 39(a), N.M.S.A.1978; *United States v. Crow Dog*, 532 F.2d 1182 (8th Cir. 1976), *cert. denied*, 430 U.S. 929, 97 S.Ct. 1547, 51 L.Ed.2d 772 (1977); *Hackney v. State*, 233 Ga. 416, 211 S.E.2d 714 (1975); *Ferguson v. Commonwealth*, 512 S.W.2d 501 (Ky.1974). We hold that the trial court did not abuse its discretion in refusing to permit the questioning requested by defendant. We see no need to adopt the ABA Standards as rules of law, although we recognize they may be useful guidelines which a trial court may consider in exercising its discretion.

Defendant's third contention is that the trial court abused its discretion by refusing to excuse for cause all those prospective jurors who said they had read newspaper articles concerning the crime. We do not agree. The record does not show that any of the jurors had specific recollection of the details of the articles. The jurors all indicated that they had no opinion as to the guilt or innocence of defendant as a result of the articles. They all indicated they could fairly judge the case.

II.

Defendant contends that the trial court erred in denying his motion for directed verdict on both the aggravated burglary and the felony-murder charges. He argues that there was insufficient evidence to go to the jury on either charge because the State failed to prove two elements of the burglary charge: (1) An unauthorized entry by defendant into the house; and (2) defendant's intent to commit a felony therein. Defendant also argues that the trial court erred in giving an aggravated burglary instruction because there was insufficient evidence to go to the jury on this charge. We do not agree. There is sufficient testimony in the record to support submission of these issues to the jury.

Intent is subjective and is almost always inferred from other facts in the case. It is rarely established by direct evidence. N.M.U.J.I.Crim. 1.50, N.M.S.A.1978; *State v. Mata*, 86 N.M. 548, 525 P.2d 908 (Ct.App.1974), *cert. denied*, 86 N.M. 528, 525 P.2d 888 (1974); *State v. Ortega*, 79 N.M. 707, 448 P.2d 813 (Ct.App.1968). The evidence showed that defendant went to the home where the victim was killed only after he called to make sure someone was there. He and another individual went to the house armed with firearms. He had the other armed person cover the back of the house while he entered through the front door. There was evidence that defendant hit the screen door with his fist to obtain entry. Defendant testified that he opened the front door himself. There was no evidence that defendant received anyone's permission to enter the house. To the contrary, several witnesses testified that they had not given defendant such permission. This evidence was sufficient to submit the burglary charge to the jury.

III.

Defendant contends that the trial court erred in failing to grant his motion for a mistrial following the prosecutor's comments during his rebuttal argument. The prosecutor made the following statement:

> I'm going to close with one last statement. Now we haven't mentioned this very much during the trial, but remember the wife of the defendant was in that living room when that shot was fired. She saw everything the defendant did. Now you notice she is not here to testify.

Defendant objected to this statement and moved for a mistrial. The motion was denied. The court properly instructed the jury to disregard the wife's failure to testify and explained the husband-wife privilege.

At this point the prosecuting attorney concluded his rebuttal argument with the following words:

> But let's just back up to Penny Frank who was in that living room, who saw what happened, who saw her husband, who saw Tina, who saw what took place. Remember when they ran out of the car, when they ran out of the house, they went back to the car, they got in. And what did Penny Frank say? Roy Nickerson told us what she said. She said, "Bob, you didn't have to shoot that girl." I think that tells us what happened inside that house, and based on that we would ask you to return the verdict of guilty of aggravated burglary and also of first-degree felony murder.

N.M.R.Evid. 505(b)(1), N.M.S.A.1978 provides:

> An accused spouse in a criminal proceeding has a privilege to prevent the other spouse from testifying against the accused.

N.M.R.Evid. 513(a), N.M.S.A.1978 provides:

> The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

The privilege of an accused to prevent his spouse from testifying is subject to certain exceptions; however, none of these exceptions are applicable in this case. N.M.R. Evid. 505(d), N.M.S.A.1978.

The State contends that the privilege was not exercised, and, therefore, that the prosecutor's comments were not improper. As to whether the privilege was exercised, we agree with the decision of the New Jersey Supreme Court in *State v. Lowery*, 49 N.J. 476, 231 A.2d 361 (1967). In that case the court stated:

> We do not regard it as necessary for a husband or wife to go upon the stand and there affirmatively "exercise" the privilege not to testify. The decision of a husband in a case like the present one not to call his wife as a witness is a sufficient "exercise" of the privilege to justify invocation of the statutory protection. (Citation omitted.)

Id. at 366.

We hold that the husband-wife privilege applied. The prosecutor's comments on the failure of the wife to testify were improper. *State v. Warren*, 212 N.W.2d 509 (Iowa 1973); *State v. Brown*, 14 Utah 2d 324, 383 P.2d 930 (1963); *State v. Torres*, 16 Wash.App. 254, 554 P.2d 1069 (1976).

The remaining issue is whether the improper argument of counsel requires reversal of these convictions, or whether the trial court's instruction to the jury to disregard counsel's statement was sufficient to cure the error.

If there is a reasonable possibility that the inappropriate remarks of the prosecutor caused the jury to consider the failure of the wife to testify as evidence against defendant, or caused it to reach a verdict that it otherwise might not have reached, then such arguments are grounds for reversal.

This case turned not upon whether defendant was at the home of the decedent, but on the manner and purpose of his entry. The State argued that the entry was a burglary, bringing the killing within the felony-murder statute. § 30–2–1A(3), N.M.S.A.1978 (formerly § 40A–2–1A(3), N.M.S.

A.1953 (Repl.1972)). Defendant took the stand and explained those acts in such a way that, had the jury believed him, there would not have been a conviction on either charge. Defendant's wife was the only other person present to see defendant's means of entry and to see whether defendant's acts within the house were felonious. Defendant's father-in-law testified that defendant's wife said to defendant immediately after the killing, "Bob, you didn't have to shoot her."

Whatever the prosecutor intended to accomplish by his comments is not controlling. Even if spoken with the purest of motives, the prosecutor's reference to the wife's failure to testify could have been interpreted by the jury to imply that she would have testified adversely to her husband.

After the trial court sustained an objection to the comment on the wife's failure to testify, the prosecutor went on to refer to the statement made by her to her father which indicated that the wife knew what had occurred. The prosecutor's reference to her absence at trial, backed by a reminder of her statement to her father, strongly suggested to the jury that the wife was not called because her testimony would damage defendant.

We adhere to the reasoning of the court in *Johnson v. The State*, 63 Miss. 313 (1885), wherein the court stated:

> If the failure of the husband to call his wife as a witness in his behalf is to be construed as testimony, or as a circumstance against him, his privilege and option in the matter would be annulled, and he would be compelled, in all cases, to introduce her, or run the hazard of being convicted on a constrained, implied confession or admission, or to make explanations for not introducing her which might involve the sacred privacy of domestic life.

Id. at 317.

We do not accept the State's argument that the court's admonition to the jury to disregard his comments removed any prejudice to defendant, unless it clearly appears from the record that his remarks could not have influenced the verdict. The record supports the opposite conclusion.

The following language from the case of *Miller v. Territory of Oklahoma*, 149 F. 330 (8th Cir. 1906), which this Court cited with approval in *State v. Rowell*, 77 N.M. 124, 128, 419 P.2d 966, 970 (1966), is appropriate here:

> The zeal . . . of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty . . . . When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. . . . [T]he presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty.

149 F. at 339.

We hold that the comments of the prosecutor on the failure of defendant's wife to testify were prejudicial to defendant. Defendant's motion for a mistrial should have been granted. The cause is remanded to the district court with directions that the conviction be set aside and that the defendant be given a new trial.

IT IS SO ORDERED.

SOSA, C. J., and McMANUS, Senior Justice, concur.

589 P.2d 1052

Doris Mae JACKSON and Gary Jackson, Petitioners,
v.
STATE of New Mexico, Respondent.
No. 12233.

Supreme Court of New Mexico.

Feb. 1, 1979.

Reginald J. Storment, Appellate Defender, Alice G. Hector, District Public Defender, Santa Fe, for petitioners.

Toney Anaya, Atty. Gen., Janice Marie Ahern, Asst. Atty. Gen., Santa Fe, for respondent.

OPINION

SOSA, Chief Justice.

The sole question presented by this petition for writ of certiorari is whether a co-perpetrator of a felony can be charged with the felony murder of a co-felon, under § 30–2–1(A)(3), N.M.S.A. 1978, (formerly § 40A–2–1(A)(3), N.M.S.A. 1953), when the killing is committed by the intended robbery victim while resisting the commission of the offense. We hold that he cannot.

On September 8, 1977, defendant and co-felon entered a pharmacy where Walter Bunt was working as a pharmacist. Defendant remained near the front of the store. Co-felon went back to the prescription counter where Bunt was standing, asked him questions about vitamins, then pulled a gun on him and demanded narcotic drugs. Co-felon and Bunt went into a back room where the drugs were stored. Bunt removed the drugs from the shelf and "accidentally" dropped some of them on the floor. Co-felon stooped to the floor to pick up the loose drugs. Bunt also bent down, as if to help co-felon, but instead grabbed for co-felon's gun. As the two wrestled, co-felon yelled to defendant that he needed help.

Bunt sensed that defendant was approaching, stopped wrestling with co-felon, and told him to take the drugs and leave. As Bunt stepped into the bathroom, defendant attempted to shut him inside. When Bunt became aware that defendant had run out of the room, he loaded his personal pistol, opened the bathroom door, and exchanged shots with co-felon. Co-felon died from a gunshot wound inflicted by Bunt. Defendant fled with co-defendant, who had been waiting in a getaway car. Bunt never saw defendant or co-defendant and was unable to identify them.

Defendants were indicted and charged with the murder of their co-felon. Liability was based on the felony-murder doctrine. The trial court dismissed the murder charge, holding that the majority and best-reasoned view was that felon could not be held criminally responsible for the death of his co-felon when the killing was committed by the victim resisting the commission of the offense, and that *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977) was not controlling in this situation. The Court of Appeals reversed. We reverse the Court of Appeals and affirm the trial court's dismissal of the murder charge.

In *State v. Jackson*, 17 N.M.St.B.Bull. 2885, 2888, (Ct.App.1978), the Court of Appeals stated that the "second aspect of *Harrison expands* the application of the felony-murder rule to permit felons to be guilty of murder when the victim has killed

their co-felon." (Emphasis added.) We disagree. In *Harrison, supra,* this Court intended to *limit* the application of the felony-murder doctrine and to keep responsibility under this doctrine in line with the evolving concepts of criminal law. Thus, any expansion of the felony-murder doctrine would fly directly against the progressive direction taken by this court in *Harrison, supra.*

We do not subscribe to the Court of Appeals' reasoning—a reasoning that would thrust our state backward to the unenlightened era of criminal responsibility. Instead we adopt the majority and best-reasoned view; namely, the felony-murder doctrine should not be expanded to cover the situation where the victim of the crime kills a perpetrator. See *People v. Antick,* 15 Cal.3d 79, 123 Cal.Rptr. 475, 539 P.2d 43 (1975); *State v. Canola,* 73 N.J. 206, 374 A.2d 20 (1977); *Commonwealth ex rel. Smith v. Myers,* 438 Pa. 218, 261 A.2d 550 (1970); *Commonwealth v. Redline,* 391 Pa. 486, 137 A.2d 472 (1958).

We hold that, under the facts of this case, a co-perpetrator of a felony cannot be charged under our felony-murder statute with the felony murder of his co-felon when the killing is committed by the intended victim while resisting the commission of the offense. The decision of the Court of Appeals is hereby reversed. The trial court's dismissal of the murder charge is affirmed.

McMANUS, Senior Justice, EASLEY and FEDERICI, JJ., concur.

PAYNE, J., dissenting.

PAYNE, Justice, respectfully dissenting.

I respectfully dissent from the majority opinion. The majority has adopted the view that the felony-murder doctrine may not be applied to a case in which the victim of a crime kills one of the perpetrators. I cannot concur in the absolute prohibition against the application of the felony-murder rule in all such cases.

The majority suggests that its approach is consistent with "the progressive direction" taken by this Court in *State v. Harrison,* 90 N.M. 439, 564 P.2d 1321 (1977). In analyzing the issue raised by this case, the majority appears to ignore the very tests which *Harrison* established. The rule adopted is logically inconsistent with the language of this Court in *Harrison.* I write this dissent to set forth what I believe to be an approach consistent with the decision in *Harrison* and with the principle of accountability for those who perpetrate criminal acts.

We held in *Harrison* that the acts of the defendant or his accomplice must be the *cause* of the death upon which a felony-murder charge is based. Causation was defined in terms of the physical acts of the defendant or his accomplice which initiated or led to the killing without the intervention of an independent force. Nothing we said in *Harrison* intimated that the fatal shot must be fired by the defendant himself or his accomplice. To the contrary, in Footnote 1, we cited an example of a situation in which a felon could be convicted of felony-murder even though the fatal shot was fired by an innocent third party. We said:

> 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 . . . .

90 N.M. at 442, 564 P.2d at 1324.

The majority opinion, read in the context of Footnote 1 in *Harrison,* establishes a distinction which has been rejected by most courts and commentators which have addressed the issue, including the courts in the jurisdictions relied on by the majority. *See e. g., People v. Washington,* 62 Cal.2d 777, 44 Cal.Rptr. 442, 402 P.2d 130 (1965); *Commonwealth ex rel. Smith v. Myers,* 438 Pa. 218, 261 A.2d 550 (1970); Note, 71 Harv.L. Rev. 1565 (1958). The present rule in New Mexico, in light of the *Harrison* decision and the decision of the Court in the present case, is that if an innocent third party's aim is true and one of two robbers is killed, the surviving felon is not guilty of felony-murder. If the third party's aim is not accurate and an innocent person is killed, the surviving felon may be convicted of felony-murder. Thus, responsibility and accountability for the loss of life resulting from the commission of a crime rests not upon any well-

reasoned principle of law, but rather, upon the accuracy of the aim of a party resisting a criminal act. Public respect for the law is not enhanced by courts engaging in distinctions based on such fortuitous circumstances as the markmanship of victims.

Any distinction based on the notion of causation is illusory. The shooting of a co-felon by the victim is no less "a dependent, intervening force" than is the policeman's accidental shooting of an innocent bystander. It is as foreseeable that a co-felon will be killed while committing a felony as it is that an innocent bystander will accidentally become the victim. In fact, it may be more likely that a bullet will hit the person it is aimed at rather than another person not aimed at. W. LaFave & A. Scott, Criminal Law, 552, n. 43 (1972).

It has been suggested that a possible basis for the result reached by the majority in this case is that the co-felon assumes the risk of being killed. Note, 71 Harv.L.Rev. 1565 (1958). This tort concept has no place in the criminal law where the wrong to be vindicated is a public rather than a private wrong. Note, 71 Harv.L.Rev. 1565, 1566 (1958); Moesel, "A Survey of Felony Murder", 28 Temp.L.Q. 453, 456–66 (1955).

It is not a defense to a charge of murder that the victim consented to his own killing. It is more logical to hold a co-felon responsible for the foreseeable risk he assumes when he engages in an inherently dangerous occupation, than to absolutely and unconditionally absolve him of all responsibility for a death which is a natural and foreseeable consequence of his criminal behavior.

The second standard set forth in *Harrison* holds that to satisfy the *mens rea* requirement of felony-murder the underlying felony must be one which is "inherently or foreseeably dangerous to human life." We said:

> 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 . . . .

90 N.M. at 442, 564 P.2d at 1324.

In determining whether this *mens rea* requirement is met, we held that

> 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. (Citations omitted.) . . . In the final analysis this is for the jury to decide in each case, subject to review by the appellate courts.

Id.

Examining the facts in this case by the foregoing test, it seems clear that this case should have been submitted to the jury. An armed robbery is an inherently dangerous act. The circumstances surrounding the commission of this particular robbery show that the deceased co-felon, Sponseller, entered the victim's store and pointed his gun at the victim. Sponseller appeared nervous. The victim and Sponseller struggled for control of Sponseller's gun. Sponseller called for help from one of the defendants, Gary Jackson. Jackson attempted to shut the victim in a back room. The victim then loaded his own gun, left the back room, and shot Sponseller. Sponseller returned the fire twice and the victim also shot twice more.

I would not hold that these facts support a felony-murder conviction as a matter of law. However, under the standards this Court set forth in *Harrison*, these facts are sufficient to submit the felony-murder charge to the jury.

Although I concede that in the majority of American jurisdictions neither an excusable or justifiable homicide can support a felony-murder charge, I believe that the best approach is to consider each case in light of the standards this Court adopted in *Harrison*. By examining each case in terms of the *actus reus* requirement of causation and the *mens rea* requirement of a foreseeably or inherently dangerous crime, we restrict the felony-murder rule to reasonable bounds without totally absolving a felon of responsibility for a death which is a foreseeable result of such a crime.

I therefore dissent.

589 P.2d 1056

Mary E. GENGLER, Plaintiff-Appellant,

v.

McKinley PHELPS, Jr., and Albuquerque Anesthesia Services, Ltd., Defendants-Appellees.

No. 3250.

Court of Appeals of New Mexico.

Nov. 28, 1978.

Writ of Certiorari Denied Jan. 3, 1979.

Alfred M. Carvajal, Albuquerque, for plaintiff-appellant.

Thomas J. McBride, Johnson, Paulantis & Lanphere, Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

This is an action for slander arising out of oral publications that defamed the plaintiff in her profession as a nurse-anesthetist. A directed verdict was granted defendants and plaintiff appeals from the judgment entered. We affirm.

A. *Facts most favorable to plaintiff.*

Plaintiff, a certified nurse-anesthetist, was given notice by the corporate defendant on March 5, 1974, that her employment with them would terminate on June 30th. On about March 26th plaintiff applied to Veterans Hospital for employment. The written application asked:

10. WHEN MAY INQUIRY BE MADE OF YOUR EMPLOYER?

Anytime.

After the initial portions of this application were completed, Dr. Phelps spoke with Dr. Clark and Dr. Smith of the Veterans Administration Hospital individually and on two separate occasions. Phelps told both Clark and Smith that Gengler lacked professional competence and plaintiff's application for employment was denied because of this "less than desirable reference."

The evidence is unclear as to whether Phelps spoke with Smith or Clark prior to or after the Veterans Administration's decision not to hire Gengler had been made. We will assume that both conversations took place prior thereto. Dr. Smith made inquiry of Dr. Phelps, but Phelps volunteered his opinion of Gengler's competency to Dr. Clark.

We note in passing that in addition to Phelps' statements concerning Gengler, a letter was sent to the Veterans Administration Hospital by Dr. Ogg on the letterhead of the corporate defendant. This letter has no relevance because plaintiff's complaint alleges only slander and not libel.

The only issue on appeal is whether Phelps' statements to Smith and Clark were privileged as a matter of law.

B. *Phelps' oral publications to Dr. Smith were absolutely privileged.*

In her application for employment with Veterans Hospital, plaintiff consented that inquiry be made of her qualifications as a nurse-anesthetist. Dr. Smith called Dr. Phelps to solicit this information. Dr. Phelps claims this disclosure is absolutely privileged. We agree. This is a matter of first impression.

Absolute immunity or privilege is a question of law for the court to decide. *Franklin v. Blank*, 86 N.M. 585, 525 P.2d 945 (Ct.App.1974).

In *Stewart v. Ging*, 64 N.M. 270, 273, 327 P.2d 333, 335 (1958), the court said:

> . . . Absolute immunity from responsibility without regard to purpose, motive, or reasonableness of conduct is, and should be, confined to a very few rather well-recognized situations. Prosser on Torts § 94 (1941). . . .

These "well-recognized situations," which include consent of plaintiff, are set forth in *Neece v. Kantu*, 84 N.M. 700, 507 P.2d 447 (Ct.App.1973), 60 A.L.R.3d 1030 (1974). "One who has himself invited . . . the publication of defamatory words cannot be heard to complain of the resulting damages to his reputation . . . ." Prosser, Law of Torts (4th Ed. 1971), p. 784.

The rule is succinctly stated in Restatement, Torts 2d, § 583 (1977):

> [T]he consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation.

Comment f states:

> The privilege conferred by the consent of the person about whom the defamatory matter is published is absolute. The

protection given by it is complete, and it is not affected by the ill will or personal hostility of the publisher or by any improper purpose for which he may make the publication, unless the consent is to its publication for a particular purpose, in which case the publication for any other purpose is not within the scope of the consent. [*Id.* at 242].

This is established law. *Peterson v. Mountain States Tel. & Tel. Company*, 349 F.2d 934, 938 (9th Cir. 1965) said:

> That publications made with the consent of the person defamed are absolutely privileged appears to be well settled. . .

See also, 50 Am.Jur.2d *Libel and Slander* § 149 (1970); 53 C.J.S. *Libel and Slander* § 80 (1948).

Plaintiff knew, when she signed the application, that Veterans Administration personnel would ask her former employer about her work record. Gengler consented.

A former employer has absolute immunity from damages in a slander suit when the alleged defamation stems from an inquiry addressed to the former employer and concerns an employee's job capabilities. In the business and professional world, public policy necessitates the disclosure of an employee's prior services when inquiry is made with the consent of the employee.

Plaintiff's only response is directed to defendants' failure to raise the issue in the court below. Plaintiff is mistaken. Defendants' second defense was:

> Any statements made by these defendants, even if such statements were slanderous, which is specifically denied, were privileged.

The oral publications made by Dr. Phelps to Dr. Smith are absolutely privileged.

C. *Phelps' oral publications to Dr. Clark were conditionally privileged as a matter of law.*

We accept Dr. Clark's testimony that she did not initiate the discussion with Dr. Phelps concerning Gengler's professional competency. Since there was no consent the issue is one of conditional privilege. We hold that Dr. Phelps' oral publications were conditionally privileged as a matter of law.

Restatement, Torts 2d, § 584 (1977) by an Introductory Note, explains privileges of the second class, commonly called conditional or qualified privileges:

> . . . They are more properly to be classified as privileges, since they arise out of the particular occasion upon which the defamation is published. They are based upon a public policy that recognizes that it is desirable that true information be given whenever it is reasonably necessary for the protection of the actor's own interests the interest of a third person or certain interests of the public. In order that this information may be freely given it is necessary to protect from liability those who, for the purpose of furthering the interest in question, give information which, without their knowledge or reckless disregard as to its falsity, is in fact untrue. [*Id.* at 243–244.]

The general rule applicable to an employer-employee relationship makes it clear that a former employer is conditionally privileged for statements made about a former employee if made to one having an interest in the subject matter of the statements. Annot., *Statement with reference to discharge from private employment as actionable per se*, 66 A.L.R. 1499 (1930). The circumstances are such as to make it proper that the information be given. I Harper & James, § 5.26, p. 447 (1956). A conditional privilege is also a question of law for the court to decide. *Mahona-Jojanto, Inc., N.S.L. v. Bank of New Mexico*, 79 N.M. 293, 442 P.2d 783 (1968). And the privilege has been recognized as a matter of law. *Edwards v. James Stewart & Co.*, 82 U.S.App.D.C. 123, 160 F.2d 935 (1947).

Restatement, ibid., § 595 Comment i, *Character of servant* states the rule in this fashion:

> Under many circumstances, a former employer of a servant is conditionally privileged to make a defamatory communication about the character or conduct of the servant to a present or prospective employer. The defamatory imputations, however, must be made for the purpose of enabling that person to protect his own interests, and they must be reasonably calculated to do so. Accordingly, only information that is likely to affect the honesty and efficiency of the servant's work comes within the privilege. . .

In New Mexico, an occasion giving rise to a conditional privilege "is one consisting of a good-faith publication in the discharge of a public or private duty when the same is legally or morally activated." *Mahona-Jojanto, Inc., supra* [79 N.M. at 295–6, 442 P.2d at 785–86]. Unquestionably, as a professional duty, Dr. Phelps was morally and actively motivated, in good faith, to disclose his knowledge of plaintiff's work as a nurse-anesthetist for the benefit and protection of Veterans Hospital. We can find no evidence of any other purpose in the record, nor any inferences from the facts that would disclose any other purpose. The contents of Dr. Clark's "interview" with Dr. Phelps were not inquired into during her examination. This was the only source that could cast any aspersions on Dr. Phelps' purposes. There is no evidence that Dr. Phelps lacked knowledge of plaintiff's work connected aptitudes as a nurse-anesthetist, nor that he was in reckless disregard of the truth or falsity of statements made. We are convinced that Dr. Phelps acted in good faith with a firm belief in the truth of his oral publications. He was simply mistaken in his belief that Dr. Clark made inquiry of him.

We conclude that Dr. Phelps acquired a conditional privilege. However, this privilege can be lost when the privilege is abused. *Mahona-Jojanto, Inc., supra,* sets forth the standards of an abuse of privilege. It states:

> . . . Abuse arises out of the publisher's lack of belief, or reasonable grounds for belief, in the truth of the alleged defamation; by the publication of the material for an improper use; by the publication to a person not reasonably necessary for the accomplishment of the purpose; or by publication not reasonably necessary to accomplish the purpose. [79 N.M. at 296, 442 P.2d at 786.]

The conditional privilege has the effect of taking away from defamatory language the presumption of malice in the publication, and casts upon the plaintiff the burden of proving actual malice. If the burden is carried forward by the plaintiff, the conditional privilege becomes functus officio and affords no further protection. *Ward v. Ares,* 29 N.M. 418, 223 P. 766 (1924). In this respect plaintiff failed.

We commend, not condemn, members of the medical profession who, in good faith, seek to protect a hospital as well as patients in the hospital in need of anesthesia, even though the oral publication may be of some harm to an anesthetist. A hospital is vitally interested in the qualifications of anesthetists whose conduct may affect the life or health of its patients. From this viewpoint, it is of primary concern to this Court that a doctor who does not abuse the conditional privilege in the service of his profession to hospitals, should be protected, not that his employee should have the right to recover damages for slander.

We conclude that Dr. Phelps acquired a conditional privilege and did not abuse it as a matter of law.

E. *This Court cannot revise the law of defamation.*

Defendants contend that the common law of defamation should be changed in New Mexico based upon *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), decided under the freedom of the press clause of the First Amendment; that its rationale is equally applicable to the law of private defamation under the First Amendment guarantee of freedom of speech. *Millsaps v. Bankers Life Company,* 35 Ill.App.3d 735, 342 N.E.2d 329 (1976);

Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Hill, *Defamation and Privacy Under the First Amendment,* 76 Columbia L.R. 1205 (1976) at 1223; "The Supreme Court, 1973 Term," 88 Harv.L.R. 41, 148 n. 52 (1974); Restatement, ibid., § 580B and comments.

We commend defendants' attorneys for the presentation of this progressive and interesting development in the law of defamation, but as they well know, this matter rests in the jurisdiction of the Supreme Court.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concurring in result only.

590 P.2d 169

STATE of New Mexico,
Plaintiff-Appellee,

v.

Reid WATKINS, Defendant-Appellant.

No. 3628.

Court of Appeals of New Mexico.

Jan. 9, 1979.

Thomas L. Grisham, Anita P. Miller, McCulloch, Grisham & Lawless, P. A., Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., J. Michael Francke, Don D. Montoya, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Convicted of perjury, defendant appeals. We discuss: (1) validity of the grand jury indictment; (2) use of taped conversations; (3) prosecutor as a witness; and (4) proof of a material false statement.

Validity of the Grand Jury Indictment

Section 31–6–3, N.M.S.A.1978, permits an indicted person to "challenge the validity of the grand jury" by motion.

> Grounds that may be presented by such motion are limited to the following:
>
> * * * * * *
>
> B. a member of the grand jury returning the indictment was ineligible to serve as a juror; or
>
> C. a member of the grand jury returning the indictment was a witness against the person indicted.

(a) The indictment was returned by a Sandoval County grand jury. Defendant moved for dismissal of the indictment, claiming the foreperson of the grand jury, Patricia Casaus, was not a resident of the county and thus was ineligible to serve as a juror. See N.M.Const., art. II, § 14. After an evidentiary hearing, the trial court ruled that Casaus was a resident. Defendant contends this ruling was error.

Residence is a question of fact. *Davey v. Davey,* 77 N.M. 303, 422 P.2d 38 (1967). In arguing that the trial court erred in ruling that Casaus was a resident, defendant reviews the evidence in the light most favorable to defendant. That is not the basis for appellate review; we review the evidence in the light most favorable to the State. *State v. Gonzales,* 82 N.M. 388, 482 P.2d 252 (Ct.App.1971).

Casaus was born and raised in Sandoval County. She desired to live separate from her parents. She looked for an apartment in the Town of Bernalillo, Sandoval County,

but was unable to find suitable accommodations. She rented an apartment on Albuquerque's North Second Street, described as being in Alameda, a community near the Town of Bernalillo, but physically located in Bernalillo County rather than Sandoval County. Defendant's contention that Casaus was not a Sandoval County resident is based on the fact that Casaus lived at this apartment most of the time.

The trial court found that Casaus maintained her permanent mailing address in Sandoval County, was employed in Sandoval County, was a registered voter in Sandoval County, "and she intends to return to Sandoval County and maintain her home there as soon as she can find suitable accomodations [sic]". Substantial evidence supports these findings. We do not review additional evidence inasmuch as the trial court's findings support the ruling that Casaus was a Sandoval County resident.

There is a similarity between residence for purpose of voting and residence for purpose of serving as a juror. Section 1–1–7(F), N.M.S.A.1978 states that for determining residence for voting:

> [A] person does not lose his residence if he leaves his home and goes to another * * * place within this state for temporary purposes only and with the intention of returning[.]

In *State v. Wimby,* 119 La. 139, 43 So. 984, 121 Am.St.Rep. 507 (1907) the residence of a grand juror was attacked. The juror had lived and been employed in another parish for some months before returning to his "home" parish. *Wimby* holds that the temporary absence of the person from the parish of his residence, without the intention of abandoning that residence, will not destroy the person's qualification to serve as a grand juror. See also, *State v. Williams,* 57 N.M. 588, 261 P.2d 131 (1953) and *Klutts v. Jones,* 21 N.M. 720, 158 P. 490, 1917A L.R.A. 291 (1916).

Casaus was a resident of Sandoval County before renting the apartment in Bernalillo County. The trial court's findings are to the effect that Casaus never intended to change her Sandoval County residence. The trial court properly denied the motion to dismiss the indictment on the ground that Casaus was ineligible to serve as a grand juror.

(b) The perjury charge is based on defendant's testimony before the grand jury. The grand jury which heard defendant's false testimony returned the indictment for perjury. Defendant contends: "[T]his is the same as Grand Jury members serving as witnesses against the person indicted"; that evidence as to defendant's perjury should have been presented to a separate grand jury.

Defendant does not claim that any member of the grand jury testified during the grand jury proceedings; thus, his "witness" claim is not that a juror was "called to give evidence regarding matters under inquiry by the grand jury." *State v. Hogervorst,* 90 N.M. 580, 566 P.2d 828 (Ct.App.1977). Defendant's claim is that having heard his false testimony, the jurors could not act impartially in determining that an indictment, charging perjury, should be returned. This claim is not a "witness" claim under § 31–6–3(C), supra; rather, it is a claim under § 31–6–3(B), supra, that because of bias, the jurors were ineligible to serve.

We assume there could be situations where grand jurors would be so prejudiced against a person that the jurors would be ineligible to serve because an indictment by jurors so prejudiced would violate their oath to " 'indict no person through malice, hatred or ill will' ". Section 31–6–6, N.M.S.A.1978. The fact that jurors heard false testimony does not, however, establish such prejudice. Indictments are based on "probable cause to accuse". Section 31–6–10, N.M.S.A.1978. The fact that the probable cause resulted from false testimony, heard by the jurors, does not establish that the jurors were unable to " 'present the truth' ", § 31–6–6, supra, or were unable to return an indictment based on the evidence.

Defendant's argument, essentially, is a policy question. Should jurors who heard the false testimony be permitted to indict on the basis of that false testimony? The

oath of jurors, § 31–6–6, supra, requires the jurors to inquire " 'of all public offenses' ". The charge to the jury requires the jury to inquire into "any public offense against the state committed and triable in the county". Section 31–6–9, N.M.S.A.1978. In carrying out the charge and their oath, "[i]t is not expected that in every instance, each grand juror shall be free from all previous knowledge of the cases, or even of the precise circumstances of the cases coming before them for official action". *Territory of New Mexico v. Young et al.,* 2 N.M. (Gild.) 93, 37 Pac.St.Repts. 93 (1881).

Tindall v. State, 99 Fla. 1132, 128 So. 494 (1930) states: "[T]hat if a witness swears falsely before a grand jury, it may, of its own motion and knowledge, indict such witness for perjury." *People v. Rallo,* 46 A.D.2d 518, 363 N.Y.S.2d 851 (1975), aff'd 39 N.Y.2d 217, 383 N.Y.S.2d 271, 347 N.E.2d 633 (1976) states: "[O]nce properly empaneled, the grand jury may indict for perjury committed before it".

The grand jury could properly indict defendant for perjury on the basis of defendant's false testimony before that grand jury. Such an indictment is consistent with the juror's duty to inquire into public offenses. The fact that the jurors heard the lies did not, in itself, make the jurors ineligible to return the indictment. Defendant's motion to dismiss the indictment because the jurors heard the false testimony was properly denied.

Use of Taped Conversations

An interview of defendant by representatives of the attorney general's office was tape recorded. This interview is referred to as the first tape. Defendant taped conversations between himself and others, including Deputy Sheriff Tenorio. These conversations are referred to as the second tape.

At a pretrial hearing on a motion to suppress, counsel for the parties agreed that conversations, other than those on the first tape, would not be used in the State's case-in-chief. Counsel also agreed there was no agreement as to whether any of the conversations could be used for purposes of impeachment. Thereafter, an evidentiary hearing was held concerning the first tape. After this hearing, the trial court suppressed portions of the first tape, but ruled that the suppressed portions "may be used for purposes of impeachment."

Defendant testified. Portions of both the first and second tape were used by the prosecutor during cross-examination in an effort to impeach defendant's trial testimony. Defendant asserts this use was improper.

Defendant contends the first tape was improperly used for impeachment because the statements used were part of plea bargain negotiations. Rule of Crim.Proc. 21(g)(6) states that pleas, offers to plea, or statements made in connection with pleas or offers to plea are "not admissible in any civil or criminal proceeding against the person who made the plea or offer." We do not decide whether, in the ordinary case, this rule prohibits use of such statements for impeachment purposes. Under the circumstances of this case, the rule did not bar the cross-examination.

Defendant asserts the second tape was improperly used for impeachment because, when used, the prosecutor knew, and defendant did not know, that Tenorio knew the conversation was being taped. On this basis, defendant asserts that the prosecutor used false testimony. Neither the claim that Tenorio knew the conversation was being taped, nor the claim that Tenorio's remarks were false, nor the claim that the prosecutor knowingly used any false remarks is supported by the appellate record.

Defendant interjected the tapes into the trial during his direct examination. As to the first tape, he testified that the attorney general's office had promised that anything he said would not be used against him in court. As to the second tape, he implied that the attorney general's office had promised that the fact that defendant was taping conversations with others would be kept secret. This testimony was a claim, before the jury, of prosecutor misconduct, a claim designed to bolster the defense. Having

used the tapes on his own behalf, defendant now claims the prosecutor could not use the tapes in an effort to weaken the credibility of the defense. The fact that the parties emphasized different positions of the tapes is of no consequence when the issue is whether the prosecutor could use the tapes to cross-examine defendant.

Having interjected the tapes into the trial for his own purposes, defendant cannot properly complain of the prosecutor's use of the tapes, on cross-examination, to attack the credibility of defendant's trial testimony. Rule of Crim.Proc. 21(g)(6) does not prohibit such use. Use of the tapes under the circumstances of this case was proper. *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977); see *State v. Borrego*, 52 N.M. 202, 195 P.2d 622 (1948).

Prosecutor as a Witness

During the presentation of the defense case, defendant sought to call attorney Don Montoya as a witness. Montoya was an assistant attorney general. He had questioned witnesses before the grand jury and was one of the prosecutors at defendant's trial.

The trial court required defendant to tender the testimony to be elicited from Montoya. After hearing this tender, the trial court refused to permit Montoya to be called as a witness. Defendant asserts this was error.

The tender had two aspects.

First, on appeal, defendant states that Montoya "could have provided evidence which would go to the issues of materiality of Watkins' testimony before the Grand Jury". This ambiguous appellate claim was more specific in the trial court. Defendant contended in the trial court that he wished to call Montoya as a witness because Montoya did the questioning before the grand jury, that Montoya was "the best witness for all of what exactly went on in that grand jury room." This information was available through the transcript of the grand jury proceedings; defendant was supplied a copy of that transcript.

Second, defendant wanted Montoya to testify "as to what Montoya had told Watkins concerning the use of statements made by Watkins against him at trial". "I believe the jury is entitled to know that Mr. Montoya told Mr. Watkins that those [statements] would not be used against him". What Montoya told defendant about use of defendant's statements is recorded on the first tape. The tape recording reveals that defendant also made a tape of the same interview. This information was available through those tapes.

"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." *State v. Hogervorst, supra.* We do not consider whether the contents of the tender by defendant could have properly been admitted. We do consider the uncontradicted showing that the evidence sought to be offered by calling Montoya as a witness was available to defendant by other means. In these circumstances, the trial court did not abuse its discretion in refusing to permit the defendant to call Montoya as a witness.

Proof of a Material False Statement

Section 30-25-1, N.M.S.A.1978 states:

> Perjury consists of making a false statement under oath or affirmation, material to the issue or matter involved in the course of any judicial, administrative, legislative or other official proceeding, knowing such statement to be untrue.

Defendant's false statements must have been material to the matter involved in the course of the grand jury proceedings. *State v. Montoya*, 77 N.M. 129, 419 P.2d 970 (1966). Defendant asserts the proof of materiality was insufficient to sustain his conviction.

There is evidence that during the evening of September 12, 1977, Sandoval County Sheriff White attempted to assault Deputy Sheriff Francia on the Jemez Dam Road north of Highway 44. Francia evaded the Sheriff and headed back toward the Town of Bernalillo, putting out a radio call for

assistance. A Town of Bernalillo police car responded, and told Francia to pull into the Pizza Hut parking lot. Francia did; the Sheriff followed "in just split seconds". According to Francia, the Sheriff got out of his car, went toward Francia and "started abusing me verbally again." About that time defendant arrived on the scene.

Defendant was a patrolman for the Sheriff's Department on the evening in question. He was told by the dispatcher to get to the Pizza Hut " 'right away' ". Defendant went to the Pizza Hut, "intervened" and brought an end to this second encounter between White and Francia on that evening.

Defendant wrote out a report, typed by another employee, concerning the Pizza Hut encounter. This typewritten report was reviewed by Tenorio who suggested changes which placed the Sheriff in a more favorable light. The report was revised in accordance with the suggestions and retyped. The revised report eliminated any reference to White "grabbing" Francia during the Pizza Hut encounter. We are not concerned with the accuracy of the report or the revised report.

The grand jury investigated the September 12, 1977 events. Defendant was called as a witness before the grand jury. Defendant denied that Tenorio told defendant to make changes in defendant's original report; stated that at the time of his discussion with Tenorio, he had only a handwritten report; denied the existence of two typewritten reports and denied making any changes in his original report. The falsity of this testimony is not contested; defendant admitted these falsehoods at trial.

Defendant's contention is that his lies to the grand jury were not material to any matter being investigated by the grand jury.

What was being investigated? The grand jury transcript shows defendant was advised that he was a possible target of the investigation, that he had a right to consult with an attorney, that he could refuse to answer any question that tended to incriminate him and that if he answered questions, he must answer truthfully. As a part of this advice, defendant was told:

> I want to advise you that this investigation centers around the incident which occurred on the night of September 12th as well as immediately after September 12th with certain documents that were prepared.

Defendant indicated he understood this advice. At trial, defendant testified that he figured that the grand jury was investigating "the incident, like I say, at the Pizza Hut." The questioning of defendant before the grand jury makes it clear that the Sheriff's activities at the Pizza Hut and defendant's report, or reports, of those activities were being investigated. Defendant's suggestion that he did not know what was being investigated, specifically, that defendant did not know that the jury was investigating a possible cover-up of the Pizza Hut incident, is without merit. Defendant was told that "certain documents" were included in the investigation.

Was defendant's false grand jury testimony material to the matter being investigated? The trial court instructed:

> False testimony is material if it has the capacity or tendency to influence the decision of the tribunal or inquiring or investigative body, or to impede the proceeding, with respect to matters which such tribunal or body is competent to consider.

Defendant does not challenge the correctness of this definition of materiality. See Annot., 22 A.L.R.Fed. 379 at § 2(a), page 383 (1975) from which the instruction was taken. Defendant's false testimony concerning his report of the Pizza Hut encounter and the revised version of the report excluding the reference to the Sheriff's grabbing of Francia, had "the capacity or tendency to influence" the grand jury investigating that incident. Defendant's claim that evidence of materiality was lacking is without merit.

The State's answer brief discussed the evidence of materiality in detail. Defendant's reply brief asserts the State's answer "misses the point".

> The issue which is raised by Defendant * * * is *not* whether or not the false statements which he made before the Grand Jury were material. Rather, the issue is that the Attorney General failed to *prove* materiality of the statements made by "clear, convincing, and direct evidence for a moral certainty and beyond reasonable doubt."

Defendant cites some federal decisions which, he asserts, require such a quantum of proof. We do not review those decisions. The quantum of proof in New Mexico for conviction in a criminal case is proof beyond a reasonable doubt. U.J.I.Crim. 1.00; *State v. Henderson*, 81 N.M. 270, 466 P.2d 116 (Ct.App.1970); see *State v. Borunda*, 83 N.M. 563, 494 P.2d 976 (Ct.App.1972). The jury could properly find, under the evidence, that "materiality" was proved beyond a reasonable doubt.

Defendant contends that the proof of materiality was insufficient because there is no proof that defendant's false testimony "impeded in any way * * * [the grand jury's] investigation of the events of September 12th". This argument overlooks the definition of materiality. The false testimony did not have to actually impede or actually influence the grand jury's investigation to be material; rather, under the unchallenged instruction, the false testimony was material if it had the capacity or tendency to influence or impede the investigation. *United States v. Abrams*, 568 F.2d 411 (5th Cir. 1978). We have previously pointed out that the false statements were material under this definition.

Defendant submitted requested instructions defining "materiality" and does not contend that the instruction defining "materiality" was incorrect. On appeal, for the first time, he asserts that "materiality" should have been determined by the trial court as a matter of law and should not have been determined by the jury. This issue was not raised in the trial court and will not be considered. N.M.Crim.App. 308. See *State v. Reed*, 62 N.M. 147, 306 P.2d 640 (1957).

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

590 P.2d 175

STATE of New Mexico, Plaintiff-Appellee,

v.

John S. SANDOVAL and Patrick Remigio, Defendants-Appellants.

No. 3622.

Court of Appeals of New Mexico.

Jan. 16, 1979.

Robert Suzenski, Santa Fe, for defendants-appellants.

Jeff Bingaman, Atty. Gen., Janice M. Ahern, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendants were convicted of possession with intent to distribute marijuana, and conspiracy to possess marijuana with intent to distribute. Sections 30–31–22 and 30–28–2, N.M.S.A.1978. They appeal. The chain of custody of the marijuana, after its seizure, was sufficiently established. *State v. Chavez*, 84 N.M. 760, 508 P.2d 30 (Ct.App. 1973). We discuss: (1) validity of the initial search, and (2) sufficiency of the evidence.

Validity of the Initial Search

An agent stopped a car, with four occupants, at a border patrol checkpoint for the purpose of determining the citizenship of the occupants. Defendants were two of the four occupants; Sandoval was the driver of the car and Remigio was a passenger in the right front seat.

The agent approached the passenger's side of the car and signaled Remigio to roll down the window. When the window was rolled down, the agent "smelled the aroma" of raw marijuana. The agent walked around the rear of the car, approached the driver's side, and asked Sandoval to open the trunk. Sandoval complied. The agent put his head in the trunk and again smelled raw marijuana. The agent then observed a plastic bag underneath the spare tire. It "appeared to be dry vegetable matter inside the bag." Certain events then followed; they are referred to in discussing the sufficiency of the evidence.

Defendants do not challenge the propriety of the initial stop to check their citizenship. Their claim goes to the initial search. The initial search was the opening of the trunk of the car at the agent's direction. Defendants claim there was no legal justifi-

cation for the opening of the trunk. This contention has three points: (a) probable cause, (b) exigent circumstances, and (c) qualifications of the agent.

(a) Probable Cause

Defendants assert the aroma of raw marijuana did not provide probable cause to search the trunk of the car. They are incorrect. The aroma did provide probable cause. *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948) points out that an odor sufficiently distinctive to identify a forbidden substance might be evidence of the most persuasive character. "The odor of marijuana detected by . . . [the agent] as emanating from the car furnished him with probable cause to search the trunk." *United States v. Villarreal*, 565 F.2d 932 (5th Cir. 1978). See *United States v. Bowman*, 487 F.2d 1229 (10th Cir. 1973); see cases cited in Judge Hendley's dissenting opinion in *State v. Bidegain*, 88 N.M. 384, 540 P.2d 864 (Ct.App. 1975), the majority opinion being reversed at 88 N.M. 466, 541 P.2d 971 (1975); see also the opinions of Judges Hernandez and Wood in *State v. Kaiser*, 91 N.M. 611, 577 P.2d 1257 (Ct.App.1978).

(b) Exigent Circumstances

Defendants contend that probable cause, alone, was insufficient justification for search of the car's trunk, that exigent circumstances were also required, and that exigent circumstances did not exist in this case. This argument overlooks the "automobile exception". See *State v. Barton*, 92 N.M. 118, 584 P.2d 165 (Ct.App.1978). Exigent circumstances are not required for the search of an automobile stopped on a public highway where there is probable cause for the search. "Why? Probable cause to search justified the initial intrusion into the car when it was stopped on the street." *State v. Luna*, 91 N.M. 560, 577 P.2d 458 (Ct.App.1978) and cases therein cited. See *State v. Lucero*, 70 N.M. 268, 372 P.2d 837 (1962).

(c) Qualifications of the Agent

Defendants claim the State failed to establish the qualifications of the agent to detect the smell of raw marijuana: "No proof was elicited that Agent Duda had learned to detect or smell that particular odor over any other odors. Nor was there any evidence in the record which would show that the odor of raw marijuana is distinctive, and susceptible to identification."

The agent testified that while at the car window on the passenger's side, he smelled raw marijuana. The agent also testified that he could not describe the smell, that marijuana has a distinctive smell with which he was familiar, and that the smell was not of burning marijuana. Inherent in the agent's testimony that he smelled raw marijuana was the claim that he was familiar with the odor of raw marijuana. *United States v. Ludwig*, 508 F.2d 140 (10th Cir. 1974).

The agent testified that he had taken courses for the "testing" of marijuana, that he had recently finished a law enforcement course, one semester of which was "drug testing" where he physically handled marijuana, that while in the military police he was "on apprehensions with marijuana" and had made "many, many apprehensions with marijuana with the border patrol in the last two years". The agent testified he had stopped other cars at the same checkpoint; had searched these other cars when he smelled marijuana; that in such searches he found marijuana and had never been mistaken. This testimony sufficiently established the agent's qualifications to detect the odor of raw marijuana. *State v. Everidge*, 77 N.M. 505, 424 P.2d 787 (1967); *State v. Chavez*, 77 N.M. 274, 421 P.2d 796 (1966); *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (Ct.App.1975); *State v. Miller*, 80 N.M. 227, 453 P.2d 590 (Ct.App.1969); see *State v. Foster*, 82 N.M. 573, 484 P.2d 1283 (Ct. App.1971).

Sufficiency of the Evidence

After the agent observed the white plastic bag under the spare tire in the trunk, he

asked Sandoval what was in the bag. Sandoval replied that it was dough. When the agent said he thought it was marijuana, Sandoval said: "[M]an, don't bust me."

Sandoval then ran and got inside the car and started the engine. The agent asked Sandoval to shut off the engine; Sandoval again stated: "[M]an, don't bust me." "[A]bout that time" Sandoval and Remigio "were observed reaching down to the floorboard near their feet". By this time another border patrol agent had arrived at the car. Fearing that defendants were reaching for weapons, the agents drew their weapons and told defendants not to move. "A couple of seconds later, the subjects did the same thing, they reached down to the floor." One of the agents reached in through the steering wheel to get the car keys. As the agent reached, Sandoval "revved his motor and took off". The agent had expected this and disengaged himself from the car within two or three feet.

The car left the checkpoint with tires spinning. Agents shot out the tires on the left side of the vehicle, but that did not stop the car. The agents were in pursuit in less than a minute. During the pursuit, the agents observed five white plastic bags by the roadside similar to the bag previously observed in the trunk. No other vehicles were encountered during the pursuit.

Agents came upon defendants' vehicle 2.9 miles from the checkpoint. As the agents approached, three of the occupants were "running toward the desert"; Sandoval was "coming out of the desert". When told to "hold it", all the occupants of the car surrendered. Sandoval's footsteps were backtracked; a plastic bag was found near where "marijuana was scattered in clumps all over the desert."

When the agents came upon defendants' vehicle, the trunk was open; the back and bottom part of the rear seat had been lifted up, giving access to the trunk. The plastic bag, previously in the trunk, had been removed. In checking the car, a semiautomatic pistol was found on the right front floor; an ammunition clip for the pistol was in the glove compartment. There was marijuana in the front seat, underneath the rear seat, "on the rear of the car and the outside on the top." There is no issue as to the validity of this second search.

Ten pounds of marijuana and a scale "to weigh pounds" were recovered. There is testimony that the amount of marijuana and its value would be consistent "[w]ith the selling of a wholesale quantity"; "a wholesale amount". Sandoval made the statement that he had purchased the marijuana in Mexico.

There is substantial evidence that Sandoval possessed marijuana; he was driving, he had the key to the trunk, he said he bought the marijuana in Mexico. There is substantial evidence that Remigio constructively possessed the marijuana and that there was a conspiracy between Sandoval and Remigio in connection with the marijuana while at the checkpoint. Both men twice reached toward the area where the gun was found. Plastic bags were thrown out of the car after leaving the checkpoint, and the rear seat was removed. Sandoval could not have removed the rear seat because he was driving. All occupants fled the car when it stopped 2.9 miles from the checkpoint. The marijuana was scattered all about the car, either during the flight or as soon as the car stopped. Concerning constructive possession, see *State v. Herrera*, 90 N.M. 306, 563 P.2d 100 (Ct.App. 1977). Concerning conspiracy, see *State v. Thoreen*, 91 N.M. 624, 578 P.2d 325 (Ct.App. 1978).

The ten pounds of marijuana, the scale, the packaging of the marijuana in plastic bags, and the testimony that the marijuana was in a wholesale amount, was substantial evidence that possession of the marijuana was with the intent to distribute. *Daygee v. State*, 514 P.2d 1159 (Alaska 1973); *State v. Harris*, 14 Wash.App. 414, 542 P.2d 122 (1975).

The judgments and sentences are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

590 P.2d 179

Faun HILLMAN, Appellant,

v.

HEALTH AND SOCIAL SERVICES DEPARTMENT of the State of New Mexico, Appellee.

No. 3364.

Court of Appeals of New Mexico.

Jan. 16, 1979.

Charles McCormack, Southern New Mexico Legal Services, Las Cruces, for appellant.

Jeff Bingaman, Atty. Gen., Carolyn Cosner, Sp. Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

LOPEZ, Judge.

Appellant, Mrs. Faun Hillman, appeals a decision of appellee, Health and Social Services Department and Fernando C. De Baca, the Department's Executive Director, denying her General Assistance benefits under the New Mexico Public Assistance Act, §§ 27–2–1 et seq., N.M.S.A. 1978. We reverse and remand.

Section 27–3–4F(1), (2), (3) N.M.S.A. 1978 gives this Court the power to set aside a

decision of appellee if it proves to be "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record as a whole; or (3) otherwise not in accordance with law." All of appellant's arguments for reversal are based upon the contention that appellee's decision was not in accordance with law.

Recitation of the following facts is essential for a clear understanding of this case. Based upon a determination of temporary disability, appellant was receiving General Assistance benefits (Category 05) in Dona Ana County. *See* §§ 27–2–7A(2) and 27–2–8, N.M.S.A. 1978. The agency in this county sent appellant an Advance Notice of termination. Appellant requested a fair hearing and benefits were continued pending the administrative appeal. *See* § 27–3–3, N.M.S.A. 1978. The agency based its termination upon a statement from a doctor that appellant was no longer disabled, that she had refused prescribed psychological evaluations and that X-rays were not significant to support a claim of disability. A fair hearing was held and the medical statement was admitted into evidence. Appellant also testified. At the end of the fair hearing, the hearing officer decided to refer this statement, testimony, and other offered material to the Incapacity Review Unit for a recommendation as to whether other physical examinations of appellant should be authorized. The Incapacity Review Unit concluded that the submitted information was completely inadequate to determine appellant's continued eligibility for Category 05 benefits. Consequently, it recommended that appellant submit to a psycho-diagnostic and orthopedic examination. In addition, it requested that a social summary accompany the reports of these examinations. This information was deemed necessary before a decision could be made on her fair hearing. Acting upon the belief that the decision of appellant's continued eligibility was to be made on evidence introduced outside the fair hearing, appellant refused to consent to the requested examinations. When this refusal was communicated to appellee, it failed to advise appellant of any opportunity for examining the reports, the doctors preparing the report, the case-worker preparing the social summary and the members of the Incapacity Review Unit upon whose recommendation the county agency's decision would be based. Based upon appellant's refused consent, the Executive Director terminated appellant's benefits. This termination was made on a document entitled "Fair Hearing Decision." A judicial appeal to this Court followed. *See* § 27–3–4, N.M.S.A. 1978.

Appellant presents three points for reversal: (1) appellee's fair hearing decision violated its own regulations; (2) appellee's fair hearing decision violated statutory and administrative law; and (3) appellee's fair hearing decision violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The first point is dispositive of this appeal. Therefore, we make no decision concerning the other points. With respect to the last point, we follow the principle 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); *Huey v. Lente*, 85 N.M. 597, 514 P.2d 1093 (1973); *see also Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

In discussing those considerations involved under appellant's first point, we note that appellee is bound by its own regulations. *Martinez v. Health and Social Services Department*, 90 N.M. 345, 563 P.2d 608 (Ct.App.), *cert. denied*, 90 N.M. 636, 567 P.2d 485 (1977). The following are those regulations pertinent to appellant's contention:

> 275.31—RIGHT TO FAIR HEARING—Every applicant or recipient may request and obtain a fair hearing with respect to any Agency action . . . concerning . . . the determination of his eligibility for assistance . . . *The right to a fair hearing includes the right to be advised of the nature and availability of such a hearing*, to receive any needed help in preparing for or participating in it, *to have a hearing which*

fully safeguards his opportunity to present his case, to have prompt notice and *implementation of the decision based on the hearing*, and to be advised that he may invoke judicial review . . . (Emphasis added)

275.33—AUTHORITY FOR DECISION-MAKING FOLLOWING HEARING—The Executive Director makes the final administrative decision *on the information provided in a fair hearing.* (Emphasis added)

275.472—INFORMATION PRESENTED—All information presented or used by the county office . . . during the course of the hearing must be heard by or, *if written, must be available to the claimant or his representative for examination prior to the hearing as well as during the hearing itself. No other information may be a part of the hearing record or used in making a decision on the case.*

In instances when the client is appealing a decision involving medical care or a medical condition, the client has the right to know the facts about any documents on which the decision was based. *The medical report may be examined following receipt of a fair hearing request by the client and/or his representative, prior to or during the hearing, or the medical report may be read aloud during the hearing.*

. . . . .

When the hearing involves medical issues, such as those concerning a diagnosis, an examining physician's report, or the Incapacity Review Unit's decision, a medical assessment other than of the person or persons involved in making the original decision will be obtained at the Department's expense from a source satisfactory to the claimant, if the hearing officer considers it necessary, and *made a part of the record.* (Emphasis added)

We have presented at some length the foregoing regulations to show the specificity governing the conduct of a fair hearing, the requisites for inclusion of information into the fair hearing record, and the information which can be considered in making a final decision of eligibility.

Based upon these regulations, it is obvious that any decision terminating a claimant's benefits must be based on a hearing which fully protects the claimant's opportunity to present his case. Specifically included in this opportunity is the option to examine all medical reports prior to or during the hearing. In addition, since medical reports are written information, they cannot be made "a part of the hearing record or used in making a decision on the case" unless they have been made available for such examination. Section 275.472, Public Assistance Manual, Vol. II–A. Furthermore, any additional medical assessments deemed necessary for a final decision is to be made a part of the record. We have already indicated that Section 275.472 requires the availability of examination as a requisite for inclusion in the record. Therefore, the availability to examine reports made pursuant to Section 275.472 is implicitly required in this section's provision that they be "made a part of the record." Moreover, Section 275.33 directs that a final decision be based on the information provided in a fair hearing.

■ The scheme emerging from these regulations is clear. No final decision terminating benefits can be made on any information other than that presented in the fair hearing; and only that written information which is available for examination may be part of the fair hearing record. Of course, any information presented in the fair hearing will necessarily be reflected in the record. It follows, therefore, that a termination of benefits cannot be based upon any information other than that contained in the record.

■ The facts of the present case indicate that the fair hearing record was "completely inadequate" to determine appellant's continued eligibility for benefits. Consequently, further medical examinations were requested. The facts further show that appellant believed that her eligibility would be based upon medical assessments

which would not be subject to examination. In this situation, appellant concluded that her eligibility would be determined upon information not presented at the fair hearing. Appellant recognized this as unlawful and, therefore, refused to submit to the requested examinations. Appellee terminated appellant's benefits on a document entitled "Fair Hearing Decision." The record of appellant's fair hearing had already been judged inadequate for an eligibility determination. Despite the regulatory scheme requiring a final decision to be based only on information provided in a fair hearing, appellee terminated appellant's benefits. The reason given for this termination was refusal to cooperate in the establishment of eligibility. The document states that, in the face of such a refusal, "presumptive ineligibility exists." Appellee's regulations do not provide for a termination based upon such a presumption. Terminations can only be based upon the hearing record. *See* Sections 275.33 and 275.472, supra. Under these circumstances, we hold that appellee's fair hearing decision violated appellee's own regulations and that, therefore, this decision is not in accordance with law. *Martinez v. Health and Social Services Department, supra.*

In arriving at this holding, we note that appellee's regulation, Section 241.72, provides for the termination of assistance whenever a client's refusal to accept medical treatment is not justified. Section 241.-72, Public Assistance Manual, Vol. II–A. In oral argument, appellee contended that its decision was made pursuant to this section and that, therefore, this decision was not in violation of appellee's regulations. A termination under this section is dependent upon a finding of unjustified refusal. As indicated above, Section 275.31 includes, in the right to a fair hearing, the right to be advised of the nature and availability of such a hearing. The facts of this case clearly indicate that appellant's refusal to consent to the requested examinations and the basis for this refusal were communicated to appellee. The reason given for this refusal was based upon appellant's belief that another hearing to examine the resulting reports would not be available. The record of appellant's fair hearing does not show that the hearing would be reopened in order to allow appellant to present her case in light of the resulting medical reports and accompanying social summary. In this situation, Section 275.31 demanded that appellee advise appellant of the availability of another hearing. Because appellee failed to inform appellant of this availability, appellant's refusal to consent to the requested examination was justified. Therefore, Section 241.-72 cannot be used as a lawful basis for terminating appellant's benefits.

Appellee cites *Georgia Department of Human Resources v. Holland,* 133 Ga.App. 616, 211 S.E.2d 635. (Ct.App.1974) as authority for the proposition that upon adjournment of a disability hearing either party is authorized to submit evidence. Based upon this proposition, appellee contends that appellant would have been afforded the opportunity to present further evidence in response to the requested examinations and social summary. Appellee's reliance upon this case as support for this contention is misplaced. The decision in *Georgia* was based upon the statutory scheme governing social welfare in Georgia. *See* Ga.Code Ann. §§ 99–2001 et seq., Book 28 (1968). Appellant cannot be presumed to know this scheme. In addition, the facts of this case and Section 275.31 require that the burden of informing appellant of this opportunity be placed upon appellee.

■ Appellee reminds us that the purpose of the rule requiring an evidentiary hearing is to assure that the final decision is not based on information received "without any notice to appellant and without any opportunity for appellant to know, prepare or meet such issues or matters considered" by the decision-maker in his conclusions. *Transcontinental Bus System v. State Corp. Commission,* 56 N.M. 158, 162, 241 P.2d 829, 831 (1952). We agree. However, it is undeniable that appellant's benefits have been terminated and the above assurance has not been met. In this situation, we set aside appellee's decision, remand this case, and order appellee to notify appellant of her

opportunity to examine any medical reports made pursuant to Section 275.472. In addition, we order appellee to reinstate General Assistance Benefits to appellant retroactively, to continue them until a fair hearing decision is made in accordance with the law, and to proceed in a manner consistent with this opinion.

IT IS SO ORDERED.

HERNANDEZ and SUTIN, JJ., concurs.

SUTIN, Judge (concurring).

I concur.

We do not have to proceed beyond the record to determine the error of the HSSD decision. To fumble with statutes, regulations, authorities, and complex issues results from inexperience in the trial and appeal of cases. HSSD should be knowledgeable of common sense procedures and not take advantage of persons on relief.

At the conclusion of the July 7, 1977 hearing, the Hearing Officer said:

> Anyway, I have the discretion to authorize a complete or medical examination. I am not going to do it at this point, Mrs. Hillman, because your case will not in effect be closed until the final decision is made, but I am going to take this material to the Incapacity Review Unit, and I will be guided by their recommendation as to whether another exam should be authorized or whatever. I am not going to authorize it now, but your case will remain open until the final decision.

On July 20, 1977, the hearing officer entered a "Fair Hearing Decision" in which she recommended that the appeal be upheld. This decision was not submitted to the Fair Hearing Review Committee nor to the HSSD Executive Director.

On November 14, 1977, the Hearing Officer wrote to Hillman's attorney:

> *Based on the evidence presented at the hearing which took place on July 7, 1977 the appeal is hereby denied.* The reason for this action is set forth on the attached summary sheet. [Emphasis added.]

I do not know what "the attached summary sheet" is. In the record following the above letter is "Fair Hearing Decision," dated October 28, 1977, in which the HSSD Executive Director, based upon the recommendation of the Hearing Officer and Fair Hearing Review Committee decided the case in favor of the Agency.

In this "Fair Hearing Decision," the "supplemental" conclusions of the Hearing Officer were that Ms. Hillman refused to undergo the examination recommended and authorized by IRU which would establish where she is now disabled. Because Ms. Hillman refuses to cooperate in the establishment of eligibility, presumptive ineligibility exists and termination of assistance by the County Office must now be considered a correct action.

It does not require judicial wisdom to conclude that the denial of Ms. Hillman's appeal was "Not" based on the evidence presented at the hearing which took place on July 7, 1977.

Unfortunately, administrative agencies oftimes are not learned in "Fair Hearings" to arrived at "Fair Hearing Decisions." The hearing of July 7, 1977 remained open until the Incapacity Review Unit made its recommendations. This hearing should have continued at a later date in which additional evidence would be presented on all material issues. Then a final decision could be rendered based upon the evidence. The hearing not having been concluded, the "Fair Hearing Decision" entered was premature, ineffective and void.

In my opinion, the decision entered should be vacated and further evidence taken, after which, a final decision can be entered from which an appeal can be taken.

590 P.2d 633

Ann L. WEHRLE, Petitioner-Appellant,

v.

Robert A. ROBISON, Respondent-Appellee.

No. 12011.

Supreme Court of New Mexico.

Feb. 15, 1979.

John S. Campbell, Albuquerque, for petitioner-appellant.

Lynn Allan, Albuquerque, for respondent-appellee.

OPINION

SOSA, Chief Justice.

The question presented by this appeal is whether a Final Decree of Dissolution of Marriage, which incorporates a property settlement agreement entered into by the parties, may be modified under N.M.R. Civ.P. 60(b), N.M.S.A.1978 after the expiration of the statutory time for doing so. We hold that it may not.

On May 5, 1976, the District Court of Bernalillo County entered a Final Decree of Dissolution of Marriage between the parties, and incorporated a Stipulation and Agreement (hereafter Agreement), executed and acknowledged by both of them, which provided for a division of their separate and community property. On October

12, 1977, petitioner filed a verified Motion for Judgment and for Order to Show Cause seeking enforcement of the terms and conditions of the Final Decree, and specifically respondent's obligation to pay certain indebtedness of the parties. On February 27, 1978, the court, upon respondent's oral motion, requested a review of the property settlement as set out in the Agreement. Respondent alleged that the debts in question were not community debts and that he was not aware that he was assuming those particular debts when he signed the Agreement. Petitioner argued that the issue of the property settlement was not properly before the court and objected to the court entertaining any questions regarding the property settlement. She challenged the court's authority to modify the Final Decree after the expiration of the statutory time for doing so. On April 7, 1978, the court entered an Amended Final Decree, completely revising the property settlement and finding that there were no community debts. Petitioner's Motion for Enforcement was denied by implication; she appeals. We reverse.

We have recently held that a final decree of dissolution of marriage is a final, nonmodifiable judgment. *Parks v. Parks*, 91 N.M. 369, 574 P.2d 588 (1978). In *Parks*, the parties had entered into a stipulation and property settlement agreement upon divorce, which was incorporated in the final decree. This Court stated:

> The judgment entered on August 23, 1972, was a final nonmodifiable judgment of property settlement * * * * Therefore, the *only way to modify or set aside such a judgment* would be by appeal or by filing a motion for relief under N.M.R.Civ.P. 60(b). (Emphasis added.)

Id. at 371, 574 P.2d at 590.

N.M.R.Civ.P. 60(b) provides for relief from a final judgment or order due to:

> (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) also specifies time limits in which a motion for relief from a final judgment or order shall be made:

> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.

In the case presently before us, the only way that respondent could have successfully sought to modify or set aside the judgment entered on May 5, 1976, would have been to appeal the judgment at the time it was entered or by timely filing a motion under Rule 60(b). The time for appeal has long since passed. A district court retains jurisdiction over final judgments for a period of thirty days after entry of the judgment. § 39–1–1, N.M.S.A.1978 [formerly § 21–9–1, N.M.S.A.1953 (Repl.1970)]. A district court loses jurisdiction after thirty days, except for relief available from a final judgment or order under Rule 60(b). *Albuquerque Prod. Credit Ass'n v. Martinez*, 91 N.M. 317, 573 P.2d 672 (1978). Thus, the only alternative open to respondent was to seek relief under Rule 60(b).

Respondent did not challenge the Final Decree under Rule 60(b)(2), (4), or (5). He stated that he was not represented by counsel and that his state of mind was such that he did not know what he was doing when he signed the Agreement. Respondent testified that he was not defrauded into signing the Agreement. He admitted that he made a mistake in entering into the Agreement.

A motion for relief under Rule 60(b)(1) would have been proper if filed within the statutory time limitation; namely, not more

than one year after the May 5, 1976 judgment. However, almost two years have elapsed from the entry of the Final Decree to the time of review of the settlement agreement. We find no merit to respondent's claim of fraud, misrepresentation, or misconduct by petitioner. Even if he had been able to prove misrepresentation or misconduct by petitioner, respondent would still be barred by the time limit applicable to Rule 60(b)(3). The only other remedy available to respondent would be under Rule 60(b)(6), which provides for relief from a final judgment if a motion is filed within a "reasonable time."

An individual must establish the existence of exceptional circumstances to obtain relief under Rule 60(b)(6). *See Perez v. Perez*, 75 N.M. 656, 409 P.2d 804 (1966); *Terrel v. Duke City Lumber Company, Inc.*, 86 N.M. 405, 524 P.2d 1021 (Ct.App.1974), *modified on other grounds*, 88 N.M. 299, 540 P.2d 229 (1975). In *Parks, supra*, 91 N.M. at 371, 574 P.2d at 590, this Court stated:

> Part (6) is to be used, however, only for reasons *other* than those set out in (1) through (5). If one is arguing mistake, fraud, misrepresentation, etc. he cannot circumvent the one-year limit set out in Rule 60(b) by claiming he is seeking relief only under part (6).

Thus, respondent cannot claim relief under Rule 60(b)(1) and (3) and also claim relief under subsection (6).

We find that *Parks, supra*, is controlling in this case. We also find that the Agreement entered into on May 5, 1976, is not ambiguous on its face and that it should be enforced. The provision that the "Respondent agrees to assume and pay each and every other obligation of the community" means all indebtedness of the parties not specifically described elsewhere in the Agreement.

We hold that respondent is time-barred from any relief available under Rule 60(b). The court below erred in entering an Amended Final Decree and in failing to grant petitioner's Motion for Judgment enforcing the terms of the Agreement. This cause is remanded to the district court for the entry of judgment in favor of petitioner and against respondent.

EASLEY and PAYNE, JJ., concur.

590 P.2d 635

Jane AKRE, Plaintiff-Appellant,

v.

Brian H. WASHBURN, Defendant-Appellee.

No. 12020.

Supreme Court of New Mexico.

Feb. 16, 1979.

Bruce C. Redd, Albuquerque, for plaintiff-appellant.

Nordhaus, Moses & Dunn, Thomas J. Dunn, Albuquerque, for defendant-appellee.

OPINION

SOSA, Chief Justice.

On October 13, 1977, plaintiff (appellant) filed her complaint alleging that on July 8, 1973, she gave defendant (appellee) $1200 for a half interest in land located in Santa Fe County and praying for a sale of the land with an equal division of the proceeds, or alternatively, for a judgment against appellee for $1200 plus interest. Appellant appeals from a summary judgment entered in favor of appellee. We affirm.

Appellant asserted in her complaint that, contrary to an agreement between them, appellee refused to deed appellant's interest in the land to her, or to return the $1200. Appellant claims that a partnership or joint venture was created between herself and appellee. Appellee denied any business dealings with appellant, denied that he owed her anything, and asserted the following affirmative defenses:

1. Complaint fails to state a cause of action upon which relief can be granted,
2. Improper venue,
3. Failure to join an indispensable party,
4. Lack of subject matter jurisdiction, and
5. Statute of Frauds.

On March 8, 1978, a hearing was held on appellee's motion for summary judgment. The Court ruled that the original answer did not contain the affirmative defense that the complaint was barred by the Statute of Limitations, but it allowed appellee to amend his answer to include this defense. A rehearing on appellee's motion for summary judgment was held on March 20, 1978. The motion was granted. Appellant contends that the court erred in granting summary judgment.

Appellant argues that because appellee denied each allegation of the complaint, each fact so pled is at issue. Appellee counters that summary judgment is properly granted where the record shows that there is no genuine issue as to any material fact. He argues that the Statute of Limitations bars appellant's claim because her complaint was filed over four years after the date the alleged agreement between the parties was entered into.

N.M.R. Civ. P. 56(c), N.M.S.A.1978 provides in pertinent part:

> 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.

N.M.R. Civ. P. 56(e), N.M.S.A.1978 provides that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Our courts use the following rules to determine whether an issue of fact exists in a summary judgment proceeding:

> (1) A summary judgment proceeding is not to decide an issue of fact, but, rather, to determine whether one exists.
>
> (2) Summary judgment can be granted only where the record shows there is no genuine issue as to any material fact.
>
> (3) The party opposing the motion for summary judgment must be given the benefit of all reasonable doubts in determining whether an issue of fact exists.
>
> (4) Summary judgment can be granted only where the moving party is entitled to the judgment as a matter of law, upon clear and undisputed facts.
>
> (5) Summary judgment proceedings must not be used as a substitute for trial. (Citations omitted.)

First Nat. Bk., Albuquerque v. Nor-Am Agr. Prod., Inc., 88 N.M. 74, 80, 537 P.2d 682, 688 (Ct.App.1975), *cert. denied,* 88 N.M. 29, 536 P.2d 1085 (1975). *See also Withrow v. Woozencraft,* 90 N.M. 48, 559 P.2d 425 (Ct.App.1976), *cert. denied,* 90 N.M. 255, 561 P.2d 1348 (1977).

In a summary judgment proceeding, the burden is on the moving party to show that there is no genuine issue of material fact to submit to the fact finder, and an opposing party may not remain silent in the face of a meritorious showing by the moving party. *Southern Union Gas Co. v. Briner Rust Proofing Co.,* 65 N.M. 32, 40, 331 P.2d 531, 536 (1958). We have recently stated:

> [W]hen the moving party demonstrates that no genuine issue as to a material fact exists as a matter of law the moving party is entitled to summary judgment and the opposing party cannot defeat the motion by a bare contention that an issue of fact exists. (Citations omitted.)

Air Engineering v. Corporacion de la Fonda, 91 N.M. 135, 137, 571 P.2d 402, 404 (1977). *See also* 73 Am.Jur.2d *Summary Judgment* § 22 (1974).

The record below shows that appellant delivered a $1200 check to appellee on July 8, 1973. Her complaint was filed on October 13, 1977. Appellant nowhere disputes the fact that over four years have lapsed since she delivered the check to appellee.

Sections 37–1–1 and 4, N.M.S.A. 1978 (formerly §§ 23–1–1 and 4, N.M.S.A. 1953) provide that an action for accounts and unwritten contracts may be brought within four years after the cause of action accrues. We have previously stated that where there is no specified time for the payment of loans, the action accrues upon the date of such loan. *Gentry v. Gentry,* 59 N.M. 395, 399, 285 P.2d 503, 506 (1955). We find that § 37–1–4 applies to this case. The Statute of Limitations began to run on the alleged demand obligation on the date it was contracted, July 8, 1973. Thus, appellant's cause of action is barred by the applicable Statute of Limitations. Because we find that summary judgment was properly granted, we do not reach the issue of whether the alleged agreement between the parties as constituting a joint venture falls within the Statute of Frauds.

Appellant asks that should the judgment not be reversed, the cause be remanded with instructions to the trial court to furnish her with a statement of its reasons for granting summary judgment. Appellant relies on *Wilson v. Albuquerque Board of Realtors,* 81 N.M. 657, 472 P.2d 371 (1970). In *Wilson,* no grounds for granting summary judgment were set forth in the motion or in the judgment. That case involved an 800-page transcript and the reason for granting summary judgment was not clearly apparent from the record. We stated:

> We do not say therefore that findings of fact and conclusions of law are required

> in summary judgment proceedings; however, we do hold that in involved cases where the reason for the summary judgment is not otherwise clearly apparent from the record, the trial court should state its reasons for granting it in a separate opinion or in a recital in the judgment.

Id. at 661, 472 P.2d at 375.

In *Garrett v. Nissen Corporation,* 84 N.M. 16, 498 P.2d 1359, (1972), the only pertinent finding by the trial court was that there was no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law. We said this is all that is required of the trial court under Rule 56(c). The trial court is not required to adopt a separate opinion or to enter a recital in the record as to the exact grounds for granting summary judgment beyond the requirements of Rule 56. We said:

> [T]he decision of this court in *Wilson v. Albuquerque Board of Realtors,* supra, insofar as it required the trial court to state reasons for granting a summary judgment in greater detail than as provided in Rule 56(c), supra, is hereby overruled.

Id. at 18, 498 P.2d at 1361. *See also Skarda v. Skarda,* 87 N.M. 497, 536 P.2d 257 (1975). In this case, the court made no finding that there was no genuine issue of material fact nor did it state any reasons for its ruling. It is apparent from the record, which is only thirty-two pages long, that the court granted summary judgment because it considered the action was barred by the Statute of Limitations. The question arises whether the court erred in failing to specifically find, and so state in its order, that there was no genuine issues as to any material fact in granting appellee's motion for summary judgment. Under the circumstances of this case, where it is clearly apparent that summary judgment was granted because the action was time-barred, we find no error. We affirm the decision of the lower court granting summary judgment in favor of appellee.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

590 P.2d 638

In the Matter of Lillian PERNELL, an alleged mentally ill Individual.

STATE of New Mexico, Plaintiff-Appellee,

v.

Lillian PERNELL, Defendant-Appellant.

No. 3588.

Court of Appeals of New Mexico.

Jan. 16, 1979.

Frederick H. Sherman, Sherman & Sherman, Deming, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Leslie D. Ringer, Chief Counsel, Patrick Lauth, Asst. Counsel, Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

This appeal involves the involuntary commitment of Pernell to the New Mexico State Hospital for evaluation and treatment, not to exceed thirty days. Statutory references to the Mental Health and Developmental Disabilities Code are either to N.M.S.A.1978 or to N.M.S.A.1978 (Supp. 1978). A variety of contentions are presented. Compare *Lynch v. Baxley*, 386 F.Supp. 378 (M.D.Ala.1974). We discuss: (1) right to appeal; (2) mootness; (3) notice; (4) quantum of proof; (5) propriety of the commitment order as to mental disorder, serious bodily harm and least drastic means; and (6) stay pending appeal.

Right to Appeal

The State has not questioned Pernell's right to appeal the trial court's order. We have considered the right to appeal because of statutory provisions. Section 43–1–12(B) —pertaining to extended commitment of adults, § 43–1–13(D)—pertaining to involuntary commitment of developmentally disabled adults to residential care, and § 43–1–16(F)—pertaining to residential treatment and habilitation of minors, refer to the right to an "expeditious appeal" of decisions under those sections. Section 43–1–11, under which Pernell was committed, does not refer to an appeal. With this legislative scheme, it would appear that the Legislature did not intend that commitments under § 43–1–11 should be appealed.

Prior to the 1965 amendment of N.M. Const., art. VI, § 2, the right of appeal was "purely statutory". *State v. Chacon*, 19 N.M. 456, 145 P. 125 (1914). The 1965 amendment, however, provides "an aggrieved party shall have an absolute right to one appeal." Pernell's personal interests were adversely affected by the order of involuntary commitment. She was an aggrieved party. See *Matter of Berry*, 521 F.2d 179 (10th Cir. 1975), cert. denied, 423 U.S. 928, 96 S.Ct. 276, 46 L.Ed.2d 256 (1975), reh.

denied, 423 U.S. 1039, 96 S.Ct. 577, 46 L.Ed.2d 414 (1975). Her notice of appeal was timely filed; there are no procedural problems in connection with the perfection of the appeal. See *Olguin v. State*, 90 N.M. 303, 563 P.2d 97 (1977); *Hudson v. State*, 89 N.M. 759, 557 P.2d 1108 (1976), cert. denied, 431 U.S. 924, 97 S.Ct. 2198, 53 L.Ed.2d 238 (1977). Concerning a penitentiary inmate, *Rodriguez v. District Ct. of First J. D., Co. of Santa Fe*, 83 N.M. 200, 490 P.2d 458 (1971) stated "that the prisoner had an undoubted right to appeal" under the amended constitutional provision.

Pernell had a right to appeal under N.M.Const., art. VI, § 2 even though no appeal was provided for by statute.

Mootness

The State moved to dismiss the appeal as moot. Pursuant to the trial court's order, Pernell was admitted to the New Mexico State Hospital for a period not to exceed thirty days. The admission was on May 2, 1978; the commitment to the hospital expired on May 31, 1978. The motion asserts Pernell voluntarily remained in the hospital as a patient from May 31 to June 26, 1978 when she was discharged pursuant to her own request. The motion asserts these facts were established by an attached affidavit; no affidavit was attached to the motion. Facts concerning Pernell's hospital stay subsequent to May 31, 1978 have not been established. See *Hamman v. Clayton Municipal School District No. 1*, 74 N.M. 428, 394 P.2d 273 (1964). However, we did not deny the motion on this ground; rather, we assumed the allegations stated in the motion were factual.

The claim of mootness was based on the fact that Pernell was no longer in the hospital pursuant to the trial court's order. Thus, Pernell can obtain no practical relief from that order on appeal. *Atchison, T. & S.F. Ry. Co. v. State Corporation Com'n*, 79 N.M. 793, 450 P.2d 431 (1969) points out that New Mexico appellate courts will not decide questions "wherein no actual relief can be afforded". See also *New Mexico Bus Sales v. Michael*, 68 N.M. 223, 360 P.2d 639 (1961). Under New Mexico decisions, an appeal will be dismissed if the question presented is moot; mootness includes the question of whether the appellate court can provide "actual relief". The State relied on these decisions and supported the claim of mootness by citing several memorandum decisions from New York which refused to review, on the ground of mootness, the propriety of a commitment to a mental institution where the person involved had been released from the commitment.

The State failed to consider *City of Albuquerque v. Campos*, 86 N.M. 488, 525 P.2d 848 (1974). This case involved the propriety of a strike by municipal employees. The strike was settled while the appeal was pending; Campos contended the legal issues raised in the appeal were moot. After listing various New Mexico decisions on mootness, the opinion states:

> It is true that in those cases we held this Court would not pass upon questions which had become moot. We do not propose to change that rule. However, the questions here presented are of great public interest and importance, and we will not permit the settlement of the dispute by one or more of the parties to terminate the right of the public to have these questions resolved on appeal. * * If, as in the present case, the questions of public importance are likely to recur, additional reason exists for the exercise by this court of its inherent discretion to resolve those questions.

In re Ballay, 157 U.S.App.D.C. 59, 482 F.2d 648 (1973) followed a similar approach in connection with the review of the propriety of a commitment to a mental hospital when the patient had been discharged while the appeal was pending. *Ballay* states:

> [T]hat consideration of issues of public importance "ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review * * *."

In this case we have a short-term order, a commitment not to exceed thirty days. Such an order is capable of repetition; the transcript refers to an involuntary commit-

ment of Pernell to the State Hospital in June, 1977. In argument, the State asserted that Pernell was involuntarily committed from June 7 to September 14, 1977. As to whether Pernell's involuntary commitment was of public importance, *Ballay*, supra, states: "[W]e cannot be oblivious to the importance of * * * the number of persons who are affected" by involuntary commitment orders.

The mootness motion was properly denied on the basis of *City of Albuquerque v. Campos, supra*, and *In re Ballay, supra.*

Notice

Pernell asserts she was denied due process by the denial of fair notice of hearing. This due process claim is a claim that statutory requirements were not met. There are two issues concerning notice.

(a) Section 43–1–11(A) states in part:

> If the department [§ 43–1–3(G)], physician or evaluation facility decides to seek commitment of the client for evaluation and treatment, a petition shall be filed with the court within five days of admission requesting such commitment. The petition shall include a description of the specific behaviors or symptoms of the client which evidence a likelihood of serious harm to the client or others, and shall also include an initial screening report by the evaluating physician individually, or with the assistance of a mental health professional, or if a physician is not available, by a mental health professional acceptable to the court.

We assume that these requirements, as to the contents of the petition, apply to the petition in this case filed by the district attorney under § 43–1–11(E).

Pernell claims the petition filed by the district attorney did not include "a description of the specific behaviors or symptoms" of Pernell. This issue is not properly before us; no claim as to the sufficiency of the petition was raised in the trial court. See *Adoption of Doe*, 89 N.M. 606, 555 P.2d 906 (Ct.App.1976). In addition, the claim is frivolous. An initial screening report by an evaluating physician was attached to, and was a part of, the petition. That report lists specific behaviors and symptoms.

(b) Section 43–1–11(E) provides:

> The court may issue a summons to the proposed client to appear at the time designated for a hearing which shall be not less than five days from the date the petition is served.

The "not less than five days" requirement was not met in this case. The petition was filed on April 28, 1978; Pernell's attorney received "the papers reflecting the problem" and conferred with Pernell on that day. The hearing was held on May 1, 1978.

Pernell objected to the hearing on May 1, 1978, but not on the basis of the time requirement. Pernell wanted a continuance of the hearing because she wanted "a medically trained lawyer". No issue of the five-day time requirement having been raised in the trial court, it is not before us for review. *Adoption of Doe, supra.* We add that there is no claim of prejudice resulting from the failure to comply with the time requirement. See *Matter of Doe*, 88 N.M. 481, 542 P.2d 61 (Ct.App.1975).

Quantum of Proof

Under § 43–1–11(C), the trial court must find the basis for a commitment by clear and convincing evidence. Pernell claims due process would be violated unless her commitment was based on proof beyond a reasonable doubt. Pernell's argument in support of a reasonable doubt standard was considered, and rejected in *Matter of Valdez*, 88 N.M. 338, 540 P.2d 818 (1975). *Valdez* adopted the clear and convincing standard and rejected the claim that due process required the reasonable doubt standard.

Propriety of the Commitment Order

Under § 43–1–11(C), the required findings, by clear and convincing evidence are:

> (1) as a result of a mental disorder the client presents a likelihood of serious harm to himself or others;

(2) the client needs and is likely to benefit from the proposed treatment; and

(3) the proposed commitment is consistent with the treatment needs of the client and with the least drastic means principle.

The trial court found:

1. That as a result of an apparent mental disorder, the respondent, Lillian Pernell, presents a likelihood of danger to herself or others.

2. That the respondent's condition is likely to benefit or improve with the proposed treatment.

3. The proposed commitment is consistent with the least drastic means principle.

Pernell raises a variety of issues directed to the findings required by the statute. Some of the issues pertain to evidence. Pernell's arguments concerning the sufficiency of the evidence proceed either on the basis that this Court should weigh the evidence or on the basis that the evidence should be reviewed in the light most favorable to Pernell. Neither basis is correct. We weigh neither the evidence nor its credibility; our review is concerned with whether substantial evidence supports the trial court's findings. In such a review, we consider the evidence in the light most favorable to the trial court's findings. *Getz v. Equitable Life Assur. Soc. of U. S.*, 90 N.M. 195, 561 P.2d 468 (1977), cert. denied, 434 U.S. 834, 98 S.Ct. 121, 54 L.Ed.2d 95 (1977); *Boone v. Boone*, 90 N.M. 466, 565 P.2d 337 (1977); *Matter of Valdez, supra.*

A. Mental Disorder

1. Pernell asserts the trial court did not find that she had a mental disorder; rather, the finding was of an "apparent" mental disorder. According to Pernell, "the court was not sure whether there was mental disorder as the finding was only as to an apparent mental disorder. This is not a finding of a mental disorder by clear and convincing evidence." The trial court used "apparent" in the sense of readily perceptible to the senses, unobstructed and unconcealed. See Webster's Third New International Dictionary (1966). Use of the word "apparent" added nothing to the trial court's finding of mental disorder; on the other hand, use of "apparent" does not establish that a finding of mental disorder was not made, or not made on the basis of clear and convincing evidence.

2. Section 43–1–3(N) defines mental disorder as follows:

> N. "mental disorder" means the substantial disorder of the person's emotional processes, thought or cognition which grossly impairs judgment, behavior or capacity to recognize reality[.]

Pernell states that "[n]o facts were found as to any requirements" under this definition. Pernell did not request that the trial court "find" the elements of this definition. In addition, the trial court was not required to make such findings even if requested to do so. Findings of fact "shall consist only of such ultimate facts as are necessary to determine the issues in the case". Rule of Civ.Proc. 52(B)(a)(2). Ultimate facts are to be distinguished from evidentiary facts. *Galvan v. Miller*, 79 N.M. 540, 445 P.2d 961 (1968). The "mental disorder" was an ultimate fact; the elements of the definition of mental disorder were evidentiary facts which the trial court was not required to find. See *McCleskey v. N. C. Ribble Company*, 80 N.M. 345, 455 P.2d 849 (Ct.App. 1969).

3. Pernell contends there was insufficient evidence that she had a mental disorder as defined in § 43–1–3(N). We disagree.

Pernell had a history of admissions to state and private hospitals over a ten-year period. Her condition was stabilized by taking a prescribed medication (Prolixin), however, she had stopped taking it for a minimum of six weeks. The evaluating physician testified Pernell suffered "from a mental disorder called chronic schizophrenia, undifferentiated type, and yes, she does present a danger to herself and others when she does not take her medication to the extent that she could become very explosive

and apparently she and her mother do not get along on a regular basis when she's not on her medication." "I'm saying that she could become violent when she's off her medication and her history shows that she has become violent when she's off her medication". The evaluating physician testified that when Pernell was interviewed she was "very agitated", "was disassociative", "did not want to be on medication" and "didn't want anyone visiting her."

We need not review additional evidence. The foregoing evidence is substantial evidence of a substantial disorder of Pernell's emotional process or thought which grossly impaired her judgment or behavior.

4. Section 43–1–5, states:

> Neither the fact that a person has been accepted at or admitted to a hospital or institutional facility, nor the receiving of mental health or developmental disability treatment services, shall constitute a sufficient basis for a finding of incompetence or the denial of any right or benefit of whatever nature which he would have otherwise.

Pernell asserts the evaluating physician's testimony should be disregarded because in giving his opinion of Pernell's condition, he took into consideration her history of prior hospitalizations. This argument is based on a misreading of § 43–1–5. Under that statute, the fact of a prior hospitalization *in itself* is an insufficient basis "for a finding of incompetence or the denial of any right or benefit . . . which [Pernell] would have otherwise." Section 43–1–5 does not bar consideration of the history of hospitalizations, along with other evidence, in reaching a conclusion as to Pernell's current condition.

B. Serious Bodily Harm

Section 43–1–3(L) states:

> L. "likelihood of serious harm to oneself" means that it is more likely than not that in the near future the person will attempt to commit suicide or will cause serious bodily harm to himself by violent or other self-destructive means as evidenced by behavior causing, attempting or threatening the infliction of serious bodily harm to himself[.]

Section 43–1–3(M) states:

> M. "likelihood of serious harm to others" means that it is more likely than not that in the near future the person will inflict serious, unjustified bodily harm on another person or commit a criminal sexual offense as evidenced by behavior causing, attempting or threatening such harm, which behavior gives rise to a reasonable fear of such harm from said person[.]

Both definitions refer to serious bodily harm.

1. The trial court's finding is that Pernell "presents a likelihood of danger to herself or others." Pernell suggests that the finding is deficient because the words "serious harm" were not used in the finding. See § 43–1–11(C)(1). One meaning of "serious" is "attended with danger", as in the phrase "a serious injury". One meaning of "harm" is "injury". "Danger", in turn, is defined as "the state of being exposed to harm: liability to injury". Webster's Third New International Dictionary (1966). When it can reasonably be done, findings of the trial court are to be liberally construed in support of the trial court's judgment. *Universal C. I. T. Corp. v. Foundation Reserve Ins. Co.*, 79 N.M. 785, 450 P.2d 194 (1969); *H. T. Coker Const. Co. v. Whitfield Transp., Inc.*, 85 N.M. 802, 518 P.2d 782 (Ct.App.1974). Considering all of the trial court's findings, and the above definitions, a reasonable construction is that the trial court used the word "danger" to mean "serious harm". In this case, the finding was sufficient. We do not, however, commend findings which, by departing from the statutory language, invite problems as to whether the requisite findings were made.

2. Pernell asserts there was no evidence to show that she had the "likelihood of serious harm to oneself", as that phrase is defined in § 43–1–3(L). She contends there was no evidence that she would be harmed, or that any harm would be serious, or that

it would be in the near future, or that she would cause any harm, or that it would be by violent or self-destructive means.

This argument overlooks the portion of the definition which requires "behavior causing, attempting or threatening the infliction of serious bodily harm". The behavior does not have to have caused the requisite harm; behavior threatening the requisite harm is sufficient.

There was evidence that Pernell had not taken the stabilizing medicine for at least six weeks. There was also evidence that she had not taken this medicine for six months. Without further medication she would deteriorate. "[S]he may decompensate to the point that she does not physically take care of herself . . . in most cases this is what happens to schizophrenics. They become withdrawn so then you see passive neglect—not eating properly, so nutritionally their body decompensates." The behavior of Pernell was the fact of not taking her medication. The refusal to take her medication was self-destructive because the refusal would result in a nutritional deficiency. The nutritional deficiency was likely in the near future. This was substantial evidence supporting the finding of the likelihood of serious bodily harm to herself.

3. Pernell asserts there was no evidence that she had the "likelihood of serious harm to others" as that phrase is defined in § 43–1–3(M). As in the immediately preceding discussion, she argues that no behavior of hers had caused such harm to others. Again we point out that the threat of such harm is sufficient. Pernell also contends there was no evidence that she "will" inflict harm on others, or that such harm would be either serious or unjustified, or that such harm was either "likely" or "in the near future".

There was evidence that without her medication "anyone could set her [Pernell] off very quickly. She does have a temper, so she can be explosive." Prior to her hospitalization in 1977, she had thrown hot water at her mother. She resented her mother with whom she lived. The evaluating physician testified: "I'm saying that she could become violent when she's off her medication and her history shows that she has become violent when she's off her medication". There was evidence that when interviewed, Pernell was agitated, could not maintain a coherent conversation and was verbally abusive to her mother. The physician likened Pernell to a seven year old child "who would not get what he or she would want, could throw a temper tantrum and strike out at somebody and hurt them." "[S]he becomes very, very agitated with her mother and could easily strike out when she's upset." The foregoing was substantial evidence that, as a result of not taking her medication, she was a threat to inflict serious, unjustified harm on her mother and that this was likely conduct in the near future.

4. We have reviewed the evidence as to likelihood of serious harm to herself and likelihood of serious harm to others. Section 43–1–11(C)(1), however, is worded in the alternative. A finding of likelihood of serious harm, either to Pernell *or* to another, would have been a sufficient finding.

C. Least Drastic Means

Section 43–1–11(C)(3) requires a finding that "the proposed commitment is consistent with the treatment needs of the client and with the least drastic means principle." Section 43–1–3(D) states:

> D. "consistent with the latest [sic] drastic means principle" means that the habilitation or treatment and the conditions of habilitation or treatment for the client separately and in combination:
>
> (1) are no more harsh, hazardous or intrustive than necessary to achieve acceptable treatment objectives for such client;
>
> (2) involve no restrictions on physical movement nor requirement for residential care except as reasonably necessary for the administration of treatment or for the protection of such client or others from physical injury; and
>
> (3) are conducted at the suitable available facility closest to the client's place of residence[.]

Pernell asserts her commitment to the State Hospital was inconsistent with the least drastic means principle. "The court erred in not allowing hospitalization in Luna County or the surrounding areas and treatment thereafter on an outpatient basis." Thus, Pernell claims the finding required by § 43–1–11(C)(3) was improper because the evidence shows there was a "suitable available facility" for treating her closer to her home than the State Hospital. Section 43–1–3(D)(3).

Pernell had been stabilized on Prolixin during her hospitalization in 1977 and had obtained renewals of the prescription for this medication from a local physician. The medication, a hypodermic injection, had been administered by a public health nurse. Pernell no longer went to the local physician who renewed her prescription because the physician would no longer accept her "SSI". "[T]he basic problem was finding a doctor who was willing to take SSI".

Because Pernell had been off her medication for at least six weeks, she needed to be hospitalized in order to be restabilized. Restabilization required careful monitoring and analysis of blood levels every 24 hours to avoid a toxic condition. Because of possible changes in Pernell's condition, restabilization also involved redetermining the proper dosage. After Pernell was restabilized, she could be maintained on an out-patient basis.

The foregoing evidence was undisputed. Pernell's claim is that the restabilization could be done in Luna County. As the trial court pointed out, there was no evidence to support this. The evaluating physician testified: "Most of the physicians in this community choose not to deal with phenothiazines and we've had considerable difficulty in getting some of the physicians to even prescribe the medication. * * * She could not be stabilized in the community as it exists at present." "[M]ost general practitioners in this part of the country are not that familiar with the phenothiazines and do not want to deal with the phenothiazines because they are very tricky." "The problem is, monitoring it closely". This was substantial evidence that the State Hospital was the closest "suitable available facility." This evidence supports the finding that the commitment was consistent with the least drastic means principle.

Stay Pending Appeal

Pernell sought a stay, in the trial court, of the commitment order. She advanced two grounds for the proposed stay. One ground was that she was entitled to be released "until she does something wrong. If she does something wrong, then incarcerate her for what she does wrong, not for what is a possibility." This argument overlooks the fact that the statutory authority for a commitment required a likelihood of serious harm to Pernell or others, proved by clear and convincing evidence. The commitment order was not based on a possibility.

The second ground urged for a stay was based on the fact that the commitment was not to exceed thirty days. Pernell pointed out that the commitment time would expire before an appeal could be decided and that the appeal would be moot. We have held that the appeal was not moot.

After the trial court refused to stay the commitment order, Pernell sought a stay in this Court on the basis of Civ.App.Proc. Rule 5. Her motion asked for a stay until there could be a hearing "on its merits", pursuant to § 43–1–10(D), in either Luna, Grant or Dona Ana Counties. We denied the stay. There had already been a hearing, in Luna County, on the merits of a commitment, and a hearing by the trial court on the request for a stay. Section 43–1–10(D) was not applicable; it pertains to a hearing on reasonable grounds for detention after an involuntary, emergency commitment. In this case, the hearing occurred prior to any detention.

On appeal, Pernell argues that denial of the right to bail pending appeal denied her due process. Thus, she proceeds on the basis that a stay of the commitment order should be considered in terms of the criminal bail process rather than in terms of stay

of a civil case. We agree that the provisions for stay of a civil judgment, pending an appeal, are not particularly helpful. See Rule of Civ.Proc. 62(d). However, we decline to specifically adopt the requirements for criminal bail as the basis for considering a stay of the commitment order. See N.M. Const., art. II, § 13; Rules of Crim.Proc. 22, 23, 24. "The civil commitment process, though technically a civil proceeding, has elements of both criminal and civil proceedings, a hybrid procedure, with some of the rights guaranteed to criminal defendants applicable to defendants in commitment hearings." *Matter of Valdez, supra.*

Likening a stay of a commitment order to bail in a criminal case, we assume that Pernell had a "right" to a stay; however, that "right" is not absolute. See *Tijerina v. Baker*, 78 N.M. 770, 438 P.2d 514 (1968).

In a criminal case, prior to conviction, the trial court may consider the nature and circumstances of the offense charged in setting bail. Rule of Crim.Proc. 22(b). After conviction, the fact of conviction and the length of the sentence may be considered. Rule of Crim.Proc. 23(c). Similarly, in considering the question of a release during commitment proceedings, the trial court may consider the circumstances alleged, and after ordering a commitment may consider the circumstances as well as the length of the commitment ordered. The trial court will, of course, consider whether the commitment was to residential care or to nonresidential treatment. Section 43–1–11(D).

Appellate review is on the basis of whether the trial court's order in connection with a stay was an abuse of discretion. See *State v. Lucero*, 81 N.M. 578, 469 P.2d 727 (Ct.App.1970).

Because of lack of medication, Pernell's condition was deteriorating. Hospitalization for restabilization was required because Pernell presented a likelihood of serious harm to herself and others. The granting of a stay would have delayed the restabilization. The evidence shows no reasonable alternative to hospitalization and thus no reasonable alternative to the likelihood of serious harm if hospitalization did not occur. The trial court did not abuse its discretion in refusing to stay the commitment.

The order for involuntary commitment is affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

590 P.2d 647

John DOE and Mary Doe as parents and next friend of Jason Doe, a minor, Plaintiffs-Appellants,

v.

J. R. "Popeye" HENDRICKS, Individually, and as Chief of Police of the City of Clayton Police Department and the City of Clayton, New Mexico, an Incorporated Municipality, Defendants-Appellees.

No. 3391.

Court of Appeals of New Mexico.

Jan. 18, 1979.

Peter Mallery, Stephen Durkovich, Anne Kass, Albuquerque, for plaintiffs-appellants.

Paul L. Butt, Albuquerque, J. W. Anderson, Tucumcari, Alvin F. Jones, Clayton, for defendants-appellees.

OPINION

SUTIN, Judge.

This case arises from a summary judgment granted to defendants, the City of Clayton, New Mexico, its Chief of Police and its Police Department. The district court found no genuine issue of material fact as to the duty owed by the Clayton police to plaintiff, a small boy who suffered a sexual assault. We affirm.

On returning home from school at 3:40 p. m. in May of 1975, the victim, aged 12, was accosted and dragged into an abandoned house by an adult male. Two neighbor children in their mid-teens saw the abduction and ran to tell their brother and sister who then went next door to use the neighbors' phone and called the police. The girl calling the police told the officer that a man had taken a small boy into an empty house across the alley and to come quickly. Because the caller did not know the address of the abandoned house she gave the address of her mother's house which was across the alley. The policeman receiving the call told her that someone would come to the house as soon as possible. The dispatcher's report deviates from the above facts. It erroneously identified the caller, the place of the incident's occurrence, and the identity of the victim. Nonetheless, the report communicated that a little boy was going to be beat up.

The dispatcher immediately took the report received from the girl into the office of Hendricks, Chief of Police, the only officer available to respond to the call. In delivering his report, the dispatcher interrupted the officer's conference with an out-of-state sheriff who was investigating a grain theft. The Chief of Police continued his discussion with the visiting sheriff who left at 4:00 p. m.

Because the police had not responded to the call, two of the boys from the family who had witnessed and reported the incident went to the police station. At 3:57 p. m. Officer Larry Vialpando arrived and met the boys coming out of the station. The boys explained the situation to Vialpando and he immediately drove to the abandoned house arriving there at 4:02 p. m. The victim and his assailant were discovered nude in the house. Seventeen minutes had passed between the time of the telephone call to the dispatcher and Vialpando's arrival at the scene of the assault. Plaintiffs sued under the "Peace Officers Liability Act", [§ 39–8–1, et seq. (2d Repl. Vol. 6, 1975 Supp.)] claiming that the City of Clayton waived sovereign immunity when it purchased liability insurance. The City's answer plead the affirmative defenses of sovereign immunity and lack of insurance, but the defendants presented no evidence on the issue. Nor did the City challenge the issue of waiver in the trial court or on appeal. Therefore, we deem the issue abandoned and hold that the City elected to waive the defense of sovereign immunity. *Jackson v. Hartley,* 90 N.M. 428, 564 P.2d 992 (1977).

The "Peace Officers Liability Act" adopted in 1973 was repealed in 1976. Section 27, ch. 58, Laws 1976. It was in effect on May 15, 1975, the date on which the assault occurred. The purpose of this Act was "to protect peace officers from personal liability arising out of certain acts committed during the performance of their activities, in the conduct of their office, and within the scope of their duties . . . ." Section 39–8–2, *supra.* The peace officer is absolved of liability while in the performance of any *public duty* which a peace officer is authorized by law to perform. Section 39–8–4, *supra.* This principle is established law and the "Peace Officers Liability Act" protects a police officer from liability while in the performance of a public duty.

Plaintiffs claim that defendants owed Jason a *special duty beyond that owed to the public in general,* the breach of which gave rise to a cause of action for damages; that Hendricks' failure to respond in time was the proximate cause of Jason's injuries. We disagree.

This is a matter of first impression.

The "special duty" concept of liability acceptable to the courts is stated in 2 Cooley On Torts (4th Ed. 1932), § 300, pp. 385–86. In pertinent part, it reads:

> The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a *duty to the public, a failure to perform it,* or an inadequate or erroneous performance, *must be a public, not an individual injury,* and must be redressed, if at all, in some form of public prosecution. *On the other hand, if the duty is a duty to the individual, then a neglect to*

perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. "The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, *and that he has suffered a special and peculiar injury by reason of its nonperformance.*" [Emphasis added.]

Trautman v. City of Stamford, 32 Conn. Sup. 258, 350 A.2d 782 (1975); *Massengill v. Yuma County,* 104 Ariz. 518, 456 P.2d 376 (1969); 41 A.L.R.3d 692 (1972); *Simpson's Food Fair, Inc. v. City of Evansville,* 149 Ind.App. 387, 272 N.E.2d 871 (1971), 46 A.L.R.3d 1077 (1972); *Walkowski v. Macomb Cty. Sheriff,* 64 Mich.App. 460, 236 N.W.2d 516 (1975); *Gerneth v. City of Detroit,* 465 F.2d 784 (6th Cir. 1972).

Absent Cooley, the "special duty" concept of liability has been adopted in other states. *Florida First National Bank v. City of Jacksonville,* 310 So.2d 19 (Fla.App.1975), cert. denied, 339 So.2d 632 (Fla.1976); *Schuster v. City of New York,* 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958); *Riss v. City of New York,* 22 N.Y.2d 579, 293 N.Y.S.2d 897, 240 N.E.2d 860 (1968); *Walters v. Hampton,* 14 Wash.App. 548, 543 P.2d 648 (1975); *Gardner v. Village of Chicago Ridge,* 71 Ill.App.2d 373, 219 N.E.2d 147 (1966); *Hartzler v. City of San Jose,* 46 Cal.App.3d 6, 120 Cal.Rptr. 5 (1975). Annot., *Liability Of Municipality Or Other Governmental Unit For Failure To Provide Police Protection,* 46 A.L.R.3d 1084 (1972); Annot., *Personal Liability Of Policeman, Etc.,* 41 A.L.R.3d 700 (1972); 57 Am.Jur.2d Municipal, Etc. Tort Liability, § 251 (1971).

There is a shadowy line separating the duties owed to the general public from those owed to individuals. The determination of this duty is a question of law for the court to decide. *First Nat. Bk., Albuquerque v. Nor-Am. Agr. Prod., Inc.,* 88 N.M. 74, 537 P.2d 682 (Ct.App.1975).

A "duty" is "[t]hat which is required by one's station or occupation." *City of Clovis v. Archie,* 60 N.M. 239, 241, 290 P.2d 1075, 1076 (1955). The duty of a police officer is fixed by law; such duty is a "public duty" owed to the public generally by the municipality.

Section 14–12–2(A)(3)(d) states:

The police officer of a municipality shall:

* * * * * *

(d) apprehend any person *in the act of violating the laws of the state* or the ordinances of the municipality and bring him before competent authority for examination and trial. [Emphasis added.]

Inasmuch as this statute is enacted for the benefit of the public and not the individual, no liability may be imposed for failure to carry out the statutory function. *Gerneth, supra.* "As a general rule, no civil liability arises for the failure of a city to supply general police protection." *Walters, supra,* (543 P.2d at 652); *Simpson's Food Fair, Inc., supra.* As stated in *Riss, supra*:

When one considers the greatly increased amount of crime committed throughout the cities . . . it is easy to see the consequences of fixing municipal liability upon a showing of probable need for and request for protection. To be sure these are grave problems at the present time . . . to which the answers are neither simple, known or presently within reasonable controls. To foist a presumed cure for these problems by judicial innovation of a new kind of liability in tort would be foolhardy indeed and an assumption of judicial wisdom and power not possessed by the courts. [293 N.Y.S.2d at 898, 240 N.E.2d at 861.]

"Governmental units cannot be held 'absolutely liable' for any and all acts or omissions which might cause damage or injury to private citizens." *Simpson's Food Fair, Inc., supra* [272 N.E.2d at 875]. "The extent of potential liability to which such a doctrine could lead is staggering." *Massengill, supra* [456 P.2d at 381.]

This is the rule where a police officer failed to stop drag racing, *Trautman, supra*; failed to arrest persons violating traf-

fic laws and driving in an unsafe manner, *Massengill, supra*; failed to halt a wave of criminal activities that forced the closing of a business, *Simpson's Food Fair, Inc., supra*; failed to protect a woman from a lover who threatened her after she called the police for help, *Riss, supra*; failed to protect a person from one with known proclivities for violence with firearms, *Walters, supra*; and failed to protect a wife from an estranged husband 45 minutes after her call to police, *Hartzler, supra.*

The public duty narrows into a special duty when a police officer owes a duty to the person injured. To create such a duty there must be privity, a direct relationship or contact between the victim and the police. Even though there is initially no liability on the part of the City for its acts or omissions, once a police officer under the stated circumstances voluntarily assumes a duty toward the injured party, then the City is subject to the same standard of care as a private person. *Hartzler, supra. Bloom v. City of New York,* 78 Misc.2d 1077, 357 N.Y.S.2d 979 (1974); *McGeorge v. City of Phoenix,* 117 Ariz. 272, 572 P.2d 100 (1977) in which examples of a special duty are set forth in two categories:

(1) *Where there has been a specific promise or representation by police to a victim in a situation which creates justifiable reliance on the part of the victim.* In this category, a special duty arises where a police officer promised the informant police protection, *Schuster, supra,* and where the court ordered police protection, *Baker v. City of New York,* 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966).

(2) *Where a police officer affirmatively causes damage to a victim.* In this category, a specific duty arises where the police brought the victim to a place to identify three assailants and was attacked, *Gardner, supra*; where a sewer inspector directed the victim to climb into an open trench, *Smullen v. City of New York,* 28 N.Y.2d 66, 320 N.Y.S.2d 19, 268 N.E.2d 763 (1971); and where a fire inspector ordered a salvage operator to fill the cargo compartment of a damaged ship with carbon dioxide, *In re M/T Alva Cape,* 405 F.2d 962 (2d Cir. 1969).

In each category, there was a direct contact and special relationship between the police officer or public official and the victim.

Plaintiffs rely on *Florida First National Bank, supra; Veach v. City of Phoenix,* 102 Ariz. 195, 427 P.2d 335 (1967) (city assuming responsibility for fire protection), and *Isereau v. Stone,* 207 Misc. 941, 140 N.Y.S.2d 585 (1955). In each situation, by direct contact with the victim, a special duty was created.

These are the rules by which the instant case must be decided. There was no direct contact between Hendricks and the boy that created a special duty. Hendricks did not promise the boy police protection in a situation in which the boy could justifiably rely on the promise. To constitute a "special duty" a "special relationship" must exist between the victim and the police officer—a "special relationship" arising out of some prior circumstances existing between the victim and the officer that imposed a duty on the police officer to protect the victim; a duty that extends beyond the ordinary public duty to protect the victims of crimes committed. No "special relationship" existed.

We do not hesitate to say that Hendricks owed the boy a public duty of protection, one that does not appear to have been performed with alacrity. Under the circumstances, the tragic event that occurred does not allow the recovery of damages. If and when the people of New Mexico desire a change in the public vs. special duty concept, they must seek relief from the legislature, not the courts. The legislature, the representatives of the people, fix the public policy of the State. The duty of the courts is to express that public policy. We have done so in this case.

No genuine issue of material facts is shown by the record and the summary judgment is affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

590 P.2d 652

Ernestine LANE, Plaintiff-Appellant,

v.

LEVI STRAUSS & CO., Defendant-Appellee.

No. 3591.

Court of Appeals of New Mexico.

Jan. 23, 1979.

Tapia & Campos, Albuquerque, for plaintiff-appellant.

Stephen M. Williams, Shaffer, Butt, Thornton & Baehr, P. C., Albuquerque, for defendant-appellee.

OPINION

SUTIN, Judge.

On July 16, 1976, plaintiff sustained an accidental injury to her back arising out of and in the course of her employment as a seamstress. The injury was a herniated and bulging disc. Plaintiff was advised to undergo surgery, but since the results of the operation could not be guaranteed, plaintiff reasonably refused the operation. The court found plaintiff *temporarily* totally disabled and refused her a lump-sum award. The lump-sum award was denied because plaintiff failed to show the existence of exceptional circumstances, that it was in her interest for rehabilitation or that it was generally in her best interest.

The court concluded, however, as a matter of fact, that plaintiff was entitled to compensation "for temporary total disability *for an indefinite period of time,* not to exceed the maximum benefits provided for under the terms and conditions of the Workmen's Compensation Act." [Emphasis added.]

Judgment was entered that plaintiff be awarded judgment for *temporary* total disability, but that she be paid compensation benefits for the period beginning July 16, "*and continuing for an indefinite time,* not to exceed the maximum period specified in the Workmen's Compensation Act." [Emphasis added.]

On appeal, plaintiff claims the facts show she suffered permanent total disability and was entitled to a lump-sum payment. In addition plaintiff challenges the amount of attorney fees awarded in the trial court. We affirm the judgment.

This case was ably presented to the district court. Memorandum briefs and good oral arguments preceded the court's decision. The facts of this case are difficult; it required the wisdom of King Solomon to solve the perplexing problems confronting plaintiff. On appeal, plaintiff urgently challenges the wisdom of the district judge.

Section 52–1–30(B), N.M.S.A.1978 (Vol. 8, ch. 52) reads:

> If, upon petition of any party in interest, the court, after hearing, determines in cases of *total permanent disability that it is in the interest of the rehabilitation of the injured workman . . . that it is for the best interests of the persons* entitled to compensation . . . the liability of the employer . . . may be discharged by the payment of a lump sum . . . . [Emphasis added.]

Under this statute, three factors determine an award of a lump-sum:

(1) total permanent disability;

(2) rehabilitation of the workman; and

(3) the best interest of the workman.

The court found plaintiff totally disabled. The primary issue is whether plaintiff's disability was, as a matter of law, permanent or temporary.

There is no dispute between the parties that plaintiff suffered permanent total disability. In final argument in the court below, defendant's attorney suggested a finding of permanent total disability. The court said:

. . . It will be the ruling of the court that the claimant be awarded temporary total disability *to continue indefinitely.* [Emphasis added.]

"To continue indefinitely" was carried over into the conclusions of the court and the judgment rendered. Perhaps, the court used the words "temporary total disability" to avoid payment of a lump-sum award. On the other hand, the trial court denied the lump-sum payment for reasons that fall within § 52–1–30(B), *supra,* which requires a determination that the case be one of total permanent disability.

Plaintiff could not be compelled to undergo major surgery. Under this circumstance her disability was of indefinite duration or of a permanent nature. *Delafield v. Maples,* 2 So.2d 704 (La.App.1941). We hold that the court determined that plaintiff suffered permanent total disability.

Permanent and temporary disability are not defined by either the Workman's Compensation Act or any judicial opinion in New Mexico. The time is present when these terms should be defined as guidelines. Other jurisdictions have defined "permanent disability" in several ways.

(1) Disability is permanent when a workman is disabled and major surgery is refused. *Delafield, supra.*

(2) Disability is permanent when the disabling condition proximately caused by an injury is no longer remedial and its character has expectedly an unchangeable condition. *Shea v. Department of Labor and Industries,* 12 Wash.App. 410, 529 P.2d 1131 (1974).

(3) Disability is permanent when further change for better or worse is not reasonably anticipated under usual medical standards. Either no further medical treatment is possible or the success of that which is suggested is so problematical as to warrant refusal to undergo it. The need for further medical treatment is not incompatible with the status of permanent disability. *Subsequent Injuries Fund v. Industrial Acc. Com.,* 226 Cal.App.2d 136, 37 Cal.Rptr. 844 (1964).

(4) Disability is permanent when substantial improvement has not occurred for a long period of time, such as two years. *Overland Construction Co. v. Industrial Com'n,* 37 Ill.2d 525, 229 N.E.2d 500 (1967).

(5) Disability is permanent when it appears that the disability will, with reasonable probability, continue for an indefinite period of time without any present indication of termination. *Logsdon v. Industrial Commission,* 143 Ohio St. 508, 57 N.E.2d 75 (1944).

(6) Disability is permanent when the condition becomes static and disability continues. The workman has then reached a relatively stable status so that nothing further in the way of medical treatment is indicated to improve that condition. *Home Insurance Company v. Industrial Commission,* 23 Ariz.App. 90, 530 P.2d 1123 (1975).

■ In contrast, "temporary disability" is that which lasts for a limited time only while the workman is undergoing treatment. This classification anticipates that eventually there will be either complete recovery or an impaired bodily condition which is static. *Hiatt v. Department of Labor and Industries,* 48 Wash.2d 843, 297 P.2d 244 (1956). Temporary disability ceases when the injured workman's physical condition becomes static or stationary. *Home Insurance Company, supra.*

■ Almost 2½ years have passed since the occurrence of plaintiff's back injury. Her medical condition is static subject to major surgery. It is obvious that plaintiff is totally and permanently disabled as a matter of law.

The second and third issues are whether a lump-sum award was in the interest of the rehabilitation of the plaintiff or in her general best interests. The decision in both instances rests with the trial court's discretion.

■ Section 52–1–30(B), quoted earlier in this opinion, provides for lump-sum awards when such an award would aid in claimant's rehabilitation. Before the amendment the statute in effect, § 52–1–50, was entitled Vocational Rehabilitation Services. The

purpose of this statute was to allow a workman to retrain himself for suitable employment to prevent the claimant from being on the welfare rolls. See *Ruiz v. City of Albuquerque,* 91 N.M. 526, 577 P.2d 424 (Ct.App. 1978). With knowledge of the phrase Vocational Rehabilitation Services, the legislature omitted the word "vocational." By this omission, the legislature intended that the word "rehabilitation" should be given its ordinary meaning. "Rehabilitation is the restoration of an individual to his greatest potential—physically, mentally, socially and vocationally." *Jones v. Grinnell Corp.,* 117 R.I. 44, 362 A.2d 139, 143 (1976). "[T]he word 'rehabilitation' is defined in Webster's New International Dictionary (2d Ed.), in the sense used in the statute, as the restoration of one's health and efficiency." *Le Clair v. Textron Mills,* 77 R.I. 318, 75 A.2d 309, 311 (1950).

We hold that the trial court did not abuse its discretion in denying plaintiff a lump-sum award either for purposes of rehabilitation or on a claim that it would be in her best interest. In *Codling v. Aztec Well Servicing Co.,* 89 N.M. 213, 549 P.2d 628 (Ct.App.1976) we held that each case stands or falls on its own merits. Cases are collected in which lump-sum awards were granted and denied. Plaintiff relies on *Prigosin v. Industrial Commission* cited in *Codling* as an example of an instance in which a lump-sum award was granted. *Prigosin* was later reversed, (113 Ariz. 87, 546 P.2d 823 (1976)), and the reversal subsequently followed. *Scowden v. Industrial Commission,* 115 Ariz. 81, 563 P.2d 336 (1977); *Jones v. Industrial Com'n of Arizona,* 114 Ariz. 606, 562 P.2d 1104 (1977).

Plaintiff detailed the debts, loans, monthly payments, etc., which leave her in desperate financial straits. It is apparent that a lump-sum award would benefit plaintiff at this moment, but such an award could be quickly exhausted and plaintiff left to the welfare rolls for relief. Plaintiff does not have advisors to carefully weigh the benefit of a lump-sum award against the certainty of monthly payments. This was the district court's duty. See, *Jones, supra.* "That a claimant wants a commutation has no relevancy whatsoever as to whether it is in his best interest. While workmen's compensation benefits are to a limited extent to take the place of a workman's earnings (citation omitted), the purpose of the workmen's compensation law is to prevent one in petitioner's position and his dependents from becoming public charges during the period of disability." *Prigosin, supra,* 546 P.2d at 825. See, *Arther v. Western Company of North America,* 88 N.M. 157, 538 P.2d 799 (Ct.App.1975). We cannot hold as a matter of law that a lump-sum award is in the best interest of the plaintiff.

Another factor for consideration is plaintiff's ultimate decision on the matter of major surgery. In her deposition she testified that she would have the operation if the doctors advised her it would be of help. If surgery is undertaken and plaintiff's total and permanent disability is substantially reduced to partial disability or plaintiff completely recovers, a lump-sum award would thwart the purpose of the Workmen's Compensation Act. Plaintiff will have received full payment for 600 weeks and yet been able to perform work during a part of this period of time. Workmen's compensation awards are not final judgments in that either the employer or employee can seek modification of the award at six month intervals. Section 52–1–56; *Martinez v. Earth Resources Co.,* 90 N.M. 590, 566 P.2d 838 (Ct.App.1977), Sutin, J., specially concurring; *Johnson v. C & H Construction Company,* 78 N.M. 423, 432 P.2d 267 (Ct.App.1967).

We hold that the trial court properly denied plaintiff a lump-sum award.

Finally, plaintiff claims that an award of an attorney fee of $4,250.00, 10% of plaintiff's total recovery, was not a reasonable attorney fee. Plaintiff's attorney cited a case in which $4,250.00 was held reasonable and the court was satisfied. A "reasonable attorney fee" has been a continuous quarrel, the amount changing from district judge to district judge. A dissatis-

fied workman or employer must sell the value of an attorney's services to the district judge, and, except for a rare result, the determination should rest in peace. The proper rule or standard to be applied in reviewing awards for attorney fees was stated in *Elsea v. Broome Furniture Co.*, 47 N.M. 356, 143 P.2d 572 (1943). It was recently quoted at length in *Michelson v. Michelson*, 89 N.M. 282, 551 P.2d 638 (1976). Regardless of the various comments made and results reached in other cases, the *Elsea* rule is controlling. It need not be repeated again. The award made of attorney fees is affirmed.

Affirmed.

IT IS SO ORDERED.

HERNANDEZ, J., concurs in result only.

LOPEZ, J., concurs.

590 P.2d 656

Jane Jessie SHOPE, Personal Representative of the Estate of George Dewey Shope, Deceased, Plaintiff-Appellant,

v.

DON COE CONSTRUCTION COMPANY, a corporation, Defendant-Appellee.

No. 3457.

Court of Appeals of New Mexico.

Jan. 25, 1979.

Morris Stagner, Keith R. Oas, Stagner, Higginbotham & Oas, P. A., Roswell, for plaintiff-appellant.

Wm. F. Brainerd, Roswell, for defendant-appellee.

OPINION

SUTIN, Judge.

Plaintiff sued defendant for damages for wrongful death of decedent. His death occurred while decedent was employed by defendant and acting within the scope of his employment. Defendant filed a motion to dismiss plaintiff's complaint because plaintiff's common-law action was barred by reason of the Workmen's Compensation Act. The motion was granted. Plaintiff's complaint was dismissed with prejudice and plaintiff appeals. We affirm.

Decedent was employed by defendant on Sunday, August 14, 1977 and died as a result of an electrocution by accident that occurred on August 25, 1977. Defendant's compensation insurer sent plaintiff checks for workmen's compensation benefits but the checks were not cashed, and on September 12, 1977, plaintiff filed a claim for lump-sum payment of workmen's compensation. We assume that plaintiff filed the workmen's compensation claim because she believed that defendant had insurance coverage and had filed a certificate of insurance previous to or within 30 days after decedent's employment began as provided in § 52–1–4, N.M.S.A.1978. Evidently, a certificate of insurance had been issued to defendant on or prior to August 25, 1977, the date of decedent's death. Otherwise, the compensation insurer would not have sent plaintiff the compensation checks.

Decedent's employment began August 14, 1977. The time for filing the certificate of insurance was September 13, 1977. Defendant filed the certificate of insurance on September 28, 1977, 15 days later. On October 17, 1977, plaintiff's claim was dismissed because it was prematurely filed.

Defendant's compensation insurer continued to send plaintiff checks for compensation benefits to date, but none of them have been cashed.

When plaintiff learned that the certificate of insurance was late in filing, she waited 30 days after her workmen's compensation claim was dismissed and on November 16, 1977 she filed this common-law action. She claims now that since defendant did not comply with the mandatory filing requirements of § 52–1–4, decedent was not conclusively presumed to have accepted the provisions of the Workmen's Compensation Act as provided in § 52–1–6(C); that plaintiff has the right to a common-law action for damages.

We must keep in mind that defendant actually had compensation insurance within the mandatory 30 day period, but was late in filing the certificate by 15 days.

Section 52–1–4 provides that the employer "shall file" a certificate of insurance previous to or within 30 days after a workman's employment begins. This is mandatory language. Why and for what purpose?

Section 52–1–4 is a long and complicated section. It concludes with the statement that the certificate of insurance filed, as provided for in this section, shall state that the insurer shall be directly and primarily liable to the workman. The purpose, then, of the mandatory filing requirement is to notify a workman that the employer has complied with the insurance requirements of the Act; that the employer is subject to the provisions thereof and that the workman is conclusively presumed to have accepted its provisions.

If this purpose is effected before a workman files a common-law action, we hold that the mandatory filing requirement is met because late filing accomplishes the same purpose as mandatory filing requirements. When the same purpose is accomplished we call it "substantial compliance." Therefore, substantial compliance is actual compliance.

We stated this rule in *Montano v. Williams*, 89 N.M. 86, 547 P.2d 569 (Ct.App.), aff'd, 89 N.M. 252, 550 P.2d 264 (1976). Plaintiff was allowed to file a common-law action for damages. The employer had paid funeral benefits to the mortuary on behalf of a decedent employee and the employer testified that he had workmen's compensation insurance. But the employer failed to produce evidence of insurance coverage. In the course of the opinion, we held that a technical delay in filing a workmen's compensation policy after an employee suffered an injury, *but prior to the time the employee filed his common-law action*, was substantial compliance with the insurance requirements of the Workmen's Compensation Act. When substantial compliance exists, the very purpose of the Act has been accomplished. *Quintana v. Nolan Bros., Inc.*, 80 N.M. 589, 458 P.2d 841 (Ct.App. 1969); *Mirabal v. International Minerals & Chemical Corp.*, 77 N.M. 576, 425 P.2d 740 (1967).

Plaintiff relies on *Addison v. Tessier*, 62 N.M. 120, 305 P.2d 1067 (1957) in which case an employee was allowed to pursue a common-law action against his employer. Naturally so, because the employer failed to obtain workmen's compensation insurance and did not relieve himself of this requirement.

Plaintiff argues strongly that a defendant "should not be allowed to take advantage of the provisions of the Act where it failed to comply with the mandatory requirement of the Act to file a policy of insurance." Common sense concludes, however, that where an employer actually had insurance coverage and complied with insurance requirements on a continuing basis annually, but simply overlooked filing a certificate of insurance in time, plaintiff should not be allowed to switch horses in the middle of the stream and take advantage of defendant by putting it to the expense of defending a common-law action and paying retribution. Workmen's compensation benefits extend for a period of 600 weeks, approximately eleven and one-half years, to provide decedent's family with financial security. This benefit satisfies the socio-economic standards of the day. Defendant did not take advantage of the provisions of the Act.

A line has been drawn between the right of a workman to a common-law action

against an employer, and the right of the employer to subject the workman to the Workmen's Compensation Act. Where the employer has actually failed to obtain insurance coverage and no insurance coverage exists at the time the common-law action is filed, the workman's right to the common-law action is conclusive. Where insurance coverage exists in fact, but notice thereof is not given the workman due to delay in filing the evidence of insurance coverage, the workman is subject to the Workmen's Compensation Act. If a common-law action was not filed prior to filing of insurance coverage, the workman does not escape the provisions of the Act. If the legislature had intended late filing by the employer to remove the workman from the Act, it would have stated this fact in § 52–1–4. Inasmuch as compensation insurance was actually obtained, an employer is protected by the Workmen's Compensation Act. Mere technicalities of this nature play no part in destroying the purpose and the fair administration of the Act.

We hold that plaintiff is governed by the provisions of the Workmen's Compensation Act.

Defendant also claims that § 52–1–6(C) is unconstitutional in that plaintiff was denied the equal protection of the law in the light of § 52–1–7.

Section 52–1–6(C) reads:

> Every employee shall be conclusively presumed to have accepted the provisions of the Workmen's Compensation Act, if his employer is subject to the provisions thereof and has complied with its requirements, including insurance.

Section 52–1–7 provides in pertinent part:

> A. Notwithstanding any provisions to the contrary in the Workmen's Compensation Act, *an employee* as defined in Subsection F [of this section] *of a professional or business corporation* . . . may affirmatively elect not to accept the provisions of the Workmen's Compensation Act.
>
> * * * * * *
>
> F. For purposes of this section:
>
> (1) executive officer shall mean the chairman of the board, president, vice president, secretary or treasurer.
>
> (2) employee means executive officer owning ten per cent or more of the outstanding stock of a professional or business corporation. [Emphasis added.]

Plaintiff claims she was denied the equal protection of the law because decedent could not elect not to be bound by the Act, whereas the executive class of workmen can; that to permit the executive class of workmen election of coverage and to deny the rest of the workmen such election is discriminatory and invalid.

We note that in 1957, the "conclusively presumed" section granted a workman the right to elect not to become subject to the provisions of the Act by giving notice in writing to his employer and to the clerk of the district court. Section 59–10–4(E), N.M.S.A.1953. This portion of the section was deleted in 1973. N.M.Laws 1973, Ch. 240, § 2.

■ Plaintiff is not in a position to challenge the constitutionality of § 52–1–6(C). Decedent did not affirmatively elect not to accept the provisions of the Act, nor was such election denied. Decedent accepted the provisions of the Workmen's Compensation Act and plaintiff is bound thereby.

However §§ 52–1–6(C) and 52–1–7 were adopted in the "New Mexico Occupational Disease Disablement Law." *See* §§ 52–3–5 and 52–3–6, N.M.S.A.1978. This constitutional question is a matter of public interest and should be decided now rather than put workmen and employers to the test by way of harassment, expense and delay of litigation.

Executive employers of a business or professional corporation are classified differently than ordinary workmen. Of course, no definite rule can be laid down as to when a classification for purposes of legislation is justified. The special circumstances in each case govern the decision of this Court.

■ In arriving at this decision, we do not inquire into the wisdom, the policy or the justness of the legislative act that cre-

ates different classifications. The legislature is accorded a wide field of choice. The fact that the legislature has adopted the classification is entitled to great weight. If the basis adopted for the classification seems plausibly reasonable to the legislature, we will not disturb the groupings merely because the basis therefore may appear to us unreasonable and unjust.

The only pertinent question regarding classification is this:

> Is it so wholly devoid of any semblance of reason to support it, as to amount to mere caprice, depending on legislative fiat alone for support?

If any doubt exists, it is our duty to resolve all doubts as to its constitutionality in favor of the validity of the law. We look to see whether there is a substantial distinction between those to whom it does apply and those to whom it does not apply. If the difference in classification is based upon a substantial distinction, the statute is constitutional. Equal protection does not prohibit different classifications for legislative purposes. Each classification is so framed as to embrace equally all who may be in like circumstances and situations. Otherwise the difference in classification is discriminatory and invalid.

All of the foregoing are the rules established in *State v. Pate*, 47 N.M. 182, 138 P.2d 1006 (1943) and *Gruschus v. Bureau of Revenue*, 74 N.M. 775, 399 P.2d 105 (1965).

We say without hesitation that a substantial distinction exists between an executive officer of a business or professional corporation and an ordinary workman. Each of these classifications are not "wholly devoid of any semblance of reason to support it, as to amount to mere caprice."

We hold that the denial of decedent the right to election coverage is a constitutional classification and § 52–1–6(C) is valid.

Affirmed.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

590 P.2d 1168

Manuel ORTIZ, Plaintiff-Appellee,

v.

David L. LANE, Defendant-Appellant.

No. 3303.

Court of Appeals of New Mexico.

Jan. 16, 1979.

Rehearing Denied Feb. 1, 1979.

David W. King, Threet, Threet, Glass & King, Albuquerque, for defendant-appellant.

Christopher Lucero, Jr., Albuquerque, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Ortiz sued Lane for a return of property held under a real estate contract in which Lane held the legal title. Judgment was entered that Lane execute a quitclaim deed conveying the property to Ortiz based upon

the doctrine of equitable estoppel. We reverse and hold that Ortiz is entitled to a return of the property but not to a quitclaim deed from Lane.

The trial court made the following findings of fact and conclusions of law:

Findings of Fact

1. That on or about July 5, 1974, the plaintiff purchased the property described in the First Amended Complaint of John C. Brooks and Roberta M. Brooks.

2. That U. S. Life Title Company was the title and closing agent and the Albuquerque National Bank, East Central Office, was the escrow agent in the transaction and that Glenn Justice Mortgage Company was the mortgage company to whom the first mortgage was to be paid.

3. That all parties necessary to the transaction were notified and all payments necessary to the transfer of title were made.

4. That on June 11, 1974, the defendant, David Lane, had said property assigned to him by prior owners *for a real estate commission owed to David Lane for the sale of said property.*

5. That on November 5, 1974, the defendant, David Lane, sent a notice of default to John C. Brooks and Roberta Brooks for One Hundred Eighty-two Dollars ($182.00) *due as commission for the sale of said property.*

6. That the plaintiff has heretofore deposited with the Court the sum of One Hundred Eighty-two Dollars ($182.00), *which is all the money due defendant, David Lane, as a real estate commission.*

7. That on December 6, 1974, the defendant, David Lane, recorded a Special Warranty Deed from John C. Brooks and Roberta Brooks to Henry D. Baca and Martha A. Baca in an effort to effectuate a prior recorded deed from Henry D. Baca and Martha A. Baca to David Lane which was recorded on June 12, 1974.

8. That at the time the defendant David Lane recorded the Special Warranty Deed of December 6, 1974, he had actual and constructive knowledge that plaintiff had purchased the property in question.

9. That the defendant, David Lane, did not send notice of default letters to the plaintiff pursuant to the terms of a certain Real Estate Contract under which he claimed an interest in the property herein.

10. That the plaintiff made mortgage payments on the first mortgage to Glenn Justice Mortgage Company from July 1974 through August 1975, even though during most of said time the defendant, David Lane, was in possession of and receiving rental income from said property.

Conclusions of Law

1. That this Court has jurisdiction over the parties and subject matter of this action.

2. *That the defendant, David Lane, is equitably estopped from asserting title to or interest in the property* described as follows:

> Lot numbered Twenty (20) in Block numbered Sixteen (16) of Plat of Blocks 13 to 25 inclusive of Altamont, an Addition to the City of Albuquerque, New Mexico, as the same is shown and designated on Plat of said Addition, filed in the Office of the County Clerk of Bernalillo County, New Mexico, on February 9th, 1953.

as he had actual and constructive knowledge that the plaintiff had purchased said property prior to recordation of the Special Warranty Deed on December 6, 1974, and any rights, title or interest which defendant, David Lane, claims in said property constitutes a cloud on plaintiffs title *and the defendant shall execute a Quitclaim Deed transferring said property to the plaintiff.* [Emphasis added.]

On January 10, 1974, Baca sold Brooks the property above described under a real estate contract, subject to a mortgage to Glenn Justice Mortgage Co., Inc. Brooks was required to make payments of $162.00 per month on the mortgage and $20.00 per

month on the real estate contract due Baca, all payable to Albuquerque National Bank as escrow agent.

Pursuant to the contract, Brooks executed a Special Warranty Deed to Baca under the same date. Lane was the real estate salesman who handled this transaction and for which Baca owed Lane a real estate commission.

On June 11, 1974, Baca conveyed to Lane by warranty deed and by an assignment all of his interest in the property and Lane made two mortgage payments that totaled $657.22. Lane obtained this property for investment purposes. The assignment was executed because Lane agreed to assume the mortgage payments in arrears.

Ortiz also became interested in the purchase of this property for investment purposes. On June 24, 1974, without knowledge of Lane's title, Ortiz inquired of Lane the type of real estate contract held. Lane told Ortiz that a balance was due and that a real estate commission was owed to Pargin Realty, a company by whom Lane was employed. In this conversation, Ortiz told Lane that he, Ortiz, was negotiating to buy the property, and Lane made no claim to ownership.

Ortiz engaged a title company to search the title and prepare the necessary papers. Lane was informed by the title company that Ortiz was purchasing the property and would bring the payments up to date. Ortiz negotiated the purchase with Brooks.

On July 5, 1974, Brooks, with an equitable title, conveyed the property to Ortiz *by warranty deed subject to the Baca-Brooks real estate contract. It was duly recorded the same day.* This deed was prepared by the staff of the title company. The parties agree that this instrument was an assignment to Ortiz of Brooks' equitable and beneficial estate in the property.

The title company also notified the Albuquerque National Bank of Ortiz' purchase of the property and Ortiz paid the bank $794.60, $657.72 of which was paid to Lane to reimburse him for previous payments made on the mortgage. *Lane repeatedly denied any knowledge of the source of this refund.*

The title company also notified Glenn Justice Mortgage Co. of the Ortiz purchase and thereafter Ortiz made payments due on the mortgage from July through November, 1974. Here, again, Lane testified that he had no knowledge of the person making the payments. In the interim period, Ortiz made improvements on the property to prepare it for rental purposes.

On November 5, 1974, Lane, with knowledge that Ortiz intended to and had purchased the property, mailed a notice of default to Brooks for failure to remit the sum of $182.00 per month as provided for in the contract. Notice was not sent to Ortiz, the purchaser who made the mortgage payments. On December 6, 1974, Lane executed an affidavit of default and termination of the Baca-Brooks real estate contract, which affidavit was directed to Brooks. Lane also obtained possession of the Brooks-Baca Special Warranty Deed from the Albuquerque National Bank, and recorded both instruments on the above date.

On December 20, 1974, Ortiz met Lane at the property and a dispute ensued over its ownership. Lane changed the locks on the doors of the house, excluded Ortiz and rented the property.

On January 15, 1975, Ortiz sued Lane *for a return of the property.* During the pendency of this suit, Ortiz continued to make the mortgage payments until September, 1975 even though Lane was in possession of the property receiving rental income. *Nevertheless, Lane testified that, during the first five months of 1975, he was without knowledge of the person making the payments. He did tell Glenn Justice Mortgage Co. not to accept payments from anyone but it refused to do so.* Lane began making mortgage payments in March, 1975, some 10 months after he obtained legal title. Unquestionably, Lane impliedly consented to the Brooks-Ortiz assignment.

We do not hesitate to say that Lane and Ortiz were both negligent with respect

to their relationship and their lack of concern about the ownership of the property and the payments on the mortgage. Neither do we commend the title company which prepared a "warranty deed" from Brooks to Ortiz. We repeat our admonition that "equity" is a synonym of right and justice; that fairness, justness and right dealing should dominate all commercial transactions and practices. *Ott v. Keller,* 90 N.M. 1, 558 P.2d 613 (Ct.App.1976). "It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. [citation omitted] Its compulsion is one of fair play." *McNeely v. Walters,* 211 N.C. 112, 189 S.E. 114, 115 (1937).

■ The trial court found that on July 5, 1974, Ortiz purchased the property from Brooks. This was evidenced by the "odd" warranty deed. Lane contends that Ortiz could not purchase the property because Brooks did not own it. Lane is mistaken. "The commonly accepted definition of 'purchased' is a binding agreement to pay an agreed price. * * * Under any definition of 'purchase' the transaction must be viewed in its entirety and if sufficient events occur a purchase can be found." *First Nat. Bank & Trust Co. of Chickasha v. United States,* 462 F.2d 908, 910 (10th Cir. 1972). The real estate "contract operates as an equitable conversion. The vendee's interest becomes realty and the vendor's interest becomes personalty. In equity the purchaser is regarded as the owner liable for payment of the purchase price. The vendor holds the legal title in trust for him." (Ibid.) The evidence of Ortiz' "purchase" was substantial.

When Brooks purchased the property he was vested with the beneficial and equitable title thereto. *Snipes v. Dexter Gin Co.,* 45 N.M. 475, 116 P.2d 1019 (1941). Baca, as the vendor, held the legal title as trustee for security only. *Trickey v. Zumwalt,* 83 N.M. 278, 491 P.2d 166 (1971).

When Lane obtained Baca's interest in June, 1974, he only had a legal title, a title that was held in trust for security only. Absent default, he had no beneficial interest in the property. Ortiz, however, is not entitled to a complete title until the Glenn Justice Mortgage is paid in full.

Lane protests findings Nos. 4, 5 and 6 that are limited to references to Lane's real estate commission. We agree that there is no evidence to support these findings. However, these references are immaterial. Ortiz did not contest Lane's legal title, and Lane's notice of default was sent to the wrong person. The harmless error arises because the trial court blindly adopted the requested findings of Ortiz. The requested findings and their adoption by the court do not receive our plaudit.

The other findings of the trial court are sustained by substantial evidence.

The trial court concluded that Lane was equitably estopped from asserting title to or any interest in the property; that Lane's title was a cloud on Ortiz' title. Therefore, Lane shall execute a quitclaim deed transferring said property to Ortiz.

Here, again, the trial court adopted Ortiz' conclusion of law. Although we do not applaud Lane's conduct, we can discern no evidence nor any findings that support this conclusion. If trial lawyers would learn the art of presenting proper findings and conclusions to the district court, and the district court would learn the art of reading the requests, we would not be burdened with these types of appeal. Requested findings and conclusions should not slip through the judge's fingers like an eel.

Appellate counsel for Ortiz was not trial counsel and he is absolved of any criticism.

■ The status of this case in the trial court is as follows: It was wrongful for Lane to obtain possession of and file the Brooks-Baca Special Warranty Deed. Lane holds only legal title to the property in trust for security. Ortiz is the owner of the beneficial and equitable title to the property and is entitled to possession thereof. He must undertake the same duties that Brooks had under the Baca-Brooks real estate contract except the payment of Lane's real estate commission. Lane has received

sufficient income from the rental of the property to pay his commission. Lane is under no duty to execute a quitclaim deed to Ortiz.

This case is reversed and remanded to the district court. The trial court shall vacate the judgment entered. A judgment shall be entered (1) that Ortiz is entitled to possession of the property under the Baca-Brooks real estate contract; (2) that the Brooks-Baca Special Warranty Deed shall be placed in the possession of the escrow agent; (3) that Lane shall prepare for filing proper instruments that will declare that the Special Warranty Deed was inadvertently filed and that he does not hold the complete title to the property.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., specially concurs.

HERNANDEZ, Judge (specially concurring).

There are two preliminary matters that must be mentioned before discussing the defendant Lane's (Lane) points of error. The claim against the defendant Albuquerque National was dismissed with prejudice and no appeal was taken from that order. The plaintiff in his first amended complaint prayed for return of the subject property. Since Lane had previously declared a forfeiture and taken possession of the property, the plaintiff's prayer was in reality a prayer for relief from the forfeiture. Consequently, this case falls within the equity jurisdiction of the courts. "The power of a court of equity to relieve from an unreasonable forfeiture is well established." *Moore v. Bunch,* 29 Mich.App. 498, 501, 185 N.W.2d 565, 567 (1971); *Skendzel v. Marshall,* 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied* 415 U.S. 921, 94 S.Ct. 1421, 39 L.Ed.2d 476.

Lane's first point of error is that the trial court erred in making findings 1 and 3 through 10, and in reaching conclusion No. 2. As to finding No. 1, he argues that Mr. and Mrs. Brooks (Brooks did not own the property but was buying it from Mr. and Mrs. Baca (Baca); consequently, Brooks had no title to convey. He does not dispute that Brooks did execute and deliver a warranty deed purporting to convey the property to the plaintiff. That deed was dated July 5, 1974, and was filed for the record the same day. The deed recited that the conveyance was:

> "Subject to that certain FHA Mortgage to Glenn Justice Mortgage Company, Inc., dated October 12th, 1973; filed for record October 16th, 1973, in Book MD–53A, page 874, records of Bernalillo County, New Mexico, which purchaser herein assumes and agrees to pay.
>
> Subject to that certain Real Estate Contract executed by and between Henry B. Baca and Martha A. Baca, his wife, as owners, and John C. Brooks and Roberta M. Brooks, his wife, as Purchasers, dated January 10, 1974, recorded in Book Misc. 348, page 555, in the office of the County Clerk of Bernalillo County, New Mexico, which Purchasers herein assumes and agrees to pay."

Generally, a conveyance of realty passes all of the interests of the grantor unless there is a specific or implied exemption. *Metzger v. Ellis,* 65 N.M. 347, 337 P.2d 609 (1959). As our Supreme Court pointed out in *Mesich v. Board of County Com'rs. of McKinley Co.,* 46 N.M. 412, 416, 129 P.2d 974, 976 (1942):

> "In law the effect of a contract whereby the owner agrees to sell and another agrees to purchase a designated tract of land, the vendor remains the owner of the legal title to the land; he holds the legal title. [Citation omitted.] But, in equity the vendee is held to have acquired the property in the land and the vendor as having acquired the property in the price of it. The vendee is looked upon and treated as the owner of the land and the equitable estate thereof as having vested in him. * * * The vendor, before payment, holds the title as trustee for security only."

Therefore, the plaintiff by the deed of July 5, 1974, acquired equitable title subject to the mortgage of the Glenn Justice Mortgage Company and the balance due on the

real estate contract. The trial court gave no indication of the nature of the title that plaintiff had purchased. It makes no difference because an appellate court is not bound by a trial court's interpretation of a written document, where the interpretation rests solely upon the wording of the document. *Price v. Johnson*, 78 N.M. 123, 428 P.2d 978 (1967). There being no reservations in the deed from Brooks to the plaintiff, he acquired their equitable title in the property subject to the mortgage and the real estate contract which he also agreed to assume and pay.

As to finding No. 3, the transaction referred to is obviously the purchase by the plaintiff of the interests of Brooks. There is substantial evidence in the record to show that Lane had actual knowledge of this transfer, as well as the escrow agent and the mortgage company. What payments the trial court is referring to, is not clear. However, as our Supreme Court pointed out in *Franklin's Earthmoving, Inc., v. Loma Linda Park, Inc.*, 74 N.M. 530, 534, 395 P.2d 454, 457 (1964):

> "The function of a reviewing court is to correct an erroneous result, not to correct errors which could not change the result. [Citations omitted.] Only ultimate facts required to support the judgment are necessary findings."

Assuming, but not deciding, that this part of the finding is in error, it could not change the result and it is not an ultimate fact.

Lane does not deny that he purchased Baca's interest in the property and received an assignment of their interest in the real estate contract. What he does contend is that there is no evidence to support the finding insofar as that he acquired Baca's interest for the real estate commission. I agree with this contention, but the error is harmless because it can be corrected on remand.

Lane argues that the error in finding No. 5 is that the notice of default that was sent to the Brooks stated that they were in default in the sum of $242.00. This contention is correct, but this too is harmless error and can be corrected on remand.

Lane contends that finding No. 6 is in error because there is no evidence in the record to support the statement that only $182.00 is due him. This too is correct. It is also harmless error and can be corrected on remand.

In my opinion, finding No. 7 is not supported by evidence in the record and if considered as a conclusion of law, it is in error. However, these are not ultimate facts and the error is harmless.

> "The makings of unnecessary and superfluous findings of fact or the presence of error in findings of fact on immaterial, irrelevant, or purely collateral issues is harmless and nonreversible error if the judgment is otherwise sufficiently supported." *United Veterans Org. v. New Mexico Prop. App. Dept.*, 84 N.M. 114, 118, 500 P.2d 199, 203 (Ct.App.1972).

Finding No. 8 is supported by substantial evidence in the record.

The pertinent part of finding No. 9 is that Lane did not send a notice of default to the plaintiff. The balance of the finding is erroneous. However, this error would not change the result.

Lane does not dispute that the plaintiff made the mortgage payments from July 1974 through August 1975, as set forth in finding No. 10. He does argue that there is no evidence to support the statement that he was in possession during that period and collecting rents. I agree; but this error would not change the result and the exact amount of rents collected by Lane can be determined on remand.

Lane's so-called second point of error is an allegation: "David L. Lane is the owner of the tract of real estate, [sic] title to which is the subject matter of this litigation." An allegation is "the assertion, declaration, or statement of a party to an action, made in a pleading, setting out what he expects to prove." Black's Law Dictionary (4th Ed.). A point of error, as contemplated by our Appellate Rules, is a specification of an alleged error committed by the trial court and upon which the appellant

seeks reversal. Consequently, there is nothing to discuss.

Lane's third point of error reads as follows: "David L. Lane was not equitably estopped from asserting title to the subject tract of real estate." I assume that *what* Lane intended to say was that the trial court erred in concluding that he was equitably estopped from asserting title to the subject property. This point is well taken in my opinion.

It is my opinion that equitable estoppel does not apply in this situation. The rule in regard to equitable estoppel is stated at 19 Am.Jur., "Estoppel" § 42:

> "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." *Westerman v. City of Carlsbad*, 55 N.M. 550, 555, 237 P.2d 356, 359 (1951).

Element (1) as to the party claiming estoppel is lacking. An interpretation of this element might read: A party cannot invoke estoppel as to facts which, in the exercise of reasonable diligence, he should know. Ortiz, in my opinion, could and should have requested a title insurance policy or the opportunity to examine a current abstract when he purchased his interest in the subject property from Brooks. Had he done so, he could have learned of Lane's interest and notified him to send all notices concerning the contract to him.

Nonetheless, I believe that Ortiz should be relieved of the forfeiture of the contract because it would be unconscionable to allow it to stand considering the amounts Ortiz has paid toward the mortgage and the contract and considering the amount he has spent in improvement of the subject property.

> "Equity as a code of conscience takes cognizance of delicate distinctions between right and wrong in human conduct. [Citation omitted.] Equity is reluctant to permit a wrong to be suffered without remedy. It seeks to do justice and is not bound by strict common law rules or the absence of precedents. It looks to the substance rather than the form. *It will not sanction an unconscionable result merely because it may have been brought about by means which simulate legality.* And once rightfully possessed of a case it will not relinquish it short of doing complete justice. It weighs the equities between the parties and adopts various devices to protect against unjust enrichment." *Merrick v. Stephens*, 337 S.W.2d 713, 719 (Mo.App. 1960). [Emphasis added.]

This case should be remanded with instructions to the trial court to modify its judgment as follows:

(1) Relieve Ortiz from the forfeiture upon condition that within 60 days he pay the following sums to the clerk of the court to be distributed to Lane under the order of the court.

(a) all averages of principal and interest due on the real estate contract;

(b) any sums paid by Lane for ad valorem taxes upon the subject property;

(c) the amount of any sums paid by Lane for improvements made to the subject property by him.

(2) Order Ortiz and his wife to execute a special warranty deed of the subject property to Lane and to deposit it with the escrow agent within 60 days.

(3) Order Lane to redeposit the special warranty deed from Brooks to Baca within 60 days and declare the recording by Lane to be of no effect.

(4) Order Lane to execute a warranty deed from him to Ortiz of the subject property, subject to the mortgage of the Glenn Justice Mortgage Company, Inc., current ad valorem taxes, easements and restrictions of record and deposit it with the escrow agent within 60 days.

(5) Order Lane to furnish the court with receipts of any ad valorem taxes paid on the subject property and proof of any expenditures made for improvements within 45 days.

(6) Order Lane to deposit all rents of the subject property received by him with the Clerk of the court within 60 days. These rents are then to be distributed to Ortiz under order of the court.

(7) Enter its order reinstating the real estate contract and restoring Ortiz to possession upon proof that he has complied with all of the foregoing.

(8) Assess all costs to Lane.

590 P.2d 1175

STATE of New Mexico, Plaintiff-Appellee,

v.

Richard MILLER, Defendant-Appellant.

No. 3824.

Court of Appeals of New Mexico.

Jan. 25, 1979.

Hank Farrah, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Santa Fe, Lawrence A. Gamble, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of receiving stolen property. Section 30–16–11, N.M.S.A.1978. The trial court did not err in admitting evidence of a transaction, similar to the one for which defendant was prosecuted, under Evidence Rule 404(b). The similarity was such that the transaction went to defendant's intent, preparation, plan and knowledge, and the absence of mistake or accident. The issue for discussion involves the propriety of the cross-examination of defendant concerning specific instances of conduct. The applicable Evidence Rule is 608(b).

The tape of the trial, and the briefs, refer to some twenty-five questions. Eliminating repeated questions and the asking of the same questions with only a slight change in wording, there were twenty such questions.

There were fourteen questions going to the buying or selling of stolen property. Examples are:

Q. Isn't it true that between March and October of 1977, you also bought between ten and twenty stolen television sets from Reggie Walker knowing they were stolen?

Q. Isn't it true that between March and October of 1977, you sold stolen merchandise, that you knew was stolen, to your attorney, Bill Tull?

There was one question going to selling a diamond ring on consignment and failing to account for the money.

There was one question going to an illegal drug selling deal.

There were four questions going to hiring people to kill or threaten people. Examples are:

Q. You offered to pay Lonnie Brown to kill a man named Bobby Baldwin, didn't you?

Q. You offered to pay Lonnie Brown to threaten the lawyer who was handling the foreclosure on your home?

Over defendant's objection, the trial court permitted the questioning on the basis of *State v. Madrid*, 83 N.M. 603, 495 P.2d 383 (Ct.App.1972). In *Madrid*, supra, the two questions asked were proper under § 20–2–4, N.M.S.A.1953 (Repl.Vol. 4). See *State v. Martinez*, 57 N.M. 158, 255 P.2d 987 (1953) which approved questions concerning specific acts of misconduct. The questioning permitted under § 20–2–4, supra, was not restricted to questions concerning "truth and veracity". Section 20–2–4, supra, was repealed by Laws 1973, ch. 223, § 2.

The provision replacing § 20–2–4, supra, was Evidence Rule 608(b). As originally adopted by the Supreme Court in 1973, the pertinent portion of Evidence Rule 608(b) stated:

> 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, if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness himself . . . .

This wording appears to require only that the questions asked be probative of truthfulness or untruthfulness.

Evidence Rule 608(b) was amended effective April 1, 1976. As amended, the pertinent portion reads:

> 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 . . . .

As amended, not only must the question asked be probative of truthfulness or untruthfulness, they must also go to the witness' character for truthfulness or untruthfulness.

Relying on *People v. Sandoval*, 34 N.Y.2d 371, 357 N.Y.S.2d 849, 314 N.E.2d 413 (1974), the State contends that all of the questions went to truthfulness. *Sandoval*, supra, states:

> To the extent, however, that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity.

This broad approach to the meaning of truthfulness is inconsistent with the wording of amended Evidence Rule 608(b). 3 Weinstein's Evidence, ¶ 608[05] (1978), page 608–28 states:

> Since Rule 608(b) is intended to be restrictive—and was amended to ensure that it would be restrictively interpreted by trial courts—the inquiry on cross-examination should be limited to these specific modes of conduct which are generally agreed to indicate a lack of truthfulness. The rule should not be broadened to allow questions about behavior which indicates "a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness." Such an approach paves the way to an exception which will swallow the rule. It is but a small step from there to the hypothesis that all bad people are liars, an unverifiable conclusion which runs counter to the doctrine that everyone is innocent until proven guilty.

The State's broad approach to the meaning of truthfulness is also inconsistent with our decisions. Considering the meaning of "dishonesty or false statement" in Evidence Rule 609(a)(2), in *State v. Melendrez*, 91 N.M. 259, 572 P.2d 1267 (Ct.App.1977), we followed the approach taken by Chief Justice Burger while a circuit judge. That approach was that convictions resting on dishonest conduct relate to credibility while violent or assaultive crimes do not. *State v. Melendrez*, supra, points out that "dishonesty or false statement" deals with veracity, and holds that shoplifting is such a crime. In *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct.App.1978) we pointed out that robbery and theft involves dishonesty.

This appeal does not involve "dishonesty or false statement" under Evidence Rule 609; rather, it involves "truthfulness" under Evidence Rule 608(b). However, the Burger approach followed in *State v. Melendrez*, supra, is applicable. In *De La O v. Bimbo's Restaurant*, 89 N.M. 800, 558 P.2d 69 (Ct.App.1976) we held that drunken and abusive conduct, resisting arrest, a battery conviction, and shooting at a person were not conduct involving truthfulness.

The questions involving hiring a person to kill or threaten people were not questions concerning defendant's character for truthfulness. They were not proper questions under Evidence Rule 608(b).

The fourteen questions concerning the buying or selling of stolen property, the question concerning an arrangement to sell illegal drugs, and the question concerning failing to account for the proceeds of the sale of a diamond ring involve dishonesty. These activities reflect on the veracity of defendant, see *State v. Melendrez*, supra, and were proper questions under Evidence Rule 608(b).

Even though the questions concerning dishonest activities were proper, was it proper to allow their use? Evidence Rule 403 requires a determination of whether the probative value of such questions, going to credibility, outweighed the tendency to

prejudice the defendant. *State v. Day*, supra. We recognize that the balancing approach under Evidence Rule 403 requires the trial court to exercise its discretion, and that our review is for an abuse of discretion. *State v. Fuson*, 91 N.M. 366, 574 P.2d 290 (Ct.App.1978).

Defendant asserts the questions were "based on uncorroborated allegations by a convicted felon." In the trial court, defendant questioned the prosecutor's good faith in asking the questions. The prosecutor responded with a document, identified as State's exhibit 2, which has not been included in the appellate transcript. Absent this document, we would not be able to determine whether the prosecutor proceeded in good faith, *State v. Melendrez*, supra, but good faith is not an appellate issue in this case. Our point is that absent the exhibit, the basis for the prosecutor's questions is not a factor in determining whether the trial court abused its discretion in permitting the questioning.

We do consider the following items: (a) The questions were asked the defendant, not a non-defendant witness. See *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct. App.1969). (b) The questions asked did not involve convictions. See *State v. Coca*, 80 N.M. 95, 451 P.2d 999 (Ct.App.1969). (c) The questions asked did involve crimes; any affirmative answer would, at the least, have been an admission against defendant's interest. (d) There were sixteen questions, not two as in *State v. Madrid*, supra.

State v. Coca, supra, stated that a series of questions concerning convictions, from drunkenness to aggravated assault, had a "tendency to prejudice the defendant." It is obvious that sixteen questions asking for admissions concerning crimes which, from the wording of the questions would have been felonies, did more than "tend" to prejudice the defendant. The questions were prejudicial.

None of the crimes included in the questions were involved in the trial of this case. The only purpose of the questions was to test defendant's credibility. *State v. Coca*, supra. The crimes involved in the questions could not be proved by extrinsic evidence. Evidence Rule 608(b). Defendant answered each of the questions in the negative.

What then was the probative value of the questions? There was none. Under the balancing test required by Evidence Rule 403, the trial court abused its discretion in permitting the questioning because the questions were prejudicial and, in light of the answers, there was no probative value.

We do not hold that a question under Evidence Rule 608(b), which asks for an admission concerning a felony, can never be asked. Our holding is that any one of such questions is prejudicial, see *State v. Rowell*, 77 N.M. 124, 419 P.2d 966 (1966) and, if there is nothing indicating the question has probative value on the question of credibility, it is an abuse of discretion to permit the question. When the question is under Evidence Rule 608(b), a prosecutor, who seeks to have a defendant make an admission concerning a felony when there has been no conviction, hazards a reversal absent a showing of probative value because of the prejudicial nature of the question.

The conviction is reversed; the cause is remanded for a new trial.

IT IS SO ORDERED.

HENDLEY and ANDREWS, JJ., concur.

591 P.2d 278

Paul J. BOLLES, Petitioner,

v.

Cleo W. SMITH, Administratrix of the Estate of Ronnie D. Kelly, Deceased, and Transport Indemnity Company, Don Ward and Company, Respondents.

No. 12098.

Supreme Court of New Mexico.

Feb. 23, 1979.

Horton, Roybal & Crollett, Adams & Foley, Albuquerque, for petitioner.

Rodey, Dickason, Sloan, Akin & Robb, Charles B. Larrabee, Civerolo, Hansen & Wolf, Albuquerque, for respondents.

OPINION

FEDERICI, Justice.

Our original opinion is withdrawn and the following opinion substituted therefor. The result of our original opinion is not changed; however, it was deemed necessary to add language to restrict the application of the rule of law announced to cases arising under §§ 41–1–1, et seq., N.M.S.A. 1978 (formerly §§ 21–11–1, et seq., N.M.S.A.1953 (Supp.1975)) and to the specific facts in this case.

Paul J. Bolles, plaintiff (petitioner), brought this action for personal injuries received in 1974 in an automobile accident arising out of his employment with Don Ward & Company (plaintiff-in-intervention). Sometime after the accident petitioner began to have seizures. The medical evidence indicated that there was a probability that the seizures were brought about by the accident.

A settlement agreement was entered into on petitioner's behalf by his original attorney. Petitioner was not happy with the settlement. At his attorney's suggestion, petitioner had another attorney evaluate the case. Subsequently, petitioner changed attorneys. Petitioner never accepted the check which had been sent to his original attorney pursuant to the settlement and never signed any settlement agreement. No judgment or dismissal had been entered by the court on the release, nor had the action been dismissed under N.M.R.Civ.P. 41(a)(1) or (2), N.M.S.A.1978.

Cleo Smith, defendant (respondent), filed a motion to enforce the alleged oral settlement agreement. The motion was granted by the trial court, and an order and judgment was entered for respondent. Petitioner appealed and the Court of Appeals affirmed, Judge Sutin dissenting. We reverse.

The issue on this appeal is whether the oral settlement agreement entered into by petitioner's attorney on petitioner's behalf can be enforced, notwithstanding the fact that it was rejected by petitioner prior to its approval by the court, or its dismissal under Rule 41(a)(1) or (2). We hold that under the facts in this case it cannot. The Release Act of New Mexico, §§ 41–1–1 and 41–1–2, prohibits settlements, releases or their solicitation while an injured person is under the care of a person licensed to practice the healing arts, or confined to a hospital or sanitarium, unless certain conditions are met. Section 41–1–1C of the Act provides that:

> 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.

Clearly the application of this Act is limited to injured persons under the care of a person licensed to practice the healing arts or confined to a hospital or sanitarium.

Respondent contends that petitioner was not under the *actual and continuous* care of a person licensed to practice the healing arts. Section 41–1–1 does not state that the care must be actual *and* continuous, nor does it limit the time within which the care must be provided. A change in the law is a matter for the Legislature. In the meantime, the courts must construe the statute as it exists based upon the facts presented in each case. We agree with respondent that the statute is restrictive and that care must be provided in good faith and must be reasonably required.

The evidence introduced in this case makes it abundantly clear that petitioner was under the "care" of a person licensed to practice the healing arts at the time the proposed oral settlement was entered into and that the Release Act of New Mexico applies to the settlement.

At the hearing on the motion by respondent to enforce the oral agreement, petitioner and his wife testified that he had been visiting and was under the care of Dr. Rudolph Maier, Dr. Leroy Miller, and Dr. Theodore Sadock at various times from the date of accident in 1974 through November 15, 1977, the date the proposed oral agreement allegedly was reached.

Dr. Maier testified that petitioner had been under his care from December 1974 to March 18, 1977, the day of the motion hearing. The testimony was as follows:

> Q. Now, you mentioned this first visit in December of '74. Were there other visits later on?
>
> A. Yes, sir. I have seen Mr. Bolles off and on over the years, the latest visit being December 29th, 1976.
>
> Q. Now, has he been under your care all during that time?
>
> A. Yes, sir. I have communicated with him, prescribed medicines and so on.
>
> Q. Is he still under your care?
>
> A. Yes.
>
> Q. And for what condition have you been treating him all of this time?
>
> A. He has convulsions, generalized convulsions with focal onset, which is suggestive of a localization in the temporal lobes. He still has some residual complaints, mainly lapses, in which he has a feeling of a dreamy kind of feeling as though he had been in the particular situation he finds himself in presently . . .

Respondent urges that the seizures were not the result of head injuries received in the accident. Again, the record makes it abundantly clear, at least for purposes of the motion hearing, that as a matter of medical probability the seizures did result from the accident. In Dr. Maier's report of February 21, 1975, he stated that since petitioner had received two head injuries, one prior to and not connected with the accident and one at the time of the accident, he could not be sure which injury caused the seizures. However, he also stated that it would be difficult for him to say that petitioner's head injury from the 1974 accident did not cause the seizures.

After petitioner changed attorneys, and upon a request made by his new attorney, Dr. Maier reviewed petitioner's history, various medical reports, and other documents and facts, and consulted with several experts in the field of neurology and neurosurgery. Based upon this review, he testified at the motion hearing that a head injury probably occurred at the time of the 1974 accident and that the epilepsy was probably a result of that injury. He also concluded that it was within the realm of medical probability that the second head injury, from the 1974 accident, was responsible for, and the more probable cause of, the epilepsy. Dr. Leroy Miller, in his report of July 12, 1976, stated that he believed it was reasonable to relate the onset of the seizures to the 1974 injury. In addition, petitioner and his wife testified that petitioner never suffered a seizure of any kind prior to the 1974 accident. In view of this testimony, respondent's contention that the seizures were not the result of the 1974 accident is without merit.

Respondent's final contention is that since the parties arrived at an oral settlement, the Release Act of New Mexico does not apply and the oral settlement should be enforced. In order for an attorney to bind a client to a settlement agreement, he must have specific authority to do so, unless there is an emergency or some overriding reason for enforcing the settlement despite the attorney's lack of specific authority. *Augustus v. John Williams & Associates, Inc.,* 92 N.M. 437, 589 P.2d 1028 (1979).

In this case the evidence indicates that petitioner's attorney did not have specific authority to settle the case for him. At the motion hearing both petitioner and his wife

testified unequivocally that they had not authorized their original counsel to settle the case and that they had refused to sign the agreement because they felt it was not a fair one. The record does not show that there is an overriding reason which would permit enforcement of the alleged settlement without the necessary authority. The proposed oral settlement was arrived at between counsel on November 15, 1976. Prior to that date petitioner's original counsel was having difficulty evaluating the case for his client, despite the availability of some medical evidence supporting petitioner's case. Petitioner and his wife were reluctant to accept the proposed settlement. They felt the offer was insufficient, considering the extent of the injury. It was agreed that petitioner would seek the advice of another attorney. On January 12, 1977, respondent filed a motion to enforce the alleged settlement agreement. Original counsel withdrew on February 17, 1977, and new counsel entered an appearance, filed a verified response to respondent's motion and recommended that petitioner refuse the settlement offer.

No judgment had been entered by the trial court based upon the oral settlement, no order of dismissal had been entered by the trial court, and no dismissal had been filed by the parties to the oral agreement under Rule 41. Based upon the record in this case, there was no enforceable oral agreement and § 41–1–1C applies.

Section 41–1–1C specifically requires that a settlement be acknowledged by the injured person before a disinterested notary public. This provision was construed in *Mitschelen v. State Farm Mut. Auto. Ins. Co.,* 89 N.M. 586, 555 P.2d 707 (Ct.App. 1976), *cert. denied,* 90 N.M. 9, 558 P.2d 621 (1976). In *Mitschelen* the Court of Appeals held that a release with respect to bodily injury claims prepared by the insurer and signed without acknowledgment by the claimant while under a doctor's care was invalid. The court stated:

> Section 21–11–1(C) [now 41–1–1C, NMSA 1978] expressly provides that there be an acknowledgment before a notary public. Under this provision, we hold that the acknowledgment is a part of the release, and it is necessary to its validity.

Id. 89 N.M. at 589, 555 P.2d at 710. The rationale in *Mitschelen* applies with equal force to the particular facts and circumstances in this case. The acknowledgment must be a part of the "Settlement Agreement." Without a writing and acknowledgment the settlement agreement in this case is void. This rule is limited to cases arising under the provisions of the Release Act of New Mexico.

The Court of Appeals is reversed, the trial court's judgment enforcing the settlement is vacated, and the cause is remanded to the trial court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, C. J., EASLEY and PAYNE, JJ., and McMANUS, Senior Justice, concur.

591 P.2d 281

DAIRYLAND INSURANCE COMPANY, Plaintiff-Appellant,

v.

Stewart ROSE, as Administrator of the Estate of Thomas Kimbriel, Deceased, Defendant-Appellee.

No. 12152.

Supreme Court of New Mexico.

Feb. 28, 1979.

LeRoi Farlow, Sarah M. Bradley, Albuquerque, for plaintiff-appellant.

William H. Carpenter, Albuquerque, for defendant-appellee.

OPINION

FEDERICI, Justice.

On November 19, 1975, Thomas Kimbriel was involved in an automobile accident resulting in his death. At the time of the accident Kimbriel was covered by an insurance contract with Dairyland Insurance Company (appellant) providing for uninsured motorist protection.

Following Kimbriel's death, Stewart Rose (appellee), administrator and personal representative of the estate of Thomas Kimbriel, made written demand for arbitration pursuant to the Dairyland policy. Appellant filed a reply to the demand for arbitration. A hearing was held before the appointed arbitrator and a decision was entered awarding damages to appellee.

Appellant filed a complaint in district court pursuant to § 66–5–303, N.M.S.A.1978 (formerly § 64–24–107, N.M.S.A.1953), for an appeal de novo from the arbitration award. Appellee's motion to dismiss the appeal was granted and this appeal followed.

The trial court held that (1) a provision in the insurance policy reflected an intention by the parties that arbitration be binding, and (2) that § 66–5–303, allowing an appeal de novo from an arbitration award, was superseded or repealed by implication by the enactment of the New Mexico Uniform Arbitration Act, § 44–7–1, et seq., N.M.S.A. 1978 (formerly § 22–3–9, et seq., N.M.S.A. 1953 (Supp.1975)).

As to the trial court's conclusion that the policy reflected an intention by the parties that arbitration be binding, appellant argues that when a policy provision is in conflict with the law, the policy provision must fall.

The policy of insurance contains the following provision:

G. *Arbitration*

If any person making claim hereunder and the company do not agree that such

person is legally entitled to recover damages from the owner or operator of an uninsured highway vehicle because of bodily injury or property damage to the insured, or do not agree as to the amount of payment which may be owing under this insurance, then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration, which shall be conducted in accordance with the rules of the American Arbitration Association unless other means of conducting the arbitration are agreed to between the insured and the company, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this insurance.

We are aware of the case law in New Mexico which holds that where the provisions of a policy of insurance conflict with, or do not contain, the statutory requirement, the statute controls. *Chavez v. State Farm Mutual Automobile Ins. Co.*, 87 N.M. 327, 533 P.2d 100 (1975); *Willey v. Farmers Insurance Group*, 86 N.M. 325, 523 P.2d 1351 (1974); *Sloan v. Dairyland Insurance Company*, 86 N.M. 65, 519 P.2d 301 (1974). However, these cases do not control the result we reach here. Even if we were to apply the rules announced, we still must determine whether the uninsured motorist insurance law, § 66–5–303, or the New Mexico Uniform Arbitration Act, applies in this case.

Appellant asserts that § 66–5–303 was not superseded or repealed by implication by the enactment of the New Mexico Uniform Arbitration Act as the trial court concluded. We disagree.

Section 66–5–303 reads:

Uninsured motorist—judicial review of arbitration award.

—Any party aggrieved by an arbitration award entered in any controversy arising under an *insured* motorist provision of a motor vehicle or automobile liability insurance policy may, within thirty days [30] after entry of the arbitration award, appeal to any district court having venue of the action. The appeal shall be "de novo." (Emphasis added.)

We note that the above statute refers to "an *insured* motorist provision". In whatever context the term "insured" is taken, there is little doubt that the intent of the Legislature in enacting this section was to refer to "an *uninsured* motorist provision". We reach this conclusion in view of the inclusion of the term "uninsured motorist" in the title of the Act and the paragraph heading of § 66–5–303, quoted above. In any event, if the Legislature intended to refer to an "insured motorist provision", § 66–5–303 would not be applicable to this case and the issue of repeal by implication would be rendered moot.

Section 44–7–12 of the Uniform Arbitration Act provides:

Vacating an award.—

A. Upon application of a party, the court shall vacate an award where:

(1) the award was procured by corruption, fraud or other undue means;

(2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) the arbitrators exceeded their powers;

(4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 5 [44–7–5 NMSA 1978], as to prejudice substantially the rights of a party; or

(5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section 2 [44–7–2 NMSA 1978] and the party did not participate in the arbitration hearing without raising the objection. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

B. An application under this section shall be made within ninety [90] days after delivery of a copy of the award to the applicant except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety [90] days after such grounds are known or should have been known.

C. In vacating the award on grounds other than stated in paragraph (5) of subsection A the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with section 3 [44–7–3 NMSA 1978], or if the award is vacated on grounds set forth in paragraphs (3) and (4) of subsection A the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with section 3 [44–7–3 NMSA 1978]. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

D. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

We are committed to the following rules of statutory construction:

> (1) Repeals by implication are not favored unless necessary to give effect to obvious legislative intent; (2) the enactment of a new and comprehensive law covering the whole subject matter which is inconsistent with and repugnant to the prior law manifests legislative intent to repeal the earlier statute, or so much thereof as may be in conflict with the later one. *Stokes v. New Mexico State Board of Education*, 55 N.M. 213, 230 P.2d 243 (1951).

Buresh v. City of Las Cruces, 81 N.M. 89, 90, 463 P.2d 513, 514 (1969).

In *Stokes v. New Mexico State Board of Education*, 55 N.M. 213, 217, 230 P.2d 243, 245 (1951) the Court, quoting from *Ellis v. New Mexico Construction Co.*, 27 N.M. 312, 319, 201 P. 487, 490 (1921), said:

> A statute is repealed by implication, though such repeal is not favored, where the legislative intent is manifest that the latter statute should supersede the former, and such intent is manifest where the Legislature enacts a new and comprehensive body of law which is so inconsistent with and repugnant to the former law on the same subject as to be irreconcilable with it . . . . The latter act (chapter 42, Laws 1903, sections 3665 to 3671, Code 1915) covering the entire subject, embracing all the law pertinent thereto and furnishing a new and comprehensive system of procedure, makes it clear that the Legislature intended to supersede prior acts relating to the same subject . . . .

55 N.M. at 217, 230 P.2d at 245.

In this jurisdiction the Legislature and the courts have expressed a strong policy preference for resolution of disputes by arbitration. This policy is reflected in § 44–7–1, which provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

See also Bernalillo Cty. Med. Center Emp. v. Cancelosi, 92 N.M. 307, 587 P.2d 960 (1978).

The legislative history of the two acts involved here lends support to the view that the New Mexico Uniform Arbitration Act was intended to supersede the de novo trial provision of the uninsured motorist insurance law.

The arbitration provisions found in § 22–3–1, et seq., N.M.S.A.1953 were enacted in 1859. This statute only authorized arbitration with respect to presently existing controversies. It was generally assumed that an arbitration clause in an uninsured motorist policy, similar to appellant's in this case, would be held unenforceable under this statute because the disputes which would arise would not be present or existing controversies at the time of the signing of the policy, but would instead be future disputes.

In 1969, with the purpose of making uninsured motorist arbitration provisions enforceable, the New Mexico Legislature passed the "de novo" appeal statute, now found in § 66–5–303.

In 1971, the Legislature enacted the New Mexico Uniform Arbitration Act, § 44–7–1, et seq., which expressly authorizes agreements to submit future controversies to arbitration. This Act was patterned after the Uniform Arbitration Act as approved in 1955 by the National Conference of Commissioners on Uniform State Laws.

It appears to the Court that the legislative intent in enacting the Uniform Arbitration Act, and the policy of the courts in enforcing it, is to reduce caseloads in the courts, not only by allowing arbitration, but also by requiring controversies to be resolved by arbitration where contracts or other documents so provide. Any other interpretation would render meaningless the intent that proceedings under the New Mexico Uniform Arbitration Act be final.

The order of the trial court is affirmed.

IT IS SO ORDERED.

McMANUS, Senior Justice, and PAYNE, J., concur.

[redacted]

591 P.2d 664

STATE of New Mexico,
Plaintiff-Appellee,

v.

William J. SMITH, Defendant-Appellant.

No. 11905.

Supreme Court of New Mexico.

Feb. 27, 1979.

Warren O. F. Harris, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Janice Marie Ahern, Charlotte Hetherington Roosen, Asst. Attys. Gen., Santa Fe, Virginia Ferrara, Asst. Dist. Atty., Albuquerque, for plaintiff-appellee.

OPINION

McMANUS, Senior Justice.

August 19, 1977 defendant William J. Smith and a co-defendant were charged with the crimes of murder, kidnapping, accessory to murder, and accessory to kidnapping. The trials of the defendants were severed, and Smith was tried October 11, 1977. The trial court granted Smith's motion for a directed verdict of acquittal as to the kidnapping charges. At the end of the trial, the court declared a mistrial because the jury was unable to reach a unanimous decision. Smith was subsequently re-tried on January 30, 1978 and was convicted of the first-degree murders of Leslie D. McDonnell and Cari Talton, a/k/a Carie Newell. Smith appeals those convictions, alleging fourteen points of error. We will discuss each point separately.

POINT I

Smith filed a motion to quash the grand jury indictment because he was denied his right to a fair presentation of evidence to the grand jury and denied his rights to due process and equal protection under the Constitution of the State of New Mexico and the Constitution of the United States. Smith argues that the indictment resulted from an uninformed and misled grand jury because the district attorney knowingly failed to present exculpatory evidence at the grand jury proceeding. The trial court denied the motion, and Smith claims error.

We decline to review the trial court's ruling on this motion. Smith failed to provide this Court with a record of the hearing on the motion to quash the indictment. Therefore, Smith waived his right to challenge the ruling of the trial court. Matters outside the record present no issue for review. *State v. Romero*, 87 N.M. 279, 532 P.2d 208 (Ct.App.1975).

POINT II

Smith claims that the trial court erred by not granting his motion to reduce bond. Smith contends that bond set at $100,000 was unreasonable in light of the fact that his first trial resulted in a mistrial.

Again, we find that no issue is presented for review. The remedy for a defendant claiming an excessive setting of bail is found under N.M.R.Crim.P. 26, N.M.S.A.1978. Rule 26 provides for an appeal from orders regarding release entered prior to a judgment of conviction. This rule specifically includes orders setting bond. Review of a motion to reduce bond at this point is not warranted because the trial court's ruling on bond has no relation to the merits of an appeal from a conviction. *State v. Cebada*, 84 N.M. 306, 502 P.2d 409 (Ct.App.1972). Furthermore, in New Mexico the amount of bail set by a trial court is within the sound discretion of the trial court. N.M.R.Crim.P. 22, N.M.S.A.1978. There has been no showing that the trial court abused its discretion in denying Smith's motion for bond reduction.

POINT III

Smith claims his conviction should be reversed because the conduct of law enforcement officials violated his constitutional rights to due process and equal protection.

Smith alleges that the law enforcement officers who prepared the affidavit for search warrant included erroneous and misleading evidence and information on the affidavit. Smith attacked the search warrant in a suppression hearing, however, he has failed to provide this Court with any record of evidence presented at that hearing. Smith's only reference indicating errors in the search warrant is to tapes of the trial. These tapes have no bearing on the search warrant. Thus, the general allegations of unfairness made by the defendant are not supported in the record. General allegations present no issue for this Court to review. *State v. Romero, supra.*

Smith also asserts that the State's attorneys acted improperly at the grand jury proceedings. Smith contends that the prosecuting attorneys knowingly failed to present exculpatory evidence in the grand jury proceedings. In addition, Smith argues that these attorneys presented the evidence and made certain comments to the grand jury in such a way as to improperly influence the decision of the grand jury. Finally, Smith alleges that certain oral testimony heard before the grand jury was not recorded in violation of § 31–6–8, N.M.S.A. 1978 [formerly § 41–5–8, N.M.S.A.1953 (Repl.1972)]. Smith has not forwarded the grand jury minutes to this Court, so again, we have no record to review.

The alleged violations of due process and equal protection made by the defendant are not supported in the record, nor does the defendant provide any authority to this Court in support of his allegations. A general claim of denial of a fair trial cannot provide a basis for relief. *State v. Paul*, 83 N.M. 527, 494 P.2d 189 (Ct.App.1972).

POINT IV

Smith contends that the trial court erred in not granting his motion to dismiss the indictment for lack of venue and jurisdiction in the District Court of Bernalillo County. A Torrance County rancher discovered the bodies of the two girls on his ranch, and the crime was allegedly committed in Torrance County.

The trial court did not err by denying Smith's motion. The Bernalillo County District Court had jurisdiction over this case because there was no evidence that the crime occurred in a place other than New Mexico. *See State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct.App.1976); *State v. Losolla*, 84 N.M. 151, 500 P.2d 436 (Ct. App.1972). In addition, venue was proper in Bernalillo County because there was substantial evidence that the defendant formed the intent to kill both girls in Bernalillo County. If elements of a crime were committed in different counties, the trial may be held in any county in which a material element of the crime was committed. *State v. Wise*, 90 N.M. 659, 567 P.2d 970 (Ct.App. 1977), *cert. denied*, 91 N.M. 4, 569 P.2d 414 (1977).

POINT V

Smith argues that the trial court abused its discretion in denying his motion for a continuance because he was not emotionally or mentally able to prepare for the trial on its originally scheduled date.

The standard of review on a denial for a motion for continuance is whether the trial court abused its discretion to the prejudice or injury of the defendant. *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (Ct.App.1975), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975); *State v. Brewster*, 86 N.M. 462, 525 P.2d 389 (Ct.App.1974); *State v. Garcia*, 82 N.M. 482, 483 P.2d 1322 (Ct.App. 1971). In this case, Smith has failed to present any evidence supporting the claims made in his motion for continuance. As there has been no showing that the denial of defendant's motion was prejudicial or that substantial justice would have been more clearly obtained if a continuance had been granted, we must uphold the trial court's decision.

POINT VI

Smith argues that the trial court erred in admitting his sawed-off shotgun because there was no way to connect the gun with the deaths of either of the girls and because the prejudicial effect of the evidence outweighed its probative value.

The admission of evidence is within the sound discretion of the trial court, and its ruling will be upheld unless there is a showing of abuse of discretion. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977). After reviewing the record, we find no such abuse.

POINT VII

Smith argues that the trial court's limitation of his cross-examination of various State witnesses concerning the character and habits of the two victims deprived him

of a fair trial and of his constitutional right to confront the witnesses against him.

Where character is an element of the crime, claim, or defense, there is no question as to its relevancy and its admission is governed by N.M.R.Evid. 402, N.M.S.A.1978. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct.App.1977), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977). In all other cases character evidence is collateral, so its admissibility is limited to the exceptions outlined in N.M.R.Evid. 404, N.M.S.A.1978. *State v. Bazan, supra; 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 pertinent part of Rule 404 provides:

> (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:
>
> * * * * * *
>
> (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 * *.

As we stated previously, the admission of evidence is within the sound discretion of the trial court. *State v. Bell, supra*; *State v. Marquez, supra.* The trial court did not abuse its discretion in refusing to admit evidence pertaining to the drug habits of the victims.

POINT VIII

Smith argues that the trial court erred in denying his motion for directed verdict of acquittal because the verdict is not supported by the evidence.

A directed verdict is not proper where there is substantial evidence to support the conviction. *State v. James*, 85 N.M. 230, 511 P.2d 556 (Ct.App.1973), *cert. denied*, 85 N.M. 228, 511 P.2d 554 (1973). The fact that some of the evidence is circumstantial does not alter the policy of affirming a conviction on appeal where the evidence taken as a whole supports the verdict. *State v. Adams*, 89 N.M. 737, 557 P.2d 586 (Ct.App.1976), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976). The question before this Court is whether the direct or circumstantial evidence admitted at trial, together with all reasonable inferences to be drawn therefrom, will sustain a finding of guilt beyond a reasonable doubt. *See State v. Adams, supra.* After reviewing the record, we find that each element of the crimes charged is supported by substantial evidence. The trial court properly denied defendant's motions for directed verdict.

The defendant also claims that the trial court erroneously denied his motion for a new trial. N.M.R.Crim.P. 45, N.M.S.A.1978 provides that the court may grant a new trial if required in the interest of justice. Such a motion is addressed to the sound discretion of the trial court, and the denial of such a motion will be upheld on appeal unless it can be shown there was a clear abuse of discretion. *State v. Wright*, 84 N.M. 3, 498 P.2d 695 (Ct.App. 1972). Smith has failed to present any facts which would indicate the trial court's ruling was arbitrary, capricious or beyond reason. *See State v. Kincheloe*, 87 N.M. 34, 528 P.2d 893 (Ct.App.1974).

POINT IX

Smith argues that the trial court erred in forcing him to produce a witness for the State. The State submits that Smith's allegations are without merit. Ginger Donham, who was listed as a witness by both the prosecution and the defense, was expecting to deliver a child the same week as the trial. Her doctor refused to let her make the trip from California by car. And, the State presented an affidavit indicating that as a general policy, airlines refuse to carry women as passengers if they are past their eighth month of pregnancy. The trial court declared Ms. Donham unavailable and

indicated it would allow the playing of her tape-recorded testimony from the previous trial. Although the trial court felt it could not order the State to produce Ms. Donham, the court did say she could appear voluntarily if she chose to do so. Ms. Donham testified at trial the next day.

N.M.R.Evid. 804(b), N.M.S.A.1978 provides that the former testimony of a witness is not hearsay and is admissible in a subsequent proceeding if the witness is unavailable at the subsequent proceeding. Subsection (a)(4) of Rule 804 defines a witness as "unavailable" when he:

> is unable to be present or testify at the hearing because of death or then existing physical or mental illness or infirmity * * *.

The trial court has discretion to determine whether the burden of showing unavailability has been met. The ruling of the trial court will not be disturbed absent a showing of abuse of that discretion. *State v. Mann*, 87 N.M. 427, 535 P.2d 70 (Ct.App.1975); *State v. Holly*, 79 N.M. 516, 445 P.2d 393 (Ct.App.1968). It is the opinion of this Court that the trial court did not abuse its discretion in refusing to order Ms. Donham's attendance. Defendant's claim that he was forced to produce a witness for the State is without merit.

Smith also contends that the trial court erred in limiting his cross-examination of Ms. Donham during the State's case in chief. N.M.R.Evid. 611(a), N.M.S.A.1978 gives the trial court the power to control the mode and order of interrogating witnesses and presenting evidence. Rule 611(b), N.M.S.A.1978 gives the trial court the power to control the scope of cross-examination of a witness or witnesses. The exercise of the judge's discretion in controlling the order of witnesses or the mode of interrogation will not be disturbed except upon a showing of abuse of that discretion. *State v. Bell, supra; State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct.App.1972). We find no such abuse here.

POINT X

Smith contends it was error for the trial court to deny his motion for "a list of all sawed-off shotguns presently being held in the Albuquerque Police Department's Evidence Room and a list of any and all sawed-off shotguns that came into the possession of the Albuquerque Police Department and other law enforcement agencies, both State and Federal during the year of 1977." N.M.R.Crim.P. 27(a)(5), N.M.S.A. 1978 provides that the defendant can obtain:

> Any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant * *.

In order to obtain a new trial for a violation of subsection (a)(5), the non-disclosed items must be material to the guilt or innocence of the accused or to the penalty to be imposed. *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct.App.1975). In addition, where the non-disclosure does not prejudice the defendant, there are no grounds for reversal. *Chacon v. State, supra.* In this case, Smith has failed to provide this Court with any record indicating that the records were in the control or custody of the State, or that they were material to his defense. Matters outside the record present no issue for review. *State v. Romero, supra.*

Smith also contends that it was error for the trial court to deny his motion for the complete record of all arrests and convictions of the State's witnesses. Under N.M.R.Crim.P. 27(b), N.M.S.A.1978, the defendant is entitled to a written list of the names and addresses of all witnesses which the district attorney intends to call at trial and any record of prior convictions of any such witness which is within the knowledge of the district attorney. The defendant was not entitled, under the rules, to information concerning prior arrests. Further-

more, the defendant did not provide any other basis which would entitle him to disclosure of a witness' arrest records. Disclosure which is not required under the Rules of Criminal Procedure or as a matter of constitutional policy [*see Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] must necessarily fall within the exercise of the judge's discretion. In this case there has been no showing of an abuse of discretion by the trial court.

POINT XI

As part of its rebuttal, the State presented Albuquerque Police Department Officer Burwash. Officer Burwash testified that he had repeatedly stopped the defendant for various offenses over a certain period of time, and that on one occasion, the defendant had threatened his life. Smith contends that the trial court erred in permitting this testimony of Officer Burwash because it was not relevant, it put Smith's character in issue, and it was evidence of other crimes.

The State submits that the testimony of Officer Burwash was properly admitted because it specifically rebutted the testimony of the defendant. On direct examination the defendant testified that he had bought a gun for protection. On cross-examination the State inquired as to Smith's need for protection, and Smith answered that he needed the gun to protect himself from Officer Burwash, who had threatened his life. The State argues that Officer Burwash's testimony properly rebuts the defendant's testimony regarding the threat and the defendant's need to carry a sawed-off shotgun. We agree with the State.

The issue of protection from a police officer was injected by the defendant. It is well settled that a defendant cannot be heard to complain on appeal that he was prejudiced by evidence which he introduced into the case. *State v. Harrison*, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970); *State v. Sedillo*, 81 N.M. 47, 462 P.2d 632 (Ct.App.1969), *cert. denied*, 81 N.M. 40, 462 P.2d 625 (1969); *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct.App.1969), *cert. denied*, 80 N.M. 731, 460 P.2d 261 (1969). The State was entitled to correct the false impression given to the jury through rebuttal testimony. *State v. Bazan, supra.* The admission of rebuttal testimony is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Garcia*, 83 N.M. 794, 498 P.2d 681 (Ct.App.1972). We find no abuse of the trial court's discretion in allowing the rebuttal testimony of Officer Burwash.

POINT XII

Smith argues that it was error for the trial court to allow the rebuttal closing argument by the State because the argument did not relate to the facts of the case and was intended to inflame the passions and prejudices of the jury. As a general rule, having failed to object to the closing rebuttal of the prosecution in a timely manner, Smith would waive any claim of error on the appellate level. *State v. Victorian*, 84 N.M. 491, 505 P.2d 436 (1973); *State v. Vallejos*, 86 N.M. 39, 519 P.2d 135 (Ct.App.1974). In this case, however, Smith contends that the rebuttal argument was improper per se and should not have been allowed even though an objection was not entered by the defense. We disagree. In criminal cases, the prosecutor is allowed a reasonable amount of latitude in closing remarks to the jury. *State v. Pace*, 80 N.M. 364, 456 P.2d 197 (1969). After reviewing the taped transcript, we cannot say that the rebuttal closing argument was improper per se.

POINT XIII

Smith argues that the trial court erred in denying his motion to disqualify the entire jury panel because of the members' bias and preconceived notions about the case.

After reviewing the record, it is our opinion that the defendant has failed to show that his jury was not impartial. In addition, Smith only exercised eight of the twelve peremptory challenges he was entitled to under N.M.R.Crim.P. 39, N.M.S.A. 1978. A defendant cannot claim prejudice for failure to dismiss prospective jurors if

he fails to exercise available peremptory challenges. *State v. Gurule*, 84 N.M. 142, 500 P.2d 427 (Ct.App.1972).

POINT XIV

Smith contends that the trial court erred in refusing to give N.M.U.J.I.Crim. 40.01, 40.24 and 41.30, N.M.S.A.1978. These instructions are concerned with the sufficiency of circumstantial evidence, weighing conflicting testimony, and the alibi defense. In the Use Notes of the Uniform Jury Instructions, the Supreme Court has indicated that these instructions should not be given. However, Smith argues that these instructions should be given because they do represent an accurate statement of the law.

A similar defense claim was raised in *State v. Johnson*, 91 N.M. 148, 571 P.2d 415 (Ct.App.1977) where the Court of Appeals stated:

> The Use Note to U.J.I.Crim. 40.01 states that no instruction on circumstantial evidence is to be given. In spite of this direction, defendant complains of the trial court's refusal to instruct on circumstantial evidence. We are bound to following the directions of the Supreme Court on this matter. *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct.App.1977).

Id. at 153, 571 P.2d at 420. The trial court properly followed the mandate of this Court and refused defendant's requested instructions.

For the foregoing reasons, the decision of the trial court is hereby affirmed.

IT IS SO ORDERED.

EASLEY and FEDERICI, JJ., concur.

591 P.2d 672

NRA SPECIAL CONTRIBUTION FUND, Plaintiff-Appellee,

v.

BOARD OF COUNTY COMMISSIONERS, Defendant-Appellant,

and

State of New Mexico ex rel. Property Tax Department, Defendant-Intervenor-Appellant.

No. 3222.

Court of Appeals of New Mexico.

Sept. 12, 1978.

Writ of Certiorari Quashed Jan. 24, 1979.

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[redacted]

[redacted]

Toney Anaya, Atty. Gen., John C. Cook, Asst. Atty. Gen., Santa Fe, for defendant-intervenor-appellant.

William H. Darden, Asst. Dist. Atty., Raton, for defendant-appellant.

Paul A. Kastler, Kastler, Erwin & Davidson, Raton, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Plaintiff, an arm of the National Rifle Association of America, brought suit for a refund of 1976 property taxes paid and to have its real estate exempt from taxation under Article VIII, § 3 of New Mexico's Constitution. Judgment was entered for plaintiff and defendants appeal. We reverse.

The trial court made the following pertinent findings of fact:

1. The NRA Special Contribution Fund is a Trust and nonprofit association organized by adoption of a constitution and by-laws on April 2, 1973. The said Trust was established for charitable, educational and scientific purposes under Section 501C–3 [§ 501(c)(3)] of the Internal Revenue Code of 1954, as amended, and received designation and approval as a Section 501C–3 [§ 501(c)(3)] organization on April 30, 1974.

* * * * * *

6. The real estate, equipment and personal property which is the subject matter of the assessment for ad valorem taxes in Colfax County for the year 1976, was used, at all pertinent times, by the Plaintiff for:

(a) Teaching of survival and conservation schools, camps and training, to the general public, with instruction provided by Wilderness Institutes, universities, U.S. Soil Conservation Service, State Game and Fish Departments, National Park Services, and other professional instructors.

(b) Outdoor education leadership workshops under sponsorship of universities, for credit hours, open to college level teachers of the general public.

(c) Training of national guard units within the State of New Mexico for firearms training, and maneuver areas.

(d) Archeological and historic tours, reenactments, and participation, with special emphasis on history of the Santa Fe Trail, and primitive skills.

(e) Law enforcement training by colleges, and other professional organizations such as the Federal Bureau of Investigation.

(f) Group training sessions for law enforcement organizations, including the New Mexico State Police, area police, and the New Mexico State Game and Fish Department.

(g) Approved metallic silhouette shoots and trainings, and competition training for black powder shoots, all open to the public.

(h) Miscellaneous other educational purposes.

7. The operations of the said properties are supported by contributions made nation wide and solicited for the specific purposes of the properties use in Colfax County, New Mexico, and the revenue earned from the events on the property is substantially less than the costs and operational expenses involved.

* * * * * *

9. The uses of the property for the purposes hereinabove described are substantial and primary, and the non-educational uses to which the property has been placed and is intended to be utilized, is minimal or non-existent.

* * * * * *

11. The Plaintiff is entitled to a refund of $1,295.07 together with interest thereon and such other relief as set forth by statute for 1976 ad valorem taxes.

Defendants challenged findings Nos. 6, 9 and 11.

The sole issue on this appeal is whether plaintiff's property is "used for educational purposes."

Article VIII, § 3 reads in pertinent part:

> [A]ll property used for educational . . purposes . . . shall be exempt from taxation.

Section 72–29–3(B), N.M.S.A.1953 (Repl. Vol. 10, pt. 2, 1975 Supp.) of the Property Tax Code provides that property exempt under the state constitution is not subject to valuation for property taxation purposes.

Facts

Plaintiff's trust owns 36,300 acres of land in Colfax County, purchased by the national organization and deeded to plaintiff. In the deed of conveyance there was no provision or limitation as to the use or purpose for which the land could be used. Plaintiff claimed all of its property was exempt and did not specify any specific acreage that was exempt nor furnish any evidence of such exempt acreage.

There is no capital stock issued, no dividends are declared, no pecuniary return is derived by trust beneficiaries from any of its operations, nor are there guaranteed benefits of any kind. Its revenues are derived almost entirely from contributions made nationally from thousands of individuals interested in promoting the educational, scientific and charitable goals of the trust.

The only witness to testify was the managing director of the NRA, National Range and Outdoor Center, who explained the various activities of plaintiff.

In a survival leadership training school students from all over the country are taught both in the classroom and through field experience the basic techniques of human survival in a wilderness situation. In 1976 there were four survival schools, each one week in length.

A youth conservation training camp is a work-learning experience for students 16 to 18 years of age who are taught the basic principles of resource management.

At a Julian Smith Outdoor Leadership Workshop, secondary school teachers and community college teachers spend a week at the NRA facilities and can earn two hours credit from the University of New Mexico. Over one half of the property is utilized during this workshop.

Basic shooting skills, techniques, and safety skills were taught in the firearm safety school.

Trinidad State Junior College of Trinidad, Colorado sponsored an archeological and historical tour to explain the Santa Fe Trail. This activity lasted one hour total. The premises were also used for a Santa Fe Trail Mountain Men Rendezvous which involved people from all walks of life who sought to recreate the techniques, skills and the aroma of the mountain men of the 1840's. One such event is held each year. In 1976, 45 participated; in 1977, 70 participated.

NRA plans for and is building an outdoor center.

During the year 1976, the property was used by national guard units along with local guard units for firearms qualification training. The property was used for educational courses in law enforcement by the F.B.I. for a two-day course, by the Trinidad State Junior College that has a special program of police training in which it offers an associate degree in the police service. It was also used by the New Mexico State Police, by the New Mexico Game and Fish Department and by New Mexico Mounted Patrol. These entities used the property for regional black powder shoots, formalized target shooting, public service programs, metallic silhouette shoots for the public, and national hunting and fishing day for conservation.

In 1976, although there were 2,700 applicants, five persons hunted turkey and thirteen persons hunted elk, and were recommended by the New Mexico Game and Fish Department.

In 1975, the year before, firearm training was the primary and substantial use of the property. In 1976, there were 266 user days for university or college seminars. By "user day" is meant the number of persons that were present in conjunction with a college credit course or seminar operated by a recognized institution of higher learning that participated in some or all of one-day use of property of the Outdoor Center.

There are no full-time teachers. There are two part-time teachers, and two full-time employees.

Plaintiff is exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code. This section exempts from taxation "Corporations . . . organized and operated exclusively for . . . charitable, scientific . . . or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . ." 26 U.S.C.A., Internal Revenue Code, § 501(c)(3) (1977 Pocket Part).

A. *Meaning of "used for educational purposes."*

The Constitution, the Property Tax Code and New Mexico opinions do not define what is meant by "used for educational purposes." As a result, the Legislature has seen fit to allow the courts to establish the standards under which property may be determined to be tax exempt when "used for educational purposes." We are confronted with the phrase that has broad significance. Its meaning is a matter of first impression in New Mexico.

Nearly 50 years ago, Mr. Justice Watson posed the difficulty of the problem in *Temple Lodge No. 6, A. F. & A. M. v. Tierney*, 37 N.M. 178, 20 P.2d 280 (1933). The property of a Masonic lodge was held charitable. In the course of the opinion, Justice Watson said:

> The broad expression "used for educational or charitable purposes" necessarily imposes upon the courts a severe task of interpretation. It is easy to instance purposes clearly within it. It is not difficult to suggest instances which would reduce to absurdity a rule too liberal. Appellees (Tierney, treasurer and collector of Bernalillo County) point out that the ordinary home is customarily used for educational purposes and often for charitable purposes. In a broad sense, a golf professional, a riding master, or a boxing instructor, is engaged in education. Charity may "cover a multitude of sins." The line of demarcation cannot be projected.

> *It can take shape only by the gradual process of adjudicating this or that purpose or use on the one side of it or on the other,* or by change in the constitutional criteria. [37 N.M. at 187, 20 P.2d at 284, 285.] [Emphasis added.]

For almost half a century, our courts have followed the dictates of *strict construction, Berger, et ux. v. University of New Mexico, et al.*, 28 N.M. 666, 217 P. 245 (1923); *Peisker v. Unemployment Compensation Commission*, 45 N.M. 307, 115 P.2d 62 (1941); *McKee v. Bureau of Revenue*, 63 N.M. 185, 315 P.2d 832 (1957), *questionable strict construction, Temple Lodge No. 6 A. F. & A. M., supra, liberal construction, Santa Fe Lodge No. 460 v. Employment Security Com'n*, 49 N.M. 149, 159 P.2d 312 (1945); *Laughlin v. Lumbert*, 68 N.M. 351, 362 P.2d 507 (1961), *reasonable and practical construction, Church of the Holy Faith v. State Tax Commission*, 39 N.M. 403, 48 P.2d 777 (1935), *reasonable but narrow construction, Evco v. Jones*, 81 N.M. 724, 472 P.2d 987 (Ct.App.1970), and *reasonable construction, Benevolent & P. Ord. of Elks v. New Mexico Prop. A. D.*, 83 N.M. 445, 493 P.2d 411 (1972).

These various rules of statutory construction leave us in a quandary when applying a statute or constitutional provision to the facts of a particular case. Thus far it has been held that an alumni association of a university fraternity is not exempt from taxation. *Albuquerque Alumnae Ass'n v. Tierney*, 37 N.M. 156, 20 P.2d 267 (1933). Masonic property is exempt, *Temple Lodge, supra.* An Elks Lodge is exempt, *Santa Fe Lodge No. 460, supra,* and is not exempt, *Benevolent and Protective Order of Elks, supra. United Veterans Organization* is not exempt. *United Veterans Org. v. New Mexico Prop. App. Dept.*, 84 N.M. 114, 500 P.2d 199 (Ct.App.1972). A nonprofit corporation's property used for low rent housing for low income families is not exempt. *Mountain View Homes, Inc. v. State Tax Commission*, 77 N.M. 649, 427 P.2d 13 (1967). A church-affiliated nonprofit corporation operating a nursing home for the aged and sick is exempt. *Retirement Ranch, Inc. v. Curry Cty. Val. Protest Bd.*, 89 N.M. 42, 546 P.2d 1199 (Ct.App.1976).

Therefore, we are left with the task of determining the reasonable construction of the phrase "used for educational purposes."

First, we must keep in mind that it is the direct and immediate use of the property that must govern our decision, and not the remote and consequential benefit derived from its use. *University of Vermont v. Town of Essex*, 129 Vt. 607, 285 A.2d 728 (1971).

Second, "The term 'educational' is comprehensive, embracing mental, moral and physical education." *Application of Syracuse University*, 59 Misc.2d 684, 300 N.Y. S.2d 129, 135 (1969). "It has often been stated that 'education is a broad and comprehensive term,' and the word 'educational' as used in the statute must be taken in its broad sense." *Faculty-Student Ass'n of Harpur Col. v. Dawson*, 57 Misc.2d 112, 292 N.Y.S.2d 216, 227 (1967). When used in its broad sense, education is whatever we learn by observation, by conversation, or by other means, away from what has been implanted by notice. "This Court well recognizes that matters of education are not restricted to academic curricula or to ivy covered halls." *State Bd. of Tax Com'rs v. Fort Wayne Sport Club, Inc.*, 147 Ind.App. 129, 258 N.E.2d 874, 881 (1970).

Curtiss, *Tax Exemption of Educational Property in New York*, 52 Cornell L.Q. 551, 562 (1966–67) says:

> . . . "Educational" contemplates both instruction and research. It covers informal as well as formal instruction. And it includes not only the more traditional educational institutions ranging from nursery schools through colleges and universities, but also organizations devoted to such activities as educational television programs and community theater productions.

To define what is an educational purpose, we turn to *McKee v. Evans*, 490 P.2d 1226 (Alaska 1971). The sole question presented for review was whether the property owned by the Apprentice and Manpower Training

Trust Fund, a management trust, was exempt from taxation on the ground that it was "used *exclusively* for nonprofit * * educational purposes." [Emphasis added.]

The property was used in conjunction with an apprenticeship training program consisting of five and one-half months formal training at the school, three years of apprenticeship or on-the-job training, and a briefer refresher course again at the school. The formal training consisted of lectures and demonstrations on the theory and practice of electrical work, and was somewhat similar to courses offered in state-supported high schools and colleges.

The court was aware of the accepted canon of strict construction. In holding the property exempt, the court said:

> We hold that the phrase "educational purposes" as used in Article IX, Section 4 of the Alaska Constitution and AS 29.10.-336(a) *includes systematic instruction in any and all branches of learning from which a substantial public benefit is derived.* [490 P.2d at 1230.] [Emphasis added.]

By a note to this rule, the court said:

> We do not say that in all contexts this definition will be of easy application, or even conclusive. However, further refinement is best left to future cases.

The Alaskan rule fixes a standard for the establishment of an "educational purpose." It has also been held that "*methodical instruction given . . . in physical and cultural development* and its continuous pursuit of those objects as desirable ends are far different from the mere pursuit of social activity for its own sake and *may properly be regarded as 'educational.'*" [Emphasis added.] *Bohemian Gymnastic Ass'n Sokol of City of N. Y. v. Higgins*, 147 F.2d 774, 776 (2d Cir. 1945).

McKee v. Evans, supra, rejects the quid pro quo policy as the rationale for allowing educational institutions tax exempt status; the educational institution seeking tax exemption need not prove it is supplying an educational benefit which the state would normally provide its citizens. The court in *McKee* noted that the Alaskan statute and constitutional provision in question did not limit "educational purposes" in this manner even though a restrictive definition would be a legislative concern at this point in time when there is "a proliferation of new kinds of educational institutions, and rapidly changing concepts of mass education." [490 P.2d at 1230.] We agree with *McKee* on this point and hold that what can be found to be an educational purpose is not restricted by the educational resources provided by the state to its citizens. But it does recognize that public education provided by an entity is a "Substantial public benefit." To grant an exemption, should we search for a program of instruction parallel to that offered in public supported educational institutions? We believe not as to length of time.

To qualify plaintiff for exemption of any of its land, the period of time of its systematic instruction, as used in the Management Trust in *McKee v. Evans, supra*, is not necessary. If a portion of plaintiff's land is primarily and substantially devoted to educational purposes, "notwithstanding that the period of its instruction is very short, that the subjects taught are confined to a narrow field, and that its purpose is utilitarian to the last degree, it is educational within the scope of that term as employed in the constitutional provision under consideration." *Lawrence Business College v. Bussing*, 117 Kan. 436, 231 P. 1039, 1040 (1925). But when the facts of the case show that the educational function is merely incidental to its activities in pursuance of educational purposes, exemption may be denied. *National Foundation of Health, Welfare & Pension Plans, Inc. v. City of Brookfield*, 65 Wis.2d 263, 222 N.W.2d 608 (1974).

In contrast with the Alaskan provisions, Article VIII, § 3 of the New Mexico Constitution does not provide that exempt property should be "exclusively" used for educational purposes. If a portion of plaintiff's land is primarily and substantially devoted to educational purposes, "notwithstanding that the period of its instruction is very short, that the subjects taught are confined

to a narrow field, and that its purpose is utilitarian to the last degree," it is educational within the scope of the term as employed in the constitutional provision under consideration. *Lawrence Business College, supra.* See also *Benevolent & Protective Order of Elks, supra.* But when the facts of the case show that the educational function is merely incidental to its activities in pursuance of educational purposes, exemption may be denied. *National Foundation, etc., supra.*

In summary, we hold the phrase "used for educational purposes" to mean "the direct, immediate, primary and substantial use of property that embraces systematic instruction in any and all branches of learning from which a substantial public benefit is derived."

To complete the definition, we must determine what is meant by "a substantial public benefit."

The theory advanced for most types of exemptions from taxation is said to be that the exempt institution serves some worthy purpose, religious, charitable, educational or governmental; or that it furthers the public welfare in some special way. "[O]ne of the reasons for the exemption of certain classes of property from taxation is that the state is to receive some benefit by reason of such exemption." *Berger, supra* [28 N.M. at 668, 217 P. at 246].

We note in passing that the general property tax remains the backbone of local taxation in New Mexico. Article VIII, § 1 of the New Mexico Constitution provides that "taxes shall be equal and uniform upon subjects of taxation of the same class." The rationale for this provision is that all property should bear its share of the cost of government. Property which is exempt from taxation does not share in the burden. Therefore, in exchange for its exempt status, such property must confer a substitute substantial benefit on the public.

We note also that the necessary expenses of government are becoming greater and the necessity for better utilization of the existent property tax is urgent. Tax exemption has a direct effect on the size of the tax base. The scope of tax exemption has broadened so that exempt organizations tend to grow wealthier and often increase the percentage of exempt property within the state first granting the exemption. Such increased exemptions may create a serious problem because a diminished tax base lessens the amount available to meet governmental costs. This factor also requires an organization that seeks a tax exemption to give the public a "substantial public benefit."

Let us consider for the moment the practical result that occurs if plaintiff's 36,300 acres of land are held exempt from taxation. A large amount of taxable property would be removed from the tax rolls and be freed from its obligation to share in the expense of conducting the Colfax County government, notwithstanding the fact that it would receive all the benefits to be derived therefrom. The burden of taxation that this property would ordinarily bear would shift to the land of others who were unable to find a means of escape. *Church of the Holy Faith v. State Tax Commission, supra,* says:

> "The greater the amount of property that escapes taxation, the greater the burden is upon other property holders to bear the support of the government. That alone should not deter us from [granting] . . . every immunity conferred by law, but public convenience, private justice, and individual hardship should cause us to hesitate and carefully examine the provision of law which is said to confer such privilege." [39 N.M. 415, 48 P.2d 784.]

On the other hand it has been said that "The purpose of this exemption is to *encourage* religious, charitable, scientific, literary, and *educational associations* not operating for the profit of any private shareholder or individual." *Santa Fe Lodge No. 460, supra* [49 N.M. at 153, 159 P.2d at 314-315]. [Emphasis added.]

These concepts that encourage and discourage the purpose of tax exemption lead courts to different results. Therefore,

we must be careful in defining "substantial public benefit."

"Substantial public benefit" has not been defined. A public benefit is a benefit conferred upon an indefinite class of persons who are a part of the public. *New York Inst. for Ed. of Blind v. Town of Wolcott*, 128 Vt. 280, 262 A.2d 451 (1970). "Substantial" is a relative term but when applied to a public benefit, as a quid pro quo for tax exemption, it means "of real worth and importance; of considerable value; valuable." *Tax Commission v. American Humane Education Soc.*, 42 Ohio App. 4, 181 N.E. 557 (1931). In *Tax Commission, supra*, the sole question presented was whether the expenditures of the Society in Ohio constituted a substantial part of its activities so as to exempt a bequest from the Ohio inheritance tax. The court described the extensive services rendered, the nature of the work performed, the percent of expenditures made and said:

> Upon consideration we cannot escape the conclusion that the expenditures made in Ohio during the past years by this association constitute a substantial part of its total expenditures and that such expenditures in Ohio are well worth having. [181 N.E. at 558.]

We note that in each case, an appellate court reviews the facts, weighs their significance and makes a determination relative to property exemption. This burden is placed on the courts because the Legislature has not defined the meaning of the phrase "used for educational purposes" nor its application to cases in which claims for tax exemption are made.

We define "Substantial Public Benefit" to mean:

> A benefit of real worth and importance to an indefinite class of persons who are a part of the public, which benefit comes to these persons from the use of property.

B. *The burden is on plaintiff to establish exemption.*

"Since liability of all real estate to taxation is the rule, with exemption the exception, the burden is placed upon the taxpayer to bring himself within the exemption statute." *Point Park Jr. Col. v. Board of P. A., A. & Rev. of A. C.*, 23 Pa.Cmwlth. 367, 351 A.2d 707 (1976).

■ The fact that plaintiff stated in its constitution that it was organized exclusively for charitable, educational, and scientific purposes, is not determinative of its claim; that its property is tax exempt as "used for educational purposes." What is determinative of its claim is the direct and immediate use of the property. *Experiment in Inter-Living v. Town of Brattleboro*, 127 Vt. 41, 238 A.2d 782 (1968); *Frank Lloyd Wright Foundation v. Town of Wyoming*, 267 Wis. 599, 66 N.W.2d 642 (1954).

Plaintiff's claim that the land was acquired for educational use in the future does not assist plaintiff in establishing an exemption. *Trustees of Protestant E. Church v. State Tax Commission*, 39 N.M. 419, 48 P.2d 786 (1935).

■ Merely because plaintiff is exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code [26 U.S.C.A. Internal Revenue Code, § 501(c)(3) (1977 Pocket Part)] has no applicability to its claim that its property in Colfax County is tax exempt as used for educational purposes. *Experiment in Inter-Living, supra* [127 Vt. 41, 238 A.2d at 786].

The trial court shall not rely upon these facts in arriving at a conclusion.

■ There is one factor upon which the trial court may rely if evidence is presented on the issue. Does plaintiff engage in any promotion, propaganda and lobbying activities to influence legislation?

The Fifth Article of plaintiff's constitution reads in part:

> *No substantial part of the activities of the Fund shall be the carrying on of propaganda, or otherwise attempting, to influence legislation*, and the Fund shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. [Emphasis added.]

We hold that "The promotion, propaganda and lobbying activities implicit in the . . . [emphasized portion of Article 5] are definitely not educational." *Hazen v. National Rifle Ass'n of America*, 69 App. D.C. 339, 343, 101 F.2d 432, 436 (1943).

If plaintiff engages casually in these activities, then its other activities are tainted with uneducational purposes. *Acta exteriora, indicant interiora secreta* [acts indicate the intention]. If any evidence is presented of such activities, plaintiff loses its standing as an educational organization whose property is "used for educational purposes."

The trial court found that plaintiff had met its burden. The defendants, in its attack, rely primarily on *Hazen, supra.* See also, *National Rifle Ass'n v. Young*, 77 U.S. App.D.C. 290, 134 F.2d 524 (1943). NRA was incorporated under "An Act for the incorporation of Societies and Clubs, for certain social and recreative purposes . . . ." It sought to avoid an assessment for taxation of its personal property because it was a benevolent, charitable and scientific institution, rendering its property exempt from taxation. The trial court overruled Hazen's demur to NRA's answer, and Hazen appealed. The Court of Appeals reversed holding that NRA had failed to show that it came within any exemption provided by law.

NRA claimed that it was exempt under the following statute:

> Property used for educational purposes that is not used for private gain shall be exempt from taxation . . . .

The primary object of NRA stated in its certificate of incorporation was to educate the youth of the nation in marksmanship and to develop marksmanship and ranges for its members. The court said:

> No one of these objects and activities is necessarily or exclusively educational in character.
>
> * * * * * *
>
> [I]t is clear, in our view, that at most the educational phase of appellee's activities is incidental and collateral to the social, recreative, promotional and propaganda phases which constitute its major reasons for existence. It does not, therefore, in any real sense relieve the government of its burden of public education. . . . [101 F.2d 435, 436.]

The opinion does not disclose how the NRA in *Hazen* attempted to fulfill its educational purpose; the record is void of the specified facts describing NRA's activities. Because *Hazen* was decided on the basis of the purposes for which NRA was incorporated, we cannot view it as controlling in this case. We accept the philosophical legal concepts of the opinion, but we cannot view it as applicable to a trust created for educational and charitable purposes. Burden of proof was not an issue. We hold that under the definition stated in this opinion, plaintiff has not met its burden in proving that the property they seek to have exempt from taxation is property that is "used for educational purposes." Whether plaintiff can meet this burden is a question of fact for the trial court.

C. *Plaintiff is entitled to a pro tanto exemption if supported by substantial evidence.*

Plaintiff is the owner of 36,300 acres of land in Colfax County. From the record we note that a large portion of this land is idle, unimproved, and unused for any immediate or future purpose. Land of this nature presents a special problem. Can there be a pro tanto exemption? Can the trial court determine from the evidence presented what, if any, portion of the land is used primarily for educational purposes and exempt that portion of the land from taxation, or must the trial court hold the entire land subject to taxation if most of it is not used for educational purposes?

Land must be an integral part of a "use for educational purposes." If we broaden the scope of the exemption, we accentuate the regressive nature of a property tax. The wealthy organizations will receive the greatest benefit. They will own the greatest amount of land that would otherwise be subject to taxation. "The evil of permit-

ting any class of corporations or societies to become tax exempt proprietors and landlords on a large scale is too well known." *Church of the Holy Faith, supra* [39 N.M. at 414, 48 P.2d at 783].

Article VIII, § 3 must be construed to free from taxation only property that is presently and actually in substantial use for educational purposes. Where the land is idle, unimproved and not in actual use, because of its present unsuitability to the actual activities of the use of the land, it will not qualify for tax exemption in the absence of legislation. The justification for requiring present use arises as a matter of public policy; it is premised on the philosophy of substantial public benefit. If a tax burden is placed on idle, unimproved, and unused land, it will create an incentive to avoid idleness and make a substantial use of the land to carry on educational purposes.

In the matter of pro tanto exemption a conflict of authority exists on the power to exempt *a portion of a building* or a portion of its value from taxation and the manner and circumstances under which an exemption will be made. The great weight of authority authorizes a partial exemption of a building. Annot., Exemption of part of building or part of its value from taxation, 159 A.L.R. 685 (1945).

Inasmuch as we should not discourage the use of property for educational purposes, we conclude that pro tanto exemption is a fair and just result. *Medical Cent. Hosp. of Vt., Inc. v. City of Burlington*, 131 Vt. 196, 303 A.2d 468 (1973); *Seventh Day Adv. Kan. Conf. A. v. Board of Cty. Com'rs*, 211 Kan. 683, 508 P.2d 911 (1973).

Ordinarily, the difficulty with making a pro tanto determination is that the purpose and use of property is, generally, not clear in itself and has been rendered less so by judicial laxity in borderline cases. Courts have had to flounder in a morass of strange facts and have decided both ways on almost every question. Usually courts are not careful in their analysis of tax exempt cases.

From a review of the record, we are unable to determine whether any of plaintiff's property is entitled to an exemption. We leave this matter with the trial court.

D. *Conclusion*

The solution to this vexatious problem rests in a new hearing before the district court. The plaintiff has presented evidence as to each of its activities. NRA may present additional evidence if it desires; it may prove the acreage, if any, involved in each activity. Defendant may present evidence concerning NRA's propaganda and lobbying activities. It may also show what portion of the property is used for educational or noneducational uses. If the court finds any property exempt from taxation, it must make a determination as to the amount of land which is subject to the exemption.

Reversed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., dissenting.

HERNANDEZ, Judge (dissenting).

I respectfully dissent.

Justice Oman speaking for the Supreme Court in *Benevolent & P. Ord. of Elks v. New Mexico Prop. A. D.*, 83 N.M. 445, 493 P.2d 411 (1972) resolved any prior conflicts in the guides or rules for the construction of Article VIII, § 3 of the New Mexico Constitution:

> "The rule in New Mexico is that of reasonable construction, without favor or prejudice to either the taxpayer or the State, to the end that the probable intent of the provision is effectuated and the public interests to be subserved thereby are furthered."

Justice Oman also had this to say in the same opinion:

> "Although our constitutional provision does not require property to be used exclusively for charitable [or educational] purposes in order to come within the ex-

emption, the uses for these purposes must be substantial and must be the primary uses made of the property."

The following definition of "educational" is a reasonable construction of that word as it is used in Article VIII, § 3, supra:

"The . . . word [educational as pertaining to education] taken in its full sense is a broad, comprehensive term and may be particularly directed to either mental, moral or physical faculties, but in its broadest and best sense it embraces them all, and includes not merely the instructions received at school, college, or university, but the whole course of training—moral, intellectual, and physical." *Ancient, Etc., S. R. of Freemasonry v. Board of Co. Com'rs.*, 122 Neb. 586, 241 N.W. 93 (1932).

Applying the holdings in *Benevolent & P. Ord. of Elks v. New Mexico Prop. A. D.*, supra, and the above definition of "educational" to the facts as found by the trial court, it is my opinion the plaintiff's property was exempt and the judgment of the trial court should be affirmed.

591 P.2d 683

Leonard E. McCRARY, Plaintiff-Appellant,

v.

BILL McCARTY CONSTRUCTION CO., INC., a New Mexico Corporation, Defendant-Appellee.

No. 3413.

Court of Appeals of New Mexico.

Feb. 6, 1979.

OPINION

HENDLEY, Judge.

Plaintiff appeals an adverse jury verdict in a personal injury action. Plaintiff was constructing a home. He cleared the lot of small trees. In removing the trees, he cut them so that there were pointed stumps two to six inches high. Plaintiff ordered fill-dirt from defendant. Upon arriving at the site, defendant's employee expressed concern that he might ruin a tire if he ran over one of the pointed stumps. Defendant's employee testified that plaintiff undertook to guide him as he backed up to dump the dirt. Plaintiff testified that he did not direct defendant's truck in backing up and that the driver undertook this on his own. The right inside dual struck a stump causing it to blow out. The explosion caused dirt to strike plaintiff in the eyes and face.

This was a bifurcated trial on the issue of liability. Plaintiff's four issues on appeal concern (1) denial of a motion for a continuance, (2) bifurcating the issues of liability and damages, (3) modifying U.J.I. Instruction 10.6 without stating reasons, and (4) modifying U.J.I. Instruction 9.5 and 13.1 without stating reasons.

Continuance and Bifurcation

Plaintiff's first two issues are interwoven. On July 19, 1977, the parties were notified that the trial was set for September 26, 1977. The pretrial order did not contain the names of Ms. Swanke or Doctor Dillerman. On September 1, 1977, plaintiff's motion was granted to amend his prayer for additional damages. This necessitated the need for Ms. Swanke's testimony. Her deposition in Oklahoma was scheduled for September 8, 1977. She refused to appear. Plaintiff rescheduled the deposition for September 22, 1977. Defendant obtained an ex parte protective order from a different judge. A hearing on the protective order was set for September 26, 1977, when the trial judge would return.

Michael D. Bustamante, Ortega & Snead, Albuquerque, for plaintiff-appellant.

R. E. Thompson, Bob F. Turner, Atwood, Malone, Mann & Cooter, P. A., Roswell, for defendant-appellee.

Plaintiff moved for a continuance listing as grounds the inability to depose Ms. Swanke and the unavailability of Doctor Dillerman. In discussing the motion, the trial court stated:

> "It goes solely to the question of damages, does it? Gentlemen, this case has been on the docket since April 22, 1975, back to September 23, 1972. The pre-trial, July 18, 1977, the pre-trial was entered.
>
> "There was subsequent conference in the latter part of August, the 25th, I believe. I believe we got together at that time.
>
> * * * * * *
>
> "And I fail to see how we can run into all of these difficulties that we run into in this case. At this late date, all of the ongoing discovery should have taken place."

The trial court then denied the motion for continuance and bifurcated the trial. The trial court stated that if liability was found, then a trial would be set on the issue of damages and plaintiff would then have an opportunity to secure his damages testimony.

The granting or denying of a motion for a continuance is within the discretion of the trial court and will only be reviewed for an abuse of discretion. *Tenorio v. Nolen*, 80 N.M. 529, 458 P.2d 604 (Ct.App.1969).

Bifurcation of trial issues is pursuant to N.M.R.Civ.P. 42(b), Rules Vol. N.M.S.A. 1978, which states:

> "*Separate Trials.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving the right of trial by jury given to any party as a constitutional right."

The bifurcation of a trial is also within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Mendenhall v. Vandeventer*, 61 N.M. 277, 299 P.2d 457 (1956).

Under the circumstances of this case, the trial court did not abuse its discretion in bifurcating the trial and in denying the motion for continuance. The bifurcation was in the interest of "expedition and economy." The denial of the continuance did not prejudice plaintiff since the deposition of Ms. Swanke and unavailability of Doctor Dillerman would not be germane to the issue of liability. Their testimony would only go to the extent of the injury and damages. Plaintiff's contention that Doctor Dillerman's testimony was essential, since the jury would not know there was an injury, is without merit. The jury was instructed that plaintiff sustained an injury.

Instruction No. 11

Instruction No. 11 reads as follows:

> "The *Plaintiff* Leonard E. McCrary owed the Defendant Bill McCarty Construction Co., Inc. the duty to exercise ordinary care to keep the property reasonably safe for use by the *Defendant* Bill McCarty Construction Co., Inc. and its employees."
>
> (Emphasis added.)

U.J.I. Civil 10.6 reads as follows:

> "The *defendant* owed the plaintiff the duty to exercise ordinary care to keep the property reasonably safe for use by the *plaintiff*."
>
> (Emphasis added.)

The only visible difference between the two instructions is the substitution of the duties owed by the plaintiff to defendant.

The Directions for Use Note for U.J.I. Civil 10.6 states in part:

> "This instruction is to be distinguished from UJI 10.2 and UJI 10.3 and is to be used only in case of a business visitor. . . ."

New Mexico Rule of Civil Procedure, N.M.R.Civ.P. 51(1)(c), N.M.S.A. 1978 states:

> "Whenever New Mexico Uniform Jury Instructions (U.J.I.) prepared by the New Mexico Supreme Court Committee on Uniform Jury Instructions and approved by the Supreme Court for publication

contains an instruction applicable in the case and the trial court determines that the jury should be instructed on the subject, the U.J.I. instruction shall be used unless under the facts or circumstances of the particular case the published Uniform Jury Instruction is erroneous or otherwise improper, and the trial court so finds and states of record its reasons."

In *Anderson v. Welsh*, 86 N.M. 767, 527 P.2d 1079 (Ct.App.1974) this court, in interpreting Rule 51(1)(c), found that failure to comply with its provisions constitutes simple error. However, that error is reversible error *only* if the complaining party is prejudiced by the non-compliance and substantial rights have been harmed. *Jewell v. Seidenberg*, 82 N.M. 120, 477 P.2d 296 (1970). The slightest evidence of prejudice is sufficient, and all doubts will be resolved in favor of the complaining party. *Anderson*, supra.

It is without question that a landowner owes the duty to exercise ordinary care to keep the property reasonably safe for the use of a business invitee. See New Mexico Digest, Negligence, Key No. 32(1). Generally, those cases involve the situation where the plaintiff is the invitee. However, the Directions for Use Notes of U.J.I. Civil 10.6 does not mandate that plaintiff be the business invitee. From the facts of this case, Instruction No. 11 was a proper instruction because the jury was entitled to know plaintiff's duty of care as a landowner. Without Instruction No. 11 the jury would not have been instructed as to the duty of care by a landowner to a business invitee. Plaintiff was not prejudiced.

Plaintiff contends that Instruction No. 11 is an abstract statement of law. We disagree. As we discussed above, it is without question that a duty is owed by the landowner to a business invitee. The facts in this case supported the giving of the instruction.

Plaintiff also asserts that it was error for the trial court to give any instruction beyond its contributory negligence instruction. U.J.I. Civil 13.1 states:

"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."

Plaintiff bases his argument on the fact that U.J.I. Civil 10.6 is a factual instruction outlining what might constitute contributory negligence. U.J.I. Civil 10.6 defines the standard of care to be used by plaintiff when he ordered the dirt to be dumped on his property. It was a proper subject of instruction. The nature of the testimony supported the giving of the Instruction No. 11.

Instruction No. 14

Over plaintiff's objection, the trial court gave defendant's requested Instruction No. 14, which states:

"An onlooker may be negligent. An onlooker has a duty to use, for his own safety, such care as an ordinarily prudent person would exercise under the circumstances. An onlooker may not sit idly by and permit himself to be endangered 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 an onlooker exercising ordinary care for his own safety to keep a lookout or warn the driver and that the plaintiff Leonard E. McCrary failed so to do then such failure is negligence."

Plaintiff contends this instruction is a modification of U.J.I. Civil 9.5, which is the duty of a passenger in an automobile. We disagree. U.J.I. Civil 9.5 was a modeling point for Instruction No. 14. It was not a modification in the sense that is contemplated by Rule 51(1)(c). U.J.I. Civil does not contain an instruction regarding the duty of an onlooker. Without such an instruction, which was supported by the evidence, the jury would not have a yardstick as to plaintiff's duty. This was a proper instruction and was not a reemphasis of the contributory negligence instruction—U.J.I.

Civil 13.1. This does not mean that instructions on the various legal duties owed to himself or to others are a reemphasis of that definition. The language in *Anderson v. Welsh*, supra, relates to definitions. See also Committee Comments to U.J.I. Civil 13.1. Instruction No. 14 was not such a definition.

Affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., specially concurring.

SUTIN, Judge (concurring).

I concur:

I should like to state the reasons I concur.

Plaintiff's complaint was filed April 22, 1975 for an accident that occurred September 23, 1972. The limitation period was five months away. The defendant was Bill McCarty d/b/a McCarty Construction Company. The summons was issued the same day and received by the sheriff a month later. Service was made on Bill McCarty, June 2, 1975.

On November 24, 1975, over five months later, the clerk of the district court sent notice to plaintiff's attorney:

> *PLEASE* EITHER TRY THIS CASE, PRESENT CLOSING PAPERS IN ADVANCE OF TRIAL DATE OR APPEAR IN PERSON ON THURSDAY, THE 18th DAY OF DECEMBER, 1975, at 9:30 o'clock a. m. at the County Courthouse in Carrizozo, New Mexico.

After two months delay, defendant was allowed to file his answer on February 11, 1976. If plaintiff's attorney had called defendant to inquire about his failure to enter an appearance, 8 months of delay would have been saved.

On March 16, 1976, plaintiff's complaint was amended to substitute Bill McCarty Construction Co., Inc., for Bill McCarty. Defendant filed an answer on March 18, 1976.

On October 18, 1976, plaintiff was granted leave to file a late jury demand.

On July 28, 1977, 8 months later, a pretrial order was entered. Plaintiff listed seven doctors as witnesses.

Plaintiff gave notice on July 15, 1977 that the deposition of Dr. Heath would be taken on July 27, 1977 in Oklahoma City. After defense attorney arrived, plaintiff's attorney called and stated that due to other commitments he was unable to attend. Plaintiff was ordered to pay defendant the sum of $500.00.

On September 1, 1977, plaintiff was allowed to amend his complaint to change the amount of damages from $160,000.00 to $510,000.00.

On September 14, 1977, plaintiff filed a request for admissions on the genuineness of a host of statements for treatment of plaintiff. On September 26, 1977, defendant respectfully and properly refused.

On September 22, 1977, a protective order was entered regarding plaintiff's request to take the deposition of Betty Swanke in Ponca City, Oklahoma for purposes of establishing damages.

On September 23, 1977, plaintiff filed a motion for continuance.

On September 27, 1977, the case came on for jury trial. The motion for continuance was denied.

Two years and four months had passed from the date the complaint was filed to the date of trial. The only witnesses plaintiff had at trial were plaintiff and his wife and the deposition of a physician.

To now claim that the trial court acted beyond the bounds of reason in denying a continuance is frivolous.

On the issue of bifurcation, plaintiff misstates the discretion exercised by the trial court. In its discretion it gave plaintiff a choice: (1) proceed to try the whole case or (2) try the case on liability alone. Plaintiff chose the latter. The discretion exercised by the court was fair and reasonable under the circumstances of this case.

Special concurring opinions are seldom read by district judges and lawyers. Nevertheless, for future reference, I should

like to state my objection to the method used by the district judge in resolving objections made by plaintiff to the two court instructions and the failure of lawyers to seek a ruling. After objections were made, and the court inquired "Anything further, Gentlemen?", the answers were no. The court said:

> All right. I'll have the jury brought back in.

The court should rule on the objections made. When non-UJI instructions are given, reasons should be stated. When the court fails in these respects, the lawyers should request the court to perform its duty. Upon failure to do so, there is no ruling from which to appeal. I think that objections are waived.

591 P.2d 688

James McFARLAND, Plaintiff-Appellant,

v.

Lamar J. HELQUIST, Defendant-Appellee.

No. 3430.

Court of Appeals of New Mexico.

Feb. 6, 1979.

Gordon J. McCulloch, LeRoi Farlow, P. A., Albuquerque, for plaintiff-appellant.

John A. Klecan and James T. Roach, Klecan & Roach, P. A., Albuquerque, for defendant-appellee.

OPINION

WALTERS, Judge.

Plaintiff McFarland appeals from the order of the District Court granting defendant's motion for summary judgment. We affirm.

Since it is not clear upon what ground the summary judgment was based, appellant argues three grounds for reversal: that there are genuine issues of fact regarding (1) the negligence of defendant, (2) the contributory negligence of plaintiff, and (3) the proximate cause of the accident.

McFarland correctly states the proper standard for granting summary judgment: The moving party must show that there is no genuine issue as to any material fact. Once the movant has made a prima facie showing that he is entitled to summary judgment, the opposing party has the burden of demonstrating the existence of a genuine factual issue. *Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972). Summary judgment is a drastic remedy, and it should be used only with great caution and should not be resorted to as a substitute for trial of the issues. *Pharmaseal Laboratories, Inc. v. Goffe,* 90 N.M. 753, 568 P.2d 589 (1977).

The following facts are not disputed: McFarland (plaintiff) was traveling east on U.S. 550 between Farmington and Aztec in the northerly lane of two eastbound lanes, driving about 55 miles per hour. The area was flat and the road was straight. Visibility was unimpaired. At about the same time and place or shortly before, Helquist (defendant) and his wife left a cemetery located off to the south of the highway. They had parked their car off the highway on the south shoulder while they attended a funeral. Helquist drove across the south lane into the left, or north, eastbound lane, and started a U-turn to the left through a break in the median, to return to Farmington. As he was starting his turn, he was rear-ended by McFarland.

After the accident Helquist returned and measured the distance from the point where he had been parked at the cemetery to the point of impact at 450 feet. McFarland estimated the distance from where he had observed parked cars on the south shoulder at the cemetery to the point where the accident occurred at approximately 160–200 feet.

In his deposition, McFarland said he was driving along U.S. 550 and noticed mourners coming to their cars from the cemetery, and he became particularly attentive to the possibility that children might be present who would dart into the highway.

There are facts which would support a jury's finding that Helquist was negligent. He testified on deposition that at some point before he made his U-turn, he got into the northernmost eastbound lane, but he did not remember looking into his rearview mirror at any time prior to the impact. He didn't remember whether he looked to see if any cars were coming from the west before he pulled onto the eastbound lanes of the highway; he didn't know how fast he was traveling; he didn't know whether or not he had engaged his left turn signal as he slowed to make the turn; he did not see McFarland's car until he was hit by it.

By the same token, the facts also indicate McFarland's contributory negligence. He was looking toward the south side of the highway as he approached and passed the cemetery west of the point of impact; he did not see Helquist pull onto the highway and he did not see Helquist in front of him until he was directly upon him. At that time Helquist was in the north lane and turned at a northerly angle "like he was fixing to go through the median," and McFarland was 10–25 feet from him. He couldn't remember if either brake or turn signals were operating on the Helquist vehicle.

McFarland argues that he is entitled to the inference that Helquist pulled across the highway directly in front of him; and that Helquist's own deposition testimony reflects that he was not keeping a proper lookout. Plaintiff also argues that reasonable men would differ on the issue of his own contributory negligence, because he was traveling within the speed limit and had only momentarily diverted his gaze to the south before he looked back and saw defendant's car immediately ahead of him. Coupling these facts with defendant's admission that he moved from the south shoulder to the north eastbound lane within

a 160- to 450-foot distance, he contends a jury could reasonably infer that he, McFarland, was suddenly confronted with defendant's automobile in front of him—presumably confronted with the circumstances of an unavoidable accident.

The argument is intriguing—as far as it goes. It overlooks, however, that even if we give plaintiff the benefit of every reasonable inference of defendant's negligence and plaintiff's confrontation with sudden danger, there is nothing in the record to overcome the fact that plaintiff did not see what immutably was in front of him. Helquist's car might have crossed over immediately before the impact, but why did plaintiff not see it, or why did he not move to the outside lane to avoid it? If, within a 160- to 450-foot span a car crosses from right to left on a flat, clear road sufficiently ahead of another on its left to wind up directly in front of the second car, the driver of the second car *must* see the vehicle moving diagonally across and ahead of him unless his eyes are completely off the road for longer than a reasonable time. Plaintiff did not see defendant's car at all until he was within 15–25 feet of it. Helquist's car might have been in its slightly-turned position for some time before impact if plaintiff did not see it cross from right shoulder to left median ahead of him; but if that is so, why did not plaintiff see, long before he did, what obviously he should have seen if he had been keeping a proper lookout? If Helquist's car crossed over to the median cut-off long enough before McFarland reached the cemetery area to explain why McFarland did not see it crossing over, then McFarland should have seen what was there to be seen had he been keeping a proper lookout. *New Mexico State Highway Dept. v. Van Dyke,* 90 N.M. 357, 563 P.2d 1150 (1977); U.J.I. 9.3. There are absolutely no inferences which may be drawn from the depositions presented to the trial judge to excuse McFarland from seeing the only two possible explanations of Helquist's presence on the highway at the point of impact. *Selgado v. Commercial Warehouse Co.,* 86 N.M. 633, 526 P.2d 430 (Ct.App.1974). "An inference is not a supposition or a conjecture, but is a logical deduction from facts proved * * * and guess work is not a substitute therefor." *Stambaugh v. Hayes,* 44 N.M. 443, 103 P.2d 640 (1940).

McFarland did not excuse himself. He said only that he did not see where Helquist had come from; he didn't see the car at all until he was so close that he was unable to avoid hitting it. According to the depositions of both parties, there was no other traffic on the road; there were no obstructions, no hills, no curves; it was daylight; the weather was clear and dry. Obviously plaintiff was contributorily negligent in failing to see what he should have seen, and reasonable minds cannot differ on that issue. It was a proper legal question to be resolved by the judge. *New Mexico State Highway Dept. v. Van Dyke, supra.*

Plaintiff finally argues that a jury (not a judge) should have determined whether his own negligence, if any, was the proximate cause of the accident. In *Silva v. Waldie,* 42 N.M. 514, 82 P.2d 282 (1938), the Supreme Court adopted the rules stated in §§ 463 and 465 of the Restatement of the Law of Torts, and declared that plaintiff's contributory negligence must have contributed substantially to his injuries in order to be considered a proximate cause. That rule was repeated in *Stephens v. Dulaney,* 78 N.M. 53, 428 P.2d 27 (1967). Certainly plaintiff's inattention—his failure to exercise reasonable care for his own safety—was a substantial contributing factor to the accident which occurred. *See Martinez v. City of Albuquerque,* 84 N.M. 189, 500 P.2d 1312 (Ct.App.1972). The record does not substantiate an inference that defendant's negligence was the sole cause, or even a contributing cause, to the collision.

There were no material issues of fact surrounding plaintiff's negligence and its contributing proximate cause to the accident to present to a jury. Consequently, the trial court correctly granted summary judgment, and that judgment is affirmed.

IT IS SO ORDERED.

SUTIN, J., dissenting.

ANDREWS, J., concurring.

SUTIN, Judge (dissenting).

The only question to resolve is whether plaintiff, McFarland, was contributively negligent as a matter of law.

McFarland was travelling east out of Farmington on Highway 550. The accident occurred one tenth of a mile east of the Farmington city limits and at the east end of a cemetery that fronts on the southern lane of the eastbound highway. There were two lanes in each direction divided by a medial area. We are concerned only with the two southern lanes of traffic moving eastward.

As McFarland approached the west end of the cemetery area, he was driving in the north lane at 55 mph which estimates at 75 feet per second. He looked to his right and saw six to eight cars parked off the south side of the highway, and 30 to 40 people, including children, walking out of the cemetery toward the highway. While driving along, he looked to the right and ahead to make sure no person, including children would run out in front of him. In fact, he was watching both sides of the highway and the area in front of him. The cemetery fronted on the highway about 160 to 200 feet.

Defendant, Helquist, drove so fast into McFarland's lane of travel while McFarland's eyes were focused at a different point that McFarland did not see the Helquist car until he looked directly ahead. A time period of two to three seconds elapsed between the time he might have seen the Helquist car and the time of the accident. The Helquist car was between 10 and 25 feet directly in front of him. It was turned slightly north as though Helquist was preparing to go through the median into the westbound lanes back toward Farmington. McFarland braced himself and his car struck the Helquist car.

We are not confronted with a situaticn in which McFarland was looking ahead and had a duty to see that which was in plain sight. Under the circumstances of this case, McFarland's attention to traffic ahead was momentarily diverted by the activity surrounding a funeral departure by a host of people. Whether McFarland was contributively negligent is a question of fact for the jury.

It is hornbook law that the operator of a vehicle has a duty to keep a proper lookout and see what is in plain sight. UJI 9.3. To justify his failure to see a vehicle, the driver must offer evidence of justification. *New Mexico State Highway Dept. v. Van Dyke,* 90 N.M. 357, 563 P.2d 1150 (1977). Once a reason is given, its reasonableness is for the jury. *Selgado v. Commercial Warehouse Company,* 86 N.M. 633, 526 P.2d 430 (Ct.App.1974).

The driver of a vehicle has a duty to keep a reasonably continuous lookout, but not a constant lookout in one direction or constantly to have his eyes on the road ahead. *Crocker v. Johnston,* 43 N.M. 469, 95 P.2d 214 (1939). He is not required to refrain from directing his attention to reasonably anticipatable dangers which may emanate from sources other than the roadway ahead. *Burnett v. Marchand,* 186 So.2d 383 (La. App.1966). As a matter of fact, the driver has a right to assume that any person entering into the highway would do so with due care and caution. *Beaucage v. Russell,* 127 Vt. 58, 238 A.2d 631 (1968).

Plaintiff's contributive negligence is a genuine issue of material fact.

591 P.2d 1158

In the Matter of the Last WILL and Testament of Beatrice M. GREIG, Deceased.

Melvin D. RUECKHAUS and Natalie Didama, Contestants-Appellants,

v.

Fletcher R. CATRON, Petitioner-Appellee.

No. 11851.

Supreme Court of New Mexico.

Feb. 9, 1979.

Rehearing Denied March 14, 1979.

Willard F. Kitts, Elizabeth E. Whitefield, Albuquerque, for Rueckhaus.

Bruce C. Redd, Albuquerque, for Didama.

Charles J. Noya, Albuquerque, Catron, Catron & Sawtell, W. Anthony Sawtell, Santa Fe, for petitioner-appellee.

OPINION

FEDERICI, Justice.

This case involves a dispute over which of two wills executed by Beatrice M. Greig, deceased, is entitled to probate. Three proceedings below are relevant to the appeal:

(1) An action filed in the District Court of Bernalillo County entitled "In The Matter of the Alleged Incompetency of Beatrice Worth Greig," No. 6–76–02395, in which the trial court determined that Ms. Greig was incompetent as of March 2, 1976;

(2) A probate proceeding filed by attorney Catron (appellee) in the District Court of Bernalillo County to probate a will executed by Ms. Greig in *1972*, followed by an "Affirmation of Will" executed by Ms. Greig on June 2, 1976, affirming the 1972 will; and

(3) A probate proceeding filed by attorney Rueckhaus (appellant) in the Probate Court of Bernalillo County to probate a will executed by Ms. Greig in *1975*.

The district court, in the course of its proceedings relating to the 1972 will, transferred the probate court proceeding to the district court and abated any action in that

case until there was a hearing on the 1972 will. After trial, the court held that the 1972 will was effective by reason of the 1976 affirmation and admitted the 1972 will and the 1976 affirmation to probate as the Last Will and Testament of Beatrice Greig. The court refused to admit the 1975 will to probate. Appellant Rueckhaus and appellant Didama appeal.

Didama is a surviving heir of Ms. Greig. She claims that because of the incompetency of Ms. Greig neither the 1972 will, the 1975 will, nor the affirmation of 1976, are valid. Therefore, Didama argues that Ms. Greig died intestate and that she is entitled to all of decedent's estate as sole surviving heir. Didama did not enter an appearance or become a party below. Didama joined in this appeal without complying with any of the rules of appellate procedure. We hold that Didama is not a proper party to this appeal.

Even if we were to assume for purposes of discussion that Didama is a proper party, she could not prevail. Notwithstanding the guardianship order in Cause No. 6–76–02395, Ms. Greig had the requisite testamentary capacity to make a will. The controlling elements of testamentary capacity were set out by this Court in *McElhinney v. Kelly*, 67 N.M. 399, 356 P.2d 113 (1960): "(1) [K]nowledge of the meaning of the act of making a will, (2) knowledge of the character and extent of the estate, and (3) knowledge of the natural object of testator's bounty." *Id.* at 403, 356 P.2d at 115 (citations omitted). *See also Hummer v. Betenbough*, 75 N.M. 274, 404 P.2d 110 (1965).

In the present case, the trial court found that:

> 11. On June 2, 1976 when Beatrice Greig signed the Affirmation of Last Will and Testament, she understood the nature of the document and the effect of her execution of the Affirmation of Last Will and Testament.
>
> 12. At the time she signed the Affirmation of Last Will and Testament, Beatrice Greig knew the natural objects of her bounty.

There is substantial evidence in the record to support the findings made by the trial court and those findings are the facts upon which the case rests.

With reference to the 1972 will and the affirmation, the trial court made the following findings:

> 6. On June 2, 1976, Beatrice Greig executed in the presence of Marie Taylor, Diane L. Catron and Fletcher Catron a document captioned, "Affirmation of Last Will and Testament" which provided:
>
> > "I, Beatrice M. Greig, do hereby declare that my Will dated January 8, 1972, is my Last Will and Testament and I hereby revoke any and all subsequent Wills which may have been made by me to this date."
>
> * * * * * *
>
> 8. On June 2, 1976, at Beatrice Greig's request and in her presence and the presence of each other, Marie Taylor and Diane L. Catron witnessed Beatrice Greig's signature by signing their names to the Affirmation of Last Will and Testament.

Based upon its findings of fact, including those quoted above, the court concluded:

> 2. The January 8, 1972 Will was effective as the Last Will and Testament of Beatrice Greig, deceased, at the time it was signed.
>
> 3. If the January 8, 1972 Will was revoked, it was either revived by the Affirmation of Last Will and Testament dated June 2, 1976, or the Affirmation of Last Will and Testament is a testamentary instrument in and of itself which incorporated by reference the terms of the 1972 Will.
>
> 4. The January 8, 1972 will and the copy of the June 2, 1976 Affirmation of Last Will and Testament should be admitted to probate as the Last Will and Testament of Beatrice Greig, deceased.

Appellant Rueckhaus contends that the 1972 will was revoked by tearing and that, having been revoked, there was no 1972 will which could have been revived

by affirmation in 1976. Consequently, Rueckhaus contends that the 1975 will should have been admitted to probate.

Sections 45–2–507 and 45–2–509, N.M.S.A.1978 (formerly §§ 32A–2–507 and 32A–2–509, N.M.S.A.1953 (Inter.Supp.1976–77)) are pertinent to the issue presented in this appeal:

45–2–507. Revocation by writing or by act.

A will or any part thereof is revoked by:

* * * * * *

B. a subsequent will which revokes the prior will or part thereof, expressly or by inconsistency; of

C. being burned, torn, canceled, obliterated or destroyed, with the *intent* and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

45–2–509. Revival of revoked will.

If a person having made a will, makes a subsequent will, revoking the prior will, and afterwards revokes the subsequent will, the prior will is not thereby made valid, unless the validity of the prior will is acknowledged in writing (emphasis added).

The record shows that the first two pages of the 1972 will had been torn two times longitudinally. The third and last page of the will had not been torn at all. There was no direct evidence that decedent, or any other person in her presence and by her direction, had torn the will. It was found in a cupboard at her residence at the time of her death. The torn will was legible and was introduced in evidence at the trial. Appellee Catron testified that at the time the affirmation was signed by decedent in 1976, an executed duplicate original of the 1972 will was in his office files in Santa Fe. Appellee also testified that decedent had told him in June 1976 that the 1972 will still existed and was in a bureau drawer in her home. The uncontradicted testimony of Ms. Greig's private nurse was that Ms. Greig went into Four Seasons Nursing Home in April or May of 1976. She was transferred to Anna Kaseman Hospital, and then to Presbyterian Hospital. Upon her return home, she was almost completely helpless.

Whether a will has been burned, torn, canceled, obliterated or destroyed with the intent to revoke it is a matter of fact to be determined in each particular case. There is substantial evidence in the record in this case to support the trial court's finding that the 1972 will had not been revoked by tearing.

A provision in the 1975 will revoked the 1972 will; however, the affirmation executed in 1976, acknowledging the validity of the 1972 will, revoked the 1975 will and *revived* the 1972 will under § 45–2–509. If the 1975 will had not been revoked, or if the 1972 will had been burned, torn, canceled, obliterated or destroyed with the intent and for the purpose of revoking it, there could have been no revival under § 45–2–509.

In the present case the trial court correctly ruled that the 1972 will, which it found had not been revoked by tearing, was revived in 1976 by an acknowledgment in writing as provided in § 45–2–509.

The decision of the trial court is affirmed.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

591 P.2d 1160

STATE of New Mexico, Plaintiff-Appellee,

v.

Charles B. DAVIS, Defendant-Appellant.

No. 3694.

Court of Appeals of New Mexico.

Feb. 1, 1979.

Melanie S. Kenton, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of kidnapping, extortion, aggravated battery, and aggravated assault. He was acquitted of assault with intent to commit a violent felony (murder). We discuss the issues that were briefed; issues listed in the docketing statement, but not briefed, are deemed abandoned. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App.1977). The issues briefed group into four topics: (1) the hostage as-

pect of kidnapping; (2) the propriety of evidence as to the injury of one of the victims; (3) discovery of and limitations on the use of a witness's statement; and (4) discovery of a grand jury transcript.

Tessier (Rolland Tessier) was a sign manufacturer; the name of the business was Tesco Signs, Inc. Defendant was employed by the firm as a janitor and truck driver. Scott had been employed by the firm, but had been fired the week before the crimes. Judy married Tessier subsequent to the events in question. At the time of the crimes she was Judy Higginbotham. Kristin Higginbotham was the daughter of Judy. Jennifer Boyd was Kristin's friend. Kristin and Jennifer were six years old. Rhea Taylor was an acquaintance of Judy. Willis (Robert Willis) was an acquaintance of Rhea.

On May 26, 1977, defendant had been instructed to deliver a coffee table to Tessier's residence. Tessier was at home preparing to hang a picture. Tessier went to get a hammer from his workshop; he saw the coffee table on the patio, the Tesco truck in the alley, and defendant loading trash on the truck. He also saw defendant's car pull into the alley, driven by Scott. He saw Scott and defendant having a conversation. Having obtained the hammer, Tessier started back to the house. Before reaching the house, Scott came up to Tessier and sought, unsuccessfully, to get his job back.

After reentering the house, there was a banging on the back door. Scott was at the back door. Scott again inquired as to getting his job back. When Tessier stated that there was no way Scott would be reemployed, Scott pulled out a pistol, cocked it, pointed it at Tessier's head, and told Tessier to put his hands on his head and back into the dining room. Scott told Tessier to call Judy; Tessier complied. Scott then told Tessier to call defendant; Tessier complied.

Upon defendant's entry, Scott inquired about Tessier's shotgun; defendant fetched it from a bedroom. Defendant handed the shotgun to Scott; Scott passed the pistol to defendant who held it on Judy. Up to this point, Scott had twice threatened to kill Tessier and once had threatened to kill Judy.

Scott demanded, and obtained, Tessier's cash—$200. Scott then demanded a check for $5,000. When told there was not that much money in the bank, Scott had Tessier write a check to Scott for $3,000. Scott then told Tessier to tear up the check and write a check to defendant for $3,000. Defendant left to cash the check. While defendant was gone, Scott rambled on "about honkeys and whities, how the black man didn't have a chance" and "repeated several times that he [Scott] wished I [Tessier] would do something so he could waste me away and blow me away because of something I had done to a friend of his." Defendant returned in about twenty minutes, having unsuccessfully attempted to cash the check at two banks. About this time, Kristin and Jennifer returned from purchasing snow cones; they were kept with Tessier and Judy.

Scott wanted Tessier to write another check; Tessier had no more checks at the house. Defendant suggested Tessier call his business and authorize defendant to pick up Tessier's checkbook. Tessier made the telephone call; defendant went after the checkbook. While defendant was on this errand, Scott went on and on about the terrible things Tessier had done to Scott's friend, Arthur Lacey, "and that he was going to waste me for what I had done."

Defendant returned with the checkbook; Scott and defendant wiped the checkbook for fingerprints. After Tessier balanced his checkbook, the balance in the checking account was $1,587. Scott and defendant conferred; Tessier was told to write a check for $1,500 to defendant. Defendant left to cash the check and returned with the money.

After Scott and defendant conferred, Scott told Tessier that everyone would depart in two vehicles. Defendant would take Judy, Kristin and Jennifer in the truck. Tessier would go with Scott in the car. Scott said "that if I [Tessier] tried to overpower him or tried to get away, Charles [defendant] will kill them [the three fe-

males], and if you try to escape, I will kill you."

Before leaving defendant obtained a pistol from Tessier's car. The group left, divided as previously indicated. Defendant and the three females were in defendant's car; Scott and Tessier in Tessier's car. Scott was holding a cocked pistol on Tessier and again threatened to kill Tessier for "'what you did to Arthur Lacey'". While driving, defendant's car had a flat tire. The group returned to the house; defendant and the females transferred to the truck. After some driving in Roswell, the group went to the Bottomless Lakes, eventually stopping in a cul-de-sac at Figure Eight Lake "where they got us out of the car and the truck."

The group went "behind the face of the hill"; Scott and defendant conferred; Tessier and the three females were directed to a flat area so that Scott and defendant were "ten to twelve feet above us, so they were looking down at us." Scott and defendant then "had quite a long discussion" and started to move closer to the females. Defendant pointed his pistol at Tessier and told him to get away from Judy.

Thereafter both Scott and defendant took turns driving to an adjacent lake to check if people were around. Scott made two trips, defendant made four. During one of Scott's trips, Tessier "tried to reason" with defendant, unsuccessfully. Defendant told Tessier he was going to waste him because Tessier treated defendant like a slave, was a racist "'and besides that, you burned my blood brother Arthur Lacey.'" The context of this conversation, according to Tessier's testimony, is that Tessier turned Lacey "'into the police'" after Lacey threatened Tessier's life.

After the trips to the adjacent lake, Scott said, "'we can't kill them here because there are too many people around, so let's go back to the car.'" When the group returned to the car, another vehicle drove up. The occupants were Rhea and Willis. When they came up to the group, the guns were pointed at them also. Scott said, "'we are going to have to waste all of you.'" When told to "go back up the hill", Tessier refused. Scott said he would kill Judy if Tessier did not get up the hill. Tessier complied.

The group was then backed up to the edge of the lake. Scott and defendant raised their guns, Tessier heard a shot, felt a bullet go by his head, slipped back and fell into the lake. As he fell he heard more shots. Rhea and Willis had been shot. After the shooting, Scott and defendant drove back to Roswell in the Tesco truck. Scott killed himself before being apprehended by the police.

The Hostage Aspect of Kidnapping

Section 30–4–1, N.M.S.A.1978 states:

> A. Kidnaping is the unlawful taking, restraining or confining of a person, by force or deception, with intent that the victim:
>
> * * * * * *
>
> (2) as a hostage, confined against his will . . . .

Under this provision, the unlawful taking, restraining or confining must be with the intent that the victim "be held as security for the performance, or forbearance, of some act by a third person." *State v. Crump*, 82 N.M. 487, 484 P.2d 329 (1971).

[redacted] The criminal information charged that each of the six victims—Tessier, Judy, Kristin, Jennifer, Rhea and Willis—were held as hostages. Thus, defendant was put on notice that the State charged the one offense of kidnapping was committed by holding any one of the victims as a hostage, and that defendant should be prepared to defend the charge in connection with each of the victims. *State v. Gurule*, 90 N.M. 87, 559 P.2d 1214 (Ct.App.1977).

[redacted] The jury was not instructed on kidnapping as to each of the victims. The kidnapping instruction limited the hostages to Judy, Kristin and Jennifer. This was no change in the charge; rather, it was a limitation on the way in which the kidnapping offense was committed. Restricting the means by which the offense was com-

mitted to three of the victims named in the information was not prejudicial to defendant. Compare *State v. Armijo*, 90 N.M. 614, 566 P.2d 1152 (Ct.App.1977).

The jury was also instructed that Judy, Kristin and Jennifer must have been held as hostages for the performance or forbearance of some act by Tessier.

Because Tessier was named as a hostage in the information, but not as a third party, defendant asserts it was improper for Tessier to be considered the third party in connection with Judy, Kristin and Jennifer. Defendant contends the use of Tessier as a third party denied the defendant "his right to know exactly what he is being charged with and to be tried solely on those charges". This contention is without merit.

We have previously pointed out that defendant was charged with kidnapping by holding any one of six victims as a hostage, and that kidnapping was submitted to the jury on the basis of three of the victims named in the information. Defendant had notice of the charge and was tried on the charges in the information.

The information did not state the third person for whom any of the six victims were held hostage, and it is not contended that the information was required to do so. See Rule of Crim.Proc. 8(a)(3). We note that defendant did not ask for information about the third person; he requested no statement of facts. See Rule of Crim.Proc. 9.

The issue, simply, is whether Tessier could be the third person involved in Judy, Kristin and Jennifer being held as hostages. *State v. Crump*, supra, makes it clear that the victim and the third person cannot be the same individual; thus, Tessier could not have been a hostage for the performance of some act by Tessier. However, *Crump*, supra, does not hold that Judy, Kristin and Jennifer could not be hostages for the performance of some act by Tessier. If it is charged that X and Y were held as hostages, this does not prohibit a conviction of kidnapping on the basis that X was hostage for the performance of some act by Y, and vice versa.

We need not consider whether there was evidence that Tessier was held as a hostage for the performance of an act by a third party because no issue as to Tessier, as a hostage, was submitted to the jury. The kidnapping instruction referred to Tessier only as a third party, not as a hostage. The instruction was not erroneous under the evidence, and was consistent with the charge in the information.

Concerning the sufficiency of the evidence, defendant states "there was no evidence of a third party for whose act or forbearance the hostages were held." The claim is frivolous. The threats to kill Judy at the house were for the purpose of requiring action by Tessier. The threat that defendant would kill Judy, Kristin and Jennifer, if on the trip to the Bottomless Lakes Tessier attempted to escape or overpower Scott, met the requirements of *State v. Crump*, supra. There is also evidence of a threat to kill Judy, while at the lake, if Tessier did not move as commanded. This evidence also met the *Crump* requirement.

Evidence of Injury of One of the Victims

The aggravated battery conviction is based on the shooting of Willis which resulted in great bodily harm. Section 30–3–5, N.M.S.A.1978. The aggravated assault charge was submitted on the basis of pointing a gun at Tessier, or Judy, or Kristin, or Jennifer, or Rhea, or Willis. Section 30–3–2, N.M.S.A.1978. Great bodily harm was not an element of the aggravated assault charge.

During direct examination, Rhea testified that she had been shot twice and hospitalized as a result of being shot. Over defendant's objection, Rhea testified as to her personal injuries, that one of the bullets went through her pelvic area, and she understood there might be damage to her reproductive organs.

Defendant had objected to this testimony as immaterial. Upon renewing this objection, the trial court agreed that the extent of Rhea's injuries had no probative value on

the aggravated assault charge. It would seem, as the prosecutor contended, that the extent of Rhea's injuries was relevant to the charge that defendant assaulted Rhea with the intent to commit murder. The trial court did not rule on this contention, and we do not consider it further.

After the trial court agreed with defendant that the extent of Rhea's injuries was not relevant to the aggravated assault charge, defendant requested the trial court to instruct the jury on the matter. The trial court did so; the jury was instructed to disregard Rhea's testimony concerning the extent of her injuries.

After the trial court instructed the jury, the State called seven more witnesses and rested its case-in-chief. Defendant then moved for a mistrial on the basis of the testimony concerning the extent of Rhea's injuries. Defendant contends the denial of this motion was error. We disagree for two reasons.

First, the motion was not timely. *State v. Milton*, 86 N.M. 639, 526 P.2d 436 (Ct.App.1974); compare *State v. Baca*, 89 N.M. 204, 549 P.2d 282 (1976).

Second, the evidence of the aggravated assault was overwhelming; defendant could not have been prejudiced by the testimony as to the extent of Rhea's injuries after the jury was told to disregard that testimony. *State v. Sanchez*, 87 N.M. 140, 530 P.2d 404 (Ct.App.1974); *State v. Thurman*, 84 N.M. 5, 498 P.2d 697 (Ct.App. 1972).

Discovery of and Limitations on Use of a Statement

Arthur Lacey was arrested in Colorado on at least one New Mexico charge and possibly four felony warrants issued in Texas. He was returned to New Mexico and jailed. We have no information as to when Lacey was returned to New Mexico. On August 30, 1977, Lacey responded to questions of two sheriff's department officers for more than two hours. The questions and answers, not under oath, were recorded. Subsequently a transcript of the recording was prepared; the typed transcript consists of 205 pages. This transcript of the officers' questions and Lacey's answers is the statement involved in this issue.

Defendant presents five contentions which involve Lacey's statement. A consideration applicable to each of the five claims is the irrelevancy of the statement to issues in this case. Lacey stated that he knew nothing about the criminal events of May 26, 1977; he first heard about them two or three days after they happened. As to the defense that defendant had no criminal intent in connection with his part in the crimes, Lacey stated that he had not been acquainted with defendant, "I never even knowed him". Lacey's knowledge about the crimes or defendant's participation was hearsay information acquired from others. Lacey had no personal knowledge. Evidence Rule 602.

(a) At a pretrial hearing on October 11, 1977, defendant requested that he be furnished a report which, upon information and belief, was in the possession of the sheriff's office. The prosecutor reported that he did not know of any such report, but if the report did exist, the report would be furnished to the defendant. At the time of this representation by the prosecutor, one of the officers who questioned Lacey was in the courtroom, but kept silent.

The transcript indicates that, at the time of defendant's request, the statement was in the possession of federal officers. Upon the statement being returned to the sheriff's office, it was turned over to the prosecutor, who promptly notified defense counsel as to its existence. The prosecutor, however, refused to furnish a copy of the statement to the defense. Instead, the prosecutor filed a motion asking the trial court to determine whether the contents of the statement should be made available to the defense. The grounds alleged for this limitation on discovery were based on comments by Lacey which were defamatory of a large number of individuals.

At a hearing on the prosecutor's motion, the trial court allowed the defense to exam-

ine the statement under certain limitations. The defense then sought a continuance of the trial setting, asserting Lacey's comments could not be adequately investigated in the short period remaining prior to the scheduled trial date. The continuance was granted. With this continuance, the record shows the Lacey statement was made available to the defense two months prior to trial.

Defendant claims the delay in making the Lacey statement available was error. "Defendant should have been able to investigate the substance of Lacey's statement as soon as possible to the time the interview was given, in order to preserve any evidence, and talk to any witnesses, that the Defendant felt was necessary in his defense." The claim is frivolous. Assuming, but not deciding, that Lacey's statement could be considered material to the preparation of the defense, the contents of the statement do not indicate any prejudice to defendant by the delayed disclosure, and defendant advances nothing indicating any prejudice. *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct.App.1975).

(b) The trial court's limitations upon defendant's use of Lacey's statement were:

> [T]hat no portion of this statement be communicated to any person other than the Defendant and further that no portion of the statement shall in any manner be copied or in any manner reduced to writing and said statement shall be returned to the undersigned Judge within 20 days of the date hereof.

Defendant contends that the limitations upon the use of Lacey's statement denied him the right to properly prepare for trial. This argument assumes that the contents of the statement were material to the preparation of the defense. At this point, we again assume, but do not decide, that the contents were material.

There are two answers to the claim of improper limitations on the use of the statement.

First, how was defendant prejudiced? Defendant advances nothing indicating the preparation of the defense was in any way harmed by the limitations. *Chacon v. State*, supra.

Second, the trial court could properly place limitations on the use of the statement. Where, as here, the prosecutor had refused disclosure, the trial court may require disclosure of relevant material under Rule of Crim.Proc. 27(e), unless:

> (2) there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

Here there was disclosure to defense counsel and to defendant. The limitations imposed by the trial court were designed to prevent disclosure to others. Lacey's statement, unsworn, is full of defamatory comments concerning a number of persons. There is nothing indicating disclosure of the defamatory comments to anyone other than defendant and his counsel had any usefulness. Disclosure of the unsworn defamatory comments would, in these circumstances, have been an unnecessary embarrassment to those who were the object of the comments.

(c) When he learned of the existence of the Lacey statement, and its nondisclosure, the prosecutor was upset. The transcript indicates the prosecutor threatened to have the officers who questioned Lacey fired. The two officers were discharged by the sheriff, and an inference from the tendered evidence is that the discharges related to nondisclosure of the Lacey statement.

The two officers were called as witnesses by the prosecutor. Defendant sought to cross-examine them as to why they had been discharged from the sheriff's department. Defendant claimed the reason for their discharge would show bias of the witnesses against the defendant because, if defendant were convicted, their reputations would be cleared. This contention approaches the frivolous.

The officers withheld the statement from both the defense and the prosecutor. If the prosecutor caused them to be discharged, how does the fact of discharge show bias toward the defendant? The fact that defendant was convicted does nothing toward clearing the officers of the fact that they withheld the statement, and may have been discharged because of the withholding. The bias of a witness is relevant because it affects the credibility of the witness. *State v. Santillanes*, 86 N.M. 627, 526 P.2d 424 (Ct.App.1974). Cross-examining the officers as to the reason for being discharged would not have shown they were biased against defendant. *State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct.App.1972).

State v. Burkett, 33 N.M. 159, 262 P. 532 (1928) approves a liberal approach as to the extent of cross-examination to test the bias, or credibility, of a witness. The decisions, however, are to the effect that "the matter of cross-examination, to test credibility, is largely within the discretion of the trial court." *State v. Burkett*, supra. Where, as here, the tendered cross-examination has been denied, the appellate issue is whether the trial court's ruling was an abuse of discretion. *State v. Williams*, 76 N.M. 578, 417 P.2d 62 (1966); *State v. Roybal*, 33 N.M. 540, 273 P. 919 (1928); *State v. Burkett*, supra; *State v. Wesson*, supra. This approach is reflected in Evidence Rule 611, which places "reasonable control" in the trial court.

Even if the questions concerning the reason the officers were discharged could somehow be considered as showing bias against the defendant, the trial court did not abuse its discretion in excluding such questions. There was no abuse of discretion because of the nature of the testimony of the officers; the testimony went only to gathering evidence—guns, bullets, the arrest of defendant and defendant's statement—after the crimes had been committed.

(d) The defense called Lacey as a witness at trial. Prior to any testimony by Lacey, defendant asked to be furnished a copy of Lacey's statement "[f]or the purpose of this examination". The trial court denied the request, ruling that the statement had no probative value on any of the issues in the case. Defendant asserts this ruling was error.

Defendant's direct examination of Lacey brought out that Lacey knew nothing about the matters being tried. Defendant then questioned Lacey about hiring someone to kill Tessier. Lacey testified that he had not hired anyone, did not know who did, could only speculate concerning a hiring, and had no factual basis for any speculation.

Defendant then inquired as to what he had told the officers, in his statement, regarding a "contract" on Tessier. Lacey testified that he had no recollection of telling the officers that certain other people were involved in a "contract on Tessier". Lacey was then asked if, in his statement, he had referred to crimes committed by Lacey and Tessier. Lacey denied making any such statement. Defendant then requested Lacey's statement "to impeach this witness." Defendant contends the denial of this request was error.

In his statement, Lacey did discuss a contract on Tessier's life, but his comments were not on the basis of personal knowledge; rather, Lacey's comments were either hearsay or speculation. Lacking any personal knowledge about the contract, the trial court properly denied use of the statement to examine Lacey at trial because the statement had no probative value.

In addition, none of Lacey's comments about the contract involved defendant; rather, they went to Scott and another named individual, neither of whom were being tried. Because Lacey's hearsay and speculative comments about the contract on Tessier did not involve defendant, the contract was a collateral issue. "[T]he extent that evidence on a collateral issue is to be permitted is within the trial court's discretion." *State v. Alderette*, 86 N.M. 600, 526 P.2d 194 (Ct.App.1974); *State v. Moraga*, 82 N.M. 750, 487 P.2d 178 (Ct.App. 1971); see *State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct.App.1974). There was no

abuse of discretion under the circumstances of this case.

Even though hearsay or speculation, in his statement, Lacey did make comments about persons involved in a contract on Tessier's life. In his statement, he did refer to alleged crimes that he committed with Tessier. Thus, his trial testimony was inconsistent with his statement. However, the trial court's refusal to allow defendant to use Lacey's statement to impeach Lacey's trial testimony was not error because Lacey did not testify to anything about the crimes or of defendant's involvement or lack of involvement. There was nothing to impeach. Refusing to permit use of the statement to impeach Lacey was not an abuse of discretion. *State v. Burkett*, supra.

(e) In refusing defendant's requests to use Lacey's statement during Lacey's trial testimony, the trial court admitted the statement "in evidence as a tender and for only that purpose, for the purpose of review by the Higher Court as to the Court's ruling".

Defendant asserts the trial court's remark, in the presence of the jury, denied him a fair trial because the remark was "a supposition" that defendant would be convicted. Defendant asserts this was error under *State v. Thayer*, 80 N.M. 579, 458 P.2d 831 (Ct.App.1969). *Thayer* held that an unintentional comment by the trial court, which tends to express the court's view as to the guilt of the accused, is prejudicial.

One of the reasons for a tender of evidence is to have the excluded evidence in the record for purposes of appellate review. *State v. Shaw*, 90 N.M. 540, 565 P.2d 1057 (Ct.App.1977). That is what the trial court did in this case. Including the statement in the record for that purpose did not tend to express any view by the court concerning defendant's guilt; the trial court did no more than explain the basis for admitting the statement as a tender. Compare *State v. Gurule*, supra.

After the jury is selected and sworn, Rule of Crim.Proc. 40(b) provides that initial instructions as provided in U.J.I.Crim. "shall be given". Included in the initial instructions, U.J.I.Crim. 1.00, is the instruction:

> No statement, ruling, remark or comment which I make during the course of the trial is intended to indicate my opinion as to how you should decide the case or to influence you in any way.

The appellate record of the trial begins with the testimony of a witness; neither the jury selection nor the trial court's opening remarks have been included. However, defendant does not claim that the above-quoted instruction was not given. In light of the record, we cannot say that the trial court's remark was understood by the jury as "a supposition" that defendant would be convicted.

Discovery of Grand Jury Transcript

A grand jury investigated the accusations made by Lacey in his statement. This grand jury did not indict defendant, he was charged by information. Nor is there any indication that the grand jury investigated the matter which resulted in charges against defendant.

Prior to trial, defendant sought to obtain the grand jury transcript in order to impeach witnesses on the basis of inconsistent statements. The trial court correctly pointed out that if a witness did not testify before the grand jury concerning defendant's case, defendant would not be entitled to a transcript of that witness's grand jury testimony. See *State v. Vigil*, 85 N.M. 735, 516 P.2d 1118 (1973). At the hearing on this motion, the grand jury transcript was not available; the trial court deferred a ruling. Defendant was to identify to the court the witnesses whose grand jury testimony defendant sought to obtain. The trial court would then review the grand jury testimony of the witnesses and determine if the witnesses' grand jury testimony related to defendant's case.

Before calling Lacey as a witness, defendant asked for a transcript of Lacey's grand jury testimony. In denying

the request, the trial court stated that the grand jury proceedings were "no way involved in this matter." Relying on *Valles v. State*, 90 N.M. 347, 563 P.2d 610 (Ct.App. 1977) defendant states: "Whether or not there is anything in the Grand Jury testimony that might aid the Defendant should not be determined by the Court." Defendant would apply *Valles* out of context. *Valles* follows *State v. Vigil*, supra, in holding that defendant is not entitled to a grand jury transcript unless the witness has testified at the criminal trial about that which he testified before the grand jury. Unless the witness testified before the grand jury about the matter being tried, defendant is not entitled to the grand jury transcript. Unless the witness testifies at the criminal trial about the matter being tried, defendant is not entitled to the grand jury transcript. *State v. Felter*, 85 N.M. 619, 515 P.2d 138 (1973).

The trial court could properly determine that Lacey did not testify before the grand jury concerning defendant's case. This is more than a determination of whether there is anything in the grand jury transcript that might aid defendant; it is a determination that there is nothing about defendant's case in the witness's grand jury testimony. The trial court, to preserve the secrecy of grand jury proceedings, properly makes that determination. See the discussion in *State v. Morgan*, 67 N.M. 287, 354 P.2d 1002 (1960).

We do not decide this issue solely on the basis that the trial court could properly determine that Lacey's grand jury testimony had nothing to do with defendant's case. In addition, Lacey did not testify to anything at defendant's trial concerning defendant's case. Thus, the requirement that the witness testify about the matter being tried was not met. Defendant was not entitled to a transcript of Lacey's grand jury testimony.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

592 P.2d 175

Barbara J. RUDISAILE, Personal Representative, Surviving Spouse and Executrix of the Estate of Stanley E. Rudisaile, Deceased, Petitioner,

v.

HAWK AVIATION, INC., a New Mexico Corporation, Respondent.

No. 12214.

Supreme Court of New Mexico.

Feb. 14, 1979.

Rehearing Denied March 14, 1979.

Palmer & Frost, Reed L. Frost, John E. Schindler, Farmington, Byrd, Davis & Eisenberg, Tom H. Davis, George M. Fleming, Austin, Tex., for petitioner.

Tansey, Rosebrough, Roberts & Gerding, Byron Caton, Farmington, for respondent.

OPINION

McMANUS, Senior Justice.

Barbara J. Rudisaile brought a wrongful death action against Hawk Aviation, Inc., for the death of her husband. The trial court sitting without a jury found for plaintiff and awarded $235,000.00 in damages.

Defendant appealed and the Court of Appeals reversed. We granted plaintiff's petition for a writ of certiorari and now reverse the Court of Appeals.

This action arose from an airplane accident which occurred on September 30, 1974 near Farmington, New Mexico. Defendant owned and operated a FAA certified field operation at the Farmington Municipal Airport. Plaintiff's decedent, Dr. Rudisaile, was a qualified pilot and the sole occupant of a Piper Cherokee 140 E which he rented from defendant.

On September 30, 1974 Alan Hawkinson, defendant's acting flight instructor, flew the Cherokee 140 E on three separate flights. After the third flight Hawkinson delivered the aircraft to Mr. Maxwell, one of defendant's employees, for a scheduled oil and oil filter change. Maxwell drained the oil and replaced the oil filter, but he failed to replenish the oil. Maxwell did, however, make an entry into the aircraft engine log book that the oil filter and oil had been changed. Dr. Rudisaile arrived at the office of defendant, conversed with Hawkinson, and proceeded to the aircraft. Dr. Rudisaile took the log book from Maxwell, climbed into the aircraft, started the engine, and taxied to the runway. The doctor did not make the customary preflight check of the aircraft prior to take-off. He left the Farmington Airport at about 3:36 p. m. and crashed a few minutes later.

The trial court determined that defendant, as lessor of an airplane which was in a defective condition unreasonably dangerous to Dr. Rudisaile, was strictly liable in tort for Dr. Rudisaile's death. The Court of Appeals reversed, holding that the doctrine of strict liability did not apply to this case because the airplane was not "defective".

The issues before this Court are: (1) whether an airplane rented without oil is "defective" within the meaning of Restatement (Second) of Torts § 402A (1965), and (2) whether decedent's failure to make a pre-flight check constitutes an affirmative defense to the tort of strict products liability.

New Mexico accepted the doctrine of strict products liability by adopting § 402A in *Stang v. Hertz Corporation,* 83 N.M. 730, 497 P.2d 732 (1972). *See also Bendorf v. Volkswagenwerk Aktiengeselischaft,* 88 N.M. 355, 540 P.2d 835 (Ct.App.1975), *cert. denied,* 88 N.M. 319, 540 P.2d 249 (1975). Section 402A of the Restatement reads as follows:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

The doctrine of strict liability was evolved to promote product safety by placing liability on the party primarily responsible for the injury occurring. *Stang, supra.* The imposition of § 402A liability " 'has a beneficial effect on manufacturers of defective products both in the care they take and in the warning they give.' (Citation omitted.)" *First Nat. Bk., Albuquerque v. Nor-Am Agr. Prod., Inc.,* 88 N.M. 74, 87, 537 P.2d 682, 695 (Ct.App.1975), *cert. denied,* 88 N.M. 29, 536 P.2d 1085 (1975).

Section 402A was extended to lessors in *Stang v. Hertz Corporation, supra.* In *Stang,* Hertz Corporation was held strictly liable for deaths resulting from a tire blow out. The tire, mounted with previous impact damage, was deemed to be unreasonably dangerous. This Court stated:

> So long as the bailor is in the business of leasing then he will be held to the same standard of care as a manufacturer or retailer for the protection of the consumer.

Id., 83 N.M. at 734, 497 P.2d at 736.

The Court of Appeals, in holding that the doctrine of strict liability did not apply to this case, reasoned that the airplane was not "defective" because "the airplane rented to the decedent had no hidden or latent defects which could not be discovered by

the exercise of reasonable care." *Rudisaile v. Hawk Aviation,* No. 3096 (N.M.Ct.App., filed Sept. 5, 1978). We disagree with this rationale. In our opinion, the Court of Appeals has substantially changed the meaning of "defect" as defined by § 402A and existing case law.

Definitional concepts of "defective condition unreasonably dangerous" are set out in § 402A Comments (*g*) and (*i*). Comment (*g*) entitled "*Defective condition*" states:

> The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, *in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.* (Emphasis added.)

Comment (*i*) entitled "*Unreasonably dangerous*" states:

> *The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it,* with the ordinary knowledge common to the community as to its characteristics. (Emphasis added.)

Courts have generally equated "defective" with "unreasonably dangerous". *See Casrell v. Altec Industries, Inc.,* 335 So.2d 128 (Ala.1976); *Seattle-First National Bank v. Tabert,* 86 Wash.2d 145, 542 P.2d 774 (1975); *Lamon v. McDonnell Douglas Corp.,* 19 Wash.App. 515, 576 P.2d 426 (1978). The Washington Supreme Court stated the following rule in *Seattle-First National Bank:*

> If a product is unreasonably dangerous, it is necessarily defective. The plaintiff may, but should not be required to prove defectiveness as a separate matter.
>
> . . . . .
>
> [L]iability is imposed under section 402A if a product is not reasonably safe.

542 P.2d at 779. The Supreme Court of Alabama stated in *Casrell:*

> [A] "defect" is that which renders a product "unreasonably dangerous," i. e., not fit for its intended purpose, and . . . all "defective" products are covered. . .
>
> The product either is or is not "unreasonably dangerous" to a person who should be expected to use or to be exposed to it. . . . The important factor is whether it is safe or dangerous when the product is used as it was intended to be used.

335 So.2d at 133.

As these cases indicate, to prove liability under § 402A the plaintiff need only show that the product was dangerous beyond the expectations of the ordinary consumer. The reasonableness of the acts or omissions of the plaintiff is never considered in determining whether a product is "defective." It is the opinion of this Court that an airplane leased without oil in the engine is dangerous beyond the expectations of the ordinary consumer. Therefore, the product is "defective" within the meaning of § 402A, and defendant is strictly liable for all resulting damages.

The next issue we address is whether decedent's own conduct should be a defense to strict tort liability. At trial, defendant requested the court to find that "decedent . . . by the exercise of reasonable care, should have known that the aircraft did not have oil . . . , and such act or omission was a proximate cause." Defendant's argument stems from the fact that decedent failed to pre-flight his aircraft. Defendant is seeking to establish conventional contributory negligence as a defense to strict liability. We refuse to accept this argument.

Conventional contributory negligence is not an affirmative defense to strict liability. *Bendorf, supra. See also Jasper v. Skyhook Corporation,* 89 N.M. 98, 547 P.2d 1140 (Ct.App.1976), *rev'd on other grounds, Skyhook Corp. v. Jasper,* 90 N.M. 143, 560 P.2d 934 (1977). "[C]ontributory negligence, as a defense to strict liability in tort, should be limited to those cases where the plaintiff *voluntarily and unreasonably encounters a known risk.* (Footnote omitted.)" (Emphasis added.) *Bachner v. Pearson,* 479 P.2d 319, 329–30 (Alaska 1970). The existence of due care on the part of the consumer is irrelevant. *Berkebile v. Brantly Helicopter Corporation,* 462 Pa. 83, 337 A.2d 893 (1975).

In this case, the record indicates that Dr. Rudisaile was not aware that the airplane had no oil in the engine before he took off. His failure to discover the absence of oil is not a defense to strict liability.

For the foregoing reasons, we reverse the Court of Appeals and affirm the decision and judgment of the trial court.

IT IS SO ORDERED.

SOSA, C. J., and EASLEY and FEDERICI, JJ., concur.

PAYNE, J., respectfully dissenting.

592 P.2d 178

RUDISAILE

v.

HAWK AVIATION, INC.

No. 12217.

Supreme Court of New Mexico.

Feb. 15, 1979.

ORIGINAL PROCEEDING ON CERTIORARI

DECISION

Because of the result reached in this Court's opinion in 92 N.M. 575, 592 P.2d 175, the issues presented in petition for writ of certiorari in this cause will not be decided. The writ is hereby quashed as being improvidently granted.

It is so ordered.

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

592 P.2d 178

MARBERRY SALES, INC., a New Mexico Corporation, Plaintiff-Appellee,

v.

D. W. FALLS, Individually, et al., Defendants-Appellees.

MARBERRY SALES, INC., a New Mexico Corporation, Plaintiff-in-Interpleader-Appellee,

v.

Jack HELLER, Defendant-in-Interpleader-Appellant,

MARBERRY SALES, INC., Plaintiff-Appellee,

v.

Jack T. HELLER, Defendant-Appellant,

and

William Weiss, Defendant.

No. 12028.

Supreme Court of New Mexico.

March 6, 1979.

Ken Neundorf, Joe Duran, Albuquerque, Saul M. Meadow, Beverly Hills, Cal., for Jack Heller.

Ahern & Montgomery, Robert D. Montgomery, Albuquerque, for Marberry Sales.

Rodey, Dickason, Sloan, Akin & Robb, Kenneth R. Brandt, Albuquerque, for First Nat. Bank of Albuquerque.

Keleher & McLeod, Arthur O. Beach, Albuquerque, for D. W. Falls.

OPINION

SOSA, Chief Justice.

The issue presented in this cause is whether the trial court erred in denying appellant's motion to set aside a default judgment entered against him on May 19, 1976. We find no error in the trial court's refusal to set aside the default judgment and affirm the judgment below.

Marberry Sales, Inc., (plaintiff-appellee) filed suit against D. W. Falls, Falls Land and Development Corporation, Inc., First National Bank of Albuquerque, Morris Shenker, and S. & F. Corporation (defendants-appellees) on July 30, 1975, seeking to recover a real estate commission due upon the sale of a large amount of land. Jack Heller (appellant), a California real estate broker, was joined as defendant in interpleader on January 22, 1976. Personal service was effected on appellant in California on April 15, 1976.

Appellant's attorney contacted plaintiff-appellee's attorney by telephone on May 11, 1976, requesting that the time in which appellant was required to file his answer or challenge the court's jurisdiction be extended. Both attorneys agreed that the time would be extended up to and including June

8, 1976. Default judgment was entered against appellant on May 19, 1976. Appellant first learned of the default judgment on November 2, 1977. He filed his first pleading in the case on November 23, 1977, when he moved to vacate the May 19, 1976 judgment. He appeals from the trial court's denial of said motion.

Appellant could have successfully sought to set aside the May 19, 1976 default judgment by appealing the judgment at the time it was entered or by filing a motion for relief under N.M.R. Civ.P. 55(c) and 60(b), N.M.S.A. 1978. The time for appeal has long since expired. See *Wehrle v. Robison*, 92 N.M. 485, 590 P.2d 633 (1979).

In order for a court to set aside a default judgment under Rule 60(b), the moving party must show a meritorious defense or cause of action and the existence of grounds for opening or vacating the judgment. *Springer Corporation v. Herrera*, 85 N.M. 201, 510 P.2d 1072 (1973). Rule 60(b) provides six bases for granting relief from a final judgment or order which are:

> (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

A motion for relief under Rule 60(b)(1), (2) or (3) may have been proper if it had been filed within the statutory time limitation applicable to those subsections, namely, not more than one year after the May 19, 1976 judgment. However, eighteen months have elapsed from the entry of the default judgment to the time of appellant's motion for setting aside the default judgment. The judgment cannot be vacated under subsections (4) or (5) since there is no suggestion that the judgment is void or that it has been satisfied, released or discharged, or that a prior judgment upon which it is based has been reversed or otherwise vacated. Thus, the only other remedy available to appellant would be under Rule 60(b)(6), which provides for relief from a final judgment if a motion is filed within a "reasonable time."

We have recently stated that exceptional circumstances must be established by an individual seeking relief under Rule (60)(b)(6). *Wehrle, supra*; *Parks v. Parks*, 91 N.M. 369, 574 P.2d 588 (1978). Whether a defendant's motion to set aside a default judgment should be granted rests within the trial court's discretion. *Gengler v. Phelps*, 89 N.M. 793, 558 P.2d 62 (Ct. App. 1976); *Gallegos v. Franklin*, 89 N.M. 118, 547 P.2d 1160 (Ct. App. 1976), *cert. denied*, 89 N.M. 206, 549 P.2d 284 (1976). A trial court's ruling on such a motion will not be reversed unless there is an abuse of discretion. *Springer Corporation, supra*; *Conejos County Lbr. Co. v. Citizens Savings & L. Ass'n*, 80 N.M. 612, 459 P.2d 138 (1969). In exercising discretion to set aside such judgments, courts should keep in mind that default judgments are not favored and that causes should generally be tried upon their merits. *Springer Corporation, supra*; *Gengler, supra.*

The chronology of the events in this case show no abuse of discretion. Appellant was represented by counsel in all of these proceedings, yet the first time he filed any pleading was in November of 1977, almost two years after he was joined as a party in interpleader. During all this time, appellant and his attorney were aware that the case was pending. They knew that they had differences with plaintiff-appellee, yet did nothing to participate in the cause of action. In addition, at no time before or after June 8, 1976, the date agreed upon for filing an answer, did appellant or his attorney file an entry of appearance or respon-

sive pleading. Finally, appellant acknowledges that our Rules of Civil Procedure for District Courts do not require that a party who has failed to appear in the action be given notice of a default judgment entered against him. In light of appellant's actions, it cannot be said that the trial court's entry of default judgment constituted an abuse of discretion.

For the foregoing reasons, and so that the policy considerations of finality of judgments and reliance thereon will be served, we hereby affirm the decision of the trial court.

IT IS SO ORDERED.

McMANUS, Senior Justice, and EASLEY, J., concur.

592 P.2d 181

EL PASO ELECTRIC COMPANY, a Texas Corporation, et al., Plaintiffs-Appellees,

v.

REAL ESTATE MART, INC., et al., Defendants-Appellants.

EL PASO ELECTRIC COMPANY, a Texas Corporation, et al., Plaintiffs-Appellees,

v.

Stewart M. PINKERTON et ux., et al., Defendants-Appellants.

EL PASO ELECTRIC COMPANY, a Texas Corporation, et al., Plaintiffs-Appellants,

v.

Stewart M. PINKERTON et ux., et al., Defendants-Appellees.

Nos. 11869, 11992 and 12003.

Supreme Court of New Mexico.

March 12, 1979.

Modrall, Sperling, Roehl, Harris & Sisk, George T. Harris, Jr., Alan K. Konrad, Albuquerque, for Real Estate Mart, et al., appellants.

I. M. Smalley, Deming, Martin, Martin & Lutz, James T. Martin, Jr., Stephen A. Hubert, Las Cruces, for El Paso Elec. Co., et al., appellees and appellants.

Bivins, Weinbrenner & Regan, Neil E. Weinbrenner, Las Cruces, Sizemore & Harris, El Paso, Tex., for Stewart M. Pinkerton, et ux., et al., appellants and appellees.

Leonard A. Helman, Public Service Commission, Santa Fe, for amicus curiae.

OPINION

SOSA, Chief Justice.

The main issues before the Court in this cause are: (1) Can a foreign public utility

exercise the power of eminent domain in New Mexico, and (2) Can a public utility acquire, by eminent domain, two 100 foot easements parallel and adjacent to each other for the erection of electrical transmission lines. We hold that under § 53-17-2, N.M.S.A.1978 (formerly § 51-30-2, N.M.S.A.1953 (Supp.1975)) a foreign public utility authorized to do business in New Mexico has the same right as a domestic public utility to exercise the power of eminent domain in New Mexico. We hold that a public utility may not, under the circumstances of this case, acquire two 100 foot easements parallel and adjacent to each other by using its power of eminent domain.

Plaintiffs-utilities, El Paso Electric Company (EPEC), a Texas corporation, Community Public Service Company (CPS), a Texas corporation, and Public Service Company (PNM), a New Mexico corporation, filed petitions in the District Courts of Dona Ana and Luna Counties seeking to condemn two parallel and adjacent 100 foot easements through defendants-landowners' property for the purpose of constructing and maintaining two 345 KV transmission lines.

Prior to filing the condemnation action, plaintiffs-utilities entered into a participation agreement known as the Southwest New Mexico Transmission Project for the purpose of constructing the two transmission lines and relative facilities to connect with both the San Juan power plant in the New Mexico Four-Corners area and the Palo Verde nuclear power plant currently under construction in northeastern Arizona. EPEC filed an application with the Public Service Commission on May 16, 1977, to obtain a certificate of public convenience and necessity. The Commission granted EPEC a certificate and location permit to construct, operate and maintain a 345 KV transmission line from the Luna Switching Station in Deming to the Newman Switching Station in Texas.

In the Dona Ana County proceeding, the district court denied defendants-landowners' motion to dismiss and held that EPEC and CPS could condemn a 100 foot easement for the first transmission line because they had the power of eminent domain pursuant to § 53-17-2. The court ruled that plaintiffs could not proceed to condemn the easement for the second transmission line because no certificate of public convenience and necessity had been obtained. In the Luna County proceeding, the district court held that EPEC and CPS had the power of eminent domain and that the taking of two 100 foot easements for the construction of the transmission lines did not violate § 62-1-4, N.M.S.A.1978 (formerly § 68-1-4, N.M.S.A.1953 (Repl.1974)). The district courts granted the parties leave to apply for an interlocutory appeal to this Court on the above-mentioned issues. These causes have been consolidated and this decision is dispositive of both petitions.

Defendants argue that EPEC and CPS do not have the power to condemn real property in New Mexico under § 62-1-4 because they are not "organized under the general incorporation laws of this state" pursuant to § 62-1-1, N.M.S.A.1978 (formerly § 68-1-1, N.M.S.A.1953 (Repl.1974)). EPEC and CPS are both Texas corporations authorized to do business in New Mexico as public electric utilities under certificates of authority. Plaintiffs counter that among the rights granted a foreign public utility authorized to do business in New Mexico is the power of eminent domain. We agree.

In determining whether a foreign public utility may exercise the power of eminent domain in New Mexico, we consider §§ 53-17-2, 62-1-1, and 62-1-4. Section 53-17-2, which relates to powers of foreign corporations, provides in pertinent part:

> A foreign corporation which has received a certificate of authority under the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] shall, until a certificate of revocation or of withdrawal has been issued as provided in the Business Corporation Act, *enjoy the same, but no greater, rights and privileges as a domestic corporation* organized for the purposes set forth in the application pursuant to which the certificate of authority is issued . . . . (Emphasis added.)

Section 62-1-4 pertains to the power of eminent domain and provides:

> *Such* corporations are hereby authorized to enter upon any lands belonging to the state or to persons . . . and from time to time to appropriate so much of such lands, *not exceeding a strip one hundred feet wide in any one place,* as may be necessary for their purpose . . . (Emphasis added.)

To ascertain the meaning of the word "such" in § 62–1–4, we look to § 62–1–1, which provides that:

> Corporations for the generation, production, transmission, distribution, sale or utilization of . . . electricity . . *may* be organized under the general incorporation laws of this state. (Emphasis added.)

"Such corporations" referred to in § 62–1–4 means all public utilities authorized to do and doing business in New Mexico, some of which may choose to incorporate here and some of which may not. Had the Legislature intended otherwise, it would have used the word "must" in § 62–1–1.

In interpreting the legislative intent behind a statute, it is important to consider the history of the particular legislation. *State v. Gonzales,* 78 N.M. 218, 430 P.2d 376 (1976); *Bradbury & Stamm Const. Co. v. Bureau of Revenue,* 70 N.M. 226, 372 P.2d 808 (1962). Prior to the enactment of the Business Corporation Act in 1967, our statutes expressly granted public utilities, domestic and foreign, the power to condemn private real property. *See* §§ 51–10–1, 51–12–8, N.M.S.A.1953 (Repl.1962), and 68–1–4, N.M.S.A.1953 (Repl.1974). The 1967 Act superseded the 1905 general corporation statutes.

The question is whether or not the Legislature intended, by enactment of the 1967 General Business Corporation Act, to abrogate the power of eminent domain previously conferred upon foreign public utilities under prior statutes. Section 51–10–1, N.M.S.A.1953 (Repl.1962) was replaced by § 51–30–2, N.M.S.A.1953 (Supp.1975) [*now* § 53–17–2, N.M.S.A.1978]. Section 53–17–2 is a general business corporation statute; it gives a foreign corporation authorized to do business in New Mexico the same rights and liabilities granted to a domestic corporation of similar kind.

The Tenth Circuit was faced with a similar case in *Cline v. Kansas Gas and Electric Company,* 260 F.2d 271 (10th Cir. 1958). The landowner there challenged a condemnation action on the ground that the Kansas Gas and Electric Company (KGEC) was not vested with the power of eminent domain because it was a foreign corporation. KGEC was organized under the laws of West Virginia; but it was authorized to engage, and did engage, in the business of generating, transmitting, selling and distributing electricity to consumers in a number of counties in Kansas. The court found that KGEC was a public utility within the Kansas statutory provision defining a public utility as "every corporation for the production, transmission, delivery, or furnishing of heat, light or power." Kan.Stat. § 66–104 (1949). The court stated:

> Section 17–505, General Statutes of Kansas 1949, provides in substance that every foreign corporation authorized to do business in the state shall be subject to the same provisions, judicial control, restrictions, and penalties, except as therein provided, as domestic corporations. And section 17–618 provides . . . that lands may be appropriated for the use of electric companies in the same manner as is provided for railway corporations . . . The two sections must be construed together. And when construed in that manner, they constitute an express legislative grant of power of eminent domain to an electric utility company organized under the laws of another state and authorized to do business in Kansas to obtain by condemnation a right-of-way across land for the construction thereon of an electric line for use in the conduct of its business of generating, transmitting, selling, and distributing electric energy for consumers generally. (Citations omitted).

Id. at 273–74. *See also Spears v. Kansas City Power and Light Co.,* 203 Kan. 520, 455 P.2d 496 (1969). We adopt this reasoning.

Among the powers granted to a public utility in §§ 62-1-1 and 62-1-4 is the power of eminent domain. Because § 53-17-2 grants a foreign corporation authorized to do business in our state the same powers as a domestic corporation of similar kind, it must necessarily confer on such corporations, absent any proviso to the contrary, the power of eminent domain. *See Gradison v. Ohio Oil Company,* 239 Ind. 218, 156 N.E.2d 80 (1959). We note that nowhere in the New Mexico Constitution is the Legislature prohibited from conferring upon a foreign corporation the right of condemnation. *Cf. Southwestern Gas & E. Co. v. Patterson Orchard Co.,* 180 Ark. 148, 20 S.W.2d 636 (1929).

Defendants argue that §§ 53-17-2 and 62-1-4 are in conflict with each other. We disagree. Sections 53-17-2 and 62-1-4 are in *pari materia.* We have previously stated that as long as the interpretation of a statute is reasonable and not in conflict with legislative intent, effect must be given, if possible, to the whole statute and every part thereof. It is the duty of the court, so far as practicable, to reconcile different provisions so as to make them consistent, harmonious, and sensible. *El Paso Electric Co. v. Milkman,* 66 N.M. 335, 347 P.2d 1002 (1959). We have also stated that where there is ambiguity created by statutes, the court will consider all existing statutes relating to the same subject so that, if possible, all of the acts will be operative. *Runyan v. Jaramillo,* 90 N.M. 629, 567 P.2d 478 (1977).

Sections 62-1-1 and 62-1-4 are also in *pari materia* with the Public Utilities Act, §§ 62-3-1 to 62-3-4, N.M.S.A.1978. Under that Act, the jurisdiction of the Public Service Commission extends to *any* utility doing business in New Mexico. Foreign public utilities authorized to do business here, such as EPEC and CPS, are subject to the same supervision as utilities incorporated under our statutes. Foreign public utilities pay the same taxes, are subject to the same type of examination, and must meet the same burdens when asking for rate relief as domestic utilities. It would be inconsistent to subject a foreign public utility to our laws and then to deny them the same rights and protections as those corporations originally domiciled in our state. For the foregoing reasons, we affirm the lower court's determination that EPEC and CPS have the power to exercise the power of eminent domain in our state.

The second issue presented in this cause is whether the 100 foot wide easement limitation contained in § 62-1-4 prohibits the condemnation of two 100 foot easements parallel and adjacent to each other. We hold that it does.

Section 62-1-4 is clear on its face. It limits the taking of land to a single strip not exceeding 100 feet in width, regardless of the number of transmission lines. Permitting plaintiffs to condemn two 100 foot easements parallel and adjacent to each other, or one easement 200 feet wide, for the purpose of erecting two transmission lines violates the wording of this section.

Defendants assert that the proper remedy available to plaintiffs is to seek an amendment of § 62-1-4 by the Legislature. We agree. The granting of the power of eminent domain, and the parameters thereto, is a matter of public policy for the Legislature's determination. *See* 26 Am. Jur.2d *Eminent Domain* § 5 (1966); 1 Nichols' *The Law of Eminent Domain* § 3.21 (1976).

In enacting § 62-1-4 and delegating the state's inherent power of eminent domain to public utilities, the Legislature determined that easements in excess of 100 feet could never be necessary. Although this legislative determination was first made in 1909 and may now be outdated and unduly restrictive due to advances in technology, a public utility cannot condemn a strip of land wider than 100 feet per transmission line, irrespective of the size of the line. This Court is limited to interpreting statutes and may not legislate. *See generally Marchiondo v. Roper,* 90 N.M. 367, 563 P.2d 1160 (1977).

The order entered by the District Court of Luna County permitting plaintiffs to condemn two 100 foot easements parallel

and adjacent to each other is reversed. The cause is remanded to the district court with directions to limit the taking by EPEC to a strip with a maximum width of 100 feet.

IT IS SO ORDERED.

McMANUS, Senior Justice, and PAYNE, J., concur.

592 P.2d 185

STATE of New Mexico, Plaintiff-Appellee,

v.

John Eloy CASTRO, Defendant-Appellant.

No. 3597.

Court of Appeals of New Mexico.

Feb. 20, 1979.

Writ of Certiorari Denied March 14, 1979.

Tandy L. Hunt, Ralph D. Shamas, Hunt & Shamas, Roswell, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael A. Kauffman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Defendant John Castro was convicted of voluntary manslaughter and aggravated burglary. The victim was Linda, his divorced wife. John appeals. We reverse on voluntary manslaughter and affirm on aggravated burglary.

Linda and John had been married for approximately eight years and were divorced in either August or September, 1977. The homicide was committed on October 6, 1977. John was off work at about 3:00 p. m., went home, drank two bottles of beer and had supper. While John was watching a baseball game on television, Linda called and wanted money for rent. He told her to let him alone and she said she didn't have to. Linda then used abusive language. Subsequently, John went to the store and purchased a gun and ammunition. This transaction took about ten minutes and John appeared calm. He went back home, loaded the gun, walked around for about a half hour and then walked to Linda's house. He planned on shooting her in the spine to prevent her from dancing. John saw Linda sitting on the couch watching television and knocked on the door. Linda became scared, called the police, hollered and ran toward the back bedroom. John broke the lower left hand window, unlocked the door, and

from a distance of five feet shot Linda three times and killed her.

John was charged with first degree murder and aggravated burglary. The jury returned a verdict of guilty of voluntary manslaughter and aggravated burglary, both with the use of a firearm.

A. *No evidence supported submission of voluntary manslaughter.*

Section 30-2-3(A), N.M.S.A. 1978 reads:

> Manslaughter is the unlawful killing of a human being without malice.
>
> A. Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion.

Smith v. State, 89 N.M. 770, 772, 558 P.2d 39, 41 (1976) says:

> It follows logically and obviously from the definition that, in order to convict of voluntary manslaughter, the jury must have evidence that there was a *sudden quarrel* or heat of passion *at the time of the commission of the crime* (in order, under the common law theory, to show that the killing was the result of provocation sufficient to negate the presumption of malice; see, e. g., R. Anderson, Wharton's Criminal Law and Procedure § 242 at 522 (1957)).
>
> The transcript of the record is barren of any such evidence of provocation. * * [Emphasis added.] [Smith was discharged.]

U.J.I. Crim. 2.20 was submitted to the jury. It contained the definition and meaning of "sufficient provocation" and reads:

> The difference between second degree murder and voluntary manslaughter is provocation. In second degree murder the defendant kills without having been sufficiently provoked, that is, without sufficient provocation. In the case of voluntary manslaughter the defendant kills after having been sufficiently provoked, that is, as a result of sufficient provocation. Sufficient provocation reduces second degree murder to voluntary manslaughter.
>
> Sufficient provocation can be any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions. *The provocation must be such as would affect the ability to reason and cause a temporary loss of self control in an ordinary person of average disposition. The provocation must be such that an ordinary person would not have cooled off before acting.* [Emphasis added.]

The State claims that the provocative telephone call from Linda put into motion the series of events that led to Linda's death. The State contends that it showed conclusively that John reacted in response to the provocation of Linda. This argument falls short of the meaning of "sufficient provocation" in three respects. First, when buying the gun John acted calmly, free of any extreme emotions. Second, John walked about the area a considerable period of time before approaching Linda's residence. He did not act immediately or soon after the provocation. *State v. Trujillo,* 27 N.M. 594, 203 P. 846 (1921). Even if we assumed that initially John was angered, he had sufficient time to cool off. He did not lose self control. Sudden anger or heat of passion and provocation must concur. *State v. Nevares,* 36 N.M. 41, 7 P.2d 933 (1932). Finally, "And words alone, however scurrilous or insulting, will not furnish the adequate provocation required for this purpose." *Nevares, supra,* Id. at 44-5, 7 P.2d at 935.

The Committee Commentary shows that *Nevares* was considered in arriving at the definition of "sufficient provocation." The "words alone" concept does not fall within the terms "any action, conduct or circumstances which arouse anger" as set forth in U.J.I. Crim. 2.20, *supra.* We conclude that the telephone conversation did not constitute "sufficient provocation."

Absent "sufficient provocation," there was no evidence to support submission of voluntary manslaughter to the jury. John is discharged on this count of the criminal information.

B. *There was sufficient evidence to support the crime of aggravated burglary.*

Section 30-16-4(A), N.M.S.A. 1978 reads:

> Aggravated burglary consists of the unauthorized entry of any . . . dwelling . . . with intent to commit any felony . . . therein and the person either:
>
> A. is armed with a deadly weapon;

Pursuant to U.J.I. Crim. 16.22, the court instructed the jury that "when the defendant entered the Linda Castro residence, he intended to commit murder when he got inside . . . ." "Murder" was stated to be the felony.

The crucial factor in the crime of aggravated burglary is whether the defendant had the *intent* to commit a felony on entering the dwelling, not whether the felony was actually committed. Intent does not have to be consummated. *State v. Tixier,* 89 N.M. 297, 551 P.2d 987 (Ct.App.1976).

The jury acquitted defendant of first and second degree murder and we hold defendant not guilty of voluntary manslaughter. None of these crimes were actually committed. This fact does not resolve the problem. The failure of defendant to commit murder in any of its degrees did not foreclose the jury from concluding that at the time of entry defendant did intend to commit murder in any one of its degrees. Proof of intent at the time of entry does not depend upon the subsequent commission of the felony, failure to commit the felony or even an attempt to commit it. *People v. Robles,* 207 Cal.App.2d 891, 24 Cal.Rptr. 708 (1962).

Defendant unlawfully entered Linda's home and from a distance of five feet shot Linda three times and killed her. Defendant testified that upon entry he intended to shoot Linda in the spine. This was an admission that he intended to commit aggravated battery as a matter of law, i. e., to inflict great bodily harm with a deadly weapon, a third degree felony. Section 30–3–5, N.M.S.A. 1978. In other words, defendant confessed to aggravated burglary, except for his defense of insanity. The court should have instructed the jury to find defendant guilty of aggravated burglary unless the jury believed him to be insane at the time.

During deliberations, the jury submitted an inquiry whether the essential element of "felony" should read:

> Murder or great bodily harm when he got inside.

Out of the presence of parties and attorneys, the court answered "no" as to "great bodily harm," and instructed the jury that:

> [T]he word "murder" is defined by either of the following: 1, 2, or 3. One, murder in the first degree, murder in the second degree, voluntary manslaughter.

In the alternative, the inquiry of the jury should have led the district court to instruct the jury that "when the defendant entered the Linda Castro home he intended to commit aggravated battery," i. e., to inflict great bodily harm with a deadly weapon.

Nevertheless, the jury was not compelled to believe defendant's testimony that his only intent at the time of entry was to do great bodily harm. Criminal intent is a state of mind, *State v. Viscarra,* 84 N.M. 217, 501 P.2d 261 (Ct.App.1972), known only by defendant. A jury cannot determine defendant's state of mind at the time of entry except from the circumstances surrounding the death of Linda and the reasonable inferences to be drawn therefrom.

In *Robles, supra,* defendant was charged with rape and aggravated burglary with intent to commit rape. The rape charge was dismissed for failure of the jury to agree. Defendant contended that the failure to find him guilty of rape negatived his conviction of burglary with intent to commit rape. In answer, the California court enumerated two rules that govern appellate review of the sufficiency of the evidence when the charge is burglary. First, the jury's verdict will not be disturbed if the circumstances reasonably justify the facts which the jury deduced from the evidence and if those facts are sufficient to support the verdict. Second, burglary may be

proved by circumstantial evidence. The burglarious intent can be reasonably and justifiably inferred from the unauthorized entry alone.

Under the rules, the jury could reasonably infer from the circumstances in the instant case that defendant intended to commit one of the degrees of murder. The jury did believe that he committed the crime of voluntary manslaughter. "We place our reliance on the sense of justice and fair play reposing in juries under correct instructions upon the law." *State v. Fiechter,* 89 N.M. 74, 77, 547 P.2d 557, 560 (1976).

Defendant raises two other issues in support of reversal.

The defendant claims that the trial court erred in not directing a verdict by reason of insanity. The evidence in the record was sufficient to warrant submission of the issue of the defendant's sanity to the jury as a question of fact. Defendant was not entitled to a directed verdict.

Appellant's final argument is that the introduction of irrelevant hearsay by the State and prosecutorial misconduct warrants a mistrial. To permit the defendant's mother-in-law to testify concerning the defendant's dismissal from employment for the harassment of three women was harmless error. In light of the seventeen page sworn statement in which the defendant admitted the killing and the statements relating the circumstances surrounding the shooting given by defendant's children, appellant's claim of prejudice cannot stand. *Proper v. Mowry,* 90 N.M. 710, 568 P.2d 236 (Ct.App.1977). However, we do not compliment the district attorney who persisted in presenting irrelevant testimony. This conduct tends to deny a defendant a fair trial. Under the circumstances of this case, defendant was not entitled to a mistrial.

Defendant's conviction of voluntary manslaughter is reversed.

Defendant's conviction of aggravated burglary is affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

ANDREWS, J., concurring in result.

592 P.2d 189

STATE of New Mexico, Plaintiff-Appellee,

v.

John DOE, a child, Defendant-Appellant.

No. 3745.

Court of Appeals of New Mexico.

Feb. 20, 1979.

Morris Stagner, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Jacob G. Vigil, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

HERNANDEZ, Judge.

John Doe, a minor, appeals from an order of the Children's Court extending the period of his parole supervision for an additional year.

Doe was committed to the New Mexico Boy's School on July 25, 1977, for a period of one year. He was paroled on March 20, 1978. On July 11, 1978, his parole was revoked for violation of the terms and conditions of his parole and he was ordered re-committed to the Boy's School. On July 13, 1978, the New Mexico Division of Corrections by Ms. Kelly Robbins, probation-parole officer, filed a petition stating that Doe was in need of care extending beyond the one year period provided in the court's original order. A hearing was held on this petition and the court subsequently granted the petition and entered the order appealed from.

Doe's sole point of error is that the court erred in denying his motion to strike the petition for extension of parole supervision because the probation-parole officer was "not a person vested with legal custody or responsibility of protective supervision." Doe contends that Section 32-1-38(E)(2), N.M.S.A.1978 (formerly § 13-14-35(E)(2), N.M.S.A.1953) of the Children's Code is controlling:

> "E. At any time prior to expiration, a judgment vesting legal custody or granting protective supervision may be modified, revoked or extended on motion by:
>
> * * * * * *
>
> (2) a person vested with legal custody, or responsibility of protective supervision, who requests the court for an extension of the judgment on the g[r]ounds that the requested action is necessary to safeguard the welfare of the child or the public interest."

Doe argues that since he was in legal custody of the Boy's School it was the only one authorized to file such a petition. In support of this, he cites the following part of Section 32-1-3(J) (formerly § 13-14-3 J, N.M.S.A.1953) of the Children's Code:

> "J. 'legal custody' means a legal status created by the order of a court or tribunal of competent jurisdiction * *. *an individual granted legal custody of a child shall exercise his rights and responsibilities as custodian personally unless otherwise authorized by the court or tribunal entering the order* * * *." [Emphasis added.]

He goes on to argue that the emphasized part of this subsection demonstrates that this was the Legislature's intention. This argument is ingenious but the Children's Code is not so restrictive. All that the emphasized subsection says to us is that if an individual, as distinct from an agency, is given legal custody, he cannot delegate his responsibility but must act personally.

The petition recites that it was made under authority of Section 32-1-38(F), N.M.S.A.1978:

> "Prior to the expiration of a judgment transferring legal custody, the court may extend the judgment for additional periods of one year if it finds that the extension is necessary to safeguard the welfare of the child or the public interest."

Section 32-1-38(E), supra, speaks of the authority of "persons" to request "the court for an extension of the judgment." Section 32-1-38(F), supra, speaks of the authority of the court to extend the judgment.

As to the authority of the probation-parole officer to initiate such a proceeding, that is contained in Section 32-1-8(A)(3), N.M.S.A.1978 (formerly § 13-14-8(A)(3), N.M.S.A.1953):

> "A. To carry out the objectives and provisions of the Children's Code, but subject to its limitations, probation officers have the power and duty to:
>
> (3) *make* predisposition studies and submit reports and *recommendations to the court.*" [Emphasis added.]

The court did not err in denying Doe's motion to strike the petition.

We affirm.

IT IS SO ORDERED.

LOPEZ, J., concurs.

WALTERS, J., specially concurring.

WALTERS, Judge (specially concurring).

I agree with the result reached, but upon a different ground.

Section 33-1-3, N.M.S.A.1978, recites the legislative purpose for establishing a "corrections division," and the purpose is said to be

> . . . to create a single, unified division within the criminal justice department to administer all laws and exercise all functions formerly administered and exercised by the penitentiary of New Mexico, the state board of probation and parole . . . , the New Mexico boy's school, the girl's welfare home and the juvenile probation services division of the administrative office of the courts.

Mrs. Kelly, being a juvenile probation-parole officer, was a member of the unified division to whom legal custody of the minor had been committed. Thus, her petition was proper as one filed by a "person," as statutorily defined, vested with legal custody who may move for modification or extension of a judgment granting protective supervision under § 32-1-38(E)(2), N.M.S.A.1978.

I do not believe Ms. Kelly's authority to petition is covered by § 32-1-8(A)(3), since that provision refers to submitting reports and recommendations to the court based upon *pre* disposition studies made by the probation officer. The instant petition was not a recommendation; nor did it precede the court's disposition of the petition to revoke parole. I do not think § 32-1-8(A)(3) can be read as anything less than a complete and related series of duties falling upon the officer to be performed prior to disposition, not afterward.

592 P.2d 191

CARTER & SONS, INC., Appellant,

v.

NEW MEXICO BUREAU OF REVENUE, Appellee.

No. 3392.

Court of Appeals of New Mexico.

Feb. 20, 1979.

Joe R. G. Fulcher, Jeffrey W. Loubet, Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, for appellant.

Jeff Bingaman, Atty. Gen., Jan E. Unna, Special Asst. Atty. Gen., Dept. of Taxation & Revenue, Santa Fe, for appellee.

OPINION

HERNANDEZ, Judge.

This is an appeal from the decision and order of the Commissioner of Revenue assessing gross receipts tax on two, hauling and road maintenance, of several operations performed by the taxpayer under its contract with Duke City Lumber Company, Inc. (Duke) for a period from January 1, 1974 through September 30, 1976.

Most of the pertinent facts are set forth in the findings of the Commissioner:

"3. This taxpayer has been engaged in the logging business in New Mexico for a number of years. During 1975 and 1976, the taxpayer had contracts with Duke City Lumber Company, Inc., (Duke) which provided that the taxpayer was to cut, limb, skid, and load timber located on Federal land and haul it to Duke's sawmill in Espanola, New Mexico. Duke had previously entered into agreements with the United States Forest Service which enabled Duke to cut and remove designated timber and Duke had contracted with the taxpayer to perform specified functions.

"4. From time to time the Forest Service advertises the proposed sale of specified timber located in the National Forests and sets a minimum price at which the timber will be sold. Lumber companies, such as Duke, bid on these sales and the successful bidder must comply with the rules of the Forest Service; this includes the building of temporary roads, and maintenance of present roads, the disposal of slash and exercising erosion control. When Duke contracts with the taxpayer, the taxpayer is required to perform these functions.

"5. When Duke contracts with the taxpayer, Duke agrees to pay the taxpayer a specified amount of money—based on per M, (1,000 feet) Gross, Less Culls,—for all logs cut, skidded, loaded and hauled to the Espanola mill. The taxpayer gets paid only if the timber is delivered to the mill.

"6. There is no breakdown in the contract of the money paid for each function performed by the taxpayer; neither Duke's records nor the taxpayer's records segregate payments made or received for the several functions performed under the contract."

Section 7-9-4, N.M.S.A.1978 (formerly § 72-16A-4, N.M.S.A.1953 (Supp.1975)) of the Gross Receipts and Compensating Tax Act provides in pertinent part:

"A. For the privilege of engaging in business, an excise tax equal to four percent of gross receipts is imposed on any person engaging in business in New Mexico.

"B. The tax imposed by this section shall be referred to as the 'gross receipts tax.' "

Section 7-9-35, N.M.S.A.1978 (formerly § 72-16A-12.23, N.M.S.A.1953 (Supp.1975)) of the Act provides:

"When a privilege tax is imposed by the Resources Excise Tax Act * * *, the provisions of the act shall apply and determine the full measure of tax liability for the privilege of engaging in the business stated in the act and no provision of the Gross Receipts and Compen-

sating Tax Act shall apply to or create a tax liability for such privilege * * *."

The following are the pertinent parts of the Resources Excise Tax Act necessary to the discussion of taxpayer's points of error.

Section 7-25-3, N.M.S.A.1978 (formerly § 72-16A-22, N.M.S.A.1953 (Supp.1975)):

"B. 'natural resources' means timber and any product thereof and any metalliferous or nonmetalliferous mineral product, combination or compound thereof, but does not include oil, natural gas, liquid hydrocarbon individually or any combination thereof or carbon dioxide;

* * * * * *

"F. 'service charge' means the total amount of money or the reasonable value of other consideration received for severing or processing any natural resources by any person who is not the owner of the natural resource. However, if the money received does not represent the value of the severing or processing performed, 'service charge' means the reasonable value of the severing or processing performed;

"G. 'severer' means any person engaging in the business of severing natural resources that he owns, or any person who is the owner of natural resources and who has another person perform the severing of such natural resources;

"H. 'severing' means mining, quarrying, extracting, felling or producing any natural resource in New Mexico for sale, profit or commercial use; and

"I. 'taxable value' means the value after severing or processing, without deduction of any kind other than specified in this subsection, of any natural resource severed or processed in New Mexico. * * *"

Section 7-25-4, N.M.S.A.1978 (formerly § 72-16A-23, N.M.S.A.1953 (Supp.1975)):

"A. For the privilege of severing natural resources, there is imposed on any severer of natural resources in New Mexico an excise tax at the following rates on the taxable value of the natural resources:

(1) All natural resources except potash and molybdenum—three-quarters of one percent;

(2) potash—one-half of one percent; and

(3) molybdenum—one-eighth of one percent."

Section 7-25-6, N.M.S.A.1978 (formerly § 72-16A-25, N.M.S.A.1953 (Supp.1975)):

"A. For the privilege of severing or processing in New Mexico natural resources that are owned by another person, and are not otherwise taxed by Sections 4 and 5 [7-25-4, 7-25-5 NMSA 1978] of the Resources Excise Tax Act, there is imposed on the service charge of any person severing or processing natural resources that are owned by another person an excise tax at the same rate that would be imposed on an owner of natural resources for performing the same function.

"B. The tax imposed by this section shall be referred to as the 'service tax.' "

Taxpayer alleges two points of error. The first being that all of the services performed by it are either "severing" or "processing" subject to the service tax. The second point is that all of the receipts received by it are exempt from the gross receipts tax.

Essentially, the Bureau's argument is that the taxpayer's activities should be separated into two parts for purposes of taxation. Stated differently, the "road maintenance" and "hauling" activities of the taxpayer are not an integral part of "severing" as contemplated by § 7-25-6A, supra. Why just into two parts? Why not into five parts (felling, building of temporary roads, maintenance of present roads, disposal of slash and erosion control); it would be just as logical or illogical. We do not believe that this is what the legislature intended. Looking again at § 7-25-3(H), supra, it states in pertinent part that: " 'severing' means * * * felling * * * for sale, profit or commercial use * * *." A tree at the location where it was felled would have very little value in comparison with its value at a lumber mill. The cost of felling

a tree is just a small part of what makes up the total cost of preparation for sale or commercial use. All of these five activities are integral parts of "severing" in this situation.

The primary purpose of the Resources Excise Tax Act is obviously to encourage the development of the extractive industries of the state because the rates imposed are a fraction of the Gross Receipts Tax. To adopt the narrow interpretation advocated by the Bureau would not be consonant with the basic purpose of the Act. "The chief aim of statutory construction is to arrive at true legislative intent." *Montoya v. McManus,* 68 N.M. 381, 388, 362 P.2d 771, 776 (1961). The Forest Service dictated the terms and conditions for severing the timber in question. None of the several activities prescribed could be eliminated. The Forest Service had roughly estimated the cost of each activity *solely* for the purpose of setting the minimum bid figure. It is our decision that "road maintenance" and "hauling" were an integral and indispensable part of taxpayer's activity of severing and as such were exempt from the Gross Receipts Tax by the provisions of § 7–9–35, supra.

The decision and order of the Commissioner is reversed and the Bureau's interpretive regulation G.R. Regulation 12.23:3 is declared void, insofar as it applies to the facts herein.

IT IS SO ORDERED.

SUTIN, J., specially concurring.

LOPEZ, J., concurs.

SUTIN, Judge (specially concurring).

I concur.

Although the record in this case is lengthy, the pertinent facts are simple. Taxpayer contracted with Duke City Lumber Co. to cut, limb, skid, load and haul timber from United States Forest Service lands to Duke City's mill, and it had to blade Forest Service roads leading to timber sites where trees were cut. This was called "road maintenance."

The Bureau seeks to tax for gross receipts obtained from (1) hauling timber from the landing to the mill and (2) road maintenance. Taxpayer argues that these two types of gross receipts are exempt from the gross receipts tax. I agree. Section 7–9–35, N.M.S.A.1978 reads in pertinent part:

> *When a privilege tax is imposed by the Resources Excise Tax Act* * * * no provisions of the Gross Receipts * * * Tax Act shall apply to or create a tax liability for such privilege * * *. [Emphasis added.]

Under the Resources Act, a tax is levied on the privilege of severing and processing natural resources. Section 7–25–2, N.M.S.A.1978. Timber is a natural resource, and "severing" includes *felling timber for commercial use.* Section 7–25–3(D) and (H). Taxpayer was the person who severed timber for Duke City Lumber Co. Section 7–25–3(G). The tax imposed is a "service tax."

The dispositive question is the nature and extent of the "privilege" referred to in § 7–9–35. The Bureau says that the "privilege" covers only the *felling of timber,* not hauling or road maintenance. I disagree.

Many views of mine have been expressed in *Cardinal Fence Co., Inc. v. Commissioner, Bur. of Rev.,* 84 N.M. 314, 502 P.2d 1004 (Ct.App.1972), Sutin, J. dissenting; *Title Services, Inc. v. Commissioner of Revenue,* 86 N.M. 128, 520 P.2d 284 (Ct.App.1974), Sutin, J. dissenting; *Co-Con, Inc. v. Bureau of Revenue,* 87 N.M. 118, 529 P.2d 1239 (Ct.App.1974), Sutin, J. dissenting; *Gathings v. Bureau of Revenue,* 87 N.M. 334, 533 P.2d 107 (Ct.App.1975), Sutin, J. dissenting; *Advance Schools, Inc. v. Bureau of Revenue,* 89 N.M. 133, 548 P.2d 95 (Ct.App.1975), Sutin, J. dissenting, rev'd 89 N.M. 79, 547 P.2d 562 (1976); *Ealey v. Bureau of Revenue,* 89 N.M. 174, 548 P.2d 454 (Ct.App. 1975), Sutin, J. specially concurring, rev'd 89 N.M. 160, 548 P.2d 440 (1976); *Western Elec. Co. v. N. M. Bureau of Rev.,* 90 N.M. 164, 561 P.2d 26 (Ct.App.1976), Sutin, J. specially concurring. I adhere to those views which are:

1. Tax statutes have definitions that create ambiguities which create a battle of the dictionaries. The purpose of the statute should not be accomplished by "semantic niggling." If there is ambiguity or doubt, it is not the fault of the taxpayer.

2. Where an exemption is claimed, the statute should be liberally construed in favor of the taxpayer because the exemption is granted for a beneficent purpose. We should protect the taxpayer by judicial construction.

3. The Commissioner should not play with the statute like a chess game. He sits in a quasi-judicial position and should seek to do justice and avoid injustice to taxpayers. He is both the judge and attorney for the Bureau. His qualifications are not fixed by law. He must not rely only on the evidence presented by his attorney, nor favor the State over the taxpayer. He must try to be objective in nature.

4. We do not view the evidence in the light most favorable to the decision. Our duty is to look at the whole record.

5. The statute does not delegate authority to the Commissioner to enact legislation by regulation which directly taxes a specific segment of business.

6. All doubts as to the meaning and intent of a tax statute must be construed in favor of the taxpayer.

7. Every taxpayer is entitled to a fair and impartial hearing.

My disagreement with the Bureau centers around the narrow and strict interpretation of the words "felling timber for commercial use." The Bureau concedes that "skidding" constitutes "severing." To "skid" is "to drag (logs) from the stump to a landing, skidway, or mill." Webster's Third New International Dictionary, p. 2133 (1966). An expert witness testified that "to haul" and to "skid" were quite similar. "They are the same in that they are a hauling function." "There's very little difference between skidding and hauling logs, other than the fact you've got a different piece of equipment."

"Felling timber for commercial use" means "hauling timber from the stump to the mill." In order to do so, taxpayer of necessity must blade Forest Service roads leading to timber sites.

The Bureau tried to burden a person engaged in mining activities with the gross receipts tax instead of the service tax. It contended the taxpayer's work was a construction service instead of "mining" a natural resource. This court said "no." *Patten v. Bureau of Revenue,* 86 N.M. 355, 524 P.2d 527 (Ct.App.1974).

My criticism of the Commissioner's attitude toward taxpayers, heretofore expressed, continues to the instant case. His attitude is: "Let the courts decide." Although not a financial burden on the Bureau, it is fractious and a conniption to the taxpayer to try and appeal such cases.

592 P.2d 512

Ruben BAZALDUA, Petitioner-Appellee,

v.

Michael HANRAHAN, Respondent-Appellant.

No. 12143.

Supreme Court of New Mexico.

March 26, 1979.

Jeff Bingaman, Atty. Gen., Michael Kauffman, Asst. Atty. Gen., Santa Fe, Ira S. Robinson, Dist. Atty., Jon A. Feder, Asst. Dist. Atty., Albuquerque, for respondent-appellant.

John B. Bigelow, Chief Public Defender, Gregory Chase, Asst. Public Defender, Mark H. Shapiro, Asst. Appellate Defender, Albuquerque, Reginald J. Storment, Appellate Defender, Santa Fe, for petitioner-appellee.

OPINION

FEDERICI, Justice.

Appellee Bazaldua was indicted by a Texas Grand Jury for aggravated robbery. The Governor of Texas issued a requisition for the extradition of appellee from the State of New Mexico to the State of Texas to stand trial for the crime, alleged by the Texas Governor to have been committed in Texas. Appellee was arrested in Albuquerque, New Mexico, on a warrant issued in Dallas County, Texas, and was subsequently arrested pursuant to a warrant issued by the New Mexico Governor directing his rendition to the State of Texas.

Appellee filed a petition for writ of habeas corpus alleging that he was not a fugitive from justice because he was not present in the State of Texas at the time the alleged offense was committed.

The district court held a hearing on the writ. Five witnesses testified under oath to the effect that appellee could not have been in the State of Texas at the time the alleged offense was committed. The five witnesses were related to, or friends of, appellee. After hearing testimony from the witnesses, the trial court granted the writ and released appellee to the custody of

his brother. But, the court allowed the State fifteen days within which to produce Eduardo Sanchez, the victim of the alleged crime, to testify in court. The State did not produce Sanchez or any other evidence. The court, by final order and judgment, sustained the writ of habeas corpus and ordered appellee discharged from custody.

The State argues that it proved its prima facie case after it presented the extradition documents, including an affidavit from the victim of the crime. Further, the State argues that appellee has the burden of proving beyond a reasonable doubt that he was not in Texas and therefore not a fugitive at the time the alleged crime was committed. The documents produced from the demanding state made out a prima facie case and this was not overcome by evidence beyond a reasonable doubt.

On the subject of extradition, Article IV, § 2, cl. 2 of the United States Constitution provides:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Congress has implemented the constitutional provision. The relevant statute, 18 U.S.C. § 3182 reads:

> Whenever the executive authority of any State or Territory demands any person as a *fugitive from justice,* of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled *shall* cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and *shall* cause the fugitive to be delivered to such agent when he shall appear. (Emphasis added.)

New Mexico has adopted the Uniform Criminal Extradition Act, §§ 31–4–1 through 31–4–30, N.M.S.A.1978 (formerly §§ 41–19–1 through 41–19–30, N.M.S.A. 1953). Section 31–4–2 of the New Mexico Act provides:

> Subject to the provisions of this act [31–4–1 to 31–4–30 N.M.S.A.1978], the provisions of the constitution of the United States controlling, and any and all Acts of Congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has *fled from justice* and is found in this state. (Emphasis added.)

In *Michigan v. Doran,* —— U.S. ——, 99 S.Ct. 530, 58 L.Ed.2d 521, decided by the United States Supreme Court on December 18, 1978, the respondent had been arrested in Michigan and charged with a crime. Michigan had notified Arizona and Arizona charged respondent with theft. An Arizona justice of the peace issued an arrest warrant which recited that there was "probable cause" to believe that respondent had committed the crime. The Governor of Arizona issued a requisition for extradition accompanied by an arrest warrant, supporting affidavits and the original complaint. The Governor of Michigan issued an arrest warrant and ordered extradition. Upon arraignment on the Michigan warrant, respondent petitioned for a writ of habeas corpus alleging that the extradition warrant was invalid because it did not comply with the Michigan Uniform Criminal Extradition Act. After reviewing the constitutional provision, the Act of Congress and Michigan's Uniform Extradition Act, the Court, through Chief Justice Burger, set out the intent and purpose of the extradition clause of the Constitution:

The Extradition Clause was intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. *Biddinger v. Commissioner of Police,* 245 U.S. 128, 132–133, 38 S.Ct. 41, 42, 62 L.Ed. 193 (1917); *Appleyard v. Massachusetts,* 203 U.S. 222, 227, 27 S.Ct. 122, 123, 51 L.Ed. 161 (1906). The purpose of the Clause was to preclude any state from becoming a sanctuary for fugitives from the justice of another state and thus "balkanize" the administration of criminal justice among the several states.

The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial.

. . . . .

Under Art. IV, § 2, the courts of the asylum state are bound to accept the demanding state's judicial determination since the proceedings of the demanding state are clothed with the traditional presumption of regularity. In short, when a neutral judicial officer of the demanding state has determined that probable cause exists, the courts of the asylum state are without power to review the determination.

— U.S. at —, 99 S.Ct. at 534–536.

The Court concluded:

We hold that once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state.

— U.S. at —, 99 S.Ct. at 536.

The Court placed a limitation upon the power of a court in the asylum state to review the requisition for extradition:

A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Cf. *Bassing v. Cady,* 208 U.S. 386, 392, 28 S.Ct. 392, 393, 52 L.Ed. 540 (1908). Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable.

— U.S. at —, 99 S.Ct. at 535.

A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Thereafter, the burden shifts to the respondent (appellee here) to prove beyond a reasonable doubt in the asylum state that he is not a fugitive from the demanding state. *South Carolina v. Bailey,* 289 U.S. 412, 53 S.Ct. 667, 77 L.Ed. 1292 (1933). In *South Carolina,* the Court said:

No question is raised concerning the form or adequacy of the writ issued by the Governor of North Carolina.

Prima facie *Bailey* was in lawful custody and upon him rested the burden of overcoming the presumption by proof. (Citation omitted.)

. . . . .

The demanding State asserted a right to the custody of the respondent under the Federal Constitution and statute. He claimed that these impliedly forbade his surrender since the evidence made it clear that he was beyond the limits of South Carolina at the time of the homicide and, therefore, was not a fugitive from the justice of that State.

These questions of federal right were properly submitted for consideration by the state court upon the return to the writ of habeas corpus. And it was the duty of that court to administer the law prescribed by the Constitution and statute of the United States . . . .

. . . . .

In *Munsey v. Clough,* 196 U.S. 364, 374, 25 S.Ct. 282, 285, 49 L.Ed. 515, through Mr. Justice Peckham, this Court said: "When it is conceded, or when it is so

conclusively proved, that no question can be made that the person was not within the demanding State when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at the time, in the demanding State, then the court will discharge the defendant. *Hyatt v. Corkran,* 188 U.S. 691, 23 S.Ct. 456, 47 L.Ed. 657 affirming the judgment of the New York Court of Appeals, 172 N.Y. 176, 64 N.E. 825. But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the State, as *habeas corpus* is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused." (Emphasis added.)

. . . . .

Considering the Constitution and statute and the declarations of this Court, we may not properly approve the discharge of the respondent unless it appears from the record that he succeeded in showing by clear and satisfactory evidence that he was outside the limits of South Carolina at the time of the homicide. Stated otherwise, he should not have been released unless it appeared beyond reasonable doubt that he was without the State of South Carolina when the alleged offense was committed and, consequently, could not be a fugitive from her justice.

289 U.S. at 417, 419–22, 53 S.Ct. at 669–671.

We adopt the rules announced by the Supreme Court of the United States in *Michigan v. Doran, supra,* and *South Carolina v. Bailey, supra.*

After the hearing on the writ and after the State failed to produce any further evidence showing that appellee was in the State of Texas at the time the alleged crime occurred, the trial court entered a final order which reads:

And the State of New Mexico . . . having failed to produce any evidence in this matter by July 27, 1978, and the Court having found beyond a reasonable doubt that the Petitioner was not in the State of Texas at the time of the alleged offense, IT IS

ORDERED that the Writ of Habeas Corpus hearing be and is sustained, AND IT IS FURTHER

ORDERED that Ruben Bazaldua, the Petitioner is hereby and permanently discharged from custody in this matter.

Although the trial court's findings and conclusions favorable to appellee are entitled to great weight, appellee did not overcome the State's prima facie case by proof beyond a reasonable doubt. The burden upon appellee of overcoming the prima facie case is heavy. Conflicting evidence is not sufficient. The evidence adduced by appellee went not only to his contention that he was not in Texas, but also to the question of alibi. Habeas corpus is not the proper proceeding in which to try the latter question. *South Carolina v. Bailey, supra.*

The order and judgment of the trial court is reversed.

IT IS SO ORDERED.

SOSA, C. J., and EASLEY, J., concur.

592 P.2d 515

McKINLEY AMBULANCE SERVICE, Appellant,

v.

BUREAU OF REVENUE, State of New Mexico, Appellee.

No. 3454.

Court of Appeals of New Mexico.

Feb. 27, 1979.

Gerald E. Bischoff, Schuelke, Wolf & Rich, Gallup, for appellant.

Jeff Bingaman, Atty. Gen., Richard M. Kopel, Special Asst. Atty. Gen., Santa Fe, for appellee.

OPINION

WOOD, Chief Judge.

After an audit, the Bureau of Revenue assessed a gross receipts tax, penalty and interest in connection with gross receipts of the taxpayer from ambulance services rendered. The taxpayer protested the assessment. After an evidentiary hearing, the commissioner of revenue ruled that the taxpayer was not entitled to most of the deduction claimed. The taxpayer appealed to this Court. The issues involve: (1) the deduction provided by § 7–9–56(A), N.M.S.A. 1978; and (2) a nontaxable transaction certificate.

Deduction Under Section 7–9–56(A), supra

The statute provides:

> Receipts from transporting persons or property from one point to another in this state may be deducted from gross receipts when such persons or property . . . are being transported in interstate . . . commerce under a single contract.

During the audit period, the taxpayer provided ambulance service under a series of written contracts with the United States Department of Health, Education and Welfare. The ambulance service was provided to and from the Gallup Indian Medical Center on both a regular and emergency basis.

Ambulance service was provided "as needed within the boundaries of McKinley County, New Mexico." In addition, taxpayer provided "other ambulance services that is needed outside the McKinley County boundaries on a per call basis as requested by the Gallup Indian Medical Center."

Some of the ambulance services provided crossed state lines and were in interstate commerce. To the extent the taxpayer showed gross receipts for transportation of passengers "from one state to another state" the deduction was allowed, and the assessment abated to that extent. However, no deduction was allowed for gross receipts based on transportation of passengers entirely within New Mexico.

■ To deduct receipts under § 7–9–56(A), supra, the taxpayer was required to show three items: 1) the receipts must be from transporting persons from one point to another in New Mexico, 2) the transportation must have been in interstate commerce, and 3) the transportation must have been under a single contract.

■ The requirements under items 1 and 3 were met. There was no showing as to the requirement of item 2. The taxpayer claims that because ambulance transportation was provided under a single contract both within New Mexico and interstate, that all receipts under the contract were deductible. We disagree.

Walter E. Heller & Company of Cal. v. Stephens, 79 N.M. 74, 439 P.2d 723 (1968) is to the effect that transportation into one state from another is the indispensable test of interstate commerce. *Markham Advertising Co. v. Bureau of Revenue*, 88 N.M. 176, 538 P.2d 1198 (Ct.App.1975) held that the posting of billboard messages, received from out-of-state advertisers, on billboards located within New Mexico was a service taking place only in New Mexico and the gross receipts from posting of the messages were taxable.

■ In transporting persons by ambulance within New Mexico, no interstate journey occurred; there was no interstate commerce as to this transportation. The fact that there was both intrastate and interstate transportation under a single contract did not authorize a deduction under § 7–9–56(A), supra, for receipts attributable to the intrastate transportation. See *Albuquerque Mov. & Stor. Co. v. Commissioner of Rev.*, 82 N.M. 45, 475 P.2d 45 (Ct.App.1970).

Nontaxable Transaction Certificate

■ The taxpayer claims he accepted a nontaxable transaction certificate in good faith, and the certificate is conclusive evidence that proceeds from intrastate transportation of ambulance passengers were deductible. The "conclusive evidence" provision of § 7–9–43(A), N.M.S.A.1978 does not apply unless the certificate covered the receipts in question. The receipts in question were receipts from ambulance services within New Mexico.

The certificate in this case was for the "PURCHASE OF SERVICES FOR EXPORT". Under the certificate, the Indian Health Service purchased ambulance service from taxpayer "who will make initial use of the product of the service outside of New Mexico." This certificate did not apply to receipts from the taxpayer's in-state ambulance service.

A statute applicable to the export certificate was § 7–9–57, N.M.S.A.1978. Concerning this export certificate, the commissioner ruled:

9. At the hearing the taxpayer introduced a nontaxable transaction certificate (NTTC) delivered by the Indian Center to the taxpayer. This NTTC (issued by the Bureau pursuant to § 72–16A–14.-12, N.M.S.A.1953 [§ 7–9–57, N.M.S.A. 1978]), provides, that it applies to the "purchase of services by a buyer who will make initial use of the product of the service outside of New Mexico." The taxpayer fails to show how much of the receipts in question are deductible under this NTTC.

As to the taxpayer's burden, see *Chavez v. Commissioner of Revenue*, 82 N.M. 97, 476 P.2d 67 (Ct.App.1970). The propriety of the above-quoted ruling as to the export certificate is not an issue in this appeal.

There being no certificate applicable to the taxpayer's in-state services, the failure to approve a deduction on the basis of receipts from in-state services was not error.

The decision of the Commissioner is affirmed.

IT IS SO ORDERED.

LOPEZ, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent:

Taxpayer was represented at the hearing by its accountant. A misunderstanding arose out of the accountant's presentation of the law applicable to the contract between United States Health Service and taxpayer. The commissioner, unfortunately, was led astray.

Taxpayer was assessed a gross receipts tax, penalty and interest of $6,546.16 for the reporting period of May 1, 1973 through July 31, 1976. The contract in evidence covered the year July 1, 1976 to June 30, 1977. This contract was not applicable. Article II of this contract stated the services that taxpayer would provide. It was limited to emergency ambulance service to the Gallup Indian Medical Center for Indian beneficiaries only when authorized by law enforcement agencies or the Gallup Indian Medical Center. These services covered an area within and outside the boundaries of McKinley County.

Prior to July 1, 1976, the contract was not restricted to McKinley County because the Navajo Reservation did not, until 1976, provide any ambulance services. The annual contract that began in the year 1972 covered an area of 150 miles from towns in Arizona to Gallup, New Mexico. The nearest ambulance to Gallup was located at Holbrook, Arizona. Mr. Trujillo, who owned taxpayer, performed services himself for taxpayer until 1974. He testified that 80% of his trips were to and from Fort Defiance, Window Rock, Sanders and Tohatchi, Arizona and Gallup, New Mexico. Thirty percent of the calls came from Arizona police outside New Mexico. The remainder came from Gallup Indian Medical Center. All of these services were in interstate commerce and not subject to taxation. *Advance Schools, Inc. v. Bureau of Revenue*, 89 N.M. 133, 548 P.2d 95 (Ct.App.1975), Sutin, J., dissenting, rev'd 89 N.M. 79, 547 P.2d 562 (1976). This service continued until the 1976–77 contract was entered into.

All of the information upon which the bureau auditor made its assessment was taken from the Gallup Indian Medical Center (Indian Health Services in Gallup). No showing was made that these receipts were from intrastate calls. This tax was imposed on emergency ambulance service in interstate commerce and was not taxable, and, if taxable, should be limited to 20% of the gross receipts.

592 P.2d 959

HONEY BOY HAVEN, INC., a New Mexico Corporation, Applicant-Appellee,

v.

Juan ROYBAL and Baudilio Bowles, Protestants-Appellants,

and

S. E. REYNOLDS, New Mexico State Engineer, Respondent-Appellant.

No. 11617.

Supreme Court of New Mexico.

Nov. 22, 1978.

G. Emlen Hall, Pecos, E. James Hardgrave, Las Vegas, for protestants-appellants.

Toney Anaya, Atty. Gen., Peter Thomas White, Asst. Atty. Gen., Santa Fe, for respondent-appellant.

Catron, Catron & Sawtell, John S. Catron, Santa Fe, for applicant-appellee.

OPINION

SOSA, Justice.

A petition for rehearing was granted subsequent to our rendering an opinion in *Honey Boy Haven, Inc. v. Juan Roybal v. S. E. Reynolds*, 17 N.M.St.B.Bull. 2815 (1978). We withdraw our original opinion and substitute the following.

In 1956 or 1957 C. A. Baltzley, the predecessor in interest and president of Honey Boy Haven, Inc. (hereafter Honey Boy) constructed a new point of diversion and ditch on Cow Creek. From 1957 to 1971 he constructed thirteen off-channel ponds, all done without permits from the State Engineer. In 1971 in response to complaints from downstream water users, the State Engineer ordered Mr. Baltzley to cease further diverting, impounding, or using water from Cow Creek. Mr. Baltzley agreed in writing to the request.

On May 4, 1973, Honey Boy, as successor in interest to Mr. Baltzley, filed two water rights applications with the State Engineer. The first application requested a permit to change points of diversion from irrigation ditches located on the bank of Cow Creek to a single point of diversion approximately one mile downstream on the west bank of Cow Creek. The new point of diversion would be located on Honey Boy's property. The second application requested a permit to change the place and method of use of 36.6 acre feet of water per year from the irrigation of 24.4 acres of land to fish rearing, fishing and recreation purposes by supplying water to thirteen ponds having a combined surface area of 5.867 acres and a total capacity of 20.034 acre feet. Notice of the applications was published; the applications were protested by thirty-one members of the Cow Creek Water Rights Association.

During the State Engineer's hearing, Honey Boy withdrew its application to change point of diversion and amended its application to change the place and method of use by slightly reducing the claimed water right acreage. The point of diversion on the application was not, however, amended. On May 6, 1974, the State Engineer entered his findings and order denying the application to change place and method of use. The basis for this denial was that Honey Boy had failed to prove that there existed valid water rights appurtenant to its lands. The State Engineer also found

that the irrigation ditches, which were claimed by Honey Boy to have been used to irrigate its lands prior to 1957, had never supplied water to those lands, and that the diversion and use of water through the new point of diversion after 1957 was illegal. Thereafter, on July 12, 1974, Honey Boy filed a notice of appeal from the State Engineer's order in the District Court of San Miguel County.

The principal issues presented to the district court on a trial de novo were: (1) whether Honey Boy's points of diversion could be changed without a permit from the State Engineer; (2) whether the claimed old points of diversion could have irrigated Honey Boy's lands; (3) whether the claimed points of diversion had irrigated Honey Boy's lands at least once every four years during the period 1931 or 1928 to 1957, and (4) whether the diversion and use of water from an unauthorized point of diversion during the period 1957 to 1971 resulted in the forfeiture of the water rights that existed under the old points of diversion. After trial on the merits, the district court entered its decision on June 17, 1977, and ruled affirmatively on each of the first three questions. The judgment, entered on July 19, 1977, granted the application to change place and method of use subject to certain conditions. Notices of appeal were filed by the State Engineer and protestants on August 18, 1977.

Although many other points were raised on appeal, we believe the dispositive issue to be whether or not Honey Boy or its predecessor in interest had to seek prior approval from the State Engineer for a change in point of diversion. With regard to this issue the trial court found and concluded as a matter of law that: (1) the water rights of Cow Creek were adjudicated by decree of the United States District Court for the District of New Mexico in *United States of America v. Hope Community Ditch,* Cause No. 712 Equity (1933); (2) the acequias in question were public community acequias established and in operation prior to March 19, 1907, therefore, pursuant to § 75–14–60, N.M.S.A.1953 (Repl. 1968) neither Honey Boy nor its predecessor in interest was required to seek the approval of the State Engineer for a change in point of diversion; (3) since there were no duly elected officers of the community acequia, neither Honey Boy nor its predecessor in interest was required to seek approval from these non-existent officers; and (4) the granting of the application would not result in detriment to any other water rights owners.

An individual desiring to change his point of diversion is required to follow a certain statutory procedure. *State ex rel. Reynolds v. Fanning,* 68 N.M. 313, 361 P.2d 721 (1961). We consider §§ 75–2–9, 75–5–23, and 75–14–60, N.M.S.A.1953 (Repl.1968) from our water and irrigation statutes to determine whether Honey Boy was required to seek the State Engineer's approval. Section 75–5–23 provides that the State Engineer must approve a permit for a change in point of diversion. Section 75–14–60 codifies the exception to this rule; it provides that if a proposed change in point of diversion is on a community acequia, established prior to March 19, 1907, the officers of the community acequia need not apply to the State Engineer in order to change the place of diversion. The change in place of diversion contemplated by § 75–14–60 is one in which exigencies require immediate reconstruction. The change in point of diversion made by Honey Boy's predecessor in interest, Mr. Baltzley, was not the change contemplated by § 75–14–60. If the water rights of an acequia have been adjudicated, then the State Engineer must approve any change, regardless of whether or not it is a community acequia. § 75–2–9.

It is unnecessary for us to decide whether or not the acequia in question is a community acequia since in *United States of America v. Hope Community Ditch, supra,* the United States District Court of New Mexico adjudicated certain water rights to the predecessors of Honey Boy. Consequently, there being a prior adjudication of water rights, Honey Boy was compelled to seek the approval of the State Engineer before any change could be made. § 75–2–9. Whether or not Honey Boy's acequia was a

community acequia, which was in operation prior to March 19, 1907, is irrelevant once the water rights of Cow Creek were adjudicated.

We hold, therefore, that due to the adjudication of water rights on Cow Creek, Honey Boy's predecessor in interest was required to seek the approval of the State Engineer before it changed the point of diversion on the acequia in question. § 75–2–9. The trial court's decision that neither Honey Boy nor its predecessor had to seek the State Engineer's approval is reversed.

The State Engineer, during oral arguments, requested this Court to remand the case to the district court to affirm the denial of the application, subject, of course, to the right of Honey Boy to file another application for change of use together with an application for change in point of diversion. The State Engineer is not seeking a denial of the application on the merits, but a denial without prejudice to refile, if it is accompanied properly with an application for change of point of diversion. This request is hereby granted together with an order to impose whatever sanctions the State Engineer deems legally appropriate.

Therefore, this cause is remanded to the trial court to affirm the State Engineer's denial of the application.

IT IS SO ORDERED.

McMANUS, C. J., and PAYNE, J., concur.

592 P.2d 961

S. J. SACHS, also known as Simon J. Sachs, a married man, Plaintiff-Appellant,

v.

BOARD OF TRUSTEES OF the TOWN OF CEBOLLETA LAND GRANT et al., Defendants-Appellees.

KERR–McGEE CORPORATION et al., Plaintiffs-Appellants,

v.

BOKUM RESOURCES CORPORATION et al., Defendants-Appellees.

Nos. 11675, 11676.

Supreme Court of New Mexico.

Nov. 22, 1978.

Rodey, Dickason, Sloan, Akin & Robb, Victor R. Marshall, Albuquerque, for plaintiff-appellant.

Edward J. Apodaca, Albuquerque, for Bd. Trustees.

Marchiondo & Berry, Zenon F. Myszkowski, Albuquerque, for defendants & intervenors.

Robert H. McBride, Albuquerque, for Bd. Trustees and Marquez Peoples.

OPINION

McMANUS, Chief Justice.

The present cases involve the same parties and the same real estate as *Sachs v. Board of Trustees, Etc.,* 89 N.M. 712, 557 P.2d 209 (1976). In that case, the mandate of this Court reads as follows:

> For the foregoing reasons, we conclude that the doctrine of acquiescence applies, making the long-recognized fence line the boundary between the parties for all purposes. Therefore, the trial court must be reversed. To the extent that it is inconsistent with this holding, the denial of Bokum's motion to set aside the 1951 quiet title judgment (based on the Turley survey's metes and bounds description) must also be reversed.
>
> The cause is reversed and remanded to the District Court of McKinley County for the entry of an appropriate decision and judgment in accordance with the views herein expressed.

Id. at 722, 557 P.2d at 219. Upon remand, the trial court ordered that the boundary between the parties for all purposes, including mineral use and interest purposes, is the fence line as established by the Supreme Court in *Sachs v. Board of Trustees, Etc.*

As this Court stated in *Varney v. Taylor,* 79 N.M. 652, 655, 448 P.2d 164, 167 (1968), "It is a general rule that if, upon remand, the court below has acted in substantial conformity to the direction of the appellate court, its judgment will not be disturbed on a subsequent appeal." In our opinion, the trial court properly complied with the mandate of this Court. Therefore, we will not disturb its judgment. The question is res judicata and appellants are barred from asserting any further claim. *City of Santa Fe v. Velarde,* 90 N.M. 444, 564 P.2d 1326 (1977).

The decision of the trial court is hereby affirmed.

IT IS SO ORDERED.

SOSA, J., and C. FINCHER NEAL, District Judge, sitting by designation, concur.

EASLEY and PAYNE, JJ., respectfully dissenting.

PAYNE, Justice, dissenting.

I dissent.

This is a dispute over mineral rights. S. J. Sachs owned land in McKinley County. When a boundary dispute arose between Sachs and the Cebolleta Land Grant, Sachs filed a quiet title action. A compromise was reached in 1951 and the district court entered a decree reflecting this compromise. Sachs then deeded his land to McKenzie, reserving one-half of the production royalty interest in the underlying minerals. In 1953 McKenzie built a fence inside the surveyed boundary of the land deeded to him by Sachs. McKenzie later deeded the land to Kerr-McGee Corporation and the land owned by the Cebolleta Land Grant was transferred to Bokum Resources Corporation. In 1974 Kerr-McGee filed suit against Bokum, seeking to quiet title along the line established by the 1951 court decree. The trial court quieted title to Kerr-McGee and Bokum appealed. This Court reversed. *Sachs v. Board of Trustees, Etc.,* 89 N.M. 712, 557 P.2d 209 (1976). The opinion held that the parties had acquiesced in the fence line and it became the boundary between the parties. The Court further held that the fence line was also the boundary for the unsevered subsurface minerals. Upon remand, the district court entered judgment on the mandate as to the one-half interest in the mineral rights belonging to Kerr-McGee and took under advisement whether the severed rights belonging to Sachs passed to Bokum. Later the Court entered a second judgment on the mandate against Sachs and Sachs appealed. I would reverse the decision of the trial court respecting the Sachs interest.

Sachs reserved one-half of the production royalty interest in the minerals. The Bokum group claims that the interest reserved by Sachs is void because it violates the rule against perpetuities. I do not agree. *Price v. Atlantic Refining Company,* 79 N.M. 629,

447 P.2d 509 (1968), held that royalty interests are not future interests and therefore are not subject to the rule against perpetuities. Appellees argue that this is a production royalty and not a simple royalty, but I can see no difference in a royalty and a production royalty. Every royalty interest is dependent on production. *See Price; Duvall v. Stone,* 54 N.M. 27, 213 P.2d 212 (1949).

In deciding the remaining issues, a careful examination of the first *Sachs* opinion is essential. In that case this Court determined two things. First, it found that the trial court erred in holding that the parties did not acquiesce in the fence line as the boundary. Secondly, it found that when title to land is acquired by acquiescence, the unsevered mineral rights are also acquired. In reaching the second conclusion the Court stated:

> In addition, the rule in New Mexico appears to be that *unless minerals are specifically excluded,* they pass with the estate. See *Duvall v. Stone,* 54 N.M. 27, 213 P.2d 212 (1949). *Before severance* of the subsurface minerals, possession of the surface implies possession of the minerals below. *Lykes Bros., Inc., v. McConnel,* 115 So.2d 606 (Fla.Ct.App.1959); *Hunsley v. Valter,* 12 Ill.2d 608, 147 N.E.2d 356 (1958); *Smith v. Nyreen,* 81 N.W.2d 769 (N.D.1957); *Dixon v. Henderson,* 267 S.W.2d 869 (Tex.Civ.App.1954). *Also, when title to the surface passes by adverse possession (to which acquiescence is analogous and frequently compared, see, e. g., State of Iowa v. Carr,* supra), *the mineral estate is included. Bremhorst v. Phillips Coal Co.,* 202 Iowa 1251, 211 N.W. 898 (1927). Moreover, a mineral lease is considered to be real property in New Mexico (*Terry v. Humphreys,* 27 N.M. 564, 203 P. 539 (1922)), and it is only logically consistent to hold that all the related real property interests embodied in a certain tract of land should pass together. (Emphasis added.)

89 N.M. at 721, 557 P.2d at 218.

This Court reversed the case and remanded it to the district court "for the entry of an appropriate decision and judgment in accordance with the views herein expressed." *Id.* at 722, 557 P.2d at 219. Both sides agree that the doctrine of the law of the case should apply. The question then is what is the law of the case. The opinion states that unless minerals are excluded they follow the surface rights. Thus when Kerr-McGee lost its surface interest in the land it also lost its interest in the underlying minerals. The opinion, however, is not so clear on what happens to the ownership of the mineral rights that were severed prior to acquiescence.

A careful examination of the law cited in the opinion and the common law governing mineral rights indicates that severed mineral rights do not pass with the surface. The opinion states that "unless minerals are specifically excluded, they pass with the estate." . *Id.* at 721, 557 P.2d at 218. Conversely, if minerals are specifically excluded they constitute a separate estate and do not pass with the surface. *Johnson v. Gray,* 75 N.M. 726, 410 P.2d 948 (1966); *Kaye v. Cooper Grocery Company,* 63 N.M. 36, 312 P.2d 798 (1957); *Duvall, supra.*

The opinion continues, "[b]efore severance of the subsurface minerals, possession of the surface implies possession of the minerals below." 89 N.M. at 721, 557 P.2d at 218. Again the converse is true. After the subsurface minerals have been severed, possession of the surface does not imply possession of the minerals. *Hunsley v. Valter,* 12 Ill.2d 608, 147 N.E.2d 356 (1958); *Dixon v. Henderson,* 267 S.W.2d 869 (Tex.Ct.App.1954). In the *Hunsley* case, cited with approval in the *Sachs* opinion, the Supreme Court of Illinois held in an adverse possession case that unsevered mineral rights pass with the surface. But the Court in *Hunsley* made it clear that its holding was not in conflict with its prior ruling that:

> [W]here the severance of surface and mineral estates occurs previous to the adverse possession, commencement of possession of the surface does not of itself result in prescriptive rights to the minerals below the surface. Pickens v. Adams, 7 Ill.2d 283, 292, 131 N.E.2d 38, 56 A.L.

R.2d 605; Kinder v. LaSalle County Carbon Coal Co., 301 Ill. 362, 133 N.E. 772.

147 N.E.2d at 360.

The *Sachs* opinion continues, "[a]lso, when title to the surface passes by adverse possession (to which acquiescence is analogous and frequently compared, see, e. g., *State of Iowa v. Carr,* supra), the mineral estate is included." 89 N.M. at 721, 557 P.2d at 218. Once more the converse is true. Other jurisdictions addressing the issue have held that if mineral rights are severed prior to the commencement of adverse possession they are not obtained by adverse possession of the surface. *Henley v. United States,* 184 Ct.Cl. 315, 396 F.2d 956 (1968); *Gerhard v. Stephens,* 68 Cal.2d 864, 69 Cal.Rptr. 612, 442 P.2d 692 (1968); *Bushey v. Seven Lakes Reservoir Company,* 545 P.2d 158 (Colo.Ct.App.1975); *Knott Coal Corporation v. Kelly,* 417 S.W.2d 253 (Ky.1967); *Turner Lumber Company v. Beckham,* 277 So.2d 110 (Miss.1972); *Douglass v. Mounce,* 303 P.2d 430 (Okla.1956); *Broadhurst v. American Colloid Company,* 85 S.D. 65, 177 N.W.2d 261 (1970); *Kanawha & Hocking Coal & Coke Co. v. Carbon County,* 535 P.2d 1139 (Utah 1975).

In *Douglass, supra,* the court held:

> It is a rule of almost universal acceptance that the severance of a mineral interest from the ownership of the surface estate creates a separate estate in those minerals. . . . The possession of the surface thereafter is not adverse to this separate mineral estate even when the surface owner also owns a portion of the minerals. This court has subscribed to that view.

Douglass at 433 (citation omitted).

The law of the case is that unsevered mineral rights pass with the surface rights but severed mineral rights are unaffected by the transfer of the surface rights. It would be an anomaly to hold that even though Bokum could not have purchased the Sachs interest from McKenzie, he could obtain the interest by McKenzie's acquiescence. Such a holding is not only contrary to logic but to the law as well. *Henley, supra; Gerhard, supra; Bushey, supra; Knott, supra; Turner, supra; Douglass, supra; Broadhurst, supra; Kanawha, supra.*

Appellees claimed that Sachs should be precluded from raising the issue of his interest in the mineral rights because the Court has already disposed of the issue. The majority seems to have accepted this view. Even though there was no reference to the Sachs interest in the opinion, Sachs filed a motion for rehearing before the Supreme Court setting out the argument concerning his mineral rights. The motion was denied. Sachs twice more filed motions for rehearing. Both of those motions were denied. Appellees claim that Sachs has had his day in court, lost and should not be given an opportunity to litigate the same issue again. I cannot agree with the appellees' argument nor with the majority opinion. In the first *Sachs* opinion this Court remanded the case to the district court for the entry of an appropriate decision in accordance with the view expressed in the opinion. The mandate from this Court as to the Sachs interest was ambiguous and led the trial court to misinterpret the law regarding severed mineral rights. When the motions for rehearing were heard, the Sachs interest had not been ruled on by the trial court. It was not until after the trial court entered its decision that Sachs had an appealable issue.

I would reverse the decision of the trial court as to the ownership of one-half of the production royalty interest in the land between the boundary set by the 1951 court decree and the fence built by McKenzie and remand for the entry of a judgment quieting title of that interest in the name of S. J. Sachs.

EASLEY, J., concurs.

592 P.2d 965

ERNEST W. HAHN, INC. and Dale Bellamah Land Co., Inc., Petitioners,

v.

COUNTY ASSESSOR FOR BERNALILLO COUNTY, New Mexico, Respondent.

No. 12030.

Supreme Court of New Mexico.

Dec. 11, 1978.

Johnson & Lanphere, J. Victor Pongetti, Albuquerque, for petitioners.

Hunter L. Geer, Albuquerque, for respondent.

OPINION

PAYNE, Justice.

This matter involves the constitutionality of property taxes imposed on properties located in Bernalillo County belonging to Ernest W. Hahn, Inc. and Dale Bellamah Land Company, Inc. Taxpayers protested Notices of Valuation received from the Bernalillo County Assessor. They challenged the valuations placed on their properties and claimed that the assessor's revaluation of their properties was unconstitutional. The Bernalillo County Valuation Protests Board denied the protests, holding that the revaluation was part of "an unscheduled continuous reappraisal program" designed to keep values current. The Court of Appeals affirmed this finding, but remanded the case in order to permit taxpayers to present their constitutional claims to the Protests Board. *Matter of Protest of Miller,* 88 N.M. 492, 542 P.2d 1182 (Ct.App. 1975), *cert. denied,* 89 N.M. 5, 546 P.2d 70 (1975). On remand the Protests Board again upheld the assessor's actions and the Court of Appeals affirmed. We granted certiorari to consider the constitutionality of the assessor's actions under Article VIII, Section 1 and Article II, Section 18 of the New Mexico Constitution. We reverse.

The assessor contends that this appeal is barred by the doctrine of res judicata in that the earlier decision of the Court of Appeals in *Miller* constituted a final decision on the merits. We hold to the contrary.

In *Miller* the court decided that the assessor's actions did not violate §§ 72–2–21.1 to 72–2–21.14, N.M.S.A.1953 (Supp.1973) (repealed by Laws 1968, ch. 61, § 7, Laws 1970, ch. 31, § 22, Laws 1973, ch. 274, § 23, and Laws 1974, ch. 92, § 34). The constitutionality of the assessor's reappraisal of taxpayers' properties was not decided in *Miller*. To the contrary, the Court of Appeals remanded the case to the Protests Board to consider the constitutional challenge. Therefore, the doctrine of res judicata does not bar this appeal.

On remand to the Protests Board, the issue was submitted on stipulated facts. In 1965 and 1966 all of the land in Bernalillo County was appraised pursuant to an overall program called the Jacobs Reappraisal. In October 1974 the assessor commenced a new program designed to reappraise all the land in Bernalillo County over several succeeding years. Between 1966 and October 1974, however, there was no scheduled, systematic reappraisal program applicable to all properties in Bernalillo County, nor was there an overall reappraisal program designed to cover all property having a similar zoning classification. The assessor did engage in "an unscheduled continuous reappraisal program" during those years.

Only eight to ten percent of the land within Bernalillo County was reappraised during the eight-year period of the "unscheduled" program. In 1969 the assessor reassigned a new market value to one percent of the total property in Bernalillo County. In 1970 the value of taxpayers' properties was raised approximately one hundred percent while only three percent of the total property in the county was reappraised. In 1971 and 1972 the assessor assigned a new value to one percent of the lands in the county and again taxpayers' lands were subjected to reappraisal. Taxpayers protested all three of the new value assignments and in each instance the Property Appraisal Department in Santa Fe lowered it to the average market value. Then, in 1973 the assessor raised the value of these properties for purposes of the 1974 tax year approximately one hundred and eighty percent above their 1966 assessed value while reappraising another two percent of the lands in the county. Taxpayers maintain that the 1973 revaluation for purposes of 1974 taxes was contrary to Article VIII, Section 1 and Article II, Section 18 of the New Mexico Constitution.

Article VIII, Section 1 provides:

> Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class.

Article II, Section 18 provides:

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.

Violations of constitutional uniform taxation requirements frequently result in violations of equal protection clauses. *Larson v. State,* 166 Mont. 449, 534 P.2d 854 (1975). A taxpayer must not be subjected to discrimination in the imposition of a property tax burden which results from systematic, arbitrary, or intentional revaluation of some property at a figure greatly in excess of the undervaluation of other like properties. *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *McCluskey v. Sparks,* 80 Ariz. 15, 291 P.2d 791 (1955); *Hamm v. State,* 255 Minn. 64, 95 N.W.2d 649 (1959).

The evidence consists of stipulated facts and documents; therefore, this Court is in as good a position to review the facts as the Protests Board and the Court of Appeals and is not bound by their findings. *House of Carpets, Inc. v. Mortgage Investment Co.,* 85 N.M. 560, 514 P.2d 611 (1973). Property values in Bernalillo County greatly increased from 1966 to 1974. Any reappraisal would therefore lead to an increase in property taxes. Taxpayers' properties

were reappraised every year from 1970 through 1973 while over ninety percent of the land in Bernalillo County had not been subjected to even a single reappraisal. Although taxpayers' property taxes have more than tripled, the large majority of property taxes in Bernalillo County have remained unchanged during this period.

In *Skinner v. New Mexico State Tax Commission*, 66 N.M. 221, 223, 345 P.2d 750, 752 (1959), this Court held that a "well-defined and established scheme of discrimination" in the method used for reappraising land within a county would violate Article VIII, Section 1 and entitle the taxpayer to relief. We also held that there was no requirement under Article VIII, Section 1 for reappraisals of all comparable properties within a county to be completed within a single year. Temporary inequalities which result from the practicalities of carrying out a county-wide systematic and definite property appraisal program are inevitable and constitutional. This rule is universally accepted. *Hamilton v. Adkins*, 250 Ala. 557, 35 So.2d 183 (1948), *cert. denied*, 335 U.S. 861, 69 S.Ct. 133, 93 L.Ed. 407 (1948); *Maricopa County v. North Central Dev. Co.*, 115 Ariz. 540, 566 P.2d 688 (Ct. App.1977); *Rogan v. County Commissioners of Calvert County*, 194 Md. 299, 71 A.2d 47 (Ct.App.1950); *Larson, supra.* However, singling out one or a few taxpayers for reappraisals for several years in succession while virtually all other owners of comparable properties do not undergo a single reappraisal in the same period is an inequality that is neither temporary nor constitutional. *Maricopa County, supra*; *Penn Phillips Lands, Inc. v. State Tax Commission*, 247 Or. 380, 430 P.2d 349 (1967).

We conclude that in the present case the reappraisal was done in a systematically discriminatory manner. First, taxpayers were singled out for selective enforcement of tax laws that apply equally to all similarly situated taxpayers. In the event the assessor was choosing properties for revaluation on a random basis, the statistical odds against taxpayers' properties being picked for revaluation in each of four consecutive years would be no more than one chance in sixteen million.

Second, it is uncontested that the 1970–1973 reappraisals of taxpayers' properties were not conducted as part of a definite and logical plan for the revaluation of all properties within Bernalillo County to be executed in a reasonably limited time. To the contrary, had the reappraisals continued at the 1969–1973 completion rate, it might well have taken from fifty to one hundred years to complete the reappraisal of all property within the county. We agree with the Arizona Supreme Court in *Sparks v. McCluskey*, 84 Ariz. 283, 327 P.2d 295, 297 (1958), wherein the court stated:

> The evidence does not indicate how many years might elapse before the program would be complete and equalization effected. We cannot subscribe to the proposition that grossly inequal values by the use of a specific method of assessment may be placed on a small portion of a class of property and remain subject to the disproportionately excessive value for an indefinite number of years in the future until the taxing officials can get around to using the same method upon the other like properties.

The assessor contends that he was under a statutory duty to annually maintain values of property at full actual value. §§ 72–2–1 through 72–2–3, N.M.S.A.1953 (repealed by Laws 1970, ch. 31, § 22 and Laws 1974, ch. 92, § 34). He argues that pursuant to that duty he was engaging in "an unscheduled, continuous reappraisal program" which violated neither the statutes pursuant to which it was conducted nor Article VIII, Section 1 and Article II, Section 18.

We need not determine whether the assessor had such a duty under the statutes or whether these reappraisals were conducted as part of such a program. Whatever the assessor's duty may have been under the applicable statutes, he had a *constitutional* duty "to take the necessary action to require, so far as possible, equality and uniformity on a continuing basis." *State ex*

rel. Castillo Corp. v. New Mexico St. T. Com'n, 79 N.M. 357, 362, 443 P.2d 850, 855 (1968). The uniformity clause of the New Mexico Constitution requires uniformity of property taxation within a county as well as statewide uniformity of assessments.

Uniformity and equality do not mean mathematical exactitude. As this Court said in *Castillo*, "[i]t is, of course, too much to expect that there will be absolute uniformity at any time (appraisals involve the human equation and therefore are simply not 100% accurate)." *Id.* at 362, 443 P.2d at 855. In order to support a claim under the uniformity clause of the New Mexico Constitution, the taxpayer must show that the inequality is substantial and amounts to an intentional violation of "the essential principle of practical uniformity." *Sioux City Bridge Co.*, 260 U.S. at 447, 43 S.Ct. at 192. Mere errors of judgment in estimating market value of property will not be sufficient to show unconstitutional discrimination. But good faith alone will not justify an assessment which is discriminatory in fact. *Sparks v. McCluskey, supra*; *Maricopa County, supra*; *Hamm, supra.*

A uniform method of taxation requires that each reappraisal be part of a systematic and definite plan which provides that all similar properties be valued in a like manner. We do not prohibit the use of cyclical plans of reappraisal of lands within a county. Such plans need not necessarily be completed within a single year. Where a cyclical program of revaluation is undertaken, however, it must be completed within a reasonably limited time. More than fifty years is not a reasonable time.

The constitutional defect in this case is the absence of any systematic and definite plan for the reappraisal of all lands in Bernalillo County. "Without such a plan, there is no assurance of uniformity of appraisal method or of sequential selection of property for reappraisal." *Larson*, 534 P.2d at 857. In determining whether a property revaluation plan constitutes intentional and arbitrary discrimination in violation of the uniformity and equal protection clauses, all relevant circumstances should be taken into consideration. Such factors should include, but not be limited to, the resources realistically available to the assessing authority, the time limitations involved in the plan, the availability of other alternatives, and the amount of temporary inequalities in valuations which result from the cyclical implementation of the plan. *Hillock v. Bade*, 22 Ariz.App. 46, 523 P.2d 97 (1974), *aff'd*, 111 Ariz. 585, 535 P.2d 1302 (1975).

Lack of adequate resources with which to undertake and complete a cyclical reappraisal within a reasonable time cannot be relied upon as an excuse where the assessor has a mandatory duty to achieve equal and uniform property taxation. As this Court said in *Castillo, supra*:

> If there is a mandatory duty, delay in exercising it is just as much to be condemned as is the refusal to do the duty. We do not believe that our constitution or the statutes authorize the taxing authorities to procrastinate in making a required decision.

79 N.M. at 362, 443 P.2d at 855.

The sole question remaining is the remedy available to taxpayers to redress this constitutional wrong for the 1974 tax year. In *Skinner, supra*, this Court said:

> [A] taxpayer who is not assessed more than the law provides has no cause for complaint in the courts *in the absence of some well-defined and established scheme of discrimination or some fraudulent action* (citations omitted). The taxpayer's remedy is to have the assessing authority raise the value on the property claimed to be, valued too low to a level with his own. (Citations omitted and emphasis added.)

66 N.M. at 223–24, 345 P.2d at 752. The assessor argues that taxpayers must therefore seek an upward revision of the taxes of other members of their class. We have indicated in *Skinner*, however, that this remedy does not apply where there has been a violation of taxpayers' constitutional right to equal and uniform taxation.

In *Hillsborough v. Cromwell*, 326 U.S. 620, 623, 66 S.Ct. 445, 448, 90 L.Ed. 358 (1946) the United States Supreme Court stated:

> The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. (Citations omitted.)

Forcing taxpayers to carry the burden of joining all other taxpayers to bring about an upward revaluation of their properties would be contrary to the holding in *Hillsborough*. Although *Hillsborough* was decided on the basis of the equal protection clause of the Federal Constitution, we are persuaded that the equal protection and uniform taxation clauses of our own Constitution require the same approach. Taxpayers are entitled to a reduction in their assessment for the 1974 tax year to a level which will achieve the practical uniformity required by Article VIII, Section 1 and Article II, Section 18 of the New Mexico Constitution.

We cannot tell from the existing record whether practical uniformity would be achieved by assessing taxpayers' properties based on the 1966 assessment level. Approximately ninety percent of the properties in Bernalillo County were assessed for purposes of 1974 taxes on the basis of the 1966 reappraisals, but that approach would not necessarily achieve practical uniformity. For example, if the value of taxpayers' properties rose three hundred percent between 1966 and 1974 while the average comparable property rose one hundred percent, that fact would dictate a higher assessment on taxpayers' properties.

We subscribe to the view set forth in *Bemis Bros. v. Claremont*, 98 N.H. 446, 102 A.2d 512, 516 (1954). The court stated: "The relief to which it [plaintiff] is entitled is to have its property appraised for taxation at the same ratio to its true value as the assessed value of all other taxable estate bears to its true value." *See also Southern Pacific Company v. Cochise County*, 92 Ariz. 395, 377 P.2d 770 (1963). On the record before us we cannot say what level of assessment is consistent with this ratio. It was stipulated that the market value assigned by the assessor on residences constructed during or prior to 1966 and which were sold during 1972, 1973 and 1974 amounts to approximately fifty to sixty percent of the actual sales prices at which the homes were sold. This is some evidence of the proper ratio, but there is no evidence of the ratio between assessed value and actual market value of other comparable (commercial) properties in 1974. Therefore, the case must be remanded to the Valuation Protests Board to determine the proper ratio to achieve practical uniformity.

The decision of the Court of Appeals is reversed and the cause remanded to the Valuation Protests Board with directions to reassess taxpayers' properties in accordance with the standards set forth in this opinion.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, EASLEY and FEDERICI, JJ., concur.

592 P.2d 971

DALE BELLAMAH LAND CO., INC., a New Mexico Corporation, et al., Petitioners,

v.

COUNTY OF BERNALILLO et al., Respondents.

No. 12114.

Supreme Court of New Mexico.

Dec. 11, 1978.

Johnson & Lanphere, Floyd Wilson, Albuquerque, for petitioners.

Joe C. Diaz, Vance Mauney, Albuquerque, for respondents.

OPINION

PAYNE, Justice.

This matter is before this Court on a writ of certiorari challenging the constitutionality of property taxes imposed for the 1975 and 1976 tax years on property located in Bernalillo County which belonged to petitioners, Dale Bellamah Land Co., Inc. until February 6, 1975 and to Adcor Realty after that date. Taxpayers brought suit for refund of the taxes pursuant to § 72–31–39, N.M.S.A.1953 (Supp.1975). The trial court upheld the constitutional challenge to the taxes and found that taxpayers' property had an actual market value of one dollar per square foot as of both January 1, 1975 and January 1, 1976. The Court of Appeals reversed both of these findings and upheld the two dollar per square foot valuation assigned to the property by the assessor. We reverse.

Originally taxpayers requested a refund of taxes only for the 1975 tax year. The trial court subsequently permitted taxpayers to file a supplemental complaint for refund of taxes for the 1976 tax year.

Under § 72–31–40(A)(1), N.M.S.A. 1953 (Supp.1975), a claim for refund must be filed no later than December 15 of the year in which the first installment of the challenged tax is due. The first installment of 1976 taxes was due November 1, 1976. The supplemental complaint was not filed until January 27, 1977. Taxpayers failed to file a timely claim under § 72–31–40(A)(1) for refund of taxes paid for the 1976 tax year. *See Dale Bellamah Land Co., Inc. v. County of Bernalillo*, 92 N.M. 368, 588 P.2d 1043 (Ct.App.1978), *cert. denied* (1978). Therefore, the present decision applies only to taxes paid for the 1975 tax year.

In *Ernest W. Hahn, Inc. v. County Assessor for Bernalillo County*, 92 N.M. 609, 592 P.2d 965 (1978), filed simultaneously with this opinion, we decided identical constitutional claims with respect to the taxation of this same property for the 1974 tax year. In that case we held that the 1974 assessment violated Article II, Section 18 and Article VIII, Section 1 of the New Mexico Constitution. The 1975 assessment was not based on any new reappraisal, but was a result of an automatic carry-over of the 1974 assessment. Because the 1975 assessment was based on the constitutionally invalid 1974 reappraisal, it too cannot withstand the constitutional challenge.

In *Hahn* we held that *temporary* inequalities which result from the practicalities of carrying out a county-wide systematic and definite property appraisal program are inevitable and constitutional. Although a county-wide reappraisal plan was instituted in October 1974, the assessment of taxpayers' property for the 1975 tax year was not based on that plan, nor was the inequality in taxation for that year merely a temporary inequality resulting from the institution of that plan. To the contrary, the 1975 inequality in taxation was an automatic perpetuation of a long-standing practice of singling out taxpayers for discriminatory treatment. Such a practice is unconstitutional.

The Court of Appeals' decision is reversed and the cause remanded to the trial court with directions to reassess taxpayers' property in a manner consistent with this opinion and the decision of the *Hahn* case. The trial court may wish to delay a decision in this case until the assessor and the Bernalillo County Valuation Protests Board have taken action as mandated in the *Hahn* decision.

IT IS SO ORDERED.

McMANUS, C. J., and SOSA, EASLEY and FEDERICI, JJ., concur.

593 P.2d 58

STATE of New Mexico ex rel. Toney ANAYA, Attorney General, Plaintiff-Appellant,

v.

Carlos JARAMILLO, Director, Department of Alcoholic Beverage Control, et al., Defendants-Appellees.

No. 12023.

Supreme Court of New Mexico.

April 2, 1979.

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

Gallegos & Benavidez, Edward F. Benavidez, Santa Fe, for Jaramillo.

Booker Kelly, Santa Fe, for Seim.

David L. Norvell, Albuquerque, for Vigil.

OPINION

FEDERICI, Justice.

This case arose through the filing of a declaratory action in the District Court of Santa Fe County by the State of New Mexico (State) against the Director of the Department of Alcoholic Beverage Control (Department) and others, to set aside a transfer of a liquor license. The license had been transferred from within the five-mile buffer zone to a location outside that five-mile buffer zone but within the county. No transfer to a location within a municipality or within the five-mile buffer zone was involved. The Department filed a motion to dismiss for failure to state a claim upon which relief could be granted. After a hearing on the motion, the trial court dismissed the complaint on the ground that "the unreported decision of the New Mexico Supreme Court in *Severo H. Benavidez vs. State of New Mexico Department of Alcoholic Beverage Control and Carlos L. Jaramillo, Director*, No. 10,353, controls the liquor license transfer which is the subject of the First Amended Complaint for Declaratory Relief." The Attorney General's office was involved in *Benavidez* and the Attorney General's office and the New Mexico Department of Alcoholic Beverage Control and Carlos L. Jaramillo, Director, are parties in this appeal.

The State contends that the reported case of *City of Santa Rosa v. Jaramillo*, 85 N.M. 747, 517 P.2d 69 (1973) controls and that the unreported, unpublished decision in *Benavidez* has no value as precedent and should not be controlling with regard to the transfer involved in this case. We disagree.

The Department contends that *Benavidez* has value as precedent and authorizes the transfer of the liquor license involved in this case. We agree.

The case of *City of Santa Rosa*, relied on by the State, is not applicable to the present case. That case involved a transfer of liquor license from the five-mile buffer zone to a location within a municipality. The present case does not involve a transfer from the five-mile buffer zone to a location within a municipality but rather a transfer from within the five-mile buffer zone to another location within the county, but outside the five-mile buffer zone.

It has been established in New Mexico, by rule, that in criminal cases "[a]n order or memorandum opinion, because it is unreported and not uniformly available to all parties, shall not be cited as precedent"; therefore, no precedential value can be accorded to unpublished decisions in *criminal* cases of both the New Mexico Supreme Court and the New Mexico Court of Appeals. N.M.R.Crim.App. 601(c), N.M.S.A. 1978. The Court of Appeals follows the same rule in *civil* cases. *See* § 34–5–13, N.M.S.A.1978 (formerly § 16–7–13, N.M.S.A.1953) and *Villegas v. American Smelting & Refining Co.*, 89 N.M. 387, 552 P.2d 1235 (Ct.App.1976). The New Mexico Supreme Court has not determined the issue as to its own unpublished decisions in *civil* cases.

An extended discussion on the effect to be given in the future by the courts to unpublished decisions of the Supreme Court in *civil* cases is deemed unnecessary since this Court hereby adopts the following rule, subject to required implementation:

Rule . Opinions in Civil Cases.

(a) *Necessity.* In civil cases it is unnecessary for the court to write formal opinions in every case. Disposition by order or memorandum opinion does not mean that the case is considered unimportant. It does mean that no new points of law, making the decision of value as a precedent, are involved.

(b) *Decision by order or memorandum opinion.* When the court determines that one or more of the following circumstances exists and is dispositive of the case, it may dispose of the case by order or memorandum opinion: (1) the issues presented have been previously decided by the supreme court or court of appeals; (2) the presence or absence of substantial evidence disposes of the issue; (3) the issues are answered by statute or rules of court; (4) the asserted error is not prejudicial to the complaining party; (5) the issues presented are manifestly without merit.

(c) *Publication of opinions.* All formal opinions shall be published. An order or memorandum opinion, because it is unreported and not uniformly available to all parties, shall not be cited as precedent.

Since there was no rule in effect at the time this case was on appeal, and since the unpublished decision by this Court in *Benavidez* was legally correct, and since the Court had set forth the ultimate facts, the basis for its conclusion and the legal result reached, the trial court is affirmed.

IT IS SO ORDERED.

SOSA, C. J., McMANUS, Senior Justice, and EASLEY and PAYNE, JJ., concur.

593 P.2d 59

GALLES CHEVROLET COMPANY, Petitioner,

v.

Charles CHANEY, Respondent.

No. 12343.

Supreme Court of New Mexico.

April 9, 1979.

Rodey, Dickason, Sloan, Akin & Robb, Robert G. McCorkle, Steven P. Bailey, Albuquerque, for petitioner.

Kanter & Carmody, John J. Carmody, Jr., Albuquerque, for respondent.

OPINION

FEDERICI, Justice.

Charles Chaney, plaintiff-respondent (plaintiff), brought this action against his employer, Galles Chevrolet Company, defendant-petitioner (defendant), seeking damages. Plaintiff was employed by defendant as a mechanic and vehicle repairman. While on defendant's premises, plaintiff fell and injured his back. Plaintiff sought recovery based on defendant's negligence and under the Workmen's Compensation Act.

The parties settled the workmen's compensation claim and agreed to a dismissal of that cause of action. Thereafter, the trial court granted defendant's motion for summary judgment dismissing the negligence claim. Plaintiff appealed and the Court of Appeals reversed, Judge Hernandez dissenting. The court determined that plaintiff was not on his way to assume the duties of his employment at the time of the accident. The Court of Appeals concluded that plaintiff had no claim under the Workmen's Compensation Act and it held that the provisions of the Act would not bar a negligence action. This Court granted defendant's petition for writ of certiorari. We reverse.

Section 59–10–12.12, N.M.S.A. 1953, read as follows at the time of the accident in 1974:

> As used in the Workmen's Compensation Act . . . unless the context otherwise requires, the words "injuries sustained in extra-hazardous occupations or pursuit" shall include death resulting from injury, and injuries to workmen, as a result of their employment and while at work in or about the premises occupied, used or controlled by the employer, and injuries occurring elsewhere while at work in any place where their employer's business requires their presence and subjects them to extra-hazardous duties incident to the business, *but shall not include injuries to any workman occurring while on his way to assume the duties of his employment or after leaving such duties, the approximate cause of which injury is not the employer's negligence.* (Emphasis added.)

This statute was amended in 1975 and is now found at § 52–1–19, N.M.S.A. 1978. However, the language emphasized above is identical to that in the amended version. We discussed this portion of the statute in *Mountain States Tel. & Tel. Co. v. Montoya,* 91 N.M. 788, 790, 581 P.2d 1283, 1285 (1978):

> [N]otwithstanding an employee has left his duties . . . the law provided yet another compensable claim under the Workmen's Compensation Act *if the injury was proximately caused by the employer's negligence.* Stated another way, under the provisions of the Workmen's Compensation Act quoted above, an employee ordinarily has *no* compensable

claim if injured *while on his way to assuming the duties* of his employment *or after leaving such duties.* On the other hand, an employee *does have* a compensable claim if injured while on his way to assuming his duties or leaving his duties *if the employer's negligence was the proximate cause of that injury. Cuellar v. American Employers' Ins. Co. of Boston, Mass.,* 36 N.M. 141, 9 P.2d 685 (1932).

If plaintiff was on his way to assume the duties of his employment and since plaintiff claims defendant was negligent, § 52–1–19 and the cases construing that section would cause the Workmen's Compensation Act to apply. In this case the record clearly shows and plaintiff expressly stated in his brief-in-chief in the Court of Appeals, and the trial court specifically found that plaintiff was on his way to assume the duties of his employment when he was injured. This finding was not challenged on appeal and there is substantial evidence to support it. The only remaining issue is whether the Workmen's Compensation Act provides plaintiff's exclusive remedy.

Section 52–1–6(D), N.M.S.A. 1978 provides in part that:

> Such compliance with the provisions of the Workmen's Compensation Act, including the provisions for insurance, shall be, and construed to be, a surrender by the employer and the employee of their rights to any other method, form or amount of compensation or determination thereof, or to any cause of action at law, suit in equity or statutory or common-law right to remedy or proceeding whatever for or on account of such personal injuries . . . .

Section 52–1–8(C), N.M.S.A. 1978, provides in part that:

> *Any employer who has complied with the provisions of the Workmen's Compensation Act* [52–1–1 to 52–1–69, NMSA 1978] relating to insurance, or any of the employees of the employer, including management and supervisory employees, *shall not be subject to any other liability whatsoever* for the death of or personal injury to any employee, except as provided in the Workmen's Compensation Act, and all causes of action, actions at law, suits in equity and proceedings whatever, *and all* statutory and *common-law rights and remedies for and on account of such death of, or personal injury to, any such employee* and accruing to any and all persons whomsoever, *are hereby abolished* except as provided in the Workmen's Compensation Act. (Emphasis added.)

If the Workmen's Compensation Act applies, the employee's negligence action, if any, is precluded. Our decision in this case is controlled by the rule set out in *Mountain States.* In that case the injured employee was provided with a compensable claim under § 52–1–19 of the Workmen's Compensation Act. In *Mountain States* we said:

> Since the Workmen's Compensation law has provided the remedy, that law is exclusive and Montoya has no right to bring an action in common law negligence against his employer . . . .

Id. at 791, 581 P.2d at 1286. The result is the same in this case.

The decision of the Court of Appeals is reversed, and the trial court's order granting summary judgment for defendant is affirmed.

IT IS SO ORDERED.

SOSA, C. J., McMANUS, Senior Justice, and EASLEY and PAYNE, JJ., concur.

593 P.2d 63

STATE of New Mexico,
Plaintiff-Appellee,

v.

Vernon Jack BRASHEAR,
Defendant-Appellant.

No. 3663.

Court of Appeals of New Mexico.

March 6, 1979.

John B. Bigelow, Chief Public Defender, Reginald J. Storment, App. Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Lawrence A. Gamble, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of one count of possession of marijuana and two counts of distribution of marijuana. Defendant's testimony supports the evidence of State witnesses that he possessed marijuana and also distributed marijuana to adults. His claim is that these activities were in the exercise of religion and, thus, his conviction violated constitutional provisions. See Annot., 35 A.L.R.3d 939 (1971). We disagree, discussing: (1) the constitutional right; (2) religious conduct; (3) burden on religious conduct; (4) the balancing process; and (5) sincerity of belief.

The Constitutional Right

The First Amendment to the Constitution of the United States provides for "no law . . . prohibiting the free exercise [of religion]". Article XXI, § 1 of the Constitution of New Mexico provides: "Perfect toleration of religious sentiment shall be secure, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship."

In the polygamy case, *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1878) stated the scope of the free exercise clause as follows:

> Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.
>
> * * * * * *
>
> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

The foregoing language in *Reynolds* seems to indicate that a legislative provision, directed to a practice, ends the matter. Such a view is incorrect. In the compulsory school attendance case, *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) states: "[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment".

Wisconsin v. Yoder, supra, also states:

> [O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare . . . .

> But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.

Thus, in *Wisconsin v. Yoder,* supra, the United States Supreme Court examined and "balanced" the interests of the state and the defendants in determining whether the "exercise of religion" prevented a criminal conviction for violating the state's compulsory school attendance law.

New Mexico prohibits the possession and distribution of marijuana except as provided by our statutes. See §§ 30-31 22 and 30–31-23, N.M.S.A. 1978. The burden of proof of any exemption or exception is upon the person claiming it. Section 30-31–37, N.M.S.A. 1978. A claim by a defendant that he may not be convicted because his activities, though a violation of the criminal statute, were in the free exercise of religion, is a defense. The remainder of this opinion discusses the aspects of the defense and how those aspects are decided.

Religious Conduct

One inquiry, as to whether this defense exists, is whether any "religion" is involved in the matter. By "religion" we mean "religiously grounded conduct", *Wisconsin v. Yoder,* supra; that is, an action and not just a belief.

Defendant testified that during readings from the Bible (Book of Revelations) at a marijuana smoking party in 1970, he was "converted"; he knew beyond any doubt that Jesus Christ was the Word of God and the Savior. As a result of this experience, his conduct was radically changed. "I used the Bible totally as my guide as to whether I could or could not do something". Defendant engaged in intensive study of the Bible and came to the conclusion that God gave man every herb-bearing seed, including marijuana. Although defendant used marijuana prior to his conversion, marijuana was important after the conversion because marijuana was the fire with which baptisms were conducted by John the Baptist; "that is the Lord's consuming fire that is being sent upon all of mankind in the last days to destroy the evil out of him. That is the fire that comes first to the youth and then to adults. . . . It cannot be quenched." We are not concerned with the validity of these beliefs. *United States v. Ballard,* 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944).

What was the conduct based on these beliefs? Defendant used marijuana and distributed it. If denied the use of marijuana, "It would prevent me from having my free access to any and all herbs which is a blessing coming to me from God". Defendant's justification for selling marijuana was that "it is a free gift of God to me" and Jesus Christ "has delivered over all herbs". The effect of distributing marijuana "[i]n a religious sense" is that "it spreads the herb to more brothers." Defendant has sold marijuana to both adults and minors in the past, and would have no compunction in the future about selling marijuana to minors. However, a sale to minors is not involved in this case.

Defendant's testimony shows that his belief in the use and distribution of marijuana was based on his interpretation of the Bible, that he had the use of all herbs as a gift from God. Was this religiously-grounded conduct?

Wisconsin v. Yoder, supra, states:

> Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical

and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

How are we to determine whether defendant's choice to use and distribute marijuana was religious or philosophical and personal?

Since everyone is precluded from making his own standards, *Wisconsin v. Yoder,* supra, we do not follow the approach used in decisions concerned with "religious beliefs" in determining whether one was entitled to conscientious objector status under the Universal Military Training and Service Act. It was held that sincere and meaningful beliefs, intensely personal, came within the meaning of "religious belief" under that act. Whether the registrant's belief was religious was determined "'*in his own scheme of things*'". (Emphasis in original.) *Welsh v. United States,* 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970); *United States v. Seeger,* 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965).

Only Justice Douglas, dissenting in *Wisconsin v. Yoder,* supra, would have followed the "religious belief" approach utilized in the selective service cases. As the above quotation shows, the majority opinion in *Wisconsin v. Yoder,* supra, rejects the "everyone makes the determination" approach under the constitutional Religious Clause.

The fact that the individual's determination is insufficient does not tell us what is a sufficient basis for determining religiously-grounded conduct.

Wisconsin v. Yoder, supra, held that the Amish objection to compulsory school attendance was more than a matter of personal preference; rather, it was a "deep religious conviction, shared by an organized group" following a traditional way of life which had not altered for centuries. Thus, *Yoder* suggests two considerations—whether the belief is of an organized group and whether the belief is a traditional belief.

In the peyote cases, the fact that an organized group espoused a belief was a factor considered in determining that the belief was religious. The organization was the Native American Church; peyote played a central role in the ceremony and practice of the church. *People v. Woody,* 61 Cal.2d 716, 40 Cal.Rptr. 69, 394 P.2d 813 (1964); see also *State v. Whittingham,* 19 Ariz.App. 27, 504 P.2d 950 (1973). The organization's belief, in itself, does not, however, determine whether a belief is religious in a particular case. The defendant may not be a member of the organization. *Whitehorn v. State,* 561 P.2d 539 (Okla. Crim.1977). The organization may not be a religious one. *United States v. Kuch,* 288 F.Supp. 439, 35 A.L.R.3d 922 (D.D.C.1968).

The absence of an organization espousing the belief that a defendant contends is religious does not, in itself, determine whether an individual's belief is religious. *In re Grady,* 61 Cal.2d 887, 39 Cal. Rptr. 912, 394 P.2d 728 (1964) did not question whether the belief of a self-styled "way shower" was religious; rather, the issue was whether the belief was honest and bona fide.

Various decisions have discussed whether the belief is a traditional one; that is, how long the belief has been held. *Wisconsin v. Yoder,* supra; *People v. Woody,* supra. *State v. Whittingham,* supra, refers to Peyotism as "an established religion of many centuries' history. . . . not a twentieth century cult nor a fad subject to extinction at a whim." *Whitehorn v. State,* supra, states that Peyotism "is not a fad or a part of the popular drug culture." The traditionalism of a belief is a factor to be considered, particularly in connection with organizations, in determining whether a belief is religious. However, traditionalism, in itself, is not determinative because it would give no effect to conversions or to revelations.

The nature of the belief is a factor to be considered in determining whether the belief is religious. The peyote in *People v. Woody,* supra, was a protector, a sacrament, and more than a sacrament. "Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious

purposes is sacrilegious." *State v. Whittingham* states "the use of peyote during a 'meeting' is a central force and the theological basis of Peyotism. Peyote constitutes, in and of itself, an object of worship. Without it the sacraments of the Native American Church are obliterated."

In *People v. Collins,* 273 Cal.App.2d 486, 78 Cal.Rptr. 151 (1969): "Defendant testified that he used marijuana in order to extend and intensify his ability to engage in meditative communication with the Supreme Being, to attain spiritual peace through union with God the Father and to search out the ultimate meaning of life and nature." *Collins,* supra, states: "[D]efendant does not worship or sanctify marijuana, but employs its hallucinogenic biochemical properties as an auxiliary to a desired capacity for communication." In *People v. Werber,* 19 Cal.App.3d 598, 97 Cal.Rptr. 150 (1971) the trial court ruled that defendant's use of marijuana did not constitute a religious practice within the constitutional concept of religion. This ruling was upheld "in the absence of evidence that marijuana . . . itself constituted for the particular defendant an object of worship essential to an exclusively religious ritual." *Leary v. United States,* 383 F.2d 851 (5th Cir. 1967), reh. denied, 392 F.2d 220 (1968), rev'd on other grounds, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) states in footnote 11: "The exemption accorded the use of peyote in the limited bona fide religious ceremonies of the relatively small, unknown Native American Church is clearly distinguishable from the private and personal use of marihuana by any person who claims he is using it as a religious practice."

Definitions of a religious practice or religious conduct are difficult. See *Washington Ethical Society v. District of Columbia,* 249 F.2d 127 (U.S.App.D.C.1957); *Fellowship of Humanity v. County of Alameda,* 153 Cal.App.2d 673, 315 P.2d 394 (1957); *United States v. Kuch,* supra. We do not attempt such a definition. Our approach has been to review decisions which considered whether a belief was religious; that is, nonsecular. On the basis of these decisions we consider whether defendant's belief in the use and distribution of marijuana was religious.

There is no evidence that defendant's belief was espoused by any organization or was a principle, tenet, or dogma of any organization of which he was a member. There is no evidence that defendant's belief encompasses marijuana as an object of worship or that the use and distribution of marijuana except in limited ways would be sacrilegious. There is no evidence that defendant uses marijuana to communicate with any Supreme Being; no evidence that defendant's use or distribution in any way involves any religious ceremony; no evidence that the use or distribution involves any principle, tenet, or dogma pertaining to the spiritual or eternal and, thus, nonsecular. The evidence shows that defendant's belief was derived from defendant's personal views of the Bible, and those views under the evidence are no more than that the use and distribution of marijuana was permitted because a gift from God. Such a permitted personal use does not amount to an intrinsic part of a religion, however religion may be defined. *People v. Crawford,* 69 Misc.2d 500, 328 N.Y.S.2d 747 (1972), affirmed 41 A.D.2d 1021, 340 N.Y.S.2d 848 (1973).

As stated in *People v. Mitchell,* 244 Cal. App.2d 176, 52 Cal.Rptr. 884 (1966):

> [D]efendant has offered no evidence that his use of marijuana is a religious practice in any sense of that term. In defendant's discourse to the jury he did refer to the Bible and to the practices of some Hindus, but in essence he was expressing only his own personal philosophy and way of life.

Defendant's belief as to the use and distribution of marijuana was not a religious belief.

People v. Mitchell, supra, referred to defendant's "discourse to the jury". In this case defendant also discoursed, in the presence of the jury, concerning his beliefs. Recognizing that an "exercise of religion" defense has a potential as a fad defense, we point out: 1) whether a defendant's belief

is "religious" is to be decided by the trial court, and 2) unless the trial court rules that the belief is religious, evidence of a defendant's religious belief should not be introduced before the jury. *People v. Mullins,* 50 Cal.App.3d 61, 123 Cal.Rptr. 201 (1975); *People v. Werber,* supra.

Burden on Religious Conduct

Defendant asserts that a statute or regulation which imposes any burden on the exercise of religious conduct is unconstitutional. "Any burden" language is used in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), but that case does not support such a broad proposition. A burden on the exercise of religious conduct does not exist if it "does not deny the free exercise of religious belief by its requirement". *Wisconsin v. Yoder,* supra. To be a burden, the "state regulation must be of the nature and quality so as to preclude or prohibit the free exercise of religion." *State v. Whittingham,* supra.

A second inquiry in connection with the free exercise defense is whether the state regulation does prohibit or preclude the free exercise of religion. We recognize that in most cases this inquiry will be hardly distinguishable from the balancing test involved in the third inquiry, subsequently discussed. *People v. Woody,* supra, held that forbidding the use of peyote destroyed the theological heart of Peyotism. In *Wisconsin v. Yoder,* supra, "the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of . . . [the Amish] religious beliefs." Thus, the decision as to the existence of a burden may forecast the decision under the balancing test. However, there may be cases where it does not; the impact of the regulation may be so slight as to not amount to a burden on the exercise of religion.

People v. Collins, supra, states:

> According to the present record, defendant does not worship or sanctify marijuana, but employs its hallucinogenic biochemical properties as an auxiliary to a desired capacity for communication. Whether this use is sacramental or philosophical is as much a verbal as legal question. . . . The point here is that the law does not bar him from practices indispensable to the pursuit of his faith. Rather, it compels him to abandon reliance upon an artificial aid and to utilize other, perhaps self-induced means to attain the desired intensification of apperception.

If defendant can obtain his "high" (his desired intensification of perception) by other means, requiring him to forego marijuana in obtaining that perception, would not be a burden on the free exercise of religion. See *People v. Mullins,* supra.

This second inquiry, concerning a burden, is a matter to be decided by the trial court. *People v. Mullins,* supra; *People v. Werber,* supra.

In this case, if defendant's belief as to the use and distribution of marijuana was religious, prohibition of that practice would be a burden on the free exercise of religion.

Balancing Process

If religious-grounded conduct is burdened by a state regulation, the third inquiry involves a balancing of the interests involved. If the regulation is a burden which denies the free exercise of religion, the regulation will not be sustained against the exercise of religion defense unless "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder,* supra.

What type of interest amounts to an interest of "sufficient magnitude"? *Wisconsin v. Yoder,* supra, refers to "interests of the highest order". *Sherbert v. Verner,* supra, refers to a "compelling state interest" directed to grave abuses endangering paramount interests. *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), reh. denied, 393 U.S. 900, 89 S.Ct. 63, 21 L.Ed.2d 188 (1968), a "free speech" case, states: "Whatever imprecision inheres in these terms, we think it

clear that a government regulation is sufficiently justified if . . . it furthers an important or substantial government interest". This same approach was applied in *United States v. Kuch,* supra, an exercise of religion case. *United States v. Kuch* states: "[C]laims of religious exemption will be honored unless a substantial state interest will be frustrated in a significant way."

The power to define crimes is a legislative function. *State v. Allen,* 77 N.M. 433, 423 P.2d 867 (1967). The Legislature has prohibited the use and distribution of a variety of substances, except in limited situations, in the Controlled Substances Act. Sections 30–31–1, et seq., N.M.S.A.1978. Among the substances prohibited is marijuana, §§ 30–31–22 and 30–31–23, supra. Generally speaking, the legal use of marijuana is limited to specified research, and that research is regulated. Sections 26–2A–1 through 7, N.M.S.A.1978 (Supp.1978). As a part of the regulation of marijuana, the Legislature classified it as an hallucinogenic substance. Section 30–31–6(C), N.M. S.A.1978 (Supp.1978).

The State introduced no evidence to rebut the defense evidence concerning the free exercise defense. There may be cases where the absence of evidence by the State may be determinative of the State's "compelling interest" position. Compare *Sherbert v. Verner,* supra. However, the absence of such evidence in this case does not aid defendant.

Here we have legislation comprehensively regulating the use and distribution of marijuana. This legislation reflects a legislative judgment that prohibition of the use and distribution of marijuana is a substantial interest of the State.

Defendant introduced evidence at trial to the effect that lots of people use marijuana. If the purpose of this evidence was an attempt to show the State's interest in regulating marijuana was less than substantial, that purpose was not served. It is the Legislature that determines whether certain conduct should be criminal, not the judiciary.

Defendant also introduced evidence that the effects of marijuana were reversible. There is no evidence, from any party, as to what those effects might be. *United States v. Kuch,* supra, refers to a study "noting that marihuana is known to distort perception of time and space, modify mood and impair judgment, which may result in unpredictable behavior". This is consistent with the legislative judgment that marijuana is an hallucinogenic substance. *Leary v. United States,* supra, states: "[I]t was not incumbent upon the Government to produce evidence to controvert the testimony of witnesses on the controversial question whether use of the drug is relatively harmless."

Our point is this: The legislative judgment that certain conduct is criminal, sufficiently establishes a compelling state interest in enforcing the particular criminal statute involved.

If the State's interest in enforcing the law prohibiting the use and distribution of marijuana is not enforced against defendant, would the State's interest be frustrated in any significant way? Yes. To exempt defendant from the applicable criminal law would be no slight exception. Such an exemption would permit anyone to violate the law by advancing the same claims made by defendant. The testimony elicited by defendant suggests there are many who would be "converted" to believe the use and distribution of marijuana was a gift from God. See *United States v. Kuch,* supra. The legislative regulation of marijuana would soon be a nullity.

How does defendant's interest balance against the compelling state interest to regulate marijuana when the State's interest would be frustrated by nonenforcement? The evidence is sparse; there is no evidence comparable to the evidence introduced by the Amish as to their interests in *Wisconsin v. Yoder,* supra. Defendant's evidence is that if denied the use and distribution of marijuana, he would be denied the use of a free gift from God. Compare the evidence in *People v. Mullins,* supra.

Under the balancing test, denying defendant this free gift would not be an un-

constitutional denial of the free exercise of religion even if defendant's belief were religious. *People v. Mullins,* supra; *People v. Werber,* supra. "[I]t is not a violation of his constitutional rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinatory symptoms". *State v. Bullard,* 267 N.C. 599, 148 S.E.2d 565 (1966).

This third inquiry, the balancing test, is to be determined by the court. *People v. Mullins,* supra.

Sincerity of Belief

A fourth inquiry concerning the exercise of religion defense is "whether the claimant holds his belief honestly and in good faith or whether he seeks to wear the mantle of religious immunity merely as a cloak for illegal activities." *People v. Woody,* supra. This issue is decided by the trier of facts. *United States v. Ballard,* supra; *People v. Werber,* supra. The decision is made on whatever evidence is at hand. *People v. Woody,* supra. Thus, this fourth inquiry, in contrast to the other three inquiries, may be an issue for the jury to decide.

When does this fourth inquiry become a jury issue? The evidentiary problem as to this fourth inquiry is similar to the evidentiary problem in connection with the defense of insanity at the time the offense was committed. Thus: 1) the trial court determines whether the evidence as to the sincerity of the religious belief is sufficient to permit the jury to consider it as a factual question; 2) if the trial court determines the evidence is sufficient to raise a factual issue, ordinarily "sincerity" is to be submitted to the jury for decision; 3) there may be instances, admittedly rare, where the evidence is so clear that the trial court may rule that the belief was sincere. See *State v. Murray,* 91 N.M. 154, 571 P.2d 421 (Ct.App.1977).

Although we have characterized the fourth inquiry as one of "sincerity", the issue, when it is to be decided by the jury, is whether defendant "holds his belief honestly and in good faith".

In this case, the fourth inquiry would have been a jury question because the evidence of "sincerity" was sufficient to raise a jury issue.

The transcript does not show on what basis the trial court refused all requested instructions concerning the exercise of religion defense. However, the instructions were properly refused because, under the evidence, defendant failed to show that his belief was religious and, therefore, failed to show that his conduct in using and distributing marijuana was religiously-grounded conduct. In addition, the instructions were properly refused because denial of the exercise of religion claim was proper under the balancing test.

The judgment and sentences of the trial court are affirmed.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

593 P.2d 71

Rudolfo ROYBAL, Pete Garcia and Filiberto Padilla, Plaintiffs-Appellees,

v.

Donaldo A. MARTINEZ, Defendant-Appellant.

Appeal of Donaldo Martinez, Contemnor-Appellant.

No. 3634.

Court of Appeals of New Mexico.

March 20, 1979.

Donald A. Martinez, Las Vegas, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Ralph W. Muxlow, III, Asst. Atty. Gen., for appellees.

Ronald J. VanAmberg, Solomon, Roth & VanAmberg, Santa Fe, for amicus curiae.

OPINION

WALTERS, Judge.

Defendant Martinez, a member and chairman of the West Las Vegas Board of Education, was found to have violated the terms of a preliminary injunction. After a hearing, the trial court imposed a 90-day jail sentence, thereby fixing the offense charged and found as the petty misdemean-

or of criminal contempt, i. e., punishment for past violations of an order of the court.

Defendant has appealed, urging five grounds for reversal. Since we find his first point dispositive of the matter, we do not discuss the remaining arguments presented to the court in the briefs of the litigants. For the same reason, we need not decide whether the appellee in this contempt appeal is the State or the plaintiffs in district court. We accept, and have considered, answer briefs filed by both.

On April 24, 1978 at 11:30 in the morning, plaintiffs filed a motion and affidavit alleging that they, also school board members, had requested the school superintendent to call a special meeting for April 20th, purportedly in accordance with an injunctive order entered by the trial court on April 19th wherein authority for calling special meetings had been granted to the board chairman *or* to a majority of the board. The same injunction prohibited all school board members from interfering with the conduct of any properly called meeting. The motion contained further allegations that defendant attended the April 20th meeting and announced that it was an improperly called meeting; he ruled all motions out of order; he accused plaintiffs of violations of the law and forfeiture of their offices, and when plaintiffs "refused to acknowledge the mandates and declarations of the Defendant, the Defendant ordered the Deputy Sheriff . . . to arrest the Defendant (sic)." Plaintiffs contended such conduct violated the previous orders of the court and they sought punishment in contempt.

On April 25, 1978, at 11:00 o'clock in the morning, an order was filed directing defendant to appear on May 12th and "show cause why he should not be held in contempt . . . and punished appropriately," and ordering that a copy of the order be served personally on Mr. Martinez.

On the morning of the hearing appellant filed a sworn document entitled "Special Appearance and Motion to Quash," on the ground that he had never been served with the order to show cause and knew of the hearing only because an article in the local newspaper had provided that information.

The issue of personal service in criminal contempt proceedings had been presented on appeal on prior occasions, the most recent appearing to be *Lindsey v. Martinez*, 90 N.M. 737, 568 P.2d 262 (Ct. App.1977), in which several earlier Supreme Court decisions were cited. We have consistently recognized the two types of contempt: "direct"—contumacious words spoken or acts committed in the presence of the court, and "indirect" or "constructive" contempt—similar misconduct, or some disobedient, scurrilous, or other defiant act engaged in out of the court's presence. Compare *Matter of Avallone*, 91 N.M. 77, 518 P.2d 870 (1978); *State v. Driscoll*, 89 N.M. 541, 555 P.2d 136 (1976), and *State v. Armijo*, 38 N.M. 280, 31 P.2d 703 (1934). If the act be done in the court's presence, the judge has the power "to summarily adjudge and punish for the contemptuous conduct" without the necessity of filing a motion or information against the contemnor. *Driscoll, supra.* In cases of constructive contempt, however, the rule is uniform and imperative that to confer jurisdiction on the court, an affidavit setting forth the alleged acts of contempt must be filed, and an order to show cause must be issued and personal service made upon the defendant, *Armijo, supra; Lindsey, supra; Momsen-Dunnegan-Ryan Co. v. Placer Syndicate Mining Co.*, 41 N.M. 525, 71 P.2d 1034 (1937); or defendant must be proceeded against by information, citation, summons, or some other form of notice, and personal service. *Momsen-Dunnegan-Ryan, supra; Lindsey, supra.*

Without receiving testimony on defendant's claim that he had not been served with the order and notice of hearing, the trial court ruled that an unsworn Return of Service signed by the sheriff and filed in open court on the morning of May 12th concluded the matter. The return reflected Defendant's acknowledgement of receipt of the document(s) served by the following notation at the bottom of the Return of Service:

Rec'd. 4–24–78—1:40 p. m.
s/ Donaldo A. Martinez.

The document itself, as filed, and with some of the blanks filled in, read:

I, Persiliano Santillanes, Sheriff of San Miguel County, State of New Mexico, do hereby certify that I served the within Order to Show Cause in the county aforesaid, in person to Donaldo A. Martinez, on the 24th day of April, 1978.

s/ Persiliano Santillanes
SHERIFF

_____
DEPUTY

DATE SERVED: 4–24–78
Fees: $5.00
SUBSCRIBED AND SWORN TO BEFORE ME THIS _____
DAY OF _____, 197____.

_____
NOTARY PUBLIC
My Commission expires_____

The words "Order to Show Cause" were written in ink over liquid paper correction fluid which had almost completely obliterated other words underneath. Examination of the document before a strong light discloses that the words "Affidavit and Motion to Show Cause" originally had been written into the blank and erased by application of the correction fluid. No evidence was adduced by plaintiffs from the sheriff or anyone else to explain the "correction" of the return of service, nor how an order to show cause that was not filed until almost twenty hours later could have been served on defendant the previous day. Defendant did not deny that Sheriff Santillanes had served on him the underlying motion and affidavit upon which the order to show cause was founded, but until the date of hearing he had no certain knowledge that the three documents were related.

The State points to a document filed by appellant on April 27th entitled "Response to Order to Show Cause" as waiving any claim that he had not been served with a copy of the show cause order. The State overlooks (as did the trial court) defendant's testimony that he responded by affidavit to an article appearing in the local newspaper by which he learned that an order had been issued; that his "Response" was directed not to the allegations or contents of plaintiffs' motion and affidavit or to the trial court's order, but to the text of the newspaper story; that defendant had no way of knowing whether the order to show cause had been issued on the motion and affidavit served on him on April 24th or whether it resulted from some other supporting motion and affidavit; and that the sworn motion to quash, with attached copy of the newspaper clipping, was then before the court in connection with defendant's entry of special appearance contesting jurisdiction for lack of service. It was only after the court ruled on the motion to quash that a copy of the order to show cause was shown to defendant. Defendant's special appearance and motion to quash, as well as the state of the record, dispose of the State's claim of waiver.

The trial court focused on the fact that defendant was present in court and knew the contents of a motion for an order to show cause. Relying on *In re Stephen Canavan*, 17 N.M. 100, 130 P. 248 (1912), the State claims that Martinez subjected himself to the jurisdiction of the court. *Canavan* announces the rule to be that "[a]ppearance and answer without objection cures irregularity in the commencement of the proceeding." Here, defendant did object. His "Response" cannot be taken as an answer to an order he had never seen; at most, his "Response" was a traverse of the grounds relied on by plaintiffs in seeking the order to show cause. It is uncontradicted that defendant appeared expressly contesting jurisdiction over his person because of lack of personal service of the order to show cause. The court ruled: "*I don't think there is any defect in the service* in this matter." That conclusion does not follow automatically simply because of defendant's awareness of a motion filed and his presence in court. Defendant appeared specially for the very purpose of asserting the defect in service despite his receipt of a motion and affidavit (which might have been totally unrelated to the order to show

cause later issued), and plaintiffs offered no credible evidence that defendant had been served with the order that was entered a day after a motion and affidavit had been filed and served on him.

It was necessary that the May 12th criminal contempt proceedings be commenced by service upon defendant, personally, of either a summons, information, or the order to show cause. *Lindsey v. Martinez, supra.* The only evidence before the court was a return of service showing delivery of the order to defendant on a date prior to the date the order was issued. To our minds, the return of service patently reflects an alteration regarding the document(s) served on defendant, and the record conclusively negates any suggestion that defendant was proceeded against in the manner mandated by the nature of the charge. The trial court had no jurisdiction over the person of defendant. *Lindsey, supra; Eaton v. Cooke,* 74 N.M. 301, 393 P.2d 329 (1964).

The judgment of the court is reversed and the cause remanded for such proceedings as are consistent with this opinion.

IT IS SO ORDERED.

WOOD, C. J., and ANDREWS, J., concur.

593 P.2d 470

Mary HERNDON, Plaintiff-Appellee,

v.

ALBUQUERQUE PUBLIC SCHOOLS and Commercial Standard Insurance Company, Defendants-Appellants.

No. 3164.

Court of Appeals of New Mexico.

July 18, 1978.

Thomas E. Jones, Albuquerque, for plaintiff-appellee.

Vance Mauney, P. A., Albuquerque, for defendants-appellants.

SUTIN, Judge.

This is a workmen's compensation case. The trial court made the following pertinent findings of fact and conclusions of law:

1. The Plaintiff was an employee of the Defendant, the Albuquerque Public School Systems, for approximately eight (8) years.

2. *From the period of June 1975 until September 1975*, the Plaintiff suffered *an accident within the meaning of the New Mexico Workmens Compensation Act.*

3. The Plaintiff gave notice to her employer and the employer had actual knowledge of the accident and injury.

4. The Plaintiff *endured an accident within the meaning of the New Mexico Workmens Compensation Act* and the same resulted in an injury which has rendered her 100% totally disabled.

* * * * * *

2. The Plaintiff suffered an accident and resulting injury as a result of *an accident within the meaning of the New Mexico Workmens Compensation Act.*

3. The injury sustained by the Plaintiff as a result of the accident suffered is a totally disabling injury and the Plaintiff is one hundred percent (100%) disabled, *as of June 4, 1975.* [Emphasis added.]

Judgment was entered for plaintiff and defendant appeals. We affirm and remand.

A. *Facts.*

Plaintiff, in her job as a textbook room clerk, was in charge of the total operation of the textbook room, inventorying and classifying all the books used in the school.

Plaintiff had a medical history of back injury and pain. She was hospitalized for three weeks in 1964 for a fractured sacrum (the last bone of the spine) which resulted from a fall. An automobile accident in 1968 and one in 1973 have also contributed to her back pain. Plaintiff had two intervertebral discs excised in August of 1973 and on December 14, 1973, because of discomfort in the lower back, she began to wear a lumbosacral corset for back support. Also, in 1974, plaintiff complained of back pain.

At the close of the 1975 school year, plaintiff's job required her to lift and carry about 13,500 books within a time span of about two weeks. Plaintiff carried books or carted books upstairs and downstairs without the aid of an elevator.

Prior to and during the week of June 4, 1975, plaintiff had no pain in her back and worked without her corset. On June 4, 1975, while pushing a cart of books down a ramp, the cart went so fast that plaintiff was unable to control it and she and the books all landed on the floor. Plaintiff suffered severe pain in her back. While performing her duties, everytime she went up and down the stairs she experienced severe pain in her leg and up her back.

After her fall and until her vacation commenced on July 28, 1975, plaintiff continued to lift heavy loads of books. She made 40–50 trips carrying books down the stairway of the school, each trip causing agony in her leg and back. Plaintiff's intense back pain persisted while she vacationed at her daughter's home. Plaintiff returned to work on August 28, 1975 and continued to work until September 2, 1975, at which time

she terminated her employment because of severe back pain.

Plaintiff's doctor testified that the cause of plaintiff's present condition was the tremendous amount of back sprain and the pressure put on her back by the type of work she performed; that her back was so painful that doctors could do nothing for her; and that he advised her to retire.

Plaintiff made no claim for compensation at the time of the fall on June 4, 1975. Though she was aware of workmen's compensation benefits and her right to receive them, she preferred to work and retain her job. She thought this condition would "straighten up."

On appeal, defendant claims the following errors: Defendant argues (1) that the court made *no finding of fact* that the accident occurred while plaintiff was acting in the scope of her employment; (2) that the time, place and cause of the injury by accident is not definite and certain as required by law; that no finding was made that this requirement was met; (3) that as *a matter of law*, plaintiff did not suffer an injury by accident arising out of the course of her employment; (4) that the employer had *no actual knowledge* of the accident; and (5) that there was no substantial evidence to support the court's findings No. 2, 3 and 4.

B. *Deficiencies in trial court's findings and their interpretation.*

The trial court found that plaintiff suffered an accident within the meaning of the New Mexico Workmen's Compensation Act from the period of June 1975 until September 1975, "endured" it, but was totally disabled as of June 4, 1975.

Haphazard findings of fact were submitted by plaintiff's attorney and adopted by the trial court. Our continued criticism of this practice has been disregarded. We do not condone this careless conduct, but we must try to interpret the findings made, from the comments of the court and the evidence in the record, to support the judgment entered.

Safeco Insurance Co. of America, Inc. v. McKenna, 87 N.M. 481, 482, 535 P.2d 1332, 1333 (1975) says:

> This court is not authorized to make findings which the district court should have made, nor to draw inferences therefrom. [citation omitted.] We are not a fact finding body and must depend upon the district court for findings of fact.

This means that it is beyond the function of an appellate court to find facts omitted by the trial court. Our duty is to interpret the findings made to determine whether the findings are sufficient to support the judgment entered.

The spirit of the Workmen's Compensation Act does not speak in terms of technical deficiencies; it speaks in terms of a system of compensation for impaired workmen that is humanitarian, economical and seeks to avoid harsh results. While we do not condone the sloppy findings made, there is no harm in giving findings of fact a liberal interpretation if the interpretation is supported by the evidence.

The phrase "within the meaning of the New Mexico Workmen's Compensation Act" can be given a broad and liberal construction. At the close of the trial, the court said:

> The plaintiff, Mary Herndon, suffered an injury in the course of her employment on or about June the fourth, 1975.

Section 59–10–13.3(A), N.M.S.A.1953 (2d Repl.Vol. 9, pt. 1) reads as follows:

> Claims for workmen's compensation shall be allowed only:
>
> (1) when the workman has sustained an accidental injury arising out of, and in the course of his employment;
>
> (2) when the accident was reasonably incident to his employment; and
>
> (3) when the disability is a natural and direct result of the accident.

When a finding is made that an accident occurred "within the meaning of the Act," it is implicit that it occurred in the course of the claimant's employment. This is especially true when the court orally makes a comment to that effect and the evidence is

undisputed. If the trial court had not believed that the statutory requirements were met, it would have denied plaintiff workmen's compensation benefits.

We interpret the finding of the court to mean "The plaintiff suffered an accident which complied with the provisions of the New Mexico Workmen's Compensation Act."

C. *The time, place and cause of the accident was definite and certain.*

What is meant by the phrase, "an accident within the meaning of the Workmen's Compensation Act?" In the sense of the statute, an "accident is an unlooked for mishap, or untoward event which is not expected or designed." *Lyon v. Catron County Commissioners,* 81 N.M.. 120, 464 P.2d 410 (Ct.App.1969). How can such an accident occur for a period of time from June 1975 until September 1975? How does a workman "endure" this accident? How can plaintiff be totally disabled on June 4, 1975 when she performed her duties until September 2, 1975?

With reference to the date of the accident, we agree that the time, place and cause of the injury must be definite and certain. *Stevenson v. Lee Moor Contracting Co.,* 45 N.M. 354, 115 P.2d 342 (1941). This is essential to determine whether the employer had written notice or actual knowledge of the accident within 30 days after its occurrence pursuant to § 59–10–13.4. *Beckwith v. Cactus Drilling Corporation,* 84 N.M. 565, 505 P.2d 1241 (Ct.App. 1972).

It has been firmly established that the 30 day provision for written notice applies to the substitute provision for actual knowledge. The employer must have actual knowledge of the accident within 30 days after its occurrence. *Rohrer v. Eidal International,* 79 N.M. 711, 449 P.2d 81 (Ct.App. 1968); *Anaya v. Big Three Industries, Inc.,* 86 N.M. 168, 521 P.2d 130 (1974); *Norris v. Amax Chemical Corporation,* 84 N.M. 587, 506 P.2d 93 (Ct.App.1973).

Plaintiff and defendants rely upon those cases in which the injury is gradual and progressive and not immediately discoverable under these authorities, the precise time of the beginning of the accident is uncertain. Weeks or months may pass before a determination can be made that the accident has in fact occurred. These are cases such as breathing dust or gases, using allergic soap, frost bite, slow poisoning, germ disease, strain, or a series of slight injuries ending in a serious one. The cases are collected in *Webb v. New Mexico Pub. Co.,* 47 N.M. 279, 141 P.2d 333 (1943) and *Stevenson v. Lee Moor Contracting Co.,* supra. See also *Gilbert v. E. B. Law and Son, Inc.,* 60 N.M. 101, 287 P.2d 992 (1955). These cases are not in point.

We interpret the trial court's finding No. 2 to mean that:

> On June 4, 1975, plaintiff suffered an accident and injury which plaintiff endured until September 2, 1975 when plaintiff suffered an accidental injury that arose out of and in the course of her employment, at a time when the accident was reasonably incident to the employment and when the disability was a natural and direct result of the accident.

We conclude that the trial court made sufficient findings to meet the requirements of definiteness and certainty.

D. *Defendants failed to establish as a matter of law that plaintiff did not suffer an injury by accident arising out of and in the course of her employment.*

Defendants argue that no decision in New Mexico "holds that any condition which develops pain but which does not result in malfunction of the body is 'injury caused by accident,' as required by § 59–10–6 [sic] N.M.S.A.1953 Comp. (Repl.Vol. 9, Pt. 2) [sic]."

In support of this position, defendants rely strongly on *Towle v. Department of Transportation, State Hwy.,* 318 A.2d 71 (Me.1974) where the court held that a claimant, a street sweeping operator, who

suffered a postural strain over a period of time had not suffered a "personal injury by accident arising out of and in the course of his employment." We note, however, that the court also stated that if the stress of labor aggravates or accelerates the development of a preexisting infirmity causing an internal breakdown of that part of the structure, a personal injury by accident does occur. This rule in *Towle* is the rule in New Mexico and applicable to the facts in the instant case. We also note that the dissenting opinion in *Towle* relied on *Ortiz v. Ortiz & Torres Dri-Wall Company,* 83 N.M. 452, 493 P.2d 418 (Ct.App.1972).

The trial court in *Ortiz* denied plaintiff recovery because no accident had occurred. The court remarked: ". . . you have to trip or something, you can't just get a pain in the middle of an ordinary occupation and claim accident . . . ." [83 N.M. at 453, 493 P.2d at 419.] However, on appeal this Court said:

> "[A] pain in the middle of an ordinary occupation" can be an accident under *Lyon*, supra. [83 N.M. at 454, 493 P.2d at 420.]

This statement is incorrect. Under *Lyon,* "a *strain* in the middle of an ordinary occupation can *result* in an accident." A "pain" can be classified as an "injury."

In *Lyon,* supra, plaintiff suffered a back injury in February, 1965 while undertaking to load a cattle guard upon the bed of a truck. Following this accident, plaintiff suffered attacks of pain but he continued to perform his regular duties for 13 months until March 18, 1966. The last week that he worked his back hurt badly and the pain eventually became so intense that he could no longer work. The undisputed medical testimony was that the rupture of the disc was caused through operating a grader and that it occurred at the time intense pain was first felt by plaintiff. The court said:

> . . . We hold that the facts are not in dispute and that they clearly support a finding that *an accidental injury occurred in March, 1966, resulting in a ruptured disc,* which injury arose out of employment; namely, operation of the grader required by the job.
>
> * * * * * *
>
> Based upon the reasoning of these cases we take it that *a malfunction of the body itself, such as a fracture of the disc . . . caused or accelerated by doing work required or expected in employment is an accidental injury* within the meaning and intent of the compensation act.
>
> Larson in his treatise on the law of workmen's compensation says: ". . . Accordingly, if the *strain of claimant's usual exertions causes collapse from * * back weakness * * * the injury is held accidental.*" [Emphasis added.] 81 N.M. at 125, 464 P.2d at 415.

We can find no indication in *Lyon* that "'a pain in the middle of an ordinary occupation' can be an accident."

As we read *Lyon* today, a workman has suffered an accidental injury if he (1) experiences preexisting back pain from a previous accident incurred during his employment, (2) continues in his normal employment under pain, (3) and subsequently suffers a ruptured disc evidenced by a severe nerve root pain, (4) which ruptured disc is caused or accelerated while working.

In the instant case, the accident was the strain on plaintiff's back initiated by the fall on June 4, 1975; the injury was the severe pain that disabled her. If this strain caused or accelerated a "collapse" from back weakness, it was a malfunction of the body and plaintiff suffered an accidental injury; if it did not, it was not accidental. Whether the injury was accidental due to the strain over a three month period of time was an issue of fact decided in plaintiff's favor. Defendants failed to establish as a matter of law that plaintiff did not suffer an injury caused by accident.

E. *Defendants had actual knowledge of the accident.*

As required by § 59–10–13.4, defendants claim that no written notice of injury was given the employer, and the employer had no actual knowledge of the injury. This statute provides in pertinent part:

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;

. . .

B. No written notice is required to be given where the employer or any superintendent or foreman or other agent in charge of the work in connection with which the *accident occurred had actual knowledge of its occurrence.* [Emphasis added.]

On November 24, 1975, plaintiff gave her employer written notice of the accident she sustained and that during the week of June 4, 1975, she suffered an injury and/or illness. This written notice did not meet the statutory deadline and therefore was ineffective.

The requirement of the Compensation Act that the employer have knowledge of the accident, either by written notice or actual knowledge, is mandatory. It is not a mere formality. It is a "condition precedent" to recovery; an employee has no right of action if she fails to comply with the statute. This part of the Act protects the employer, giving him notice so that he may investigate the facts and circumstances and question witnesses. The requirement is also intended to prevent the filing of fictitious claims where lack of time makes proof of genuineness difficult. *Ogletree v. Jones,* 44 N.M. 567, 106 P.2d 302 (1940). *Ogletree* said:

> This knowledge which the statute requires means "more than just putting upon inquiry and involves more than knowledge of the mere happening of an accident." [44 N.M. at 570–1, 106 P.2d at 305.]

Where actual knowledge of an accident is a prerequisite to recovery, the employer must know, without making any investigation or inquiry, that an accident happened. Mere knowledge of an employer that a claimant injured his back falls short of actual knowledge of an accident. *Simmons v. International Minerals & Chemical Corporation,* 77 N.M. 100, 419 P.2d 756 (1966). See, *Smith v. State,* 79 N.M. 25, 439 P.2d 242 (Ct.App.1968); *Gutierrez v. Wellborn Paint Manufacturing Company,* 79 N.M. 676, 448 P.2d 477 (Ct.App.1968). The employer would have to investigate or make inquiry of the facts and circumstances that surround the back injury to determine whether it resulted from a mishap or untoward event that occurred.

We must turn to the facts to determine whether the employer had actual knowledge of the strain on plaintiff's back that resulted in the accidental injury of September 2, 1975.

Adolph Gallegos testified that plaintiff worked for him for three years. He had full knowledge of her duties and her work. He knew that boxes of books were too heavy for her to lift; that she should not lift them, but she did. In June, plaintiff told him that she hurt her back; that it kept getting worse; that she experienced pressure because of the demands of inventory. He knew by the kind of work she had to do, that her back was aggravated. He went with her many times to pick up books and she complained of her back aches.

Gallegos testified that plaintiff told him several times around the end of June that her back hurt and that she would take a vacation early to have her back checked.

While plaintiff was on vacation, she called Gallegos and told him that she would return to work when school started in August to help train a new person; that she would not be able to continue with her work because her doctor said her back needed a rest. She returned in August and trained a person to replace her, and on September 2, 1975 she was forced to terminate her employment because the severe pain in her back made further work impossible.

Two days later, on September 4, 1975, plaintiff made her claim for workmen's compensation.

When she told Gallegos her back was extremely painful, he suggested that a workmen's compensation form be prepared. From information furnished him by plain-

tiff he prepared and signed Employer's First Report of Injury. In this report, Gallegos stated that the date of injury was *June 4, 1975*; that plaintiff returned to work June 5 and worked until July 28, 1975; that she was off work for four weeks and returned on August 25 and worked until September 2, 1975; *that her back was injured as a result of lifting heavy books and making trips up and down steep basement steps.* Gallegos concurred with the facts stated in this report.

In determining whether defendants had actual knowledge of the accident, we give no credence to Gallegos' testimony as to the meaning of an "accident," nor to plaintiff's statement that the "accident" occurred on June 4, 1975. It is obvious that the employer and claimant have no understanding of what may constitute an "accident" in a workmen's compensation claim. The average person believes that an accident occurs, by way of illustration, where a claimant suffers a cut finger or smashed thumb. Neither of the parties knew or understood the meaning of an "accident" as described in *Lyon,* supra. Our duty is to glean from the evidence presented, the "accident" that occurred and the date thereof.

We do not fix the date of plaintiff's accident as June 4, 1975. We deem this event to be an incident that occurred in the course of plaintiff's employment which led to the eventual accident. The "accident" was the subsequent and continued strain on plaintiff's back that resulted in an accidental injury on September 2, 1975.

Both parties are mistaken as to the employer's actual knowledge of plaintiff's accident. Plaintiff argues adamantly that, prior to September 2, 1975, she told her employer she hurt her back. Defendant contends that Gallegos had actual knowledge only of the fact that plaintiff's back was hurting her. Either way this knowledge alone is insufficient to show actual knowledge of the "accident." The important fact of which defendants must have actual knowledge is: "What caused plaintiff's back to hurt?" *Simmons v. International Minerals & Chemical Corporation,* supra. See also, *Higgins v. Board of Directors of N. M. State Hosp.,* 73 N.M. 502, 389 P.2d 616 (1964); *Bolton v. Murdock,* 62 N.M. 211, 307 P.2d 794 (1957); *Hammond v. Kersey,* 83 N.M. 430, 492 P.2d 1293 (Ct.App.1972); *Smith v. State,* supra; *Gutierrez v. Wellborn Paint Manufacturing Company,* supra.

Rohrer v. Eidal International, supra, says:

> It is the totality of the facts and circumstances that determine whether the employer has "actual knowledge." [79 N.M. at 713, 449 P.2d at 83.]

It is established law that where the employer, after having been informed of the accident and injury, makes out a report of the accident and injury, these facts manifest an acknowledgment of notice of the accident and injury. *Ortiz v. Ortiz & Torres Dri-Wall Company,* supra; *Geeslin v. Goodno, Inc.,* 77 N.M. 408, 423 P.2d 603 (1967); *Waymire v. Signal Oil Field Service, Inc.,* 77 N.M. 297, 422 P.2d 34 (1966).

When we read the Employer's First Report of Injury, together with Gallegos' previous knowledge of plaintiff's work and the pressure brought to bear upon the aggravation of her back injury, we hold that defendants had actual knowledge of plaintiff's incident that occurred on June 4, 1975 that resulted in an accidental injury on September 2, 1975.

Plaintiff's third point has been answered by the discussion of the foregoing points.

Plaintiff seeks an additional award for attorney fees for services rendered in the trial court. We deny this request. Plaintiff did not request an attorney fee for services rendered on this appeal. None is awarded.

Plaintiff did not suffer total disability as of June 4, 1975. She suffered total disability as of September 2, 1975 and is entitled to disability benefits as of that date.

Affirmed. This cause is remanded to the district court to amend its judgment to read that plaintiff is totally disabled as of September 2, 1975.

IT IS SO ORDERED.

LOPEZ, J., concurs.

HERNANDEZ, J., (dissenting).

HERNANDEZ, Judge (dissenting).

I respectfully dissent. It is my opinion that the employer had no actual knowledge of the accident and that no written notice of injury was given as required by § 59–10–13.4, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1). The plaintiff complained to her supervisor on several occasions of pain in her back and leg. Considering plaintiff's previous injuries to her back, such complaints could not be held to give the employer actual knowledge of the accident and injury which occurred in the summer of 1975. *Sanchez v. James H. Rhodes & Company,* 74 N.M. 112, 391 P.2d 336 (1964).

593 P.2d 478

STATE of New Mexico,
Plaintiff-Appellee,

v.

Carlos CERVANTES,
Defendant-Appellant.

No. 3715.

Court of Appeals of New Mexico.

March 8, 1979.

Joan Friedland, Friedland, Simon, Lopez, Vigil & Nelson, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Santa Fe, Michael A. Kauffman, Janice M. Ahern, Asst. Attys. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Heroin and phencyclidine are controlled substances. Sections 30–31–6(B), N.M.S.A. 1978 (Supp.1978) and 30–31–8(B), N.M.S.A. 1978. Defendant appeals his convictions of three counts of trafficking in heroin and two counts of distribution of phencyclidine. Sections 30–31–20 and 30–31–22, N.M.S.A. 1978. We (1) answer four issues summarily and discuss (2) search and seizure claims and (3) evidence of conduct.

Issues Answered Summarily

(a) Defendant made an insufficient showing to obtain dismissal on the basis of pre-indictment delay. *State v. Duran*, 91 N.M. 756, 581 P.2d 19 (1978); *State v. Tafoya*, 91 N.M. 121, 570 P.2d 1148 (Ct.App. 1977); *State v. Jojola*, 89 N.M. 489, 553 P.2d 1296 (Ct.App.1976).

(b) Newspaper articles submitted in support of a motion for a change of venue did not, in themselves, require granting of the motion. *State v. Foster*, 82 N.M. 573, 484 P.2d 1283 (Ct.App.1971). Under the evidence, and the trial court's findings, the trial court did not abuse its discretion in denying the motion. *State v. Turner*, 90 N.M. 79, 559 P.2d 1206 (Ct.App.1976).

(c) Pursuant to Rule of Crim.Proc. 32(a), the prosecutor served written demand upon defendant to give notice as to whether defendant intended to claim an alibi. Defendant did not respond. At trial, defendant sought to offer the testimony of a witness and certain exhibits to the effect that, at the time the crimes were committed in Santa Fe, defendant no longer lived in that city. The trial court excluded this testimony, but permitted defendant to testify that he resided in Albuquerque at the pertinent times. This was in accordance with Rule of Crim.Proc. 32(c) which reads:

> If a defendant fails to serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself.

The trial court's exclusion of the alibi evidence was not an abuse of discretion. See *State v. Smith*, 88 N.M. 541, 543 P.2d 834 (Ct.App.1975).

(d) Defendant sought a mistrial on the basis of comments of the prosecutor during closing argument. Defendant's argument emphasizes one sentence of the prosecutor, out of context. What the prosecutor said, in context, was that if the jury reviewed the evidence (emphasizing some exhibits), the prosecutor was convinced the jury would be convinced, beyond a reasonable doubt, of defendant's guilt. This was not improper argument; rather, it was a fair argument based on the evidence. Denial of the mistrial motion was not error.

Search and Seizure

A search warrant authorized search of specified premises for heroin. The search resulted in seizure of the items subsequently identified herein. Defendant sought suppression of these items. After an evidentiary hearing, the trial court denied the several motions to suppress. Defendant asserts this was error. Under this issue we discuss: (a) facial sufficiency of the affidavit on which the search warrant was based, (b) propriety of the evidentiary hearing, and (c) seizure of items not mentioned in the search warrant.

(a) Facial Sufficiency

Defendant claims the affidavit was insufficient to show probable cause. The affidavit states:

> On January 27, 1978 Affiant was contacted by a Confidential Informant, herein after [sic] referred to as C.I., who stated that during the late evening hours of January 26, 1978 he (C.I.) was inside George Cervantes' residence at 743 Alto Street, Santa Fe, New Mexico and personally observed George Cervantes to be in possession of a large quantity of heroin. Said heroin was packaged in small aluminum packets and inside a plastic baggie. C.I. is a heroin addict and is very knowledgeable about the way heroin is packaged for street sale.
>
> C.I. has given information to affiant on at least one occassion [sic] in the past week which has resulted in the recovery of stolen property and the indictment of a suspect. Affiant was also contacted by Officer Arthur Ficke of the Santa Fe Community Relations Bureau on January 27, 1978 and was informed by Officer Ficke that he had received a telephone call from an unknown male through the Santa Fe Crime Stoppers Program telephone number and the unknown male who called at 8:00 AM on January 27,

1978 had stated that he knew that a large shipment of heroin had come into town on January 26, 1978 at approximately 2:00 PM and that the heroin had gone to George Cervantes' house on Alto Street, Santa Fe, New Mexico.

Defendant's motion, attacking the affidavit, alleged a facial insufficiency on the basis that (1) the confidential informer was not disclosed, (2) insufficient facts showing the reliability of the confidential informer, and (3) insufficiency of both the knowledge and reliability of the anonymous informer.

Probable cause for issuance of the search warrant in this case, requires use of the information from the informers. In this situation, *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) states:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant . . . the magistrate must be informed of some 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."

See *Hudson v. State*, 89 N.M. 759, 557 P.2d 1108 (1976), cert. denied, 431 U.S. 924, 97 S.Ct. 2198, 53 L.Ed.2d 238 (1977).

Because the informer need not be disclosed in the affidavit, the claim based on the nondisclosure of the informer is without merit.

The affidavit recites that the confidential informer was present in the residence to be searched during the late evening hours of January 26, 1978, and personally observed the heroin, with which he was familiar because he was an heroin addict. This informed the judge issuing the search warrant as to "the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were . . . ."

The affidavit recites that the confidential informer had given information in the past week which had resulted in the recovery of stolen property. This informed the judge of the underlying circumstances from which the affiant concluded that the informer was credible.

Defendant does not argue that the personal observations of the confidential informer were insufficient. His claim goes to the sufficiency of the information, in the affidavit, as to the credibility of the informer. Defendant seems to argue that an item of reliable information, given in the past week, was insufficient, as a matter of law, to show the informer's credibility. Compare *State v. Gutierrez*, 91 N.M. 542, 577 P.2d 440 (Ct.App.1978). We disagree.

The determination of probable cause is made by the judge issuing the search warrant. *State v. Perea*, 85 N.M. 505, 513 P.2d 1287 (Ct.App.1973). The circumstances stated in the affidavit as to the informer's credibility satisfied this judge; the issuing judge was not "confined by niggardly limitations or by restrictions on the use of . . . [his] common sense . . . ." *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The issuing judge's "determination of probable cause should be paid great deference by reviewing courts . . . ." *Spinelli v. United States*, supra.

The affidavit stated the circumstances from which the affiant concluded the confidential informer was reliable. We cannot say that the issuing judge's common-sense view of those circumstances was erroneous as a matter of law.

The information in the affidavit concerning the confidential informer was a sufficient showing of probable cause. Accordingly, we do not consider that part of the affidavit which refers to the anonymous informer. Compare *Hudson v. State*, supra. The affidavit was facially valid.

(b) Propriety of the Evidentiary Hearing

In support of the motion attacking the facial validity of the affidavit, defendant

submitted his affidavit which stated: "On information and belief, the alleged informant does not exist; the police contrived the 'tips' as a pretext to invade private premises." In addition, defendant moved "for an in camera hearing, to determine whether a certain confidential informant can supply testimony that is relevant and helpful to the Defendant . . . ." The asserted "relevant and helpful" information with which we are concerned relates only to the motion to suppress; we are not concerned with disclosure of informers apart from the suppression motions.

The trial court held an evidentiary hearing on the various motions relating to suppression of evidence. We consider the propriety of the evidentiary hearing.

(1) Defendant was not entitled to an evidentiary hearing on his motion attacking the facial validity of the affidavit. Footnote 1 to *Aguilar v. Texas*, supra, states: "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." It is of no consequence that the affiant in this case might have had additional information which could have been presented to the issuing judge. Footnote 3 to *Spinelli v. United States*, supra. Information brought out at a hearing on a motion to suppress cannot be used to augment the information presented to the issuing judge. *State v. Lewis*, 80 N.M. 274, 454 P.2d 360 (Ct.App. 1969). In this case, the only information submitted to the issuing judge was contained in the affidavit. The only information to be considered by the trial court in determining the sufficiency of the affidavit was the information contained in the affidavit. *State v. Duran*, 90 N.M. 741, 568 P.2d 267 (Ct.App.1977).

(2) This Court has held that a defendant may be entitled to an evidentiary hearing when a sufficient challenge is made to the veracity of the statements made in the affidavit. *State v. Gutierrez*, supra; *State v. James*, 91 N.M. 690, 579 P.2d 1257 (Ct.App.1978). The treatment of such a challenge in *Gutierrez* and *James* may leave the impression that the hearing is wide open to all claims of untruthfulness. To correct any such impression, we quote the limitations stated in *Franks v. Delaware*, 434 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978):

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Franks v. Delaware, supra, is the applicable authority. Any contrary suggestion or contrary treatment of this issue in *State v. Gutierrez*, supra, and *State v. James*, supra, is not to be followed.

(3) Defendant challenged the truthfulness of the affidavit when he asserted the informer did not exist. We assume that this was a claim of a falsehood by the affiant. A claim that the affiant's statement was false was not a claim that the falsehood was deliberate or in reckless disregard of the truth. Defendant's allegation did not state a claim entitling him to an evidentiary hearing.

(4) Defendant's claim that the informer did not exist was only on information and belief; thus, defendant did not claim any personal knowledge. *Rekart v. Safeway Stores, Inc.*, 81 N.M. 491, 468 P.2d 892, 38 A.L.R.3d 354 (Ct.App.1970). No supporting reasons were given for this claim. No offer of proof accompanied defendant's motions. Thus, no evidentiary hearing should have been held. When the evidentiary hearing was in fact held, defendant offered no evidence in support of the claimed falsehood and offered no reason for the absence of evidence. The evidentiary hearing should have concluded at that point.

(5) Defendant called two witnesses in support of the claimed falsehood. One witness was the officer who received information from the anonymous informer. This officer testified that the anonymous tipster did exist. The second witness was the officer who received information from the confidential informer. This second officer testified that the confidential informer did exist. This testimony negated defendant's unsupported claim as to the nonexistence of an informer. There being no evidence suggesting the affiant proceeded on the basis of a deliberate falsehood or reckless disregard for the truth, the hearing should have concluded at that point.

(6) The trial court conducted an in camera hearing of the second officer (the affiant). This was done to protect the identity of the confidential informer. The reason for the in camera hearing in connection with the suppression motions was stated, as follows, by the trial court:

> [I]f the confidential informant were not a reliable informant as a matter of fact then the information from such an unreliable informant will not support the search warrant. I must conduct an in camera hearing that there was a sufficient basis for belief of the confidential informant. If I am not satisfied with that, I must rule that the motion to suppress is well taken.

This view, by the trial court, was held to be incorrect in *Franks v. Delaware*, supra. The reliability of the confidential informant was not an issue. The only issue was the deliberate falsity or reckless disregard for the truth by the second officer, the affiant. An in camera hearing might be appropriate on the issue of the affiant's deliberate falsity if the informer's identity should be protected; however, the in camera hearing was improper in this case because the hearing was on the question of the reliability of the confidential informer. No in camera hearing should have been held in connection with the suppression motions. To the extent that *State v. Gutierrez*, supra, and *State v. James*, supra, indicate that the reliability of the nongovernmental informer may be litigated in a suppression hearing, they are contrary to *Franks v. Delaware*, supra, and are not to be followed.

(7) *Franks v. Delaware*, supra, is consistent with Evidence Rule 510(c)(3) which states:

> If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed.

Under this rule, the trial court examines the reasonable belief of the person receiving the information from the informer; the trial court does not examine the reliability of the informer. Evidence Rule 510(c)(3) did not authorize the in camera hearing held in this case.

(c) Seizure of Items Not Mentioned in the Search Warrant

The search warrant authorized a search for heroin. Heroin was not found during the search. The searching officer seized, among other items, pieces of aluminum foil, syringes, cooking spoons, a cooking cup, a "tie-up", a triple beam scale and $1,500 in cash. Defendant moved to suppress most of these items on the basis that their seizure "went beyond the scope of the warrant . . . ."

Defendant's contention is not a "scope of the search" claim. See *State v. Alderete*, 88 N.M. 619, 544 P.2d 1184 (Ct. App.1976). The officers were properly on the premises to search pursuant to a facially valid warrant. They were also on the premises to arrest defendant on several charges, including charges of trafficking in heroin. The items seized relate to trafficking in heroin. The propriety of the seizure must be considered in this context.

Seizure of the items was proper because a) the officers could reasonably have believed that the items showed defendant's intent to traffic in heroin, *State v. Bell*, 90 N.M. 160, 560 P.2d 951 (Ct.App.1977), or b) the officers could reasonably have believed the items related to the trafficking charges on which he was arrested, *State v. James*, supra.

The various suppression motions were properly denied.

Evidence of Conduct

This issue concerns trial use of the items seized on January 30, 1978 at the time of defendant's arrest. The seizure was four and one-half months after the latest offense being tried.

The prosecutor sought to introduce these items as part of its case-in-chief. The prosecutor sought admission of these items under Evidence Rule 404(b), claiming the items tended to prove motive, opportunity, and intent. The trial court excluded the evidence as part of the case-in-chief on the basis that the prejudicial impact of the evidence outweighed its probative value. Evidence Rule 403.

On direct examination, defendant denied the transactions involved in the charges being tried, denied he sold drugs to the undercover agents, and asserted that during the pertinent time period he had no drugs to sell. On cross-examination, defendant replied in the negative when the prosecutor asked if he had ever sold drugs. Defendant admitted that he had "done drugs," had been an addict, and was a heroin addict on January 30, 1978. The prosecutor then brought out that upon being arrested and advised of his constitutional rights, defendant voluntarily told a detective "that the works that you would find in the back" belonged to defendant.

"[T]he works" were the narcotic paraphernalia and money. The prosecutor was permitted to cross-examine defendant concerning these items. Defendant claims this cross-examination was error. The State defends the cross-examination as proper under Evidence Rule 404(b). The State's claim is not supported by the record. The trial court permitted the cross-examination "for the limited purpose of impeachment of his statement that he never sold heroin . . . ." This impeachment involves Evidence Rule 608(b), not Evidence Rule 404(b).

Defendant does not claim that the conduct involved (possession of the paraphernalia and money) did not go to truthfulness and therefore improper under Evidence Rule 608(a). See *State v. Miller*, 92 N.M. 520, 590 P.2d 1175 (1979). His claim is that the cross-examination concerning the paraphernalia and money was irrelevant, was prejudicial, and was prohibited extrinsic evidence.

Defendant admitted the "fix kit" was his—the syringes, spoons and a cooker. He stated the cut pieces of aluminum "may have been there . . . ." He denied any knowledge of the money. He didn't know what the "tie-up" (a piece of rubber tubing) was; he explained that he never tied himself when he injected. He was shown the scales; he admitted the scales were similar to scales he owned. This testimony went to whether defendant had been a seller of heroin. This testimony went to defendant's credibility, and was relevant.

The prejudice claim goes to the balancing process under Evidence Rule 403; that is, whether the probative value of the testimony as to defendant's credibility was exceeded by the prejudicial impact of the testimony which went to conduct some four and one-half months after the latest sale being tried. See *State v. Day*, 91 N.M. 570, 577 P.2d 878 (Ct.App.1978). It is clear that the

trial court balanced these two items. This evidence was excluded when offered by the prosecutor in the case-in-chief. The trial court permitted this evidence only for purposes of impeachment after defendant denied any sales of heroin. After balancing the two items, the trial court permitted the questioning. This was a discretionary ruling; the appellate issue is whether the trial court abused its discretion. *State v. Fuson*, 91 N.M. 366, 574 P.2d 290 (Ct.App.1978). In light of the limited purpose for which the testimony was admitted, we cannot hold there was an abuse of discretion.

There is an additional answer to the prejudice claim. In the trial court, defendant never claimed the cross-examination should be excluded because its prejudicial impact outweighed its probative value. The prejudice claim is not properly before us for review. *State v. Hogervorst*, 90 N.M. 580, 566 P.2d 828 (Ct.App.1977).

Evidence Rule 608(b) reads in part: "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." Defendant states: "The State here was allowed to go well beyond merely cross-examination of the witness, but was allowed to use extrinsic evidence seized pursuant to a search 4½ months after the last crime alleged in the indictment."

Defendant does not point out what extrinsic evidence was "used". The transcript reveals that defendant was shown some scales and asked if he recognized them. Defendant said the scales were similar to the scales he owned. He was also shown a photograph. He recognized the scene depicted in the photograph. The photograph showed the "fix kit" that defendant admitted owning. It also showed the "tie-up" which defendant said he never used, and could not identify.

"Extrinsic" means: "Foreign; from outside sources . . . ." Black's Law Dictionary (4th Ed. 1951). The scales and the photograph were extrinsic in that sense. Compare Evidence Rule 613(b). However, the prosecutor did no more than ask defendant to identify the scales and the items shown in a photograph. This identification testimony went to items about which defendant testified. The identification testimony was based on extrinsic items (the scale and photograph), but the testimony was not extrinsic evidence because defendant made the identifications. Asking defendant if he can identify certain items is not proving specific conduct by extrinsic evidence within the prohibition of Evidence Rule 608(b). Compare *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct.App.1978).

Another answer to defendant's extrinsic evidence contention is that, in the trial court, defendant never claimed that asking the defendant to identify the scales and the items depicted in the photograph was proof by extrinsic evidence or improper under Evidence Rule 608(b). The contention is not properly before us because not raised in the trial court. *State v. Hogervorst*, supra.

In support of the extrinsic evidence claim, defendant cites *State v. McKelvy*, 91 N.M. 384, 574 P.2d 603 (Ct.App.1978). See also *State v. Barela*, 91 N.M. 634, 578 P.2d 335 (Ct.App.1978). In *McKelvy*, supra, a rebuttal witness testified to conduct denied by the defendant on cross-examination. This testimony went to credibility and was improper because extrinsic and in violation of Evidence Rule 608(b). In *Barela*, supra, the tendered testimony, attacking credibility, was properly excluded because extrinsic. Neither case is applicable to defendant's contentions directed to the cross-examination of defendant. There was rebuttal testimony in this case, but defendant does not claim this rebuttal evidence was erroneous. Defendant's argument goes only to the cross-examination of defendant.

The judgment and sentences are affirmed.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

593 P.2d 487

Joseph L. GARCIA, Plaintiff-Appellant,

v.

PRESBYTERIAN HOSPITAL CENTER and John Doe I, John Doe II, John Doe III, Defendants-Appellees.

No. 3376.

Court of Appeals of New Mexico.

March 20, 1979.

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

Eric D. Lanphere, Johnson & Lanphere, Albuquerque, for defendants-appellees.

OPINION

WALTERS, Judge.

Plaintiff underwent surgery twice in June and early July 1972 for prostatic cancer, and on July 25, 1972 he was subjected to a third surgery which brought about the complaint filed in this action. He appeals from a summary judgment granted to defendant below.

The trial court, in entering summary judgment, found the following "undisputed" facts:

> Plaintiff, Joseph L. Garcia knew immediately after the catheter in question fell out in July of 1972, that something was wrong with regard to the *treatment and care he was receiving as a hospital patient,* and that on that event plaintiff consulted attorneys in March of 1973 in order to determine his legal position with regard to these events, such that from and after March, 1973, plaintiff was not relying upon any acts or omissions of his treating physician or of any agent or nurse employed by the hospital, and plaintiff, and therefore, the plaintiffs action filed July 13, 1976 is barred by the applicable three (3) year statutes of limitations. (Emphasis added).

Summary judgment is proper if there are no material facts in dispute. It is a remedy to be invoked with caution because its effect is harsh, extreme, and drastic. *Pharmaseal Laboratories, Inc. v. Goffe,* 90 N.M. 753, 568 P.2d 589 (1977); *Phillips v. United Serv. Auto. Ass'n.,* 91 N.M. 325, 573 P.2d 680 (Ct.App.1977). It is not to be used as a substitute for trial on the merits, *Pharmaseal, supra;* likewise, the party against whom the summary judgment is asserted must have all reasonable doubts in determining whether any genuine issue exists resolved in his favor, *Skarda v. Skarda,* 87 N.M. 497, 536 P.2d 257 (1975), and in the

most favorable light they will bear supporting his right to a trial on the issues, *Read v. Western Farm Bur. Mut. Ins. Co.,* 90 N.M. 369, 563 P.2d 1162 (Ct.App.1977); *Cortez v. Martinez,* 79 N.M. 506, 445 P.2d 383 (1968); *Coca v. Arceo,* 71 N.M. 186, 376 P.2d 970 (1962).

The three questions raised in this appeal are: (1) whether plaintiff exercised due diligence to learn if negligence had been committed by defendant or its employees which necessitated the third surgical procedure while he was a patient in the hospital; (2) whether it is an an undisputed fact that plaintiff "knew immediately after the catheter in question fell out in July of 1972 that something was wrong with regard to the treatment and care he was receiving as a hospital patient"; and (3) whether a confidential relationship existed between the hospital and its employees, and plaintiff, so as to impose a duty on the hospital to disclose and thereby toll the statute of limitations.

The language used by the trial court in the judgment entered and the argument made by appellees to this court on appeal, clearly indicate that the inquiry below shifted from a question of plaintiff's ignorance that any negligence had been committed, to the issue of plaintiff's counsel's diligence, or lack of it, in dispelling that ignorance once he had been retained by plaintiff. Plaintiff's counsel filed an affidavit, which was before the trial court, in which he stated that he had searched the hospital records and was unable to determine the reason for the third operation; that he sought to obtain that information from plaintiff's attending physician, and it was not until he had filed a claim before the Medical-Legal panel that the physician's attorney permitted the doctor to talk to counsel. That occurred in September of 1974. It was at that time that plaintiff's counsel learned from the doctor that the loss of the catheter was occasioned by negligence of one of the hospital employees, necessitating the third surgery, and not because the patient's body had rejected the catheter, or because any one of numerous other possible physical reactions had occurred. Bearing in mind that plaintiff had repeatedly asked the doctor and the hospital nursing staff why it was necessary that a third operative procedure be undertaken, and that neither the doctor nor the nurses would answer his question, can it be said as a matter of law that there was a lack of due diligence in obtaining information known only to the doctor and the nurses when they refused to divulge that information? Is it not as logical to believe that both plaintiff and his attorney might have felt that the cancerous or weakened condition of the plaintiff, for which he was first operated, had something to do with the loss of the catheter, and that there was no negligence at all?

One of the definitions of "diligence" found in Webster's Third New International Dictionary is as follows:

> persevering application; devoted and painstaking application to accomplish an undertaking; assiduity.

It is further there described as "the attention and care required of a person—opposed to negligence." The same source defines "laches" as

> slackness or carelessness toward duty or opportunity; negligence, remissness

and

> neglect to do a thing at the proper time; undue delay in asserting a right or claiming a privilege—compare STATUTE OF LIMITATIONS.

The opinion letter of the trial court (made a part of the court record) finding that "plaintiff by the exercise of reasonable diligence should have known of the possibility of negligence prior to July 12, 1973," is a finding of laches on the part of plaintiff or his attorneys. *See, e. g., Papanikolas Bros. Ent. v. Sugarhouse Shopping Center Assoc.,* 535 P.2d 1256 (Utah 1975); *Oxford v. Estes,* 229 Ala. 606, 158 So. 534 (1934); *Dexter & Carpenter v. Houston,* 20 F.2d 647 (4th Cir. 1927). "Laches is lack of diligence." *Poka v. Holi,* 44 Haw. 464, 357 P.2d 100 (1960).

In discussing the theory of laches in *Cave v. Cave,* 81 N.M. 797, 802, 474 P.2d 480, 485 (1970), the court quoted from *Morris v. Ross,* 58 N.M. 379, 271 P.2d 823 (1954), as requiring four elements to establish laches:

(1) Conduct on the part of the defendant, * * * giving rise to the situation of which complaint is made and for which the complainant seeks a remedy, * * *;
(2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit;
(3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and
(4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is not held to be barred.

It was said in *Cave, supra,* that "[t]he duty to proceed arises 'when the fraud is known, or ought to have been known.'" That case also indicates that a finding of laches, "not favored absent inexcusable neglect," must be based upon the evidence and inferences therefrom which are submitted to the fact finder. *Pratt v. Parker,* 57 N.M. 103, 255 P.2d 311 (1953), as well as the foreign cases above cited and innumerable others, make it clear that whether or not laches is present depends upon the facts and circumstances of the case under consideration. If there was no factual reason which would excuse plaintiff's delay in filing his complaint, then summary judgment was proper. The affidavit of plaintiff's attorney raised an issue of excuse, however, going to the layman's ignorance of a medical condition, the absence of information in the medical records, and the chill of silence from those who might have revealing information, sufficient to raise a factual issue of excusable delay.

We have searched the record, which consists of depositions and affidavits, and have been unable to find any intimation by plaintiff that he knew "something was wrong with . . . the treatment and care he was receiving as a hospital patient" on July 24, 1972. Certainly he knew *something* was wrong. He observed the nurses' and doctor's consternation at the time the catheter fell out, and the doctor's insistence that he would have to return to surgery. But despite plaintiff's questioning of the doctor and the nurses regarding the necessity for the third surgery, the only answers he got were, "don't worry, everything is going to be all right . . . we're going to get you well," from the doctor; and by the nurses he was told that they didn't know why the surgery was necessary, "to ask the doctor." Plaintiff never was told what the third surgery was intended to accomplish or why it was necessary. He was no more aware until September 1974 that something was wrong with his treatment and care than he was aware that his own physical condition might have forced the loss of the catheter and triggered the third surgery. The record is simply barren of any evidence of knowledge on the part of the plaintiff with respect to the instigating cause for the operation performed on July 25, 1972. The ultimate fact found by the trial court is not "undisputed" simply because there is no support whatever for it in the record.

Finally, if there was justifiable delay in filing the complaint which rests on defendant's duty to disclose and their failure to do so, defendants claim on appeal that there is no such duty existing between a hospital or its employees and a patient. If this is so, plaintiff may not rely on defendants' failure to divulge information as an excuse to overcome the defense of laches or lack of due diligence, or for tolling the statute of limitations during the period of such nondisclosure.

Fiduciary relationship, confidential relationship, constructive fraud, and fraudulent concealment are all parts of the same concept. *See Hardin v. Farris,* 87 N.M. 143, 530 P.2d 407 (Ct.App.1974); *Barber's Super Markets, Inc. v. Stryker,* 84 N.M. 181, 500 P.2d 1304 (Ct.App.1972); *Snell v. Cornehl,* 81 N.M. 248, 466 P.2d 94 (1970); *Giovannini v. Turrietta,* 76 N.M. 344, 414 P.2d 855 (1966); *Velasquez v. Mascarenas,* 71 N.M 133, 376 P.2d 311 (1962); *Everett v. Gilliland,* 47 N.M. 269, 141 P.2d 326 (1943); *In re Trigg,* 46 N.M. 96, 121 P.2d 152 (1942);

State Tr. & Sav. Bank v. Hermosa Land & Cattle Co., 30 N.M. 566, 240 P. 469 (1925); *Cardenas v. Ortiz,* 29 N.M. 633, 226 P. 418 (1924). An analysis of all of those cases reveals that the nature of the relationship which creates a duty to disclose, and a breach of which duty constitutes constructive fraud or fraudulent concealment, springs from the confidence and trust reposed by one in another who, by reason of a specific skill, knowledge, training, judgment, or expertise, is in a superior position to advise or act on behalf of the party bestowing trust and confidence in him. Once the relationship exists "there exists a duty to speak . . . [and] mere silence constitutes fraudulent concealment." *Hardin v. Farris, supra.*

In the common knowledge of man, patients submit themselves to the skills and arts, proficiency and expertise, of hospital personnel, once they become confined to a hospital. Indeed, most frequently they have no real choice in the matter; they are physically and intellectually unable to do much more than submit and rely upon the medical superiority and ethical propriety of their attendants. We have no difficulty in declaring a confidential relationship in the standing of a hospital to it patients. Coexistent with that relationship, therefore, is the hospital's obligation to divulge all material facts to its patients. The effect of nondisclosure is as Judge Hernandez wrote in *Hardin v. Farris, supra,* at 87 N.M. 146, 530 P.2d 410:

> . . . [W]here a party against whom a cause of action accrues prevents the one entitled to bring the cause from obtaining knowledge thereof by fraudulent concealment . . . or where the cause is known to the injuring party, but is of such character as to conceal itself from the injured party, . . . 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. (Emphasis added).

There was an issue of fact regarding the diligence of plaintiff which, absent a duty on the hospital, should have been presented to the fact finder, thus precluding the entry of summary judgment. Our decision, however, that the hospital had a duty to disclose, and the tolling effect arising from its failure to disclose, disposes of this appeal on the basis that the statute was tolled during the period of nondisclosure. Plaintiff's complaint was filed well within the three-year period following September 10, 1974. *Hardin v. Farris, supra;* § 37–1–8, N.M.S.A. (1978).

The summary judgment is reversed and the case is remanded with directions to reinstate it upon the trial court's docket.

IT IS SO ORDERED.

LOPEZ, J., concurs.

ANDREWS, J., dissents.

ANDREWS, Judge (dissenting).

I dissent.

In my opinion, the district court properly granted summary judgment where the issue is the applicability of the three-year statute of limitation for tort. Section 37–1–8, N.M. S.A.1978. In New Mexico, a cause of action for personal injuries for malpractice begins to run, not from the time of the malpractice, *see Roybal v. White,* 72 N.M. 285, 383 P.2d 250 (1963), but from the time the injury manifests itself in a physically objective manner and is ascertainable. *Peralta v. Martinez,* 90 N.M. 391, 564 P.2d 194 (Ct. App.1977), cert. denied 90 N.M. 636, 567 P.2d 485 (1977).

The Court in its judgment, found as follows:

> Plaintiff, Joseph L. Garcia, knew immediately after the catheter in question fell out in July of 1972 that something was wrong with regard to the treatment and care he was receiving as a hospital patient and that on that event plaintiff consulted attorneys in March of 1973 in order to determine his legal position with regard to these events, such that from and after March, 1973, plaintiff was not relying upon any acts or omissions of his treating physician or of any agent or

nurse employed by the hospital, and plaintiff, and therefore, the plaintiff's action filed July 13, 1976 is barred by the applicable three (3) year statute of limitation.

Clearly, plaintiff's injury manifested itself in a physically objective manner and was ascertainable from the date the catheter fell out in July 1972. The limitation period should begin to run from that date and no later. *See Yoshizaki v. Hilo Hospital,* 50 Haw. 1, 427 P.2d 845 (1967).

To hold otherwise requires reliance on the only exception to the rule—that of fraudulent concealment. Pursuant to this exception, the limitation period is tolled where a party against whom a cause of action accrues prevents the one entitled to bring the cause from obtaining knowledge of that fact. *Hardin v. Farris,* 87 N.M. 143, 530 P.2d 407 (Ct.App.1974). However, the fraudulent concealment exception applies only if a confidential relationship exists between the injured party and the one against whom the cause of action accrues. Such a relationship has been established in many diverse classes of cases, including corporate officer and shareholder or creditor, doctor and patient, dentist and patient, druggist and patient, nurse and patient, trustee and beneficiary, and family members. *See* Annot. 45 A.L.R.3d 630 (1972) and Annot. 68 A.L.R. 176 (1930). However, I find no case, except under a statutory scheme specifically establishing the relationship, where the confidential relationship is held to exist between a patient and hospital. *See Crossett Health Center v. Croswell,* 221 Ark. 874, 256 S.W.2d 548 (1953); *Yoshizaki v. Hilo Hospital, supra,* Annot., 89 A.L.R.2d 1180 (1963). To assume such a relationship where there is no evidence that a continuous trust is reposed by one person in the skill and integrity of the other, *Else v. Fremont Methodist Church,* 247 Iowa 127, 73 N.W.2d 50 (1955), is to place an unjustified burden upon a hospital.

Where mere silence constitutes fraudulent concealment, *Hardin v. Farris, supra,* there should be a clear showing that a confidential relationship exists which imposes a duty to speak and that the essential facts of the right of action are known to the injuring party and unknown to the injured party. Such is not the case here.

The summary judgment should be affirmed.

593 P.2d 754

George HALE and Sylester Hale, Plaintiffs-Appellees,

v.

Gerald M. WHITLOCK, Martha A. Whitlock, Defendants-Appellants,

and

Albuquerque National Bank, Defendant.

No. 12151.

Supreme Court of New Mexico.

April 16, 1979.

Robinson, Stevens & Wainwright, George F. Stevens, Albuquerque, William J. Lock, Albuquerque, for defendants-appellants.

John J. Duhigg, Albuquerque, for plaintiffs-appellees.

OPINION

FEDERICI, Justice.

Appellees brought this action asking the district court to declare that they were not in default on a real estate contract and to restrain the escrow agent, Albuquerque National Bank, from delivering the documents held in escrow to appellants. Appellants counterclaimed, asking the court to declare the real estate contract to be in default and to grant them possession of the property.

The trial court held that appellees were in default on the real estate contract and ordered the Albuquerque National Bank to release the escrow papers to appellants. However, in its order, the court, under its equity powers, granted appellees an additional fifteen days following entry of its judgment to pay off the entire contract balance plus interest and attorney fees. Appellees tendered the required amount to appellants within the time allowed by the court. This appeal followed.

The following facts in the case are stipulated. In 1966 appellees purchased the property in question under a real estate contract. For several years following appellees' purchase of the property, appellees failed to make some of the monthly payments on time. The original seller did not object to the failure to make payments and appellees were led to believe that prompt payment of twelve monthly installments per year would not be insisted upon. The original seller assigned her interest in the real estate contract to appellants in 1977. Appellees were never put on notice that appellants would insist upon strict performance regarding payment of the future installments under the contract. Soon after appellants purchased the real estate contract from the original seller, however, appellants demanded that appellees bring their payments up to date by tendering $1,675 for twenty-five delinquent installments. Shortly thereafter appellees brought this declaratory action.

Appellants contend that the court erred in giving appellees additional time to pay off the entire contract balance after declaring the contract to be in default. Appellees contend that the court had equity jurisdiction under the facts in this case.

It is well settled in New Mexico that the type of real estate contract involved in this case is enforceable and upon default, the

vendor may terminate the contract, regain possession of the property and retain the payments made. *Eiferle v. Toppino*, 90 N.M. 469, 565 P.2d 340 (1977); *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, it is also recognized in each of these cases that there are exceptions to this rule, and that under certain circumstances, the contract and acts of the parties should be construed if at all possible to avoid a forfeiture. *See Stamm v. Buchanan*, 55 N.M. 127, 227 P.2d 633 (1951).

Under the facts in this case, the trial court properly exercised its equity jurisdiction in granting appellees additional time within which to pay off the entire balance due under the real estate contract along with interest and attorney fees. The result was to place the parties in the positions they would have been in had the contract been fully performed.

The decision of the trial court is affirmed.

IT IS SO ORDERED.

McMANUS, Senior Justice, and EASLEY, J., concur.

593 P.2d 755

STATE of New Mexico, Plaintiff-Appellee,

v.

Jerrel W. PENDLEY, Defendant-Appellant.

No. 3736.

Court of Appeals of New Mexico.

March 22, 1979.

Tom Cherryhomes, Carlsbad, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Sammy J. Quintana, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of aggravated battery. Section 30–3–5(C), N.M. S.A.1978. We (1) answer four contentions summarily and discuss (2) verdict of an eleven-person jury, and (3) deferred sentence under the firearm enhancement statute.

An office party, followed by a party at the country club, continued at defendant's residence. Defendant went upstairs to use the bathroom, then rested on a bed. Defendant's wife found him, inquired if he was all right and kissed him. As the door closed upon his wife leaving the bedroom, defendant heard the victim say, " 'why don't you kiss me the way you did Jerry [defendant]' ". Defendant got up and, as he opened the door, he saw the victim push defendant's wife against the wall of the stairs " 'and start pawing and trying to kiss her.' "

The victim refused to accede to several requests to leave. Defendant "knocked me [his wife] to the bedroom". Defendant

went downstairs, got a pistol and told the victim " 'you will leave now. Again he refused and started toward me.' "

The evidence is conflicting as to whether the victim was shot before there was a struggle for the pistol, or was shot while defendant and the victim were struggling for the pistol. Defendant testified that he got the pistol in order to force the victim from defendant's house since the victim had refused to leave. Defendant also testified that the victim never threatened defendant and never threatened defendant's wife "other than when he pushed her up against the stairway" and "he tried to kiss her".

Contentions Answered Summarily

(a) The information charged the defendant applied force to the victim "with a deadly weapon, to-wit: a gun . . . contrary to Section 40A–3–5C & 40A–29–3.-1, NMSA, 1953." Section 40A–29–3.1, supra, was the firearm enhancement statute; it is now compiled as § 31–18–4, N.M.S.A. 1978.

Defendant objected to the submission of an interrogatory to the jury as to whether a firearm was used, claiming that the information did not give him notice that the State sought enhancement of any sentence because a firearm was used. Defendant's claim, which is frivolous, is that the information did not use the word "firearm" and that "gun" is not included in the statutory definition of "deadly weapon", see § 30–1–12(B), N.M.S.A.1978. Defendant was specifically charged with violating the firearm enhancement statute. This, in itself, was sufficient notice. Defendant was also charged with use of a deadly weapon, a gun, in committing the crime. This, in itself, was also sufficient notice. If defendant was uncertain whether the gun was a firearm he could have obtained a description of the weapon under Rules of Crim. Proc. 8 and 9. *State v. Barreras*, 88 N.M. 52, 536 P.2d 1108 (Ct.App.1975).

(b) Defendant requested an instruction to the effect that defendant shot the victim "while attempting to prevent an assault with intent to commit a violent felony in his home." The requested instruction stated that this defense was available if, among other requirements, it appeared to defendant that commission of this assault "was close at hand". The asserted justification for this requested instruction was the evidence that the victim attempted to kiss defendant's wife. That incident was not "close at hand", it was over. Defendant had interrupted the victim, and knocked his wife into the bedroom, before going downstairs for the pistol. We do not consider the legal correctness of the requested instruction. The instruction was properly refused because the evidence did not support the instruction.

(c) Defendant's requested instruction, to the effect that he shot the victim in defense of his wife, was also properly refused. The evidence did not support the requested instruction, which would have required defending his wife "from an attack". Defendant had "defended" his wife, by knocking her into the bedroom, before he went after his pistol.

(d) Defendant also requested an instruction on his "right of self-defense". This request was properly refused because there was no evidence that defendant used the gun in self-defense. The evidence most favorable to defendant is that the victim tried to get the gun away from defendant. Self-defense was not involved in this struggle because the victim was only after the gun, the victim never threatened defendant.

Verdict of an Eleven-Person Jury

Twelve jurors were chosen, but no alternate. At the close of the State's case, one of the jurors became ill and could not continue to serve in the case. The trial court stated it would declare a mistrial unless both the State and defendant consented to the matter being submitted to a jury of eleven persons.

The State consented, defendant's counsel consented and defendant consented. The trial court questioned defendant as to his knowledge of his right to have the matter

decided by a twelve-person jury, that if defendant "prefer to have it tried by twelve people rather than eleven . . . . you have that right."

THE COURT: And, do you concur with Counsel that you are agreeable to letting a jury of eleven decide the issues in this case as opposed to a jury of twelve?

MR. PENDLEY: Yes, sir.

Defendant contends the trial court erred in failing to declare a mistrial; that the right to a twelve-person jury cannot be waived. Such a view, expressed in *Territory v. Ortiz*, 8 N.M. 154, 42 P. 87 (1895) was overruled in *State v. Hernandez*, 46 N.M. 134, 123 P.2d 387 (1942).

Next, defendant claims that he could not consent to being tried by an eleven-person jury. *State v. Hernandez*, supra, is to the contrary.

Next, defendant asserts his waiver was not effective because not in writing. He relies on Rule of Crim.Proc. 38(a) which states: "Criminal cases required to be tried by jury shall be so tried unless the defendant, in writing, waives a jury trial with the approval of the court and the consent of the state." This requirement, of a written waiver, avoids ambiguities if the right to a jury is waived prior to trial. We doubt that the written waiver requirement was intended to apply to the situation in this case.

Assuming that the written waiver requirement was applicable, we note that defendant did not claim, in his motion for a new trial, that his waiver of a twelve-person jury was ineffective because not in writing. His claim, that a written waiver was required, is asserted for the first time on appeal. The claim is not entitled to appellate review because the claim that the waiver be in writing is not a question which can be raised for the first time on appeal. See N.M.Crim.App. 308.

There is another reason why this assertion is without merit. Still assuming that the written waiver requirement of Rule of Crim.Proc. 38(a) was applicable, this requirement could be waived. *Baird v. State*, 90 N.M. 667, 568 P.2d 193 (1977). The specific agreements of defendant and his counsel, that the trial proceed with eleven jurors, waived the requirement that the waiver be in writing.

Defendant also contends that the trial court erred in inquiring about an eleven-person jury in the presence of the jury. Since defendant was agreeable to proceeding with eleven jurors, he could not have been hurt by expressing his agreement in the presence of the jurors.

Deferred Sentence Under the Firearm Enhancement Statute

At sentencing, the trial court was asked "to consider a deferred sentence and impose a strict condition of probation." The trial court pointed out that the statute prohibited suspension of the first year of the sentence, but there was no express prohibition against a deferred sentence in this portion of the statute. The trial court stated:

> [T]he Statute intended anyone convicted of the offense that involves a firearm, spend at least one year in the State Penitentiary. With the Court feeling that that was the intent of the legislature, I'm going to impose the minimum sentence that I feel that I can impose under the Statute.

The question is whether the trial court could have deferred defendant's sentence.

The trial court has general authority to suspend or defer sentences. Section 31–20–3, N.M.S.A.1978. However, the sentence enhancement provisions for use of a firearm are mandatory. *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). How do the mandatory enhancement provisions of § 31–18–4, supra, affect the trial court's general authority to defer or suspend sentence?

The applicable portion of § 31–18–4, 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 years; and

(2) for any crime constituting a felony other than a capital felony, the court shall not suspend the first one year of any sentence imposed.

B. For a 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 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.

Under paragraph A(2), the trial court may not suspend the first year of the sentence for a first felony. There is no prohibition against deferring the sentence for the first felony. Under paragraph B, "the court shall not suspend or defer all or any part of the sentence" for second or subsequent felonies. As worded, § 31–18–4, supra, did not bar the trial court from deferring defendant's sentence, if in fact, this conviction was defendant's first felony.

Did the Legislature intend to prohibit deferring the sentence for a first felony conviction when a firearm was used? Legislative intent is to be determined primarily from the language used in the statute; we look first to the words used. *State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (Ct. App.1973). Under this primary approach, the trial court's authority to defer sentence for a first felony was not affected; § 31–18–4(A)(2), supra, does not mention a deferred sentence.

The State argues:

Since the legislature intended that a person who used a firearm in the commission of a felony cannot have one year of his sentence suspended, it only stands to reason that they [sic] certainly did not intend for a less punitive measure; deferment, to be applicable. Having created this statute, the courts cannot now alter the criminal penalties set forth by the legislature. The establishment of criminal penalties is a legislative function.

We agree that it is for the Legislature to establish criminal penalties; however, the wording enacted by the Legislature did not bar deferment of sentence for a first felony where a firearm was used. It does not "stand to reason" that the Legislature intended such a bar because a reference to a deferred sentence was omitted from § 31–18–4(A)(2), supra, when such a reference was included in § 31–18–4(B), supra.

The State also argues that it would be "absurd to think that the legislature intended to allow deferment of a sentence" under § 31–18–4(A)(2), supra, for a first felony offender. In support of this argument the State refers us to Laws 1977, ch. 216, § 5 (appearing in the compiler's note to § 31–18–1, N.M.S.A.1978). That provision, not in effect prior to July 1, 1979, makes various changes in the law concerning use of deadly weapons, as opposed to firearms only, and does bar deferral of sentences. We must presume that the Legislature was informed as to existing law when it enacted the 1977 statute. *State v. Trujillo*, 85 N.M. 208, 510 P.2d 1079 (Ct.App.1973). Being informed as to existing law when it enacted a law in 1977 to become effective July 1, 1979, the 1977 law shows a legislative intent to change the existing law. The result is that the Legislature recognized that § 31–18–4(A)(2), supra, did not apply to deferred sentences. See *State v. Cutnose*, 87 N.M. 300, 532 P.2d 889 (Ct.App.1975).

In essence, the State is arguing that we should add words omitted by the Legislature; that although the Legislature omitted deferred sentences from § 31–18–4(A)(2), supra, we should add "or defer" after "suspend" in that provision. We are not to "add words in the construction of a statute, except where it is necessary to do so to make the statute conform to the obvious intent of the Legislature, or to prevent absurdity." *State v. Ortiz*, 78 N.M. 507, 433 P.2d 92 (Ct.App.1967). Compare *State v.*

Herrera, 86 N.M. 224, 522 P.2d 76 (1974). This rule applies when the statute must be construed in order to ascertain the legislative intent. Where the meaning of the statutory language is plain, there is no room for construction. *State v. McHorse*, supra; *State v. Ortiz*, supra. Here the words used by the Legislature are free from ambiguity; deferred sentences were omitted from § 31–18–4(A)(2), supra. There is no basis for construction; no basis for adding words to the statute. There is no obvious legislative intent to include deferred sentences in § 31–18–4(A)(2), supra. The result is not absurd because the use or nonuse of a deferred sentence was still within the trial court's discretion.

Having misunderstood the meaning of § 31–18–4(A)(2), supra, and desiring to impose the minimum sentence, the trial court did not consider whether defendant's sentence should be deferred. In this, the trial court erred.

Defendant's conviction is affirmed. The cause is remanded for a further sentencing hearing in accordance with this opinion. *Compare State v. Barreras*, supra.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

593 P.2d 760

STATE of New Mexico, Plaintiff-Appellee,

v.

Paul MOORE, Defendant-Appellant.

No. 3760.

Court of Appeals of New Mexico.

March 22, 1979.

John B. Bigelow, Chief Public Defender, Michael J. Dickman, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael A. Kauffman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Moore appeals his conviction of receiving stolen property. All but one of the issues listed in the docketing statement were abandoned because not briefed. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App. 1977). The one issue presented involves a warrantless search of Moore's residence. We discuss: (1) the initial stop, (2) entry into the house, and (3) seizure of stolen goods.

The Initial Stop

The Rainey residence was burglarized on the evening of July 30th; three rifles and their cases were among the items taken in the burglary. Checking the neighborhood for possible witnesses, Patrolman Brown was informed by a neighbor that the neighbor "had seen one of Mr. Rainey's renters there earlier in the evening." The renter had been seen at the front door. The neighbor described the person seen; Rainey stated the description matched Moore, who lived in one of Rainey's "rent houses" one block behind Rainey's residence. Brown went to the rent house in an attempt to contact Moore, "there was no answer."

On July 31st, Brown drove into the neighborhood and observed a light green Dodge pickup in front of the rent house. When he came back to the rent house, fifteen to twenty minutes later, the pickup was gone.

On August 1st, Brown observed the pickup in front of the rent house and stopped to talk to Moore. The man who came to the door said Moore was not at home; however, the person who came to the door matched the description of Moore which Brown had received from the neighbor. Brown then did two things. He ran a registration check on the pickup, which had expired Texas license plates. The report was that the pickup was registered to someone in Texas. He contacted Rainey to "confirm identity of Mr. Moore . . . ." Brown described the man who came to the door; Rainey informed Brown, "that was Mr. Moore." Brown went back to the rent house; the pickup was gone and no one answered the door.

On the evening of August 1st, Brown observed Moore driving toward the rent house. Brown pulled in behind Moore in front of the rent house. It was 8:45 p. m. Brown asked if Moore was at home, Moore stated that he wasn't and wanted to know what Brown wanted. Brown asked Moore "if he had any identification on him"; Moore said that he did not.

The above facts show Brown had a reasonable basis for stopping Moore to investigate his identity. Defendant does not claim to the contrary. *State v. Galvan*, 90 N.M. 129, 560 P.2d 550 (Ct.App.1977).

Entry Into the House

When asked for identification, Moore got nervous and was pacing around. Brown asked Moore to come to the police department and answer some questions. Moore asked, "for what." "I told him first off it was evident that he didn't have a driver's license if he didn't have any identification on him" and also told Moore that the "pick-up registration was expired . . . ." Moore stated he would go in the house and get some identification; Brown permitted him to do so.

Gunnells, in the process of moving out of his residence, had stayed with Moore at the rent house one or two nights prior to August 1st. Gunnells was a passenger in the pickup on the evening of August 1st and was present when Brown asked Moore for identification.

Moore and Gunnells walked from the pickup toward the rent house. Brown saw Moore and Gunnells "standing at the front door"; it appeared to Brown "that they both went inside the house." Brown then called Lt. Vinyard, his supervisor, on the radio. When Moore did not reappear in "about two minutes" Brown went up to the house. Brown asked Gunnells "where Mr. Moore had went and he said last time that I saw him, and he pointed over his shoulder, said that he was headed for the back door."

Vinyard arrived at 8:58 p. m.; Brown reported "what had happened previously with Mr. Moore . . . ." Vinyard and Brown went to the door of the rent house. Vinyard asked, and Gunnells confirmed, that he had been staying there. Vinyard asked Gunnells if Moore had gone into the house. "And he [Gunnells] thumbed, a thumbing motion and nodded his head like to the back bedroom of the house where Mr. Moore had gone." In addition to motioning with his thumb and head, Gunnells said that Moore "went to the back." Vinyard took Gunnells thumbing motion as a "[g]ester to enter the house." Vinyard and Brown entered the house.

While searching the rent house for Moore, stolen property was discovered. Defendant claims this warrantless search was unlawful because the officers were not justified in entering the house. Defendant asserts the only exceptions conceivably applicable to the warrantless entry were "consent" and "hot pursuit," and neither was applicable in this case. We do not discuss "consent".

Defendant contends that "hot pursuit" allows the police, acting without a warrant, to pursue and arrest a "suspected felon" who retreats within a house. He claims "hot pursuit" is inapplicable because no arrest had been set in motion when he fled, and that he was not a suspected felon. Defendant asserts that his offenses, at most, were the misdemeanors of concealing identity, see § 30–22–3, N.M.S.A.1978, and driving without a driver's license, see §§ 66–5–16 and 66–5–37, N.M.S.A.1978. The State asserts that "hot pursuit" is not limited to suspected felons; that the police could pursue and arrest defendant because he had committed misdemeanors in the presence of Brown. Neither the defendant's nor the State's position sufficiently reflects the facts in this case.

A man of Moore's description had twice been identified as Moore; twice Moore had denied to Brown that he was Moore. Brown was pursuing the question of Moore's identity when he allowed Moore to enter the house to obtain identification. Brown thought Moore had entered the rent house when in fact Moore "jumped the fence next to the front door" and fled. Why was the question of identification being pursued? Because a man of Moore's description, and referred to as one of Rainey's renters, had been observed at the Rainey residence on the evening of the burglary. When Moore failed to reappear, Brown suspected him of the burglary.

When Brown and Vinyard entered the house they were in "hot pursuit" of a suspected felon who had twice concealed his identity. The term "hot pursuit" describes what the officers were doing, but the term, in itself, does not justify the entry. The justification depends on why the officers were in "hot pursuit". See *United States v.*

Santana, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976); *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). The justification for a "hot pursuit" warrantless entry depends on exigent circumstances and the purpose for the entry.

What amounts to exigent circumstances is a fact question which depends upon practical considerations of the individual case. "The circumstances must be evaluated from the point of view of a prudent, cautious and trained police officer." *State v. Sanchez*, 88 N.M. 402, 540 P.2d 1291 (1975). *People v. Ramey*, 16 Cal.3d 263, 127 Cal.Rptr. 629, 545 P.2d 1333 (1976) states:

> "[E]xigent circumstances" means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. There is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers.

New Mexico exigent circumstances cases come easily within this definition. *State v. Sanchez*, supra; *In re One 1967 Peterbilt Tractor, Etc.*, 84 N.M. 652, 506 P.2d 1199 (1973); *State v. Kaiser*, 91 N.M. 611, 577 P.2d 1257 (Ct.App.1978); *State v. Hansen*, 87 N.M. 16, 528 P.2d 660 (Ct.App.1974).

There were exigent circumstances in this case. The man who had been identified as being at the scene of the burglary and had twice denied his identity, had, with permission, entered the rent house to obtain identification, but had failed to reappear. The emergency situation, requiring swift action, was to determine if Moore was still in the house.

The purpose of the entry must be valid. The discussion of purpose is often in terms of probable cause to arrest, see *United States v. Santana*, or probable cause to search, see *Warden, Maryland Penitentiary v. Hayden*, supra. This does not mean there may not be other valid purposes for entry, for example, a reasonable belief as to a medical emergency. In this case, however, there was probable cause to arrest Moore for the burglary on the basis of the two identifications that Rainey made to Brown. In addition, there was probable cause to search the rent house to forestall the imminent escape of Moore, the suspected burglar. See *In re One Peterbilt Tractor, Etc.*, supra, and *State v. Hansen*, supra.

Because we hold there was probable cause to arrest Moore and probable cause to search for Moore as a suspected felon, we do not consider the State's argument that the valid purpose was to arrest Moore because he committed a misdemeanor in the presence of the officer. On the merits of this claim, see *Phillips v. State*, 483 P.2d 1377 (Okl.Cr.1971).

Seizure of Stolen Goods

Upon entry, Vinyard identified himself as a police officer and called out for Moore. There was no response. The officers went through each of the rooms "looking in the closets" for Moore. They came to the last room, a bedroom. Vinyard first checked the closet, then looked under the bed. As Vinyard knelt down to look under the bed: "[T]here was a brown leather case protruding out between the mattress and the box springs two or three inches. Observed it as being the end of a gun butt . . . ." After ascertaining that Moore was not under the bed, Vinyard "pulled the mattress up and there appeared to be three cases or weapons concealed in three different types of cases."

Vinyard put the mattress back down, called for Brown and inquired the reason Brown stopped Moore "other than just traffic stop. And he [Brown] said, 'Residential burglary.' " Vinyard had Brown describe the weapons; Brown described two rifles. Vinyard removed the gun cases from under the mattress and opened them. Two of the rifles met Brown's description. The three cases, with rifles, were taken into custody. Rainey identified the three cases, with rifles, as his. A search warrant was then obtained; other items stolen from Rainey

were discovered during this search and seized.

It is uncontradicted that Vinyard observed what he thought was a protruding gun butt during a good faith search for Moore. See *State v. Alderete*, 88 N.M. 619, 544 P.2d 1184 (Ct.App.1976). Vinyard then lifted the mattress and saw three rifle cases. Defendant seems to argue that it was improper for Vinyard to lift the mattress. We disagree. Verification that a rifle case was, in fact, under the mattress was a common-sense security precaution for an officer present in the residence of a suspected burglar who had not been found. See *Warden, Maryland Penitentiary v. Hayden*, supra; *Rodriquez v. State*, 91 N.M. 700, 580 P.2d 126 (1978).

Once three rifle cases were observed under the mattress, Vinyard verified that rifles had been stolen from the Rainey residence. He then opened the gun cases and found they contained rifles matching the description of rifles that had been stolen. Defendant states: "While there may well have been probable cause to believe the closed cases contained contraband, the officers could not open them without first obtaining a warrant." Defendant relies on *Rodriquez v. State*, supra, and the quotation in *Rodriquez* taken from *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). We, of course, must apply the limitations of those decisions when applicable. Here they are not applicable because the "incident to arrest" aspect is missing.

United States v. Chadwick, supra, and *Rodriquez v. State*, supra, dealt with personal property in the exclusive control of the police so that there was no danger that the arrestee might gain access to the property to seize a weapon or destroy evidence. In this case we do not have an arrestee; Moore had not been found. Because Moore had not been found, the officers could properly open the gun cases to verify that the cases did in fact contain the stolen rifles, and to know that the rifles were in fact in their possession so that they could not be used against the officers. This was for the officers' own security. See *Rodriquez v. State*, supra.

The search warrant obtained on the basis of the stolen rifles and cases seized during the search for Moore was proper. Accordingly, we do not consider whether there was probable cause for the search warrant independent of that recovered stolen property.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and HERNANDEZ, JJ., concur.

593 P.2d 1071

Cora DUTTON, Plaintiff-Appellant,

v.

Paul SLAYTON, Defendant-Appellee.

No. 12248.

Supreme Court of New Mexico.

April 30, 1979.

Martin, Martin & Lutz, James T. Martin, Jr., William L. Lutz, Las Cruces, for plaintiff-appellant.

Kenneth B. Wilson, Roswell, for defendant-appellee.

OPINION

EASLEY, Justice.

Dutton sued Slayton because Slayton closed a road used by Dutton to reach her property. The trial court granted summary judgment for Slayton. Dutton appeals. We reverse.

We examine the issue of whether a public road existed which gave Dutton access. Dutton's complaint and affidavits alleged that a road which crossed Slayton's property was a "public road" because it had been used by Dutton and the public in general for well over ten years. Dutton denied that she had any claim to the use of Slayton's property other than that she had a right to use the "public road". She denied permissive use.

A map drawn up by the county, on which the county was required to show the location of all county highways, was admitted into evidence by stipulation. This map did not show the road claimed by Dutton.

Slayton says that Dutton's sole claim was that the road was a public road and that § 67–2–1, N.M.S.A.1978 defines public roads to be roads dedicated to public use or roads recognized by county authorities. Dutton made no claim that the road had ever been dedicated. The road did not appear on the county's road map, which § 67–4–1, N.M.S.A.1978 requires to show "the complete system of county highways".

Therefore, according to Slayton, the road cannot be a public road, and summary judgment was properly granted.

Dutton contends that § 67–2–1 does not purport to give a comprehensive definition of "public road". The section states that the two classes of roads mentioned are public roads, but this does not prohibit other sorts of roads from being found to be "public roads". New Mexico has in fact recognized the principle that public roads may be created by prescription. *Lovelace v. Hightower*, 50 N.M. 50, 168 P.2d 864 (1946).

The statutory definition is not controlling. Facts necessary to the creation of a prescriptive easement in favor of the public have been properly alleged. Therefore, questions of fact as to the existence of a public easement are raised. Summary judgment was improper.

The decision of the district court is reversed, and the cause is remanded for trial.

IT IS SO ORDERED.

PAYNE and FEDERICI, JJ., concur.

593 P.2d 1072

STATE of New Mexico, Plaintiff-Appellee,

v.

William Allen ADAMS, Defendant-Appellant.

No. 12033.

Supreme Court of New Mexico.

April 30, 1979.

Reginald J. Storment and Martha A. Daly, Appellate Defenders, Santa Fe, for defendant-appellant.

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

OPINION

EASLEY, Justice.

Adams was convicted of first-degree felony murder based on robbery. He appeals. We affirm.

Adams raises two points on appeal: whether substantial evidence supports the trial court's finding that Adams' confession was voluntary; and whether the jury was properly instructed on the essential elements of felony murder.

Adams contends that his confession was not voluntary because it was induced by an implied promise of leniency. He relies on the testimony of Officer Archuleta who testified that Adams had asked him if it might go easier on him if he made a statement; but that Archuleta did not remember his exact reply to Adams. Since he believed he was offered leniency and Archuleta did not remember his *exact* words, Adams claims there was no substantial evidence that he was *not* offered leniency. However, a review of the transcript clearly contradicts Adams' position.

Adams testified at the suppression hearing:

> Well, like I said, when I asked about the leniency, he said he did not—He didn't answer me directly that it would help. He didn't say that it wouldn't help.
>
> . . . . .
>
> Well, he told me that if I would make a statement, now, it would be the best time to make it because it would go easier somehow.

Officer Archuleta testified as follows:

> [H]e implied that he wanted to know whether leniency would be granted and I flat out advised Mr. Adams that I am in no position to make any kind of promises whatsoever and that I want that understood. If he wanted to give me a statement, I will take it. If not, that's all I have to say to you.
>
> . . . . .
>
> I do honestly remember not making any kind of suggestion towards leniency; that much I do know.

After the evidentiary hearing, the trial court denied Adams' motion to suppress his confession. Our question is whether the trial court's decision is supported by substantial evidence. *Rodriquez v. State,* 91 N.M. 700, 580 P.2d 126 (1978). *State v. Watson,* 82 N.M. 769, 771, 487 P.2d 197, 199 (1971) holds:

> A prima facie case for admission is made where the officers testify that the confession was obtained without threat or coercion or promise of immunity. If the accused confesses because he was induced by the promise that his punishment will not be so severe as it otherwise might be, the confession is not admissible because it was not voluntary. State v. Lord, 42 N.M. 638, 84 P.2d 80 (1938).

There is substantial evidence in the record that Adams' confession was not obtained by an express or implied promise of leniency.

Adams argues that the jury was not properly instructed on all the essential elements of felony murder. He relies on *State v. Harrison,* 90 N.M. 439, 564 P.2d 1321 (1977), which held that in a felony murder the death must be caused by the acts of the defendant or his accomplice without an independent intervening force. In *Harrison,* this court stated, "In view of this decision, N.M.U.J.I.Crim. 2.04 . . . will have to be altered to conform herewith." *Id.* at 442, 564 P.2d at 1324.

Paragraph 2 of the uniform instruction, both before and after *Harrison,* required that defendant be found to have caused the death of the victim *during the commission of the felony.*

Adams was tried after the decision in the *Harrison* case, but before the amendment to the instruction. The jury was given a modified instruction which incorporated the language of the *Harrison* opinion. The instruction specified that the state must prove that:

> 3. There is a causal relationship between the robbery and the death of Gregory Martin Kary.

The jury was also instructed that:

> Causation consists of those acts of defendant initiating and leading to the homicide without an independent force intervening, even if defendant's acts are unintentional or accidental.

Adams contends that the jury was not instructed that the victim's death had to have been caused during Adams' commission of the felony of robbery. We do not agree.

The instructions given were adequate to define the necessary causal connection between the robbery and the homicide. To return a verdict of guilty, the jury had to find that the death of the victim was caused by Adams' acts in the commission of the robbery.

We affirm the conviction.

IT IS SO ORDERED.

McMANUS, Senior Justice, and FEDERICI, J., concur.

593 P.2d 1074

David E. JONES, Plaintiff-Appellee,

v.

NEW MEXICO STATE HIGHWAY DEPARTMENT, New Mexico State Highway Commission, Julian Garcia, Kenneth L. Towle, Albert N. Sanchez, Robert C. Martin and James W. Chaney, Defendants-Appellants.

No. 12235.

Supreme Court of New Mexico.

April 30, 1979.

Jeff Bingaman, Atty. Gen., V. Henry Rothschild, Deputy Chief Counsel, Asst. Atty. Gen., Santa Fe, for defendants-appellants.

Michael L. Gregory, Las Vegas, for plaintiff-appellee.

OPINION

PAYNE, Justice.

David E. Jones brought a breach of contract action against the New Mexico State Highway Department and State Highway Commissioners. The complaint was filed in the District Court in San Miguel County. The State moved for dismissal asserting improper venue and insufficient service of process. The District Court in San Miguel County transferred the cause to the District Court in Santa Fe County. The State appealed.

The controlling issue in this case is whether an action against a state officer may be brought in a district court other than the District Court in Santa Fe County, in the absence of a waiver of venue by the state officer.

Section 38–3–1(G), N.M.S.A.1978 states that "suits against any state officers as such shall be brought in the court of the county wherein their offices are located, at the capitol [capital] and not elsewhere."

The State Highway Commissioners are state officers within the meaning of this statute. *See State ex rel. Bureau of Revenue v. MacPherson,* 79 N.M. 272, 442 P.2d 584 (1968); *Tudesque v. New Mexico State Board of Barber Exam,* 65 N.M. 42, 331

P.2d 1104 (1958). The State Highway Commission's office is located at the state capital in Santa Fe. § 67–3–9, N.M.S.A.1978. The Legislature, in enacting this statute, intended that actions against state officers be brought only in Santa Fe County. *State v. Quesenberry,* 74 N.M. 30, 390 P.2d 273 (1964).

We have held that this venue statute is not to be equated with jurisdiction. *Kalosha v. Novick,* 84 N.M. 502, 505 P.2d 845 (1973). Although in *Kalosha* we held that proper venue may be waived, there is no evidence in this case that the State waived venue. To the contrary, the State moved for dismissal of the action alleging improper venue.

Absent a statute giving it such authority, a trial court has no power to change the venue of a misfiled lawsuit. 1 *Moore's Federal Practice* ¶ 0.146[2], at 1660 (2d ed. 1978). Venue was improper in this case, and the District Court in San Miguel County could not properly issue an order for a change of venue.

We need not discuss the issue of service of process raised by the State.

The trial court is reversed. The matter is remanded with instructions to dismiss the action in the District Court in San Miguel County.

IT IS SO ORDERED.

EASLEY and FEDERICI, JJ., concur.

593 P.2d 1075

John C. CLARK, Plaintiff-Appellant,

v.

Louis LeBLANC and Dorothy LeBlanc, his wife, Defendants-Appellees.

No. 11848.

Supreme Court of New Mexico.

May 1, 1979.

William N. Henderson, Albuquerque, for plaintiff-appellant.

David L. Norvell, Albuquerque, for defendants-appellees.

OPINION

EASLEY, Justice.

John C. Clark sued Louis and Dorothy LeBlanc (LeBlanc) to enforce a judgment. The trial court granted a default judgment for Clark. LeBlanc moved to set aside the judgment. The court granted the motion and certified the cause for interlocutory appeal. We granted the appeal and reverse the trial court.

The principal issue is whether service by publication gives the district court jurisdiction in an *in personam* action if it is established that LeBlanc left the state and concealed himself in order to avoid service. We also inquire whether the court erred in failing to find that LeBlanc left the state and concealed himself to avoid service.

Judgment in the first action was against a corporation. The present suit was brought seeking to enforce that judgment against LeBlanc individually, alleging that he was the alter ego of the corporation. Default judgment was entered in favor of Clark. Jurisdiction was based on publication of notice as specified by N.M.R.Civ.P. 4(g), N.M.S.A.1978. LeBlanc claims that *in personam* jurisdiction in this action was lacking due to inadequate service of process.

LeBlanc relies on several cases to the effect that a personal judgment cannot be based upon constructive service of process. *E. g., Sullivan v. Albuquerque Nat. Trust & Savings Bank,* 51 N.M. 456, 188 P.2d 169 (1947); *State v. District Court of Ninth Judicial Dist., Curry County,* 44 N.M. 16, 96 P.2d 710 (1939). It is important, however, that in all of the cases cited, the defendant was not a resident of New Mexico.

Two functions are served by service of process by personal delivery of the papers within the state. First, it shows that defendant has an appropriate relationship to the state and is within the power of the court generally. The LeBlancs do not contest the fact they have such a relationship; they admit that they were and continue to be residents of New Mexico. The "minimum contact" test of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), is clearly satisfied.

The second function served by requiring personal service is to give the defendant notice of the proceeding against him. It is clear that due process prohibits the use of constructive service where it is feasible to give notice to the defendant in some manner more likely to bring the action to his attention. *Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). In *Chapman v. Farmers Ins. Group,* 90 N.M. 18, 558 P.2d 1157 (Ct.App.1976), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977), our Court of Appeals held that service by publication is effective only in *in rem* actions, where the defendant is given constructive notice of the action when the court assumes control of defendant's property located within the jurisdiction.

We agree with the application of the *Chapman* rule in most cases, but we feel that an exception is called for in cases where the defendant, being aware that civil action may be instituted against him, attempts to conceal himself to avoid service of process. In concealing himself, the defendant, by his own action, renders personal service of process impossible. This action constitutes a waiver of notice of the proceedings sought to be avoided. In *Chapman,* the Court of Appeals particularly noted that the record contained no indication that the defendant had deliberately concealed himself and that she had no reason for doing so. To allow a person to escape his civil obligation by purposefully hiding himself would be to encourage deception.

This principle has been used to uphold awards of alimony made against a husband who concealed himself within the state to avoid service of process. Constructive service was held sufficient for such an *in personam* judgment in *Gill v. Gill,* 277 Minn. 166, 152 N.W.2d 309 (1967), and *Roberts v. Roberts,* 135 Minn. 397, 161 N.W. 148 (1917).

Rule 4(g) authorizes service by publication where a defendant

> resides or has gone out of the state, or has concealed himself within the state, has avoided service of process upon him or his or their whereabouts cannot be discovered after due inquiry and search has been made, or is in any manner situated so that process cannot be served upon him or them . . . .

The case in which a resident defendant has effectively concealed himself outside the state clearly satisfied one or more of the requirements.

The trial court concluded that it did not have jurisdiction over LeBlanc, as no personal service was obtained in New Mexico or by the long arm statute outside New Mexico, and that the suit filed by Clark was an "*in personam*" action. It is clear that the decision rested upon the erroneous conception of the law that service by publication would not give rise to *in personam* jurisdiction, even if LeBlanc deliberately concealed himself. Thus, the trial court did not reach the question of whether LeBlanc did purposefully conceal himself to avoid service of process. Since the issue was not material to the consideration by the court, the court's refusal to adopt plaintiff's requested finding to that effect cannot be held to constitute a finding to the contrary. *Cf. Sanchez v. Sanchez,* 84 N.M. 498, 505 P.2d 443 (1973); *Gallegos v. Wilkerson,* 79 N.M. 549, 445 P.2d 970 (1968).

We reverse the trial court's order, as it was based on an incorrect rule of law. We remand the matter to the trial court for a finding as to whether LeBlanc purposefully concealed himself to avoid service of process, further testimony being taken only if desired by the court. If it is determined that there was a purposeful concealment, the default judgment should be allowed to stand; if not, it should be vacated.

IT IS SO ORDERED.

McMANUS, Senior Justice and FEDERICI, J., concur.

594 P.2d 336

STATE of New Mexico, Plaintiff-Appellee,

v.

David SENA, Defendant-Appellant.

No. 3806.

Court of Appeals of New Mexico.

April 3, 1979.

John B. Bigelow, Chief Public Defender, Michael Dickman, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael A. Kauffman, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of burglary. The issue to be discussed concerns defendant's competency to be tried and sentenced. Other issues listed in the docketing statement were abandoned because they were not briefed. *State v. Ortiz,* 90 N.M. 319, 563 P.2d 113 (Ct.App.1977).

We discuss: (1) the competency issues; (2) when the issues were raised; (3) the State's opposition to a hearing; and (4) the hearing to be held.

The Competency Issues

State v. Roybal, 76 N.M. 337, 414 P.2d 850 (1966) states:

> [N]o person shall be called upon to stand trial or be sentenced who because of mental illness is incapable of understanding the nature and object of the proceedings, or of comprehending his own condition in reference thereto, or of making a rational defense.

The parties present the question of competency in terms of the competency of defendant to be tried. Competency to be sentenced may be, and in this case is, a

separate issue. *In re Smith,* 25 N.M. 48, 176 P. 819, 3 A.L.R. 83 (1918). Competency to be sentenced involves the question of whether

> the prisoner has not at the present time, from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court * * *.

In re Smith, supra.

When the Issues of Competency Were Raised

Prior to trial, defendant moved for an examination "for the purpose of determining his mental competency to stand trial . . . ." The ground asserted, by counsel, was that counsel had reason to doubt the competency of defendant to aid him in defending the case. Neither the request for an examination nor counsel's doubt as to defendant's competency raised a question as to defendant's competency to stand trial. There was no showing as to counsel's reasons for his doubt. *State v. Hovey,* 80 N.M. 373, 456 P.2d 206 (Ct.App.1969); see *State v. Hollowell,* 80 N.M. 756, 461 P.2d 238 (Ct.App.1969). In addition, this motion was withdrawn prior to trial. Compare *State v. Madrigal,* 85 N.M. 496, 513 P.2d 1278 (Ct. App.1973).

Prior to trial, defendant executed an affidavit concerning his election to enter a guilty plea. Upon questioning by the trial court concerning this affidavit, defendant informed the trial court that he wished to plead not guilty. Defendant's wish was granted; he was tried and convicted by a jury. Defendant asserts that his "confusion" concerning a guilty plea raised an issue as to his competency to stand trial. We disagree; the transcript of these proceedings may show confusion as to the appropriate plea, but it does not show defendant incapable of understanding the nature and object of the proceedings.

No issue as to competency to stand trial was raised prior to trial. We have not been provided a transcript of the trial; thus, there is nothing indicating the question of defendant's competency was raised during the trial.

After the verdict of guilty was returned, counsel for both parties, and the trial court, agreed that a diagnostic evaluation would be appropriate. Defendant seems to argue that this raised an issue concerning defendant's competency. The argument is frivolous. Diagnostic evaluations are for the purpose of assisting the trial court in determining the appropriate disposition, considering both the interests of the public and the offender. Section 31–20–3(C), N.M.S.A.1978. No issue as to defendant's competency was raised by the fact that counsel and the court agreed there should be a diagnostic evaluation, or by the trial court's order for a diagnostic evaluation.

The diagnostic evaluation, at the penitentiary, recommended against a sentence to the penitentiary, but recommended that defendant be sentenced to a mental hospital for "proper custody and treatment." These recommendations were based on various items, including: 1) defendant was "unable to cooperate in the evaluation process"; 2) defendant's condition "makes him a threat to himself and others"; 3) two weeks into the diagnostic evaluation, defendant attempted suicide by cutting his arm with a razor; 4) during an interview, defendant banged his head into a wall and "stated that he did this in order to 'arrange his thoughts' "; 5) defendant "exhibited signs of organicity." The psychological report states:

> Testing indicates clear-cut, overt psychosis of the schizophrenic type. This means he is having delusions, memory difficulties and confused and bizarre thoughts or beliefs. Hallucinations, psychomotor retardation and withdrawal are probable with this individual.

The items in the preceding paragraph, taken from the diagnostic evaluation, all go

to defendant's condition at the time of the evaluation. The evaluation occurred within five weeks from the date defendant was tried. The evaluation also contained the following items: 1. "David has scars on arms and neck from other serious attempts he has made to take his life." 2. According to defendant, he blacked out frequently. 3. The signs of organicity exhibited were indications of "gross organicity". The time factor, together with all of the items in this and the preceding paragraph, go to defendant's condition at the time of trial.

The diagnostic evaluation raised questions concerning defendant's competency to be tried *and* defendant's competency to be sentenced.

Counsel, and the trial court, knew of the diagnostic evaluation at the time of sentencing. However, at the sentencing hearing, defendant did not seek a hearing on either of the competency issues. Defendant's counsel asked the trial court "to see that David is transferred to the Las Vegas Hospital for further treatment" or, in the alternative, to place defendant on probation. The trial court imposed sentence; its judgment recommended that defendant be transferred to the State Hospital at Las Vegas "for proper custody and treatment as may be necessary." We need not decide whether the trial court should have ordered a competency hearing on its own motion at this point.

After sentencing, defendant moved for a new trial. This motion asserted the diagnostic evaluation raised a reasonable doubt as to defendant's competency to stand trial and as to defendant's competency to understand the nature of the sentencing procedure. Defendant's appeal is from the denial of this motion. By the new trial motion, defendant presented issues as to defendant's competency. In light of the diagnostic evaluation, the trial court should have held a hearing on the competency issues. *State v. Guy,* 79 N.M. 128, 440 P.2d 803 (Ct.App.1968).

The State's Opposition to a Hearing

The new trial motion was based solely on the question of defendant's competency. Although no hearing was held on the competency question, the State contends that denial of the motion was proper.

The State contends the appeal should be decided on the basis of new trial concepts, that the standard for granting a new trial "should be the same no matter what grounds are alleged in the motion for a new trial." The State argues: (a) that evidence as to defendant's competency could have been discovered through the exercise of reasonable diligence and used by defendant at the trial, see *State v. Lucero,* 90 N.M. 342, 563 P.2d 605 (Ct.App.1977); (b) that defendant "had ample time and opportunity to bring the issue of his competency to stand trial before the court" but did not do so; (c) that there is nothing in the record indicating defendant was unable to participate in his defense; and (d) that defendant did not timely raise the competency issue. The State concludes that defendant "should not be permitted to complain through a motion for a new trial when by his own action or inaction the trial court was not presented with the question of his competency." The State relies on *State v. Young,* 91 N.M. 647, 579 P.2d 179 (Ct.App.1978), but that case deals with insanity at the time of committing the offense, and not with competency to be tried or sentenced.

The State's argument overlooks the basic concepts involved in this case. If defendant was not competent to stand trial, he should not have been tried. If defendant was not competent to be sentenced, he should not have been sentenced. If in fact defendant was incompetent, it is contradictory to argue that defendant, in effect, waived the competency issue by inaction or late action. *State v. Guy,* supra. Whether defendant was incompetent to be tried has not been determined. Whether defendant was incompetent to be sentenced has not been determined. What defendant seeks is a hearing on these issues.

Rule of Crim.Proc. 35(b) as worded, both prior to and subsequent to its 1978 amend-

ment, permits the "question" or "issue" of competency to be raised "at any stage of the proceedings." There must, of course, be a sufficient basis for the "question", see *State v. Hovey,* supra, but once there is such a basis the question can be raised at "any stage". In *State v. Noble,* 90 N.M. 360, 563 P.2d 1153 (1977) the question was raised by pretrial motion. In *Territory v. Kennedy,* 15 N.M. 556, 110 P. 854 (1910) the question was raised during the trial. *In re Smith,* supra, considered the question in relation to the propriety of carrying out the sentence of hanging. The question was raised by post-conviction motion in *State v. Guy,* supra.

Why may the question be raised at any stage? Because the conviction of an incompetent, or the sentencing of an incompetent, violates due process of law. *State v. Guy,* supra.

The Hearing to be Held

Defendant is to be accorded a hearing on his competency to stand trial, and if competent to be tried, then on his competency to be sentenced. At the hearing, defendant has the burden of persuasion, by a preponderance of the evidence, that he was incompetent. *State v. Lopez,* 91 N.M. 779, 581 P.2d 872 (1978).

A question not completely answered by prior decisions is, who must the defendant persuade, a judge or jury, when the issue of competency is raised after the trial?

No statute provides for a jury trial on the question of competency to be sentenced. No court rule provides for a jury trial on the question of competency to be sentenced. Rule of Crim.Proc. 35(b), both before and after its 1978 amendment, goes only to competency to stand trial. *In re Smith,* supra, is to the effect that defendant is not entitled to a jury trial on the question of competency to be sentenced.

No current statute provides for a jury trial on the question of competency to be tried. The applicable rule is Rule of Crim. Proc. 35(b) prior to its amendment in 1978. That rule provided that the "court, without a jury" should decide the issue. This provision was held unconstitutional in *State v. Chavez,* 88 N.M. 451, 541 P.2d 631 (Ct.App. 1975). Our ruling was on a limited basis. The right to a jury trial, as it existed at the time of adoption of the Constitution, is secured by N.M.Const., art. II, § 12. A statute, enacted in 1855–56, and in effect when the Constitution was adopted, provided for a jury trial in certain situations. *State v. Chavez,* supra, held that under the statute, the right to a jury trial existed. Support for this result, found in *State v. Folk,* 56 N.M. 583, 247 P.2d 165 (1952), is quoted in *State v. Chavez,* supra.

State v. Noble, supra, explained the evidence required before the question of competency to stand trial was to be decided by the jury. Both *State v. Chavez,* supra, and *State v. Noble,* supra, discussed the right to have a jury decide competency to stand trial when the issue was raised by pretrial motion. See also *State v. Upton,* 60 N.M. 205, 290 P.2d 440 (1955). We have found no New Mexico decision holding there is a right to a jury trial when the issue of competency to stand trial is first raised after the trial. General language in *State v. Folk,* supra, supports such a view, but the question of competency to stand trial was raised during Folk's trial. Thus, the decision in *State v. Folk,* supra, is that there was a factual issue as to Folk's competency to stand trial which should have been submitted to the trial jury.

Territory v. Kennedy, supra, and *State v. Folk,* supra, point out that the right to a jury trial on the question of competency to stand trial depended on the 1855–56 statute, which is quoted in *State v. Folk,* supra. The statute is not a model of clarity. *State v. Noble,* supra, and *State v. Chavez,* supra, were of the view that a right to a jury trial existed on the issue of competency to stand trial, if by pretrial motion, there was reasonable doubt as to the defendant's competency to stand trial. Rule of Crim.Proc. 35(b)(2)(i), as amended in 1978, takes a more restricted view. That rule permits the competency to stand trial issue, when presented by pretrial motion, to be decided by the

trial court or, in the trial court's discretion, by a jury. We cannot reconcile the amended rule with *State v. Noble,* supra, and *State v. Chavez,* supra. We recognize, however, that the 1855–56 statute is ambiguous, requiring interpretation, and that language in *Territory v. Kennedy,* supra, supports the approach taken in the amended rule. See also language in connection with the motion for rehearing in *State v. Upton,* supra.

Although amended Rule of Crim.Proc. 35(b)(2)(i) is not applicable in this case, the approach taken by the rule indicates a restrictive approach to the right to a jury trial on the issue of competency to stand trial when the issue is presented for decision prior to trial. Such an approach is consistent with *In re Smith,* supra, which indicated there was no right to a jury trial on the issue of competency to be sentenced. Consistent with these views, we hold there is no right to a jury trial on the issue of competency to stand trial when that issue is first raised, as in this case, at the sentencing hearing.

The cause is remanded to the trial court for a hearing on the question of defendant's competency to stand trial and the question of defendant's competency to be sentenced. Both issues are to be decided by the trial court, without a jury. If defendant is found to have been incompetent to stand trial, the conviction and the sentence are to be vacated. If defendant is found to have been competent to stand trial, but incompetent to be sentenced, the conviction is to remain in effect, but the sentence is to be vacated. If defendant is found to have been competent on both issues, the judgment and sentence remain in effect.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

594 P.2d 340

STATE of New Mexico, Plaintiff-Appellee,

v.

Joseph LUNA, Defendant-Appellant.

No. 3757.

Court of Appeals of New Mexico.

April 5, 1979.

David G. Gilbert, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Lawrence A. Gamble, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

ANDREWS, Judge.

Following a jury trial in Bernalillo County District Court, defendant was convicted of robbery and conspiracy and acquitted of aggravated battery. Defendant, appellant here, was one of four occupants in a car when another passenger left the car and committed a robbery. The central question is whether the defendant was merely present in the vehicle at the time of the offense or whether he participated in the criminal plan and criminal acts. We affirm the robbery conviction and remand for further proceedings in regard to the conspiracy conviction.

Facts

During the afternoon of May 22, 1977, defendant, Joseph Luna (Luna) along with Patrick Gonzales (Gonzales) and Donald Juarez (Juarez), was a passenger in a Nova automobile driven by David Wolff (Wolff). Wolff drove the car into the Northdale Shopping Center parking lot where Juarez left the car and shortly thereafter seized the purse of an elderly woman, knocking her to the pavement as he did so.

Juarez then ran back across the parking lot, with the purse, and jumped into the Nova which was waiting with an open door. Wolff drove the car from the lot. None of the others left the Nova while it was parked in the lot.

A witness at the shopping center heard the victim calling for help and saw a young man get into a Nova containing three other people. The witness called the police and described the incident and the car.

After receiving a call concerning the incident, Officer Noga of the Bernalillo County Sheriff's Department spotted and followed the Nova. When the car entered a filling station, the officer blocked the Nova with his cruiser. Soon, two other officers (Lemmons and Kettles) joined Officer Noga and the three searched the Nova and its occupants. A purse matching the description of that taken, and containing the victim's identification, was found in the front seat of the car. Money in the denominations the victim stated she had carried in her purse was found in the possession of Wolff and Gonzales. When the officers searched the car, they found currency stuffed between the top and bottom of the front seat and under the left rear floor mat, and change beneath both the front and rear floor mats on the left and right sides. No money was found on the person of defendant Joseph Luna and he stated "I did not even touch the money."

On direct examination, Gonzales testified that he, Wolff, Juarez and Luna were riding around. They were all sniffing paint. They needed gas for the car because they were running low, but they "didn't have any money." Juarez was talking about getting a purse. They took Juarez over to the Northdale Shopping Center. When asked, "Did you discuss what you were going to do at the Northdale Shopping Center?" Gonzales answered, "Yes." When asked what was discussed, Gonzales stated that he said he was "going to stay in the car" and that "I didn't want nothing to do with it. Nobody else did I guess. Don Juarez wanted to steal a purse. He can do what he wants to, you know." But when asked, "Did you all agree that he would go out and snatch a purse?" he answered, "Yes." When asked, "When you decided where to go and what to do there, did Mr. Luna agree to it?" he stated, "I guess we all agreed to it because we were all in it, you know." Officer Noga testified that after the car had been stopped by the police, defendant Luna told him, "Give us a break."

When viewed in the light most favorable to the State, *State v. Parker,* 80 N.M. 551, 458 P.2d 803 (Ct.App.1969), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969), the record shows: (1) Luna told Officer Foster that they were driving around trying to find some money and they decided to stop at the Northdale Shopping Center; (2) Luna knew that Juarez was going to snatch the purse because they had "discussed it over in the car;" (3) prior to stealing the money the

occupants of the car didn't have any money; (4) they needed gas for the car because they were running low; (5) after they left the shopping center, they went to a gas station; (6) they all agreed that Juarez would go out and steal the purse; (7) after Juarez stole the purse and ran back to the car he jumped in the open door, and the car immediately took off; (8) when the car was found by the officers there was money stuffed in the crevice between the top and bottom of the front seat between Wolff and Luna; and (9) there was change on the front floorboard. Luna was in the front seat on the passenger side.

Wolff and Juarez were tried before the same jury on April 25, 1978. Wolff was found guilty of robbery and acquitted of conspiracy and aggravated battery, and Juarez was convicted of robbery and aggravated battery with great bodily harm and acquitted of conspiracy. Patrick Gonzales pleaded guilty to robbery and aggravated battery and the conspiracy count against him was dismissed. Defendant Luna's trial was held June 19, 1978, and he received concurrent sentences of two-to-ten years and one-to-five years on the robbery and conspiracy counts, respectively. These sentences were suspended and Luna was put on three years probation and ordered to pay the victim $1,000.00 in restitution.

The issues presented in regard to Luna's conviction relate to: (1) substantial evidence; (2) admission and relevancy of lay opinion; and (3) effective assistance of counsel.

Sufficiency of the Evidence

Although aiding and abetting and conspiracy are separate offenses, *State v. Armijo,* 90 N.M. 12, 558 P.2d 1151 (Ct.App. 1976), the same set of facts is applicable to each offense in this case.

(1) Aiding and Abetting

Neither presence, nor presence with mental approbation is sufficient to sustain a conviction as an aider or abettor. Presence must be accompanied by some outward manifestation or expression of approval. *State v. Salazar,* 78 N.M. 329, 431 P.2d 62 (1967). There must be a community of purpose, a partnership, in the unlawful undertaking. *State v. Harrison,* 81 N.M. 324, 466 P.2d 890 (Ct.App.1970). This community of purpose may be shown by evidence of acts, conduct, words, signs or any means sufficient to incite, encourage or instigate commission of the offense. *State v. Atwood,* 83 N.M. 416, 492 P.2d 1279 (Ct. App.1971), cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Although defendant admits he was a passenger in the car when Juarez snatched the purse, he asserts that the evidence shows only that he was in the presence of Juarez and Wolff, evidence insufficient to support the conviction. We disagree, and find sufficient outward manifestation and expression of approval of the crime to support the conviction in: (a) the fact that the four occupants of the car were riding around without money which they needed for gas; (b) that they went to a gas station after the robbery; (c) that the police found money in the area of the car where the defendant was seated; (d) that the four occupants of the car "discussed it over in the car;" (e) that they agreed that Juarez would steal the purse; (f) that they "were all in it." All of these facts support a finding of the "community of purpose" necessary to establish a charge of aiding and abetting.

(2) Conspiracy

Gonzales testified that they all "agreed" that Juarez would snatch a purse. When queried as to whether the four of them had reached an agreement as to the commission of the crime, he stated, "I guess we all agreed to it 'cause we were all in it."

Defendant argues that the only reasonable inference that can be drawn from the totality of Gonzales's testimony is that if the defendants agreed to do anything, it was to let Juarez carry out his unlawful intentions on his own. We disagree. The facts show that the car door was open for

Juarez, that Wolff and Gonzales had money in their possession, and that money was within the immediate area where Luna was seated. These facts support an inference that the occupants of the car agreed to assist Juarez in carrying out his unlawful intentions.

Defendant also argues that Gonzales's testimony is so inconsistent, vague and speculative that no inference regarding Joseph Luna can reasonably be drawn from it. This Court will not weigh the evidence. The determination of the weight and effect of evidence, including all reasonable inferences to be drawn from both direct and circumstantial evidence, is reserved for determination by the trier of facts, which in this case is the jury. *State v. Bloom,* 90 N.M. 192, 561 P.2d 465 (1977).

Opinion Testimony

The testimony which defendant argues was improper and to which objections were made at trial is as follows:

Q. Did you all agree that he (Juarez) would go out and snatch the purse?
MR. JAFFEE: Objection Your Honor.
A. Yes.
MR. JAFFEE: The question is improper.
THE COURT: No, it is permitted. Overruled.

Q. Mr. Gonzales, when you have stated on examination at this point, that before you decided where to go . . .
MR. JAFFEE: Objection Your Honor, there has been no such statement.
THE COURT: Let me hear the rest of the question.
Q. And what you were going to do, did Mr. Luna specifically enter into the agreement of what to do?
MR. JAFFEE: Objection.
THE COURT: That's permitted. Overruled.
MR. JAFFEE: May I state the basis for it.
THE COURT: He may answer the question. Overruled.
A. Now you were saying . . .?
Q. Let me state it again. Listen very carefully. When you decided where to go and what you were going to do there, did Mr. Luna agree to it?
A. We all agreed to it, because we were all in it.

Rule 701, New Mexico Rules of Evidence in regard to opinion testimony by a lay witness states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Defendant argues that Gonzales's opinions were not rationally based on his perceptions because (1) they were unsupported by a necessary factual foundation; (2) his capacity to perceive and understand the events had been severely impaired; and (3) his testimony was riddled with fundamental inconsistencies. A ruling on such evidence is within the discretion of the trial court. *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).

Several recent New Mexico decisions deal with the admissibility of lay opinion testimony and hold that a non-expert witness may give opinion testimony concerning his or her own perceptions where that opinion is helpful to the determination of a fact in issue. *State v. Tixier,* 89 N.M. 297, 551 P.2d 987 (Ct.App.1976); *Jesko v. Stauffer Chemical Company,* 89 N.M. 786, 558 P.2d 55 (Ct.App.1976). Under Evidence Rule 701 and these cases, the foundation required for admitting such evidence is a showing of first-hand knowledge on the part of the witness, and a rational connection between the observations made and the opinion formed. If these two requirements are present and the witness's opinion might be helpful in the determination of the facts in issue, the opinion is admissible. The re-

quirement of a rational basis is satisfied if the opinion or inference is one which a normal person would form on the basis of the observed facts. 3 Weinstein's Evidence ¶ 701[02].

It is not disputed that Gonzales was present in the car during the time the discussion in question took place, and this is sufficient to establish the requisite first-hand knowledge. His opinion as to whether the four occupants of the car were in agreement is well within the bounds of what a normal person would form on the basis of his observations. This being so, there was a sufficient foundation laid for the admission of the opinion testimony.

Whether Gonzales had the capacity to perceive and understand the events is the next issue. Gonzales stated he had been smoking marijuana and was "high" when he entered the car. Subsequently, he sniffed paint fumes which made him "higher", but when asked "Did you know what was happening that day?" he replied, "I guess I could say I did know more or less what was going on."

Gonzales's testimony was consistent with other versions of what happened that day. Gonzales's statement, given to Sheriff Deputy Kingsbury and admitted as State's Exhibit No. 3, evidences the rationality of the witness's perception and memory. While Gonzales admitted that he had smoked marijuana and sniffed paint, he did remember the date, the time, who he was with, who owned the car, what Juarez said and what occurred just prior to and after the purse snatching.

Ineffective Assistance of Counsel

Defendant argues that he was denied effective assistance of counsel because the trial attorney: (1) did not attempt to revise conspiracy charges against defendant Luna after defendants Juarez and Wolff were acquitted of conspiracy at a separate trial; (2) made inflammatory and prejudicial remarks in closing; (3) questioned Patrick Gonzales on his prior written statement which had not been mentioned by the State on direct examination; (4) failed to prepare and submit jury instructions; and (5) made no pretrial motions.

Initially it should be noted that this issue is not listed in the docketing statement. Rule 501(a)(2) N.M.R.App.P. (Crim.) limits the issues in the brief-in-chief "to the issues designated in the docketing statement." However, defendant asserts that because it would be unreasonable to expect that the trial attorney, responsible for filing the docketing statement [Rule 205(b) N.M.R. App.P. (Crim.)] would allege his own incompetence, such deficiency should not prejudice defendant's right to assert the issue on appeal. We would agree in most situations. In the instant case, though, where judgment and sentence were entered on August 11, 1978, the docketing statement was filed August 22, 1978, and a different lawyer was appointed counsel on appeal on August 24, 1978, this second lawyer could have requested leave to amend the docketing statement in a timely manner.

Still, because the right to effective counsel is a fundamental right, *State v. Torres,* 78 N.M. 597, 435 P.2d 216 (Ct.App. 1967), subject to review regardless of adherence to procedural rules, Rule 308, N.M.R. App.P. (Crim.); *State v. Reynolds,* 79 N.M. 195, 441 P.2d 235 (Ct.App.1968), arguments made pursuant to this issue will be entertained.

The doctrine of fundamental error is resorted to in criminal cases only if the innocence of the defendant appears to be indisputable or if the question of his guilt is so doubtful that it would shock the conscience to permit his conviction to stand. *State v. Torres, supra; State v. Lauderdale,* 85 N.M. 157, 509 P.2d 1352, cert. denied, 85 N.M. 144, 509 P.2d 1339 (Ct.App.1973). If there is a total absence of evidence to support a conviction, as well as evidence of an exculpatory nature, then an appellate court has the duty to see that substantial justice is done and to set aside the conviction. *State v. Salazar,* 78 N.M. 329, 431 P.2d 62 (1967).

The evidence in this case is not so deficient. However, there is a substan-

tial question raised by the failure of defense counsel to take any pretrial action on the conspiracy charge. The conspiracy charge against Gonzales was dismissed two months before defendant went to trial. The other two codefendants, (Juarez and Wolff) were acquitted of conspiracy following a jury trial a day after the count was dismissed against Gonzales. Although defendant might properly have been charged as combining with Gonzales, he was tried on the charge of a four-man conspiracy. His trial counsel did nothing to attack or limit that charge by motion or otherwise. Cf. *State v. Tijerina,* 86 N.M. 31, 519 P.2d 127 (1973). A criminal defendant is denied the effective or competent assistance of counsel "if the trial, considered as a whole, is a mockery of justice, a sham, or a farce." *State v. Garcia,* 85 N.M. 460, 513 P.2d 394 (1973). Considering the history of the charges of the indictment against all four defendants, the trial on the issue of conspiracy, as submitted, may have been a mockery.

The case is remanded to the district court where defendant shall have the right to file a petition in an independent proceeding on the sole issue of trial counsel's effective or ineffective representation of defendant for the charge of conspiracy. If a final determination is made that such representation was effective, the conspiracy conviction shall be affirmed. If not, defendant shall be entitled to a new trial on the conspiracy charge. See *State v. Doe,* 90 N.M. 404, 564 P.2d 207 (Ct.App.1977); *State v. Debarry,* 86 N.M. 742, 527 P.2d 505 (Ct.App.1974); *State v. Gurule,* 84 N.M. 142, 500 P.2d 427 (Ct.App.1972); *State v. Torres,* 81 N.M. 521, 469 P.2d 166 (Ct.App.1970).

The judgment of the court is affirmed in part and reversed in part and the cause is remanded for such proceedings as are consistent with this opinion.

IT IS SO ORDERED.

WALTERS, J., concurs.

SUTIN, J., concurs, specially.

SUTIN, Judge (Specially Concurring).

I concur.

To remand this case to the district court under the present standards fixed for "ineffective assistance of counsel," will be a useless gesture.

In 1976, the Supreme Court adopted a rule that improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel, unless, taken as a whole, the trial was a mockery of justice; that counsel is presumed competent; that a defendant is denied his right to effective assistance of counsel only when his trial becomes a sham or a farce. *State v. Moser,* 78 N.M. 212, 430 P.2d 106 (1967). This standard encompasses a "mockery," "sham" or "farce." It has continued to this day.

Defendant should petition the Supreme Court to determine whether the "mockery of justice" rule should be clarified or overruled. In my opinion, it should be discarded. If the Supreme Court grants certiorari, this opinion will not be published. So be it.

This rule arose out of an early concept. If a defendant selected an incompetent lawyer, the acts of the lawyer were imputed to the defendant. Every poor defendant had a duty to select a successful, experienced competent attorney to defend him or seek the assistance of the public defender with the assurance that the lawyer appointed was experienced, active in trial practice, familiar with the practice and procedure, competent and dedicated.

Criticism of the "mockery of justice" concept has been so intense, that courts have adopted a modern view. *State v. Hester,* 45 Ohio St.2d 71, 45 Ohio Ops. 156, 341 N.E.2d 304 (1976); *People v. Gonzales,* 37 Colo.App. 8, 543 P.2d 72 (1975); *Baxter v. Rose,* Tenn., 523 S.W.2d 930 (1975); *McQueen v. Swenson,* 498 F.2d 207 (8th Cir. 1974); *Modern Status Of Rule As To Test In Federal Court Of Effective Representation By Counsel,* 26 ALR Fed. 218 (1976). American Bar Association Standards relating to defense function would be enlightening. Justice Erickson of the Supreme Court of Colorado, a foremost proponent of American Bar Association Standards, said:

Justice cannot be the product of our courts under an adversary system if defense counsel fails to serve as an advocate who is competent and well prepared to represent his client. American Bar Association Standards for Criminal Justice Relating to The Defense Function §§ 1.1(a) and 1.1(b). In reviewing the record in this case, *we can only conclude that defense counsel fell far short of the minimum requirements of competency* and thereby denied the defendant his right to the effective assistance of counsel. [Emphasis added.] *People v. White,* 182 Colo. 417, 514 P.2d 69, 72 (1973).

The test to be adopted is whether an accused under all the circumstances, including the fact that he had retained counsel, had a fair trial and substantial justice was done. *Hester, supra.* Justice demands that an accused shall have an attorney who renders reasonably effective assistance from the time of retention or appointment through the trial of the case.

It is also my opinion that a convicted person is entitled to the effective assistance of counsel on appeal. An appellate court can chastise an attorney who fails in his duties, but it should not allow carelessness, mistakes, or inexperience, or traditional technical omissions to deny this person a fair appeal or substantial justice.

In any event, the trial court can determine under the "mockery of justice" rule, whether defendant's counsel fell short of the minimum requirements of competency in preparation for and during the trial of the case.

594 P.2d 347

STATE of New Mexico, Plaintiff-Appellant,

v.

Ray D. MARES, Defendant-Appellee.

No. 3758.

Court of Appeals of New Mexico.

April 5, 1979.

Writ of Certiorari Denied May 2, 1979.

Jeff Bingaman, Atty. Gen., Jacob G. Vigil, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

Ernesto J. Romero, Gary V. Stone, Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

Defendant, identified as a sheriff's department peace officer, was charged with the unlawful touching or application of force with intent to injure, by use of a firearm. This was a charge of aggravated battery, with firearm enhancement. Sections 30–3–5 and 31–18–4, N.M.S.A.1978. At a pretrial hearing, the trial court granted defendant's motion to dismiss. The State appealed. We reverse, discussing: (1) propriety of the pretrial ruling, and (2) double jeopardy.

Propriety of the Pretrial Ruling

Defendant's motion was entitled: "MOTION TO DISMISS INDICTMENT FOR FAILURE TO STATE A CRIME." The motion pointed out that aggravated battery required an " 'unlawful' " action. The motion alleged that defendant was at all times "in the lawful discharge" of his duties as a peace officer and "therefore, as a matter of law, the acts constituting the factual basis for the indictment herein were lawful and the prosecution . . . cannot lie." The motion asked for an evidentiary hearing. See Rule of Crim.Proc. 33(g).

Over the prosecutor's objection, the trial court conducted an evidentiary hearing. The trial court's order "finds and concludes as a matter of law, that Defendant was at all times in the lawful performance of his duties and responsibilities as a commissioned peace officer and acting within the scope of his appointed duties . . . ." The trial court ordered the indictment dismissed on the basis that it "fails to state a crime, because at all times material hereto Defendant's acts, relied upon . . . to show guilt . . . on the part of the Defendant, were lawful acts . . . ."

The contention, that the indictment failed to charge a crime, is frivolous. The indictment complied with the requirements of Rule of Crim.Proc. 5(d).

Defendant's motion sought a pretrial ruling on a factual question—the lawfulness of defendant's action in shooting the victim. The trial court decided this factual question. In deciding this question the trial court erred in two ways.

Rule of Crim.Proc. 33(d) states: "Any defense, objection or request which is capable of determination without a trial on the merits may be raised before trial by motion."

When is a matter capable of determination without a trial on the merits? *United States v. Covington,* 395 U.S. 57, 89 S.Ct. 1559, 23 L.Ed.2d 94 (1969) states: "A defense is thus 'capable of determination' if trial of the facts surrounding the commis-

sion of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Gulf Oil Corp.,* 408 F.Supp. 450 (W.D.Pa.1975) states that a motion to dismiss "must not attempt to contradict the material allegations of the indictment. This, the Court believes, is the holding of *United States v. Covington, supra* . . . ."

Examples of matters which can be determined prior to trial are unkept promises made on behalf of the prosecution, *State v. Session,* 91 N.M. 381, 574 P.2d 600 (Ct.App. 1978), and deprivation of the right to counsel, see *State v. Allen,* 91 N.M. 759, 581 P.2d 22 (Ct.App.1978). Rule of Crim.Proc. 18 contemplates that a defense motion to suppress evidence is to be made in advance of trial. See *State v. Blea,* 92 N.M. 269, 587 P.2d 47 (Ct.App.1978). The facts of the crime are not involved in these matters.

The lawfulness of defendant's action, in shooting the victim, does involve the facts of the crime. Defendant's claim of lawfulness contradicts the indictment allegation of unlawfulness. In deciding the lawfulness of defendant's action in advance of trial, the trial court violated Rule of Crim.Proc. 33(d) because lawfulness was not capable of determination without a trial on the merits. See *United States v. Knox,* 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275 (1969); *People v. Thomas,* 74 Misc.2d 6, 343 N.Y. S.2d 1010 (1973). *State v. Murray,* 91 N.M. 154, 571 P.2d 421 (Ct.App.1977) is not inconsistent with this holding because *Murray* involves the special rules applicable to the question of insanity at the time of the offense.

The trial court's first error was in deciding, in advance of trial, a question involving the facts of the crime. Its second error was in deciding a question which was for the jury to decide.

State v. First Judicial Dist. Court, 52 N.M. 28, 191 P.2d 334 (1948) points out that trial by jury is the normal and, in most instances, the preferable mode of disposing of issues of fact in criminal cases alleging felonies; that maintenance of the jury as the fact-finding body in felony cases is of great importance and is to be jealously guarded. Consistent with this view, waiver of the right to jury trial by a defendant requires the consent of the prosecutor and the approval of the trial court. Rule of Crim.Proc. 38; *State v. First Judicial Dist. Court,* supra.

The limited authority of the trial court to usurp the jury's fact-finding function in felony trials is illustrated by cases involving mental capacity. The trial court may determine the question of competency to stand trial only when there is no reasonable doubt as to competency. *State v. Noble,* 90 N.M. 360, 563 P.2d 1153 (1977); see *State v. Lopez,* 91 N.M. 779, 581 P.2d 872 (1978). The trial court may determine the question of insanity at the time of the offense only when there is no conflicting evidence on the insanity issue. *State v. Murray,* supra.

The limited authority of the trial court to decide factual questions concerning the lawfulness of the actions of a peace officer has been decided. The reasonableness of an officer's action is a jury question; the question of reasonableness is to be taken from the jury only when "the minds of reasonable men could not differ . . . ." *Alaniz v. Funk,* 69 N.M. 164, 364 P.2d 1033 (1961); see *State v. Vargas,* 42 N.M. 1, 74 P.2d 62 (1937); compare *Mead v. O'Connor,* 66 N.M. 170, 344 P.2d 478 (1959).

The trial court called upon the prosecutor, at the pretrial motion hearing, to present the prosecution evidence on the lawfulness of defendant's shooting of the victim. The prosecutor properly declined to do so, pointing out that the matter could not be decided in a pretrial motion hearing. The trial court decided the question of lawfulness on the basis of defendant's testimony. The prosecutor's position as to the evidence was "that we have eye witness [sic] testimony . . . to show what occurred in this case. It is that the officer fell, became enraged and shot the man." Compare *Mead v. O'Connor,* supra. If, when required to present its evidence, see Rule of Crim.Proc. 40, the prosecution presented evidence supporting its position, the trial

court could not have properly decided the question because it would have been a matter to be decided by the jury.

The trial court could not properly decide the question of lawfulness either in advance of trial or at trial, absent a waiver of the right to have the jury determine the facts, or absent prosecution evidence on the question of lawfulness. Because of the trial court's limited role in deciding factual questions in this felony case, its decision concerning lawfulness was error because it usurped the jury's function to decide the facts.

Double Jeopardy

Although the trial court erred in deciding the question of lawfulness in a pretrial proceeding, defendant asserts this Court may not review the propriety of the lawfulness ruling by the trial court. In addition to ruling that defendant's action was lawful, the trial court ruled "[t]hat the Defendant is not guilty . . . ." Defendant asserts we have no authority to review an acquittal, see § 39–3–3(B), N.M.S.A.1978, even when the acquittal was erroneous.

■ The State's right of appeal is governed by statute. *State v. Ashcroft,* 32 N.M. 209, 252 P. 1001 (1927). Section 39–3–3(B)(1), supra, authorizes an appeal from an order dismissing an indictment. The trial court dismissed the indictment. However, § 39–3–3(C), supra, states that no appeal shall be taken when the Double Jeopardy Clause of the federal or state Constitutions prohibits further prosecution. If the Double Jeopardy Clause is applicable, we cannot review an acquittal, even if the acquittal was erroneous. See *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

■ The trial court's acquittal ruling does not, however, answer the double jeopardy question. If the acquittal ruling was in a proceeding in which defendant was not in jeopardy, the acquittal rule is not applicable. *Serfass v. United States,* 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975) explains:

Although articulated in different ways by this Court, the purposes of, and the policies which animate, the Double Jeopardy Clause . . . are clear. "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . * * * "

As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy." . . . In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. . . . In a nonjury trial, jeopardy attaches when the court begins to hear evidence. . . . The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is "put to trial before the trier of the facts, whether the trier be a jury or a judge." . . .

Under our cases jeopardy has not yet attached when the District Court granted petitioner's motion to dismiss the indictment. Petitioner was not then, nor has he ever been, "put to trial before the trier of facts." The proceedings were initiated by his motion to dismiss the indictment. Petitioner had not waived his right to a jury trial, and, of course, a jury trial could not be waived by him without the consent of the Government and of the court. . . . In such circumstances, the District Court was without power to make any determination regarding petitioner's guilt or innocence. . . . At no time during or following the hearing on petitioner's motion to dismiss the indictment did the District Court have jurisdiction to do more than grant or deny that motion, and neither before nor after the ruling did jeopardy attach.

The proceedings in this case were on defendant's motion to dismiss the indictment. There had been no waiver of jury trial. The trial court "was without power" to make any determination regarding defendant's guilt or innocence. Defendant was not put to trial before the trier of facts by the motion hearing initiated by defendant. Defendant was not in jeopardy at the motion hearing. The dismissal "was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend. . . . [I]n such cases a trial following the Government's successful appeal of a dismissal is not barred by double jeopardy . . . ." *United States v. Sanford,* 429 U.S. 14, 97 S.Ct. 20, 50 L.Ed.2d 17 (1976).

The order dismissing the indictment is reversed. The cause is remanded with instructions to reinstate the case on the trial docket.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

594 P.2d 351

ROGERS MORTUARY, INC., a New Mexico Corporation, Plaintiff-Appellee,

v.

John G. WHITE, Defendant-Appellant.

No. 3653.

Court of Appeals of New Mexico.

April 10, 1979.

Bradley D. Tepper, Menig, Sager, Curran & Sturges, Albuquerque, for defendant-appellant.

Roberto C. Armijo, Las Vegas, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Plaintiff sued defendant for the balance due on a Funeral Purchase Agreement entered into between plaintiff and defendant. The trial court held for plaintiff that as a matter of law the CCPA, Title I, known as the Truth in Lending Act (The Act) was inapplicable to the transaction. The jury returned a verdict for plaintiff on the balance due. Defendant appeals from the judgment entered. We affirm.

On appeal, defendant claims plaintiff violated The Act and therefore defendant was entitled to a directed verdict. In the alternative, defendant contends this issue of plaintiff's violation of The Act should have been submitted to the jury. We disagree.

On March 28, 1975, plaintiff and defendant entered into a Funeral Purchase Agreement. The pertinent terms of the agreement read:

> TERMS: The debt ($1062.36) represented by this agreement is due upon completion of the services to be rendered. However, no interest will be added for a minimum of 30 days, after which 1/12 of the annual maximum rate of legal interest permissible will be charged monthly on any balance past due.

The funeral was held and services performed on March 29, 1975. The debt was due on that date.

This case is governed by § 103(f) and (e) of The Act (15 U.S.C.S. § 1602(f) and (e)).

Section 1602(f) and (e) read in pertinent part:

> (f) The term "creditor" refers only to creditors who regularly extend . . . credit . . . for which the payment of a finance charge is or may be required, whether in connection with . . . sales of . . . services, or otherwise. . . .
>
> (e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

The Federal Reserve Board issued a set of regulations known as Regulation Z which is codified in Title 12, Part 226 of the Code of Federal Regulations. Regulation Z, § 226.4(c) reads in pertinent part:

> A late payment . . . is not a finance charge if imposed for actual unanticipated late payment . . . .

The question for decision is:

> Was plaintiff a creditor within the definition of The Act? In other words was plaintiff a person who permitted defendant to defer payment of the debt incurred in the Funeral Purchase Agreement and required defendant to pay interest or a finance charge?

The answer is "No." Plaintiff was not such a creditor and was not, therefore, governed by The Act. *Bright v. Ball Memorial Hospital Ass'n, Inc.*, 463 F.Supp. 152 (D.Ind. 1979).

The Act was created to assure "meaningful disclosure of credit terms" to enable consumers to compare credit prices and to "avoid the uninformed use of credit." 15 U.S.C.S. § 1601.

Examples of situations which The Act was designed to address are personal loans made by a consumer finance company or bank, retail installment sales from a department store or auto dealer, and sales or

loans made pursuant to a credit card. Warren-Larmore, *Truth in Lending: Problems of Coverage*, 24 Stanford L.Rev. 793 (1972).

The Funeral Purchase Agreement does not fall within any of the above categories. Credit is extended when a consumer incurs a debt and the parties agree to a repayment schedule which allows for the deferred payment of the debt (Id. 796).

We find no provision in the Funeral Purchase Agreement that extends "credit" to defendant. There is nothing in the Agreement granting defendant the right to defer payment of the debt or the right to repay the debt under a repayment schedule. The debt incurred was due on March 29, 1975, the day the funeral services were performed. However, if defendant failed to pay this debt for more than 30 days, and was late in payment thereafter, then defendant was charged with interest each month on any balance past due. This does not constitute a finance charge. *Garland v. Mobil Oil Corporation*, 340 F.Supp. 1095 (D.C.Ill.1972).

Defendant was the only party attempting to interpret the Agreement as an extension of credit. On July 8, 1975, some 13 weeks after the debt was incurred, defendant mailed plaintiff $100.00 as a part payment and wrote:

> Please do not expect me to pay you any interest in this indebtedness . . . so please do not add this to the debt.

On April 6, 1976, a year after the debt was due and payable, defendant wrote plaintiff:

> I shall be willing to pay you $100.00 per month until the bill is paid, with a reasonable amount of interest.
>
> Now, you are demanding the full amount of which I do not have, and I do not know when I shall have it all in one lump sum. I am sure that no just court shall expect me or anyone else to pay that does not have it. Now, if you want that kind of a settlement kindly let me know—so I may get this bill straightened out and settled.

Plaintiff rejected defendant's offer to pay in installments.

On August 3, 1976, plaintiff filed its complaint to recover $962.36, the balance due, plus interest. On November 21, 1977, 15 months thereafter, defendant offered plaintiff judgment in the amount of $627.36. This offer was not accepted. Around January 20, 1978, two months before trial, defendant paid plaintiff on account an additional sum of $600.00. As each payment was made by defendant, plaintiff insisted on payment of the entire debt. The payments were not accepted as "installment" payments or as an extension of "credit."

On March 27, 1978, 3 years after the debt was incurred, and 19 months after the complaint was filed, defendant went to trial before a jury to avoid payment of $362.36 plus interest, the balance due on the Funeral Purchase Agreement. On May 16, 1978, after judgment was entered, defendant gave notice of appeal, posted a supersedeas bond in which $802.00 was deposited in the registry of the court, paid costs of appeal in the sum of $275.24 and an unknown amount in attorney fees.

Defendant did not establish an extension of credit. Defendant sought to avoid payment of a just obligation. Plaintiff was not a creditor as a matter of law.

Affirmed.

IT IS SO ORDERED.

WOOD, C. J., and ANDREWS, J., specially concurring.

WOOD, Chief Judge and ANDREWS, Judge (specially concurring).

The evidence does not establish a relationship between the parties other than as stated in the Funeral Purchase Agreement. That agreement does not show an extension of credit within the meaning of 15 U.S.C. § 1602(e). We concur in the portion of the opinion which discusses the statute and the result reached. However, the comments on the efforts of defendant to "create" an extension of credit and to avoid payment are unnecessary. We do not join in those comments.

594 P.2d 742

Petra G. RIBERA, Petitioner-Appellee,

v.

EMPLOYMENT SECURITY COMMISSION and Mrs. Brian O'Neil, Respondents-Appellants.

No. 12040.

Supreme Court of New Mexico.

April 18, 1979.

Rehearing Denied May 16, 1979.

Jeff Bingaman, Atty. Gen., R. Baumgartner, Asst. Atty. Gen., Human Services Dept., Albuquerque, for respondents-appellants.

Bruce P. Moore, Santa Fe, for petitioner-appellee.

OPINION

FEDERICI, Justice.

Ribera (appellee) was employed as a housekeeper. She terminated her employment because of pain she suffered while performing her housekeeping duties. She had been advised by her physician that the pain which resulted from her arthritis would not cease so long as she continued the housekeeping job. It is undisputed that appellee suffered from arthritis for several years during her employment and that the original arthritic condition itself was not caused by the employment.

Appellee applied for unemployment compensation after leaving her employment. The Employment Security Commission (now the Employment Services Division of the Human Services Department) disqualified appellee from receipt of unemployment benefits until she had obtained new work and earned wages equal to five times her weekly benefit amount, pursuant to § 51–1–7, N.M.S.A. 1978. Appellee filed a petition for writ of certiorari in the district court seeking review of the Commission's decision. The district court reversed the Commission's decision and it appeals.

As its first point the Commission argues that the district court erred in its decision that the findings and conclusions made by the Commission, after hearing, were not supported by substantial evidence.

Section 51–1–7 reads:

An individual shall be disqualified for benefits:

A. if it is determined by the commission that he left his employment voluntarily *without good cause in connection with his employment.* The disqualification shall continue for the duration of his unemployment and until he has earned wages in an amount equivalent to five times his weekly benefit amount otherwise payable. (Emphasis added.)

The Commission made the following findings and conclusions after its hearing on the matter:

To establish good cause for a voluntary leaving connected with the employment, an individual must have been confronted with compelling and necessituous [sic] circumstances of such magnitude that he had no other alternative than to leave gainful employment. In addition, the reason for the leaving must be directly attributable to, or causally related to the employment. Good cause connected with the employment is not evidenced by a leaving for any non-work related personal or domestic reason.

Here, there is no doubt that the work aggravated the claimant's medical condition and that her condition had progressed to the extent that she could no longer adequately perform her job duties. *However, there is no evidence to indicate that the condition was caused directly by the work performed for this particular employer or was otherwise attributable to her employment.*

In the instant case, the weight of the evidence shows that the claimant left work voluntarily and without good cause connected with the employment; therefore, was subject to disqualification for benefits pursuant to the provisions of Section 59–9–5(a) [now § 51–1–7, N.M.S.A.1978] of the Act. (Emphasis added.)

N.M.R.Civ.P. 81(c)(4), N.M.S.A.1978 permits the filing of a writ of certiorari to the district court to review a decision of the Employment Security Commission. On review, the rule provides that:

The district court shall try and determine such cause upon the evidence legally introduced at the hearing before said employment security commission [employment services division] presented by the parties to said court. After hearing said cause the court shall make findings of fact and conclusions of law and enter judgment therein upon the merits.

In *Wilson v. Employment Security Commission*, 74 N.M. 3, 389 P.2d 855 (1963), this Court reviewed the above rule and the authorities concerning the scope of review by the trial court and said:

The parties, however, are in disagreement as to the scope of review by the district court, announced in *Prestridge Lumber Co. v. Employment Security Commission*, 50 N.M. 309, 176 P.2d 190. After discussing both the statute and the rules, this court there said:

"* * * We take this [the statute and rule] to mean the district court shall make its own findings of fact, after a review of the evidence. It does not mean, necessarily, that the district court must ignore the findings of the Commission. It may give them some weight and should follow the Commission's findings in making its own, save where the evidence clearly preponderates against them * * * [citing cases]. In the last analysis, however, the responsibility of making correct findings rests with the district court and it is not to be hampered or embarrassed in the performance of this duty by the findings of the Commission."

. . . . .

It is true that the majority of both State and Federal courts have adopted the substantial evidence rule for review of administrative agency decisions, 4 Davis, Administrative Law, § 29.01, and we have adopted that view in construing the review provisions applicable to other administrative agencies. *Continental Oil Co. v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809. The statute, § 59–9–6(h) and (i), N.M.S.A.1953, and rule 81(c)(4) requires the district court to

> review a challenged decision of the Employment Security Commission to determine whether it is lawful. In so determining, the reviewing court must determine whether the Commission's findings of fact are supported by substantial evidence. *The trial court shall adopt as its own such of the Commission's findings of fact as it determines to be supported by substantial evidence* and shall make such conclusions of law and decision as lawfully follow therefrom. If the district court determines that the legal evidence before the Commission fails to substantially support such findings or decision, then the district court shall make its own findings of fact, conclusions of law and decision based only upon the legal evidence before the Commission. If *Prestridge* conflicts with what we have said, then it is modified to conform herewith. (Emphasis added.)

Id. at 6–8, 389 P.2d at 857–58.

In *Wilson*, the Court also defined substantial evidence:

> Much confusion has arisen in reviewing decisions of an inferior court or tribunal as to what is meant by the term "substantial evidence." It means more than merely any evidence and more than a scintilla of evidence and contemplates such relevant legal evidence as a reasonable person might accept as sufficient to support a conclusion. [Citations omitted.] This court has said that evidence is substantial if reasonable men all agree, or if they may fairly differ, as to whether it established such fact. [Citations omitted.] Substantial evidence may also be stated as in *James v. Bailey Reynolds Chandelier Co.*, 325 Mo. 1054, 30 S.W.2d 118, 123:
>
> > "Whether the evidence in a given case is sufficient to support the finding of the jury, when taken and considered in the fashion in which it must be on demurrer, depends on whether it is sufficient to establish with reasonable certainty in the minds of persons of ordinary and average intelligence the existence of the facts on which the finding is necessarily based."

Id. at 8, 389 P.2d at 858–59.

In *LeMon v. Employment Security Commission*, 89 N.M. 549, 555 P.2d 372 (1976), this Court denied relief to a claimant for unemployment compensation benefits under facts quite similar to those in this case.

The record in this case discloses that appellee's arthritic pain had existed for several years. Appellee suffered pain whether she worked or whether she was at home and was given lighter household duties by her employer because she suffered pain. Appellee's work aggravated her arthritic condition and she had been advised by her physician that the pain would not cease as long as she continued the housekeeping job. Further, the record shows that appellee was advised by her doctor not to do general housekeeping work. "This seems to be prima facie inconsistent with a claim for unemployment benefits, which necessarily alleges that claimant is able, available for and actively seeking new work." *LeMon, supra*, 89 N.M. at 551, 555 P.2d at 374.

There is some question as to whether the Commission properly preserved its third point for review regarding the effect to be given to reports of two physicians submitted on behalf of appellee. In any event, the physicians' reports are neither conclusive nor dispositive on the question of whether incapacity caused by the illness or disability established good cause in connection with her employment. Neither of the reports submitted by the doctors stated that the disability was job related or job connected.

Based upon all of the evidence, we find that there was substantial evidence to support the findings and conclusions made by the Commission and that the trial court erred in refusing to adopt the Commission's findings and conclusions.

The trial court is reversed and the cause is remanded for entry of such order or judgment as may be necessary to sustain

appellant's original findings and conclusions.

IT IS SO ORDERED.

EASLEY and PAYNE, JJ., concur.

594 P.2d 745

F & T COMPANY, d/b/a Good Housekeeping Shops, Petitioner,

v.

Ann WOODS, Respondent.

Ann WOODS, Petitioner,

v.

F & T COMPANY, d/b/a Good Housekeeping Shops, Respondent.

Nos. 12141, 12150.

Supreme Court of New Mexico.

April 23, 1979.

Rehearing Denied May 17, 1979.

Sommer, Lawler & Scheuer, Thomas A. Simons, IV, Santa Fe, for F & T Co., petitioner and respondent.

White, Koch, Kelly & McCarthy, Larry White, W. B. Kelly, Santa Fe, for Ann Woods, respondent and petitioner.

Toney Anaya, Atty. Gen., Vernon O. Henning, Ralph W. Muxlow, Asst. Attys. Gen., Santa Fe, amicus curiae on behalf of Department of Corrections.

OPINION

FEDERICI, Justice.

Plaintiff brought this action against defendant F & T Company, doing business as Good Housekeeping Shops, for damages suffered as a result of the rape of plaintiff by Robert Sanders, defendant's employee. Plaintiff alleged that defendant was negligent in hiring and negligent in retaining Sanders, and that this negligence was the proximate cause of the rape.

Defendant is in the business of selling and servicing home appliances in Santa Fe and other areas. Defendant's manager, Mr. Houliston, hired Sanders, who was employed by defendant at the time of the incident involved in this case. Sanders was authorized by defendant to deliver and repair appliances sold by defendant at times when customers were at home. Plaintiff purchased a television set from defendant which Sanders delivered to plaintiff's home on August 30, 1973. During the night of September 2, 1973, Sanders entered plaintiff's apartment, without her permission, and raped her. At the time of the incident Sanders was on his own time, was not acting within the scope of his employment, was not in defendant's business vehicle, and had no authority from defendant to enter plaintiff's apartment. Defendant did not enter plaintiff's apartment to deliver or repair an appliance. The act did not occur in or near defendant's place of business.

After all the evidence had been submitted, defendant moved for a directed verdict, alleging that the evidence was not sufficient to submit the case to the jury. Defendant contended that, under the circumstances, it could not have foreseen that its employee would commit the act in question. Stated another way, defendant's argument was that even if defendant was negligent in the hiring or retention of Sanders, such negligence was not the *proximate cause* of the incident. The trial court denied the motion for a directed verdict. The jury returned a verdict for plaintiff.

Defendant appealed and the Court of Appeals reversed the trial court for its failure

to sustain defendant's motion for a directed verdict on the *negligent hiring* theory. However, the Court of Appeals affirmed the trial court's denial of defendant's motion for directed verdict on the *negligent retention* theory. Both plaintiff and defendant petitioned this Court for a writ of certiorari and both petitions were granted.

Plaintiff's theory that defendant was negligent either in hiring Sanders or in retaining him as a deliveryman is based on plaintiff's claim that defendant "knew or in the exercise of reasonable care *should have known*" of Sanders' dangerous propensities. Defendant claims it can only be liable for what it knew; that "should have known" is not an element of the tort.

The torts of negligent hiring and negligent retention of an employee are based on the act or omission of the employer. See Annots., 48 A.L.R.3d 359 (1973); 34 A.L.R.2d 372 (1954). As stated in Restatement (Second) of Torts § 302B (1965):

> An act or an omission may be negligent if the actor *realizes or should realize* that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal. (Emphasis added.)

N.M.U.J.I. Civ. 12.1 reads:

> The term "negligence" may relate either to an act or a failure to act.
>
> An act to be negligent must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to himself or to another and which such a person in the exercise of ordinary care would not do.
>
> A failure to act, to be negligent, must be a failure to do an act which one is under a duty to do and which a reasonably prudent person in the exercise of ordinary care would do in order to prevent injury to himself or to another.

As this Court stated in *Mahoney v. J. C. Penney Company*, 71 N.M. 244, 377 P.2d 663 (1962):

> One test for determining the issue of negligence is to consider whether a person of ordinary prudence *could or should have foreseen* or anticipated that someone might be injured by his action or nonaction. If so, that person is negligent. (Citation omitted.) (Emphasis added.)

Id. at 256, 377 P.2d at 671. *See also Stake v. Woman's Division of Christian Service*, 73 N.M. 303, 387 P.2d 871 (1963); *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).

In *Stake* the plaintiff was a nurse who was injured by a patient. The nurse alleged a negligent failure to warn her of the patient's dangerous propensities. The Court said:

> Duty to warn of dangerous propensities of a patient necessarily must arise from knowledge of such propensities . . .

73 N.M. at 305–6, 387 P.2d at 873. However, in *Kelly*, the knowledge standard set forth in *Stake* was viewed as meaning "knew or should have known".

Based on the above authorities we believe it is clear that liability in New Mexico for negligent hiring or retention of an employee is grounded upon the "knew or should have known" standard, and not solely upon "actual knowledge". This result is consistent with the "knew or should have known" standard applied in other areas of negligence. *See Simon v. Akin*, 79 N.M. 689, 448 P.2d 795 (1968); *Williams v. Herrera*, 83 N.M. 680, 496 P.2d 740 (Ct.App. 1972).

A substantial portion of the evidence in this case went to Houliston's inquiry or lack of inquiry before hiring Sanders, and to Houliston's apparent knowledge of Sanders' past criminal record. This evidence raised a factual issue as to whether Houliston exercised ordinary care in selecting Sanders as a deliveryman. This evidence is not dispositive, however, because the question of "foreseeability" or "proximate cause" must be resolved before defendant's liability can be determined. It is not enough that plaintiff prove that defendant

was negligent in hiring or retaining Sanders. In addition, plaintiff must prove that the negligent hiring or retention of Sanders was the proximate cause of the rape.

This Court has defined proximate cause in many cases, one of which is *Maestas v. Alameda Cattle Co.*, 36 N.M. 323, 14 P.2d 733 (1932). The definition has been restated in N.M.U.J.I. Civ. 12.10, N.M.S.A. 1978:

> The proximate cause of an injury is that which in a natural and continuous sequence . . . produces the injury, and without which the injury would not have occurred.

In *Bouldin v. Sategna*, 71 N.M. 329, 378 P.2d 370 (1963), this Court discussed the concept of foreseeability and proximate cause. In *Bouldin* the defendant parked his pickup truck in a parking lot and left the keys in the unlocked truck. A third person stole the pickup, ran out of gas and abandoned it in the middle of a highway. Plaintiff collided with the abandoned vehicle. The plaintiff in *Bouldin* sued the owner of the pickup claiming that the owner should have foreseen, under the circumstances, that the truck might have been stolen if left parked in the lot with the ignition keys in it; or, stated differently, that the owner's negligence in leaving the keys in the unlocked pickup was the *proximate cause* of the accident. This Court held that the defendant's negligence in leaving the keys in the unlocked truck was not the proximate cause of the accident; therefore, defendant was not liable as a matter of law. The Court stated:

> The question which we are called upon to answer may be stated thus: Is the owner of a car who leaves it unattended and without removing the key in violation of § 64–18–53, N.M.S.A.1953, liable for injuries to persons and property suffered when the car is hit after its having been abandoned on the highway by a thief who stole it?
>
> . . . . .
>
> We do not perceive theft of a car as a natural event to be foreseen by a person who is negligent in leaving his car unattended with the key in the ignition. *Much less can it be believed that such a state of facts as gave rise to the instant litigation could be remotely considered to be a natural or probable result of defendant's having left his car unlocked, or that they could have been reasonably foreseen.*
>
> . . . . .
>
> By nothing which we have said do we wish to be understood to be reflecting in any way upon our long established rule that negligence and causal connection are ordinarily a question of fact for the jury. *Ortega v. Texas-New Mexico Railway Company*, 70 N.M. 58, 370 P.2d 201. *While fully recognizing this rule, we also recognize the equally well understood rule that where reasonable minds cannot differ, the question is one of law to be resolved by the judge. Greenfield v. Bruskas*, 41 N.M. 346, 68 P.2d 921; *White v. Montoya*, 46 N.M. 241, 126 P.2d 471. (Emphasis added.)

Id. at 331, 333, 334, 378 P.2d at 371, 373.

Marchiondo v. Roper, 90 N.M. 367, 563 P.2d 1160 (1977) and *Hall v. Budagher*, 76 N.M. 591, 417 P.2d 71 (1966) also discuss proximate cause as it relates to the liability of employers for negligent acts of employees against third persons. Both cases considered circumstances somewhat analagous to those in this case. In *Marchiondo* this Court refused to impose civil liability upon a tavern keeper for the negligent sale of intoxicating liquor to an inebriated customer where the customer subsequently struck and killed a third party while driving home. In *Hall* a collision occurred on a highway after the owner of the car had left the defendant's premises and was on his way home. This Court held that a third person motorist could not bring an action against the tavern keeper for an automobile accident caused by an intoxicated driver whose intoxication was brought about by the sale of liquor to him in violation of state liquor regulations. Although the concepts of foreseeability and proximate cause are sometimes confused in the cases, their applicability is the same.

We must review the evidence in the light most favorable to plaintiff and disregard any evidence favorable to defendant, as the trial court is required to do when considering a motion for directed verdict. *Hayes v. Reeves*, 91 N.M. 174, 571 P.2d 1177 (1977); *Archuleta v. Pina*, 86 N.M. 94, 519 P.2d 1175 (1974). We have applied the rule here. Nevertheless, we are convinced that under the facts in this case, defendant should not be held liable under a *negligent hiring* theory for the criminal act of its employee because, as a matter of law, the act of Sanders could not have been foreseen by defendant at the time it hired Sanders. To state it another way, under the specific facts in this case, defendant's negligence, if any, in hiring Sanders, was not the proximate cause of plaintiff's injury.

The next question we address is whether the evidence presented as to the foreseeability or proximate cause of Sanders' act was sufficient to submit the case to the jury on plaintiff's *negligent retention* theory.

On August 28, 1973, Detective Leyba talked to Houliston during the course of investigating some rapes. One of these rapes occurred on August 21 or August 24, 1973. A purse belonging to a previous victim had been found in the trash area of defendant's business on August 26. Leyba suspected that a "colored person" was involved in one of the cases and had learned that the only colored person seen in the area of the residence where the incident under investigation occurred was a deliveryman for defendant.

Leyba asked Houliston if he had any colored employees, and was told there were two: Milton and Sanders. Leyba made further inquiries concerning Sanders' duties, employment and address. At no time did Leyba tell Houliston that Sanders definitely was his suspect in the case. There is additional evidence concerning the August 28 conversation between Leyba and Houliston, but it is favorable to defendant.

In summary, the evidence on the *negligent retention* theory was this: Houliston knew of Sanders' previous criminal record and was subjected to Leyba's general inquiries regarding Sanders. Leyba also mentioned to Houliston that the purse of another victim of a rape-burglary thought to have been committed by a colored person had been found in the trash area of defendant's premises.

Applying the law set forth above to the facts in this case, we do not believe that the rape of plaintiff by defendant's employee could be remotely considered to have been foreseeable by defendant or to be a natural or probable result of defendant's *retention* of its employee, Sanders.

To place liability upon the owner of a business for the *negligent hiring* or *negligent retention* of its employee under the circumstances existing in this case would go beyond what was ever intended under existing rules and principles of negligence and tort law. To hold defendant liable under the facts in this case would make every employer, including the State and all governmental subdivisions, an insurer of the safety of any person who may at any time have had a customer relationship with that employer.

By this opinion we do not foreclose all causes of action against employers based upon the negligent hiring or negligent retention of an employee. Whether the hiring or retention of an employee constitutes negligence depends upon the facts and circumstances of each case.

The Court of Appeals opinion as to negligent hiring is affirmed. The Court of Appeals opinion as to negligent retention is reversed. The judgment of the trial court is reversed and the cause is remanded for entry of judgment for defendant.

IT IS SO ORDERED.

McMANUS, Senior Justice, and EASLEY and PAYNE, JJ., concur.

SOSA, Chief Justice (dissenting).

SOSA, Chief Justice, dissenting.

I disagree with the majority's opinion.

The issue of causal connection is, in my opinion, a question of fact for the jury. The issue of negligent retention was submitted to the jury, which found against defendant. Under this set of circumstances, I would be most hesitant to invade the province of the jury.

Therefore, I must respectfully dissent.

594 P.2d 750

Wallace A. WENDELL and John P. Varsa d/b/a Wendell-Varsa & Associates, Plaintiffs-Appellees,

v.

James H. FOLEY, Old Town Development Company, Defendants-Appellants,

Reliable Productions, Inc., Intervenor.

No. 3464.

Court of Appeals of New Mexico.

April 10, 1979.

Writ of Certiorari Denied May 3, 1979.

Quincy D. Adams, Adams & Foley, Albuquerque, for defendants-appellants.

Lewis O. Campbell, Campbell, Cherpelis & Pica, Albuquerque, for plaintiffs-appellees.

OPINION

WALTERS, Judge.

Wolfson was president of Lobo Hijo Corporation (Lobo). Lobo Hijo was the general partner of Freeway Old Town, Ltd. (Freeway), and Freeway was the general partner of Old Town Development Company (Old Town). Plaintiff Wendell-Varsa and Associates (W–V) contracted in July 1972 with Freeway to provide architectural services for construction of an Albuquerque hotel. Freeway's obligation under the contract was assumed by Old Town on September 9, 1973. Wolfson managed the affairs of Freeway, Old Town and Lobo. Varsa, of W–V, was Wolfson's stepson and was a shareholder, director or officer of Lobo during the entire period of the contract and at the time of the trial. W–V sued Old Town for unpaid billings which included two promissory notes executed by Wolfson on behalf of Old Town.

The architectural contract provided a fixed fee for basic services, with additional approved services to be compensated at $15.00 per hour. It required that any amendments to the contract and any authorizations to the architect for additional services had to be made in writing. The only request made by Wolfson in writing for services outside the basic contract was for W–V to hire a kitchen consultant. Wolfson, however, approved change orders prepared by W–V for display boards, for furniture layouts and interior consultation, for preparation of information and drawings connected with 109 items in six change orders at $25.00 per hour, and for project representation beyond the basic services required by the contract by W–V at the hourly rate of $25.00. W–V submitted periodic bills covering those items, which Old Town was unable to pay. Ultimately, in April and June 1975, two promissory notes were executed by Wolfson on behalf of Old Town to cover the amount of W–V's billings, aggregating $39,464.70, plus interest. W–V thereafter rendered two more bills for additional services performed by W–V under a separate contract (termed "Lobby Expansion" contract by the parties). At time of

trial neither the lobby billings of $10,771.63 nor the notes had been paid.

The trial court found that Wolfson had authority to approve additional services, to agree with W–V for such services, and to execute the notes on behalf of Old Town. It concluded that the promissory notes were given for antecedent debts and therefore did not require consideration. Judgment in the amount of the notes, plus interest and attorney fees, and for the unpaid billings on the lobby contract was entered against Old Town.

This appeal has been brought by Old Town asserting error in the amount awarded for (a) failure of consideration, and (b) lack of authority in Wolfson to orally approve additional services. Old Town contends that $23,528.75 of the total covered by the notes should have been disallowed, because services represented by that amount were not additional but required under W–V's basic contract. It further claims that in any event billings should have been at $15 per hour, not $25; and that none of the change orders were made by written request of its agent. Old Town argues there was a failure of consideration for the alleged underlying "antecedent debt." Alternatively, it contends that Wolfson had no authority to orally modify the contract in 1974 to provide for a different hourly rate of compensation, and Old Town should not be bound by his agreements to pay.

We note, first of all, that the contract did not require a written request for additional services; it merely provided that additional services be authorized in writing. Wolfson authorized all such services when he approved the submitted change orders and the bills covering them.

W–V argued in the trial court that because under § 3–408 of the Uniform Commercial Code (§ 55–3–408, N.M.S.A., 1978) no consideration is necessary for an instrument that is given in payment of an antecedent debt, the court could not look behind the promissory notes in deciding the claim of W–V.

The UCC does provide that no consideration is needed to support a note given in payment of an antecedent debt. But a review of the decided cases under this section of the Act indicates that they follow the official comment, which also accompanies our statute, and accept that this provision was enacted "to change the result of decisions holding that where no extension of time or other concession is given by the creditor the new obligation fails for lack of legal consideration. It is also intended to mean that an instrument given for more or less than the amount of a liquidated obligation does not fail by reason of the common law rule that an obligation for a lesser liquidated amount cannot be consideration for the surrender of the greater." This commentary makes it clear that the consideration under discussion refers to a new quid pro quo between transferor and transferee of the negotiable instrument. There need be none at all from the person to whom the instrument is given to permit substitution of a note instead of cash from his debtor. The terms of the note then become the debtor's obligation. But when the debtor and payee are the immediate parties in the lawsuit, and the debtor contests payment of the note on grounds that the underlying debt does not exist in whole or in part, or came about through fraud in the inducement or, as here, because the debtor's agent exceeded his authority in a manner known to the creditor-payee, then the debtor may attack payment demanded on the instrument by showing that the creditor is not a holder in due course and is subject to defenses available against one who is not a holder in due course, such as taking without value, with notice of defenses, or in bad faith. *See, Community Bank v. Ell,* 278 Or. 417, 564 P.2d 685 (1977); *Estate of Wetmore,* 36 Ill.App.3d 96, 343 N.E.2d 224 (1976); *Mecham v. United Bank of Arizona,* 107 Ariz. 437, 489 P.2d 247 (1971); *Greenberg v. Morris,* 436 S.W.2d 734 (Mo.1968).

Unfortunately, counsel on appeal (who was not counsel for Old Town at trial) failed to point out any evidence other than six answers given by Mr. Varsa, not favor-

able to appellant's theories, in the 141 pages of appellee's testimony; and although we have undertaken the arduous task of reading the entire record and the voluminous exhibits accompanying it, we are unable to find a single word supporting Old Town's contentions that Wolfson was without authority to approve the change orders and requests for payment submitted by W–V; without authority to modify the contract; without authority to execute the promissory notes; nor that W–V, by failure of value, good faith, or lack of notice of defenses against the notes, was not a holder in due course.

We affirm the trial court for three reasons: (1) Old Town offered no witnesses nor evidence to prove that the "additional services" for which W–V billed actually were "basic services" required under the architectural contract. Wolfson's deposition was received in evidence; in it he testified that all of W–V's change order billings covered additional services. Varsa, one of the partners of W–V, was the only witness called at trial and, as should have been expected, he corroborated his firm's billing as proper charges for additional services. Old Town did not produce an expert or any other witness to analyze the change orders or contradict the witnesses' categorization of the work as additional services rendered under the change orders. In the absence of any evidence in the trial court, appellant's theory of improper charges cannot be considered on appeal, *Laguna Dev. Co. v. McAlester Fuel Co.,* 91 N.M. 244, 572 P.2d 1252 (1977). A party cannot assert an affirmative defense and expect relief thereon without presenting any evidence on the matter, *Wallace v. Wanek,* 81 N.M. 478, 468 P.2d 879 (Ct.App. 1970).

(2) Wolfson testified that as president of Lobo Hijo and general partner of Freeway, he had authority to manage the contract for construction, and the limited partnership agreement attached to his deposition bore out that testimony. The general partner was given "control over the daily business of the limited partnership" to the exclusion of the limited partners, and he was endowed with broad powers to complete the project, hire contractors, borrow money, and exercise all the powers of a general partner under the New Mexico Uniform Partnership and Limited Partnership Acts. There was no evidence produced by Old Town that might have shown that Wolfson violated any of his contractual or fiduciary duties to his limited partners, or that he acted beyond his authority. A defendant has an obligation to present evidence on his theories of defense. *Laguna, supra.*

(3) In the absence of any restriction on Wolfson's powers to represent Old Town, and even though the contract required all modifications to be in writing, it is the general rule that, in the absence of a prohibiting statute, a written contract may be orally modified by the parties who made the original agreement, *Canada v. Allstate Ins. Co.,* 411 F.2d 517 (5th Cir. 1969); and, even if within the statute of frauds, it is enforceable if adherence to the original agreement "would be unjust in view of a material change in position in reliance on the subsequent agreement." Restatement (Second) of Contracts, § 224 (Tent.Draft 1973). Our Supreme Court, although not ruling directly on the question, has indicated in *Mercury Gas and Oil Corp. v. Rincon Oil and Gas Corp.,* 79 N.M. 537, 445 P.2d 958 (1968); *Tyner v. DiPaolo,* 76 N.M. 483, 416 P.2d 150 (1966); and *Driver-Miller Plumbing, Inc. v. Fromm,* 72 N.M. 117, 381 P.2d 53 (1963), that there may be parol modification of a written contract. Professor Corbin unequivocally states the rule to be that "[a]ny written contract . . . can be rescinded or varied at will by oral agreement of the parties; . . . even . . . a written agreement that the contract shall not be varied or rescinded," unless the oral transaction itself is one enumerated within the statute of frauds, 6 Corbin, Contracts 206, § 1295. Consequently, Wolfson and Varsa, for W–V, had the power to modify the original contract, and they did so. Old Town urges us to consider the personal relationship of Varsa and Wolfson, the cir-

cumstances of the amendment of the contract having been negotiated between themselves and without consultation or approval of any other limited partner or corporate officer, Varsa's business interest in Lobo Hijo's corporation, W–V's billing on July 31, 1975 after the claimed oral modification, at $15.00 per hour instead of $25.00; and to conclude that the architect breached a fiduciary duty to the owner to perform with loyalty in the best interest of his employer, as did Wolfson breach his fiduciary duty as a general partner to act in the best interest of his limited partners. Old Town suggests that, instead, Wolfson and Varsa colluded to increase W–V's contract fees at the expense of the limited partners, thereby committing a constructive fraud upon Old Town.

These considerations were presented to the trial court in the form of requested findings, and were denied. Rightly so, for as we have noted, Old Town failed to present any evidence on those issues. There was nothing before the court to support the claims and insinuations that Varsa's interest in Lobo Hijo was enhanced by the modified contract; that Wolfson exceeded the boundaries of his authority; that either party acted in bad faith. More than innuendo is required to show fraud, *Barber's Super Markets, Inc. v. Stryker,* 84 N.M. 181, 500 P.2d 1304 (Ct.App.1972), and whereas the relationship and circumstances here are of a nature from which constructive fraud could occur, Wolfson and Varsa—the only witnesses heard in the trial court—satisfactorily explained the reasons for modifying the original contract, for making and approving change orders, and for executing the promissory notes. Moreover, fraud must be shown by clear and convincing evidence, which certainly was lacking in this case. *See Hockett v. Winks,* 82 N.M. 597, 485 P.2d 353 (1971).

The challenged findings of the trial court are supported by substantial evidence and this court will not reweigh the evidence, or pass upon the credibility of the witnesses, in order to reach a different result. *Platero v. Jones,* 83 N.M. 261, 490 P.2d 1234 (Ct.App.1971); *Svejcara v. Whitman,* 82 N.M. 739, 487 P.2d 167 (Ct.App. 1971).

The dissenting opinion urges that the judgment should be reduced by a claimed overcharge of $300.35 on the "kitchen design" contract, as well as by $2,948.40 plus interest, which appellant claims represents a sum already paid to Varsa.

Varsa, in its brief and as noted in the dissent, did argue that no request for repayment of the $2,948.40 was made by Old Town in the trial court in the form of a counterclaim. But the straightforward answer to the allegation of overpayment is simply that it was not requested and it did not occur. Varsa submitted a bill to Old Town for *$42,413.10* on December 8, 1975, one of the items in that bill being a charge of $2,948.40 for additional services. The bill, Exhibit 4, clearly footnoted the fact that of the amount billed, two promissory notes for $36,910.76 and $2,553.94, respectively, had been executed "securing $39,-464.70 of the balance due, leaving $2,948.40 unsecured." The exhibit further carries a notation in Varsa's handwriting of payment of that $2,948.40 balance on December 8, 1975 by one of the limited partners. Thus, it was not included in the *$39,464.70* amount sued for under the promissory notes; and it was not included in the $10,771.63 billed and allowed as the balance due on the Lobby Expansion contract. Varsa made no claim in the trial court for, nor was there included in the amount of the judgment awarded, a sum representing double payment of that $2,948.40 item.

The $300.35 coverage was explained by Varsa as travel expense for which he was entitled to reimbursement under the terms of the architectural contract. Even though charged as a detail of "kitchen design," it was itemized as "travel" and was, in fact, an allowable contract item.

The judgment is affirmed.

IT IS SO ORDERED.

SUTIN, J., concurring in part and dissenting in part.

HERNANDEZ, J., concurs.

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

Plaintiff sued four individuals d/b/a Old Town Development Co. and Old Town Development Co., a limited partnership. The claim sought recovery in two of three counts on two promissory notes, one for $36,910.76, and the second for $2,553.94. The two notes were executed as follows:

Old Town Development Co.
By Freeway Old Town Limited, General Partner,
By Cyril Wolfson, President Lobo Hijo Corporation, its General Partner.

Old Town Development Company, Ltd. is a limited partnership. The limited partners are four individuals, one of whom appeared to be their representative during the construction of a hotel. He cooperated with Cyril Wolfson on behalf of Old Town in reviewing architectural services performed by plaintiff (Varsa). The general partner was Freeway Old Town, Ltd.

The general partner of Freeway was Lobo Hijo Corporation. Cyril Wolfson was president of Lobo Hijo and he managed the offices of Old Town, Freeway and Lobo Hijo.

John Peter Varsa and Wallace A. Wendell, plaintiffs, were shareholders in Lobo Hijo. Varsa was a director and officer. Cyril Wolfson was his stepfather.

On July 24, 1972, Freeway, by way of Lobo Hijo and Wolfson, entered into a standard form contract with Varsa, for the performance of architectural services in the construction of a large hotel. This contract was taken over by Old Town later. During the construction of the Hotel, a limited partner and Wolfson met constantly to review the work done by the contractor and Varsa.

At the end of construction, financial problems faced Old Town in the payment of its debts. To resolve the debts owed to Varsa, Varsa submitted two statements to Old Town for unpaid architectural services, one for $36,910.76 and the other for $2,553.94. After approving these amounts, Wolfson executed and delivered to Varsa, the Old Town promissory notes for the above respective amounts which totaled $39,464.70.

A dispute arose between Old Town and Varsa over the amounts due for architectural services. Old Town claimed that $15,935.95 was the amount due, and that the balance of $23,528.75 was not authorized in writing as provided in the contract.

Old Town challenged the following findings of fact:

> 8. During the construction of the hotel, additional services were requested of . . . [Varsa] by Wolfson and agreed to by . . . [Varsa].
>
> a. for the preparation of display boards;
>
> b. for furniture layout and interior consultation; and
>
> c. for the preparation of information and drawings necessary for 109 items in change orders to be performed *at the rate of $25.00 per hour, which requests for additional services were not in writing.* [Emphasis added.]
>
> * * * * * *
>
> 10. Wolfson was the agent for . . [Old Town] *and had the authority to enter into the agreements for additional services* and project representation for and on behalf of . . . [Old Town]. [Emphasis added.]
>
> 11. Both Wolfson and . . . [Varsa] agreed to each modification to the Hotel Contract.
>
> * * * * * *
>
> 13. Subsequent to receiving the March 31, 1975 statement, Wolfson advised . . [Varsa] that Old Town Development did not presently have sufficient monies to pay the statement of March 31, 1975 [$36,910.76].
>
> * * * * * *
>
> 16. Subsequent to receiving the June 9, 1975 statement, Wolfson advised . . [Varsa] that Old Town Development did not presently have sufficient money to pay the additional $2,553.94 billed on the statement of June 9, 1975.
>
> * * * * * *

18. Wolfson had authority to execute the promissory notes on behalf of Old Town Development.

Among many conclusions made by the court, the following are pertinent:

6. The promissory notes were given for antecedent debts and therefore no consideration needed to be proven.

7. There was good, valuable and adequate consideration for the modifications to the Hotel Contract . . . .

Old Town makes one point on appeal: QUESTIONED ITEMS TOTALLING $23,528.75, INCLUDED IN THE TWO NOTES OF 4/14/75 FOR $36,910.76, AND THE NOTE OF 6/19/75 FOR $2,553.94, SHOULD HAVE BEEN DISALLOWED BY THE COURT.

Stated in this fashion, Old Town's point means this to me:

Old Town asserts that the two notes totalling $39,464.70 are composed of items that allegedly represent services performed by Varsa. Old Town claims that certain of those items in the amount of $23,528.75 should not be allowed and that Varsa should be limited to a recovery of $15,935.95.

The items totalling $23,528.75 which Old Town questions are:

a.	Additional Architectural Services	$18,200.00
b.	Additional Services	2,948.40
c.	Kitchen Design Contract	300.35
d.	Furniture Layout	2,080.00
	Total	$23,528.75

The primary contention of Old Town is that the two notes in question are not supported by antecedent debts in excess of $15,935.35. Old Town claims there was a lack of consideration for the items totalling $23,528.75 and a violation of the architectural contract because there was no written authorization for the services billed.

Article 3 of the Uniform Commercial Code relative to commercial paper is indirectly involved.

Section 55–3–408, N.M.S.A. 1978 of the Uniform Commercial Code reads:

Want or failure of consideration is a defense as against any person not having the rights of a holder in due course, *except that no consideration is necessary for an instrument . . . given in payment of or as security for an antecedent obligation of any kind.* Nothing in this section shall be taken to displace any statute outside this act under which a promise is enforceable notwithstanding lack or failure of consideration. *Partial failure of consideration is a defense pro tanto whether or not the failure is in an ascertained or liquidated amount.* [Emphasis added.]

I think Old Town contends that there was a partial failure of consideration to the extent of $23,528.75. If established, this constitutes a pro tanto defense. Thus the recovery by Varsa would be precluded only to the extent of the partial failure of consideration. The burden is on Old Town to establish a partial failure of consideration. *Oklahoma Nat. Bank v. Equitable Credit Finance Co.,* 489 P.2d 1331 (Okl.1971). Partial failure of consideration only goes to reduce recovery and in legal effect concedes the consideration sufficient to sustain the note. *Parker v. McGaha,* 291 Ala. 339, 280 So.2d 769 (1973).

In determining whether the antecedent debt is sufficient consideration, the "antecedent debt" itself must be proven. An inquiry must be made into the validity of the antecedent debt to determine whether there was consideration for the debt.

The first disputed item is additional architectural services submitted by Varsa of 109 items in change orders, construction inspection services beyond the agreement and 700 hours spent by job completion at $25.00 an hour for a total of $17,500.00 and a New Mexico state tax, at 4%, of $700.00, for a total of $18,200.00.

It is Old Town's contention that these "additional architectural services are not in fact additional services as provided in the contract; that they are basic services required to be performed under the contract; and in any event, additional services as provided in the contract are at the rate of $15.00 per hour, not $25.00 per hour.

I agree with this last argument and dissent on this issue.

Section 2(b) of the contract provides:

FOR THE ARCHITECT'S ADDITIONAL SERVICES as described in Paragraph 1.3, compensation computed as follows:

Principals' time at the fixed rate of FIFTEEN dollars ($15.00) per hour.

Article 12 of the Architect's Agreement reads in part:

. . . This Agreement may be amended *only* by written instrument *signed by both Owner and Architect.* [Emphasis added].

To me the word "only" means "exclusively," regardless of the circumstances, and a "written instrument signed by both Owner and Architect," is more strict than a provision prohibiting an amendment, except in writing. This agreement is a standard form provided by Architects for the protection of Architects. It was not intended to allow architects to violate the terms of the contract to seek protection. Seven hundred hours were spent on additional services. At $15.00 per hour rather than $25.00, Old Town is entitled to a credit of $7,000.00 plus interest on the total amount of the judgment.

The battle took place over the meaning of paragraph 1.3 of the contract entitled "Additional Services." It reads:

If any of the following Additional Services are authorized by the Owner IN WRITING, they shall be paid for by the Owner as hereinbefore provided. [Emphasis added.]

This language simply means that if Old Town permitted or allowed Varsa to render "Additional Services," Old Town would pay.

Section 1.3 is followed with 21 subsections. Section 1.3.11 included "Change Orders . . . not commensurate with the services required of the Architect." One hundred and nine "Change Orders" were submitted by Varsa in writing to the contractor, each of them signed by Varsa, Old Town and the contractor. The "Change Orders" were permitted. These were structural changes that affected substantial portions of the Hotel, not ordinary in scope and effect and unusual in expenditures. These items amounted to $17,500.00 plus a New Mexico state tax of $700.00.

The only testimony at trial was that of Varsa and the deposition of Wolfson. None of the four limited partners testified. One of the four limited partners was an attorney who represented Old Town. No architects were called by Old Town to dispute the claim for "Additional Services" for which Old Town was liable. Strenuous attempts were made by Old Town in argument with Varsa and Wolfson to color "Additional Services" with the paint of "Basic Services" required under the contract. The trial court heard the testimony and made the determination. We do not evaluate the difference between "Additional Services" and "Basic Services" in a multi-million dollar project. I affirm less reduction of $7,000.00 principal.

The second disputed item is a charge of $2,948.40 for additional services beyond the basic contract. Although disputed, this item was actually paid by one of the limited partners. Varsa claims that since Old Town did not file a counterclaim for repayment of this sum, it is inappropriate for Old Town to advance such a claim for relief at this time; that this charge was never litigated and cannot be raised for the first time on appeal. This is frivolous. Varsa must not avoid payment with alacrity, at least without a grin on his face. I dissent on this issue. The amount of $2,948.40 plus interest should be reduced from the judgment entered.

The third disputed item is one for $300.35 which is in excess of the guaranteed maximum for the kitchen design contract. I dissent on this issue.

The final disputed item is one for $2,080.00 for furniture layout and consultant charges. This is covered by Section 1.3.8 of the contract and was not authorized by Old Town in writing. I dissent on this issue.

It is my opinion that the judgment should be reduced in the sum of $12,328.75.

594 P.2d 1166

Maria PARKER, Petitioner-Appellant,

v.

Windell E. PARKER, Respondent-Appellee.

No. 12169.

Supreme Court of New Mexico.

May 14, 1979.

Toulouse, Krehbiel & DeLayo, Charlotte Mary Toulouse, Houston, Housman, Freeman & Dawe, David G. Housman, Albuquerque, for petitioner-appellant.

Sheehan & Sheehan, Timothy M. Sheehan, Albuquerque, for respondent-appellee.

OPINION

EASLEY, Justice.

Mrs. Parker moved to have the district court review an "alimony" award entered on the default of Parker in a 1975 divorce action. The motion was denied, and Mrs. Parker appeals.

The dispositive issue is whether the one-year limitation in N.M.R.Civ.P. 60(b)(1), N.M.S.A.1978 bars Mrs. Parker's motion for review.

The default decree ordered Parker to pay Mrs. Parker half of the amount he had "contributed" to his military retirement plan during coverture as "alimony". Mrs. Parker later discovered that the military retirement was non-contributory and Parker had not paid any money into the plan. Three years after the decree was entered, she moved for review of the pension provision, claiming that since the trial court denominated the pension provision as alimony, the matter is subject to the continuing jurisdiction of the trial court under § 40–4–7, N.M.S.A.1978, and that her discovery of the

nature of the husband's pension plan is a changed circumstance which calls for modification of the order.

Parker urges that the pension provision, though called alimony in the decree, really represents a mistake by Mrs. Parker with regard to division of property, and thus is not a matter for continuing jurisdiction. Even if it is alimony, the only change of circumstances is the change in knowledge of Mrs. Parker. Neither the retirement plan nor the financial condition of the parties has changed at all. Thus, the strict test of *Lord v. Lord*, 37 N.M. 24, 16 P.2d 933 (1932) for changed circumstances is not met.

Mrs. Parker next argues that the error was a clerical error, which by the terms of N.M.R.Civ.P. 60(a), N.M.S.A.1978, may be corrected at any time. Parker counters that the issue of clerical error is not properly before the Court because it was not raised in the district court. He asserts, without citation to the record, that the wife's sole argument below was based on "mistake of fact".

We hold that there was no clerical error. The mistake was in Mrs. Parker's conception of the nature of the pension plan, a substantive flaw rather than a technical one. The decree was prepared by Mrs. Parker's attorney and adopted by the trial court without any appearances by Parker. There is nothing in the record to suggest that Parker misrepresented the nature of the pension plan to his wife. The mistake is chargeable to Mrs. Parker, and clearly falls within Rule 60(b)(1), specifying a one-year period of limitation within which a mistake may be asserted to modify a decree.

The trial court was correct in dismissing the motion on these grounds. We need not answer the other questions.

IT IS SO ORDERED.

SOSA, C. J., and PAYNE, J., concur.

594 P.2d 1167

James BRISTER, Plaintiff-Appellant,

v.

Wyona BRISTER, Defendant-Appellee.

No. 11892.

Supreme Court of New Mexico.

May 14, 1979.

Fred M. Calkins, Albuquerque, for appellant.

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

OPINION

EASLEY, Justice.

Wyona Brister filed a motion for an increase in alimony against her ex-husband, James Brister. Brister filed a counterclaim to terminate or substantially reduce alimony. The court increased the alimony and denied Brister's requested relief. Brister appeals. We reverse.

We inquire:

1. Whether the court may disregard a stipulated agreement for alimony which was incorporated in the original divorce decree and change the amount to be paid.

2. Whether the provision as to alimony was a part of the community property division instead of support.

3. Whether a former decision on a similar motion was res judicata against Brister, the movant, where the district court ruled that alimony payments would not be reduced or terminated because of Brister's sole claim that Mrs. Brister had established a "de facto" marriage with another man.

4. Whether support from a paramour, living with Mrs. Brister as her husband, may be considered on the issue of changed financial circumstances in deciding Brister's right to reduction or termination of alimony.

5. Whether alimony should have been prospectively reduced or terminated under the circumstances, in light of the fact that Roof, the paramour, and Mrs. Brister had terminated their relationship before the date of the hearing.

6. Whether Brister is entitled to claim a retroactive reduction or termination of alimony during the period Mrs. Brister was receiving support from her lover.

The divorce decree incorporated an agreement which provided alimony to Mrs. Brister until her death or remarriage.

Brister previously filed a motion on December 8, 1976 to terminate alimony on the grounds that Mrs. Brister had been living with James H. Roof in California for more than a year and had been holding herself out as his wife. Brister claimed that Cal. Civ.Code § 4801.5 (West) (Supp.1979) provides that the act of Mrs. Brister warranted cancellation of the alimony award, and that the trial court should apply the California law. The evidence submitted was fairly conclusive that Mrs. Brister was holding herself out to be the wife of Roof, and had lived with him as alleged. There was no issue raised in the record on the 1976 motion as to Mrs. Brister's *need* for alimony. The trial court held on that motion that, even though Mrs. Brister was living in a common-law relationship with another man, this was not a basis for modification of an alimony award.

As to the instant motion, Brister filed a counterclaim asking for reduction or termination of alimony based on Mrs. Brister's changed circumstances in that Roof was providing for her support. The court found that there was no proof of a change in circumstances warranting reduction or termination of alimony, that the alimony agreement was in the nature of a community property distribution, that Mrs. Brister should be allowed additional alimony, and that relief would be denied to Brister.

Effect of Stipulated Settlement

The public policy on modification of alimony awards is established by § 40–4–7(B)(2), N.M.S.A.1978, which gives the district court the authority to change any order with respect to alimony allowed to either spouse "whenever the circumstances render such change proper". The court may disregard the agreement and make an award that the court deems fair. *Scanlon v. Scanlon*, 60 N.M. 43, 287 P.2d 238 (1955). In *Scanlon*, this court held that the above statute becomes a part of any agreement for alimony and that the contract for alimony that is incorporated in a decree becomes merged and thus subject to equitable modification, even when it contains a provision that the agreement cannot be amended without the consent of both parties. *See Spingola v. Spingola*, 91 N.M. 737, 580 P.2d 958 (1978).

The trial court having general power to modify this decree for alimony, the exercise

of that power is not affected under these circumstances by the fact that the decree is based on an agreement entered into by the parties to the action. We hold that the trial court erred on this issue.

Alimony or Community Property Division?

The trial court erroneously held that the payments made to Mrs. Brister were in the nature of a distribution of community property instead of being alimony, and thus, the payments were not subject to modification.

The stipulated agreement specifically distinguished between the property division and support, recognized the obligation of Brister to provide support for Mrs. Brister, acknowledged the court's continuing jurisdiction to alter the amount of alimony, provided an elaborate means by which the amount could be increased or decreased because of inflation or deflation, and specified that alimony would terminate upon the death or marriage of Mrs. Brister or the death of Brister. There was no language in the contract from which it could be determined that any consideration was given to the value of any property that was divided in determining the amount allowed for support, nor was there any provision indicating that the settlement of property rights would have been any different if the grant of alimony had not been made. The decree by its terms separated alimony from property distribution and incorporated the settlement agreement. There were no findings made by the court based on evidence, other than the contract, which would support a holding that the parties had intended to and did agree that the payments were in lieu of property distribution.

This issue has previously been settled in *Scanlon, supra*, where this Court held that the provisions regarding alimony were entirely severable from the provisions as to property. The same is true here. In *Ferret v. Ferret*, 55 N.M. 565, 237 P.2d 594 (1951), this Court was considering an almost identical set of facts and attached significance to the fact that the contract recited that it was executed to settle any claims, including the obligation of the husband to support the wife, and that the payments would be limited to the period that the wife should remain single. "[I]t is difficult to avoid the conclusion that the payments are in fact as for alimony and intended so to be." *Id.* at 574, 237 P.2d at 599.

The decree is clear and unambiguous. It stands and is enforced as it speaks. *Parks v. Parks*, 91 N.M. 369, 574 P.2d 588 (1978); *Chavez v. Chavez*, 82 N.M. 624, 485 P.2d 735 (1971).

Res Judicata

Mrs. Brister claims, and the trial court so found, that the same issues that were before the court in the instant motion were decided by the court in ruling on the December 1976 motion and thus are barred by the doctrine of res judicata. We do not agree. The thrust of Brister's December 1976 motion was to show that Mrs. Brister was living with Roof and holding herself out as his wife and that, under California law, Brister had the right to cancellation of alimony. The record does not reflect that the issue of Mrs. Brister's need for alimony was litigated. Mrs. Brister's need is the key question in the present proceeding and not the application of California law as in the prior proceeding.

Authority to modify an alimony award depends on the law of the jurisdiction which granted the award. *See Hazelwood v. Hazelwood*, 89 N.M. 659, 556 P.2d 345 (1976); *Corliss v. Corliss*, 89 N.M. 235, 549 P.2d 1070 (1976). We hold that the California statutory law, which does not comport with our statutes or case law, cannot be invoked to control a modification of a New Mexico divorce decree in a subsequent action in the same court that granted the decree, where at least one of the parties was still a New Mexico resident.

The evidence bearing on the application of the doctrine of res judicata does not meet the classic test given in *Lindauer Mercantile Co. v. Boyd*, 11 N.M. 464, 70 P. 568 (1902), because there is no identity of sub-

ject matter as respects the two proceedings. The trial court was in error on this point.

Support from a Cohabiting Male

This Court has not decided the issue as to whether support, furnished by a person who is cohabiting as husband and wife with the recipient of alimony, may be considered as a factor in determining the need for alimony. Alimony, which literally means nourishment or sustenance, is support for one spouse by another as a substitute for the statutory right to marital support during coverture. *Chavez, supra.* It is not intended as a penalty against a husband. *Richards v. Richards,* 44 Haw. 491, 355 P.2d 188 (1960); *Bouma v. Bouma,* 439 P.2d 198 (Okla.1968). Alimony is a personal right as opposed to a property right. *McClure v. McClure,* 90 N.M. 23, 559 P.2d 400 (1976); *Burnside v. Burnside,* 85 N.M. 517, 514 P.2d 36 (1973).

There is no fixed rule by which the amount of alimony can be determined. Each case depends upon its relevant facts in the light of what is fair and reasonable. *Sloan v. Sloan,* 77 N.M. 632, 426 P.2d 780 (1967). Changes in circumstances of divorced parties may warrant reducing or terminating alimony obligations. *McClure, supra.* A number of important factors must be considered in determining the sufficiency of alimony payments, such as the needs of the wife, her age, health and means to support herself, the earning capacity and the future earning capacity of the husband, the duration of the marriage, and the amount of the property owned by the parties. *Michelson v. Michelson,* 86 N.M. 107, 520 P.2d 263 (1974). If the recipient becomes able to support herself after the passage of a period of time, this constitutes a change in circumstances that has been held to warrant termination of the husband's alimony obligation. *McClure, supra.*

The focal point in each case is the recipient's need for support. We consider Mrs. Brister's salary and the income from her property under present case law. Actual need being the criterion, what matters if the money comes from an inheritance, a crap game or the largess of a live-in lover. We hold that this additional resource of Mrs. Brister's may be weighed in determining the amount of alimony that should be paid. We do not consider this ruling to be at odds with *Hazelwood, supra,* which case we read to hold that a so-called "de facto" marriage is not, *in and of itself,* grounds for cancellation of an alimony award.

Prospective Reduction or Termination

The decree specified that alimony be terminated on the death or marriage of Mrs. Brister. Neither contingency has occurred. She was not receiving any part of her support from Roof at the time of the hearing, and there was no showing that she would in the future, because the couple had separated. Thus, no grounds existed for prospective reduction or cancellation of alimony payments.

Retroactive Reduction, Setoff or Termination

The court granted an increase in alimony from the $200 awarded in the decree to $296.86. This figure was arrived at by stipulation of the parties and reflected the escalation in the cost of living since the decree was entered.

Under our view, if Mrs. Brister's need was reduced by Roof's contribution, Brister may be entitled to a retroactive reduction and setoff, depending upon the facts. However, although there was a considerable amount of controversy over the amount of money that Mrs. Brister was earning and receiving from all sources during the time of her cohabitation with Roof, the court did not find the level of Mrs. Brister's *need* during that time. Absent such a finding of a particular amount needed to support Mrs. Brister, there is no figure to which a comparison may be made with the dollar amount of support she actually received. The trial court found that the stipulated settlement provided "the only grounds available . . . for termination of alimony". The trial court, therefore, did not consider the evidence of changed circumstances relating to the support allegedly

provided to Mrs. Brister by Roof. Findings on this issue, predicated upon the law we have here announced, are material to final disposition.

We remand so that the trial court may consider the evidence, in the light of our opinion, to determine if a retroactive reduction or setoff is warranted, and to dispose of the other issues in accordance with this opinion.

IT IS SO ORDERED.

McMANUS, Senior Justice and PAYNE, J., concur.

594 P.2d 1172

Gene CORLEY, Petitioner-Appellant,

v.

Carol Jo CORLEY, Respondent-Appellee.

No. 12062.

Supreme Court of New Mexico.

May 16, 1979.

Bowen, Shoesmith & Tawney, Mark G. Shoesmith, Alamogordo, for petitioner-appellant.

Fettinger & Bloom, John H. Harrington, Alamogordo, for respondent-appellee.

OPINION

EASLEY, Justice.

Corley appeals from a court-ordered division of property in his divorce action against Mrs. Corley. We reverse.

Corley challenges several findings of the trial court as not supported by substantial evidence. He also argues that the court erred in failing to find that the community's expenditures exceeded their income during the marriage, and that the court's conclusion that the Belen Farm was community property is not supported by the findings.

The evidence is quite complicated. The relevant unchallenged findings in the trial court are: The parties were married March 21, 1971. Only a division of community property and a determination of separate property was under consideration. Corley Homes, Inc. was in existence at the time of the marriage, and was solely owned by Mr. Corley. This corporation purchased 64.4 acres of land (the Belen Farm) on May 7, 1971 with $22,533.61 of the corporation's funds, by check dated April 30, 1971. On November 15, 1972, Corley Homes, Inc. owed $22,597.43 on the Belen Farm to Albuquerque National Bank. On the latter date, the corporation conveyed the Belen Farm to Burnett Realty. That company assumed the balance owing to Albuquerque National Bank to pay the remaining purchase price for the east 31.315 acres of the Belen Farm, after payment of $7,972 to Corley Homes, Inc. Burnett Realty acquired no equitable interest in the west 33.185 acres.

On November 21, 1975 Burnett Realty conveyed to the parties, as joint tenants, the west 33.185 acres of the Belen Farm. On November 20, 1975 a mortgage and note were executed by the parties in the amount of $25,000 on 15.877 of the west 33.185 acres of the Belen Farm. On January 19, 1976 a mortgage and note were executed by the parties for $10,030 on 17.308 of the west 33.185 acres of the Belen Farm. The money obtained from the January 19, 1976 mortgage was loaned to the Corley Corporation, owned by Glenn Corley, Mr. Corley's

son, in January of 1976. Corley Corporation repaid the January, 1976 mortgage, in part by repaying the bank with a $10,000 Corley Corporation check. Corley Corporation has paid back loans from Corley which came from the mortgage of November 20, 1975 by paying community indebtedness on behalf of Corley in excess of $4,050. Community bills paid from the Corley Homes, Inc. funds consisted of household bills of the parties and personal bills of the parties.

The parties grew hay on the 33.185 acres described above. They trained horses on the land. Mrs. Corley contributed her labors and talents to the improvements on the 33.185 acres consisting of a three-bedroom house, a barn and an old milk barn remodeled into a guest house. Prior to the marriage, the improvements to the Belen Farm included the installation of an irrigation well and pump and land levelling, having total value of $6,813.

In determining whether challenged findings have substantial support in the evidence, we review the record with the following rules in mind:

> [W]here there is a conflict in the evidence, upon review, the evidence must be considered in a light most favorable to the successful party, indulging all reasonable inferences to be drawn therefrom in support of the judgment. (Citations omitted.)

Gray v. J. P. (Bum) Gibbins, Inc., 75 N.M. 584, 586, 408 P.2d 506, 507 (1965).

> 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 or established by the evidence, when such facts are viewed in the light of common knowledge or common experience. (Citation omitted.)

Samora v. Bradford, 81 N.M. 205, 207, 465 P.2d 88, 90 (Ct.App.1970).

> [T]he testimony of a witness, whether interested or disinterested, cannot arbitrarily be disregarded by the trier of the facts * * *.

Medler v. Henry, 44 N.M. 275, 283, 101 P.2d 398, 403 (1940). *See also Aragon v. Boyd*, 80 N.M. 14, 450 P.2d 614 (1969); *Frederick v. Younger Van Lines*, 74 N.M. 320, 393 P.2d 438 (1964); and *In re Faulkner's Estate*, 35 N.M. 125, 290 P. 801 (1930).

We first consider the challenged findings that Corley commingled his separate and community funds into the corporation funds of Corley Homes, Inc., and that the corporate account of Corley Homes, Inc. was treated by Corley as a personal account and was used for the benefit of the community. Without detailing the evidence here, it is sufficient to say that the record supports these findings and they are upheld.

We next consider the findings that on November 21, 1975, the Belen Farm was vested in the parties as joint tenants, and that it was community property. Our review of the record discloses no evidence that the Belen Farm was purchased with community funds. In fact, the unchallenged findings indicate otherwise. There is no finding, nor clear and convincing evidence to support a finding, of transmutation. *Burlingham v. Burlingham*, 72 N.M. 433, 384 P.2d 699 (1963). Thus, the finding that the Belen Farm was community property is not supported by substantial evidence. Corley testified that when he conveyed title to the entire 64.4 acres to Burnett Realty, that company was to pay off the mortgage on the entire farm, and then deed back the west half. There was corroborative testimony. The unchallenged findings of the court are entirely consistent with this testimony, and the court in fact found that Burnett Realty acquired no equitable interest in the west 33.185 acres of the Belen Farm.

Corley testified that he had no intent to own the property jointly with Mrs. Corley and never instructed Burnett Realty to fill out the deed form in that manner. Mrs. Corley paid no consideration for a joint tenancy interest. The deed of November 21, 1975 cannot alone be relied upon as substantial evidence that the Belen Farm was vested in the parties as joint tenants. *Wiggins v. Rush*, 83 N.M. 133, 489 P.2d 641

(1971); *Burlingham, supra; In re Trimble's Estate*, 57 N.M. 51, 253 P.2d 805 (1953). The finding of joint tenancy is not supported by the evidence.

The court found that personal bills paid by Corley Homes for 1976, which totalled approximately $21,300, were personal income of Mr. Corley and not an indebtedness of the community. The record indicates that personal bills paid for the year 1976 were paid from the account of Corley Corporation, not from the account of Corley Homes, Inc. Mrs. Corley testified that personal expenses were routinely paid from the account of Corley Corporation for the year 1976. However, Glenn Corley, sole owner of Corley Corporation, Deanna Brady, Corley Corporation's accountant, and Corley, all testified that bills paid in this manner represented advances on Corley's salary, and that Corley was indebted to Corley Corporation in the amount of $11,000. This testimony is undisputed. The court's finding that payments on the couple's personal and community bills, paid from Corley Corporation, represented income rather than indebtedness is contrary to the undisputed testimony and cannot be upheld. *Frederick, supra.*

We consider the challenged finding that, "The Petitioner paid all his community bills from the Corley Homes, Inc. funds with the exception of household and personal items which were paid from a joint account at First National Bank of Belen, Account # 11–428–134." The court made two other findings on the same subject: "That the community bills paid from the Corley Homes, Inc. funds consisted of *household bills of the parties and personal bills of the parties*"; and, "That *Corley Corporation* has been paying the Petitioner's personal bills as did the old corporation, Corley Homes, Inc." (Emphasis added.) These two findings were not challenged, and must be accepted by this Court as the facts of the case. *Baca v. Gutierrez*, 77 N.M. 428, 423 P.2d 617 (1967). The challenged finding is in conflict with both unchallenged findings in that it stated that Corley paid *all* his community bills from *Corley Homes, Inc., except household and personal items.* Therefore, the challenged finding cannot stand in the face of this conflict with the two unchallenged findings which must be taken as true. Also, the record contains no substantial evidence which would support the finding even if it were not in conflict with unchallenged findings.

The challenged finding that all monies earned by the parties during the marriage were deposited into the Corley Homes, Inc. accounts nos. 113–816–004 and 11–428–046 is in error. Our review of the record indicates that, at best, there is substantial evidence to indicate that *some* of the monies earned by the parties during marriage were deposited into the Corley Homes, Inc. account no. 11–428–046. The other number does not appear in the record. The finding is not supported by substantial evidence.

The challenged finding that, at the time of the marriage of the parties, Corley had a safe in the home of H. A. Mems which contained approximately $2,200 is also in error. Corley testified that, at the time of the marriage, he had between $60,000 and $75,000 in his safe. He further testified that, shortly after the marriage, he bought approximately 20 head of horses, breeding stock, and paid for them with cash from his safe. He also testified that he spent cash from his safe on building materials for his home, which was completed in September of 1971. H. A. Mems testified that he was Corley's bookkeeper and had Corley's safe at his home, that "sometime in the summer of 1971" he had occasion to open the safe and he observed that it contained only $2,400 in cash.

It appears that the trial court inferred from Mems' testimony that there was $2,200 (sic) in the safe *at the time of the marriage.* Mems only testified that there was $2,400 in the safe in "the summer of 1971". The parties were married in March of 1971. There was no evidence that Corley did not have access to his safe between March and the summer of 1971. In the face

of Corley's uncontradicted testimony that he spent cash from his safe for 20 head of horses and for building materials shortly after his marriage, the inference that the $2,400 was all that was in the safe at the time of the marriage is not a reasonable one. Therefore, this finding is not supported by substantial evidence.

With respect to the finding that certain horses are community property, it is important to note that all but two of the horses named were foaled on the Belen Farm during the marriage of the parties. The two horses that were not foaled on the farm, Snooper II and Roan Mare, according to undisputed testimony, were purchased with Corley's separate funds.

As to the offspring of Corley's separately owned horses, they constitute "rents, issues and profits thereof" and are separate property. § 40–3–8(C), N.M.S.A.1978. All the horses are patently the separate property of Corley. *Campbell v. Campbell,* 62 N.M. 330, 310 P.2d 266 (1957).

The trial court found that Corley commingled separate and community funds in the account of Corley Homes, Inc. "The mere commingling of separate property * * * with community property does not change its character from separate to community property, unless the separate property so commingled cannot be traced and identified (citations omitted)." *Burlingham, supra,* 72 N.M. at 441, 384 P.2d at 705. The evidence in this case indicates commingling of separate and community funds. However, the uncontradicted evidence also indicates that community expenditures exceeded community income. These expenditures were shown to come from three different sources: the parties' joint bank account, the account of Corley Homes, Inc. (Corley's corporation), and the account of Corley Corporation (solely owned by Glenn Corley). If the community's expenditures of funds exceeded the income, then any commingling of funds was to the benefit of the community, rather than to the detriment of the community. *See Hayner v. Hayner,* 91 N.M. 140, 571 P.2d 407 (1977).

When evidence on a disputed issue of fact is in the form of uncontradicted figures, the Supreme Court will review it in order to determine if the trial court dealt with it properly. *Moore v. Moore,* 71 N.M. 495, 379 P.2d 784 (1963). As evidence of the parties' income during their marriage, Corley introduced the joint income tax returns filed by the parties from 1971 through 1976. The tax returns were not contradicted. Mrs. Corley introduced into evidence a list of personal expenses of the parties for the year 1976. That list, for that year alone, shows greater expenditures than the total income of the parties for all the years they lived together, as shown on their joint tax returns.

The court refused Corley's requested finding that expenditures exceeded the community income. When requested to do so, it is error for a trial court to refuse to make a finding of fact which is abundantly supported by uncontradicted testimony. *Greenfield v. Bruskas,* 41 N.M. 346, 68 P.2d 921 (1937). The trial court erred in failing to adopt this finding.

The court's unchallenged findings indicate that the community contributed labor and talent to the benefit of Corley's separate property. Mrs. Corley should be given credit for the value of her share of these contributions.

For the above reasons, we reverse the decision of the trial court and remand for consideration by the trial court of the remaining issues, including the value of Mrs. Corley's interest in the community labors which were expended on behalf of the Belen Farm and on behalf of Mr. Corley's horses.

IT IS SO ORDERED.

McMANUS, Senior Justice, and FEDERICI, J., concur.

594 P.2d 1177

PUBLIC SERVICE COMPANY of New Mexico, Petitioner-Appellant and Cross-Appellee,

v.

NEW MEXICO PUBLIC SERVICE COMMISSION, Respondent-Appellee and Cross-Appellant.

City of Santa Fe, Intervenor.

No. 11969.

Supreme Court of New Mexico.

May 17, 1979.

Keleher & McLeod, Richard B. Cole, Albuquerque, for petitioner-appellant.

Jeff Bingaman, Atty. Gen., David S. Cohen, Patrick T. Ortiz, Asst. Attys. Gen., Santa Fe, for Public Service Commission.

Frank R. Coppler, Santa Fe, for intervenor.

Jeff Bingaman, Atty. Gen., Paul L. Biderman, Steven Asher, Asst. Attys. Gen., Santa Fe, for amicus curiae.

OPINION

PAYNE, Justice.

Public Service Company of New Mexico (PNM) brought this action in district court to review a decision of the New Mexico Public Service Commission with respect to PNM's request for rate increases for water service to the City of Santa Fe. The district court reversed the decision and remanded the case to the Commission. Both parties appeal.

When the Commission first considered the proposed rates, it held lengthy hearings and found that a fair rate of return on equity for PNM's Santa Fe water operations was 4 percent. PNM's proposed rates, based on a 14 percent rate of return, were disapproved as unjust and unreasonable. On appeal to the district court, the Commission's order granting a 4 percent return was found to be unsupported by substantial evidence. The district court annulled and vacated the Commission's decision and ordered the case remanded to the Commission with permission to take new evidence on the issue of a fair rate of return. The Commission appeals the district court's finding that a 4 percent rate of return was not supported by substantial evidence and PNM appeals the court's decision to the extent that it permits the Commission to consider additional evidence on remand.

We first determine the issue raised by the Commission of whether the district court erred in its finding that a 4 percent rate of return was not supported by substantial evidence.

The district court stated in its findings:

> Further examination of this record discloses no arithmetic formula or other basis, be it algebraic or expressed in hypothetical theory that would allow the commission based on this record to arrive at a figure of four percent (4%) as a fair and valid return. . . .
>
> . . . I cannot find a clear and adequate basis in the record for the rate arrived at by the commission. . . . I simply cannot find relevant testimony which would enable anyone seriously studying the matter to pin point how the figure of four percent (4%) was arrived at.

Judicial review of a Commission's decision is limited to a determination of whether the Commission acted fraudulently, arbitrarily, or capriciously, and whether the Commission's decision is supported by substantial evidence. *Llano, Inc. v. Southern Union Gas Company*, 75 N.M. 7, 399 P.2d 646 (1964). The district court may not substitute its judgment for that of the Commission. *Maestas v. New Mexico Public Service Commission*, 85 N.M. 571, 514 P.2d 847 (1973). Although every inference is to be drawn in support of the Commission's decision, a reviewing court may not uphold a Commission's decision which is not supported by substantial evidence. *See Rinker v. State Corporation Commission*, 84 N.M. 626, 506 P.2d 783 (1973).

The Commission points to several factors which it contends constitute substantial evidence to support a 4 percent rate of return. One is the relative risks of Santa Fe water operations compared to PNM's electrical operations. Another is PNM's general financial health, including the market value of PNM's stock, recent stock dividends, and PNM's credit rating and capital attractiveness. These factors are properly considered in a rate hearing. However, these factors alone do not indicate why 4 percent, as opposed to 6, 8, or 12 percent, is a fair and reasonable rate of return. General statements are no substitute for specific factual evidence. The Commission does not point to any such evidence to justify a 4 percent rate.

The expert witnesses for both the Commission and for PNM testified that a rate of return between 13 percent and 14.8 percent was justified. The Commission contends that it was entitled to ignore the expert testimony presented to it, and to set a rate inconsistent with that testimony. Assuming *arguendo*, that this is a correct statement of law (*see Hardin v. State Tax Commission*, 78 N.M. 477, 432 P.2d 833 (1967)), it does not justify the setting of rates, inconsistent with the expert testimo-

ny, which are not otherwise supported by substantial evidence. The district court did not err in rejecting the 4 percent rate of return and annulling the Commission's decision.

We next consider whether the district court erred in remanding the case to the Commission with permission to take additional testimony.

The court stated:

> I do not deem it necessary that additional evidence be taken, though the commission in its wisdom if it so desires may do so.

The district court reviewed the Commission's decision pursuant to § 62–11–5, N.M. S.A.1978, which reads in part:

> The trial before the district court shall be before the court without a jury and the court shall have no power to modify said action or order appealed from, but shall either affirm or annul and vacate the same. The court shall vacate and annul the order complained of, if it is made to appear to the satisfaction of the court that the order is unreasonable or unlawful.

PNM contends that because § 62–11–5 does not specifically provide for a remand of a rate case to the Commission for the taking of new evidence, the remand of this case was improper. PNM argues that the substantial evidence in the existing record requires the Commission on remand to adopt a rate of return on equity of between 13 and 14.8 percent.

The district court correctly rejected this argument, stating:

> I do not deem it the court's function here to usurp the powers of the commission to the extent of stating a percentage or a range of percentages within which an appropriate rate must fall. I merely state that such figure when established must be consistent with the evidence adduced before the commission.

Section 62–11–5 does not authorize the district court to modify an order of the Commission. If the approach advocated by PNM were adopted, it would place the district court in the position of weighing the evidence and substituting its judgment for the judgment of the Commission. The district court properly restricted its review to the question of whether the Commission's order was supported by substantial evidence. Having found that it was not, the court remanded the case for the entry of a new order based on substantial evidence.

PNM contends that in establishing a new rate of return the Commission is limited by the decisions of this Court from considering evidence outside of the existing record. PNM relies on *State v. Carmody*, 53 N.M. 367, 208 P.2d 1073 (1949) in which a writ of prohibition was issued against a trial judge to prevent him from remanding a pending cause to the State Corporation Commission for the taking of additional evidence. This Court said:

> [N]ot a single case has been found in which the cause was remanded to an administrative board or authority for further proceedings as, for instance, taking of additional testimony, that lacks the sanction of statutory or constitutional authorization for the remand.
>
> [The] trial judge could not properly remand the cause to the Corporation Commission for the taking of additional evidence. He could only determine the questioned order to be reasonable or unreasonable, lawful or unlawful, on the record made before the Commission and approve, or disapprove, the same accordingly.

Id. at 376–77, 208 P.2d at 1079.

The Commission seeks to distinguish *Carmody* and other cases relied on by PNM on the basis that they involve remands following *interlocutory* orders of the reviewing courts. It cites the following language from *Carmody*:

> The kind of remand we are here talking about is one for the taking of additional testimony preliminary to deciding reasonableness or lawfulness of the order under review, as enjoined by the statute. Of course, when the reviewing court has decided this basic question, if judgment

> vacating the questioned order be entered, then with or without any formal order of remand, the cause will stand remanded to the administrative board for the conduct of such further proceedings as lie within its statutory powers. (Citations omitted.)

Id. at 377, 208 P.2d at 1079.

Even if we were to assume that the Court in *Carmody* intended such a distinction, we can discern no rational basis for distinguishing interlocutory from final orders for purposes of determining the issue in this case. The Commission, amicus curiae, and the intervenor do not cite any basis for this distinction. However, the decision we reach in this case is not inconsistent with the above quoted language in *Carmody*.

In *Carmody* this Court said that after entry of a final order a cause will always stand remanded to the administrative agency for such further proceedings as lie within its statutory powers. This proposition is not more than a statement of an obvious rule of law. "An agency is always free to conduct such further proceedings as lie within its statutory powers. . . ." 2 Vom Baur, *Federal Administrative Law*, § 790, at 755 (1942). The agency has an affirmative duty to exercise its statutory powers. The question is what further proceedings lie within the Commission's statutory powers after its decision in a rate case has been annulled and vacated.

Under the Public Utilities Act the Commission has continuing jurisdiction to set just and reasonable utility rates. Section 62–10–1, N.M.S.A.1978 provides in part:

> [T]he commission, whenever it deems that the public interest or the interest of consumers and investors so requires, may proceed, to hold such hearing as it may deem necessary or appropriate.

It is the Commission's position that it had the authority under § 62–10–1 to consider additional evidence regardless of whether the district court's remand order so provided. The Commission argues that it had an affirmative duty to utilize the most recent available economic data in determining just and reasonable utility rates. *See Mountain States Tel. v. New Mexico State Corp.*, 90 N.M. 325, 563 P.2d 588 (1977). The Commission contends that because approximately 13 months elapsed between the date of the Commission rate hearing and the entry of the district court's order of remand, it had an obligation, rather than merely a right, to consider new evidence on remand. The Commission also contends that there is no applicable statutory time limitation within which the new testimony must be heard and a new decision rendered, but that it is only limited by the general requirement that it act diligently and in good faith to dispose of the matter.

PNM argues that if the Commission is permitted to take new testimony on remand, the regulatory scheme established by the Public Utilities Act will be violated and the rate relief to which PNM is undisputedly entitled will be indefinitely delayed. Such a procedure could become confiscatory by depriving a utility of a fair return on its investment. PNM contends that § 62–8–7, N.M.S.A.1978 places a ten-month limit within which a final decision on rate increases must be made.

Section 62–8–7 sets forth the statutory procedure for rate changes. Under that section a utility files a proposed rate increase with the Commission, giving the Commission 30 days' notice thereof before the proposed rates can go into effect. Within that thirty-day period the Commission may suspend the operation of the proposed rates for up to 9 months pending a hearing. The Commission may also suspend imposition of the proposed rates for an additional three-month period. However, during the extended period the utility may put the proposed rates into effect by filing its undertaking secured by a bond for the purpose of refunding any amounts that may later be determined to be excessive.

■ We hold that § 62–8–7 does not make it mandatory for the Commission to act within any specific time; it merely provides that if the Commission fails to act within the nine-month suspension period, the utility may put the proposed rates into effect. *See Mountain States Tel., supra.*

The Commission contends, however, that once it has determined that the requested rates are unjust and unreasonable, even if its decision is annulled on review, the time limitations contained in § 62–8–7 are no longer applicable. We do not agree.

Once the Commission's order is annulled and vacated, a rate case is in the same posture it was in before the original decision was rendered. The Commission may hold additional hearings and take additional testimony just as if the vacated order had never been entered; however, because the proposed rates may be put into effect after expiration of the initial nine-month period, the Commission will have every reason to act expeditiously to enter new findings based on substantial evidence.

The decision of the trial court is affirmed and the case is remanded to the Commission with directions to conduct such further proceedings as are consistent with the views expressed herein.

IT IS SO ORDERED.

SOSA, C. J., and EASLEY, J., concur.

McMANUS, Senior Justice, dissenting.

FEDERICI, J., not participating.

McMANUS, Senior Justice, respectfully dissenting.

I respectfully dissent only from the portion of the majority opinion whereby the case is remanded to the Commission with directions to conduct further proceedings.

I feel that § 62–11–5, N.M.S.A.1978 only gives the Supreme Court, as well as the district court, authority to affirm or annul and vacate the action of the Commission. There is no provision in the statute which allows a remand for the taking of new evidence.

594 P.2d 1181

NEW MEXICO HOSPITAL ASSOCIATION, Petitioner-Appellant,

v.

EMPLOYMENT SECURITY COMMISSION of New Mexico, Respondent-Appellee.

No. 11753.

Supreme Court of New Mexico.

May 18, 1979.

Sutin, Thayer & Browne, LaFel E. Oman, Marianne Woodard, Albuquerque, for petitioner-appellant.

J. R. Baumgartner, Albuquerque, for respondent-appellee.

OPINION

EASLEY, Justice.

The Employment Security Commission (ESC) issued a decision requiring members of the New Mexico Hospital Association (the Hospitals) to reimburse the New Mexico Unemployment Compensation Fund (the State Fund) for 100% of unemployment compensation paid to claimants for certain weeks during which the State Fund also received a 50% contribution from the Federal Unemployment Trust Fund (the Federal Fund). The District Court in Bernalillo County affirmed the ESC decision, and the Hospitals appeal. We affirm.

The issues raised are (1) whether the New Mexico Unemployment Compensation Act, §§ 51–1–1, *et seq.*, N.M.S.A.1978 (the State Act) is ambiguous and may be construed to require the Hospitals to reimburse the State Fund for only 50% of benefit costs during those periods when the Federal Fund contributes 50%; and (2) if the State Act cannot be so construed, whether the State Act conflicts with federal unemployment laws and regulations.

Under the State Act there are "contributing employers" and "reimbursing employ-

ers". Contributing employers are taxed to the State Fund according to the schedules set forth in § 51–1–11. Reimbursing employers (non-profit organizations) are allowed the option of paying, on a reimbursement basis, the amount of benefits actually paid to claimants. § 51–1–13. The Hospitals are reimbursing employers.

The Federal-State Extended Unemployment Compensation Act of 1970 (the Federal Extended Compensation Act) (compiled as §§ 201–207 following 26 U.S.C. § 3304, Vol. 7 U.S.C. 1976 ed. at 897–99), encourages participating states to provide extended benefits, up to 39 weeks, during certain defined periods of high unemployment (extended benefit periods). This is accomplished by contributions to the various state funds from the Federal Fund of 50% of the last 13 weeks of benefit costs during an extended benefit period, from week 27 through week 39.

At the time the Federal Extended Compensation Act was passed, the New Mexico Act provided for 30 weeks of regular unemployment compensation to claimants as compared with 26 weeks in most states. Under the ESC decision, the Hospitals were required to reimburse the State Fund for 100% of regular benefit costs (the first 30 weeks) and for 50% of extended benefit costs (weeks 31 through 39). Since the Federal contribution during an extended benefit period applies from weeks 27 through 39, the result of the ESC decision was that for weeks 27 through 30 the State Fund received 150% of benefit costs attributable to the Hospitals; 100% reimbursed by the Hospitals and 50% from the Federal Fund.

The Hospitals contend that the ESC ruling is inconsistent with the reimbursement concept. They urge us to construe the State Act to require reimbursing employers to pay to the State Fund only half the amount of any sharable compensation. This question is the first impression in the United States.

Construction of the State Act

Regular benefits are those benefits provided under § 51–1–4 for 30 weeks, and extended benefits are those benefits payable under § 51–1–48 during an extended benefit period to those claimants who have exhausted all their rights to regular benefits. Unless there is ambiguity in a statute, construction is uncalled for. *State v. Elliot*, 89 N.M. 756, 557 P.2d 1105 (1977); *Atlantic Oil Producing Co. v. Crile*, 34 N.M. 650, 287 P. 696 (1930). The State Act requires reimbursing employers to make payments in lieu of contributions in amounts equal to the full amount of regular benefits actually paid plus one-half of the amount of extended benefits. § 51–1–13. The alleged ambiguity is in the definition of what are "regular benefits" and "extended benefits". Are the amounts paid for weeks 27 through 30 regular or extended benefits? Particular attention must be paid to the emphasized portions of the following statutes.

Section 51–1–42, N.M.S.A.1978, provides:

> As used in the *Unemployment Compensation Law*: (Emphasis added.)
>
> . . . . .
>
> B. "benefits" means the cash unemployment compensation payments payable to an eligible individual pursuant to Section 51–1–4, N.M.S.A.1978 . . . .

Section 51–1–4(C), N.M.S.A.1978 provides for unemployment benefits to be paid to individuals for 30 weeks.

Section 51–1–48, which was enacted as an amendment to the New Mexico Unemployment Compensation Law to implement the federal program of extended benefits, provides:

> Definitions; extended benefits.
>
> A. *As used in this section*, unless the context clearly requires otherwise: (Emphasis added.)
>
> . . . . .
>
> (7) "regular benefits" means benefits payable to an individual under the *Unemployment Compensation Law* . . *other than extended benefits*;
>
> (8) "extended benefits" means benefits . . . payable to an individual under the *provisions of this section* for weeks of unemployment in his eligibility period. (Emphasis added.)

We find no ambiguity in the State Act regarding these definitions. It is clear that "extended benefits" are benefits payable "under the provisions of this section", § 51–1–48, and benefits payable under *other sections* of the Unemployment Compensation Law are "regular benefits". A claimant is eligible for "extended benefits" only after he has exhausted all his rights to "regular benefits that were available to him under the Unemployment Compensation Law". § 51–1–48(C).

Constitutionality of the State Act

The Hospitals contend that, as interpreted by the ESC, the State Act conflicts with Federal Statutes and regulations.

a. *Federal Regulations*

The relevant Federal Regulation is 20 C.F.R. 615.12, which provides:

> The State law shall require an employer to reimburse the State Fund for 50 per cent of any sharable compensation paid to an individual that is attributable under the State law to service with such employer if the employer . . . is reimbursing the State fund with respect to such service.

The Hospitals argue that this regulation means that the State shall require a reimbursing employer to reimburse *no more than 50%* of any sharable compensation. The language of the regulation, however, admits of no such requirement.

b. *The Federal Act*

The relevant Federal statutes were enacted by Titles I and II of Pub.L.No. 91–373 (1970). Title I (codified in scattered sections of 5, 15, 26 and 42 U.S.C.) amended certain sections of the existing Federal Act, and enacted a new section, 26 U.S.C. § 3309. Title II was the Federal Extended Compensation Act.

As originally enacted, the Federal Act did not provide unemployment compensation for employees of non-profit hospitals. Section 26 U.S.C. § 3306(c)(8) excludes from the definition of "employment", service for non-profit organizations such as the Hospitals. Title I of the 1970 amendments brought those employees under the purview of the Act. 26 U.S.C § 3304(a)(6)(A) now requires states to provide compensation to claimants formerly employed in hospitals. Section 3304(a)(6)(B) now provides that these institutions be allowed to make reimbursing payments in lieu of contributions as provided in § 3309.

It is provided in the Federal Extended Compensation Act that:

> State law shall provide that payment of extended compensation shall be made . . . to *individuals who have exhausted all rights to regular compensation under the State law* . . . . (Emphasis added.)

§ 202.

> There shall be paid to each State an amount equal to one-half of the sum of—
>
> (A) the sharable extended compensation, and
>
> (B) the sharable regular compensation,
>
> paid to individuals under the State law.
>
> . . . . .
>
> extended compensation paid . . . is sharable extended compensation to the extent that the aggregate extended compensation paid does not exceed the smallest of . . .
>
> [(A) 50 per centum of the total amount of regular compensation . . payable to him . . . ,
>
> (B) thirteen times his average weekly benefit amount, or
>
> (C) *thirty-nine* times his average weekly benefit amount, *reduced by the regular compensation paid* . . . (Emphasis added.)]
>
> (c) [Sharable regular compensation] For purposes of subsection (a)(1)(B), regular compensation paid . . . is *sharable regular compensation*—
>
> (1) if such week is in such individual's eligibility period . . . and
>
> (2) *to the extent that the sum* of such compensation, plus the regular compensation paid . . . *exceeds*

> *twenty-six times (and does not exceed thirty-nine times)* the average weekly benefit amount . . . for weeks of total unemployment payable to such individual *under* the *State law* . . . . (Emphasis added.)

§ 204.

From the above sections it appears that the Congress contemplated that the Federal Fund would share 50% of the costs of the last 13 weeks of benefits in an extended benefit period, regardless of whether those were termed "extended" or "regular" compensation under state law. The legislative history reflects this intention.

> The Federal Government would pay one-half the cost of the extended unemployment compensation required under this title. Not to discourage States from providing regular compensation for longer than 26 weeks, the Federal Government would also pay one-half of regular compensation in excess of 26 weeks in a benefit year to the extent such regular compensation is paid during an extended benefit period.

H.R.Rep.No. 612, p. 30, 91st Cong., 1st Sess. (1969); *See* S.R.Rep.No. 752, p. 35, 91st Cong., 2nd Sess. (1970).

From the above sections, and the legislative history of those sections, it is clear that the Congressional intent was to allow the Federal Fund to share with the State Fund 50% of compensation paid from weeks 27 through 39 in an extended benefit period, whether those benefits were all "extended", or were part "regular" and part "extended" under the particular state law.

The Hospitals cite Congressional legislative history which indicates that, by providing the reimbursement plan for non-profit organizations and placing the costs of administering the program on contributing employers, it was the intention of Congress to allow these organizations to take part in the system at a minimum cost. The Hospitals argue that they should not now be required to make payments which act as a general subsidy to the system. This legislative history does not relate to the Federal Extended Compensation Act. That Act does not prohibit the states from requiring reimbursement by non-profit organizations of the full amount of "regular benefits" under State law. Indeed, Title I of Pub. L.No. 91–373, by enacting the new § 3309, appears to require the opposite.

Our review of the committee reports and of discussions on the floor of both houses indicates that, apparently, the Congress did not perceive this interaction between Titles I and II of Pub.L.No. 91–373.

Had the Congress considered the issue, they might have provided that non-profit organizations reimburse the various state funds for no more than 50% of any sharable compensation. However, reimbursing employers already benefit in that they do not share in the administrative costs of providing regular compensation to claimants, and, under the State Act, they receive the benefit of 50% of the cost of extended compensation for the last nine weeks. Both of these benefits are at the expense of contributing employers because the administration costs of the unemployment system and the Federal contributions during extended benefit periods find their source in the taxes imposed on contributing employers. 26 U.S.C. § 3301; 42 U.S.C. §§ 1101 to 1105. The Congress might well have intended not to extend any further benefits to reimbursing employers at the expense of contributing employers.

In construing a Federal Act to effectuate the Congressional purpose, courts must take care not to extend the scope, nor distort the ordinary meaning of the Statutes. *62 Cases of Jam v. United States*, 340 U.S. 593, 71 S.Ct. 515, 95 L.Ed. 645 (1951); *Hoffman v. Joint Council of Teamsters No. 38*, 230 F.Supp. 684 (N.D.Cal.1962). In construing State Statutes, this Court has held:

> A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration.

Burch v. Foy, 62 N.M. 219, 223, 308 P.2d 199, 202 (1957). We have found no Federal cases construing Federal Statutes which provide a contrary rule where, as here, Congress apparently did not consider a possible effect which resulted from the Federal Statute.

We have found that the State Act is not ambiguous with regard to the definition of "regular" and "extended" benefits, and that the State Act is not in conflict with Federal statutes and regulations. The decision of the district court is affirmed.

IT IS SO ORDERED.

McMANUS, Senior Justice and FEDERICI, J., concur.

594 P.2d 1186

STATE of New Mexico,
Plaintiff-Appellant,

v.

Roldon GARCIA a/k/a Roldan Garcia,
Defendant-Appellee.

No. 3549.

Court of Appeals of New Mexico.

Oct. 17, 1978.

Rehearing Denied Nov. 7, 1978.

Supreme Court Order Quashing Cert. Feb. 23, 1979.

Toney Anaya, Atty. Gen., Sammy J. Quintana, Asst. Atty. Gen., Santa Fe, for plaintiff-appellant.

John B. Bigelow, Chief Public Defender, Santa Fe, Alice G. Hector, District Public Defender, Mark Shapiro, Asst. App. Defender, Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

Defendant's latest felony conviction, for burglary, was affirmed by memorandum opinion in *State v. Garcia*, (Ct.App.) No. 3115, decided November 29, 1977. Thereafter, a supplemental information charged defendant with being an habitual offender. The prior convictions charged were: 1) two grand larceny convictions in Bernalillo County District Court in 1954; 2) a conspiracy conviction in federal district court in 1962; and 3) a conviction for unlawfully taking a vehicle in Bernalillo County District Court in 1970. The trial court struck all of the prior convictions charged; the State appealed. We reverse, discussing: (1) procedural matters; (2) burden of proof; (3) absence of record; and (4) the federal conviction.

Procedural Matters

(a) Defendant first moved to dismiss the habitual charge to the extent it was based on the 1954 and 1962 convictions. After an evidentiary hearing, Judge M. Sanchez denied the motion, then recused himself at defendant's request. Defendant then filed a new motion, seeking to strike all of the prior convictions charged. This motion was heard, and granted by Judge Ryan. Arguing the propriety of Judge Ryan's ruling on appeal, defendant refers us to testimony introduced at the hearing before Judge M. Sanchez. The testimony at the hearing before Judge M. Sanchez was not admitted as evidence, nor tendered as evidence, at the hearing before Judge Ryan. In argument before Judge Ryan, defendant asked that the transcript of the hearing before Judge M. Sanchez be reviewed. Judge Ryan declined to do so, pointing out that the matter before him was a new motion. Because the testimony at the hearing before Judge M. Sanchez was neither introduced nor considered at the hearing before Judge Ryan, it will not

be considered by us in determining the propriety of Judge Ryan's ruling.

(b) The only evidence introduced at the hearing before Judge Ryan consisted of exhibits. Although a designation conference was held, N.M.Crim.App. 209, at which the complete transcript of the hearing before Judge Ryan was designated for use on appeal, the designation order makes no mention of the exhibits. There is nothing indicating that either party asked Judge Ryan to designate that the exhibits be transmitted to this Court, yet either party could have done so. N.M.Crim.App. 208. The exhibits were not transmitted to this Court until we requested them.

Defendant contends the failure of the State to cause the exhibits to be transmitted to this Court is fatal to the State's appeal. He points out that in the absence of the exhibits, certain statements by counsel, in the briefs, have no evidentiary support in the hearing before Judge Ryan. In support of this argument, he reminds us that statements of counsel are not evidence. *State v. Duran*, 91 N.M. 38, 570 P.2d 39 (Ct.App.1977). Defendant also reminds us that the burden is on the appellant, in this case the State, to provide the necessary appellate record. See *State v. Duran*, 91 N.M. 756, 581 P.2d 19 (1978).

Defendant's argument overlooks the fact that the State has provided a complete transcript of the hearing before Judge Ryan. This "complete transcript" distinguishes *State v. Alderete*, 91 N.M. 373, 574 P.2d 592 (Ct.App.1977). If the exhibits are not to be considered, this transcript shows a total absence of evidence at the hearing before Judge Ryan and, thus, nothing that even arguably supports Judge Ryan's ruling. The State having provided a transcript showing an absence of evidence, the result would be a reversal of Judge Ryan's ruling without reaching the merits.

The issues argued before Judge Ryan cannot be intelligently considered without reference to the exhibits. We ordered transmission of the exhibits to us in order to consider those issues. We have authority, on our own motion (neither party ever asked that the exhibits be transmitted) to have exhibits sent to us for our review when those exhibits had been introduced, and relied on, before the trial court. The exhibits are before us on our own motion; accordingly, we consider the merits of the appellate issues.

Burden of Proof

Judge Ryan granted the motion to strike all the prior convictions charged in the supplemental information. We do not know on what basis the motion was granted. Remarks by Judge Ryan during the course of the hearing leave the impression that the motion to strike may have been granted on the basis that the State had failed to meet its burden of proof. If this impression is correct, we have the question of what was meant by "burden of proof" and at what point in time the burden was not met. Accordingly, we repeat statements from our prior opinions.

State v. Dawson, 91 N.M. 70, 570 P.2d 608 (Ct.App.1977) held:

> The State makes a prima facie case upon proof that defendant has been convicted of a prior felony.
>
> * * * * * *
>
> Defendant's position throughout has been that the State has the burden of proving the validity of the prior convictions. Until defendant raised an issue as to the validity of the prior convictions, "validity" was not an issue in the case.

See *State v. Gallegos*, 91 N.M. 107, 570 P.2d 938 (Ct.App.1977).

Defendant's motion asserted that all of the prior convictions, charged in the supplemental information, were invalid. *State v. O'Neil*, 91 N.M. 727, 580 P.2d 495 (Ct.App. 1978) states:

> Having made this contention, defendant was entitled to present evidence going toward the asserted invalidity.
>
> Summarizing: 1. Defendant has the burden of producing evidence in support of his defense that his prior convictions are invalid. 2. Until such evidence is

> produced, this defense simply is not a matter to be decided. 3. Once such evidence is produced, the State has the burden of persuasion as to the validity of the prior convictions.

There is no issue in this appeal concerning identity. State exhibits, showing the prior convictions, made a prima facie case as to the prior convictions. Defendant's motion to strike claimed the prior convictions were constitutionally invalid. See *State v. Gallegos*, supra. Defendant's exhibits, however, were not evidence tending to establish constitutionally invalid convictions. There being no evidence that the prior convictions were constitutionally invalid, there was no "validity" issue to be decided and the State did not fail to meet its burden of proof. We discuss defendant's exhibits in the next two issues.

Absence of Record

Defendant's 1954 and 1970 New Mexico convictions were based on his guilty pleas. Defendant's exhibit 1 is an affidavit of the clerk of the Bernalillo County District Court. The affidavit states that notes of the guilty plea proceedings cannot be located.

In *State v. O'Neil*, supra, two of the defendant's prior convictions were based on guilty pleas in San Juan County. The transcripts of the guilty plea proceedings had been destroyed, with the result that there was no official record of what occurred in the guilty plea proceedings. We stated:

> The fact that no transcript of the San Juan County guilty pleas could be obtained was not evidence that those guilty pleas were invalid; all this shows is that the transcript was unavailable.
>
> . . . . .
>
> The failure of defendant to introduce evidence in support of the asserted invalidity of the San Juan County guilty pleas disposes of this appeal. There being no evidence of invalidity, there was no basis for dismissing the San Juan County felonies from the supplemental information. Where the record in the habitual offender proceeding is silent as to invalidity, there is no basis for holding the prior convictions invalid.

State v. O'Neil, supra, disposes of defendant's claim that defendant's New Mexico convictions were properly stricken because of the absence of a record as to what occurred when defendant pled guilty. Recognizing the applicability of *O'Neil*, supra, defendant argues that *O'Neil* was incorrectly decided. We disagree. Defendant overlooks the fact that "invalidity" of a prior conviction is a defense, and that it is defendant's obligation to present evidence in support of this defense. *State v. O'Neil*, supra.

The Federal Conviction

For the federal conviction to be considered as a prior conviction under the habitual offender statute, the conviction must have been for a crime "which if committed within this state would be a felony". Section 40A–29–5, N.M.S.A.1953 (2d Repl. Vol. 6). A State's exhibit shows that defendant pled guilty in federal court to the offense of "conspiring to violate the laws of the United States, to wit: to illegally sell heroin". Defendant states: "It is possible that after looking at the offense of which Mr. Garcia was actually convicted, Judge Ryan properly concluded that it would not have been a felony in New Mexico." If this was Judge Ryan's conclusion, it was legally incorrect. At the time of the federal conviction, in 1962, conspiracy to illegally sell heroin would have been a felony if committed in New Mexico. Sections 40–1–3 and 40–11–1, N.M.S.A.1953 (Original Vol. 6); § 54–7–14, N.M.S.A.1953 (Repl.Vol. 8, pt. 2).

Defendant asserts that the record does not show that his guilty plea in federal court was voluntary and intelligent. We disagree, but point out, once again, that the burden was on defendant to produce evidence that it was *not* voluntary or intelligent. *State v. O'Neil*, supra. The only evidence introduced before Judge Ryan concerning the voluntariness of defendant's federal plea is an exhibit. This exhibit is a transcript of the guilty plea proceedings in

federal court. This transcript shows a plea pursuant to plea bargain; the original charge of unlawful sale of imported heroin was to be dismissed after defendant pled guilty to conspiracy to illegally sell heroin. The transcript shows this plea was entered with advice of counsel; "I have explained to the defendant the procedure that is proposed to take place today, and he agrees." This is not evidence of an involuntary or unintelligent plea.

Defendant asserts that his federal plea was constitutionally invalid. He points out that the federal trial judge (a) did not address the defendant personally, (b) did not inquire if the plea was voluntary, and (c) did not affirmatively make a record showing that defendant understood the constitutional rights being waived by the guilty plea. Defendant relies on *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). We have held that *Boykin* is not to be applied retroactively. *State v. Guy*, 81 N.M. 641, 471 P.2d 675 (Ct.App.1970). The Tenth Circuit Court of Appeals reached the same result. *Perry v. Crouse*, 429 F.2d 1083 (10th Cir. 1970). See also, *Halliday v. United States*, 394 U.S. 831, 89 S.Ct. 1498, 23 L.Ed.2d 16 (1969), reh. denied, 395 U.S. 971, 89 S.Ct. 2106, 23 L.Ed.2d 761 (1969). The requirements of *Boykin*, supra, decided in 1969, were not applicable to defendant's guilty plea in federal court in 1962.

The order striking the prior convictions charged in the supplemental information is reversed. The cause is remanded with instructions to reinstate the charges.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

594 P.2d 1190

STATE of New Mexico, Plaintiff-Appellant,

v.

Robert T. MONTOYA, Defendant-Appellee.

No. 3791.

Court of Appeals of New Mexico.

April 3, 1979.

Writ of Certiorari Denied May 1, 1979.

Jeff Bingaman, Atty. Gen., Santa Fe, James F. Blackmer, Asst. Atty. Gen., Albuquerque, for plaintiff-appellant.

G. Hank Farrah, Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

After his latest conviction, for "failure to appear" (§ 31–3–9, N.M.S.A.1978), a supplemental information charged that defendant was an habitual offender. The supplemental information sought enhancement of the "failure to appear" sentence on the basis of ten previous convictions. The trial court struck the paragraph in the supplemental information which alleged a conviction in federal court. The trial court ruled that seven of the previous convictions should be counted as only one prior conviction under our habitual offender statute. The State appealed. We discuss whether: (1) the federal conviction was a "prior" conviction under the habitual offender statute; and (2) the seven convictions should be counted as more than one "prior" under the habitual offender statute.

Section 31–18–5, N.M.S.A.1978 states:

> 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 . . . .

The punishment depends on the number of prior felonies. The parties agree that paragraphs 1 and 2 of the supplemental information charge but one prior felony. The dispute as to paragraphs 3 through 10 of the supplemental information presents the question as to whether defendant is exposed to a sentence, under § 31–18–5, supra, as a third, or fourth, felony offender.

The Federal Offense

Paragraph 3 of the supplemental information alleged that defendant had been

"convicted of ILLEGAL PURCHASE OF HEROIN, a felony, in Criminal Cause No. 24315 in the United States District Court for the District of New Mexico, Albuquerque, New Mexico, on April 6, 1971." Although the federal statute is not identified in the record, the parties do not dispute that defendant's purchase violated 26 U.S.C.A. § 4704(a) (1967) at the time of the purchase.

The trial court struck the paragraph 3 allegations, ruling that "the federal crime of illegal purchase of heroin, contrary to 26 U.S.C., Section 4704(A), would not be a crime under the laws of the State of New Mexico . . . ."

At the time of defendant's federal conviction, and presumably at the time the federal offense was committed (inasmuch as the record does not show the date of the federal offense). New Mexico prohibited the possession of heroin except in limited circumstances. Sections 54–7–1 and 54–7–13, N.M.S.A.1953 (Repl.Vol. 8, pt. 2).

"A prior conviction in another jurisdiction which was not a felony under the laws of New Mexico will not support an enhanced sentence." *State v. Silas*, 92 N.M. 434, 589 P.2d 674 (1979). "For the federal conviction to be considered as a prior conviction under the habitual offender statute, the conviction must have been for a crime 'which if committed within this state would be a felony' ". *State v. Garcia*, 92 N.M. 730, 594 P.2d 1186 (1978).

Defendant contends the federal crime of illegal purchase of heroin would not have been a felony in New Mexico because the elements of an illegal purchase under the federal statute did not include possession, which was the New Mexico offense.

Defendant relies on *United States v. Brown*, 207 F.2d 310 (7th Cir. 1953). *Brown* states that the federal statute did not make it a crime to possess narcotics, but only to purchase them. *Brown* also states that while a person illegally purchasing narcotics "would probably have narcotics in his possession, the possession is not a necessary element" of the crime. *Brown* does not answer our question. Our question does not involve the elements of the federal statute. Our question, when the federal elements have been met, is whether the federal crime would have been a felony under New Mexico law. Specifically, the question is whether defendant's illegal purchase of heroin would have amounted to the crime of illegal possession of heroin under New Mexico law.

Federal decisions establish that there is a relationship between "purchase" and "possession". Unexplained possession of the narcotic is sufficient to sustain a conviction for illegal purchase. *United States v. Gulley*, 374 F.2d 55 (6th Cir. 1967); see *Amaya v. United States*, 373 F.2d 197 (10th Cir. 1967). Our question is the converse—would the illegal purchase of heroin amount to the crime of illegal possession? Yes.

"Purchase" means "to obtain (as merchandise) by paying money or its equivalent . . . ." "Obtain" means "to gain or attain possession . . . ." Webster's Third New International Dictionary (1966). "Possession" may be actual or constructive. See U.J.I.Crim. 36.40. Constructive possession requires no more than knowledge of the narcotic and control over it; control, in turn, requires no more than the power to produce or dispose of the narcotic. *State v. Montoya*, 85 N.M. 126, 509 P.2d 893 (Ct.App. 1973); *Amaya v. United States*, supra.

The illegal purchase of heroin under the federal statute would have been the crime of illegal possession of heroin if committed in New Mexico. The trial court erred in striking from the supplemental information, the allegation concerning the federal conviction for illegal purchase of heroin.

The Seven Convictions

Paragraphs 4 through 10 of the supplemental information allege seven convictions involving heroin. All the convictions were on March 29, 1977. According to the State's brief, these convictions occurred at one trial by one jury.

State v. Sanchez, 87 N.M. 256, 531 P.2d 1229 (Ct.App.1975) indicates that where multiple convictions occur at a single trial, whether the convictions may be counted as more than one conviction to enhance a sentence for a subsequent conviction under the habitual offender statute depends on whether the convictions were a "single transaction" crime or were crimes unrelated to one another. "Single transaction" convictions would count as only one "prior" under the habitual offender statute; unrelated convictions would count as multiple convictions. See also *State v. Baker*, 90 N.M. 291, 562 P.2d 1145 (Ct.App.1977).

Relying on *State v. Sanchez*, supra, the State urges us to hold that the seven heroin convictions should be counted as four prior convictions under the habitual offender statute. *State v. Linam*, —— N.M. ——, —— P.2d ——, No. 11,816, decided January 11, 1979 [St. B. Bull., Vol. 18, No. 5, page 67] rejects the "unrelated crime" concept discussed in *State v. Sanchez*, supra. *Linam* states: "[I]t is inherent in the habitual criminal act that, after punishment is imposed for the commission of a crime, the increased penalty is held *in terrorem* over the criminal for the purpose of effecting his reformation and preventing further and subsequent offenses by him." Consistent with this purpose, *Linam* holds that "*each* felony must have been committed after conviction for the preceding felony."

Under *State v. Linam*, supra, the seven heroin-related convictions cannot be treated as more than one prior conviction under the habitual offender statute. The reason is that the seven convictions occurred at the same trial and, thus, none of the seven offenses could have been committed after any one of the seven convictions. This result is consistent with other decisions limiting the use of multiple convictions at one trial for the purpose of enhancing the sentence for the latest conviction. *State v. Garcia*, 91 N.M. 664, 579 P.2d 790 (1978); *State v. Baker*, supra; *State v. Martinez*, 89 N.M. 729, 557 P.2d 578 (Ct.App.1976), cert. denied, 430 U.S. 973, 97 S.Ct. 1663, 52 L.Ed.2d 367 (1977); *State v. Ellis*, 88 N.M. 90, 537 P.2d 698 (Ct.App.1975).

The trial court correctly ruled that the seven heroin-related convictions could be counted as only one prior conviction under the habitual offender statute.

That part of the trial court's order which struck the allegation of the prior federal conviction is reversed; that part of the trial court's order which held that the seven heroin-related convictions would be treated as one prior conviction in the habitual offender proceedings is affirmed. The cause is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

LOPEZ and WALTERS, JJ., concur.

594 P.2d 1193

FIDELITY NATIONAL BANK, a National Banking Corporation, Plaintiff-Appellee,

v.

LOBO HIJO CORPORATION, Defendant-Appellant, Cross-Appellee,

v.

John RUST, G. R. McNary, Albert Anella and James H. Foley, Cross-Defendants, Cross-Appellants.

No. 3335.

Court of Appeals of New Mexico.

April 3, 1979.

Writ of Certiorari Denied May 1, 1979.

J. E. Casados, Gallagher, Casados & Martin, Albuquerque, for appellant, cross-appellee.

Quincy D. Adams, Adams & Foley, Albuquerque, for cross-defendants, cross-appellants.

Martin E. Threet, Threet, Threet, Glass & King, Albuquerque, for appellee.

OPINION

WOOD, Chief Judge.

The trial court's judgment determined the amount due the Bank pursuant to a promissory note, determined that the amount due was a prior lien on certain real estate which had been mortgaged to the Bank, foreclosed this lien and ordered the real estate sold, directed how the proceeds of the sale were to be applied, and ruled that the Bank was entitled to judgment for any deficiency that remained after application of the sale proceeds. The numerous

defendants included Lobo (Lobo Hijo Corporation), Freeway (Freeway Old Town Limited), and Limited Partners (Rust, McNary, Anella and Foley). A deficiency judgment was entered against Lobo. A judgment was entered in favor of Lobo and against Limited Partners on the basis of an indemnity agreement. Lobo's appeal, which involves the dismissal of its counterclaim against the Bank (1) raises the issue of the propriety of a setoff. The appeal of Limited Partners raises (2) procedural claims involving the indemnity agreement and issues as to (3) whether the indemnity agreement was joint and several, and (4) whether there was a deficiency to which the indemnity agreement applied.

The trial court approved the special master's sale of the property. After application of the proceeds of the sale, the Bank was granted a deficiency judgment against Lobo for $75,577.25. Lobo was granted a judgment against Limited Partners in the same amount.

Setoff

The bank's complaint was filed September 28, 1976. On October 21, 1976 Lobo filed a motion which asserted: (a) it deposited $80,000 into its checking account with the Bank on October 15, 1976 and had written checks on the basis of this deposit; (b) the checks had been returned because the Bank had "placed a hold" on the deposited funds; (c) the Bank had placed the "hold" with the intention of applying the deposited funds against the amount due pursuant to the promissory note; and (d) the Bank's action was contrary to law. Responding to the motion, the Bank admitted it held Lobo's deposit for the purpose of applying a setoff and that it had the right to do so "by reason of the agreement between the parties . . . ."

An evidentiary hearing was held on the motion on October 22, 1976. At the conclusion of the hearing, then District Judge Payne stated from the bench:

> I am going to rule that the bank may not apply the money as against the indebtedness at this point in time. However, I am going to rule that they may claim a setoff and hold the funds without distribution, pending a determination as to whether the setoff would be proper to apply to the debt, or not.

No written decision was entered in accordance with this oral ruling of Judge Payne.

More than four months after the oral ruling (March 4, 1977), Lobo filed its answer to the Bank's complaint, a counterclaim against the Bank, and a cross claim against Limited Partners. The counterclaim alleged the Bank converted the funds represented by the $80,000 deposit "by failing and refusing to honor any checks written on the checking account." This claim of conversion is the basis for the jurisdiction of the Court of Appeals. Section 34–5–8(A), N.M.S.A. 1978; *Measday v. Sweazea*, 78 N.M. 781, 438 P.2d 525, 26 A.L.R.3d 1386 (Ct.App.1968).

On April 7, 1977 the Bank moved to strike the counterclaim "for the reason that this matter has previously been determined. . . . ." Thereafter, pursuant to stipulation of the parties, the trial court denied the motion to strike, and ruled that the counterclaim would be tried separately, but after the Bank's suit had been tried.

In May, 1977 the Bank moved (1) either to dismiss the counterclaim on the basis that it had been disposed of, or (2) in the alternative for summary judgment on the basis that there were no genuine issues of fact as to the counterclaim. After a June, 1977 hearing, of which there is no record, the trial court reserved judgment on the motion until after the trial of the Bank's claim, but prior to trial of the counterclaim.

After trial of the Bank's claim in September, 1977, the trial court's decree of foreclosure, in October, 1977, granted the Bank's motion to dismiss the counterclaim with prejudice.

Lobo's appellate claim is presented in the alternative either that the trial court erred in dismissing the counterclaim or in granting summary judgment in favor of the Bank.

The issue as to the propriety of dismissing the counterclaim centers on the oral ruling of Judge Payne which was not incorporated in a written decision, the evidentiary hearing in October, 1976 and the June, 1977 hearing of which there is no record. We do not consider these matters further because the counterclaim was properly disposed of by summary judgment.

The Bank's alternative motion of May, 1977 included a request for summary judgment. The trial court's ruling granted the motion without specifying the basis for dismissal. Although we do not know the basis for the trial court's ruling, the order of dismissal was proper if the Bank was entitled to summary judgment on Lobo's counterclaim. *In re Will of Skarda*, 88 N.M. 130, 537 P.2d 1392 (1975).

Lobo asserts there was a factual question concerning the Bank's right to setoff Lobo's deposit of $80,000 against Lobo's indebtedness to the Bank. We disagree.

Lobo's promissory note to the Bank states:

> To secure payment of this note . . . we, hereby assign as security for the payment of said indebtedness . . . property of any kind or nature, held by, or under possession or control of said bank . . . and a first and prior lien and right of offset is hereby given for the payment of all indebtedness . . . upon all property or evidence of indebtedness held by said bank.

In addition, a signature card, signed by the president of Lobo, states:

> RIGHT OF SET OFF. All funds to which the depositor is entitled may at all times be held and treated as collateral security for the payment of any and all liabilities of depositor to bank, direct or indirect, absolute or contingent, now or heretofore existing or hereafter arising.

The undisputed facts show the Bank had a right of setoff.

Lobo also asserts that the Bank had no legal right to utilize its deposit as a setoff. Lobo relies on *Melson v. Bank of New Mexico*, 65 N.M. 70, 332 P.2d 472 (1958) which stated the "better rule" to be:

> "There was no unsecured liquidated debt at the time the bank debited the checking account to apply [the deposit] on the chattel mortgage note. Except where the mortgagee has contracted with the mortgagor to apply funds subject to withdrawal on the order of the mortgagor to the secured indebtedness of the mortgagor, there is no right to apply the account nor to hold such account until the security has first been exhausted so that the unpaid balance of the indebtedness is an unsecured debt."

Melson does not support Lobo; rather, *Melson* recognizes a right of setoff pursuant to a contract. *Merchant v. Worley*, 79 N.M. 771, 449 P.2d 787 (Ct.App.1969) upheld a setoff where the promissory note expressly authorized the setoff. Here the Bank was given a right of setoff by Lobo's promissory note and by Lobo's signature card.

The trial court properly dismissed Lobo's counterclaim because, under the undisputed facts, the Bank was entitled to setoff the $80,000 deposit against Lobo's indebtedness to the Bank and, thus, the Bank was entitled to summary judgment.

Procedural Claims Involving the Indemnity Agreement

Lobo's cross claim against Limited Partners was filed in March 1977. When the Bank's claim was tried in September, 1977, and when the Decree of Foreclosure was entered in October, 1977, no responsive pleading had been filed to the cross claim.

Limited Partners contends "there was no trial whatsoever on the Cross Claim," and that its attorney, Mr. Foley, was unaware that the cross claim was tried at the September, 1977 trial.

At the beginning of the September, 1977 trial, the Bank's attorney stated that there is "some sort of indemnity crossclaim involved," and that Mr. Foley was representing the defendants. Mr. Foley "believed" that was right; Limited Partners was "still in this lawsuit, I don't know . . . ." The trial court inquired if Mr. Foley was representing "those four individuals [Limit-

ed Partners] . . . ." Mr. Foley agreed that he was; "I don't anticipate any conflict between myself as a lawyer and witness . . . ."

During the trial, a witness called by Lobo identified the indemnification agreement. When Lobo's attorney offered the agreement as evidence, Mr. Foley stated: "No objection. This is the—." The trial court then stated: "This is the agreement that you agreed to indemnify. It will be admitted." Thereafter the attorney for Lobo sought to call Mr. Foley as a witness. The trial court inquired of Mr. Foley if he would have any problem testifying in light of his representation "of the four guarantors of the position of Lobo Hijo . . . ." The evidentiary problem was resolved by stipulation between the attorney for the Bank and Lobo; the evidence apparently involved an asserted defense against the Bank's mortgage. Mr. Foley then introduced answers to interrogatories, directed to the capacity in which Lobo had executed the mortgage.

At the close of the evidence, the trial court orally announced that it would grant Lobo judgment "against the four people who signed the indemnity letter for any deficiency resulting at the foreclosure sale." Mr. Foley then said: "I would like to have the judgment recognize that as I understand, the judgment was awarded over against the four individuals," and if Limited Partners had to pay any deficiency, Limited Partners wanted the right to "bid in" over and above the amount of the judgment in favor of the Bank.

The exchanges between the trial court and Mr. Foley, considered alone, are ambiguous because Limited Partners was in the lawsuit both as a defendant to the Bank's claim, and as a defendant to Lobo's indemnity cross claim. The evidence introduced by Mr. Foley, also considered alone, is ambiguous because we cannot determine whether the evidence was introduced as a defense to the Bank's claim or as a defense to the cross claim.

However, the ambiguities do not stand alone. The indemnification agreement did not go to the Bank's claim, it went to the cross claim. Mr. Foley had no objection to introduction of the agreement, he did not claim that introduction of the agreement went beyond the issues being tried. After the trial court's oral judgment, Mr. Foley wanted the written judgment worded in a way he thought might be of benefit to Limited Partners.

The record does not support the contention that the cross claim was not tried or the contention that Mr. Foley was unaware of the cross claim being tried.

The decree of foreclosure was filed October 5, 1977; it provided for judgment in favor of the Bank, against Lobo, and in favor of Lobo, against Limited Partners, to the extent of any deficiency. On October 5, 1977, Limited Partners orally moved for an extension of time in which to file requested findings of fact and conclusions of law. The motion was denied. On October 11, 1977, Limited Partners filed a reply to the cross claim which had been litigated in September, 1977. On November 15, 1977, Limited Partners filed objections to confirmation of the special master's report of the sale of the property, objections to entry of a deficiency judgment, and objections to judgment against Limited Partners. These objections recognized that the cross claim had been tried in September, 1977; the objections recite Limited Partners was "forced to trial on the cross claim" although it had never been served a copy of the cross claim and had filed no reply to the cross claim, at the time of trial, because unaware of the cross claim until the trial was underway.

At the evidentiary hearing on Limited Partners' objections, Mr. Foley testified that he did not become aware of the cross claim until "after the trial . . . ." This testimony is contradicted by the record, reviewed above; this testimony is also contradicted by the trial court, it remembered the cross claim being litigated. Thereafter the special master's report was approved. The approval order also entered the amount of the deficiency judgment in favor of the Bank, against Lobo, and the

amount of the deficiency judgment, in favor of Lobo, and against Limited Partners.

Limited Partners asserts: "Since there was no reply or answer filed to the Cross Claim [at the time of the September, 1977 trial], there could be no trial because there were no issues to be tried." Issues can be tried by implied consent. Rule of Civ.Proc. 15(b). The transcript shows the cross claim was tried by implied consent. *Csanyi v. Csanyi*, 82 N.M. 411, 483 P.2d 292 (1971); *White v. Wayne A. Lowdermilk, Inc.*, 85 N.M. 100, 509 P.2d 575 (Ct.App.1973).

On November 17, 1977, Limited Partners filed requested findings of fact and conclusions of law. These requests went to an asserted absence of a valid deficiency judgment against Lobo, a claim that in the absence of a valid deficiency judgment, there was no liability on the part of Limited Partners, and an assertion that no valid judgment could be entered against Limited Partners on Lobo's cross claim. Limited Partners asserts error by the trial court in failing to act on the requested findings.

This contention overlooks the fact that the deficiency judgment against Lobo, and judgment against Limited Partners on Lobo's cross claim, had been entered on October 5, 1977 as part of the decree of foreclosure. Findings in connection with that decree, first requested on November 17, 1977, were untimely and therefore waived. Rules of Civ.Proc. 52(B)(a)(6) and 52(B)(b); *Wagner Land and Investment Co. v. Halderman*, 83 N.M. 628, 495 P.2d 1075 (1972).

Limited Partners contends that its requested findings of November 17, 1977 should be considered as requested findings directed to the evidentiary hearing held on November 23, 1977 in connection with its objections to approval of the special master's report. If so, the argument affords Limited Partners no benefit. The issues raised by the objections went to the decree of foreclosure entered on October 5, 1977. Thus, the objections were in the nature of a motion under Rule of Civ.Proc. 60(b) seeking relief from a judgment. Findings are not required for such a motion. See Rule of Civ.Proc. 52(B)(a)(1); *Mathieson v. Hubler*, 92 N.M. 381, 588 P.2d 1056 (Ct.App.1978).

Whether the Indemnity Agreement was Joint and Several

The indemnity agreement was a letter, addressed to Lobo and Freeway, signed by Limited Partners. The letter states in part:

> [T]he undersigned will indemnify and hold you harmless from any loss, liability or expense arising out of any deficiency judgment against you which may be obtained by Fidelity National Bank upon foreclosure of its mortgage . . . .

Limited Partners asserts its agreement was to indemnify Lobo and Freeway, jointly. Because there was no deficiency judgment against Freeway, and because there was no deficiency judgment against Lobo *and* Freeway, Limited Partners asserts that judgment against it, on the basis of the Bank's deficiency judgment solely against Lobo, was improper. We disagree.

The letter agreement, in itself, does not show the agreement was a joint indemnity agreement. The "you" in the indemnity letter refers to the addressees. The addressees are:

> Lobo-Hijo Corporation
> Freeway-Old Town, Ltd.
> c/o Gallagher, Casados & Patten
> Bank of New Mexico Building
> Albuquerque, NM 87102
> Gentlemen: . . .

The "you" in the letter can be fairly read as referring to the addresses individually. Thus, we do not hold that the letter was an agreement to indemnify Lobo and Freeway, jointly. However, no evidence was presented, or tendered, as to the intent of Lobo, Freeway, and Limited Partners as to whether the agreement was to indemnify Lobo and Freeway, jointly. Accordingly, we answer the contention of Limited Partners by assuming the agreement was joint—to indemnify Lobo *and* Freeway.

Section 38–4–2, N.M.S.A. 1978 provides: "Where two or more persons are bound by contract . . . whether jointly only, or

jointly or severally, or severally only . . the action thereon may . . . be brought against any or all of them . . ."

Section 38–4–3, N.M.S.A. 1978 provides: "All contracts, which by the common law are joint only, shall be held and construed to be joint and several . . . ."

Under these statutes, the indemnity agreement, if joint, was to be construed to be joint and several. Lobo, severally, was entitled to be indemnified on the basis of the deficiency judgment against it.

Whether There Was a Deficiency to Which the Indemnity Applied

The proceeds of the sale of the mortgaged property were $75,577.25 short of satisfying the judgment. The trial court granted a deficiency judgment against Lobo in that amount, and the judgment in favor of Lobo, against Limited Partners, was also in that amount. The judgment recognized the Bank's right of setoff; the judgment provided that the deficiency judgment against Lobo was to be satisfied from the $80,000 deposit held by the Bank.

Limited Partners asserts that by applying the setoff, "the indebtedness was reduced to the amount paid at the Foreclosure Sale and there was no deficiency. If there was no deficiency, there could be no judgment over against Limited Partners."

This contention is frivolous; it disregards both the wording of the judgments and agreement of the parties. Limited Partners agreed to indemnify Lobo for any "loss, liability or expense arising out of any deficiency judgment" obtained by the Bank upon foreclosure of the mortgage. A deficiency judgment was entered, in favor of the Bank, against Lobo. The fact that the Bank collected that deficiency judgment by setting off the judgment against the deposit, does not make the deficiency judgment any less of an expense to Lobo. Seventy-five Thousand, Five Hundred Seventy-seven and 25/100 of Lobo's money was used to satisfy the deficiency judgment; Lobo was entitled to indemnification from Limited Partners for that amount.

The decree of foreclosure and the trial court's order approving the special master's sale are affirmed.

IT IS SO ORDERED.

HENDLEY and ANDREWS, JJ., concur.

594 P.2d 1199

STATE of New Mexico, Plaintiff-Appellant,

v.

Mary Lou BACA, Defendant-Appellee.

No. 3861.

Court of Appeals of New Mexico.

April 17, 1979.

Louis E. Valencia, Chief Deputy Dist. Atty., Bernalillo, for plaintiff-appellant.

Peter E. Gallagher, Pedro G. Rael, Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

This appeal by the State presents the problem of the State's violation of N.M. Crim.App. 209(a).

According to the docketing statement, the trial court's order dismissing the criminal charge against defendant was filed October 23, 1978, and the State's notice of appeal was filed October 27, 1978. The docketing statement was filed, and the record proper (see N.M.Crim.App. 206(b)) was received, on November 8, 1978. The appeal was assigned to the limited calendar on November 13, 1978.

The pertinent portion of N.M.Crim.App. 209(a) states:

> Within 3 days after receipt of a General or Limited calendar designation, the appellant shall file with the clerk of the district court and serve upon the appellee a description of the parts of the proceedings believed necessary for inclusion in the transcript. Within 7 days after the filing of the description by the appellant or within 10 days after receipt of the calendar assignment if no description is filed by appellant, the district judge shall conduct a conference for the purpose of designating the transcript of proceedings.

The State did not file a description of the parts of the proceedings believed necessary for inclusion in the transcript within three days. The State's designation was not filed until December 11, 1978. An affidavit of a secretary in the district attorney's office states that the first effort to obtain a designation conference was in late December, 1978. On January 16, 1979, the State gave notice that a designation conference would be held on February 28, 1979. An order was entered by the trial court on February 28, 1979 which designated the proceedings to be included in the transcript. On March 29, 1979, notice was given, pursuant to N.M. Crim.App. 209(c), that the transcript had been filed with the district court clerk.

On March 27, 1979, the State sought permission to file a late transcript. The motion was denied; the parties were given through April 4, 1979 to file memoranda directed to whether this Court should dismiss the appeal because of the noncompliance with N.M.Crim.App. 209. Having considered these memoranda, we dismiss the State's appeal because the State did not designate its desired transcript until 28 days after the calendar assignment, the State made no effort to obtain a designation conference before late December, 1978, and the designation conference was not held until 107 days after the calendar assignment.

N.M.Crim.App. 209(a) does not require the State, as appellant, to file a description of the parts of the proceedings to be included in the transcript. Even if the appellant does not file such a description, the district

judge is to conduct a designation conference. The rule contemplates that the designation conference is to be held within 10 days after receipt of the calendar assignment regardless of whether the appellant files a description of the proceedings desired by appellant.

The rule states the trial court "shall conduct" the conference. The State's view is that the burden of rule compliance is on the judge, not the appellant. We disagree. The appellant has the burden to provide the necessary record on appeal. *State v. Duran,* 91 N.M. 756, 581 P.2d 19 (1978); see *State v. Cranford,* 92 N.M. 5, 582 P.2d 382 (1978); *State v. Edwards,* 54 N.M. 189, 217 P.2d 854 (1950). Thus, the State had the burden of bringing the need for a designation conference to the trial court's attention so that the conference could have been held within the 10-day time period provided by the rule. The State first sought to bring the need for the designation conference to the trial court's attention some six weeks after receipt of the calendar assignment.

The State asserts that it would be improper to dismiss the appeal because of the rule violation; that other sanctions should be considered, such as a citation for contempt, or assessment of costs. The State points out that dismissal of the appeal, because of a rule violation, is inappropriate, except in an extreme case. See N.M.Crim. App. 102.

In considering whether a defendant's appeal should be dismissed for violation of appellate rules, a rule of liberal construction has been applied to the end that appeals are decided on their merits. *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). We doubt that a rule of liberal construction should be applied in favor of the State when the State is appealing dismissal of a criminal case. However, we do not base our decision on the applicability or nonapplicability of a rule of liberal construction.

Whether the rule violation is extreme, warranting dismissal, must be determined on a case-to-case basis. *Olguin v. State,* supra. *Linam v. State,* supra, points out that when a defendant's appeal is dismissed, the dismissal only affects the defendant. Dismissal of the State's appeal in this case would affect the defendant as well as the State because the State's appeal seeks reinstatement of the criminal charge. Should the State's appeal be successful in reinstating the criminal charge, we have no way of determining, at this point, whether the State-caused appellate delay would affect the ultimate defense of the case. What we do know, at this point, is that defendant has not been convicted of a crime, that she has the benefit of the presumption of innocence, and that the criminal charge against defendant has been dismissed. The State's rule violation had delayed its own appeal approximately three months. Such a delay, in a case seeking reinstatement of a dismissed criminal charge is, in our opinion, extreme.

The State's violations of N.M.Crim. App. 209(a) were: (a) the late filing by the State of its description of the parts of the proceedings to be included in the transcript and (b) the failure of the State to call the trial court's attention to the need for a designation conference to be held within the 10-day period provided by the rule. We do not hold an appellant responsible for a late designation conference where the trial court cannot conduct the conference within the 10-day period. However, most conferences take little of the trial court's time and, in most appeals, the conference is held within the 10-day time period. A three-month delay in the conference is unconscionable. This delay was caused by the State's rule violation. Because the delay was extreme, the appeal is dismissed.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.

594 P.2d 1202

Margaret H. SANFORD,
Plaintiff-Appellant,

v.

PRESTO MANUFACTURING COMPANY, a Mississippi Corporation,
Defendant-Appellee.

No. 3775.

Court of Appeals of New Mexico.

April 19, 1979.

Sharon Stidley Mitchell, Payne, Mitchell & Wilson, Ruidoso, for plaintiff-appellant.

Carl H. Esbeck, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, for defendant-appellee.

OPINION

WOOD, Chief Judge.

Plaintiff sought damages from her employer on the basis of injuries allegedly received while at work. Defendant moved to dismiss on the basis that plaintiff's exclusive remedy was under the Workmen's Compensation Act. The motion was granted; plaintiff appeals. The issue is whether plaintiff's complaint, which alleges that the employer committed a battery upon plaintiff, states a basis on which the employer could be held liable to plaintiff, outside of the Workmen's Compensation Act.

Mountain States Tel. & Tel. Co. v. Montoya, 91 N.M. 788, 581 P.2d 1283 (1978) reaffirmed the view that, if the Workmen's Compensation Act provided a remedy for an employee's injury, the workmen's compensation law was the exclusive remedy when an employee sought to recover from the employer.

Plaintiff's claim is that the Workmen's Compensation Act does not apply. Section 52–1–9, N.M.S.A.1978 makes the Workmen's Compensation Act the exclusive remedy for an injury caused by accident. Plaintiff claims the alleged battery was an intentional injury and, thus, not an acciden-

tal injury. See 2A Larson, Workmen's Compensation Law, § 68.11 (1976). Plaintiff's theory has been recognized, but on a limited basis. *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930). Plaintiff's claim does not come within that limited basis.

Plaintiff's complaint alleges: (1) on September 2, 1976 defendant intentionally placed into use "a new oven for baking teflon on small appliances"; (2) the oven was operated "under the authorization of the Defendant"; (3) when in use, the new oven "created" toxic fumes "at a density which was dangerous to human health"; (4) the toxic fumes were easily discernible; (5) defendant, and its agents and employees knew, from September 2, 1976, that use of the oven created toxic fumes; (6) that plaintiff was exposed to the fumes while working for defendant and "did not consent to the offensive or dangerous touching by these toxic fumes"; (7) that due to exposure to the fumes, defendant developed "fume fever" to her damage; and (8) "this battery was intentionally or maliciously committed . . . ."

In essence, plaintiff's claim goes to intended working conditions.

The claim, that defendant's intentional use of the oven amounted to a battery, does not aid plaintiff.

We are not concerned that the alleged battery was not a direct application of force. Prosser, Laws of Torts (4th ed. 1971) pages 34–35 states: "[I]t is no longer important that the contact is not brought about by a direct application of force such as a blow, and it is enough that the defendant sets a force in motion which ultimately produces the result . . . ."

Our concern is with the nature of a battery claim. For there to be a battery, there must be an unpermitted contact. Prosser, supra, page 35. "The gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff." Prosser, supra, page 36. The fact that plaintiff did not consent provides no support for plaintiff's claim because her claim is based on intentional conduct of the employer. Labeling the employer's conduct as a battery does not aid in determining whether that conduct exposed the employer to liability outside of the Workmen's Compensation Act.

Only certain types of conduct expose the employer to liability outside of the workmen's compensation law. In *Boek v. Wong Hing*, supra, the employer was liable for common-law damages because the employer intentionally and maliciously inflicted injury by striking the employee with a broom handle. In *Bryan v. Utah International*, 533 P.2d 892 (Utah 1975), plaintiff claimed that a co-employee intentionally caused plaintiff to be hit by a cable, that intentional misconduct of this sort had been going on for considerable time and was known by various supervisors of the defendant corporation. These claims were an insufficient basis for holding the employer liable outside of the workmen's compensation law. Because of differences in the alleged facts, neither *Boek v. Wong Hing*, supra, nor *Bryan v. Utah International*, supra, is applicable.

In *Provo v. Bunker Hill Company*, 393 F.Supp. 778 (D.D.C.Idaho 1975), plaintiff was burned when molten zinc burst from an uncovered pot. Seeking to hold the employer liable, outside the workmen's compensation law, plaintiff alleged that the employer had "knowledge of numerous similar occurrences" and the employer's "callous disregard of such risk amounts to an intentional tort" that could not be deemed an accident. Plaintiff supported his claim with records "of numerous injuries" occurring at the smelter "plus affidavits to the effect that exploding lead burns employees at the rate of once or twice a month." *Provo* held that plaintiff had shown no right to relief on the theory that his injury was incurred as the result of an intentional tort.

In *Wilkinson v. Achber*, 101 N.H. 7, 131 A.2d 51 (1957), the claim was that the employer knew or should have known that gas had escaped onto the premises and ordered the decedent to operate certain electrical

equipment when the employer knew or should have known an explosion could result. An explosion did result. The claim that the employer's act was willful, deliberate or culpable did not take the case out of the workmen's compensation law. In so holding, the opinion distinguishes intentional, or deliberately ordered, acts from intentional injuries and suggests that liability of the employer, outside of the workmen's compensation law, is limited to "injuries deliberately inflicted . . . ."

The complaint in *Artonio v. Hirsch*, 3 A.D.2d 939, 163 N.Y.S.2d 489 (1957) alleged the plaintiff was injured as a result of the employer's "willful, reckless and unlawful acts in locking, or tampering with, safety devices on a power press" which plaintiff operated. The complaint was held to allege a claim, based on an accidental injury, under the workmen's compensation law and not to allege a wanton and deliberate act by the employer for which the employee could maintain a common-law action.

Larson, supra, § 68.13 states:

> Since the legal justification for the common-law action is the nonaccidental character of the injury from the defendant employer's standpoint, the common-law liability of the employer cannot be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury.
>
> * * * * * *
>
> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.
>
> * * * * * *

If these decisions seem rather strict, one must remind oneself that what is being tested here is not the degree of gravity or depravity of the employer's conduct, but rather the narrow issue of intentional versus accidental quality of the precise event producing injury. The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.

The conduct of the employer, alleged in the complaint, is that defendant intentionally permitted a hazardous work condition to exist, or that defendant intentionally tolerated a dangerous condition. Injuries suffered by plaintiff as a result of that condition were accidental injuries within the meaning of our workmen's compensation law; they were not intentional injuries of the sort on which a common-law action for damages may be based.

The order dismissing the complaint is affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

595 P.2d 387

Henry G. DEMERS, Plaintiff-Appellant,

v.

Edward J. GERETY, M. D., Defendant-Appellee.

No. 2724.

Court of Appeals of New Mexico.

Feb. 7, 1978.

[redacted]

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

Bruce D. Hall, Wm. Robert Lasater, Jr., Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for defendant-appellee.

OPINION

SUTIN, Judge.

"Ancaeus . . . was told by a hard-pressed slave that he would never live to taste the wine of his vineyards, and when such wine was set before him he sent for the slave to laugh at the latter's prognostications; but the slave made the answer 'there's many a slip 'twixt the CUP and the lip'. At this instant Ancaeus was told that the Calydonian BOAR was devastating his vineyard, whereupon he set down his cup, went out against the boar, and was slain in the encounter." Brewer's Dictionary of Phrase & Fable, Centenary Edition (1970), Harper & Rowe, p. 33.

Litigation is a slippery experience when appeals are reversed. Everything is uncertain until the case is put to rest.

Plaintiff was denied the right to taste the wine of his vineyard. He was slain in the instant case in his encounter with two district judges.

This is a career case. See *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (1973); Id., 86 N.M. 141, 520 P.2d 869 (1974), Id., 87 N.M. 52, 529 P.2d 278 (Ct.App.1974). In the first trial, plaintiff was awarded $67,000.00 in damages. In the second trial, he was awarded nothing. Plaintiff appeals. We reverse.

A. *The original trial judge erroneously recused himself.*

The Honorable Gerald D. Fowlie, District Judge, presided at the first trial. After reversal by this Court, the mandate for a new trial was filed in the district court clerk's office on December 6, 1974. On the same day, Judge Fowlie formally filed a recusal that stated:

> I hereby recuse myself from hearing any proceedings in the above cause.

Judge Fowlie mailed a copy of his recusal to attorneys of record. The recusal showed that this case was reassigned to Judge Harry E. Stowers, Jr. Eighteen months later, on June 14, 1976, Judge Stowers also filed a formal recusal. Judge Stower's recusal, however, did not show that the case was reassigned to Judge Maurice Sanchez. Neither does the record show that this cause was reassigned from Judge Stowers to Judge Sanchez in accordance with the rules adopted by the Judges of the Second Judicial District. The district court's record shows that on some unrecorded date: "A44262 not honored by Judge Sanchez unless all counsel stipulate and agree to the disqualification."

After learning that Judge Sanchez would preside in this case on the merits, plaintiff filed an affidavit of disqualification and defendant filed a motion to quash. A hearing on defendant's motion was held on July 15, 1976. That same day, plaintiff filed a motion that Judge Fowlie withdraw his recusal and six days later, Judge Fowlie, without a hearing, and remaining mute, summarily denied the motion.

[redacted] In the absence of any explanation, this Court cannot look with approval upon the conduct of plaintiff's attorney which allowed a delay of 19 months. Nevertheless, plaintiff did not waive the right to challenge the recusal by Judge Fowlie.

Recusal is governed by § 16–11–3(C)(1)(a), N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.) of the Code of Judicial Conduct. It reads as follows:

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including *but not limited to instances where*:

(a) he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;

Recusal rests within the discretion of the trial judge. If a district judge seeks a recusal, the judge need not state the reasons why personal bias and prejudice exists. He/she may have personal reasons. But these reasons must be valid. *Doe v. State*, 91 N.M. 51, 570 P.2d 589 (1977). Furthermore, when the recusal is challenged, and the challenge is denied, a district judge has a duty to state in the order of denial that he has valid reasons for recusing himself. To remain mute constitutes an abuse of discretion; to refuse to hear the case without a compelling reason constitutes a neglect of duty.

In the trial of cases, recusal and disqualification of district judges is a subject of vital importance in the administration of justice. If they are not disqualified, they have a duty to sit. To introduce this subject matter, we borrow the words quoted in the landmark case of *Benedict v. Seiberling*, 17 F.2d 831, 840 (D.C.Ohio, 1926):

"Quite true it is that the judge has no concern in presiding on the trial of any particular case, and no litigant has any right to have a particular judge try his case; but every litigant under the Constitution and laws has the right to insist that his case be tried by the regular judge, if he is holding the court, unless he is shown to be disqualified, and it is essential to the orderly administration of justice and the integrity of the Constitution that judges appointed under it to administer its judicial power shall not be wrongfully driven from the judgment seats in any case. * * *"

It has been held that a district judge has the inherent power at any time to acknowledge his own disqualification and certify that fact of record, *State ex rel. Mizner Land Corporation v. Gray*, 117 Fla. 294, 157 So. 663 (1934). In addition, a judge has ". . . the discretionary power to disqualify himself *sua sponte* whenever the existence of any semblance of judicial bias or impropriety in a proceeding in his court comes to his attention." *Stein v. State*, Ind.App., 334 N.E.2d 698, 699 (1975). But the grounds relied on by the judge for disqualification must be adequate, because a judge has no right to disqualify himself in the absence of a valid reason. *Williams & Mauseth Ins. Brokers, Inc. v. Chapple*, 11 Wash.App. 623, 524 P.2d 431, 434 (1974); *Arizona Conference Corp. v. Barry*, 72 Ariz. 74, 231 P.2d 426 (1951); *Clawans v. Waugh*, 10 N.J.Super. 605, 77 A.2d 519 (1950); *Board of County Com'rs of Pitkin v. Blanning*, 29 Colo.App. 61, 479 P.2d 404, 406 (1970), or for the most compelling reasons. *Nelson v. Fitzgerald*, 403 P.2d 677 (Alaska, 1965). "There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *In Re Union Leader Corporation*, 292 F.2d 381, 391 (1st Cir. 1961).

We should heed the admonition of Justice Montoya as stated in his special concurring opinion in *Gray v. Sanchez, Robertson v. Sanchez*, 86 N.M. 146, 150, 520 P.2d 1091, 1095 (1974).

If the present system of disposing of cases in the Second Judicial District inhibits or in any way interferes with the substantive right of the litigant to disqualify a judge, as set forth in the statute, then the latter right must prevail. Otherwise, the statutory right is more illusory than real.

Given this duty to hear a case, and absent compelling reasons to recuse himself such as bias or prejudice, reversal and remand for a new trial are not sufficient to prevent a judge from retrying a case. *State v. Nelson*, 65 N.M. 403, 413, 338 P.2d 301 (1959). *State ex rel. Anaya v. Scarborough*, 75 N.M. 702, 410 P.2d 732 (1966).

Plaintiff objected to the recusal by Judge Fowlie. On review of a perplexing problem such as this one, our duty points toward satisfying the expectations of fairness of a party rather than resolving the interplay of judges in a multi-judge district court. We must never deny to any litigant the right to a fair and impartial trial before a fair and impartial judge—the very essence of justice in our judicial system.

Judge Fowlie's recusal was erroneous.

B. *The presiding judge erred in refusing to honor plaintiff's affidavit of disqualification timely filed.*

This cause was at issue on February 20, 1970, and was tried with Judge Fowlie presiding. The judgment entered on September 20, 1972 was appealed to this Court. After two opinions by this Court and one by the Supreme Court, the case was reversed and remanded for a new trial consistent with the opinion of this Court. The mandate was filed in the office of the district court clerk on December 6, 1974. Twenty months later, Judge Sanchez decided to try this case on the merits. The record does not disclose the date or the procedure by which Judge Sanchez became the presiding judge.

More than six years after the cause was at issue, on July 1, 1976, plaintiff filed an affidavit of disqualification directed to Judge Sanchez. Within a week of plaintiff's attempt to disqualify Judge Sanchez, defendant filed a motion to quash the affidavit relying on the fact that the cause was at issue on February 20, 1970, and the affidavit was not timely filed as provided by §§ 21–5–8 and 21–5–9, N.M.S.A.1953 (Repl. Vol. 4, 1975 Supp.).

A hearing was held on defendant's motion to quash. Thereafter, the motion was sustained because the affidavit was not timely filed.

The trial court relied on *Gray v. Rozier E. Sanchez and Harry E. Stowers, Jr., District Judges*, and *Robertson v. Honorable Maurice Sanchez, Judge*, supra. *Gray* was a criminal case. *Robertson* was a civil case.

In interpreting § 21–5–8, *Gray v. Sanchez* followed *Beall v. Reidy*, 80 N.M. 444, 457 P.2d 376 (1969). It acknowledged the problems which arise when a party who has not been apprised of the trial judge, needs to later disqualify the designated judge. *Gray* quoted at length from *Beall*. Chief Judge Wood of this Court, speaking for the Supreme Court, said:

> ". . . [A] party needs to know the name of the judge before whom the case is to be tried *and needs that information early in the litigation.*
>
> . . . Accordingly, it is incumbent upon the judges in multi-judge districts to provide, *by rule*, a method by which the party may know the name of the judge before whom the case is to be tried *and may know the name before the right to disqualify under § 21–5–8, supra, has been lost.*" [86 N.M. at 148, 520 P.2d at 1093.] [Emphasis added.]

Gray stated that the Second Judicial District responded to this dilemma. It promulgated specific amendments to the Rules of Criminal Procedure to inform defendants of the names of the possible trial judges. It held that "Through adherence to this new rule, the remedy of provisional disqualification should prove to adequately protect the statutory right of disqualification." [86 N.M. at 148, 520 P.2d at 1093.]

Paradoxically, in the companion civil case of *Robertson*, where no similar rules were adopted for giving notice to parties of the docket assignment, the court did not take judicial notice of the predicament described in *Beall* and recognized in *Gray*. The trial court compounded this oversight by relying on *Robertson* as authority in this civil case.

In *Robertson*, the cause was at issue in February, 1973, and Judge Maurice Sanchez took office on July 1, 1973. Notice was given on August 1, 1973, that Judge Sanchez was assigned to hear motions in civil jury cases. On October 15, 1973, Robertson filed an affidavit of disqualification directed to Judge Sanchez, which affidavit was not honored. Robertson sought a writ of prohibition. The Supreme Court held (1) an affidavit of disqualification must be direct-

ed "only to the judge before whom the case is to be tried *on the merits*," and "in this instance, within ten days after the time for filing a demand for jury trial has expired." [86 N.M. at 149, 520 P.2d at 1094.] [Emphasis by Court.]

The court held the affidavit did not conform to statutory requirements though Judge Sanchez was assigned to try the case *on the merits*, the affidavit was not timely filed, i. e., in February, 1973, five months before Judge Sanchez took office.

The court said:

> This result may seem unduly harsh but it is consistent with the clear provisions of the statute.

We read this unduly harsh result to mean this: In every claim for relief filed in a multi-judge district court, each party must file a timely provisional affidavit of disqualification against any non-judge who may subsequently take office as a district judge and be assigned to try the case on the merits.

As in *Beall*, Alaska's Supreme Court declared that the district judges should devise a method by which the assignment of cases to judges should be made sufficiently in advance of trial, with notice to the parties of the assignment so that their rights under the disqualification statute would not interfere with the trial date. *Roberts v. State*, 458 P.2d 340 (Alaska, 1969). Thereafter, the presiding judge of the district entered an order that the cases not at issue would be assigned jointly to the three judges on the date that the case was at issue. *Hartford Accident and Indemnity Company v. State*, 498 P.2d 274 (Alaska, 1972).

Subsequently, the Supreme Court of Alaska held that an action is not "assigned to a judge" within the meaning of the statute providing for disqualification of a judge, "until it has been assigned to a particular judge and a *reasonable attempt has been made to notify the parties before the court of that assignment.*" *Hartford Accident and Indemnity Company* [498 P.2d at 276.] [Emphasis added.]

Roberts and *Hartford Accident* stand for the proposition that notice to the parties of the name of a particular judge assigned to try the case is an essential ingredient in the time period fixed by statute, so that the right to disqualify by a party shall not be lost.

Hartford Accident cited authority sufficiently analogous that lends support to this proposition. *Marsin v. Udall*, 78 Ariz. 309, 279 P.2d 721, 723 (1955); *Tarsey v. Dunes Hotel, Inc.*, 75 Nev. 364, 343 P.2d 910, 911–912 (1959); *Wolf v. Marshall*, 120 Ohio St. 216, 165 N.E. 848, 849 (1929); *State ex rel. Beeler v. Smith*, 76 Wash. 460, 136 P. 678 (1913). These cases hold that when, upon the assignment of a judge to try a case, the parties cannot comply with the time period of disqualification because of lack of notice regarding the presiding judge, the time period gives way to a party's substantial right of disqualification. *Marsin* said:

> Any rule of court that operates to lessen or eliminate the right is of no legal force. [279 P.2d at 723.]

New Mexico has also recognized that the right to disqualify a judge is a substantive right. *Beall*, supra. "A substantial right has been defined as an essential legal right and not a mere technical one." *In Re Egan's Estate*, 155 Neb. 611, 52 N.W.2d 820, 826 (1952). "Moreover, the tendency of modern practice is to yield as little as possible to technicalities and to be more liberal in upholding substantive rights instead of subtle technicalities." *Rapides Grocery Company v. Vann*, 230 La. 829, 89 So.2d 359, 363 (1956). We have a duty to protect the substantive rights of a party.

The trial court's strict adherence to the requirements of § 21–5–8 defeated plaintiff's substantive right to disqualify a judge under the circumstances when it was impossible for plaintiff to meet those dictates due to the gross lack of notice to plaintiff.

It is essential that rules provide a method by which the party may know the name of the judge before the right to disqualify is lost. Not only did plaintiff lack notice of the reassignment of judges, but the reassignment was also defective.

On November 4, 1974, the Second Judicial District Court Administrator issued to the district court clerk assignment procedures to be used in civil cases when disqualifications and/or recusals are entered.

Pertinent procedures adopted were:

2. When a Judge is disqualified or he recuses himself, the case will be reassigned to the next Judge who is due a replacement assignment because of his previous disqualification or recusal.
3. An equal distribution of cases will be maintained among the Judges by making replacement assignments for *each* case which he is disqualified or on which he recuses himself. Such replacement assignment of cases will be made *only* from cases where disqualifications and/or recusals of other Judges were made and *not* from the new case filings. [Emphasis by Administrator.]

At a hearing on defendant's motion to quash plaintiff's affidavit of disqualification the district court clerk testified that she did not recall having made the actual reassignment of this case to Judge Sanchez. Since she did not note the matter, in all probability, the assignment was not made. The chief deputy clerk testified that it was not her practice to send notice of reassignment of judges to attorneys of record, nor was she aware of any procedure whereby a party is advised of the name of the judge. The rules do not provide for notification.

The evidence is undisputed (1) that Judge Sanchez was not assigned to try this case; (2) even if he were, he was not assigned in compliance with the rule on "equal distribution"; and (3) that plaintiff was not notified of any assignment of the case to Judge Sanchez.

The affidavit of disqualification filed July 1, 1976 was timely filed rendering Judge Sanchez without power or jurisdiction to proceed further with the action.

The trial court erred in refusing to honor plaintiff's affidavit of disqualification.

C. *Denial of plaintiff's right to proceed on medical malpractice was reversible error.*

We hold that denial of plaintiff's right to proceed on the theory that defendant performed an operation contrary to the standards of a surgeon was reversible error for three reasons: (1) Although defendant's motion for directed verdict should have been sustained and the cause reversed for failure of the plaintiff to make a case on proximate cause, it was not remanded with instructions to grant an outright reversal on this issue; (2) Plaintiff was not granted a partial new trial; and (3) Defendant made an untimely motion to delete negligent surgery as an issue in the case and waived it.

Opinions often conclude with "a new trial consistent with this opinion." What is meant by this phrase? It is vague and indefinite. Ofttimes, it requires a Houdini to resolve it. See *Varney v. Taylor*, 79 N.M. 652, 448 P.2d 164 (1968); *Knollenberg v. State Bank of Alamogordo*, 40 N.M. 284, 58 P.2d 1195 (1936). Appellate judges who use this language escape the burden of explanation and place the burden on the district judge to interpret its meaning. We should avoid the use of this phrase.

First, defendant was not granted an outright reversal.

One of plaintiff's claimed act of malpractice was:

> The defendant proceeded to perform an operation upon him and in so doing failed to possess and apply the knowledge and use the skill and care which would be used by reasonably well qualified specialists in the same field practicing under the same circumstances.

Demers, (85 N.M. at 643, 515 P.2d at 647).

Subsequently, this Court said:

> . . . Since there was no expert testimony, there was no issue as to causation and the trial court incorrectly denied defendant's motion to direct a verdict on

the issue of negligent surgery. We must therefore reverse.

Demers, (87 N.M. at 53, 529 P.2d at 279).

The opinion concluded:

> The case is reversed and remanded to the trial court *for a new trial* consistent with this opinion. [Emphasis added.] [87 N.M. at 54, 529 P.2d at 280.]

The mandate read in pertinent part:

> WHEREAS . . . an opinion was handed down and the judgment of the Court of Appeals was entered reversing the judgment of the District Court *and remanding said cause to you for a new trial*;
>
> NOW, THEREFORE, this cause is remanded to you for such further proceedings therein as may be proper, consistent and in conformity with said opinion and judgment of the Court of Appeals. [Emphasis added.]

This case was not remanded to enter judgment on the directed verdict.

It appears from the language in the opinion that the trial court incorrectly denied defendant's motion for a directed verdict on the theory of negligent surgery because plaintiff produced no expert testimony to establish proximate causation. The opinion, however, did not conclude that "We hold that the issue of negligent surgery shall not be retried."

When a motion for directed verdict should be sustained and the case reversed because plaintiff did not establish a case, it does not mean that the case should be remanded with instructions to render judgment. In an identical situation, *Bryne v. Prudential Ins. Co. of America*, 88 S.W.2d 344, 347 (Mo.1935), the court said:

> . . . It is the settled practice of appellate procedure that a case should not be reversed, for failure of proof, without remanding unless the appellate court is convinced that the available essential evidence has been fully presented and that no recovery can be had in any event. While essential proof is wanting herein, nevertheless the general aspects of the situation which appears to have existed justify, we think, the assumption that upon a retrial the plaintiff can likely adduce the proof necessary to make out a prima facie case.

This appellate practice has been followed in New Mexico. *Morstad v. A. T. & S. F. Ry. Co.*, 23 N.M. 663, 170 P. 886 (1918); *State ex rel Bujac v. District Court*, 28 N.M. 28, 205 P. 716 (1922).

In *Morstad*, the court, upon reversal of the judgment in favor of plaintiff, said:

> . . . It does not appear from the record that he may not be able to show upon another trial that he was entitled, without executing any release, to transportation over the defendant's railroad to the hospital for treatment. It is therefore proper to submit such question to the consideration of a jury rather than to enter judgment at this time against the plaintiff. [23 N.M. at 673, 170 P. at 890.]

Bujac, relied upon by defendant, involved a second appeal from a judgment on the mandate. In the first trial Bujac was successful. On appeal, the judgment was reversed because Bujac failed to establish his claim. He offered no corroborating testimony as required. The opinion concluded:

> "It follows from all of the foregoing that the judgment of the court below was erroneous, and should be reversed, and the cause remanded, with directions to proceed in accordance herewith; and it is so ordered." [28 N.M. at 29, 205 P. at 717.]

After *Bujac* was re-docketed in the district court, judgment was entered against Bujac. Prior thereto, notice was given Bujac of the proposed judgment, and without objection, the judgment was entered. Subsequently, Bujac sought to vacate the judgment but failed. He appealed. On affirmance the court said:

> *It is to be observed that in the opinion and mandate in the former case this court did not direct the district court to enter judgment dismissing the claim of the claimant.* . . . To proceed in accordance with the mandate and opinion would be to enter the judgment which

the court has entered in the *absence of some application on the part of the claimant to submit further proof by way of corroboration, or other matters of legal significance*, showing that the order should not be entered. [Emphasis added.] [28 N.M. at 30–31, 205 P. at 718.]

Bujac followed Morstad.

During thirty pages of rambling argument by opposing counsel, plaintiff's attorney stated that the issue was whether the negligence of the defendant performed during surgery was the proximate cause of plaintiff's injuries; that there was no medical evidence that the necrosis was caused by the shortness of the stoma. ". . . [W]e can establish by competent evidence that proximate cause . . . and I think it would be error for this Court to restrict the issues in view of the language of the mandate and of the opinion of the Court of Appeals . . . I agree that if, after we present our evidence, if we have failed to submit evidence of proximate cause in accordance with the terminology of the opinion, the court should direct a verdict." We agree. Plaintiff offered expert evidence of proximate cause, but the court refused it.

The trial court erroneously ruled that the question of negligent surgery had already been adjudicated and no further adjudication was necessary.

Second, plaintiff was not granted a partial new trial.

In a similar case, the Supreme Court of Alaska said:

> Consequently, we hold that the issues of methodology and informed consent may not be retried, but a new trial regarding the issue of proper supervision is required.

The opinion concluded:

> Affirmed in part, reversed, in part, and remanded for proceedings consistent with this opinion.

Poulin v. Zartman, 542 P.2d 251, 276 (Alaska, 1975). *Poulin* held that a Supreme Court may grant a *partial new trial*, setting aside only so much of a judgment as is affected by error and allow the balance of the judgment to remain intact.

In the instant case, this Court did not grant a partial new trial. The opinion granted plaintiff a new trial. It did not state that negligent surgery shall not be retried, and that a new trial is granted only on the issue of legal consent. Under this rule, the trial court committed reversible error.

Third, defendant's motion to delete negligent surgery was not timely filed. The mandate issued after the appeal of the first trial was filed in the district court on December 6, 1974. Over 20 months later, on August 19, 1976, on the morning of trial, defendant requested the district court to enter judgment that negligent surgery be deleted as an issue in the case. No prior notice was given plaintiff. The trial court stated that this matter should have been determined by judgment on the mandate immediately after the mandate issued from this Court. This was not done.

During this 20 month period, defendant had knowledge of the right to proceed to obtain judgment on the mandate. Inexcusable delay in asserting a right until the morning of trial is so untimely as to catch off guard an opposing party and the trial judge. It unduly interferes with, or hinders the orderly prosecution of the trial and lays a heavy burden on the judge and the opposing party. It is both inequitable and unfair.

This conduct can be likened to waiver, the intentional relinquishment or abandonment of a known right, *Cooper v. Albuquerque City Commission*, 85 N.M. 786, 518 P.2d 275 (1974), and laches, inexcusable delay in asserting a right, and implied waiver arising from knowledge of existing conditions and acquiescence in them. *Pratt v. Parker*, 57 N.M. 103, 255 P.2d 311 (1953). See also, *Cave v. Cave*, 81 N.M. 797, 474 P.2d 480 (1970).

In this sense, equity should be a controlling factor. Black's Law Dictionary (Rev. 4th Ed.) 634 (1968) defines equity in its broad and restricted sense. In its broadest sense, it denotes the spirit of fairness

and justness, and in its restricted sense, it notes equal and impartial justice as between two persons whose rights or claims are in conflict.

As a matter of equity, defendant waived his right to seek the deletion of plaintiff's claim as to negligent surgery.

We conclude that negligent surgery has been preserved as an issue in a new trial of this case.

D. *The trial court did not follow the doctrine of law of the case.*

"The doctrine of law of the case has long been recognized in New Mexico, since before statehood . . . and since after statehood." *Ute Park Summer Homes Ass'n v. Maxwell Land G. Co.*, 83 N.M. 558, 560, 494 P.2d 971, 973 (1972). This doctrine means that the law applied on the first appeal of a case is binding on the second appeal. This rule applies not only to questions specifically decided, but also to those necessarily involved, and those questions which could have been so raised. *Farmers State Bank of Texhoma v. Clayton Nat. Bank*, 31 N.M. 344, 245 P. 543 (1926).

In the first trial, the court instructed the jury: (1) that a fiduciary relationship exists between doctor and patient; (2) that an adult person of sound mind has the right to determine for himself whether surgery shall be performed upon him; (3) that it is malpractice to perform an operation upon a patient other than which has been explained and agreed to by the patient; (4) that a physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment; (5) U.J.I. 17.6 on circumstantial evidence.

These instructions became the law of the case and the failure to give them was reversible error.

Claims litigated and decided in the first trial and sustained on appeal also became the law of the case. In the first trial, plaintiff gave express consent to defendant to perform an operation described as "Repair Ventral Hernia," but claimed that a "revision of ileostomy" was performed without the "legal consent" of plaintiff. During the repair of the hernia, defendant revised the ileostomy.

First, we have not determined whether a revision of the ileostomy was necessary during repair of the ventral hernia. If defendant presents evidence of necessity, an issue of fact exists whether revision of the ileostomy constituted an act of medical malpractice even without the consent of plaintiff.

Second, we have decided that defendant did not have "legal consent" to perform a revision of the ileostomy.

In the first opinion on appeal, this Court said:

> We have reviewed the record and find that plaintiff's theory of *lack of consent* to surgery is supported by substantial evidence. [Emphasis added.] [85 N.M. at 644, 515 P.2d at 648.]

In the second opinion, this Court said:

> Since our prior opinion decided there was a *lack of consent*, it goes without saying, there could not have been any *informed consent*. [Emphasis added.] [87 N.M. at 53, 529 P.2d at 279.]

"Legal consent" as used in U.J.I. 8.3, that "A doctor must obtain a legal consent," means actual or express consent according to law. See, 85 N.M. at 649, 515 P.2d 645, 653, Sutin, J., Specially Concurring. This Court decided that there was a "lack of consent."

"Informed consent" means an "educated consent," a duty to make a full and frank disclosure to the patient of all pertinent facts relative to the surgery. See, 85 N.M. at 651–653, 515 P.2d 645, Sutin, J., Specially Concurring. The use of the words "informed consent" in the second opinion was erroneous because it was not an issue in the first trial, nor one that was involved nor one that could have been decided. It is, of course an issue that can be raised in the third trial of this case.

Nevertheless, in the third trial, the court shall properly instruct the jury that plaintiff did not give legal consent to defendant to perform a revision of the ileostomy and a revision of the ileostomy constituted an act of medical malpractice; that the issue of proximate cause of damages by reason thereof is a question of fact for the jury. However, if the revision of the ileostomy was necessary to perform a repair of the ventral hernia, consent of the plaintiff was not required. We leave the language to be used within the discretion of the trial court, and its instruction on this issue shall be final and unappealable.

Defendant contends that the wisdom of the law of the case is such that there must be an end to litigation at some time, citing *Knollenberg*, supra. Yet *Knollenberg* reversed for the third time with directions to the district court to set aside the judgment.

On the second trial, the court ruled that the only issue to be submitted to the jury was whether defendant obtained "legal consent" from the plaintiff before performing an operation.

The death knell rang upon plaintiff. In fact, the trial court instructed the plaintiff out of court when the following instructions were given:

(1) There is no issue of Dr. Gerety's competency to perform the surgery of November 13, 1976. You are to disregard any suggestion that the physician did not possess the knowledge and ability to perform that surgery.

(2) Neither the fact that an unintentional result occurred, nor the fact the plaintiff claims injuries therefrom, nor the fact that this lawsuit was filed, is evidence of any malpractice.

The trial court, in effect, directed a verdict for defendant.

This case is reversed and remanded to the district court with the following instructions:

(1) to vacate the judgment entered and grant plaintiff a new trial with Judge Gerald Fowlie presiding;

(2) during the trial of the case, allow plaintiff to produce expert testimony that the necrosis was proximately caused by the alleged shortness of the stoma;

(3) the same instructions shall be given in the third trial that were given in the first trial;

(4) allow defendant to raise as an additional issue on negligent surgery, if substantial evidence is presented, the necessity of revising the ileostomy to repair the ventral hernia, and to instruct on this issue; and

(5) to instruct the jury on lack of consent as stated in this opinion.

(6) defendant shall pay the costs of this appeal.

IT IS SO ORDERED.

LOPEZ, J., concurs.

ROY G. HILL, District Judge (dissenting).

ROY G. HILL, District Judge (dissenting).

I dissent.

This case is before this court for the third time. In the original decision *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct.App. 1973), a jury decision in favor of the Plaintiff was affirmed. This court held there, among other things, that because the trial court correctly denied directed verdict and judgment n. o. v. motions as to one of Plaintiff's theories "lack of consent to the operation" it was not necessary to decide whether the trial court was also correct as to Plaintiff's other theories. The Supreme Court in *Gerety v. Demers*, 86 N.M. 141, 520 P.2d 869 (1974) reversed, holding that Section 21–1–1(50)(b) N.M.S.A., 1953 (Repl. Vol. 4, 1970) required a decision on the propriety of the trial court's decision to grant Defendant a directed verdict on Plaintiff's other two theories: (1) Negligent Surgery; and (2) Lack of Informed Consent.

In this court's second opinion, *Demers v. Gerety*, 87 N.M. 52, 529 P.2d 278 (Ct.App. 1974), it was determined there was no issue

as to causation as it related to negligent surgery and therefore the trial court incorrectly denied Defendant's motion for a directed verdict on that issue.

On the issue of Lack of Informed Consent, it was simply stated:

> "Since our prior opinion decided there was a lack of consent, it goes without saying there could not have been any informed consent."

The case was retried and Plaintiff now appeals presenting ten points for reversal. The majority has reversed the trial court. I would affirm.

Plaintiff's Request for trial before another Judge

Plaintiff first argues that the Honorable Gerald D. Fowlie, District Judge, before whom the first trial was conducted, shunned his duty by recusing himself from the retrial. I find nothing in our law that placed a duty on Judge Fowlie to preside at the retrial of this case. *State v. Scarborough*, 75 N.M. 702, 410 P.2d 732 (1966) is no help to Plaintiff. It was not error for Judge Fowlie to have recused himself.

Following Judge Fowlie's recusal, the case was reassigned to the Honorable Harry E. Stowers who eventually recused himself and the case was then reassigned to the Honorable Maurice Sanchez on June 15, 1976.

Plaintiff argues that because Judge Fowlie's recusal eventually led to the assignment of Judge Sanchez, Plaintiff was severely prejudiced. A party to a lawsuit has no right to a particular judge. A party to a lawsuit has the statutory right of disqualification set forth in Section 21–5–8, N.M. S.A., 1953 (Repl. Vol. 4, 1970) as well as the right to disqualify pursuant to Article VI, Section 18, Constitution of New Mexico.

Plaintiff filed an affidavit of disqualification pursuant to the noted section against the Honorable Maurice Sanchez. Judge Sanchez correctly refused to honor the affidavit. Plaintiff's argument on this issue is disposed of completely in *Gray v. Sanchez*, 86 N.M. 146, 520 P.2d 1091 (1974). That case involved the same district judge and the same factual situation insofar as the timeliness of the attempted statutory disqualification.

In addition to the affidavit of disqualification filed pursuant to Section 21–5–8 supra, Plaintiff sought to disqualify Judge Sanchez pursuant to Article VI, Section 18, Constitution of New Mexico. Plaintiff again relies on *Scarborough*, supra, and again Plaintiff's reliance is misplaced. The Supreme Court there held:

> "We now declare, in accord with what appears to be the American rule, that an 'interest' necessary to disqualify a judge must be a present pecuniary interest in the result, or actual bias or prejudice, and not same indirect, remote, speculative, theoretical or possible interest." (Citations omitted)

The court did go on to say that ". . . a person charged with a crime should not be required to proceed to trial before a presiding judge who has openly expressed animosity or hostility". id. 75 N.M. at 709, 410 P.2d at 736. The court also pointed out that in the two cases therein cited, there was proof that the court favored one side over the other. I find no such evidence in the present case. It should also be noted that the decision in *Scarborough*, supra, was based upon the Supreme Court's superintending control over inferior courts as provided in Art. VI, Section 3, New Mexico Constitution. The record here does not reflect any attempt by Plaintiff to prevent Judge Sanchez from proceeding in this cause through the Supreme Court's same power. Judge Sanchez properly refused to allow himself to be disqualified by either the statutory affidavit or the motion pursuant to Article VI, Section 18, New Mexico Constitution.

Negligent Surgery

The trial court held that the question of negligent surgery had been adjudicated by this court in *Demers v. Gerety*, 87 N.M. 52, 529 P.2d 278 (1974) and consequently entered judgment for the defendant on that issue (Tr. 127–130). Plaintiff argues that because this court reversed and granted a

new trial, the trial should have been open to all issues. Plaintiff relies on language from 58 Am.Jur.2d New Trial 229; *Bendorf v. Volkswagenwerk Aktiengeselischaft*, 88 N.M. 355, 540 P.2d 835 (1975); *Ortega v. Ortega*, 33 N.M. 605, 273 P. 925 (1928) and *St., ex rel. Bujac v. District Court*, 28 N.M. 28, 205 P. 716 (1922). The Am.Jur.2d citation and *Bendorf* do not support Plaintiff's position. The two New Mexico cases cited support the trial court's ruling.

In *Bujac* the Supreme Court stated:

"A general survey of this whole matter would seem to lead to the conclusion that there is one general, fundamental principle always to be applied, and that is that the appellate court, unless prevented by some limitation upon its powers, should, upon reversal, either render the proper judgment or direct the lower court to do so, except in those cases where such action is prevented by the circumstances, or where legal injustice would thereby result to one of the parties. Ordinarily the parties should go back to the point where the error occurred, and the case should proceed from that point to a conclusion, unless the circumstances prevent such a course. The fact that the infirmity of the case is first disclosed in the appellate court has nothing to do with the matter, and creates new rights in the losing party.

Thus in jury trials if the error occurs prior to verdict there must be a new trial, because the parties cannot be placed in the same position they were in when the error occurred, and before the same jury. This is a rule of necessity. If the error is in the verdict, for example, where it is not supported by substantial evidence, there must at least in civil cases be a new trial, for in such cases there remains no verdict upon which to base the judgment. In such cases, however, it would seem that in the absence of a motion in the trial court for an instructed verdict the complaining party would not be in position to urge the error upon this court, although we might, of our own motion, consider the same. *Sais v. City Electric Co.*, 26 N.M. 66, 188 Pac. 1110. If the error occurred by reason of the court denying a motion for judgment non obstante veredicto, it would be an error of law which should be corrected by directing the district court to enter the proper judgment. If an improper judgment be rendered upon the verdict, the same rule would apply." id. at 50–51, 205 P. at 725.

Bujac was followed in *Ortega* and both of these cases come within the rule enunciated in 5B C.J.S Appeal and Error, § 1950 at 513 which reads:

"Whether the whole judgment is vacated and set aside, or only a part thereof, depends on whether the reversal is a general one of the whole judgment or decree, or only a reversal of a distinct part of the judgment. If, on appeal from the overruling of a motion to direct a verdict as to a given issue, there is a reversal, it is a holding that, as a matter of law, such issue was proved or disproved; but, where the appeal is from directing a verdict, then the reversal decides nothing, except that it was error to hold below that there was no question for a jury."

The trial court properly refused to allow Plaintiff to proceed on the theory of negligent surgery.

Physician-Patient Relationship

In *Demers v. Gerety*, 85 N.M. 641, 645, 515 P.2d 645, 649 (1973), in discussing the physician-patient relationship, it was noted "We begin our discussion by noting that the physician-patient relationship is a fiduciary one" citing *Woods*, supra. In *Demers v. Gerety*, 87 N.M. 52, 529 P.2d 278 (Ct.App. 1974), the quoted remark was explained to mean "only that 'utmost good faith toward the patient' is required in disclosure of the possible consequences of medical treatment."

The comment in the first opinion and the explanation in the second were not intended to indicate a requirement that a trial court instruct on the "fiduciary relationship" between physician and patient. To the contrary, I would hold such an instruction is not required and it was not error for the trial court to refuse to give any or all of Plaintiff's requested Instruction No. 6.

Damages for Unauthorized Operation Instructions

The trial court's Instruction No. 1 reads:

"The Plaintiff claims that he sustained damages and that the proximate cause thereof was the following claimed act of malpractice:

The Defendant performed an operation upon the Plaintiff without first obtaining a legal consent.

The Plaintiff has the burden of proving that he sustained damage and that the claimed act was the proximate cause thereof.

The Defendant denies the Plaintiff's claim.

If you find that Plaintiff has proved the claim required of him, then your verdict should be for the Plaintiff. If on the other hand, you find that the claim required to be proved by Plaintiff has not been proven, then your verdict should be for the Defendant."

This instruction when read in conjunction with Instruction Nos. 4 and 6 quoted below show clearly that the jury was instructed on the Plaintiff's theory that the doctor had a duty to have the legal consent of the patient to perform an operation and that an operation performed without that consent regardless of the consequences was compensable:

"A poor medical result is not, in itself, evidence of any wrong doing by the doctor. The Court has determined, as a matter of law, that Plaintiff has failed to prove that the surgery was negligently performed and you must not consider this question in arriving at your verdict."

"A doctor must obtain a legal consent either by or on behalf of his patient before operating on him."

It was not error for the trial court to refuse to give Plaintiff's requested Instruction No. 11:

"Damages arising from an unauthorized procedure may be recovered even though the operation was performed with the utmost care and skill."

Refused Instructions

Plaintiff contends it was error for the trial court to refuse to give Plaintiff's requested Instruction Nos. 4, 5, 7, 11, 14, 16 and U.J.I. 17.6. Plaintiff makes two attacks on the trial court's refusal. Plaintiff first argues that because these instructions were given in the first trial of this case they became the law of the case.

The doctrine of law of the case recognized in this state is that the rule applies to questions specifically decided as well as those necessarily included. *Ute Park Summer Homes Association v. Maxwell Land Grant Co.*, 83 N.M. 558, 494 P.2d 971 (1972). I would hold that uncontested instructions given in the trial of a case which is subsequently retried do not fall within the doctrine of law of the case. *Thoroughbred Motor Court v. Allen Co.*, 296 S.W.2d 690 (Ky.App.1956).

Trial Court's Instructions 4 & 5

The trial court instructed:

"A poor medical result is not, in itself, evidence of any wrong doing by the doctor. The Court has determined, as a matter of law, that Plaintiff has failed to prove that the surgery was negligently performed and you must not consider this question in arriving at your verdict."

"There is no issue of Dr. Gerety's competency to perform the surgery of November 13, 1967. You are to disregard any suggestion that the physician did not possess the knowledge and ability to perform the surgery."

The function of this court is to correct erroneous results and not to correct errors which even if corrected would not change the result. *Gough v. Famariss Oil and Refining Company*, 83 N.M. 710, 496 P.2d 1106 (1972); *Wright v. Brem*, 81 N.M. 410, 467 P.2d 736 (1970). An appellant has the burden of showing he is prejudiced by erroneous instructions. *Jewell v. Seidenberg*, 82 N.M. 120, 477 P.2d 296 (1970).

When the quoted instructions are read in context with all the instructions as they must be they do not present prejudicial error to the Plaintiff.

While I do not approve the specific language of trial court Instruction No. 4, I note that counsel for Plaintiff did invite such an instruction by a persistent attempt to inject the issue of "negligent surgery" into the case. (Tr. 208).

It was not reversible error for the trial court to give its Instructions 4 and 5.

595 P.2d 401

Bert Michael GEARHART, Plaintiff-Appellant,

v.

EIDSON METAL PRODUCTS, Employer, and Sentry Insurance Co., Insurer, Defendants-Appellees.

No. 3603.

Court of Appeals of New Mexico.

Feb. 6, 1979.

Rehearing Denied Feb. 16, 1979.

Writ of Certiorari Denied March 14, 1979.

Leof T. Strand, Albuquerque, for plaintiff-appellant.

Mark J. Klecan, Klecan & Roach, P. A., Albuquerque, for defendants-appellees.

OPINION

HENDLEY, Judge.

Plaintiff appeals a workman's compensation award. He contends that the trial court erred in (1) finding that he had a 5 percent scheduled injury impairment but was not disabled, (2) finding that plaintiff would not require future medicals, (3) refusing to assess certain costs against defendant, and (4) awarding attorney fees in the amount of $200.

Scheduled Injury.

The trial court found that plaintiff had suffered an injury to the elbow resulting in a 5 percent impairment of the elbow (§ 52–1–43(B), N.M.S.A.1978), but that he was not totally or partially disabled, pursuant to § 52–1–41 or 42, N.M.S.A.1978.

Viewing the evidence and its logical inferences in the light most favorable to support the verdict (*Adams v. Loffland Brothers Drilling Co.*, 82 N.M. 72, 475 P.2d 466 (Ct.App.1970)), we find that a medical expert testified that plaintiff's pain was subjective and the pain did not hinder him from working regularly and, accordingly, plaintiff was not disabled and the condition was not chronic. Plaintiff's expert found plaintiff to have a 5 percent permanent impairment of his right upper extremity. The finding of the trial court was within the range of the testimony of the medical experts. It was for the trial court to resolve the conflict. *Martinez v. Universal Constructors, Inc.*, 83 N.M. 283, 491 P.2d 171 (Ct.App.1971).

Future Medical Expense.

Section 59–10–19.1, N.M.S.A.1953 (2nd Repl. Vol. 9, pt. 1), subsequently amended, see 52–1–49, N.M.S.A.1978, states as follows:

> *"Medical and related benefits—Artificial members.*—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."

* * * * * *

The trial court found that the plaintiff would not require any medical attention in the future for the injury sustained. Notwithstanding any language which may be construed to the contrary in *Gallegos v. Duke City Lumber Co., Inc.*, 87 N.M. 404, 534 P.2d 1116 (Ct.App.1975), we are of the view that the continuing medical and surgical attention for the injury cannot be terminated by the trial court. The right created by statute is for a period "continuing as long as medical and surgical attention is reasonably necessary." The trial court cannot restrict or terminate that substantive right.

Neither does *Hales v. Van Cleave*, 78 N.M. 181, 429 P.2d 379 (Ct.App.1967) preclude an award of medical or surgical attention which may arise in the future. *Hales* only prohibits the trial court from making a specific award of money for future medical or surgical attention.

Costs.

Plaintiff filed a cost bill for one medical expert and two lay witnesses in the trial court. He also requested costs in his Requested Findings of Fact and Conclusions of Law filed on March 27, 1978. Defendants' Requested Findings of Fact and Conclusions of Law filed on March 31, 1978, stated in part as follows:

> "29. The plaintiff's attorney failed to supply medical reports to the defendants' attorney, although those reports were requested on January 24, 1978 during the plaintiff's deposition (Page 38) and on February 4, 1978 (copy of letter attached).
>
> "30. This failure to supply medical records made it necessary for the defendants to file a motion to produce such records [filed February 27, 1978], and also made it necessary to depose Dr. Allan Wilson.
>
> * * * * * *
>
> "32. The failure by the plaintiff's attorney to supply medical reports to the defendants precluded the defendants from making an offer, in writing, more than 30 days prior to trial." (Tr. 32)

The trial court made its Findings of Fact and Conclusions of Law on April 18, 1978, which were identical to those quoted above. The trial court's judgment was filed on April 18, 1978. Costs were not awarded.

There was no hearing on the issue of costs relative to the failure to furnish medical reports. Thus, Findings Nos. 29, 30 and 32 are not supported by the record. Plaintiff is awarded costs for the medical and lay witnesses. The trial court abused its discretion in not awarding such costs. *Hales v. Van Cleave, supra.*

Attorney Fees.

The trial court awarded plaintiff $200 in attorney fees. The awarding of attorney fees is within the sound discretion of the trial court and not reviewable absent an abuse. *Escobedo v. Agriculture Products Co., Inc.*, 86 N.M. 466, 525 P.2d 393 (Ct.App.1974).

In *Keyser v. Research Cottrell Co.*, 84 N.M. 173, 500 P.2d 997 (Ct.App.1972) this court held that § 52–1–54(D), N.M.S.A.1978, sets forth the elements which must be considered in awarding attorney fees and it is an abuse of discretion if the trial court fails to consider them. From the record we cannot determine what was considered by the trial court in awarding attorney fees.

In *Ortega v. N.M. State Highway Dept.*, 77 N.M. 185, 420 P.2d 771 (1966) our Supreme Court considered other issues as also being important. These included the length of the transcript of the proceedings in the trial court, the amount of the award, and the results. In the present case, injury and liability were fully contested. Plaintiff's attorney prepared and conducted a full trial on the merits, attended two depositions, prepared a motion to undertake discovery, and prepared proposed findings of fact and conclusions of law. Moreover, plaintiff was successful in receiving an award of compensation. From the above, it clearly appears that the trial court abused its discretion in awarding plaintiff attorney fees of only $200. To allow such a low award to stand would have a "chilling effect upon the ability of an injured party to obtain adequate representation." *Herndon v. Albuquerque Public Schools and Commercial Standard Insurance Company*, 92 N.M. 287, 587 P.2d 434 (1978).

The decision of the trial court on the award of attorney fees is reversed. Since the original trial judge is no longer on the court and given the factors which we have outlined above, we feel that we are in as good a position to set attorney fees as a new trial judge. Accordingly, we award plaintiff attorney fees for the trial in the amount of $1,000.

The judgment is affirmed as to plaintiff's award of compensation and is reversed as to costs, future medical attention and attorney fees. Plaintiff is awarded the sum of $1,500 attorney fees on appeal. *Schiller v. Southwest Air Rangers, Inc.*, 87 N.M. 476, 535 P.2d 1327 (1975).

IT IS SO ORDERED.

WALTERS, J., concurs.

SUTIN, J., concurs in result.

SUTIN, Judge (concurring in result).

I concur in the result.

A special concurring opinion is not read or relied upon by lawyers and district judges. It is a waste of space in New Mexico Reports and should not be written. If the Supreme Court grants certiorari, it will not be published. Generally, I write one to point out the idiosyncratic performance of trial lawyers and district judges, together with the tortuosities of appellate opinions.

First, the district judge adopted the findings and conclusions requested by defendants. The Supreme Court and this Court have heretofore remanded such a cause to the district court to make its own findings. Heretofore, I disagreed and still disagree. But when a district judge adopts the requested findings without reading and studying them, the trial lawyer often leads the judge astray. It was done in this case.

In Correspondence Opinions written in response to Memorandum Opinions submitted by my brethren, I have suggested a solution to this problem: (1) submit requested findings and (2) submit proper findings for the court to use with a change in verbiage. A district judge, long after a

trial, generally accepts any findings submitted by the successful party even without carefully reading them. It occurred in this case. Under these circumstances, a remand is necessary but impractical. The district judge no longer sits in office. A new trial granted would be a useless appendage. Plaintiff can seek an increase in the percentage of scheduled disability.

Second, there was no evidence of partial permanent disability. No such finding appears in the court's findings nor in the judgment. At the close of the case, comments were made, and for these comments, I applaud the district judge. He stated that he leaned toward plaintiff to give him some relief. He awarded plaintiff "partial permanent disability of five percent," and "if the Court's arithmetic is correct . . $1,010.88."

Partial disability is defined in Section 52–1–25, N.M.S.A.1978 as follows:

> "[P]artial disability" means a condition whereby a workman * * * is unable to some percentage-extent to perform the usual tasks in the work he was performing *at the time of his injury and* is unable to some percentage-extent *to perform any work for which he is fitted* by age, education, training, general physical and mental capacity and previous work experience. [Emphasis added.]

The question put to Dr. Allan Wilson by plaintiff, reads:

> Q. Doctor, do you have an opinion—*I will talk about impairment of function and not legal disability,*—Do you have an opinion as to the percentage extent that Bert suffers, percentage extent of functional impairment that Bert suffers as a result of the condition in his right elbow . . .?
>
> A. It is my opinion that Bert has a five percent permanent impairment of his right upper extremity. [Emphasis added.]

The testimony of Dr. Wilson does not establish permanent partial disability. Seldom, if ever, is an expert witness asked the following questions:

> In your opinion, is the workman wholly (or to some percentage-extent partially) unable to perform the usual tasks in the work he was performing at the time of the injury?
>
> In your opinion, based upon the age, education, training, general physical and mental capacity and previous work experience, is the workman wholly (or to some percentage-extent partially) unable to perform any work for which he is fitted?

On cross-examination, plaintiff was asked these questions to which he made these answers:

> Q. You are still working at this job with Bill Jay Construction Company [same type of work]?
>
> A. Yes.
>
> Q. And that, as with all the other previous job[s], involves essentially the same type of work that you have been doing all of your adult life, doesn't it?
>
> A. Yes.

Plaintiff agreed that he was wholly able to perform the usual tasks in the work he was performing at the time of his injury, and wholly able to perform all work for which he was fitted by age, education, training, general physical and mental capacity and previous work experience.

Dr. Wilson was asked these questions to which he made these answers:

> Q. Now Doctor, did you have an opinion, based upon reasonable medical probability on May 4, 1977, as to whether Bert Gearhart was able to return to work?
>
> A. I did not feel that he could return to work at this point, no.
>
> Q. *Did you subsequently okay his return to work?*
>
> A. *Yes I did.* Basically we treated Bert on 5/4/77 and he returned to work on 5/18/77, and was at that point, essentially asymptomatic *and was discharged.* [Emphasis added.]

The trial court found that on May 18, 1977, plaintiff was released by Dr. Wilson as being fully recovered.

Dr. Jacob Bronitsky was asked this question to which he made this answer:

Q. Would you be able to express an opinion for us as to whether or not in your opinion Bert Gearhart is disabled to any extent?

A. I don't think he is disabled to any extent. He is able to do the heavy kind of work that he has been doing. I mean *if* he is having some discomfort, I would say, *if* I had to give a percentage, I would say about five percent. [Emphasis added.]

Furthermore, the court concluded:

4. The undisputed medical evidence was that the Plaintiff suffered from a 5% impairment of the right arm at the elbow.

* * * * * *

6. The Plaintiff is entitled to $1,010.88 as compensation benefits.

7. The Plaintiff is completely able to perform the type and amount of work which he was performing on February 10, 1977.

8. The Plaintiff is completely able to perform all work for which he is fitted by age, education and work experience.

9. The Plaintiff has suffered a schedule injury which has produced a 5% *impairment* of the right arm at the elbow, but such injury has *not* created any *disability*. [Emphasis by Court.]

If defendants had cross-appealed, we would have been compelled to deny plaintiff any compensation benefits. Defendants put in their requested conclusions that plaintiff was entitled to compensation benefits and yet was not disabled. This contradiction is explained by the comments made by the district judge at the close of the evidence, and defendants' desire to seek judgment.

This mishmash, hodgepodge and hogwash method of trying cases on the part of both parties does find favor with most appellate judges, but not with me.

However, I want to make my position clear. Merely because a workman is wholly able to perform his usual tasks does not per se mean that he is totally or partially disabled.

In my Correspondence Opinion in *Lopez v. Phelps Dodge Corporation*, No. 3505, filed September 19, 1978, cert. granted, November 11, 1978, I said:

> Plaintiff drove a muck truck having a capacity of 85 to 100 tons of ore. He was divorced but he had custody of the children, three of whom had reached the age of 18, and three who had not. He wore a back brace during his employment. He was not paid compensation benefits and had to borrow money from a bank. He worked a midnight shift to 8:00 a. m. Many workmen will do slave labor to support a family notwithstanding disability as defined by law. The mere fact that he is employed full time does not bear on the percentage of his disability, if any.
>
> * * * * * *
>
> In the trial of a workmen's compensation case, "Plaintiff must establish that he was totally or partially unable to perform the work he was doing at the time of the injury." *Medina v. Zia Company*, 88 N.M. 615, 544 P.2d 1180 (Ct.App.1975). This does not mean that plaintiff must suffer the pangs of misery while doing the work. Plaintiff was able to perform his job on a full time basis with a back brace, pain and discomfort. . . .

"Slave labor" and "pangs of misery" suffered while performing work puts a workman in the category of disability under the Workmen's Compensation Act. This includes pain suffered which, in the opinion of a workman or an expert, falls within the definition of disability.

Third, in my opinion, this appeal was taken to provide for future medical expense, costs and attorneys fees. I concur with Judge Hendley. The considerations that enter into the matter of fixing attorney fees was stated in *Elsea v. Broone Furniture Co.*, 47 N.M. 356, 143 P.2d 572 (1943) and followed in *Michelson v. Michelson*, 89 N.M. 282, 551 P.2d 638 (1976). See *Marez v. Kerr-McGee Nuclear Corporation*,

No. 3487, filed December 19, 1978, Sutin, J., specially concurring.

595 P.2d 406

STATE of New Mexico,
Plaintiff-Appellee,

v.

David BAREFIELD,
Defendant-Appellant.

No. 3807.

Court of Appeals of New Mexico.

April 24, 1979.

Writ of Certiorari Denied May 25, 1979.

James L. Porter, Albuquerque, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Michael E. Sanchez, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant was convicted of aggravated burglary, kidnapping, rape, two sodomies, and robbery while armed with a deadly weapon. These convictions, the subject of this appeal, are referred to hereinafter as Case 3. Only two of the issues listed in the docketing statement were briefed; other issues were abandoned because not briefed. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct.App.1977). The two issues briefed concern: (1) defendant's right to a speedy trial; and (2) credit on defendant's sentence.

Defendant was committed to the penitentiary in 1966 for second degree murder. This is Case 1. He was paroled in 1973.

Defendant was indicted for armed robbery in March, 1974. This is Case 2. In June, 1974, he was found incompetent to stand trial in Case 2, and was committed to the State Hospital.

In August, 1974, defendant escaped from the State Hospital and committed the crimes involved in Case 3.

In September, 1974, defendant's parole in Case 1 was revoked; he was remanded to the penitentiary.

In October, 1974, defendant was indicted for the Case 3 crimes. In November, 1974, defendant was found incompetent to stand trial in Case 3, but was returned to the penitentiary, where he was then confined in connection with Case 1. Although found incompetent, he was returned to the penitentiary because the testimony indicated he was extremely dangerous, a possible homicide or suicide, had escaped from the State Hospital, and psychiatric treatment was available at the penitentiary.

In February, 1978, defendant was found competent to stand trial. He was tried and convicted, in Case 3, in April, 1978.

Speedy Trial

A Supreme Court order, entered in April, 1975, extended the time to try defendant pursuant to Rule of Crim.Proc. 37 "to six months from the time Respondent is declared competent to stand trial." Defendant was tried within this time period. Compliance with the Supreme Court order and with Rule of Crim.Proc. 37 is not an issue in the appeal.

Defendant's speedy trial claim is based on the delay by the State in seeking a redetermination of his competency. *State v. Santillanes*, 91 N.M. 721, 580 P.2d 489 (Ct.App.1978). The factual basis for this contention involves reports which stated defendant was competent to stand trial. References to some of these reports appear in the file in Case 2, rather than Case 3. Both

cases involve the same district attorney's office. We disagree with the State's contention that the prosecutor in Case 3 is not chargeable with knowledge of the reports in Case 2. *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct.App.1975). Defendant seems to argue that the various reports were, in themselves, a determination that defendant was competent to stand trial. We disagree. Competency to stand trial is a matter to be determined either by the court or jury. Rule of Crim.Proc. 35(b); *State v. Tartaglia*, 80 N.M. 788, 461 P.2d 921 (Ct.App.1969).

Although the claim of denial of a speedy trial is a constitutional claim, see N.M. Const., art. II, § 14, the claim is based in part on a provision in § 31–9–1, N.M.S.A. 1978, which states:

> Defendants determined to be incompetent under this section shall have the question of their mental capacity to stand trial redetermined * * * whenever the medical authorities of the institution to which the defendant was committed or any medical authority appointed by the court, report to the court that, in their opinion, the defendant is mentally competent to stand trial.

Technically, § 31–9–1, supra, is not applicable. Defendant was not committed to a mental institution after the incompetency determination in Case 3 in November, 1974. Defendant had already been committed to the penitentiary in Case 1, and had been returned to the penitentiary for parole violation. In addition, defendant had also been committed to the State Hospital in Case 2. All the November, 1974 order of incompetency did was direct that defendant be returned to the penitentiary.

Although not technically applicable, § 31–9–1, supra, supports the speedy trial claim because the statute contemplates a redetermination of competency when medical authorities are of the view that a defendant is competent to be tried.

The reports indicate a competency to stand trial. The speedy trial claim is based on the State's delay in seeking a redetermination of competency. Accordingly, we consider the four factors involved in the question of denial of a speedy trial, and the balancing of those factors. *State v. Tafoya*, 91 N.M. 121, 570 P.2d 1148 (Ct.App.1977).

(a) Length of the Delay

When did the delay begin and when did it end? Defendant asserts the delay began in September, 1975 with a Clinic Psychological Report. We disagree. This report went only to the absence of a need for defendant to be hospitalized; it did not discuss competency. Testimony at the competency hearing supports defendant's claim that there were reports in January, 1976 which indicated defendant was competent to stand trial. We consider the delay period to have begun in January, 1976. By oral motion in late November, 1977, the State requested that defendant be examined on the question of competency to stand trial. The examination was conducted in December, 1977, a competency hearing was held in January, 1978, and the order, declaring defendant competent, was entered in February, 1978. Thus, delay ended in November, 1977. The delay period to be considered is from January, 1976 through November, 1977, a maximum of twenty-three months.

What happened during the twenty-three-month period?

Defendant refers to the January, 1976 reports as being from the "Psychological Services Unit" at the penitentiary. An April, 1976 motion by the prosecutor referred to the January, 1976 reports and requested a court-ordered psychiatric examination. This motion was granted in April, 1976; however, the examination was not held until September, 1976. The report of the examination states that defendant was competent to stand trial.

A competency hearing was scheduled in May, 1977. Because "the evaluation was done back in September [1976]," the hearing was postponed and another evaluation was ordered by the trial court. The context of the hearing indicates this was agreeable to the attorney who appeared for defendant. Apparently, the examination ordered in May, 1977 was not held.

In August, 1977, the trial court again ordered a psychiatric examination; we do not know who sought this examination, but the order was "approved" by counsel for the State and for the defendant. Testimony indicates the examination was conducted in September, 1977; the examiner was of the opinion that defendant was competent to stand trial.

Thereafter, the State's oral motion in November, 1977 for a competency examination.

(b) Reason for the Delay

The trial court was of the view that part of the delay was due to change of counsel or the physical absence of counsel. We agree. The trial court ordered a psychiatric examination in April, 1976. The examination was in September, 1976; however, defense counsel Ronald T. Taylor moved and was permitted to withdraw in May, 1976. The public defender was appointed to represent defendant. At the competency hearing scheduled in May, 1977, which was postponed by agreement of counsel, attorney Teel appeared on behalf of defendant. Attorney Teel informed the trial court "this is John Walker's case, and John is in South America . . . ." Defense approval of the court-ordered examination in August, 1977 was "Woody Smith for John Walker." On November 9, 1977, defendant filed a motion to dismiss which recites: "Petitioner has on numerous occassions [sic] requested assistance from his Court Appointed Attorney but to no avail, therefore, this Motion is being filed Pro se." Attorney Bruce Kelly entered his appearance for defendant on December 2, 1977.

Part of the delay can also be attributed to defense counsel's agreement to postpone the competency hearing in May, 1977 in order to obtain another psychiatric evaluation.

(c) Defendant's Assertion of the Right

Defendant first asserted his right to a speedy trial by his motion to dismiss filed November 9, 1977.

(d) Prejudice to the Defendant

Defendant claims he was prejudiced by the length of time he was incarcerated. The record shows he was incarcerated in connection with his murder conviction.

Defendant asserts the delay prejudiced his "interest in maintaining his anxiety at minimum and protecting his psychological well-being." There is no evidence to support this claim; the competency reports in the file, to the extent they contribute anything, are adverse to this assertion.

Defendant contends his defense was impaired because, at trial, defendant "was unable to elicit testimony crucial to his defense because the memory of the . . . [victim] was greatly impaired." Defendant does not suggest what that testimony might have been. The victim's lack of memory would seem to be a benefit to defendant. Defendant presented a full defense, including insanity at the time of commission of the crimes.

(e) The Balancing Process

The above four factors are to be balanced in determining whether there was a denial of a speedy trial because of delay in determining defendant's competency. *State v. Tafoya*, supra. The twenty-three-month delay was presumptively prejudicial. *State v. Tafoya*, supra. Part of the delay is fairly attributable to defense counsel, not the State. Defendant never asserted his right to a speedy trial until November, 1977. Defendant has not shown prejudice.

Applying the balancing process, defendant was not denied his right to a speedy trial.

Credit on Defendant's Sentence

Defendant contends the trial court erred in failing to give defendant credit on his sentence for presentence confinement. Section 31–20–12, N.M.S.A.1978; *State v. La Badie*, 87 N.M. 391, 534 P.2d 483 (Ct.App. 1975). From the number of days defendant asserts should be credited, we assume the claim is for credit for all confinement from the date in November, 1974, when he was

held to be incompetent to stand trial in Case 3, until September 13, 1978, the date sentence was imposed in Case 3.

Section 31–20–12, supra, provides for credit for presentence confinement against the sentence imposed upon conviction of the offense charged or a lesser included offense. If the confinement was not in connection with the offense charged, § 31–20–12, supra, does not authorize a credit. *State v. Brewton*, 83 N.M. 50, 487 P.2d 1355 (Ct.App. 1971).

Defendant's presentence confinement occurred because his parole in Case 1 had been revoked. To the extent defendant was confined in Case 1, he was not entitled to credit under § 31–20–12, supra. Anticipating this result, defendant contends his parole was improperly revoked in Case 1. The propriety of the parole revocation involves the parole board, which was not before the trial court in Case 3. Thus, the trial court, in Case 3, could not determine the propriety of the parole revocation in Case 1. *State v. Bambrough*, 81 N.M. 548, 469 P.2d 527 (Ct.App.1970).

We cannot, however, say that defendant was not confined in Case 3. After ruling that defendant was incompetent in Case 3, the trial court ordered defendant returned to the penitentiary because he was dangerous and had escaped from the State Hospital. This seems to indicate that in light of his incompetency, defendant would have been confined at the State Hospital, in Case 3, but for the fact that he was dangerous. The record being ambiguous, defendant may raise the issue of credit on his Case 3 sentences by appropriate motion. See *State v. Murray*, 81 N.M. 455, 468 P.2d 416 (Ct.App.1970). If defendant, in fact, was confined on Case 3 charges, he is entitled to credit for that presentence confinement even though he was also confined, at the same time, in Case 1. *Mancinone v. Warden, Connecticut State Prison*, 162 Conn. 430, 294 A.2d 564 (1972).

The judgment and sentences are affirmed.

IT IS SO ORDERED.

HERNANDEZ and LOPEZ, JJ., concur.

595 P.2d 410

Ernest H. CHRISTMAN, Plaintiff-Appellee,

v.

Bill VOYER and Mountain States Telephone and Telegraph Company, Defendants-Appellants

No. 3252.

Court of Appeals of New Mexico.

May 1, 1979.

Michael L. Gregory, Las Vegas, for defendants-appellants.

E. Douglas Latimer, Albuquerque, for plaintiff-appellee.

OPINION

ANDREWS, Judge.

This suit, originally filed for injunctive relief against defendants Bill Voyer (Voyer) and Mountain States Telephone Company, alleged breach of a lease agreement and interference with business relationship. After a non-jury trial, the court ordered Voyer to pay plaintiff, Ernest H. Christman (Christman), $2500 as exemplary damages. This appeal, brought by Voyer alone, raises no issue as to the injunction, but urges that the court erred in awarding exemplary damages. We agree.

Facts

In 1969, Christman, a licensed and practicing medical doctor specializing in ophthalmology, established a part-time practice in Las Vegas, New Mexico. His office was located adjacent to an optical dispensary operated by his landlord, an optician.

Voyer, also an optician, purchased the optician's practice in 1973, continuing the dispensary at the same location. Voyer and Christman subsequently entered into a verbal agreement whereby in exchange for the fifty dollar monthly rental fee for office space, Voyer answered the telephone on an extension line at the dispensary and made appointments for Christman when patients called on Christman's number listed in the local directory. Christman saw patients at his Las Vegas office only part of one day each week and had no staff at this office except on that day. This arrangement, and the proximity of the office and business, was advantageous to both since patients usually left the physician's office and went directly to the adjacent optical dispensary to have eyeglass prescriptions filled.

In 1974, Voyer purchased the building in which the office and dispensary were located, but the agreement did not change. At the time of the purchase, Voyer solicited a five year lease. Christman offered to sign a lease for a shorter term, promising one year's notice of intention to vacate or terminate, but no agreement was signed.

Upon receipt of a thirty-day notice to vacate in September, 1975, Christman moved to a new location. In order to increase the volume of his own business and to provide better service to the community, Voyer rented Christman's former office to a full-time ophthalmologist who had his own telephone number and receptionist.

After these changes, when calls came on Christman's number, Voyer answered and referred requests for eye examinations to the new physician rather than Christman and revealed Christman's new location only when callers were insistent.

Although Christman made efforts to notify patients of his new location and phone number and even sought injunctive relief to effect a telephone intercept on the number, his practice dwindled and diminished and in March, 1976, he determined that it was not economically feasible to continue his Las Vegas practice.

This suit followed, with Christman alleging that as a result of Voyer's acts he suffered damages in the form of costs of moving his business to another location; in loss of income to his practice; and, in addition to the loss of patients, the loss of good will.

After trial, the court finding "no clear proof as to the specific amount of damage", awarded "nominal damages" for the tortious interference with business relationship and exemplary damages in the amount of $2,500, plus costs.

Voyer claims that the court erred in ruling that the plaintiff was entitled to exemplary damages and challenges the following Findings upon which such award is based:

"20. Defendant's actions in failing to reveal the whereabouts or deliberately concealing the whereabouts of Plaintiff to those persons calling for Plaintiff were motivated by malice and a desire to increase the personal gain of Defendant.

21. Defendant's actions and malicious interference with the relationship between Plaintiff and his patients for the personal gain of defendant caused damage to Plaintiff's practice in an undetermined amount.

22. Plaintiff is entitled to punitive damages in the amount of $2500 for Defendant's intentional malicious interference with the relationship Plaintiff had with his patients."

Voyer also asserts error in the court's refusal to find the defendant had no contract or obligation to refer incoming telephone calls or patients to Christman and never refused, upon request, to give any person Christman's new telephone number or address.

This Court, at oral argument, raised a further issue: whether punitive or exemplary damages can be awarded without an award of compensatory damages. This issue, briefed by the parties since oral argument, is determinative of the appeal, and we therefore find it unnecessary to discuss the other issues presented.

In New Mexico, exemplary damages are recoverable in actions for damages based upon tortious acts. *Colbert v. Journal Publishing Co.,* 19 N.M. 156, 142 P. 146 (1914). They are not awarded as compensation to the party wronged, but rather as punishment to the offender, *Bank of New Mexico v. Rice,* 78 N.M. 170, 429 P.2d 368 (1967), and as a warning to others. *Sanchez v. Securities Acceptance Corp.,* 57 N.M. 512, 260 P.2d 703 (1953). Punishment in the form of exemplary damages may be imposed because of various types of conduct, *Loucks v. Albuquerque National Bank,* 76 N.M. 735, 418 P.2d 191 (1966), including conduct amounting to malice. *Galindo v. Western States Collection Company,* 82 N.M. 149, 477 P.2d 325 (Ct.App.1970).

The amount of punitive damages must be left to the jury's sound discretion based on the circumstances of each individual case, but must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason and justice. *Faubion v. Tucker,* 58 N.M. 303, 270 P.2d 713 (1954); *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.,* 84 N.M. 524, 505 P.2d 867 (Ct.App.1972). But this test has not been elevated to any level of exactness. Rather, the courts have refused to specify a ratio between the amount of actual damages and the award of punitive damages, where the validity of the ratio would be determined by the test of reasonableness. "Such a test, by necessity geared to exact figures, does not seem proper to this Court or feasible for actual use." *Faubion v. Tucker,* supra; *see Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.,* supra.

The rule that has been established with specificity is that punitive damages alone cannot be recovered for tort, *Grandi v. LeSage,* 74 N.M. 799, 399 P.2d 285 (1965); *see Samedan Oil Corp. v. Neeld,* 91 N.M. 599, 577 P.2d 1245 (1978); *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.,* supra; *Faubion v. Tucker,* supra.

Crawford v. Taylor, 58 N.M. 340, 270 P.2d 978 (1954), further defines the parameters of the rule. Although the complaint in *Crawford* contained an adequate statement of a wanton and malicious act constituting a cause of action in tort, the only claim for damages flowing from the malicious conduct was for punitive damages. Faced with the rule prohibiting a cause of action for punitive damages alone, the court stated:

> "Nevertheless, the alleged malicious interference by defendant with plaintiff's right to carry out her contract with the hospital and enjoy the fruits thereof would sustain an award to plaintiff of nominal damages. The fact that the prayer makes no request for nominal damages is immaterial since the prayer, not being a part of the statement of a cause of action, could be omitted entirely. [Citations omitted.] If, as we believe, the allegations are sufficient to sustain an award of at least nominal damages, it has already been indicated by this Court in *Hagerman Irrigation Co. v. McMurray,* [sic] 1911, 16 N.M. 172, 113 P. 823, that such an award, in a proper case, will support an award of punitive damages, and we so hold the law to be in this jurisdiction."

58 N.M. at 343, 270 P.2d at 979, 980.

Thus, even though there appear to be two lines of authority on this issue in New Mexico, the first reflected in U.J.I. Civil 14.25 to the effect that exemplary damages may not be awarded unless there is an award of compensatory damages, and the second holding that an award of nominal damages supports an award of exemplary damages, the cases are consistent and require that plaintiff suffer actual damages in order to receive an award of exemplary damages. *See Grandi v. LeSage,* supra; *Montoya v. Moore,* 77 N.M. 326, 422 P.2d 363, 36 A.L.R.3d 1362 (1967); *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.,* 88 N.M. 472, 542 P.2d 52 (Ct.App.1975), rev'd on other grounds, 89 N.M. 187, 548 P.2d 865 (1976). The question remains as to what proof is necessary to establish "actual damages."

The Supreme Court, in *Stevens v. Mitchell,* 51 N.M. 411, 186 P.2d 386 (1947), defined "nominal damages" as "a trivial sum of money awarded to a litigant who has established a cause of action but *has not established that he is entitled to compensatory damages.*" [Emphasis added.] 51 N.M. at 415, 186 P.2d at 389. In the instant case, the trial court found that Voyer's conduct established grounds for the award of exemplary damages, but also found that Christman has failed to supply "clear proof as to the specific amount of damage" which Voyer's acts had caused him. The requirement for proof of compensatory damages is set out in *Stevens,* supra:

> "The evidence must afford data, facts, and circumstances reasonably certain from which the jury may find the actual loss; and the plaintiff must show by a preponderance of evidence the damages caused by the injury complained of." 51 N.M. at 414, 186 P.2d at 389.

This rule requires proof of actual loss. As stated above, the trial court found no proof as to the "specific amount" of damage. Because the evidence is insufficient to support a finding that plaintiff, Christman, suffered actual damages, we conclude that the necessary predicate to an award of exemplary damages is missing and therefore find that the punitive damages award should be vacated. There being no basis for an award of exemplary damages, the judgment is reversed.

IT IS SO ORDERED.

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

595 P.2d 414

STATE of New Mexico, Plaintiff-Appellee,

v.

Albert SAIZ, Defendant-Appellant.

No. 3867.

Court of Appeals of New Mexico.

May 1, 1979.

John B. Bigelow, Chief Public Defender, Michael J. Dickman, Asst. Appellate Defender, Santa Fe, for defendant-appellant.

Jeff Bingaman, Atty. Gen., Sammy J. Quintana, Asst. Atty. Gen., Santa Fe, for plaintiff-appellee.

OPINION

WOOD, Chief Judge.

Defendant appeals his conviction of shoplifting merchandise valued over $100. Section 30–16–20, N.M.S.A.1978. We proposed summary affirmance; however, the appeal was reassigned to the limited calendar as to one issue. N.M.Crim.App. 207(d). The issue involves the propriety of the prosecutor's comment to the grand jury. The comment was:

> This case was before you on a previous hearing. It was dismissed by Judge Baiamonte concerning, due to confusion over the identity of the defendant, and we are now again seeking an indictment on him.

Defendant contends the comment was "inherently prejudicial" and, thus, a violation of due process. The "inherent prejudice" claimed is that the comment informed the grand jury that although its previous indictment had been dismissed, the grand jury should reindict. Defendant asserts the comment improperly colored the grand jury's evaluation of the evidence and influenced its assessment of whether there was probable cause to charge the defendant with a criminal offense. See § 31–6–10, N.M.S.A.1978.

Defendant ignores the facts and the reasoning of the trial court. The trial court remarked that the previous indictment had been dismissed because defendant indicated his name was other than Albert Saiz. The trial court wanted the grand jury to review the matter to insure that the proper person was charged. Defendant was known under several aliases, five aliases are listed in the indictment pursuant to which defendant

was convicted. The trial court was of the view that presenting the matter to the grand jury a second time (after the first indictment was dismissed because of the identity question) was for the protection of the defendant. We agree.

Relying on *Davis v. Traub*, 90 N.M. 498, 565 P.2d 1015 (1977), defendant asserts the grand jury is not the tool of the prosecutor to be manipulated at the will of the prosecutor. We agree, but there is no manipulation in this case. The prosecutor did no more than explain why a matter, previously considered, was again being presented to the grand jury. This case is not at all similar to *Davis v. Traub*, supra, where prejudice was presumed. For the conviction in this case to be reversed, an affirmative showing of prejudice is required. Rule of Crim.Proc. 7(a) and (d). No prejudice has been shown.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

595 P.2d 751
598 P.2d 641

Barbara J. RUDISAILE, Personal Representative, Surviving Spouse and Executrix of the Estate of Stanley E. Rudisaile, Deceased, Plaintiff-Appellee,

v.

HAWK AVIATION, INC., a New Mexico Corporation, Defendant-Appellant.

No. 3096.

Court of Appeals of New Mexico.

Sept. 5, 1978.

Reed L. Frost, John E. Schindler, Palmer & Frost, P. A., Farmington, Tom Davis and George M. Fleming, Byrd, Davis & Eisenberg, Austin, Tex., for plaintiff-appellee.

Byron Caton, Tansey, Rosebrough, Roberts & Gerding, P. C., Farmington, for defendant-appellant.

OPINION

LOPEZ, Judge.

The plaintiff-appellee brought a wrongful death action for the death of her husband as a result of an airplane crash. The trial court sitting without a jury found for the plaintiff and awarded damages in the sum of $235,000.00. The defendant appeals. We reverse.

We discuss the following issues: (1) whether strict liability in tort should apply to the facts of this case; and (2) whether the affirmative defenses of contributory negligence and assumption of the risk should have been applied.

Facts

This action arose from an airplane accident which occurred on September 30, 1974 near Farmington, New Mexico. The defendant owned and operated an FAA certified field operation at the Farmington Municipal Airport. The plaintiff's decedent, Dr. Rudisaile, was a qualified pilot and the sole occupant of a Piper Cherokee 140 E which had been rented from the defendant.

On September 30, 1974, Alan Hawkinson, the defendant's acting flight instructor, flew the Cherokee 140 E on three separate flights. At the end of the third flight, Mr. Hawkinson delivered the aircraft to Mr. Maxwell, one of defendant's employees, for a scheduled oil and oil filter change. Mr. Maxwell drained the oil and replaced the oil filter, but failed to replenish the oil that

had been drained from the engine. He did, however, make an entry into the aircraft engine log book that the oil filter and oil had been changed. Dr. Rudisaile arrived at the office of the defendant, conversed with Mr. Hawkinson, and proceeded to the aircraft. Maxwell handed the engine log book to him. The doctor took the log book, climbed into the right front seat of the aircraft, started the engine, and taxied to the runway. The doctor did not make the customary pre-flight check of the aircraft prior to take-off. He took off from the Farmington Airport at about 3:36 p. m. The last visual contact Farmington's FAA air traffic control tower had with Rudisaile's aircraft was about two miles from the crash site.

The defendant filed findings of fact which asked the court to find that the proximate cause of the crash was the decedent's failure to obey federal air regulations; that the decedent knew or, by the exercise of reasonable care, should have known that the aircraft did not have oil; that such act or omission was a proximate cause of the crash; that there was no product defect in the aircraft and that insufficient oil in the aircraft engine was not an inherent defect in the engine, but was a failure by defendant, Hawk Aviation, Inc., to properly service the aircraft for users such as plaintiff's decedent.

The defendant also filed conclusions of law which asked the court to conclude that plaintiff failed to prove that the proximate cause of the crash was the negligence of the defendant; that the facts proved in this case do not support the application of the law of strict liability in tort; and that the decedent was contributorially negligent.

The trial court denied the defendant's requested findings and conclusions, filed its own findings and conclusions and entered judgment.

The following are the pertinent findings and conclusions of the trial court:

Findings of Fact

1. On September 30, 1974, defendant rented an airplane owned by defendant to the deceased Stanley E. Rudisaile, a qualified pilot.

2. Defendant was regularly engaged in the business of renting airplanes to qualified pilots of the general public.

3. The airplane rented to the deceased Stanley E. Rudisaile was expected to and did reach him, the user, without substantial change in the condition in which it was rented.

4. Prior to leasing the airplane to the decedent the oil had been drained from the engine and not replaced.

5. The defendant rented a defective product, an airplane without oil in the engine, which was unreasonably dangerous to the user, decedent.

6. The decedent took off in the rented airplane and shortly thereafter the airplane crashed about five miles southwest of the airport.

7. As a result of the injuries received in the crash the decedent died on October 1, 1974.

8. The proximate cause of the crash and resulting death of decedent was lack of oil in the engine.

9. The decedent used the rented aircraft for the purpose for which it was intended to be used.

Conclusions of Law

2. The defendant as lessor of the airplane which was in a defective condition reasonably dangerous to the decedent is strictly liable in tort for the decedent's death.

. . . . .

4. The decedent did not misuse the airplane rented to him by defendant.

Defendant filed a motion for a new trial. The motion for new trial was denied. Subsequently, this appeal was filed.

Point I

Does strict liability in tort apply to the facts of this case?

The question of whether the doctrine of strict products liability is applicable is one

of law to be decided by the court. See *Southern Union Gas Co. v. Briner Rust Proofing Co.,* 65 N.M. 32, 331 P.2d 531 (1958); *First Nat. Bk., Albuquerque v. Nor-Am Agr. Prod. Inc.,* 88 N.M. 74, 537 P.2d 682 (Ct.App.1975).

New Mexico has accepted the doctrine of strict products liability by adopting § 402(A) of the Restatement of the Law, Torts 2nd (1965) and extended it to lessors in *Stang v. Hertz,* 83 N.M. 730, 497 P.2d 732 (1972); *Bendorf v. Volkswagenwerk Aktiengeselischaft,* 88 N.M. 355, 540 P.2d 835 (Ct.App.1975), *cert. denied,* 88 N.M. 319, 540 P.2d 249 (1975).

Section 402(A) of the Restatement reads as follows:

> (1) One who sells *any product in a defective condition unreasonably dangerous* to the user or consumer or to his property is *subject to liability for physical harm* thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the *seller is engaged in the business of selling* such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

The question presented in the instant case is whether an airplane which has no oil in it constitutes a defect under § 402(A) of the Restatement of Torts.

Justice Traynor, in *Greenman v. Yuba Power Products, Inc.,* 59 Cal.2d 57, 27 Cal. Rptr. 697, 700, 377 P.2d 897, 900 (1962), held that a manufacturer was held strictly liable in tort when he placed an article on the market knowing that it was to be used without inspection for defects, and the article proved to have a defect that caused injury to a human being. The reasons for imposing strict liability include the difficulty in proving the negligence of a manufacturer because of the manufacturing process involved and the latency of the defect. In addition, for policy reasons, courts desire to insure that the cost of defective products are borne by the manufacturers who put such products on the market, and not borne by the injured persons who are powerless to protect themselves.

The trial court erred in concluding that the doctrine of strict liability applied in this case. The explanation of defect set out in *Stang,* supra, as quoted from *Lechuga, Inc. v. Montgomery,* 12 Ariz.App. 32, 467 P.2d 256 (1970) is as follows:

> " 'Inherent in these policy considerations is . . . the character of the defect itself, that is, one occurring in the manufacturing process and the unavailability of an adequate remedy on behalf of the injured plaintiff.' "

Such is not the case here. The airplane rented to the decedent had no hidden or latent defects which could not be discovered by the exercise of reasonable care. There is a great difference between a "defect" which would warrant the imposition of strict liability in tort and a condition causing physical injury which results from negligence.

The aircraft in this case was not "defective" in the sense intended by § 402(A), supra. The plane simply had no oil. This condition was caused by negligence, and involved conduct which was not intended to be subject to strict liability in tort.

Point II

Affirmative defenses of contributory negligence and assumption of risk should be applied.

The defendant argues that decedent was an experienced pilot and thus, contributory negligence or assumption of the risk should have been applied because of the decedent's failure to discover the lack of oil. In Point I we determined that strict liability in tort does not apply to the facts of this case. Therefore, the defenses available under a negligence theory would be applicable. We make no comment on the merits of these defenses. Further, because Point I is dispositive of this appeal, we do not address the other issues raised by appellant.

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

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, J., dissenting.

SUTIN, Judge (dissenting).

I dissent.

A. *Defendant did not challenge findings of fact, and judgment must be affirmed.*

Defendant did not properly challenge the specific findings set forth in Judge Lopez' opinion, nor properly refer either to the place where the findings are found in the transcript or to the point in the argument where the findings are challenged. Defendant states in its Brief-in-Chief, p. 3:

> While factual issues were contested at trial, no substantial evidence appeal is being taken from the trial judge's decision.

Where the findings are not challenged, we may assume the findings are correct and conclusive on appeal, *State ex rel. Newsome v. Alarid,* 90 N.M. 790, 568 P.2d 1236 (1977), and where the findings are supported by substantial evidence, this judgment must be affirmed.

Judge Lopez disregarded the findings of the court and pursued an erroneous path of the law to reverse.

State ex rel. Newsome has intruded upon prior decisions of the Supreme Court and this Court in its application of Rule 9(m)(2) of the Rules Governing Appeals [§ 21–12–9(m)(2), N.M.S.A.1953 (Repl.Vol. 4, 1975 Supp.)]. It reads in pertinent part:

> If any finding is challenged, *it must be so indicated* by a parenthetical note referring to the appropriate numbered point in the argument, e. g.
>
> EXAMPLE
>
> . . . (Finding No. 5, Tr. 37, Challenged—Point Two). [Emphasis added.]

A fair reading of the phrase "it must be so indicated," gives this language a compulsory, mandatory, commanding force. However, there is no reference to what punishment shall be meted out to fit the crime of noncompliance. Generally, the Supreme Court suggests contempt proceedings directed to attorneys, but, instead, the Supreme Court has read into Rule 9(m)(2) the death knell of the appellant. *Tafoya v. Tafoya,* 84 N.M. 124, 500 P.2d 409 (1972) said:

> . . . Accordingly, we will not review the record or consider the claimed errors relied upon for reversal.

Springer Corporation v. American Leasing Company, 80 N.M. 609, 610, 459 P.2d 135, 136 (1969) said:

> . . . The trial court's findings are conclusive on appeal.

In *American General Companies v. Jaramillo,* 88 N.M. 182, 538 P.2d 1204 (Ct.App. 1975) this Court followed the decisive quotation from *Springer Corporation.*

State ex rel. Newsome said:

> . . . 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.* [Emphasis added.] [90 N.M. at 793, 568 P.2d at 1239.]

What does this language mean? Under what circumstances are the trial court's findings conclusive on appeal? Are the findings conclusive on appeal within the discretion of an appellate court? Must we look to the totality of the pleadings and the briefs to determine whether a sufficient challenge to the facts has been found? Must we determine whether the issue of strict liability is an important public issue

squarely before us for the first time? Or must we determine from the sum total of the statements made in *State ex rel. Newsome, supra,* whether the trial court's findings are conclusive on appeal?

This Court is now left in a state of uncertainty. The intrusion made on prior decisions may indicate a desire that the problem be solved on a case to case basis; that the importance of the issue involved rises above the compulsory language of Rule 9(m)(2); that a common sense approach is more important than the death knell. Nevertheless, it is essential in the administration of the Rule in a search for justice that we do not play "ring around the rosy." In my opinion, Rule 9(m)(2) should have added thereto, the sanctions to be imposed upon noncompliance with the rule.

The Court of Appeals also evades and avoids Rule 9(m)(2) when it wants to reverse a case. We simply close our eyes to the existence of the rule. *Ortiz v. Ortiz & Torres Dri-Wall Company,* 83 N.M. 452, 493 P.2d 418 (Ct.App.1972), Sutin, J. dissenting. In *Ortiz,* I said:

> From at least 1915 through 1971, this rule has been a thorn in the side of attorneys who have not studied trial and appellate procedure. [83 N.M. at 456, 493 P.2d at 422.]

This thorn remains an affliction even to this day. Thus it has always been. Thus it will always be until sanctions are imposed upon non-compliance with the rule.

Inasmuch as the *Newsome* court stated in clear language that its decision was limited to "this case only," it means to me that *Tafoya, Springer Corporation* and *American General Companies, supra,* have not been modified and they remain in full force and effect. However, if certiorari is granted, the Supreme Court may, under the "liberal" doctrine stated in *State ex rel. Newsome* compel a determination of this case on the merits. We may feel compelled to do so in every case of substance and importance.

The trial court's decision is set forth in the majority opinion. In substance, the court found that defendant leased decedent an airplane, a defective product, without oil in the engine which was unreasonably dangerous; that shortly after taking off, the plane crashed and the proximate cause of the crash was lack of oil in the engine.

Preceding the decision, Judge Musgrove, the trial judge, entered a written "Opinion," a copy of which is attached hereto as "Appendix A." This procedure is the best and most fair method that a trial court can use in rendering assistance to the parties and to this Court. The evidence is set forth concisely, clearly, and it does not need repetition. The opinion supports the findings of the court. When a *learned* district judge has written a careful and full opinion to support a decision, we should not reverse the judgment entered unless we take care to point out any error or errors discovered. The majority opinion fails in this regard. I can find none.

To reverse the opinion and decision of the trial court *in this case* is to insult the hallowed rule that the function of this Court is to see that justice is done according to law. Judge Magruder of the First Circuit Court of Appeals of the United States once said:

> *We should never unnecessarily try to make a monkey of the judge in the court below, or to trespass on his feelings or dignity and self-respect.* . . . Sometimes we may have occasion to reverse a judge of the district court on a ground not presented to it, or considered below. If so, we should be at pains to point that out. *And if the district court has written a careful and full opinion, with which we agree, and which we feel unable to improve upon, we should affirm on the opinion of the court below.* Magruder, The Trials and Tribulations of an Intermediate Appellate Court, 44 Cornell L.Q. 1, 3 (1958).

I agree with the opinion written below. The majority opinion does not. The judgment below should be affirmed on this point. I now turn to the second.

B. *The meaning of the majority opinion.*

The majority opinion holds that the doctrine of strict liability does not apply to this

case because "The airplane rented to decedent had no hidden or latent defects which could not be discovered by the exercise of reasonable care," i. e., the airplane had open and patent defects that a pilot could have discovered. Therefore, the doctrine of strict tort liability faded away. No authority was cited for this conclusion.

The majority opinion also holds that under a negligence theory, the affirmative defenses of contributory negligence and assumption of risk should be applied.

The judgment was reversed and "remanded for proceedings consistent with the opinion." I interpret this to mean that after Judgment on Mandate any proceedings may be undertaken by the trial court and the parties as they see fit; except that plaintiff cannot pursue the doctrine of strict tort liability. Plaintiff can proceed further in implied warranty and negligent theories or any other claim for relief warranted by law. It is known that I disapprove use of the words "consistent with this opinion" because it often leaves trial courts and parties in a state of uncertainty.

This case is a matter of first impression in New Mexico. This will be remembered as a dark day in strict tort liability if the protection of the public is discarded in a lessor-lessee relationship of this nature. The majority opinion strays far from the development of the doctrine of strict tort liability, its policies and its purposes. It would do violence and thwart the basic purpose of the doctrine if a lessor of an airplane absent oil who puts a product in the stream of commerce in a defective condition unreasonably dangerous can escape liability to a user of the product who is within the class the doctrine was designed to protect.

The majority opinion has adopted an ultra conservative view to protect the manufacturer-seller-lessor of the product, even though this doctrine was established primarily for the protection of the consumer-user-lessee. The courts of this country have moved forward not backward in the development of this protection. They sought to protect the public from the hordes of products thrown into the stream of commerce. To do this, judges interpreted § 402A of Restatement, Torts 2d, to effect this purpose. The important factor to discern is whether the product used is safe when the product is used as it was intended to be used. "Hidden or latent defects" were injected by this Court into the tort of products liability to protect the lessor. No reasons are given and none have been found. Whether defects are hidden, latent, open, or obvious are factors which bear upon the user's knowledge of the danger involved. Hidden or latent defects as well as open and obvious defects can be discovered in the exercise of reasonable care. By use of this language, the majority opinion inserts a foreign object, the defense of conventional contributory negligence, into the tort of products liability. A rose is a rose and contributory negligence is contributory negligence—the failure to exercise ordinary care. The essence of a valid defense is an awareness by the user of the danger in the use of the product and the risk involved.

The majority opinion and defendant's position on this appeal evade the application of these established rules of law. The opinion does not reach the defense of contributory negligence and the defendant seeks its adoption as a defense in strict tort liability.

I shall now turn to the points raised by the defendant in this appeal.

C. *Decedent's own conduct was not a defense in this case.*

Defendant's first two points may be discussed together: (1) the policy behind strict liability in tort does not apply to the facts in this case, and (2) decedent's own conduct should be a defense to strict tort liability.

If I understand defendant's position correctly, the law as it relates to decedent's own conduct is in a state of confusion as to the defense of contributory negligence; that decedent's conduct as an affirmative defense is an open question. There is general agreement, it says, that contributory negligence, in the sense of a failure to discover or guard against product defects, is

not a defense, but that "assumption of risk" does constitute an affirmative defense. Between these two concepts, apart from the failure to discover or guard against product defects, is there negligent conduct on the part of the plaintiff that should be an affirmative defense? The answer is "No."

The law does provide one other type of misconduct as a defense—misuse of the product that proximately contributed to the plaintiff's injury. As to this defense, there is much confusion as to whether or when it will be available as a defense. *Bendorf v. Volkswagenwerk, etc.,* 88 N.M. 355, 540 P.2d 835 (Ct.App.1975) (*Bendorf I*). "Strictly speaking," this is part of the denial of plaintiff's case, rather than an affirmative defense. *Bendorf I,* Sutin, J., specially concurring [88 N.M. at 365, 540 P.2d 835].

The trial court concluded that decedent did not misuse the airplane and this type of misconduct is not an issue in this appeal.

In strict tort liability law, the only affirmative defenses are "assumption of risk" and misuse of the product. "The crucial difference between strict liability and negligence is that the existence of due care, whether on the part of [the] seller or consumer, is irrelevant." *Berkebile v. Brantly Helicopter Corporation,* 462 Pa. 83, 337 A.2d 893 (1975). "It is consequently our opinion that contributory negligence, as a defense to strict liability in tort, should be limited to those cases where the plaintiff voluntarily and unreasonably encounters a known risk." *Bachner v. Pearson,* 479 P.2d 319, 329–330 (Alaska, 1970) cited in *Stang v. Hertz Corporation,* 83 N.M. 730, 497 P.2d 732 (1972), 52 A.L.R.3d 112 (1973). See *Williamson v. Smith,* 83 N.M. 336, 491 P.2d 1147 (1971); *Bendorf I,* Sutin, J., specially concurring [88 N.M. 355 at 363–364, 540 P.2d 835].

In strict tort liability, contributory negligence in the form of an unreasonable use of a product with an awareness of the dangers involved is the only defense available to the seller or lessor of the product.

Bendorf I and *Bendorf II,* 90 N.M. 414, 564 P.2d 619 (Ct.App.1977) have created a "causation" theory which allows a seller to escape the doctrine of strict liability. This theory may cause confusion. If a product is in a "defective condition unreasonably dangerous" to the user, and the use of the product has no relationship with the proximate cause of the accident, and the negligence of the user is the sole proximate cause of the accident, the user cannot recover damages. For example, if a leased airplane has a defective seat system, a defective tire, a defective propeller, and no oil in the engine, all unknown to the pilot, and the pilot takes off from the airport and negligently crashes into the tower, unaffected by the condition of the airplane, the pilot cannot rely on the doctrine of strict tort liability.

All of the foregoing constitute the types of misconduct of a plaintiff under which liability of a defendant can be determined. The conduct of the decedent as an affirmative defense is not an open question; it has been fixed.

In the instant case, defendant requested the trial court to find that "decedent . . by the exercise of reasonable care, should have known that the aircraft did not have oil . . . and such act or omission was a proximate cause." Defendant's argument centers around the fact that "decedent failed to pre-flight his aircraft." Defendant seeks to establish conventional contributory negligence as a defense to strict liability, and to the defense theory set forth in *West v. Caterpillar Tractor Co.,* 336 So.2d 80 (Fla. 1976) that "lack of ordinary due care could constitute a defense to strict liability." In Florida the doctrine of comparative negligence was adopted. The court said:

> We now have comparative negligence, so the defense of contributory negligence is available in determining the apportionment of the negligence by the manufacturer of the alleged defective product and the negligent use made thereof by the consumer. The ordinary rules of causation and the defenses applicable to negligence are available under our adoption of the Restatement Rule. If this were not so,

this Court would, in effect, abolish the adoption of comparative negligence. [336 So.2d at 90.]

For a civil war on this subject matter, see *Daly v. General Motors Corp.,* 20 Cal.3d 725, 144 Cal.Rptr. 380, 575 P.2d 1162 (1978). Our Supreme Court refused to adopt the concept of comparative negligence. *Syroid v. Albuquerque Gravel Products Co.,* 86 N.M. 235, 522 P.2d 570 (1974).

The failure of decedent to discover the absence of oil or to guard against its absence is one form of contributory negligence that is not a defense. The conduct of the decedent was not a defense in this case.

The only issue on this appeal is whether the airplane was in a "defective condition unreasonably dangerous."

D. *A leased airplane absent oil is in a defective condition unreasonably dangerous.*

The trial court found that:

> The defendant rented a defective product, an airplane without oil in the engine, which was unreasonably dangerous to the user, decedent.

Defendant "believes that a lack of oil in an airplane is not a defect of the type ordinarily included in strict tort liability." The absence of oil, it says, is a "condition." It is more than a mere "condition." The absence of oil in an airplane is a "defective condition unreasonably dangerous." In *First Nat. Bk., Albuquerque v. Nor-Am Agr. Prod., Inc.,* 88 N.M. 74, 85, 537 P.2d 682 (1975) we paraphrased the pertinent parts of Restatement of the Law, Torts 2d § 402A. In applying this language to the instant case under the lessor-lessee doctrine, it reads as follows:

> A lessor of a product (1) in a defective condition, unreasonably dangerous (2) to the lessee, is subject to liability . . .

In strict liability tort law we do not speak primarily in terms of a "defect" in a product. A defect may be harmless. We speak in terms of a product in a "defective condition unreasonably dangerous" to the user.

What does "defective condition unreasonably dangerous" mean? Definitional concepts are set out in § 402A comments (g) and (i).

Comment (g) entitled "Defective condition" states:

> The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, *in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.* . . . [Emphasis added.]

Comment (i) entitled "Unreasonably dangerous" states:

> . . . *The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it,* with the ordinary knowledge common to the community as to its characteristics. . . . [Emphasis added.]

These definitional concepts have spawned an avalanche of analysis, comment and criticism. The easiest way to resolve the interpretation of comments (g) and (i) is to use a tort way of thinking and tort terminology based upon the purposes of strict tort liability law. As a result, the courts now say that "defective" and "unreasonably dangerous" are synonymous. "Defective" means "unreasonably dangerous" and has no independent significance. The important factor to consider is whether the product has met the reasonable expectations of an ordinary user as to its safety. *Seattle-First National Bank v. Tabert,* 86 Wash.2d 145, 542 P.2d 774 (1975); *Casrell v. Altec Industries Inc.,* Ala., 335 So.2d 128 (1976); *Lamon v. McDonnell Douglas Corp.,* 19 Wash.App. 515, 576 P.2d 426 (1978).

Seattle-First National Bank (motor vehicle), followed in *Lamon* (airplane) stated the rule as follows:

> If a product is unreasonably dangerous, it is necessarily defective. The plaintiff

may, but should not be required to prove defectiveness as a separate matter.

* * * * * *

Thus, we hold that liability is imposed under Section 402A if a product is not reasonably safe, . . . [542 P.2d at 779.]

Casrell, followed in *Lamon,* says:

Our answer is, a "defect" is that which renders a product "unreasonably dangerous," i. e., not fit for its intended purpose, and that all "defective" products are covered. Whether a product is "unreasonably dangerous" is for the trier of fact, just as negligence, vel non, is in a traditional negligence case.

The product either is or is not "unreasonably dangerous" to a person who should be expected to use or to be exposed to it. If it is, it makes no difference whether it is dangerous by design or defect. The important factor is whether it is safe or dangerous when the product is used as it was intended to be used. . . .

* * * * * *

"Defective" is interpreted to mean that the product does not meet the reasonable expectations of an ordinary consumer as to its safety. . . . [335 So.2d at 133.]

"Whether concern is with one or both of the requirements, there is 'general' agreement that to prove liability under § 402A the plaintiff must show that the product was dangerous beyond the expectations of the ordinary [consumer]." *Bruce v. Martin-Marietta Corp.,* 544 F.2d 442, 447 (10th Cir. 1976).

In the instant case, decedent used the airplane in the way it was intended to be used. In its condition, the airplane was unreasonably dangerous and unsafe to decedent. When aloft, this condition challenged the safety of decedent for the purpose for which the airplane was to be used and was the proximate cause of his death. "The purpose of the 'unreasonably dangerous' clause would appear to be best served by its inclusion in the issue of proximate cause." *Berkebile, supra* [337 A.2d at 899].

Defendant's argument is that it had "no duty to make an 'obviously' dangerous product safe. Neither is an 'obviously dangerous product' defective in a legal sense." Unfortunately, the airplane was not "obviously" dangerous to decedent who was without awareness of the danger. It was "obviously" dangerous to defendant with knowledge. To avoid liability, defendant had a duty to remove the danger before leasing the airplane.

Airplane cases on this subject matter are sparse. *Lamon v. McDonald Douglas Corp., supra; Wilson v. Piper Aircraft Corp.,* 282 Or. 61, 577 P.2d 1322 (1978); *Berkebile v. Brantly Helicopter Corporation, supra; Kritser v. Beech Aircraft Corporation,* 479 F.2d 1089 (5th Cir. 1973), and *Bachner v. Pearson, supra.*

Lamon involved an airline stewardess who stepped into an *open* emergency hatch of a DC–10 airplane. Defendant contended that the defect was open and obvious precluding recovery. The court held that a *patent* danger did not relieve the defendant of liability automatically *unless the plaintiff voluntarily and unreasonably encountered the danger.*

In *Wilson,* plaintiff's theory was that the crash was caused by engine failure resulting from carburator icing. Plaintiff contended that an airplane furnished with a standard airplane engine was defective because an engine of another type, or with a different carburator system, would be safer in one particular. A judgment for plaintiffs was reversed for a new trial because no evidence was presented that an alternative safer design, practical under the circumstances, was available.

In *Berkebile,* while climbing in flight, the seven foot outboard section of one of the three main rotor blades of a helicopter separated. The helicopter crashed on a wooded hillside, killing the decedent operator. Defendant theorized that the rotor blade had fractured due to an abnormal use brought

about by power failure resulting from fuel exhaustion, followed by a failure on decedent's part to push down the collective pitch in time to go into autorotation and to effect a proper emergency landing. The rotor system was open and obvious. Plaintiff claimed that the design of the rotor system was defective because the average pilot had insufficient time to place the helicopter in autorotation in an emergency power failure in climbing flight. The court said:

> The autorotation system is a safety device existing for the sole purpose of preventing a crash in the event of engine failure *for any reason.* The reason the engine failed is irrelevant. Even defendant's argument that decedent was flying without gas, would be no "abnormal use." The autorotation system only comes into use in the event of engine failure for whatever reason it may be. Nor can it be said that the failure of decedent to go into autorotation "within the necessary time" rebuts the contention that the autorotation system was defective in not allowing sufficient time for its activation. . . . [Emphasis by Court.] [337 A.2d at 901.]

In *Berkebile,* the autorotation system was obvious to decedent as a safety device as the oil system was to decedent in the instant case. Both existed for the sole purpose of preventing a crash in the event of engine failure *for any reason.*

Kritser involved a relatively new airplane operated by decedent, a qualified pilot. As the airplane approached the runway with landing gear down, the right engine fluttered and backfired. Despite the pilot's efforts to regain altitude, the plane rose only slightly before spinning and falling toward the ground. Plaintiff focused on an alleged defect in the fuel system whereby there was an interruption or "parting" of the fuel supply to the engine when the plane engages in a maneuver known as a "slip." To accomplish a slip, the pilot lowers one wing and then applies the rudder in a direction opposite the lowered wing. The nose of the plane does not turn, but the plane slips sideways. Resulting forces displace the fuel away from the fuel outlet of the tank in the lowered wing. Then air instead of fuel flows from the tank to the engine, and the engine misfires and loses power. "Kritser had actual knowledge and notice of the flight manual supplement issued by Beech Aircraft stating:

> 'Flight operation "CAUTION" To prevent fuel flow interruption, avoid prolonged operation in a slip or skid attitude under low fuel conditions.' " [479 F.2d at 1094.]

The evidence established a "slip" of the plane during operation. This notice was not sufficient to absolve defendant of liability. The court said:

> According to comment j in the Restatement, a seller may be required to give a warning in order to prevent a product from being unreasonably dangerous. Then the product "is not in a defective condition" if the product "is safe for use" when the warning is followed. Beech Aircraft cannot simply give a general warning. The warning must be adequate *to make the airplane safe* when the warning is followed. Here the jury expressly found that Kritser followed the recommended procedures set out in the owner's manual . . . . Thus, *the warning was inadequate to make the product safe.* [Emphasis added.] [479 F.2d at 1096.]

Bachner, cited in *Stang,* held a lessor liable when it leased an airplane with a hole in the exhaust system that allowed carbon monoxide to enter into the cabin causing the aircraft to crash. From the view of safety to the pilot, there is no difference between a hole in an exhaust system and a hole in the oil system. The absence of oil in an engine equates with a leak in the oil system that empties the oil during flight. Both are "unreasonably dangerous," a risk that the lessor cannot impose on the lessee.

In strict tort liability our perspective should be broad, not limited.

To absolve the defendant of liability is to encourage the lease of airplanes without oil in them. In manufacturer's design cases, courts no longer subscribe to the "patent-latent" distinction in the conduct of a manufacturer's strict liability in tort. Its only function is to encourage patent design defects. *Byrns v. Riddell, Incorporated,* 113 Ariz. 264, 550 P.2d 1065 (1976); *Brown v. North Am. Mfg. Co.,* 576 P.2d 711 (Mont. 1978).

We must not forget the policy of the law stated by Chief Justice Vanderbilt in *Stang*:

"'* * * One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court'." [83 N.M. at 735, 497 P.2d at 737.]

Today, we must say that a leased airplane absent oil is unsafe to decedent. It was in a "defective condition unreasonably dangerous."

The judgment of the trial court should be affirmed.

E. *Plaintiff's conduct is not a mitigating factor in strict liability in tort.*

Defendant suggests the adoption of comparative negligence law. This we cannot do.

This case should be affirmed.

"APPENDIX A"

STATE OF NEW MEXICO

IN THE DISTRICT COURT

BARBARA J. RUDISAILE, Personal Representative, Surviving Spouse and Executrix of the Estate of STANLEY E. RUDISAILE, Deceased,	)	
Plaintiff,	)	No. 74-822
vs.	)	
HAWK AVIATION, INC., a New Mexico corporation,	)	
Defendant.	)	

OPINION

The issues presented in this case are: (1) Causation, (2) Strict Liability (3) Affirmative Defenses (4) Damages.

Causation: The issue here is whether the cause of the crash was lack of oil, lack of gasoline or both. The evidence is indisputable that prior to leasing the airplane to the decedent the oil had been drained from the engine and not replaced. An entry of the oil change had been made in the log book and the log book was handed to the decedent just prior to take off. The decedent did not check the oil level before take off. The engine ran without oil about six minutes from the time of taxi to take off, plus

the time from take off to time of crash. After the crash there was damage to the internal parts of the engine from having run without oil, including signs of overheating. Witness Hines' explanation of what happened when the engine overheated causing the valves to stick resulting in loss of power was logical, reasonable and persuasive. The testimony of the witnesses concerning the sounds the plane was making just before the crash is compatible with Hines' explanation of what was happening to the engine. The evidence shows that the engine had not completely failed at the time of the crash but was only developing about 500 RPM or idle speed although the throttle and mixture controls were set at three quarters full. That was not enough power to maintain level flight. All of the witnesses who testified on the matter agreed that the engine would have been running rough, noisy and some vibration from the lack of oil. The preponderance of the evidence proves that the cause of the crash was loss of power resulting from the engine malfunctioning from lack of oil. After the crash the fuel selector was in the left tank position. The fuel quantity indicator showed one quarter full in the left tank and between three quarters and full in the right tank. On a visual and stick-in-tank check made by Barnes he found no gas in the left tank. The electrical boost pump was on and in operating condition. After the crash the fuel system was found intact except the fuel strainer bowl had been broken off. When the fuel selector was switched to the right tank with the boost pump on, fuel was pumped out at the fuel strainer break. After the crash the plane ended in a position listing about fifteen degrees to the right with tail down. If gasoline had been pumped from the left tank after the crash the natural tendency would have been for it to flow towards the right wing from the break at the fuel strainer. When the right tank was checked by removing the cap, fuel ran out and was evident on the ground. The tanks on the plane each held 25 gallons of fuel. Only 24 gallons were actually usable. On the morning before the fatal flight Allen Hawkinson had flown the plane 2.9 hours. The engine consumed fuel at the rate of 8.4 gallons per hour. He indicated he had done all of the flying from the left tank. Simple mathematics shows that 24.36 gallons would have been consumed from the left tank. More than the usable amount. This is assuming the tanks had been filled to capacity. There was a conflict in the evidence in that regard. The tanks may have been filled only to the tabs making each tank hold only 18 gallons. If that were the case Allen Hawkinson's testimony is even more improbable. The decedent either took off on the right tank or the left tank. We know he ended up on the left tank. If the decedent took off on the right tank, there would have been no need to switch to the left tank unless the engine did start running rough. The evidence was that the normal procedure to follow when the engine starts running rough, missing and the like, is to turn on the boost pump, switch tanks and try to locate the trouble. Assuming there was very little or no gas in the left tank the proximate cause of his being in that position was from the lack of oil in the engine. But for the engine running rough or missing from lack of oil, there was no need to switch tanks. Again assuming he took off on the right tank and there was no engine trouble, in that case we would have the situation that for some unexplained reason he switched to the left tank, ran out of gas and crashed without switching back to the right tank. Such an assumption is not reasonable nor probable under the facts of this case.

If the decedent took off on the left tank we would have to conclude that when the engine started missing either from lack of fuel or from lack of oil or both that he did not switch tanks. The standard procedure is to take off and land on a full or the fullest tank. The decedent was a properly certified commercial pilot with an instructor's rating. An instructor pilot normally flies from the right seat as did the decedent at the time of the crash. Allen Hawkinson who had flown the plane many hours testified he had switched tanks from the right seat many times with no trouble.

Based on all the facts and the reasonable inferences from those facts, the proximate cause of the crash and death of decedent was lack of oil in the engine and in any event was at least a contributing proximate cause.

Plaintiff also claims a right to recover on the basis of a misrepresentation by defendant. New Mexico has not adopted the rule of strict liability as set out in Restatement of Torts (2nd) Sec. 402B. However, even if 402B were the rule in New Mexico the evidence does not clearly demonstrate that the decedent relied on the misrepresentation contained in the log book and spoken by Mr. Hawkinson. Did he simply forget to check the oil or did he rely on the misrepresentation? There is no direct evidence on the point. It would have to be by inference. The burden of proof has not been met on that point.

Strict Liability: On legal principles there is no valid distinction between this case and *Stang v. Hertz*, 83 N.M. 730, 497 P.2d 732 wherein the rule of strict liability was applied to leased vehicles.

Here the defendant rented a defective product, an airplane without oil in the engine, which was unreasonably dangerous to the user, decedent, and which caused the death of the decedent. The defendant, lessor, was engaged in the business of renting airplanes and the airplane was expected to and did reach the decedent without substantial change in its condition after it was rented.

These conditions meet the test of strict liability. Restatement of Torts (2nd) Sec. 402A as extended to lessors.

Defendant claims that this is a case of personal services involving an oil change and that strict liability does not apply to personal services. The fallacy of that argument is, 1. the personal services were not rendered to the decedent but to the defendant; 2. the cause of the defective condition while under the control of the defendant is immaterial as far as the duty owed the decedent is concerned.

Defendant claims that the public policy reason for strict liability is to protect the ordinary consumer and that the decedent was a certified flight instructor not an ordinary consumer, ergo strict liability does not apply. The protection afforded by the rule of strict liability applies equally to the wary and unwary. The well qualified pilot is no more fair game than the ordinary pilot.

Affirmative Defenses: It is agreed that ordinary contributory negligence is not a defense in a case of strict liability.

Defendant claims that the defect was obvious and therefore not unreasonably dangerous. He bases this on the fact that decedent did not check the oil level before take off and that the oil pressure and oil temperature gauges were in proper working order which would have alerted the pilot to the defective condition. This is simply a way of saying that decedent negligently failed to discover the defect, ordinary contributory negligence, which is not a defense.

Defendant also claims that decedent misused the airplane by not ascertaining its safety as required by F.A.A. regulations. He confuses the word misuse. Misuse contemplates an abnormal or unexpected use of the product. It presupposes that the product was delivered in a safe condition but by the abnormal or unexpected use the dangerous condition was created. The facts of this case will not support such a contention. There are no facts nor reasonable inferences which would show that decedent discovered the lack of oil in the engine and was aware of the danger and nevertheless proceeded unreasonably to fly the plane. See *Bendorf v. Volkswagenwerk*, 88 N.M. 355, 540 P.2d 835, citing comment (n) to Sec. 402(A) Restatement of Torts (2nd) for distinction of discovered and discoverable defect.

Damages: At the time of his death Dr. Rudisaile was 37 years of age with a life expectancy of 34.88 years. He was a dentist with at least an average income of $25,273.00 per year for the last four years of his life. Based on the guidelines of the Varney and subsequent cases $235,000.00 is a reasonable amount for damages.

Counsel will submit any requested findings of fact and conclusions of law by April 25, 1977. Counsel for plaintiff will submit a form of judgment in accordance with this opinion.

/s/ JAMES W. MUSGROVE
District Judge

595 P.2d 761

Eugene BURNS, Plaintiff-Appellee,

v.

TRANSCON LINES, Employer, and Transport Indemnity Company, Insurer, Defendants-Appellants.

No. 3837.

Court of Appeals of New Mexico.

March 15, 1979.

Writ of Certiorari Denied May 1, 1979.

William P. Gralow, Civerolo, Hansen & Wolf, Albuquerque, for appellants.

Terry M. Word, Richard E. Ransom, Smith, Ransom & Gilstrap, Albuquerque, for appellee.

OPINION

WOOD, Chief Judge.

The issue in this workmen's compensation case is whether plaintiff should have been awarded compensation benefits under the New Mexico law. Defendants' contention is that Oklahoma law should have been applied.

Plaintiff is a resident of Oklahoma employed as a truck driver. He was hired in Oklahoma. His employer, Transcon Lines has an Oklahoma City address. Plaintiff's truck run was from Oklahoma City to the West Coast and return to Oklahoma City. Plaintiff was injured in March, 1977 when

the truck in which he was riding was involved in an accident in Bernalillo County, New Mexico. Compensation was awarded on the basis of disability resulting from this New Mexico accident.

On appeal, defendants do not contest the trial court's determination that plaintiff suffered a compensable injury, and do not contest an award based on two weeks temporary total disability and 15 percent partial disability. Defendants claim that Oklahoma law should have been applied in reckoning the benefits.

In making this claim, defendants do not contend that New Mexico lacked jurisdiction to award benefits under the New Mexico compensation statute. Nor do defendants claim that "full faith and credit" or any other constitutional principle required that the benefits awarded be based on the law of Oklahoma rather than the law of New Mexico. See *Chapman v. John St. John Drilling Company*, 73 N.M. 261, 387 P.2d 462 (1963). Defendants assert that Oklahoma has the greatest interest in the employment relationship, "that the better approach would be to apply Oklahoma law to the award and the New Mexico Court could have and should have done so."

Defendants do not inform us as to the Oklahoma law they would have the New Mexico courts apply. An Oklahoma statute, in effect at the time of plaintiff's accidental injury, was 85 Okla.Stat.Ann. § 4. This statute provided that:

[a] Oklahoma law applied "to employers and to employees, irrespective of where accident resulting in injury may occur, whether within or without the territorial limits of the State of Oklahoma, when the contract of employment was entered into within the State of Oklahoma, and the said employee was acting in the course of such employment and performing work outside the territorial limits of this State under direction of such employer."

[b] If the provisions of paragraph [a] are met the employee "may elect to commence and maintain his action for benefits and compensation" before the Oklahoma State Industrial Commission.

[c] "*Such right of election shall, however, not preclude the injured employee from recovering any benefits or compensation provided under any law of the State where injury occurred,* and if such action be so commenced in such other state, or under the law of another state, and is prosecuted to final determination, such employee shall thereupon be precluded from his right of action under the laws of this State." (Our emphasis.)

If, as defendants contend, Oklahoma law should have been applied by the New Mexico court, the Oklahoma statute gave the injured employee the option to recover "any benefits or compensation" provided under New Mexico law. See *Morrison v. Hurst Drilling Company*, 508 P.2d 643 (Okl.1973). This Oklahoma statute does not, however, tell us what benefits or compensation are provided under New Mexico law for a workman injured while travelling through New Mexico.

The New Mexico compensation law does not specifically state that New Mexico compensation benefits are to be paid to a transitory worker suffering a compensable injury in New Mexico. However, legislative history and current provisions of New Mexico compensation statutes show that the benefits to which plaintiff was entitled were the benefits of the New Mexico workmen's compensation law.

Laws 1949, ch. 14, § 2 (compiled as § 59–10–34, N.M.S.A.1953, 1st Repl. Vol. 9, pt. 1) provided, under certain conditions, for an exemption from the New Mexico compensation law of an employer and his employee who was hired outside of New Mexico but was temporarily within New Mexico doing work for his employer. Under this statute the "benefits under the workmen's compensation act or similar laws of such other state shall be the exclusive remedy against such employer for an injury * * received by such employee while working for such employer in this state."

The above 1949 law was repealed by Laws 1973, ch. 227, § 2. Since this repeal, no New Mexico statute has excepted the out-of-state employee, injured in New Mexico, from benefits under the New Mexico compensation law. Laws 1973, ch. 227, § 1 enacted new extraterritorial provisions. The changes effected by Laws 1973, ch. 227 show a legislative intent to change the law that previously existed. *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 573 P.2d 213 (1977).

Laws 1973, ch. 227, § 1 was repealed by Laws 1975, ch. 241, § 1. This 1975 law re-enacted the 1973 law as three sections. The pertinent sections are §§ 52–1–65 and 52–1–66, N.M.S.A. 1978.

Section 52–1–66 provides a method for the out-of-state employer to "be deemed to have secured the payment of compensation under this act" in a situation "[i]f an employee is entitled to the benefits of this act by reason of an injury sustained in this state in employment by an employer who is domiciled in another state and who has not secured the payment of compensation as required by this act * * *."

Section 52–1–65, supra, provides that a payment "of benefits under the workmen's compensation law of another state * * * to an employee * * * otherwise entitled on account of such injury * * * to the benefits of this act * * * shall not be a bar to a claim for benefits under this act * * *."

Neither § 52–1–65 nor § 52–1–66, supra, expressly provide that New Mexico benefits are to be paid the transitory employee injured in New Mexico. Both statutes, however, contemplate that New Mexico benefits are to be paid; that benefits from another state do not control the permissible recovery in New Mexico. These provisions, combined with the repeal of the 1949 law which excluded the transitory employee from New Mexico benefits, and the legislative intent to change the 1949 law, provide the basis for our conclusion. That conclusion is that a transitory employee suffering a compensable injury in New Mexico is entitled to the benefits provided by the New Mexico workmen's compensation law.

New Mexico law required that plaintiff's award be on the basis of New Mexico benefits; the trial court did not err in awarding those benefits. Defendant's argument as to a "better approach" is not only foreclosed by our statutory provisions but would not lead to a different result under Oklahoma law.

The judgment is affirmed. Plaintiff is awarded $1,750 for services of his attorney in the appeal.

IT IS SO ORDERED.

HERNANDEZ, J., concurs.

SUTIN, Judge (dissenting).

I dissent.

Plaintiff is a resident of Oklahoma employed by defendant, Transcon Lines, an Oklahoma Corporation, engaged in interstate commerce. Plaintiff was employed to operate a truck from Oklahoma City to Fresno, California and back. An accident occurred in Tijeras Canyon, New Mexico while plaintiff was in the sleeper of the truck. Plaintiff suffered injuries arising out of an accidental injury, and recovered workmen's compensation benefits in the district court.

The crucial issue on appeal is whether the district court had jurisdiction to award compensation benefits to plaintiff while he was engaged in interstate commerce. This issue is a matter of first impression.

In 1929 (Laws 1929, ch. 113, § 11, p. 212), the legislature adopted the following provision now designated as § 52–1–14, N.M.S.A. 1978:

> This act shall not be construed to apply to business or pursuits or employments which according to law are so engaged in interstate commerce *as to be not subject to the legislative power of the state*, nor to persons injured while they are so engaged. [Emphasis added.]

For half a century, this provision has not been interpreted or applied. What is meant by the phrase "as to be not subject to the

legislative power of the state?" "The consensus of authority seems to be that a state may provide compensation to one engaged in interstate commerce so long as the Congress of the United States, acting under its constitutional power to regulate commerce among the states, has not pre-empted the field." *Hall v. Industrial Commission of Ohio,* 131 Ohio St. 416, 3 N.E.2d 367, 370 (1936). Congress has not pre-empted this field. But when Congress has not acted, state powers may only be exercised with certain limitations. This power extends to those matters of a local nature in which the employer is in business in the state and the employee engages in interstate commerce. This power to provide compensation to one engaged in interstate commerce does not extend to nonresident employers whose employee enters this state in the course of employment in interstate commerce. This would place an undue burden on interstate commerce. *Spohn v. Industrial Commission,* 138 Ohio St. 42, 32 N.E.2d 554, 133 A.L.R. 951 (1941).

In *Spohn,* the court held that a resident of Ohio who entered into a contract employment in the State of Michigan with a Michigan Corporation to act as an "over the road driver" of trucks engaged only in interstate commerce was not entitled to participate in the Ohio State Workmen's Compensation Fund on account of an injury received in Ohio and arising out of such interstate employment. The rule is otherwise when a nonresident employer is engaged indiscriminately in interstate and intrastate commerce. *Holly v. Industrial Commission,* 142 Ohio St. 79, 50 N.E.2d 152, 148 A.L.R. 868 (1943).

Section 52–1–14, *supra,* means not only that the Act shall not apply to nonresident employers engaged in interstate commerce, but it shall not be "construed to apply." We cannot read between the lines, infer, deduce or take this section to mean that the Act shall apply to nonresident employers engaged in interstate commerce.

"Since we adopted the Colorado statute we should not lightly refuse to follow its construction by the Supreme Court of that state." *Stevenson v. Lee Moor Contracting Co.,* 45 N.M. 354, 369, 115 P.2d 342, 351 (1941). We did not adopt the same interstate commerce clause. C.L. 1921, § 4384 of the Colorado Compensation Act before amended, read:

> The provisions of this act shall not apply to common carriers engaged in interstate commerce nor to their employees.

The Colorado Supreme Court held that the Act was applicable to an employee of a "contract carrier" as distinguished from a "common carrier." *Zelle v. Industrial Commission of Colorado,* 100 Colo. 116, 65 P.2d 1429 (1937). However, where the employer is engaged solely in interstate commerce, the employee is barred from compensation benefits. But if the employer is engaged in interstate and intrastate commerce, coverage depends upon the specific engagement or work at the time involved. *Consolidated Fast Freight v. Walker,* 103 Colo. 347, 85 P.2d 720 (1938). In *Cohen v. Schaetzel,* 106 Colo. 266, 103 P.2d 1060 (1940), the employer operated a trucking business between Denver and Chicago. The employee was killed in an accident in Nebraska while riding in the truck. The employer was not doing business in Nebraska. The Colorado Supreme Court affirmed a judgment against the employer in an action for damages because the Nebraska and Colorado Workmen's Compensation Commissions were without jurisdiction to award compensation benefits. *Nebraska was without jurisdiction because the employer was a nonresident employer, whose employee was engaged in interstate commerce in Nebraska.* Colorado was without jurisdiction because § 4384, *supra,* was applicable.

Spohn and *Cohen* are supported in *McClung v. Pratt,* 44 Wash.2d 779, 270 P.2d 1063 (1954).

In the State of Washington, § 51.12.090 of the Industrial Insurance Act reads in part:

> The provisions of this title *shall apply to employers and workmen* (other than railways and their workmen) *engaged in intrastate and also in interstate or foreign commerce,* for whom a rule of liabili-

ty or method of compensation now exists under or may hereafter be established by the Congress of the United States * *. [Emphasis added.]

McClung held that, despite the application of the Act to interstate commerce, a nonresident motor carrier who was engaged in business *only* in interstate commerce did not come within the purview of this section and employees of such nonresident employer was not covered by the Act while engaged *exclusively*, in interstate commerce in the State of Washington. To come within the purview of the Act, the nonresident motor carrier must be engaged in *both* interstate and intrastate commerce.

In the instant case, unquestionably, the district court was without jurisdiction to award plaintiff workmen's compensation benefits.

There is another basis for this conclusion.

Section 52–1–2, N.M.S.A. 1978 reads in pertinent part:

> [E]very private person, firm or corporation engaged in carrying on for the purpose of business or trade *within this state* * * * shall become liable to, and shall pay to any such workman * * * compensation in the manner and amount, at the time herein required. [Emphasis added.]

The section covers only employers who carry on their business in New Mexico. It does not cover employers from foreign states who engage in interstate commerce through the State of New Mexico and the employee suffers an accidental injury in New Mexico.

Industrial Commission v. Watson Bros. Transp. Co., 75 Ariz. 357, 256 P.2d 730 (1953) involved Watson Bros., a Nebraska Corporation, with its principal place of business located in Omaha. It was engaged in interstate trucking in Colorado, New Mexico, Arizona and California. Watson Bros. was assessed premiums by the Arizona Commission's Order. Watson Bros. sought to set aside the order directing payment. The Supreme Court held the Commission was without jurisdiction to assess and collect premiums from a foreign corporation engaged in interstate commerce covering workmen who were employed outside the state who drove trucks across the state while engaged in interstate commerce between termini outside the state.

Nothing appears in the New Mexico Workmen's Compensation Act that grants a district court jurisdiction to award plaintiff compensation benefits inasmuch as plaintiff was an employee of an Oklahoma Corporation employed to transport from Oklahoma to California, and through the State of New Mexico.

The judgment of the district court must be reversed.

595 P.2d 765

Eva Lynn ROLLINS, Plaintiff-Appellee,

v.

ALBUQUERQUE PUBLIC SCHOOLS and Mountain States Mutual Casualty Company, their insurer, Defendants-Appellants.

No. 3685.

Court of Appeals of New Mexico.

March 27, 1979.

Writ of Certiorari Denied April 25, 1979.

Lawrence H. Hill, Civerolo, Hansen & Wolf, P.A., Albuquerque, for defendants-appellants.

William E. Snead, Ortega & Snead, Albuquerque, for plaintiff-appellee.

OPINION

SUTIN, Judge.

Plaintiff sued defendants to recover workmen's compensation benefits arising out of an accidental injury that occurred on February 2, 1976. Judgment was entered for plaintiff and defendant appeals. We reverse.

Plaintiff was employed by the Albuquerque Public Schools as a homebound teacher. On February 2, 1976, plaintiff fell and injured her knees. Compensation benefits were paid up to March 8, 1976, on which date plaintiff returned to work. She remained in her employment until January 7, 1977 when a second accidental injury occurred in which plaintiff suffered a fractured hip and surgery.

On November 1, 1976, two months prior to the second accidental injury, Albuquerque Public Schools became self-insured. From January 8, 1977, it began paying plaintiff maximum compensation benefits for temporary total disability. Thereafter, plaintiff did not return to work and retired.

Plaintiff developed a condition in her knees known as post traumatic arthritis, a permanent and progressive disease which became disabling on August 1, 1977. From August 1, 1977 to March 9, 1978, the time of trial, plaintiff was suffering (1) temporary total disability resulting from the hip fracture, and (2) total permanent disability resulting from the knee injury. During this period, plaintiff was receiving maximum compensation for the hip injury. On May 24, 1977, plaintiff filed her claim and was awarded maximum compensation benefits for the knee injury.

The question presented by defendants is:

> Was plaintiff's claim for the first injury filed prematurely inasmuch as plaintiff was receiving maximum compensation benefits for the second injury, both arising out of the same employment and the same employer?

The answer is "yes."

Section 52–1–69, N.M.S.A.1978 entitled "Premature filings," reads in part:

> No claim shall be filed by any workman who is receiving maximum compensation benefits . . . .

"Maximum compensation benefits" means "total disability." At the time plaintiff's claim was filed, plaintiff was receiving maximum compensation benefits. One purpose of § 52–1–69 is to bar a suit to establish *liability* for compensation. *Arther v. Western Company of North America,* 88 N.M. 157, 538 P.2d 799 (Ct.App.1975). Liability is admitted by payment of maximum compensation benefits. It has been suggested that when liability is established, a claim filed for a lump sum award is not premature. *Briscoe v. Hydro Conduit Corporation,* 88 N.M. 568, 544 P.2d 283 (Ct.App. 1975), Sutin, J., Specially Concurring. Otherwise, an employer must not be put to the expense of defending a claim when total disability is admitted.

Section 52–1–69 is applicable when maximum compensation benefits are being paid by reason of the second injury because this section is broad and expansive. No mention is made of claims arising out of successive accidental injuries during work in the same employment under the same employer. "No claim shall be filed" means any workman receiving maximum compensation benefits is totally disabled and shall not file

a claim regardless of what accidental injury or injuries caused total disability. Plaintiff's disability from the knee and hip injuries constituted one form of disability, not two. To defeat prematurity, we would be compelled to add an exception to § 52–1–69:

> *Except,* a claim can be filed for the first injury when maximum compensation benefits are received in a subsequent accidental injury arising out of the same employment under the same employee.
>
> *Or*
>
> No claim shall be filed by any workman receiving maximum compensation benefits *for the first injury.*

If § 52–1–69 were limited to the first injury, payment of maximum compensation benefits arising out of a second accidental injury would be irrelevant.

When maximum compensation benefits are refused or reduced, a workman can then file a claim for maximum compensation benefits to establish total disability arising out of the original and subsequent accidental injuries.

A workman can only be 100% totally disabled. He cannot be 200% disabled unless the Workmen's Compensation Act provides for double recovery while a workman is engaged by the same employer. *Fox v. Hartford Accident & Indemnity Company,* 130 Ga.App. 104, 202 S.E.2d 568 (1973). Georgia's workmen's compensation provisions were repealed in 1978. To allow double recovery, plaintiff would receive approximately $278.37 per week as maximum compensation payments, $124.97 per week paid for the second injury and $153.40 per week awarded by the court for the first injury. We are unable to find anywhere in the Workmen's Compensation Act or by judicial opinion that maximum compensation benefits can exceed that provided for in the Act. Section 52–1–41(A) reads in part:

> *For total disability* the workman shall receive, during the period of that disability, sixty-six and two thirds percent of his average weekly wages, not to exceed a *maximum compensation* of ninety dollars ($90.00) a week . . . . [Emphasis added.]

Section 52–1–41(A) means that a workman cannot be totally disabled doubly and receive $278.37 per week. To construe it otherwise would grant a workman a "windfall," fundamentally inconsistent with the nature of the Act. *Harrison v. Lakey Foundry Corporation,* 361 Mich. 677, 106 N.W.2d 521 (1960); 2 Larson's Workmen's Compensation Law, § 59.41 (1976).

Plaintiff receiving maximum compensation benefits when her claim was filed, it was premature.

We foresee problems arising with reference to (1) Albuquerque Public Schools as an insured and a self-insured employer during the period that compensation benefits were paid or are to be paid; (2) what effect benefits to be paid on the first injury may have on payments theretofore made by the self-insurer on the second injury; (3) the application of § 52–1–47, N.M.S.A.1978, raised on appeal by defendants, but presently inapplicable, which provides for reduction of compensation benefits paid or payable on account of any prior injury; and (4) whether the "Subsequent Injury Act," § 52–2–1, N.M.S.A.1978, et seq. is applicable.

These and any other problems raised on this appeal must await further proceedings in the district court, a judgment rendered and an appeal taken.

Reversed.

IT IS SO ORDERED.

WALTERS, J., concurs.

HENDLEY, J., specially concurs.

HENDLEY, Judge (specially concurring).

I concur in the result reached by the majority.

Section 52–1–47(B), N.M.S.A.1978, is controlling. It states in part:

> "Compensation benefits for . . . any combination of disabilities . . . shall not exceed an amount equal to six hundred multiplied by the maximum

weekly compensation payable at the time of the accidental injury resulting in disability . . . ."

Here plaintiff was receiving payments for total disability and would be precluded from filing a claim. Section 52–1–69, N.M. S.A.1978.

595 P.2d 768

Mercy SOUTH, Personal Representative and Administratrix of the Estate of Bill South, Deceased, Michael South, a minor, by and through his Mother and next friend, Mercy South, and Mercy South, Individually, Plaintiffs-Appellants,

v.

Andy J. LUCERO and Gilbert Lucero, Defendants-Appellees.

No. 3509.

Court of Appeals of New Mexico.

April 3, 1979.

Writ of Certiorari Denied May 1, 1979.

James A. Mungle, Albuquerque, for plaintiffs-appellants.

LeRoi Farlow, LeRoi Farlow, P. A., Albuquerque, for defendants-appellees.

OPINION

SUTIN, Judge.

This case involves a motorcycle-truck collision that occurred on November 15, 1975, at about 1:00 a. m. on U.S. Highway 60 about five miles west of Datil, New Mexico. Decedent was operating a motorcycle accompanied by his son, Michael. Plaintiffs sued defendants to recover damages for wrongful death of decedent and for personal injuries of Michael. The jury returned a verdict for defendants and plaintiffs appeal from the judgment entered. We affirm.

This appeal centers around two points: (1) whether a proper foundation was laid for the admission in evidence of a toxicology report and blood alcohol test and (2) whether the court erred in admitting the toxicology report in evidence in violation of statutory requirements.

During the events that occurred, the following witnesses established the foundation linkage: (1) Leo Lujan, a deputy medical investigator, the owner of a funeral home in Socorro, who worked under the supervision of Dr. Sidney Auerbach, a district medical investigator in Socorro; (2) Jimmy Clayton Standefer, and (3) Earnest Warren Street, toxicologists employed by the State Medical Investigator to do blood tests; and (4) Dr. Michael Benziger, a pathologist employed by the Office of Medical Examiners in Albuquerque to perform autopsies.

Dr. Auerbach was not available as a witness at the time of trial.

The office of the State Medical Investigator is located at the school of medicine at the University of New Mexico. He appoints physicians as district medical investigators and other persons as deputy medical investigators, each of whom work under the supervision of a district medical investigator. He also promulgates rules and regulations for the proper investigation of deaths and maintains records of deaths which are investigated by the state or district medical investigators. Section 24–11–3, N.M.S.A. 1978.

The State Medical Investigator provides the district medical investigators with vials for proper labeling and sealing of blood specimens and External Examination forms.

Included in the Office of the State Medical Investigator is a laboratory in which toxicologists are employed to perform tests on blood samples of deceased persons. A log sheet form is available. It contains information relative to the types of samples received, by whom taken and sealed, and the dates; by whom transported and received and the dates; the tests requested and a laboratory number. When completed the specimens are put in a test tube rack and placed in a refrigerator, sealed off by lock and key from everyone except the toxicologist. To analyze the blood specimens, a toxicologist will remove the test tube rack with sealed vials, break the seals and perform the tests.

The chain of evidence, link by link, from the death of decedent to the blood alcohol test and the admission in evidence of the toxicology report runs as follows:

On November 15, 1975, at 3 a. m., about 2 hours after the accident, the body of a deceased male was brought by Community Ambulance Service to the funeral home of Lujan in Socorro. It was the only mortuary in the area of the accident. Lujan was told that the body was that of decedent who had been killed in an accident. Dr. Auerbach who drew the specimens from the body at the funeral home, received some telephone calls with reference to decedent. No other body of a person killed in an accident was brought to Lujan's funeral home that morning.

Lujan assisted Dr. Auerbach, who, with use of a syringe, drew three specimens of blood from decedent's body. The specimens were put in three vials, labeled and sealed. Dr. Auerbach also prepared a work sheet report. Lujan saw Dr. Auerbach write that the body from which the specimens were taken was identified as that of decedent.

Dr. Auerbach left the funeral home to go to his office to complete his report. He took with him the sealed vials and work sheet.

Three or four hours later that morning, Dr. Auerbach returned to the funeral home and handed Lujan the sealed vials. Lujan transported the sealed vials and decedent's body to the admitting office of the Bernalillo County Medical Center in Albuquerque. The deliveries were made the morning of November 15, 1975.

The Chief Medical Investigator's Office received an External Examination form filled in with a typewriter and signed by Dr. Auerbach. It identified the body as that of Bill R. South, the decedent. This was the completed report prepared from Dr. Auerbach's worksheet.

Upon arrival of the blood samples, a log sheet form was completed. It showed that the blood samples were taken and sealed by Dr. Auerbach on November 15, 1975, and received by Arthur Wakeman of the Chief Medical Investigator's Office on November 17, 1975.

On November 17, 1975, Standefer received the sealed vials in the laboratory from Arthur Wakeman, checked the vials with the log sheet, verified the seals, saw that the vials were sealed by Dr. Auerbach and saw the name of decedent. He also checked Dr. Auerbach's External Examination form with the log sheet. Standefer assigned the vials laboratory number 475B and replaced the vials in the refrigerator.

On November 18, 1975, Street removed the sealed vials from the refrigerator that were identified with decedent. He broke the seals, tested the blood and concluded that the alcoholic content was .188 percent. He made a toxicology report. The report and the blood test were admitted in evidence.

At the request of plaintiffs, a supplemental test was made of decedent's blood on July 23, 1976. The test showed .190 percent, unusually close when repeated several months later. The results were substantially the same and this toxicology report was admitted in evidence.

Plaintiffs' argument is divided into three categories: "(1) the body from which the blood samples were taken was not properly identified; (2) there were breaks in the chain of evidence prior to the samples being tested; (3) the blood tested could not have been drawn from the body alleged to be that of Bill South [decedent]." We disagree and answer these arguments *seriatim.*

A. *Decedent's body was properly identified.*

Plaintiffs' argument that decedent was not properly identified flows from the failure of defendants to call as witnesses the ambulance driver and Dr. Auerbach. The sequence of events indisputably identify the corpse of decedent as the body from which blood samples were taken. The corpse of a male person was brought to the funeral home in Socorro, the only funeral home in the area of the accident. It was there identified through conversations as that of decedent who had been killed in an accident. The body was transferred to Albuquerque by Lujan where an autopsy was performed by Dr. Benziger, a witness who testified on behalf of plaintiffs with reference to the autopsy. After the post mortem examination, the body was transferred to the mortuary of Fitzgerald & Son in Albuquerque. Before burial, we assume that plaintiffs identified the body as that of decedent. From the time of the arrival of the corpse at Lujan's mortuary in Socorro to the time the body was delivered to the Albuquerque Mortuary, the body was identified as that of decedent. There was no evidence or suggestion that the body was not that of decedent.

B. *There was no break in the chain of evidence.*

Plaintiffs claim that the missing link in the chain of evidence occurred during the three to six hour hiatus while the vials were in the custody of Dr. Auerbach during his absence from the funeral home. This argument is made because Lujan was unaware of what happened to the samples during Dr. Auerbach's absence. We do know that the vials were labeled and sealed before Dr. Auerbach left the funeral home and after Dr. Auerbach returned them to Lujan. To create a missing link, we would be compelled to assume that during the three or four hour period of Dr. Auerbach's absence, an intermeddler had access to the vials, took possession of them, broke the seals, tampered with the blood samples, put them back in the vials, and sealed them. This procedure might happen in a murder mystery but we cannot accept it as a missing link in this case.

Plaintiffs rely heavily on *Apodaca v. Baca*, 73 N.M. 104, 385 P.2d 963 (1963). In *Apodaca*, prior to the enactment of the Office of Chief Medical Investigator, a missing link occurred in the chain of evidence. On May 23, 1960, a blood sample in a test tube, stoppered, not sealed, with a tag attached and securely wrapped around it, was mailed from Tucumcari to Van Atta Laboratories in Albuquerque. Van Atta no longer performed blood alcohol tests. On May 27, 1960, four days later, Dr. Beighley received a request from the Tucumcari Police Department to test and analyze the blood specimen. Van Atta delivered the blood specimen to Dr. Beighley. Van Atta was an intermediate party. The court said:

> When, how, by whom and in what manner or condition the specimen was received by Van Atta Laboratory is not shown by the evidence. How long, where and how the specimen was kept, as well as who had possession of the specimen

from May 23, to May 27, 1960, is also not shown. Neither does the evidence show by whom, how and in what manner or condition the specimen was delivered to Beighley's Laboratory. [73 N.M. at 107, 385 P.2d at 965.]

In *Apodaca*, the blood sample was in the possession of an intermediate agency for four days. The test tube was not sealed. Access by intermeddlers was unknown. The condition of the blood sample from Tucumcari to Van Atta to Beighley was unknown. The missing link was the four day period that the test tube rested in the Van Atta Laboratory.

In the instant case, the vials were sealed, labeled and possessed by Dr. Auerbach and Lujan, delivered by Lujan from Socorro to the Bernalillo County Medical Center in Albuquerque and obtained there by Wakeman of the Chief Medical Investigator's laboratory. During this entire period, the vials were labeled and sealed. There was no evidence of tampering. *Abercrombie v. State*, 138 Ga.App. 536, 226 S.E.2d 763 (1976). Intermeddlers could not tamper with the blood samples unless the seals were broken. *State v. Fornier*, 103 N.H. 152, 167 A.2d 56 (1961). The seals were not broken until Street, the toxicologist, made the alcoholic test. As long as the sealed vials were identified as those of Dr. Auerbach, it is immaterial in how many or in whose hands the vials may have been. Neither is it necessary to negate the possibility of an opportunity for tampering with the vials or to trace their custody by placing each of their custodians on the witness stand. Such a rigorous exaction regarding proof is supported neither by reason nor by authority. *State v. Chavez*, 84 N.M. 760, 508 P.2d 30 (Ct.App.1973), in which opinion *Apodaca* was compared. *See State v. Harrison*, 81 N.M. 623, 471 P.2d 193 (Ct.App. 1970) where *Apodaca* was distinguished.

State v. Chavez, supra, fixed the following guidelines for the admission into evidence of items identified, either visually or by establishing custody of them: (1) The item must be identified from the time it was obtained to the time it was offered in evidence. It suffices if the evidence established is more probable than not that the item was one connected with the case. A preponderance of the evidence is sufficient. (2) Factors to be considered include (a) the nature of the item; (b) the circumstances surrounding the preservation and custody of it; and (c) the likelihood of intermeddlers tampering with it. (3) If the trial judge is satisfied within a reasonable probability that the item has not been changed in important respects, he may permit its introduction in evidence.

The testimony of Lujan, Standefer and Street identified the sealed vials from the time they were obtained to the time they were tested. There was no missing link with reference to the blood test and the toxicology report. The foundation for their admission as evidence was established. *Interstate Life & Accident Insurance Co. v. Whitlock*, 112 Ga.App. 212, 144 S.E.2d 532 (1965); *McCreary v. State*, 165 Tex.Cr.R. 436, 307 S.W.2d 948 (1957); *Commonwealth v. Rick*, 244 Pa.Super. 33, 366 A.2d 302 (1976); *Cook v. State*, 52 Ala.App. 159, 290 So.2d 228 (1974); *Munn v. State*, 257 Ark. 1057, 521 S.W.2d 535 (1975); *Perry v. City of Oklahoma City*, 470 P.2d 974 (Okl.1970) where *Apodaca* is distinguished; *Ritter v. State*, 3 Tenn.Cr.App. 372, 462 S.W.2d 247 (1971); *State v. Walz*, 218 N.W.2d 480 (S.D. 1974); *State v. Auger*, 124 Vt. 50, 196 A.2d 562 (1963).

Plaintiffs rely on *Rose v. Paper Mills Trucking Company*, 47 Mich.App. 1, 209 N.W.2d 305 (1973) and *Nesje v. Metropolitan Coach Lines*, 140 Cal.App.2d 807, 295 P.2d 979 (1956). The deficiencies in proof shown in those cases were established in the instant case.

Furthermore, plaintiffs claim that for foundational purposes, one of the essential criteria is that "the 'qualified person' taking the samples must establish that part of the foundation showing use of sterile equipment." *Lessenhop v. Norton*, 261 Iowa 44, 153 N.W.2d 107 (1967). We note that *Lessenhop* and *Rose* adopted a formula of nine criteria to be proven by a party seeking the introduction in evidence of blood samples,

the fourth of which is, that "the instruments used were sterile." Sterilization was not an issue in either case. Plaintiffs also point to *Steere Tank Lines, Inc. v. Rogers*, 91 N.M. 768, 581 P.2d 456 (1978) where the evidence showed that a deputy medical examiner took a clean dry syringe to draw the sample. However, there was nothing in the record to show that it resulted in an unreliable blood sample.

Plaintiffs did not object to the admissability of the evidence on this ground. It was raised for the first time on appeal. Plaintiffs developed through Lujan that Dr. Auerbach used a syringe but there the interrogation stopped. If plaintiff had objected that defendant failed to establish sterilization of the syringe and the vials, defendant would have asked Lujan the decisive question. Not having objected, the issue was waived. Presently, we do not deem it necessary to determine the adoption of the nine criteria formula heretofore mentioned. We do say that Dr. Auerbach, a district medical investigator, was not only acting within a quasi-official capacity, but he was independently charged with the duty of acting in accordance with his professional responsibilities. There is no injustice in presuming that Dr. Auerbach performed his duties with reference to sterilization, unless and until contrary evidence is introduced. *See State v. Auger, supra.*

C. *The blood tests were made from blood taken from decedent's body.*

Plaintiffs' argument that the blood samples taken in Socorro could not have been those tested by the State Medical Investigator's office is futile. Plaintiffs' claim that Lujan testified the blood samples were drawn on *November 19, 1975*; that he billed the State Medical Investigator the next day, *November 20, 1975*, for the transportation of the body and blood samples, and that the samples tested were received on *November 17, 1975*, with the testing done on *November 18, 1975*. "How," say plaintiffs, "could the samples have been tested in Albuquerque prior to being drawn in Socorro?"

We assume that the date of *November 19, 1975*, was either a typographical error or an inadvertent date stated in answer to a question asked. Plaintiffs evidently discovered this date in preparation of the appeal. There was no other mention of this date in the trial. The death occurred at 1 a. m. the morning of November 15, 1975. The examination and withdrawal of blood took place in Socorro two hours later. The documents, reports and testimony erase from the record the date of *November 19, 1975*, as the date the samples were drawn.

D. *Additional claim of missing link.*

Plaintiffs' reply brief adds another claim of "break in the chain" of evidence. For example: What happened to the blood samples from November 15, 1975, when received in the Bernalillo County Medical Center and November 17 when received by Wakeman? What happened to the body of decedent those two days? How was the body preserved since Mr. Lujan did not embalm the body? These questions do not require an answer since defendants had no opportunity to reply. However, we will reply.

Plaintiffs know what happened to the body and the samples during this two day period. Dr. Benziger, plaintiffs' witness, performed an autopsy on decedent's body and it was removed to an Albuquerque mortuary. Plaintiffs do not contend the autopsy was performed on some other corpse. The blood samples remained in the Bernalillo County Medical Center labeled and sealed. There was no missing link. In fact, there is no semblance of suspicion to create a missing link in the chain of evidence.

We hold that a proper foundation was laid for the admissibility of the toxicology report and the blood test.

E. *The toxicology report was properly admitted in evidence under statute.*

Plaintiffs claim that any report of a medical investigator obtained under § 24–11–6(B), N.M.S.A.1978 is not admissible at trial. The statute reads:

> In those cases where the death resulted from a motor vehicle accident on a public

highway, and the state, district or deputy medical investigator performs or causes to be performed a test or tests to determine the alcoholic content of the deceased's blood, a copy of the report of this test shall be sent to the planning division of the state highway department *for the department's use only for statistical purposes. The copy of the report sent of the planning division of the state highway department of the results shall not contain any identification of the deceased and should not be subject to judicial process.* [Emphasis added.]

Plaintiffs misconstrue this statute. The "copy" of the report does not identify the deceased. This report is not subject to judicial process. No limitation is placed on the original report which identifies the deceased person. To disallow its use in civil and criminal cases would render its use valueless. If the legislature had intended to deny judicial process to the original report, it would have inserted this purpose in the statute. Without a limitation, the use is broad and extensive. Its use in the courtroom serves the State in criminal cases and litigants in civil cases.

The toxicology report was properly admitted in evidence under the statute.

F. *Plaintiffs are liable for the costs.*

Plaintiffs filed a complaint and defendant filed a counterclaim. In the judgment rendered, it was ordered that judgment be entered in favor of defendant against plaintiffs *and defendant recover costs expended.*

The judgment also ordered, on motion of plaintiff prior to trial, that the counterclaim of defendant be dismissed with prejudice.

Plaintiffs claim that neither party was the prevailing party and no costs should be awarded either party.

On April 16, 1976, plaintiffs moved the court to strike defendant's counterclaim. The counterclaim sought damages to Gilbert Lucero's truck caused by decedent's negligence. On the day of trial, January 3, 1978, the court announced that Gilbert Lucero, the pick-up owner, had been previously dismissed as a party. We assume the court sustained plaintiffs' motion. The counterclaim was not tried before the jury.

Rule 54(d) of the Rules of Civil Procedure provides that in a judgment "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." *Read v. Western Farm Bur. Mut. Ins. Co.*, 90 N.M. 369, 376, 563 P.2d 1162 (Ct.App.1977).

The matter of assessing costs lies within the discretion of the trial court. Unless an abuse of discretion is shown, we will not interfere with the discretion exercised. *Hales v. Van Cleave*, 78 N.M. 181, 429 P.2d 379 (Ct.App.1967). There was no abuse of discretion. Even if we were to consider plaintiffs to be a prevailing party, which we do not, the trial court in its discretion can "otherwise direct" which party shall be allowed costs. The court did not "otherwise direct." Plaintiffs lost the lawsuit and must suffer the payment of defendant's costs.

Affirmed.

IT IS SO ORDERED.

HENDLEY and LOPEZ, JJ., concur.

595 P.2d 774

Helen D. LAMONT, Plaintiff-Appellee and Cross-Appellant,

v.

NEW MEXICO MILITARY INSTITUTE, Employer, and Fireman's Fund Insurance Company, Insurer, Defendants-Appellants and Cross-Appellees.

No. 3596.

Court of Appeals of New Mexico.

April 3, 1979.

Writ of Certiorari Denied May 1, 1979.

John S. Catron, Catron, Catron & Sawtell, Santa Fe, for defendants-appellants and cross-appellees.

John Wentworth and Steven L. Tucker, Jones, Gallegos, Snead & Wertheim, P. A., Santa Fe, for plaintiff-appellee and cross-appellant.

OPINION

LOPEZ, Judge.

Defendants appeal a judgment in a workmen's compensation case awarding benefits and attorney fees to plaintiff. Plaintiff cross appeals the trial court's denial of her request for a lump sum award. We affirm.

The issues for decision on appeal are (1) whether the rate of compensation in effect on the date of disability applies or whether the rate in effect on the date of the original accident applies; (2) whether the amount of attorney fees awarded was excessive; and (3) whether the trial court's finding that it was not in the interest of the rehabilitation of plaintiff to receive a lump sum award was erroneous.

Facts

On August 22, 1975, plaintiff slipped and fell while employed as a member of the faculty of the New Mexico Military Institute. As a result of this fall, plaintiff sustained a fractured ankle and back injuries. Plaintiff ceased working from August 22,

1975, to September 11, 1975. On this latter date, plaintiff returned to work and continued teaching until January 21, 1977. After this date, plaintiff ceased working entirely. The evidence at trial indicated that plaintiff's physical injuries precipitated a severe traumatic neurosis. The court found that this neurosis was the natural and direct result of the August 22 accident and rendered plaintiff totally disabled within the meaning of § 52–1–24, N.M.S.A. 1978 [formerly § 59–10–12.18, N.M.S.A. 1953 (2d Repl Vol. 9, pt. 1, 1974)]. This finding is not challenged on appeal.

Rate of Compensation

Defendants argue that the trial court erred in finding that plaintiff is entitled to compensation at the rate of $124.97 per week. Defendants claim that the correct rate is $90.00 per week. Defendants base this argument on the contention that the controlling date for purposes of determining the rate of compensation is August 22, 1975, the date plaintiff sustained the accidental injury which caused her to be totally disabled. Since the maximum rate in effect on August 22, 1975, was $90.00 per week, defendants submit that plaintiff is entitled to no more than this amount. In response, plaintiff argues that the applicable rate of compensation is that rate in effect on the date of disability. The court found the date of disability to have occurred on January 21, 1977. Since the rate in effect on this date was $124.97, plaintiff claims that the trial court was correct in awarding her this amount. We agree.

In stating our agreement with plaintiff's position, we reaffirm the policy underlying compensation awards, i. e. "compensation is awarded not for the injury as such but rather for an impairment of earnings capacity caused by the injury." 2 A. Larson, Workmen's Compensation Law, § 57.31 at 10–68 (1978). Our Supreme Court recognized this policy in *Kendrick v. Gackle Drilling Company*, 71 N.M. 113, 376 P.2d 176 (1962):

> In construing the statute, we must first consider the purpose of determining the average weekly wage. The Legislature has said that "disability" of an injured workman is to be measured by his loss of wage earning ability caused by the accidental injury.

Id. at 117, 376 P.2d at 179. Because an employee's earning capacity is impaired only when he is disabled, it follows that awards are made for this disability. As Larson states in his treatise on workmen's compensation law:

> It has been stressed repeatedly that the distinctive feature of the compensation system, by contrast with tort liability, is that *its awards* (apart from medical benefits) *are made* not for physical injury as such, but *for "disability"* produced by such injury. (Emphasis added.)

2 A. Larson, Workmen's Compensation Law, § 57.10 at 10–2 (1978).

We acknowledged this principle in *Moorhead v. Gray Ranch Company*, 90 N.M. 220, 561 P.2d 493 (Ct.App.), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977). In that case, the defendants argued, like defendants in the case at hand, that the rate of compensation should be determined by the rate in effect at the time of the accident and not by that rate in effect at the time of disability. We disagreed with this argument and held that "the rate of compensation should be based upon the applicable law on the date of disability." *Id.* at 224, 561 P.2d at 497. Accordingly, based upon *Moorhead*, we hold that in the present situation the rate of compensation in effect on the date of disability applies. In addition, after reading the record, we conclude that the court's finding that the disability occurred on January 21, 1977, is supported by substantial evidence. Therefore, we also hold that the trial court did not err in finding that plaintiff is entitled to compensation at the rate of $124.97 per week.

In so holding, we note that defendants attempt to reconcile *Moorhead* and *De La Torre v. Kennecott Corporation*, 89 N.M. 683, 556 P.2d 839 (Ct.App.1976), with their position by arguing that in these cases a second accident occurred. Defendants contend that these subsequent accidents

account for the rate of compensation applied. Assuming without deciding that defendants' argument is correct, the fact that a second accident may have occurred does not mean that these cases stand for or give support to the proposition that the rate of compensation in effect on the date of the accident applies. Indeed, this proposition was specifically rejected in *Moorhead.* We conclude that the holding in *Moorhead* is consistent with and promotes the policy underlying compensation awards discussed above and, therefore, we reaffirm its holding in the present case. Furthermore, in view of the express holding of *Moorhead,* those cases and statutory sections cited by defendants with respect to this issue are not applicable.

Attorney Fees

Defendants argue that the trial court's award of attorney fees in the amount of $6000.00 was excessive. Section 52–1–54D, N.M.S.A. 1978 [formerly § 59–10–23D, N.M.S.A. 1953 (2d Repl. Vol. 9, 1974)] governs the award of such fees and reads in part as follows:

> [T]he trial court in determining and fixing a reasonable fee must take into consideration:
>
> (1) the sum, if any offered by the employer:
>
> (a) before the workman's attorney was employed; and
>
> (b) after the attorney's employment but before court proceedings were commenced; and
>
> (c) in writing thirty days or more prior to the trial by the court of the cause; and
>
> (2) The present value of the award made in the workman's favor . . . .

In determining the propriety of an award of attorney fees, it should be remembered that such an award is discretionary and will not be disturbed in the absence of an abuse of discretion. *Gallegos v. Duke City Lumber Co., Inc.,* 87 N.M. 404, 534 P.2d 1116 (Ct.App.1975); *Adams v. Loffland Brothers Drilling Company,* 82 N.M. 72, 475 P.2d 466 (Ct.App.1970).

To support their argument, defendants contend that (1) the court, in the exercise of sound discretion, should have considered their offer of settlement despite the fact that this offer was not made thirty days prior to trial, (2) the court should have considered that the amount recovered by plaintiff, computed at the rate of $90.00 per week, exceeds the settlement offer by only $553.62, and (3) consideration should have been given to the amount of work performed by plaintiff's attorneys and the novelty and difficulty of the issues involved.

With respect to defendants' first contention, we note that the facts surrounding the offer of settlement are subject to differing interpretations. Defendants cite facts justifying the lateness of their offer; plaintiff states facts negating this justification. Because of this situation and the fact that the court was not bound by the provisions of § 52–1–54D to consider defendants' offer, we conclude that defendants' first contention is no basis for finding an abuse of discretion. In addition, we conclude that defendants' second contention does not justify such a finding. We have already determined the correct rate of compensation to be $124.97 per week. Therefore, defendants' computation is incorrect and should not have been considered. Finally, we conclude that defendants' third contention provides no grounds for finding an abuse of discretion. In so concluding, we note that § 52–1–54D does not include, among those considerations for determining a reasonable fee, the amount of work expended by a claimant's attorney or the novelty and difficulty of the issues involved. In addition, we have indicated in prior decisions that the amount of work performed is not determinative. *Gallegos v. Duke City Lumber Co., Inc., supra*; *Maes v. John C. Cornell, Inc.,* 86 N.M. 393, 524 P.2d 1009 (Ct.App.1974). However, although this consideration is not determinative, we have also indicated in other decisions that the failure to consider the work performed is an abuse of discretion. *See Herndon v. Albuquerque Public Schools and Commercial Standard Insurance Company,* 92 N.M. 287, 587 P.2d 434 (1978); *Ortega v. New Mexico State High-*

way Department, 77 N.M. 185, 420 P.2d 771 (1966); *Gearhart v. Eidson Metal Products*, 92 N.M. 763, 595 P.2d 401, No. 3603 (Ct.App., 1979), *cert. denied*, Mar. 14, 1979. From the record, it is difficult to determine what was considered by the trial court in awarding attorney fees. However, the record does indicate that the rate of compensation and the propriety of a lump sum award were fully contested. Plaintiff's attorneys drafted two complaints, attended one deposition, prepared and conducted a full trial on the above issues and prepared proposed findings of fact and conclusions of law. Therefore, we hold that the trial court did not abuse its discretion and that the award of attorney fees in the amount of $6000.00 was not excessive.

Lump Sum Award

The trial court found that it was not in the interest of the rehabilitation of plaintiff to receive a lump sum award. Plaintiff asserts in her cross appeal that this finding is not supported by substantial evidence and is, therefore, erroneous. Plaintiff claims that the undisputed and uncontroverted evidence indicates that the best opportunity for her rehabilitation is to receive a lump sum award rather than periodic installments. Based on this evidence, plaintiff contends that the exceptional circumstances justifying a lump sum award exist in the case at hand and that, in this situation, a trial court should not hesitate to make such an award. Defendants argue that the evidence is not conclusive with respect to the therapeutic value of plaintiff receiving a lump sum award, that the court's finding is supported by substantial evidence and that no abuse of discretion exists. We agree.

Section 52–1–30B, N.M.S.A. 1978 [formerly § 59–10–13.5B, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1, Supp. 1975)] governs the payment of lump sum awards and reads:

> If, upon petition of any party in interest, the court, after hearing, determines in cases of total permanent disability that *it is in the interest of the rehabilitation of the injured workman* or in case of death that it is for the best interests of the persons entitled to compensation, and after due notice to all parties in interest of a hearing, the liability of the employer for compensation may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation computed at five percent discount, compounded annually. (Emphasis added.)

Section 52–1–30B was amended in 1975. Prior to this time, the statute provided that the "best interests of the parties entitled to compensation" was the determinative factor. Those New Mexico cases discussing the propriety of lump sum awards deal with the statute prior to the 1975 amendments. *See Codling v. Aztec Well Servicing Co.*, 89 N.M. 213, 549 P.2d 628 (Ct.App.1976); *Arther v. Western Company of North America*, 88 N.M. 157, 538 P.2d 799 (Ct.App.1975) *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975); *Briscoe v. Hydro Conduit Corporation*, 88 N.M. 568, 544 P.2d 283 (Ct. App.1975); *Sanchez v. Kerr McGee Company, Inc.*, 83 N.M. 766, 497 P.2d 977 (Ct.App.1972); and *Livingston v. Loffland Brothers Co.*, 86 N.M. 375, 524 P.2d 991 (Ct.App.1974), *cert. denied*, 86 N.M. 372, 524 P.2d 988 (1974). Therefore, the present case is our first opportunity to construe the statute in its amended form. Although this case is a matter of first impression, we conclude that the principles governing the payment of lump sum awards under the old statute are still relevant to payment under the amended statute.

Major consideration should be given to the following principle stated in 3 A. Larson, Workmen's Compensation Law, § 82.71 (1976):

> Since compensation is a segment of a total income-insurance system, it ordinarily does its share of the job only if it can be depended on to supply periodic income benefits replacing a portion of lost earnings. If a partially or totally disabled worker gives up these reliable periodic payments in exchange for a large sum of cash immediately in hand, experience has shown that in many cases the lump sum

> is soon dissipated and the workman is right back where he would have been if workmen's compensation had never existed. One reason for the persistence of this problem is that practically everyone associated with the system has an incentive—at least a highly visible short-term incentive—to resort to lump-summing. . .
>
> The only solution lies in conscientious administration, *with unrelenting insistence that lump-summing be restricted to those exceptional cases* in which it can be demonstrated that the purpose of the Act will best be served by a lump-sum award. (Emphasis added.)

We recognized this principle in *Arther v. Western Company of North America, supra,* and stated: ". . . periodic compensation payments are the rule, and lump-sum awards are the exception." *Id.* 88 N.M. at 159, 538 P.2d at 801. Because lump-summing is a departure it "should only be permitted when it appears that exceptional circumstances warrant the departure." *Codling v. Aztec Well Servicing Co., supra* at 215, 549 P.2d at 630. The establishment of such circumstances depends on the merits of each case. *See Codling v. Aztec Well Servicing Co., supra,* for a collection of cases granting and denying lump sum awards.

Applying the foregoing principles and the express mandate of § 52–1–30B to the case at hand, we hold that the court's finding that it was not in the interest of the rehabilitation of plaintiff to receive a lump sum award is supported by substantial evidence and is, therefore, not erroneous. The record indicates that the testimony with respect to the therapeutic value of plaintiff receiving a lump sum award is not conclusive. In stating that this testimony is not conclusive, we do not mean to hold that rehabilitation must be established to an absolute certainty in order to justify a lump sum award. However, in the present case, the nature of this testimony coupled with (1) plaintiff's mental condition, (2) the possibility that her motive for wanting the award i. e. to buy a house, might leave her without sufficient funds for everyday living costs and (3) the possible managerial problems lead us to the conclusion that a substantial basis underlies the court's failure to award plaintiff a lump sum payment. Therefore, we hold that the court did not abuse its discretion in making its finding.

Based upon the foregoing, we affirm the trial court's judgment. In addition, plaintiff is awarded $2000.00 attorney fees for this appeal.

IT IS SO ORDERED.

HENDLEY and WALTERS, JJ., concur.